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Request for Judicial Notice of Facts and Documents (F.R.E. Rule 201)

United States District Court Western District of Washington

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Judge Voorhees
LC 18 JUDGE
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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GORDON K. HIRABAYASHI,)	NO. C-83-122-V
)	
Petitioner,)	(Former Crim No. 45738)
)	
vs.)	REQUEST FOR JUDICIAL NOTICE OF
)	FACTS AND DOCUMENTS (F.R.E.
UNITED STATES OF AMERICA,)	Rule 201)
)	
Respondent.)	
)	

A. REQUEST FOR JUDICIAL NOTICE

In connection with the Court's consideration of the pending Petition and the government's related Response and Motion to vacate Petitioner's conviction and dismiss the underlying indictment, Petitioner requests that the Court take judicial notice of certain facts and documents pursuant to Rule 201(b) of the Federal Rules of Evidence and the Court's inherent authority to take judicial notice.

First, Petitioner requests that the Court take judicial notice of the indisputable adjudicative facts set forth in Appendix 1, submitted herewith, pursuant to Rule 201(b)(2). As discussed in

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KATHRYN BANNAI
671 So. Jackson St.
Seattle, WA 98104
(206) 682-9932

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1 Petitioner's memoranda in support of the Petition and in reply to
2 the government's motion, those facts established a clear and
3 compelling absence of any legal basis for continuing to sustain his
4 1942 conviction under Public Law 503. They also demonstrate that
5 the relief requested in the Petition is consistent with the
6 overriding public interest in correcting egregious legal errors
7 which have directly and continuingly prejudiced a large group of
8 ethnic Americans. Specifically, these facts lead to the undeniable
9 conclusion that there was no military necessity to justify the
10 evacuation and internment of 110,000 Japanese Americans during World
11 War II and that therefore Executive Order 9066, the military orders
12 implementing it, and Public Law 503 enforcing it were
13 unconstitutional. Furthermore, these facts show the government's
14 misconduct in altering, destroying and suppressing exculpatory
15 evidence throughout the Petitioner's case.

16 These adjudicative facts are found in sources whose
17 reliability cannot reasonably be questioned: (1) the Report to
18 Congress of the Commission on Wartime Relocation and Internment of
19 Civilians, entitled Personal Justice Denied (February 1983) as
20 supplemented by the "Addendum and Additional Views to the
21 Commission's Report" (June, 1983) and Personal Justice Denied, Part
22 2: Recommendations (June, 1983), in (2) the recently discovered
23 government documents which are appended to the Petition and in (3)
24 government documents received by Peter Irons pursuant to a Freedom
25

1 of Information Act request. Copies of the source material for each
2 of the facts listed in Appendix 1 are compiled therein.

3 In addition to Petitioner's request that the Court take
4 judicial notice of adjudicative facts, Petitioner requests that the
5 Court take judicial note of the non-adjudicative facts set forth in
6 detail in Appendix 2, submitted herewith, pursuant to the Court's
7 inherent authority to notice "acceptably sound" non-adjudicative
8 facts. Advisory Committee Note to FRE 201; Wyman v. Wallace, 94
9 Wn.2d 99, 615 P.2d 452 (1980); Roberts, Preliminary Notes Toward a
10 Study of Judicial Notice, 52 Cornell L.Q. 210 (1967). These facts
11 concern the creation, mandate, composition, processes and
12 credibility of the Commission on Wartime Relocation and Internment
13 of Civilians. They also concern the Commission's report, the
14 documents referred to in the report, and the Commission's unanimous
15 findings and conclusions set forth in the report, including its
16 findings that no military necessity existed to justify the
17 evacuation and incarceration of 110,000 Japanese Americans during
18 World War II. Petitioner requests that the Court take judicial
19 notice of these facts to establish the Commission's report as an
20 accurate source of the adjudicative facts set forth in Appendix 1.

21 The government, through its attorney, Mr. Victor Stone, has
22 already agreed that the Court could take judicial notice of the
23 Commission's report. In Korematsu v. United States, Crim No.
24 27635-W MHP, Petition for Writ Error of Coram Nobis Oral Opinion,
25 (N.D. Calif. January 19, 1983) (hereinafter "Korematsu Petition"), a
26

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671 So. Jackson St.
Seattle, WA 98104
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1 petition for writ of error coram nobis with identical issues was
2 filed on January 19, 1983. At a status conference before the
3 Honorable Marilyn Hall Patel on March 14, 1983, the Court asked if
4 the government had filed a response to the petition. Mr. Stone
5 stated that it had not and asked if the government could be given an
6 extension of time until after the Commission issued its
7 recommendations. Mr. Stone then stipulated on the record that
8 judicial notice of the Commission's report was appropriate.

9
10 Court: You would agree that it is appropriate for the
11 Court to take judicial note of the Government Report?

12 Mr. Stone: Absolutely.

13 Korematsu Petition, Transcript of Status Conference, March 14, 1983
14 at 18-19, a copy of which is attached hereto in Appendix 3.

15 Petitioner also requests that the Court take judicial
16 notice of the existence, authenticity, and stated contents of the
17 government documents submitted to the Court, including the specified
18 portions of the Final Report of General DeWitt. Specifically,
19 Petitioner requests that the Court take notice that the documents
20 are official government documents, that the documents were prepared
21 by government personnel acting on behalf of the government at or
22 reasonably near the time of the events or observations they record,
23 and that copies of the documents were recently produced pursuant to
24 a Freedom of Information Act (FOIA) request. The foundation for
25 this particular request is set forth in the Petition and the
26 attached Affidavits of John A. Herzig and Peter Irons. Petitioner

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671 So. Jackson St.
Seattle, WA 98104
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1 requests that the Court take judicial notice of these
2 non-adjudicative facts to establish the government documents as an
3 accurate source of the adjudicative facts set forth in Appendix 1.

4 Finally, Petitioner requests that the Court take judicial
5 note of the existence, authenticity, and stated contents of those
6 legal briefs cited in Appendix 1 filed with the United States
7 Supreme Court by the government and amicus curiae in Yasui v. United
8 States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S.
9 81 (1943).

10 B. LEGAL BASIS FOR JUDICIAL NOTICE

11 1. Adjudicative Facts.

12 FRE 201(b)(2) concerns judicial notice of
13 ascertainable adjudicative facts whose accuracy is established by
14 resort to reliable sources. The Rule authorizes a court to take
15 judicial notice of adjudicative facts which are "not subject to
16 reasonable dispute that [they are] . . . capable of accurate and
17 ready determination by resort to sources whose accuracy cannot
18 reasonably be questioned." Thus, the focus is whether the facts
19 offered for judicial notice are subject to accurate determination
20 through reliable sources. Wright & Graham, Federal Practice and
21 Procedure, Evidence Section 5106 at 500-501 (1977). This
22 determination is to be made in view of the consideration that
23 judicial notice is a matter of convenience, subject to the
24 requirement of procedural fairness. Davis, A System of Judicial
25 Notice Based On Fairness and Convenience, Perspectives of Law, 69,
26 (1964).

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1 Under FRE 201(b), a court may properly take judicial notice
2 of historical facts such as are set forth in Appendix 1. See, e.g.,
3 Brown v. Board of Education of Topeka, 84 F.R.D. 383 (D. Kan. 1979)
4 (concerning the existence of a city's racially segregated school
5 system in 1954). Similarly, the Court may take notice of the state
6 of affairs in politically sensitive situations. See, e.g., Fong Sen
7 v. United States Immigration and Naturalization Service, 137 F.Supp
8 236 (E.D. La.), aff'd, 234 F.2d 656 (5th Cir. 1956) (concerning the
9 absence of official governmental persecution on the basis of race,
10 religion, or political preference).

11 Where, as here, the facts offered for judicial notice are
12 found in a report of a Congressionally authorized fact-finding body
13 and in official government documents, judicial notice is especially
14 appropriate due to the presumed reliability of these official
15 sources. Concerning judicial notice of findings of a Congressional
16 fact-finding body, Overfield v. Pennroad, 146 F.2d 889 (3rd Cir.
17 1944) is directly on point. The issue before that court was the
18 concealment of financial aspects of particular corporate
19 transactions. Two Congressional committees had investigated the
20 defendant corporation's activities and rendered specific findings in
21 their reports to Congress. The Third Circuit deemed proper judicial
22 notice of those findings.

23 Courts can and do take judicial notice of such
24 Congressional [investigative] proceedings [Citing U.S.
25 v. Darby, 312 U.S. 100 (1941)] and the existence of
26 facts disclosed by them is certainly relevant on any
27 question of concealment.

1 Id. at 88. Accord, Tobacco and Allied Stocks v. Transamerica Corp.,
2 143 F.Supp. 323 (D. Del. 1956). There are numerous cases concerning
3 judicial notice of facts found in official government documents.
4 See, e.g., Massachusetts v. Westcott, 431 U.S. 322 (1977) [judicial
5 notice of facts in records of the Coast Guard merchant vessel
6 documentation division]; American Indians Residing on Maricopa-AK
7 Chin Reservation v. United States, 667 F.2d 980 (Ct. Cl. 1981),
8 cert. den., 456 U.S. 989 (1982) [judicial notice of facts of
9 rights-of-way acquired by a railroad found in official records of
10 Department of Interior]; Orantes-Hernandez v. Smith, 541 F.Supp. 351
11 (C.D. Cal. 1982) [judicial notice under FRE 201(b) of facts
12 pertaining to the El Salvador civil war which were matters of
13 reliable public record, including an official report by the U.S.
14 State Department to Congress]; De Cloux v. Johnston, 70 F.Supp. 718
15 (N.D. Cal. 1947) [judicial notice of records of other court
16 proceedings involving petitioner/prisoner "to the end that a
17 background be provided."].

18 Judicial notice of the facts listed in Appendix 1 is
19 particularly appropriate in ruling upon the Petition or the motion
20 pending before this Court. The facts listed in Appendix 1 are
21 definite and verifiable and thus capable of accurate determination
22 within the meaning of FRE 201(b)(2). Wright & Graham, supra, §5106
23 at 500. They are distinctly more definite and verifiable than many
24 of the facts noticed in the cases cited above. They certainly do
25 not involve elusive or vague judgments or opinions inherently
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1 subject to dispute. For example, Fact No. 1(d) is based upon the
2 Commission's finding, which is independently supported by the
3 government documents appended to the Petition, that the military
4 justified the "military necessity" of excluding persons of Japanese
5 ancestry from the West Coast on the grounds that such persons posed
6 a danger of espionage and sabotage. Similarly, Fact No. 1(f) is
7 based on the Commission's finding, which is also independently
8 supported by the government documents, that there were no
9 substantiated acts of espionage or sabotage by Japanese Americans
10 during World War II. These are definite facts capable of accurate
11 determination--facts about which there is no reasonable dispute.
12 The other adjudicative facts listed in Appendix 1 are similarly
13 capable of accurate determination and are not the subject of
14 controversy.

15 In addition, the sources of the facts requested to be
16 judicially noticed in this case are indisputably reliable. As in
17 Overfield v. Pennroad, supra, a critical source of the present facts
18 is the report of a Congressionally authorized investigative body.
19 The findings of the Commission on Wartime Relocation and Internment
20 of Civilians were made pursuant to the Commission's numerous
21 well-attended hearings across the country (750 people testified
22 including most of the living government personnel involved), its
23 thorough investigation, research and review of reams of government
24 documents. The facts listed in Appendix 1 were ascertained by the
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1 Commission largely on the basis of governmental documents written
2 contemporaneously with the events and observations they record.

3 The Commission itself was a bi-partisan
4 congressionally established and funded body whose specific mandate
5 was to make factual findings primarily about the evacuation and
6 internment of Japanese Americans during World War II. The
7 Commission's report is balanced and scholarly, and it represents the
8 unanimous view of the Commission's distinguished members. The
9 Commission's work generated considerable public following and
10 participation. The report has drawn little, if any, serious
11 substantive criticism.

12 The government cited a portion of the report in its
13 response to the Petition. That response, of course, was to move to
14 vacate Petitioner's conviction and to dismiss the indictment.
15 Perhaps more telling is the government's stipulation on the record
16 in the Korematsu Petition proceedings that judicial notice of the
17 report is appropriate. This is a further indication of the
18 reliability of the Commission's report.

19 In addition to the report, the facts stated in
20 Appendix 1 are clearly supported by the documents cited in the
21 Commission's report, by the documents appended to the Petition, and
22 other documents obtained by Peter Irons through a Freedom of
23 Information Act Request and by the briefs of the government and
24 amicus curiae submitted to the Supreme Court in Yasui, supra, and
25 Hirabayashi, supra,. Those documents are government documents, and
26

1 with the exception of the legal briefs, were generated by key
2 government decision-makers at or near the time of the events or
3 observations they recorded. They were stored by the government on
4 government premises, and were produced by the government pursuant to
5 a FOIA request.

6 Thus the sources of the adjudicative facts in Appendix
7 1 are clearly "sources whose accuracy cannot reasonably be
8 questioned" within the meaning of FRE 201(b)(2). Accordingly,
9 pursuant to FRE 201(b)(2) and the legal precedents discussed above,
10 it is respectfully submitted that judicial notice of the
11 adjudicative facts listed in Appendix 1 is clearly appropriate.

12 2. Non-adjudicative Facts.

13 The existence of the Commission's report, the findings
14 and conclusions contained therein and the circumstances surrounding
15 the Commission's work, as set forth in detail in Appendix 2, are
16 non-adjudicative facts. The specific standards set forth in FRE
17 201, therefore, are inapplicable.¹ Accordingly, the Court may
18
19

20 ¹ Commentators agree that the requirement of indisputability does
21 not apply to non-adjudicative facts. See, Davis, An Approach to
22 Problems of Evidence in the Administrative Process, 55
23 Harv.L.Rev. 364 (1942); McCormick, Evidence §§331 et. seq.
24 (1954); Wright & Graham, supra, §§5100 et. seq.; Davis, Judicial
25 Notice, 55 Col. L.Rev. 945 (1955); Davis, A System of Judicial
26 Notice Based on Fairness and Convenience, Perspectives of Law 69
27 (1964).

1 take judicial notice of such facts without reference to the
2 requirement of Rule 201 that facts be beyond "reasonable dispute."
3 FRE 201(b), Advisory Committee's Note to FRE 201; Wyman v. Wallace,
4 94 Wn.2d 99, 615 P.2d 452 (1980). The Advisory Committee's Note to
5 FRE 201 emphasized and approved of an expansive view of judicial
6 access to non-adjudicative or legislative facts. See, generally,
7 United States v. Darby, 312 U.S. 100 (1941).

8 As discussed above, the Commission's report is an accurate
9 and reliable document, issued by a formally created Congressional
10 Commission, and the Court may therefore properly take judicial
11 notice of the report, its contents and the circumstances under which
12 it was created. As noted, the government has stipulated to such a
13 notice in the Korematsu Petition, Transcript of Status Conference,
14 March 14, 1983, at pp. 18-19.

15 Finally, in view of the accompanying Affidavits of
16 John A. Herzig and Peter Irons, and the authorities discussed above,
17 judicial notice of the existence, authenticity, and stated contents
18 of the government documents, including the legal briefs in Yasui,
19 supra, and Hirabayashi, supra, is appropriate.

20 3. Miscellaneous.

21 Included in Appendix 3 for the courts consideration is
22 Personal Justice Denied in its entirety, the recommendations of the
23 Commission on Wartime Relocation and Internment of Civilians, and
24 Transcript of Status Conference, March 14, 1983, Korematsu v. United
25 States, Crim. No. 27635-W MHP (N.D. Cal. January 19, 1983).

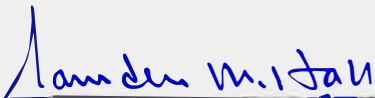
1 CONCLUSION

2 Accordingly, based on the above discussion, Petitioner
3 respectfully requests that the Court take judicial notice of the
4 adjudicative facts set forth in Appendix 1, the non-adjudicative
5 facts set forth in Appendix 2, and Personal Justice Denied, in
6 ruling on the Petition for writ of error coram nobis or on the
7 Government's motion to vacate Petitioner's conviction and dismiss
8 the indictment.

9 DATED this 2nd day of December, 1983.

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KATHRYN BANNAI

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16 ARTHUR G. BARNETT

17
18
19 
20 CAMDEN M. HALL, P.J.
FOSTER, PEPPER & RIVIERA

21 Of Attorneys for Petitioner,
22 GORDON K. HIRABAYASHI