

response to DOJ

May 10, 1986

Honorable Daniel Glickman
Subcommittee on Governmental
Administrative Law and Relations
Committee on the Judiciary
B-351 Rayburn Building
Washington, D.C. 20515

Re: H.R. 442

Dear Congressman Glickman:

This written testimony in support of H.R. 442 is submitted by and on behalf of the attorneys who represented Mr. Fred T. Korematsu in his petition for writ of error coram nobis which reopened his landmark Supreme Court case on the constitutionality of the internment of Japanese Americans during World War II. Scholars and historians have long known that the military necessity claimed by the government to justify the imprisonment of Japanese Americans never existed and that Japanese Americans never posed a threat to the military security of this nation. Mr. Korematsu's petition, and the companion petitions filed by Gordon Hirabayashi and Minoru Yasui, not only demonstrated that there was never any such military necessity, but also that, for that reason, the government deliberately misled the courts, including the Supreme Court, in order to uphold the legality of its actions. 1/ Based on this tragic legal and historical record, it is our position that the redress provided by H.R. 442 is a significant compensatory and symbolic acknowledgment of the denial of civil and constitutional rights suffered by Japanese Americans as the result of our government's unjustified program of racial discrimination. For that reason, we support the passage of H.R. 442.

We also wish to respond to the disturbing written testimony, dated April 25, 1986, submitted to the Hon. Peter Rodino in opposition to H.R. 442 by the Department of Justice. Similar to its practice in the coram nobis proceedings, the Justice Department's testimony misrepresents and obscures facts and issues in an attempt to absolve the government of responsibility for its wrongful acts and to fabricate a justification for its refusal to acknowledge or

redress those wrongs. The Department's opposition to H.R. 442, moreover, contradicts its representations to the federal District Courts in the coram nobis proceedings that "[i]t is uniquely the job of Congress . . . to create commissions and redress complaints" and its citation of S. 2116, 98th Cong., 1st Sess. (1984), a predecessor of H.R. 442, as an example of such appropriate legislative efforts.

Despite President Ford's revocation of Executive Order 9066, Congress' repeal of its implementing legislation, and the comprehensive investigation of the Commission on Wartime Relocation and Internment of Civilians ("CWRIC" or "Commission"), the Department steadfastly refuses to acknowledge that the racially-based actions taken against Japanese Americans were unjustified. In fact, in the coram nobis proceedings the Department of Justice revived the government's attempt to defend the propriety of the internment on the basis of military necessity. It is singularly inappropriate for this government, through the voice of the Department of Justice, to continue arguing that the internment was both constitutional and justified in the face of all contrary authority. Congressional acknowledgment of the Commission's findings, public education regarding those facts and an award of monetary redress are necessary, not only to show that this nation can admit and rectify its own errors, but also as a national memorial to help deter future unjust actions.

Our following testimony is divided into three parts: (1) The factual basis for redress; (2) The continuing need for meaningful redress; and (3) Correction of the Department of Justice's unjust accusations of Japanese American disloyalty.

1. The Findings of the Commission and the Coram Nobis Courts Provide a Reliable Factual Basis for the Enactment of Redress Legislation.

The internment of Japanese Americans during World War II has rightfully been recognized as the most sweeping governmental deprivation of civil and constitutional rights in modern times. In the past 40 years, numerous books, treatises and articles have condemned the forcible removal of the Japanese Americans. It was not until the formation of CWRIC, however, that a comprehensive study, including review of documents previously unavailable to the public, could be conducted. CWRIC's inquiry was not limited to academic and archival research, but included the testimony

of hundreds of actual participants, including internees, government officials and military personnel. The extent and care given to its research imbue the Commission's work with great credibility.

The Commission's report, Personal Justice Denied, was submitted to the federal District Court in support of the Korematsu coram nobis petition. In Korematsu, the court found the report to be trustworthy and took judicial notice of the "general nature and substance of its conclusions." 2/ In particular, the court explicitly recognized:

"The findings and conclusions of the Commission were unanimous. In general, the Commission concluded that at the time of the issuance of Executive Order 9066 and implementing military orders, there was substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry without regard to individual identification of those who may have been potentially disloyal.

The Commission found that military necessity did not warrant the exclusion and detention of ethnic Japanese. It concluded that 'broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership.' As a result, 'a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.' Personal Justice Denied at 18." 3/

While the Department of Justice tells this Committee that the findings of Commission's report are "subject to debate", the Department not only declined to challenge the trustworthiness of Personal Justice Denied in the course of the Korematsu proceedings, but it agreed "absolutely" that the report was a proper subject for judicial notice. 4/ The Department's present attack on the report appears to stem from displeasure with CWRIC's recommendations, and not from any demonstrable factual or historical errors.

The Department also argues to this Committee that the Commission's failure to discuss the so called "Magic Cables", the wartime intercepts of Japanese diplomatic cables, in its original report casts doubt upon the reliability of the CWRIC report. This accusation is unfounded and misleading. In the Addendum to Personal Justice Denied, CWRIC examined the Cables and found that they did not alter any of its conclusions or recommendations. In fact, the Commission stated that the cables confirmed its views on the internment. Nor does the Department mention the caution contained in the Addendum:

" . . . it is worth underscoring that espionage and sabotage by a small group does not justify excluding and detaining the entire ethnic group to which they belong." 5/

Also omitted from the Department's testimony is any mention that the Government presented testimony and documentary evidence on the Magic Cables in the hearings on the Hirabayashi coram nobis petition in June 1985. 6/ This evidence did not persuade the Hirabayashi court that there was any justifiable basis for the internment. Instead, the court found:

" . . . that the failure of the government to disclose to petitioner, to petitioner's counsel, and to the Supreme Court the reason stated by General DeWitt for his deciding that military necessity required the exclusion of all those of Japanese ancestry from the West Coast was an error of the most fundamental character and that petitioner was in fact very seriously prejudiced by that non-disclosure in his appeal from his conviction of failing to report. In consequence, petitioner's conviction on the failure to report count must be reversed." 7/

It is revealing that, although CWRIC issued its Addendum approximately five months before the oral argument in Korematsu, the government did not raise the Magic Cables issue in that proceeding.

The Department further advises this Committee that, in each of the coram nobis cases, it moved "effectively to afford petitioners the very relief they sought," by making motions to vacate the petitioners' convictions. In fact, the court in Korematsu found the government's "Response

and Motion" to be procedurally improper and denied the government's request. Moreover, all three petitioners opposed the government's motion because it failed to respond to the factual allegations of suppression of evidence, failed to recognize or accept responsibility for the wrongs revealed by the history of the internment, and sought to avoid any judicial inquiry or findings on the merits of the petitioners' charges. The District Court in Hirabayashi also rejected the government's motion and, although the Yasui court granted the government's motion, an appeal from that decision is pending before the Ninth Circuit.

Contrary to the impression created by the Department's testimony, Attorney General Smith has never directly issued any statement of policy in response to Mr. Korematsu's petition, nor communicated any such views to any of the petitioners, their legal counsel, or the courts. The language quoted by the Department is actually taken from the government's motion, through which the government sought to circumvent factual inquiry into the internment. As already discussed, each of the coram nobis petitioners opposed the Department's motion precisely because it failed to recognize or accept responsibility for the wrongs inflicted by the internment.

A more serious misrepresentation is the Department's contention that the court in Korematsu made no factual findings regarding governmental misconduct. The government has similarly mischaracterized and misrepresented the Korematsu decision in its Brief as Appellee in the Yasui appeal and counsel for Mr. Korematsu were compelled to submit an amicus curiae brief in that proceeding to correct those misstatements. 8/ As noted above, the court in Korematsu took judicial notice of the general findings and conclusions of the Commission. The court also conducted an independent review of the government documents submitted by Mr. Korematsu in support of his coram nobis petition. Based upon these documents and Personal Justice Denied, the court found that critical evidence refuting the alleged military necessity for the exclusion and internment had been knowingly withheld from the courts and that the relief sought by Mr. Korematsu was therefore justified. 9/

The Department's contradictory and unfounded positions, and outright misrepresentations, both in the coram nobis proceedings and before this Committee are antithetical to the purposes and responsibilities of the Department of Justice. The credibility of the Department, not CWRIC, is called into question by the Department's testimony.