

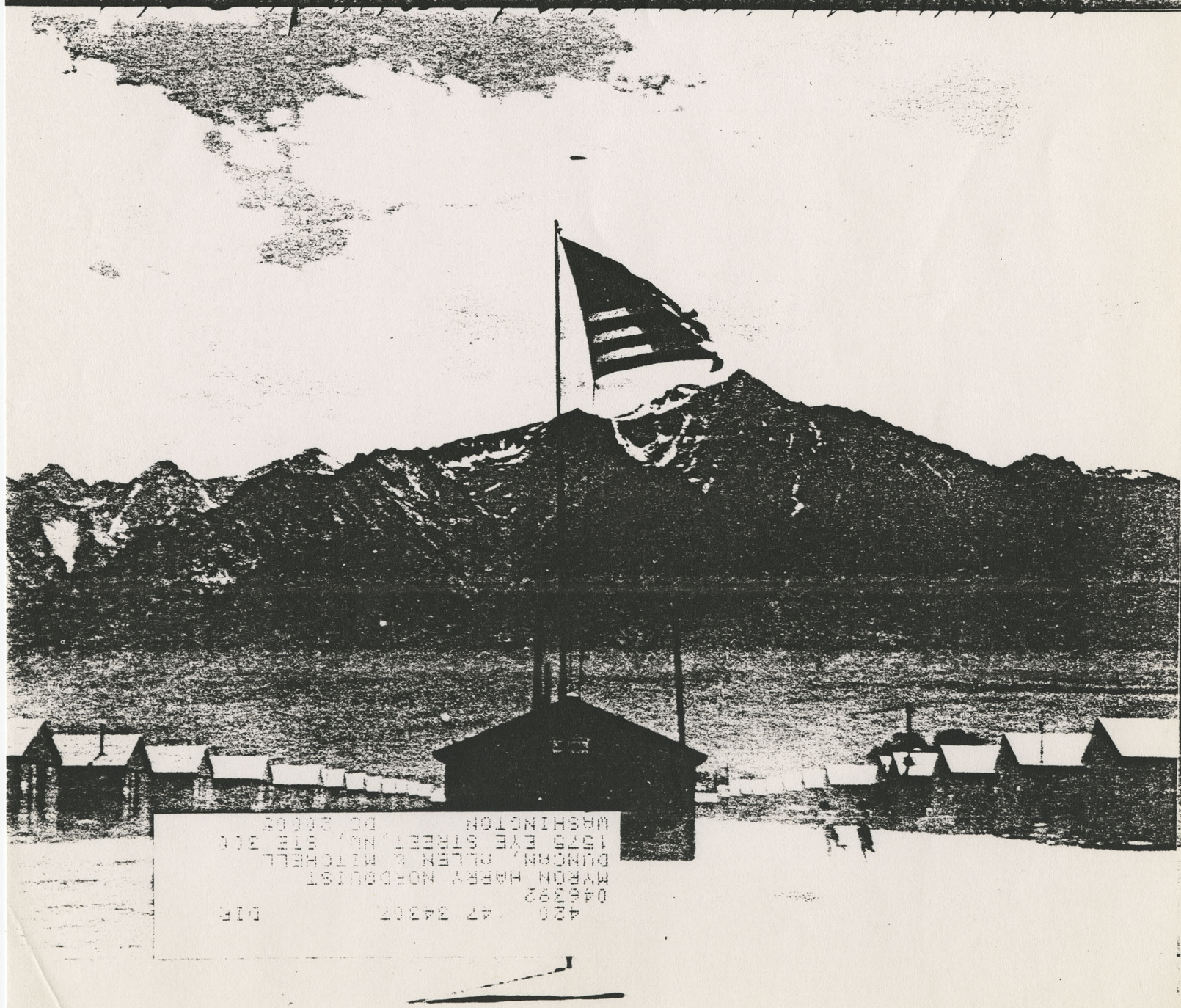
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The Japanese American Internment





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The Japanese-American Internment

By Alec Dubro

No crowds filled the federal district courtroom in San Francisco this past May 9. Only a handful of young Japanese-Americans and a few mildly interested spectators observed two lawyers asking the court to vacate a 40-year-old U.S. Supreme Court decision upholding the internment of Japanese-Americans during World War II (*Korematsu v. U.S.* (1944) 323 US 215). *Korematsu v. U.S.* (Crim. No. 27635-W).

Those present heard Victor Stone, special counsel for appellate matters for the U.S. Department of Justice, ask the judge for additional time to respond. Attorneys representing the petitioner, Fred Korematsu, requested the court to expedite matters. "The documents," said attorney Dale Minami of Minami, Tomine & Lew in Oakland, "took a long time to get. And the defendants are 64 and 65 years old." (Identical actions are being pursued in federal district court by Gordon Hirabayashi in Seattle and Minoru Yasui in Portland, Oregon.)

Judge Marilyn Hall Patel reached a compromise. A hearing would be held on October 3, 1983, to review Korematsu's petition for a writ of error coram nobis—a petition bringing before the court errors in matters of fact that were not originally at issue, but were material to the validity of an earlier proceeding.

Thus, after four decades, a controversial chapter of American legal history has been reopened.

Violating the evacuation order

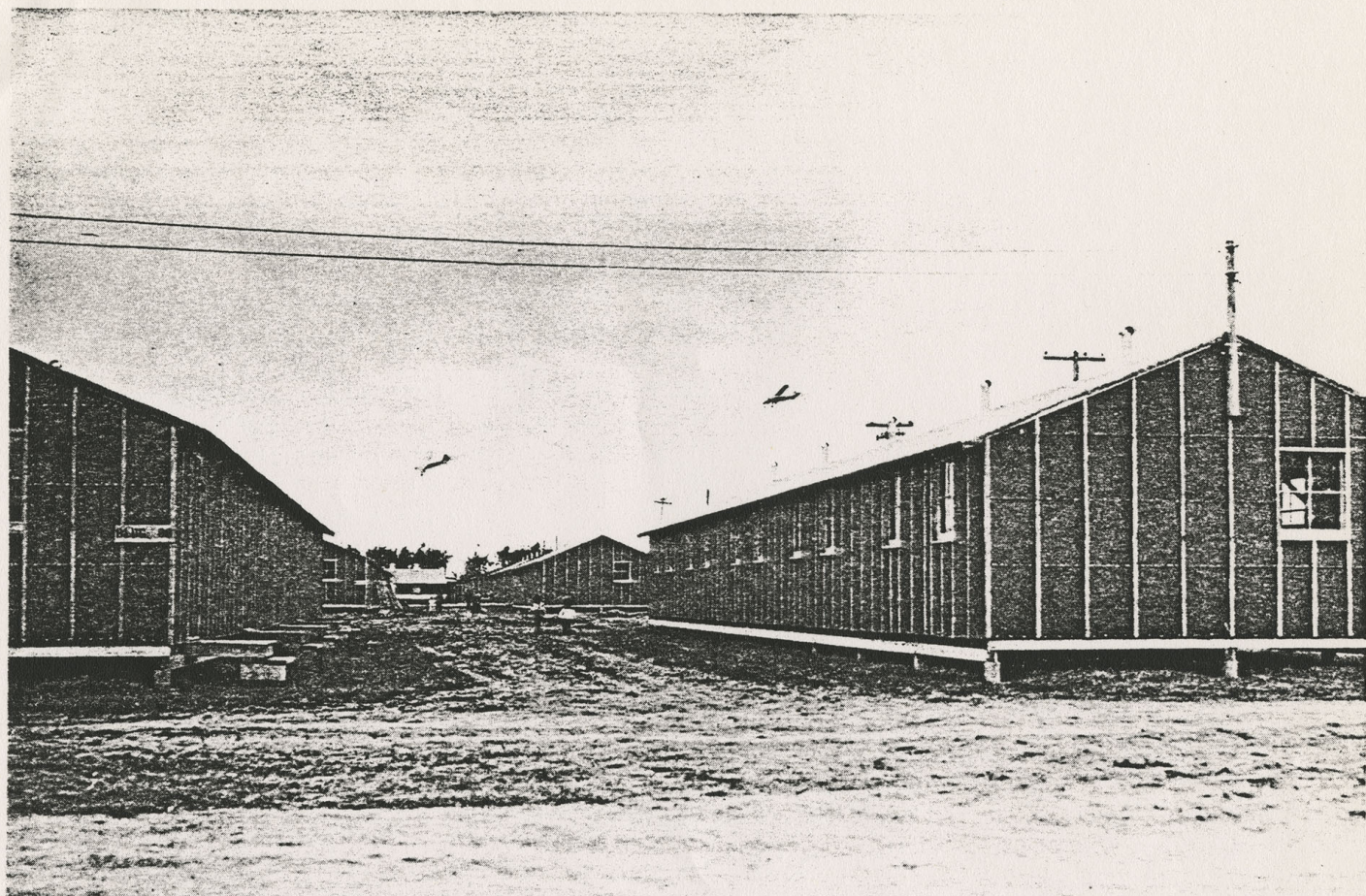
On May 9, 1942, the Western Defense Command headquartered at the Presidio in San Francisco formally ordered all persons of Japanese ancestry residing on the West Coast to report for relocation to the interior. Fred Korematsu didn't follow the order. "Why should I?" he thought. He was a U.S. citizen, born in Oakland; he had committed no crime.

To avoid the evacuation order, Korematsu, then in his early 20s, moved from his home in San Leandro to Oakland and went to work at a trailer company. He recalls that several weeks later, "I was waiting on a streetcorner in San Leandro for my girlfriend. I went into a drugstore to get some cigarettes and someone must have recognized me. Pretty soon the San Leandro police came and asked me for an ID, but they didn't know what to do with me and they called the MPs. I was taken first to the San Leandro jail and then to San Francisco.

"My lawyer, Ernest Besig of the ACLU, kept trying to get me bailed out, but the judge kept raising my bail. Eventually, they took me to the military stockade at the Presidio, and I stayed there until my trial."

On September 8, 1942, in U.S. District Court in San Fran-

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cisco, Korematsu was convicted of violating the Act of March 19, 1942 (Pub L 503, 56 Stat 173). He was given a five-year suspended sentence, then shipped off to an internment camp. The act made it a federal offense to violate any restriction issued by a military commander in a "military" area — in this case, a drugstore in San Leandro. The law was intended to give teeth to Executive Order No. 9066, promulgated by President Franklin D. Roosevelt on February 19, 1942. The order extended the president's war powers, through the War Department, to enable the military to "evacuate groups of persons based on a reasonable classification," as then-Attorney General Francis Biddle put it. (Although other enemy aliens were covered by its provisions, the order was drafted

specifically to restrict the Japanese.) Biddle, who was not a proponent of the evacuation, explained candidly, "(The order) is not based on any legal theory but on the facts that the unrestricted movements of certain racial classes, whether American citizens or aliens, in specified defense areas may lead to serious disturbances."

Commission inquiry

In the mid-1970s, a segment of the Japanese-American community began to seek redress for the wrongs suffered by Japanese-Americans during World War II. Acting principally through the Japanese-American Citizens League in San Francisco, the movement pressured Congress to act. In response, Hawaiian Senators Daniel Inouye and Spark Matsunaga, both Democrats, and California Democratic Congressmen Norman Mineta and Robert Matsui introduced bills requesting their respective houses to authorize the formation of a board of inquiry on the Japanese internment. On July 31, 1980, then-President Jimmy Carter signed into law a bill creating the Commission on Wartime Relocation and Internment of Civilians (Pub L 96-317). Its assignment was to investigate the history of the internment and to make recommendations for ameliorative legislation, if necessary.

Peter Irons, an attorney and professor of political science at the University of California at San Diego, was one of the witnesses called to testify before the commission hearings. In the course of preparing his testimony, Irons filed requests for documents with the Justice Department under the Freedom of Information Act. The FOIA documents, plus other

The court is taking
a second look at
the basis for three
Supreme Court rulings
upholding the
government's right to
evacuate and intern
Japanese-Americans

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material Irons discovered among War Department records in the National Archives, led him to the conclusion that the government's evidence justifying the evacuation and internment of the Japanese-Americans had been misleading.

Specifically, Irons discovered from internal Justice Department memoranda that members of the department's Alien and Enemy Control Unit had withheld from the Supreme Court evidence that disproved the government's contention that Japanese-Americans were dangerous and disloyal. Moreover, says Irons, Justice Department officials were knowingly "derelict in their failure to report these findings to the solicitor general and attorney general." In addition, the War Department records showed that the original Army report on Japanese-Americans—which did not suggest that they posed any serious threat to national security—had been quashed in favor of a more alarmist and distorted version.

It was this latter evidence that served as the basis for the Supreme Court's decisions in favor of the government in the cases of *Yasui*, *Hirabayashi* and *Korematsu*—the so-called Wartime Cases. *Korematsu*, *supra*; *Hirabayashi v. U.S.* (1943) 320 US 81; *Yasui v. U.S.* (1943) 320 US 115. And it was these three decisions that sanctioned the evacuation, internment and impoverishment of 110,000 Japanese-Americans.

In February 1982, the commission released a report titled *Personal Justice Denied*, which describes the events following the issuance of Executive Order 10666. According to the report, the War Department, under the guidance of Army Lieutenant General John De Witt, chief of the Western Defense Command, "moved toward the momentous exclusion of American citizens from the West Coast without any thoughtful, thorough analysis of the problems, if any, of sabotage and espionage on the West Coast or of any realistic solutions to those problems." Partial exclusion of all enemy aliens and of all Japanese, regardless of citizenship, began on March 2, 1942. Later that month, an 8 p.m. to 6 a.m. curfew was imposed on all remaining Japanese. By August 18, all Japanese had been evicted from the Pacific slope.

The commission found, however, that both the Federal Bureau of Investigation and the Office of Naval Intelligence believed, at the time, that Japanese-Americans were an easily contained threat. In late January 1942, Lieutenant Commander K.D. Ringle of the ONI, who had excellent connections within the Japanese-American community, reported to his superiors that, in the commission's words, "ethnic Japanese in the United States were at least passively loyal to this country." The greatest number of potentially disloyal Japanese-Americans and resident aliens was 3,500, or about 3 percent of the total population, Ringle reported, and the ONI had the names of most of these individuals. He objected to any move against Japanese-Americans as a group.

Recently declassified War Department documents, however, show that Japan may have sought out Japanese-Americans to act as intelligence agents. The documents describe a prewar operation known as "Magic," which had intercepted coded cables from Tokyo to Japanese diplomatic posts. The Japanese apparently attempted to employ black and Caucasian Americans, as well as those of Japanese ancestry, for intelligence-gathering. The documents reveal little about the success of the recruitment effort. Its



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Supreme Court decisions upholding the evacuation were based on distorted evidence.



Francis Stewart



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very existence, however, as confirmed by the decrypted cables, may have helped prompt Roosevelt to sign Executive Order 9066.

De Witt, with the solid support of the president and his staff (except Biddle), began plans for the evacuation. De Witt's perceptions of the "threat" from Japanese-Americans were colored by a demonstrable racism—"A Jap's a Jap," he told San Francisco reporters—and by intense pressure from outside the military. The press picked up any and all anti-Japanese sentiment—from Secretary of the Navy Frank Knox's false claim of a Japanese "fifth column" in Hawaii, to preposterous sabotage rumors—and clamored for the removal of the Japanese. The commission report also notes that De Witt was acutely aware of the demands of California produce growers and political leaders, such as Los Angeles Mayor Fletcher Bowron and California Attorney General Earl Warren, to evacuate the Japanese.

In his 1943 *Final Report: Japanese Evacuation from the West Coast*, De Witt explained his reasons for the evacuation by stating that Japanese-Americans had been signaling to submarines, storing arms and contraband, engaging in Emperor-worship and participating in sabotage of war plants and materiel. Most of the charges, however, were not corroborated.

According to a statement by the Federal Communications Commission on January 1, 1942, there had been no known transmissions from shore to enemy ships. FBI chief J. Edgar Hoover reported to the attorney general on February 2, 1942, that the arms seized from Japanese-Americans in warrantless raids amounted to nothing more than small-caliber guns. And later studies showed that the form of Shinto involving Emperor-worship had few followers among American Japanese, most of whom were far removed from ultranationalist influences. As for sabotage, the *Final Report* is its own best refutation: "The very fact that no sabotage has taken place to date is a dis-

turbing and confirming indication that such action will be taken."

The application of such logic resulted in the internment of nearly all mainland Americans of Japanese descent for up to four years.

The constitutional question

Fred Korematsu decided to fight his conviction for violating the evacuation order. San Francisco attorney Wayne Collins, one of very few lawyers at the time who would touch Japanese-American cases, took the case out of political conviction and appealed on constitutional grounds. The U.S. Court of Appeals for the Ninth Circuit ruled only on the issue of whether a suspended sentence is appealable, then certified the case—because of its legal and political volatility—to the Supreme Court.

The high court had already upheld convictions under the Act of March 19, 1942 in the cases of Hirabayashi, a Seattle resident who had failed to report to his evacuation center, and Yasui, a member of the Oregon bar who deliberately violated a curfew order in Portland to test its legality. In the Hirabayashi decision, the court noted:

Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.

In *Korematsu*, this same military judgment was again upheld. This time, however, three justices dissented. The majority decision was based on a narrow interpretation of the case—that it was within the power of Congress to wage war by evacuating the Japanese, and that Korematsu, therefore, could not evade the evacuation order. Writing the majority opinion, Justice Hugo Black sidestepped the constitutional

quagmire posed by internment of persons who had committed no crimes. "It is sufficient here," he wrote, "for us to pass upon the order which the petitioner violated. To do more would go beyond the issues raised . . ." Black did address the issue of racism, although his conclusion seems rather strange from today's perspective. "Korematsu," he said, "was not excluded from the Military Area because of hostility to him or his race."

Others on the court saw the issue differently, however. Justice Owen Roberts wrote that *Korematsu* was "a case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States." In an equally sharp dissent, Justice Frank Murphy lashed out at the factual evidence presented by the Justice Department and accepted by the



Charles Mace

Japanese-American

court. The evidence used to justify the evacuation was, he wrote, "largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese-Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation."

Despite the eloquent dissents, *Korematsu* stood. But it was clearly an unusual decision. According to Jesse Choper, dean of the University of California's Boalt Hall and a constitutional expert, "Since the Wartime Cases, the court has never upheld racial discrimination." In the years since *Korematsu*, the court developed the doctrine of "strict scrutiny" in dealing with racial classifications, under which the state must show a compelling interest to act against a racial minority.

Reopening the Wartime Cases

As Peter Irons completed his research for his appearance before the commission, he realized that he had enough information to reopen the Wartime Cases. Not only were Yasui, Hirabayashi and Korematsu all alive, but each was anxious to have his conviction vacated. In 1981, Irons began contacting Japanese-American attorneys who might be interested in working on the cases, a large number of whom were associated with the Oakland-based Asian Law Caucus. A fund-raising group, the Committee to Reverse the Japanese Wartime Cases, was formed to help finance the work.

The result was the filing this past January of a lengthy petition for a writ of error coram nobis. According to Boalt Hall professor Paul Mishkin, a specialist in constitutional law, coram nobis is an old common law writ that has not been used much in the past 30 years. Nonetheless, he says, it serves as "an excellent vehicle" for presenting new evidence in old cases. Irons says that coram nobis is "limited to cases where appeals are exhausted and the sentence served; you cannot relitigate the case."

The Korematsu petition alleges "numerous and related acts of governmental misconduct" resulting in "manifest injustice." The petition charges that the departments of justice and war altered, destroyed and suppressed evidence such as Ringle's report exonerating the Japanese community. Evidence for these charges comes from the FOIA documents obtained by Irons. One particularly illuminating memo quoted in the petition was sent by John L. Burling of the Justice Department's Alien and Enemy Control Unit to Assistant Attorney General Her-

bert Wechsler, on September 11, 1944. It states:

You will recall that General De Witt's report makes flat statements concerning radio transmitters and ship-to-shore signalling which are categorically denied by the FBI and the Federal Communications Commission. There is no doubt that these statements are intentional falsehoods . . .

The petition also charges that the government abused the doctrine of judicial notice in the Korematsu case, and in doing so "perpetrated a fraud upon the courts." Judicial notice is the act by which a court recognizes the existence of facts and propositions that are not reasonably subject to dispute and that may be immediately and accurately determined by reference to sources of reasonably indisputable accuracy. In the Wartime Cases, judicial notice was unaccountably extended to such evidence as De Witt's assertions of Japanese-American disloyalty.

Japanese-Americans received \$40 million in reparations at a rate of 10 cents on the 1942 dollar.

As the petition notes: "The government sought judicial notice of 'evidence' that allegedly proved the disloyalty of Japanese-Americans and their consequent predisposition to commit acts of espionage and sabotage. However, government officials had knowledge of contrary evidence on each of these issues." According to the petition, Nanette Dembitz, a member of the Justice Department's alien unit, noted in a memo dated August 11, 1942, that the facts presented in the cases were not appropriate for judicial notice.

The Justice Department currently is remaining officially silent about the three petitions. According to Victor Stone, the department's special counsel, the government cannot comment on the case. Privately, Justice Department officials say they consider the petition for a writ of error coram nobis "a very peculiar pleading" and take pains to refute the petitioners' claims. "No one doubts that the decision to relocate the Japanese was probably wrong in retrospect. They shouldn't have done it, but that doesn't mean it was a manifest injustice," says one official.

In its final report issued in mid-June, however, the Commission on the Wartime Relocation and Internment of Civilians recommended that Congress adopt a resolution formally apologizing to those in-

terned for the "grave injustice" they had suffered. The commission concluded that there was no justification for the internment, citing war hysteria, racial hatred and a failure of political leadership as its causes. The commission also recommended, among other things, that persons convicted of violating a curfew or refusing to report for relocation receive a presidential pardon.

Congressional action on the commission's recommendations is likely to take several years, however. In addition, even if granted, a pardon would not satisfy Korematsu's original goal of having his conviction vacated. According to Minami, Korematsu, Yasui and Hirabayashi will probably pursue their current actions.

Whatever the disposition of their cases by the courts, the Japanese-American community feels it was victimized. For 40 years, the internees have tried to forget their wartime experiences. But many have not been able to close that chapter of their lives. Perhaps one reason is that the government never adequately compensated the internees for their material losses. According to Michi Weglyn, author of a comprehensive study of the evacuation, *Years of Infamy* (William Morrow, 1976), the Japanese-American community lost \$400 million as a result of the evacuation. The Evacuation Claims Act of 1948 stipulated that losses would be settled at 1942 prices, minus a 10-percent lawyer's fee. Japanese-Americans cautiously filed \$132 million in claims but ultimately received less than \$40 million, or 10 cents on the 1942 dollar.

In its final report, the wartime relocation commission recommended that the government pay \$20,000 to each of the approximately 60,000 surviving internees. A study conducted for the commission estimated the economic losses of the internees to be as high as \$6.2 billion in 1983 dollars, with inflation and interest added.

The issue of financial reparation, however, is a separate one from the issue of vacating a criminal conviction. And although some may view the reopening of a 40-year-old case as a quixotic venture, the Japanese-American attorneys working on the case think otherwise. "One of the main reasons we took *Korematsu*," says Dennis Hayashi of the Asian Law Caucus, "is the issue of present civil rights, not merely the vacating of old wrongs. We don't want this decision to remain on the books."

Regardless of what the courts decide about the Wartime Cases, at least one Japanese-American feels a small sense of triumph. "I had always wanted to fight it somehow," says Fred Korematsu, "but I never had the means. I think this is great." □