ancestry. In its opinion the court stated:

> "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. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it." (Emphasis added) 320 U.S. 81 at 99.

The position taken by the government with respect to the efficacy of loyalty hearings was set forth in a post-argument memorandum filed by Solicitor General Fahy with the Supreme Court on May 14, 1943. That memorandum stated in relevant part:

> "Our position is not that hearings are an inappropriate method of reaching a decision on the question of loyalty. The Government does not contend that, assuming adequate opportunity

> for investigation, hearings may not ever be appropriately utilized on the question of the loyalty of persons here involved. It is submitted, however, that in the circumstances set forth in our brief, this method was not available to solve the problem which confronted the country. The situation did not lend itself, in the unique and pressing circumstances, to solution by individual loyalty hearings. In any event, the method of individual hearings was reasonably thought to be unavailable by those who were obliged to decide upon the measures to be taken."

A great deal of additional documentary evidence was submitted by both petitioner and the government, but the evidence, outlined above, goes to the very heart of the issue before the Supreme Court, that is, the military necessity for the exclusion order. It demonstrates that General DeWitt ordered the exclusion of everyone of Japanese ancestry from the West Coast because of his belief that it was impossible to separate loyal Japanese from those who might be disloyal no matter how much time was devoted to that task.

General DeWitt's reason for ordering the exclusion was made known to the War Department in the original version of his Final

Report. From the changes in that report which were insisted upon by the War Department there can be no doubt that the War Department was aware of, but did not agree with, General DeWitt's belief that it was the impossibility of separating the loyal from the disloyal Japanese that made their exclusion from the West Coast a military necessity.

A copy of the original version of the Final Report was never made available to the Justice Department. In consequence, all through the course of petitioner's appeal, that department was unaware of General DeWitt's stated reason for the exclusion of the Japanese from the West Coast. The Justice Department assumed and argued to the Supreme Court that the military necessity arose out of a lack of time to make a separation rather than out of an impossibility of making that separation.

Although the Justice Department did not knowingly conceal from petitioner's counsel and from the Supreme Court the reason stated by General DeWitt for the exclusion of the Japanese, the government must be charged with that concealment because it was information known to the War Department, an arm of the government.

It is petitioner's position that the concealment by the government of the reasons stated by General DeWitt for the exclusion of the Japanese from the West Coast was a suppression of evidence which requires the vacation of petitioner's convictions.

Whether this action by the government warrants the vacation of

petitioner's convictions requires the Court to consider whether a conviction may be set aside under a writ of error coram nobis and, if so, the requirements that must be met by one seeking the remedy of that writ.

A writ of error coram nobis is a seldom-used remedy, but if a petition for a writ of error coram nobis is found to be meritorious, a conviction may be set aside even though the petitioner has fully served his sentence on that conviction. United States v. Morgan, 346 U.S. 502 (1954); Holloway v. United States, 393 F.2d 731, 732 (9th Cir. 1968). Petitioner is not foreclosed, therefore, from availing himself of this remedy even though he long ago served the sentence which was imposed upon him.

In order for a writ of error coram nobis to be available to petitioner with respect to his conviction on the failure to report count, he must meet a number of requirements:

1. His petition must be brought in the court in which he was convicted. United States v. Morgan, 346 U.S. 502, 507 n.9 (1954).

2. A more usual remedy must not be available to him. James v. United States, 459 U.S. 1044 (1982)(Brennan, J., dissenting from denial of petition for writ of certiorari).

3. He must demonstrate that he suffers present adverse consequences from his conviction sufficient to satisfy the case or controversy requirement of Article III. United States v. Dellinger, 657 F.2d 140, 144 n.6 (7th Cir. 1981).

4. He must show that there are valid reasons for his not having attacked his conviction earlier. Maghe v. United States, 710 F.2d 503 (9th Cir. 1983).

5. He must demonstrate that the error of which he complains was of the most fundamental character. United States v. Morgan, 346 U.S. 502, 512 (1954); United States v. Taylor, 648 F.2d 565, 570 (9th Cir. 1981).

6. Finally, he must demonstrate that it is probable that a different result would have occurred had the error not been made. United States v. Dellinger, 657 F.2d 140, 144 n.9 (7th Cir. 1981).

In the present action the first requirement is clearly met. Petitioner brought his petition in the Western District of Washington, the district in which he was convicted.

The second requirement is also met. Petitioner's right to appeal from his conviction was exercised and exhausted long ago. His right to petition for habeas corpus relief is unavailable because he is no longer in custody. The writ of error coram nobis is at this time the only remedy available to him.

The requirement that petitioner must demonstrate that he presently suffers adverse consequences from his conviction is less clear. Understandably, misdemeanor convictions do not carry with them the adverse consequences that flow from felony convictions. Although it is highly unlikely that his 1942 conviction on the failure to report count would ever be used to impeach his

credibility in any future civil or criminal trial, nonetheless it could be so used in jurisdictions, and there are some, which permit that use of misdemeanor convictions. It is true, too, that if petitioner were ever convicted for any other crime, a sentencing judge would be advised of that 1942 conviction and could properly take that conviction into consideration in fashioning an appropriate sentence. As was said in Holloway v. United States, 393 F.2d at 732: "Coram nobis must be kept available as a post-conviction remedy to prevent 'manifest injustice' even where the removal of a prior conviction will have little present effect on the petitioner."

The Court is of the opinion that petitioner has adequately demonstrated that he presently suffers adverse consequences from his conviction in 1942 of the crime charged in the first count of the indictment.

With respect to the requirement that petitioner must present valid reasons for his not having attacked his conviction earlier, the government argues that all of the factual material presented on behalf of petitioner has been a matter of public record for nearly forty years and that petitioner is hence bound by the doctrine of laches from seeking to overturn his convictions. The government particularly relies upon the book Americans Betrayed by Morton Grodzins, which was published in 1949.

The Court has read with care all of the excerpts from the

Grodzins book which the government presented as an exhibit and which it asked the Court to consider. At no place in those excerpts is there any reference to the statements made by General DeWitt in the initial version of his Final Report. In none of the other publications submitted by the government is there any such reference.

Although it is true that at least one copy of the initial version of the Final Report survived, petitioner cannot be faulted for not finding and relying upon that version long before he brought this action in early 1983.

Ms. Aiko Herzig-Yoshinaga, a professional researcher, testified that it would have been exceedingly difficult for a lay person to locate that copy of the initial version of the Final Report. Although she had been employed as an archival researcher on the staff of the Commission on Wartime Relocation and Internment of Civilians between June 1981 and June 1983, she testified that it was not until the end of 1982 that she became aware of the existence of the initial version and then only because she had fortuitiously observed that copy on the desk of an archivist in the Modern Military Section of the National Archives and, upon examining it, recognized its wording to be different from that of the published version.

There is no evidence in the record that petitioner actually knew, or had reason to know, of the existence of the initial

version of the Final Report prior to the time that Ms. Herzig-Yoshinaga happened upon it in the National Archives. Petitioner did not unduly delay the commencement of this action after he learned of the existance of the initial version of the Final Report.

The Court finds, in consequence, that petitioner has presented valid reasons for not having sooner brought his petition for writ of error coram nobis.

The requirements that the error of which the petitioner complains be of the most fundamental character and that, absent the error, it is probable that a different result would have occurred will be considered together.

The error of which petitioner complains is that, during the pendency of his appeal before the Supreme Court, neither he nor his counsel was informed by the government of the reason given by General DeWitt in the original version of his Final Report for the exclusion of all persons of Japanese ancestry from the West Coast. That statement was in essence that the military necessity, requiring the exclusion, was the impossibility of separating the loyal persons from the disloyal ones no matter how much time was devoted to that task.

It was General DeWitt who made the decision that military necessity required the exclusion of all persons of Japanese ancestry from the West Coast. The central issue before the Supreme

Court in the appeal of petitioner from his conviction on the first count was whether exclusion was in fact required by military necessity. Nothing would have been more important to petitioner's counsel than to know just why it was that General DeWitt made the decision that he did. The attorneys for the Justice Department assumed, and argued to the Supreme Court, that it was the need for prompt action that made the exclusion a military necessity. The statements by General DeWitt in his Final Report belied that assumption. His statement was that it was not time that made the exclusion necessary but rather the impossibility of determining whether any particular individual was or was not loyal.

The disclosure of that information to petitioner's counsel and to the Supreme Court would have made it most difficult for the government to argue, as it did, that the lack of time made exclusion a military necessity. At the hearing on petitioner's petition Edward Ennis, who was in charge of the preparation of the brief for the government, testified that the whole thrust of the government's argument before the Supreme Court was that there was not sufficient time to make a differentiation between the loyal Japanese and those who might be disloyal. When asked what he would have done had he learned in March or April, 1943, of General DeWitt's statement, he answered that it would have presented "a very serious problem" and that it would have been "very dangerous" to take that position before the Supreme Court.

Had the statement of General DeWitt been disclosed to petitioner's counsel, they would have been in a position to argue that, contrary to General DeWitt's belief, there were in fact means of separating those who were loyal from those who were not; that the legal system had developed through the years means whereby factual questions of the most complex nature could be answered with a high degree of reliability. Counsel for petitioner could have pointed out that with very little effort the determination could have been made that tens of thousands of native-born Japanese Americans -- infants in arms, children of high school age or younger, housewives, the infirm and elderly -- were loyal and posed no possible threat to this country. More time might have been required to consider the loyalty of those who had spent their adult lives in truck gardening or farming or fishing, but a great number of those, too, could have been rather quickly found to be loyal and of no possible threat.

Had counsel for petitioner known and been able to present to the Supreme Court the reason stated by General DeWitt for the evacuation of all Japanese, it is this Court's opinion that the Supreme Court would have felt impelled to consider and to rule upon petitioner's appeal from his conviction on the failure to report count rather than confirming petitioner's sentence by simply affirming his conviction upon the curfew count. If the asserted ground was known by the Supreme Court to be the impossibility of

separating the loyal from the disloyal, the Supreme Court would have found itself in an area of inquiry where its collective wisdom and its collective experience were far greater than that of General DeWitt. The justices of the Supreme Court were intimately familiar with the process of factual determinations. If the military necessity for exclusion was the impossibility of separating the loyal from the disloyal, the Supreme Court would not have had to defer to military judgment because this particular problem, separating the loyal from the disloyal, was one calling for judicial, rather than military, judgment.

The Court finds 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 vacated.

With respect to petitioner's conviction on the curfew count, the Court has made the same analysis with respect to the requirements for the granting of a writ of error coram nobis. With respect to that conviction, the Court finds that it is unable to set aside the conviction of petitioner of violating the curfew

order on a single day in May of 1942. After considering the arguments made in the government's brief before the Supreme Court with respect to the curfew violation and the lengthy opinion of the Supreme Court affirming that conviction, the Court is not persuaded that the non-disclosure of the statement made by General DeWitt with respect to the military necessity for exclusion was an error of the most fundamental character with respect to the curfew count or that the non-disclosure was actually prejudicial to petitioner with respect to that count.

Even though the curfew order was burdensome with respect to native-born Japanese since it lumped them in with alien Germans, alien Italians, and alien Japanese, the burden was nevertheless relatively mild when contrasted with the harshness of the exclusion order. Under the curfew order, petitioner and all others subject to that order, were permitted to live in their own homes, to continue to work at their places of employment, to travel back and forth from their homes to their places of employment, and, between six in the morning and eight in the evening, to move freely about so long as they remained within a distance of five miles from their places of residence. In addition, the curfew order was a temporary restriction. It was promulgated on March 24, 1942, and was, as a practical matter, relatively short lived. As soon as the exclusion orders became effective, the curfew order was supplanted by them.

By the time the petitioner's appeal had been heard by the Supreme Court, the curfew order had long since been replaced by the exclusion and relocation orders. The Court is persuaded that petitioner's conviction on the curfew count would without question have been affirmed by the Supreme Court even though the Supreme Court had been made aware of the reason given by General DeWitt for his ordering the exclusion of those of Japanese ancestry from the West Coast. His reason for the exclusion did not significantly undermine the earlier issuance of the curfew order. The Court must hence deny the petition of petitioner that his conviction on the curfew count be vacated.

Accordingly, the petition of petitioner that his conviction on Count I of the indictment be vacated is GRANTED. His petition that his conviction on Count II of the indictment be vacated is DENIED.

The Clerk of this Court is instructed to send uncertified copies of this Memorandum Decision to all counsel of record.

DATED this 10th day of February, 1986.

Donald S. Voorhees
United States District Judge