Dear Ms. O'Brien:

I am writing to you on behalf of the Japanese American Citizens League — Legislative Education Committee ("JACL-LEC") to comment on eligibility of various categories of individuals for restitution under § 105 of the Civil Liberties Act of 1988, Pub. L. No. 100-383, 50 U.S.C. App. § 1989b, and to request a meeting with you to discuss the to-be-proposed implementing regulations for the redress program. In addition, by this letter JACL-LEC responds to the questions posed by the Department of Justice in its notice dated October 17, 1988. 53 Fed. Reg. 41252 (October 20, 1988).

1. Background

On August 10, 1988, the President signed into law Pub. L. 100-383, 50 U.S.C. App. § 1989. Section 105(a)(1) of that Act authorizes the Attorney General to pay each eligible individual $20,000. Section 108 defines "eligible individual" to include all United States citizens or a permanent resident aliens of Japanese ancestry who were living on the date of enactment and who, between December 7, 1941 and June 30, 1946 were either:

(i) "confined, held in custody, relocated, or otherwise deprived of liberty of property as a result of --"
(I) Executive Order Numbered 9066, dated February 19, 1942;

(II) the Act entitled 'An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones,' approved March 21, 1942 (56 Stat. 173); or

(III) any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States, or other action taken by or on behalf of the United States or its agents, representatives, officers, or employees, respecting the evacuation, relocation, or internment of individuals solely on the basis of Japanese ancestry;" or

(ii) "enrolled on the records of the United States Government during the period beginning on December 7, 1941, and ending on June 30, 1946, as being in a prohibited military zone."


In drafting these eligibility provisions, Congress recognized that many people who were not incarcerated nevertheless were injured by the relocation and exclusion program. So-called "voluntary" evacuees, who left the West Coast as a part of the evacuation program but who settled outside the incarceration centers, are therefore entitled to compensation. Conf. Rep. No. 785, 100th Cong., 2d Sess., at 22 (1988). Congress did not, however, limit restitution only to those individuals who actually moved as a consequence of military exclusion orders. Congress instead

1/ Persons who "relocated" to Japan between December 7, 1941 and September 2, 1945 are expressly excluded from eligibility. Id.
enacted a sweeping measure of eligibility that compensates all individuals "deprived of liberty or property" by any governmental orders respecting evacuation, relocation, or incarceration. 50 U.S.C. App. § 1989b-7(2)(B)(i).

Consistent with these expansive eligibility provisions, Congress' primary purpose in enacting the restitution provision, aside from deterrence, was to provide some measure of compensation for the suffering imposed by our government through the exclusion program. As Rep. Swindall, the Republican floor manager, stated at the time the House of Representatives adopted the Civil Liberties Act of 1988, "Stating you are wrong is inadequate. You must repair as best you can the damage." 134 Cong. Rec. H6311 (August 4, 1988)(statement of Rep. Swindall). The Act itself provides that these restitution payments are "damages for human suffering." 50 U.S.C. App. § 1989b-4(f)(1). Only through a broad interpretation of the Act’s eligibility provisions will the Department most fully repair the damage.

2. **Japanese Americans in Hawaii.**

Although most of the discussion at the time of the enactment of the Civil Liberties Act of 1988 concerned actions taken by the U.S. Government in the forty-eight contiguous states, the Act also clearly covers affected Hawaiians. During the war, approximately 2,000 Japanese Americans in Hawaii were taken into custody.3/ Some of these persons were detained in Hawaii throughout the war, while others were shipped to War Relocation Authority incarceration centers on the mainland.4/ Furthermore, the

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2/ The restitution payments are, therefore, excluded from income for the purposes of federal taxes and benefits. Id.


4/ *Id.* at 274-280. See Exhibit S, attached (letter from a woman who was incarcerated from December 7, 1941 to March 3, 1942 in Hawaii). Exhibits A-S, attached, are copies of letters received by JACL-LEC. Names and identifying information have been redacted to preserve the writers' privacy.
remaining Japanese Americans were subject to numerous military restrictions and orders.

Nothing in the Act excludes Japanese American residents of Hawaii from restitution. Like their mainland counterparts who were incarcerated, relocated, and deprived of liberty and property, these Japanese Americans from Hawaii are entitled to statutory redress payments.

3. Persons Incarcerated by Entities Other Than the War Relocation Authority and the Army.

Individuals evacuated, relocated, incarcerated, or otherwise deprived of liberty or property on the basis of Japanese ancestry by actions of agencies other than the War Relocation Authority and the Army are also entitled to restitution. The Department of Justice, for example, arrested and incarcerated 2,192 Japanese permanent resident aliens before February 16, 1942. Over two-thirds of these individuals remained in Department of Justice custody during the war.5/

Those individuals arrested and incarcerated by the Department of Justice immediately following the start of the war had been classified as "enemy aliens." Designation as an "enemy alien" meant little in terms of loyalty, but included "Issei businessmen, religious and community leaders, officers of the Japanese associations, all Shinto and Buddhist priests and priestesses, many Japanese-language newspaper editors and owners, and most Japanese-language school teachers."6/ In addition, this group included all Japanese fisherman operating out of Terminal Island in Los Angeles Harbor.7/


Such individuals fall within the ambit of the Act. Incarcerated by the Department of Justice for much of the war in separate centers away from their families, these people were confined or held in custody as a result of "actions taken by or on behalf of the United States" respecting evacuation and incarceration. Moreover, their sudden confinement resulted in and exacerbated property losses. Accordingly, these individuals are entitled to statutory redress payments.

4. Persons Absent from Their Places of Residence at the Time the Exclusion and Relocation Orders were Issued.

The exclusion orders forced a number of people who were absent from their principal places of residence to relocate. This group included Japanese American soldiers, persons traveling for business reasons, those temporarily working away from home, and those attending school outside the restricted areas. These individuals, domiciliaries of the restricted areas at the time the war broke out, are "relocated" persons under § 108.

Travel restrictions imposed at the start of the war severely constrained travel by Japanese Americans anywhere on the West Coast.\footnote{8/ At least as early as February 6, 1942, aliens of Japanese ancestry were prohibited from traveling, except in their local community, without filing detailed papers at least seven days in advance. 28 C.F.R. 30.1 et seq., 7 Fed. Reg. 844 (Feb. 10, 1942). As of March 24, 1942, no person of Japanese ancestry, citizen or alien, was allowed to travel more than five miles from home. Public Proclamation No. 3, ¶ 2, 7 Fed. Reg. 2543 (April 2, 1942).}

\footnote{9/ Public Proclamation No. 6, 7 Fed. Reg. 4436 (June 12, 1942), which was issued June 2, 1942, provided: "No person of Japanese ancestry, whether alien or non-alien, who is now outside of Military Area No. 1 or outside of the said California portion of Military Area No. 2 shall enter either (Footnote Continued)
their West Coast homes could not return after that date.10/ As a result of the military orders, these people had to "relocate" to a place outside the restricted area.

Individuals temporarily away from their homes during the early part of the war are similar to the "voluntary" evacuees. Both these groups were not incarcerated, but were otherwise coerced into abandoning their West Coast homes. Moreover, many individuals lost their property when they were forced to stay away from West Coast homes.11/ There is no principled reason for distinguishing between these individuals and "voluntary" evacuees. Just as Congress intended to compensate the "voluntary" evacuees, it must also have intended to compensate those who were banished from homes they had temporarily left.

The common law further supports compensation for those who were temporarily away from their homes. As the common law concept of domicile recognizes, every person has a "true, fixed home and principal establishment, . . . to which, whenever he is absent, he has the intention of returning." Wright, Miller & Cooper, Federal Practice and

(Footnote Continued

of said areas unless expressly authorized so to do by [Western Defense Command headquarters]." Military Areas Nos. 1 and 2 were designated in Public Proclamation No. 1, issued March 2, 1942. 7 Fed. Reg. 2320 (March 26, 1942).

10/ See Exhibits A-E, H, I, O, Q, attached (soldiers domiciled in the exclusion zones); Exhibit F (person temporarily working in Michigan who was unable to return to his home in California); Exhibit T (person who left to attend school, and who lost a farm during the war).

11/ See Exhibit A, attached. The author of this letter was drafted into the Army prior to the war. At the time of the evacuation, he was not allowed to return to the West Coast in order for the disposal of his farms. Id. See also Exhibits B-E, and Q, attached (letters received by JACL-LEC from other soldiers who were in the Army at the time the war broke out, who were denied the opportunity to help dispose of their property and who suffered property losses as a result of the exclusion and internment program)
Procedure 2d § 3612.12/ Military personnel, prisoners, and out-of-state students retain their domiciles, even if they are away from their permanent residences for protracted periods. Id. Similarly here, Japanese Americans who were in the Army, in college, or temporarily working outside the West Coast continued to have permanent homes inside the restricted zones.

As a consequence of these broad exclusion provisions, every Japanese American domiciled in the restricted areas at the start of the war was forced to "relocate" by the military orders.13/ Each of those individuals, regardless of whether they were physically within the restricted areas at the start of the war, was forced to find some other place to live during the evacuation, relocation and incarceration period. As "relocated" persons, all of these individuals are eligible for individual compensation under the Civil Liberties Act of 1988.

5. Individuals Born to Persons with Pre-Relocation Domiciles in the Exclusion Zones.

Individuals born during the war to parents with pre-war domiciles in the exclusion zones are also "relocated" persons eligible for compensation. These children are therefore eligible for compensation regardless of whether they themselves were incarcerated.14/

12/ As Wright, Miller & Cooper point out, domicile has both a physical and a mental component. Id. The domicile is often defined as the place where the person intends to remain indefinitely, even if not permanently or desirously. Id. at n.5. See also Hawes v. Club Ecuestre El Comandante, 598 F.2d 698 (1st Cir. 1979).

13/ Domicile is an inclusive, rather than an exclusive, test: while all persons domiciled in the exclusion zone were necessarily forced to relocate, some persons not domiciled in the restricted zones were also forced to relocate, either through forced removal or otherwise. See, e.g., Exhibit R, attached (student at the University of California "voluntarily" moved to Wyoming).

14/ Where these children were incarcerated in a camp after (Footnote Continued)
For a substantial majority of all children born to relocated individuals, the relocation resulted in these children being born in places different from the places they would have been born had the evacuation and relocation program never occurred. Some of these children were born in unrestricted areas to parents who had "voluntarily" relocated. Others were born to parents who had been incarcerated in the camps but who had been released to unrestricted areas.  

Like persons who were away from their homes at the time of the exclusion and relocation, the eligibility of children born during the evacuation, relocation and internment period should be determined according to their domicile. Where exclusion and relocation orders prevented them from returning to their parents' place of permanent, established residence -- i.e., the parents' domicile -- that child should likewise be considered to have been "relocated" because of the exclusion and relocation program.

Although the period of the incarceration was indefinite at the time the relocation occurred, the parents could not change their domiciles on account of the evacuation, relocation and internment program. This question was directly addressed in Hiramatsu, et al. v. Phillips, 59 F. Supp. 167 (S.D. Cal. 1943). In applying the concept of domicile in the context of the incarceration program, the court noted, "Domicile . . . is entirely a question of residence and freedom of will. . . . The intention to acquire domicile of choice necessarily involves an exercise of volition or freedom of choice not prescribed or dictated by any external necessity." Id. at 168

(Footnote Continued)

they were born, they are entitled to restitution as incarcerated individuals.

15/ See Exhibit N, attached (child was born in Denver, Colorado, because his family could not return to their California home).

16/ At common law, minor children are assigned the domicile of their father, or of their mother if the mother has custody. Wright, Miller & Cooper § 3615. This rule reflected the assumption that minor children would have the same permanent, established residence as their parents.
(emphasis supplied). The court therefore rejected a claim by a group of Japanese Americans, then incarcerated at Poston, Arizona, that they were domiciliaries of Arizona because they intended to stay in Arizona after military restraints were removed. *Id.*

Applying this rule, children born outside of the restricted areas are domiciled wherever their parents were domiciled before the evacuation, relocation and internment program began. These children, who were prevented from returning to their places of domicile by the military restrictions, were therefore "relocated" on account of the military orders implementing Executive Order 9066. Accordingly, these individuals are also eligible for restitution under the Act.

6. Japanese American Military Personnel Who were Incarcerated by or Transferred from the Western Defense Command.

Japanese Americans serving on active duty in the Western Defense Command at the outbreak of the war were also confined, held in custody, relocated and deprived of liberty or property as a result of directives and actions of the U.S. Army. Some of these individuals were domiciliaries of excluded areas, were precluded from returning to those areas on account of race, and are therefore eligible for restitution because of "relocation" and infringement of their right to travel.17/ Others of these individuals are eligible because they were themselves confined or held in custody by the military, or were removed from the West Coast by military authorities.

The courts, both civilian and military, have made clear that "an individual does not cease to be a person within the protection of the fifth amendment of the Constitution because he has joined the nation's armed forces and has taken the oath to support that Constitution with his life, if need be." *United States v. Hiatt*, 141 F.2d 664, 666 (3d Cir. 1944). See also *Burns v. Wilson*, 346 U.S. 137, 142 (1953); *Courtney v. Williams*, 1 M.J. 267, 270 (C.M.A. 1976). This includes the right to be free from

17/ See pp. 5-7, supra (discussing "relocation") and pp. 13-14, infra (discussing the right to travel).

Race-based restrictions were nonetheless placed on all Japanese American military personnel shortly after the attack on Pearl Harbor.18/ There is evidence, contained in letters former Japanese American soldiers have written to JACL-LEC, that Japanese American soldiers were confined under continuous guard almost immediately following December 7, 1941. See, e.g., Exhibit A, attached.19/ Even outside the Western Defense Command, Japanese American soldiers were subject to race-based incarceration. See Exhibit P, attached (Japanese American soldiers at Fort Riley, Kansas, were incarcerated in barracks by armed, machine-gun bearing guards when President Roosevelt visited the base to review other troops).

Furthermore, Japanese American soldiers were summarily transferred from the West Coast after December 7, 1941. On January 1, 1942, Lt. Gen. John L. DeWitt, commander of the Western Defense Command and the person responsible for carrying out the evacuation and relocation, requested that all Japanese American soldiers be removed from his command.20/ As is reflected in Exhibit A, these

18/ Approximately 5000 Japanese Americans entered the armed forces during 1940 and 1941. tenBroek, et al., Prejudice War and the Constitution, at 166. During the course of the war, almost 26,000 Japanese Americans served in the armed forces. War Relocation Authority, The Evacuated People: A Quantitative Description, at 166. Over half of these soldiers came from the mainland with the remainder from Hawaii. Id.

19/ See also Exhibits G, H, O, and Q, attached (letters documenting incarceration of Japanese American soldiers); tenBroek, et al., Prejudice War and the Constitution, at 166. JACL-LEC is informed that government documents exist that show that incarceration of these soldiers was a planned effort on the part of the military.

orders were then implemented and Japanese American soldiers were transferred out of the Western Defense Command.21/

Japanese American soldiers were also deprived of both liberty and property by other aspects of the evacuation, relocation and incarceration program. These individuals were deprived of liberty when the Army refused to grant them furloughs for travel within the states of Washington, Oregon, California and Arizona.22/ Furthermore, many of these soldiers were deprived of property by the evacuation and incarceration of the remainder of their families. See Exhibits B-E, and Q attached (letters reflecting property loss by soldiers).

Japanese American military personnel incarcerated or relocated thus were "confined, held in custody, relocated, or otherwise deprived of liberty or property" by a "directive of the Armed Forces of the United States, or other action taken by or on behalf of the United States." The historical record shows that these actions were based solely on Japanese ancestry. The Department, therefore, must draw its eligibility regulations to include these affected American servicemen.

7. Hospitalized and Other Confined Persons Not Incarcerated or Physically Relocated.

Individuals who were hospitalized or otherwise interned at institutions within the exclusion areas are also eligible for compensation. In many instances, these individuals were forced to obtain either travel permits or

21/ See also Exhibits B-E, G-J, attached (letters reflecting transfer of Japanese American soldiers from the West Coast); tenBroek, et al., Prejudice, War and the Constitution, at 166.

22/ See pp. 13-14, infra (right to travel). See also Exhibits A, D, E, and Q, attached (letters documenting Army refusal to grant furloughs to Japanese American soldiers wishing to visit their West Coast homes); tenBroek, et al., Prejudice, War and the Constitution, at 166.
certificates of exemption in order to travel to a hospital or to remain in the exclusion zones. Those individuals who applied for such certificates or permits are eligible for compensation because they are "enrolled on the records of the United States Government" as being in a prohibited military zone between December 7, 1941 and June 30, 1946. 50 U.S.C. App. § 1989b-7(2)(B)(ii).

Those individuals who did not obtain formal approval to stay, but who remained in hospitals or other institutions during the war should be entitled to compensation. It would be unduly formalistic to exclude from restitution those individuals who would be eligible but for their failure to file the forms. In any event, had these individual been released from their respective hospitals or institutions, they faced imminent relocation and incarceration. Thus, individuals confined to hospitals or other institutions in the restricted zones during the evacuation, incarceration and relocation period are entitled to statutory restitution.


Many Japanese Americans, both inside and outside the exclusion areas, were deprived of their constitutionally protected right to interstate travel as a result of the exclusion orders. By mid-1942, persons of Japanese ancestry

23/ See Exhibits K and L, attached (letters from individuals confined to a sanitarium in the exclusion zones).

24/ See Public Proclamation No. 6, 7 Fed. Reg. 4436, 4437 (June 12, 1942)(exempting or deferring exclusion for persons "in hospitals or confined elsewhere, and too ill or incapacitated to be removed therefrom without danger of life"); Public Proclamation No. 7, 7 Fed. Reg. 4496, 4499 (June 16, 1942)(exempting individuals "involuntarily interned or confined" in federal, state or local institutions while they were so confined). See also Public Proclamation No. 11, 7 Fed. Reg. 6703, 6704 (Aug. 26, 1942).
were barred from traveling within the states of California, Washington, Oregon and Arizona. 25/ Individuals thus deprived of their right to interstate travel are eligible for compensation.

The Supreme Court has long recognized a constitutionally protected right to interstate travel. As the Court stated in Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (emphasis supplied),

This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty united to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules or regulations which unreasonably burden or restrict this movement.

The Court further declared that the right to interstate travel could only be restricted where "necessary to promote a compelling governmental interest." Id. at 634 (emphasis in original).

History has shown, however, that there was no compelling governmental interest justifying a restriction of the rights of Japanese Americans to engage in interstate travel. Indeed, as the Department told the United States Court of Appeals for the Ninth Circuit, the evacuation, incarceration and other restrictions placed on Japanese Americans resulted from General DeWitt's racism, not from a military judgment that the restrictions were necessary. See Hirabayashi v. United States, 828 F.2d 591, 601 19th Cir. 1987). That court also concluded that had the Supreme Court known the true facts of the lack of necessity for the incarceration and other restrictions, the Supreme Court would not have approved them. Id. at 602-604, 608.

Japanese Americans nationwide were, therefore, deprived of liberty when the government unconstitutionally abridged their right to interstate travel by excluding them from the West Coast. That deprivation of liberty flowed

25/ See n.8, supra.
directly from the provisions of Public Proclamation Nos. 6 and 7, and the Civilian Exclusion Orders, which together excluded all Japanese Americans from traveling within the states of California, Oregon, Washington, and Arizona. All Japanese Americans who were deprived of their right to travel by these military orders are therefore eligible for restitution.


Under the terms of the Act, Japanese Americans who were deprived of property by the evacuation, relocation and incarceration program are also entitled to restitution. Because this ground for restitution is separate from confinement or relocation, these individuals must be compensated even where they were not themselves subject to incarceration or forced to relocate.

There are a number of persons who were not themselves confined or interned, but who nevertheless suffered a deprivation of property as a result of the evacuation, relocation and incarceration program. Some of these individuals were temporarily away from their homes, serving in the military, working or away at school. Others of these individuals were permanently living, i.e. domiciled, outside of the restricted zones but owned property in the restricted areas nonetheless.

At the time of the war, it was extremely common for the nisei (second-generation) children of immigrant Japanese to own the family property. In areas such as California, the immigrant parents were forbidden from holding title to land, so that any real property had to be in the name of an American citizen child.26/ When these children left the area, they retained title to the land.

Exclusion of the immigrant parents and siblings from the West Coast resulted in the loss of many of these

26/ The California Alien Land Law of 1913, for example, forbade the immigrant Japanese from purchasing land or from obtaining a lease with a term longer than three years. Personal Justice Denied, at 34.
properties. Those owners that lost properties because of the evacuation, incarceration or relocation of their families suffered this loss as a direct result of military orders issued on the basis of Japanese ancestry. Accordingly, these individuals fall within the plain meaning of the Act’s eligibility terms and therefore are eligible for restitution.

10. Persons who Left the West Coast Prior to "Voluntary" Relocation.

Another subset of individuals eligible for restitution are those people who left the West Coast after December 7, 1941, but prior to implementation of a formal "voluntary" relocation program. These individuals, who may have left out of fear or to avoid further harassment, should be considered "voluntary" relocatees for the purposes of restitution.

Congress, in explicitly providing restitution to all individuals who appear on government records as being in a prohibited military zone between December 7, 1941, and June 30, 1946, demonstrated its judgment that all Japanese Americans on the West Coast as of December 7, 1941 should be deemed to be eligible for compensation. All of these persons were victims of either forced removal, or were coerced by then-prevailing conditions to leave.

Consistent with Congress’ judgment, the Department should include as eligible individuals those persons who, at the start of the war, were present in the areas later designated exclusion zones. Those who left the West Coast

27/ See Exhibits A, D, E, Q, and T, attached (individuals who lost property as a result of the incarceration of their families).

28/ The "voluntary" relocation program was formally implemented by Public Proclamation No. 1, issued March 2, 1942. 7 Fed. Reg. 2320, 2321 (Mar. 26, 1942).

29/ See Exhibit S, attached (student who returned home after December 7, 1941 to Wyoming to avoid the building anti-Japanese prejudice on the West Coast).
prior to formal "voluntary" relocation are therefore eligible for restitution.


In its notice of October 17, 1988, the Department inquired as to the eligibility of Peruvian Japanese (and presumably other Latin American residents of Japanese ancestry) who were brought to and incarcerated in the United States during World War Two for restitution. These persons should be deemed to have been "permanent resident aliens" for the purposes of the statutory eligibility provisions.

During the course of the war, approximately 2300 Latin Americans of Japanese ancestry were brought to the United States at the behest of the U.S. Government. Our government sought the Latin American Japanese in order to exchange them for American citizens in Japanese-controlled areas. Although brought to the U.S. by force, these individuals were not issued visas that allowed them to enter this country. Thus, upon landing here, they were classified as illegal entrants subject to deportation.

A number of these individuals were deported to Japan. By the beginning of 1947, however, 300 Peruvian Japanese still remained in the United States. Although negotiations were then underway between the U.S. and Peru as to the fate of these individuals, no permanent solution was reached until 1949, when these individuals were formally recognized as "permanent legally admitted immigrants."

30/ Personal Justice Denied, at 305.

31/ Id.

32/ Id. at 308.

33/ At the end of the war, however, 1400 still remained in the U.S. In 1945, 800 additional Peruvian Japanese were voluntarily deported to Japan. Id. at 312.

34/ Id. at 313.

35/ Id. at 314.
Neither the Act nor the committee reports specifically address the eligibility of Latin American Japanese for restitution. Fundamental fairness mandates that the Department recognize that these individuals were, in reality, "permanent legally admitted immigrants" at the time they arrived in this country. These individuals were brought to the U.S. and interned here at the behest of the U.S. government. To rely now upon the failure of our government to grant these persons visas prior to bringing them here in order to deny their restitution is both unfair and arbitrary.

12. Minors who Emigrated to Japan.

In its October 17, 1988 notice, the Department also inquired as to whether minor children who "repatriated" to Japan should be eligible for restitution. These individuals should be eligible for restitution since the decision to travel to Japan could not have been their own, voluntary choice.

36/ The incarceration of Latin American Japanese was mentioned briefly during hearings on H.R. 442 before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary. During those hearings, Cong. Berman asked whether the Peruvian Japanese would be eligible. At that time, Cong. Frank, the chairman of the subcommittee, indicated that the "quick answer" was that Peruvian Japanese would not be eligible. Legislation to Implement the Recommendation of the Commission on Wartime Relocation and Internment of Civilians: Hearings before the Subcommittee on Administrative Law and Governmental Relation of the House Committee on the Judiciary, 100th Cong., 1st Sess. 108 (1987). Such a "quick answer," given without opportunity for reasoned analysis and made over a year prior to final enactment, should not be accorded much weight. Cf. Foti v. Immigration and Naturalization Service, 308 F.2d 779, 786 (2d Cir. 1962).

37/ Most of the minor children who accompanied parents to Japan were probably American citizens by birth. Thus, if these children renounced their citizenship, they are "expatriates," not "repatriates."
The Civil Liberties Act of 1988 expressly forbids payment of compensation to individuals who relocated to Japan, or any other country with which we were at war, between December 7, 1941 and September 2, 1945. This provision was included, in part, as a response to Justice Department objections that by failing to exclude persons outside the United States, the bill proposed to compensate "disloyal" individuals who emigrated to Japan. See Statement of Richard K. Willard, reprinted in H.R. Rep. No. 278, 100th Cong., 1st Sess., at 24. Some minor children, however, accompanied their parents to Japan during the war.


The purpose of the statutory exclusion of renunciants was clearly to prevent those individuals who

38/ Only 180 individuals of Japanese ancestry emigrated to Japan before September 2, 1945. See War Relocation Authority, The Evacuated People: A Quantitative Description, at 158.

39/ JACL-LEC in no way accepts the conclusion that all persons who emigrated to Japan were "disloyal." Such a conclusion is an example of post hoc ergo propter hoc reasoning, and totally ignores the effects of relocation and incarceration in impelling emigration. On the contrary, there is clear evidence that many emigrated to protest U.S. policies and programs, and because of disillusionment stemming from discriminatory treatment. Many felt that the U.S. Government had undermined and disregarded their citizenship.

40/ Individuals who emigrated to Japan after September 2, 1945 do not fall within the exclusion and are therefore entitled to restitution if otherwise eligible.
voluntarily chose to go to Japan from claiming restitution. Minor children, however, were not in a position to make their own choice on emigration. Congress should not be presumed to have imposed sanctions upon the children because of their parents' choices. Such a choice would have both been unfair and not in keeping with the remedial purposes of the redress program. Accordingly, the Department should find that children of adults who returned to Japan during the war are not excluded from receiving restitution.

13. Non-Japanese American Family Members who were Forced to Accompany Their Family to the Camps.

Non-Japanese American family members who were forced to go into the camps in order to avoid breaking up their families must also be compensated. These individuals were forced into the camps by the exclusion, incarceration and relocation orders as surely as if they had been Japanese Americans. Under the circumstances, these individuals cannot be presumed to have waived their constitutional rights.

According to the final report prepared by Gen. DeWitt on the evacuation, incarceration and relocation program, a person of Japanese ancestry was "any person who has a Japanese ancestor regardless of degree." DeWitt, Final Report -- Japanese Evacuation From the West Coast, at 514 (1943). This meant that, in some cases, a parent and a child would be subject to evacuation and incarceration, while the other parent faced the choice of submitting to incarceration or splitting the family. Exhibit M, attached, describes one such family in which a Mexican American wife was forced to join her husband and infant son in camp.

There is no indication in the legislative history that Congress intended to exclude these people when it limited restitution payments to individuals of Japanese ancestry. Indeed, the compensatory aims of the Act are served only if these individuals also receive restitution. Certainly, they shared both the personal indignity of incarceration as well as the financial burdens of lost jobs, incomes, and properties with their Japanese American family members. A non-Japanese American spouse was deprived, for example, of his or her share of the marital estate attributable to the Japanese American spouse's income and assets.
Moreover, these persons could not have waived their constitutional rights in the context of the mass incarceration. It is well established that a waiver of constitutional rights, to be effective, must be knowing and voluntary. *E.g.* *McCarthy v. United States*, 394 U.S. 459 (1969). Here, where a person was required to enter the camps in order to keep their family together, waiver cannot be voluntary. Any waiver of constitutional protections was clearly coerced.

It cannot be disputed that the non-Japanese family members meet all the qualifications for eligibility except actually being of Japanese ancestry. The Department should interpret the statute to allow individuals incarcerated because of the race of their family members likewise to recover. Any other interpretation would fail to account for the reality of the injustices perpetrated.

14. Verification of "Voluntary" Evacuees who did not Complete "Change of Residence" Cards.

In its October 17, 1988 notice, the Department also requested comments on how the eligibility of voluntary evacuees who did not complete "Change of Residence" cards can be verified. There are several sources for potential verification.

In the first instance, the voluntary evacuees may themselves have correspondence or other memorabilia that shows that, as of December 7, 1941, these individuals lived in one of the exclusion zones. Copies of old bills, rental agreements, mortgage payments, medical records, school and other institutional records, employment and tax records are all examples of such memorabilia. In addition, photographs also will provide a record of where people lived.

Where an individual does not have such documentation, the individuals may be able to obtain records of church attendance or membership in local organizations that will verify presence in a community. In addition, sworn statements from former neighbors can attest to the fact that a particular family lived in the restricted areas. In addition, census reporting data, to the extent that it can be made available, may also indicate that an individual lived in the restricted zones prior to the relocation
program. Similar types of documentation could also be used to determine whether the individual subsequently lived in an area not subject to the restrictions.

At the heart of questions of "verification" lie two issues. First, the Department must determine what types of "verification" it will accept. In this respect, JACL-LEC urges the Department to draft its regulations so as to leave open the range of permissible documentation. At most, the regulations should give examples of satisfactory verifying documents.

The Department must not become overly dependent upon written verification. Much of the documentation necessary to verify even simple matters such as address may be difficult to obtain at this late date. An overemphasis on written documentation will unduly restrict payment and unjustly penalize those individuals unlucky enough not to have held onto necessary documents for nearly fifty years. It is essential, therefore, that the Department establish a procedure for verification through sworn statements. Just as in any judicial proceeding, a claimant should be able to buttress his or her claim through submission of affidavits and depositions.

Congress clearly intended for the government to bear the burden in determining eligibility. The Act therefore prohibits the Attorney General from requiring any application for payment. 50 U.S.C. App. § 19896-4(a)(2). "Verification," especially through written documents, implies, however, that the claimant will bear the burden of proving the circumstances underlying his or her claim of eligibility. Shifting the burden back to the claimant would be contrary to congressional intent.

Although the census information is usually deemed to be confidential, the limited use of this information to help identify persons entitled to compensation in this rare circumstance would not create any disincentives to full public participation in the census. In addition, there is some evidence that census data may have been used to aid other government agencies in locating ethnic Japanese. Personal Justice Denied, at 104 n.*.
The Department thus should establish presumptions in favor of eligibility. For example, any individual who lived in the areas of the West Coast prior to the time the restrictions were imposed should be presumed to have been either a "voluntary" evacuee or an incarcerated person. The broad provisions of the Act entitle virtually every Japanese American who lived in the exclusion zones at the outbreak of the war to compensation. Similarly, any Japanese American stationed within the Western Defense Command should be presumed to have been transferred on the basis of Japanese ancestry.

In order to fulfill the statute's purpose of making repair to all Japanese Americans and their families who suffered harm as a result of evacuation, incarceration and relocation, the claims process must not be too rigorous. The Department must make both the claims process and the required "verification" reasonable in light of the long passage of time.

Conclusion

JACL-LEC urges the Department to interpret the eligibility provisions of the Civil Liberties Act of 1988 broadly, in accordance with the statute's remedial purpose. Congress and the President, through strong approval of the Civil Liberties Act, expressed their clear intent to redress a grave injustice. As Representative Hyde stated, "We can hold off on a couple of highways. Justice comes at the top of the list." Chicago Tribune, p.14 (Sept. 22, 1987). It is in this spirit that JACL-LEC urges the Department to interpret the Act's eligibility provisions broadly to effect a full remedy.

Please feel free to contact me if you have any questions regarding the issues raised in this letter.

Sincerely,

John T. Nakahata

Counsel to the Japanese American Citizens League -- Legislative Education Committee

Attachments
cc: Robert Bratt (ORA)
    Alice Kale (ORA)
    Shirley Lloyd (ORA)
October 27, 1988

Dr. Setsuko M. Nishi
Dr. Stephen S. Fugita
The University of Illinois
at Chicago
Pacific/Asian American Mental Health
Research Center (M/C 261)
1033 West Van Buren Street
Chicago, Illinois 60607

Dear Drs. Nishi and Fugita:

On behalf of Senator Inouye who is currently away from the office, I wish to share with you a copy of a letter from Dr. Lewis Judd, Director of the Alcohol, Drug Abuse, and Mental Health Administration of the National Institute of Mental Health, concerning your research grant proposal on "War Time Incarceration and the Course of Nisei Lives."

Aloha,

MARGARET L. CUMMISKY
Legislative Assistant

MLC: sed
Enclosure
Dr. Lewis L. Judd  
Director  
Alcohol, Drug Abuse, and Mental Health Administration  
National Institute of Mental Health  
Rockville, Maryland 20857

Dear Dr. Judd:

On behalf of Senator Inouye who is currently away from the office, I wish to acknowledge your letter concerning Dr. Setsuko Nishi's research grant proposal on "War Time Incarceration and the Course of Nisei Lives."

Thank you for sharing this information with Senator Inouye. He greatly appreciates your assistance in this matter.

Aloha,

MARGARET L. CUMMISKY  
Legislative Assistant

MLC:sed
The Honorable Daniel K. Inouye  
United States Senate  
Washington, D.C. 20510  

Dear Senator Inouye:

Thank you for your letter of September 12 on behalf of Setsuko M. Nishi, Ph.D., and her research grant proposal entitled "War Time Incarceration and the Course of Nisei Lives" (1 R01 AG07458-01A1). Dr. Nishi's application was assigned both to the National Institute on Aging (NIA) and the National Institute of Mental Health (NIMH), with NIA having primary responsibility. The application was recommended for approval by the National Advisory Councils of both NIA and NIMH, thus enabling either Institute to make an award within funding resources and priority score considerations.

As you know, funds are not available to support all of the high-quality applications that are recommended for support. If resources are not available to NIA to permit making a grant award, NIMH will be notified. Should this occur, NIMH may then consider funding of this application within the available resources.

Sincerely yours,

[Signature]

Lewis L. Judd, M.D.  
Director
Dr. Setsuko M. Nishi  
Dr. Stephen S. Fugita  
The University of Illinois  
at Chicago  
Pacific/Asian American Mental Health  
Research Center (M/C 261)  
1033 West Van Buren Street  
Chicago, Illinois 60607  

Dear Drs. Nishi and Fugita:

I wish to share with you a response from the Department of  
Health and Human Services to my letter supporting your grant  
application entitled "War Time Incarceration and the Course  
of Nisei Lives."

You should be hearing shortly from the National Institute on  
Aging.

Aloha,

[Signature]

DANIEL K. INOUYE  
United States Senator

DKI:mcd  
Enclosure
Dr. T. Franklin Williams
Director
National Institute on Aging
National Institutes of Health
Building 31C, Room 2C02
Bethesda, Maryland 20892

Dear Dr. Williams:

Thank you for your response to my letter on behalf of Dr. Setsuko M. Nishi of the University of Illinois concerning her grant application entitled "War Time Incarceration and the Course of Nisei Lives."

I greatly appreciate your serious consideration of Dr. Nishi's application.

Aloha,

DANIEL K. INOUYE
United States Senator

DKI: mcd
The Honorable Daniel K. Inouye  
United States Senate  
Room 722, Hart Senate Building  
Washington, D.C. 20510

Dear Senator Inouye:

Thank you for your letter of September 12, 1988, regarding the grant application entitled "War Time Incarceration and the Course of Nisei Lives" submitted by Dr. Setsuko M. Nishi of the University of Illinois. We were pleased to receive this application, given the significance of this topic.

Dr. Nishi's application has undergone the usual National Institutes of Health review process. It has been assigned to the National Institute on Aging (NIA) with the number 1 RO1 AG07458-01A1. The initial evaluation for technical and scientific merit was conducted by the Life Course and Prevention Research/Aging Subcommittee at its June meeting. The initial review group, sometimes referred to as a "Study Section," is composed of non-government researchers with expertise in the areas described in the application. The application was forwarded to the National Advisory Council on Aging for further consideration at its September meeting, and Dr. Nishi will be receiving information from the NIA shortly on the status of her application.

Please be assured that Dr. Nishi’s application will receive every consideration. Thank you for your interest in this application and the National Institute on Aging.

Sincerely yours,

T. Franklin Williams, M.D.
Director
National Institute on Aging
September 12, 1988

Dr. Setsuko M. Nishi
Dr. Stephen S. Pugita
The University of Illinois
at Chicago
Pacific/Asian American Mental Health
Research Center (M/C 261)
1033 West Van Buren Street
Chicago, Illinois 60607

Dear Drs. Nishi and Pugita:

Thank you for your letter of August 30th, regarding your research proposal entitled "War Time Incarceration and the Course of Nisei Lives."

In light of the recent passage of the Japanese reparations bill, I believe your proposal is important in examining the long-term social and psychological effects of the World War II incarceration of Japanese Americans. In this regard, I have conveyed my support to Dr. Franklin Williams and Dr. Lewis Judd, and wish you both much success in your endeavor.

If I can be of further assistance to you, please do not hesitate to let me know.

Aloha,

Daniel K. Inouye
United States Senator

DKI: mbd
September 12, 1988

Dr. Lewis Judd  
Director  
National Institute of Mental Health  
Parklawn Building  
5600 Fishers Lane  
Rockville, Maryland 20857

Dear Dr. Judd:

It has recently come to my attention that a research proposal entitled "War Time Incarceration and the Course of Nisei Lives" is being considered by The National Institute on Aging and The National Institute of Mental Health on a dual assignment basis.

It is my strong belief that this research proposal is worthy and appropriate for funding, especially in light of the recent enactment of the measure authorizing reparations for Americans of Japanese ancestry. The project will examine the long-term social and psychological effects of the World War II incarceration of Japanese Americans. It will provide valuable insight on how the internees were able to adapt to the catastrophic disruptions caused by their incarceration. This project will also play a significant role in addressing the issues of stress, coping and the life course. Accordingly, I urge you to give every consideration to approving this research proposal.

Thank you for your attention and assistance in this matter.

Aloha,

[Signature]

DANIEL K. INOUYE  
United States Senator

DKI: mbd
Dr. Franklin T. Williams  
Director  
National Institute on Aging  
9000 Rockville Pike  
Bethesda, Maryland  20892

Dear Dr. Williams:

It has recently come to my attention that a research proposal entitled "War Time Incarceration and the Course of Nisei Lives" is being considered by The National Institute on Aging and The National Institute of Mental Health on a dual assignment basis.

It is my strong belief that this research proposal is worthy and appropriate for funding, especially in light of the recent enactment of the measure authorizing reparations for Americans of Japanese ancestry. The project will examine the long-term social and psychological effects of the World War II incarceration of Japanese Americans. It will provide valuable insight on how the internees were able to adapt to the catastrophic disruptions caused by their incarceration. This project will also play a significant role in addressing the issues of stress, coping and the life course. Accordingly, I urge you to give every consideration to approving this research proposal.

Thank you for your attention and assistance in this matter.

Aloha,

DANIEL K. INOUYE  
United States Senator

DKI: mbd
August 30, 1988

Senator Daniel Inouye
ATTN: Maria Blanco
722 Hart Senate Office Bldg.
Washington, D.C. 20510

Dear Senator Inouye:

Your support and encouragement has been crucial to the development of the research proposal "War Time Incarceration and the Course of Nisei Lives" which has been submitted to The National Institute on Aging and The National Institute of Mental Health on a dual assignment basis. The proposal has received a high and fundable priority score. However, in view of the current budget uncertainties, we have been informed that funding for this project cannot be assured in this cycle. A final decision will be made on the proposal September 14-16.

Thus, it is with great urgency that we ask for your continuing support and endorsement of this research on the longterm social and psychological sequelae of the World War II evacuation, incarceration and resettlement at a critical point in the funding decision process. We would appreciate it very much if you could express your interest and belief in the importance of this research to the Directors of the The National Institute on Aging and The National Institute of Mental Health. Both letters are requested because the study is jointly reviewed and, if funded, may be paid from the budgets of both agencies.

Dr. Franklin T. Williams, Director
National Institute on Aging
9000 Rockville Pike
Bethesda, MD 20892

Dr. Lewis Judd, Director
National Institute of Mental Health
Parklawn Building
5600 Fishers Lane
Rockville, MD 20857
For further information, please call us at (312) 996-2879.

Sincerely yours,

Setsuko M. Nishi, Ph.D.

Stephen S. Fugita, Ph.D.
EXECUTIVE SUMMARY

WAR TIME INCARCERATION AND THE COURSE OF NISEI LIVES

Dr. Setsuko M. Nishi and Dr. Stephen S. Fugita

Submitted to The National Institute on Aging and The National Institute of Mental Health (dual assignment)

Abstract:

This project will examine the long term social and psychological effects of the World War II incarceration of Japanese Americans. It will employ a longitudinal design which will permit following a group of Japanese Americans from the time they were incarcerated to the present. Specifically, the respondents will be 740 second generation Japanese Americans, 508 who were incarcerated and 232 who were not incarcerated.

At the time of the incarceration, these individuals were in their adolescence or early adulthood. Life course data will be collected and assembled for these persons for three time periods: during the incarceration (1942-45), 1967, and in 1990. The source of data for the 1942-45 incarceration period will be the War Relocation Authority case file records stored at the National Archives. All persons who were incarcerated have such records. The 1967 data will come from the Japanese American Research Project which interviewed 2304 Nisei throughout the continental U.S. The 1990 data will involve a personal reinterview of the same respondents to document their current status.

The objectives of the study are to examine (1) the impact of the war time incarceration on mental health, health, and status attainment some 25 and 45 years after the event, (2) the significance of life-cycle stage, gender and support systems at the time of the internment, (3) the relationship between respondents' objective incarceration experience and their contemporary reconstruction of the event.

Status of Application:

The Aging Subcommittee of The National Institute of Mental Health has approved the proposal with a high and fundable priority score. This review group has recommended, at this time, that the proposal be funded for two years to analyze the first two waves of the longitudinal study, linking data from the 1942-1945 War Relocation Authority files to the 1967 Japanese American Research Project survey. Furthermore, they have suggested that we submit a proposal to collect the contemporary third wave of data at the beginning of the second year of the project.
As an application submitted on a dual assignment basis, The National Institute on Aging as primary and The National Institute of Mental Health as secondary, the proposal will go to their respective Councils in mid September 1988 for final action. We have just been informed that we cannot be assured that the project will be funded in this cycle.

Significance and Urgency

The proposal was developed through consultation with behavioral and social scientists convened by the Commission on War Time Internment of Civilians.

While evacuation, incarceration, and resettlement are central events in Japanese American history, little is known about how these momentous events effected the course of their lives in the long run.

This research would be of enormous value in enabling us to learn about coping with catastrophic disruptions and to memorialize these World War II events by contributing to much needed knowledge on stress, coping and the life course.

The camp generation constitutes an aging cohort and if we are to learn the lessons of this experience, research must be undertaken now.
Draft letter to: Dr. Franklin T. Williams
Dr. Lewis Judd

Dear Dr. Williams/Dr. Judd:

It has recently come to my attention that a research proposal entitled "War Time Incarceration and the Course of Nisei Lives" is being considered by The National Institute on Aging and The National Institute of Mental Health on a dual assignment basis.

It is my strong belief that this research proposal is worthy and appropriate for funding, especially in light of the recent enactment of the measure authorizing reparations for Americans of Japanese ancestry. The project will examine the long-term social and psychological effects of the World War II incarceration of Japanese Americans. It will provide valuable insight on how the internees were able to adapt to the catastrophic disruptions caused by their incarceration. This project will also play a significant role in addressing the issues of stress, coping and the life course. Accordingly, I urge you to give every consideration to approving this research proposal.

Thank you for your attention and assistance in this matter.

Aloha, DKI

bcc: Dr. Setsuko M. Nishi
Dr. Stephen S. Fugita
August 10, 1988

The Honorable Daniel K. Inouye
United States Senate
Washington, D.C. 20510

Dear Senator Inouye:

On behalf of our client, the National Committee for Japanese-American Redress, we wish to express our admiration and gratitude for your tireless efforts on behalf of the redress legislation. The entire nation takes special pride in the passage of this historic law. It would not have occurred without your patient and devoted labors.

NCJAR wants you to know, also, that the struggle for Court vindication continues, and in that regard we enclose a copy of the Petition for Certiorari which we filed on August 5, 1988, on behalf of the NCJAR class-action plaintiffs in Hohri et al. v. United States.

With best wishes.

Sincerely,

Landis, Cohen, Rauh and Zelenko

Benjamin L. Zelenko

Enclosure
BLZ:rkb
IN THE
Supreme Court of the United States
October Term, 1988

WILLIAM HOHRI, et al.,
Petitioners,
v.
THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BENJAMIN L. ZELENKO, ESQ.
(Counsel of Record)
B. MICHAEL RAUH, ESQ.
MARTIN SHULMAN, ESQ.
KARIN S. LEFF, ESQ.
LANDIS, COHEN, RAUH AND ZELENKO
1019 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 785-2020

Counsel for Petitioners
QUESTIONS PRESENTED

I. Whether the statute of limitations for plaintiffs’ claims was tolled until the early 1980’s when evidence of the government’s fraud on this Court first became available?

II. Whether “sovereign immunity” bars compensation for intentional government violations of the fundamental constitutional rights of American citizens of Japanese ancestry interned during World War II?

III. Whether Executive Orders 9066 and 9102, and related statutes, regulations, and executive actions interning American citizens of Japanese ancestry during World War II made the government a fiduciary for those persons, for purposes of Tucker Act jurisdiction under United States v. Mitchell?
PARTIES TO THE PROCEEDINGS

Petitioners (plaintiffs below) are William Hohri, Hannah Takagi Holmes, Chizuko Omori (individually and as representative for Haruko Omori), Midori Kimura, Merry Omori, John Omori (individually and as representative of Juro Omori), Gladyce Sumida, Kyoshiro Tokunaga, Tom Nakao, Harry Ueno, Edward Tokeshi, Rentaro Hashimoto, Nelson Kitsuse (individually and as representative for Takeshi Kitsuse), Eddie Sato, Sam Ozaki (individually and as representative for Kyujiro Ozaki), Kumao Toda (individually and as representative for Suketaro Toda), Kaz Oshiki, George R. Ikeda, Tim Takayoshi, Cathy Takayoshi, and the National Council for Japanese American Redress.

Plaintiffs requested class certification (an issue not yet determined) for the class of persons defined as follows:

The approximately 120,000 United States citizens and permanent residents, and representatives of such persons no longer living, who during World War II were subjected to forcible segregation, arrest, exclusion, imprisonment, curfew and travel restrictions, deportation, loss of citizenship, or other deprivations of their civil rights and liberties due to the fact of their Japanese ancestry, pursuant to President Proclamation 2525, Executive Order 9066, Public Laws 503 and 405, Presidential Proclamation 2655, or other actions and orders of the United States, its officers, agents, and employees.
Defendant herein is the United States of America, also referred to as the "government."
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IN THE
Supreme Court of the United States
October Term, 1988

No. 88-

WILLIAM HOHRI, et al., Petitioners,
v.
THE UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Plaintiffs William Hohri, et al., petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case

OPINIONS BELOW

The decision of the United States Court of Appeals for the Federal Circuit is reported at 847 F.2d 779 (Fed. Cir. 1988). The district court opinion is reported at 586 F. Supp. 769 (D.D.C. 1984).

JURISDICTION

The court of appeals' judgment was entered on May 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and § 1257(3).
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED


STATEMENT OF THE CASE

Plaintiffs are American citizens and permanent residents who were subjected to unprecedented mass racial discrimination by the United States government during World War II, solely on the basis of their Japanese ancestry. Plaintiffs seek monetary and declaratory relief on behalf of themselves and approximately 120,000 Americans similarly situated, for injuries arising from those wartime actions.

Following United States entry into World War II, War Department officials conferred with West Coast politicians and devised a plan of mass exile and detention for all Americans of Japanese ancestry on the west coast. ¶59, Amended Complaint, App. 1 96-97. Subsequently, on February 14, 1942, the local military

1 "App." refers to the Appendix filed with this Court.
commander issued a "Final Recommendation" to the President, urging that mass actions be taken against Americans of Japanese ancestry to prevent espionage and sabotage. JA2169. The military claimed that individual treatment was not feasible, because the Japanese race was "an enemy race" whose "racial strains are undiluted" despite their United States citizenship, and that loyal citizens assertedly could not be quickly distinguished from the disloyal. JA 169.

On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066 (App. 149-50), empowering the Secretary of War to exclude "any or all persons" from any designated areas. Pursuant to that Order and implementing legislation, Pub.L. No. 77-503, 56 Stat. 173 (1942), "exclusion orders" were issued banishing all Americans of Japanese ancestry from the entire state of California, and major portions of Oregon, Washington, and Arizona, and simultaneously ordering them detained indefinitely in racially segregated prison camps. In the camps, plaintiffs were denied virtually every fundamental right protected by the Constitution. Their mass exclusion and imprisonment continued for approximately three years without meaningful individual review, trials, or any pretense of due process.

Numerous contemporaneous legal challenges were raised against these discriminatory actions.3 Those

2 "JA" refers to the Joint Appendix filed with the United States Court of Appeals for the Federal Circuit.

3 Over fifty contemporaneous legal challenges were brought, including actions for injunctive and declaratory relief, habeas corpus, and constitutional challenges to criminal prosecutions for violations of the government’s discriminatory orders. JA 215-219.
challenges were repeatedly denied by this Court and lower federal courts, based on the government’s claim of “military necessity.” See Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); and Yasui v. United States, 320 U.S. 115 (1943). As a result, Americans of Japanese ancestry have had no judicial redress whatsoever for the government’s wrongful actions, and have suffered severe stigma and injury due to this Court’s affirmation of the government’s wartime policies.

In the early 1980’s, archival documents were discovered and later made available for the first time to plaintiffs and the general public, showing that responsible government officials at the time actually knew there was no factual justification to the claim of “military necessity” and knew the exclusion and detention program was solely the product of racial animus. Exhibits J, K, and L, Amended Complaint, App. 131-43. Those documents further showed that government officials deliberately concealed this crucial evidence from this Court, and intentionally obstructed plaintiffs’ contemporaneous access to judicial redress for the government’s own wrongful actions.\(^4\) \(^5\) 93-103, Amended Complaint, App. 112-117.

\(^4\) Limited administrative redress was provided by the 1948 American-Japanese Evacuation Claims Act, 50 U.S.C. App. §§ 1981 \emph{et seq.}, but that Act was predicated on the government’s continuing claim that the wartime actions were based on “military necessity,” and did not permit review or redress for the constitutional wrongs, personal injuries, or numerous other injuries inflicted on Americans of Japanese ancestry. See S. Rep. No. 1740 (80th Cong., 2d Sess.), \emph{reprinted in} 1948 U.S. Code Cong. & Ad. News 2298-2300; and S. Rep. No. 601 (82d Cong., 1st Sess.), \emph{reprinted in} 1951 U.S. Code Cong. & Ad. News 1694.

\(^5\) Legislation to authorize partial compensation recently passed
Based on this newly discovered evidence, plaintiffs filed suit against the United States in March, 1983. Their Complaint asserts twenty-two claims for compensatory and declaratory relief including claims for violation of: Due Process; Equal Protection; Unjust Taking; Protection from Unreasonable Arrest, Search and Seizure; Privileges and Immunities; Right to Fair Trial and Representation by Counsel; Protection from Cruel and Unusual Punishment; Freedom of Religion; Freedom of Speech and Press; Freedom of Association; Freedom of Petition for Redress of Grievances; Privacy, Travel, and other Constitutional Rights; Protection from Involuntary Servitude; Bills of Attainder and Ex Post Facto Laws; Denial of Habeas Corpus; Conspiracy to Deprive Civil Rights; Assault and Battery; False Arrest and False Imprisonment; Abuse of Process and Malicious Prosecution; Negligence; Contract; and Breach of Fiduciary Duty.

PROCEEDINGS BELOW/PRIOR APPEALS

The government moved to dismiss plaintiffs' Complaint, citing sovereign immunity, statutes of limita-
tions, and alleged exclusivity of the 1948 American-Japanese Evacuation Claims Act, 50 U.S.C. App. § 1981 et seq., (hereinafter “1948 Claims Act”). Plaintiffs opposed dismissal, asserting (1) the 1948 Claims Act was constitutionally deficient and not the exclusive remedy for plaintiffs’ injuries; (2) sovereign immunity does not bar plaintiffs’ claims in light of specific constitutional and statutory grants of jurisdiction, and the egregious facts of this case; and (3) plaintiffs’ claims were timely because deliberate governmental fraud and concealment tolled the statutes of limitations until the early 1980’s, when direct evidence of fraud was uncovered.

The district court, granting dismissal, ruled that the 1948 Claims Act was not the exclusive remedy for plaintiffs’ injuries. *Hohri v. United States*, 586 F. Supp. 769 (D.D.C. 1984). The district court found waivers of sovereign immunity under the Tucker Act for plaintiffs’ contract claim (Count XXI) and Takings Clause claim (Count III), but found no waiver of sovereign immunity for plaintiffs’ other constitutional claims (Counts I-II, IV-XV). The district court held the Federal Tort Claims Act was a waiver of sovereign immunity as to plaintiffs’ causes of action sounding in tort (Counts XVI-XX), but held they were barred due to plaintiffs’ failure to file preliminary administrative claims. The district court further ruled there was no fiduciary relationship between plaintiffs and the government to support Count XXII.

The district court also held that government officials concealed and misrepresented critical intelligence information before this Court during the war. Without any evidentiary hearings, however, the district court held plaintiffs had sufficient notice of that conceal-
ment through isolated post-war scholarly references in the late 1940's and early 1950's. The district court therefore held the statute of limitations was tolled only during that early period, and therefore even plaintiffs' contract and Takings Clause claims were now time-barred.

Plaintiffs first appealed to the United States Court of Appeals for the District of Columbia Circuit, which held plaintiffs' Takings Clause claims were timely, because of fraud and concealment by government officials before this Court, and because of the strong deference due the military commander's judgment and the decisions this Court based thereon, at least until the creation of the Commission on Wartime Relocation and Internment of Civilians ("CWRIC") by Congress in 1980, Pub.L. No. 96-317, 94 Stat. 964. The District of Columbia Circuit affirmed the district court's decision in all other significant respects. Hohri v. U.S., 782 F.2d 227 (D.C. Cir. 1986). The government filed a suggestion for rehearing en banc, which was denied. 793 F.2d 304 (D.C. Cir. 1986)

Plaintiffs and the government both sought further review in this Court, which vacated the judgment of the District of Columbia Circuit on jurisdictional grounds and remanded the case with instructions that the appeal be transferred to the Federal Circuit. Hohri v. U.S., 482 U.S. 847 F.2d 779 (Fed. Cir. 1988). Senior Circuit Judge Baldwin vigorously dissented from the panel's ruling on the statute of limitations, stating (847 F.2d at 782):
Appellee's actions during the War clearly constituted fraudulent concealment. The district court found, based on the pleadings and the historical evidence, that appellee did, in fact, conceal critical evidence during the prosecution of *Hirabayashi* and *Korematsu* before the Supreme Court. 586 F. Supp. at 787-88. But the court found that once the Hoover, Fly, and Ringle documents, all objects of concealment, were leaked, the statute had run. *Id.* I disagree that these documents were sufficient to rebut the presumption of military deference provided by the Supreme Court in *Hirabayashi* and *Korematsu*. These documents constituted only a small portion of the information concealed, and by no means the most important information.

**REASONS FOR GRANTING THE WRIT**

Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice . . . [but] Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, [and] because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily . . .

*Korematsu v. United States*, 323 U.S. at 223 (1944).
I. This is an historic case of mass constitutional violations imposed on innocent Americans due solely to racial animus.

During World War II, the United States government forcibly deprived 120,000 loyal American citizens and permanent residents of their most fundamental constitutional freedoms, solely on the basis of their race. These actions were motivated by racial animus, ill will, and wartime hysteria.

The seeds for such mass deprivations were sown long before Pearl Harbor. Federal and state laws had for many years discriminated against Americans of Japanese ancestry, denying them citizenship and the right to purchase property, and relegating them to a second-class existence. When Japanese Imperial forces attacked Pearl Harbor, the effects of discrimination and segregation gave rise to rampant racism, and Americans of Japanese ancestry became a national scapegoat.

Following United States entry into the war, the government carried out a concerted and pre-planned

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7 Several years before the Pearl Harbor attack, plans were made at the highest levels of the government that "concentration camps" should be built for imprisoning Americans of Japanese ancestry (citizens and non-citizens) in the event of "trouble" and in order to "impress the Japanese with the seriousness of our preparations" for war. See October 9, 1940, Memorandum from Secretary of Navy Knox to President Roosevelt, (Exhibit A, Amended Complaint, JA 143); and August 10, 1936 Memorandum from President Roosevelt to Chief of Naval Operations (Exhibit B, Amended Complaint, JA 145).
mass exile and imprisonment of all Americans of Japanese ancestry on the West Coast, citizens and residents alike. Over 120,000 men, women, and children were rounded up at gun point. Hospitals, orphanages, and asylums were raided. Plaintiffs were all banished to forsaken prison camps, where they were detained under harsh and dangerous conditions by their own government for periods averaging three years. See, ¶¶66-92, Amended Complaint, App. 100-12. These actions were taken without probable cause, filing of criminal charges, or trials. No similar actions were taken against Americans of Italian or German ancestry.8

Plaintiffs suffered devastating losses of liberty, dignity, livelihood, property, and life itself. The captives did not know how long they would be imprisoned or whether they would survive the camps. Many did not. Others survived physically but the substance of their lives was destroyed by the government’s actions, which deprived them not only of their freedom, but also of their honor. At times they were treated worse than animals—entire families were often housed in

8 Government officials also planned to imprison over 100,000 Americans of Japanese ancestry living in Hawaii, where martial law had actually been imposed. This plan was unsuccessful primarily because the large percentage of Americans of Japanese ancestry in the island’s population (35%) and their great value as labor made such an effort impracticable. However, over 2,000 Americans of Japanese ancestry were either selectively imprisoned in island camps or deported to mainland prison camps. By contrast, Americans of Japanese descent constituted at most 3% of any West Coast state’s population, all of whom were imprisoned. See, generally, Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied (1983), pp. 261-82.
single horse stalls. They were shunned, despised, and blamed for the atrocities of the Japanese Imperial forces, simply because of their facial characteristics. Their psychological trauma was immense; there is no way to prove oneself loyal when one is branded as disloyal solely "by blood." The local commanding general's theory was "once a Jap, always a Jap":

In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized", the racial strains are undiluted... It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.

See "Final Recommendation" from General Dewitt to the Secretary of War, dated February 14, 1942, Exhibit G, Amended Complaint, JA 169.

Yet, not a single act of espionage or sabotage by Americans of Japanese ancestry in the United States was ever shown. Rather, these Americans went to extraordinary lengths to "prove" their loyalty. Most of them peacefully assembled in response to the government's orders for mass exile and imprisonment, relying on their government's promises to protect them and their property. They shunned physical re-
sistance, and instead petitioned for redress, raising hundreds of administrative and legal challenges to the wartime actions, only to suffer resounding defeats due to this Court's imprimatur of the government's claim of "military necessity." When the War Department inflicted the ultimate insult of forcibly conscripting its supposedly disloyal prisoners into racially segregated combat units, these Americans served with unequaled valor in units which suffered over 300% casualty rates and earned more commendations for bravery than any other in the war. ¶90, Amended Complaint, App. 111.

This Court three times directly upheld the mass infringement of all of these Americans' most basic freedoms solely on the basis of their race. *Korematsu v. United States*, supra; *Hirabayashi v. United States*, supra; and *Yasui v. United States*, supra. In so doing, this Court bestowed on the government's outrageous actions the highest stamp of approval. This Court not only condemned the women, children, and men of the plaintiff class to live out the war years in prison camps; it also established the dangerous legal precedent, which continues to "lie about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need," *Korematsu v. United States*, 323 U.S. at 246 (Jackson, J., dissenting) that the Constitution may permit mass exile and imprisonment of American citizens and residents solely on the basis of their race.9

The judiciary is the last bastion for protecting the rights of minorities against abuses of government power. In light of the government’s grievous fraud and deliberate obstruction of every means of judicial relief normally available to plaintiffs, this Court should not leave the question of constitutional redress to the political process, including action—or inaction—by Congress or the Executive, *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), and should review the decisions below which have left plaintiffs with no judicial remedy whatsoever.

II. This Court should address the taint of decisions fraudulently procured, in order to vindicate its own processes.

This Court must confront the question—perhaps an unprecedented one—of what it should do when its own decisions have been tainted by government misconduct. When Solicitor General Charles Fried argued the jurisdictional question before this Court in the prior hearing of this case (Transcript of Oral Argument of the Solicitor General in *Hohri v. United States*, No. 86-510, April 20, 1987, pp.4-5), the government admitted for the first time in this tribunal that its wartime actions were shameful, wrong, and racially-motivated. But those actions were not merely

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10 General Fried admitted that:

The Japanese Americans for cultural and frankly racial reasons could not be presumed to enjoy the presumption of loyalty which other Americans did and that therefore, it was too dangerous to leave them at large along the West Coast of America. It is this basing of our action on a judgment of what Justice Murphy in his dissent correctly identified as a sort of amateur socio-anthropology with a frankly
deplorable; they were duplicitous. And, it was not for want of asking by this Court that the wrong result was reached. It was not the questions which were wanting—it was the answers that the government gave.

The government's wartime explanation of the alleged "military necessity" underlying the need to imprison plaintiffs was a book entitled the *Final Report*, nominally authored by the west coast military commander, General DeWitt. During preparation of the government's wartime brief to this Court in *Korematsu*, it came to the attention of attorneys in the Department of Justice that there were serious inaccuracies in the factual underpinnings of the *Final Report*. They therefore sought to alert this Court to those inaccuracies by inserting a footnote in the government's brief, stating:

The [Final Report's] recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in possession of the Department of Justice. In view of the contrariety of the reports on this matter, we do not ask the Court to take judicial

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racist caste which was our shame.

Respondents complain now, as they did then, that this was a wrong judgment. It was.

notice of the recitals of those facts contained in the Report.

Memorandum from John L. Burling to Assistant Attorney General Wechsler, September 11, 1944, quoted in *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984). Military officials, alerted to the footnote, physically intervened while the briefs were at the printer, and caused the footnote to be rewritten.11

Sensitive to the ramifications of whether the Court was receiving the whole truth on “military necessity” during the wartime argument of the *Korematsu* case, Chief Justice Stone specifically asked whether the Final Report reflected “all that was known, or could be known, by the military authorities in forming this judgment.” (Transcript of Oral Argument of the Solicitor General in *Korematsu v. United States*, October 12, 1944, p.10). The Solicitor in response failed to disclose the authoritative contrary intelligence reports then in the government’s possession, including FBI, FCC, and Office of Naval Intelligence reports, and continued to invite the Court’s judicial notice of the alleged facts underlying the military commander’s actions. *Id.*

11 For a full account of these dramatic events, see, Peter Irons, *Justice at War: The Story of the Japanese American Internment Cases*, Oxford University Press (New York, 1983) Chapter 11, “The Printing Stopped About Noon,” pp. 278-310. The revised footnote deleted all mention of “contrariety” of facts, and stated, “We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice; and we rely upon the Final Report only to the extent that it relates to such facts.” Brief for the United States, at 21-22, *Korematsu v. United States*, 323 U.S. 214 (1944).
In retrospect, Mr. Justice Frankfurter hit the nail most squarely on the head, asking (*Id.*, at 10-11):

**MR. JUSTICE FRANKFURTER:** Suppose the commanding general, when he issued Order No. 34, had said, in effect, "It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of war, I had authority to take advantage of my hostility and clear the Japanese from this area." Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it.

**THE SOLICITOR:** It would not have been.

**MR. JUSTICE FRANKFURTER:** As I understand the suggestion, it is that, as a matter of law, the report of General DeWitt two years later proved that that was exactly what the situation was. As I understand, that is the legal significance of the argument.

**THE SOLICITOR:** That is correct, Your Honor; and the report simply does nothing of the kind.

What the Solicitor General failed to disclose was that exactly the kind of *Final Report* Mr. Justice Frankfurter envisioned had indeed been authored by General DeWitt, but all copies of it had already been ordered burned, so as not to disclose the true motives which were operating. All of these facts were not learned until very recently, *See, infra*, Argument III.

The government's wartime actions pierced the very heart of our legal system. The judicial process re-
quires that all litigants be diligent and forthright. See, Hazel Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944). But even today, the government has not told the entire story about the wartime internment; indeed, the Court has not yet required this disclosure. At the very least, to vindicate its own authority, this Court should require an evidentiary hearing in the district court on the statute of limitations issue in order to determine whether the wrongs previously committed can be righted.

This Court should right the record for the sake of the individuals who have previously been deprived of a judicial remedy because this Court's wartime precedent precluded presentation of their claims, and simply for the sake of justice.

III. The decisions below are in conflict with recent Ninth Circuit rulings that the newly discovered evidence of fraud renders relief timely.

Three separate federal district courts as well as the Ninth Circuit have found that the recently uncovered Department of Justice records showing deliberate government fraud and concealment were a timely basis for granting petitions for writs of error coram nobis filed in 1983 by Messrs. Korematsu, Hirabayashi, and Yasui.12 One of these decisions, for example, states that prior to the 1980's, there was no specific evidence of governmental misconduct available:

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The government has also failed to rebut petitioner’s showing of timeliness. It appears from the record that much of the evidence upon which the petitioner bases his motion was not discovered until recently. In fact, until the discovery of the documents relating to the government’s brief before the Supreme Court, there was no specific evidence of governmental misconduct available.


In a government appeal from the grant of Mr. Hirabayashi’s petition for writ of error *coram nobis*, the Ninth Circuit also recently reviewed the government’s claim of untimeliness and categorically rejected it. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987), petition for rehearing en banc denied, December 24, 1987. That court began its discussion of the case by noting, 828 F.2d at 593:

*The event which triggered the lawsuit occurred in 1982, when an archival researcher discovered the sole remaining copy of the original report prepared by the general who issued the curfew and exclusion orders. This report was intended to explain the basis for those orders. War Department officials revised the report in several material respects and tried to destroy all of the original copies before issuing the final report. The Justice Department did not know of the existence of the original report at the time its attorneys were preparing briefs in the *Hirabayashi* and *Korematsu* cases. [Emphasis added.]*
As the Ninth Circuit observed, 828 F.2d at 598, "Most significantly, the original report did not purport to rest on any military exigency, but instead declared that because of traits peculiar to citizens of Japanese ancestry it would be impossible to separate the loyal from the disloyal ..." Continuing, the court stated, 828 F.2d at 599:

... while the Supreme Court based its decision in Hirabayashi upon deference to the military judgment of the need for expediency, General DeWitt, the person responsible for the racially based confinement of American citizens, made no such judgment. The district court further found that the United States government doctored the documentary record to reflect that DeWitt had made a judgment of military exigency.

With regard to the materiality of the fraud, the Ninth Circuit emphasized the "critical nature of General DeWitt's decision and his report," 828 F.2d at 600, and rejected the government's position on the timeliness issue which relied on the Grodzins book and similar texts which led the district court astray in this case, 828 F.2d at 605, stating:

The government argues that the district court should have dismissed the petitioner's claim on the ground of laches. It argues that the material upon which the petitioner relies had been a matter of public record for decades, or, alternatively, that the petitioner by due diligence should have found the material earlier. For the reasons we have discussed in the preceding section of this opinion, the district court's decision to grant the writ was
clearly based upon material which was not known until very recently. The key document upon which the district court relied was the suppressed report of General DeWitt. The district court squarely confronted the government’s laches contention by stating as follows:

... At no place in [the 1949 Grodzins book] 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.

627 F. Supp. at 1455. These findings are clearly supported.

The suppressed DeWitt report is not the only evidence which has surfaced as a result of research during this decade. There are memos, which have only recently come to light, by Justice Department lawyers Ennis and Burling, relating to the War Department’s suppression of the revised report, and their doubts about the accuracy of the report...

The discovery of these materials recently caused the District of Columbia Circuit to hold that the government’s fraudulent concealment tolled the statute of limitations in cases brought by Japanese Americans for civil damages arising out of their internment. *Hohri v. United States*, 782 F.2d 227, 246 (D.C. Cir. 1986), *vacated on jurisdictional grounds*. 482 U.S. —, 107 S.Ct. 2246, 96 L.Ed.2d 51 (1987).
Plaintiffs here cannot be taxed with a lack of diligence in their search for documentation refuting the government's claim of military necessity. In the Hirabayashi coram nobis proceeding, the Ninth Circuit found that Mr. Hirabayashi had been diligent in his attempt to challenge the conviction, 828 F.2d at 605, stating:

As to the diligence of Hirabayashi in finding the material we must agree with the district judge who heard direct evidence on this issue and found that "petitioner cannot be faulted for not finding and relying upon [the only surviving copy of the initial version of the report] long before he brought this action in early 1983." 627 F. Supp. at 1455. Professional historians had failed to discover it as well, and the difficulty for a lay person to locate the initial version was documented in the record by testimony concerning its discovery.

Plaintiffs could not reasonably have been expected to find the tell-tale documents which had eluded so many historians for so many years. Judge Baldwin, dissenting from the opinion of the Federal Circuit, suggests that plaintiffs' standard of diligence should be one of "reasonableness," 861 F.2d at 783-84, and that had the plaintiffs filed their claims in the 1940's and 1950's, the case would have been dismissed on the pleadings due to the decisions in Hirabayashi and Korematsu. Plaintiffs were reasonable to wait to file their suit until the "military necessity" rationale had been rebuffed and they had evidence of a "cognizable" claim.
Thus, plaintiffs must respectfully disagree with the conclusion of the district judge below, and the two panel members of the Federal Circuit who affirmed that decision *per curiam*. In light of all that has been said before, plaintiffs must appeal to this Court for enforcement of the rigorous standards barring peremptory dismissals at the pleading stage. The district judge acted without evidentiary hearings and findings by the jury as the trier of the fact, even though the meaning and import of the recently-discovered historical record was sharply in controversy. Decisions of other district courts as well as the Ninth Circuit are facially in conflict with the rulings of untimeliness below. Given the magnitude of the interests at stake and the wrongs which concededly were committed, those rulings should not be left unreviewed.

IV. Given the unprecedented fraud on this Court and the deliberate denial of otherwise available remedies, the courts below looked too narrowly at the scope of relief for the government’s wartime wrongs.

A. Plaintiffs’ constitutional claims are not barred by sovereign immunity.

The lower courts’ decisions establish the untenable proposition that even in this case of unprecedented and deliberate fraud, the federal judiciary is without power to award relief for mass infringements of fundamental constitutional rights. Such a rigid application of sovereign immunity doctrine is inappropriate in this case, because it would destroy all plaintiffs’ constitutional rights and reward the government for perpetrating a successful fraud. Yet now that the fraud has finally been discovered, the government argues there is no judicial power to address it. The Constitution would be meaningless verbiage if the
government could commit deliberate fraud, deny all prospective relief, and then hide behind the cloak of sovereign immunity when compensatory and declaratory relief are sought as the sole remaining means of redress.

In light of the government's pervasive and deliberate wrongdoing, there is a sufficient jurisdictional predicate to hear plaintiffs' claims, based on Article III of the Constitution and existing statutory waivers of sovereign immunity. The Tucker Act, 28 U.S.C. § 1491, by its own terms waives sovereign immunity for "claims against the United States arising under the Constitution." This Court held in United States v. Mitchell, 463 U.S. 206, 216 (1983), that where a claim "falls within the terms of the Tucker Act, the United States has presumptively consented to suit." Thus, plaintiffs here should not need to show any further consent by Congress as a precondition to their fifteen causes of action (Counts I-XV) "arising under this Constitution." In order for claims to be actionable under the Tucker Act, this Court has further required a showing that the rights upon which plaintiffs rely must "fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." Id., at 217. In prior cases, this Court has looked solely to whether the constitutional right is accompanied by an express textual provision for compensation—and only the Fifth Amendment Takings Clause thus far has been interpreted as containing such a provision. In the highly unusual facts of this case, however, this Court's determination of whether a constitutional right "mandates compensation" should also be based on whether there are any other ade-
quate judicial remedies available to redress plaintiffs' injuries.\textsuperscript{13}

In this case, all normally available judicial remedies were deliberately denied by the government as part and parcel of its own pervasive wrongdoing. Indeed, the government's unprecedented fraud upon this Court resulted in three decisions upholding the wartime deprivations and barring further legal claims

\textsuperscript{13} In addition to Tucker Act jurisdiction for plaintiffs' constitutional claims (Counts I-XV), defendant's breach of contract (Count XXI), and defendant's breach of fiduciary duty (Count XXII), the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671 \textit{et seq.}, provides jurisdiction for plaintiffs' claims sounding in tort, quasi-constitutional tort, and civil rights violations (Counts XVI-XX).

Plaintiffs should not be barred from FTCA remedies for failure to file administrative claims pursuant to 28 U.S.C. § 2675(a). The very highest levels of government, including Congress, the President, and this Court, ratified the wartime actions. Any agency claims were futile. The agencies did not have power to overturn Supreme Court decisions and accord the constitutional relief which plaintiffs seek. Requiring compliance with § 2675(a) would have been a logistical nightmare and needless folly for the 120,000 claimants, or even named plaintiffs, as many of the relevant agencies no longer exist, and settlement prospects were non-existent. Any congressional interest in thorough agency investigation of claims has already been fulfilled by Congress' own Commission on Wartime Relocation and Internment of Civilians, expressly created for that purpose in 1980. Further, the agency filing requirement was not even in existence at the time the FTCA was passed and when most of the plaintiffs were still in prison camps. That requirement should not be applied now, because the government's wrongdoing prevented earlier assertion of the claims. \textit{Accardi v. United States}, 356 F. Supp. 218 (S.D.N.Y. 1973). Accordingly, § 2675(a) should not interfere with the remedial purposes underlying the FTCA's waiver of sovereign immunity for plaintiffs' claims.
thereon: Korematsu, Hirabayashi, and Yasui, supra. Yet the constitutional rights asserted here surely require judicial vindication. If the government itself deliberately obstructed contemporaneous methods of judicial relief which would not have been barred by the defense of sovereign immunity, the government should not now be able to use "sovereign immunity" as a jurisdictional "Catch 22." To rule otherwise would allow wrongdoers to profit from their wrongs, and would eliminate the judicial branch's jurisdiction over the most egregious violations of law. See, Hazel Atlas Glass Co. v. Hartford Empire Co., 322 U.S. at 2386; United States v. Lee, 106 U.S. 196, 218-220 (1882); and the All-Writs Act, 28 U.S.C. §1651. Given the particular circumstances of this case, the constitutional violations alleged in Counts I-XV of plaintiffs' Complaint "may be fairly interpreted as mandating compensation . . . for damages sustained." Mitchell, supra, 463 U.S. at 217.

Even should this Court restrict its examination to losses recoverable only under the Takings Clause, takings of "property" in this case should be interpreted to include the destruction of vested constitutional rights on which all notions of "property" are based. The Constitution creates settled expectations of liberty and justice, breaches of which are normally actionable via prospective injunctive action, habeas corpus, and the like. When egregious wrongful conduct occurs and judicial remedies are deliberately obstructed, the right to judicial relief must be held to vest, and to be actionable retrospectively after cessation of the obstructive conduct. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Pitts v. Unarco Industries, Inc., 712 F.2d 276, 279 (7th Cir. 1983).
In the ultimate analysis, this Court may create a comprehensive remedy for government's egregious conduct, and need not be constrained to find an express statutory waiver of sovereign immunity. As Justice Harlan stated in *Bivens v. Six Unnamed Agents*, 403 U.S. 388, 407 (1971) (concurring):

The question then, is, as I see it, whether compensatory relief is "necessary" or "appropriate" to the vindication of the interest asserted. [Citations omitted.] In resolving that question, it seems to me that the range of policy considerations we may take into account is at least as broad as the range a legislature would consider with respect to an express statutory authorization of a traditional remedy.

Creation of such a remedy is appropriate in this case. The magnitude of the wrong is so great that, as in *Bivens*, the Court must fashion a remedy to right it. Here as in *Bivens*, "It is damages or nothing, so damages it must be." *Id.*, at 410.

Article III jurisdiction extends to all cases "arising under this Constitution" and "to controversies to which the United States shall be a party." Historically, Article III has provided a jurisdictional basis to hear and redress claims for constitutional injuries: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). See Note: Rethinking Sovereign Immunity After Bivens, 57 N.Y.U.L. Rev. 597 (1982); Comment: Sovereign Immunity — An Anathema to the "Constitutional Tort," 12 Santa Clara Lawyer 543, 556-59 (1972).
This Court held in *Bell v. Hood*, 327 U.S. 678 (1946), that the federal judiciary has inherent power under Article III to hear claims against the United States for constitutional violations, and to create all necessary remedies to enforce federal constitutional rights. In *Bivens*, supra, this Court created a retrospective damages remedy against federal officials for constitutional infringements, because other relief was unavailable. In *Owen v. City of Independence*, 445 U.S. 622 (1980), this Court extended damages remedies to constitutional violations by municipalities, stating: "A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." Certainly, the Court here should do no less with respect to deliberate constitutional violations by the federal government.

This case is *sui generis*. *Hokri v. United States*, 782 F.2d at 249 (D.C. Cir. 1986). An effective remedy in this case need not be held to expand the general rule of sovereign immunity in other cases, where governmental wrongdoing was not as egregious, or prospective legal remedies were not fraudulently withdrawn.

This Court should hold that it has inherent Article III jurisdiction to authorize review and redress of plaintiffs' injuries so as to redress the assault on its own integrity resulting from the government's fraud, and it should so order.
B. A fiduciary duty existed here.

It is especially important for this Court to review the fiduciary duty issues raised here in the context of its ruling in *United States v. Mitchell*, 463 U.S. 206 (1983). The district court held there was no such actionable duty in this case. App. 60-61. Yet, in its program of mass exclusion and internment pursuant to Executive Orders 9066 and 9102, the government clearly did undertake express and implied fiduciary responsibilities toward plaintiffs by pervasive control of every aspect of their daily lives, and by forcing them into a position of dependency and exploitation. See, e.g., Exhibits, O, P, and Q to Amended Complaint, JA 196-216. Plaintiffs depended on the government for their every need. Fiduciary relationships have been recognized to arise as a result of similar pervasive government control of Indians, *United States v. Kagama*, 118 U.S. 375 (1886); *Short v. United States*, 719 F.2d 1133 (Fed. Cir. 1983); *Moose v. United States*, 674 F.2d 1277 (9th Cir. 1982); *Oldland v. Gray*, 179 F.2d 408, 414 (10th Cir. 1950). The same is true for Bikini Islanders, *Juda v. United States*, 6 Cl. Ct. 441 (1984).

All the elements of a traditional fiduciary relationship are present here. The government repeatedly stated it was acting for the benefit of plaintiffs, and promised expressly to protect their rights and property. The courts below looked too narrowly for an express statutory creation of a fiduciary relationship, instead of considering all applicable statutes, regulations and governmental pronouncements as part of the total circumstances which must be examined in ruling on this issue. *Gila River Pima-Maricopa Indian Community v. United States*, 9 Cl. Ct. 660 (1986);
White Mountain Apache Tribe of Arizona v. United States, 9 Cl. Ct. 1 (1985). It was plain error to deny a remedy for breach of fiduciary duty without even an evidentiary hearing to explore and resolve the factual issues inherent in such an inquiry. Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983); Bell v. Hood, 327 U.S. 678, 681-83 (1946). Accordingly, this Court should recognize plaintiffs' right to prove the existence of a fiduciary relationship giving rise to compensable claims under the Tucker Act, and reverse the judgments below so as to allow plaintiffs a hearing on that claim, and other issues.

CONCLUSION

For the above reasons, this Court should grant the writ of certiorari to review the full scope of remedies available to plaintiffs and to redress the unprecedented wrongs to petitioners and this Court.

Respectfully submitted,

Benjamin L. Zelenko, Esq.
(Counsel of Record)
B. Michael Rauh, Esq.
Martin Shulman, Esq.
Karin S. Leff, Esq.

Counsel for Petitioners

Landis, Cohen, Rauh and Zelenko
1019 Nineteenth Street, N.W.
Suite 500
Washington, DC 20036
(202) 785-2020
August 1988.
The President  
The White House  
Washington, D.C. 20500  

Dear Mr. President:

While you have announced your intention to sign H.R. 442, the Japanese-American Restitution bill, I recommend that you ask your advisors to consider one final, yet vital, point.

On page 8 of the Conference Report, the term "evacuation, relocation, and internment period" is defined as the period from December 7, 1941, to June 30, 1946. The fact is, Executive Order 9066 was not even signed by President Roosevelt until February 19, 1942.

Why should an apology and payments be extended to anyone relocated or interned before February 19, 1942? Isn't it a fact that actions were taken against individuals prior to February 19 for valid security reasons? The record clearly shows that to be the case.

Furthermore, the United States was not at war with Japan on December 7. Therefore, if you sign this conference report, you will be in the position of apologizing and authorizing payments to individuals who were relocated or interned for valid reasons on the very day that Pearl Harbor was bombed. That seems to me an insult to our WWII veterans, both living and dead.

I do hope you will consider the ramifications of this one overly-broad provision before signing the Conference Report.

Kindest personal regards.

Sincerely,

JESSE HELMS: hda

[Emphasis added by AsHa, P.O. Box 372, Lawndale, CA 90260]
Story 'retold'

EDITOR:
I heard a story the other day and I think it needs to be retold. It was about an ex-marine of WW2 who was killed in action during the war and buried in one of the many temporary cemeteries throughout the South Pacific.

This marine in his spirit body was not very happy about the many dumb things his government was doing and because of his sorrow was permitted to revisit the islands where he had seen much death and carnage among his buddies.

He met a visitor and was asked the following questions which he answered as follows:

Q. "What were you fellows doing here?"
A. "The government sent us here to fight the war."
Q. "You mean the U.S. government?"
A. "Yes, of course."
Q. "But weren't you American citizens?"
A. "Yes."
Q. "Then what were you guilty of?"
A. "Being between the ages of eighteen and thirty-six and in good health."
Q. "Did you want to come to these God-forsaken places?"
A. "No."
Q. "Then why come?"
A. "The Country needed the cooperation of all citizens in its time of peril."
Q. "So you didn't enjoy it but realized the necessity, is that right?"
A. "That's it in a nutshell."
Q. "Well, you are lucky you weren't of Japanese ancestry and living on the west coast. You would have been required to move to an inland state, or select a relocation center to reside in. Oh my goah, what's that? An Earthquake?"
A. "No, it's not an earthquake. It's just us fellows turning over!"

Dellin A. Erickson
Ontario, Oregon 97914

[SEE OTHER SIDE]
July 5, 1988

Ms. Maria Blanco
c/o Senator Daniel Inouye
722 Hart Senate Office Bldg.
Washington, D.C. 20515

Dear Ms. Blanco:

Dr. Setsuko Nishi suggested I send these materials dealing with our proposal to study the long term effects of the World War II incarceration on Japanese Americans to you. They include the original grant proposal submitted to The National Institute on Aging and The National Institute of Mental Health. Also included are addenda that were submitted to the NIMH Initial Review Group.

Perhaps the most informative document is the Executive Summary dated July 5th which summarizes the objectives of the study and the current status of the project.

Dr. Nishi and I very much appreciate your help with what we consider to be a very important and timely study.

Sincerely yours,

[Signature]

Stephen S. Fugita, Ph.D.
Associate Director
EXECUTIVE SUMMARY

This project will examine the long term social and psychological effects of the World War II incarceration of Japanese Americans. It will employ a longitudinal design which will permit following a group of Japanese Americans from the time they were incarcerated to the present. Specifically, the respondents will be 740 second generation Japanese Americans, 508 who were incarcerated and 232 who were not incarcerated.

At the time of the incarceration, these individuals were in their adolescence or early adulthood. Life course data will be collected and assembled for these persons for three time periods: during the incarceration (1942-45), 1967, and in 1990. The source of data for the 1942-45 incarceration period will be the War Relocation Authority case file records stored at the National Archives. All persons who were incarcerated have such records. The 1967 data will come from the 1967 Japanese American Research Project which interviewed 2304 Nisei throughout the continental U.S. The 1990 data will involve a personal reinterview of the respondents to document their current status.

The objectives of the study are to examine (1) the impact of the wartime incarceration on mental health, health, and status attainment some 25 and 45 years after the event, (2) the significance of life-cycle stage, gender and support systems at the time of internment, (3) the relationship between respondents' objective incarceration experience and their contemporary reconstruction of the event.

We have been unofficially informed by the Executive Secretary of the Subcommittee on Aging of the National Institute of Mental Health that an Initial Review Group has approved the project with a high and fundable priority score. At this time, we are awaiting the official written review of that Review Group. However, we have been told that the Review Group recommended that the project be funded for two years to analyze the first two waves of the longitudinal study, the 1942-45 War Relocation Authority case files and the 1967 Japanese American Research Project survey and to link the data from individuals who are common to both data sets. The Review Group suggested that we submit a proposal to collect the contemporary third wave of data at the beginning of the second year of the project.

It should be emphasized that the opportunity to study the long-term impact of this event will soon be gone as the individuals who experienced this massive dislocation are now in the later stages of their life cycle.
September 29, 1987

Department of Health and Human Services
Public Health Service

We have previously communicated with program staff at the National Institute on Aging and the National Institute of Mental Health and have been encouraged by both agencies to submit the enclosed proposal, "Wartime Incarceration and the Course of Nisei Lives" on a dual assignment basis because of their overlapping interests. We would like to respectfully comply with their wishes and request that the National Institute of Aging be the primary agency and the National Institute of Mental Health the secondary.

Sincerely yours,

William T. Liu, Ph.D.
Director

Stephen S. Fugita, Ph.D.
Co-Principal Investigator
War Time Incarceration and the Course of Nisei Lives

3a. NAME (Last, first, middle)
Nishi, Setsuko, M./Fugita, Stephen S.

3d. POSITION TITLE
Professor of Sociology (Nishi)
Associate Director (Fugita)

3f. DEPARTMENT, SERVICE, LABORATORY OR EQUIVALENT
Pacific/Asian American Mental Health Research Center

3g. MAJOR SUBDIVISION
The Graduate College

4. HUMAN SUBJECTS

4a. □ No ☑ Yes OR
Exemption # 1186/478/0

4b. Assurance of Compliance #

5. VERTEBRATE ANIMALS

5a. □ No ☑ Yes OR
IACUC Approval Date

5b. Animal Welfare Assurance #

6. DATES OF ENTIRE PROPOSED PROJECT PERIOD
From: July 1, 1988
Through: June 30, 1991

7. COSTS REQUESTED FOR FIRST 12-MONTH BUDGET PERIOD
7a. Direct Costs
$ 331,853

7b. Total Costs
$ 466,547

8. COSTS REQUESTED FOR ENTIRE PROPOSED PROJECT PERIOD
8a. Direct Costs
$ 957,469

8b. Total Costs
$ 1,303,036

9. PERFORMANCE SITES (Organizations and addresses)
University of Illinois at Chicago
P/AAMHRC
1033 W. Van Buren St.
Chicago, IL 60607

City University of New York
Graduate Center
33 W. 42nd St.
New York, NY 10036

11. APPLICANT ORGANIZATION (Name, address, and congressional district)
University of Illinois at Chicago
P.O. Box 6998
Chicago, IL 60680
7th Congressional District

13. ENTITY IDENTIFICATION NUMBER
376-000511

14. ORGANIZATIONAL COMPONENT TO RECEIVE CREDIT TOWARDS A BIOMEDICAL RESEARCH SUPPORT GRANT

15. OFFICIAL IN BUSINESS OFFICE TO BE NOTIFIED IF AN AWARD IS MADE (Name, title, address and telephone number)
John P. Ward
Director Grants & Contracts
University of Illinois at Chicago
P.O. Box 6998 M/C 551
Chicago, IL 60680 (312) 996-2860

16. OFFICIAL SIGNING FOR APPLICANT ORGANIZATION (Name, title, address and telephone number)
Karen R. Hitchcock
Vice Chancellor for Research
University of Illinois at Chicago
P.O. Box 6998, Chicago, IL 60680
(312) 996-4995

17. PRINCIPAL INVESTIGATOR/PROGRAM DIRECTOR ASSURANCE: I agree to accept responsibility for the scientific conduct of the project and to provide the required progress reports if a grant is awarded as a result of this application. A willful provision of false information is a criminal offense (U.S. Code, Title 18, Section 1001).

18. CERTIFICATION AND ACCEPTANCE: I certify that the statements herein are true and complete to the best of my knowledge, and accept the obligation to comply with Public Health Service terms and conditions if a grant is awarded as the result of this application. A willful false certification is a criminal offense (U.S. Code, Title 18, Section 1001).

Senator Daniel K. Inouye
722 Senate Hart Building
Washington, D.C. 20510

Dear Senator Inouye,

A Questionnaire on U.S.-Japan Relationship

Mr. Noboru Takeshita, the new President-designate of the Liberal Democratic Party, is expected to assume the post of the Prime Minister of Japan shortly.

In full agreement with Ambassador Mansfield who said that the U.S.-Japan relationship is "the most important bilateral one in the world," the new administration of Japan to be led by Mr. Takeshita as well as the Japanese public will have a great deal of interest in what and how you American leaders think of the future of the relations between our two countries.

As the oldest and the most representative newspaper in Japan, the Mainichi Shimbun would like to conduct a survey of opinions of all the U.S. Senators on the future of this relationship. We would be most grateful to you if you could please spare your time to kindly answer the following questions.
(For each question, please pick up one answer and circle the one of your choice.)

1. How much interest do you have concerning U.S.-Japanese relations?
   A. I have been very much interested in them and quite familiar with their mode of working.
   B. I have had somewhat of an interest in them.
   C. I have not been very much interested in them.
   D. My interest in them has been almost nil.

2. How do you evaluate present U.S.-Japan relations in general?
   A. Very good.
   B. Fairly good.
   C. Not so good.
   D. Very bad.

3. What, in your opinion, is the most difficult problem that the U.S. and Japan must overcome in order to secure stable and developing relationship?
   A. Friction due to economic problems.
   B. Difference of approach to defence matters.
   C. Cultural differences.
   D. Some other problem.

If you chose (D), please specify below:

______________________________
4. To achieve a better relationship, on which side should the task fall to try to improve it?
   A. Mainly on the Japanese side.
   B. Rather more on the Japanese side.
   C. Equally on both sides.
   D. Rather more on the U.S. side.
   E. Mainly on the U.S. side.

5. Do you expect U.S.-Japan relations to progress for the better under Mr. Takeshita's administration?
   A. I am very optimistic of a fully satisfactory progress.
   B. I have some expectations for improvement.
   C. I am somewhat sceptical about the progress.
   D. I hold no expectation as to the progress in near future.

6. How well did you know of Mr. Takeshita before?
   A. I knew his positions and name quite well.
   B. I knew of him to some extent.
   C. I didn't know him very well.
   D. I had never heard of him before.

7. Could you please give the names of any Japanese member(s) of Diet (Congress) you may know?

   Although you will be identified to us, we will see to it that in accumulating and publishing this survey, anonymity will strictly be maintained.

   In about a week's time, we will call upon your press secretary to receive your answers if you would kindly choose to answer.

   Thanking you beforehand for your kindness, we are,

   Yours faithfully,

   Akiyuki Konishi
   Executive Bureau Chief.

   Kenji Suzuki
   Political Correspondent.
September 28, 1987

Margaret Cummisky
Offices of Senator Inouye
SH-722 Hart Senate Office Building
Washington, D.C. 20510-1102

RE: Japanese-American Internment Legislation

Dear Ms. Cummisky:

I enclose the resolution adopted by the Western Legislative Conference on September 23. The roll call vote by state was 9-6, with the following breakdown:

Aye: AK, CA, CO, Northern Marianas, Guam, HI, NV, OR, WA.

Nay: AZ, ID, MT, NM, UT, WY.

Thank you for your assistance with the request for information.

Sincerely,

Peter W. Sly
CWAG Director

pws:

APPROVED RESOLUTION NO. 87-24

FEDERAL COMPENSATION OF INTERNED JAPANESE AMERICANS AND INDIVIDUALS OF ALEUT AND GUAMANIAN ANCESTRY

(Supporting Federal Legislation to Compensate Interned Japanese Americans and Individuals of Aleut and Guamanian Ancestry)

(Introduced by the Resolutions Committee)

WHEREAS, the U.S. Commission on Wartime Relocation and Internment of Civilians has found that Japanese Americans and individuals of Aleut ancestry interned during World War II suffered enormous damages and losses both material and intangible; and

WHEREAS, the internment of individuals of Japanese and Aleut ancestry was carried out without any documented acts of espionage or sabotage or other acts of disloyalty to the United States; and

WHEREAS, the internment of these individuals was caused by racial prejudice, war hysteria, and a failure of political leadership; and

WHEREAS, the basic civil liberties and constitutional rights of those individuals were fundamentally violated by that evacuation and internment; and

WHEREAS, the United States has assumed all responsibilities from the Japanese government to compensate the people of Guam for land, loss of life, and personal property during World War II; and

WHEREAS, there is before the U.S. Congress, proposed legislation specifically addressing land compensation and war reparations for the people of Guam;

NOW, THEREFORE, BE IT RESOLVED that the Western Legislative Conference of the Council of State Governments supports legislation to compensate Japanese Americans and individuals of Aleut ancestry interned during World War II; and
BE IT FURTHER RESOLVED that the Conference requests that the President of the United States sign into law the final version of the above legislation; and

BE IT FURTHER RESOLVED that the Conference supports the speedy passage of legislation to compensate the people of Guam for their losses during World War II.

(RESOLUTION APPROVED BY THE CONFERENCE AT ITS 1987 ANNUAL MEETING ON SEPTEMBER 23 IN HONOLULU, HAWAII.)
Dear Senator Matsunaga,

I am writing as an admirer of your tremendous personal efforts on behalf of S. 1009 who believes that you and your Congressional colleagues are making a serious mistake by including the present wording of the "Extinguishment of Claims" clause in the bill. While I understand the nature of making compromises to garner support, I cannot understand or condone this compromise. It undermines the Hohri and Hirabayashi lawsuits in a way that hurts the chances for legislated as well as judicial redress. And it forever closes a historic opportunity for the American people to understand and prevent a recurrence of our Federal Government's wrongdoing in the 1940's.

For reasons outlined more fully below, the Extinguishment Clause should be modified before S. 1009 leaves the mark-up process. And, with the help of your House colleagues, a similar change should be made in H.R. 442 before it is voted on by the full House.

As lawyers, we both understand that no judicial or legislative process has a 100 percent chance of victory. That is why I am personally in favor of any and all efforts to achieve redress. That is also why arguments on behalf of the current language in the Extinguishment Clause need to be rebutted, as follows:

1. The 1948 Claims Act did not provide finality, so we need some now

Yes, let's have the 100th Congress be the one that settles the legislative score on redress. But let's not let fiscal conservatism compromise what should never be compromised: devotion to Constitutional principle. All
Japanese Americans lost their Constitutional rights in the 1940's. Only the survivors get money from this bill. And no one gets the type of vindication of Free Speech, Due Process, Religion, and other rights that are included in the lawsuits. The bill does not seek to understand the process of Governmental wrongdoing during the 1940's Supreme Court cases, and, especially in light of the resources being spent today on another case of monumental Governmental wrongdoing in Iran and Nicaragua, the inquiry that the Hohri and Hirabayashi lawsuits undertake is extremely vital.

As a compromise to fiscal conservatives, perhaps the extinguishment clause could be changed to allow lawsuits filed before the date of enactment of the legislation to proceed to final judgement, while mandating a set-off or deduction of the $20,000 legislative remedy if a greater judicial remedy is achieved.

Or, only after consultation with William Hohri, Gordon Hirabayashi and their lawsuit colleagues, perhaps the Extinguishment Clause can be changed to an Enabling Clause (to remove statute of limitations and sovereign immunity barriers) to allow the important Constitutional issues to be litigated without silly jurisdictional arguments getting in the way. A tradeoff here (and, again, I do not speak for any other person or group and prefer that you meet with the lawsuit principals directly) might be to write the Enabling Clause so that it diminishes the possible payouts in the lawsuits in return for legislated payouts and the promise of a fair day in court. (Hirabayashi, by the way, seeks only to vacate a 1942 curfew violation, but could eventually become a civil suit for money damages; Hohri seeks $10,000 for each of 22 different causes of action, for a possible payout of $220,000 for each of 120,000 plaintiffs, or a total of over $20 billion).

2. The issei and other older victims of the camps are dying off, so let's push for the money bills to get the fastest remedy

If the legislative process could give more guarantees that S. 1009 and H.R. 442 would result in $20,000 per survivor authorized and appropriated by Fiscal Year 1989, then dropping the money aspects of the lawsuits might be more palatable. However, Gramm-Rudman fever and the current occupant of the White House are two major obstacles to legislated redress. And, besides, keeping the lawsuits alive is the best possible way to get publicity for the redress cause and to keep the heat on wavering legislators (with the threat of far larger payouts).

Speed is truly of the essence, but not if
legislated payouts are not more certain and not if it means giving up the right to vindicate our cherished Constitutional rights.

3. **Pragmatism in the legislative arena dictates the need to make tactical compromises to achieve important ends**

The current language of the Extinguishment Clause is not a tactical compromise. It is a strategic error of the highest order, because it allows Justice Department attorneys to move for a dismissal of the lawsuits on justiciability or other similar grounds without protecting Japanese American claims or vindicating Constitutional rights. For example, during both the District Court and Court of Appeals arguments in Hohri, Judges Oberdorfer and Markey, respectively, inquired as to the status of the redress legislation, perhaps looking to dismiss or postpone the cases because of the Congressional action. Fortunately, neither was able to prevail using that theory.

If the current language of the Extinguishment Clause is allowed to remain unchanged, however, future generations of Americans threatened by preventive detention or mass internments will question why we in the 1980's did not allow the Hohri and Hirabayashi inquiries to continue. And Japanese Americans living under an ongoing cloud of suspected wartime disloyalty will question why fundamental challenges to the Constitutionality of their internment were not allowed to proceed.

Monetary compensation to victims of injustice is an important part of our Anglo-American jurisprudential system, and the token but significant amount of $20,000 per survivor allocated under S. 1009 is appropriate and worthy of every fair-minded American's support. Nevertheless, in this circumstance, money alone cannot vindicate rights. Allowing the redress bills to proceed without the lawsuits is not pragmatism. It is a mistake.

In sum, I hope that you and your colleagues in Congress will consider modifying the Extinguishment Clause. Please
call me at 212-807-9591 if you would like me to come to Washington to discuss this matter or if I can assist you in any way.

Very truly yours,

Philip T. Nash

PHILIP TAJITSU NASH
Attorney at Law

cc Rep. Frank
Sen. Inouye
Rep. Matsui
Rep. Mineta
Sen. Pryor
Grayce Uyehara
March 27, 1987

Ms. Margaret Cummisky
Office of the Honorable
Daniel Inouye
722 Hart Senate Building
Washington, D.C. 20510

Dear Margaret:

Since I am unable to get up to the Hill today, I am sending this to you via U.S. mail.

Because you are handling the redress related matters for the Senator, would you please be so kind as to have this letter signed and then through inter-office mail route, sent to Elma Henderson, 109 Hart for Senator Matsunaga's signature.

After that point, I will make arrangements with Elma to have this sent to the House side for the three signatures.

Thanks. I really appreciate your help in this.

Sincerely,

Colleen Darling
Associate Director
Dear Friend:

"THE TIME IS NOW TO GO FOR IT"

For some years now, we have worked together with concerned Americans to seek a legislative remedy for the wrongful exclusion and detention of Americans of Japanese ancestry during World War II. This is an effort in which significant progress has been made, but we are still short of our final goal. The Japanese American Citizens League, and now the Legislative Education Committee (JACL-LEC), have been two of the primary organizations seeking redress.

In 1980, the President signed Public Law 96-317, which established the Commission on Wartime Relocation and Internment of Civilians. This Commission conducted the first official investigation of the government's action against Japanese Americans and provided the President and Congress with an official report and recommendations.

These recommendations form the basis of the current congressional legislation. H.R. 442 in the House of Representatives has 134 co-sponsors. While the legislation is yet to be introduced in the Senate, there are 64 senators committed to supporting it. We feel that "THE TIME IS NOW TO GO FOR IT".

Although we can all be proud of our achievements thus far, we still face many difficult obstacles in our efforts. A legislative campaign such as this is costly and requires much hard work, dedication and money.

The JACL-LEC is in need of additional funds to provide the kind of lobbying support required to achieve success. We are joining as colleagues in the United States Congress, who strongly support the redress legislation, to appeal for your support in this fund drive. In addition, we ask you to contact your representatives in Congress to support the respective legislation.

We know that many of you have responded generously in the past—and because you share our feeling that we have come too far toward our goal to risk having to say, "For want of a few more dollars and votes, the opportunity was lost".
Every day, every dollar, and every vote counts. Please let JACL-LEC and your Congressional representative hear from you now...for a legislative victory in the 100th Congress.

Yours truly,

Daniel K. Inouye
United States Senate

Spark M. Matsunaga
United States Senate

Norman Y. Mineta
U.S. Representatives

Robert T. Matsui
U.S. House of Representatives

Patricia Saiki
U.S. House of Representatives