

IN THE
Supreme Court of the United States

OCTOBER TERM, 1986

WILLIAM HOHRI, et al.,

Petitioners,

—v.—

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

**AMICI CURIAE BRIEF IN SUPPORT OF PETI-
TIONERS SUBMITTED BY THE ASIAN AMERICAN
LEGAL DEFENSE AND EDUCATION FUND, THE
ASIAN LAW CAUCUS, INC., THE ANTI-DEFAMA-
TION LEAGUE OF B'NAI B'RITH, THE JAPANESE
AMERICAN CITIZENS LEAGUE, AND THE
JAPANESE AMERICAN CITIZENS LEAGUE
LEGISLATIVE EDUCATION COMMITTEE**

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SUPREME COURT OF THE UNITED STATES
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BRIEF OF AMICI CURIAE

Pursuant to Rule 36 of the Rules of
the Supreme Court, amici curiae have
obtained the consent of the parties to
this proceeding. The letters of consent
accompany the filing of this brief.

INTEREST OF AMICI CURIAEINTEREST OF THE ASIAN AMERICAN LEGAL
DEFENSE AND EDUCATION FUND AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Asian American Legal Defense and Education Fund (hereinafter "AALDEF") is a non-profit legal organization committed to protecting the civil rights of Asian Americans and to eradicating racial discrimination through education and litigation. AALDEF seeks full redress in this case for the egregious violation of individual rights in order:

1) to remove the dual stigma of disloyalty and racial inferiority of those who suffered the hardships and indignities of the camps, and

2) to deter future government misconduct that would foster racial prejudice and endanger the civil

liberties of all Americans.

In line with its commitment to civil rights, AALDEF has supported redress legislation and has filed amicus curiae briefs in Korematsu v. United States, 584 F. Supp. 1406 (N.D.Cal. 1984) and Hirabayashi v. United States, 627 F. Supp. 1445 (W.D.Wash. 1986), wherein the courts vacated the wartime convictions of two Japanese Americans who defied military orders leading to the internment.

The en masse incarceration of Japanese Americans during World War II serves as a continuing reminder of the delicate nature of individual rights in a democratic society where racism, wartime hysteria and government misconduct flagrantly violated constitutional safeguards. Such a tragedy must never be repeated.

INTEREST OF THE ASIAN LAW CAUCUS AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Asian Law Caucus, Inc.
(hereinafter "ALC"), is a non-profit law office and community organization with offices in Oakland and San Francisco, California. Since its inception in 1972, the ALC has litigated numerous major civil rights cases. Recently, the ALC successfully represented Mr. Fred Korematsu, the Japanese American who petitioned a federal district court for a writ of coram nobis to vacate his conviction for violating military orders that led to the World War II internment. Mr. Korematsu's petition relied on recently discovered damning evidence of governmental misconduct during his wartime trial and appeals. As a result of its involvement in Korematsu v. United States, 584 F. Supp. 1406 (N.D.Cal. 1984), and in line with its long-standing

commitment in defense of civil rights,
the ALC requests that this Court
reinstate the Japanese Americans' claims
for compensatory and declaratory relief.

INTEREST OF THE ANTI-DEFAMATION LEAGUE
OF B'NAI B'RITH AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Anti-Defamation League of B'nai
B'rith (hereinafter "ADL") was organized
in 1913 to advance goodwill and mutual
understanding among Americans of all
creeds and races, and to combat racial
and religious prejudice in the United
States. The ADL is vitally interested in
protecting the civil rights of all
persons, and in ensuring that every
individual receives equal treatment under
the law regardless of his or her race,
religion or ethnic origin.

In line with its purposes, the ADL
seeks to eliminate all effects, both

retrospective and prospective, of the Japanese American internment cases. In this regard, the ADL has consistently supported legislative remedies for the injuries caused by the World War II internment of Japanese Americans, including legislation for just compensation and for the elimination of the precedential effect of the Japanese American cases, by barring all possible future internment actions based on race, religion, ethnicity, color or national origin. Consequently, the ADL has filed amicus curiae briefs in Korematsu v. United States, 584 F. Supp. 1046 (N.D.Cal. 1984) and Hirabayashi v. United States, 627 F. Supp. 1445 (W.D.Wash. 1986), and joins in this amici curiae brief in support of the Petitioners.

INTEREST OF THE JAPANESE AMERICAN
CITIZENS LEAGUE AS
AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Japanese American Citizens League (hereinafter "JACL"), with some 26,000 members, is the oldest continuing human and civil rights organization which exists to protect the rights of Americans of Japanese and Asian ancestry and all Americans.

The JACL Legislative Education Committee (hereinafter "JACL-LEC") is the lobbying arm of JACL established to seek redress for Japanese Americans who were denied individual freedom and the protection of the United States Constitution when they were wrongfully interned during World War II.

JACL has a long standing interest to remedy the injustice suffered from the false accusations of disloyalty without individual review, a shame and degradation which is still carried by those who went into the concentration

camps in their own country.

To remedy the shameful episode for the Japanese American survivors and to affirm the guarantees of the Bill of Rights and the Constitution for all people at all times, we join in support of the Petitioners.

STATEMENT OF THE CASE

Petitioners are twenty-five individuals, all of whom were either Japanese Americans imprisoned during World War II or the representatives of such prisoners. Petitioners initiated this class action lawsuit, as representatives of approximately 120,000 American citizens and American residents of Japanese ancestry, or descendants of such persons no longer living, who were subjected to forcible segregation,

arrest, imprisonment or other restrictions pursuant to Presidential Proclamation 2525, Executive Order 9066, or other orders or actions by the United States, its officers, agents, and employees. They sought money damages and a declaratory judgment on twenty-two claims, based upon a variety of alleged constitutional violations, torts, and breaches of contract and fiduciary duties. The district court dismissed each of these claims. Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984). The court of appeals affirmed, except as to the claim founded on the Fifth Amendment to the Constitution. Hohri v. United States, 782 F.2d 227 (D.C. Cir. 1986). Subsequently, Petitioners have requested that this Court grant their petition for writ of certiorari on grounds that they are entitled to the reinstatement of their constitutional

claims and claims for monetary damages and declaratory relief.

SUMMARY OF ARGUMENT

During World War II, Japanese Americans fought for the United States in Europe and the Pacific while the United States imprisoned their families in concentration camps. Amici curiae respectfully urge this Court to grant the petition of the Japanese Americans for writ of certiorari in order to correct this long-standing injustice.

Recently discovered evidence from the government's own files reveals that Japanese Americans were falsely branded and imprisoned by the government as a race prone to commit treason against the United States. Consequently, they suffered under the dual stigma of disloyalty and racial inferiority.

Studies have shown that this stigma subjected Japanese Americans to severe emotional and psychological injuries. These injuries persist because the government continues publicly to maintain that the imprisonment was necessary to safeguard national security against potentially disloyal Japanese Americans. Only the authoritative pronouncements of this Court can decisively destroy the myth of disloyalty that haunts Japanese Americans to this day.

ARGUMENT

- I. PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED TO AMERICANS OF JAPANESE ANCESTRY, WHO SUFFER SEVERE EMOTIONAL AND PSYCHOLOGICAL INJURIES CAUSED BY GOVERNMENTAL MISCONDUCT.

Japanese Americans fighting for the United States in Europe emerged from

World War II as the most highly decorated combat unit for that unit's size and length of service in United States military history.¹ However, they returned home to find their families imprisoned in concentration camps scattered throughout desolate areas of the United States.² The injustice of such racially discriminatory treatment, unsubstantiated by any facts warranting the claim of military necessity, brutally stigmatized Japanese Americans with the brand of suspected disloyalty and racial inferiority. The devastating scope and breadth of their emotional and psychological injuries provide compelling

¹ See United States Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied 253-260 (1982).

² President Franklin D. Roosevelt used the term "concentration camps," as did numerous high-ranking government officials. See Nash, Book Review, 94 Yale L. J. 743 n.2 (1985).

reasons for this Court to grant review.
Amici respectfully urge this Court to grant the petition of Japanese Americans for a writ of certiorari in order to correct this long-standing injustice.

A. Petitioners Were Falsely Accused
And Imprisoned As Threats To
National Security.

Under the pretext of national security, the Western Defense Command during World War II issued military orders which led to the racist imprisonment of approximately 120,000 persons of Japanese descent, two-thirds of whom were United States citizens by birth. These discriminatory orders were based on accusations by the government that this minority group was committing or predisposed to commit sabotage and

espionage against the United States. See General J. DeWitt, Final Report: Japanese Evacuation from the West Coast--1942 (1943). Such accusations were based on a series of unsubstantiated factual allegations, see United States Commission on Wartime Relocation and Internment of Civilians (hereinafter "CWRIC"), Personal Justice Denied at 86-88 (1982), which were accepted by this Court to support its deference to the War Department's finding of widespread potential disloyalty among Japanese Americans. See Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

However, recently discovered evidence reveals that the government had intentionally and materially misled this Court on the critical issue of whether Japanese Americans imminently threatened

national security. See Hirabayashi v. United States, 627 F. Supp. 1445, 1449-54 (W.D. Wash. 1986); Korematsu v. United States, 584 F. Supp. 1406, 1417-19 (N.D. Cal. 1984).³ In particular, the government knew but did not inform this Court that its allegations of widespread disloyalty were contradicted by its own intelligence sources. See Hohri v. United States, 782 F.2d 227, 232-237

³ See generally P. Irons, Justice at War 186-218, 278-310 (1983). Information released through the Freedom of Information Act includes documents in which government attorneys during the war charged their superiors with the "suppression of evidence" and with presenting to the Supreme Court a crucial military report that contained "lies" and "intentional falsehoods." Also released were military files that reveal the alteration and destruction by War Department Officials of crucial evidence in the wartime Japanese American cases. High government officials thwarted a last minute attempt by Justice Department attorneys to warn the Court that the government's charges of widespread Japanese American disloyalty had no factual basis. Id.

(D.C. Cir. 1986); Korematsu v. United States, 584 F. Supp. 1406, 1417-19 (N.D. Cal. 1984).⁴ In fact, the allegations were rooted in the racial prejudice of high government officials. Hirabayashi v. United States, 627 F. Supp. 1445, 1449 (W.D. Wash. 1986).⁵ These officials

⁴ The government represented to this Court that it had relied on facts contained in a report entitled Final Report: Japanese Evacuation from the West Coast--1942 (1943), prepared by General John L. DeWitt, then Commanding General of the Western Defense Command. DeWitt's evaluation and version of the facts informed the court's opinions. However, the government concealed from the Supreme Court information possessed by the Federal Communications Commission, the Department of Navy, and the Justice Department which directly contradicted DeWitt's assertions. Korematsu v. United States, 584 F. Supp. at 1417-19. This new evidence suggests that "the Justice Department misled the Supreme Court when it argued that 'military necessity' justified the mass evacuation of Japanese American citizens." Hohri v. United States, 782 F.2d at 235-37.

⁵ Based on an eighteen month study, the CWRIC concluded that the incarceration was not based upon military necessity, but on the historical causes of "race prejudice, war hysteria and a failure of political leadership. . . . A grave injustice was done to American citizens and

believed that Japanese racial characteristics prevented any meaningful determination of the loyalty of persons of Japanese descent. Id. at 1449-54.⁶

Without knowing of the racist and fraudulent nature of the government's allegations, this Court permitted the government to treat Japanese Americans as if they were in fact more dangerous than other Americans. Stripped of racism and fraud, however, the record reveals that Japanese Americans were neither committing nor predisposed to commit

resident aliens of Japanese ancestry who, without judicial review or any probative evidence against them, were excluded, removed and detained by the United States during World War II." CWRIC, Personal Justice Denied at 18.

⁶ The hatred of persons of Japanese descent expressed by wartime government officials was consistent with the long and ugly history of anti-Japanese agitation and legislation that existed in the U.S. decades before the outbreak of World War II. See CWRIC, Personal Justice Denied at 27-46.

treason, but were at least as loyal as any other group. See CWRIC, Personal Justice Denied at 51-60.

B. Petitioners Suffer Under The Stigma Of Disloyalty And Racial Inferiority, Having Been Wrongfully Branded And Racially Segregated.

The government's tainted accusations of disloyalty amounted to accusations of treason. "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort." U.S. Const. art. III, s. 3, cl. 1. In the present case, military officials and Department of Justice attorneys argued that Japanese Americans, through sabotage and espionage, would aid or had aided the Japanese enemy. These accusations amount to allegations of treason as defined by

the United States Constitution.

Although knowing that its accusations had no foundation, the government punished Japanese Americans as if they were in fact more treacherous than other Americans: it forcibly removed them from their homes and imprisoned them in concentration camps. The harshness of the government's actions intensified the perception among Japanese Americans that they alone, based solely on their racial identity, were suspected of having the potential to betray the nation. This was a stigma which no other Americans suffered.⁷ See CWRIC, Personal Justice Denied at 10-12.

⁷ Federal courts have recognized the grave nature of stigma and reputational injuries that arise from charges less severe than the allegations of disloyalty and treasonous conduct which were offered by War Department officials to support their view of en masse imprisonment based on military necessity. See Van Bourg v. Nitze, 388 F.2d 557, 559 n.1

Compounding the stigma of disloyalty was the racial stigma derived from having been singled out and segregated as an untrustworthy race. Japanese Americans, unlike German and Italian Americans, were interned en masse under the belief that they would otherwise attempt to assist, or were already assisting, an enemy state.⁸ This humiliating distinction denied Japanese Americans the dignity of.

(D.C. Cir. 1967) (injuries to reputation have a punitive effect). This has been the view of courts that have reviewed cases involving dishonorable discharges from military service. See McAliley v. Birdsong, 451 F.2d 1244, 1246 (6th Cir. 1971); Grubb v. Birdsong, 452 F.2d 516, 517-18 (6th Cir. 1971). Additionally, courts have recognized that anything less than an honorable discharge from the custody of the armed forces inevitably stigmatizes the individual, see Bland v. Connally, 293 F.2d 852, 853 n.1 (D.C. Cir. 1961), and encompasses both civil rights and personal honor, see Bernstein v. Herren, 136 F. Supp. 493, 496 (S.D.N.Y. 1955).

⁸ This individualized approach was applied to German Americans despite visible, active pro-Nazi operations among German Americans before the outbreak of the war. CWRIC, Personal Justice Denied at 283-93.

full membership in society. Their feelings of racial inferiority were like those suffered by blacks in Brown v. Board of Education, 347 U.S. 483 (1954). In that decision, the Court concluded that state-enforced segregation of black children "solely because of their race generates feelings of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." Id. at 494. In his discussion of Brown, constitutional law scholar Lawrence Tribe states that "racial separation in our society conveys strong social stigma and perpetuates both the stereotypes of racial inferiority and the circumstances on which such stereotypes feed." L. Tribe, American Constitutional Law 1021 (1978).

Psychological studies have found that

the dual stigma of disloyalty and racial inferiority has devastated the former internees. Branded by the government and this Court as a menace to national defense, and imprisoned without trial, Japanese Americans endured a rejection that was painful and complete.⁹ Betrayed

⁹ The most common social and psychological responses of second generation Americans to their imprisonment are:

- (1) Attempting to deny or avoid the experience and refusing to acknowledge the significance of losses . . . ;
- (2) Losing faith in white America; maintaining a general distrust or hatred toward white society and choosing to associate only with Japanese Americans;
- (3) Turning aggressions inward, as rape victims often do, by blaming themselves for something over which they had little control. Anger is internalized as feelings of guilt, shame and racial inferiority; and energy is focused on attaining economic success in order to prove that one is not inferior. . . ;
- (4) Identifying with the aggressor by refusing to associate with other Japanese Americans and proudly proclaiming ignorance of Japan, its language and culture This denial of who one was and how one looked bred ethnic hate and, ultimately, self-loathing.

CWRIC, Personal Justice Denied at 299-300.

by their own country, they suffered severe emotional and psychological injuries, including the debilitating effects of self-hatred, shame, acute identity crisis and collective demoralization.¹⁰

¹⁰ Some Nisei (i.e. second generation, native-born American citizens of Japanese descent) who survived the internment suffer from "acute identity crisis," see Fukushima and Ito, The Effects of Relocation on the Mental Health of Japanese Americans: Evaluation of the Literature and Recommendations (undated) (hereinafter "Fukushima, Effects of Relocation") (prepared for the Japanese American Citizens League, National Committee for Redress, for submission to the CWRIC) as well as "collective demoralization," see Mass, Socio-Psychological Effects of the Concentration Camp Experience on Japanese Americans, Bridge 6 (Winter 1978). The Nisei who suffer from "acute identity crisis" and "collective demoralization" reject all things Japanese and over-embrace majoritarian values and attitudes. Similarly, other former internees suffer from "cultural paranoia," a malady characterized by patterns of self-rejection, cultural rejection, inadequacy and paranoia. Id.

In addition, Nisei suffer from "post-traumatic stress syndrome." See CWRIC, Proceedings at 1-6; Fukushima, Effects of Relocation; Ishiyama, Impact upon Nisei Identity (1981) (prepared for the Japanese American Citizens League, National Committee for Redress, for submission to the

According to the CWRIC, the most devastating loss due to the incarceration was:

[T]he loss of liberty and the personal stigma of suspected disloyalty for thousands of people who knew themselves to be devoted to their country's cause and to its ideals but whose repeated protestations of loyalty were discounted The wounds of the exclusion and detention have healed in some respects, but the scars of that experience remain, painfully real in the minds of those who lived through the suffering and deprivation of the camps.

CWRIC, Personal Justice Denied at 3
(1982).

CWRIC); Miyoshi, Identity Crisis of the Sansei and the Concentration Camp (undated) (NIMH grant number 1-R13 MH25655-01). Former internees who suffer from this syndrome have manifested debilitating psychological effects and emotional traumas. For example, many concentration camp survivors, feeling intense shame from having been treated as potential traitors, have repressed their experiences to such a degree as not to reveal their experiences to their children. The inability

At the request of the CWRIC, a panel of distinguished mental health experts studied and reported on the long-term psychological harm and emotional trauma suffered by Japanese Americans as a result of imprisonment. The experts concluded that:

[F]or most Japanese Americans, their differential treatment in World War II was a great shock and painfully humiliating. It jolted their views of themselves as good American citizens or law-abiding residents, as well as blast[ed] their aspirations and expectations for themselves and their children. For most, it was a betrayal of their idealistic trust in democracy and a terrible stigma that their country did not trust them.

CWRIC, Proceedings of Research Conference

of Nisei to express themselves freely stems directly from the concentration camp experience, which assaulted their self-esteem and self-image. See Ishiyama, Impact upon Nisei Identity (1981).

on Social and Psychological Effects of Exclusion and Detention, Papers for the Commission, Part III, Preface, p.9 (June 1983) (hereinafter "CWRIC, Proceedings").

Although over forty years have passed, Japanese Americans still perceive that many Americans doubt that they were loyal during the war.¹¹ Equally painful to them is that their own government still maintains that their imprisonment

¹¹ According to the United States Commission on Civil Rights, many individuals still blame Japanese Americans for the bombing of Pearl Harbor and even for domestic unemployment associated with the international trade conflict with Japan. See United States Commission on Civil Rights, Recent Activities Against Citizens and Residents of Asian Descent 3 (1986). This unwillingness to treat Japanese Americans as true Americans sometimes erupts into racially motivated violence. In a highly publicized case, two white men, who were laid off automobile workers, mistook a Chinese American for a Japanese. Blaming him for layoffs in the industry, they bludgeoned the unarmed Chinese American to death with a baseball bat. Id. at 43. See N.Y. Times, June 6, 1984, at A24, col. 3; N.Y. Times, April 26, 1983, at A16, col. 11.

was necessary to protect national security.¹² Even former wartime government officials have stepped forward to echo the government's wartime suspicions in the national media and

¹² In a position paper opposing Japanese American redress, the Department of Justice recently informed the House Judiciary Committee that it rejected the CWRIC's factual finding of no military necessity. Without addressing any specific inaccuracies in the comprehensive CWRIC report, Personal Justice Denied, the Department of Justice summarily dismissed the CWRIC's efforts as a futile attempt to "comprehend the perception of our national leaders under the extreme wartime conditions of the period." Letter from Department of Justice (John R. Bolton, Assistant Attorney General) to House Judiciary Committee Chairman Peter W. Rodino, Jr., April 25, 1986.

A contrary view was expressed by the district court in the recent Hirabayashi decision, 627 F. Supp. 1445 (W.D. Wash. 1986). In that decision, the court rejected the government's argument that military necessity justified the mass deprivation of civil rights and liberties. The district court charged the government with purposefully concealing from this Court facts that undercut the presumption of military necessity in the wartime Hirabayashi case, 320 U.S. 81 (1943).

before Congress.¹³

Because the government and former wartime government officials continue to mislead the public concerning the factual basis for the incarceration, Japanese Americans continue to bear the stigma of suspected disloyalty and racial inferiority. Without review by this Court, the government's racism and deceit will go unchallenged, and Japanese Americans will suffer to no end. Only

¹³ See Japanese Internment Camp Report, MacNeil-Lehrer Report, June 16, 1983 (Transcript No. 2014); McCloy, Repay U.S. Japanese?, N.Y. Times, April 10, 1983, at E21, col. 1; Japanese-American and Aleutian Wartime Relocation: Hearings on H.R. 3387, H.R. 4110, and H.R. 4332 Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary, 98th Cong., 2d Sess. 117, 430, 680, 699 (1985) (statements of John J. McCloy, former Assistant Secretary of War; David Lowman, former official of the National Security Agency; Karl R. Bendetsen, former provost-marshal, General's Chief of Aliens Division, Western Defense Command; Frederick B. Wiener, colonel, U.S. Army, retired) (hereinafter cited "Hearings"); Hearings, April 28, 1986 (unpublished).

this High Court can decisively destroy the myth of disloyalty, and thereby begin the healing process that has thus far been denied to Americans of Japanese descent.

CONCLUSION

For the above reasons, amici curiae respectfully urge this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

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