OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 86-510

TITLE UNITED STATES, Petitioner V. WILLIAM HOHRI, ET AL.

PLACE Washington, D. C.

DATE April 20, 1987 (REVISED COPY)

PAGES 1 thru 43

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IN THE SUPREME COURT OF THE UNITED STATES

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UNITED STATES, :

Petitioner :

v. : No. 86-510

WILLIAM HOHRI, ET AL. :

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Washington, D.C.

April 20, 1987

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 1:59 o'clock p.m.

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on behalf of Respondent

C O N T E N T S

ORAL ARGUMENT OF	PAGE
CHARLES FRIED, Washington, D.C.; Solicitor General Department of Justice on behalf of Petitioner	4
BENJAMIN L. ZELENKO, washington, D.C.; on behalf of Respondent	18
CHARLES FRIED, Washington, D.C.; Solicitor General Department of Justice on behalf of Petitioner - Rebuttal	39

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: General Fried you may proceed whenever you're ready.

ORAL ARGUMENT OF

CHARLES FRIED

ON BEHALF OF PETITIONER

GENERAL FRIED: Thank you, Mr. Chief Justice, and may it please the Court.

This case arises out of a deplorable episode from what was surely the greatest cataclysm in modern times, the Second World War, in which over 60,000,000 people lost their lives and whole populations were herded from their homes and cruelly massacred.

The allies did not always adhere to the standards and the values for which they were fighting. The British for instance, after a debate which is eerily foreshadowing of the same debate that we had in this country, interned in 1940, indiscriminately German and Austrian Nationals in Great Britain, even though the largest number of them were known to be Jewish Refugees.

The Japanese internment was surely our greatest departure from the values for which we are fighting. Not so much because of the suffering which was inflicted on these Japanese American, many people suffered during that war, but because of the basis on which that suffering was

inflicted, the basis which was urged publicly and before this Court. The basis that was urged was a political judgment reached at the highest levels.

The Japanese Americans for cultural and frankly racial reasons could not be presumed to enjoy the presumption of loyalty which other Americans did and tnat 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 racist caste which was our %tame.

Respondents complain now, as they did then, that this was a wrong judgment. It was. They are argue now, as they did then, that such a racially based judgment is a constitutionally insufficient basis for so cruel an imposition.

The eloquent dissents in the Korematsu decision agreed with that and President Ford in his Proclamation of 1976 said that this is something which must never be allowed to happen again.

Bz As Justice Murphy said, that with that decision, we fell into the ugly abyss of racism. But it is crucial to realize that there was nothing hidden or sneaky about that awful judgment. These"sics, these wrong basics

were spread all over the records. They were spread all over the briefs of the government and they indeed were spread all over the opinions of the United States Supreme Court.

The issues in these cases now are rather technical. First, did the Court of Appeals of the District of Columbia have jurisdiction to reach the Statute of Limitations issue in the Tucker Act Claim? Only if it is determined that the Court of Appeals had jurisdiction should this Court proceed to consider that court's remarkable conclusion that the Statute of Limitations on those claims had not run some 40 years after the events that had been involved.

Let me deal then with the jurisdictional question first. Section 1295(a)(2) says that if a case contains claims based in whole or in part on Section 1346 then appeal must lie to the Federal Circuit.

There is an Except Clause, and three types of cases are put into the Except Clause. CertaikH-inds of tax cases, quiet title cases and FTCA cases.

It is our view that the naturA, the reasonable reading of that statute is to say that those three kinds of cases, in Congress' intention did not give the Federal Circuit this kind of exclusive jurisdiction over the claim. That if that is all you have then the Federal

Circuit does not have jurisdiction.

The Court of Appeals and the Respondent's argue for a different reading. They say that if you have an Except Clause claim appended to a Tucker Act claim, then the presence of the Except Clause claim destroys, precludes the appellate jurisdiction in the Federal Circuit which would otherwise obtain.

Now we are frank to say that the language of 1295(a)(2) does not absolutely rule out that reading.

It is however, a reading which seems to us quite unnatural and lead to a conclusion which is incoherent, a scheme which it is hard to understand why Congress should have wished to enact.

There is nothing about those three types of cases; the tax cases, the quiet title cases, FTCA cases, that their presence together with the Tucker Act case should destroy the Federal Circuit's jurisdiction, a jurisdiction which the Congress otherwise desired in order that Tucker Act cases should all be adjudicated in one court.

Now if we are wrong about this and if the presence of an FTCA case does indeed have this jurisdiction destroying quality, then it becomes all the more important that this FTCA case, with it's drastic jurisdictional effect, must meet some minimal standard of

substantiality before it is allowed to have that effect. And we contend that however you define that substantiality it is surely not present here.

The statute, the Federal Torts Claims Act Statute says that all federal torts claims must be preceded by an administrative claim filed two years prior to the filing of the cause of action.

In this case, not only was this not done within two years, it has never been done. It has not been done to this date. And though there was a lot of difference of opinion in the courts below about many things none of the twelve judges who looked at this matter thought that there was any basis for the respondents having failed to file an administrative claim at all.

Indeed, we know of no court anywhere that has ever suggested that there is a reason to excuse the filing of an administrative claim. And therefore, it is our view that whatever the standard, threshold standard of substantiality that a jurisdiction destroying FTCA claim must have, this one surely does not meet that standard.

QUESTION: What was the reason the Court of Appeals majority gave for reaching a contrary conclusion?

GENERAL FRIED: The Court of Appeals said, and I hope I can reproduce their reasoning persuasively for you, was that, (Laughter), I'll do my best, was that after all

the respondents were free to ask the court to try to change the law, to reach a different conclusion.

There were equitable considerations after all. Maybe there were reasons for having concluded that it would have been pointless to file an administrative claim. I believe that's the gist of what they were saying. And, of course, it's true.

A litigant should always be free to ask a court to change its mind or change the law. But that freedom does not promote an insubstantial and frivolous claim into one with sufficient substantiality to in effect destroy the exclusive jurisdiction of the Federal Circuit over Tucker Act claims.

Now it is only if this Court concludes that we are wrong on both legs of this jurisdictional argument that we feel entitled to ask the court from relief from the Court of Appeals remarkable decision about the Statute of Limitations.

The keystone of respondents and the Court of Appeals conclusion that the Statute of Limitations had been told for almost 40 years is this suffices that the Hirabayashi and Korematsu cases here were not just wrong, I think they were wrong, but that they had been procured by the government's concealment and the respondents say even fraud. And that these two decisions, which were

flawed in this very special way, have stood as a barrier to respondents Taking claim. And they stand as a barrier until the government, the war-making branches of the government, have released the courts from their grasp.

Now as a preliminary reason why Hirabayashi and Korematsu should not be viewed as having this remarkable and powerful preclusive force is the fact that the those two decisions did not deal with an issue like that which would be produced in a Takings Clause case.

In any event, they dealt with a specific question. Whether the restraints on personal liberty, one of them a curfew order, the other an exclusion order which the court said were justified under the War Powers and met due process. That was what was decided in those two cases.

As the Endo Case indicated the court did not even go so far in Hirabayashi and Korematsu to say that those cases justified and that the government arguments justified the personal restraint of the detention. So we think that the issue of whether there would have been sufficient military necessity to justify a Taking is a matter which was quite open after those two decisions and might have been litigated. That incidentally --

QUESTION: What is the difference between exclusion and killing?

GENERAL FRIED: Well, killing is much, much worse.

QUESTION: How much?

GENERAL FRIED: Well, --

QUESTION: When you pick up people and throw them out of their homes and where they live, what is anything between that and murder?

GENERAL FRIED: Well, murder suggests that life is taken contrary to law. Taking --

QUESTION: Well is there any difference? What's the differences between that and taking the life?

GENERAL FRIED: Well, fortunately, large numbers --

QUESTION: What is the difference between banishment and hanging?

GENERAL FRIED: Well, large numbers of those who were banished were able, after 1945, to return to their homes and we should be grateful for that.

QUESTION: Another.

GENERAL FRIED: Well, there was great devastation among their property, Justice Marshall. That's quite correct, which is why Congress, in 1948, passed the Japanese-American Evacuation Claims Act and why some 26,000 family claims were filed under that Act.

QUESTION: General Fried, can I ask you one

question about the Takings point you were just making that the Hirabayashi and the other case held that the exclusion orders and the curfew were okay, but they didn't reach the point of whether the government could have taken the property if they had sought to do that.

But the argument that they make, as I understand, isn't that they foreclosed an argument as to a deliberate Taking, but rather a Taking which occurred as a by-product of an emergency evacuation where there were inadvertent and unintentional Takings as a result of military action.

GENERAL FRIED: Well, there's a --

QUESTION: Isn't it correct that the holdings at least bore on that type of a Taking claim because they legitimized the military action?

GENERAL FRIED: Justice Stevens, there is a further problem about that because it is far from clear that those would have constituted cognizable Takings under the Taking Clause at all because the government after all neither seized the property nor regulated it to the point of valuelessness, which are the two forms of Taking which are familiar to the law. And neither one of those Takings was present here.

Indeed it is in response to that in part that Congress, in 1948 acted, because there were losses, there

were economic losses which did not fit in any familiar way within Takings Clause jurisprudence.

Now, passing all of these objections and assuming that somehow the Statute of Limitations is properly an issue, it's very important to note that the argument about concealment is not a correct argument. And it is not a correct argument because the government, the Solicitor General in this Court, in the Hirabayashi and Korematsu cases depended not on any information which was present but concealed, but rather on that theory which Justice Murphy and I with him, characterized as a sociological theory and a racial theory about the general characteristics of Japanese Americans. That was the basis of the argument that was made to this Court and accepted in this Court.

The Solicitor General in his brief quite explicitly, in the famous footnote in the Korematsu Brief, disavowed any reliance on General DeWitt's report which went beyond matters of this general sort. And that disavowal, though heavy weather is made of it today, was well understood at the time.

And one need only look at the American Civil Liberties Union Brief in the Korematsu case to see that the Civil Liberties Union well understood that the government was not making, and was not relying on any

argument based on individualized suspicions or acts of disloyalty, but rather on general, racial, and cultural characteristics.

That was what we were doing and in an odd way, the worse we look then, and we looked pretty bad unfortunately, the better our case is now because the wrong in what we did was spread all over the record.

QUESTION: But isn't it true that they did rely on the inability to make individualized judgment as to the loyalty of the particular members of the race?

GENERAL FRIED: Justice Stevens, I don't --

QUESTION: At least General DeWitt relied on that.

GENERAL FRIED: General DeWitt did. And that point also urged --

QUESTION: Or purportedly relied I should say.

GENERAL FRIED: -- but it's important to see that that is not a distinct point. That is not another argument distinct from the racial and cultural argument, it is a corollary of it.

The racial and cultural argument said, these people are so different, their cultural heritage is so different that we really can't tell in the usual way who's loyal and who isn't. That's why we've got to do this dreadful thing to them. So those two arguments were

really one in the same argument.

QUESTION: If that's true, why would they have not inserted the proposed footnote in the brief?

GENERAL FRIED: Well, as somebody who, on a daily basis lives with fights with the clients, you do try to pacify an excited client by coming up with a wording which gives you everything you want but which seems to somehow do something for him.

If you look at those two footnotes it seems to me that the one that's in there quite sufficiently says, we are not relying on General DeWitt's final report for anything else than for what it says about what happened.

After the evacuation and for general statistical data, and so it was understood. The ACLU really rubbed our noses in that point in their amicus brief. There was no mistake about it.

QUESTION: But it doesn't advise the court that the factual predicate for part of what General DeWitt relied on was, in fact, erroneous.

GENERAL FRIED: Well, part of what may have been moving General DeWitt, but General DeWitt was not the government of the United States. The Proclamation was issued by the President of the United States and the basis urged for that Proclamation in this Court was not urged by General DeWitt, it was urged by Solicitor General Fahy.

And neither President Roosevelt, nor Solicitor General Fahy relied on General DeWitt's views in this respect.

General DeWitt had a lot of views which he expressed in a lot of (inaudible) which were not shared, I do hope, by either the Solicitor General or the President.

In any event, what was not avowed by the government that there were these, particularly the fly and the Hoover Memorandum did not therefore contradict anything which the government was asserting.

We are in short, faulted by the Court of Appeals for failing to deny a proposition we specifically declined to affirm. Now, it is the case that the Burling and Ennis Memoranda were not discovered until 1982. But they are an irrelevance. They deal with internal governmental discussions about whether we should affirm, sorry, whether we should disclose information contradicting what we refused to affirm and those opinions did not prevail.

It is important to see that, by 1949, that information which Burling and Ennis would have had us make public was well known and fully publicized so that it seems to me that Burling and Ennis just dropped from the case at that point.

Now the Court of Appeals tells us that taking all that aside they had this Situation Specific Rule and I quote from the Court they had Situation Specific of

tolling such that only when, quotes, one of the war-making branches, released the courts from the grasp of Korematsu and Hirabayashi could this Statute of Limitations begin to (inaudible).

Well, that is a striking metaphor, but it is only a metaphor. It is no doctrine of law, at least no doctrine of law known in any authority up until now. But let us take it seriously as if it was meant to be viewed as a doctrine of law and pass it in the way one passes doctrines of law.

Why was then President Ford's 1976 Proclamation that the relocation was wrong a national mistake, a setback of fundamental American principles? That the victims were loyal Americans who had been subject to indignities and that this would never again be repeated.

Why was this not such a release by the head of one of the war making branches? And the mystery of the Court of Appeals rule or metaphor deepens further when we are told that although this Proclamation of President Ford's in 1976 was not sufficient to effect this release from the grasp of those two cases.

What was sufficient was an act of Congress passed in 1980 which reached no such conclusion but merely said that the issue had to be studied further. That is a mystery which I am afraid I am unable to offer an answer

to although Judge Bork in his dissent did offer an answer. If I may, I'll save the rest of my time for rebuttal.

QUESTION: Thank you, General Fried. We'll hear now from you, Mr. Zelenko.

ORAL ARGUMENT OF

BENJAMIN L. ZELENKO

ON BEHALF OF RESPONDENT

MR. ZELENKO: Mr. Chief Justice, and may it please the Court: This is an historic case. The Executive Branch should find no repose when it systematically conceals the facts from this Court. The wartime imprisonment of plaintiffs imposed substantial losses on them. They seek their day in court and ask that the judgment of the Court of Appeals be affirmed.

Mr. Chief Justice, if I may I'd like to divide my argument by spending most of the time on the tolling or Statute of Limitations question. And before the close, deal with the appellate jurisdiction question.

In discussing Statutes of Limitations and tolling, I suggest to the Court that there are two questions to be considered. First, was there a concealment by the government of the basis of plaintiff's Takings claims sufficient to toll the statute? And secondly, if there was a concealment and there was tolling, at what point did their claims accrue?

First as to concealment, we're before the Court today on a motion to dismiss made by the government where it still does not concede that there was concealment. On that issue alone we would submit the matter should have had an evidentiary hearing as to whether there was concealment.

But let us start the recitation of why plaintiffs argue there is concealment. The first and only authoritative study of this wartime era came out of a Commission Report in 1982-83.

That report made two findings for the purposes of this argument. One, that there was information in the possession of the government that contradicted its representations to this Court that there was a military necessity for the actions it took. And two, there was concealment by the government of a lack of any information going the other way.

In other words, there was no information in the government's possession supporting its claim of military necessity. To interrupt myself, when the Solicitor General refers to the briefs in Korematsu and Hirabayashi, it's instructive to look at the briefs in Korematsu and Hirabayashi.

For example, the brief of the government at page 35, the classification was not based upon invidious race

discrimination, said the government at the time. Rather it was founded upon the fact that the group as a whole contained an unknown number of persons who could not readily be singled out and were a threat to the security of this nation, end of quote.

The information, may it please the Court, was directly contradictory. The government had in its possession a report of a Naval intelligence officer, Naval intelligence having the sole responsibility for domestic intelligence over the Japanese, and Americans of Japanese ancestry.

It said in effect, 90 percent of the evacuation is without foundation. At most, 10 percent would be needed. And we can identify the 10 percent that are at risk. We can conduct loyalty hearings. We can distinguish between the loyal and the disloyal. But what was represented to this Court was diametrically opposite. We don't have sufficient time. That report was concealed.

The Department of Justice memorandum in the Appendix, urging that the Solicitor General present that report to the attention of the government was disregarded. There were FCC reports and FBI reports that directly contradicted representations by the military commander that there was signaling, radio transmissions. Those were not disclosed by the government.

There were Department of Justice memoranda to the Solicitor urging that they be, that the record be clarified, that the Court be informed, disregarded. Now the Department of Justice memoranda were not known in the '40s or the '50s.

The Department of Justice memoranda were only disclosed when this Commission reported, made its study, looked at archival materials that had never been looked at before.

And what was the importance of those Department of Justice memoranda? Well in one recent decision a Coran Nobis Court considering the petition of Fred Korematsu said that the Department of Justice memoranda represented the first example of wrongdoing by the government, because it showed that the government intentionally concealed information from the court. You can't have it both ways. Can't apologize long after the fact and not present full records for the court's attention.

But there's more, it goes on. There's an exchange of memoranda about a footnote in Korematsu. Well, the Solicitor General says, the court knew what was going on. The amici were arguing that there was no FBI report or Naval Intelligence report.

But where are the reports? Why didn't the government come clean? It fancy danced. It did rely on

the final report of General DeWitt and when the Solicitor was before this Court and was asked, he did rely on the report. He did not disavow the report.

But go beyond that, there's more evidence. There's a burned Final Report. There were two final, Final reports. The first Final Report, everyone thought, or no one knew about, including the government at the time Hirabayashi case. The first Final Report contained several damning statements by the Commanding General.

First it said, these people should be detained or excluded, I beg your pardon, excluded for the duration of the war. Secondly, it's not a question of time, we can never determine their loyalty. Perhaps they were talking about the inscrutable nature of the Japanese-American.

When the War Department got a load of that report, it set in motion efforts to get the commanding general to make changes quickly. The commanding general initially refused.

Eventually those changes were made and an order went out to burn every copy of that first edition. And affidavits were required that every copy was burned. And there had to be a witness to the burning.

But, lo and behold, one copy of the first edition of the Final Report containing the racial statements that I've alluded to was found, while this

Commission was undergoing its study.

QUESTION: How does that report support your tolling argument, Mr. Zelenko?

MR. ZELENKO: I'm trying, Your Honor, to --

QUESTION: I thought the Solicitor General's position was that the government's brief the court relied frankly on racial generalizations. And what you're saying is that General DeWitt relied on them too. I don't see how that helps you on your tolling argument.

MR. ZELENKO: Your Honor, with all due respect, I think the Solicitor General overstates what the Court was told. I read a portion of the brief that the government submitted in Korematsu.

The government didn't say this was racial, invidious racial discrimination. It came before the court and said, we can't tell, we don't have enough time, we have to take extraordinary actions because there isn't time to distinguish who's loyal and who's not loyal. But they did know, they did have the time. They did know from their intelligence expertise that they could make that distinction. They just paid no attention to it.

And what was damning in the Final Report, copies of which were handed to each Justice of this Court, was that there were statements originally in that report that showed it. And the War Department Assistant Secretary

McCloy saw that that was changed. Because that undermined what the government was trying to present to this Court as its true motives. That's how I use it, Mr. Chief Justice.

And finally, to sum up, come back to the Commission Report. The Commission Report was the first and, to date, only authoritative study of the wartime actions of this government. It showed two things: A concealment of contradictory information that was not presented to the court and the concealment that there was no support at all for the military actions taken.

Those are findings of the Commission. They are contained in paragraphs 95 and 96 of our complaint, and they go to part of the argument made by the Court of Appeals holding that there was concealment and there was tolling under equitable doctrine.

Every court that has examined the record, and that includes the District Court in this case, the Court of Appeals and two Coram Nobis District Courts have found concealment. And they found the first notice of that wrongdoing when the Department of Justice memoranda were disclosed.

Let me pass now, if there was concealment and there was tolling, when does the action sought here, the cause of action, Takings claim accrue? There are a number of alternative dates that the Court can consider in the

record before you. Of course, the earliest date will come as no surprise as selected by the government. That is the date the injury occurred.

When evacuation was proclaimed, 1942, the Americans of Japanese ancestry were given, in some cases, no more than 48 hours to pack up their belongings and move out. And the only belongings they could take with them to the camps was what they could carry on their backs.

The government undertook no responsibility for what was left behind. Pack it tightly and we'll try to put it in a dry place, as it were.

There were forced sales of property and this is documented in the cases from the Attorney General's precedents that are cited in our brief, where farms worth $5,000 were turned over for a debt owed of about $700. There were great property losses. And they were incidental to the forced evacuation.

Make no mistake that the Taking, that the military necessity decisions rendered by this Court on three occasions established a mighty strong barrier to justify the Takings of property and we submit prohibited, precluded effective redress by the Americans of Japanese (inaudible), of Japanese ancestry.

And two examples we cite in our brief: One, is the Claims Act that was passed the Congress in 1948. The

legislative history of that Act and its interpretation by the Attorney General shows that Congress believed there was no other route for compensation because Korematsu and Hirabayashi had foreclosed any other route. Military necessity had been validated by this Court.

The Attorney General in ruling on claims under the Claims Act said the same thing. In 1956, when a few of the claims were allowed to go to the Court of Claims and we cite the decision of the Aleutian Livestock Case in our brief.

Korematsu is cited by the Court of Claims as a reason not to provide any further compensation under takings analysis, only the Claims Act analysis, a much narrower degree of compensation.

So in case law, in legislative history, and in common understanding, the decisions of military necessity rendered by this Court with respect to exclusion, curfews, and the rest were understood to validate Takings and any other action the government took. The government says, no concealment.

When we evacuated them, that's when the action accrued six years was up in 1948, '46, maybe '52. That's it. No claim. We submit there was concealment and the District Court that granted the government's motion to dismiss, found there was concealment and it found tolling.

And so you have a second date and the second date is when the FBI, the Naval Intelligence, and the FCC Report were published in a book by Grodzins. Excerpts of those reports were published in 1949.

The District Court found that the cause of action accrued as of 1949 when plaintiffs had in their possession the information that had been withheld from this Court in Korematsu.

Now I ought to point out a few things. First, the Final Report burning, and that whole little episode, of course, was not mentioned in Grodzins. But Grodzins gave a small picture of what occurred. It gave snippets the substance of what Grodzins published had, of course, been already argued before the court.

The ACLU and Korematsu had said, where's the FBI report? Where's Naval Intelligence? Where is the factual information to back up the government's claim of military necessity?

So, the court had heard all of this and we would argue that the publication in 1949, five years after the decision, of just those snippets gave very little, was not a basis for accrual. It was not a comprehensive report.

The publication of some information already disclosed here, but more importantly than any of that, it did not show that the government lacked any information to

support its claim of military necessity. It only showed that the government had withheld some information contradicting its claim of military necessity.

What's a third date? Well, the government comes up with a fallback position, if you will, on the Bicentennial of 1976, President Ford decided that an apology was due and repealed Executive Order 9066. And the Japanese-American community welcomed the repeal.

It loomed as an ever, a constant reminder of the authority under which they were banished or exiled from their homes. But it didn't represent anything of legal significance, because the President said when he repealed 9066, if we knew then what we know now, it never would have happened.

May it please the Court, the government did know then what it knew now. Hindsight was not all it had. It did not, in other words, acknowledge concealment.

QUESTION: Mr. Zelenko, isn't that statement, this is a, isn't that statement pretty close to a statement that there was no military necessity?

MR. ZELENKO: I don't think so, Your Honor. I think what President Ford was saying, it was a mistake, an error of judgment, if you will.

QUESTION: If there were military necessity, it was not an error of judgment.

MR. ZELENKO: It was an error of judgment in hindsight. And in part, President Ford was referring to the valor and the sacrifices, the tremendous sacrifices of Americans of Japanese ancestry in the war effort. It did not signify that, and no inquiry had been made, that we had the facts, that we operated conspiratorially, if you like, Your Honor, that during the war. It was more --

QUESTION: But the thing that was the, if I understand your legal theory correctly, that which made it impossible, or unlikely to prevail at least on a Takings claim, was the outstanding acceptance of the proposition that there was in fact military necessity.

Seems to me that would have been awfully hard to maintain after President Ford did what he did. That's what I'm --

MR. ZELENKO: I think we disagree, Your Honor. We don't read President Ford's Proclamation as saying there wasn't military necessity in 1942. He's saying hindsight is 20/20. Now we know these people were never a security threat. We didn't know that at the time.

QUESTION: Isn't that the same thing as saying there was no military necessity?

MR. ZELENKO: No, Your Honor. What we're saying is that in 1942, when this Court ruled, there was no military necessity then. Gerald Ford is saying, in 1976,

perhaps, now knowing what we know in 1976 about the loyalty, reliability and so on, there may have been a mistake then. That would not have been ("significant" - inaudible) legally.

The Court of Appeals said that had no legal significance. If you went in to Court in '76 saying we are filing a complaint for Takings of property on the grounds that it was a mistake, that the President has just acknowledged that it was a mistake, the government, we believe would have said that has no legal significance whatever should there --

QUESTION: No, (inaudible)

MR. ZELENKO: -- military necessity was found by the court.

QUESTION: -- they wouldn't have said that. They would have said there was a Taking because you sold a $5,000 farm for $700, or cases of that kind, and that's our prima facie case, now put in your defense. And what would the defense be? Could they have put in a military necessity defense?

MR. ZELENKO: We think they could have, Your Honor, exactly. We think that the statement in '76 was an apology, but not of legal --

QUESTION: I see.

MR. ZELENKO: -- consequence.

QUESTION: (Inaudible) President did in 1976 was of no legal consequence. What on earth legal consequence was the Commission Report in '82?

MR. ZELENKO: I'm coming to that, Your Honor and you will allow me to answer, I hope.

QUESTION: It was not a rhetorical question.

MR. ZELENKO: The two last dates before the Court are the date offered by the Court of Appeals, that is the creation of the Commission in 1980, and plaintiffs' own theory of the case which was due diligence, a diligence discovery standard in cases of tolling, and we would have, as we had argued, suggested 1982-83 when the Commission Report was filed.

We think that those two dates are close analytically. The significance of the congressional enactment was this, Your Honor, when the Congress created the Commission in 1980, it said, no sufficient inquiry has yet been made, or has, no sufficient inquiry has been made to date. That meant no inquiry by this Court. No inquiry by the Congress. No one has looked at the facts as to that period.

As a matter of fact, for the benefit of the record that's when our clients came to us shortly before the Commission was created. It was the creation of the Commission that sent a surge of interest about looking

into the rights, or the possibility of asserting rights for compensation for wrongs visited during the war.

This lawsuit was filed one month after the Commission's Report was filed. We think the Commission, creation of the Commission, and the report of the Commission are interchangeable.

QUESTION: Did Congress act on the Commission's report?

MR. ZELENKO: Your Honor, I worked in the Congress for many years and I would bow to any member of this Court in trying to fathom what the Congress will or won't do, but to date has not --

QUESTION: (Inaudible) oh no, did it?

MR. ZELENKO: Has not yet acted on --

QUESTION: And when it created the Commission it said the matter needed further study.

MR. ZELENKO: No, it didn't say that, Your Honor. And that was the term that (inaudible) --

QUESTION: Well then what did it say?

MR. ZELENKO: It said, there has been no sufficient study made.

QUESTION: And --

MR. ZELENKO: Not further study. There has been no sufficient --

QUESTION: I suppose the implication is if there

hasn't been sufficient study made thus far, that perhaps the Commission could supply that gap.

MR. ZELENKO: Yes, Sir.

QUESTION: And, you say that although the President's Proclamation, revoking the order under which the Japanese Americans were interned had no legal effect, the report of a Commission created by Congress to study the matter and the report which was never acted upon by Congress does have a great deal of legal significance.

MR. ZELENKO: Well, Your Honor, we suggest from the plaintiffs' position the disclosures of the Commission, the archival disclosures of the Commission do have significance because they're related to the due diligence standard here.

When did the plaintiffs know? When should the plaintiffs', by reasonable diligence, due diligence, should they have known of their claims? And it really wasn't until the Commission, the first authoritative study of the matter presented its report that we have that information.

QUESTION: Then your position is that the Commission revealed much material that had not been heretofore known and that's why it's so significant.

MR. ZELENKO: Yes, Your Honor. And the material, I have to repeat one more time, of two sorts.

One, of material never heretofore disclosed that was contradictory to what the government asserted, but even more importantly perhaps concealment of any information supporting the government's ("position" - inaudible).

QUESTION: So then the action of this Commission would have been just as significant if it had been a purely private body, because it wasn't the imprimatur of the Commission, it was the facts that had got it.

MR. ZELENKO: Well, Your Honor, I think it is the imprimatur. It's the first time the federal government, and of course, the Court of Appeals found that to be of significance.

QUESTION: Well, found what to be of significance?

MR. ZELENKO: That one of the war-making branches, namely the Congress, had stood up to the deference heretofore accorded to the military judgment which this Court had ruled was due.

QUESTION: It stood up to it and said, that this hasn't been sufficiently studied.

MR. ZELENKO: Including by this Court, had not been studied. For these reasons we think that, we suggest that the accrual date of our action either affirm the Court of Appeals as a date of creation of this Commission, or use due diligence standard when the plaintiffs knew, or

by reasonable diligence, should have known of their rights. In either event the accrual is sufficiently recent to permit this action to go forward.

I'd like to turn briefly now to the jurisdictional question. The legislative history of the Court Improvements Act and the statute itself, I think show that the Congress was mainly concerned with creating a National Patent Appeals, a Court of Patent Appeals and to improve efficiency of the operations of those two courts.

It's our position that the history and the draftsmanship of 1295(a)(1), 1295(a)(2), show that the "except" language is different in (1) and different in (2) and that where an FTCA claim is involved, the Congress never intended to confer jurisdiction on the Federal Circuit Court of Appeals. There is nothing in the legislative history to suggest that.

In fact, as our brief notes, the Congress even repealed a vestige of hardly ever used jurisdiction in the Claims Court, Court of Claims, with respect to FTCA cases. So we start with the proposition that no FTCA claim jurisdiction was ever intended to be in the Federal Circuit.

QUESTION: Well, I guess the statute can be read either way on these mixed claims.

MR. ZELENKO: It can, Your Honor, except with respect to the mixed claims involving FTCA with compared to mixed claims under the patent section of 1338. There, of course, copyright and trademark cases are expressly carved out so long as they're the only cases involved. And no other cases, I believe is the language of 1295(a)(1). That no other language --

QUESTION: Which shows Congress knew how to write it if it wanted to.

MR. ZELENKO: Exactly.

QUESTION: I don't think it supports you.

MR. ZELENKO: Well, Your Honor, I disagree. You see --

QUESTION: Quite the contrary --

MR. ZELENKO: -- to this extent that if the Congress wanted to have a copyright and trademark jurisdiction remain in the regional Courts of Appeal, so long, in any case where those were the only issues involved. It knew how to write that exception and did so.

QUESTION: What if we agree with the Solicitor General that the Federal Tort Claims Act here was so clearly improper for failure to follow administrative proceedings, that it should be disregarded altogether?

MR. ZELENKO: We would submit first that, we first submit that the reading of the statute and the

statute is opaque is that mixed questions jurisdiction where a FTCA claim is involved, properly goes to the regional Court of Appeals.

Then the question is, were these FTCA claims frivolous? We don't think they are. We are continuing to assert them, in a separate petition before this Court. We think the circumstances of this case are so unusual.

The fact that the Commission had made such a thorough examination, and recent examination study of the situation we thought it was futile to try to go through an administrative filing process under FTCA in light of, the purposes of that administrative filing was to alert the agencies.

We thought that was simply redundant and a 120,000, potential 120,000 claimant case, we also thought it was an impossible issue to try to comply with, requirement to comply with.

Now the Court of Appeals said there was substantive merit to our FTCA claims, but found that it was without jurisdiction to rule on them because we had not complied with the administrative filing requirement. That, it found was not frivolity.

The District Court, also which dismissed our FTCA claims did not find them to be frivolous. But if this court should find them to be frivolous despite my

best efforts to convince you otherwise, let me suggest that the interests of justice which would be the section of the Code, 1631, that you would transfer this case, under which you would transfer it to the Federal Circuit, simply doesn't fit.

No interests of justice will be served by not deciding the merits and transferring this case to the Federal Circuit. It will be expensive to all parties. It will be a burden on the courts, and the merits have already been decided.

No interests of justice will be served no matter what you find on the mixed question issue or frivolity. Under the authority of Squillacote cited in our brief, we urge you to decide the merits, however you decide the frivolity question.

It's hard to deal with a case of such momentous proportions except to say that, were it not for the recent awareness evidenced in the country of the problems and the hardships, the deprivations during the war, this case would never been presented.

Attorneys representing Americans of Japanese ancestry had a obligation to comport with Rule 11. We based our complaint on the most recent and first authoritative report ever submitted which found that the wartime treatment was not justified by military necessity.

The Commission also said that imprisonment and continued exclusion were not driven by an analysis of military factors. Responsible officials in the government knew that those wartime actions were not supported and they concealed that information from the plaintiffs, from the Congress, and from this Court. Thank you.

QUESTION: Thank you, Mr. Zelenko. General Fried, you have seven minutes left.

REBUTTAL ARGUMENT OF

CHARLES FRIED

ON BEHALF OF PETITIONER

GENERAL FRIED: The Court of Appeals decision on Statute of Limitations is indeed a thorn in our flesh. And we would greatly appreciate relief from this Court from it.

Nevertheless, it is the very heart of our contention that this dramatic case should be decided scrupulously, meticulously, according to ordinary rules of law. And, however much we would crave relief, nonetheless the application of those ordinary rules of law lead us, we think, to the conclusion that there was no jurisdiction in the Court of Appeals; and therefore, relief or no, the matter must go to the Federal Circuit, however much we would like you to apply some balm to the wound.

I would like to take exception to the

characterization of General, of President Ford's Proclamation and to simply say that I hope that each member of the Court will study it.

It is about as abject a Proclamation as it would be dignified for the Chief Executive of a nation to indulge and I think it was not characterized by the respondents as I would characterize it.

As to the Ringle Report which did contradict the general sociological thesis on which we relied, footnote two of the government's Korematsu Brief was the famous footnote.

Footnote three of the government's Korematsu Brief cited the Ringle Report. It cited it as the report of an anonymous intelligence officer, but there it was. It was cited. There it was in the government's Korematsu Brief. It was cited by the ACLU. It was cited by the dissents. That is how early that brief was known.

Further, it is important to recall that the FCC and FBI materials were known by 1949, and therefore, the Department of Justice memos saying that they should have been known in 1943, I would imagine by 1949, become simply irrelevant.

And then, as to how we should properly characterize the government's argument in Korematsu, since both the respondent and I are interested parties, I would

simply read from "Personal Justice Denied" which was the Commission's Report and they stated in their report, in its brief to the Supreme Court the Justice Department was careful not to rely on DeWitt's Final Report as a factual basis for the military decision it had to defend.

And further, the Justice Department, defending the exclusion before the Supreme Court made no claim that there was identifiable subversive activity.

QUESTION: General Fried, the oral argument did rely on the DeWitt Report.

GENERAL FRIED: It relied on the DeWitt Report to the extent that there was a belief that there was military necessity. The oral argument, Solicitor General Fahy's oral argument did not say we rely on the DeWitt Report for matters which in fact, have been disclaimed in our brief, but rather that we do not retreat from the notion that there was military necessity.

QUESTION: Well, I surely wouldn't have understood his argument that way. When he said, it is even suggested that because of some footnote in our brief in this case indicating that we do not ask the court to take judicial notice of the truth of every recitation or instance in the final report of General DeWitt, that the government has repudiated the military necessity of the evacuation.

Literally, he's only talking about the military necessity. I surely would have understood him to be saying he endorsed the report, in that statement.

GENERAL FRIED: Well, Justice Murphy, in his dissent seemed to have understood exactly what was going on. I think the fencing which we're all familiar with that takes place in oral argument was, I guess, an attempt to back the Solicitor General into a corner and what he said was --

QUESTION: The fencing was just, "will you make them available," and then he went on with his argument (inaudible).

GENERAL FRIED: But I believe that what the Solicitor General said on that occasion was, yes, we think there was military necessity.

The fact that we repudiate as we did by some footnote or another, I think, I would not have used that phrase, the fact that we repudiate aspects of the report does not mean that we draw back from the argument that there was military necessity.

That conclusion, that judgment was not General DeWitt's judgment. That was the judgment of the President of the United States and I don't believe Solicitor General Fahy was free to draw back from that conclusion no matter what the report said.

QUESTION: He surely was free to put in the other footnote that was proposed. He had that authority.

GENERAL FRIED: That other footnote would have said it even more. This footnote, it seems from that very colloquy, was quite sufficient to put the cat among the pigeons. Everybody knew what was going on.

That footnote put the court and put our opponents on notice. One need only read the ACLU's Brief to see how it put them on notice what we were and were not relying on. If there are no further questions. Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, General Fried.

The case is submitted.

(Whereupon, at 2:59 p.m., oral argument in the above-entitled case was submitted).

CERTIFICATION

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#86-510 - UNITED STATES, Petitioner V. WILLIAM HOHRI, ET AL

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BY Paul A. Richardson

(REPORTER)