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AT SEATTLE
CLERK U.S. DISTRICT COURT
BY WESTERN DISTRICT OF WASHINGTON
DEPUTY

11 UNITED STATES DISTRICT COURT
12 WESTERN DISTRICT OF WASHINGTON

13 GORDON K. HIRABAYASHI,
14
15 Petitioner,
16
17 vs.
18 UNITED STATES OF AMERICA,
19
20 Respondent.

No. C83-122V

GOVERNMENT'S CLOSING ARGUMENT

21
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23
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26
27 GOV'T. CLOSING
28

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

GORDON K. HIRABAYASHI,)	
)	
Petitioner,)	No. C83-122V
)	
vs.)	GOVERNMENT'S CLOSING ARGUMENT
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
)	

I.

THE PROCEEDINGS BELOW.

On May 28, 1942, an indictment was filed in the United States District Court for the Western District of Washington charging the petitioner, Gordon Kiyoshi Hirabayashi, a resident of a designated military area, with two misdemeanors, i.e. failing to report to the Civil Control Station on May 12, 1942 as required by Civilian Exclusion Order No. 57 (Count I) and failing to remain within his residence between 8:00 p.m. and 6:00 a.m. on May 4, 1942 as required by Public Proclamation No. 3 (Count II), both of which military

GOV'T. CLOSING - 1

1 regulations were issued pursuant to Presidential Executive Order 9066
2 (Feb. 19, 1942). (Ex. 141, pp. 1-3). On September 15, 1942, the district
3 court, United States District Judge Lloyd L. Black, rejected both petitioner's
4 pretrial demurrer and amended demurrer to the charges (id. at 9; reprinted at
5 46 F. Supp. 657), expressly invoking the doctrine of judicial notice:

6 The defendant, after filing an original demurrer, later,
7 pursuant to court permission, interposed an amended demurrer
8 to each such count of the indictment upon the grounds that the
9 orders and proclamations involved are unconstitutional by
10 virtue of being in violation of the Fifth Amendment and of
11 Article 4, Section 2, Clause 1 of the Constitution of the
12 United States, and also are not authorized by Executive Order
13 of the President or by any valid legislative act or law of
14 Congress.

15 *** The matter was presented to the court after oral argument
16 supplementing very extensive briefs which in the aggregate
17 cited about one hundred thirty court decisions and several
18 texts. ***

19 In substance and effect the defendant's position is that
20 regardless of how critical the war perils, of how necessary
21 and vital the military area, and of how essential to American
22 success in this conflict the curfew provisions and evacuation
23 orders applicable to those of Japanese ancestry in such
24 military area, may be that the armed forces of this country
25 and our government are absolutely helpless to make or enforce
26 any such curfew provisions or exclusion orders until a
27 Constitutional amendment has been proposed, voted by both
28 houses of Congress, and finally adopted by three-fourths of
the states. (Id. at 10, emphasis added.)

* * * * *

20 It was recently stated in State of California v. Anglim,
21 129 F.2d (CCA 9th) 455:

22 "*** The same act at one time may be regarded as
23 constitutional by facts judicially noted or other facts then
24 shown, and at another time, on other known or proved facts, be
25 held unconstitutional. It was so held in an opinion by
26 Mr. Justice Holmes in Chastleton Corp. v. Sinclair, 264 U.S.
27 543, 548, 549, 44 S.Ct. 405, 67 L.Ed. 841, in determining the
28 constitutionality of the rent regulating law for the District
of Columbia."

26 And so the decision of this case must be in the light of
27 the unprecedented world conflict which so suddenly engulfed
28 this nation, in the light of this being a declared Military

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1 Area, in the light of the dangers that would confront us if
2 defendant should prevail, in the light of the advantage to
3 this nation and actually to those of Japanese ancestry from
4 the orders and proclamations which defendant attacks.

5 This Pacific Coast has been shelled at Santa Barbara,
6 Seaside, Vancouver Island, ships have been submarined without
7 warning in sight of shore, sinking has occurred near the
8 entrance to the straits that lead to Puget Sound, Dutch Harbor
9 has been bombed, and a formidable force of Japanese soldiers
10 occupies Kiska Island. Who can guarantee that they who have
11 already invaded the western Aleutians have not since Pearl
12 Harbor been perfecting plans to attack by carrier planes and
13 suicide parachutists the vital Seattle bomber factories, our
14 docks so essential to Alaska's life, the navy yard at
15 Bremerton just across the bay? (Id. at 11-12, emphasis
16 added.)

17 * * * * *

18 In the very recent opinion under date of July 29, 1942 of
19 the United States District Judge F. Ryan Duffy in the Lincoln
20 Seiichi Kanai habeas corpus proceeding before him [Ex parte
21 Kanai, 46 F. Supp. 286 (E.D. Wisc.)], in which such
22 petitioner, an American citizen of Japanese ancestry,
23 challenged the constitutionality of said Presidential Order
24 No. 9066 and attacked the validity of the same Military Area
25 No. 1 herein involved, the court said:

26 "*** This court will not constitute itself as a board of
27 strategy, and declare what is a necessary or proper military
28 area.

29 "*** The field of military operation is not confined to
30 the scene of actual physical combat. Our cities and
31 transportation systems, our coastline, our harbors, and even
32 our agricultural areas are all vitally important in the
33 all-out war effort in which our country must engage if our
34 form of government is to survive. *** This court can take
35 judicial notice of the extensive manufacturing facilities for
36 airplanes and other munitions of war which are located on or
37 near our west coast. (Id. at 13-14, emphasis added.)

38 * * * * *

39 The defendant may most properly be deemed by the
40 President, military forces and Congress as residing in a
41 portion of a vital military fortress and factory arsenal. (Ex
42 parte Ventura-supra [44 F. Supp. 520 (W.D. Wash. 1942)]).

43 In view of the war emergency the President and the
44 Commander of this defense command, as authorized by Congress
45 in said Public Law 503, may determine whether persons of
46 Japanese ancestry shall observe curfew in a military area and

whether they shall be removed therefrom. (Id. at 15, emphasis added.)

Petitioner's one day jury trial followed on October 20, 1942 at which he was convicted on both counts and sentenced to concurrent three month terms of imprisonment (id. at 24). In lieu of utilizing a trial transcript in his direct appeal, petitioner's counsel filed a bill of exceptions summarizing the trial testimony and proceedings, which summary was certified as accurate by the district court (id. 31-37). That summary shows that petitioner unsuccessfully sought jury instructions that would have required the jury to find that he personally was guilty of a crime such as espionage or sabotage before the jury could convict him for failing to obey the military regulations (id. 20-22, 35). By motion for directed verdict, petitioner renewed his constitutional arguments, and he made a different judicial notice argument than he makes here, i.e.,

"that the court erred in taking judicial notice of Executive Order #9066, Public Proclamations 2 and 3 and Civilian Exclusion Order #57 of the Military Commander as they were unconstitutional and void, and that Public Law #503 under which the action was prosecuted was not a valid criminal statute." (Id. 35-36, emphasis added.)

As petitioner concedes, he did not and "does not deny that he knowingly violated Public Law 503 and the underlying military curfew and evacuation orders" (Pet.'s Post-Hearing Br. at 4:22-23) since "the central issue before the Court was whether the Public Law 503 and the underlying military orders were constitutional." (Id. at 37:10-11.)

Petitioner did not take exception to the district court's written pretrial statement that petitioner's legal position did not depend upon "how critical the war perils, ... how necessary and vital the military area, and ... how essential to American success" were the military regulations. (Ex.

141 at 10.) Petitioner also did not take exception to the district court's "taking judicial notice" in its written pretrial opinion that there existed a West Coast "war emergency," including a realistic exposure to airplane and submarine raids on the "vital" West Coast bomber factories, docks and navy yards in that very military area which the district court "deemed ... a vital military fortress and factory arsenal." (Id. at 10-15.) Both petitioner's bill of exceptions and the testimony of Edward Ennis (at the coram nobis hearing) confirm that at petitioner's trial which followed the trial court's written opinion, petitioner did not make any factual record nor seek to make any factual record disputing the existence of a bona fide West Coast "war emergency."

Moreover, during the government's case in chief, the prosecution called Captain Michael Revisto, the "officer of the U.S. Army in Charge of Japanese evacuation in Seattle under Lt. Gen. J. L. DeWitt" (id. at 33), who was an Assistant G-2, i.e., an intelligence officer (coram nobis hearing testimony of William Hammond; see also the original subpoena contained in the original district court file). Petitioner's 1942 bill of exceptions reflects that the petitioner neither sought nor received testimony from this intelligence officer about the particular intelligence information in that military area which was pending before General DeWitt. In addition, after the prosecution rested, petitioner did not prove nor proffer any "other facts" (Ex. 141 at 11) in his direct case to contradict the district court's judicially noticed conclusion that there was a "war emergency."

In his Statement of Points on Appeal, petitioner listed the constitutional claims and the cases upon which he relied (id. at 40-43). He did not note any factual arguments.

1 Petitioner's case was briefed and argued in the Ninth Circuit prior to
2 the time that the Supreme Court ordered the whole case certified up to it on
3 April 5, 1943 (Ex. 141 at 43; Ex. 126 at 4). Petitioner's opening Ninth
4 Circuit brief raised only legal errors (Ex. 124 at 1-2, Argument Summary
5 I.-IV.) i.e., "the constitutionality or validity of the President's Executive
6 Order No. 9066 ... and of the Public Proclamation Nos. 1, 2, and 3 and
7 Civilian Exclusion Order No. 57 ..." (id. p. 2 of "Statement of Pleadings and
8 Facts"). Regarding the "emergency of war" asserted by the government (id. at
9 8), petitioner responded that absent martial law, which was not in effect on
10 the West Coast, factual proof of a war emergency was irrelevant and "the
11 President, Secretary of War and Military Commanders were and are without
12 constitutional power or authority to enforce either the exclusion order or the
13 curfew law against American citizens." (Id. at 10.) Alternatively,
14 petitioner argued that the "due process" clause of the Fifth Amendment
15 requires that each Japanese American who was a citizen must be convicted of a
16 crime such as treason before being interned (id. 10-12). 1/

17 In petitioner's Ninth Circuit reply brief, petitioner quoted at length
18 from the October 1942 Harper's Magazine article "The Japanese in America" (Ex.
19 A-5 at 2-4) and stated that individual loyalty consideration of each Japanese
20 American was required because the author of that article considered that "at
21 least 75% of them (American born United States citizens of Japanese ancestry)

22 _____
23
24 1/ Petitioner acknowledged, however, that there was a potential loyalty
threat presented by Japanese aliens in the United States, stating:

25 "There exists a sound reason for a suspicion that alien
26 enemies, those who owe their allegiance to hostile powers,
27 would commit such acts of treason -- it would be but the
natural thing for them to do.... (Id. at 11.)

28 GOV'T. CLOSING - 6

are loyal to the United States." (Id. at 3.) Petitioner went on to urge the Ninth Circuit to "take judicial notice" (id. at 3) that the FBI had the situation well in hand, and that published statements of Secretary of War Stimson, Assistant Attorney General Rowe, and California Attorney General Earl Warren stated that there was no sabotage in Pearl Harbor and no sabotage or Fifth Column activity in California. (Id. 3-6.)

Petitioner continued (Ex. A-5 at 11):

We commend to the court for reading in its entirety the clear, able and decisive opinion of Judge Fee in the Yasui case [United States v. Yasui, 48 F. Supp. 40 (D. Or. 1942)], supra. Judge Fee's digest of the law on this subject and his reasoning is so persuasive that we contend that the law as stated in his opinion is still the law of this land and is controlling and conclusive in this case.

Judge Fee's Yasui opinion emphasized the legal significance of the failure to declare martial law and also states that "it is obvious during the clash of arms the evidence of the military necessities cannot be adduced in a civil court." 48 F. Supp. at 52. 2/

Summing up all his arguments, petitioner's 1943 Ninth Circuit Reply Brief concludes (Ex. A-5 at 18):

CONCLUSION

In conclusion, appellant contends that the real issues in this case have not been met and cannot be met by counsel for the Government and that this court must hold that it is the law of this land that,

(a) Until martial law is established by the Congress, the Military Commanders have no jurisdiction of civilians;

2/ As the coram nobis petition here pointed out, at Yasui's federal district court trial Judge Fee had sustained Yasui's objection to the government's proffers of direct evidence -- offered to prove the necessity for a curfew and the government's concern about divided loyalties -- on the ground that such evidence was irrelevant. (Hirabayashi's coram nobis petition at p. 74 & fn. 6 & 7, and p. 76 fn. 10.)

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1 (b) That until he was granted a hearing on the question
2 of his loyalty to this country, where he would be given his
day in court and a right to establish that loyalty, appellant
could not be forced to leave his home and go into internment;

3 (c) That the war powers of the President do not and
4 cannot supercede the jurisdiction of the civil courts, and

5 (d) That Public Law No. 503 for the reasons set forth in
6 appellant's opening brief and this brief is unconstitutional
and void.

7 Therefore the verdict of the jury must be set aside, the
8 judgment of the trial court overruled and the demurrer of the
appellant to the indictment sustained.

9 Edward Ennis, then Director of the Department of Justice Alien Enemy
10 Unit, testified (at the coram nobis hearing) that in 1943 he argued the
11 Hirabayashi and Yasui cases in the Ninth Circuit on behalf of the government.
12 During that 1943 oral argument Ennis readily admitted that from December 7,
13 1941 to May 12, 1942 "not one of these 70,000 Japanese descended citizen
14 deportees had filed against him in any federal court of this circuit an
15 indictment or information charging espionage, sabotage or any treasonable
16 act." (Ex. 126 at 41.)

17 In the Supreme Court, petitioner contended

18 ...only that Congress unconstitutionally delegated its
19 legislative power to the military commander by authorizing him
20 to impose the challenged regulation, and that, even if the
21 regulation were in other respects lawfully authorized, the
Fifth Amendment prohibits the discrimination made between
citizens of Japanese descent and those of other ancestry. (320
U.S. 81, 89.)

22 His current petition argues that the Supreme Court was misled by the
23 government in its resolution of this latter "due process" claim (Pet.'s
24 Post-Hearing Br. at 4).

25 In disposing of petitioner's due process claim, the Supreme Court
26 specifically noted -- as had the district court in its pretrial written
27

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1 opinion -- that "Appellant [Hirabayashi] does not deny that, given the danger,
2 a curfew was an appropriate measure against sabotage." (320 U.S. at 99.)

3 The Court also noted:

4 *** The alternative which appellant insists must be accepted
5 is for the military authorities to impose the curfew on all
6 citizens within the military area, or on none. In a case of
7 threatened danger requiring prompt action, it is a choice
8 between inflicting obviously needless hardship on the many, or
9 sitting passive and unresisting in the presence of the threat.
10 We think that constitutional government, in time of war, is
11 not so powerless and does not compel so hard a choice if those
12 charged with the responsibility of our national defense have
13 reasonable ground for believing that the threat is real. (320
14 U.S. at 95.)

15 * * * * *

16 ... Congress, and the military authorities acting with its
17 authorization, have constitutional power to appraise the
18 danger in the light of facts of public notoriety. We need not
19 now attempt to define the ultimate boundaries of the war
20 power. We decide only the issue as we have defined it -- we
21 decide only that the curfew order as applied, and at the time
22 it was applied, was within the boundaries of the war power.
23 In this case it is enough that circumstances within the
24 knowledge of those charged with the responsibility for
25 maintaining the national defense afforded a rational basis for
26 the decision which they made. Whether we would have made it
27 is irrelevant. (320 U.S. at 102.)

28 * * * * *

... as we have seen, those facts, and the inferences which
could be rationally drawn from them, support the judgment of
the military commander, that the danger of espionage and
sabotage to our military resources was imminent, and that the
curfew order was an appropriate measure to meet it.

*** It is unnecessary to consider whether or to what extent
such findings would support orders differing from the curfew
order.

The conviction under the second count is without
constitutional infirmity. Hence we have no occasion to review
the conviction on the first count since, as already stated,
the sentences on the two counts are to run concurrently and
conviction on the second is sufficient to sustain the
sentence. For this reason also it is unnecessary to consider
the Government's argument that compliance with the order to
report at the Civilian Control Station did not necessarily

1 entail confinement in a relocation center. (320 U.S. at
2 103-105.)

3 Petitioner did not move the Supreme Court for rehearing of this 1943 decision
4 or file any subsequent legal challenge until 1983 although he testified (at
5 the coram nobis hearing) that he had long been aware of the Korematsu case,
6 Korematsu v. United States, 323 U.S. 214 (1944), and historical works such as
7 Americans Betrayed by Morton Grodzins (1949) (Ex. A-49), and Prejudice by
8 Carey McWilliams (1944) (Ex. A-67), the latter two criticizing the Supreme
9 Court decision in his case. Petitioner testified (at the coram nobis hearing)
10 that he did not approach any attorneys to seriously discuss reopening his case
11 prior to the early 1970's.

12 On May 24, 1984, this Court issued an order "that it must hold an
13 evidentiary hearing in order to permit petitioner to attempt to demonstrate by
14 competent evidence that he was in fact denied due process at his trial or upon
15 his appeal."

16 II.

17 THE STANDARD OF REVIEW.

18 Petitioner's Post-Hearing Brief alleges that egregious government
19 misconduct "deprived Petitioner of a fundamentally fair trial and appeal"
20 (Pet.'s Post-Hearing Br. 2:15-16). He first argues, consistent with this
21 Court's May 24, 1984 order, that he is entitled to have his convictions
22 vacated if fundamental errors seriously prejudiced his trial and appeal (id.
23 at 2:2).

24 In the alternative, citing language in United States v. Taylor, 648 F.2d
25 565, 574 n. 28 (9th Cir.), cert. denied, 454 U.S. 866 (1981), he urges this
26 Court to create a new lower standard upon which to grant coram nobis relief:
27 that even absent proof of prejudice this Court may vacate convictions if it

1 concludes that government conduct had the potential to or "could have affected
2 the Court's determination of the constitutionality of Public Law 503 and the
3 curfew and evacuation orders." (Id. at 2:26-3:1). Petitioner goes on to
4 argue that he "need not prove that Public Law 503 probably would have been
5 held unconstitutional if the Supreme Court had considered the suppressed
6 evidence" (id. at 3:20-21) as long as there is "any reasonable likelihood"
7 that the government's 1943 actions "could have affected the judgment of the
8 Court." (Id. at 4:7; see also id. at 5:8-9 & 38:1-7.) Finally, petitioner
9 urges this Court to hold that prejudice to his case should be "presumed if
10 there is intentional destruction of evidence by the prosecution." (Id. at
11 4:14.)

12 Petitioner's alternate legal theories are contrary to applicable law.

13 1. Petitioner Bears the Burden of Proving that the Outcome would have
14 been Different.

15 Petitioner's proposed lower standard -- an "any reasonable likelihood
16 which could have affected" test -- is improper even in the case of a direct
17 appeal. Even in such an appeal, "considerations of justice," "judicial
18 integrity" and intentional "illegal conduct" are not enough, standing alone,
19 to warrant vacating a conviction if the resultant "errors alleged are
20 harmless" since "the conviction would have been obtained notwithstanding the
21 asserted error." United States v. Hastings, 461 U.S. 499, 505-506 (1983).
22 Accord, United States v. Morrison, 449 U.S. 361, 365-367 (1981).

23 The instant coram nobis petition, however, is not a direct appeal, but
24 rather is a forty year old collateral attack which is resolved in a manner
25 similar to a habeas corpus petition. United States v. Taylor, 648 F.2d 565,
26 571 n.21 & 573 n.25 (9th Cir.), cert. denied, 454 U.S. 866 (1981). In United
27 States v. Frady, 456 U.S. 152, 166 (1982) the Supreme Court "reaffirm[ed] the

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1 well-settled principle that to obtain collateral relief a prisoner [or
2 petitioner] must clear a significantly higher hurdle than would exist on
3 direct appeal." Consequently, on collateral attack, even a "massive violation
4 of due process" must be "causally related to the conviction," Leiterman v.
5 Rushen, 704 F.2d 442, 444 (9th Cir. 1983).

6 The Supreme Court stated in United States v. Morgan, 346 U.S. 502, 511
7 (1954) that "Continuation of litigation after final judgment and exhaustion or
8 waiver of any statutory right of review should be allowed through this
9 extraordinary remedy only under circumstances compelling such action to
10 achieve justice." Simply because "errors in certain matters of fact" may have
11 occurred is not enough, standing alone, to warrant relief since coram nobis
12 "jurisdiction was of limited scope [applying only] in those cases where the
13 errors were of the most fundamental character, that is, such as rendered the
14 proceeding itself irregular and invalid." Id. 346 U.S. at 509 n.15. In
15 United States v. Darnell, 716 F.2d 479, 480 fn.5 (7th Cir. 1983), cert.
16 denied, 104 S.Ct. 1454 (1984), which this Court has previously quoted and
17 relied upon in its April 29, 1985 order (at p.3), the Seventh Circuit stated:

18 *** The principle that coram nobis is not a substitute for
19 appeal limits the issues that may be raised to those "of the
20 most fundamental character." United States v. Morgan, 346
21 U.S. at 511, 74 S.Ct. at 252. This limited scope ensures that
22 coram nobis will not be utilized as a substitute for appeal.
23 It is presumed that the challenged proceedings were correct
24 and a heavy burden rests on the petitioner to demonstrate
25 otherwise. In addition, a standard akin to the "actual
26 prejudice" standard is applied: the coram nobis petitioner
27 must demonstrate that but for the fundamental errors committed
28 a more favorable judgment would have been rendered. United
States v. Dellinger, 657 F.2d 140, 144 n.6 (7th Cir. 1981).

25 Although petitioner (Post-Hearing Br. 1-3) relies primarily upon United
26 States v. Taylor, supra, that case cites the above language in Morgan, 648
27 F.2d at 570 n.14, and acknowledges that Taylor sought to prove "a great
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1 prejudice" to his case, 648 F.2d at 571. Of course, in Taylor the Court was
2 only ruling that an evidentiary hearing on the coram nobis petition was
3 warranted at that point, specifically "withholding judgment on the extent of
4 prosecutorial malfeasance or prejudice to the appellant necessary to warrant
5 relief," 648 F.2d at 574 n.28. That question was left to the district court
6 which, after remand, simply denied the coram nobis petition without reaching
7 that question, 527 F. Supp. 863.

8 There is, therefore, no controlling Supreme Court or Circuit case support
9 for petitioner's argument that collateral coram nobis relief is permissible
10 forty years after conviction, simply because of the speculative observation
11 that an error "could have" resulted in prejudice where the petitioner fails to
12 carry his burden of proving that the outcome of his case was prejudiced.
13 Indeed, the caselaw is directly to the contrary. See Frady, Hastings,
14 Morrison, Morgan, Darnell and Leiterman, supra.

15 2. This Case Involves No Misrepresentations Made to the Trier of Fact.

16 Petitioner's reliance upon United States v. Agurs, 427 U.S. 97 (1976) and
17 cases following it is inapposite. Those cases deal with factually exculpatory
18 evidence withheld from the trier of fact. No such facts are placed in issue
19 in petitioner's Post-Hearing Brief, nor was the legal issue now raised --
20 whether judicial notice was appropriate -- previously submitted (in 1942) by
21 the Court to the trier of fact, i.e. the petit jury.

22 Petitioner here has at all times conceded that he knowingly and
23 intentionally violated the military regulations at issue. Thus, the question
24 of petitioner's factual innocence or guilt was never disputed and there is no
25 allegation that it was incorrectly decided by the trier of the fact. Nor does
26 petitioner's Post-Hearing Brief in this case identify any perjured testimony
27 offered at trial. Instead, petitioner attacks the government's legal argument

1 in its appellate pleadings, i.e., the government's Supreme Court discussion of
2 judicial notice. This issue was raised before trial by the district judge and
3 after trial by petitioner in the Ninth Circuit and the Supreme Court. The
4 original district court and Ninth Circuit pleadings show that at least up
5 until this case reached the Supreme Court, petitioner's position (in full
6 agreement with Judge Fee's Yasui opinion) was that facts relating to the
7 military necessity for a curfew were not relevant due to the admitted absence
8 of a formal declaration of martial law and the government's admitted failure
9 to give this particular citizen petitioner any individualized attention before
10 subjecting him to the military regulations he intentionally violated.
11 Consequently, despite the fact that the government called as a witness at
12 trial Assistant G-2 Captain Michael Revisto, the Army officer in charge of
13 evacuation in Seattle under General DeWitt, petitioner did not question him
14 about the Army's basis to believe that there was a bona fide "war emergency."
15 In sum, there was neither false nor incomplete evidence on this question
16 submitted to the trier of fact. Consequently, legal standards such as Brady
17 that apply to fact finders misled by perjurious or incomplete testimony do not
18 apply to this case.

19 The gravamen of petitioner's coram nobis complaint is no longer the
20 constitutionality of the military regulations on their face, but rather the
21 wholly different question whether there was a sufficient administrative record
22 basis in 1942 to implement such regulations. Petitioner argues that the
23 government was required in 1943 to bring to the Court's attention not only the
24 declassified considerations which lay behind the actions adopted by the War
25 Department and the Commander-in-Chief (the President), but also the then
26 classified internal dissenting policy views which were not adopted, some of
27 which urged more extreme measures (e.g., by General DeWitt) and some of which

1 urged less extreme measures (e.g., by Lt. Com. Ringle) than the War Department
2 adopted.

3 The universe of differing internal policy positions which lead up to
4 official actions are not discoverable, N.L.R.B. v. Sears, Roebuck & Co., 421
5 U.S. 132, 150-151 (1975). Moreover, here the government openly informed the
6 Supreme Court in 1943 that it was not declassifying all the confidential
7 military information which went into the difficult policy decisions to issue
8 these regulations (Ex. 99, p.12). This fact was acknowledged and accepted by
9 both Judge Fee in his Yasui opinion, 48 F. Supp. at p.52 ("during the clash of
10 arms the evidence of the military necessities cannot be adduced in a civil
11 court") and the Supreme Court, 320 U.S. at 99 ("these are only some of the
12 many considerations"). Nonetheless, this petitioner argues that it was
13 misconduct to seek, even openly, judicial notice of only those considerations
14 which were not classified. Compare, the 1944 Supreme Court argument of
15 Solicitor General Fahy in Korematsu, Ex. 98, pp. 8-9 (Supreme Court cannot
16 take judicial notice of General DeWitt's report where it goes beyond facts of
17 public general knowledge and if the Court believes more facts are needed it
18 will have to remand the case to the trial court). Today, a special ex parte
19 in camera procedure exists which provides an alternative approach. See the
20 Classified Information Procedures Act (CIPA), Pub. L. 96-456, 94 Stat. 2025
21 (Oct. 15, 1980) reprinted in 18 U.S.C. App. § 1-16 at pp. 549-554 (1982);
22 United States v. Wilson, 732 F.2d 404, 414 (5th Cir.), cert. denied, 105 S.Ct.
23 609 (1984) (ex parte review by court reveals no Brady violation); United
24 States v. Wilson, 750 F.2d 7, 9 (2d Cir. 1984) (same). No similar statutory
25 nor judicial procedure existed in the 1940's. See Korematsu v. United States,
26 323 U.S. 214, 245 (Jackson, J., dissenting, "Neither can courts act on
27 communications made in confidence.")

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1 At all events, since the allegation of prosecutorial misconduct in this
2 case has nothing to do with intentionally perjurious evidence misleading the
3 trial court or petit jury, Morgan, Frady, and Hastings control. Even if those
4 cases did not control, petitioner incorrectly describes a defendant's burden
5 under Agurs and Brady. In United States v. Bagley, ___ U.S. ___, 105 S.Ct.
6 3375, 3384 & 3385 (1985), the Supreme Court stated that in all Agurs and Brady
7 situations "evidence is material only if there is a reasonable probability
8 that, had the evidence been disclosed to the defense, the result of the
9 proceeding would have been different." Consequently, even if this were an
10 Agurs and not a Morgan situation (which we deny), petitioner is incorrect that
11 he need not show a probability that "the result of the proceeding would have
12 been different" but that he can prevail even if he only shows that the result
13 of the proceeding could have been different.

14 3. Even if Evidence has been Destroyed, Prejudice is not Presumed.

15 Petitioner also argues that this Court should hold that prejudice should
16 be "presumed if there is an intentional destruction of evidence by the
17 prosecution" (Pet.'s Post-Hearing Br. 4:14). Such a presumption is contrary
18 to the caselaw.

19 Again, even in a direct appeal which imposes a lower burden upon a
20 defendant, a defendant still must "show (1) bad faith or connivance on the
21 part of the government, and (2) that he was prejudiced by the loss or
22 destruction of the evidence." United States v. Jennell, 749 F.2d 1302, 1308
23 (9th Cir. 1985) citing United States v. Loud Hawk, 628 F.2d 1139, 1146 (9th
24 Cir. 1979) (en banc), cert. denied, 445 U.S. 917 (1980). Petitioner's
25 reliance on contrary dicta in United States v. Arra, 630 F.2d 836, 849-850
26 (1st Cir. 1980) and the language in United States v. Heiden, 508 F.2d 898, 902
27 (9th Cir. 1974) which was modified by the en banc Ninth Circuit in Loud Hawk,

1 supra, is inapposite. See also United States v. Bagley, supra, 103 S.Ct. at
2 3379-3381 (reversing a Ninth Circuit "automatic reversal" rule which did not
3 require the court to appraise whether the newly discovered evidence was
4 "likely to have changed the verdict").

5 Where a defendant has delayed a significant period of time before
6 commencing a collateral attack upon his conviction and is also required to
7 show "sound reasons" for his "failure to seek appropriate earlier relief," the
8 rule that his prejudice must be proven and not merely assumed from the
9 destruction of a piece of evidence is even more compelling. In describing the
10 procedure to be followed in a coram nobis proceeding where the transcript of
11 the original criminal proceeding was no longer available, the Supreme Court in
12 Morgan, supra, 346 U.S. at 512, stated in words equally applicable here:

13 ... the absence of a showing of waiver from the record does
14 not of itself invalidate the judgment. It is presumed the
15 proceedings were correct and the burden rests on the accused
16 to show otherwise.

17 Similarly here, there is a presumption that the original proceedings were
18 correct, not incorrect, and the burden rests on petitioner "to show
19 otherwise." See also INS v. Miranda, 459 U.S. 14, 18 (1982). Thus,
20 petitioner's suggestion that the Court should presume prejudice from the
21 destruction or loss of evidence at this late date is contrary to the
22 controlling caselaw.

23 III.

24 A CHRONOLOGY OF EVENTS

25 1. The Official Previously Classified War Department M.I.D. Reports.

26 The evidence at the hearing showed that prior to the bombing of Pearl
27 Harbor, the Office of Naval Intelligence (O.N.I.) and the Military
28 Intelligence Division (M.I.D.) of the Army secretly intercepted and decrypted

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1 Japanese diplomatic cables, a few of which were declassified during the 1946
2 Congressional Pearl Harbor hearings but the bulk of which were not
3 declassified until the 1970's (coram nobis testimony of David Lowman). These
4 cables reveal that in 1941 the Japanese government believed that it had
5 recruited some "second generation" Japanese Americans in West Coast airplane
6 factories and in the United States Army in order to learn about the
7 disposition in the United States of critical war materials and manpower. 3/
8 These secretly obtained cables formed the basis for warnings which the Office
9 of Naval Intelligence and the Military Intelligence Division of the War
10 Department widely distributed in sanitized form both at the time of
11
12
13
14

15 3/ Discussing the "utilization of our 'Second generations' and our
16 resident nationals" as spies, one Japanese diplomatic cable sent from
17 Tokyo to Washington, D.C. (Ex. A-17) states that "the utmost caution must
be exercised." Another cable sent to Tokyo from Los Angeles (Ex. A-22)
states:

18 *** We have already established contacts with absolutely
19 reliable Japanese in the San Pedro and San Diego area, who
20 will keep a close watch on all shipments of airplanes and
21 other war materials, and report the amounts and destinations
of such shipments. The same steps have been taken with regard
to traffic across the U.S.-Mexican border.

22 We shall maintain connection with our second generations
23 who are at present in the (U.S.) Army, to keep us informed of
24 various developments in the Army. We also have connections
with our second generations working in airplane plants for
intelligence purposes.

25 A third cable sent to Tokyo from Seattle (Ex. A-23) states "we have made
26 arrangements to collect intelligence from second generation Japanese
27 draftees on matters dealing with the troops, as well as troop speech and
behavior [at p.2] *** [and] we are making use of a second generation
Japanese lawyer..." [at p.3].

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interception of these various messages 4/ and in year-end survey reports issued during December 1941. 5/

4/ The information contained in Ex. A-17 was sent by the Chief of the Intelligence Branch of the War Department M.I.D. General Staff to the Chief of the Army Counter Intelligence Branch and to the FBI (Ex. A-17a). The Director of the Office of Naval Intelligence forwarded the information to the Chief of Naval Operations and a copy was sent to the FBI (Ex. A-17b). The Military Intelligence Division of the War Department distributed the information with a rating that both the source and information were "reliable" to Army units in its nine Corps Areas, including General DeWitt's (coram nobis testimony of William Hammond), in Puerto Rico, in the Canal Zone, in the Philippine Islands, in the Territory of Hawaii, to the FBI and to O.N.I. (Ex. A-17c, see also A-17e). The FBI distributed the information to twenty two of its top officials (Ex. A-17d). The Special Agent in Charge of the Boston FBI field office communicated this same information to the Director of the FBI in Washington, D.C. (Ex. A-17c). Officials of the FBI later incorporated this information in a personal and confidential June 1941 FBI report (Ex. A-22; pp. 15-16) which was sent to the Secretary to the President at the White House for his information and the President's (Ex. A-22k), to the Assistant Secretary of State (Ex. A-22L) and to the Attorney General (Ex. A-22m); other FBI reports issued in September and October 1941 distributed this information to the FBI field offices (Ex. A-17f and Ex. A-17g).

The information contained in Ex. A-22 was likewise distributed in O.N.I. and the FBI (Ex. A-22a and A-22b); to the Chiefs of the Intelligence and Counter Intelligence Branches of the Office of Chief of Staff of the War Department Military Intelligence Division (Ex. A-22c and A-22d); to the B-7-J unit (Japanese Counter Intelligence Section) of O.N.I. and Naval Districts 1 to 15, the Military Intelligence Division of the War Department and the FBI (Ex. A-22e and A-22f); to the Attorney General (Ex. A-22g); to FBI field offices in Los Angeles and San Diego (Ex. A-22h); to the Army G-2 of the 9th Corps Area with a rating from the War Department Military Intelligence Division that both the source and information was "reliable"; and in the June 1941 FBI memorandum sent to the White House, State Department, and Attorney General (Ex. A-22j, pp. 25-26; and Ex. A-22k, Ex. A-22L and Ex. A-22m). The information was still being distributed by O.N.I. to the FBI, the 15 Naval Districts and M.I.D. on new sets of O.N.I. index cards entitled "ESPIONAGE (Japanese Intelligence Network in the U.S.)" as late as December 1, 1941 (Ex. A-22o).

The information contained in Ex. A-23 showed similar M.I.D., O.N.I. and FBI distribution (Ex. A-23a and Ex. A-23b).

5/ The initial December 1941 intelligence survey report (Ex. A-40 at pp. 2 and 10) was used as a model for other post Pearl Harbor

(Footnote Continued)

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1 On January 3, 1942, the War Department Military Intelligence Division
2 issued a "Summary of Information" (Ex. A-6) which (at p.1) specifically
3 referenced by name Ex. A-17h, the O.N.I. December 24, 1941 memorandum, and is
4 noted G2/CI: G2 designates military intelligence; CI designates
5 counterintelligence, compare Ex. A-17a. This exhibit shows that a file copy
6 was retained in M.I.D.'s Japanese activities file (No. 000.24), and shows
7 distribution to FBI, M.I.D., State Department, Special Defense Unit of the
8 Department of Justice, and all the Army Corps Areas. It also rated both the
9 source and information it contained as "reliable" (see the "x" on the "o" in
10 "source" and on the "n" in "information," p.1 of Ex. A-6). In pertinent part,
11 it stated:

12 *** Approximately 5,000 Japanese are congregating at some
13 undetermined point in strategic Baja California. ***

14 The Japanese practice of cloaking subversive operations
15 with "legitimate business fronts" exists in Mexico as well as
16 in the United States. ***

17 (Footnote Continued)

18 counterintelligence surveys (Ex. A-40b). See also Ex. A-17h (dated
19 December 24, 1941) at pp. i, iii, iv. 22, 23. This latter report states
20 in part 1, pp. 21-22 (emphasis added):

21 *** It must constantly be kept in mind in this connection
22 that Japan strove to put into operation in the United States
23 and its territories a highly integrated and specialized
24 intelligence network which could "take over" from regular
25 established agencies in wartime.

26 Under such circumstances, Japanese nationals and
27 pro-Japanese nisei who are well settled in normal and yet
28 strategic occupations are likely to be the mainstay of
Japanese espionage-sabotage operations in this country.

Both Ex. A-140 (at p.26) and Ex. A-17h (at p.27) show wide distribution to
naval districts, to the FBI, M.I.D., the Coordinator of Information
(C.O.I., Colonel Donovan), the State Department and (of Ex. A-17h) to the
Special Defense Unit of the Department of Justice.

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1 *** In the United States there is a possible infiltration of
2 Japanese espionage agents through Cuban and Florida ports. A
3 similar danger exists on the Pacific Coast and Mexican border.

4 * * * * *

5 In streamlining their Intelligence Machine the Japanese
6 have been guided by two major considerations -- that of a
7 system of "total intelligence" such as the Germans have
8 developed; and establishment of a completely integrated
9 intelligence organization which in time of war and the
10 breaking off of official relations would be able to take over
11 intelligence operations on a major scale.

12 * * * * *

13 Although never fully developed, this new espionage
14 organization was characterized by a high degree of
15 decentralization. The general pattern included individuals,
16 small groups, and commercial organizations functioning
17 separately yet directly controlled by Imperial Japanese
18 Government through Embassy and Consulate.

19 The new program provided for the utilization of citizens
20 of foreign extraction, aliens, Communists, Negroes, Labor
21 union members, anti-Semites, and individuals having access to
22 Government Departments, experimental laboratories, factories,
23 transportation facilities and governmental organizations of
24 various kinds. Nisei and Japanese aliens were not overlooked.

25 In event of open hostilities, Mexico was to be the
26 Japanese intelligence nerve center in the Western Hemisphere,
27 and in anticipation of war, U.S.-Latin American intelligence
28 routes were established, involving extensive cooperation among
Japanese, German and Italian intelligence organizations.

In this connection there should be kept in mind the
proximity of San Diego to Tiajuana and of El Centro to
Mexicali. [Illegible] along with Yuma, Nogales, El Paso,
Laredo, and Brownsville are well known Japanese "post offices"
and espionage centers.

*** A widespread decentralized system of Japanese "clubs,"
labor organizations, and legitimate business groups has been
converted into an important unit of the central Japanese
Intelligence Network. There can be no doubt that most of the
leaders have been and still continue to function as key
operatives for the Japanese Government along the West Coast.

Finally, on January 21, 1942, Lieutenant Colonel P.M. Robinett, G-2 of
the U.S. Army General Headquarters, issued a confidential Information Bulletin

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1 (No. 6) entitled "Japanese Espionage" (Ex. A-50) which was for high level
2 dissemination "Not ... lower than division." (Id. p.3). At that time,
3 Robinett was among the select group of government officials authorized to have
4 personal access to the decrypted Japanese cables (coram nobis testimony,
5 Hannah Zeidlick). Brigadier General Mark W. Clark was then Deputy Chief of
6 Staff of the U.S. Army General Headquarters which was stationed at the Army
7 War College, Washington, D.C. (coram nobis testimony of Hannah Zeidlick, and
8 Ex.'s A-6 and A-50). This information bulletin entitled "Japanese Espionage"
9 mentions Japanese organizations in Hawaii, New York City, Los Angeles,
10 Washington D.C., San Francisco, Seattle, and Ogden, Utah. It concludes:

11 6. Conclusions. - a. It may be expected that Japanese
12 diplomatic and consular communications will be replaced now by
13 using the diplomatic and consular organization of an allegedly
14 neutral power identified with the Axis. They may also use
15 officials of other neutral countries whom they have subverted.

16 b. Their espionage net containing Japanese aliens,
17 first and second generation Japanese and other nationals is
18 now thoroughly organized and working underground.

19 c. In addition to their communications net through
20 neutral diplomats, they may be expected to have their own
21 underground communication net. * * *

22 On February 13, 1942, Brigadier General Mark Clark furnished the above
23 information bulletin "published by [his] headquarters on the subject of
24 Japanese Espionage" to Assistant Secretary of War John J. McCloy "confirming"
25 their telephone conversation of the previous day in order to assist the
26 Assistant Secretary of War "in settling this question" as it related to the
27 West Coast. McCloy needed this information because his immediate superior,
28 Secretary of War Stimson, was the recipient of General DeWitt's recommendation
to evacuate all "potentially dangerous" individuals or classes of persons,
which was then being prepared (Ex. 4, pp.25, 33-38; Ex. 29, pp.25, 33-38).
General Clark goes on to assure Assistant Secretary of War McCloy "that the

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1 G-2 of the Western Defense Command has all this information..." (Ex. A-81).
2 After General DeWitt's recommendation was received by the War Department on
3 February 16, the War Department conferred with the Justice Department and then
4 submitted a draft order to President Roosevelt which on February 19 became
5 Executive Order 9066 (Ex. 4, p.25; Ex. 29, p.25).

6 Petitioner argues that the above described intelligence data and reports
7 -- which data his own witness testified derived from the most important source
8 of wartime intelligence data (coram nobis cross-examination testimony of John
9 Herzig) -- were not important. Instead, petitioner rests his case upon
10 reports written by Curtis B. Munson and Lt. Com. K.D. Ringle and the alleged
11 destruction for improper reasons of the first draft of General DeWitt's
12 evacuation report.

13 2. The Munson Reports.

14 In November 1941 and January 1942, the FBI wrote internal analyses of the
15 reports prepared by Curtis B. Munson, a forty-nine year old businessman. The
16 January 16, 1942, FBI analysis (Ex. A-157) was prepared for Mr. Tamm, then the
17 first assistant to J. Edgar Hoover (coram nobis testimony of Ed Ennis, Tr.
18 377:22) and the November analysis was prepared for FBI Director Hoover (Ex.
19 A-155, p.1; Ex. A-157, p.4). These analyses pointed out that Munson was the
20 brother-in-law of former Congressman Richard M. Russell (Ex. A-157, p.1), that
21 Munson admitted having "no knowledge of ... investigative work" (id. at p.2)
22 and stated "he would like to enroll" in the FBI training program (id. at p.9).
23 Twenty six years earlier he had been employed as a "cub reporter for three
24 months" (id. at p.1), and two days after Pearl Harbor he told the Special
25 Agent in Charge of the FBI Los Angeles field office that he had better access
26 to President Roosevelt than the Director of the F.B.I. "and that he [Munson]
27 could get in touch with the President directly from Los Angeles in fifteen

1 minutes, and he wished that [the Los Angeles field office of the FBI] be aware
2 of this fact." (Ex. A-156.)

3 In November 1941 Munson visited the West Coast FBI field offices "as well
4 as the Military and Naval agencies." (Ex. 157, p.3.) At that time "the nature
5 of Mr. Munson's mission was not generally made known or understood by [the
6 FBI], O.N.I. and G-2 and Mr. Munson carried no credentials." (Id. at p.9, see
7 p.3.) "Munson made no attempt to pry into the Bureau's confidential matters
8 and limited himself to requests for general information." (Id. at p.3).
9 Munson did, however, obtain confidential access to lists of Japanese suspects
10 in the Naval Districts on the West Coast (Ex. A-155, pp. 2-3 and Ex. A-157,
11 p.4), lists of Japanese associations (Ex. 139, p.8), and secret Naval
12 documents (id. at p.11). Since Munson's primary source of confidential
13 information appears to have been the Navy, it is not surprising that he told
14 an Army Intelligence officer "that the ONI on the California coast had a
15 better understanding of the Japanese situation than that possessed by the
16 F.B.I. and M.I.D. ..." (Ex. A-157, p.8).

17 The FBI noted that Munson's November report (Ex. 139) "contains no
18 specific factual information of importance to the Bureau" and that Munson's
19 statement "that the Japanese rarely occupy positions in defense plants" was
20 merely the repetition of what a Portland, Oregon FBI agent told Munson (Ex.
21 A-157, p.4). The FBI's analysis stated that Munson "minimized the danger of
22 sabotage" from all Japanese persons in the United States and limited the
23 "espionage threat" to their ability "to obtain information as to movement of
24 supplies by ship and railroad." (Id. at p.4). The Bureau commented (Ex.
25 A-155, p.2) that Munson's psychological and sociological

26 ... suppositions as to the manner in which the Japanese will
27 react in the event of war between the United States and Japan
28 are purely theoretical and conjectural and for that reason
would not appear to be as significant in a practical way as

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1 his observations concerning the need for physical protection
2 of important facilities.

3 See also id. at 3 (Munson's reasoning is "purely theoretical"); Ex. A-157,
4 p.4 (Munson's "conclusions were ... purely theoretical and conjectural.")
5 Both the FBI and President Roosevelt stated that there was "nothing much
6 new" in Munson's reports (Ex. A-68, p.1; Ex. A-15).

7 The FBI report noted that one of Munson's recommendations -- that 600
8 Japanese suspects "should be placed under continuous surveillance" by FBI
9 agents -- was internally inconsistent with Munson's view that there "are
10 only 100 or 120 really dangerous suspects" (Ex. A-155, pp. 2-3). The FBI
11 also believed that the recommendation was impractical since such
12 surveillance would have required 2,400 agents.

13 In his December 20 report (Ex. __, Tab 16) Munson recommended that
14 all Japanese nationals and their property in the continental United
15 States, not simply on the West Coast, should "be immediately placed under
16 absolute Federal control" supervised perhaps by "loyal Nisi" who were
17 "rigidly approved by and under the thumb" of a military or naval
18 intelligence agency (Tab 16, pp. 9-10, also reprinted in Ex. A-157, p.6).
19 Two days after Pearl Harbor, Munson advised the FBI Special Agent in
20 Charge of the Los Angeles field office, Richard Hood, to ignore the
21 Attorney General because the Attorney General was "not in favor of picking
22 up citizens for custodial detention." (Ex. A-156.) FBI Agent Hood noted
23 that absent instructions from the Bureau, he had no intention of following
24 Mr. Munson's advice which was "that it would be all right if this office
25 went ahead and picked up any citizens where there was any doubt about it,
26 and let them get out the best way they can." Id., also reprinted in Ex.
27 A-157, pp. 8-9. In one report, Munson states that the number of suspects

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1 "would have to be materially increased" if Japanese American citizens were
2 added. (Ex. 140, p.4.) The FBI also noted that Munson's findings were
3 all formulated prior to Pearl Harbor (Ex. A-157, p.6), and that Munson's
4 desire to break radio silence after the outbreak of war "without
5 apparently appreciating the inadvisability of such a course" caused "some
6 concern," id at p.9. The FBI analysis concluded (Ex. 157, p.9) by noting
7 that FBI Agent Shivers (whom Munson regarded as highly as Munson regarded
8 Ringle, Ex. 5, p. 3-4) reported that "Munson did considerable talking and
9 probably gave people more information than he got out of them." Former
10 FBI Special Agent in Charge Richard Hood testified (at the coram nobis
11 hearing) that in his professional opinion Munson's reports could not have
12 been relied upon without additional evidentiary support.

13 At all events, Munson's reports, albeit colorful and unprofessional,
14 reflect his perception of the difficulties encountered on the West Coast.
15 For example, Munson states:

16 Take the Shinto religion, Buddhist religion, Christian
17 religion, ancestor worship, family worship, all tied back to
18 sun worship of which the Emperor of Japan is the living
19 titular head on earth; add to this, the Oriental mind, western
20 business culture, innate politeness and fear; add also the
21 fact that each individual Japanese is playing all by himself
22 in a field the size of the Yale Bowl with his own conscience
23 as umpire, carrying the ball with as much competitive spirit
24 as an American, the while the stands -- whom he wishes to
25 please -- are filled to overflowing with his departed
26 ancestors each of whom is vitally interested and sitting in
27 judgment on his personal gyrations; add again a number of
28 other things of varying importance, -- such as the fact that
the Japs are the greatest joiners in the world and have
associations for everything to join from "Fixing Flowers
Properly in a Bowl" to "War Relief for Japanese Soldiers in
China". You then have a picture so complex to western minds
that it cannot be solved by facts and pencil. When it is all
added up no westener will say on the coast here how any
individual Japanese will act under given circumstances, how
reliable he is, nor what the mass of them will do. (Ex. A-69,
pp. 1-2.)

* * * * *

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1 *** You have to feel this problem -- not figure it out with
2 your pencil. We only cite the sand that our reader may never
3 forget the complexities of even a shovel full of sand. (Ex.
4 139, Report p.1.)

5 As noted above, Munson had access to some confidential Naval intelligence
6 reports and therefore concluded "that the O.N.I. on the California coast had a
7 better understanding of the Japanese situation than that possessed by the FBI
8 and M.I.D. ..." (Ex. A-157, p.8). In two different reports, Munson relied
9 upon a secret Navy Department report entitled "Japanese Organizations and
10 Activities in the 11th Naval District" (Ex. 139, Report p.11; Ex. 140, Report
11 p.11) and Munson stated in his final report that Assistant District
12 Intelligence Office Lt. Com. K.D. Ringle of the 11th Naval District was one of
13 two intelligence officers who appeared to him to be a "crystallization" of
14 "99% of the most intelligent views on the Japanese...." (Ex. 5, Report p.2.)

15 Starting with his December 20, 1941 report and continuing through the end
16 of January 1942, Munson had his political friends urge the President to have
17 General DeWitt (in the War Department "Corps Area Headquarters at
18 San Francisco") put Lt. Com. Ringle in charge of Munson's West Coast Japanese
19 plan (Ex. 45). This did not occur. However, Ringle's views did get
20 circulated to the Attorney General (Ex. 33) who passed them along to the
21 Assistant Secretary of War McCloy (Ex. 34), and Ringle was consulted on
22 relocation by the Director of the War Relocation Authority (WRA) (Ex. 100),
23 which in May 1942 (see Ex. 78, p.490) printed and circulated a "compilation"
24 of Ringle's personal memoranda (including Ringle's January 26 memo) prefaced
25 by the disclaimer that the memorandum did "not necessarily reflect the
26 policies of the War Relocation Authority or the Navy Department." (Ex. 77,
27 p.3.) In any event, the language in Munson's December 20, 1941 report did
28 directly result in a December 30, 1941 request from the Chief of Naval

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1 Operations (received January 5, 1942) for "a report from Lieutenant Commander
2 Ringle concerning his views on the Japanese referred to in Mr. Munson's
3 report." (Ex. 46.) Thereafter, Ringle wrote a report dated January 26, 1942
4 (Ex. 32) which was mailed to Washington on January 29, 1942 (Ex. 47).

5 3. The Ringle Reports.

6 The January 26 Ringle report was sent by the Office of the Chief of Naval
7 Operations to the FBI, the M.I.D., and to the Department of Justice's Special
8 Defense and Alien Enemy Control Units, the latter then headed by Edward Ennis
9 (Ex. A-77, coram nobis testimony of Edward Ennis, Tr. 191:22-24). The cover
10 letter from the Navy Department made it clear that the Ringle report was
11 prepared at O.N.I.'s request due to the Munson Report's endorsement of Lt.
12 Com. Ringle and that the Ringle report "does not represent the final and
13 official opinion of the Office of Naval Intelligence on this subject." (Ex.
14 A-77). Ringle went on to write an expanded version of his report for the WRA
15 in May 1942 (Ex. 77) and received permission to publish a shortened version of
16 it in the October 1942 issue (Ex. 78, p.490) of Harper's magazine (Ex. 35,
17 pp. 1-2).

18 Ringle, who like Munson had no personal access to or awareness of the
19 decrypted Japanese diplomatic cables, was of the opinion that many Japanese
20 born alien residents would do no more than "surreptitious observation work for
21 Japanese interests if given a convenient opportunity" (Ex. 32, p.2; Ex. 77,
22 p.6); that about 3,500 Japanese aliens and citizens would actively "act as
23 saboteurs or agents" (id.); and that the most dangerous are members of
24 Japanese military associations in the United States who as of May 1942 (see
25 Ex. 78, p.490) still had "not yet been apprehended" (Ex. 77, p.7). Ringle
26 also believed that "the most potentially dangerous element of all" were the
27 Kibei of whom Ringle estimated there were 8-9,000 (Ex. 77, p.30) and who, in

1 spite of their citizenship and "the Bill of Rights" (Ex. 32, p.3; Ex. 77, p.7)
2 should be guarded in detention camps, stripped of their citizenship, and
3 deported to Japan "at the first opportunity" (Ex. 77, p.30), along with their
4 parents or guardians (id., pp.32 and 35). Procedurally, Ringle recommended
5 that these people should be "considered guilty unless proven innocent." (Id.)

6 Regarding Japanese resident aliens, Ringle also believed it would be
7 "perfectly legal" and "may be more expeditious in the long run" to declare
8 them all suspect and have them prove their innocence, as with the Kibei (id.
9 at 35-36). According to Ringle's estimates, that would require only about 25%
10 of the total evacuee population to be held in custody (Ex. 32, p.4; Ex. 77,
11 p.37; Ex. 78, p.490). Ringle recommended that American citizens of Japanese
12 ancestry be given a role "in the national war effort ... even though subject
13 to greater investigative checks as to background and loyalty, etc., than
14 Caucasian Americans." (Ex. 77, p.7.) However, Ringle discouraged the use of
15 Japanese Americans as teachers for any Japanese descended detainees (Ex. 77,
16 p.51) and recommended that Shintoism be banned as "it is not a true religion
17 but a form of patriotism toward Japan." (Ex. 77, p.53.) Ringle also said
18 that in the pre-war period Japanese Americans were not discriminated against
19 on the basis of race, but rather because they "belonged to a minority group in
20 the American population of whose loyalty and integrity the people at large
21 were not sure." (Ex. 77, p.20; Ex. 78, p.496.)

22 Ringle also wrote an intelligence report dated February 7, 1942 which,
23 unlike the earlier report, was officially approved by Ringle's superior,
24 District Intelligence Officer of the 11th Naval District, Bruce L. Canaga (see
25 also, coram nobis testimony of Richard Hood), and circulated to the Director
26 of Naval Intelligence, the Assistant Chief of Staff G-2 of the War Department
27 Military Intelligence Division (in whose Japanese activities file, No. 000.24,

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1 it still appears), the Aliens Division of the War Department Office of Provost
2 Marshall, to the FBI (Ex. A-7), and by the FBI to their Los Angeles field
3 office (Ex. A-70).

4 This report, entitled "Japanese Menace on Terminal Island, San Pedro,
5 California," noted that more than 80% of the population were Japanese American
6 citizens (Ex. A-7, Report p.1). Ringle's report warns that there is a 75%
7 chance of physical observation and espionage since "known alien sympathizers,
8 even though of American citizenship" were present (Ex. A-7, Report pp.3-4).
9 Ringle also warned about a 20% chance of sabotage which he stated he would
10 have increased but for "the rather rigid and effective guards and protections
11 which have been placed into effect within the last six months." (Ex. A-7,
12 Report p.4.) He also estimated a 5% chance of "fifth column activity" (id.).

13 From the above, we submit that petitioner has failed to show that there
14 is any hard intelligence data in the Munson or Ringle reports -- of a nature
15 similar to the intercepted Japanese diplomatic cables about which they were
16 totally unaware -- which could have been considered exculpatory.

17 4. General DeWitt's Curfew Orders and Evacuation Report.

18 In July 1942 after most of the Japanese Americans were detained, Civil
19 Affairs Officer Col. Karl R. Bendetsen recommended to General DeWitt that the
20 curfew order, which this petitioner violated, be modified or revoked (Ex.
21 A-111). General DeWitt, however, felt the curfew was important and continued
22 it after obtaining the views of his Assistant Chief of Staff G-2
23 (Intelligence), Col. John Weckerling, who agreed with General DeWitt about its
24 importance vis a vis German and Italian aliens, despite the objections of both
25 Bendetsen and, later, of Assistant Secretary of War John J. McCloy (Ex.
26 A-111). Even by that date, G-2 Wecklering advised General DeWitt that
27 Wecklering still continued to be concerned about "sabotage or attempted

1 sabotage on a mass scale ..." (id.). At that time, no West Coast FBI officers
2 nor West Coast Army G-2 officers objected to the curfew and evacuation orders
3 or argued that they were unnecessary (coram nobis testimony of William
4 Hammond, Richard Hood, Robert Mayer and Richard Ham).

5 On January 18, 1943, General DeWitt had a telephone conversation with
6 Assistant Secretary of War McCloy in which they disagreed about allowing
7 evacuees into the U.S. Army. General DeWitt, who "didn't concur" in this plan
8 (Ex. A-84, p.2), had been overruled by the War Department and was upset that
9 he had been instructed to prepare for about 30,000 investigations (Ex. A-84,
10 p.1). General DeWitt told Assistant Secretary of War McCloy that "we wouldn't
11 have evacuated these people at all if we could determine their loyalty."
12 (Id.). McCloy responded (id.):

13 McCloy: I don't know whether we are at one on that --

14 DeWitt: I know we are not one on it --

15 McCloy: We evacuated them from the West Coast because
16 we thought the front was immediate. We couldn't
sort them out immediately. ***

17 About three months later on April 19, 1943, McCloy received DeWitt's
18 report on the evacuation. McCloy immediately complained that "it is sort of a
19 document to support the contention that no Jap is ever going to get back into
20 the Western Defense Command" (Ex. 5, p.2), and "that the Western Defense
21 Command is taking a view which is a little at variance with that of the War
22 Department view" (Ex. 5, p.3) on "the question as to whether the Japanese
23 should be relocated now or not until after the duration [of the war]" (Ex. 5,
24 p.2). McCloy pointed out that the War Department might well overrule issuing
25 that part of the report. (Id. at p.4).

26 Colonel Bendetsen responded that the report was similar to a galley proof
27 and not meant to constitute "a thing of finality" (id. at p.1 and see pp.2, 4,
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1 5), and that the War Department's and DeWitt's differences were not insoluble
2 (id. at pp.2 and 5). Bendetsen also stated that General DeWitt had been
3 misquoted in the newspapers (id. at p.3). As petitioner's original 1943
4 Supreme Court briefs brought to everyone's attention, on April 14, 1943, the
5 Washington Post quoted General DeWitt as stating, inter alia, "A Jap's a Jap"
6 and "There is no way to determine their loyalty" in his testimony before a
7 Congressional Subcommittee on the question of the resettlement of Japanese
8 Americans on the West Coast. (Ex. 130, p.25; Ex. 127, p.114.)

9 Subsequently, Bendetsen (through Barnett, Ex. 14), and McCloy (through
10 Adler, Ex. 16 and through Bendetsen, Ex. 6, p.3) told DeWitt he need not
11 accept changes to his evacuation report. DeWitt at first stood firm against
12 even the idea of any changes (Ex. 101), but by May 5 sought a meeting on the
13 subject with Bendetsen (Ex. 18; Ex. A-45). Finally, by May 9, DeWitt decided
14 to make his own changes (Ex. 8 and 19). In fact, he adopted most of the War
15 Department's suggestions (Ex. 15, pp.1-4) but added many more (Ex. 15, pp.4-9;
16 Ex. 20). The first set of changes went to the printer on May 27, 1943 (Ex.
17 21) and a revised second printing of DeWitt's evacuation report was mailed to
18 Chief of Staff General George C. Marshall in Washington, D.C. on June 18, 1943
19 (Ex. 27) and received on June 21, 1943 (Ex. A-42). General Marshall did not
20 forward DeWitt's report to the Secretary of War until July 19, 1943 (Ex. 29,
21 p.iii). Thereafter, several dozen additional changes were requested on
22 September 11 and 14, 1943 before publication of what was called the "Final
23 official, or 3rd Printing" by Sunset Press for the G.P.O. (Ex. A-108, Ex. 26,
24 and coram nobis testimony of Hannah Zeidlik).

25 Bendetsen sought to live up to his representations to Assistant Secretary
26 McCloy on April 19, 1943 that the first version of the report should be
27 treated no differently than a draft (Ex. 5). Consequently, after DeWitt

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1 decided to change the first printing, Bendetsen recalled the original cover
2 letters (Ex. 19 and 10) and the ten copies of that version which had been
3 printed (Ex. 26, 9, 25). No attempt was made to hide this recall. In fact,
4 the new cover letters sent with the second printing openly referred to the
5 first printing previously recalled and revised (Ex. 27, 23) and dozens of
6 documents memorializing the recall and amendment of the first printing were
7 preserved (see, e.g., Ex. 28, 27, 23, 26, 9, 25, 19, 10, 5, 21, 20, 8, 18,
8 101, 6, 16, 14). Under the prevailing procedures during World War II (Army
9 Regulation 380-5 § 22, Ex. A-63 at p.11, and War Department Circular 201, Ex.
10 A-73), both the first and second printing drafts and plates were destroyed and
11 a certificate of destruction prepared (Ex. 11 and Ex. A-43). However, two
12 copies of the first printing and two copies of the second printing were each
13 carefully preserved and inventoried (Ex. A-108). One of these early ten
14 copies of the first printing was offered by petitioner at the hearing (Ex. 4).
15 Contrary therefore to petitioner's claim that allegedly exculpatory documents
16 were intentionally destroyed, all the documents still exist. None have been
17 intentionally destroyed.

18 5. The Supreme Court Litigation.

19 On the same day that the War Department first received General DeWitt's
20 original version of his evacuation report, April 19, 1943, Edward Ennis at the
21 Justice Department was informed that the War Department was "determining
22 whether it [the report] was to be released" for use in this case (Ex. 36,
23 p.1). At that same time, Ennis declined to use a statement by the Director of
24 the War Relocation Authority which also was "prepared post and propter litem
25 motem" (id. at p.2) -- after the fact and for use in the controversy which had
26 arisen. Ennis also raised the question with the Solicitor General whether the
27

1 government could cite confidential investigative reports to the Supreme Court
2 (id.).

3 As it turned out, the War Department did not decide to declassify and
4 publicly distribute DeWitt's Report until January 1944, nearly six months
5 after the Hirabayashi case was briefed, argued and decided (Ex. A-48a, p.11,
6 fn.2). This delay appears to have resulted from the War Department's concern
7 that General DeWitt was seeking to utilize his evacuation report to gain
8 support for his separate but continuing disagreement with the War Department
9 concerning whether Japanese American servicemen should be permitted to return
10 to the West Coast prior to the end of the war (Ex. A-84, pp. 1-2; Ex. 5,
11 pp. 2-4; Ex. 6, pp. 1-3). The report was, however, made public by the War
12 Department well in advance of the Supreme Court litigation in the Korematsu
13 case, but was not relied upon by the government (A-48a, p.11, fn.2). During
14 the six month hiatus between the drafting and publishing of DeWitt's
15 evacuation report during which time DeWitt disagreed with the War Department
16 over the return of Japanese American servicemen to the West Coast, General
17 DeWitt was replaced by General Enmons, who favored such a return (Ex. A-84,
18 p.3).

19 On April 30, 1943, just prior to filing the government's Supreme Court
20 Hirabayashi brief, Ennis advised the Solicitor General that he obtained a copy
21 of the Ringle report from attorneys for the War Relocation Authority who also
22 advised Ennis "that the Ringle memorandum represent[ed] the view of the Office
23 of Naval Intelligence" at the time of the evacuation, Ex. 35, p.4. Ennis also
24 stated that he was told that under the delimitation agreement, O.N.I. was "the
25 intelligence agency having the most direct responsibility for investigating
26 the Japanese from the security viewpoint ..." (id. at p.3). Ennis prepared a
27 draft letter for the Solicitor General to send to the Secretary of the Navy in

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1 order to ascertain if these facts were true. If they were, then Ennis stated
2 that he believed the government should "advise the Court" of these facts, id.

3 Although the petitioner now echoes Ennis' 1943 concerns, petitioner has
4 not produced any additional correspondence or testimony to bear out Ennis'
5 concerns. Indeed, just to the contrary, Ennis testified (at the coram nobis
6 hearing) that his understanding, ultimately, was that Ringle's views were only
7 accepted by individual Naval intelligence officers, but not officially by
8 O.N.I. (Tr. 438:11-13). Ennis also testified that none of the government
9 activities which ultimately occurred or government papers filed in this case
10 or in the Yasui or Korematsu cases were improper or unconstitutional.

11 Although Ennis left the government and worked with the Japanese American
12 citizens League (J.A.C.L.) in 1946 and became a member of the board of
13 directors of the A.C.L.U. that same year, it never struck him that there
14 remained to be corrected some intentional government misconduct in this case
15 that he should communicate either to the J.A.C.L. or the A.C.L.U. (Tr.
16 336:19-24). Indeed, he testified that the whole incident was so unexceptional
17 that Ennis testified "the whole matter had entirely left [his] memory" until
18 it was brought to his attention in 1981 or 1982 (Tr. 335:24-Tr.336:9).

19 Other evidence confirms Ennis' testimony. The cover letter of both
20 Ringle's January 26, 1943 report (Ex. A-77, p.1) and the preface to the longer
21 WRA version (Ex. 77, p.3) and the published version (Ex. 78, p.490) all
22 disclaim that they represent anything other than Ringle's personal views.
23 Although Ennis states in 1943 (Ex. 35, pp. 2-3) that knowledge of O.N.I.'s
24 Ringle report would have made a difference to him fourteen months earlier,
25 Ennis no doubt forgot in 1943 that he was in fact privy to the original
26 distribution of the Ringle report fourteen months earlier, before Executive
27

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1 Order 9066 was signed (Ex. A-77, p.1), but the report apparently made little
2 or no impression upon him or his office at that time.

3 Ennis was also misinformed about O.N.I. being the intelligence agency
4 with the most direct responsibility. From the later half of 1940 until
5 February 9, 1942, O.N.I. and the FBI shared the responsibility for
6 investigating Japanese espionage, counterespionage, sabotage and subversive
7 activities since

8 * * * the Navy Department [did] not want the full
9 responsibility for the checking of the Japanese because of a
10 lack of personnel, etc. Admiral Anderson furnished ... the
11 background of Commander McCollom and pointed out that the
12 Commander had resided in Japan, knows the Japanese language
and has excellent Japanese contacts. Admiral Anderson agreed
to make Commander McCollom and the Far Eastern Division of the
Navy Department available for consultation and advice to the
FBI at any time it was necessary or desirable. * * *

13 (Ex. A-86, pp. 1-2.)

14 These facts contradicted Ennis' 1943 "informal" information. Even so,
15 the government's opening Hirabayashi brief did bring Lt. Com. Ringle's
16 anonymous October 1942 Harper's magazine article to the Supreme Court's
17 attention (Ex. 99, p.29, fn.46). Of course as noted above, in January 1943,
18 five months earlier, petitioner's Ninth Circuit Reply Brief (Ex. A-5, p.1 and
19 Brief, pp. 2-4) and petitioner's Ninth Circuit brief answering amicus
20 California (Ex. 125, p.1 and Brief, pp. 1-2) made major arguments citing the
21 intelligence views of the Harper's article. The Harper's article was also
22 brought to the Supreme Court's attention by petitioner (Ex. 126, p.21) and two
23 of his amici (Ex. 127, pp.92, 93; Ex. 128, p.15).

24 Moreover, neither in this case, nor in the Yasui and Korematsu cases did
25 the government defend the wisdom of General DeWitt's decision nor argue that
26 Japanese Americans were in fact disloyal. Rather, the government's position
27 was that the government as a whole, not just General DeWitt, was faced with a
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difficult decision during wartime in a declared war zone, and under those conditions its actions were rational and therefore minimally acceptable. See Ex. 98, pp.10, 14-15; Tr. 422:2-5.)

The government's Supreme Court Hirabayashi brief (Ex. 99) stated:

The situation which gave rise to the curfew and evacuation measures was wholly unprecedented in the history of this country. The validity of those measures must be tested, not in the light of the military situation as it exists today, nor even in the light of the military situation as it existed at that time viewed as a matter of hindsight. * * * (p.60).

* * * * *

The exact and detailed military situation affecting the Pacific Coast after the attack on Pearl Harbor, which was within the personal and official knowledge of the President, the Secretary of War and General DeWitt when it was determined that the entire Japanese population should be evacuated, was a closely guarded military secret. It was not a matter of public knowledge then or now, and probably cannot be a matter of public knowledge at least until the military authorities decide that there is no possible military risk. However, the facts about the military situation which were then publicly known or have since been disclosed may be stated in support of the action taken. (p.12).

* * * * *

Our Pacific Fleet had been rendered all but powerless for the time being, and the Japanese forces were making bold and impressive strides. Indeed, our very coast had been shelled. Faced with the responsibility of repelling a possible Japanese invasion which might have threatened the very integrity of our nation, it was the duty of the commanding general to take into account the plain fact that over 100,000 Japanese were grouped along the coast. It was essential to recognize that although the majority of these people might be regarded as loyal to the United States, a disloyal minority, if only a few hundreds or thousands, strategically placed, might spell the difference between the success or failure of any attempted invasion. (p.61).

* * * Even assuming that administrative hearings might have been held for each Japanese, such hearings would have been virtually worthless unless each were preceded by an investigation carefully conducted by a trained investigator.

1 Many months, or perhaps years, would be required for such
2 investigations and hearings. / Meanwhile the threat of a
3 Japanese attack would persist.

4 / Based on investigations by the Federal Bureau of
5 Investigation over a course of years, about 10,000 hearings
6 have been granted to alien enemies throughout the United
7 States since December 7, 1941. (p.62).

8 * * * * *

9 * * * The rationale of the action here in controversy is not
10 the loyalty or disloyalty of individuals but the danger from
11 the residence of the class as such within a vital military
12 area. If there was a rational basis for this judgment, then
13 the only question that remains is whether a given individual
14 was or was not a person of Japanese ancestry. (p. 64).

15 After the oral Supreme Court argument, the government filed an additional
16 pleading on May 14, 1943, to clarify its precise position in this case:

17 * * * Our position is not that hearings are an inappropriate
18 method of reaching a decision on the question of loyalty. The
19 Government does not contend that, assuming adequate
20 opportunity for investigation, hearings may not ever be
21 appropriately utilized on the question of the loyalty of the
22 persons here involved. It is submitted, however, that in the
23 circumstances set forth in our brief, this method was not
24 available to solve the problem which confronted the country.
25 The situation did not lend itself; in the unique and pressing
26 circumstances, to solution by individual loyalty hearings. In
27 any event, the method of individual hearings was reasonably
28 thought to be unavailable by those who were obliged to decide
upon the measures to be taken. If the Government's brief (pp.
62-64) is thought to be inconsistent with the views set forth
herein, it is requested that this memorandum be considered as
superseding the brief to this extent. (Ex. 131, pp. 1-2.)

At the coram nobis hearing, Ed Ennis supported this assessment of the
situation. He testified that holding just the 5,000 Japanese alien hearings
took between one and two years (Tr. 242:1-7; Tr. 275:14-17).

Approximately one year later when the Korematsu case was being briefed
and argued in the Supreme Court, the government made essentially the same
arguments (Ex. A-48a, pp. 22-24). Even though a modified version of DeWitt's

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1 report was published by that time, the War Department reluctantly acquiesced
2 in the Department of Justice's decision not to rely generally upon DeWitt's
3 report, see Ex. A-48a, p.11, fn.2. The War Department did not choose to
4 reveal to the Court or even the Department of Justice attorneys (Ex. A-85),
5 the still classified fact that intercepted Japanese diplomatic cables, only
6 the substance of which were widely distributed in early 1942, lay behind the
7 fears of the leaders of the professional intelligence community . Ennis
8 testified that throughout the war he was kept ignorant of that entire
9 intelligence operation, which remained highly classified until the 1946 Pearl
10 Harbor hearings. See Ex. A-71 and testimony of David Lowman. However,
11 neither Ennis nor Burling had clearance for nor received any confidential
12 military information (Tr. 315:1-6 & 11-17; Tr. 324:9-11; Tr. 325:6-19). For
13 this reason, Ennis and Burling's perceptions of the War Department's motives
14 were not based on a full appreciation of all the relevant facts. 6/

15 IV.

16 PETITIONER HAS NOT CARRIED HIS BURDEN OF PROOF.

17 1. The Outcome of Petitioner's Case was Unaffected by the Facts He
18 has Adduced.

19 Petitioner claimed that he and the Supreme Court were knowingly and
20 prejudicially misled both in his case and in the Korematsu Supreme Court
21 proceeding.

22
23
24 6/ Ennis testified that he also had no confidence in and disagreed
25 strongly with the military judgment calls made by Admiral Nimitz and
26 General Richardson in Hawaii (Tr. 343:25-345:22), by General Drum in the
27 Eastern Defense Command (Tr. 420:1-9), and by General Gullion (Tr.
28 397:2-3). Ennis and Burling's protests were also prompted by their view
that General DeWitt's evacuation report sought "to blame this Department
with the evacuation by suggesting that we were derelict in our duties."
Ex. 84, p.2 (Burling, emphasis added); accord, Ex. 44, p.2 (Ennis).

1 At the coram nobis hearing, Ennis testified that prior to 1943 he had
2 supervised hundreds of cases and was sensitive to the need to disclose
3 exculpatory information at trial (Tr. 263:12-23). He went on to state
4 that since the Supreme Court was not the trial court, no question of
5 disclosing exculpatory evidence was presented in this case, or is ever
6 presented at that stage of a case (Tr. 406-407; Tr. 338:2-5). Rather, the
7 problem presented was "what we should call to the attention of the Court
8 ... as subject to judicial notice." (Tr. 222:7-9). Ennis testified that
9 the government's position in the Hirabayashi case -- that there was not
10 sufficient time to hold individual hearings -- was "a correct" and
11 "appropriate" government representation (Tr. 279:10-18) which he himself
12 might have constructed (Tr. 246:14-15) and with which the Solicitor
13 General agreed (Tr. 280:16), even assuming that General DeWitt personally
14 took the more extreme and injudicious position that hearings were useless.
15 Ennis testified that his objections to the evacuation were not based on
16 the availability of hearings. Rather, Ennis objected to evacuation
17 because he was not aware of facts which suggested that there was "a
18 serious enough danger in the Japanese community to have any exclusion
19 program at all...." (Tr. 279:13-15). 7/

20 Ennis stated that in his personal meetings with General DeWitt in
21 December 1941 and January 1942, DeWitt exhibited a "general fear of
22 sabotage and espionage" (Tr. 288:14), but exhibited no personal animus

23 _____
24 7/ Ennis admitted, however, that he and Burling did not have any special
25 clearances for decrypted cable information (Tr. 315: 5-6; Tr. 324:11), did
26 not regularly receive ONI reports (Tr. 315:15-16) or General DeWitt's
27 military reports (Tr. 313:13), and did not attend meetings of the Joint
28 Chiefs of Staff, meetings with Chief of Staff George C. Marshall nor
meetings with the military "G-2"s (Tr. 324:6-16).

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1 toward people of Japanese ancestry (Tr. 343:4-8). Ennis testified that
2 J. Edgar Hoover "was neutral" and "didn't seek to make any recommendation
3 or urge any course of action" with respect to Executive Order 9066 (Tr.
4 382:1-13), even though "there were differences of opinion between the
5 civilian Department [of Justice] and the military Department [of War] as
6 to what was required in Continental United States." (Tr. 314:23-25.)

7 With regard to the briefs in these cases, Ennis stated that he did
8 not believe that the government was entitled to introduce classified
9 military intelligence reports, rather than public information, in support
10 of a judicial notice argument (Tr. 318:19-20). Consequently, the
11 government did not discuss any such reports and candidly told the Supreme
12 Court that no such material was being made available (Tr. 318:21-23; Ex.
13 99, p.12).

14 Even at the time of the writing of the government's Korematsu briefs
15 more than one year later and after the publication of General DeWitt's
16 evacuation report, Ennis' proposed footnote did not seek to offer
17 conflicting classified military information to the Supreme Court (Tr.
18 338:16-17). Rather, Ennis simply sought to notify the Supreme Court not
19 to rely generally upon General DeWitt's written recitation of the publicly
20 known facts since parts of DeWitt's published report were disputed by
21 other classified information (Tr. 326:10; Tr. 338:16-21; Tr. 208:14-22;
22 Tr. 253:2-4, 10-11, 17-20), with which Ennis never confronted DeWitt (Tr.
23 321:23-Tr. 322:1). Ennis went on to testify that the footnote that was
24 used (Ex. A-48, p.11, fn.2), which Ennis also proposed (Tr. 254:15-16),
25 was "the narrowest way to deal with the problem ... and avoided any
26 censurable misconduct" even if the A.C.L.U. brief had not been filed in
27 the Korematsu case (Tr. 377:2-4). That footnote, carefully narrowing the

1 government's reliance on General DeWitt's report only to the extent that
2 its facts were actually repeated in the government's brief (Tr.
3 208:17-22), was approved by Ennis, Burling, Assistant Attorney General
4 Herbert Wexler of the War Division of the Justice Department, and
5 Solicitor General Charles Fahy, none of whom disassociated themselves from
6 the brief (Tr. 327:12-Tr. 328:19), although Ennis had previously warned
7 Fahy that he might do so (Tr. 254:8; Tr. 325:20-24). Ennis testified that
8 the Korematsu footnote as it finally appeared "wasn't misleading if it was
9 carefully read..." (Tr. 326:2-3) and met the required minimum standard of
10 disclosure (Tr. 328:13-19).

11 In addition, Ennis testified that the A.C.L.U.'s brief included a
12 "statement of the same problem" raised in his memoranda (Tr. 372:22),
13 identified the same concerns Ennis expressed in his memoranda (Tr.
14 374:13-15), and its discussion was "longer" and "clearer" than even the
15 proposed footnote which was not used. (Tr. 375:2-11.) Thus, Ennis
16 testified, the A.C.L.U. brief "leads correctly to the inference that this
17 problem was called to the Court's attention more clearly than in our
18 footnote..." (Tr. 376:17-19, emphasis added). Thus, Ennis' prospective
19 fears memorialized in his and Burling's pre-argument memoranda were never
20 realized.

21 Furthermore, Ennis stated (Tr. 418:6-15) that Korematsu's October
22 1944 A.C.L.U. amicus brief was signed by Carey McWilliams, see also Ex.
23 A-46, p.27. McWilliams published a book called "Prejudice" in October
24 1944 (Ex. A-67, p.viii) identifying at p.114 Lt. Col. K.D. Ringle as the
25 intelligence officer who prepared the Harper's Magazine article cited by
26 all the parties (Ex. A-66, p.191, fn.55). Ennis testified that Justices
27 Murphy's and Jackson's dissents in the Korematsu case (323 U.S. 233-242)

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1 showed that the Supreme Court was not misled by the government's position
2 in these cases (Tr. 374:16-18). Ennis testified that the dissents of both
3 Justices Murphy and Jackson showed that the Court was indeed alerted "that
4 the Army's justification was disputed" (Tr. 326:8-10). Ennis stated that
5 the Justices "said the [DeWitt] report is full of erroneous statements,
6 and the erroneous statements they referred to were the information I tried
7 to get into the footnote." (Tr. 256:25-Tr. 257:3). Moreover, in that
8 part of Justice Murphy's dissent attacking DeWitt's final report, Justice
9 Murphy cited McWilliams' book "Prejudice" four times (323 U.S. at p.237,
10 fn.6, at p.238, fn.7 and fn.9, and at p.239, fn.12).

11 The Supreme Court simply chose to reject the suggestion to remand the
12 case for a detailed factual exposition of all the confidential military
13 reports, which suggestion was candidly noted at oral argument by the
14 Solicitor General (Ex. 98, p.9), advocated by dissenting Justice Murphy
15 (Tr. 331:9-10), and later urged by Korematsu in his unsuccessful rehearing
16 petition (at p. 9-11) to the Supreme Court, 324 U.S. 885 (1945). In
17 addition, Nanette Dembitz, one of the government's attorneys in the
18 Hirabayashi case (Ex. 99, p.82), made this same point in a 1945 law review
19 article (Ex. A-66, p.227) which criticized the Supreme Court for making
20 the policy choice not to remand the Korematsu case for a detailed
21 evidentiary hearing. Accord, Rostow, "The Japanese American Cases -- A
22 Disaster," 54 Yale L.J. 489, 520 (1945) (pointing out the significance of
23 footnote two in the government's brief). All of the above shows that
24 neither the parties, the Supreme Court, nor the legal community were
25 misled by government officials into believing that the decisions in these
26 cases should be based upon an uncritical acceptance of all the details of
27 General DeWitt's evacuation report.

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1 Petitioner also complains about illicit radio signalling fears
2 expressed in General DeWitt's evacuation report and about the use of data
3 from General DeWitt's evacuation report in the Hirabayashi Supreme Court
4 brief of amici California, Oregon and Washington.

5 Initially, we point out that as noted above, General DeWitt's report
6 and views were not declassified in 1943 and therefore played no part in
7 the outcome of the Hirabayashi case. Even if General DeWitt's personal
8 views had mattered, it is clear that even if misinformed, General DeWitt
9 sincerely believed: (1) that the F.B.I.'s post Pearl Harbor arrests of
10 Japanese aliens were not sufficiently thorough 8/; (2) that mobile radio

11 _____
12 8/ When asked to comment in April 1944 upon the fears expressed by
13 General DeWitt in his evacuation report, Dillon S. Meyer, then Director of
14 the WRA wrote to the Secretary of War in a confidential memorandum that
15 General DeWitt's "confidence in the thoroughness of the clean-up
16 operations immediately following the outbreak of war was something less
17 than complete." Ex. 112, p.4. All versions of DeWitt's report begin by
18 complaining that in the post-Pearl Harbor period "little was done to
19 implement the presidential proclamation. No steps were taken to provide
20 for the collection of contraband and no prohibited zones were proclaimed."
21 Ex. 4, p.3; see also Ex. 29, p.3. As noted in this pleading at pp.20-21,
22 General DeWitt's Corps Area was "reliably" advised by M.I.D. on January 3,
23 1942 (by Ex. A-6): (1) that "[a]pproximately 5,000 Japanese are
24 congregating at some undetermined point in strategic Baja California";
25 (2) that the border towns on both sides of the United States-Mexican
26 border "are well known Japanese 'post offices' and espionage centers"; and
27 (3) that most of the leaders of Japanese "clubs," labor organizations and
28 legitimate business groups were still functioning at that time as key
operatives of the Japanese Intelligence Network along the West Coast. See
also Ex. A-50, of which Ex. A-81 reports the Western Defense Command was
aware. Ennis also testified to DeWitt's general fear of espionage and
sabotage (Tr. 288:14; Tr. 285:25-Tr. 286:1-7). General DeWitt's fears
were certainly not put to rest by FBI raids as late as February 7, 1942
resulting in the confiscation from enemy aliens of twenty one sticks and
one half box of dynamite, one hundred sixty six dynamite blasting caps,
three pounds of black powder, one hundred sixty three feet of fuse, eight
millimeter film containing photographs of battleships and fortifications,
four cameras, several firearms and ammunition, two shortwave radio sets,
seven radios capable of receiving shortwave, three telegrapher's keys, one
radio oscillator, a microphone, and four boxes of assorted radio
(Footnote Continued)

transmitting units were illegally operating on the West Coast 9/ assisting
enemy submarines which were attacking our coastal shipping 10/; that the
resources then available were not sufficient to resolve that problem 11/;

(Footnote Continued)

equipment. Ex. A-1. Former FBI Special Agent in Charge Richard Hood testified that suspicious persons of Japanese dissent continued to be rounded up for months after Pearl Harbor. Ennis testified that approximately 4,000 Japanese aliens not picked up shortly after Pearl Harbor were ultimately apprehended. (Tr. 273:10-274:20.)

9/ As of January 9, 1942 "... Gen'l DeWitt seemed concerned and, in fact, seemed to believe that the woods were full of Japs with transmitters..." (Ex. 107, p.1). DeWitt's operational personnel "report to their commanding officers that they have fixes on Jap agents operating transmitters on the West Coast. These officers, knowing no different, pass it on to the general and he takes their word for it." (Ex. 107, p.2). All versions of DeWitt's report describe DeWitt's concern "during the closing weeks of December" which "was in part based upon the interception of unauthorized radio communications which had been identified as emanating from certain areas along the coast." Ex. 4, pp. 3-4; and Ex. 29, pp. 3-4.

10/ All versions of General DeWitt's report state: "Of further concern ... was the fact that for a period of several weeks following December 7th, substantially every ship leaving a West Coast port was attacked by an enemy submarine. This seemed conclusively to point to the existence of hostile shore-to-ship (submarine) communications." Ex. 4, p.4; Ex. 29, p.4. An FCC report also notes that shortly before January 9, 1942 "a Jap sub off the coast ... was destroyed by bombing from the air." Ex. 107, p.2. G-2 Periodic Reports reflected the presence of enemy submarines on the West Coast during late December and January. Ex. 57, pp. 1-2 and Ex. A-51 (map); Ex. 58, p.1 and Ex. A-52 (map); Ex. 59, pp. 1-2 and Ex. A-53 (map); Ex. A-54 (map); Ex. 61, p.1 and Ex. A-55 (map). The 1944 FBI retrospective comment upon these submarine attacks did not dispute that they took place but simply "pointed out that undoubtedly the Japanese Navy had made preparations for submarines to proceed to the West Coast immediately after Pearl Harbor and, quite naturally ... these attacks would follow." Ex. 41, Memo p.3.

11/ On December 31, 1941, San Francisco FCC supervisor Greaves (see Ex. 102) told Lt. Col. L.R. Forney, General DeWitt's G-2 in charge of counterespionage (see Ex. 107, p.1) that he operated "only a monitoring service and has only a very few men" and that there "probably are a large number of ... records in Washington pertaining to [suspected illegal radio sets on the West Coast] but they are not immediately available to him." Nonetheless, he guessed that there were not "more than ten to twenty-five cases of reasonably probable illegal operation of radio sending sets on
(Footnote Continued)

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1 and that there was a realistic possibility of both enemy air and naval
2 (especially submarine) raids upon the Western Defense Command. 12/ As the
3 Supreme Court noted, retrospective analyses with the perfect hindsight it
4 affords does not undercut the authority of a military commander who acted
5 in good faith on the basis of the information then at hand. Mitchell v.
6 Harmony, 54 U.S. (13 How.) 115, 134-135 (1851) ("... the state of facts,
7 as they appeared to the officer at the time he acted, must govern the
8 decision ... and the discovery afterwards that it was false or erroneous,
9 will not [control or] make him a trespasser."); Sterling v. Constantin,
10 287 U.S. 378, 399-400 (1932). In any event, even if petitioner's case had
11 been remanded, the now declassified cables and the intelligence reports
12

13 (Footnote Continued)

14 the entire Pacific Coast." The impression Lt. Col. Forney gained was that
15 the FCC was "not in a position to take an extensive part in solving the
16 problem being considered by the Commanding General." (Ex. A-83). At a
17 subsequent meeting with the FCC on January 9, 1942, General DeWitt's
18 officers "stressed the necessity of finding the transmitter quickly...."
19 Ex. 107, p.3. The FCC representative, George Sterling, who was the Chief
20 of the FCC's National Defense Operations (see Ex. 102, p.2), told General
21 DeWitt "that ... while time is of the essence ... not to be surprised if
22 it took several hours and possibly days if [the transmitter] were moving
23 about." Ex. 107, p.3. This led General DeWitt to immediately concur in
24 the plans for a well equipped and staffed Joint Radio Intelligence Center
25 (Ex. 107, p.4), and General DeWitt went so far as to agree to finance its
26 \$30,000 start up cost and \$200,000 annual operating cost (Ex. 107, p.4;
27 Ex. 106, Ex. 104). The Center did not actually begin operating, however,
28 until March 1942 (Ex. 43, p.3) and did not change General DeWitt's sincere
belief that in the event of an emergency, "a number of illegal stations
will come into being." Ex. 81. As late as January 24, 1942, General
DeWitt continued to believe that illegal transmitters were aiding the
enemy, and DeWitt freely said so to the Secretary of War, who informed the
Attorney General that he had independently confirmed General DeWitt's
apprehensions. Ex. A-2.

12/ See the G-2 Periodic Reports, Part 4, e.g., Ex. 57, p.2; Ex. 58, p.2;
Ex. 59, p.2; Ex. 60, p.2; Ex. 61, pp. 2-3; Ex. 62, p.2; Ex. 63, p.3; Ex.
64, p.4. Petitioner's observation that the nearest hostile ground forces
were more than 2,000 miles away (Pet. Post-Hearing Br. 27:18, 28:5) is
beside the point.

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1 which relied upon the cables show that there was some military
2 intelligence basis for General DeWitt's and the War Department's fears.

3 Finally, even though amici California, Oregon and Washington may have
4 consulted or even used parts of an early version of General DeWitt's
5 evacuation report, the amici did not represent or even suggest that the
6 Supreme Court should give special consideration to those portions of their
7 brief because such portions originated with General DeWitt's command. At
8 the coram nobis hearing, petitioner's witness, Ennis, could not recall
9 whether these amici on behalf of the government got the same pages of the
10 early version of DeWitt's report that were made available to Ennis and
11 Burling at the Department of Justice at that time (Tr. 282:15-24), as
12 suggested in Ex. 84, p.2, or whether the amici got other portions as well,
13 as suggested in Ex. 2, p.3. Ennis was offended not so much by the amici,
14 as at the Army officials who made DeWitt's draft available to the amici
15 without Ennis' knowledge or permission (Tr. 283:4-12). Ennis conceded,
16 however, that if his permission had been asked he probably would not have
17 objected to making the material available to the amici (Tr. 284:15-285:1).
18 At all events, Ennis testified that no part of the amici brief that was
19 filed was particularly offensive (Tr. 284:3-6), and none of these actions
20 materially altered the way this case was argued and decided (Tr.
21 283:13-15). There was, therefore, no evidence that this conduct had any
22 effect on the outcome of this case.

23 In sum, petitioner has not carried his heavy burden of demonstrating
24 that any errors of a fundamental magnitude occurred, and that "but for
25 [them] a more favorable judgment would have been rendered." United States
26 v. Darnell, supra, 716 F.2d at 481, n.5. This is true not only as to
27 petitioner's curfew conviction -- which is all, we submit, that was at

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1 issue in the Supreme Court in 1943 -- but, as we have demonstrated above,
2 even as to petitioner's evacuation conviction. 13/

3 At bottom, petitioner suggests that it was improper for the
4 government simply to brief a judicial notice argument, and erroneous for
5 the Supreme Court to have utilized judicial notice to deal with
6 confidential military information (which included the highly secret
7 decrypting of intercepted Japanese cables), rather than remanding the case
8 for a public trial of these matters during an ongoing war. This is the
9 same procedural issue which concerned Justice Jackson in the Korematsu
10 case (dissenting, 323 U.S. at 245) where he complained that military
11 decisions are not susceptible of "intelligent judicial appraisal" because
12 they "do not pretend to rest on evidence, but are made on information that
13 often would not be admissible[,] assumptions that could not be proved,"
14 and confidential national defense information that "could not be disclosed
15 to courts...." That issue, however, was thoroughly discussed and decided
16 in 1943 and the doctrine of res judicata bars the petitioner from
17 reopening his case simply to relitigate this issue because it might be
18 more favorably treated now than in 1943. The Supreme Court in Federated
19 Department Stores, Inc. v. Moitie, 452 U.S. 394, 398, 401-02 (1981),
20 stated in words equally applicable here:

21 _____
22 13/ At the coram nobis hearing, petitioner's own counsel candidly told
23 the court:

24 "We can't sit here today and say that if this information had
25 been made available to the Court it would have changed the
Court's opinion. I don't think anyone can say that." (Tr.
114:16-19.)

26 Accord, Korematsu v. United States, 584 F. Supp. 1406, 1419 (N.D. Ca. 1984)
27 (Footnote Continued)

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1 . . . the res judicata consequences of a final . . . judgment
2 on the merits [are not] altered by the fact that the judgment
3 may have been wrong or rested on a legal principle
4 subsequently overruled in another case. Angel v. Bullington,
5 330 U.S. 183, 182 (1947); Chicot County Drainage District v.
6 Baxter State Bank, 308 U.S. 371 (1940); Wilson's Executor v.
7 Dean, 121 U.S. 525, 534 (1887).

8 * * * * *

9 This court has long recognized that "[p]ublic policy
10 dictates that there be an end of litigation; that those who
11 have contested an issue shall be bound by the result of the
12 contest, and that matters once tried shall be considered
13 forever settled as between the parties." Baldwin v. Traveling
14 Men's Assn., 283 U.S. 522, 525 (1931).

15 2. Laches Bars Relief.

16 Petitioner has failed to carry his burden of showing "sound reasons"
17 for his failure to seek appropriate earlier relief.

18 A recent Ninth Circuit opinion, Maghe v. United States, 710 F.2d 503
19 (9th Cir.), cert. denied, 463 U.S. 1212 (1983), restated the rule
20 announced by the Supreme Court in United States v. Morgan, 346 U.S. 502,
21 512 (1954):

22 To be entitled to a writ of coram nobis, Maghe must show that,
23 there are "sound reasons" for his failure to seek relief
24 earlier. United States v. Morgan, 346 U.S. 502, 512, 74 S.Ct.
25 247, 253, 98 L.Ed. 248 (1954). The district court properly
26 denied Maghe's petition without a hearing because he failed to
27 allege an adequate factual basis justifying his 25-year delay
28 in seeking relief. See United States v. Taylor, 648 F.2d 565,
573 (9th Cir.), cert. denied, 545 U.S. 866, 102 S.Ct. 329, 70
L.Ed.2d 168 (1981).

The court then went on to explain that a prior lack of interest or a
newly acquired interest in seeking relief is not a "sound reason" that

(Footnote Continued)

("Whether a fuller, more accurate record would have prompted a different
decision cannot be determined.")

1 will justify a long delay in seeking legal relief. Accord United States
2 v. Correa-DeJesus, 708 F.2d 1283, 1286 (7th Cir.), cert. denied, 464 U.S.
3 1010 (1983).

4 The factual circumstances which this petitioner raises have all been
5 matters of public record for nearly forty years. This petitioner's 1943
6 Supreme Court brief explicitly complained to the Supreme Court about
7 General DeWitt's statements that "There is no way to determine [Japanese
8 American] loyalty." Ex. 130, p.25. Korematsu's 1944 pleadings (Ex. A-46,
9 p. 21-23) argued to the Supreme Court about the government's footnote in
10 its Korematsu brief and about: (1) General DeWitt's reported illegal radio
11 signals; (2) the Harper's article conclusions; and (3) the lack of O.N.I.
12 or FBI reports in the record. The 1944 McWilliams book (Ex. A-67, p.114)
13 [and the 1945 Dembitz law review article (Ex. A-66, p.191, fn.55)]
14 identified Lt. Com. K.D. Ringle of the O.N.I. as author of the Harper's
15 magazine article. Morton Grodzins published Americans Betrayed in 1949
16 (Ex. A-49) and recounted in great detail the controversy among the
17 Department of Justice, the FBI, the FCC, Ringle's supporters, and the War
18 Department. 14/ Since petitioner conceded in his testimony at the coram

19
20 14/ Chapter nine, particularly pp.280-297, of Grodzins' 1949 book,
21 (which this Court agreed to judicially notice for laches purposes, Tr.
22 535:20-21) detailed most of the same publicly available declassified
23 intelligence information and exhibits discussed by the petitioner. The
24 book commented upon the policy position of Lt. Com. Ringle of the Office
25 of Naval Intelligence (Americans Betrayed, pp.145-146 & n.46, 188-189),
26 the FBI (id., pp.188, n.23, 257-258 & n.49), and the FCC (id., pp.291-293)
27 contradicting the Final Report's references such as to off-shore and radio
28 signalling. Grodzins' book also highlights the position of General DeWitt
and the conflict between McCloy at the War Department and Ennis at the
Department of Justice. As a result, Grodzins suggested going back to the
judicial system in 1949 because, citing Justice Jackson, "the Court's
validation of evacuation remains like a loaded weapon...." (Id.,
pp.357-358.) This is the identical justification petitioner urges today
(Post-Hearing Br. 49:16). The research for Grodzins' book included access
(Footnote Continued)

1 nobis hearing that he was not unfamiliar with these source materials but
2 nonetheless made no real effort to seek to challenge his conviction until
3 the 1970's, he has contributed by his own inaction to the four decades of
4 delay which have made it impossible for a court to reexamine and redécide
5 what originally occurred. In addition, as the testimony of Ennis and the
6 government witnesses showed, detailed recollections about these very
7 specific forty year old events are no longer available. Even where old
8 records of these events were made (see Ex. A-78, p.132, fn.17 and Ex.
9 A-11, p.121, fn.20, quoting and recounting in 1960 the importance in 1942
10 of Ex. A-50), the notes of those now enfeebled military historians, e.g.,
11 Stetson Conn (coram nobis testimony of Hannah Zeidlik), though available
12 at least as late as 1969 (see Ex. A-74, p.vii), have also been lost (coram
13 nobis testimony of Hannah Zeidlik).

14 All the while, the archival material -- from which petitioner's
15 attorney was able to obtain and construct the bulk of the petition in four
16 months (between August 28, 1981, Tr. Ex. A-76, and December 9, 1981, Ex.
17 A-8) -- and the different versions of DeWitt's evacuation report were
18 publicly available at the National Archives (Ex. A-124, Ex. A-109, Ex.
19 A-108, and coram nobis testimony of Hannah Zeidlik). Petitioner testified
20 that prior to the filing of the petition, he never even made an FOIA
21 request to review the original documents and memoranda from his case.

22 (Footnote Continued)

23 in the 1940's to the Department of Justice files (*id.*, 182, n.6, 208, n.6)
24 and personal interviews with Ed Ennis (*id.*, 231, n.1, 232, n.3, 255,
25 n.57), James Rowe, Jr., then assistant to the Attorney General (*id.*, 240,
26 n.21, 266, n.78), John J. McCloy, then Assistant Secretary of War (*id.*,
27 259, n.65, p.264, n.74), and Francis Biddle, then Attorney General (*id.*,
28 pp. 154-159, 167), which reprinted the text of the 1944 FBI and FCC
letters disparaging General DeWitt's evacuation report.

1 The district court decision in Hohri v. United States, 586 F. Supp.
2 769 (D.D.C. 1984, app. pending No. 84-5460) (Japanese American internment
3 related civil damage suit) is instructive in this respect. Almost the
4 identical factual allegations of misconduct made here were made there (see
5 586 F. Supp. 772-781). That court stated that the same books and public
6 records offered by the government in the instant case showed on their face
7 that even under the plaintiff's version of the facts, "the underlying
8 documents concealed from the Supreme Court in 1944 became public and were
9 available to diligent plaintiffs from the late 1940's onward." Id. at
10 790. The court continued:

11 The publication in the late 1940's of the previously concealed
12 Ringle, Fly, and Hoover documents, not the publication in the
13 1980's of the Ennis and Burling memoranda, provided the basis
14 on which plaintiffs could have filed a complaint challenging
15 the military necessity finding ... (Id.).

16 * * * * *

17 It may be that timely claims on their behalf would have
18 prevailed. But it is now close to forty years after the camps
19 were closed, and almost that long after the facts essential to
20 those claims were published. Much time has passed, memories
21 have dimmed, and many of the actors have died. _/ * * *

22 / For example, General DeWitt, a critical witness, died in
23 1962. (Id. at 795.)

24 The conclusion is inescapable. Petitioner has offered no sufficient
25 justification for his forty year delay in seeking relief.

26 3. Petitioner Labors Under no Legal Disabilities and Presents no
27 Cognizable Injury which this Court could Redress.

28 If there are no present adverse legal consequences flowing from a
conviction, there is no justiciable case or controversy.

Collateral attacks upon old criminal convictions, where the sentence
has already been served, are moot "if it is shown that there is no

1 possibility that any collateral legal consequences will be imposed on the
2 basis of the challenged conviction." Sibron v. New York, 392 U.S. 40, 57
3 (1968); United States v. Morgan, supra, 346 U.S. at 512-513; Ybarra v.
4 United States, 461 F.2d 1195 (9th Cir. 1972); Chavez v. United States, 447
5 F.2d 1373 (9th Cir. 1971). This doctrine was recently discussed in Lane
6 v. Williams, 455 U.S. 624, 632 (1982). There, the Supreme Court noted
7 that the typical legal consequences which warranted an exercise of
8 collateral relief involved civil penalties such as loss of the right to
9 vote, the right to serve as an official of a labor union for a specified
10 period of time, or to engage in certain businesses. None of those
11 allegations are made here.

12 This petitioner offered no testimony at the coram nobis hearing that
13 his convictions ever resulted in the loss of a job or impeachment in any
14 legal proceeding. His only claim is that he suffers from moral stigma and
15 that there is the "remote" possibility (Pet.'s Post-Hearing Br. 48) that
16 his now forty year old test case misdemeanor convictions could be used in
17 some legal forum to impeach his credibility or affect some future
18 sentence.

19 There is no allegation that the misdemeanor convictions at issue
20 deprive petitioner of any of his civil rights (to vote, etc.). As in Lane
21 v. Williams, supra, since no felony violations are involved

22 *** No civil disabilities such as those present in Carafas
23 [v. La Valle, 391 U.S. 234] result ... At most, certain
24 nonstatutory consequences may occur; employment prospects, or
25 the sentence imposed in a future criminal proceeding, could be
26 affected *** The discretionary decisions that are made by an
27 employer or a sentencing judge, however, are not governed by
28 the mere presence or absence of a recorded violation ... Any
disabilities that flow from what respondents did ... are not
removed or even affected by a District Court order ... In
these circumstances, no live controversy remains.

1 In St. Pierre v. United States, 319 U.S. 41, 43 (1943), the Supreme
2 Court stated that it is an insufficient allegation, as a matter of law, to
3 allege as a present adverse legal consequence "that the judgment may
4 impair [the petitioner's] credibility ... in any future legal proceeding."
5 In Sibron, the Court did not overrule that holding, but rather revalidated
6 it and took considerable pains to distinguish it on the unique facts
7 present in Sibron. In this regard, the Sibron opinion states, 392 U.S. at
8 56, fn.17:

9 We note that there is a clear distinction between a
10 general impairment of credibility, to which the Court referred
11 in St. Pierre, see 319 U.S., at 43, and New York's specific
12 statutory authorization for use of the conviction to impeach
13 the "character" of a defendant in a criminal proceeding. The
14 latter is a clear legal disability deliberately and
15 specifically imposed by the legislature. (Emphasis added.)

16 In the instant case, this "clear distinction" between a general and
17 specific impairment of credibility is totally absent. There is no specific
18 statutory disability imposed by the federal legislature attaching to this
19 misdemeanor conviction. Indeed, just the opposite is true here. The federal
20 legislature has repealed the statute involved in the instant case, 18 U.S.C.
21 § 1383, and enacted 18 U.S.C. § 4001(a) to prohibit the repetition of any
22 similar executive orders.

23 If petitioner were correct that the "remote" possibility of impeachment
24 from a forty year old already-repealed malum prohibitum misdemeanor in some
25 undetermined state or foreign legal forum is a sufficient disability to
26 maintain a case or controversy, then the above-quoted language from Sibron was
27 totally unnecessary and St. Pierre has been overruled, not distinguished.
28 Every outstanding conviction, no matter how slight its effect, could
hypothetically lead to impeachment in some forum and would therefore be
sufficient, per se, to maintain collateral review. That result would render
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1 St. Pierre a nullity and would have obviated the Sibron decision's careful
2 language distinguishing, not overruling, St. Pierre. See, e.g., 392 U.S. at
3 56, fn.17 supra and also at pp.51, 53 and fn.13, and 57.

4 The second adverse legal consequence that petitioner has identified,
5 "that the conviction will become a consideration in some future sentencing,"
6 is also legally insufficient. That too is universally true of all convictions
7 in every conceivable hypothetical situation. Therefore, this ruling is also
8 in direct conflict with the continued viability of St. Pierre. Once again, in
9 Sibron a specific legislative provision in the New York Criminal Code mandated
10 that any subsequent repetition of that misdemeanor conduct (possession of
11 burglary tools) by Sibron would thereafter be treated as a felony. 392 U.S.
12 at 56 and at 48, fn.5. That kind of specific legislative penalty enhancement
13 is not present in this case. In contrast, the legal sufficiency of the mere
14 speculative possibility that "the sentence imposed in a future criminal
15 proceeding, could be affected" not only by the underlying conduct (which a
16 federal judge is always free to consider, see 18 U.S.C. § 3577), but
17 additionally by the formal judgment of conviction, was recently reconsidered
18 in Lane v. Williams, 455 U.S. 624, 632 (1982) and rejected, over Justice
19 Marshall's dissent on that very point, 455 U.S. at 637. See also United
20 States v. Ray, 683 F.2d 1116, 1120-1122 (7th Cir.) cert. denied, 459 U.S. 1091
21 (1982) (even conduct underlying a prior acquittal may be considered at a
22 subsequent sentencing); United States v. Grayson, 438 U.S. 41, 50 (1978).

23 Furthermore, the record in this case shows that this conviction is not
24 within the Sibron rule because it is not like "most criminal convictions"
25 which we readily concede ordinarily entail adverse consequences. Most
26 criminal convictions, however, either involve a felony with its concomitant
27 loss of civil rights, or involve moral turpitude, or are malum in se, or

1 involve statutory crimes which have not long ago been legislatively repealed
2 and discredited. They do not commonly involve situations where the defendant
3 marches into the police station demanding to be arrested for a regulatory
4 violation in order to test its constitutionality in the Supreme Court.

5 Since the government has challenged and rebutted the presumption of
6 adverse legal consequences which would attach in the ordinary felony case, and
7 since petitioner's unmeritorious suggestion of remote legal consequences
8 provides a legally insufficient basis for Article III jurisdiction, there is
9 no case or controversy and the petition must be dismissed.


10 CONCLUSION

11 For all the above described legal and factual reasons, petitioner has not
12 demonstrated that there was prosecutorial misconduct which resulted in a
13 fundamental miscarriage of justice. Because petitioner has been unable to
14 carry the heavy burden he must bear to overturn these forty year old
15 misdemeanor convictions, the petition should be denied.

16 Respectfully submitted,

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2 CERTIFICATE OF SERVICE

3 I hereby certify that on this 4th day of September, 1985, I
4 have express mailed a copy of the Government's Closing Argument
5 and the balance of Ex. A-8 to petitioner's counsel at the below
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