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## Government Memorandum in Support of Motion to Reconsider

United States District Court Western District of Washington

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WESTERN DISTRICT OF WASHINGTON  
BY DEPUTY

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

GORDON K. HIRABAYASHI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

No. C83-122V

GOVERNMENT'S MEMORANDUM IN SUPPORT  
OF ITS MOTION TO RECONSIDER AND  
ALTER OR AMEND

The Memorandum Opinion is Clearly Erroneous  
Because It is Based Upon Factual Assertions  
Which are Indisputably Contradicted by the  
Written Historical Record Placed Before the  
Supreme Court and This Court.

1. General DeWitt's Beliefs were Not Concealed from Anyone, Including  
the Supreme Court, in 1943.

This Court's memorandum decision is based on the conclusion that General DeWitt believed it impossible to separate loyal from disloyal Americans of Japanese ancestry and that DeWitt's belief was hidden from the Supreme Court in 1943. In historical perspective, the "impossibility" argument of General DeWitt was unfortunate and misguided. Indeed, the Government apparently recognized this in 1943, as the Solicitor General abandoned that argument in

GOV'T. MEMO IN SUPPORT - 1

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1 his post-argument brief. However, contrary to this Court's conclusion, the  
2 written historical record placed before this Court clearly establishes that  
3 the Supreme Court was repeatedly made aware of General DeWitt's personal views  
4 concerning impossibility.

5 This Court's memorandum decision states that "... all through the course  
6 of petitioner's appeal [the Justice Department] was unaware of General  
7 DeWitt's stated reason for the exclusion of the Japanese from the West Coast.  
8 The Justice Department assumed and argued to the Supreme Court that the  
9 military necessity arose out of a lack of time to make a separation rather  
10 than out of an impossibility of making that separation." (Mem. 25:8-14); and  
11 that "The disclosure of that information to petitioner's counsel and to the  
12 Supreme Court would have made it most difficult for the government to argue,  
13 as it did, that the lack of time made exclusion a military necessity." (Mem.  
14 31:12-15.) Finally, this Court states (Mem. 32:1-16):

15 Had the statement of General DeWitt been disclosed to  
16 petitioner's counsel, they would have been in a position to argue  
17 that, contrary to General DeWitt's belief, there were in fact  
18 means of separating those who were loyal from those who were not;  
19 that the legal system had developed through the years means  
20 whereby factual questions of the most complex nature could be  
21 answered with a high degree of reliability. Counsel for  
22 petitioner could have pointed out that with very little effort the  
23 determination could have been made that tens of thousands of  
24 native-born Japanese Americans -- infants in arms, children of  
25 high school age or younger, housewives, the infirm and elderly --  
26 were loyal and posed no possible threat to this country.

21 The 1943 Supreme Court briefs in this case show that everyone did know  
22 about and did argue about General DeWitt's personal beliefs -- about the  
23 impossibility of making a loyalty determination -- which were reported in the  
24 public press on April 13, 1943. Moreover, the Justice Department and  
25 petitioner Hirabayashi both vigorously and openly argued to the Supreme Court  
26

1 their views about the difficulty of separating the loyal from the disloyal  
2 even when ample time was available.

3 For example, between the passages this Court has already cited (Mem.  
4 22:7-20) from pp. 62-63 of the Government's 1943 Supreme Court brief was the  
5 argument:

6 Moreover, even if there had been time for individual  
7 hearings, there is no reason to suppose that they could have  
8 solved the problem. A hearing to determine what a particular  
9 Japanese would do in the event that the Japanese forces should  
10 succeed in effecting a landing on the Pacific Coast would have  
11 been of doubtful utility. In every such hearing there would  
12 undoubtedly be evidence of thrift, industry, devotion to family,  
13 absence of criminal record, etc. And it would be upon the basis  
14 of such evidence that the Hearing Board would be asked to look  
15 deep into the mind of a particular Japanese and determine whether  
16 his allegiance to the United States was so dominant within him as  
17 to overcome the ties of kinship or other intangible forces which  
18 might bind him to the members of an invading Japanese army.  
19 (Emphasis added.)

20 Petitioner recognized and responded in his 1943 Reply Brief (at p. 13) to  
21 this assertion with the precise argument which this Court now states was never  
22 made:

23 Then the government argues (pp. 62, 63) that no hearing could  
24 determine whether a given individual was loyal or not. That is an  
25 argument that no representative of the Department of Justice  
26 should make. For all justice rests on the assumption that inquiry  
may develop the truth. Of course, in a given case, it may not do  
so. Injustices result on both sides of the picture: the guilty  
are let go, the innocent may be detained. But those are the risks  
inherent in a democratic society.... Besides, the government has  
used hearings of the kind here suggested in almost identical  
situations, and apparently with great success. \*\*\* All aliens of  
German or Italian nationality about whom there was any ground for  
suspicion have passed before these boards. Only those found to be  
dangerous have been interned. The others are at large. If this  
was done with the hundreds of thousands of these enemy aliens it  
could certainly have been done with the relatively few thousand  
citizens of Japanese ancestry who would have asked for the right  
to a hearing. \*\*\* (Emphasis added.)

Moreover, the first page and footnote 2 of petitioner's Reply Brief stated:

1 \*\*\* Nothing in the record indicates what facts were considered by  
the military authorities. 2/ \*\*\*

2 2/ Indeed, recent testimony by General DeWitt indicates that  
3 prejudice dominated his thinking. He opposed a proposal that some  
4 Japanese be returned to the West Coast and said, "A Jap's a Jap,  
it makes no difference whether he is an American citizen or not"  
(see San Francisco News, April 13, 1943, p. 1). We print the  
5 relevant portion in an appendix, page 25, infra.

6 APPENDIX

7 Extracts from San Francisco News, April 13, 1943,  
pp. 1, 3

8 DEWITT HITS COAST JAPS

9 Charges of a movement to bring American-born Japanese back to  
the Pacific Coast were made today by Lieut. Gen. DeWitt,  
10 commanding general of the Western Defense Command and Fourth Army,  
at a House naval affairs subcommittee hearing here. He said he  
11 would oppose this movement "with every effort and means at my  
disposal."

12 "I don't want any Jap back on the Coast," said General  
DeWitt, after informing the committee of "a feeling developing in  
13 certain sections and among certain elements" to bring these  
American-Japanese back to the Coast military area.

14 "There is no way to determine their loyalty," he declared.  
15 "This West Coast is too vulnerable. I am opposing this movement  
16 with every effort and means at my disposal. \*\*\*

17 "I don't care what they do with the Japs as long as they  
don't send them back here. A Jap is a Jap." \*\*\* (Emphasis  
18 added.)

19 In addition to this full reproduction for the Supreme Court of General  
DeWitt's personal views, the first page of Petitioner's 1943 Reply Brief (at  
20 fn. 1) also referred the Court to the 1943 amicus curiae brief of the Japanese  
21 American Citizens League. That brief also vigorously attacked DeWitt's  
22 "impossibility" justification and, in a passage that could hardly have been  
23 overlooked, compared DeWitt's personal views to Hitler's:

24  
25 ... We now examine the claims asserted to justify failure to  
26 accord individual loyalty hearings to American citizens of

1 Japanese ancestry who might have been suspected of disloyalty.  
2 The grounds asserted for this failure are that such hearings were  
impractical, on the one hand; and inadequate to cope with the  
3 alleged military danger, on the other hand.

4 \*\*\* There were those, of course, who claimed that it would have  
5 been impossible to tell the loyal from the disloyal; who said that  
6 all persons of Japanese ancestry look alike. It is a challenge to  
the intelligence of this nation that such childish opinions  
actually carried the day. [J.A.C.L. Amicus Brief, pp. 12-13,  
emphasis added.]

\* \* \* \*

7 That American citizens of Japanese descent are loyal, and  
8 that their loyalty can be ascertained on the same basis and in the  
9 same manner as the loyalty of other citizens, is demonstrated by  
the action of the War Department [in organizing a Japanese  
American combat team]. \*\*\*

10 It is generally conceded by all thinking Americans that the  
11 great majority of Americans of Japanese ancestry are loyal to this  
12 country. The argument is that it was impossible to discriminate  
13 between the loyal and the disloyal at that time. We contend that  
14 if the War Department, in view of their special Japanese American  
15 combat team, can distinguish between the loyal and the disloyal  
today, the Government could have distinguished between them at the  
time of the evacuation, especially in view of Mr. Eisenhower's  
statement regarding the relative proportion of the loyal and  
disloyal. We believe that American traditions and ideals, as well  
as the present war aims, required no less. [Id., pp. 106-107,  
emphasis added.]

\* \* \* \*

17 Notwithstanding the announcement of the Western Defense  
18 Command that it was military necessity which dictated the removal  
19 of Americans of Japanese ancestry from the Pacific slope, one is  
20 forced to question the validity of that argument in the light of  
Lieutenant General John L. DeWitt's statement on April 13, 1943,  
before a House of Representatives Subcommittee on Naval Affairs,  
when he declared, according to an Associated Press dispatch:

21 "A Jap's a Jap" and "it makes no difference whether he  
22 is an American citizen or not \*\*\* I don't want any of them.  
23 We got them out. They were a dangerous element. The west  
coast is too vital and too vulnerable to take chances. \*\*\*

24 ... General DeWitt, who is the commanding general of the Western  
25 Defense Command and the individual charged by the President with  
26 the responsibility of determining the need for evacuation, holds  
that Americanism is not a matter of the mind or heart but is  
determined by race and ancestry. This is a dangerous concept, a  
line of thought and action pursued by our enemies -- by Hitler who

1 believes in the master race and by the Tokyo militarists who have  
2 announced the "holy mission" of the Japanese race. It is a  
concept which is the antithesis of the democratic ideals of the  
American nation.

3 General DeWitt's bitter declaration throws open the entire  
4 question of the evacuation by fiat of 70,000 American citizens  
5 without trial or hearing from their homes along the west coast.  
6 The army had declared the mass evacuation necessary because of  
7 military necessity and the omission of individual hearings had  
8 been explained by the fact that there had been not enough time for  
9 such tests of loyalty in the face of the existing military  
10 situation. It now appears, however, that wholesale evacuation and  
11 the abridgment of the citizenship rights of an entire American  
12 minority group was born of the blind race prejudice of a single  
13 individual.

14 If a single individual's personal prejudice determined the  
15 destinies of so many people, it is indeed a grave compromising of  
16 American concepts. [Id.; pp. 114-115, emphasis added.]

17 The other 1943 briefs before the Supreme Court also openly debated the  
18 same argument. The 1943 amicus brief of California, Oregon and Washington in  
19 the Hirabayashi case reiterated General DeWitt's impossibility thesis, and the  
20 public and Congressional awareness of it. Defending DeWitt, the amicus brief  
21 stated:

22 \*\*\* It is a speculation that such an expression [of primary  
23 loyalty] for Japan would have been forthcoming at a hearing which  
24 would have had for its purpose the determining of whether or not  
25 the individual should remain in a Pacific Coast Military Area.  
26 The possibility that the disloyal elements would have been  
disclosed through the holding of individual hearings is, at least,  
sufficiently doubtful that it cannot be said that the Commanding  
General committed an abuse of discretion when he decided on the  
more certain course of removing all disloyal elements by removing  
the group as a whole.

The apparent reasonableness of the evacuation was set forth by the  
Tolan Committee in its [March 19, 1942] report to Congress,  
wherein it declared:

\* \* \* \*

"Various arguments were adduced in testimony before the committee  
why the Japanese, both citizen and alien, should be evacuated from  
the west coast. Most commonly it was said that homogeneity of

1 racial and cultural traits made it impossible to distinguish  
2 between the loyal and the disloyal.

3 \* \* \* \*

4 Because the Japanese population has remained apart from the  
5 rest of the people of the Pacific Coast and because inscrutability  
6 is a definite racial characteristic, it was at least doubtful  
7 whether any safe and practical measure for determining prospective  
8 disloyalty could have been employed.

9 Regarding the lack of an adequate test, former Attorney  
10 General Earl Warren of California testified before the Tolan  
11 Committee as follows:

12 "We believe that when we are dealing with the Caucasian race  
13 we have methods that will test the loyalty of them, and we  
14 believe that we can, in dealing with the Germans and the  
15 Italians, arrive at some fairly sound conclusions because of  
16 our knowledge of the way they live in the community and have  
17 lived for many years. But when we deal with the Japanese we  
18 are in an entirely different field and we cannot form any  
19 opinion that we believe to be sound." [Amicus Brief,  
20 pp. 42-44, emphasis original only in last two lines;  
21 footnotes omitted.]

22 Moreover, in the contemporaneously considered Yasui case, petitioner  
23 Yasui's 1943 brief also highlighted this argument:

24 A possibility of danger existed from German and Italian alien  
25 enemy sources against whom, however, the General took no like  
26 blanket action. Evidently he is suspicious of all Japanese aliens  
and Americans of Japanese descent. Mere suspicion, however, is a  
product of the imagination and has not yet been elevated to the  
dignity of evidence. In the San Francisco News and other San  
Francisco newspapers of April 13, 1943, General DeWitt was quoted  
as having testified on that date before a House naval affairs  
subcommittee hearing held in San Francisco, in part as follows:

27 "I don't want any Jap back on the Coast.

28 "There is no way to determine their loyalty.

29 \* \* \* \*

30 The statements indicate a bare assumption upon his part not  
31 that these citizens are disloyal but that it is impossible to  
32 determine their loyalty from which it must be inferred he made no  
33 attempt to ascertain whether or not they were loyal. Apparently  
34 he does not apply the same line of reasoning to European alien  
35 enemies in his district or to their citizen issue or to other  
36 citizens who may be inimical to our welfare. His statements



1 indicate quite clearly that he does not regard the native-born of  
2 Japanese descent to be citizens despite the provisions of the 14th  
3 Amendment. \*\*\* The statements indicate that the drastic military  
4 orders were issued because of a prejudice harbored against these  
5 citizens of Japanese extraction and that it was prejudice and not  
6 military necessity that evoked them. Suspicion existing in a few  
7 minds does not raise a presumption of disloyalty on the part of  
8 these citizens and does not constitute a factual basis justifying  
9 drastic military measures depriving them of their properties and  
10 denying them of their liberties. The slant of one's eyes, the  
11 color of one's skin and the old geographical origin and  
12 nationality of one's ancestors may give rise to suspicion on the  
13 part of the prejudiced and the uninformed but they have no bearing  
14 on the question of one's loyalty. [Yasui Brief, pp. 22-23,  
15 emphasis added.]

16 Other documents also show that General DeWitt's personal views were  
17 neither concealed from the Supreme Court nor approved. As this Court's opinion  
18 acknowledges, in the Government's 1943 post argument brief, the Solicitor  
19 General consciously chose to abandon the impossibility argument which he had  
20 originally raised (see supra) and which General DeWitt was publicly expressing  
21 (Mem. 23:21-24:13).

22 Finally, the concurring opinion filed by Justice Douglas in Hirabayashi  
23 made clear that the Solicitor General's argument -- that it was impossible to  
24 separate the loyal from the disloyal in the short time available -- controlled  
25 the outcome as a matter of fact, even though the Supreme Court had before it  
26 broader hypothetical arguments about the impossibility of hearings when time  
was not short. Justice Douglas rejected the argument that race, ancestry, or  
lack of assimilation could render a loyalty determination useless and he  
repeated the "mind and heart" language from the J.A.C.L. brief quoted above,  
see 320 U.S. at 107-108. This is essentially the same position that the  
Government took in its post-argument memorandum, i.e., that speculation  
about the "impossibility" of loyalty hearings was unnecessary because  
the decisionmakers concluded (and Mr. Ennis confirmed at the 1985

1 hearing) that the factual situation "did not lend itself" to providing  
2 thousands of individual hearings (Mem. 24:7-13).

3 At all events, this Court's ruling that General DeWitt's "impossibility"  
4 beliefs were hidden from the Supreme Court is flatly and unalterably  
5 contradicted by the written historical record. The General's beliefs were  
6 openly argued in 1943 (and again in the 1944 Korematsu briefs) and did not  
7 result in a reversal of this petitioner's (or Korematsu's) conviction four  
8 decades ago when Japanese American exclusion was upheld [in Korematsu] even  
9 though detention was struck down [in Ex parte Endo, 323 U.S. 283 (1944)]. 1/  
10 These long known facts take on no added Brady significance today simply  
11 because one additional written expression of DeWitt's well known personal  
12 views, contained in a then classified document, was not delivered to the  
13 defendant. United States v. Agurs, 427 U.S. 97, 112 (1976).

14 2. General DeWitt Was Not the Sole Decisionmaker.

15 This Court's memorandum decision states that it was "General DeWitt who  
16 made the decision that military necessity required the exclusion of all  
17 persons of Japanese ancestry from the West Coast." (Mem. 30:22-24.) This  
18 overlooks the fact, also acknowledged in that part of this Court's opinion  
19 quoting the 1943 Supreme Court Hirabayashi opinion, that it was not General  
20 DeWitt alone who made the decision under review, but "the judgment of the  
21 military authorities and of Congress" who together comprised "the war-making  
22 branches of the government" (Mem. 23:5-6 and 9-10). It was precisely because

23 \_\_\_\_\_  
24 1/ In his Korematsu dissent (323 U.S. at 241-242), Justice Murphy made the  
25 same argument about the lack of necessity to hold hearings for the children  
26 and elderly which this Court asserts (Mem. 32:10-12) was not made by this  
petitioner, and if made would have persuaded a majority of the justices.

1 many high officials, including the President, and two branches of government  
2 (Congress and the Executive Branch) were responsible for deciding to punish  
3 curfew and evacuation violations (although General DeWitt may have initiated  
4 that decision-making process) that the Supreme Court was not concerned about  
5 remanding the Hirabayashi or Korematsu case for a factual hearing into the  
6 allegations about General DeWitt's lack of military considerations or personal  
7 bias. 320 U.S. at 89-93, 97-103; 323 U.S. at 217-218; see 324 U.S. 885 (1945)  
8 (denying Korematsu's rehearing petition requesting a remand for a factual  
9 hearing).

10 3. General DeWitt Was Not Ordered to Change his Report.

11 This Court's memorandum decision states that "changes in [General  
12 DeWitt's] report ... were insisted upon by the War Department...." (Mem.  
13 25:1-2.) This conclusion misreads the oral and documentary evidence before  
14 the Court. What the evidence shows is that DeWitt was strong willed (Mem.  
15 12:17-20), that DeWitt never relinquished personal responsibility for  
16 revisions to his report to the War Department (Mem. 16:3-10), that changes to  
17 the Final Report were only "suggested by the War Department" (Mem. 16:18), and  
18 that McCloy was prepared to forward the original version of DeWitt's report to  
19 the Secretary of War with a recommendation that it be overruled precisely  
20 because McCloy could not insist on changes. Indeed, the record is clear that  
21 DeWitt had to be wheedled and cajoled into accepting the suggested revisions  
22 by his own staff. If the War Department could simply have insisted upon  
23 changes to DeWitt's Final Report, then the lengthy 1943 telegraphic and  
24 telephonic correspondence to which the Court repeatedly cites (Mem. pp. 11-16)  
25 would never have occurred.  
26

1       4. Because General DeWitt's Personal View that "There is no Way to  
2 Determine their [Japanese American] Loyalty" Was Never Hidden and is Not Newly  
3 Discovered, Laches Bars Relief.

4       This Court's memorandum decision rejects the bar of laches because "There  
5 is no evidence in the record that petitioner knew, or had reason to know, of  
6 the existence of the initial version of the Final Report prior to the time  
7 that Ms. Herzig-Yoshinaga happened upon it in the National Archives." (Mem.  
8 29:23 - 30:2.) This overlooks the fact that it was not the first draft version  
9 of DeWitt's Final Report, but what General DeWitt "did in fact believe" (Mem.  
10 19:14) which this Court concludes was at issue when curfew and evacuation were  
11 ordered in the Spring of 1942, and during the Supreme Court's litigation of  
12 this case. As noted supra, General DeWitt openly declared his views, which  
13 were reported in the popular press, and DeWitt's views were emphatically  
14 denounced in the 1943 litigation by petitioner and his amici. The mere fact  
15 that DeWitt's 1942 personal views may also be reflected in other documents  
16 then classified, such as the first draft of the 1943 Final Report or the  
17 written transcripts of DeWitt's 1943 telephone conversations with General  
18 Gullion and Assistant Secretary of War McCloy, and that those redundant  
19 expressions of DeWitt's personal views were not declassified and delivered to  
20 the defendant in 1943, does not defeat laches.

21       At all events, this Court's memorandum decision is itself proof that the  
22 written correspondence quoting the objectionable portions of DeWitt's first  
23 draft and proposing the suggested changes, not the first draft itself, is all  
24 that was needed to make petitioner's argument (Mem. pp. 16-19).  
25 Mrs. Herzig-Yoshinaga testified that like the petitioner, she was "a good  
26 example" of a "person with no background in historical research" and that she  
holds no degree in archival research (Tr. 562:23-563:3; Tr. 617:18-20).


1 Nonetheless, she testified that before locating the first draft of General  
2 DeWitt's Final Report she "had formerly seen a file which indicated that the  
3 Assistant Secretary of War's office had requested certain alterations, certain  
4 changes, to be made in the so-called first version of the DeWitt report ..."  
5 (Tr. 561:3-7; Tr. 604:12-14). This Court found (Mem. 30:1-2) that she did not  
6 choose to pursue that line of inquiry "prior to the time that [she] happened  
7 upon [the draft version of the Final Report] in the National Archives." This  
8 contradicts any assertion of diligence on her part or on the part of  
9 petitioner (or any other lay person) in acting upon this very explicit and  
10 revealing correspondence, openly kept regularly available at the Archives  
11 (Ex's. 35, 66, 67, 68, 70, 71, 85, 63, A84, A109, A11, A74, A124, A108; Tr.  
12 628:8-11). Under these circumstances, even if DeWitt's private views on  
13 evacuation were not well known (which they were), petitioner's thirty year  
14 delay before deciding to peruse and act upon any of the explicit  
15 correspondence documents kept at the National Archives is inexcusable.

16 For all the above reasons, as well as those previously briefed by the  
17 Government, this Court's memorandum decision should be reconsidered and  
18 amended.

19 Respectfully submitted,

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