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Government's Reply Memorandum in Support of its Motions to Dismiss and for a Stay

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JUDGE VOORHEES
NOTE ON MOTION CALENDAR:
MARCH 22, 1985
ORAL ARGUMENT REQUESTED



MAR 21 1985

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

10 UNITED STATES DISTRICT COURT
11 WESTERN DISTRICT OF WASHINGTON

FILED ENTERED
LOGGED RECEIVED

MAR 27 1985

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

No. C83-122V
(Former Crim. No. 45738)

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

21 GOVERNMENT'S REPLY MEMORANDUM IN SUPPORT OF ITS
22 MOTIONS TO DISMISS AND FOR A STAY

23 (1). In petitioner's Memorandum in Opposition to these
24 government motions, petitioner concedes (at p. 4) that the
25 legal issues involved in the pending appeal in Yasui v.
26 United States, No. 84-3730 (9th Cir.) are "identical" to the
27 issues involved in this case. The Ninth Circuit has
28 scheduled oral argument in the Yasui appeal for May 7, 1985.
Therefore, the Yasui appeal is scheduled to be taken under
submission for decision by the Ninth Circuit almost six

GOV'T REPLY MEMO - 1

90

1 weeks before this Court even begins its currently scheduled
2 June 17, 1985 hearing. If a stay pending the outcome of the
3 Yasui appeal were granted, we would, of course, advise the
4 Ninth Circuit of that fact so that they could expedite as
5 much as possible the Yasui decision.

6 (2). By letter dated March 13, 1985, petitioner's
7 counsel informed us that this Court instructed them to
8 inform us that this Court will "not consider [our] proposed
9 draft [prehearing order] for any purpose." If there was, in
10 fact, an ex parte ruling on this matter, we object to that
11 ruling and request that it be reconsidered when the Court
12 decides our renewed motion to dismiss or, in the
13 alternative, for a stay. However, out of an abundance of
14 caution, since the jurisdictional section of the
15 government's proposed prehearing order (at Part I.)
16 contained the current statement of the government's legal
17 position in support of its renewed motion to dismiss due to
18 this Court's lack of jurisdiction, and since the grounds for
19 our renewed motion to dismiss have already been addressed by
20 petitioner at pp. 2-4 of his March 18, 1985 Memorandum in
21 Opposition to our motion, we herewith reprint verbatim the
22 government's legal argument in support of our renewed motion
23 to dismiss, as it appeared in our Draft Prehearing Order (at
24 pp. 1-12):
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26
27
28

I.

OBJECTIONS TO THE PETITIONER'S STATEMENT OF
FEDERAL JURISDICTION

Petitioner, who admits completing service of his two concurrent ninety day misdemeanor sentences, asserts jurisdiction for this post conviction collateral attack under the All-Writs Act, 28 U.S.C. 1651, as interpreted by the Supreme Court in United States v. Morgan, 346 U.S. 502 (1954). Jurisdiction for coram nobis relief under United States v. Morgan, supra, requires three prerequisites, none of which exist here.

1. The petitioner must demonstrate the existence of "present adverse legal consequences flowing from the conviction sufficient to satisfy the 'case or controversy' requirement of Article III." United States v. Darnell, 716 F.2d 479, 481 n.5 (7th Cir. 1983), cert. denied, ___ U.S. ___ (Dec. 5, 1983) (emphasis added), citing United States v. Morgan, supra.

a. This Court's May 24, 1984 order does not identify what present adverse legal consequences can be remedied by the instant motion. At the May 18, 1984 hearing, the Court stated that an Article III case or controversy existed because even though the misdemeanor conviction "is no longer a stigma in the eyes of knowledgeable persons" (Tr. 99:line 14-15), the petitioner

1 "has in the eyes of some people, and perhaps many people,
2 lived under this cloud of having disobeyed a lawful statute
3 of the United States." (Tr. 99:line 11-14). Therefore, the
4 court stated, the petitioner had the "right" to vindicate
5 "his honor." (Tr. 99:line 7-8).
6

7 b. Moral stigma, however, without more is not an
8 adverse legal consequence of this conviction. A legal
9 consequence sufficient to satisfy the constitutional Article
10 III case or controversy requirement must be more
11 substantive. Lane v. Williams, 455 U.S. 624, 632 n.13
12 (1982) ("Collateral review of a final judgment is not an
13 endeavor to be undertaken lightly. It is not warranted
14 absent a showing that the complainant suffers actual harm
15 from the judgment that he seeks to avoid. Emphasis added).
16 Moreover, petitioner chooses to reside in a foreign country
17 (Pet. 1). Correcting stigma remaining in the eyes of
18 foreigners about petitioner's forty year old United States
19 misdemeanors is certainly beyond the power of this Court.
20 Petitioner has himself already taken the only approach
21 available to correct ignorance about his past: he authorized
22 one of his attorneys to write a book about his version of
23 those forty year old events, i.e. Justice at War (1983) by
24 Peter Irons; and he has voluntarily engaged in public
25 relations activities designed to educate people about these
26 forty year old events, i.e., by making statements to the
27 press as co-chair of the Seattle Washington Japanese
28 American Citizens League Redress Committee. (See 1984 Cong.

1 Hearings [before the Subcommittee on Admin. Law and Gov't.
2 Relations of the House Jud. Comm., 98th Cong., 2nd Sess.
3 (Serial No. 90, 1984) on Japanese-Americans and Aleutian
4 Wartime Relocation and H.R. 3387, H.R. 4110 and 4322] at
5 p. 757). In these circumstances, one is hard pressed to see
6 how ignorance "remaining in the eyes of some people" carries
7 any current adverse legal consequences that could be
8 remedied by a court order.

9 Petitioner himself has alleged as his FACTUAL,
10 CONTENTION No. 4 which he seeks to prove at the hearing that
11 he "continues to suffer from adverse collateral consequences
12 or legal disabilities which stem from his criminal
13 convictions." Petitioner's Proposed Pretrial Order at p. 4.
14 Such proof is totally distinct from the other issues that
15 involve forty year old events. Here there is no claim of
16 continued loss of liberty, jobs, or other deprivation of any
17 substantive right. At the minimum, therefore, there is no
18 good reason why prior to convening a hearing, petitioner
19 should not have to shoulder his burden of producing proof of
20 such present adverse legal consequences and convincing this
21 Court that petitioner is entitled to a favorable finding on
22 this threshold matter.

23
24 2. As the Ninth Circuit stated in Maghe v. United
25 States, 710 F.2d 503 (9th Cir. (1983), cert. denied, ____
26 U.S. ____ (June 27, 1983), before putting the government to
27 the burden of a hearing on the merits in any situation where
28 a petition is more than a few years old, the petitioner must

1 "allege an adequate factual basis justifying his 25 year
2 delay in seeking relief." Such a petitioner must
3 demonstrate that there are "sound reasons" for his "failure
4 to seek appropriate earlier relief." United States v.
5 Morgan, supra, 346 U.S. at 512. "The doctrine of laches
6 adequately protects against 'sandbagging' and ensures that
7 coram nobis relief will not be granted where a petitioner's
8 inexcusable delay in raising his claim has prejudiced the
9 government. [citation omitted] These safeguards against
10 abuse of the writ serve essentially the same function as the
11 cause and prejudice standard." United States v. Darnell,
12 supra. Accord, United States v. Taylor, 648 F.2d 565, 573
13 n.25 (9th Cir.), cert. denied, 454 U.S. 866 (1981) ("Whether
14 a hearing is required on a coram nobis motion should be
15 resolved in the same manner as habeas corpus petitions.")

16
17 The cause and prejudice standard applicable to habeas
18 corpus petitions is not a matter that is determined at or
19 after litigation on the merits. Indeed, it is irrelevant to
20 the merits of even constitutional claims. Rather, habeas
21 corpus petitioners "are barred from asserting that claim" in
22 the first instance, if they have not satisfied the cause and
23 prejudice standard, Engle v. Isaac, 456 U.S. 107, 135 (1982)
24 (emphasis added). Violation of the standard will "bar
25 consideration of the claim in a federal habeas proceeding,"
26 456 U.S. at 123; it operates as a "bar against the very due
27 process argument raised here and if violated "respondents
28 may [not] litigate, in a federal habeas proceeding, a

1 constitutional claim..." 456 U.S. at 125 (emphasis added).
2 This is because, as here, "[p]assage of time, erosion of
3 memory, and dispersion of witnesses" have occurred, Engle v.
4 Issac, supra, 456 U.S. at 127-128. In sum, its primary
5 purpose is to forestall further litigation, rather than
6 merely deny relief that has already been fully litigated and
7 ordered.

8 Even in purely civil actions, which this is not, when
9 laches has occurred, "the court is passive and does
10 nothing." Brown v. County of Buena Vista, 95 U.S. 157, 160
11 (1977). The court "will refuse to interfere, and will leave
12 the parties where it finds them." Id. at 159. Petitioner's
13 argument that the government cannot raise laches here due to
14 a concomitant failure on the part of government officers to
15 perform their duty is simply wrong. Boone Co. v.
16 Burlington, 139 U.S. 684, 693 (1891) (Quoting "the
17 established rule that laches will not be imputed to a
18 government for a failure on the part of its officers to
19 perform their duty," citing cases). See also Schweiker v.
20 Hansen, 450 U.S. 785, 789 (1981) (Despite critical
21 misinformation provided by government officials, resulting
22 in a loss of social security benefits, estoppel does not lie
23 against the government where the respondent remained free to
24 reopen the matter "at any time.")

25 a. This Court's May 24, 1984 order states that at
26 the evidentiary hearing on the merits the government may
27 introduce:
28

1 evidence to the effect that the
2 information upon which petitioner
3 grounds his petition has been public
4 knowledge for so long that the doctrine
of laches bars petitioner from being
accorded the remedy which he now seeks.

5 b. With all due respect, where a petition is
6 filed forty years after conviction the Court may not conduct
7 a complete hearing without prior consideration of the
8 government's unimpeached references to published works which
9 show on their face that laches bars this proceeding. Engle
10 v. Isaac, supra. The district court decision in Hohri v.
11 United States, 586 F. Supp. 769 (D.D.C. 1984) (Japanese
12 American internment related civil damage suit) is
13 instructive in this respect. Almost the identical factual
14 allegations of misconduct made here were made there (see 586
15 F. Supp. 772-781). That court stated that the same books
16 and public records offered by the government in the instant
17 case showed on their face and without the necessity of any
18 hearing that even under the plaintiff's version of the
19 facts, "the underlying documents concealed from the Supreme
20 Court in 1944 became public and were available to diligent
21 plaintiffs from the late 1940's onward." Id. at 790. The
22 court continued:

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

28 * * *

1 It may be that timely claims on their
2 behalf would have prevailed. But it is
3 now close to forty years after the camps
4 were closed, and almost that long after
5 the facts essential to those claims were
6 published. Much time has passed,
7 memories have dimmed, and many of the
8 actors have died. 37/ * * *

9 37/ For example, General DeWitt, a
10 critical witness, died in 1962. (Id. at
11 795.)

12 In this setting we submit that it is particularly
13 inappropriate to put off a ruling on the government's laches
14 argument until after the government and the witnesses have
15 been put to the burden of a complete evidentiary hearing.

16 3. Finally, since coram nobis may not serve as a
17 second appeal, a heavy burden rests on the petitioner to
18 demonstrate that error "of the most fundamental character"
19 occurred, without which error a more favorable judgment
20 would have been rendered for him. United States v. Morgan,
21 supra; United States v. Darnell, supra.

22 a. In this Court's May 24, 1984 order, the Court
23 stated:

24 The Court wishes to make clear that
25 at the evidentiary hearing, it does not
26 intend to reexamine nor to rule upon the
27 wisdom of the exclusion or curfew orders
28 of Lieutenant General John L. DeWitt.
The evidentiary hearing will be confined
to the presentation of evidence bearing
upon the issues as to whether
representatives of the government
knowingly withheld material evidence
from defendant and from the courts and
as to whether petitioner was in
consequence, denied due process at his
trial or upon his appeal.

1 b. Where, as here, the petitioner has conceded
2 that the Department of Justice representatives did not
3 knowingly withhold evidence at his 1942 trial or upon his
4 1943 appeal, there is no basis for a hearing under the terms
5 of the Court's order.

6 Unlike the situation in the Korematsu v. United States,
7 584 F. Supp. 1406 (N.D. Cal. 1984) or in Hohri v. United
8 States, supra, petitioner here concedes that even under his
9 version of the facts, no Justice Department attorneys had
10 any reason to even question the objective truth of General
11 DeWitt's strongly held beliefs (Pet. 56-57) about espionage
12 and sabotage until well after the Supreme Court disposed of
13 his case (Pet. p.58:line 4-7). There is, therefore, no
14 prosecutorial misconduct which could have occurred at this
15 petitioner's trial or on his appeal.

16 Nor did this petitioner himself choose to subpoena any
17 War Department officials to testify at his trial or seek to
18 contest the factual basis for the curfew and evacuation
19 orders, United States v. Hirabayashi, 46 F. Supp. 657, 659
20 (W.D. Wash. 1942). Rather, petitioner argued that such
21 discriminatory orders were unauthorized and unconstitutional
22 as a matter of law. Id. In petitioner's case, the Supreme
23 Court (320 U.S. 115) unanimously rejected the argument "that
24 the curfew order involved an unlawful delegation by Congress
25 of its legislative power," which was the question the
26 Supreme Court decided. That Court specifically declined to
27 reach the violation by Hirabayashi of the exclusion orders,
28

1 320 U.S. at 105, and explicitly refrained from deciding
2 "whether or to what extent such findings would support
3 orders differing from the curfew order." 320 U.S. at 105.
4 The Court went on to recite the prevailing social, economic
5 and political conditions which had intensified Japanese
6 group solidarity and "in large measure prevented [Japanese
7 American] assimilation ..." 320 U.S. 96-99. The Supreme
8 Court openly acknowledged that the briefs before it did not
9 put the Court in a position to make findings of fact about
10 the loyalty of Japanese Americans as a group, and that in
11 any event the actual loyalty of the group as a whole was
12 irrelevant to the basis for the curfew regulation. The
13 Court stated:

14 There are only some of the many
15 considerations which those charged with
16 the responsibility for the national
17 defense could take into account in
18 determining the nature and extent of the
19 danger of espionage and sabotage, in the
20 event of invasion or air raid attack.
21 The extent of that danger could be
22 definitely known only after the event
23 and be definitely known only after the
24 event and after it was too late to meet
25 it. Whatever views we may entertain
26 regarding the loyalty to this country of
27 the citizens of Japanese ancestry, we
28 cannot reject as unfounded the judgment
of the military authorities and of
Congress that there were disloyal
members of that population, whose number
and strength could not be precisely and
quickly ascertained. We cannot say that
the war-making branches of the
Government did not have ground for
believing that in a critical hour such
persons could not readily be isolated
and separately dealt with, and
constituted a menace to the national
defense and safety, which demanded that

1 prompt and adequate measures be taken to
2 guard against it.

3 Appellant does not deny that, given
4 the danger, a curfew was an appropriate
5 measure against sabotage. It is an
6 obvious protection against the
perpetrations of sabotage most readily
committed during the hours of darkness.
*** (320 U.S. at 99, emphasis added).

7 Moreover, with respect to the 1944 Korematsu Supreme
8 Court decision (which at least occurred after the alleged
9 misconduct but on its face clearly acknowledges the "sharp
10 controversy as to the credibility of the DeWitt report," 323
11 U.S. at 245, and see id. 235-241), the recent 1984 Korematsu
12 district court opinion was forced to conclude that "whether
13 a fuller, more accurate record would have prompted a
14 different [1944 Supreme Court] decision cannot be
15 determined." 584 F. Supp. at 1419, emphasis added.

16 If it cannot be determined from the identical petition
17 filed in the Korematsu exclusion case whether General
18 DeWitt's allegedly inaccurate 1944 report adversely effected
19 a subsequent 1944 Supreme Court exclusion opinion, it
20 certainly cannot be said that the same petition (which
21 petitioner Hirabayashi has filed here to challenge his
22 curfew violation) made out the necessary prima facie showing
23 in this Court that DeWitt's 1944 report adversely affected a
24
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1 1943 Supreme Court curfew opinion that preceded by six
2 months the release of DeWitt's Final Report. 1/

3 Since all three of these jurisdictional prerequisites
4 for a hearing are missing, this court's jurisdictional power
5 to require an evidentiary hearing remains at issue. Forty
6 year old documents and elderly witnesses with forty year old
7 recollections should not be unnecessarily subjected to the
8 stress of travel and the rigors of a cross-examination
9 designed to impugn their good faith and integrity without
10 further consideration addressing respondent's objections.
11 We indicated to this Court at the May 1984 hearing (Tr.
12 128:line 10-14) that we intended to renew our motion to
13 dismiss on these three jurisdictional bases. This Court
14 stated we could renew our motion (Tr. 128:line 15-17) and
15 indicated it would again review our jurisdictional arguments
16 (Tr. 129:line 14-21). Therefore the government (without
17 filing additional papers in support but relying on all the
18 extensive memoranda of law already filed by both sides on
19 these three jurisdictional questions) requests the Court not
20 to convene such a hearing in the absence of a ruling by this
21 Court directly addressing the substance of each of these
22 three jurisdictional matters. See the Government's Renewed
23 Motion to Dismiss, which we are filing herewith.

24
25
26 1/ Even assuming that rhetoric from early drafts of
27 DeWitt's Final Report was used in the California, Oregon,
28 and Washington Supreme Court amicus brief, nothing in that
amicus brief was attributed to General DeWitt.

[END OF REPRINTED MATERIAL]

(3). The government's jurisdictional disagreements with petitioner are now quite clear.

a. Present adverse legal consequences

Petitioner argues that the language he relies upon in Sibron v. New York, 392 U.S. 40 (1968) was not modified by Lane v. Williams, 455 U.S. 624 (1982), and that the government's factual presentation has not overcome the Sibron presumption of legal consequences upon which petitioner relies.

The government argues that Lane v. Williams, 455 U.S. 624, 632 n.13 (1982) makes it clear that the Sibron presumption is not applicable where there are no "existing civil disabilities," as here. The Lane v. Williams rejection of the particular Sibron language upon which petitioner relies is unambiguous, since dissenting Justice Marshall makes petitioner Hirabayashi's identical argument (about the "possibility" of some adverse consequences under state law, 455 U.S. at 634-641), and the Lane majority opinion addresses and flatly rejects Justice Marshall's views (455 U.S. at 632 n.13). See also, United States v. Darnell, supra, 716 F.2d at 481 n.5.

Alternatively, even if the Sibron rule was applicable to this case (which we deny), the government's position is that we have already addressed and rebutted the existence of any existing civil disabilities and any hypothetical adverse legal consequences.

1 Petitioner argues (Memo in Opp., p. 2) that "this Court
2 has already ruled that collateral consequences exist.
3 (May 18, 1984, Tr. 99.)" The government's response is that
4 petitioner misreads this Court's oral ruling on May 18, 1984
5 at Tr. 99, which was a ruling that social stigma, not
6 identifiable legal disabilities, exist. We submit that no
7 existing legal disabilities have ever been identified either
8 by petitioner or this Court, and the caselaw is clear that
9 social stigma is not a legal disability.

10 b. Laches.

11 Petitioner does not deny that Maghe v. United States,
12 710 F.2d 503 (9th Cir. 1983), cert. denied, ___ U.S. ___
13 (June 27, 1983) is applicable, but petitioner asserts (Memo
14 in Op. pp. 3-4) that "key documents to this proceeding were
15 not available to Petitioner until 1982," citing Hohri v.
16 United States, 586 F. Supp. 769 at 789 (D.D.C. 1984), app.
17 pending (No. 84-5460).

18 The government submits that petitioner miscites the
19 Hohri case. The holding there is precisely to the contrary,
20 i.e., that the FBI, FCC and ONI documents have been
21 available since the 1940's and were the important
22 substantive documents, not Mr. Ennis' internal memoranda
23 summarizing those documents. Moreover, the Hohri opinion
24 did not find, 586 F. Supp. at 789, that the Ennis memoranda
25 were not available under the Freedom of Information Act
26 until 1982. The Hohri court only stated that these
27 documents "were not released until the Commission's report
28

1 was published in 1982...." It is true that these documents
2 were not released by publication until 1982. But it is
3 neither true nor stated that they were classified or
4 unavailable upon routine request under the Freedom of
5 Information Act (which has been in effect since July 4,
6 1967). Indeed, petitioner's mischaracterization of the
7 Hohri opinion on this point is even inconsistent with the
8 evidence that this petitioner has himself previously filed
9 in this Court. The February 28, 1984 Affidavit of Peter
10 Irons shows that he did not choose to make a routine Freedom
11 of Information Act request until August 28, 1981 (id. at
12 p. 4), and that shortly thereafter in October 1981 -- prior
13 to 1982 -- he was permitted to and did receive these
14 allegedly "unavailable" documents (id. at p. 6).

15 In sum, petitioner does not disagree that under the
16 caselaw the government is entitled, as a matter of
17 procedure, to a prehearing ruling concerning whether or not
18 laches has been demonstrated by the government's unimpeached
19 references to published works. Petitioner's disagreement
20 simply goes to the merits, i.e. petitioner disagrees with
21 the government that all of his current claims appear in
22 previously published works. That controversy cannot justify
23 a hearing since it conclusively can be settled by the
24 Court's perusal of the published references which the
25 government has previously supplied as exhibits to its
26
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earlier motion papers. Accord, Hohri v. United States,
supra. 2/

The government believes that language recently used in
N.A.A.C.P. v. N.A.A.C.P. Legal Defense & Education, 753 F.2d
131 (D.C. Cir. No. 83-1719, June 25, 1985 at slip op. 12)
applies equally well here:

The doctrine of laches bars relief
to those who delay the assertion of
their claims for an unreasonable time.
Laches is founded on the notion that
equity aids the vigilant and not those
who slumber on their rights. Several
aims are served by requiring the
reasonable diligence of plaintiffs in
pursuing their legal rights. Plaintiffs
are encouraged to file suits when courts
are in the best position to resolve
disputes. As claims become increasingly
stale, pertinent evidence becomes lost;
equitable boundaries blur ... and
plaintiffs gain the unfair advantage of
hindsight, while defendants suffer the
disadvantage of an uncertain future
outcome.

* * * * *

2/ Attached herewith as G. Ex. 19 are pages from one
additional published book, Prejudice by Carey McWilliams
(1944). Chapter IV (pp. 106-153) was cited by Justice
Murphy, dissenting, in Korematsu v. United States, 323 U.S.
214 at 237 in fn.6 (McWilliams, pp. 123-124), 323 U.S. at
238 in fn.'s 7 & 9 (McWilliams, pp. 119-123), and 323 U.S.
at 239 fn.12 (McWilliams, pp. 126-128). We are attaching
pages 114-115 of that same chapter IV where author Carey
McWilliams compares General DeWitt's views on "military
necessity" with those of the Army, Navy, FBI, and Lt. Com.
Ringle "of Naval Intelligence" whom McWilliams identifies as
the author of the Harper's October 1942 article. Quite
clearly, this book refutes petitioner's claim that the
government intentionally and successfully suppressed the
views and identity of Lt. Com. Ringle from the public and
the Supreme Court during the litigation of these cases.
Predictably (given the age of this petition), author Carey
McWilliams is no longer alive to testify how and when he
learned Ringle's identity.

1 ... there are no court cases excusing
2 twelve years of delay based purely on
3 the motive, however well-meaning, of
4 wishing to avoid the disadvantages of
 filing suit. [Id. at fn.59, at slip op.
 13.]

5 c. Error of fundamental character.

6 The government submits that its pleadings have also
7 shown that the petitioner's factual assertions are
8 insufficient because they do not "demonstrate that but for
9 the fundamental errors committed a more favorable judgment
10 would have been rendered." United States v. Darnell, supra,
11 716 F.2d 479 at 481 n.5. Indeed, the opinion in Korematsu
12 v. United States conceded as much. Korematsu v. United
13 States, 584 F. Supp. 1406, 1419 (N.D. Cal. 1984) (Whether a
14 different decision would have resulted "cannot be
15 determined."). In United States v. Frady, 456 U.S. 152, 166
16 (1982) the Supreme Court stated that "to obtain collateral
17 relief a [petitioner] must clear a significantly higher
18 hurdle than would exist on direct appeal" i.e., the
19 petitioner must satisfy the "cause and actual prejudice"
20 standard. Accord, United States v. Darnell, supra.

21 The petitioner here has never explained how his
22 allegations can clear that "higher hurdle." Rather, he
23 ignores the controlling standard and, without explanation,
24 maintains that he is entitled to try to prove a violation of
25 his due process rights, irrespective of his failure to
26 allege or proffer satisfaction of the "cause and actual
27 prejudice" standard.

1 (4). Petitioner argues (Memo in Op., p. 6) that the
2 1984 Congressional hearings on Japanese-Americans and
3 Wartime Relocation "are not relevant to this proceeding."

4 The government submits that those hearings are relevant
5 to show that this Court should not prematurely hold such
6 hearing, due to its complexity, the burden it will impose,
7 and its likely length where, as here, the Ninth Circuit will
8 already have under submission the question whether holding
9 such a hearing is proper. 3/

10 In addition, both those Congressional hearings and the
11 other supporting documents attached to the government's
12 Proposed Prehearing Order (at pp. 16-21) directly undercut
13 nearly all of petitioner's unsupported factual allegations.
14 Since we are informed (see page 2 supra) that this Court is
15 not considering the Government's Proposed Prehearing Order
16 in connection with this motion, we herewith reprint verbatim
17 Part VII of that document which outlines the government's
18 proposed exhibits and thereby shows that the factual
19 allegations of the petition are both unsupported and
20 unsupportable:
21

22
23
24
25
26 3/ Moreover, we submit that if such a hearing is ultimately
27 held, both parties will likely use this Congressional
28 testimony for impeachment purposes.

VII.

[GOVERNMENT'S] EXHIBITS

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1. The September 12, 1984 Congressional testimony of Edward J. Ennis states that he made correct and sufficient disclosures to the Supreme Court in the 1943 pleadings he supervised on behalf of the United States in this case, and that the Department of Justice "faithfully" performed its duty (Hearings before the Subcommittee on Admin. Law and Gov't. Relations of the House Jud. Comm., 98th Cong., 2nd Sess. (1984) on H.R. 338, H.R. 4110, and H.R. 4322, Serial No. 90 at pp. 660-661, 667-668 and 679, hereinafter "1984 Cong. Hearings," a copy of which we are herewith lodging with the Clerk of the district court and serving upon petitioner).

2. The written Statement of Peter Irons, attorney for petitioner, offered on September 12, 1984 (1984 Cong. Hearings, p. 801) stating that: (1) "a Japanese espionage network existed on the West Coast at least until June 1941" (1984 Cong. Hearings, p. 925); (2) "The 'Magic' cables ... establish that the Japanese government hoped to enlist Japanese Americans as agents of this network" (1984 Cong. Hearings, p. 925); (3) that an investigation of more than a hundred named Japanese Americans in connection with one West Coast Japanese espionage network penetrated in June 1941 was not closed until at least June 1942 (1984 Cong. Hearings, pp. 927-928); and (4) that one Japanese American named

1 Toraicho Kono was concededly engaged in Japanese espionage
2 in June 1941 (1984 Cong. Hearings, pp. 927-928).

3 3. The September 12, 1984 testimony of John A. Herzig,
4 affiant on behalf of petitioner, acknowledging: (1) that
5 the 1946 statement of the Joint Congressional Committee
6 investigating Pearl Harbor was "absolutely true" that:

7 MAGIC was some of the finest
8 intelligence available in our history.
9 Washington authorities learned that
10 Japanese spies and agents, directed by
11 the Japanese Government, were collecting
12 and transmitting to Tokyo an immense
13 amount of exact and detailed information
14 respecting military and naval
15 installations. With extraordinary
16 skill, zeal, and watchfulness, the
17 intelligence services of the Army Signal
18 Corps and the Naval Office of Naval
Communications broke Japanese codes and
intercepted messages between the
Japanese Government and its spies and
agents and ambassadors in all parts of
the world, and supplied the high
authorities in Washington with reliable
secret information respecting Japanese
designs, decisions and operations at
home in the United States and in other
countries.

19 (1984 Cong. Hearings, p. 860); and (2) that the volume
20 entitled Guarding the United States and its Outposts (1964)
21 published by the Office of the Chief of Military History is
22 the "official government record" of this event and contains
23 a chapter (Chapt. V, pp. 115-149) on "Japanese Evacuation
24 from the West Coast" (1984 Cong. Hearings, p. 831).

25 4. The September 12, 1984 testimony of David D. Lowman
26 (1984 Cong. Hearings, pp. 430-549 and 868-881):

27 (1) identifying particular "Magic" cables which the United
28 States secretly intercepted in 1941 which showed that the

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1 Japanese government believed that it had succeeded in
2 establishing an espionage network which included Japanese
3 Americans and aliens (1984 Cong. Hearings, pp. 441-488) and
4 attaching inter alia the complete text of No's 119 & 174
5 (1984 Cong. Hearings, pp. 493-494 and 496); (2) identifying
6 the December 4, 1941 26 page report of the Counter
7 Subversion Section, Office of Naval Intelligence entitled
8 "Japanese Intelligence and Propaganda in the United States
9 During 1941" (1984 Cong. Hearings, pp. 504-529) which
10 repeated almost verbatim and disseminated without
11 attribution but as its own opinion the text of various
12 intercepted Magic cables including No. 119 (at ONI Report,
13 p. 2, ¶ 3, reprinted at 1984 Cong. Hearings, p. 503) and No.
14 174 (at ONI Report, p. 10, ¶ 4-6, reprinted at 1984 Cong.
15 Hearings, p. 513) alleging ongoing espionage by Japanese
16 Americans; (3) identifying documents showing that in
17 response to a February 12, 1942 telephone call of Assistant
18 Secretary of War John J. McCloy requesting the assistance of
19 the General Headquarters of the U.S. Army in "settling this
20 question" of Japanese espionage, Deputy Chief of Staff
21 Brigadier General Mark W. Clark provided Assistant Secretary
22 McCloy with a January 21, 1942 three page confidential
23 Information Bulletin (No. 6) entitled "Japanese Espionage"
24 prepared by the Assistant Chief of Staff, G-2 (Military
25 Intelligence) of the U.S. Army General Headquarters which
26 states on p. 3 in subsections (b) and (c) of the section
27 called "Conclusions" that "Their espionage net containing
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1 Japanese aliens, first and second generation Japanese and
2 other nationals is now thoroughly organized and working
3 underground. *** [and] they may be expected to have their
4 own underground communication net." (1984 Cong. Hearings,
5 pp. 530-533); and (4) stating that Officer Ringle, who in
6 January 1942 was an Assistant District Intelligence Officer
7 in the 11th Naval District, was "totally unaware" of Magic
8 (1984 Cong. Hearings, pp. 436-437).

9 5. Four documents we have retrieved from the 1942
10 Records of the U.S. Army Intelligence Decimal files, Ass't
11 Chief of Staff (G-2), File # 000.24 "Japanese Activities"
12 1941-1948 (Record Group 319, Boxes 5 and 6, National
13 Archives, Suitland, Maryland record center), including:

14 a. A duplicate copy of the 26 page ONI report
15 entitled "Japanese Espionage" dated December 4, 1941 and
16 reprinted at 1984 Cong. Hearings, pp. 504-529;

17 b. A three page January 3, 1942 War Department,
18 M.I.D. (Military Intelligence Division) memo entitled
19 "Japanese Activities and Intelligence Machine in the Western
20 Hemisphere," similar in tone to item (a) above, a copy of
21 which is attached hereto;

22 c. A February 7, 1942 report prepared by Officer
23 Ringle entitled "Japanese Menace on Terminal Island, San
24 Pedro, California" estimating a 75% chance of espionage, a
25 20% chance of sabotage, and a 5% chance of fifth column
26 activity by Japanese descended "alien sympathizers, even
27
28

1 though of American citizenship," and cover letters showing
2 wide distribution, a copy of which is attached hereto; and

3 d. A one page May 26, 1942 confidential
4 memorandum prepared by Officer Ringle's superior (see
5 document (c) above), entitled "Suspected subversive
6 activities -- Japanese Evacuees," warning of problems from
7 Japanese aliens who were arrested and then cleared and
8 released after undergoing individual hearings by the Alien
9 Enemy Control Boards, and a cover letter showing wide
10 distribution.

11 6. A copy of Guarding the United States and Its
12 Outposts (Office of the Chief of Military History, U.S. Army
13 1964), Chapter V ("Japanese Evacuation from the West
14 Coast"), at p. 121 quoting the January 21, 1942 U.S. Army
15 General Headquarters "Japanese Espionage" intelligence
16 bulletin No. 6 and (in fn. 20) locating a copy of that
17 January 21, 1942 bulletin in the 1942 Western Defense
18 Command files kept by Assistant Secretary of War McCloy.

19 7. The identical passage referred to in ¶ 6 above, as
20 it originally appeared in Command Decisions, Office of the
21 Chief of Military History, Dept. Army, 1960, first published
22 by Harcourt, Bruce, 1959), Chapter 5 ("The Decision to
23 Evacuate the Japanese from the Pacific Coast"), p. 132 and
24 fn. 17.

25 8. Western Defense Command document dated May 3, 1943
26 (reprinted in 1984 Cong. Hearing, pp. 614-617) recounting at
27 ¶ 1.(b) and ¶ 5 that with respect to suggestions by the
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1 Assistant Secretary of War for improvements in the April 15,
2 1943 draft of General DeWitt's Final Report: "Mr. McCloy
3 stated that he strongly desired to avoid creating the
4 impression that he had any wish to prescribe what the
5 Commanding General should say or not say in the final
6 report. *** He emphasized ... that he did not wish [sic] to
7 be misunderstood and that if the CG [Commanding General] did
8 not himself feel that an improvement would result [McCloy]
9 would rather drop the matter."

10 [END OF REPRINTED MATERIAL]


11 (5). Conclusion

12 For the reasons stated above and in our original moving
13 papers -- which demonstrate why this Court should exercise
14 restraint, if at all possible, to avoid unnecessarily
15 initiating such an historically complex and emotionally
16 charged hearing -- the government respectfully requests that
17 its renewed motion to dismiss, or in the alternative for a
18 stay, should be granted.

19 Respectively submitted,

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