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Memorandum of Points and Authorities in Support of Petition for Writ of Error Coram Nobis for Gordon Hirabayashi

United States District Court Western District of Washington

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

GORDON K. HIRABAYASHI, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	No. C83-122V Crim. No. 45738 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF ERROR CORAM NOBIS FOR GORDON K. HIRABAYASHI

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Memorandum of Points and Authorities

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Petitioner, GORDON K. HIRABAYASHI, submits the following memorandum in support of his petition for writ of error coram nobis.

PRELIMINARY STATEMENT

In separate but identical Petitions, GORDON HIRABAYASHI, MINORU YASUI, and FRED TOYOSABURO KOREMATSU, challenge their respective convictions under Public Law 503 which imposed criminal penalties on Japanese Americans for violation of military curfew and exclusion orders during World War II. Although each Petitioner brings his challenge in the respective United States District Court in which he was convicted, the interconnected pattern of misconduct which tainted each of their trials and appeals can only be understood by considering all three cases together. Because the government's course of misconduct permeated all Petitioners' cases, references to "Petitioners" is intended to include each Petitioner.

Petitioners have recently discovered evidence of governmental misconduct in the prosecution of their respective cases which effectively denied them fair trials and appeals in violation of the United States Constitution. Specifically, the petitioners contend (1) that the government destroyed and suppressed evidence which controverted its own legal assertion of wartime military necessity; (2) that the government submitted false and inaccurate information to the courts with knowledge of its falsity; and, (3) that the destruction and suppression of evidence and the submission of false evidence were compounded by the government's failure to disclose exculpatory evidence.

Petitioners further allege that these acts, in conjunction with an improper request by the government for judicial notice of facts known to be false and manipulation of amicus curiae briefs constituted a fraud upon the courts. Considering the acts of misconduct separately and in their cumulative effect, it is clear that Petitioners' constitutional rights to due process were fundamentally and systematically violated.

I. RELIEF BY WRIT OF ERROR CORAM NOBIS IS AVAILABLE TO CORRECT FUNDAMENTAL ERRORS WHICH DEPRIVED PETITIONERS OF DUE PROCESS RIGHTS UNDER THE UNITED STATES CONSTITUTION

Under 28 U.S.C. §1651, a petition in the nature of the common law writ of error coram nobis is available to challenge federal criminal convictions obtained by errors of such fundamental character as to render the underlying proceeding irregular and invalid. United States v. Morgan, 346 U.S. 502 (1954). The Morgan case established the district court's power, under 28 U.S.C. §1651, to grant relief by the writ even after a petitioner has fully served his sentence. Id at 513. Similarly, in United States v. Danks, 357 F. Supp. 190, 196 (D. Hawaii 1973), the court stated, "Coram nobis must be kept available as a post conviction remedy to prevent 'manifest injustice' even where the removal of the prior conviction will have little present effect on the petitioner."

The courts have exercised their power under this writ not only where errors during trial are of constitutional dimension but also where the errors are so fundamental that serious injustice would arise if coram nobis relief were not allowed. United States v. Wickham, 474 F. Supp. 113, 116 (C.D.

Cal. 1979).

The allegations of misconduct in the instant petition lie squarely within the ambit of coram nobis. The various acts of suppression and destruction of evidence, the presentation of false evidence, and the generalized course of fraud on the court directly affected petitioners' rights to fair proceedings. In similar situations, the courts have held that "prosecutorial misconduct may so pollute a criminal prosecution so as to require a new trial, especially when the taint in the proceedings seriously prejudices the accused." United States v. Taylor, 648 F.2d 565, 571 (9th Cir.), cert. denied, 454 U.S. 866 (1981). The court in Taylor held that a new trial is appropriate "when the prosecution has knowingly used perjured testimony or withheld materially favorable evidence from the defense".

Although procedurally distinct, a petition for writ of error coram nobis and a habeas corpus petition under 28 U.S.C. §2255 are substantively equivalent. See Morgan, 346 U.S. 510-11; Taylor, 648 F.2d at 573. Thus, prescinding from 28 U.S.C. §2255, a criminal defendant may challenge a criminal conviction not only for lack of jurisdiction or constitutional error, but also to remedy claimed errors of either law or fact "presenting exceptional circumstances constituting a fundmental defect which inherently results in a complete miscarriage of justice." United States v. Addonizio, 442 U.S. 178, 185 (1979). The legal significance of this petition extends beyond the fate of three individuals. The government's misconduct in Petitioners' cases not only resulted in the denial of their

rights to fair proceedings but also legitimized the mass imprisonment of 110,000 Japanese Americans during World War II without trials. The constitutional violations alleged are no less significant some forty years later. As expressed by the United States Supreme Court in Chessman v. Teets, 354 U.S. 156 (1957), constitutional error cannot be minimized by the passing of time:

> Evidently it also needs to be repeated that the overriding responsibility of this Court is to the Constitution of the United States, no matter how late it may be that a violation of the Constitution is found to exist...We must be deaf to all suggestions that a valid appeal to the Constitution...comes too late, because courts, including this Court, were not earlier able to enforce what the Constitution demands. The proponent before the Court is not the petitioner but the Constitution of the United States."

Id. at 165.

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II. THE GOVERNMENT'S FAILURE TO ADHERE TO ESTABLISHED STANDARDS OF PROSECUTORIAL CONDUCT VIOLATED PETITIONERS' DUE PROCESS RIGHTS

The petition submitted in this case discloses a pattern of conduct by government prosecutors and agents calculated to assure Petitioners' convictions and to gain court approval of wartime actions. In manipulating Petitioners' cases in this way, the prosecution abrogated its duty to the courts, the constitution and the defense. As first declared in Berger v. United States, 295 U.S. 78 (1935), agents of any prosecutorial entity, including attorneys, police, and other investigators, must be held to a definite standard of conduct in order to ensure the right to a fair and impartial trial guaranteed by the due process clause of the Fifth and Fourteenth Amendments. The breach of this standard by government prosecutors and their agents in the instant cases constitutes a basis to reverse Petitioners' convictions.

In Berger, the prosecutor, in closing argument to the jury, improperly charged the defendant with suppression of evidence. In language which has become the classic statement of the prosecutions's duty, the court reversed the conviction, stating,

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense a servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with

> earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

Id. at 88.

Similarly, prosecutors, as representatives of the state, have been admonished that "'[a] criminal trial is not a game in which the State's function is to outwit and entrap its quarry. The State's pursuit is justice, not a victim'". Imbler v. Craven, 298 F. Supp. 795, 809 (C.D. Cal. 1969), aff'd sub nom., Imbler v. State of California, 424 F.2d 631 (9th Cir.), cert. denied, 400 U.S. 865 (1970), quoting Giles v. Maryland, 386 U.S. 66, 100 (1967)(Fortas, J., concurring).

The courts have consistently asserted that the responsibility of the government prosecutor to represent the interests of the State includes his duty to assure that convictions are obtained only within the constraints of the Constitution. As recently as 1979, in Gannett Co. v. DePasquale, 443 U.S. 368, 384 (1979), the Supreme Court reaffirmed the prosecutorial standard of conduct set forth in Berger: "The responsiblity of the prosecutor as a representative of the public surely encompasses a duty to protect the societal interest in an open trial. But this responsiblity also requires him to be sensitive to the due process rights of a defendant to a fair trial." Should this safeguard of the "ethical responsibilities of the prosecutor" fail, "review remains available under due process standards." United States v. Ash, 413 U.S. 300, 320

(1973).

The government fell far short of meeting these standards of prosecutorial conduct in Petitoners' cases. While the government finally won court approval of the military orders, it did so by keeping material evidence from the court, by submitting false evidence and, more importantly, by sacrificing petitioner's constitutional rights to fair trial.

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III. THE PROSECUTION'S USE OF FALSE EVIDENCE AND THE SUPPRESSION OF MATERIALLY FAVORABLE EVIDENCE IN THE HIRABAYASHI, YASUI, AND KOREMATSU CASES CONSTITUTED A DENIAL OF DUE PROCESS REQUIRING VACATING OF PETITIONERS' CONVICTIONS

In order to present the strongest possible cases to the courts, the government suppressed key reports from military and government agencies. These reports authoritatively refuted the government's justification of the curfew and exclusion orders. In presenting evidence known to be inaccurate and false, the government placed a "tailored" factual record before the court as a basis for its "military necessity" claim. Had courts been provided with accurate and credible facts, the military orders would not have been upheld against Petitioners' constitutional attacks.

Beginning with Mooney v. Holohan, 294 U.S. 103 (1935) (per curiam), the courts have consistently held that either prosecutorial suppression of material evidence favorable to a defendant, or knowing presentation of false evidence, constitutes a denial of due process requiring a reversal of convictions so obtained.[1] Each ground stands as an independent basis for reversal. In Mooney, the petitioner claimed that the prosecution had knowingly elicited false testimony and suppressed evidence useful to the defense in order to obtain the defendant's conviction. In ruling for the appellant, the court emphasized the importance of protecting against such conduct:

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[1]. See Pyle v. Kansas, 317 U.S. 213 (1942); Alcorta v. Texas, 355 U.S. 28 (1957)(per curiam); Hysler v. Florida, 315 U.S. 411 (1942); Woollomes v. Heinze, 198 F.2d 577 (9th Cir. 1952), cert. denied, 344 U.S. 929 (1953).

> [The due process] requirement, in safeguarding the liberty of the citizen against deprivation through the action of the State, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions. It is a requirement that cannot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation.

Id. at 112(Citation omitted)(Emphasis added)

Subsequent cases have both affirmed and expanded Mooney's basic pronouncement of due process protection against instances of suppression of submission of false evidence. Thus, in Napue v. Illinois 360 U.S. 264 (1959) the Supreme Court ruled that post coviction relief was available to vacate a conviction where the prosecutor knowingly failed to correct false testimony which was relevant to a witness' credibility In so holding, the court found evidence of credibility to be material enough to warrant relief. See also Loraine v. United States, 396 F.2d 335, 339 (9th Cir. 1968), cert. denied, 393 U.S. 933 (1968).

In the landmark case of Brady v. Maryland, 373 U.S. 83 (1963), the court held that the prosecution's suppression of evidence favorable to the accused and material to guilt or punishment could violate due process regardless of the good or

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bad faith of the prosecution:2

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.
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> The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of justice suffers when any accused is treated unfairly. An inscription on the walls of the Department of Justice states the proposition candidly for the federal domain: "The United States wins its point whenever justice is done its citizens in the courts"[3]

Enlarging the due process principle of Brady further in cases involving suppression or false evidence, the courts have clearly stated that such actions violate constitutional rights even when committed by government representatives other that the individual trial/appellate attorney. In the leading case of Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), the court ruled that the defendant was entitled to have

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[2]See also Smith v. Phillips, ____ U.S.____, 71 L.Ed. 2d 78, 87 (1982) ("...the touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor".; United States v. Hibler, 463 F.2d 455 (9th Cir. 1972).

[3]Although the defense in Mooney made a specific request for evidence in the possession of the prosecution, such a request is not a prequisite to holding the government to its duty to disclose. In United States v. Hibler, supra, the court stated, "That defense counsel did not specifically request the information, that a 'diligent' defense attorney might have discovered the information on his own with sufficient research, or that the prosecution did not suppress the evidence in bad faith, are not conclusive; due process can be denied by failure to disclose alone."

his conviction set aside because the prosecutor failed to disclose potentially exculpatory evidence which was withheld by the police. The court held that even though the police, rather than the prosecutor, withheld the information, the resulting denial of due process was the same:

> ...the effect of the nondisclosure [is not] neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes no difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather that the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant. 'The cruelest lies are often told in silence." If the police silence as to the existence of the reports resulted from negligence rather that guile, the deception is no less damaging.

Id at 846.

The court emphasized that the State's duty to assure the fairness of the proceedings and to achieve justice extends beyond the prosecuting attorneys to the enforcement agency of the state itself:

> The duty to disclose is that of the state which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused. We cannot condone the

> crime by questionable inferences which might be refuted by undisclosed and unproduced documents then in the hands of the police. To borrow a phrase from Chief Judge Briggs, this procedure passes 'beyond the line of tolerable imperfection and falls into the field of fundamental unfairness'.[4]

Id.(footnotes omitted).

In 1976, apparently seeing the need to establish uniform standards for application of Mooney and its progeny, the Supreme Court rendered its decision in United States v. Agurs, 427 U.S. 97 (1976). Agurs remains today as the yardstick by which challenges to convictions based on false or suppressed evidence must be measured. The court in Agurs identified three situations involving suppression of evidence and defined for each category the circumstances in which a conviction may be vacated:

1. Misconduct cases typified by Mooney, 294 U.S. 103, where the prosecution introduces perjured testimony or false evidence which it knows or should know is false, a conviction will be reversed if the false evidence is considered material to a conviction. The evidence is material if there is "any reasonable likelihood" that the false evidence or testimony could have affected the judgment. Agurs, 427 U.S. at 103.

In Petitioners' trials and appeals, the Justice Department and other governmental agencies knew that charges of Japanese American espionage and sabotage were refuted by other authoritative evidence to the contrary. Relying upon the

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[4] For reaffirmation of this basic principle, that any government misconduct is the responsiblity of the prosecution, see Giglio v. United States, 405 U.S. 150, 154 (1972); Ray v. United States, 588 F.2d 601, 603 (8th Cir. 1978).

government's factual misrepresentations, the Supreme Court upheld the constitutionality of Petitioners' convictions. As argued in more detail in subsection II(B) of this Memorandum, Petitioner's convictions should be reversed on this ground alone.

2. The second classification of cases are those illustrated by Brady, 373 U.S. 83, where a request is made by the defense for specific evidence, and the prosecution fails to comply. Agurs, 427 U.S. at 104. As this category is not applicable to the instant petition, it will not be considered in detail.

3. The final group of cases are those illustrated by Agurs itself, wherein exculpatory evidence suppressed is unknown to the defense and no request for the evidence is made. 427 U.S. at106. The prosecution's duty to produce such evidence arises from the "obviously exculpatory character" of the evidence, which "is so clearly supportive of a claim of innocence" that the prosecution is put on notice of its duty to produce it. Id. at 106. A violation of due process arises if, within the context of the entire record, "the omitted evidence creates a reasonable doubt that did not otherwise exist". Id at 112.

As argued in subsection II(A) immediately following, the government suppressed various documents and reports obviously exculpatory in character. Critical language in General DeWitt's original Final Report, as well as facts presented in other government investigative documents exposed the lack of any factual basis for the military orders. This evidence would have supported Petitioners' constitutional challenges and the failure to disclose these documents subverted petitioners' due process

rights.

A. THE GOVERNMENT SUPPRESSED MATERIAL EVIDENCE CONTRADICTING THE "MILITARY NECESSITY" JUSTIFICATION UNDERLYING THE CURFEW AND EXCLUSION ORDERS

The test established by the Supreme Court in the third category of United States v. Agurs, 427 U.S. 97, requires the prosecution to disclose exculpatory evidence. While the government's suppression of such evidence in petitioners' cases is more fully described in POINTS ONE, TWO and THREE of the petition, the following discussion points out the materiality of the suppressed evidence under the Agurs standard.

The government's factual allegations regarding sabotage and espionage were the sole focus of the Court's constitutional inquiry in Petitioner's cases. The Supreme Court in Hirabayashi v. United States, 320 U.S. 81 (1943) and Yasui v. United States, 320 U.S. 115 (1943) made it clear that the government's claim of military necessity and therefore constitutionality of the military orders, succeeded or failed on whether its claims regarding the disloyalty and disloyal acts of Japanese Americans were justified. The Court framed the essential question in Hirabayashi v. United States: "Whether in the light of all the facts and circumstances there was any substantial basis for the conclusion...that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage..." Hirabayashi, 320 U.S. at 95.

In Korematsu v. United States, 323 U.S. 212, 218 (1944), the court stated that an even greater factual showing would be required to support the government's claim: "[n]othing

short of apprehension of the gravest imminent danger to the public safety can constitutionally justify either [the curfew or exclusion order]."

That the government's allegations of Japanese American espionage and sabotage were material to the Supreme Court's holdings is obvious from the Court opinions themselves. In Hirabayashi, the court stated:

> [We] cannot reject as unfounded the judgment of the military authorities and that of Congress that there were disloyal members of [the Japanese American] population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the goverment 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 prompt and adequate measures be taken to guard against it.

320 U.S. at 99. The court added,

> [T]he findings of danger from espionage and sabotage, and of the necessity of the curfew order to protect against them, have been duly made....
>
> The military commander's appraisal of facts..., and the inferences which he drew from those facts, involved the exercise of his informed judgment...[T]hose facts... support (his) judgment..., that the danger of espionage and sabotage to our military resources was imminent....

Id. at 103-104.

In Korematsu, the Court reaffirmed the position taken in Hirabayashi, adding that

> Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of

> disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the miltary on the same ground.

323 U.S. at 218,219.

The Court's decisions on the constitutionality of the military orders, therefore, rested on the premise that wartime necessity existed supporting the promulgation of official measures. Evidence contradicting such necessity would clearly have been material to the Court's finding and its consequent judgments. Each of the documents suppressed refuted different aspects of the government's case and, viewed as a whole, the suppressed evidence would have fatally undermined the government's position that any security threat by the Japanese American populace existed. A short examination of documents and their individual significance underscores this point.

1. Suppression of General DeWitt's Final Report

As outlined in POINT ONE of the petition, it was assumed until recently that only one draft of the Final Report, dated June 5, 1943, was composed. An initial draft, however, has been discovered which was originally withheld not only from the defense but also from other governmental agencies, including the Department of Justice. The initial draft contained statements contrary to positions taken by the United States in its argument to the Supreme Court. These statements were either excised or altered for the express purpose of avoiding an "unfavorable

reaction" by the Supreme Court. Needless to say, the Supreme Court never received this initial draft and all copies of the initial draft were recalled. Eventually, the galley proof, galley pages, drafts and memoranda of the original report were destroyed by burning.

Among the statements in the inital draft which were altered or excised and suppressed were the following:

1. "It was impossible to establish the identity of the loyal and disloyal with any degree of safety."

2. "It was not that there was insufficient time in which to make such determination; it was simply a matter of facing the realities that a positive determination would not be made, that an exact separation of the 'sheep from the goats' was unfeasible."(Emphasis added).

Officials of the War Department excised and altered these statements in the DeWitt Report because they stood in direct opposition to the government's position that the reason for mass evacuation was insufficiency of time to hold individual hearings. In addition, the statements contradicted prior statements made by DeWitt thus impairing his credibility. The statements were excised and redrafted to state that "no ready means existed for determining the loyal and disloyal..."

Ignorant of DeWitt's statements that insufficiency of time was not the reason for the military actions, the Department of Justice continued to argue to the courts that the justification for the orders was, in fact, insufficiency of time. The Government had stated in its brief to the United States

Supreme Court in Hirabayashi: " ...it would be impossible quickly and accurately to distinguish those persons [who had formed an attachment to, and sympathy and enthusiasm for, Japan] from other citizens of Japanese ancestry." Brief for United States in Hirabayashi v. United States, p 12.

2. Suppression of the Report of the Office of Naval Intelligence (ONI) on Japanese American loyalty.

As set forth in more detail in POINT TWO of the Petition, the ONI was assigned by Presidential Order to investigate the West Coast Japanese American population. The ONI's official report concluded that the majority of Japanese Americans were loyal to the United States. Further, the ONI asserted that not only could the disloyal be identified but that a mechanism for distinguishing between the loyal and disloyal could have been established. Indeed, other authorities, such as the FBI, recognized that the Japanese Americans presented no grave threat to this country's security.

The ONI Report was sent to Attorney General Francis Biddle in 1942 and was known to the prosecution throughout the trials and appeals of Petitioners' cases. Yet this report was never presented to either the courts or Petitioners. Given the assertions in the second DeWitt Final Report that the loyalty of Japanese Americans was questionable, and that disloyal Japanese Americans could not readily be distinguished with any certainty, the ONI report was material to any factual rebuttal by Petitioners.

3. Suppression of the Reports of the Army Military Intelligence Division (G-2), the Federal

Communications Commission (FCC), and the Federal Bureau of Investigation (FBI)

Central to the United States' argument justifying the curfew and exclusion was the alleged potential for espionage and sabotage by Japanese Americans. In his Final Report, DeWitt argued that the military orders were justified because Japanese Americans were predisposed to acts of espionage and sabotage. In support of his allegations, he cited the interception of unauthorized radio communications and reports of unauthorized signal lights, implying that Japanese Americans were responsible for such acts.

Both the War Department and the Department of Justice possessed evidence which flatly refuted these allegations before the Hirabayashi case was decided. This evidence was suppressed from the trial courts and the United States Supreme Court [As outlined in POINT TWO of the Petition]. Official records of the Army Military Intelligence Division, FBI and FCC specifically rejected DeWitt's claim that Japanese Americans committed, or were prepared to commit, acts of espionage or sabotage. The chairman of the FCC, in fact, reported to the Attorney General that every shore-to-ship signal had been investigated and no substantiation of illicit signaling was ever discovered. General DeWitt was informed of this as early as January 9, 1942, yet maintained in his Final Report that illicit radio communication had occurred with the implication of participation by Japanese Americans.

Reviewing the above-described documents suppressed by the government, their materiality to Petitioners' cases under the

standard in United States v. Agurs, 427 U.S. 97 becomes evident. Each document contained facts which contradicted government assertions of "military necessity" and thus each was "obviously exculpatory in character", Id. at 107.[5] Additionally, these records of the Army Military Intelligence Division, FBI, and FCC, would have further undercut the credibility of General DeWitt as a source of accurate factual information concerning the threat posed by the Japanese Americans. Without contrary evidence, however, the courts in general and Supreme Court in particular were left with a biased, prefabricated record. The frustration over the inadequacies of the record was expressed by Justice Jackson in his dissent in Korematsu,

> How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable.

323 U.S. at 245.

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[5] Even if this court considers the suppressed information merely the opinions of military officials, it has been held that due process is violated when the prosecution fails to inform the defense that contrary opinions exist. Ashley v. Texas, 319 F.2d 80, 85 (5th Cir. 1963), cert. denied, 375 U.S. 931 (1963)

B. THE SUBMISSION OF FALSE EVIDENCE WHICH THE PROSECUTOR KNEW OR SHOULD HAVE KNOWN TO BE FALSE, AND THE FAILURE TO CORRECT OR DISCLOSE SUCH FALSITY VIOLATED PETITIONERS' DUE PROCESS RIGHTS TO FAIR PROCEEDINGS

The submission of false evidence by the Department of Justice falls within the first category of suppression cases defined by Agurs, 427 U.S. at 106. As discussed in the previous section of this memorandum, the prosecution suppressed evidence which would have proven its proferred evidence to be false. In addition, the prosecution presented the courts with "evidence" of espionage and sabotage associated with Japanese Americans stemming from disloyalty. This "evidence" was contradicted by information in the possession of the government. The Court, unaware of the falsity of these allegations, relied on these "facts" to uphold the constitutionality of the curfew and exclusion orders.

Rather than repeat the previous discussion and the detailed account in POINTS ONE, TWO and THREE of the petition, the following summarizes the false evidence submitted:

1. The government asserted that the miltary orders were necessary because there was insufficient time to separate the loyal from the disloyal. This contention was undermined by statements in DeWitt's original Report which were excised and altered to conceal evidence from the court.

2. The DeWitt Report's "findings" of unauthorized signal lights and illicit radio communications, suggesting possibilities of sabotage and espionage by Japanese Americans were directly refuted by responsible

governmental agencies. Further, DeWitt's allegations of espionage and sabotage among Japanese Americans were flatly contradicted by the Army Military Intelligence Division, the FBI and the FCC. Both the Solicitor General of the United States and the Attorney General of the United States knew that DeWitt's allegations were refuted by other agencies, yet failed to disclose its falsity to the United States Supreme Court.

3. DeWitt's assertion that it was impossible to ascertain the loyalty of Japanese Americans was controverted by the report of the Office of Naval Intelligence which was responsible for investigating the loyalty of West Coast Japanese Americans.

It is established law that a conviction of a defendant based on false evidence is "inconsistent with the rudimentary demands of justice..." Mooney v. Holohan, 294 U.S.at 112. Following Mooney, courts have consistently held that the prosecutor's knowing use of false evidence is unconstitutional. Pyle v. Kansas, 317 U.S. 213; Hysler v. Florida, 315 U.S. 411; Giglio v. United States, 405 U.S. 150. It is not only improper for the prosecution to affirmatively misrepresent facts, but it is just as improper for the prosecution to create an inference of guilt by omitting material facts. As stated in Imbler v. Craven, 298 F. Supp. 795, 809 (C.D. Cal. 1969) aff'd, sub nom., Imbler v. State of California, 424 F.2d 631 (9th Cir.),cert. denied, 400 U.S. 865 (1970), quoting Giles v. Maryland, 386 U.S. 66, 100 (1967) (Fortas, J., concurring):

...omissions and half-truthsare equally

> damaging and prohibited, and their use is no less culpable. Creating an inference that a fact exists when in fact to the knowledge of the prosecution it does not, constitutes the knowing use of false testimony.
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> "Evidence may be false either because it is perjured, or, though not in itself factually inaccurate, because it creates a false impression of facts which are known not to be true." (Citations omitted)(emphasis added)

As noted in Agurs, 427 U.S. at 103, a conviction obtained through the use of false evidence must be set aside "if there is any reasonable likelihood that the false evidence could have affected the judgment of the jury" or, in this case, the court before whom the constitutional question was presented.

In Petitioners' cases, the central issue before the court was whether the military had an adequate factual justification for the curfew and exclusion of Japanese Americans. The false evidence described herein was offered on this central issue, painting a false and misleading picture of imminent threat to the security of the West Coast. Whether by affirmative misrepresentation, suggestive inference or by failure to disclose contrary evidence, the government knowingly and purposefully made a false impression on the courts. Given the government's manipulation of this evidence and the Supreme Court's finding of military necessity on the factual record before them, there is clearly more than a "reasonable likelihood" that the false evidence affected the court's judgment.

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IV. THE PROSECUTION'S BAD FAITH IN INTENTIONALLY DESTROYING EVIDENCE MATERIAL TO THE PETITIONERS' DEFENSES PREJUDICED PETITIONERS' RIGHTS TO FAIR PROCEEDINGS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION

As discussed in POINT ONE of the Petition and Section III of this Memorandum, several branches of government collaborated to destroy the original DeWitt Final Report. This destruction not only constituted suppression of evidence, but also raises an independent ground of misconduct upon which this court may base vacation of Petitioners' convictions.

When the prosecution and affiliated government agencies are responsible for the loss or destruction of evidence, the courts will find a due process violation if bad faith lies behind the government's actions. This standard should be distinguished from the standard applicable to suppression cases discussed above; in suppression cases, a due process violation will be found on the basis of the materiality of the evidence, "irrespective of the good faith or bad faith of the prosecution". Brady v. Maryland, 373 U.S. 83.

In 1974, the Ninth Circuit established an explicit test for vacation of convictions based on destruction of evidence. In United States v. Heiden, 508 F.2d 898 (9th Cir. 1974), the court was confronted with destruction of marijuana prior to the appellant's trial. The court declared that

> When there is loss or destruction of such evidence, we will reverse a defendant's conviction if he can show (1) bad faith or connivance on the part of the government or (2) that he was prejudiced by the loss of evidence.

Id. at p.902

Prior to Heiden, the courts had established that the loss or destruction of evidence by the prosecution could violate defendant's constitutional rights if the prosecutor acted in bad faith. See United States v. Augenblick, 393 U.S. 348 (1969); United States v. Bryant, 439 F.2d 642 (D.C. Cir. 1971); United States v. Henry, 487 F.2d 912 (9th Cir. 1973).

It is significant to note that after Heiden, the courts have suggested that prejudice will be presumed if there is intentional destruction of evidence by the prosecution. As stated in United States v. Arra, 630 F.2d 836, 849-850 (1st Cir. 1980), where the government erased a tape of their surveillance of the appellants,

> It may be, though we do not now so decide that intentional wrongful misconduct on the part of the government would warrant an assumption that the evidence destroyed would have been favorable to the defense.

In the instant cases, the various governmentand military authorities purposefully and methodically collected all copies of the original DeWitt Final Report and had them destroyed. The conclusion is inescapable that the intent behind the destruction was to keep any evidence contrary to the government's legal position away from the Court. This intent is underscored by governmental agents' efforts to destroy not only the original Final Report but to alter and cover up any records of that original Report's existence. Such a blatant exhibition of bad faith falls squarely within the type of misconduct prohibited by Heiden, 508 F.2d 898.

The destruction of the Final Report was prejudicial to the Petitioner's defense. The government's claim of military

necessity rested on the assumption that there was insufficient time to determine the loyalty of Japanese Americans on an individual basis. Yet, General DeWitt's own statements that insufficiency of time was not the reason for the orders, were destroyed with the original Final Report. Petitioners were thereby prejudiced in their ability to challenge the factual justification for the military orders put forth by the government. The bad faith exhibited by the War Department in destroying the original Final Report was so egregious and calculated that the court should presume that the evidence destroyed favored the petitioners. Arra, 630 F.2d 836.

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V. THE PATTERN AND PRACTICE OF GENERALIZED MISCONDUCT BY THE GOVERNMENT CONSTITUTED A FRAUD ON THE COURT RESULTING IN FURTHER DEPRIVATION OF PETITIONER'S DUE PROCESS RIGHTS

Fraud on the court "...is that species of fraud which does, or attempts to, defile the court itself or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its important task of adjudicating cases that are presented for adjudication." Bulloch v. United States, 95 F.R.D. 123, 143 (D. Utah 1982)(citations omitted).

Petitioners contend that the government executed a systematic plan to impede the administration of justice in their cases. Considered in its totality, these acts amounted to a fraud on the court, warranting relief from petitioners' convictions.

Officials of the War Department, Justice Department, the Military, and the Executive branch acted in concert to effectuate a plan which: 1) deprived the court of relevant and material evidence necessary for a full adjudication of the underlying criminal actions, and 2) introduced into the proceedings information which was known to be false, misleading and prejudicial. This plan was intended to validate the government orders which ultimately resulted in the exclusion and imprisonment of an entire sector of the citizenry.

A. DEVELOPMENT OF A STANDARD FOR FRAUD ON THE COURT

The Federal Courts are empowered by rules of equity to grant relief from judgments which are "manifestly

unconscionable." Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 244-45 (1944)(citation omitted). In Hazel-Atlas, the Supreme Court granted relief some fifteen years after entry of a patent infringement judgment; the defendant had moved for vacation of the judgment on discovering a fraud upon the court. The fraud occurred when the Circuit Court of Appeals granted a patent based upon the submission of a document purporting to be an independent industry opinion. In fact, the article given to the court had been written by one of the attorneys for the appellant.

In setting aside the judgment, the court found that appellant had misled the court through a deliberately planned and carefully executed scheme to defraud the court. The court exercised its extraordinary power to set aside judgments because of the great public interest in maintaining the integrity of the judicial process. Id. at 246.

These equitable powers were recently exercised in Bulloch v. United States, 95 F.R.D. 123. In Bulloch, the court invalidated a twenty-six year old judgment for the government in an action filed by sheep owners for injuries caused by nuclear testing. In that case, the court found that the government's misconduct in making false and deceptive misrepresentations, intentionally withholding evidence, and generally manipulating the processes of the court amounted to fraud on the court. The court found the fraud to be even more egregious because the government "enjoyed a virtual monopoly of knowledge in comparison to that independently available to the plaintiff sheep owners, their attorneys and, indeed, the Court..." Id. at 144.

The criminal courts have also been invested with such equitable powers to prevent intrinsic fraud. United States v. Frank, 520 F.2d 1287, 1292 (2d Cir. 1975), cert. denied, 423 U.S. 1087(1976). This power results from the reservation by the court of an inherent authority to regulate and supervise the administration of criminal justice. United States v. Cortina, 630 F.2d 1207, 1214 (7th Cir. 1980). Finding that false statements within an affidavit constitute fraud on the judicial system, Cortina held that the court's supervisory powers over government officials are at their "strongest and most defensible" when ordering sanctions against governmental fraud. Id.

These supervisory powers are referred to in United States v. Banks, 383 F. Supp. 389, 392 (D.S.D. 1974), appeal dismissed sub nom., United States v. Means, 513 F.2d 1329 (8th Cir. 1975). In Banks, the misconduct involved the use of perjured testimony, conspiracy, suppression of documents, illegal and unconstitutional use of military personnel, and the violation of ethical, professional, and moral standards.

B. MATERIALITY

The materiality of a scheme that misleads and deceives the court must be viewed in the totality of the government's conduct. While no single component of the plan may have clouded the administration of justice, the theory of fraud on the court requires that the entire practice be examined for the overall effect on the judgment of the court. The court in Hazel-Atlas discussed the required showing of the materiality of the fraud:

> Whether or not (the fraud) was the primary basis for that ruling, the article did impress the court, as shown by the Court's

> opinion. Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think that circumstances call for such an attempted appraisal. Hartford's officials and lawyers thought the article material. They conceived it in an effort to persuade a hostile Patent officer to grant their patent application, and went to considerable trouble and expense to get it published. Having lost their infringement suit based on the patent in the District Court wherein they did no specifically emphasize the article, they urged the article upon the Circuit Court and prevailed. They are in no position now to dispute its effectiveness.

322 U.S. at 246-47 (Emphasis added).

From an examination of the opinions of the Supreme Court in Petitioners' cases, it is clear that the misinformation proferred by the government did enter into the judicial decision. Such a strict determination in not required, however, under Hazel-Atlas. It is sufficient that the offending party deem the evidence important to its case. Thus, the offending party should be precluded from denying the effectiveness of the misinformation submitted to the court.

C. GOVERNMENT MISCONDUCT IN HIRABAYASHI, KOREMATSU AND YASUI AS FRAUD ON THE COURT

Petitioners contend that governmental abuses rose to the level of an intentional and contrived program to mislead the Court. This process of deceit has been presented in detail in the instant Petition. Collectively and cumulatively, the government's acts deprived both Petitioners and the courts of information vital to the determination of constitutionality of the military orders.

Compounding this misconduct, the government further manipulated the court's processes by introducing before the court

information on racial characteristics of Japanese Americans which was prejudicial, racially-biased, irrelevant and of dubious credibility. The government offered this evidence of racial characteristics, and of the propensity of Japanese Americans toward disloyalty, through the doctrine of judicial notice. According to Rule 201(b) of the Federal Rules of Evidence, "a judicially noticed fact must be one not be subject to reasonable dispute in that it is either 1) generally known within the territorial jurisdiction of the court, or 2) capable of accurate and ready determination by resort to source whose accuracy cannot be reasonably questioned."

The doctrine, which provides a process of streamlining the presentation of adjudicative facts, is reserved for those points which are unquestionably true. If there is bona fide dispute about the truth of the fact and the court believes that the truth is not or cannot be established to a convincing degree, the court should refuse judicial notice and remand for further evidence. Dembitz, Racial Discrimination and the Military Judgments: The Supreme Court's Korematsu and Endo Decisions, 45 Colum. Rev. 177, 185 n.39 (1945).

The government used the doctrine of judicial notice to prove facts which it could not establish by other means. Given the government's knowledge of contradictory evidence, the use of judicial notice illustrates clearly the extent to which the government manipulated both the facts and the court's processes to win Petitioners' cases at all costs

Another example of governmental misconduct was the War Department's manipulation of amicus curiae. While the War

Department withheld DeWitt's Final Report from the Department of Justice but furnished the report to the California State Attorney General for use in preparing the amicus brief of the West Coast states in Hirabayashi. In addition, to assure that the allegations in the Final Report would be introduced by amici, the military actively assisted the states in the preparation of their brief.

The course and scope of governmental misconduct in Petitioners' cases make application of the court's supervisory powers seem most appropriate. The court has exercised such equitable powers both in civil actions such as Bulloch, 95 F.R.D. 123, and in criminal cases such as Banks, 383 F. Supp. at 392, and Cortina, 630 F.2d 1216. The application of the court's broad supervisory powers seems particularly appropriate in Petitioners' cases for the government's misconduct had a much wider impact than on Petitioners cases alone.

Ultimately, the government's misconduct resulted in the validation of a program which excluded and evacuated 110,000 Americans of Japanese ancestry. The governments' actions violated the integrity of the judicial process itself and, as in Hazel-Atlas, this offense against the court provides adequate grounds for setting aside Petitioners' convictions.

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VI. THE CUMULATIVE EFFECT OF ALL THE ACTS OF GOVERNMENTAL MISCONDUCT OPERATED TO DENY PETITIONERS DUE PROCESS RIGHTS TO A FAIR TRIAL AND APPEAL

Petitioners additionally urge that the course of conduct undertaken by the government, viewed in its totality, represents an aggregate violation of due process rights. The cumulative effect of the acts of misconduct described in the petition demand extraordinary relief from the court.

The courts have found a denial of due process based on cumulative errors at trial. United States v. Semensohn, 421 F.2d 1206, 1210 (2d Cir. 1970). Where no one individual error would require reversal of a conviction, the court may ascribe due process violations to the total effect of errors which cast serious doubt on the fairness of a trial. United States v. Guglielmini, 384 F.2d 602, 607 (2d Cir. 1967). The court must examine such cumulative effect in close legal cases, where such an effect could have made the difference between conviction and acquittal. United States v. Bledsole, 531 F.2d 888, 892 (8th Cir. 1976).

In United States ex rel. Marzeno v. Gengler, 574 F.2d 730, 736-37 (3d Cir. 1978), the court commented on the cumulative effect of multiple non-disclosures of evidence: "Certainly, the effect of each non-disclosure must not only be considered alone, for the cumulative effect of non-disclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial." United States ex rel. Marzeno v. Gengler, 574 F.2d 730,

736-37 (3rd Cir. 1978).

Petitioners submit that the acts of government misconduct separately and cumulatively violated their due process rights. This pattern of misconduct has been discussed extensively in the Petition and in this Memorandum and will not be repeated here. When considered as a whole, the government's repeated abuse of the judicial process resulted in the denial to Petitioners of a fair proceedings.

CONCLUSION

The pattern of governmental misconduct described insured Petitioners' convictions at trial as well as the affirmance of those convictions on appeal. In securing Petitioners' convictions, the government also won court approval for the mass exclusion of one ethnic minority. The convictions stand today, not because Petitioners committed any wrong to society but because they were persons of Japanese ancestry. Petitioners urge this court to carefully weigh the complete record of governmental abuses, in each of its components and as a whole, and do justice where it was denied forty years ago.

Dated: January 26, 1983

Peter Irons

Kathryn Bannai

Arthur G. Barnett