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AT SEATTLE
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WESTERN DISTRICT OF WASHINGTON
DEPUTY
BY

Judge Donald S. Voorhees
July 31, 1985
CC TO JUDGE _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GORDON K. HIRABAYASHI,)	
)	
Petitioner,)	NO. C83-122V
)	
vs.)	PETITIONER'S POST-HEARING BRIEF
)	
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

PETITIONER'S POST-HEARING BRIEF

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121

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	iii
I. INTRODUCTION	1
II. ISSUES	1
III. LEGAL STANDARDS	1
A. Relief is Warranted Because Government Misconduct Deprived Petitioner of His Right to Due Process Under the Fifth Amendment and Violated the Sanctity of the Courts	1
1. Suppression of Evidence	3
2. Use of Evidence that the Government Knew or Should Have Known to be True	3
3. Destruction of Evidence	4
IV. ANALYSIS	4
A. Suppression of Evidence	4
1. The Delimitation Agreement	5
2. The Ringle Report	6
3. The Munson Reports	12
4. The Final Report	16
5. FCC Reports	16
6. Department of Justice	21
7. G-2 Periodic Reports	26
B. Alteration and Destruction of Evidence	28
1. Alteration and Suppression of Final Report	29
C. Use of Evidence that the Government Knew or Should Have Known to be False	36
1. Misrepresentations	38

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

	<u>Page</u>
2. Abuse of Amici	44
3. Continued Misconduct	45
V. ADVERSE LEGAL CONSEQUENCES	48
VI. CONCLUSION	48

TABLE OF AUTHORITIES

Cases

	PAGE
<u>Giglio v. United States</u> , 405 U.S. 150 (1972)	36
<u>Hirabayashi v. United States</u> , 320 U.S. 81 (1943)	passim
<u>Holloway v. United States</u> , 393 F.2d 731 (9th Cir. 1968) . .	48
<u>Hysler v. Florida</u> , 315 U.S. 411 (1942)	36
<u>Imbler v. Craven</u> , 298 F. Supp. 795 (C.D. Cal. 1969), <u>affd</u> , sub nom. <u>Imbler v. California</u> , 424 F.2d 631 (9th Cir.), <u>cert. denied</u> , 400 U.S. 865 (1970)	36, 37
<u>Korematsu v. United States</u> , 323 U.S. 214 (1944)	49
<u>Mooney v. Holohan</u> , 294 U.S. 103 (1935)	36
<u>Pyle v. Kansas</u> , 317 U.S. 213 (1942)	36
<u>Sibron v. New York</u> , 392 U.S. 40 (1968)	45
<u>United States v. Agurs</u> , 427 U.S. 97 (1976)	3, 4, 38
<u>United States v. Arra</u> , 630 F.2d 836 (1st Cir. 1980)	4, 29
<u>United States v. Goldberg</u> , 582 F.2d 384 (9th Cir 1978) . . .	3
<u>United States v. Heiden</u> , 508 F.2d 898 (9th Cir. 1974) . . .	4, 28
<u>United States v. Imbruglia</u> , 617 F.2d 1 (9th Cir. 1980) . . .	3
<u>United States v. Morgan</u> , 346 U.S. 502 (1954)	1
<u>United States v. Taylor</u> , 648 F.2d 565 (9th Cir.), <u>cert.</u> <u>denied</u> 454 U.S. 866 (1981)	1, 2, 3

Statutes

Public Law No. 503	1, 3
28 U.S.C. Section 1651(a)	1

Other Authorities

Dembitz, RACIAL DISCRIMINATION AND THE MILITARY JUDGMENT: The Supreme Court's Korematsu and Endo Decisions, 45 Colm. L. Rev. 175 (1945)	39
---	----

1 I. INTRODUCTION

2 Petitioner seeks issuance of a writ of error coram nobis to vacate
3 his October 20, 1942 criminal convictions of two violations of Public Law
4 No. 503: failure to observe a curfew as required by Public Proclamation
5 No. 3 and refusal to be evacuated as required by Civilian Exclusion Order
6 No. 57. The relief requested by Petitioner is based on numerous acts of
7 misconduct by agencies of the Government during and after Petitioner's trial.

8 II. ISSUES

9 A. Did the Government suppress evidence, present evidence it knew
10 or should have known to be false, or destroy evidence in its attempt to
11 secure Petitioner's convictions and defend those convictions on appeal?

12 B. If so, should the Court grant Petitioner's prayer for relief and
13 vacate Petitioner's convictions?

14 III. LEGAL STANDARDS

15 A. Relief is Warranted Because Government Misconduct Deprived Petitioner of His Right to Due Process Under the Fifth Amendment and Violated the Sanctity of the Courts.

16
17 The writ of error coram nobis is available by statute, 28 U.S.C.
18 §1651(a), to challenge a federal criminal conviction obtained by the Govern-
19 ment through constitutional or fundamental errors that render a proceeding
20 irregular and invalid. United States v. Morgan, 346 U.S. 502 (1954).

21 Coram nobis relief is warranted where Government abuses "offend
22 elementary standards of justice," cause "serious prejudice to the accused,"
23 or, even absent such prejudice, "undermine public confidence in the admini-
24 stration of justice." United States v. Taylor, 648 F.2d 565, 571 (9th
25 Cir.), cert. denied, 454 U.S. 866 (1981). As stated in Taylor, the leading
26 Ninth Circuit case,

27 ////

28 PETITIONER'S POST-HEARING BRIEF - 1

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1 prosecutorial misconduct may so pollute a criminal prosecution as to require a new trial, especially when the taint in
2 the proceedings seriously prejudices the accused. . . .
3 When a conviction is secured by methods that offend elementary standards of justice, the defendant may invoke the
4 Fourteenth Amendment guarantees of a fundamentally fair trial. . . . Moreover, this principle is not strictly limited to those situations in which the defendant has suffered
5 arguable prejudice, the principle is designed to maintain
6 also public confidence in the administration of justice.

7 Id. at 571 (emphasis added). Guilt or innocence is not the fundamental consideration in due process arguments. The Court cites Justice Frankfurter:

9 This Court has rejected the notion that because a conviction is established on incontestable proof of guilt it may stand, no matter how the proof was secured. Observance of due process has to do not with questions of guilt or innocence but the mode by which guilt is ascertained. Irvine v. California, 347 U.S. at 148, 74 S. Ct. at 391 (Frankfurter, J. dissenting.)

13 Id. at 571, n.20.

14 Here, the Government misconduct is so egregious that the Court
15 should find that the Government's misconduct deprived Petitioner of a fundamentally fair trial and appeal. Even absent a finding that Petitioner suffered sufficient prejudice, Petitioner's convictions were secured by methods
16 that offend elementary standards of justice, violate the sanctity of the
17 courts, and undermine the public confidence in the administration of justice.
18 For these reasons alone, the Court should grant the petition for writ of
19 error coram nobis.

22 Although in Taylor, the Ninth Circuit expressly withheld judgment
23 "as to the extent of prosecutorial malfeasance or prejudice to appellant
24 necessary to warrant relief," Taylor, 648 F.2d at 574, n.28, this Court
25 should, however, rule that Petitioner need only show that the Government
26 misconduct could have affected the Court's determination of the constitution-

27 ////

28 PETITIONER'S POST-HEARING BRIEF - 2

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1 ality of Public Law 503 and the curfew and evacuation orders. The Government
2 misconduct, therefore, rendered the proceedings unfair.

3 1. Suppression of Evidence. In United States v. Agurs, 427
4 U.S. 97 (1976), the Court stated that the reversal of a conviction is war-
5 ranted where the omitted evidence raises a "reasonable doubt" that did not
6 otherwise exist. This does not mean that the accused must show that the omit-
7 ted evidence, if considered, would have resulted in acquittal. This is clear
8 from the fact that the Court states that the standard is higher than the
9 harmless-error standard, but is not so high as to require "probability" of
10 acquittal. Id. at 111. See also, United States v. Goldberg, 582 F.2d 384,
11 489 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979), (this test is stricter
12 than the harmless-error standard, but is not so severe as to require the
13 defendant to show that the undisclosed evidence probably would have resulted
14 in acquittal); and United States v. Imbruglia, 617 F.2d 1 (9th Cir. 1980).

15 Here, the suppressed evidence is material to the question of the
16 constitutionality of Public Law 503 because it was more than harmless-error
17 for the Government to suppress the intelligence reports indicating that the
18 security problems, if any, posed by the West Coast Japanese population did
19 not warrant the issuance of the military curfew and evacuation orders.
20 Petitioner need not prove that Public Law 503 probably would have been held
21 unconstitutional if the Supreme Court had considered the suppressed evidence.

22 2. Use of Evidence that the Government Knew or Should Have
23 Known to be False. The Court "has consistently held that a conviction

24 ¹The Taylor Court ruled that "Taylor's claim of government fraud
25 would, if proven, meet the various tests for relief in the nature of coram
26 nobis." Taylor, 648 F.2d at 571, n.22. Thus, it was not necessary for
27 petitioner Taylor to prove that he would have been acquitted but for the
government's misconduct. Instead, it was enough that the misconduct involved
important evidence that rendered the proceedings unfair.

1 obtained by the knowing use of perjured testimony is fundamentally unfair,
2 and must be set aside if there is any reasonable likelihood that the false
3 testimony could have affected the judgment of the jury." (Emphasis added.)
4 Agurs, 427 U.S. at 103. Presumably this same standard applies where the
5 prosecution knowingly uses false evidence. Thus, the Court should grant the
6 petition if it determines that the false evidence used by the Government
7 could have affected the judgment of the Court.

8 3. Destruction of Evidence. In United States v. Heiden, 508
9 F.2d 898, 902 (9th Cir. 1974), the Court declared that,

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

13 Id. at 902. After Heiden, the courts have suggested that prejudice will be
14 presumed if there is intentional destruction of evidence by the prosecution.
15 In United States v. Arra, 630 F.2d 836, 849-850 (1st Cir. 1980), the Court
16 stated that,

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

20 IV. ANALYSIS

21 A. Suppression of Evidence.

22 Petitioner does not deny that he knowingly violated Public Law 503
23 and the underlying military curfew and evacuation orders. Instead, Peti-
24 tioner argued and still argues that the Fifth Amendment "prohibits the dis-
25 crimination made between citizens of Japanese descent and those of other
26 ancestry." Hirabayashi v. United States, 320 U.S. 81, 89. In response to
27 Petitioner's due process argument, the Government presented to the courts a

1 "tailored" factual record to support its argument that military necessity
2 justified the imposition of the military curfew and exclusion orders. The
3 Government attorneys and their agents suppressed exculpatory evidence that
4 would have permitted the Petitioner to rebut the Government's arguments. The
5 suppressed evidence, examined below, seriously prejudices Petitioner, offends
6 elementary standards of justice, and even absent prejudice, undermines public
7 confidence in the administration of justice.

8 In addition, it was more than harmless error for the Government to
9 suppress the following intelligence reports. Therefore, the evidence sup-
10 pressed by the Government raises a "reasonable doubt" that did not otherwise
11 exist.

12 1. The Delimitation Agreement. Discussion of the Delimitation
13 Agreement is essential to understanding the significance of the evidence that
14 was suppressed by the Government. In a memo dated June 26, 1939, President
15 Roosevelt directed that,

16 . . . the investigation of all espionage, counter-espionage,
17 and sabotage matters be controlled by the Federal Bureau of
18 Investigation of the Department of Justice, or the Military
Intelligence Division of the War Department and the Office
of Naval Intelligence of the Navy Department.

19 . . .

20 the directors of these three agencies are to function as a
21 committee to coordinate their activities.

22 . . .

23 . . . no investigation should be conducted by any investi-
24 gative agency of the Government into matters involving
actually or potentially any espionage, counter-espionage or
sabotage, except by the three agencies mentioned above.

25 (Exhibit 94, Tab 1)

26 ////

27 ////

28 PETITIONER'S POST-HEARING BRIEF - 5

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1 On June 5, 1940, in accordance with the Presidential Directive of
2 June 26, 1939, the three agencies charged with the investigation of espionage
3 and sabotage activities entered into the "Delimitation Agreement." (Exhib-
4 it 95, Tab 2). This Agreement spelled out the basic working relationship
5 between the agencies. The FBI was given primary responsibility for investi-
6 gating all domestic and civilian matters related to espionage and sabotage in
7 the continental United States and in certain of its territories.

8 For many years prior to this Agreement, ONI had been keeping a
9 particularly close watch on the activities of Japan since Japan was an
10 unfriendly major naval power. The ONI had already established an extensive
11 investigatory network related to Japanese activities. Because the FBI would
12 have had to establish a whole new network, it was agreed that ONI would
13 continue to conduct investigations on Japanese espionage activities. (See
14 Exhibit 133, Admission No. 24, p. 32). This arrangement was later formally
15 recognized by a revised Delimitation Agreement dated February 9, 1942, in
16 which it was agreed that ONI would be responsible for "jointly with FBI, the
17 coverage of Japanese activities in the categories enumerated in Paragraph I
18 [espionage, counterespionage, subversion and sabotage]." (Exhibit 96, Tab 3,
19 p. 4)

20 2. The Ringle Report. After Pearl Harbor, the Navy reviewed
21 the investigative reports which had been done on the Japanese American and
22 Japanese resident alien population. In reviewing one such report, the Chief
23 of Naval Operations noted in a memo of December 30, 1941 (Exhibit 46, Tab 6),
24 that Curtis Munson reported that,

25 Ninety-nine per cent of the most intelligent views on the
26 Japanese by military, official and civil contacts in
27 Honolulu and the mainland, was best crystallized by two

27 ////

28 POST-HEARING MEMO - 6

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1 intelligence men before the outbreak of the war. These two
2 men are Lieutenant Commander K. D. Ringle of the 11th Naval
3 District in Los Angeles and Mr. Shivers, in Honolulu, of the
4 FBI.

5 The Chief of Naval Operations (CNO) ordered that Lt. Com. Ringle submit to
6 him a report "on the Japanese referred to in Mr. Munson's report." Lt. Com.
7 Ringle was thereafter relieved of all other responsibilities so that he
8 devote full time to Japanese issues. (Exhibit 148)

9 Four other exhibits submitted herein establish the point that
10 Lt. Com. Ringle was widely considered to be an expert on Japanese issues:
11 (1) a letter from John Franklin Carter, Presidential consultant, advised
12 Roosevelt that Munson's general recommendations for allaying racial antago-
13 nism be acted upon. Carter stated "[t]he best qualified officer to handle
14 this work, in Munson's opinion, is Lieutenant Commander K. D. Ringle . . ."
15 (Exhibit 45, Tab 7); (2) a letter from McCloy to Biddle, dated March 21, 1942
16 (Exhibit 34, Tab 8), in which McCloy thanks Biddle for sending him the Ringle
17 Report. In the letter McCloy states that,

18 . . . while out there [West Coast], I talked at some length
19 with Commander Ringle and other officials of the Office of
20 Naval Intelligence, 12th Naval District. I was greatly
21 impressed with Commander Ringle's knowledge of the Japanese
22 problem along the Coast.

23 (3) the transcript of a telephone conversation of August 3, 1942 (Exhibit 80,
24 Tab 10), between Colonel Bendetsen and Colonel Tate in which they discussed
25 the problem of transferring Ishimaru, a Japanese American internee, from one
26 internment camp to another. Bendetsen stated: "Ishimaru [the internee] is
27 one of the people by the way whom Commander Ringold [sic] seemed to feel was
28 all right, and he told me that he considered Ishimaru to be pretty reliable,"
29 (p. 2). Bendetsen thereby acknowledged Lt. Com. Ringle's expertise regarding
30 ////

31 PETITIONER'S POST-HEARING BRIEF - 7

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1 the Japanese Americans; (4) a letter dated May 6, 1942 (Exhibit 100, Tab 69),
2 after the evacuation in the Los Angeles area had commenced, Milton Eisen-
3 hower, then director of the War Relocation Authority (WRA) put in a special
4 request to Rear Admiral Wilkinson, Director of Naval Intelligence, specifi-
5 cally requesting the services of Lt. Com. Ringle to assist the WRA in devel-
6 oping a program for evacuation and relocation. Eisenhower stated in part,

7 Many of us in the War Relocation Authority have conferred
8 from time to time with Commander K. D. Ringle because we
9 have found that he has a deep understanding of the problem
 we are now facing in evacuating and relocating the Japanese
 . . . He has been extremely helpful.

10 Lt. Com. Ringle was subsequently assigned to assist the WRA and wrote a
11 report for them which was essentially an expansion of his original views in
12 his January 26, 1942 report to the Chief of Naval Operations. This second
13 report to WRA was later excerpted and published anonymously in the Harpers
14 magazine article of October 1942.²

15 In terms of distribution of the Ringle Report to ONI (Exhibit 32,
16 Tab 4), the Chief of Naval Operations received this report on or about
17 January 29, 1942 (Exhibit 47, Tab 5). The Department of Justice had the
18 Report prior to March 9, 1942, when it was transmitted by the Attorney
19 General to the Department of War (Exhibit 33, Tab 11).

20 The Ringle Report to ONI is significant for several reasons. It was
21 written by an expert on the Japanese American population (Ringle) in his
22 capacity as a Naval Intelligence Officer at the direct order of the Chief of

23
24 ²See Exhibit 35, Tab 36, p. 2, where Ennis states that, "A com-
25 parison of this memorandum with the article leaves no doubt that the author
26 of the Harpers article is Lt. Com. K. D. Ringle." Ennis went on to state
27 that he was unofficially advised that Lt. Com. Ringle was, "lent to the War
Relocation Authority to prepare a manual on the background of the Japanese
who were being evacuated from an Intelligence or security viewpoint, for the
use of the WRA personnel. After this memorandum was prepared permission was
obtained to abstract it and publish it anonymously in Harpers."

1 Naval Operations. As previously discussed, ONI was primarily responsible for
2 investigation of the ethnic Japanese population. The Report dated January 26,
3 1942, was written before the issuance of Executive Order 9066, February 19,
4 1942, and before DeWitt's military curfew and exclusion orders went into
5 effect.

6 Salient points of the Ringle Report to ONI can be summarized as
7 follows:

- 8 a. . . . within the last eight to ten years the entire
9 'Japanese question' in the United States has reversed
10 itself. The alien menace is no longer paramount, and is
11 becoming of less importance almost daily . . . (p. 1)
- 12 b. . . . of the Japanese-born alien residents, the large
13 majority are at least passively loyal to the United
14 States. (p. 2)
- 15 c. . . . however, there are among the Japanese both alien
16 and United States citizens . . . who would act as
17 saboteurs or agents. This number is estimated to be
18 less than three percent of the total, or about 3,500 in
19 the entire United States. (p. 2)
- 20 d. . . . of the persons mentioned in 'c' above, the most
21 dangerous are either already in custodial detention or
22 are members of organizations . . . The membership of
23 these groups is already fairly well known to Naval
24 Intelligence service or the Federal Bureau of Inves-
25 tigation . . . (p. 2)
- 26 e. . . . as a basic policy tending toward the permanent
27 solution of this problem, the American citizens of
28 Japanese ancestry should be officially encouraged in
their efforts toward loyalty and acceptance as bona fide
citizens . . . (p. 2)
- f. . . . the most potentially dangerous element of all are
those American citizens of Japanese ancestry who have
spent the formative years of their lives, from 10 to 20,
in Japan . . . [Kibei] (p. 2)
- g. . . . the writer heartily agrees with the reports sub-
mitted by Mr. Munson . . . (p. 3)

26 ////

27 ////

28 PETITIONER'S POST-HEARING BRIEF - 9

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1 h. . . . in short, the entire 'Japanese Problem' has been
2 magnified out of its true proportion, largely because of
3 the physical characteristics of the people; that it is
4 no more serious than the problems of the German, Italian
5 and Communistic portions of the United States popula-
6 tion, and, finally it should be handled on the basis of
7 the individual, regardless of citizenship, and not on a
8 racial basis. (p. 3, emphasis original).

6 In his Report, Ringle supported his conclusions with the following:

- 7 1. The Japanese American Citizens League at their Janu-
8 ary 11, 1942 convention required that each member, as a
9 prerequisite to membership, take a loyalty oath in sup-
10 port of the Constitution and the United States. (p. 5)
- 11 2. Many of the Nisei leaders have voluntarily contributed
12 valuable anti-subversive information to this and other
13 government agencies. (p. 5)
- 14 3. That the Japanese consular staff, leaders of the Central
15 Japanese Association, and others who are known to have
16 been sympathetic to the Japanese cause do not themselves
17 trust the Nisei. (p. 5)
- 18 4. That a very great many of the Nisei have taken legal
19 steps through the Japanese consulate and the Government
20 of Japan to officially divest themselves of Japanese
21 citizenship (dual citizenship), even though by so doing
22 they become legally dead in the eyes of the Japanese
23 law, and are no longer eligible to inherit any property
24 which they or their family may have held in Japan.
25 (p. 5)

19 Edward J. Ennis, Director, Alien Enemy Control Unit, Department of
20 Justice, crystallized the significance of the Ringle Report in a memorandum
21 to the Solicitor General, dated April 30, 1943 (Exhibit 35, Tab 36). In this
22 memo, Ennis reviewed the Harpers magazine article (Exhibit 78, Tab 13) writ-
23 ten by "an Intelligence Officer." Ennis later traced the authorship of this
24 magazine article to Lt. Commander Ringle. He highlighted for the Solicitor
25 General several key points extracted from the Harpers article, including:

26 ////

27 ////

28 PETITIONER'S POST-HEARING BRIEF - 10

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1 as the Japanese Navy League, Military Virtue Society, etc.
2 Since the Naval officers believe that it was necessary to
3 evacuate only about 10,000 people, they could have identi-
fied by name, they did not feel it was necessary to evacuate
all the Japanese. (p. 2)

4 Ennis understood that under the Delimitation Agreement it was agreed
5 that Naval Intelligence should specialize on the Japanese, while Army Intel-
6 ligence occupied other fields, Ennis stated that,

7 Had we known that the Navy thought that 90% of the evacua-
8 tion was unnecessary, we could strongly have urged upon Gen.
DeWitt that he could not base a military judgment to the
contrary upon Intelligence reports, as he now claims to do.
9 (p. 3)

10 Ennis discussed the Government's position with respect to the
11 Hirabayashi case pending before the Supreme Court as follows:

12 In view of the fact that the Department of Justice is now
13 representing the Army in the Supreme Court of the United
States and is arguing that a partial, selective evacuation
14 was impracticable, we must consider most carefully what our
obligation to the Court is in view of the fact that the
responsible intelligence agency regarded a selective evacu-
15 ation as not only sufficient but preferable . . . Thus, in
one of the most crucial points of the case, the Government
16 is forced to argue that individual, selective evacuation
would have been impractical and insufficient when we have
17 positive knowledge that the only Intelligence agency respon-
sible for the advising Gen. DeWitt gave him advice directly
18 to the contrary. (p. 3)

19 He urged the Solicitor General to reveal the Ringle Report to the Court by
20 advising:

21 In view of this fact, I think we should consider very
22 carefully whether we do not have a duty to advise the Court
of the existence of the Ringle memorandum and of the fact
23 that this represents the view of the Office of Naval Intel-
ligence. It occurs to me that any other course of conduct
24 might approximate the suppression of evidence. (p. 4)

25 3. The Munson Reports.

26 Prior to the war, President Roosevelt had developed his own informal
27 intelligence system through John Franklin Carter, a journalist, who helped

1 Roosevelt obtain information and estimates by exploiting sources outside the
2 Government. One such source was Curtis B. Munson, a well-to-do Chicago
3 businessman who gathered intelligence for Carter under the guise of being a
4 Government official. Munson sent to Carter several reports based on his
5 investigation of the Japanese population on the West Coast. These reports,
6 in turn, were transmitted to Roosevelt. (Personal Justice Denied, p. 51,
7 52)

8 Munson's first report was dated November 7, 1941 (Tab 14). He
9 stated, "Our Navy has done by far the most work on this problem, having given
10 it intensive consideration for the last 10 or 15 years." (p. 2) Munson had
11 canvassed the entire West Coast and obtained opinions of the various services
12 and "also of business, employees, universities, fellow white workers, stu-
13 dents, fish packers, lettuce packers, farmers, religious groups, etc." (p. 2)
14 He reported the religious, family and cultural background of the Japanese on
15 pages 2 through 8. He went on in his report to describe the family set-up in
16 the United States and Japanese organizations and activities. On page 11 of
17 his report he stated,

18 There are still Japanese in the United States who will tie
19 dynamite around their waist and make a human bomb out of
20 themselves. We grant this, but today they are few. Many
21 things indicate that very many joints in the Japanese set-up
22 show age, and many elements are not what they used to be.
23 The weakest from a Japanese standpoint are the Nisei. They
24 are universally estimated from 90 to 98% loyal to the United
25 States if the Japanese element of the Kibei is excluded.
26 The Nisei are pathetically eager to show this loyalty. They
27 are not Japanese in culture. They are foreigners to Japan.
28 (p. 11)

24 As to potential sabotage, Munson stated that,

25 As interview after interview piled up, those bringing in re-
26 sults begin to call it the same old tune. Such it was with
27 only minor differences. These contacts ranged all the way
28 from two-day sessions with Intelligence services, through
businessmen, to Roman Catholic priests . . . The story was

1 all the same. There is no Japanese 'problem' on the West
2 Coast. There will be no armed uprising of the Japanese.
3 There will undoubtedly be some sabotage financed by Japan
4 and executed largely by imported agents or agents already
5 imported . . . In each Naval District there about 250 to
6 300 suspects under surveillance. It is easy to get on the
7 suspect list, merely a speech in favor of Japan at some
8 banquet, being sufficient to land one there . . . The
9 Japanese are hampered as saboteurs because of their easily-
10 recognized physical appearance. It will be hard for them
11 to get near anything to blow it up if it is guarded. There
12 is far more danger from Communists and people of the Bridges
13 type on the Coast than there is from Japanese. The Japanese
14 here is almost exclusively a farmer, a fisherman or a small
15 businessman. He has no entry to plants or intricate machin-
16 ery. (pp. 13-14)

10 As for espionage, Munson noted that, "a great part of this work
11 (espionage) was probably completed and forwarded to Tokio [sic] years ago,
12 such as soundings and photography of every inch of the Coast." (p. 14) He
13 noted that while Japanese would be effective as far as movement of supplies,
14 troops and ships are concerned,

15 They occupy only rarely positions where they can get to con-
16 fidential papers or plants. They are usually, when rarely
17 so placed, a subject of perpetual watch and suspicion by
18 their fellow workers. They would have to buy most of this
19 type of information from white people. (p. 15)

18 The next Munson report, entitled "Report on Hawaiian Islands by
19 Curtis B. Munson," was undated but was transmitted from Carter to Roosevelt
20 on December 8, 1941. (See cover letter, Tab 15.) After his investigation in
21 Hawaii, Munson concluded, as in his earlier report, that the second genera-
22 tion was estimated as approximately 98% loyal. He further stated:

23 However, the FBI state that there are about 400 suspects,
24 and the FBI's private estimate is that only 50 or 60 of
25 these are sinister. (In all figures given, only aliens are
26 considered. Should it be possible to pick up citizens, this
27 figure would have to be materially increased.) There are
28 also a few Germans and Italians in the Islands who should be
29 picked up . . . The Army Intelligence showed this reporter
30 a secret map with pins of different colors to denote first
31 generation, second generation and other nationalists who are

1 suspect, and their distribution in the Islands. Each one of
2 these men's address is known and they showed me that it
3 would be a comparatively easy job to pick them up almost in
4 a few hours, should the necessity arise . . . (p. 2-3)

5 In his report dated December 20, 1941, (Exhibit 5, Tab 16), Munson
6 stated on page 1 that this report should be read in conjunction with his
7 other reports: "Japanese on the West Coast" (Exhibit 139, Tab 14) and "Re-
8 port on the Hawaiian Islands" (Exhibit 140, Tab 15). He noted, "We did not
9 repeat many basic statements originally embodied in the earlier reports as
10 these statements had already been made and held good in both cases." He
11 emphasized that, "An attack is the proof of the pudding." (p. 3)

12 In the latter report (Exhibit 5, Tab 16), Munson discussed a state-
13 ment made by Secretary of Navy Knox, who had said, "I think the most effec-
14 tive fifth column work of the entire war was done in Hawaii, with the pos-
15 sible exception of Norway." (p. 1) Munson commented that,

16 We suggest this paragraph creates the wrong impression and
17 that it uses the term 'fifth column'. This term is loose
18 and has been widely abused. Should not the term 'complete
19 physical espionage' have been used instead? 'Physical
20 espionage' is supplied unwittingly by the gabble of Navy
21 wives, by the gabble of loyal second generation Japanese, by
22 the gabble of the postmen and the milkmen and classified by
23 definite agents of a foreign government . . . Fifth column
activities, such as in Norway, impugns the loyalty of a
certain large portion of a population. Your observer still
doubts that this was the case in Honolulu. He doubts, for
instance, that outside of sabotage, organized and paid for
by the Imperial Japanese government beforehand (i.e. pro-
fessional work), that there was any large disloyal element
of the Japanese population which went into action as a Fifth
Column running around and intentionally disrupting things on
their own hook. (pp. 1-2)

24 Also as to Secretary Knox's statement, Munson further stated: "It is not the
25 measured judgement of 98% of the Intelligence services or the knowing citi-
26 zenry on the mainland or in Honolulu." (p. 2)

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28 PETITIONER'S POST-HEARING BRIEF - 15

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1 On January 9, 1942, George E. Sterling, of the FCC, and a few mem-
2 bers of his staff met with General DeWitt and Western Defense Command (WDC)
3 staff to review and discuss transmission monitoring operations (Exhibit 107,
4 Tab 21). During this conference it was proposed that a joint FCC and mili-
5 tary center be established to facilitate the reporting and monitoring of
6 suspected illegal transmissions. (p. 4) By agreement, the operating person-
7 nel were all to be from the FCC and that Army and Navy representatives were
8 merely to help in identifying their stations and traffic. (p. 4) On Janu-
9 ary 13, 1942, Lt. Col. Smith of the Signal Corps sent to General DeWitt a
10 report and recommendation for the establishment of a Radio Intelligence Cen-
11 ter (RIC) to be operated and controlled by the FCC. (Exhibit 106, Tab 22,
12 p. 2) The report recommended that the equipment and personnel be supplied
13 by the FCC (p. 2). On January 15, 1942, General DeWitt requested funding
14 for the RIC. (Exhibit 104, Tab 23) In a letter from General DeWitt to
15 Mr. Greaves of the FCC, dated April 9, 1942 (Exhibit 103, Tab 24), DeWitt
16 acknowledged receipt of a report covering the first month's operation of the
17 Radio Intelligence Center and stated he appreciated being kept informed of
18 the activities at the Center. He also stated in the letter, "I am very much
19 pleased over the results so far achieved and am grateful to you and your
20 splendid organization for your invaluable assistance."

21 The Radio Intelligence Division (RID) of the FCC summarized its work
22 performed for other agencies in a report dated March 10, 1943 (Exhibit 88,
23 Tab 26). This report acknowledged that the RIC was set up at the request of
24 General DeWitt and further detailed tracking and monitoring procedures. The
25 report also stated:

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28 PETITIONER'S POST-HEARING BRIEF - 17

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1 As a result of a conference, February 17, 1942, arrangements
2 were completed for furnishing to the Office of the Chief
3 Signal Officer, War Department, copies of all messages in-
4 tercepted from clandestine radio stations under surveillance
5 by the Radio Intelligence Division. (p. 1)

6 Once the Final Report was released and available to the Department
7 of Justice, Justice Department attorneys began an investigation into the
8 accuracy of the factual statements made in the Final Report regarding the
9 reasons for the issuance of the military orders by General DeWitt. In a
10 letter dated February 26, 1944 (Exhibit 75, Tab 28), the Attorney General
11 specifically requested that the FCC respond to allegations made in the Final
12 Report regarding illicit radio transmissions and shore-to-ship signalling.
13 The Attorney General was also concerned about the allegation that authorities
14 would be unable to obtain a search warrant quickly enough for the full re-
15 moval of these unlawful transmitters. Biddle asked Fly to confirm the fol-
16 lowing:

17 The experience of the Department of Justice which, of
18 course, itself investigated great numbers of rumors concern-
19 ing signal lights and radio transmitters, was that without
20 exception the rumors proved to be baseless; and so far as
21 this Department is aware, there is no evidence of the exist-
22 ence of any illicit signaling by lights or by radio trans-
23 mitters . . .

24 Biddle also requested that he be informed of the extent to which General
25 DeWitt or his subordinates were kept advised regarding FCC findings.

26 Finally, the Attorney General noted:

27 This Department did not discover any unlawful radio signal-
28 ling or any unlawful shore-to-ship signalling with lights.
Great numbers of all kinds of reports from the public, how-
ever, were received but these did not diminish in number
following the evacuation. I would be interested in knowing
whether the number of reports of unlawful radio transmis-
sions received by the Commission varied in accordance with
the pattern suggested by General DeWitt or varied in accord-
ance with the experience of this Department. (p. 2)

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PETITIONER'S POST-HEARING BRIEF - 18

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1 In response to the Attorney General's requests, an internal FCC
2 memorandum was prepared identifying the tracking stations and equipment uti-
3 lized, and summarized the establishment of a joint Radio Intelligence Center
4 with the Army. (Exhibit 43, Tab 29) The FCC reported that from December
5 1941 to July 1, 1942, there were 760 reports of unidentified or unlawful
6 radio signals in areas evacuated. (p. 3) Each case was investigated and
7 there were no cases involving signals which could not be identified by the
8 FCC. (p. 4) The findings indicated that in 641 of the 760 cases the FCC
9 found no radio signalling involved at all. The remaining 119 cases in which
10 radio signalling was found all came from identified and lawful stations.
11 With respect to the alleged reduction in reported cases after the evacuation,
12 the FCC report indicated:

13 It will be seen that the number of complaints requiring
14 investigation received before and after July 1st are com-
15 parable. It is quite evident that these complaints were
influenced only to a small degree, if at all, by the evacu-
ation of the Japanese (p. 4)

16 In a letter from James Fly, Chairman of the FCC, to the Attorney
17 General, dated April 3, 1944 (Exhibit 76, Tab 30), regarding DeWitt's Final
18 Report on Japanese evacuation from the West Coast, Fly reported:

19 Time after time, the Army reported stations transmitting in
20 Kana code, a code used almost exclusively by Japanese
military stations, had been located at various points along
21 the West Coast by Army direction finders . . . The Com-
mission's investigations disclosed that all such reports
22 were unfounded; that the transmissions involved were in each
case from a station outside the United States, usually in
23 Japan itself. (p. 1)

24 In a follow-up letter of April 4, 1944 (Exhibit 40, Tab 31), Fly
25 restated to Biddle that the reference in the Final Report to hundreds of
26 reports of signalling by means of signal lights and unlawful radio transmis-
27 sions proved after investigation, without exception, to be baseless. He

28 PETITIONER'S POST-HEARING BRIEF - 19

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1 further reported to Biddle that from December of 1941 to July 1, 1942 the FCC
2 was engaged in monitoring and identifying signals reported to be from unlaw-
3 ful transmitters and in locating any such transmitters on the West Coast.
4 RID was engaged in a comprehensive 24-hour surveillance of the entire radio
5 spectrum to guard against any unlawful radio activities.

6 In the April 4th letter, Fly also reported:

7 The General and his staff were kept continuously informed of
8 the Commission's work, both through occasional conferences
9 and day-to-day liaison And as the result of a
10 request of General DeWitt in January 1942, the Commission
11 established a Radio Intelligence Center in San Francisco for
12 coordinating radio intelligence information collected by the
13 Army, Navy and the Commission As part of the plan
14 for coordinating activities, Army and Navy personnel main-
15 tained a liaison attendance at this Center. (p. 3)

16 Finally, in response to the inquiry from Biddle, Mr. Fly reported:

17 You note that the memorandum suggested that available means
18 were inadequate to locate and seize any such radio transmit-
19 ter, but state that if your understanding that equipment was
20 available for locating such a transmitter is correct, the
21 problem with which General DeWitt is concerned would not
22 arise in practice. Your understanding is correct. As noted
23 above, equipment developed by the Commission's engineers was
24 on and after December 7, 1941 in the hands of its personnel
25 on the West Coast, which enabled them easily to locate the
26 individual house and even the exact room containing a con-
27 cealed transmitter. (p. 4)

28 In fact, there is evidence as early as September 27, 1942, which
suggested that General DeWitt himself acknowledged that reports of illicit
transmissions were not well-founded. In a letter to Sterling, dated Septem-
ber 27, 1942 (Exhibit 81, Tab 25), DeWitt acknowledged:

It is true that during the months coastal patrols have oper-
ated in this area none of the reported suspicious stations
have proven to be enemy, clandestine, or illegal; however,
the work of the partols has been of considerable assistance
to this command in the prompt indentification of signals.

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28 PETITIONER'S POST-HEARING BRIEF - 20

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1 6. Department of Justice.

2 The Department of Justice had either information or reports that
3 should have been provided to the Supreme Court. For example, the FBI's
4 belief that the Japanese population did not constitute a threat on the West
5 Coast was evidenced by an internal memo from J. Edgar Hoover to Tolson, Lamm,
6 and Ladd, dated December 17, 1941 (Exhibit 38, Tab 32). In this memo, Hoover
7 recognized that the by giving them a list, "we won't be giving them anything
8 they don't already have, as we have given them two or three lists already."
9 (p. 1) Hoover further stated:

10 I thought the Army was getting a bit hysterical, and al-
11 though I believe the condition is very critical and serious,
12 I do not believe that they can put over any plan to clean
13 people out of that area unless there is some very imminent
14 prospect of attack. . . . [T]here was no sense in the Army
15 losing their heads as they did in the Booneville Dam affair,
16 where the power lines were sabotaged by cattle scratching
17 their backs on the wires, or the 'arrows of fire' near
18 Seattle, which was only a farmer burning brush as he had
19 done for years. (p. 1)

20 [W]e must have proof not just allegations against these
21 people . . . (p. 2)

22 [I]f the Army wanted to take in thousands predicated upon
23 lists furnished by us we wanted to be very careful to have
24 specific recommendations on every person on any of our lists
25 so that if there is any howl afterwards, we will not be left
26 holding the bag. (p. 3)

27 A letter from the Attorney General to Representative Leland Ford,
28 dated January 27, 1942 (Exhibit 83, Tab 33), summarized the Department of
Justice's early positions relative to evacuation. In that letter, Biddle
stated:

As a result of these conferences, the decision of this
Department that the program I have outlined above [which did
not include wholesale evacuation], together with the exten-
sive investigations which have been carried on by the Fed-
eral Bureau of Investigation, would adequately control the
problem of the Japanese population of the Pacific coast.

1 For this reason, and also because of the legal difficulties
2 involved in attempting to intern or evacuate the thousands
3 of American born persons of Japanese race who are, of course,
4 American citizens, this Department did not deem it advisable
5 at this time to attempt to remove all person of the Japanese
6 race into the interior of the country. (p. 2)

7 The Justice Department's position was also recorded in a memorandum
8 to the President, dated February 17, 1942 (Exhibit 79, Tab 34), only two days
9 before the President signed Executive Order 9066. Therein Biddle informed
10 the President of the following: "My last advice from the War Department is
11 that there is no evidence of imminent attack and from the FBI that there is
12 no evidence of planned sabotage." (p. 1) Biddle further advised the Presi-
13 dent to allay public fears regarding danger to the United States and noted:

14 It is extremely dangerous for the columnists, acting as
15 "Armchair Strategists and Junior G-Men," to suggest that an
16 attack on the West Coast and planned sabotage is imminent
17 when the military authorities and the FBI have indicated
18 that this is not the fact. It comes close to shouting FIRE!
19 in the theater (pp. 1-2)

20 In an April 19, 1943 memo to Solicitor General Charles Fahy (Exhib-
21 it 1, Tab 35), Ennis acknowledged that in preparation for briefing and argu-
22 ments before the Supreme Court in Hirabayashi, Yasui and Korematsu:

23 [T]he War Department has today received a printed report
24 from General DeWitt about the Japanese evacuation and is now
25 determining whether it is to be released so that it may be
26 used in connection with these cases. (p. 1)

27 Ennis further noted that the Justice Department had an outstanding request to
28 the War Department to furnish any public materials which might be helpful to
the Department of Justice.

As noted in the section regarding FCC documents, after the Depart-
ment of Justice obtained copies of DeWitt's Final Report, the DOJ attorneys
requested that the FBI review the Final Report and report on the accuracy of

PETITIONER'S POST-HEARING BRIEF - 22

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1 the allegations contained in the Final Report which the FBI investigated. In
2 a memo to the Attorney General from J. Edgar Hoover, dated February 7, 1944
3 (Exhibit 41, Tab 37), Hoover reported:

4 . . . there is no information in the possession of this
5 Bureau as the result of investigations conducted relative to
6 submarine activities and espionage activity on the West
7 Coast which would indicate that the attacks made on ships or
8 shores in the area immediately after Pearl Harbor have been
9 associated with any espionage activity ashore or that there
10 has been any illicit shore-to-ship signaling, either by
11 radio or lights. (cover letter)

12 . . . no information is possessed relative to the number or
13 percentage of ships attacked immediately after Pearl Harbor,
14 nor is there any information to indicate that these attacks
15 were associated with any espionage activity ashore. (p. 3)

16 Hoover noted that as to General DeWitt's statement:

17 'there were many evidences of the successful communication
18 of information to the enemy, information regarding positive
19 knowledge on his part of our installations,' it is generally
20 known that the Japanese had for years prior to the outbreak
21 of the war collected information as to locations of military
22 and naval installations, as well as data relative to the
23 coast lines of the United States, but it should not be as-
24 sumed that any part of this information came to the Japanese
25 through shore-to-ship signaling by lights or illicit radio
26 operation. Every complaint in this regard has been inves-
27 tigated, but in no case has any information been obtained
28 which would substantiate the allegation that there has been
illicit signaling from shore-to-ship since the beginning of
the war. (p. 3)

29 The FBI was asked to determine the accuracy of DeWitt's assertions
30 that interceptions of suspicious or unidentified radio signals and shore-to-
31 ship signal lights were virtually eliminated and attacks on out-bound ship-
32 ping from West Coast ports appreciatively reduced following the evacuation.
33 Hoover reported to Biddle in his February 7, 1944, memorandum: "There has
34 been no material reduction in the number of complaints received pertaining to
35 submarine activities on the West Coast as a result of persons of Japanese
36 ancestry having been removed from the coast." (p. 3)

1 In analyzing the three known attacks on the West Coast mentioned in
2 the Final Report, Hoover indicated that after the FBI investigated each inci-
3 dent, it was unable to find any evidence of shore-to-ship signalling or of
4 landing in the area. Hoover further stated there was never any evidence
5 found which would link Japanese Americans or Japanese resident aliens to any
6 of these activities.

7 In a February 23, 1944, memorandum to Edward Ennis (Exhibit 42,
8 Tab 38), John Burling, a Justice Department attorney, indicated that he had
9 met with the FCC. Burling wrote that after this meeting he concluded that
10 General DeWitt's statements in the Final Report were made by him at a time
11 when he personally knew the facts to be otherwise and, therefore, were either
12 deliberately untruthful or, at least deliberately misleading. Burling ex-
13 plained:

14 The significance of this is that one of General DeWitt's
15 principal arguments in favor of mass alien enemy raids was
16 that it was impossible to locate radio transmitters pre-
17 cisely and, therefore, impossible to obtain search warrants
18 . . . Mr. Sterling stated categorically that a search war-
19 rant could always be obtained since his men would be in a
20 position to swear to the precise location of the transmit-
21 ter . . .

22 His [Sterling's] men also reported to the Army in every case
23 in which the Army referred a complaint for them, and thus
24 the Army had notice that every complaint was unfounded . . .

25 In conclusion, General DeWitt's report suggests there was a
26 great deal of illicit radio communication and that the fail-
27 ure of the Department of Justice adequately to provide for
28 prevention of it necessitated the evacuation of the Japan-
ese. If the report can be construed as stating this direct-
ly, then, as General DeWitt well knew, the statement is a
lie (a) because there were no illicit transmissions and,
(b) if there had been they could have been located and dealt
with by the FCC and by the use of judicial search warrants.
If General DeWitt's statement is construed as being merely
ambiguous, then his intent was to mislead without directly
lying.

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28 PETITIONER'S POST-HEARING BRIEF - 24

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1 On April 13, 1944, in a memorandum to the Solicitor General (Ex-
2 hibit 92, Tab 41), John Burling reviewed the Final Report and outlined the
3 factual inaccuracies regarding the military justification for the evacuation.
4 He further stated:

5 The most important statements of fact advanced by General
6 DeWitt to justify the evacuation and detention were incor-
7 rect, and furthermore that General DeWitt had cause to know,
8 and in all probability did know, that they were incorrect at
9 the time he embodied them in his final report to General
10 Marshall . . . [I]t is my view that his flat misstatements
11 of fact as to evacuation discredit his statements as to
12 detention . . . Contrary to the assumptions upon which we
13 in this office have been going for some time, the original
14 detention was not ordered as a mere temporary expedient, to
15 be in effect for a few days while the persons were removed
16 from California, nor was it in any sense hypothetical or
17 speculative . . . It may also be shown that it was the
18 intention of the Army at that time to continue with deten-
19 tion (with very few exceptions) at least for more than a few
20 weeks . . . Our further assumption that the detention was
21 ordered so as to give time to sift the loyal from the dis-
22 loyal Japanese Americans is likewise unfounded . . . In
23 view of this statement in General DeWitt's official report,
24 it is apparent that we could only defend detention on the
25 ground that evacuation was necessary and that evacuation
26 could not be carried out without detention. This, however,
27 is not a matter of law, but is a matter of fact, and almost
28 the only available confirmation of the alleged fact is
General DeWitt's statement . . . General DeWitt, however,
says that this is so; and this Department can support deten-
tion only if it informs the Court, on the strength of its
own reputation for veracity, that it is so. We, however,
believe it is not so; we know that General DeWitt has made
false statements in his evacuation report, and we therefore
should not take the position in court. (p. 3)

21 Shortly after his memo to the Solicitor General, Burling wrote to
22 Philip Glick, Solicitor, War Relocation Authority on April 24, 1944 (Exhib-
23 it 90, Tab 42). In preparing the brief to the Supreme Court in Korematsu,
24 Burling reviewed a memorandum prepared by the WRA entitled "Fifth Column
25 Threat" and advised Glick:

26 It is a mistake to try to justify detention in terms of
27 specific evidence of overt acts indicating a fifth column
28 threat, since there probably is no such evidence . . . The

28 PETITIONER'S POST-HEARING BRIEF - 25

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1 legends surrounding the Japanese fishing fleet remain leg-
2 ends, and this Unit could give you little help in supplying
3 authority to insert as indicated in your memorandum. I do
4 not point these matters out in any spirit of criticism, but
5 merely to correct the record since, as I feel sure you will
6 agree, it is important that the Government not place its
7 official stamp of approval on the vast mass of fifth column
8 folklore which, insofar as concrete evidence is concerned,
9 is almost entirely baseless.

6 7. G-2 Periodic Reports.

7 The G-2 Periodic Reports were weekly summaries of intelligence as
8 analyzed by the Military Intelligence Division (MID) of the Army. Informa-
9 tion in these reports included assessments of: the enemy situation at end
10 of period; enemy operations during period; miscellaneous, (enemy casualties,
11 morale, supply and equipment, terrain not under our control, weather and
12 visibility, and enemy's probable knowledge of our situation); and, enemy
13 capabilities.

14 The first G-2 report (No. 1) dated January 3, 1942 (Exhibit 57,
15 Tab 44), states:

16 No hostile ground forces are believed to be nearer than the
17 enemy occupation forces at WAKE ISLAND. (p. 1)

18 No hostile operations conducted in this theatre of opera-
19 tions except harassing attacks by submarines . . . (p. 1)

20 The enemy's probable knowledge of our situation has not been
21 gained by observation or reconnaissance but by information
22 learned during peace and the activities of the fifth colum-
23 nists . . . (p. 2)

24 Negative reports relative to a. [suprise attacks against
25 HAWAII or a portion of the PACIFIC COAST, including the
26 PANAMA CANAL and ALASKA, by carrier-borne aircraft or pos-
27 sibly accompanied by naval action], and d. [attacks on the
28 Maritime Provinces in eastern SIBERIA to elminate menacing
Russian air power . . .] and known activity relative to b.
[harassing attacks by submarine or surface craft . . .], and
c. [intensification of campaigns in CENTRAL CHINA, MALAYA,
PHILIPPINES and other objectives in the Far East] leads to
the assumption that Japan will confine itself to this capa-
bility for the present, combined with a possible renewal of
b. at some future date. (p. 2).

1 The G-2 reports for the weeks ending January 10, 1942 (Exhibit 58,
2 Tab 45) and January 17, 1942 (Exhibit 59, Tab 46), contained the same rele-
3 vant information as in the prior report (No. 1) but added the following:
4 "The last attack on shipping by hostile submarines was reported on 24 Decem-
5 ber." (p. 1). G-2 report No. 4 (Exhibit 60, Tab 47) placed the nearest hos-
6 tile ground forces at, "2,000 miles west by south of the Hawaiian Islands."
7 (p. 1)

8 Report No. 6 for the week ending February 7, 1942 (Exhibit 61, Tab
9 48), had a significant change from all previous reports in the section asses-
10 sing the enemy's probable knowledge of our situation. Report No. 6 stated
11 that the enemy's probable knowledge was gained by, "information learned
12 during peace by the activities of accredited diplomatic, military and naval
13 attaches and their agents." (p. 2) The deletion of "fifth columnists" as a
14 source of information was a significant admission by the Army that they had
15 no evidence to support this assertion in the first place. This reassessment
16 as to the source of information was repeated in the next four weekly reports.

17 In Reports Nos. 10-13 (Exhibits 65-68, Tabs 52-55), the enemy forces
18 remained over "2,000 miles from Hawaii," and the Army continued to believe
19 the Japanese would confine itself to its Far Eastern campaign, with a pos-
20 sible extension into Australia.

21 Report No. 14 for the week ending April 4, 1942 (Exhibit 69, Tab 56)
22 was the first report of suspected sabotage. The report states, "sabotage was
23 definitely indicated in the burning of two Southern Pacific Railroad bridges
24 near Niland, California, 29 March." Report No. 15 (Exhibit 70, Tab 57), how-
25 ever, concluded that the fires reported in Report No. 14 were, "apparently
26 the work of a pyromaniac or person with a grudge against the railroad and are
27 not the result of co-ordinated efforts at sabotage." (p 3)

1 Reports No. 14 (Exhibit 69, Tab 56), No. 15 (Exhibit 70, Tab 57),
2 No. 16 (Exhibit 71, Tab 58), No. 17 (Exhibit 72, Tab 59), No. 18 (Exhibit 73,
3 Tab 60), and No. 19 (Exhibit 74, Tab 61) covered the periods through the week
4 ending May 9, 1942 (Petitioner was arrested May 16, 1942). Throughout these
5 reports the enemy basically stayed 2,000 miles away and confined themselves
6 to the Far Eastern campaign.

7 As for any active sabotage during this period, G-2 Report No. 17,
8 (Exhibit 72, Tab 59) reported the, "possibility of sabotage in connection
9 with burning of a short trestle on the Oregon Trunk Line . . ." (p. 2), which
10 after investigation by the FBI the following week, "revealed that no sabotage
11 was involved." (Exhibit 73, Tab 60, p. 3). Report No. 19 (Exhibit 74,
12 Tab 61), stated: "Investigation discloses that the fire at Western Pipe and
13 Steel Company . . . was not of incendiary origin but caused by a short cir-
14 cuit . . ." (p. 4)

15 B. Alteration and Suppression of Evidence.

16 Several branches of Government collaborated to alter and destroy the
17 original Final Report. This destruction not only constituted suppression of
18 evidence, but also raises an independent ground of misconduct upon which this
19 Court may vacate the Petitioner's convictions.

20 When the prosecution and affiliated Government agencies are respon-
21 sible for the loss or destruction of evidence, the courts will find a due
22 process violation if bad faith lies behind the Government's actions or if the
23 defendant can show prejudice by the loss of evidence. United States v.
24 Heiden, supra. Here, the destruction of the Final Report and the alteration
25 of the dates of transmittal letters shows bad faith, and, in any event,
26 prejudiced the Petitioner.

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28 PETITIONER'S POST-HEARING BRIEF - 28

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1 The Government's claim of military necessity rested on the assump-
2 tion that there was insufficient time to determine the loyalty of Japanese
3 Americans on an individual basis. Yet, General DeWitt's own statement that
4 insufficiency of time was not the reason for the orders, was destroyed with
5 the original Final Report. Petitioner was thereby prejudiced in his ability
6 to challenge the factual justification for the military orders put forth by
7 the Government. The bad faith exhibited by the War Department in altering
8 and destroying the original Final Report was so egregious and calculated that
9 the Court should presume that the evidence destroyed favored Petitioner.
10 United States v. Arra, supra.

11 1. Alteration and Suppression of Final Report.

12 The evidence of alteration of the Final Report is clear from the
13 trail of documents presented by the Petitioner. The significance of the
14 alteration is that it allowed the Government to present after-the-fact,
15 tailored and more defensible arguments to the Court rather than the actual
16 indefensible justifications. The alterations occurred before oral arguments
17 to the Supreme Court were heard (May 10 and 11). The evidence that the Re-
18 port was available for use in Hirabayashi was also altered, and an attempt
19 was made to cover up this fact by "adjusting" department records of receipt
20 of the Report and recalling and destroying original versions.

21 Executive Order 9066 authorized the appropriate military commander
22 in his judgment to issue military orders designating military zones. It
23 further authorized him to exclude people from these areas and subject them to
24 whatever restrictions he deemed necessary to protect against espionage and
25 sabotage. Thus, the military orders relevant to these proceedings (Public
26 Proclamation No. 3 and Civilian Exclusion Order No. 57) were issued pursuant
27 to what DeWitt, in his sole discretion, believed necessary. Therefore, the
28 PETITIONER'S POST-HEARING BRIEF - 29

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1 only relevant justifications for the issuance of the orders are what DeWitt
2 utilized in his decision to order curfew and evacuation. Even McCloy, who
3 pushed for the changes in the Final Report, acknowledges that it is DeWitt's
4 report and that he strongly desired to "avoid creating the impression he
5 could prescribe what the commanding General should say or should not say in
6 the final report." (Exhibit 6, Tab 70, p. 3)

7 Two exhibits herein contain statements from DeWitt demonstrating his
8 true attitude about the loyalty of Japanese Americans and the ability to make
9 loyalty determinations. This is the attitude expressed in the original ver-
10 sion of the Final Report but which was subsequently altered in the later ver-
11 sion. First, based on notes of a January 4, 1942 conference between DeWitt
12 and James Rowe of the Justice Department (Exhibit 30, Tab 62), DeWitt stated:

13 I have little confidence that the enemy aliens are law-
14 abiding or loyal in any sense of the word . . . particularly
15 the Japanese. I have no confidence in their loyalty whatso-
16 ever. I am speaking now of the native born Japanese . . .
17 (p. 1)

18 . . . we have lots of aliens who are perfectly loyal who are
19 not American citizens, and some . . . but it is particularly
20 hard to separate the sheep from the goats. (p. 5)

21 Second, on January 14, 1943 (Exhibit 12, Tab 63), in a telephone
22 conversation with General Gullion, DeWitt stated, "I don't see how they can
23 determine the loyalty of a Jap by interrogation . . ." Later in the conver-
24 sation he said, "There isn't such a thing as a loyal Japanese and it is just
25 impossible to determine their loyalty by investigation -- it just can't be
26 done."

27 The evidence of alteration began with transmittal letters dated
28 April 15, 1943 to John J. McCloy (Exhibit 3, Tab 64) and General Marshall
(Exhibit 24, Tab 65), in which DeWitt sent to each two printed and bound

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PETITIONER'S POST-HEARING BRIEF - 30

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1 volumes of his Final Report. He stated in each letter that he was "official-
2 ly" forwarding these bound copies on that date. He later stated in each
3 letter:

4 These are going forward via Air Express because I am advised
5 that there is an urgent need of the material contained
6 therein for use in the preparation of the Federal Govern-
7 ment's brief in the cases now pending before the Supreme
8 Court of the United States challenging the constitutionality
9 of the entire program.

10 On April 19, 1943, McCloy called Bendetsen (DeWitt's aide) (Exhib-
11 it 5, Tab 66) and said he was worried about the content and form of the Final
12 Report and was upset that the report as transmitted was in final form. The
13 pertinent parts of the conversation were as follows:

14 B: . . . That isn't -- hasn't been distributed except as an
15 official report . . . This is merely his report to --
16 from him on to the War Department.

17 M: . . . There is no such thing as a separate report -- it
18 contains a lot of stuff that I question the wisdom of
19 and it certainly complicates it to get it into a written
20 form such as this. I thought it was perfectly clear
21 that you were going to let us have a galley before it
22 was bound up.

23 . . .

24 M: . . . I'm not trying to tell you that you can't say what
25 you want to say, but I wanted to put some considerations
26 -- we might want to put some considerations before you
27 before you made any report to anybody. But this is all
28 in the air of finality -- the letter of transmittal is
29 already printed and signed -- completed -- done -- pat.
30 That is what disturbs me . . . There are a number of
31 things in it which I feel should not be made public -- I
32 feel that it, to a large extent, is a sort of self-
33 serving document on this matter of relocation . . .

34 . . .

35 M: . . . Now it is a sort of document to support the
36 contention that no Jap is ever going to get back into
37 the Western Defense Command. Which was not at all the
38 purpose of the original idea -- it was a report on the
39 evacuation and that was all.

1 B: Sir, I don't think that there was ever any thing that
2 the report should not contain the basis on which the
3 action was taken -- and that has been attempted reli-
4 giously.

5 M: Bendetsen, you know as well as I do that when you go
6 through that report, that it is pointed to this issue --
7 this question that is now up. Even negation of the
8 suggestion that it wasn't a question of time -- it was
9 a matter of -- as you put it -- facing the facts --
10 clearly -- too clearly -- pointed to the issue at hand
11 to make any mistake about it.

12 . . .

13 M: The difference is this. This way it comes up in a
14 completely definitive form -- with a letter of transmit-
15 tal already printed and bound into it and signed, sealed
16 and delivered. The act of the Final Report has now been
17 consummated as of April 15. That is what disturbs me.
18 There is no taking that back.

19 . . .

20 M: . . . [Y]ou have got to treat this as a report of DeWitt
21 has been made. Final recommendations -- even as to how
22 the -- how long the Japanese are going to stay there --
23 how a man can make a recommendation without knowing what
24 developments the war is going to take, I don't see. It
25 looks to me as if there is a prejudgment of the problem
26 without getting the facts, but, however, that is done,
27 that's over the dam. I think it is unfortunate that it
28 is over the dam because if any action is taken now it
involves the question of overruling which we might have
avoided.

After this phone conversation, Bendetsen went to Washington as
DeWitt's emissary to discuss changes in the Final Report with McCloy. In a
telegram of April 26, 1943 (Exhibit 14, Tab 67), Barnett tells DeWitt:

BENDETSSEN TOLD ME THAT HE COULD RECOMMEND ACCEPTANCE OF SOME
PARTS OF THE SUGGESTED REVISIONS BUT THAT TWO POINTS WENT TO
THE FUNDAMENTAL CONCEPT OF EVACUATION STOP THE PRINCIPAL ONE
OF THESE WAS THAT LOYALTY COULD NOT BE DETERMINED AND FOR
THAT REASON MASS EVACUATION WAS ORDERED STOP HE REQUESTED
INSTRUCTIONS STOP I TOLD HIM IT WAS YOUR REPORT AND THAT THE
WAR DEPARTMENT COULD NOT TELL YOU WHAT TO SAY STOP . . .

The next day, DeWitt sends his response back to General Barnett in a telegram
(Exhibit 101, Tab 68), which stated:

PETITIONER'S POST-HEARING BRIEF - 32

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1 MY REPORT AS SIGNED AND SUBMITTED TO CHIEF OF STAFF WILL NOT
2 BE CHANGED IN ANY RESPECT WHATSOEVER EITHER [sic] IN SUB-
3 STANCE OR FORM AND I WILL NOT REPEAT NOT CONSENT TO ANY
4 REPEAT ANY REVISION MADE OVER MY SIGNATURE STOP HIGHER
5 AUTHORITY MAY OF COURSE PREPARE AND RELEASE WHATSOEVER THEY
6 DESIRE AS VIEWS OF THAT AUTHORITY BUT STATEMENTS IN MY
7 SIGNED REPORT OF EVACUATION ARE MINE AND SO SUBMITTED STOP
8 SUBMISSION OF PREPARED REVISIONS FOR PRESENTATION TO ME FOR
9 ACCEPTANCE OR REVISION WILL ACCOMPLISH NOTHING AS FINAL WORD
10 ON SUBJECT SO FAR AS I REPEAT I AM CONCERNED HAS BEEN SAID.

11 On May 3, 1943 (Exhibit 16, Tab 69), Barnett reported to DeWitt:

12 MCCLOY ANXIOUS THAT BENDETSEN CONFER WITH YOU AT ONCE CON-
13 CERNING CHANGES IN FINAL REPORT SUGGESTED BY ASSISTANT
14 SECRETARY WHICH THE LATTER FEELS YOU MAY MAKE ONCE THE BASIS
15 HAS BEEN FULLY EXPLAINED PERIOD . . . SECRETARY CONVINCED
16 THAT FINAL REPORT IMPORTANT TO GOVERNMENT CASE IN SUPREME
17 COURT AND THAT TIME IS SHORT PERIOD HE DOES NOT ASK ANY
18 REVISIONS BE MADE UNLESS YOU CONSIDER THEM AS NOT REPEAT NOT
19 COMPROMISING YOUR PERSONAL VIEWS PERIOD IN SUBSTANCE THESE
20 CHANGES RELATE TO CONFINING SCOPE OF REPORT TO FACTUAL
21 STATEMENT INCLUDING REASONS FOR EVACUATION SEGREGATING YOUR
22 PROPOSALS FOR FURTHER DISPOSITION OF EVACUEES AND PLACING
23 LATER AND SEPARATE DOCUMENT PERIOD . . .

24 In a memorandum to Dewitt from Bendetsen, also dated May 3, 1943, Bendetsen
25 recorded his discussions with McCloy regarding suggested changes to the Final
26 Report (Exhibit 6, Tab 70), and summarizes the substance of the week's con-
27 ferences with McCloy relating to, "(a) the attitude and position of the War
28 Department with regard to continued exclusion of the Japanese . . . and
(b) the final report of the Commanding General." (p. 1) Bendetsen reported
it was McCloy's position was that there no longer existed any military neces-
sity for the continued exclusion of all Japanese from the evacuated zone.
McCloy stated: "[T]he War Department, of its own motion, would not take any
action to direct or require the revision or revocation of present restric-
tions in this regard." (p. 1) Bendetsen reported that McCloy did say, how-
ever,

////

1 that if the question were to be presented officially to the
2 Secretary of War by the White House or by any other official
3 federal agency having a legitimate interest whether from the
4 viewpoint of the War Department there is longer any military
5 objection to the return of those Japanese "whose loyalty had
6 been determined," the answer would be, "no." (p. 1)

7 Bendetsen responded to McCloy:

8 if the War Department thought no further military necessity
9 existed and that therefore it could not justify the maintenance
10 of present restrictions . . . then how could the War
11 Department justify the existence of military areas coincident
12 with each relocation center. (The undersigned reminds
13 Mr. McCloy that there never was any military necessity for
14 this action and that it was based only upon the request of
15 the War Relocation Authority for War Department assistance
16 in maintaining proper public relations with the interior
17 states in which the relocation centers exist.) (p. 2)

18 Bendetsen related McCloy's two recommended changes in the Final
19 Report relevant to the instant Petition. First, in paragraph 2 of the letter
20 of transmittal the statement appeared that "the necessity of exclusion of all
21 Japanese from the Pacific Coast 'will continue for the duration of the
22 present war.'" A second objection was,

23 to that portion of Chapter II which said in effect that it
24 is absolutely impossible to determine the loyalty of Japanese
25 no matter how much time was taken in the process. He
26 said that he had no objection to saying that time was of the
27 essence and that in view of the military situation and the
28 fact that there was no known means of making such a determination with any degree of safety . . . (emphasis original) (p. 4)

29 In a telegram dated May 5, 1943, (Exhibit 18, Tab 71) DeWitt told
30 Barnett:

31 HAVE NO DESIRE TO COMPROMISE IN ANY WAY GOVT CASE IN SUPREME
32 COURT AND DO NOT UNDERSTAND HOW SUBSTANCE AND FORM OF REPORT
33 AS SUBMITTED CAN HAVE THIS AFFECT STOP . . . DO NOT UNDER-
34 STAND MCCLOY'S PROPOSAL STOP REPORT IS NOW FACTUAL AND I
35 SOLEMNLY SEE MY VIEWS AND ACTIONS DETERMINED AS NECESSARY AT
36 TIME OF EVACUATION WEAKENED OR UNDERMINED IF REPORT CHANGES
37 STOP I CANNOT CONSCIENTIOUSLY CHANGE OR PUT INTO SEPARATE

38 PETITIONER'S POST-HEARING BRIEF - 34

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1 DOCUMENT PROPOSALS FOR FUTURE DISPOSITION OF EVACUEES WITH-
2 OUT BY MY OWN ACT INVALIDATING MY ASSIGNED MISSION AND RE-
3 SPONSIBILITIES THEREUNDER STOP.

4 General DeWitt then directed the version of the Final Report be revised and
5 ordered:

6 ALL COPIES HERETOFORE SENT TO THE WAR DEPARTMENT PAREN NOT
7 INCLUDING INCLOSURES CLOSE PAREN WILL BE CALLED IN BY YOU
8 AND YOU WILL HAVE WAR DEPARTMENT RECORDS OF RECEIVING REPORT
9 DESTROYED INASMUCH AS SUCH REVISION IS FINALLY SENT TO WAR
10 DEPARTMENT WILL HAVE A LATER DATED TRANSMITTAL LETTER PD.
11 (Exhibit 19, Tab 72).

12 Exhibit 7, Tab 73; Exhibit 15, Tab 74; Exhibit 20, Tab 75 are all
13 documents evidencing recommended changes to the original version of DeWitt's
14 Final Report. These were more than changes in form since they significantly
15 altered what General DeWitt was putting forth as his rationale for the evacu-
16 ation. For example, on page iii, paragraph 2, second sentence of the orig-
17 inal version of the Final Report (Exhibit 4, Tab 17), the words, "and will
18 continue for the duration of the war," were eliminated and were replaced with
19 words, ". . . their loyalties were unknown and time was of the essence." On
20 page 9, second complete paragraph, the fifth and sixth sentences of the Final
21 Report (Exhibit 4, Tab 17), including DeWitt's assertion that it was not that
22 there was insufficient time to separate the loyal from disloyal, was substi-
23 tuted for the following, "to complicate the situation, no ready means existed
24 for determining the loyal and disloyal with any degree of safety . . ." In
25 the telegram of May 9, 1943 (Exhibit 20, Tab 75), Barnett reviewed the
26 changes and confirmed that, ". . . changes fifteen through fifty five, in-
27 clusive, which include number twenty seven [It was not that there was insuf-
28 ficient time . . . (p. 9)] have been adopted."

Also on May 9, 1943, in a telegram from Bendetsen to Barnett (Exhib-
it 8, Tab 76), Bendetsen ordered Barnett to, "take action to call in all

PETITIONER'S POST-HEARING BRIEF - 35

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1 copies previously sent to WD less inclosures and to have WD destroy all
2 records of receipt of report as when final revision is forwarded letter of
3 transmittal will be redated." Exhibits 9, 25, 21, 10, 26, 27, 22, 23, with
4 the Tabs 77 through 84, document the attempt to recall all copies of the
5 original version of the Final Report. As requested by DeWitt, War Department
6 records regarding receipt of the original version of the Final Report were
7 "adjusted accordingly." (See Exhibit 10, Tab 80.) The revised version of
8 the Final Report was mailed to the Chief of Staff on June 18, 1943, with the
9 transmittal letter dated June 15, 1943. (Exhibits 27, 22 and 23, Tabs 82, 83
10 and 84.) The galley proofs, galley pages, drafts and memorandum of the Final
11 Report were destroyed on June 29, 1943. (Exhibit 11, Tab 87)

12 C. Use of Evidence that the Government Knew or Should Have Known to
13 be False.

14 The Government presented the Courts with false "evidence" suggesting
15 that Japanese Americans engaged in acts of espionage and sabotage. This
16 "evidence" was contradicted by information in the possession of the Govern-
17 ment. The Court, unaware of the falsity of these allegations, relied on
18 these "facts" to uphold the constitutionality of the curfew and exclusion
19 orders. It is established law that a conviction of a defendant based on
20 false evidence is "inconsistent with the rudimentary demands of justice."
21 Mooney v. Holohan, 294 U.S. 103 at 112 (1935). Following Mooney, courts
22 have consistently held that the prosecutor's knowing use of false evidence is
23 unconstitutional. Pyle v. Kansas, 317 U.S. 213 (1942); Hysler v. Florida,
24 315 U.S. 411 (1942); Giglio v. United States, 405 U.S. 150 (1972). It is
25 not only improper for the prosecution to affirmatively misrepresent facts,
26 but it is just as improper for the prosecution to create an inference of
27 guilt by omitting material facts. As stated in Imbler v. Craven, 298

1 F. Supp. 795, 806 (C.D. Cal. 1969), affd sub nom., Imbler v. California,
2 424 F.2d 631 (9th Cir.), cert. denied, 400 U.S. 865 (1970):

3 omissions and half-truths are equally damaging and pro-
4 hibited, and their use is no less culpable. Creating an
5 inference that a fact exists when in fact to the knowledge
6 of the prosecution it does not, constitutes the knowing use
7 of false testimony.

8 Evidence may be false either because it is perjured, or,
9 though not in itself factually inaccurate, because it
10 creates a false impression of facts which are known not to
11 be true. [Citations omitted.]

12 [Emphasis added.]

13 In Petitioner's case, the central issue before the Court was whether
14 the Public Law 503 and the underlying military orders were constitutional.
15 To support its argument of military necessity, the Government used the false
16 evidence described herein to paint a false and misleading picture of imminent
17 threat to the security of the West Coast. Whether by affirmative misrepre-
18 sentation, suggestive inference, or by failure to disclose contrary evidence,
19 the Government knowingly and purposefully made a false impression on the
20 courts.

21 As mentioned above, the Government had in its possession intelli-
22 gence reports and other documents that rebutted statements it made to the
23 Court. Based upon these reports from responsible intelligence agencies, the
24 Government knew or should have known that it was presenting false information
25 to the Court.

26 The misrepresentations made to the courts offends elementary stan-
27 dards of justice, seriously prejudiced the accused, violated the sanctity of
28 the courts, and undermined the public confidence in the administration of
justice. Therefore, this Court should grant Petitioner's prayer for relief.

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PETITIONER'S POST-HEARING BRIEF - 37

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1 In addition, where the prosecutor used perjured testimony to obtain
2 a conviction, the courts have reversed the conviction if there was "any rea-
3 sonable likelihood that the false testimony could have affected the judgment
4 of the jury." Agurs, 427 U.S. at 103 (emphasis added). The same standard of
5 materiality should apply when, as here, the Government knowingly used false
6 evidence to obtain Petitioner's convictions and defend those convictions on
7 appeal.

8 1. Misrepresentation.

9 During the evidentiary hearing, Edward Ennis testified that because
10 no factual record was developed at the trial court level, the Government in
11 its brief to the Supreme Court relied almost exclusively on the doctrine of
12 Judicial Notice to create its "factual basis" for the military orders. (See
13 also Exhibit 99, pp. 10-11) The Government argued: (1) racial, religious
14 and cultural characteristics of Japanese Americans predisposed them to dis-
15 loyalty; (2) there was not sufficient time to separate the loyal from the
16 disloyal; and, (3) the Government's military necessity claim was supported by
17 evidence which it could not reveal to the Court because it was a "closely
18 guarded military secret." (Government's brief, Exhibit 99, p. 12)

19 In its brief (Exhibit 99), the Government first asked the Court to
20 take judicial notice of "facts" such as: concentration of Japanese popula-
21 tion on the West Coast (pp. 17, 33-34, 46); religion (Shintoism and Buddhism)
22 (pp. 25-28); attendance at Japanese language schools (pp. 30-31); membership
23 in cultural or social organizations (p. 31); dual citizenship (pp. 24-25);
24 and Japanese Americans who were educated in Japan (Kibei) (pp. 28-29). The
25 Government then argued that these "racial characteristics" proved that a
26 great number of Japanese Americans were very likely to be disloyal. Respon-
27 dent made this argument despite evidence indicating the "facts" were in

1 dispute, and therefore, not appropriate for judicial notice. Petitioner's
2 convictions were gained based upon racist characterizations which Respondent
3 misrepresented were not subject to reasonable dispute.⁴

4 The Ringle Reports (to ONI on January 26, 1942 and the expanded
5 version to WRA in June of 1942) and the Munson Reports directly contradicted
6 the Government's arguments about loyalty, except for the part of the argument
7 as it related to the Kibei. These comprehensive intelligence reports dis-
8 cussed and refuted the very same "racial characteristics" used by the Govern-
9 ment in its argument to the Court. These were the only intelligence reports
10 which evaluated and analyzed these characteristics as they related to the
11 ethnic Japanese population after Pearl Harbor. Thus, had the Government been
12 required to put forth facts to support its judicial notice argument, its own
13 "expert witnesses," (Ringle, Munson, ONI and FBI) would not have supported
14 the Government's case as represented to the Court.

15 The Government further argued that not only did racial characteris-
16 tics predispose Japanese Americans to disloyalty, but an attack by Japan on
17 the West Coast was imminent and the disloyal element was organized into a
18 "fifth column" which would aid the attack. The Government's brief states:

19 . . . the military situation was so grave, the danger of an
20 enemy attack was so far within the realm of probability, and
21 the peril to be apprehended from treacherous assistance to
22 the enemy on the part of an unknown number of Japanese con-
centrated in critical areas along the West Coast was so
substantial it was a matter of high military necessity to
take prompt precautionary steps. (p. 61)

23 ////

24 ⁴See Discussion of judicial notice as utilized by the Government in
25 Hirabayashi in Exhibit A-66, Dembitz, RACIAL DISCRIMINATION AND THE MILITARY
26 JUDGMENT: The Supreme Court's Korematsu and Endo Decisions, 45 Columbia Law
27 Review 174, 183-189 (1945). Nanette Dembitz was herself a former Government
attorney who participated in preparation of the U.S. brief in Hirabayashi.

28 PETITIONER'S POST-HEARING BRIEF - 39

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1 These representations were made to the Court despite the fact that
2 the G-2 reports indicated there was no threat of imminent attack. On Febru-
3 ary 17, 1942, the Attorney General directly stated to the President: "There
4 is no evidence of imminent attack and from the FBI that there is no evidence
5 of planned sabotage." (Exhibit 79, Tab 34) Thus, these representations were
6 made in the Government's brief in spite of the fact that the only Government
7 reports which investigated and analyzed this entire issue, the Munson, Ringle
8 and FBI reports, stated there was no evidence of fifth column activity.

9 Further compounding this misrepresentation, the Government supported
10 its fifth column position by first noting how Japanese espionage aided the
11 Pearl Harbor attack (p. 45) and then noting:

12 The overwhelming majority of persons of Japanese ancestry in
13 the United States resided on the West Coast . . . a number
14 of them, citizen and aliens alike might be disposed to
 assist the enemy, particularly in the case of an attack.
 (p. 46)

15 The Government thereby asked the Court to draw the false inference that
16 Japanese Americans were involved in the Pearl Harbor attack. There was never
17 any evidence to support this allegation and the Munson Reports, Ringle
18 Reports and FBI reports in the Government's possession did not support the
19 Government's position.

20 The Government also argued that time was of the essence and that
21 there was no ready means to identify and separate the loyal from the dis-
22 loyal. (Exhibit 99, pp. 34, 46, 62, 63) However, DeWitt did not base his
23 decision to issue the orders on either of these reasons. DeWitt's position

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26 ////

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28 PETITIONER'S POST-HEARING BRIEF - 40

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1 was that loyalty could not be determined regardless of whether or not there
2 was sufficient time.⁵ Thus, by presenting a justification which was not a
3 consideration for the issuance of the orders and by not telling the Court the
4 true basis for the decision, the Government falsely represented the true
5 facts to the Court on this crucial issue.

6 As to the Government's ability to identify and separate the loyal
7 from the disloyal, it should be noted that those considered most dangerous
8 were not only easily identifiable, but, in fact, before issuance of EO 9066,
9 were all arrested and detained. The FBI and ONI had prepared lists of
10 suspected dangerous individuals from even before Pearl Harbor.

11 Furthermore, Government witnesses at the evidentiary hearing tes-
12 tified that the investigative agencies thoroughly and competently conducted
13 investigations on all reports of suspected subversive activities. The
14 Respondent's own documents clearly show that these agencies had compiled
15 lists of names, addresses, employment and membership in organizations of all
16 individuals considered dangerous. See Exhibits A17f; A17h; A22; and, A40.
17 Thus, despite the fact the Government had lists of identified potentially
18 dangerous people even prior to Pearl Harbor and despite the fact that each
19 one of these individuals had been investigated, monitored and later arrested,
20 the Government nonetheless represented that this could not be done.

21 Finally, by identifying, investigating and arresting suspicious
22 individuals, the Government showed that "ready means" were available to make
23 a loyalty determination. Also, as Mr. Ennis testified, loyalty hearings were

24 ⁵See Exhibit 30, Tab 62 and Exhibit 12, Tab 63. See also the first
25 version of the Final Report (Exhibit 4, Tab 17), which states that the
26 evacuation will continue for the "duration of the present war." (p. iii),
27 and: "It was not that there was insufficient time in which to make such a
determination . . ." (p. 9)

1 conducted and determinations were made for enemy aliens, Japanese and Germans,
2 but not for Japanese Americans, which thereby resulted in aliens receiving
3 "more due process than citizens." Although the Government was utilizing a
4 "ready means," it represented to the Court that there was no workable method
5 (i.e. no "ready means") to make loyalty determinations.

6 The Government's last main argument was a suggestion to the Court
7 that secret information in its possession proved military necessity. (Ex-
8 hibit 99, p. 12) The Government in fact had no evidence which would justify
9 evacuation of over 120,000 people. It was suggested by the Government during
10 the course of the instant proceedings that diplomatic intercepts provided the
11 basis for the decision to evacuate. There is no evidence which even suggests
12 that DeWitt utilized the diplomatic intercepts in any form or even that he
13 utilized the information from the intercepts as a basis for his decision to
14 order evacuation.

15 The intercepts offered by the Respondent in the instant case are
16 totally irrelevant to the issues of governmental misconduct and violation of
17 Petitioner's due process. Assuming arguendo they are relevant, the inter-
18 cepts themselves at most contain a request from Tokyo to the consulate to
19 recruit second generation Japanese for information collecting. Assuming
20 arguendo the consulates were successful in this assigned mission, as Colonel
21 Herzig testified there is an enormous and significant difference from a
22 military intelligence perspective between the collection of raw information
23 obtained from publicly available sources and intelligence or espionage opera-
24 tions, which refer to covertly obtaining and analyzing information.

25 However, there is not a single cable nor group of cables taken
26 collectively, which can reasonably demonstrate that recruitment efforts were
27 successful. There was never any evidence of a second generation espionage

1 network which operated for Japan. No Japanese American was ever convicted of
2 espionage or sabotage activities in the U.S. Furthermore, all suspected
3 individuals and organizations were easily identifiable and thoroughly inves-
4 tigated by the proper authorities and the results of all investigations were
5 negative.

6 The Supreme Court in its opinion in Hirabayashi accepted in total
7 these misrepresentations about racial characteristics, loyalty and fifth
8 column threat. The Court stated:

9 The German invasion of the Western European countries had
10 given ample warning to the world of the menace of the "fifth
11 column." Espionage by persons in sympathy with the Japanese
12 Government had been found to have been particularly effec-
13 tive in the surprise attack on Pearl Harbor . . . At a time
14 of threatened attack upon this country, the nature of our
15 inhabitants' attachment to the Japanese enemy was conse-
16 quently a matter of grave concern.

17 Hirabayashi v. United States, supra at 96.

18 In incorporating the Government's arguments, the Court discussed the
19 social factors preventing assimilation of the ethnic Japanese; Japanese lan-
20 guage schools; Japanese Americans born and educated in Japan; and, dual
21 citizenship (Id. at 96-99) and then concluded:

22 . . . Whatever views we may entertain regarding the loyalty
23 to this country of the citizens of Japanese ancestry, we
24 cannot reject as unfounded the judgment of the military
25 authorities and of Congress that there were disloyal members
26 of that population, whose number and strength could not be
27 precisely and quickly ascertained. We cannot say that the
28 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 consti-
tuted a menace to the national defense and safety, which
demanded that prompt and adequate measures be taken to guard
against it.

29 Id. at 99.

30 ////

31 PETITIONER'S POST-HEARING BRIEF - 43

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1 . . . But as we have seen, those facts, and the inferences
2 which could be rationally drawn from them, support the judg-
3 ment of the military commander that the danger of espionage
and sabotage to our military resources was imminent, and
that the curfew order was appropriate to meet it.

4 Id. at 103-104.

5 2. Abuse of Amici.

6 Not only did the Government misrepresent the facts to the courts by
7 tailoring a set of facts by judicial notice and by suppressing obviously
8 exculpatory evidence, but the Government used the States of California,
9 Washington and Oregon as amici curiae to present its tailored facts to the
10 Court.

11 As discussed above, War Department officials withheld DeWitt's Final
12 Report from the Justice Department until January 1944. Nonetheless, War
13 Department officials did release the initial version of the Final Report for
14 presentation to the Supreme Court through the amici curiae. DeWitt person-
15 ally delegated a member of his legal staff, Captain Herbert E. Wenig, to
16 assist the Attorney General of California in preparing the amici brief on
17 behalf of the three West Coast states. (Exhibit 91, Tab 88)

18 As both Burling and Ennis realized when they finally received the
19 Final Report and the amici brief, much of the material contained in the amici
20 brief was taken from the Final Report. (Exhibit 111, Tab 89; Exhibit 2,
21 Tab 90) In his memo to Wechsler dated September 30, 1944, Ennis states:

22 It is also to be noted that parts of the report which, in
23 April 1942 could not be shown to the Department of Justice
24 in connection with the Hirabayashi case in the Supreme
25 Court, were printed in the brief amici curiae of the States
26 of California, Oregon and Washington. In fact the Western
Defense Command evaded the statutory requirement that this
Department represent the Government in this litigation by
preparing the erroneous and intemperate brief which the
States filed.

27 ////

1 It is entirely clear that the War Department entered into an
2 arrangement with the Western Defense Command to rewrite
3 demonstrably erroneous items in the report by reducing to
4 implication and inference what had been expressed less ex-
5 pertly by the Western Defense Command and then contrived to
6 publish this report without the knowledge of this Department
7 by the use of falsehood and evasion.

8 (Exhibit 2, Tab 90, pp. 3-4)

9 3. Continued Misconduct.

10 The Government continued its pattern of misconduct beyond the deci-
11 sion by the Supreme Court in Petitioner's case. Petitioner asserts that
12 Government attorneys are obligated to disclose to a defendant or the courts
13 obviously exculpatory and newly discovered evidence which comes to the Gov-
14 ernment's attention even after the close of a case. However, not only did it
15 fail to make such disclosures, the Government continued to make misrepresen-
16 tations to the Court despite its knowledge of evidence to the contrary.

17 As discussed before [pages 14 et seq.], once DeWitt's Final Report
18 was released and available to the Department of Justice, Justice Department
19 attorneys investigated the accuracy of allegations asserted in the Final
20 Report. After receiving reports from the FBI and the FCC directly refuting
21 the allegations, Government attorneys responsible for the Supreme Court brief
22 in the pending Korematsu case attempted to advise the Court of the situation.
23 Pursuant to this, John Burling inserted the following footnote into the brief
24 to the Supreme Court in Korematsu:

25 The Final Report of General DeWitt (which is dated June 5,
26 1943, but which was not made public until January 1944) is
27 relied on in this brief for statistics and other details
concerning the actual evacuation and the events that took
place subsequent thereto. The recital of the circumstances
justifying the evacuation as a matter of military necessity,
however, is in several respects, particularly with reference
to the use of illegal radio transmitters and shore-to-ship
signalling by persons of Japanese ancestry, in conflict with
information in possession of the Department of Justice. In
view of the contrariety of the reports on this matter we do

1 not ask the Court to take judicial notice of the recital of
2 those facts contained in the Report.

3 (Exhibit 84, Tab 43). In explaining the footnote to Herbert Wechsler,
4 Burling stated:

5 You will recall that General DeWitt's report makes flat
6 statements concerning radio transmitters and ship-to-shore
7 signalling which are categorically denied by the FBI and by
8 the Federal Communications Commission. There is no doubt
9 that these statements were intentional falsehoods, inasmuch
10 as the Federal Communications Commission reported in detail
11 to General DeWitt on the absence of any illegal radio trans-
mission The statements made by General DeWitt are
12 not only contrary to our views but they are contrary to de-
13 tailed information in our possession and we ought to say so.

14 (Exhibit 84, Tab 43)

15 The War Department objected to this footnote and undertook to remove
16 it from the Justice Department's brief. In a memo to to Ennis, Burling
17 stated:

18 It became necessary for you to suggest the possibility to
19 Captain Fisher that the brief had gone for final printing
20 and, presumably as a result of this, Mr. McCloy called the
21 Solicitor General and particularly referred to the footnote.
22 Presumably at Mr. McCloy's request, the Solicitor General
23 had the printing stopped at about noon.

24 (Exhibit 85, Tab 92) Ennis urged to Wechsler that the footnote remain un-
25 changed:

26 This Department has an ethical obligation to the Court to
27 refrain from citing it [the Final Report] as a source of
28 which the Court may properly take judicial notice if the
Department knows that important statements in the source are
untrue and if it knows as to other statements that there is
such contrariety of information that judicial notice is
improper.

29 (Exhibit 2, Tab 90)

30 The War Department implicitly recognized that the Final Report was
31 problematic, but did not wish to present any criticism of the Final Report to

32 PETITIONER'S POST-HEARING BRIEF - 46

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1 the court's attention:

2 Captain Fisher came to the Solicitor General's office and
3 discussed the footnote. Captain Fisher took the position
4 that he would not defend the accuracy of the report but that
5 the Government would deal with sufficient honesty with the
6 court if it would merely refrain from reciting the report
7 without affirmatively flagging our [Burling and Ennis]
8 criticism thereof.

9 (Exhibit 85, Tab 92)

10 Pursuant to the War Department's efforts, the footnote was finally
11 revised to read:

12 The Final Report of General DeWitt (which is dated June 5,
13 1943, but which was not made public until January 1944),
14 hereinafter cited as Final Report, is relied on in this
15 brief for statistics and other details concerning the actual
16 evacuation and the events that took place subsequent there-
17 of. We have specifically recited in this brief the facts
18 relating to the justification for the evacuation, of which
19 we ask the Court to take judicial notice, and we rely upon
20 the Final Report only to the extent that it relates to such
21 facts.

22 (Exhibit 87, Tab 91; Exhibit 86, Tab 93; Exhibit A-48a, page 11)

23 This revised footnote did not fulfill the Government's obligation to
24 disclose to Petitioner and the Court of evidence contrary to the misrepre-
25 sentations of the Final Report. Therefore, the Government's failure to make
26 a proper disclosure constituted a continuation of the pattern of misconduct
27 which denied Petitioner of his rights to due process.

28 However, the pattern of misconduct did not stop there. Charles
29 Fahy, in oral argument before the Supreme Court in the Korematsu case, dis-
30 cussed the brief's footnote:

31 It is even suggested that because of some foot note in our
32 brief in this case indicating that we do not ask the Court
33 to take judicial notice of the truth of every recitation or
34 instance in the final report of General DeWitt, that the
35 Government has repudiated the military necessity of the
36 evacuation. It seems to me, if the Court please, that that
37 is a neat little piece of fancy dancing. There is nothing

38 PETITIONER'S POST-HEARING BRIEF - 47

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1 in the brief of the Government which is any different in
2 this respect from the position it has always maintained
3 since the Hirabayashi case -- that not only the military
4 judgment of the general, but the judgment of the Government
5 of the United States, has always been in justification of
the measures taken; and no person in any responsible posi-
tion has ever taken a contrary position, and the Government
does not do so now. Nothing in this brief can validly be
used to the contrary.

6 [Emphasis added.] (Exhibit 98, Tab 19, p. 7)

7 V. ADVERSE LEGAL CONSEQUENCES

8 The existence of present adverse legal consequences flowing from
9 Petitioner's criminal convictions is presumed. Sibron v. New York, 392
10 U.S. 40 (1968). The Government has the burden of overcoming this presump-
11 tion. Id. The Government has failed to show that there is no possibility of
12 collateral legal consequences.

13 Moreover, Petitioner has demonstrated the possibility of adverse
14 legal consequences. These include moral stigma and injury to reputation.
15 See Exhibits 134 and 138. These also include the possibility that the con-
16 viction will be used for impeachment purposes in some future legal proceeding
17 or that the conviction will become a consideration in some future sentencing.
18 Even though the adverse use of Petitioner's conviction appears remote, a
19 coram nobis petition must be available to prevent manifest injustice.
20 Holloway v. United States, 393 F.2d 731, 732 (9th Cir., 1968).

21 VI. CONCLUSION

22 As established in the instant proceedings, Petitioner, through its
23 witnesses and exhibits, developed a record which proved a shocking and inde-
24 fensible pattern of governmental misconduct. In contrast, the record as
25 developed by the Respondent did not significantly rebut the evidence submit-
26 ted by the Petitioner. No document the Government put into evidence even

27 ////

28 PETITIONER'S POST-HEARING BRIEF - 48

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1 suggests the misconduct, as presented by the Petitioner, did not in fact
2 occur. No document in evidence legally justifies the misconduct.

3 Both John McCloy and Karl Bendetsen, former Government officials,
4 had first-hand knowledge of suppression, misrepresentation, alteration and
5 destruction of evidence from the Government's perspective. Both, as Ennis
6 testified, are alive and available to testify, and yet the Government elected
7 not to call these witnesses. Instead, the Government paraded a series of
8 witnesses whose testimonies provide absolutely no insight into the real
9 issues at hand.

10 After 40 years of enduring his convictions, Mr. Hirabayashi has
11 remained steadfast in his belief and faith in the American judicial system.
12 He comes before the Court to vindicate that faith in the Constitution.
13 Mr. Hirabayashi is motivated by his belief that the Constitution is more than
14 just a scrap of paper. The record of his convictions, as they stand today,
15 based upon a record of suppression, alteration and destruction of evidence,
16 remains a violation of the Constitution and lies like a "loaded weapon." As
17 Justice Jackson stated in his dissent in Korematsu v. United States, 323
18 U.S. 214, 246 (1944):

19 [O]nce a judicial opinion rationalizes such an order to show
20 that it conforms to the Constitution, or rather rationalizes
21 the Constitution to show that the Constitution sanctions
22 such an order, the Court for all time has validated the
23 principle of racial discrimination in criminal procedure and
24 of transplanting American citizens. The principle then lies
about like a loaded weapon ready for the hand of any author-
ity that can bring forward a plausible claim of an urgent
need. Every repetition imbeds that principle more deeply in
our law and thinking and expands it to new purposes.

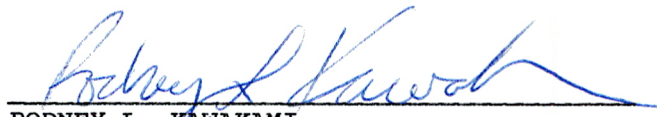
25 ⁶The errors and violations of Petitioner's due process rights are
26 not restricted to those arising from prosecutorial misconduct. Offer of
27 Proof Exhibit 142 establishes that the original trial court denied Petitioner
his constitutional right to a jury trial when that court directed the jury to
find the Defendant guilty based upon the ancestry of the Defendant.

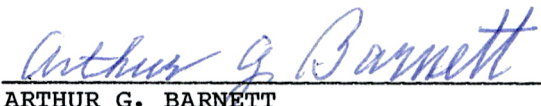
1 . . .
2 But if we review and approve, that passing incident becomes
3 the doctrine of the Constitution. There it has a generative
4 power of its own, and all that it creates will be in its own
5 image. Nothing better illustrates this danger than does the
6 Court's opinion in this case. [Emphasis added.]

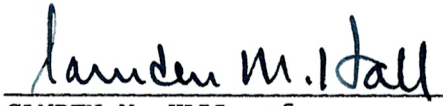
7 As evidenced by the person who from the audience during the eviden-
8 tiary hearing announced "the reason is because they bombed Pearl Harbor;" by
9 the letters received by the Petitioner (Exhibits 134 and 138); by the recent
10 slaying of Vincent Chin, a Chinese American who was beaten to death by out-
11 of-work autoworkers who blamed the Japanese for their unemployment; and even
12 as evidenced by the defense offered by the Government in the instant proceed-
13 ings, the distinction between citizens of Japan and Japanese Americans which
14 was not made over 40 years ago is still pervasive in our society. Americans
15 did not bomb Pearl Harbor, yet Americans were unjustly deprived of their
16 constitutional rights.

17 To be an American citizen will only be a cherished, treasured and
18 respected status when all rights are preserved for all citizens. By correc-
19 tion of this Court's record, a statement would be made that rights guaranteed
20 to all Americans, whatever their ancestry, will be safeguarded and upheld in
21 the American system of justice. As Mr. Hirabayashi stated before this Court,
22 "This is not just a Japanese American case; this is an American case."

23 Respectfully submitted,

24 
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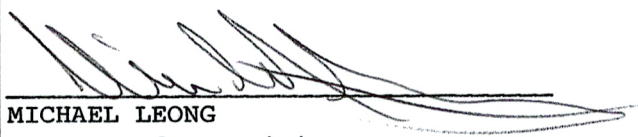
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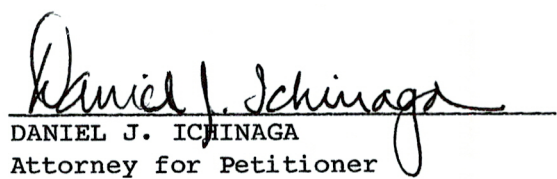
28 PETITIONER'S POST-HEARING BRIEF - 50

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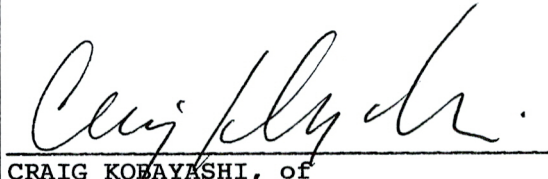
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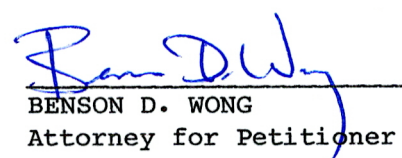
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