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Petition for Writ of Error Coram Nobis for Gordon K. Hirabayashi

United States District Court Western District of Washington

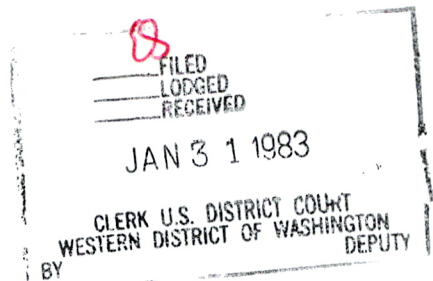
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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

GORDON K. HIRABAYASHI,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

No. **C83-122V**
Crim. No. 45738
PETITION FOR WRIT OF
ERROR CORAM NOBIS FOR
GORDON K. HIRABAYASHI

PETITION FOR WRIT OF ERROR

CORAM NOBIS

From the Judgment of Conviction October 20, 1942
and from the Sentence thereon of October 21, 1942
The Honorable Lloyd L. Black, Judge

Kathryn Bannai
671 S. Jackson Street, Suite 201
Seattle, Washington 98104
(206) 682-9932

Arthur G. Barnett
1012 Seattle Tower
Seattle, Washington 98101
(206) 624-8822

Peter Irons
429 Parkwood Lane
Leucadia, California 92024
(619) 753-0403

Petition for Writ of
Error Coram Nobis for
Gordon K. Hirabayashi

Attorneys for Petitioner

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CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY _____ DEPUTY

PETITION FOR WRIT OF
ERROR CORAM NOBIS FOR
GORDON K. HIRABAYASHI

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1 JURISDICTION

2 Jurisdiction is conferred on this Court by 28 U.S.C.
3 §1651. Included in the powers conferred on federal district
4 courts by this section of the United States Code, known as the
5 All-Writs Act, is the authority to issue writs of error coram
6 nobis and thus to vacate the criminal convictions of defendants
7 who have completed the sentences imposed on them after conviction.

8
9 CONVICTION BY THIS COURT OF PETITIONER

10 Petitioner was convicted in this Court on October 20,
11 1942 of two counts of violation of Public Law 503, 56 Stat.
12 173. Petitioner was sentenced by Judge Lloyd Black to a term of
13 ninety days on each count, sentences to run concurrently.
14 Petitioner completed service of his sentence and was subsequent-
15 ly discharged from custody.

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1 Public Law 503 and their convictions were upheld by the Supreme
2 Court in 1943 and 1944, respectively.

3 Although this petition is separate from those filed
4 on behalf of Yasui and Korematsu, the remainder of this
5 petition refers collectively to all three defendants as
6 "Petitioners." This collective appellation and format requires
7 explanation and justification. Three related factors make such
8 a presentation not only reasonable but essential: (1) the
9 virtual identity of the legal and constitutional issues raised
10 in Petitioners' cases and decided by the Supreme Court; (2) the
11 relevance of the evidence presented and discussed below to each
12 of Petitioners' cases; and (3) the interrelated pattern of the
13 acts of misconduct alleged below and their impact on each of
14 Petitioners' cases. Petitioners will discuss in more detail
15 below the operation of these factors in their cases; the point
16 is made here to advise the court of the distinctive form of
17 this petition.

18 B. Background of Petition and Relevance of Appendix

19 Petitioners' arrests and convictions arose from
20 the decision to incarcerate Japanese Americans during World War
21 II. This decision was initiated early in 1942 by military and
22 civilian officials of the U.S. War Department and was sub-
23 sequently ratified by President Roosevelt. The historical
24 record makes clear that these officials acted largely in
25 response to political and economic pressure fueled by wartime
26 hysteria and prejudice against Japanese Americans. As a result
27 of this pressure, some 110,000 Japanese Americans were forced
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1 into detention camps for an indefinite period, without the
2 bringing of charges against them.

3 Adoption of the internment program was achieved over
4 the strenuous opposition of officials of the U.S. Department of
5 Justice, including the Attorney General and several of his
6 subordinates. The grounds for this opposition included doubts
7 about the necessity for mass evacuation and about the constitu-
8 tionality of the detention without charges of American citizens.
9 Although these Justice Department officials ultimately deferred
10 to the War Department and the President, the relevance of their
11 objections to the issues raised below requires discussion at
12 some length of the events that preceded the evacuation decision.
13 Petitioners respectfully refer the Court to the Appendix to
14 this petition for presentation of these events.

15 C. Summary of Acts of Governmental Misconduct
16 Alleged by Petitioners

17 In seeking the vacation of their respective con-
18 victions, Petitioners allege below the commission by government
19 officials of numerous acts of misconduct during the entire
20 course of their cases. A continuing and cumulative pattern of
21 misconduct, designed to secure Petitioners' convictions and
22 judicial approval of the evacuation and incarceration program,
23 emerges from these related acts. While the pattern of mis-
24 conduct alleged below is complex, when unraveled the acts
25 involved can be grouped under four headings. A separate
26 allegation that Petitioners' convictions violate current
27 constitutional standards, which provide a ground for vacation,
28 is made below under a fifth heading. The following summary of

Petitioners' allegations is included at this point to assist the Court in dealing with this necessarily lengthy and complex petition.

POINT ONE: Officials of the War Department Altered and Destroyed Evidence and Withheld Knowledge of This Evidence From the Department of Justice and the Supreme Court.

In April 1943, General John L. DeWitt, who headed the Western Defense Command and issued the military orders at issue in Petitioners' cases, submitted an official report to the War Department on the evacuation and incarceration program. Justice Department officials had requested access to this Final Report for use in the government's Supreme Court briefs in Hirabayashi and Yasui. When War Department officials discovered that the report contained statements contradicting representations made by the Justice Department to the courts, they altered these statements. They subsequently concealed records of the report's receipt, destroyed records of its preparation, created records that falsely identified a revised version as the only report, and withheld the original version from the Justice Department. These acts were committed with knowledge that the contents of this report were material to the cases pending before the Supreme Court.

POINT TWO: Officials of the War Department and the Department of Justice Suppressed Evidence Relative to the Loyalty of Japanese Americans and to the Alleged Commission by Them of Acts of Espionage.

The government relied in Petitioners' cases on purported evidence of widespread disloyalty among the Japanese Americans and the alleged commission by them of

1 acts of espionage. Presented to the courts as justifica-
2 tion of the curfew and exclusion orders at issue, these
3 claims were made in the Final Report of General DeWitt.
4 Responsible officials knew that these claims were false.
5 Reports of the Office of Naval Intelligence directly
6 refuted DeWitt's disloyalty claims, while reports of
7 DeWitt's own intelligence staff and of the Federal Bureau
8 of Investigation and the Federal Communications Commission
9 directly refuted DeWitt's espionage claims. Although the
10 Final Report was before the Supreme Court in Petitioners'
11 cases, these exculpatory reports were withheld from the
12 Court despite the protest of government attorneys that
13 such action constituted "suppression of evidence."

14 POINT THREE: Government Officials Failed to Advise
15 the Supreme Court of the Falsity of the
16 Allegations in the Final Report of
General DeWitt.

17 When certain Justice Department attorneys learned of
18 the exculpatory evidence discussed in Point Two, infra, they
19 attempted to alert the Supreme Court to its existence and the
20 falsity of the Final Report of General DeWitt. Their effort
21 took the form of a crucial footnote in the government's
22 Korematsu brief to the Court. This footnote explicitly
23 repudiated DeWitt's espionage claims and advised the Court of
24 the existence of countering evidence. Before submission of the
25 brief, War Department officials intervened with the Solicitor
26 General and urged removal of the footnote. As a result of this
27 intervention, the Solicitor General halted printing of the
28 brief and directed that the footnote be revised to the War

1 Department's satisfaction. The Korematsu brief accordingly
2 failed to advise the Court of the falsity of DeWitt's claims
3 and thus misled the Court.

4 POINT FOUR: The Government's Abuse of the Doctrine
5 of Judicial Notice and the Manipulation
6 of Amicus Briefs Constituted a Fraud
Upon the Courts.

7 Justice Department and War Department officials
8 undertook separate but related efforts to present a false
9 and misleading record to the courts in Petitioners' cases.

10 Even before trial of these cases, Justice Department
11 officials decided to utilize the doctrine of judicial notice in
12 presenting "evidence" that the "racial characteristics" of
13 Japanese Americans predisposed them to disloyalty. Despite the
14 rebuff of one trial judge, and knowledge by Justice Department
15 attorneys that countering evidence existed, such tainted
16 "evidence" was included in the Supreme Court briefs in Peti-
17 tioners' cases. In addition, War Department officials made
18 available to the attorneys general of the West Coast states the
19 Final Report withheld from the Justice Department, and delegated
20 a military officer to assist in preparing the amicus briefs
21 submitted by these states to the Supreme Court. Justice
22 Department attorneys later learned of these acts and concluded
23 they were unlawful, but failed to report these acts to the
24 Supreme Court.

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1 POINT FIVE: Petitioners Are Also Entitled to
2 Relief On the Ground That Their Con-
3 victions Are Based on Governmental
 Orders That Violate Current Consti-
 tutional Standards.

4 The acts of misconduct alleged in the preceding
5 Points provide ample ground for the vacation of Petitioners'
6 convictions. With Petitioners' cases before this Court through
7 the instant petition, the application of current constitutional
8 standards provides an additional ground for vacation. The
9 racial classification involved in the military orders at issue
10 is subject to the "strict scrutiny" standard laid out in
11 subsequent Supreme Court opinions. The government now has the
12 task of proving that such a racial classification is essential
13 to fulfill a compelling governmental interest and that no less
14 restrictive alternative is available. Petitioners argue that
15 application of this standard requires vacation of their con-
16 victions.

17 D. Relevant Statute and Orders at Issue in
18 Petitioners' Cases

19 For the convenience of this Court, the pertinent
20 provisions of the statute and orders at issue in Petitioners'
21 cases are presented below, along with a summary of the structure
22 and operations of the evacuation and incarceration program of
23 which they formed the legal basis.^{1/}

25 ^{1/} The statute and orders applicable to each Petitioner are
26 presented in the Supreme Court opinions in their respective
27 case, to which this court is respectfully referred. See
 Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v.
 United States, 320 U.S. 115 (1943); and Korematsu v.
28 United States, 323 U.S. 214 (1944).

1 President Roosevelt signed Executive Order 9066 on
2 February 19, 1942. This order was a broad measure which
3 declared in pertinent part:

4 WHEREAS, The successful prosecution of the
5 war requires every possible protection
6 against espionage and against sabotage to
national-defense material, national-defense
premises and national-defense utilities....:

7 NOW THEREFORE, By virtue of the authority
8 vested in me as President of the United
9 States, and Commander in Chief of the Army
10 and Navy, I hereby authorize and direct the
11 Secretary of War, and the Military Commanders
12 whom he may from time to time designate,
13 whenever he or any designated Commander
14 deems such action necessary or desirable,
15 to prescribe military areas . . . from
16 which any or all persons may be excluded,
17 and with respect to which, the right of any
18 person to enter, remain in, or leave shall
19 be subject to whatever restriction the
20 Secretary of War or the appropriate Military
21 Commander may impose in his discretion. 2/

22 On February 20, 1942, Secretary of War Henry L.
23 Stimson exercised the authority granted him in Executive Order
24 9066 by designating Lt. General John L. DeWitt as Military
25 Commander of the area included in the Western Defense Command,
26 which included the eight westernmost states in the continental
27 United States. General DeWitt first implemented this grant of
28 authority by issuing Public Proclamation No. 1 on March 2,
1942.^{3/} This Proclamation established six designated "military
areas" within the Western Defense Command. Military Area
No. 1 included the western halves of California, Oregon and
Washington, and the southern half of Arizona. Military Area

27 2/ 7 Fed. Reg. 1407. Emphasis added.

28 3/ 7 Fed. Reg. 2320.

1 No. 2 included the remaining portions of those states, while
2 the other four states within the Western Defense Command were
3 each designated as a military area. In a press release issued
4 on the same date, General DeWitt placed Japanese Americans on
5 notice that "[e]ventually orders will be issued requiring all
6 Japanese including those who are American-born to vacate all of
7 Military Area No. 1."^{4/}

8 On March 21, 1942, President Roosevelt signed Public
9 Law 503. This law was enacted to enforce the military orders
10 authorized by Executive Order 9066 and imposed criminal
11 penalties for their violation. The statute provided in
12 pertinent part:

13 [W]hoever shall enter, remain in, leave, or
14 commit any act in any military zone . . .
15 contrary to the restrictions applicable to
16 any such area or zone . . . shall, if it
17 appears he knew or should have known of the
18 existence and extent of the restrictions or
19 order and that this act was in violation
20 thereof, be guilty of a misdemeanor and
21 upon conviction shall be liable to a fine
22 of not to exceed \$5,000 or to imprisonment
23 for not more than one year, or both, for
24 each offense. ^{5/}

25 On March 24, 1942, General DeWitt issued the first
26 military order following enactment of Public Law 503. Public
27 Proclamation No. 3 imposed a curfew on German and Italian
28 aliens, and all persons of Japanese ancestry. This curfew

4/ Western Defense Command, Press Release No. 3, March 3,
1942, quoted in Jacobus tenBroek et al., Prejudice, War
and the Constitution, p. 117.

5/ 56 Stat. 173.

1 required all designated persons to be in their residences
2 between the hours of 8:00 p.m. and 6:00 a.m.^{6/}

3 General DeWitt then instituted the internment phase
4 of the mass evacuation program. Public Proclamation No. 4,
5 issued on March 27, 1942, prohibited all Japanese Americans
6 from leaving Military Area No. 1 after March 29. This "freeze
7 order" was accompanied by the first of a series of Civilian
8 Exclusion Orders that required the Japanese Americans subject
9 to each order to report to a Civilian Control Center for
10 processing. After processing each person was transferred
11 under guard to an Assembly Center. The first Civilian Exclusion
12 Order required the evacuation of all Japanese Americans from
13 Bainbridge Island, Washington. A total of 108 such orders,
14 each of which affected approximately 1000 Japanese Americans,
15 was issued over a period that ended on June 12, 1942.^{7/}

16 Prior to March 27, 1942, the War Department began
17 construction of ten Relocation Centers located in unpopulated
18 areas of California, Arizona, Colorado, Wyoming, Idaho and
19 Arkansas. These Relocation Centers were administered by the
20 War Relocation Authority, a civilian agency established by
21 President Roosevelt on March 18, 1942 pursuant to Executive
22 Order 9102. These centers were guarded by U.S. Army troops and

23
24 ^{6/} 7 Fed. Reg. 2543.

25 ^{7/} To ensure that no Japanese Americans were overlooked by
26 any of these exclusion orders, General DeWitt issued
27 Public Proclamation No. 7 on June 8, 1942, which read in
28 part: "Should there be any areas remaining in Military
Area No. 1 from which Japanese have not been excluded, the
exclusion of all Japanese from these areas is provided for
in this proclamation." 7 Fed. Reg. 4498.

1 each was designated a "military area" over which General DeWitt
2 retained authority.^{8/}

3 Between March and October 31, 1942, the War Department
4 interned a total of 109,347 persons of Japanese ancestry. By
5 the end of this period all Japanese Americans who had resided
6 within the boundaries of Military Areas No. 1 and 2 were
7 confined within the Relocation Centers. Release of the last
8 Japanese Americans held in custody occurred on March 20, 1946,
9 almost four years after the internment program had begun.^{9/}

10 E. History of Petitioners' Cases

11 Minoru Yasui was the first of the three Petitioners
12 arrested for violation of the military orders. Yasui violated
13 the curfew imposed by Public Proclamation No. 3 and was arrested
14 in Portland, Oregon on March 28, 1942. Gordon Hirabayashi
15 violated both the curfew and Civilian Exclusion Order No. 57
16 and was arrested in Seattle, Washington on May 12, 1942. Fred
17 Korematsu violated Civilian Exclusion Order No. 34 and was
18 arrested in San Leandro, California on May 30, 1942.

19 Charges based on these violations were brought
20 against each Petitioner by indictment or information in the
21 respective United States District Courts in Portland, Seattle
22 and San Francisco. All three Petitioners pled not guilty to
23 the charges against them and each filed a demurrer to the
24 indictment or information. Each demurrer was subsequently
25

26 ^{8/} 7 Fed. Reg. 2165.

27 ^{9/} War Relocation Authority, Semi-Annual Report, January 1
28 to June 30, 1946, p. 13; quoted in tenBroek, et al., Note
13, supra, p. 13.

1 denied after hearing. Fred Korematsu was found guilty on
2 September 8, 1942 and was sentenced to five years probation
3 with imposition of sentence suspended. Gordon Hirabayashi was
4 found guilty on October 20, 1942 on the two counts brought
5 against him and sentenced to ninety days on each count, with
6 sentences to run concurrently. Minoru Yasui was found guilty
7 on November 16, 1942 and was sentenced to one year imprisonment
8 and a fine of \$5,000.

9 On September 11, November 16, and November 20, 1942,
10 Korematsu, Hirabayashi and Yasui each appealed their respective
11 convictions to the United States Court of Appeals for the
12 Ninth Circuit. The Circuit Court heard oral arguments in
13 Hirabayashi's and Yasui's cases on March 27, 1943. Invoking a
14 rarely used procedure, the Circuit Court certified the cases to
15 the United States Supreme Court without opinion. Korematsu's
16 appeal was argued in the Circuit Court on April 18, 1943 and
17 was also certified to the Supreme Court on the limited
18 procedural question of whether a suspended sentence was
19 appealable.

20 The Supreme Court heard oral arguments in all three
21 cases on May 10 and 11, 1943. Ruling that an appeal was
22 properly taken from the suspended probationary sentence, the
23 Supreme Court remanded Korematsu's appeal to the Circuit Court
24 on June 1, 1943. On June 21, 1943, the Supreme Court unanimous-
25 ly upheld the convictions of Hirabayashi and Yasui. In Yasui's
26 case, however, the Court held that the District Judge had erred
27 in ruling the curfew order unconstitutional as applied to
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1 citizens and in ruling that Yasui had forfeited his citizenship,
2 and remanded the case to the District Court for resentencing.

3 On December 2, 1943, the Circuit Court sustained
4 Korematsu's conviction with an opinion that cited the Supreme
5 Court opinion in Hirabyashi as controlling. Korematsu's
6 petition for certiorari was granted by the Supreme Court on
7 March 27, 1944. The Court heard oral argument in the case on
8 October 11 and 12, 1944. In a six-to-three decision issued on
9 December 18, 1944, the Supreme Court upheld Korematsu's con-
10 viction. The Court ruled on the same day in a unanimous
11 opinion in Ex parte Endo (on an appeal from denial of a habeas
12 corpus petition brought by an interned Japanese American) that
13 Congress had not authorized the continuing detention of a
14 concededly loyal citizen.

15 F. Summary of the Impact of Governmental Misconduct
16 On the Factual and Legal Issues Presented
17 In Petitioners' Cases and Decided by the Supreme
18 Court

18 The government's misconduct was complex in execution
19 and long in duration. To understand the significance of
20 such misconduct requires an explanation of the legal and
21 factual premises upon which the courts, and the Supreme
22 Court in particular, based their decisions in these cases.

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1 The stated purpose of Executive Order 9066 was to
2 provide "every possible protection against espionage and
3 against sabotage" to national defense facilities.^{10/} On
4 March 2, 1942, under the authority of Executive Order 9066,
5 General DeWitt issued Public Proclamation No. 1, which did the
6 following:

- 7 1. Recited that the entire Pacific coast was
8 "subject to espionage and acts of sabotage,
9 thereby requiring the adoption of military
 measures necessary to establish safeguards
 against such enemy operations;"
- 10 2. Established Military Area No. 1 which in-
11 cluded approximately 90% of the Japanese
 Americans on the mainland; and
- 12 3. Announced the planned evacuation of the
13 Japanese American population from this area. ^{11/}

14 Each of the subsequent military orders affecting Japanese
15 Americans relied upon the findings set forth in Public
16 Proclamation No. 1 for their justification and authority.

17 In upholding the constitutionality of these orders, the
18 Supreme Court relied heavily upon the ostensible purpose of
19 these orders, as set forth in Executive Order 9066 and Public
20 Law 503, and upon the military's purported "findings" of a
21 threat of espionage and sabotage from the West Coast Japanese
22 Americans.

23 From the outset, however, in order to justify the
24 incarceration of Japanese Americans, the military and the
25 War Department destroyed, suppressed and manipulated evidence
26

27 ^{10/} 7 Fed. Reg. 1407.

28 ^{11/} 7 Fed. Reg. 2320.

1 so as to create an appearance of a military threat from
2 allegedly disloyal elements within the Japanese American
3 population. Ultimately, attorneys for the Justice Department
4 became aware of such evidence, but capitulated to the War
5 Department's and military's tactics, and suppressed and dis-
6 torted the "evidence" they chose to place before the Supreme
7 Court in petitioners' cases. Unfortunately, the Supreme Court
8 accepted the government's factual picture of a purported
9 military threat as a true and complete representation of the
10 basis of the military orders and explicitly based its decisions
11 upholding the constitutionality of these orders upon the
12 military's ostensible apprehension of a danger of espionage and
13 sabotage from the Japanese Americans.

14 Explaining its inquiry into the constitutionality of
15 the military orders at issue in Hirabayashi and Yasui, the
16 Supreme Court stated:

17 [O]ur inquiry must be whether in the
18 light of all the facts and circumstances,
19 there was any substantial basis for the
20 conclusion, in which Congress and military
21 commander united, that the curfew as
22 applied was a protective measure necessary
to meet the threat of sabotage and espionage
which would substantially affect the war
effort and which might reasonably be
expected to aid a threatened enemy invasion. 12/

23 Observing that "racial discriminations are in most circumstances
24 irrelevant and therefore prohibited," the Court explained
25 the fundamental legal and moral context in which it made its
26 inquiry:

27 _____
28 12/ Hirabayashi v. United States, supra, 320 U.S. at 95.

1 Distinctions between citizens solely because of
2 their ancestry are by their very nature odious
3 to a free people whose institutions are founded
4 upon the doctrine of equality. For that reason,
5 legislative classification or discrimination
6 based on race alone has often been held to be a
7 denial of equal protection. Yick Wo v. Hopkins,
8 118 U.S. 356 ...; Yu Cong Eng v. Trinidad, 271
9 U.S. 500 ...; Hill v. Texas, 316 U.S. 400....
We may assume that these considerations would be
controlling here were it not for the fact that
the danger of espionage and sabotage, in time of
war and of threatened invasion, calls upon the
military authorities to scrutinize every relevant
fact bearing on the loyalty of populations in the
danger areas. 13/

10 In Korematsu, the Court similarly explained at the very outset
11 of its opinion that:

12 [A]ll legal restrictions which curtail the civil
13 rights of a single racial group are immediately
14 suspect. That is not to say that all such
15 restrictions are unconstitutional. It is to say
16 that courts must subject them to the most rigid
scrutiny. Pressing public necessity may
sometimes justify the existence of such restric-
tions; racial antagonism never can. 14/

17 Under this standard, the military orders establishing the
18 curfew and ordering the removal of the Japanese Americans from
19 the West Coast required for their justification:

20 Nothing short of apprehension by the proper
21 military authorities of the gravest imminent
danger to the public safety . . . 15/

22 Notwithstanding this language, the Court in both
23 Hirabayashi and Korematsu accepted without question, but
24 clearly not without misgivings, the "facts" presented to
25

26 13/ Id. at 100.

27 14/ Korematsu v. United States, supra, 323 U.S. at 216.

28 15/ Id. at 218.

1 it by the government in support of the constitutionality of
2 the military orders.^{16/} Upholding the factual basis of the
3 orders at issue in Hirabayashi, the Court concluded:

4 [W]e cannot reject as unfounded the judgment
5 of the military authorities and that of Congress
6 that there were disloyal members of [the Japanese
7 American] population, whose number and strength
8 could not be precisely and quickly ascertained.
9 We cannot say that the war-making branches of the
10 government did not have ground for believing that
11 in a critical hour such persons could not readily
12 be isolated and separately dealt with, and consti-
13 tuted a menace to the national defense and safety,
14 which demanded that prompt and adequate measures
15 be taken to guard against it. ^{17/}

16
17 Again, in the specific context of its response to the argument
18 that Public Law 503 effected an unconstitutional delegation of
19 powers, the Court in Hirabayashi declared:

20 [T]he findings of danger from espionage and
21 sabotage, and of the necessity of the curfew
22 order to protect against them, have been duly
23 made....

24
25 ^{16/} Notwithstanding the Supreme Court's conclusion that
26 racial classifications are "odious to a free people," are
27 "immediately suspect" and should be subject to the "most
28 rigid scrutiny," by failing to apply these principles in
reviewing the constitutionality of the military orders
promulgated by DeWitt, the Court abdicated its responsi-
bilities to petitioners and to the Constitution. In this
respect, entirely independent of the manifest injustices
put at issue by the instant petition, Petitioners respect-
fully submit that the Court's original decisions in
Korematsu, Hirabayashi and Yasui were themselves funda-
mentally in error. Indeed, by their consistent reliance
upon the principles of strict scrutiny first articulated
in Korematsu and Hirabayashi, subsequent decisions of the
Supreme Court have made clear that the Court erred in
Petitioners' cases in failing to apply in fact the most
rigid scrutiny of the invidious racial classifications
established by the military orders. See, e.g., Bolling v.
Sharpe, 347 U.S. 497, 499 (1954); McLaughlin v. Florida,
379 U.S. 184, 192 (1964); Loving v. Virginia, 388 U.S. 1,
11 (1967).

^{17/} Hirabayashi v. United States, supra, 320 U.S. at 99.

1 The military commander's appraisal of facts ...,
2 and the inferences which he drew from those
3 facts, involved the exercise of his informed
4 judgment. ...[T]hose facts ... support [his]
5 judgment, that the danger of espionage and
6 sabotage to our military resources was
7 imminent.... 18/

8 Finally, in Korematsu, the Court reaffirmed its prior analysis
9 and conclusion in Hirabayashi and added:

10 Like curfew, exclusion of those of Japanese
11 origin was deemed necessary because of the
12 presence of an unascertained number of dis-
13 loyal members of the group, most of whom were
14 no doubt loyal to this country. It was be-
15 cause we could not reject the finding of the
16 military authorities that it was impossible to
17 bring about an immediate segregation of the
18 disloyal from the loyal that we sustained the
19 validity of the curfew order as applying to
20 the whole group. In the instant case, tem-
21 porary exclusion of the entire group was
22 rested by the military on the same ground. 19/

23 As the Court's choice of language in these passages
24 makes evident, the Court upheld the constitutionality of the
25 military orders at issue in both Hirabayashi and Korematsu
26 on "findings" of facts by General DeWitt. The "facts" upon
27 which the Court relied, however, were not facts at all.
28 Composed of half-truths and outright lies, the "facts" presented
to the Court resulted from a deliberate and knowing attempt by
the the highest ranking military and civilian officials in the
United States government to destroy, suppress and withhold
highly credible evidence that no such threat from Japanese
Americans as posited by DeWitt ever existed. In place of such
evidence, these officials fabricated a factual record composed

18/ Id. at 103-104.

19/ Korematsu v. United States, supra, 323 U.S. at 218-219.

1 of other "evidence," some of which had been discredited as
2 early as January 1942, and argued that the military orders
3 leading to the incarceration of the Japanese American people
4 were justified by such fabrications.

5 Had the true facts been presented to the Supreme
6 Court, the Court could not have concluded even that "[w]e
7 cannot reject as unfounded the judgment of the military authori-
8 ties," or that "[w]e cannot say that the War-making branches of
9 the government did not have ground for believing" in the threat
10 ostensibly posed by Japanese Americans. As Petitioners will
11 show, that the military had no such ground was known, not only
12 to DeWitt, but to the Navy, the FBI, the FCC, the War Department
13 and the Department of Justice, and should have been divulged to
14 the Court. As the destruction, suppression and fabrication of
15 evidence was critically material to petitioners' constitutional
16 challenges, petitioners' respective convictions must be vacated.

STATEMENT OF THE CASE

POINT ONE

OFFICIALS OF THE WAR DEPARTMENT ALTERED AND DESTROYED
EVIDENCE AND WITHHELD KNOWLEDGE OF THIS EVIDENCE FROM
THE DEPARTMENT OF JUSTICE AND THE SUPREME COURT

As noted above, General DeWitt's Final Report on the evacuation of Japanese Americans is of central significance to the allegations of governmental misconduct made in this petition. This official report was prepared to justify the evacuation decision and contained the "disloyalty" and "espionage" claims on which DeWitt purported to base his recommendation for mass evacuation. Until now, it has been believed that there was only one "Final Report." Petitioners have discovered the existence of a prior version which had been printed and formally transmitted to the War Department.

This initial version contained statements known by War Department officials to be material to the loyalty issue raised before the Supreme Court in Hirabayashi and Yasui. Moreover, War Department officials knew that statements in the initial version contradicted representations already made to the Courts by the Department of Justice and undermined the credibility of General DeWitt. In order to "clean up" the Report, War Department officials willfully altered these statements to conceal the contradictions. In addition, War Department officials destroyed records and altered and concealed other records to withhold from the Justice Department and the Supreme Court any evidence that an original version of the Report had existed and had been formally submitted to the War Department.

1 A. The Justice Department Requested Evidence
2 From the War Department For Use in the
3 Government's Briefs in Hirabayashi and Yasui

4 On April 5, 1943, after certification by the Court of
5 Appeals, the Supreme Court ordered up the entire records in the
6 Hirabayashi and Yasui cases. Argument was set for the week of
7 May 10, 1943. Edward J. Ennis, Director of the Alien Enemy
8 Control Unit of the Department of Justice, undertook supervision
9 of the preparation of briefs in both cases.^{1/}

10 To prepare the briefs, Ennis formally requested
11 the War Department "to supply any published material in the
12 War Department's possession on the military situation on the
13 West Coast at the time of the evacuation to be used in the
14 Hirabayashi brief in the Supreme Court."^{2/} Ennis also reported
15 to Solicitor General Fahy with respect to this request on April
16 19, 1943:

17 ^{1/} Ennis intended to address the major issues of the curfew
18 and evacuation in the Hirabayashi brief, since Hirabayashi
19 had been convicted of violating both the curfew order and
20 the evacuation order applicable to him. Given the fact
21 that Yasui had been convicted only of curfew violation,
22 and that the District Judge had held that Yasui had
23 forfeited his United States citizenship, a holding with
24 which the United States disagreed, Ennis proposed submit-
25 ting a "short brief" in the Yasui case "discussing
26 the special question of the defendant's citizenship" and
27 referring the Supreme Court to the Hirabayashi brief for
28 discussion of the curfew issue. Memorandum, Edward J.
Ennis to Solicitor General Fahy, April 19, 1943, Folder 3,
Box 37, Charles Fahy Papers, Franklin D. Roosevelt Library,
Hyde Park, New York [cited hereafter as Fahy Papers]. See
Exhibit A.

29 ^{2/} Memorandum, Edward J. Ennis to Herbert Wechsler, September
30 30, 1944, Folder 3, Box 37, Fahy Papers. This memorandum
was written in connection with the preparation of the
Government's brief to the Supreme Court in the Korematsu
case. See Exhibit B.

1 In this connection the War Department has
2 today received a printed report from
3 General DeWitt about the Japanese evacuation
4 and is now determining whether it is to be
5 released so that it may be used in connection
6 with these cases. The War Department has
7 been requested to furnish any published
8 materials which may be helpful. 3/

6 Ennis made this request for the purpose of "assisting the
7 Court . . . in the presentation of the factual material"
8 relating to the curfew and evacuation issues raised in the
9 Hirabayashi and Yasui cases. The relevance of material in
10 the possession of the War Department, as the agency respon-
11 sible for the mass evacuation program and for the military
12 orders that precede and accompanied this program, is obvious.

13
14 B. War Department Officials Altered the Final
15 Report To Conceal Contradictions With Rep-
16 resentations Made to the Courts By the
17 Department of Justice

16 Ennis had requested a copy of the Final Report
17 which had been formally transmitted to the War Department
18 by General DeWitt on April 15, 1943. Ten copies of the Report
19 had been printed and bound, and six of these copies had been
20 sent to the War Department. Two of these copies went to
21 Assistant Secretary of War John J. McCloy. In a transmittal
22 letter to McCloy dated April 15, 1943, DeWitt noted that
23 the Report had been shipped Air Express because it was needed
24 for the preparation of the Government's Supreme Court briefs:

25 These are going forward via Air Express
26 because I am advised that there is an
27 urgent need of the material contained
28 therein for use in the preparation of the

3/ Note 1, supra.

1 Federal Government's briefs in the cases
2 now pending before the Supreme Court of
3 the United States challenging the con-
4 stitutionality of the entire program. 4/

4 In reviewing the initial version of the Final
5 Report, McCloy discovered a statement by General DeWitt that
6 prompted him to direct that the Report be altered and with-
7 held from the Justice Department. The objectionable state-
8 ment appeared in Chapter II, entitled "Need for Military
9 Control and For Evacuation." This chapter included both
10 the "military necessity" and disloyalty" claims made by DeWitt
11 in support of the evacuation. The significant paragraph
12 is quoted below in full:

13 Because of the ties of race, the intense
14 feeling of filial piety and the strong bonds
15 of common tradition, culture and customs, this
16 population [Japanese Americans] presented a
17 tightly-knit racial group. It included in
18 excess of 115,000 persons deployed along
19 the Pacific Coast. Whether by design or
20 accident, virtually always their communities
21 were adjacent to very vital shore installa-
22 tions, war plants, etc. While it was
23 believed that some were loyal, it was known
that many were not. It was impossible to
establish the identity of the loyal and
the disloyal with any degree of safety. It
was not that there was insufficient time in
which to make such a determination; it was
simply a matter of facing the realities
that a positive determination could not be
made, that an exact separation of the
"sheep from the goats" was unfeasible. 5/

24 4/ Letter, General DeWitt to McCloy, April 15, 1943, File
25 319.1, Section I, Records of the Western Defense Command
26 and Fourth Army, Civil Affairs Division, Record Group 338,
National Archives and Record Service [NARS], Washington,
D.C. See Exhibit C.

27 5/ Final Report, Japanese Evacuation From the West Coast,
28 1942, [initial version], p. 9, *ibid.* Emphasis
added. See Exhibit D.

1 The underscored portion of this paragraph is signi-
2 ficant for several reasons. First, DeWitt's assertion that
3 is was "impossible" to separate the loyal and the disloyal
4 among the Japanese Americans contradicted DeWitt's own prior
5 statement of the subject. On December 26, 1941, at a time
6 of greater military uncertainty and potential danger of
7 Japanese attack on the West Coast, DeWitt had opposed mass
8 evacuation with the statement that "I think we can weed the
9 disloyal out of the loyal and lock them up if necessary."^{6/}
10 DeWitt offered no evidence in the Final Report to explain
11 his change in opinion. What he did offer were simply supposi-
12 tions that the "racial characteristics" of Japanese Americans
13 predisposed them to disloyalty.

14 Second, officials of the War Department and Depart-
15 ment of Justice -- including McCloy and Attorney General
16 Biddle -- had known since early 1942 that reports from respon-
17 sible intelligence agencies flatly contradicted DeWitt's
18 claim that it was impossible to separate the loyal from the
19 disloyal. Evidence of this knowledge and the reports on
20 which it was based is detailed in the following section of
21 this petition.

22 Third, the statement that considerations of time
23 had not been a factor in the mass evacuation decision contra-
24 dicted the position consistently taken by the Department of

25 6/ Transcript of telephone conversation, General DeWitt and
26 General Allen W. Gullion, Provost Marshal General, United
27 States Army, December 26, 1941, File 311.3 (Telephone
28 conversations, DeWitt, 1942-43), Record Group 338, Records
 of the Western Defense Command, National Archives and
 Records Service, Washington, D.C.

1 Justice before the courts. Counsel for Hirabayashi and Yasui
2 argued at length in their briefs to the Supreme Court that
3 the prior experience of the British government in conducting
4 individual loyalty hearings for enemy aliens demonstrated
5 the feasibility of this less restrictive alternative to mass
6 evacuation. DeWitt's elimination of the time factor from
7 the evacuation equation was directly and critically relevant to
8 this central question.

9 McCloy had not expected to receive the Final Report
10 in printed and bound form before he had an opportunity to
11 review it. He communicated his surprise to Colonel Karl
12 Bendetsen in a telephone conversation on April 19, 1943:

13 The arrangement that I understood was
14 that you were going to submit a galley
15 that you could go over and we could work
16 on that and make any suggestions
17 [T]he letter of transmittal is already
18 printed and signed -- completed -- done
19 -- pat. That is what disturbs me. The
20 whole thing disturbs me -- frankly." 7/

21 At the end of this conversation McCloy ordered
22 Colonel Bendetsen to report to Washington for consultation
23 on the Final Report. Bendetsen subsequently reported to
24 General DeWitt on May 3, 1943, that McCloy objected:

25 . . . to that portion of Chapter II which
26 said in effect that it is absolutely impossi-
27 ble to determine the loyalty of Japanese no
28 matter how much time was taken in the
process. He said that he had no objection
to saying that time was of the essence and
that in view of the military situation and
the fact that there was no known means of

27 7/ Transcript of telephone conversation, Colonel Bendetsen
28 and McCloy, April 19, 1943, note 4, supra. See Exhibit
E.

1 making such a determination with any degree
2 of safety the evacuation was necessary. 8/

3 McCloy then instructed Captain John M. Hall of his staff to
4 revise the paragraph from the Final Report quoted above. Hall
5 revised the last two sentences of this paragraph to read as
6 follows:

7 To complicate the situation, no ready means
8 existed for determining the loyal and the
9 disloyal with any degree of safety. It was
 necessary to face the realities -- a
 positive determination could not be made. 9/

10 Hall's revision produced more than a semantic change.
11 It resulted in the complete alteration of DeWitt's original
12 statement and its meaning. DeWitt obviously claimed that it was
13 "impossible" to segregate the Japanese Americans on the basis
14 of loyalty because he assumed that their "racial characteristics"
15 predisposed them to disloyalty. Hall's unsupported statement
16 that "no ready means existed" by which loyalty could be deter-
17 mined shifted the argument to the question of practicality and
18 concealed the racist underpinning of DeWitt's equally unsuppor-
19 ted claim. More important, Hall's revision concealed from the
20 Justice Department DeWitt's express admission that the time
21 required to pursue the less restrictive alternative of
22

23 8/ Memorandum, Colonel Bendetsen to General DeWitt, May 3,
24 1943, Note 4, supra. Emphasis in original. See Exhibit
 F.

25 9/ Memorandum, "Suggested changes by Capt. Hall in "Final
26 Report: Japanese Evacuation from West Coast - 1942",
27 [no recipient or date noted], ibid. See Exhibit G. This
28 alteration appeared in the published version of the Final
 Report, Japanese Evacuation From the West Coast, 1942,
 Washington, D.C.: Government Printing Office, 1943.
 [Hereinafter cited as DeWitt, Final Report.]

1 segregation by loyalty had not been a factor in the mass
2 evacuation decision.

3 The impact of this alteration of the Final Report
4 on Petitioners' cases is undeniable. Barred by McCloy from
5 access to the original version of the Report, the Justice
6 Deptment erroneously asserted to the Supreme Court in
7 Hirabayashi and Yasui that lack of sufficient time for a
8 loyalty determination had necessitated the adoption of the
9 program of mass evacuation. The Hirabayashi brief, incor-
10 porated by reference on this point in the Yasui brief, included
11 this assertion: "Many months, or perhaps years, would be
12 required for such [loyalty] investigations and hearings."^{10/}
13 In view of DeWitt's original statement on this question, the
14 consequence of this assertion was to mislead the Court on this
15 crucial issue.

16 The Supreme Court's reliance on this misleading and
17 erroneous assertion is evident. The Court upheld the curfew
18 order at issue in both Hirabayashi and Yasui on the ground that
19 DeWitt had determined that the Japanese American population
20 included "disloyal members . . . whose number and strength
21 could not be precisely and quickly ascertained" and that such
22 persons could not readily be isolated and separately dealt
23 with" by any means other than the curfew.^{11/} Later, in
24 Korematsu, the Court upheld the exclusion order at issue (and
25

26 ^{10/} Hirabayashi v. United States, 320 U.S. 81 (1943), Brief
27 for the United States, pp. 62-65.

28 ^{11/} Hirabayashi v. United States, supra, 320 U.S. 81, 99.

1 the mass evacuation program as well) with quotation of this
2 same excerpt from Hirabayashi.^{12/}

3 The altered version of the Final Report was pre-
4 sented to the Supreme Court in Korematsu after its public
5 release in 1944. Justice Murphy's dissent in Korematsu
6 provides a clear indication that the outcome of Petitioners'
7 cases might have differed had the Court not been misled on
8 this issue. "No adequate reason is given for the failure
9 to treat these Japanese Americans on an individual basis
10 by holding investigations and hearings to separate the loyal
11 from the disloyal," Justice Murphy wrote in reference to the
12 Final Report. Rather, "it is asserted that the loyalties of
13 this group 'were unknown and time was of the essence'."^{13/}
14 This interior quotation from the Final Report reflected, of
15 course, the alteration of the original version directed by
16 McCloy. Had the Court been aware of DeWitt's initial statement,
17 other members of the Court might well have shared Justice
18 Murphy's doubts.

19
20 C. War Department Officials Destroyed Records of
21 the Original Version of the Final Report and
22 Concealed Records of Its Existence From the
23 Department of Justice

24 After the alteration of the Final Report to eliminate
25 General DeWitt's damaging statements, War Department officials
26 destroyed records of the receipt of the initial version sent to
27 the War Department and records used in its preparation. On May

27 ^{12/} Korematsu v. United States, 323 U.S. 214, 218 (1943).

28 ^{13/} Id. at 241 (Murphy, J., dissenting).

1 9, 1943, Colonel Bendetsen transmitted to General James Barnett,
2 Assistant Chief of Staff of the Western Defense Command, the
3 following order from DeWitt:

4 Take action to call in all copies previously
5 sent to WD [War Department] less enclosures
6 and to have WD destroy all records of
7 receipt of report as when final revision is
8 forwarded letter of transmittal will be
9 redated. 14/

10 Two days later, on May 11, DeWitt sent a telegram to
11 the Army Chief of Staff requesting return of the six printed
12 copies of the Final Report that had been sent to the War
13 Department on April 15. DeWitt also requested that "your
14 record [of] receipt of same be cancelled for reason rewritten
15 report in process."^{15/}

16 War Department records were subsequently altered
17 to conceal the receipt of the initial version of the Final
18 Report. On June 7, 1943, Captain Hall returned to Colonel
19 Bendetsen the original and copy of General DeWitt's letter
20 of transmittal dated April 15. "War Department records have
21 been adjusted accordingly," Hall reported to Bendetsen.^{16/}

22 The final step in the destruction of records took
23 place on June 29, 1943. On that day, the following document
24 - - - - -

25 14/ Telegram, Colonel Bendetsen to General Barnett, May
26 9, 1943, File 319.1, Note 4, supra. See Exhibit H.

27 15/ Telegram, General DeWitt to Chief of Staff, United
28 States Army, May 11, 1943, ibid. See Exhibit I.

16/ Letter, Captain Hall to Colonel Bendetsen, June 7,
1943, ibid. See Exhibit J.

1 was submitted to Bendetsen's office by Warrant Officer Theodore
2 E. Smith:

3 I certify that this date I witnessed
4 the destruction by burning of the galley
5 proofs, galley pages, drafts and memorandums
6 of the original report of the Japanese
7 Evacuation. 17/

8 While these records were being destroyed, the altered
9 version of the Final Report was printed and, on June 5, 1943,
10 submitted to the War Department by General DeWitt. 18/ This
11 date has a particular significance to the Hirabayashi and Yasui
12 cases. Although arguments in these cases before the Supreme
13 Court had taken place several weeks earlier, the Court's
14 opinions were not issued until June 21, 1943. The Justice
15 Department's request to the War Department for material relevant
16 to these cases had been made in April and was still outstanding.
17 Notwithstanding this request, and their knowledge that the
18 Final Report had been officially requested, War Department
19 officials did not release the Report until January 1944.

20 Justice Department officials gained access to the
21 altered version of the Final Report only after its release
22 to the press. The purge of War Department records gave them
23 no hint that any other version of the Report had ever existed.
24 Not until the recent discovery by Petitioners of a copy of
25 the original version in the files of the Western Defense
26 Command, and of the records relating to its alteration, did
27 this shocking episode come to light. The deliberate alter-

28 17/ Memorandum, Warrant Officer Junior Grade Theodore E.
Smith, June 29, 1943, Ibid. See Exhibit K.

18/ DeWitt, Final Report, p. vii.

1 ation and destruction of evidence material to issues raised
2 in Petitioners' cases and decided adversely to them by the
3 Supreme Court speaks for itself.

1 POINT TWO

2 OFFICIALS OF THE WAR DEPARTMENT AND THE
3 DEPARTMENT OF JUSTICE SUPPRESSED EVIDENCE
4 RELATIVE TO THE LOYALTY OF JAPANESE
5 AMERICANS AND TO THE ALLEGED COMMISSION
6 BY THEM OF ACTS OF ESPIONAGE

7 The alteration of the original version of the Final
8 Report, and the destruction of records of its preparation,
9 were directly related to the suppression of authoritative
10 intelligence reports showing that the "evidence" upon which
11 General DeWitt relied to support his assertions of a threat
12 from Japanese Americans was false. These reports conclu-
13 sively refuted both the disloyalty and espionage allegations
14 made in the Final Report in support of mass evacuation.

15 Officials of the War Department and the Department
16 of Justice were aware since early 1942 of reports that dealt
17 with the disloyalty and espionage issues. These reports
18 had been submitted by the Office of Naval Intelligence (ONI),
19 the Military Intelligence Division of DeWitt's command (MID),
20 the Federal Bureau of Investigation (FBI), and the Federal
21 Communications Commission (FCC). Collectively, these reports
22 refuted every allegation made in the Final Report. However,
23 none of this exculpatory evidence was presented to the courts
24 which considered Petitioners' cases. Instead, over the ob-
25 jections of the attorneys responsible for the briefs in these
26 cases, the Justice Department knowingly presented to the courts
27 the false factual picture created by DeWitt and the War Depart-
28 ment in support of the incarceration program.

- - - - -

- - - - -

1 A. The Disloyalty and Espionage Allegations
2 Made in the Final Report

3 Allegations that Japanese Americans constituted
4 a disloyal element among the West Coast population, and that
5 members of this group had committed acts of espionage, provided
6 the twin foundations of DeWitt's justification of mass eva-
7 cuation in the Final Report. DeWitt's actions could in fact be
8 justified only on an asserted link between these separate
9 allegations. Acts of espionage were in the province of military
10 and civilian intelligence and law enforcement agencies. The
11 mass evacuation and incarceration of all Japanese Americans
12 depended on an assertion of widespread disloyalty among this
13 group, and upon the related assertion that they were predisposed
14 to sympathy to Japan and would commit acts of espionage to
15 further Japanese war aims.

16 General DeWitt made such an explicit linkage between
17 disloyalty and espionage in his Final Report. He expressed
18 it in the following terms:

19 In his estimate of the situation, the
20 Commanding General found a tightly-
21 knit, unassimilated racial group, sub-
22 stantial numbers of whom were engaged in
23 pro-Japanese activities. . . . He had no
24 alternative but to conclude that the
25 Japanese [Americans] constituted a po-
26 tentially dangerous element from the
27 viewpoint of military necessity -- that
28 military necessity required their immediate
 evacuation to the interior. . . . There
 were hundreds of reports nightly of
 signal lights visible from the coast,
 and of intercepts of unidentified radio
 transmissions. . . . The problem required
 immediate solution.

1 It called for the application of measures
2 not then in being. 1/

3 Long before he submitted the Final Report to the War
4 Department, DeWitt had expressed his belief that Japanese
5 Americans were disloyal as a group in statements that literally
6 reeked of racism. On January 4, 1942, more than a month before
7 he recommended mass evacuation, DeWitt made the following
8 statement to an official of the Department of Justice:

9 I have little confidence that the enemy
10 aliens are law-abiding or loyal in any
11 sense of the word. Some of them, yes;
12 many, no. Particularly the Japanese.
I have no confidence in their loyalty
whatsoever. I am speaking now of the
native-born Japanese. . . . 2/

13 The Final Report included a revealing expression
14 of DeWitt's belief that the "racial characteristics" of Japanese
15 Americans predisposed them to disloyalty. DeWitt included
16 in the Report the text of the "Final Recommendation" he sub-
17 mitted to the Secretary of War on February 14, 1942. The
18 following statement appeared in this document:

19 In the war in which we are now engaged
20 racial affinities are not severed by
21 migration. The Japanese race is an
22 enemy race and while many second and
third generation Japanese born on United
States soil, possessed of United States
citizenship, have become 'Americanized',

24 1/ Final Report: Japanese Evacuation From the West Coast,
25 1942, Washington, D.C.: Government Printing Office, 1943
[hereafter cited as DeWitt, Final Report], pp. 8-9.

26 2/ Transcript, Conference in Office of General DeWitt,
27 January 4, 1942, File 014.31, Box 7, Record Group 338
[Records of the Western Defense Command and Fourth Army],
28 National Archives and Records Service, Washington, D.C.
Emphasis added. See Exhibit L.

1 the racial strains are undiluted. . . .
2 It, therefore, follows that along the
3 vital Pacific coast over 112,000 potential
4 enemies, of Japanese extraction, are at
5 large today. 3/

6 DeWitt's final public statement about the loyalty
7 of Japanese Americans came shortly before his transfer from
8 the Western Defense Command in June 1943. Testifying before a
9 congressional committee on April 13, 1943, that "it makes no
10 difference whether he is an American citizen or not."^{4/}

11 These statements do more than document the consistency
12 of DeWitt's hostility toward Japanese Americans as a racial
13 group. His expression of "no confidence" in the loyalty of
14 Japanese Americans led to the fabrication of "evidence" that
15 members of this group had committed acts of espionage. The
16 espionage allegations in the Final Report thus provide a
17 classic example of the self-fulfilling prophecy in operation.

18 The Final Report shows the consequence of DeWitt's
19 linkage of disloyalty and espionage. DeWitt included in
20 his "Final Recommendation" for mass evacuation the following
21 prediction that Japanese Americans would engage in acts of
22 espionage:

23 3/ DeWitt, Final Report, p. 3. Emphasis added.

24 4/ Quoted in San Francisco Chronicle, April 14, 1943. The
25 printed text of General DeWitt testimony does not contain
26 the first statement quoted above. That testimony, as
27 printed, read in relevant part: "I don't want any of
28 them [persons of Japanese ancestry] here. They are a
 dangerous element. There is no way to determine their
 loyalty.... The danger of the Japanese was, and is now --
 if they are permitted to come back -- espionage and
 sabotage. It makes no difference whether he is an American
 citizen, he is still a Japanese...." Hearings, House Naval
 Affairs Subcommittee to Investigate Congested Areas, 78th
 Cong., 1st Sess., Part 3, pp. 739-740.

1 Hostile naval and air raids will be
2 assisted by enemy agents signaling
3 from the coastline and the vicinity
4 thereof; and by supplying and
5 otherwise assisting enemy vessels
6 and by sabotage. 5/

7 Having predicted in the "Final Recommendation"
8 that Japanese Americans would commit espionage, DeWitt was
9 forced by the logic of his prophecy to include "evidence"
10 of espionage in the Final Report. DeWitt made two separate
11 allegations of espionage activities in his Report. One dealt
12 with radio communications from the mainland to Japanese
13 submarines off the coast; the other with the transmission
14 of visual signals to offshore Japanese vessels.

15 DeWitt first stated that his recommendation of
16 mass evacuation was:

17 . . . in part based upon the interception
18 of unauthorized radio communications
19 which had been identified as emanating
20 from certain areas along the coast.
21 Of further concern to him was the fact
22 that for a period of several weeks
23 following December 7th [1941], sub-
24 stantially every ship leaving a West
25 Coast port was attacked by an enemy
26 submarine. This seemed conclusively
27 to point to the existence of hostile
28 shore-to-ship (submarine) communication. 6/

29 The second espionage allegation in the Final Report
30 came in a section that charged the Department of Justice with
31 having "impeded" the search for "arms, cameras and other
32 contraband" in the possession of Japanese Americans by insisting

33 5/ DeWitt, Final Report, p. 33. Emphasis added.

34 6/ Id. at 4. Emphasis added.

1 that premises occupied by citizens could be searched only with
2 the warrant required by the Fourth Amendment. DeWitt accom-
3 panied this criticism with the following statement:

4 There were hundreds of reports nightly
5 of signal lights visible from the coast
6 Signaling was often observed at
7 premises which could not be entered without
8 a warrant because of mixed [i.e., alien and
9 citizen] occupancy. 7/

10 It should be noted that these related allegations
11 of disloyalty and espionage were the only "evidence" offered
12 by General DeWitt to support the mass evacuation and incar-
13 ceration of Japanese Americans. These allegations in the Final
14 Report were presented to the Supreme Court in Petitioners'
15 cases as the basis of the "military necessity" argument in
16 support of the military orders at issue. It also deserves
17 notice that DeWitt did not directly charge that any of the
18 alleged acts of espionage had been committed by Japanese
19 Americans. Presumably because no person -- of Japanese ancestry
20 or otherwise -- was charged with espionage on the West Coast,
21 DeWitt resorted to implication rather than accusation.

22 B. Officials of the War Department and the Depart-
23 ment of Justice Suppressed the Report of the
24 Office of Naval Intelligence on the Loyalty
25 of Japanese Americans

26 1. Preparation and Contents of the ONI Report

27 The responsibility of the Office of Naval Intelligence
28 (ONI) for the investigation of the Japanese American population
29 on the West Coast originated in June 1939. At that time, in

30 7/ Id. at 8.

1 response to increasing tension between the United States and
2 Japan, President Roosevelt ordered a reorganization of the
3 government's intelligence activities on the West Coast.^{8/} The
4 "Delimitation Agreement" of June 4, 1940 further coordinated
5 the operations of civilian and military intelligence agencies
6 and specifically assigned primary responsibility for investiga-
7 tion of the Japanese American population on the West Coast to
8 the ONI.^{9/}

9 Among the most significant of the intelligence
10 reports suppressed by government officials in Petitioner's
11 cases was the ONI report on its investigation of the Japanese
12 Americans submitted to the Chief of Naval Operations on
13 January 26, 1942. Entitled "Report on Japanese Question,"
14 this document discussed in detail the question of the loyalty
15 of Japanese Americans on the West Coast. It had been prepared
16 by Lieutenant Commander Kenneth D. Ringle, the official most
17 knowledgeable about Japanese Americans among the personnel of
18 all federal intelligence agencies both before and during the
19 war.^{10/}

21 ^{8/} United States Navy, Office of Naval Intelligence, "United
22 States Naval Administration in World War II," n.d., pp.
66-69. See Exhibit M.

23 ^{9/} Ibid.

24 ^{10/} Memorandum, "Japanese Question, Report on," Lieutenant
25 Commander K. D. Ringle to Chief of Naval Operations,
26 January 26, 1942, File BIO/ND 11BF37/A8-5, Records of the
27 United States Navy. See Exhibit N. Note the following
statement of Ringle's background and experience: "(a)
Japanese people as a naval language student attached to

28 [FOOTNOTE ^{10/} CONTINUED ON FOLLOWING PAGE]

1 Pursuant to his duties on the intelligence staff
2 of the Eleventh Naval District, with headquarters in Los
3 Angeles, Commander Ringle assumed primary responsibility for
4 the investigation of the loyalty of Japanese Americans.
5 He maintained close contact with Japanese Americans and with
6 officials in other intelligence agencies. His periodic
7 reports, in particular that of January 26, 1942, thus consti-
8 tuted the most expert and definitive intelligence on the
9 loyalty question.

10 In his report of January 26, 1942, Commander Ringle
11 concluded that the vast majority of Japanese Americans were
12 loyal to the United States and presented little danger to
13 military security. He admitted that a small number among the
14 entire Japanese American population represented a potential
15 military danger, noting that:

16 . . . there are among the Japanese,
17 both alien and United States citizens,
18 certain individuals, either deliberately
19 placed by the Japanese government or
20 actuated by a fanatical loyalty to
21 that country, who would act as
22 saboteurs or agents. This number is
estimated to be less than three
percent of the total, or about 3500
in the entire United States. 11/

23 [FOOTNOTE 10/ CONTINUED FROM PREVIOUS PAGE]

24 the United States Embassy in Tokyo from 1928 to 1931. (b)
25 One year's duty as Assistant District Intelligence Officer,
26 Fourteenth Naval District (Hawaii) from July 1936 to July
27 1937. (c) Duty as Assistant District in charge of Naval
28 intelligence matters in Los Angeles and vicinity from July
1940 to the present time." Pp. 3-4.

11/ Id. at 2.

1 Commander Ringle added to this estimate the signifi-
2 cant statement that the identities of the potentially disloyal
3 were easily discoverable:

4 . . . of the persons mentioned . . .
5 above, the most dangerous are either
6 already in custodial detention or are
7 members of such organizations as the Black
8 Dragon Society, the Kaigun Kyokai (Navy
9 League), or the Haimusha Kai (Military
10 Service Men's League), or affiliated
11 groups. The membership of these groups is
12 already fairly well known to the Naval
13 Intelligence service or the Federal Bureau
14 of Investigation. . . . 12/

15 On the basis of these informed estimates and his
16 personal knowledge of the Japanese Americans, Commander
17 Ringle came to the following conclusion:

18 That, in short, the entire 'Japanese
19 Problem' has been magnified out of its
20 true proportion, largely because of the
21 physical characteristics of the people;
22 that it is no more serious than the
23 problems of the German, Italian, and
24 Communistic portions of the United States
25 population, and, finally that it should be
26 handled on the basis of the individual,
27 regardless of citizenship, and not on a
28 racial basis. 13/

29 Most importantly, in accordance with the existing
30 "Delimitation Agreement" between the federal intelligence
31 agencies, Commander Ringle's report was available to both
32 the Federal Bureau of Investigation and to General DeWitt
33 through the staff of the Military Intelligence Division
34 (MID) of the Western Defense Command.

35 - - - - -

36 12/ Ibid.

37 13/ Id. at 3.

2. The Government's Knowledge of
the ONI Report

It is significant that the ONI Report came to the personal attention of both Attorney General Biddle and Assistant Secretary of War McCloy before General DeWitt issued the curfew and exclusion orders applicable to Petitioners. Biddle transmitted the report to McCloy on March 9, 1942, with a letter that read: "You will be interested in the enclosed confidential report of the Office of Naval Intelligence with respect to the Japanese situation on the West Coast."^{14/} McCloy responded on March 21, 1942, with a letter that included the following:

I spent some time on the West Coast, returning yesterday, and while out there I talked at some length with Commander Ringle and other officials of the Office of Naval Intelligence, 12th Naval District. ^{with Commander} Ringle's knowledge of the Japanese problem along the coast.^{15/}

Additionally, the substance and conclusions of the ONI Report came to the attention of officials of the Department of Justice during preparation of the Government's brief to the Supreme Court in the Hirabayashi case. Subsequent to his preparation of the report of January 26, 1942, Commander Ringle prepared, at the request of officials of the War Relocation

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^{14/} Biddle to McCloy, March 9, 1942, File ASW014.311 [Eastern Defense Command, Exclusion Order Reports], Entry 47, Box 6, Record Group 107, Records of the Assistant Secretary of War, National Archives and Records Service, Washington, D.C. See Exhibit O.

^{15/} McCloy to Biddle, March 21, 1942, See Exhibit P.

1 Authority (WRA), an expanded 57-page report entitled "The
2 Japanese Question in the United States."^{16/} This report
3 discussed in detail such questions as dual citizenship, the
4 Shinto religion, the education in Japan of the American-born
5 "Kibei" group, and the basic loyalty of Japanese Americans.
6 On each of these questions, Commander Ringle presented authori-
7 tative data that contradicted or substantially qualified the
8 allegations made in the Final Report of General DeWitt. In
9 effect, the report prepared by Commander Ringle for the War
10 Relocation Agency controverted every piece of "evidence"
11 submitted to the Supreme Court on the loyalty issue by the
12 Department of Justice in Petitioners' cases.

13 The ONI Report of January 26, 1942, along with
14 excerpts from the report submitted to the WRA on June 15,
15 1942, was subsequently published in summary form in the
16 October, 1942 issue of Harpers Magazine. This article was
17 anonymously published under the title "The Japanese in America,
18 The Problem and Solution," under the pseudonym "An Intelligence
19 Officer."^{17/} In April, 1943, this article came to the attention
20 of Edward J. Ennis of the Department of Justice, who was then
21 responsible for preparation of the Government's brief to the
22 Supreme Court in the Hirabayashi case. Ennis subsequently
23 identified Commander Ringle as the author of the magazine

24
25 ^{16/} Memorandum, "The Japanese Question in the United States,"
26 Lt. Commander K. D. Ringle, June 15, 1942, "Commander
27 Ringle File." Box 573, Record Group 210, Records of the
28 War Relocation Authority, National Archives and Records
Service, Washington, D.C.

^{17/} Harpers Magazine, Vol. 185, No. 1109 (October 1942),
p. 489.

1 article and obtained copies of the reports on which it was
2 based.^{18/}

3 3. The Government's Suppression
4 of the ONI Report

5 On April 30, 1943, Ennis informed Solicitor General
6 Fahy of his knowledge of the ONI Report and its contents.
7 Given the importance of the memorandum from Ennis to Fahy, it
8 is quoted below at length:

9 . . . I have repeatedly been told
10 that the Army, before the war, agreed
11 in writing to permit the Navy to conduct
12 its Japanese intelligence work for it. I
13 think it follows, therefore, that to a very
14 considerable extent the Army . . . is bound
15 by the opinion of the Naval officers in
16 Japanese matters. Thus, had we known
17 that the Navy thought that 90 percent
18 of the evacuation was unnecessary, we could
19 strongly have urged upon General DeWitt
20 that he could not base a military judgment
21 to the contrary upon Intelligence reports,
22 as he now claims to do.

23 Lt. Com. Ringle's full memorandum is
24 somewhat more complete than the version
25 published in Harpers and I think you will
26 be interested in reading it [I]t is
27 my opinion that this is the most reasonable
28 and objective discussion of the security
problem presented by the presence of
the Japanese minority. In view of the
inherent reasonableness of this memorandum
and in view of the fact that we now know
that it represents the view of the In-
telligence agency having the most direct
responsibility for investigating the
Japanese from the security viewpoint, I
feel that we should be extremely careful
in taking any position on the facts more
hostile to the Japanese than the position
of Lt. Com. Ringle. . . . Furthermore, in

27 ^{18/} Memorandum, Ennis to Solicitor General, April 30, 1943,
28 File 146-42-20, #8, Records of the Department of Justice.
See Exhibit Q.

1 view of the fact that the Department of
2 Justice is now representing the Army in
3 the Supreme Court of the United States
4 and is arguing that a partial, selective
5 evacuation was impracticable, we must
6 consider most carefully what our obligation
7 to the Court is in view of the fact that
8 the responsible Intelligence agency regarded
9 a selective evacuation as not only suffi-
10 cient but preferable. It is my opinion
11 that certainly one of the most difficult
12 questions in the whole case is raised by
13 the fact that the Army did not evacuate
14 people after any hearing or on any in-
15 dividual determination of dangerousness,
16 but evacuated the entire racial group
17 Thus, in one of the crucial points
18 of the case the Government is forced to
19 argue that individual, selective evacuation
20 would have been impracticable and insuffi-
21 cient when we have positive knowledge that
22 the only Intelligence agency responsible
23 for advising General DeWitt gave him advice
24 directly to the contrary.

14 In view of this fact, I think we should
15 consider very carefully whether we do not
16 have a duty to advise the Court of the
17 existence of the Ringle memorandum and of
18 the fact that this represents the view of
19 the Office of Naval Intelligence. It
20 occurs to me that any other course of
21 conduct might approximate the suppression
22 of evidence. 19/

19 Despite this clear warning of the Government's duty
20 to the Supreme Court, the Solicitor General ignored Ennis'
21 memorandum. Although the Attorney General, the Assistant
22 Secretary of War, and the Solicitor General each had personal
23 knowledge of the existence and contents of the ONI Report, and
24 knew that it controverted statements made to the Court on the
25 loyalty issue, the Government's briefs to the Supreme Court in

26 - - - - -

27 _____
28 19/ Ibid.

1 Hirabayashi and Yasui contained no mention whatsoever of the
2 ONI Report.

3 4. The Impact of Suppression of the ONI
4 Report on Petitioners' Cases

5 Suppression of the ONI report had a direct and
6 adverse impact on the outcome of Petitioners' cases. The
7 report made clear that allegedly disloyal members of the
8 Japanese American population could easily have been identified
9 and segregated. As a less restrictive alternative to the mass
10 evacuation and incarceration of the entire group, this would
11 have been an admittedly preferable course. However, in con-
12 tradiction of the ONI Report, the Government claimed in its
13 Hirabayashi brief that such an alternative was impossible:

14 If those Japanese who might aid the enemy
15 were either known or readily identifiable,
16 the task of segregating them would probably
17 have been comparatively simple. However,
18 the identities of the potentially disloyal
19 were not readily discoverable. 20/

18 The Government thus concluded that mass evacuation
19 was necessary: "Since they [the disloyal] were not easily
20 identifiable, the only certain way of removing them was to
21 remove the group as a whole."^{21/}

22 The Government made a similar claim in its Korematsu
23 brief:

24 _____
25 20/ Hirabayashi v. United States, 320 U.S. 81 (1943), Brief
26 for the United States, p. 61.

27 21/ Ibid. These arguments were presented by reference to
28 the Supreme Court in the Yasui brief. 320 U.S. 115
(1943), Brief for the United States, p. 8.

1 There was a basis for concluding that some
2 persons of Japanese ancestry, although
3 American citizens, had formed an attachment
4 to, and sympathy and enthusiasm for, Japan.
5 It was also evident that it would be
6 impossible quickly and accurately to dis-
7 tinguish these persons from other citizens
8 of Japanese ancestry. 22/
9

10 The Government's claims on this issue clearly affected
11 the opinions of the Supreme Court. The Court expressed its
12 agreement with these claims in the following statement in its
13 Hirabayashi opinion:
14

15 Whatever views we may entertain regarding
16 the loyalty to this country of the citizens
17 of Japanese ancestry, we cannot reject as
18 unfounded the judgment . . . that there
19 were disloyal members of that population,
20 whose number and strength could not be
21 precisely and quickly ascertained. We
22 cannot say that the war-making branches of
23 the Government did not have ground for
24 believing that . . . such persons could not
25 readily be isolated and separately dealt
26 with. . . . 23/
27

28 The Supreme Court also cited this passage in the Korematsu
29 24/
30 opinion in upholding the exclusion order at issue.

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22/ Korematsu v. United States, 323 U.S. 214 (1944), Brief
for the United States, p. 12. Footnote omitted.

23/ Hirabayashi v. United States, supra, 320 U.S. 81, 99.

24/ Korematsu v. United States, supra, 323 U.S. 214, 218.

1 The importance of the ONI Report to Petitioners'
2 cases cannot be overstressed. Based on first-hand knowledge
3 and access to all relevant information on the loyalty of
4 Japanese Americans, it explicitly recommended against mass
5 evacuation or other restrictive measures directed against
6 Japanese Americans as a group. The ONI Report also directly
7 refuted the unsupported disloyalty allegations made by General
8 DeWitt in his Final Report. The suppression of this crucial
9 document both from the courts and from Petitioners clearly
10 constituted an egregious act of governmental misconduct.

11 C. Officials of the War Department Suppressed
12 Reports of the Military Intelligence
13 Division That Refuted the Espionage Allega-
 tions in the Final Report

14 Among the most important records that show the
15 falsity of the espionage allegations made by General DeWitt in
16 his Final Report are those of DeWitt's own Military Intelligence
17 Division (MID, or G-2). The suppression of these G-2 reports
18 is of particular significance to Petitioners' cases, since they
19 were submitted to DeWitt personally by members of his staff
20 before the recommendation for mass evacuation and since they
21 directly refuted DeWitt's statements in the Final Report.

22 Beginning on January 3, 1942, MID officials submitted
23 directly to DeWitt a weekly "G-2 Periodic Report" that included
24 assessments of enemy capabilities and intelligence sources.

25 These reports were based on radio monitoring, aerial and naval

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reconnaissance, and reports from G-2 installations along the West Coast from San Diego to Alaska.^{25/} The first five of these weekly reports, dated January 3 through January 31, 1942, identically stated:

The enemy's probable knowledge of our situation has not been gained by observation or reconnaissance but by information learned during peace and the activities of fifth-columnists. ^{26/}

Beginning on February 7, 1942, and continuing through May 16, 1942 -- at which time all of the military orders applicable to Petitioners had been issued -- these G-2 reports contained a significant revision and uniformly stated:

The enemy's probable knowledge of our situation has not been gained by observation or reconnaissance but by information learned during peace by the activities of accredited, diplomatic, military and naval attaches and their agents. ^{27/}

As noted above, DeWitt cited in his Final Report as a justification for mass evacuation "hundreds of reports nightly of signal lights visible from the coast" and "the nightly observation of visual signal lamps from constantly changing

^{25/} The reports for this period are located in Records of the Western Defense Command, G-2 Section, Weekly Intelligence Reports, 1942-1946, Record Group 338, Boxes 28-29, National Archives and Records Service, Washington National Records Center, Suitland, Maryland. Those reports submitted through February 28, 1942, were signed by Colonel D. A. Stroh; those submitted through March 21, 1942, by Colonel J. H. Harrington; and those submitted through May 16, 1942 by Colonel John Weckerling.

^{26/} G-2 Periodic Report, No. 3, January 31, 1942. Id. Emphasis added. See Exhibit R.

^{27/} G-2 Periodic Report, No. 20, May 16, 1942, Id. Emphasis added. See Exhibit S.

locations...."^{28/} The obvious implication of these statements was that Japanese Americans had been signaling to Japanese submarines off the coast. However, an Air Force intelligence report submitted to DeWitt on February 26, 1942 stated:

Numerous flares, signal lights, and unidentified naval surface craft have been reported, but not included in this report because of:

- (1) The unreliability of source, or
- (2) Improbability of information, or
- (3) Negative investigation reports have included more reasonable or more probable natural causes for reported phenomena. ^{29/}

Although DeWitt's own intelligence staff could find no evidence of espionage by Japanese Americans, DeWitt included such allegations in his Final Report and suppressed the G-2 reports that refuted his allegations. Suppression of the reports that eliminated prior references to "fifth-column" activities had a direct impact on Petitioner's cases. The Government's briefs to the Supreme Court stressed the "fifth-column" threat allegedly posed by Japanese Americans, and the Court specifically noted in Hirabayashi "the menace of the 'fifth column'" in the context of the Court's expression of "grave concern" about the loyalty of Japanese Americans. ^{30/}

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^{28/} DeWitt, Final Report, p. 8.

^{29/} 4th Air Force Periodic Intelligence Report, February 26, 1942, note 25, supra.

^{30/} Hirabayashi v. United States, supra, 320 U.S. at 96.

I

1 Suppression of the exculpatory evidence contained in the G-2
2 reports thus constituted an act of governmental misconduct.

3 D. Officials of the War Department and the
4 Department of Justice Suppressed Reports of
5 the Federal Bureau of Investigation and the
6 Federal Communications Commission That
 Refuted the Espionage Allegations in the
 Final Report

7 1. Initial Reports of the FBI and FCC
8 on Espionage

9 Well before the outbreak of war between the United
10 States and Japan, the Federal Bureau of Investigation (FBI) and
11 the Federal Communications Commission (FCC) were actively
12 engaged in the investigation of espionage activities on the
13 West Coast and elsewhere in the country. After the Japanese
14 attack on Pearl Harbor and the declaration of war on Japan,
15 officials of both agencies worked closely with General DeWitt
16 and his intelligence staff in this field. Reports of the FBI
17 and FCC were available to DeWitt before his recommendation of
18 the mass evacuation and incarceration of Japanese Americans
19 that refuted the espionage allegations made in the Final
20 Report. In addition, Justice Department officials failed to
21 bring these reports to the attention of the courts or Peti-
22 tioners despite their exculpatory nature and their obvious
 relevance to Petitioners' cases.

23 The FBI played a direct role in the investigation of
24 espionage. Pursuant to a secret directive issued by President
25 Roosevelt in 1939, the FBI was assigned to investigate cases of
26 "actual or strongly presumptive espionage or sabotage" within
27 the United States. Accordingly, prior to and during the war
28 the FBI conducted investigations of alleged acts of espionage

1 or sabotage by Japanese Americans both on its own initiative
2 and at the request of military intelligence agencies and state
3 and local police.^{31/}

4 In March 1941, the FBI participated in the "surrep-
5 titious entry" of the Japanese consulate in Los Angeles, an
6 undertaking of the Office of Naval Intelligence under the
7 leadership of Lt. Commander Ringle.^{32/} Based on the lists of
8 Japanese agents and sympathizers obtained in this raid and
9 records seized during the subsequent arrest of Japanese agent
10 Tachibana, the Japanese espionage network on the West Coast was
11 dismantled in June 1941.^{33/} The names of those discovered to
12 be Japanese sympathizers or spies were added to the Justice
13 Department's "ABC" list of dangerous aliens. Some 1,370
14 Japanese aliens on the "ABC" list were arrested within five
15 days of the Pearl Harbor attack.

16 FBI Director J. Edgar Hoover ordered a follow-up
17 investigation of possible Japanese American espionage after the
18 consular break-in. On November 8, 1941, Nat J.L. Pieper,
19 Special Agent in Charge of the San Francisco FBI office,
20 reported to Hoover that:

21 . . . practical results of espionage
22 investigations of Japanese have been
23 meager . . . [T]he reason for lack of
24 practical results is that although sur-
25 veillances, spot checks, and a thorough and
26 logical investigation of individuals
27 reported to be engaged in espionage activi-

26 ^{31/} Note 8, supra.

27 ^{32/} See Appendix, infra, note 7.

28 ^{33/} Ibid.

1 ties has been conducted, no evidence has
2 been obtained indicating that any have been
3 guilty of violating any federal statutes
4 for which prosecution would lie. 34/

4 In the period that followed the outbreak of war,
5 the FBI continued to investigate all reports of espionage and
6 sabotage. A number of these reports were transmitted to the
7 FBI by Army personnel under the command of General DeWitt.
8 Included were reports that Japanese Americans had committed
9 acts of sabotage against the electric power lines and had lit
10 "arrows of fire" designed to point Japanese airplanes toward
11 military targets. Hoover discussed these reports in a December
12 17, 1941, memorandum to senior members of his staff. Reporting
13 on a telephone conversation with Pieper, Hoover noted that:

14 . . . there was no sense in the Army losing
15 their heads as they did in the Bonneville
16 Dam Affair, where the power lines were
17 sabotaged by cattle scratching their backs
18 on the wires, or the 'arrows of fire' near
19 Seattle, which was only a farmer burning
20 brush as he had done for years. 35/

18 At no time in the period that preceded completion of
19 the mass evacuation and incarceration of Japanese Americans did
20 FBI reports substantiate any of the claims later made by
21 General DeWitt in his Final Report of acts of espionage or
22 sabotage.

23
24 34/ Memorandum, Special Agent in Charge N.J.L. Pieper to J.
25 Edgar Hoover, November 8, 1941, File 100-71-1, Records of
26 the Federal Bureau of Investigation. See "Memorandum on
27 Pearl Harbor Attack and Bureau's Activities Before and
28 After." Id.

35/ Memorandum J. Edgar Hoover to Mr. Tolson, Mr. Tamm,
and Mr. Ladd, December 17, 1941, File 100-97-1-67, Records
of the Federal Bureau of Investigation. See Exhibit T.

1 The Federal Communications Commission was responsible
2 for all radio monitoring in the United States before and
3 during the war. Shortly after Pearl Harbor General DeWitt
4 requested that the FCC supplement existing stationary monitoring
5 facilities with mobile direction-finding intercept units to
6 detect shore-to-ship radio transmissions. Subsequently, on
7 January 9, 1942, DeWitt and his staff met with George E.
8 Sterling, Chief of the FCC's Radio Intelligence Division.
9 Sterling informed DeWitt at this meeting that the FCC's round-
10 the-clock surveillance of the entire radio communications
11 spectrum would detect any illicit radio transmitters.^{36/}

12 Following a discussion at this meeting of the FCC's
13 capabilities and expertise, DeWitt established the Radio
14 Intelligence Center (RIC) under the direction of the FCC. RIC
15 operated as the central clearance agency on matters relating to
16 radio intelligence and communications. Both the Army and Navy
17 maintained direct telephone communications with RIC and had
18 liaison personnel at the Center.^{37/}

19 Sterling came away from the meeting with DeWitt on
20 January 9, 1942 with an impression that DeWitt and his staff
21 were incompetent in the radio intelligence field. He expressed
22 this attitude in a candid and scathing memorandum dated January
23 9:

24
25 ^{36/} Memorandum, "Conference With General DeWitt at San
26 Francisco, Friday January 9th [1942], Files of the Radio
27 Intelligence Division, Record Group 173, Records of the
Federal Communications Commission, National Archives and
Records Service, Washington, D.C. See Exhibit U.

28 ^{37/} Memorandum, Fly to Biddle, April 4, 1944, Box 37, Folder
3, Fahy Papers, FDRL. See Exhibit V.

1 The General launched into quite a discourse
2 on the Japanese and other foreign language
3 programs, radio transmitters operated by
4 enemy agents in California sending messages
5 to ships at sea, and a general discussion of
6 the enemy aliens and all Japanese in the
7 area followed.

8 Since Gen'l DeWitt seemed concerned and, in
9 fact, seemed to believe that the woods
10 were full of Japs with transmitters, I
11 proceeded to tell him and his staff the
12 organization [of the FCC radio monitoring
13 program]. I know it virtually astounded
14 the General's staff officers

15 Frankly, I have never seen an organization
16 that was so hopeless to cope with radio
17 intelligence requirements The per-
18 sonnel is unskilled and untrained. Most are
19 privates who can read only ten words a
20 minute. They know nothing about signal
21 identification, wave propagation and other
22 technical subjects, so essential to radio
23 intelligence procedure. They take bearings
24 with loop equipment on Japanese stations in
25 Tokio . . . and report to their commanding
26 officers that they have fixes on Jap agents
27 operating transmitters on the West Coast.
28 These officers, knowing no better, pass it
on to the General and he takes their word
for it. It's pathetic to say the least

Furthermore, Army reports Navy stations as
being Japs and vice versa Whenever
a station cannot be identified they call
F.C.C. Consequently, it is easy to under-
stand the hundreds of calls that have been
made to the F.C.C. office in S.F. They
look to the F.C.C. as an authority on all
matters pertaining to radio communications
other than their own. 38/

Despite Sterling's assurance that the FCC had detected
no illicit radio transmissions, and the constant communication
of his staff with RIC personnel, DeWitt continued to accuse
Japanese Americans of radio espionage. DeWitt's charges were

38/ Note 36, supra. Emphasis added.

1 accepted as fact at the highest levels of command. On January
2 25, 1942, only 15 days after DeWitt's meeting with Sterling,
3 Secretary of War Stimson urged Attorney General Biddle to
4 accept DeWitt's first written evacuation proposal on the basis
5 of these unfounded charges:

6 In recent conferences with General DeWitt,
7 he has expressed great apprehension because
8 of the presence on the West Coast of
9 many thousand alien enemies. As late as
10 yesterday, 24 January, he stated over the
11 telephone that shore-to-ship and ship-to-
12 shore radio communications, undoubtedly
coordinated by intelligent enemy control
were continually operating The
alarming and dangerous situation just
described, in my opinion, calls for im-
mediate and stringent action. 39/

13 Although the FBI and FCC found no evidence of Japanese
14 American involvement in espionage or sabotage, DeWitt deli-
15 berately included in his Final Report the discredited allega-
16 tions of shore-to-ship signaling and radio transmissions.
17 These allegations formed the core of the "military necessity"
18 argument for the mass evacuation and incarceration of Japanese
19 Americans. DeWitt included no mention in the Final Report of
20 the FBI and FCC investigations and findings of which he had
21 knowledge.

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26 39/ Stimson To Biddle, January 25, 1942, Record Group 107,
27 Records, the Assistant Secretary of War, National Archives
28 and Records Service, Washington, D.C. Quoted in R.
Daniels, The Decision to Relocate the Japanese Americans
(J.B. Lippincott Co. 1975) pp. 23-24.

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2. FBI and FCC Refutations of DeWitt's
Espionage Allegations

As noted above, War Department officials withheld release of the Final Report until January 1944. The falsity of DeWitt's espionage allegations was thus concealed from the Justice Department during consideration of the Hirabayashi and Yasui cases by the Supreme Court. Justice Department officials learned of the Report's release on January 20, 1944, through an article in the Washington Post headlined "Japs Attack All Ships Leaving Coast." Attorney General Biddle shortly thereafter requested reports from the FBI and FCC on the veracity of DeWitt's charges. This action was prompted by Edward J. Ennis and John L. Burling of the Alien Enemy Control Unit, who were then responsible for preparation of the Government's brief to the Supreme Court in the Korematsu case.

FBI Director Hoover submitted a detailed report to the Attorney General on February 7, 1944, entitled "Reported Bombing and Shelling of the West Coast." In his cover memorandum to this report, Hoover summarized the FBI's findings:

Certain statements were made in the report indicating that immediately after the attack on Pearl Harbor there was a possible connection between the sinking of United States ships by Japanese submarines and alleged Japanese espionage activity on the West Coast. It was also indicated that there had been shore-to-ship signaling, either by radio or lights, at this time.

As indicated in the attached memorandum, there is no information in the possession of this Bureau as the result of investigations conducted relative to submarine attacks and espionage activity on the West Coast which would indicate that attacks made on ships or shores in the area

1 immediately after Pearl Harbor have been
2 associated with any espionage activity
3 ashore or that there has been any illicit
4 shore-to-ship signaling, either by radio or
5 lights. 40/

6 In an additional comment on DeWitt's allegations of
7 shore-to-ship signaling, Hoover stated:

8 Every complaint in this regard has been
9 investigated, but in no case has any
10 information been obtained which would
11 substantiate the allegations that there
12 has been illicit signaling from shore-to-
13 ship since the beginning of the war. 41/

14 Preceding the Attorney General's request for an
15 FCC report on DeWitt's charges, John L. Burling met on February
16 23, 1944, with George E. Sterling, Chief of the Radio In-
17 telligence Division of the FCC. Burling's report to Ennis of
18 this meeting stated the following:

19 Mr. Sterling read to me reports transmitted
20 by his representatives of their discussions
21 with General DeWitt's radio intelligence
22 officers, in which it was explained to the
23 Army men that their fixing operations were
24 being poorly conducted His men also
25 reported to the Army in every case in which
26 the Army referred a complaint to them, and
27 thus the Army had notice that every complaint
28 was unfounded. 42/

22 40/ Memorandum, J. Edgar Hoover to the Attorney General,
23 February 7, 1944, Folder - Japanese Relocation Cases III,
24 Box 37, Fahy Papers Franklin D. Roosevelt Library, Hyde
25 Park, N.Y. [hereafter cited as Fahy Papers, FDRL]. The
26 date indicated is that of receipt of the memorandum by the
27 Office of the Attorney General. See Exhibit W.

26 41/ Ibid.

27 42/ Burling to Ennis, February 23, 1944, Section 23, File
28 146-13-7-2-0, Records of the Department of Justice.
Emphasis added. See Exhibit X.

1 On February 26, 1944, Attorney General Biddle re-
2 quested a report from FCC Commissioner James L. Fly. In
3 response to a request from Fly for material to assist in the
4 FCC report, Sterling submitted a detailed memorandum dated
5 March 25, 1944 on the activities of the Radio Intelligence
6 Center established at DeWitt's order and its coordination with
7 DeWitt's intelligence staff. This memorandum covered the
8 period from December 1, 1941 to July 1, 1942 and concluded:

9 During this entire period of operation, no
10 illegal radio stations were found within
11 the confines of the Evacuated Area of the
 Western Defense Command. 43/

12 Most significantly, in a report to Biddle dated
13 April 4, 1944, Commissioner Fly brought Sterling's January 9,
14 1942 memorandum to the attention of the Attorney General. This
15 report similarly concluded:

16 There were no radio signals reported to the
17 Commission which could not be identified,
18 or which were unlawful. Like the Department
19 of Justice, the Commission knows of no
 evidence of any illicit radio signaling in
 this area during the period in question. 44/

20 Although Biddle had received the reports from Hoover
21 and Fly six months before it submitted its brief to the Supreme
22 Court in Korematsu, the government's briefs make no mention
23 whatsoever of the findings of the FBI and the FCC; nor was the
24 existence of these reports ever disclosed to Korematsu's

26 43/ Memorandum to the Chief Engineer, March 25, 1944, note 36,
27 supra. See Exhibit Y.

28 44/ Fly to Biddle, April 4, 1944, Folder 3, Box 37, Fahy
 Papers, FDRL. See Exhibit V.

1 attorneys. As will be discussed below, the veracity of the
2 Final Report was allowed to go unchallenged before the Supreme
3 Court although the Justice Department had in its possession
4 authoritative evidence that the allegations against the Japanese
5 Americans set forth in DeWitt's Report were patently false.
6 Indeed, the FBI and FCC reports were suppressed even though
7 Ennis had written to Biddle as early as February 26, 1944, the
8 same day that Biddle had requested the FCC report, apprising
9 him that:

10 [The Final Report] stands as practically
11 the only record of causes for the evacuation
12 and unless corrected will continue to do
13 so. Its practical importance is indicated
14 by the fact that already it is being cited
15 in the briefs in the Korematsu case in the
16 Supreme Court on the constitutionality of
17 the evacuation. 45/

18 Thus, the suppression of the FBI and FCC findings
19 that began with the Hirabayashi and Yasui cases was again
20 perpetrated on the Court in Korematsu.

21 The suppression of the ONI Report, the G-2 reports,
22 and the findings and reports of the FBI and FCC constituted
23 egregious governmental misconduct which prejudiced Petitioners
24 and subverted the entire course of the judicial process in
25 their cases.

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28 45/ Memorandum, Edward Ennis to Attorney General Biddle,
February 26, 1944, Box 37, Folder 3, Charles Fahy Papers,
Franklin D. Roosevelt Library, Hyde Park, New York.
ee Exhibit Z.

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POINT THREE

GOVERNMENT OFFICIALS FAILED TO ADVISE
THE SUPREME COURT OF THE FALSITY OF THE
ALLEGATIONS IN THE FINAL REPORT OF GENERAL DEWITT

As shown above, officials of the War Department and Department of Justice had personal knowledge that the allegations of disloyalty and espionage in the Final Report of General DeWitt were false. Reports submitted to these officials by responsible intelligence agencies provided a conclusive refutation of these allegations, and discredited the "military necessity" claim offered by DeWitt in support of the mass evacuation and incarceration of Japanese Americans. These reports contained exculpatory evidence of direct relevance to the central issues in Petitioners' cases, and their suppression constituted prejudicial misconduct by governmental officials.

Government attorneys responsible for the Supreme Court brief in the Korematsu case subsequently attempted to advise the Court of the falsity of the Final Report. At the insistence of the War Department, Justice Department officials disregarded this effort and prevented the Court from learning of the exculpatory intelligence reports. This failure to advise the Court of these crucial reports constituted a still further act of governmental misconduct.

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1 A. Government Attorneys Attempted To Advise the
2 Supreme Court of the Falsity Of The Final Report

3 As noted above, the War Department withheld the
4 Final Report from the Justice Department until January 19,
5 1944, when it was released to the press.^{1/} Justice Department
6 officials then conducted an independent investigation of the
7 Report's espionage allegations. After receiving reports from
8 the Federal Bureau of Investigation and the Federal Communica-
9 tions Commission which directly refuted these allegations,
10 government attorneys responsible for the Supreme Court brief in
11 the pending Korematsu case attempted to advise the Court of
12 their existence. Thus, John L. Burling, Assistant Director of
13 the Alien Enemy Control Unit of the Justice Department,
14 inserted the following footnote in the Department's brief to
15 the Supreme Court in Korematsu:

16 The Final Report of General DeWitt (which
17 is dated June 5, 1943, but which was not
18 made public until January, 1944) is relied
19 on in this brief for statistics and other
20 details concerning the actual evacuation
21 and the events that took place subsequent
22 thereto. The recital of the circum-
23 stances justifying the evacuation as a
24 matter of military necessity, however, is
25 in several respects, particularly with
26 reference to the use of illegal radio
27 transmitters and to shore-to-ship signaling
28 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 not ask the Court to take judicial

25 - - - - -

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27 _____

28 1/ See Point One, supra.

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1 notice of the recitals of those facts
2 contained in the Report. 2/

3 The insertion of this significant footnote was
4 designed to advise the Supreme Court that the Justice Depart-
5 ment possessed evidence which refuted the espionage allegations
6 in the Final Report. Burling explained the importance of this
7 footnote in a memorandum to Assistant Attorney General Herbert
8 Wechsler, who directed the War Division of the Department:

9
10 You will recall that General DeWitt's
11 report makes flat statements concerning
12 radio transmitters and ship-to-shore
13 signalling which are categorically denied
by the FBI and the Federal Communications
Commission. There is no doubt that these
statements are intentional falsehoods... 3/

14 The proposed footnote was set in print and circulated
15 with the brief to War Department and Justice Department offi-
16 cials for final approval. Burling anticipated that the War
17 Department would object to this repudiation of the asserted
18 justification for General DeWitt's military orders. He appealed
19 to Wechsler for support:

20 I assume that the War Department will
21 object to the footnote and I think that we
22 should resist any further tampering with it
with all our force. 4/

23
24 2/ Memorandum, John L. Burling to Assistant Attorney General
25 Herbert Wechsler, September 11, 1944, File 146-42-7,
26 Records of the Department of Justice. Emphasis added.
See Exhibit AA.

27 3/ Ibid. Emphasis added.

28 4/ Ibid.

1 The Korematsu brief was due in printed form at the Supreme
2 Court on October 5, 1944. During the last week of September,
3 a printed copy was sent to Assistant Secretary of War John J.
4 McCloy for his comments.

5 B. At the Insistence of the War Department,
6 Justice Department Officials Altered the Burling
7 Footnote and Thus Failed to Advise the Supreme
8 Court of the Falsity of the Final Report

9 Shortly after they received the Korematsu brief,
10 War Department officials undertook a shocking campaign designed
11 to remove the footnote drafted by Burling. In a report to
12 his superior, Edward J. Ennis, dated October 2, 1944, Burling
13 described the War Department's campaign of intervention and
14 manipulation:

15 Although the War Department was furnished
16 with a first draft of the brief last
17 April and although it had a copy of the
18 page proof for about a week, the War
19 Department did not react to the brief until
20 the morning of September 30 when Captain
21 [Adrian S.] Fisher [of the staff of
22 Assistant Secretary of War McCloy] called
23 you and suggested a change. It became
24 necessary for you to suggest the possibility
25 to Captain Fisher that the brief had
26 gone for final printing and, presumably,
27 as a result of this, Mr. McCloy called
28 the Solicitor General and particularly
29 referred to the footnote. Presumably
30 at Mr. McCloy's request, the Solicitor
31 General had the printing stopped at
32 about noon. 5/

33 When he learned that Solicitor General Fahy had
34 stopped the printing of the government's brief at the insistence

35 5/ Memorandum, John L. Burling to Edward Ennis, October
36 2, 1944, ibid. Emphasis added. See Exhibit BB.

1 of McCloy, Ennis immediately prepared a memorandum to Assistant
2 Attorney General Wechsler "strongly recommending that the
3 footnote be kept in its existing form." Among the "various
4 exhibits illustrating the falsity of the DeWitt report" that
5 Ennis attached to this memorandum were the FBI and FCC reports
6 previously submitted to the Attorney General. Wechsler in turn
7 forwarded Ennis's memorandum and the appended documents to
8 Solicitor General Fahy.^{6/}

9 Ennis urged in this memorandum that the disputed
10 footnote was necessary to advise the Supreme Court that the
11 Justice Department knew DeWitt's espionage allegations to
12 be untrue. He stated that alteration or removal of the footnote
13 would amount to a breach of the Department's ethical respon-
14 sibilities and an abuse of the judicial notice doctrine:

15 This Department has an ethical obligation
16 to the Court to refrain from citing it [the
17 Final Report] as a source of which the Court may
18 properly take judicial notice if the Department
19 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. ^{7/}

20 Ennis added that the Justice Department had an
21 additional obligation to the Japanese Americans falsely
22 accused by DeWitt of espionage activities:

23 The general tenor of the report is not only that
24 there was a reason to be apprehensive, but also
25 to the effect that overt acts of treason were
being committed. Since this is not so it is

26 ^{6/} Memorandum, Edward Ennis to Herbert Wechsler, September
27 30, 1944, Folder 3, Box 37, Fahy Papers, See Exhibit
B.

28 ^{7/} Ibid.

1 highly unfair to this racial minority that
2 these lies, put out in an official publica-
3 tion, go uncorrected. This is the only
 opportunity which this Department has to
 correct them. 8/

4 Despite this clear warning of the duty owed to the
5 Supreme Court by the Department of Justice, neither Wechsler
6 nor Fahy answered the memorandum submitted by Ennis. According
7 to Burling, Fahy met with Captain Fisher at the request of
8 Assistant Secretary McCloy on Saturday evening, September 30,
9 1944. Burling later reported to Ennis that at this meeting:

10 Captain Fisher took the position that
11 he would not defend the accuracy of
12 the report but that the Government would
13 deal with sufficient honesty with the
14 [Supreme Court] if it would merely
 refrain from reciting the report without
 affirmatively flagging our criticism
 thereof. 9/

15 At the conclusion of the September 30 meeting,
16 Solicitor General Fahy directed Wechsler to reach a compromise
17 on the disputed footnote by Monday, October 2. Accordingly,
18 Wechsler drafted the following two alternatives as a substitute
19 for the original footnote:

20 1. "We have specifically recited in
21 this brief the facts relating to the
22 justification for the evacuation, of
23 which we ask the court to take judicial
 notice; and we rely upon the Final
 Report only to the extent that it
 relates to such facts."

24 2. "We do not ask the court to notice
25 judicially such particular details
 recited in the report as justification

27 8/ Ibid.

28 9/ Note 5, supra.

1 for the evacuation as the use of
2 illegal radio transmitters and
3 shore-to-ship signaling by persons
4 of Japanese ancestry, which conflict
5 with information derived from other
6 sources." 10/

7 Wechsler read the alternative drafts to Captain
8 Fisher by telephone on the morning of October 2. In this
9 conversation, Wechsler explained that the first alternative
10 was designed to "drop out any reference to matters in con-
11 troversy" and that it had been phrased in "the gentlest con-
12 ceivable way."^{11/} After this conversation, Fisher called
13 Burling at the Justice Department and told him that "although
14 the War Department did not agree to either alternative, never-
15 theless the first would be preferable."^{12/}

16 The War Department's victory in persuading the
17 Justice Department to alter the Burling footnote kept the
18 Supreme Court from learning of vitally important exculpatory
19 evidence which undermined the factual justification for
20 DeWitt's military orders. The consequence of the government's
21 failure to expose the falsity of the Final Report is apparent
22 in the Supreme Court's opinion in Korematsu, for, in upholding
23 the constitutionality of the exclusion order at issue, the

24 - - - - -

25 10/ Memorandum, Captain Fisher to McCloy, October 2, 1944,
26 File 014.311, Western Defense Command Exclusion Orders
(Korematsu), Box 9, Record Group 107, National Archives.
See Exhibit CC.

27 11/ Transcript of telephone conversation, Fisher and Wechsler,
October 2, 1944, ibid. See Exhibit DD.

28 12/ Note 10, supra.

1 Court found that it "has a definite and close relationship to
2 the prevention of espionage and sabotage."^{13/}

3 The inherent incredibility of the Final Report
4 was evident to Justice Jackson, who expressed skepticism in
5 his dissenting opinion in Korematsu:

6 How does the Court know that these orders
7 have a reasonable basis in necessity?
8 No evidence whatever has been taken
9 by this or any other court. There is a
10 sharp controversy as to the credibility
11 of the DeWitt report. So the Court,
12 having no real evidence before it, has
13 no choice but to accept General DeWitt's
14 own unsworn, self-serving statement,
15 untested by any cross-examination, that
16 what he did was reasonable. ^{14/}

17 Evidence on the credibility of DeWitt's allegations
18 existed at the time of Petitioner's trials and subsequent
19 appeals. The failure of the government to advise the Court
20 of this evidence constituted misconduct that both violated
21 ethical standards of conduct and subverted the judicial
22 process.

27 ^{13/} Korematsu v. United States, supra, 323 U.S. 214, 218.

28 ^{14/} Id. at 245.

1 POINT FOUR

2 THE GOVERNMENT'S ABUSE OF THE DOCTRINE
3 OF JUDICIAL NOTICE AND THE MANIPULATION
4 OF AMICUS BRIEFS CONSTITUTED A FRAUD
5 UPON THE COURTS

6 Petitioners' cases proceeded from trial through
7 decision by the Supreme Court on a record intentionally
8 fashioned to assure their convictions. The acts of altera-
9 tion, destruction and suppression of evidence alleged in the
10 instant petition separately constituted misconduct that deprived
11 Petitioners of their constitutional rights. The cumulative
12 effect of these acts of misconduct was calculated to induce the
13 courts to rely on false and misleading statements.

14 In addition, the government's abuse of the doctrine
15 of judicial notice and its manipulation of amicus briefs were
16 intentionally designed to place an equally false and misleading
17 record before the courts. The acts of misconduct alleged above
18 deprived Petitioners and the courts of a full and accurate
19 factual record; those alleged below show that the records
20 actually submitted to the courts by the government were tainted
21 and presumptively affected the outcome of Petitioners' cases.
22 The acts alleged below thus constituted a fraud upon the courts.

23 A. The Government Abused the Doctrine of
24 Judicial Notice During the Course of
25 Petitioners' Cases

26 During the entire course of Petitioners' cases,
27 the government's attempt to demonstrate the alleged "disloy-
28 alty" of Japanese Americans involved abuse of the doctrine
of judicial notice. The effort to show that the "racial
characteristics" of Japanese Americans predisposed them to

1 disloyalty, and to the commission of espionage and sabotage,
2 began, in fact, before any of the Petitioners were tried.

3 Minoru Yasui was the first of Petitioners to be
4 tried. On May 29, 1942, the month before Yasui's trial took
5 place, the U.S. Attorney for Oregon requested the advice of
6 Maurice Walk, Assistant Solicitor of the War Relocation
7 Authority:

8 Insofar as the rules of evidence permit,
9 I wish to introduce evidence to support
10 the proclamation of the Western Defense
11 Command ... affecting the Japanese by
12 reason of their racial characteristics
13 and belief which stamp and distinguish
14 them from other nationalities. 1/

15 Walk responded on June 6, 1942, advising the U.S.
16 Attorney to include in the trial record "facts justifying
17 the exclusion of American citizens of Japanese descent from
18 the declared military zones." He stated that, given the
19 unavailability of evidence necessary to prove the disloyalty
20 of Japanese Americans, reliance on judicial notice was necessary
21 to establish the military's belief in collective disloyalty as
22 evidentiary fact:

23 In my judgment, we have got to recognize
24 that the facts relied on to vindicate the
25 legality of this differential treatment
26 are not susceptible of proof by the ordi-
27 nary types of evidence. We shall probably,
28 therefore, be compelled to rely greatly
on the doctrine of judicial notice. 2/

25 1/ Letter, Carl C. Donough to Maurice Walk, May 29, 1942,
26 Box 337, Record Group 210 [Records of the War Relocation
27 Authority], National Archives and Records Service,
Washington, D.C. Emphasis added.

28 2/ Letter, Maurice Walk to Carl C. Donough, June 6, 1942.
Id. See Exhibit EE.

1 The source and purpose of this advice on trial
2 strategy is significant. As Assistant Solicitor of the WRA,
3 Walk had no direct responsibility for the prosecution of
4 Petitioners. However, the WRA administered the "relocation
5 centers" in which Japanese Americans were incarcerated, and
6 WRA officials anticipated legal challenges to their power to
7 detain those being held in the centers. Walk's advice in
8 the Yasui case was designed to utilize that trial as a "dry
9 run" of a strategy based on the doctrine of judicial notice,
10 for later application to expected challenges to incarceration.
11 Walk made clear that the success of this strategy in the
12 Yasui case would establish the "military necessity" foundation
13 for subsequent exclusion and detention cases:

14 It is of great importance to us, in plan-
15 ning the strategy of a case which will
16 necessarily involve the validity of the
17 detention of Japanese Americans as well
18 as their exclusion from military areas,
19 to know just how far we are likely to go
with the doctrine of judicial notice. For
this reason ... I hope that you will find
it possible to urge the foregoing consid-
eration upon the Court in the approaching
trial of Minoru Yasui. 3/

20 In a lengthy memorandum to the U.S. Attorney in
21 Oregon, Walk listed eleven "propositions" relating to the
22 alleged existence and danger of a "fifth column" of Japanese
23 Americans. These propositions reflected nothing more than
24 supposition and racial stereotypes about Japanese Americans.
25 The following excerpts from Walk's memorandum exemplify this
26 bias:

27 _____
28 3/ Ibid. Emphasis added.

1 There is a Japanese fifth column in this
2 country of undisclosed and undetermined
3 dimensions. It is composed of American
4 citizens of Japanese descent, and will
5 be used as an instrument of espionage
6 and sabotage. A fifth column exists by
7 virtue of successfully pretending loyalty
8 to the country of citizenship and success-
9 fully concealing all evidence of its
10 activities from the constituted authori-
11 ties.

12 A great majority of American citizens of
13 Japanese descent are loyal to this country;
14 but it is impossible during this period
15 of emergency to make a particular in-
16 vestigation of the loyalty of each person
17 in the Japanese community. Such an invest-
18 igation would be hampered in any case by
19 the difficulties which the Caucasian exper-
20 iences with Oriental psychology. 4/

21 Walk further advised that, under the doctrine of
22 judicial notice, evidence should be introduced that dealt with
23 those Japanese Americans educated in Japan, those who adhered
24 to the Shinto religion and those who had "dual nationality" as
25 a result of Japan's citizenship laws. Each of these state-
26 ments of "fact" assumed the consequent disloyalty of Japanese
27 Americans. Walk concluded by urging that the U.S. Attorney
28 employ the judicial notice doctrine in the Yasui trial to
 place these "propositions" on the record. 5/

4/ Ibid. Emphasis added.

5/ Ibid. For example, the reference to the "indeterminable"
number of adherents of Shinto concluded: "It is impossible
to predict how such persons would act if any army of the
Emperor of Japan were landed upon our shores." The final
three "propositions" were predicated on the assumption that
public hostility toward Japanese Americans would justify
their detention. The Government's brief to the Supreme
Court in Hirabayashi pressed this "preventive detention"
argument, notwithstanding that it had no factual or
constitutional support. Brief for the United States, pp.
31-32.

1 In response to this advice, the U.S. Attorney
2 attempted to introduce "evidence" of racial characteristics
3 of Japanese Americans in the Yasui trial. The government
4 first sought to present this evidence through the testimony
5 of an unidentified "expert witness." The U.S. Attorney
6 informed the court of:

7 ... the availability of a man who is
8 familiar, by reason of long residence
9 and contact, with the Orient, and in par-
10 ticular the Japanese people ... who is
11 available to testify as to ... the
12 Japanese as a race of people and their
13 ideals and culture and their type of
14 loyalty ... under which circumstances
15 such as the present condition of war
16 between Japan and the United States. 6/

13 Walk's strategy received an initial setback in
14 the Yasui trial. Counsel for Yasui responded to the U.S.
15 Attorney's attempt to place the "expert witness" on the
16 stand with a statement that he would "object to any testimony
17 or dissertation by some man as to his conclusions as to what
18 some of the Japanese [Americans] might do under certain
19 circumstances."^{7/} The trial judge informed the U.S. Attorney

20 - - - - -

21
22 6/ The transcript of the Yasui trial is found in Yasui v.
23 United States, 320 U.S. 115 (1943), Brief for the United
24 States and Record. Record, pp. 206-207. Emphasis
25 added. The Government also offered the testimony of an
26 official of the Lumber and Sawmill Workers Union at the
27 Yasui trial in order to show that hostility toward Japanese
28 Americans "threatened to affect the very war production
effort," and that "their own safety demands that there be
a certain type ... of restriction" such as the curfew at
issue. The District Judge sustained an objection to this
testimony. Record, pp. 201-207.

7/ Id. at 207.

1 that "I have no interest in this matter at all," and the
2 profered witness was withdrawn. ^{8/}

3 Although government attorneys retreated from
4 this approach in the subsequent Hirabayashi and Korematsu
5 trials, the judicial notice strategy was refined for use in
6 the appellate proceedings in Petitioners' cases. This
7 strategy was outlined in a memorandum prepared by Nanette
8 Dembitz of the Alien Enemy Control Unit of the Department of
9 Justice. Entitled "Method of Presenting Facts Relevant to
10 the Constitutionality of Japanese Evacuation Progam," this
11 memorandum urged the following approach:

12 It appears that facts as to the following
13 matters should be presented to the Court:
14 The number of persons of Japanese ancestry,
15 both alien and non-alien, in the United
16 States; ... the lack of assimilation of
17 such persons in the population as a whole;
18 the existence of methods by which the
19 loyalty of such persons to Japan might
20 have been encouraged, such as the activi-
21 ties of Japanese Consuls, the return of
22 such persons to Japan for education, the
23 dual citizenship of American citizens,
24 and activities of Shinto priests; the
25 engagement of such persons in espionage
26 and sabotage ^{9/}

20 After a canvass of existing precedent on this
21 question, Dembitz offered the following advice:

22 As to the facts in point with respect
23 to the Japanese program, it appears that
24 all of them could be established to the
25 Court's satisfaction without the

25 ^{8/} Id at 208.

26 ^{9/} Memorandum, Nanette Dembitz to John L. Burling, August 11,
27 1942, File 31.090, Box 332, Record Group 210, National
28 Archives. See Exhibit FF (only pp. 1-6 and 17-18 attached).
Emphasis added.

introduction of evidence and that even the citation of documentary authority would not be necessary with respect to many of them; however, it is obvious that as much documentary authority as is available should be used. It would also appear that the facts could be sufficiently established, without the use of evidence, so that the Court would refuse an offer of evidence to contradict these facts. 10/

Justice Department attorneys adopted the approach suggested by Dembitz in preparation of the briefs submitted to the Supreme Court in Petitioners' cases. The "racial characteristics" argument was presented most extensively in the government's Hirabayashi brief, with the "evidence" presented in that brief incorporated by reference in the Yasui and Korematsu briefs as well. 11/

The government sought judicial notice of "evidence" that allegedly proved the disloyalty of Japanese Americans and their consequent predisposition to commit acts of espionage and sabotage. However, government officials had knowledge of contrary evidence on each of these issues. The report of the Office of Naval Intelligence, submitted by Lieutenant Commander Ringle in January 1942, refuted the "disloyalty" claims made by General DeWitt and subsequently repeated in the government's briefs to the Supreme Court. Officials of the War and Justice Departments knew of the ONI

10/ Id. at 17. Emphasis added. It should be noted that this memorandum followed by a month the refusal by Judge Fee at the trial of Minoru Yasui to hear direct evidence on the disloyalty issue, on the ground of irrelevance.

11/ See these briefs generally.

1 report as early as March 1942. In March 1944, the Federal
2 Bureau of Investigation and the Federal Communications Com-
3 mission reported to the Justice Department that DeWitt's
4 espionage allegations were false. Nonetheless, the government
5 continued to press the doctrine of judicial notice on the
6 courts so as to introduce "facts" which were either false or
7 contradicted by evidence in the government's possession.

8 The Supreme Court's reliance on the "disloyalty"
9 evidence presented under the judicial notice doctrine is
10 evident in its opinions in Petitioners' cases, as illustrated
11 in the following excerpt from Hirabayashi:

12 Whatever views we may entertain regarding
13 the loyalty to this country of the citizens
14 of Japanese ancestry, we cannot reject as
15 unfounded the judgment of the military
16 authorities and of Congress that there were
disloyal members of that population, whose
number and strength could not be precisely
and quickly ascertained. 12/

17 An examination of the records presented in these
18 cases clearly reveals the government's abuse of judicial
19 notice. Nanette Dembitz, who recommended that the government
20 rely on this doctrine and who signed the government's brief in
21 Hirabayashi, subsequently recanted her position and she
22 authoritatively discussed the abuse of the judicial notice
23 doctrine in Hirabayashi and subsequent decisions. In an
24 article published June 1945 in the Columbia Law Review,
25 entitled "Racial Discrimination and the Military Judgment:
26 The Supreme Court's Korematsu and Endo Decisions," Dembitz
27

28 12/ Hirabayashi v. United States, 320 U.S. 81, 99 (1943).

1 examined virtually every piece of "evidence" submitted to
2 the Supreme Court in each of Petitioners' cases. She asserted
3 that the doctrine of judicial notice is not applicable if
4 "there is a bona fide dispute about the existence of the fact"
5 at issue. She cited countering evidence of many of the "facts"
6 presented to the Supreme Court and criticized the use of the
7 doctrine to admit racial stereotype and public prejudices as
8 evidentiary fact.^{13/}

9 Dembitz concluded that the "facts" placed on
10 record by the government were not facts susceptible to
11 judicial notice:

12 A "reasonable" man could not and would
13 not have come to a positive conclusion,
14 on the basis of the available documentary
15 data, that most of the supposed influences
16 toward disloyalty did not in fact exist;
17 a belief in their existence could not be
18 said to rest on "reasonable or substantial
grounds" insofar as the phrase connotes that
a fact is established by a preponderance of
evidence after weighing of an adequate amount
of data on both sides. ^{14/}

19 ^{13/} 45 Col. L. Rev. 175, 185, n. 9. Ms. Dembitz quoted the
20 statement in Hirabayashi that governmental authorities
21 "have constitutional power to appraise the danger [posed
22 by Japanese Americans] in the light of facts of public
23 notoriety." She then noted that "the opinion itself shows
24 that the danger was appraised not in the light of 'facts'
25 reasonably established by consideration of an adequate
26 amount of data but of widely held suspicions, such as much
27 may be possessed by every group of society with respect to
28 every other group. A typical instance is the statement,
frequently and positively made, that the persons of
Japanese ancestry have close filial ties and are thus
easily dominated by their parents, as contrasted with the
findings by reputable sociologists that the second-genera-
tion generally strive to disassociate themselves from the
ways of their parents even more than in the usual immigrant
families."

^{14/} Id. at 185-186. Emphasis added.

1 In view of the government's knowledge of contrary
2 evidence on the central "disloyalty" issue, the long-range
3 strategy initiated before Petitioners' trials and pursued
4 during the entire course of their cases constituted an abuse
5 of the doctrine of judicial notice and resulted in a fraud
6 upon the courts.

7 B. The War Department Manipulated the Amicus
8 Briefs of the West Coast States and Unlaw-
9 fully Submitted "Evidence" Withheld From
10 the Department of Justice

11 As noted above, in April 1943, the Justice Department
12 had requested the Final Report of General DeWitt to assist in
13 preparation of the Supreme Court brief in the Hirabayashi case.
14 Because of their concern about certain statements in the Final
15 Report on the "military necessity" issue, however, War Depart-
16 ment officials withheld the Final Report from the Justice
17 Department until January 1944.

18 Despite this act by War Department officials,
19 they did release the initial version of the Final Report for
20 presentation to the Supreme Court in the Hirabayashi case.
21 General DeWitt personally delegated a member of his legal
22 staff, Captain Herbert E. Wenig, to assist the Attorney
23 General of California in preparing the amicus brief sub-
24 mitted on behalf of the three West Coast states.^{15/} Captain

25 ^{15/} Letter, Attorney General Robert Kenny to Colonel Joel
26 Watson, May 1, 1943, Hirabayashi File, Record Group 153
27 [Records of the Judge Advocate General's Office],
28 Washington National Records Center, Suitland, Maryland.
Attorney General Kenny wrote as follows: "... I greatly
appreciate the assistance being rendered this office by

1 Wenig was then a member of the Judge Advocate's staff of the
2 Western Defense Command. Wenig prepared an amicus brief which
3 included lengthy excerpts, without attribution, from the
4 initial version of the Final Report. Most of these excerpts
5 presented a "racial characteristics" argument designed to
6 persuade the Court that Japanese Americans were inherently
7 disloyal. The following excerpt from the amicus brief illus-
8 trates the central point of this argument:

9 The Japanese of the Pacific Coast area on the
10 whole have remained a group apart and inscrutable
11 to their neighbors. They represent an unassimi-
12 lated, homogeneous element which in varying
 degrees is closely related through ties of race,
 language, religion, custom and ideology to
 the Japanese Empire. 16/

13
14 [FOOTNOTE 15/ CONTINUED FROM PREVIOUS PAGE]

15 Lieutenant [sic] Herbert E. Wenig, whom General DeWitt has
16 designated to provide liaison with this office." It is
17 additionally significant that the War Department also
18 collaborated with the West Coast states in the preparation
19 in 1944 of an amicus brief to the Supreme Court in the
20 Korematsu case. The Judge Advocate General noted this
21 collaboration in a letter to the Deputy Chief of Staff of
22 the Western Defense Command: "This letter will confirm
 understanding just had with you and approved by General
 Emmons [who succeeded General DeWitt in September, 1943]
 that the Judge Advocate section collaborate fully, but
 informally, with the Attorneys General of the states
 mentioned in the preparation of a joint brief to be filed
 by them as amici curiae in the above mentioned case."
 Judge Advocate General to Deputy Chief of Staff, March 31,
 1944, Korematsu File. Ibid.

23 16/ Brief of the States of California, Oregon and Washington
24 as Amici Curiae, p. 11. Emphasis added. Compare the
25 following statement in the Final Report: "Here was a
26 relatively homogeneous, unassimilated element bearing
27 a close relationship through ties of race, religion,
28 language, custom, and indoctrination to the enemy."
 DeWitt, Final Report, p. 15. The extent of reliance in
 the brief of the West Coast States on the Final Report is
 substantial. Statements on pp. 10, 11, 14-20, 22-23, and
 25-26 of the West Coast brief are taken directly from the
 latter source.

1 The amicus brief concluded that these "racial characteristics"
2 created a reasonable suspicion that Japanese Americans would
3 engage in espionage and sabotage:

4 The facts just reviewed indicate that
5 because of the racial, cultural, reli-
6 gious and ideological ties and
7 sympathies with Japan and the various
8 causes which have kept the Japanese
9 apart, there would be a sufficient
10 number that could be used as a fifth
11 column in assisting in sabotage or
12 espionage or giving aid in the event
13 of an attempted attack. 17/

14 In a highly misleading manner, the amicus brief also
15 presented to the Supreme Court the espionage allegations made
16 in the Final Report. After reciting three alleged incidents of
17 Japanese attack on the West Coast in 1942, the brief drew the
18 following conclusion:

19 There was an increasing indication that
20 the enemy had knowledge of our patrols
21 and naval dispositions, for ships leaving
22 west coast ports were being intercepted
23 and attacked regularly by enemy submarines. 18/

24 17/ Id. at 26.

25 18/ Id. at 10. The statement quoted above misleadingly
26 compressed into one charge two allegations made against
27 Japanese Americans in the Final Report, which read as
28 follows: "In summary, the Commanding General was con-
fronted with the Pearl Harbor experience, which involved
a positive enemy knowledge of our patrols, naval disposi-
tions, etc., on the morning of December 7th; [and] with
the fact that ships leaving West Coast ports were being
intercepted regularly by enemy submarines"
DeWitt, Final Report, p. 18. Emphasis added. Notwith-
standing the obvious suspicion of General DeWitt that
Japanese Americans had aided in both the Japanese attack
on Pearl Harbor and subsequent submarine attacks on
shipping, he did not directly link the two episodes. In
stating as a fact that such a linkage existed, the states'
amicus brief misled the Supreme Court. See discussion of
War Department involvement in the preparation of this
brief under Point Three, infra.

1 The amicus brief assured the Supreme Court that
2 the "facts" presented to the Court were deserving of judicial
3 notice:

4 ... the Court may take notice of many of
5 the facts to be stated because they are
6 generally notorious and are ... matters of
7 public concern upon which the Court may
8 inform itself by reference to documentary
9 evidence of any other reliable source. 19/

10 These "generally notorious" facts were, in truth,
11 no more than the unsupported allegations of an interested
12 party. By making the Final Report available to the West Coast
13 states, and delegating Captain Wenig to assist in preparing the
14 amicus brief, General DeWitt sought to perpetrate a fraud upon
15 the courts. By concealing the Final Report from the Department
16 of Justice, while assuring its introduction through friendly
17 amici, DeWitt manipulated the judicial process and in fact
18 committed a fraud upon the Court. Significantly, when the
19 Justice Department belatedly learned of DeWitt's actions after
20 Supreme Court decision of Hirabayashi, it properly condemned
21 his unlawful behavior:

22 It is also to be noted that parts of the
23 [Final Report] which, in April 1942 [sic]
24 could not be shown to the Department of
25 Justice in connection with the Hirabayashi
26 case in the Supreme Court, were printed
27 in the brief amici curiae of the States
28 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 erron-

26 - - - - -

27
28 19/ Id. at 8.

eous and intemperate brief which the
States filed. 20/

In upholding the constitutionality of the military orders under which petitioners were prosecuted and convicted, the Supreme Court relied upon the very "facts" purportedly demonstrating the disloyalty of the Japanese Americans that the states' amicus brief, with the aid of General DeWitt, presented to the Court. That the government possessed other evidence refuting the charges asserted in the amicus brief, renders DeWitt's manipulation of the judicial process that much more egregious. The false factual picture presented to the Court by means of the government's abuse of judicial notice and manipulation of the states' amicus brief led the Court in Hirabayashi to conclude that the military orders at issue:

... were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of espionage and sabotage. 21/

Such a deliberate manipulation of the judicial process constituted a fraud upon the Court.

20/ Memorandum, Edward J. Ennis to Herbert Wechsler, September 30, 1944, Folder 3, Box 37, Fahy Papers. Emphasis added. See Exhibit B.

21/ Hirabayashi v. United States, supra, 320 U.S. at 94-95.

POINT FIVE

PETITIONERS ARE ALSO ENTITLED TO RELIEF
ON THE GROUND THAT THEIR CONVICTIONS
ARE BASED ON GOVERNMENTAL ORDERS THAT
VIOLATE CURRENT CONSTITUTIONAL STANDARDS

Petitioners further allege that their convictions are based on governmental orders that violate current substantive constitutional standards. Nearly forty years ago, the Supreme Court sustained the constitutionality of the government's decision to impose a curfew on and then to evacuate all Japanese Americans living on the West Coast. In doing so, however, the Court did not in fact apply the same type of "strict scrutiny" of suspect classifications that would be applied today. The Court deferred to the government's unproven assertions that a grave danger of espionage and sabotage existed, that Japanese Americans should be regarded as potential saboteurs, and that an appropriate method of combatting this perceived danger was first to impose a curfew on all persons of Japanese ancestry and then to evacuate and detain this entire racial group.

In racial discrimination cases decided after Korematsu, the Court demanded far more from the government to justify the use of a racial classification that burdened or stigmatized a racial minority. The government now has the exceedingly difficult task of proving that it is essential to use such a classification to fulfill a compelling governmental interest and that no less restrictive alternative is available. The Court has consistently held, in cases decided after Korematsu, that the government has failed to meet this highly

1 demanding burden of proof. Moreover, the Court has stated that
2 the government's burden is particularly great when the Court is
3 reviewing a criminal conviction based on a racial classification.

4 Judged by today's standards, the government plainly
5 did not offer sufficient proof to justify the racial classifica-
6 tion challenged in Petitioners' cases. Thus, Petitioners'
7 convictions violate their right to equal protection, as applied
8 through the Due Process Clause of the Fifth Amendment. A
9 petition in the nature of a writ of error coram nobis is the
10 appropriate means of remedying this fundamental constitutional
11 defect in Petitioners' convictions.

1 PRAYER FOR RELIEF

2 Petitioners respectfully submit that it would be
3 impossible to find any other instance in American history of
4 such a longstanding, pervasive and unlawful governmental
5 scheme designed to mislead and defraud the courts and the
6 nation. By the misconduct set forth in detail above, the
7 United States deprived petitioners of their rights to fair
8 judicial proceedings guaranteed by the Fifth Amendment to the
9 United States Constitution. Although successful to date, this
10 fundamental and egregious denial of civil liberties cannot be
11 permitted to stand uncorrected.

12 WHEREFORE, petitioner GORDON K. HIRABAYASHI
13 respectfully prays:

- 14 1. That the judgment of conviction be vacated;
15 2. That the military orders under which he was
16 convicted be declared unconstitutional;
17 3. That his indictment be dismissed;
18 4. For costs of suit and reasonable attorneys'
19 fees;
20 5. For such other relief as may be just and proper.

21 Dated: January 26, 1983

22 Respectfully submitted,

23
24 By Arthur G. Barnett
25 Arthur G. Barnett

26 By Peter Irons
27 Peter Irons

28 By Kathryn Bannai
Kathryn Bannai

1

APPENDIX

1
2 Petitioners have presented above those facts that
3 relate to the issuance of Executive Order 9066 and enactment of
4 Public Law 503, and the promulgation of the military orders
5 applicable to Japanese Americans on the West Coast. Petitioners
6 consider it necessary as well to recount in this Appendix those
7 significant events that preceded and led to the adoption of
8 these measures. Such a recounting will enable the Court to
9 place in proper context the origins of the internment program
10 and the allegations of governmental misconduct made throughout
11 this Petition. In particular, the steps taken before the Pearl
12 Harbor attack to combat espionage and sabotage, the political
13 pressures that culminated in the internment program, and the
14 concomitant debate among government officials over the necessity
15 for and constitutionality of this program, are of central
16 importance to this Petition.

17 A. Steps Taken By the Government Before the Pearl
18 Harbor Attack to Combat Espionage and Sabotage

19 It is relevant to claims advanced by the Government
20 during Petitioners' cases to recount the steps taken before
21 the Japanese attack on Pearl Harbor to protect the West
22 Coast area against potential espionage and sabotage. Predicated
23 on apprehensions of an eventual state of war between Japan and
24 the United States, planning in this regard began in June, 1939
25 with a secret directive issued by President Roosevelt. The
26 President ordered that "the investigation of all espionage,
27 counter-espionage and sabotage matters be controlled and
28 handled" jointly by the Federal Bureau of Investigation [FBI],

1 the Military Intelligence Division of the Army [MID], and the
2 Office of Naval Intelligence of the Navy [ONI].^{1/}

3 A year later, on June 4, 1940, the President's
4 order that such intelligence operations be "coordinated" by
5 these three agencies was modified by a "Delimitation Agree-
6 ment" that assigned to the FBI control over cases of "actual
7 or strongly presumptive espionage or sabotage, including the
8 names of individuals definitely known to be connected with
9 subversive activities." Significantly, this agreement delegated
10 to ONI primary responsibility for the collection and dissemina-
11 tion of intelligence relating to the Japanese American popula-
12 tion, presumably because of the proximity of segments of this
13 population to naval installations along the West Coast.^{2/}

14 Within the United States Department of Justice,
15 responsibility for prewar planning for the treatment of
16 potential "alien enemies" was delegated to the Special Defense
17 Unit. Personnel of this Unit compiled extensive lists of
18 "subversive" and "dangerous" aliens of German, Italian and
19 Japanese citizenship. In collated form, these lists were
20 informally known as the "ABC" list, so called from the listing

21 - - - - -

22 - - - - -

23 - - - - -

24 - - - - -

26 ^{1/} United States Navy, Office of Intelligence, "United
27 States Naval Administration in World War II," n.d., pp.
66-69. See Exhibit M.

28 ^{2/} Ibid.

1 of three categories of aliens in descending order of potential
2 danger.^{3/} By mid-1941, some six months before the Pearl Harbor
3 attack, the "ABC" list included the names of more than 2,000
4 aliens of Japanese descent.^{4/} This group included virtually
5 the entire leadership of the West Coast population of Japanese
6 Americans, the vast majority of them aliens by virtue of
7 restrictive Federal legislation.^{5/}

8 The FBI and military intelligence agencies submitted
9 to the Special Defense Unit the names of Japanese Americans
10 considered potentially dangerous for inclusion on the "ABC"
11 list. Some of these names were taken from public sources such
12 as the publications of Japanese American organizations and
13 newspapers such as the Rafu Shimpo in Los Angeles.^{6/} A more

14
15 3/ Those listed in category "A" were the "known dangerous"
16 aliens, which included among the Japanese American
17 population "fishermen, produce distributors, Shinto and
18 Buddhist priests, influential businessmen, and members
19 of the Japanese Consulate." Those in category "B" were
20 considered "potentially dangerous" but had not been
21 thoroughly investigated, while those in category "C"
22 had not been connected to Japanese intelligence activities
23 but "were watched because of their pro-Japanese inclina-
24 tions and propagandist activities." This last group
25 included Japanese language instructors, martial arts
26 instructors, travel agents, and newspaper editors.
27 Office of Naval Intelligence, "Japanese Organizations and
28 Societies Engaged in Propaganda, Espionage and Cultural
Work," ONI File A8-5/EF37, ONI Records, National
Archives and Records Service, Washington, D.C.

23 4/ Ibid. See also Custodial Detention Files, File 100-2-
24 60-3, Sections 180-190, Records of the Federal Bureau
25 of Investigation. The "ABC" list was formally known as
the Custodial Detention Index.

26 5/ The Immigration Act of 1924 excluded Japanese from ad-
27 mission into the United States. 43 Stat. 161. Federal
28 law, also enacted in 1924, denied to the Japanese citi-
zenship by naturalization. 8 U.S.C. §703 (1924).

6/ Note 3, supra.

1 significant source of names was the list of Japanese sym-
2 pathizers and espionage agents seized in March, 1941 during
3 an illegal break-in and burglary of the Japanese consulate
4 in Los Angeles. This break-in was planned and executed by
5 Lieutenant Commander Kenneth D. Ringle of ONI, with the aid of
6 the FBI. T

7
8 June,
9 1941, to the arrest of Itaru Tachibana, a Japanese naval
10 officer posing as an English language student. Along with the
11 records photographed by Government agents during the consular
12 break-in, and those seized when Tachibana was arrested, were
13 lists of agents who had gathered intelligence on behalf of the
14 Japanese government in the form of maps, lists of Army and Navy
15 installations, data on defense factories, and the locations of
16 power lines and dams.^{7/}

16 B. Steps Taken After the Pearl Harbor Attack
17 to Deal With Japanese Americans Considered
18 Dangerous

18 The significance to Petitioners' cases of the
19 consular break-in and the arrest of Tachibana lies in sub-
20 sequent conclusions by the FBI about their impact on Japanese
21 intelligence operations. As noted above in Point Two, FBI
22 officials concluded that the break-in and arrests had ended any
23 - - - - -
24

25 ^{7/} This account is based on Kenneth D. Ringle, Jr., "What
26 Did You Do Before the War, Dad?", The Washington Post
27 Magazine, December 6, 1981, p. 54. Petitioners believe
28 that FBI records of the consular break-in are located
in File 65-13888, Records of the FBI. These records
have been requested by Kenneth D. Ringle, Jr., but have
not been released by the FBI.

1 substantial threat of espionage and sabotage on the West Coast
2 by Japanese Americans.^{8/} The available records of the FBI and
3 military intelligence agencies disclose no evidence of espionage
4 or sabotage in the period that followed Pearl Harbor. In fact,
5 these records affirmatively disclaim the commission of such
6 acts on the West Coast.^{9/}

7 It is relevant as well to note that the Department
8 of Justice moved, immediately after the Pearl Harbor attack,
9 to arrest all those aliens of Japanese descent included in
10 the "ABC" list. During the night of December 7-8, 1941, FBI
11 and military agents, assisted by local police, arrested 736
12 alien Japanese on the West Coast. Within four days, the
13 number of Japanese arrested reached 1,370. By the end of
14 the "ABC" roundup in February, 1942, a total of 2,192 alien
15 Japanese on the mainland had been arrested and interned for
16 some period of time.^{10/}

17 Following these arrests, the Attorney General
18 directed that the Department of Justice establish a network
19 of Alien Enemy Hearing Boards across the country. Most of
20 the 92 hearing boards included one or more lawyers as
21 members. Aliens who had been arrested and interned were
22 afforded informal hearings at which, Biddle noted, "any
23

24 ^{8/} Memorandum, J. Edgar Hoover to Mr. Tolson, Mr. Tamm,
25 and Mr. Ladd, December 17, 1941, File 100-97-1-67, Records
of the FBI. See Exhibit T.

26 ^{9/} These records are discussed under Point Two, supra.

27 ^{10/} Department of Justice, Press Releases, December 8 and
28 13, 1941, February 16, 1942; quoted in Jacobus tenBroek,
et al., Prejudice, War and the Constitution, p. 101.

1 'fair' evidence could be admitted" that bore on the loyalty
2 of the alien. Close to two-thirds of those initially detained
3 were subsequently released outright or on parole by the hearing
4 boards on a finding that they posed no danger to the United
5 States.^{11/} However, most of the Japanese Americans released
6 after such a finding were then placed in Relocation Centers on
7 the order of General DeWitt. Those Japanese Americans released
8 from internment by the Department of Justice were placed in
9 custody by the War Department on the basis of orders issued
10 without hearings and predicated on an assumption that the
11 "racial characteristics" of Japanese Americans as a group
12 predisposed them to disloyalty and the commission of espionage
13 and sabotage.

14 C. Political Pressures for the Evacuation of
15 Japanese Americans

16 The public record discloses no evidence of any
17 substantial public hostility toward Japanese Americans in
18 the weeks that followed the Pearl Harbor attack.^{12/} Similarly,
19 the official record discloses no suggestions within the Govern-
20 ment for restrictive measures against Japanese Americans as a
21

22 ^{11/} Francis Biddle, In Brief Authority, pp. 208-209.

23 ^{12/} "Agitation for a mass evacuation of the Japanese did
24 not reach significant dimensions until more than a month
25 after the outbreak of war." Stetson Conn, et al., United
26 States Army in World War II: The Western Hemisphere:
27 Guarding the United States and Its Outposts, p. 120. This
28 volume, issued by the Office of the Chief of Military
History, Department of the Army, in 1964, is part of the
official history of the armed services during World War
II. The Court is directed to Chapter V, "Japanese
Evacuation From the West Coast," for an authoritative
discussion of the origins of the mass evacuation program.

1 group for close to two months after Pearl Harbor. In fact,
2 General DeWitt initially expressed opposition to a proposal
3 that the Army institute the internment of all Japanese Americans
4 in California. He expressed this opposition in a telephone
5 conversation on December 26, 1941 with Major General Allen W.
6 Gullion, Provost Marshal General of the Army. Gullion passed
7 on to General DeWitt a recommendation for internment made by
8 the Washington, D.C. representative of the Los Angeles Chamber
9 of Commerce. General DeWitt responded to this recommendation
10 as follows:

11 I thought that thing out to my satisfac-
12 tion . . . if we go ahead and arrest the
13 93,000 Japanese [in California], native
14 born and foreign born, we are going to have
15 an awful job on our hands are are very
16 liable to alienate the loyal Japanese from
17 disloyal I'm very doubtful that it
18 would be common sense procedure to try and
19 intern or to intern 117,000 Japanese in
20 this theater I don't think it's a
21 sensible thing to do.... An American
22 citizen, after all, is an American citizen.
23 And while they all may not be loyal, I
24 think we can weed the disloyal out of the
25 loyal and lock them up if necessary. 13/

19 During the month that followed this expression
20 by General DeWitt of opposition to the evacuation or intern-
21 ment of Japanese Americans, public pressures for such moves
22 remained relatively limited. 14/ However, the situation

23 13/ Telephone conversation, General DeWitt with General
24 Gullion, December 26, 1941, File 311.3, Records of the
25 Western Defense Command, Civil Affairs Division; quoted
in id., p. 118.

26 14/ Note 12, supra. See also tenBroek, et al., Note 10,
27 supra, pp. 73-80. This study is the product of the
28 University of California Japanese American Evacuation and

[FOOTNOTE 14/ CONTINUED ON FOLLOWING PAGE]

1 changed dramatically following the release to the press on
2 January 25, 1942, of the so-called "Roberts Report" on the
3 Pearl Harbor attack. This report was issued by a commission
4 appointed by President Roosevelt and chaired by Associate
5 Justice Owen J. Roberts of the United States Supreme Court.
6 In addition to finding that the Army and Navy commanders in
7 Hawaii had been negligent in preparing for a possible Japanese
8 attack, the report included the following statement:

9 There were, prior to December 7, 1941, Japanese
10 spies on the island of Oahu. Some were Japan-
11 ese consular agents and others were persons
12 having no open relations with the Japanese
13 foreign service. These spies collected, and
14 through various channels, transmitted, informa-
15 tion to the Japanese Empire respecting the
16 military and naval establishments and disposi-
17 tions on the island. 15/

14 Although unsupported by any cited evidence, the
15 implied assertion that Japanese Americans had performed espio-
16 nage activities on behalf of Japan was widely put in explicit
17 terms by the West Coast press. 16/ Public concern about the
18 "danger" posed by Japanese Americans quickly turned into a
19 campaign of pressure on both military and civilian officials

20
21 [FOOTNOTE 14/ CONTINUED FROM PREVIOUS PAGE]

22 Resettlement Study, an academic project begun in February,
23 1942 and supported by funding from the University of
24 California, the Rockefeller Foundation, and the Columbia
25 Foundation. Although not an official government project,
26 this comprehensive study received the cooperation of the
27 Research Branch of the Civil Affairs Division, Western
28 Defense Command. Id., p. xiii.

26 15/ Congressional Record, Vol. 88, Part 8, p. A261.

27 16/ "The publication of the report of the Roberts Commission
28 . . . on 25 January had a large and immediate effect
 both on public opinion and on government action." tenBroek,
 et al., Note 10, supra, p. 121.

1 for the mass evacuation of Japanese Americans from the West
2 Coast.^{17/} DeWitt's exposure to this pressure is evident from
3 his report of a January 27 meeting with Governor Culbert
4 Olson of California. In a telephone conversation of January
5 29 with Major Karl R. Bendetsen of the Provost Marshal General's
6 office, DeWitt made the following statement:

7 There's a tremendous volume of public
8 opinion now developing against the Japanese
9 of all classes, that is aliens and non-aliens,
10 to get them off the land, and in Southern
11 California . . . they are bringing pressure on the
12 government to move all the Japanese out. As a
13 matter of fact, it's not being instigated or
14 developed by people who are not thinking but
15 by the best people of California. Since the
16 publication of the Roberts Report they felt
17 that they were living in the midst of a lot
18 of enemies. They don't trust the Japanese,
19 none of them. ^{18/}

20 In addition to pressure for mass evacuation from
21 state officials such as Governor Olson, military officials
22 were subjected to pressure from members of the West Coast
23 Congressional delegation. On January 30, 1942, Major Bendetsen
24 represented Provost Marshal Gullion at a meeting in Washington
25 with members of this delegation, at which he was presented with
26 a six-point proposal for action against Japanese Americans in
27 the form of a recommendation to President Roosevelt. This
28 proposal included two significant elements:

- 29 (1) A designation by the War Department of
30 critical areas throughout the country and
31 territorial possessions.

32 ^{17/} Id., pp. 81-96.

33 ^{18/} Telephone conversation, General DeWitt with Major
34 Bendetsen, January 28, 1942; quoted in Conn, et al.,
35 Note 12, supra.

1 (2) Immediate evacuation of all such critical
2 areas of all enemy aliens and their
3 families, including children under 21
4 whether aliens or not. 19/

5 In a telephone conversation with Major Bendetsen
6 on January 31, General DeWitt indicated his agreement with
7 the recommendation of the West Coast Congressional delegation.
8 DeWitt expressed his support for the mass evacuation of
9 Japanese Americans as a protection against possible acts of
10 sabotage: "The only positive answer to that question is
11 evacuation of all enemy aliens on the West Coast, and their
12 resettlement or internment and the positive control [of such
13 a program] military or otherwise." General DeWitt made
14 clear his endorsement of the mass evacuation of all American
15 citizens of Japanese ancestry: "All Japanese, irrespective
16 of citizenship."^{20/}

17 One fact of great significance emerges from this
18 record: Between the month from the end of December, 1941 to
19 the end of January, 1942, General DeWitt changed his posi-
20 tion on mass evacuation from that of opposition as not "a

21 19/ Memorandum, Major Bendetsen to General Gullion, January
22 31, 1942, File PMG 384.4, Records of the Western Defense
23 Command. According to Conn, et al., "The Congressional
24 recommendations were a verbatim copy of a draft submitted
25 by a representative of the Los Angeles Chamber of Com-
26 merce." Note 12, supra, p. 123, n. 27. Major Bendetsen
27 interpreted this recommendation, in reporting to General
28 Gullion on January 31, 1942, as "calling for the immediate
evacuation of all Japanese from the Pacific coastal
strip including Japanese citizens [sic] of the age of 21
and under. . ." Id, p. 123.

20/ Telephone conversation, General DeWitt with Major Bendet-
sen, January 31, 1942, Records of the Provost Marshal
General, National Archives and Records Service, Washington,
D.C.

1 sensible thing to do" to support of the evacuation of all
2 persons of Japanese ancestry, "irrespective of citizenship."
3 It will be shown below that during this period, and after-
4 ward as well, no evidence reached General DeWitt or any
5 other responsible government official that indicated that
6 Japanese Americans posed any danger of espionage or sabotage
7 on the West Coast. In fact, intelligence reports prepared
8 by the FBI and other federal agencies directly refuted all
9 such allegations. The conclusion is inescapable that General
10 DeWitt's endorsement of mass evacuation resulted both from his
11 often-expressed racial hostility toward Japanese Americans and
12 from pressure from state and congressional politicians.

13 D. The Debate Within the Federal Government Over
14 Proposals for the Mass Evacuation of Japanese
15 Americans

16 Officials of both the War Department and the Depart-
17 ment of Justice initially opposed the proposals for mass
18 evacuation. The grounds for such opposition included doubts
19 about the military necessity for evacuation and the constitu-
20 tionality of an evacuation program that included American
21 citizens. This opposition was expressed at a meeting in the
22 office of Attorney General Biddle on February 1, 1942, attended
23 by Assistant Secretary of War McCloy.^{21/}

24 At this meeting, Biddle submitted to McCloy the
25 draft of a press release to be signed and issued jointly by

26 ^{21/} Also in attendance at this meeting were Provost Marshal
27 General Gullion, Major Bendetsen, FBI Director Hoover,
28 Assistant to the Attorney General James H. Rowe, Jr.,
and Edward J. Ennis, Director of the Alien Enemy Control
Unit of the Department of Justice.

1 the Attorney General and Secretary of War Stimson. The
2 initial sections of this press release announced agreement
3 by the two Departments on steps to bar enemy aliens from
4 limited areas that surrounded vital military installations
5 on the West Coast, none of which involved restrictions on
6 citizens. The proposed release concluded with this sentence:

7 The Department of War and the Department of
8 Justice are in agreement that the present
9 military situation does not at this time
 require the removal of American citizens
 of the Japanese race. 22/

10 At McCloy's request, the Attorney General agreed to
11 withhold issuance of the proposed release until General DeWitt
12 could respond to it. Provost Marshal Gullion called DeWitt
13 later that day and read to him the text of the press release.
14 General DeWitt was emphatic in his response to the sentence
15 quoted above: "I wouldn't agree to that."^{23/} As a consequence
16 of this objection by General DeWitt, this sentence was removed
17 from the press release.

18 Following the meeting on February 1 between the
19 Attorney General and McCloy, Secretary of War Stimson became
20 personally involved in the debate over mass evacuation. On
21 February 3, Stimson met with General Gullion to discuss recom-
22 mendations from General DeWitt for the designation of "military
23 areas" from which Japanese aliens would be excluded by order of
24 the Attorney General. Stimson recorded this conversation in
25 his official diary as follows:

26 22/ Telephone conversation, General DeWitt with General
27 Gullion, February 1, 1942. Note 20, supra.

28 23/ Ibid.

1 General DeWitt . . . is very anxious about
2 the situation and has been clamoring for the
3 evacuation of the Japanese of the area
4 surrounding the intensely important area at
5 San Diego, Los Angeles, San Francisco and
6 Puget Sound, where are located some of the
7 most important airplane factories and naval
8 shipyards. He thinks he has evidence that
9 regular communications are going out from
10 Japanese spies in those regions to submarines
11 off the coast assisting in the attacks by the
12 latter which have been made upon practically
13 every ship that has gone out. If we base our
14 evacuations upon the ground of removing enemy
15 aliens, it will not get rid of the Nisei
16 [native-born Japanese American citizens] who
17 are . . . the more dangerous ones. If on the
18 other hand we evacuate everybody including
19 citizens, we must base it as far as I can see
20 upon solely the protection of specified plants.
21 We cannot discriminate among our citizens on
22 the ground of racial origin. We talked the
23 matter over for quite a while and then post-
24 poned it in order to hear further from General
25 De Witt who has not yet outlined all of the
26 places that he wishes protected. 24/

15 Two elements of this statement by Stimson require
16 comment. First, General DeWitt had been personally informed,
17 almost a month before this meeting, that reports of communica-
18 tions from the coast to Japanese submarines had been investi-
19 gated by the Federal Communications Commission and found to be
20 baseless. Second, Stimson at this point recognized that the
21 proposed evacuation of American citizens of Japanese ancestry
22 had no constitutional basis.

23 Notwithstanding the doubt expressed by Stimson,
24 Assistant Secretary of War McCloy undertook to suggest to
25 General DeWitt a way around the constitutional barriers to
26

27 24/ Entry of February 3, 1942, Henry L. Stimson Diaries,
28 Yale University Library, New Haven, Connecticut. Emphasis
added.

1 the evacuation of citizens from the major West Coast cities.
2 In a telephone conversation with General DeWitt on February
3 3, after the meeting between Stimson and General Gullion,
4 McCloy made the following suggestion:

5 Now, my suggestion is that (after we have
6 talked it over with General Gullion and Major
7 Bendetsen) we might call those [cities]
8 military reservations in substance, and
9 exclude everyone -- whites, yellows, blacks,
10 greens -- from that area and then license back
11 into the area those whom we felt there was no
12 danger to be expected from. . . . You see,
13 then we cover ourselves with the legal situa-
14 tion is taken care of [sic] in a way because
15 in spite of the constitution you can eliminate
16 from any military reservation anyone -- any
17 American citizen, as we could exclude everyone
18 and then by a system of permits and licenses
19 permitting those to come back into that area
20 who were necessary to enable that area to
21 function as a living community. Everyone but
22 the Japs --. 25/

23 During this conversation with General DeWitt,
24 McCloy requested that he submit to the War Department a
25 formal recommendation on the evacuation issue, and dis-
26 patched Major Bendetsen (who was shortly promoted to Lieu-
27 tenant Colonel) to the West Coast to assist in drafting his
28 recommendation. On February 10, 1942, Colonel Bendetsen
submitted to General DeWitt a memorandum headed "Evacuation
of Japanese from the Pacific Coast." This memorandum stated
that there was "no disagreement in any quarter regarding the
necessity for placing all Japanese in the same category"
regardless of citizenship. This statement was in fact erroneous

25/ Telephone conversation, General DeWitt with Mr. McCloy,
February 3, 1942. Emphasis added. Note 2, supra.

1 and misleading as an expression of the views of Secretary
2 Stimson, who had recently stated to General Gullion his doubts
3 about the constitutionality of any mass evacuation of citizens.
4 Colonel Bendetsen then noted that it was "highly improbable
5 that the Secretary will accept the recommendation of the entire
6 evacuation [of Japanese Americans] from the coastal strip."
7 This statement referred to the proposal by General DeWitt that
8 Japanese Americans be evacuated from the entire area that
9 extended some two hundred miles eastward from the coastline.
10 Colonel Bendetsen concluded with the following statement:

11 . . . any recommendation should be predicated
12 on the military necessity involved and this
13 in turn can be developed only after a consid-
14 eration of all the factors such as loss of
15 vegetable production which may be consequent
16 [from farms operated by Japanese Americans],
17 and other economic dislocations which may ensue.
18 These later factors can be weighed only from
19 the standpoint of the military disadvantages
20 which may be involved. If from the military
21 st

22 /
23 The significance of this memorandum emerges in its
24 contrast with the "Final Recommendation" submitted on February
25 14, 1942, by General DeWitt to Secretary Stimson. In balancing
26 "military necessity" against the possible "loss of vegetable
27 production" from the farms operated by Japanese Americans,
28 Colonel Bendetsen demonstrated that the subsequent evacuation

26/ Memorandum, Colonel Bendetsen to General DeWitt, February
10, 1942, Records of the Western Defense Command.

1 recommendation was less a purely military decision than a
2 matter of the "economic dislocation" that evacuation might
3 produce.

4 E. The "Final Recommendation" and the Evacuation
5 Decision

6 During the period that preceded receipt by the
7 War Department of the "Final Recommendation" of General
8 DeWitt, debate within the Government over the evacuation
9 issue centered on the "licensing" proposal advanced by Assistant
10 Secretary of War McCloy. Secretary of War Stimson and Attorney
11 General Biddle maintained their constitutional doubts about the
12 evacuation of Japanese American citizens during this period.
13 Stimson met with McCloy on February 10, 1942, to review the
14 interim proposal by General DeWitt that some 88 limited areas
15 along the Coast (containing military installations, defense
16 factories, and public utilities) be evacuated of all enemy
17 aliens and Japanese American citizens. Following this meeting,
18 Stimson recorded the following in his official journal:

19 The second generation Japanese [native-born
20 citizens] can only be evacuated as part of
21 a total evacuation, giving access to the
22 areas only by permits, or by frankly trying
23 to put them out on the ground that their
24 racial characteristics are such that we
cannot understand or trust even the citizen
Japanese. The latter is the fact but I am
afraid it will make a tremendous hole in
our constitutional system. 27/

25 On February 12, 1942, Attorney General Biddle ad-
26 dressed a letter to Stimson stating that the Department of

27 _____
28 27/ Entry of February 10, 1942. Emphasis added. Note 27,
supra.

1 Justice lacked the personnel and facilities to undertake a
2 mass evacuation program. Biddle added the following to his
3 letter:

4 I have no doubt that the Army can legally,
5 at any time, evacuate all persons in a
6 specified territory if such action is deemed
7 essential from a military point of view for
8 the protection and defense of the area. No
9 legal problem arises where Japanese citizens
10 are evacuated; but American citizens of
11 Japanese origin could not, in my opinion, be
12 singled out of an area and evacuated with the
13 other Japanese. However, the result might be
14 accomplished by evacuating all persons in the
15 area and then licensing back those whom the
16 military authorities thought were not objec-
17 tionable from a military point of view. 28/

18 It should be noted that the "licensing" proposal,
19 as a means for the evacuation of Japanese Americans from
20 limited "military areas" received no further consideration
21 after February 11, 1942. On that date Stimson discussed the
22 evacuation issue with President Roosevelt, on the basis of
23 a memorandum summarizing the "questions to be determined
24 re Japanese exclusion" by the President. This memorandum
25 presented the following questions for decision by the President:

- 26
- 27 (1) Is the President willing to authorize
28 us to move Japanese citizens [American
citizens of Japanese descent] as well
as aliens from restricted areas?
 - (2) Should we undertake withdrawal from the
entire strip DeWitt originally recommended,
which involves a number over 110,000
people, if we included both aliens
and Japanese citizens?

27 28/ Letter, Attorney General Biddle to Secretary of War
28 Stimson, February 2, 1942, Record Group 407, National
Archives and Records Service, Washington, D.C.

- 1 (3) Should we undertake the intermediate
2 step involving, say, 70,000 which
3 includes large communities such as Los
4 Angeles, San Diego, and Seattle?
5
6 (4) Should we take any lesser step such as
7 the establishment of restricted areas
8 around airplane plants and critical
9 installations, even though General DeWitt
10 states that in several, at least, of the
11 large communities this would be wasteful,
12 involve difficult administrative problems,
13 and might be a source of more continuous
14 irritation and trouble than 100 percent
15 withdrawal from the area? 29/

16 Stimson discussed these questions with the President
17 over the telephone on February 11, 1942. No record has been
18 located of any notation of this discussion by the President,
19 but Stimson recorded in his official journal of that day that
20 he "fortunately found that [President Roosevelt] was very
21 vigorous about it and [he] told me to go along on the line that
22 I had myself thought the best."^{30/}

23 Stimson did not record which of the alternative
24 courses he thought best. However, later that day McCloy
25 stated in a telephone conversation with Colonel Bendetsen
26 that "we have carte blanche to do whatever we want to do as
27 far as the President's concerned" and that the President had
28 specifically authorized the evacuation of citizens, subject
29 only to the qualification, "Be as reasonable as you can."^{31/}

30/ Memorandum, for Record (unsigned), February 11, 1942,
31/ File 014.311, Records of the Assistant Secretary of
32/ War, ibid.

33/ Entry of February 11, 1942, Note 27, supra.

34/ Telephone conversation, Assistant Secretary McCloy with
35/ Colonel Bendetsen, February 11, 1942, File 311.3 (Tel
36/ Convs, Bendetsen, Feb-Mar 42), Records of the Western
37/ Defense Command.

1 Following this conversation, Colonel Bendetsen
2 returned from San Francisco to Washington to meet with War
3 Department officials on the evacuation issue. He brought
4 with him the "Final Recommendation" of General DeWitt in the
5 form of a memorandum to the Secretary of War headed "Evacua-
6 tion of Japanese and other Subversive Persons from the Pacific
7 Coast." Included in this memorandum were allegations about the
8 commission of acts of espionage and sabotage by Japanese
9 Americans and slurs on this group as members of an "enemy
10 race." The knowing falsity of these allegations is discussed
11 below.^{32/} The significance of these statements in the "Final
12 Recommendation" to this Appendix lies in their presentation to
13 Stimson as justification for the mass evacuation of Japanese
14 Americans from the West Coast. General DeWitt put his formal
15 recommendation in the following words:

16 That the Secretary of War procure from the
17 President direction and authority to design-
18 ate military areas in the combat zone of
19 the Western Theater of Operations (if necessary
20 to include the entire combat zone), from
21 which, in his discretion, he may exclude all
22 Japanese, all alien enemies, and all other
23 persons suspected for any reason by the
24 administering military authorities of being
25 actual or potential saboteurs, espionage
26 agents, or fifth columnists. ^{33/}

27 F. Adoption of the "Final Recommendation" and
28 the Issuance of Executive Order 9066

29 The "Final Recommendation" of General DeWitt,
30 backed by verbal authorization from the President to proceed

31 ^{32/} See discussion under Points Two and Three, supra.

32 ^{33/} De Witt, Final Report, p. 36. Emphasis added.

1 with the drafting of an evacuation program, became the basis
2 for a crucial series of meetings on February 17 and 18,
3 1942. Secretary Stimson first met on February 17 with Assistant
4 Secretary McCloy, Colonel Bendetsen, Provost Marshal Gullion,
5 and General Mark Clark, the latter representing General George
6 C. Marshall, Chief of Staff of the Army. Stimson described the
7 meeting in his official journal as follows:

8 Finally we worked the matter into a situation
9 where we could take immediate steps beyond
10 the ones which I had already authorized General
11 DeWitt on the coast to do. A proposed order
12 for the President was outlined and General
13 Gullion undertook to have it drafted tonight.
14 War Department orders will fill in the applica-
15 tion of this Presidential order. These were
16 notified and Gullion is also to draft them.
17 It will involve the tremendous task of moving
18 between fifty and one hundred thousand people
19 from their homes and ultimately locating them
20 in new places away from the coast. 34/

21 On the same day, February 17, Attorney General
22 Biddle sent a letter to President Roosevelt, objecting to
23 mass evacuation as unnecessary. Biddle put his objections
24 in the following words:

25 For several weeks there have been increasing
26 demand for evacuation of all Japanese, aliens
27 and citizens alike, from the West Coast states.
28 A great many of the West Coast people distrust
the Japanese, various special interests would
welcome their removal from good farm land and
the elimination of their competition, some of
the local California radio and press have
demanded evacuation, the West Coast Congres-
sional Delegation are asking the same thing
and finally, Walter Lipman [sic] and Westbrook
Pegler [nationally syndicated newspaper colum-
nists] recently have taken up the evacuation
cry on the ground that attack on the West Coast
and widespread sabotage is imminent. My last

28 34/ Entry of February 17, 1942, Note 27, supra.

|

1 advice from the War Department is that there
2 is no evidence of imminent attack and from the
3 F.B.I that there is no evidence of planned sabo-
 tage. 35/

4 Notwithstanding this objection to evacuation,
5 Biddle met on the evening of February 17 with McCloy and
6 General Gullion to draft a proposed Executive Order for
7 submission to the President. Accompanying Biddle at this
8 meeting were James H. Rowe, Jr., Assistant to the Attorney
9 General, and Edward J. Ennis, director of the Alien Enemy
10 Control Unit of the Department of Justice. In his memoirs,
11 Biddle described this meeting as follows:

12 General Gullion had an executive order ready
13 for the President to sign. Rowe and Ennis
14 argued strongly against it. But the decision
15 has been made by the President. It was, he
16 said, a matter of military judgment. I did
 not think I should oppose it any further. The
 Department of Justice, as I had made it clear
 to him from the beginning, was opposed to and
 would have nothing to do with the evacuation. 36/

17 The following day, February 18, 1942, Biddle met with Stimson
18 and members of their staffs to go over the proposed Executive
19 Order. In final form, the order was approved and taken to the
20 White House by Rowe for submission to the President. Executive
21 Order 9066 was signed by President Roosevelt on February 19,
22 and its pertinent provisions are cited above in the Statement
23 of Facts.

24 _____

25 35/ Memorandum, Attorney General Biddle to President Roose-
26 velt, February 17, 1942, Folder - C.F. Hawaii, Confidential
27 File, President's Secreatry's Files, Franklin D. Roosevelt
 Library, Hyde Park, New York. Emphasis added.

28 36/ Note 11, supra, p. 219.

1 G. Conclusion

2 There can be no doubt that the decision to evacuate
3 and intern the Japanese American population on the West Coast
4 was a direct consequence of two facts: first, General DeWitt's
5 capitulation to the pressures exerted by State and federal
6 officials; and second, his belief that the "racial characteris-
7 tics" of Japanese Americans predisposed them to disloyalty.
8 Until the end of January 1942, DeWitt expressed opposition to
9 mass evacuation and agreement that the Army could "weed the
10 disloyal out of the loyal" among the Japanese Americans. The
11 arrest and internment of those on the "ABC" list convinced the
12 Department of Justice that no significant threat of espionage
13 or sabotage remained on the West Coast.

14 However, following the publication of the sensational,
15 but undocumented allegations of spying by Japanese Americans in
16 Hawaii that were made in the "Roberts Report," and the pressures
17 exerted on General DeWitt by Governor Olson and members of the
18 West Coast Congressional delegation, General DeWitt submitted
19 to the War Department a "Final Recommendation" for the eva-
20 cuation of all persons of Japanese ancestry on the West Coast.
21 This recommendation cited no evidence that Japanese Americans
22 posed a danger of espionage or sabotage.

23 Responsible officials of both the War Department
24 and the Department of Justice harbored serious doubts about
25 the constitutionality of mass evacuation and restrictive
26 measures directed at Japanese Americans as a group. Notwith-
27 standing these doubts, they finally bowed to the claims of
28 General DeWitt that "military necessity" required mass

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1 evacuation. These officials consequently approved the "Final
2 Recommendation" of General DeWitt and drafted for submission to
3 the President the Executive Order that empowered General DeWitt
4 to issue the military orders at issue in Petitioners' cases and
5 to implement the mass evacuation and internment of the Japanese
6 American population of the West Coast.

ATTORNEYS OF RECORD FOR PETITIONER
GORDON K. HIRABAYASHI

Kathryn Bannai

671 South Jackson St., Ste. 201
Seattle, Washington 98104
(206) 682-9932

Arthur G. Barnett

1012 Seattle Tower
Seattle, Washington 98101
(206) 624-8822

Peter Irons

429 Parkwood Lane
Leucadia, California 92024
(619) 753-0403

Nettie L. Alvarez

Richard S. Ralston

9541 Wallingford North
Seattle, Washington 98103
(206) 522-7434

Rodney L. Kawakami

Michael Leong

671 South Jackson St., Ste. 201
Seattle, Washington 98104
(206) 682-9932

Jerald E. Nagae

2701 Westin Building
Seattle, Washington 98121
(206) 623-8780

Benson D. Wong

1111 Third Avenue Building
Seattle, Washington 98101
(206) 447-4400