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2 violate such orders might not have been upheld against
3 Petitioner's constitutional attacks.

4 The Ninth Circuit, in Taylor, stated that coram nobis relief
5 is warranted when Government abuses (1) offend elementary
6 standards of justice, (2) cause serious prejudice to the accused,
7 or (3) even absent such prejudice, undermine public confidence in
8 the administration of justice. Based on that general standard,
9 the court should grant Petitioner's request for coram nobis
10 relief. By examining decisions dealing with the suppression of
11 evidence and the use of false evidence, the court should conclude
12 that the Government misconduct seriously prejudiced Petitioner.¹

13 The Supreme Court in United States v. Agurs, 427 U.S. 97
14 (1976) identified three situations involving suppression of
15 evidence or use of false evidence and defined for each situation
16 the circumstances in which a conviction may be vacated. Two
17 situations are relevant here:

18 (1) In cases typified by Mooney v. Holohan, 294 U.S. 103
19 (1935), the prosecution introduces perjured testimony or false
20 evidence which it knows or should know is false. In a series of
21 cases after Mooney, "the Court has consistently held that a

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23 ¹ Petitioner believes that the standard of materiality
24 described in the text of this memorandum provides the court with
25 ample guidance to find that coram nobis relief should be granted
26 without an examination of actual prejudice. If, however, the
court focuses solely on the prejudice suffered by Petitioner, the
court must determine the materiality of the suppressed evidence

27 (cont. next page)

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2 conviction obtained by the knowing use of perjured testimony is
3 fundamentally unfair, and must be set aside if there is any
4 reasonable likelihood that the false testimony could have
5 affected the judgment of the jury." (Emphasis added.) Agurs,
6 427 U.S. at 103. Presumably this same standard applies where the
7 prosecution knowingly uses false evidence. Therefore, if there
8 is any reasonable likelihood that perjured testimony or other
9 false evidence could have affected the judgment of the judge or
10 the jury, the conviction must be set aside.

11 (2) The second group of cases is typified by Agurs which
12 sets a standard of materiality for cases of suppression where no
13 request for disclosure is made. The prosecutor violates his
14 constitutional duty if "his omission is of sufficient
15 significance to result in the denial of the defendant's right to
16 a fair trial." Agurs, 427 U.S. at 108.

17 The standard for determining sufficient significance in
18 cases where, as here, the evidence was available to the
19 prosecution is not as high as cases in which new evidence is
20 discovered from a neutral source. In "neutral source" cases it
21 must be shown that newly discovered evidence would probably have
22 resulted in acquittal. Fed. Rule Crim. Proc. 33. Agurs, 427

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24 _____
25 (footnote continued)

26 by reexamining Public Law 503 and its underlying military orders
27 in light of both the suppressed evidence and the constitutional
28 standards relating to racial characteristics.

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2 U.S. at 111, n.19. On the other hand, the standard is higher
3 than the not harmless-error standard. Agurs, 427 U.S., at 112.
4 The Agurs standard requires that the suppressed evidence create
5 some reasonable doubt, but the standard does not require the
6 suppressed evidence to be so material that disclosure of the
7 suppressed evidence would have resulted in the acquittal. This
8 is clear from the fact that the Court states that the standard is
9 not so high as to require "probability" of acquittal. Id. at
10 111. In some circumstances the new evidence in itself might be
11 "of relatively minor importance" and yet require a new trial.
12 Id. at 113.²

13 B. The Government Suppressed Material Evidence Contradict-
14 ing the "Military Necessity" Justification Underlying
The Curfew and Exclusion Orders

15 In Petitioner's case, Petitioner did not deny that he
16 knowingly violated Public Law 503 and the underlying military
17 curfew and evacuation orders. Instead, Petitioner argued and
18 still argues that the fifth amendment "prohibits the
19 discrimination made between citizens of Japanese descent and
20 those of other ancestry." Hirabayashi, 320 U.S. at 89. In

22 ² In Agurs, the evidence concerned failure to disclose a
23 victim's arrest record. The Court pointed out that this evidence
24 had some marginal materiality, but since it did not actually
25 contradict any evidence of the prosecutor and was simply
26 cumulative of other evidence in favor of the accused, it could
not serve to raise doubts regarding the defendant's guilt.
Agurs, 427 U.S. at 113-114. In contrast, Petitioner's case
concerns Government concealment of obviously exculpatory

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2 response to Petitioner's due process argument, the Government
3 presented to the courts a "tailored" factual record to support
4 its argument that military necessity justified the imposition of
5 the military curfew and exclusion orders. The Petitioner argues
6 that the Government attorneys and their agents suppressed
7 exculpatory evidence that would have permitted the Petitioner to
8 rebut the Government's arguments. Therefore, based upon the
9 test set forth in Taylor, this court must now determine whether
10 the omitted evidence seriously prejudices Petitioner, offends
11 elementary standards of justice, or even absent prejudice,
12 undermines public confidence in the administration of justice.

13 The Supreme Court in Hirabayashi made it clear that the
14 Government's claim of military necessity, and therefore
15 constitutionality of the military orders, rested upon the
16 Government's claims regarding the disloyalty and disloyal acts of
17 Japanese Americans. The Court framed the essential question in
18 Hirabayashi as follows: "[w]hether in the light of all the facts
19 and circumstances there was any substantial basis for the
20 conclusion ... that the curfew as applied was a protective
21 measure necessary to meet the threat of sabotage and espionage."

22 Hirabayashi, 320 U.S. at 95.

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24 _____
25 (footnote continued)

26 evidence, unknown to Petitioner, that directly bears on the
27 constitutionality of the statute and military orders under which
28 Petitioner was convicted, and is not cumulative.

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2 As evidenced by the Court's opinion in Hirabayashi, the
3 Government's allegations of Japanese American espionage and
4 sabotage were material to the Supreme Court's decision. In
5 Hirabayashi, the Court stated:

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

17 Id. at 99. The Court added,

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

21 The military commander's appraisal of facts ..., and
22 the inferences which he drew from those facts, involved
23 the exercise of his informed judgement ... [T]hose
24 facts ... support [his] judgment ..., that the danger
25 of espionage and sabotage to our military resources was
26 imminent....

27 Id. at 103-104.

28 The Court's decision on the constitutionality of the
military orders, therefore, rested on the premise that wartime
necessity existed to support the promulgation of military
measures and that there was no other reasonable alternative.
Evidence contradicting both contentions would clearly have been
material to the Court's finding and its consequent judgments.
Each of the documents suppressed refuted different aspects of the
Government's case and, when viewed as a whole, the suppressed

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2 evidence could have undermined the Government's position that any
3 security threat by the Japanese American populace existed. A
4 short examination of documents and their individual significance
5 underscores this point.

6 1. Suppression of the Final Report. It was assumed
7 until recently that only one version of the Final Report, dated
8 June 5, 1943, was composed. However, a previously printed and
9 circulated version containing statements contrary to positions
10 the Government presented to the Supreme Court has been recently
11 discovered. Certain statements made in the Final Report were
12 excised or altered for the express purpose of avoiding an
13 "unfavorable reaction" by the Supreme Court. Needless to say,
14 the Supreme Court never received a copy of the Final Report, and
15 all copies of the Report were recalled, and the galley proofs,
16 galley pages, drafts, and memoranda relating to the original
17 Final Report were destroyed by burning.

18 Among the statements in the Final Report which were altered
19 or excised and suppressed were the following:

20 (a) "It was impossible to establish the identity
21 of the loyal and disloyal with any degree of safety."

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

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2 (c) "The security of the Pacific Coast continues
3 to require ... exclusion of the Japanese ... and will
4 continue for the duration of the present war."

5 Officials of the War Department excised and altered these
6 statements in the original Final Report because the statements
7 stood in direct opposition to the Government's position that the
8 reason for mass evacuation was insufficiency of time to hold
9 individual hearings. In addition, the statements contradicted
10 prior statements made by General DeWitt, thus impairing his
11 credibility. The statements were excised and redrafted to state
12 that "no ready means existed for determining the loyal and
13 disloyal," which even in this revised form was a false or
14 misleading statement. (Revised Final Report, p. 9.)

15 Ignorant of War Department's statements that insufficiency
16 of time was not the reason for the military actions, the Justice
17 Department continued to argue to the courts that the
18 justification for the orders was, in fact, insufficiency of time.
19 The Government stated in its brief to the United States Supreme
20 Court in Hirabayashi: "it would be impossible quickly and
21 accurately to distinguish those persons [who had formed an
22 attachment to, and sympathy and enthusiasm for, Japan] from other
23 citizens of Japanese ancestry." Brief for United States in
24 Hirabayashi v. United States, p 12.

25 2. Suppression of the ONI and Munson Reports on
26 Japanese American Loyalty. The ONI, pursuant to the
27 "Delimitation Agreement," was assigned to investigate the West

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2 Coast Japanese American population. The ONI Report, prepared by
3 Lt. Commander Ringle at the direction of the Chief of Naval
4 Operations, concluded that the majority of Japanese Americans
5 were loyal to the United States. Furthermore, the ONI Report
6 stated that not only were Japanese Americans "Americanized," but
7 that the disloyal could be identified and a mechanism for
8 distinguishing between the loyal and disloyal could have been
9 established. Indeed, other authorities, such as the FBI,
10 recognized that the Japanese Americans presented no grave threat
11 to this country's security.

12 The ONI Report was sent to Attorney General Francis Biddle
13 in 1942 and was known to the Government throughout the trial and
14 appeal of Petitioner's case. Yet this report was never presented
15 to either the courts or Petitioner. Given the assertions in the
16 Government's Hirabayashi brief that the loyalty of Japanese
17 Americans was questionable and that disloyal Japanese Americans
18 could not readily be distinguished with any certainty, the ONI
19 Report was material to any factual rebuttal by Petitioner.

20 3. Suppression of the MID, the FBI, and FCC Reports.
21 The alleged potential for espionage and sabotage by Japanese
22 Americans was central to the Government's argument justifying its
23 curfew and exclusion orders. In both versions of the Final
24 Report, DeWitt argued that the military orders were justified
25 because Japanese Americans were predisposed to acts of espionage
26 and sabotage. In support of his allegations, he cited the
27 interception of unauthorized radio communications and reports of

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2 unauthorized signal lights, implying that Japanese Americans were
3 responsible for such acts.

4 Both the War Department and the Justice Department possessed
5 evidence which flatly refuted these allegations before the
6 Hirabayashi case was decided. This evidence was suppressed from
7 the trial court and the United States Supreme Court. Official
8 records of the MID, FBI, and FCC specifically rejected DeWitt's
9 claim that Japanese Americans committed, or were prepared to
10 commit, acts of espionage or sabotage. The chairman of the FCC,
11 in fact, reported to the Attorney General that every
12 shore-to-ship signal had been investigated and no substantiation
13 of illicit signaling was ever discovered. General DeWitt was
14 informed of this as early as January 9, 1942, yet stated in both
15 versions of the Final Report that illicit radio communication had
16 occurred with the implication of participation by Japanese
17 Americans.

18 As discussed above, the suppressed evidence is highly
19 material and sufficient to establish doubt as to whether the
20 finding of constitutionality would have been made had the
21 evidence been before the Court. Far from being harmless or
22 marginally relevant, the suppressed evidence seriously prejudiced
23 Petitioner's case. The evidence is material under the Mooney and
24 Agurs standards of materiality for false and suppressed evidence.
25 The coram nobis standard set forth in Taylor is fully met.

26 The above-described documents contained facts which
27 contradicted Government assertions of "military necessity" and

28 PETITIONER'S HEARING MEMORANDUM-20

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

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2 thus each was of "obviously exculpatory character", Agurs, 427
3 U.S. at 107.³ Additionally, the records of the MID, FBI, and
4 FCC, would have further undercut the credibility of General
5 DeWitt as a source of accurate factual information concerning the
6 threat posed by the Japanese Americans. Without contrary
7 evidence, however, the courts in general and the Supreme Court in
8 particular were left with a biased, fabricated record. The
9 frustration over the inadequacies of the record was expressed by
10 Justice Jackson in his dissent in Korematsu,

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

19 323 U.S. at 245.

20 C. The Use of Evidence Which The Prosecutor Knew or
21 Should Have Known to be False, and the Failure
22 To Correct or Disclose Such Falsity Violated Peti-
23 tioner's Due Process Rights To a Fair Proceeding.

24 The submission of false evidence by the Justice Department
25 falls within the first category of suppression cases defined by
26 Mooney. The Government presented the courts with false
27 "evidence" suggesting that Japanese Americans engaged in acts of
28 espionage and sabotage. This "evidence" was contradicted by

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30 ' Even if this court considers the suppressed information
31 merely the opinions of military officials, it has been held that
32 (cont. next page)

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2 information in the possession of the Government. The Court,
3 unaware of the falsity of these allegations, relied on these
4 "facts" to uphold the constitutionality of the curfew and
5 exclusion orders.

6 The following summarizes the false evidence submitted:

7 1. The Government asserted that the military orders
8 were necessary because there was insufficient time to separate
9 the loyal from the disloyal. This contention was contradicted by
10 statements in the original Final Report which were withheld and
11 later excised and altered to conceal evidence from the Court.

12 2. The Government asserted that the racial
13 characteristics of Japanese Americans predisposed them to
14 disloyalty.

15 3. The Government's argument that the concentration
16 of Japanese near vital West Coast war industries implied fifth
17 column activities.

18 Unquestionably, the Government's pervasive misconduct "so
19 pollute[d] [the] criminal proceeding as to require a new trial."
20 Taylor, 648 F.2d at 571. The Government's knowing use of false
21 evidence raises to the level of constitutional error rendering
22 the proceeding irregular and invalid. Morgan, 346 U.S. at 502.

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24 _____
25 (footnote continued)

26 due process is violated when the prosecution fails to inform the
27 defense that contrary opinion exist. Ashley v. Texas, 319 F.2d
28 80, 85 (5th Cir. 1963), cert. denied, 375 U.S. 931 (1963).

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2 It is established law that a conviction of a defendant based on
3 false evidence is "inconsistent with the rudimentary demands of
4 justice." Mooney, 294 U.S. at 112. Following Mooney, courts
5 have consistently held that the prosecutor's knowing use of false
6 evidence is unconstitutional. Pyle v. Kansas, 317 U.S. 213
7 (1942); Hysler v. Florida, 315 U.S. 411 (1942); Giglio v. United
8 States, 405 U.S. 150 (1972). It is not only improper for the
9 prosecution to affirmatively misrepresent facts, but it is just
10 as improper for the prosecution to create an inference of guilt
11 by omitting material facts. As stated in Imbler v. Craven, 298
12 F. Supp. 795, 806 (C.D. Cal. 1969), aff'd sub nom. Imbler v.
13 California, 424 F.2d 631 (9th Cir.), cert. denied, 400 U.S. 865
14 (1970):

15 ... omissions and half-truths are equally damaging and
16 prohibited, and their use is no less culpable.
17 Creating an inference that a fact exists when in fact
18 to the knowledge of the prosecution it does not,
19 constitutes the knowing use of false testimony.

18 "Evidence may be false either because it is perjured,
19 or, though not in itself factually inaccurate, because
20 it creates a false impression of facts which are known
21 not to be true." [Citations omitted.]

20 [Emphasis added.]

21 In Petitioner's case, the central issue before the Court was
22 whether the Public Law 503 and the underlying military orders
23 were constitutional. To support its argument of military
24 necessity, the Government used the false evidence described
25 herein to paint a false and misleading picture of imminent threat
26 to the security of the West Coast. Whether by affirmative
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2 misrepresentation, suggestive inference, or by failure to
3 disclose contrary evidence, the Government knowingly and
4 purposefully made a false impression on the courts.

5 III. DUTY TO DISCLOSE EXCULPATORY EVIDENCE EXTENDS TO INVESTI-
6 GATIVE AGENCIES.

7 It is well established that the duty to disclose exculpatory
8 evidence extends not only to prosecuting attorneys, but to the
9 entire Government, including investigative agencies. United
10 States v. Caldwell, 543 F.2d 1333 (D.C. Cir. 1975), cert. denied
11 423 U.S. 1087 (1976); United States v. Bryant, 439 F.2d 642 (D.C.
12 Cir. 1971).

13 In Bryant, the court remanded the case for a determination
14 of the Government's degree of negligence or bad faith in
15 connection with the loss of a tape recording between the
16 defendants and undercover agents of the Bureau of Narcotics and
17 Dangerous Drugs ("BNDD"). The defense attorneys were
18 consistently told by the attorneys for the Government that no
19 tapes of conversations existed. A few days prior to the trial
20 the Government attorneys informed the defendants' attorneys that
21 there had been a tape, but that the BNDD had lost it. Subsequent
22 testimony showed that the tape had been intentionally not
23 preserved and that the U.S. Attorneys Office was not informed of
24 the tape's existence. In stating the safeguards afforded
25 defendants in requiring disclosure of certain evidence by the
26 Government, the court stated:

27 Technically, it may be that evidence which cannot be
28 found is not in the Government's "possession," And, of