

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27 ////

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

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

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

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

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

6 7. G-2 Periodic Reports.

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

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

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

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

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

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

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

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

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

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

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

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

15 B. Alteration and Suppression of Evidence.

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

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

27 ////

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

10 United States v. Arra, supra.

11 1. Alteration and Suppression of Final Report.

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

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

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

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

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

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

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

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

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

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

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

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

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

23 . . .

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

34 . . .

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

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

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

12 . . .

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

19 . . .

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

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

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

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

PETITIONER'S POST-HEARING BRIEF - 32

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

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

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

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

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

29 ////