

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

5 Bendetsen responded to McCloy:

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

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

17 to that portion of Chapter II which said in effect that it  
18 is absolutely impossible to determine the loyalty of Japan-  
19 ese no matter how much time was taken in the process. He  
20 said that he had no objection to saying that time was of the  
21 essence and that in view of the military situation and the  
22 fact that there was no known means of making such a deter-  
23 mination with any degree of safety . . . (emphasis origi-  
24 nal) (p. 4)

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

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



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

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

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

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

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

PETITIONER'S POST-HEARING BRIEF - 35

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

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

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



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

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

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

8  
9 [Emphasis added.]

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

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

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

27 ////

28 PETITIONER'S POST-HEARING BRIEF - 37

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

8 1. Misrepresentation.

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

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



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

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

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

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

23 ////

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



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

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

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

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

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

24 ////

25 ////

26 ////

27 ////



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

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

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

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

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



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

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

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

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



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

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

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

17 Hirabayashi v. United States, supra at 96.

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

22 . . . Whatever views we may entertain regarding the loyalty  
23 to this country of the citizens of Japanese ancestry, we  
24 cannot reject as unfounded the judgment of the military  
25 authorities and of Congress that there were disloyal members  
26 of that population, whose number and strength could not be  
27 precisely and quickly ascertained. We cannot say that the  
28 war-making branches of the Government did not have ground  
for believing that in a critical hour such persons could not  
readily be isolated and separately dealt with, and consti-  
tuted a menace to the national defense and safety, which  
demanded that prompt and adequate measures be taken to guard  
against it.

29 Id. at 99.

30 ////

31 PETITIONER'S POST-HEARING BRIEF - 43

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

4 Id. at 103-104.

5 2. Abuse of Amici.

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

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

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

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

27 ////



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

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

6 3. Continued Misconduct.

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

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

22 The Final Report of General DeWitt (which is dated June 5,  
23 1943, but which was not made public until January 1944) is  
24 relied on in this brief for statistics and other details  
25 concerning the actual evacuation and the events that took  
26 place subsequent thereto. The recital of the circumstances  
27 justifying the evacuation as a matter of military necessity,  
however, is in several respects, particularly with reference  
to the use of illegal radio transmitters and shore-to-ship  
signalling by persons of Japanese ancestry, in conflict with  
information in possession of the Department of Justice. In  
view of the contrariety of the reports on this matter we do



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

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

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

15 (Exhibit 84, Tab 43)

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

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

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

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

34 (Exhibit 2, Tab 90)

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



1 the court's attention:

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

9 (Exhibit 85, Tab 92)

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

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

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

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

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

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



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

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

7 V. ADVERSE LEGAL CONSEQUENCES

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

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

21 VI. CONCLUSION

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

27 ////



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

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

10 After 40 years of enduring his convictions, Mr. Hirabayashi has  
11 remained steadfast in his belief and faith in the American judicial system.  
12 He comes before the Court to vindicate that faith in the Constitution.  
13 Mr. Hirabayashi is motivated by his belief that the Constitution is more than  
14 just a scrap of paper. The record of his convictions, as they stand today,  
15 based upon a record of suppression, alteration and destruction of evidence,  
16 remains a violation of the Constitution and lies like a "loaded weapon." <sup>6</sup> As  
17 Justice Jackson stated in his dissent in Korematsu v. United States, 323  
18 U.S. 214, 246 (1944):

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

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

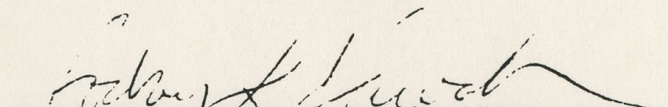


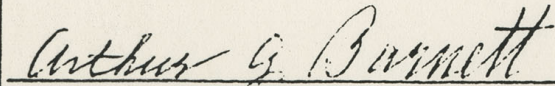
1 . . . .  
2 But if we review and approve, that passing incident becomes  
3 the doctrine of the Constitution. There it has a generative  
4 power of its own, and all that it creates will be in its own  
5 image. Nothing better illustrates this danger than does the  
6 Court's opinion in this case.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

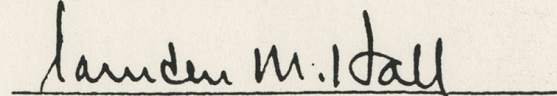
7 As evidenced by the person who from the audience during the eviden-  
8 tiary hearing announced "the reason is because they bombed Pearl Harbor;" by  
9 the letters received by the Petitioner (Exhibits 134 and 138); by the recent  
10 slaying of Vincent Chin, a Chinese American who was beaten to death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

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

23 Respectfully submitted,

24   
25 \_\_\_\_\_  
26 RODNEY L. KAWAKAMI  
27 Attorney for Petitioner

28   
29 \_\_\_\_\_  
30 ARTHUR G. BARNETT  
31 Attorney for Petitioner

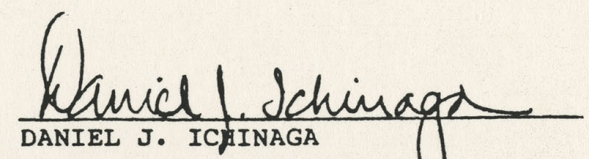
32   
33 \_\_\_\_\_  
34 CAMDEN M. HALL, of  
35 FOSTER, PEPPER & RIVIERA  
36 Attorneys for Petitioner



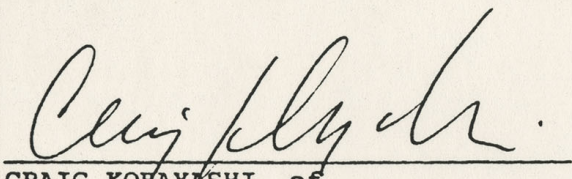
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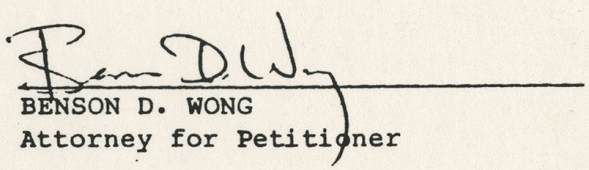
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