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

Bendetsen responded to McCloy:

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

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

> to that portion of Chapter II which said in effect that it is absolutely impossible to determine the loyalty of Japanese no 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 <u>that there was no known means of making such a determination with any degree of safety . . .</u> (emphasis original) (p. 4)

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

> HAVE NO DESIRE TO COMPROMISE IN ANY WAY GOVT CASE IN SUPREME COURT AND DO NOT UNDERSTAND HOW SUBSTANCE AND FORM OF REPORT AS SUBMITTED CAN HAVE THIS AFFECT STOP . . . DO NOT UNDERSTAND MCCLOYS PROPOSAL STOP REPORT IS NOW FACTUAL AND I <u>SOLEMNLY</u> 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

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> DOCUMENT PROPOSALS FOR FUTURE DISPOSITION OF EVACUEES WITHOUT BY MY OWN ACT INVALIDATING MY ASSIGNED MISSION AND RESPONSIBILITIES THEREUNDER STOP.

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

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

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

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

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

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

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

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

> omissions and half-truths are equally damaging and prohibited, and their use is no less culpable. Creating an inference that a fact exists when in fact to the knowledge of the prosecution it does not, constitutes the knowing use of false testimony.
>
> Evidence may be false either because it is perjured, or, though not in itself factually inaccurate, because it creates a false impression of facts which are known not to be true. [Citations omitted.]

[Emphasis added.]

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

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

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

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

1. Misrepresentation.

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

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

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

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

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

> . . . the military situation was so grave, the danger of an enemy attack was so far within the realm of probability, and the peril to be apprehended from treacherous assistance to the enemy on the part of an unknown number of Japanese concentrated 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)

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[4] See Discussion of judicial notice as utilized by the Government in Hirabayashi in Exhibit A-66, Dembitz, RACIAL DISCRIMINATION AND THE MILITARY 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> The German invasion of the Western European countries had given ample warning to the world of the menace of the "fifth column." Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor . . . At a time of threatened attack upon this country, the nature of our inhabitants' attachment to the Japanese enemy was consequently a matter of grave concern.

Hirabayashi v. United States, supra at 96.

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

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

Id. at 99.

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> . . . But as we have seen, those facts, and the inferences which could be rationally drawn from them, support the judgment 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.

Id. at 103-104.

2. Abuse of Amici.

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

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

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

> It is also to be noted that parts of the report which, in April 1942 could not be shown to the Department of Justice in connection with the Hirabayashi case in the Supreme Court, were printed in the brief amici curiae of the States 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.

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> It is entirely clear that the War Department entered into an arrangement with the Western Defense Command to rewrite demonstrably erroneous items in the report by reducing to implication and inference what had been expressed less expertly 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.

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

3. Continued Misconduct.

The Government continued its pattern of misconduct beyond the decision by the Supreme Court in Petitioner's case. Petitioner asserts that Government attorneys are obligated to disclose to a defendant or the courts obviously exculpatory and newly discovered evidence which comes to the Government's attention even after the close of a case. However, not only did it fail to make such disclosures, the Government continued to make misrepresentations to the Court despite its knowledge of evidence to the contrary.

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

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

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

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

> You will recall that General DeWitt's report makes flat statements concerning radio transmitters and ship-to-shore signalling which are categorically denied by the FBI and by the Federal Communications Commission. There is no doubt that these statements were intentional falsehoods, inasmuch as the Federal Communications Commission reported in detail to General DeWitt on the absence of any illegal radio transmission . . . . The statements made by General DeWitt are not only contrary to our views but they are contrary to detailed information in our posession and we ought to say so.

(Exhibit 84, Tab 43)

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

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

(Exhibit 85, Tab 92) Ennis urged to Wechsler that the footnote remain unchanged:

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

(Exhibit 2, Tab 90)

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

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the court's attention:

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

(Exhibit 85, Tab 92)

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

> The Final Report of Generel DeWitt (which is dated June 5, 1943, but which was not made public until January 1944), hereinafter cited as Final Report, is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereof. We have specifically recited in this brief the facts relating to the justification for the evacuation, of 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.

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

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

However, the pattern of misconduct did not stop there. Charles Fahy, in oral argument before the Supreme Court in the Korematsu case, discussed the brief's footnote:

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

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

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

V. ADVERSE LEGAL CONSEQUENCES

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

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

VI. CONCLUSION

As established in the instant proceedings, Petitioner, through its witnesses and exhibits, developed a record which proved a shocking and indefensible pattern of governmental misconduct. In contrast, the record as developed by the Respondent did not significantly rebut the evidence submitted by the Petitioner. No document the Government put into evidence even

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

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

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

> [O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority 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.

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[6] The errors and violations of Petitioner's due process rights are not restricted to those arising from prosecutorial misconduct. Offer of 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.

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. . .

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

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

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

Respectfully submitted,

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