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UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON

GORDON K. HIRABAYASHI,)
)
 Petitioner,) NO. C83-122V
)
 vs.) ORDER
)
 UNITED STATES OF AMERICA,)
)
 Respondent.)
 _____)

Both petitioner and the government feel aggrieved by the rulings made by the Court in its memorandum decision of February 10, 1986, and both have filed motions for the Court to reconsider those rulings.

The government contends that the Court should reconsider the decision it has rendered in this matter for the following reasons:

1. General DeWitt's beliefs were not concealed from anyone, including the Supreme Court, in 1943.
2. General DeWitt was not the sole decision maker.
3. General DeWitt was not ordered to change his report.

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1 4. Petitioner is barred by his delay in seeking relief since
2 General DeWitt's view that there was no way to determine the
3 loyalty of Japanese-Americans was not newly-discovered.

4 With respect to its contention that General DeWitt's beliefs
5 were not concealed in 1943 from anyone, including the Supreme
6 Court, the government places its reliance upon a news story, which
7 was apparently published in the San Francisco News on April 13,
8 1943, and which was reproduced as an appendix to petitioner's reply
9 brief in the Supreme Court. In that news story General DeWitt was
10 quoted as saying:

11 "I don't want any Jap back on the Coast, ...
12 There is no way to determine their loyalty, ...
13 I don't care what they do with the Japs as long
 as they don't send them back here. A Jap is a
 Jap."

14 The government points out that the amicus curiae brief filed
15 by the Japanese-American Citizens League with the Supreme Court
16 also made reference to that news story.

17 The basis for this Court's vacation of petitioner's conviction
18 was the concealment by the government from petitioner's counsel and
19 from the Supreme Court of the considered statement of General
20 DeWitt in the first version of his Final Report that the military
21 necessity for the evacuation was, not that there was insufficient
22 time to separate the loyal from disloyal Americans of Japanese
23 ancestry, but that it was impossible to make that separation no
24 matter how much time was devoted to that task.

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1 The news story upon which the government relies to argue that
2 everyone was aware of General DeWitt's beliefs did not in fact
3 report that General DeWitt made the statements that he did in his
4 Final Report. His reported statements were unquestionably
5 intemperate, but the news story did not report him as saying, as he
6 did in his Final Report, that the military necessity for his
7 exclusion orders was the impossibility of separating the loyal
8 Japanese-Americans from the disloyal ones no matter how much time
9 was devoted to that task.

10 If it were commonly known, as the government contends, that
11 General DeWitt believed that the evacuation was required by the
12 impossibility of separating loyal Japanese-Americans from disloyal
13 ones, one would have expected the Justice Department to so state in
14 its brief to the Supreme Court and to argue forthrightly that the
15 exclusion was justified because it was simply impossible to make
16 that separation no matter how much time was devoted to that task.

17 At no place, however, in its brief before the Supreme Court did
18 the government suggest to the Supreme Court that the military
19 necessity for the exclusion of Japanese-Americans was the
20 impossibility of separating the loyal from the disloyal. The
21 Justice Department did not make that argument. Its argument before
22 the Supreme Court was that there was not time to make that
23 separation.

24 Edward J. Ennis, who was in charge of the preparation of the
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1 briefs of the government before the Supreme Court in the
2 Hirabayashi, Yasui and Korematsu appeals, testified in person before
3 this Court. The Court was tremendously impressed by his integrity,
4 the candor with which he testified, and by his memory of events
5 which transpired over forty years ago. Mr. Ennis testified that he
6 was unaware of the initial version of General DeWitt's final report
7 until June 18, 1985, when it was shown to him by counsel for
8 petitioner, just the day before he appeared as a witness in this
9 Court. The Court is convinced that had he been aware of the
10 statements initially made by General DeWitt in his Final Report, Mr.
11 Ennis would have felt compelled to make full disclosure of those
12 statements to the Supreme Court.

13 Mr. Ennis testified that while the Hirabayashi appeal was
14 pending, he did learn that the War Department had received a printed
15 report from General DeWitt about the Japanese evacuation. He stated
16 that when he asked for a copy of that report, he was told by an
17 officer in the War Department that it was only an internal report
18 that was not to be released. Later, he was told by that same
19 officer that the report might be released later. He was given at
20 that time only thirty pages which had been extracted from the
21 report. One can be sure that those pages did not include the
22 statements of General DeWitt which the War Department had found
23 objectionable.

24 The testimony of Mr. Ennis is borne out by his memorandum (Ex.

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1 39) of February 26, 1944, to Attorney General Francis Biddle in
2 which he stated:

3 "We learned of the existence of General
4 DeWitt's report last Spring when we were trying
5 to get some information for the Hirabayashi
6 brief in the Supreme Court and we were refused
7 a copy of the printed report at that time on
8 the ground that it was confidential between
9 General DeWitt and the War Department but we
10 were given a few pages torn out of a copy
11 merely because they wanted us to have selected
12 facts to support the evacuation."

13 In light of this testimony of Mr. Ennis and the exhibit
14 supporting that testimony it is simply not true that at the time of
15 the Hirabayashi argument everyone knew of General DeWitt's stated
16 belief that the military necessity for the exclusion of Japanese-
17 Americans was the impossibility of separating loyal Japanese-
18 Americans from disloyal ones no matter how much time was devoted to
19 that task.

20 The only tangible support for the government's contention that
21 everyone knew of General DeWitt's belief was a single news story.
22 That news story did not state what General DeWitt stated in his
23 Final Report. Moreover, there is a vast difference in the utility
24 to petitioner's counsel before the Supreme Court of a newspaper
25 account by a nameless reporter on the one hand as contrasted with a
26 formal, printed and signed statement by General DeWitt on the
other.

27 The government's argument that the statements by General
28 DeWitt in his Final Report were of no significance because they

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1 simply stated what everyone knew is belied by the actions taken by
2 the War Department. It is manifest that the War Department was not
3 of the opinion that the beliefs expressed by General DeWitt in his
4 Final Report were known to everyone. There can be no question but
5 that the War Department felt that the Final Report contained
6 statements by General DeWitt which undermined the position of the
7 government in the Japanese-American actions then pending before the
8 Supreme Court. Somehow or another this thought had to have been
9 conveyed to General DeWitt, for in his message of May 5, 1943, (Ex.
10 71) to Brigadier General Barnett he stated that he "had no desire
11 to compromise in any way the government's case in the Supreme
12 Court."

13 The Court must reject the government's argument that General
14 DeWitt's beliefs were not concealed from anyone. The government
15 states in its brief that "[I]n historical perspective, the
16 'impossibility' argument of General DeWitt was unfortunate and
17 misguided" but were not concealed. The Court finds that they were
18 unfortunate, misguided and concealed.

19 In this Court's opinion, the government was under a duty to be
20 scrupulously fair in its dealings with petitioner, for he was no
21 ordinary criminal, his crime no ordinary crime.

22 Petitioner's crime was that he refused to permit himself to be
23 imprisoned without offense and without trial. The order requiring
24 petitioner to report to a designated Civilian Control Station was

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1 but the first step towards his ultimate imprisonment, and
2 petitioner was aware of that when he refused to report. That his
3 imprisonment might be referred to as an internment made it no less
4 an imprisonment, a complete deprivation of his freedom of movement.

5 The exclusion order, ordering in effect the imprisonment of
6 petitioner, was justified only if there was in fact a military
7 necessity for his imprisonment. Under those circumstances the
8 government owed to petitioner a duty of absolute fairness in
9 advising him why it was that his imprisonment was required by
10 military necessity.

11 At a time when he was on the New York Court of Appeals,
12 Justice Cardozo used these words to define the duty owed by one
13 standing in a fiduciary relationship to another:

14 "Not honesty alone, but the punctilio of an
15 honor the most sensitive, is then the standard
of behavior."

16 Meinhard v. Salmon, 249 N.Y. 458, 164 N.E. 545, 62 ALR 1 (1928). In
17 this Court's opinion the standard of behavior of the government
18 toward petitioner was no less high.

19 The government also argues that the 1943 amicus brief filed by
20 the States of California, Oregon and Washington in Hirabayashi
21 "reiterated General DeWitt's impossibility thesis."

22 Rather than supporting the government's argument that this
23 Court was in error in setting aside the conviction of petitioner,
24 that amicus brief reenforces this Court's belief that the

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1 government unfairly withheld knowledge of the DeWitt report from
2 petitioner's counsel.

3 The final version of General DeWitt's Final Report was not
4 made public until January, 1944. The amicus brief of the States of
5 California, Oregon and Washington was filed on May 11, 1943. This
6 date was before the Final Report had been revised. A comparison of
7 the wording of the initial version of the Final Report with
8 excerpts from the amicus brief of the States of California, Oregon
9 and Washington reveals that the initial version had to have been
10 disclosed to the writers of the amicus brief even though it was
11 denied to the Justice Department and to petitioner's counsel. A
12 couple of excerpts from the two demonstrate that disclosure.

13 The initial version of the Final Report stated at page 10:

14 "Research has established that there were over
15 124 separate Japanese organizations along the
16 Pacific Coast engaged, in varying degrees, in
17 common pro-Japanese purposes. This number does
not include local branches of parent
organizations, of which there were more than
310.

18 Research and coordination of information had
19 made possible the identification of more than
20 100 parent fascistic or militaristic
21 organizations in Japan which have had some
22 relation, either direct or indirect, with
23 Japanese organizations or individuals in the
24 United States. Many of the former were parent
25 organizations of subsidiary or branch
26 organizations in the United States and in that
capacity directed organizational and functional
activities. There was definite information
that the great majority of activities followed
a line of control from the Japanese government,
through key individuals and associations to the
Japanese residents in the United States."

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