D'ale Minami
Minami, Tomine & Lew
370 Grand Avenue
Oakland, California 94610
(415) 893-9100

Peter Irons
429 Parkwood Lane
Leucadia, California 92024
(619) 753-0403

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

C83 0277 MHP

FRED TOYOSABURO KOREMATSU,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Crim. No. 27635-W

PETITION FOR WRIT OF ERROR
CORAM NOBIS

From the Judgment of Conviction
September 8, 1942
The Hon. A.F. St. Sure, Judge

All counsel of record
for Petitioner designated
following Petition.

Dale Minami
Minami, Tomine & Lew
370 Grand Avenue
Oakland, California 94610
(415) 893-9100

Peter Irons
429 Parkwood Lane
Leucadia, California 92024
(619) 452-3548

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRED TOYOSABURO KOREMATSU, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Crim. No. 27635-W

PETITION FOR WRIT OF ERROR CORAM NOBIS

From the Judgment of Conviction
September 8, 1942
The Hon. A.F. St. Sure, Judge

All counsel of record
for Petitioner designated
following Petition.

TABLE OF CONTENTS

- - - - -

TABLE OF CONTENTS
(continued)

- - - - -

TABLE OF CONTENTS
(continued)

- - - - -

TABLE OF CONTENTS
(continued)

Dale Minami
Minami, Tomine & Lew
370 Grand Avenue
Oakland, California 94610
(415) 893-9100

Peter Irons
429 Parkwood Lane
Leucadia, California 92024
(619) 452-3548

Attorneys for Petitioner

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

FRED TOYOSABURO KOREMATSU, Petitioner, v. UNITED STATES OF AMERICA, Respondent.	Crim. No. 27635-W PETITION FOR WRIT OF ERROR CORAM NOBIS

Fred T. Korematsu ("Petitioner") alleges as follows:

PARTIES

A. Petitioner

Petitioner FRED TOYOSABURO KOREMATSU is a citizen of the United States and a resident of San Leandro, California.

B. Respondent

Respondent is the UNITED STATES OF AMERICA.

- - - - -

- - - - -

- - - - -

JURISDICTION

Jurisdiction is conferred on this Court by 28 U.S.C. §1651. Included in the powers conferred on federal district courts by this section of the United States Code, known as the All-Writs Act, is the authority to issue writs of error coram nobis and thus to vacate the criminal convictions of defendants who have completed the sentences imposed on them after conviction.

CONVICTION BY THIS COURT OF PETITIONER

Petitioner was convicted in this Court on September 8, 1942 of one count of violation of Public Law 503, 56 Stat. 173. Petitioner was sentenced to a term of five years of probation and imposition of sentence was suspended. Following an order of the United States Supreme Court and subsequent decision by the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court, Petitioner completed service of his probationary sentence.

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

INTRODUCTION

By this petition for writ of error coram nobis, Petitioner seeks to vacate his conviction in 1942 before this court for violation of Public Law 503. His conviction was upheld by the United States Supreme Court in 1944. Petitioner has recently discovered evidence that his prosecution was tainted, both at trial and during the appellate proceedings that followed, by numerous and related acts of governmental misconduct. Both separately and cumulatively, these acts of misconduct constituted fundamental error and resulted in manifest injustice to Petitioner, depriving him of rights guaranteed by the Fifth Amendment to the Constitution of the United States.

A. Relation of This Petition to Those Filed on Behalf of Gordon Hirabayashi and Minoru Yasui

This is an extraordinary petition in many ways. First, it seeks to vacate a conviction that led to a historic and widely cited and debated opinion of the Supreme Court. Second, the allegations of governmental misconduct made below raise the most fundamental questions of the ethical and legal obligations of government officials. Third, the alleged misconduct was committed not only before this court but also before the United States Supreme Court. Fourth, this petition is identical to separate petitions being filed on behalf of Gordon Hirabayashi and Minoru Yasui in the federal district courts in Seattle, Washington and Portland, Oregon, respectively. Hirabayashi and Yasui were also convicted in 1942 of

- - - - -

violation of Public Law 503 and their convictions were upheld by the Supreme Court in 1943.

Although this petition is separate from those filed on behalf of Hirabayashi and Yasui, the remainder of this petition refers collectively to all three defendants as "Petitioners." This collective appellation and format requires explanation and justification. Three related factors make such a presentation not only reasonable but essential: (1) the virtual identity of the legal and constitutional issues raised in Petitioners' cases and decided by the Supreme Court; (2) the relevance of the evidence presented and discussed below to each of Petitioners' cases; and (3) the interrelated pattern of the acts of misconduct alleged below and their impact on each of Petitioners' cases. Petitioners will discuss in more detail below the operation of these factors in their cases; the point is made here to advise the court of the distinctive form of this petition.

B. Background of Petition and Relevance of Appendix

Petitioners' arrests and convictions arose from the decision to incarcerate Japanese Americans during World War II. This decision was initiated early in 1942 by military and civilian officials of the U.S. War Department and was subsequently ratified by President Roosevelt. The historical record makes clear that these officials acted largely in response to political and economic pressure fueled by wartime hysteria and prejudice against Japanese Americans. As a result of this pressure, some 110,000 Japanese Americans were forced

- - - - -

into detention camps for an indefinite period, without the bringing of charges against them.

Adoption of the internment program was achieved over the strenuous opposition of officials of the U.S. Department of Justice, including the Attorney General and several of his subordinates. The grounds for this opposition included doubts about the necessity for mass evacuation and about the constitutionality of the detention without charges of American citizens. Although these Justice Department officials ultimately deferred to the War Department and the President, the relevance of their objections to the issues raised below requires discussion at some length of the events that preceded the evacuation decision. Petitioners respectfully refer the Court to the Appendix to this petition for presentation of these events.

C. Summary of Acts of Governmental Misconduct Alleged by Petitioners

In seeking the vacation of their respective convictions, Petitioners allege below the commission by government officials of numerous acts of misconduct during the entire course of their cases. A continuing and cumulative pattern of misconduct, designed to secure Petitioners' convictions and judicial approval of the evacuation and incarceration program, emerges from these related acts. While the pattern of misconduct alleged below is complex, when unraveled the acts involved can be grouped under four headings. A separate allegation that Petitioners' convictions violate current constitutional standards, which provide a ground for vacation, is made below under a fifth heading. The following summary of

Petitioners' allegations is included at this point to assist the Court in dealing with this necessarily lengthy and complex petition.

POINT ONE: Officials of the War Department Altered and Destroyed Evidence and Withheld Knowledge of This Evidence From the Department of Justice and the Supreme Court.

In April 1943, General John L. DeWitt, who headed the Western Defense Command and issued the military orders at issue in Petitioners' cases, submitted an official report to the War Department on the evacuation and incarceration program. Justice Department officials had requested access to this Final Report for use in the government's Supreme Court briefs in Hirabayashi and Yasui. When War Department officials discovered that the report contained statements contradicting representations made by the Justice Department to the courts, they altered these statements. They subsequently concealed records of the report's receipt, destroyed records of its preparation, created records that falsely identified a revised version as the only report, and withheld the original version from the Justice Department. These acts were committed with knowledge that the contents of this report were material to the cases pending before the Supreme Court.

POINT TWO: Officials of the War Department and the Department of Justice Suppressed Evidence Relative to the Loyalty of Japanese Americans and to the Alleged Commission by Them of Acts of Espionage.

The government relied in Petitioners' cases on purported evidence of widespread disloyalty among the Japanese Americans and the alleged commission by them of

acts of espionage. Presented to the courts as justification of the curfew and exclusion orders at issue, these claims were made in the Final Report of General DeWitt. Responsible officials knew that these claims were false. Reports of the Office of Naval Intelligence directly refuted DeWitt's disloyalty claims, while reports of DeWitt's own intelligence staff and of the Federal Bureau of Investigation and the Federal Communications Commission directly refuted DeWitt's espionage claims. Although the Final Report was before the Supreme Court in Petitioners' cases, these exculpatory reports were withheld from the Court despite the protest of government attorneys that such action constituted "suppression of evidence."

POINT THREE: Government Officials Failed to Advise the Supreme Court of the Falsity of the Allegations in the Final Report of General DeWitt.

When certain Justice Department attorneys learned of the exculpatory evidence discussed in Point Two, infra, they attempted to alert the Supreme Court to its existence and the falsity of the Final Report of General DeWitt. Their effort took the form of a crucial footnote in the government's Korematsu brief to the Court. This footnote explicitly repudiated DeWitt's espionage claims and advised the Court of the existence of countering evidence. Before submission of the brief, War Department officials intervened with the Solicitor General and urged removal of the footnote. As a result of this intervention, the Solicitor General halted printing of the brief and directed that the footnote be revised to the War

Department's satisfaction. The Korematsu brief accordingly failed to advise the Court of the falsity of DeWitt's claims and thus misled the Court.

POINT FOUR: The Government's Abuse of the Doctrine of Judicial Notice and the Manipulation of Amicus Briefs Constituted a Fraud Upon the Courts.

Justice Department and War Department officials undertook separate but related efforts to present a false and misleading record to the courts in Petitioners' cases.

Even before trial of these cases, Justice Department officials decided to utilize the doctrine of judicial notice in presenting "evidence" that the "racial characteristics" of Japanese Americans predisposed them to disloyalty. Despite the rebuff of one trial judge, and knowledge by Justice Department attorneys that countering evidence existed, such tainted "evidence" was included in the Supreme Court briefs in Petitioners' cases. In addition, War Department officials made available to the attorneys general of the West Coast states the Final Report withheld from the Justice Department, and delegated a military officer to assist in preparing the amicus briefs submitted by these states to the Supreme Court. Justice Department attorneys later learned of these acts and concluded they were unlawful, but failed to report these acts to the Supreme Court.

- - - - -

- - - - -

- - - - -

- - - - -

POINT FIVE: Petitioners Are Also Entitled to Relief On the Ground That Their Convictions Are Based on Governmental Orders That Violate Current Constitutional Standards.

The acts of misconduct alleged in the preceding Points provide ample ground for the vacation of Petitioners' convictions. With Petitioners' cases before this Court through the instant petition, the application of current constitutional standards provides an additional ground for vacation. The racial classification involved in the military orders at issue is subject to the "strict scrutiny" standard laid out in subsequent Supreme Court opinions. The government now has the task of proving that such a racial classification is essential to fulfill a compelling governmental interest and that no less restrictive alternative is available. Petitioners argue that application of this standard requires vacation of their convictions.

D. Relevant Statute and Orders at Issue in Petitioners' Cases

For the convenience of this Court, the pertinent provisions of the statute and orders at issue in Petitioners' cases are presented below, along with a summary of the structure and operations of the evacuation and incarceration program of which they formed the legal basis.[1/]

1/ The statute and orders applicable to each Petitioner are presented in the Supreme Court opinions in their respective case, to which this court is respectfully referred. See Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943); and Korematsu v. United States, 323 U.S. 214 (1944).

President Roosevelt signed Executive Order 9066 on February 19, 1942. This order was a broad measure which declared in pertinent part:

> WHEREAS, The successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises and national-defense utilities...:
>
> NOW THEREFORE, By virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas . . . from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion. 2/

On February 20, 1942, Secretary of War Henry L. Stimson exercised the authority granted him in Executive Order 9066 by designating Lt. General John L. DeWitt as Military Commander of the area included in the Western Defense Command, which included the eight westernmost states in the continental United States. General DeWitt first implemented this grant of authority by issuing Public Proclamation No. 1 on March 2, 1942. 3/ This Proclamation established six designated "military areas" within the Western Defense Command. Military Area No. 1 included the western halves of California, Oregon and Washington, and the southern half of Arizona. Military Area

---

2/ 7 Fed. Reg. 1407. Emphasis added.

3/ 7 Fed. Reg. 2320.

No. 2 included the remaining portions of those states, while the other four states within the Western Defense Command were each designated as a military area. In a press release issued on the same date, General DeWitt placed Japanese Americans on notice that "[e]ventually orders will be issued requiring all Japanese including those who are American-born to vacate all of Military Area No. 1."[4/]

On March 21, 1942, President Roosevelt signed Public Law 503. This law was enacted to enforce the military orders authorized by Executive Order 9066 and imposed criminal penalties for their violation. The statute provided in pertinent part:

> [W]hoever shall enter, remain in, leave, or commit any act in any military zone . . . contrary to the restrictions applicable to any such area or zone . . . shall, if it appears he knew or should have known of the existence and extent of the restrictions or order and that this act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense. 5/

On March 24, 1942, General DeWitt issued the first military order following enactment of Public Law 503. Public Proclamation No. 3 imposed a curfew on German and Italian aliens, and all persons of Japanese ancestry. This curfew

- - - - -

4/ Western Defense Command, Press Release No. 3, March 3, 1942, quoted in Jacobus tenBroek et al., Prejudice, War and the Constitution, p. 117.

5/ 56 Stat. 173.

required all designated persons to be in their residences between the hours of 8:00 p.m. and 6:00 a.m.[6/]

General DeWitt then instituted the internment phase of the mass evacuation program. Public Proclamation No. 4, issued on March 27, 1942, prohibited all Japanese Americans from leaving Military Area No. 1 after March 29. This "freeze order" was accompanied by the first of a series of Civilian Exclusion Orders that required the Japanese Americans subject to each order to report to a Civilian Control Center for processing. After processing each person was transferred under guard to an Assembly Center. The first Civilian Exclusion Order required the evacuation of all Japanese Americans from Bainbridge Island, Washington. A total of 108 such orders, each of which affected approximately 1000 Japanese Americans, was issued over a period that ended on June 12, 1942.[7/]

Prior to March 27, 1942, the War Department began construction of ten Relocation Centers located in unpopulated areas of California, Arizona, Colorado, Wyoming, Idaho and Arkansas. These Relocation Centers were administered by the War Relocation Authority, a civilian agency established by President Roosevelt on March 18, 1942 pursuant to Executive Order 9102. These centers were guarded by U.S. Army troops and

---

6/ 7 Fed. Reg. 2543.

7/ To ensure that no Japanese Americans were overlooked by any of these exclusion orders, General DeWitt issued Public Proclamation No. 7 on June 8, 1942, which read in part: "Should there be any areas remaining in Military Area No. 1 from which Japanese have not been excluded, the exclusion of all Japanese from these areas is provided for in this proclamation." 7 Fed. Reg. 4498.

each was designated a "military area" over which General DeWitt retained authority.[8/]

Between March and October 31, 1942, the War Department interned a total of 109,347 persons of Japanese ancestry. By the end of this period all Japanese Americans who had resided within the boundaries of Military Areas No. 1 and 2 were confined within the Relocation Centers. Release of the last Japanese Americans held in custody occurred on March 20, 1946, almost four years after the internment program had begun.[9/]

E. History of Petitioners' Cases

Minoru Yasui was the first of the three Petitioners arrested for violation of the military orders. Yasui violated the curfew imposed by Public Proclamation No. 3 and was arrested in Portland, Oregon on March 28, 1942. Gordon Hirabayashi violated both the curfew and Civilian Exclusion Order No. 57 and was arrrested in Seattle, Washington on May 12, 1942. Fred Korematsu violated Civilian Exclusion Order No. 34 and was arrested in San Leandro, California on May 30, 1942.

Charges based on these violations were brought against each Petitioner by indictment or information in the respective United States District Courts in Portland, Seattle and San Francisco. All three Petitioners pled not guilty to the charges against them and each filed a demurrer to the indictment or information. Each demurrer was subsequently

---

8/ 7 Fed. Reg. 2165.

9/ War Relocation Authority, Semi-Annual Report, January 1 to June 30, 1946, p. 13; quoted in tenBroek, et al., Note 13, supra, p. 13.

denied after hearing. Fred Korematsu was found guilty on September 8, 1942 and was sentenced to five years probation with imposition of sentence suspended. Gordon Hirabayashi was found guilty on October 20, 1942 on the two counts brought against him and sentenced to ninety days on each count, with sentences to run concurrently. Minoru Yasui was found guilty on November 16, 1942 and was sentenced to one year imprisonment and a fine of $5,000.

On September 11, November 16, and November 20, 1942, Korematsu, Hirabayashi and Yasui each appealed their respective convictions to the United States Court of Appeals for the Ninth Circuit. The Circuit Court heard oral arguments in Hirabayashi's and Yasui's cases on March 27, 1943. Invoking a rarely used procedure, the Circuit Court certified the cases to the United States Supreme Court without opinion. Korematsu's appeal was argued in the Circuit Court on April 18, 1943 and was also certified to the Supreme Court on the limited procedural question of whether a suspended sentence was appealable.

The Supreme Court heard oral arguments in all three cases on May 10 and 11, 1943. Ruling that an appeal was properly taken from the suspended probationary sentence, the Supreme Court remanded Korematsu's appeal to the Circuit Court on June 1, 1943. On June 21, 1943, the Supreme Court unanimously upheld the convictions of Hirabayashi and Yasui. In Yasui's case, however, the Court held that the District Judge had erred in ruling the curfew order unconstitutional as applied to

- - - - -

citizens and in ruling that Yasui had forfeited his citizenship, and remanded the case to the District Court for resentencing.

On December 2, 1943, the Circuit Court sustained Korematsu's conviction with an opinion that cited the Supreme Court opinion in Hirabyashi as controlling. Korematsu's petition for certiorari was granted by the Supreme Court on March 27, 1944. The Court heard oral argument in the case on October 11 and 12, 1944. In a six-to-three decision issued on December 18, 1944, the Supreme Court upheld Korematsu's conviction. The Court ruled on the same day in a unanimous opinion in Ex parte Endo (on an appeal from denial of a habeas corpus petition brought by an interned Japanese American) that Congress had not authorized the continuing detention of a concededly loyal citizen.

F. Summary of the Impact of Governmental Misconduct On the Factual and Legal Issues Presented In Petitioners' Cases and Decided by the Supreme Court

The government's misconduct was complex in execution and long in duration. To understand the significance of such misconduct requires an explanation of the legal and factual premises upon which the courts, and the Supreme Court in particular, based their decisions in these cases.

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

The stated purpose of Executive Order 9066 was to provide "every possible protection against espionage and against sabotage" to national defense facilities.[10/] On March 2, 1942, under the authority of Executive Order 9066, General DeWitt issued Public Proclamation No. 1, which did the following:

1. Recited that the entire Pacific coast was "subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations;"

2. Established Military Area No. 1 which included approximately 90% of the Japanese Americans on the mainland; and

3. Announced the planned evacuation of the Japanese American population from this area. 11/

Each of the subsequent military orders affecting Japanese Americans relied upon the findings set forth in Public Proclamation No. 1 for their justification and authority.

In upholding the constitutionality of these orders, the Supreme Court relied heavily upon the ostensible purpose of these orders, as set forth in Executive Order 9066 and Public Law 503, and upon the military's purported "findings" of a threat of espionage and sabotage from the West Coast Japanese Americans.

From the outset, however, in order to justify the incarceration of Japanese Americans, the military and the War Department destroyed, suppressed and manipulated evidence

---

10/ 7 Fed. Reg. 1407.

11/ 7 Fed. Reg. 2320.

so as to create an appearance of a military threat from allegedly disloyal elements within the Japanese American population. Ultimately, attorneys for the Justice Department became aware of such evidence, but capitulated to the War Department's and military's tactics, and suppressed and distorted the "evidence" they chose to place before the Supreme Court in petitioners' cases. Unfortunately, the Supreme Court accepted the government's factual picture of a purported military threat as a true and complete representation of the basis of the military orders and explicitly based its decisions upholding the constitutionality of these orders upon the military's ostensible apprehension of a danger of espionage and sabotage from the Japanese Americans.

Explaining its inquiry into the constitutionality of the military orders at issue in Hirabayashi and Yasui, the Supreme Court stated:

> [O]ur inquiry must be whether in the light of all the facts and circumstances, there was any substantial basis for the conclusion, in which Congress and military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might resaonably be expected to aid a threatened enemy invasion. 12/

Observing that "racial discriminations are in most circumstances irrelevant and therefore prohibited," the Court explained the fundamental legal and moral context in which it made its inquiry:

12/ Hirabayashi v. United States, supra, 320 U.S. at 95.

> Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. Yick Wo v. Hopkins, 118 U.S. 356 ...; Yu Cong Eng v. Trinidad, 271 U.S. 500 ...; Hill v. Texas, 316 U.S. 400.... We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. 13/

In Korematsu, the Court similarly explained at the very outset of its opinion that:

> [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. 14/

Under this standard, the military orders establishing the curfew and ordering the removal of the Japanese Americans from the West Coast required for their justification:

> Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety . . . 15/

Notwithstanding this language, the Court in both Hirabayashi and Korematsu accepted without question, but clearly not without misgivings, the "facts" presented to

---

13/ Id. at 100.

14/ Korematsu v. United States, supra, 323 U.S. at 216.

15/ Id. at 218.

it by the government in support of the constitutionality of the military orders.[16/] Upholding the factual basis of the orders at issue in Hirabayashi, the Court concluded:

> [W]e cannot reject as unfounded the judgment of the military authorities and that of Congress that there were disloyal members of [the Japanese American] 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. 17/

Again, in the specific context of its response to the argument that Public Law 503 effected an unconstitutional delegation of powers, the Court in Hirabayashi declared:

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

16/ Notwithstanding the Supreme Court's conclusion that racial classifications are "odious to a free people," are "immediately suspect" and should be subject to the "most rigid scrutiny," by failing to apply these principles in reviewing the constitutionality of the military orders promulgated by DeWitt, the Court abdicated its responsibilities to petitioners and to the Constitution. In this respect, entirely independent of the manifest injustices put at issue by the instant petition, Petitioners respectfully submit that the Court's original decisions in Korematsu, Hirabayashi and Yasui were themselves fundamentally in error. Indeed, by their consistent reliance upon the principles of strict scrutiny first articulated in Korematsu and Hirabayashi, subsequent decisions of the Supreme Court have made clear that the Court erred in Petitioners' cases in failing to apply in fact the most rigid scrutiny of the invidious racial classifications established by the military orders. See, e.g., Bolling v. Sharpe, 347 U.S. 497, 499 (1954); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Loving v. Virginia, 388 U.S. 1, 11 (1967).

17/ Hirabayashi v. United States, supra, 320 U.S. at 99.

> The military commander's appraisal of facts ..., and the inferences which he drew from those facts, involved the exercise of his informed judgment. ...[T]hose facts ... support [his] judgment, that the danger of espionage and sabotage to our military resources was imminent.... 18/

Finally, in Korematsu, the Court reaffirmed its prior analysis and conclusion in Hirabayashi and added:

> Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom were no doubt loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. 19/

As the Court's choice of language in these passages makes evident, the Court upheld the constitutionality of the military orders at issue in both Hirabayashi and Korematsu on "findings" of facts by General DeWitt. The "facts" upon which the Court relied, however, were not facts at all. Composed of half-truths and outright lies, the "facts" presented to the Court resulted from a deliberate and knowing attempt by the the highest ranking military and civilian officials in the United States government to destroy, suppress and withhold highly credible evidence that no such threat from Japanese Americans as posited by DeWitt ever existed. In place of such evidence, these officials fabricated a factual record composed

---

18/ Id. at 103-104.

19/ Korematsu v. United States, supra, 323 U.S. at 218-219.

of other "evidence," some of which had been discredited as early as January 1942, and argued that the military orders leading to the incarceration of the Japanese American people were justified by such fabrications.

Had the true facts been presented to the Supreme Court, the Court could not have concluded even that "[w]e cannot reject as unfounded the judgment of the military authorities," or that "[w]e cannot say that the War-making branches of the government did not have ground for believing" in the threat ostensibly posed by Japanese Americans. As Petitioners will show, that the military had no such ground was known, not only to DeWitt, but to the Navy, the FBI, the FCC, the War Department and the Department of Justice, and should have been divulged to the Court. As the destruction, suppression and fabrication of evidence was critically material to petitioners' constitutional challenges, petitioners' respective convictions must be vacated.

STATEMENT OF THE CASE

POINT ONE

OFFICIALS OF THE WAR DEPARTMENT ALTERED AND DESTROYED EVIDENCE AND WITHHELD KNOWLEDGE OF THIS EVIDENCE FROM THE DEPARTMENT OF JUSTICE AND THE SUPREME COURT

As noted above, General DeWitt's Final Report on the evacuation of Japanese Americans is of central significance to the allegations of governmental misconduct made in this petition. This official report was prepared to justify the evacuation decision and contained the "disloyalty" and "espionage" claims on which DeWitt purported to base his recommendation for mass evacuation. Until now, it has been believed that there was only one "Final Report." Petitioners have discovered the existence of a prior version which had been printed and formally transmitted to the War Department.

This initial version contained statements known by War Department officials to be material to the loyality issue raised before the Supreme Court in Hirabayashi and Yasui. Moreover, War Department officials knew that statements in the initial version contradicted representations already made to the Courts by the Department of Justice and undermined the credibility of General DeWitt. In order to "clean up" the Report, War Department officials willfully altered these statements to conceal the contradictions. In addition, War Department officials destroyed records and altered and concealed other records to withhold from the Justice Department and the Supreme Court any evidence that an original version of the Report had existed and had been formally submitted to the War Department.

A. The Justice Department Requested Evidence From the War Department For Use in the Government's Briefs in Hirabayashi and Yasui

On April 5, 1943, after certification by the Court of Appeals, the Supreme Court ordered up the entire records in the Hirabayashi and Yasui cases. Argument was set for the week of May 10, 1943. Edward J. Ennis, Director of the Alien Enemy Control Unit of the Department of Justice, undertook supervision of the preparation of briefs in both cases.[1/]

To prepare the briefs, Ennis formally requested the War Department "to supply any published material in the War Department's possession on the military situation on the West Coast at the time of the evacuation to be used in the Hirabayashi brief in the Supreme Court."[2/] Ennis also reported to Solicitor General Fahy with respect to this request on April 19, 1943:

1/ Ennis intended to address the major issues of the curfew and evacuation in the Hirabayashi brief, since Hirabayashi had been convicted of violating both the curfew order and the evacuation order applicable to him. Given the fact that Yasui had been convicted only of curfew violation, and that the District Judge had held that Yasui had forfeited his United States citizenship, a holding with which the United States disagreed, Ennis proposed submitting a "short brief" in the Yasui case "discussing the special question of the defendant's citizenship" and referring the Supreme Court to the Hirabayashi brief for discussion of the curfew issue. Memorandum, Edward J. Ennis to Solicitor General Fahy, April 19, 1943, Folder 3, Box 37, Charles Fahy Papers, Franklin D. Roosevelt Library, Hyde Park, New York [cited hereafter as Fahy Papers]. See Exhibit A.

2/ Memorandum, Edward J. Ennis to Herbert Wechsler, September 30, 1944, Folder 3, Box 37, Fahy Papers. This memorandum was written in connection with the preparation of the Government's brief to the Supreme Court in the Korematsu case. See Exhibit B.

> In this connection the War Department has today received a printed report from General DeWitt about the Japanese evacuation and is now determining whether it is to be released so that it may be used in connection with these cases. The War Department has been requested to furnish any published materials which may be helpful. 3/

Ennis made this request for the purpose of "assisting the Court . . . in the presentation of the factual material" relating to the curfew and evacuation issues raised in the Hirabayashi and Yasui cases. The relevance of material in the possession of the War Department, as the agency responsible for the mass evacuation program and for the military orders that precede and accompanied this program, is obvious.

B. War Department Officials Altered the Final Report To Conceal Contradictions With Representations Made to the Courts By the Department of Justice

Ennis had requested a copy of the Final Report which had been formally transmitted to the War Department by General DeWitt on April 15, 1943. Ten copies of the Report had been printed and bound, and six of these copies had been sent to the War Department. Two of these copies went to Assistant Secretary of War John J. McCloy. In a transmittal letter to McCloy dated April 15, 1943, DeWitt noted that the Report had been shipped Air Express because it was needed for the preparation of the Government's Supreme Court briefs:

> These are going forward via Air Express because I am advised that there is an urgent need of the material contained therein for use in the preparation of the

---

3/ Note 1, supra.

> Federal Government's briefs in the cases now pending before the Supreme Court of the United States challenging the constitutionality of the entire program. 4/

In reviewing the initial version of the Final Report, McCloy discovered a statement by General DeWitt that prompted him to direct that the Report be altered and withheld from the Justice Department. The objectionable statement appeared in Chapter II, entitled "Need for Military Control and For Evacuation." This chapter included both the "military necessity" and disloyalty" claims made by DeWitt in support of the evacuation. The significant paragraph is quoted below in full:

> Because of the ties of race, the intense feeling of filial piety and the strong bonds of common tradition, culture and customs, this population [Japanese Americans] presented a tightly-knit racial group. It included in excess of 115,000 persons deployed along the Pacific Coast. Whether by design or accident, virtually always their communities were adjacent to very vital shore installations, war plants, etc. While it was believed that some were loyal, it was known that many were not. It was impossible to establish the identity of the loyal and the disloyal with any degree of safety. It was not that there was insufficient time in which to make such a determination; it was simply a matter of facing the realities that a positive determination could not be made, that an exact separation of the "sheep from the goats" was unfeasible. 5/

4/ Letter, General DeWitt to McCloy, April 15, 1943, File 319.1, Section I, Records of the Western Defense Command and Fourth Army, Civil Affairs Division, Record Group 338, National Archives and Record Service [NARS], Washington, D.C. See Exhibit C.

5/ Final Report, Japanese Evacuation From the West Coast, 1942, [initial version], p. 9, ibid. Emphasis added. See Exhibit D.

The underscored portion of this paragraph is significant for several reasons. First, DeWitt's assertion that is was "impossible" to separate the loyal and the disloyal among the Japanese Americans contradicted DeWitt's own prior statement of the subject. On December 26, 1941, at a time of greater military uncertainity and potential danger of Japanese attack on the West Coast, DeWitt had opposed mass evacuation with the statement that "I think we can weed the disloyal out of the loyal and lock them up if necessary."[6/] DeWitt offered no evidence in the Final Report to explain his change in opinion. What he did offer were simply suppositions that the "racial characteristics" of Japanese Americans predisposed them to disloyalty.

Second, officials of the War Department and Department of Justice -- including McCloy and Attorney General Biddle -- had known since early 1942 that reports from responsible intelligence agencies flatly contradicted DeWitt's claim that it was impossible to separate the loyal from the disloyal. Evidence of this knowledge and the reports on which it was based is detailed in the following section of this petition.

Third, the statement that considerations of time had not been a factor in the mass evacuation decision contradicted the position consistently taken by the Department of

---

6/ Transcript of telephone conversation, General DeWitt and General Allen W. Gullion, Provost Marshal General, United States Army, December 26, 1941, File 311.3 (Telephone conversations, DeWitt, 1942-43), Record Group 338, Records of the Western Defense Command, National Archives and Records Service, Washington, D.C.

Justice before the courts. Counsel for Hirabayashi and Yasui argued at length in their briefs to the Supreme Court that the prior experience of the British government in conducting individual loyalty hearings for enemy aliens demonstrated the feasibility of this less restrictive alternative to mass evacuation. DeWitt's elimination of the time factor from the evacuation equation was directly and critically relevant to this central question.

McCloy had not expected to receive the Final Report in printed and bound form before he had an opportunity to review it. He communicated his surprise to Colonel Karl Bendetsen in a telephone conversation on April 19, 1943:

> The arrangement that I understood was that you were going to submit a galley that you could go over and we could work on that and make any suggestions . . .. [T]he letter of transmittal is already printed and signed -- completed -- done -- pat. That is what disturbes me. The whole thing disturbs me -- frankly." 7/

At the end of this conversation McCloy ordered Colonel Bendetsen to report to Washington for consultation on the Final Report. Bendetsen subsequently reported to General DeWitt on May 3, 1943, that McCloy objected:

> . . . 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 that there was no known means of

---

7/ Transcript of telephone conversation, Colonel Bendetsen and McCloy, April 19, 1943, note 4, supra. See Exhibit E.

> making such a determination with any degree of safety the evacuation was necessary. 8/

McCloy then instructed Captain John M. Hall of his staff to revise the paragraph from the Final Report quoted above. Hall revised the last two sentences of this paragraph to read as follows:

> To complicate the situation, no ready means existed for determining the loyal and the disloyal with any degree of safety. It was necessary to face the realitites -- a positive determination could not be made. 9/

Hall's revision produced more than a semantic change. It resulted in the complete alteration of DeWitt's original statement and its meaning. DeWitt obviously claimed that it was "impossible" to segregate the Japanese Americans on the basis of loyalty because he assumed that their "racial characteristics" predisposed them to disloyalty. Hall's unsupported statement that "no ready means existed" by which loyalty could be determined shifted the argument to the question of practicality and concealed the racist underpinning of DeWitt's equally unsupported claim. More important, Hall's revision concealed from the Justice Department DeWitt's express admission that the time required to pursue the less restrictive alternative of

---

8/ Memorandum, Colonel Bendetsen to General DeWitt, May 3, 1943, Note 4, supra. Emphasis in original. See Exhibit F.

9/ Memorandum, "Suggested changes by Capt. Hall in "Final Report: Japanese Evacuation from West Coast - 1942'", [no recipient or date noted], ibid. See Exhibit G. This alteration appeared in the published version of the Final Report, Japanese Evacuation From the West Coast, 1942, Washington, D.C.: Government Printing Office, 1943. [Hereinafter cited as DeWitt, Final Report.]

segregation by loyalty had not been a factor in the mass evacuation decision.

The impact of this alteration of the Final Report on Petitioners' cases is undeniable. Barred by McCloy from access to the original version of the Report, the Justice Deprtment erroneously asserted to the Supreme Court in Hirabayashi and Yasui that lack of sufficient time for a loyalty determination had necessitated the adoption of the program of mass evacuation. The Hirabayashi brief, incorporated by reference on this point in the Yasui brief, included this assertion: "Many months, or perhaps years, would be required for such [loyalty] investigations and hearings."[10/] In view of DeWitt's original statement on this question, the consequence of this assertion was to mislead the Court on this crucial issue.

The Supreme Court's reliance on this misleading and erroneous assertion is evident. The Court upheld the curfew order at issue in both Hirabayashi and Yasui on the ground that DeWitt had determined that the Japanese American population included "disloyal members . . . whose number and strength could not be precisely and quickly ascertained" and that such persons could not readily be isolated and separately dealt with" by any means other than the curfew.[11/] Later, in Korematsu, the Court upheld the exclusion order at issue (and

---

10/ Hirabayashi v. United States, 320 U.S. 81 (1943), Brief for the United States, pp. 62-65.

11/ Hirabayashi v. United States, supra, 320 U.S. 81, 99.

the mass evacuation program as well) with quotation of this same excerpt from Hirabayashi.[12/]

The altered version of the Final Report was presented to the Supreme Court in Korematsu after its public release in 1944. Justice Murphy's dissent in Korematsu provides a clear indication that the outcome of Petitioners' cases might have differed had the Court not been misled on this issue. "No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal," Justice Murphy wrote in reference to the Final Report. Rather, "it is asserted that the loyalties of this group 'were unknown and time was of the essence'."[13/] This interior quotation from the Final Report reflected, of course, the alteration of the original version directed by McCloy. Had the Court been aware of DeWitt's initial statement, other members of the Court might well have shared Justice Murphy's doubts.

C. War Department Officials Destroyed Records of the Original Version of the Final Report and Concealed Records of Its Existence From the Department of Justice

After the alteration of the Final Report to eliminate General DeWitt's damaging statements, War Department officials destroyed records of the receipt of the initial version sent to the War Department and records used in its preparation. On May

---

12/ Korematsu v. United States, 323 U.S. 214, 218 (1943).

13/ Id. at 241 (Murphy, J., dissenting).

9, 1943, Colonel Bendetsen transmitted to General James Barnett, Assistant Chief of Staff of the Western Defense Command, the following order from DeWitt:

> Take action to call in all copies previously sent to WD [War Department] less enclosures and to have WD destroy all records of receipt of report as when final revision is forwarded letter of transmittal will be redated. 14/

Two days later, on May 11, DeWitt sent a telegram to the Army Chief of Staff requesting return of the six printed copies of the Final Report that had been sent to the War Department on April 15. DeWitt also requested that "your record [of] receipt of same be cancelled for reason rewritten report in process." 15/

War Department records were subsequently altered to conceal the receipt of the initial version of the Final Report. On June 7, 1943, Captain Hall returned to Colonel Bendetsen the original and copy of General DeWitt's letter of transmittal dated April 15. "War Department records have been adjusted accordingly," Hall reported to Bendetsen. 16/

The final step in the destruction of records took place on June 29, 1943. On that day, the following document

- - - - -

14/ Telegram, Colonel Bendetsen to General Barnett, May 9, 1943, File 319.1, Note 4, supra. See Exhibit H.

15/ Telegram, General DeWitt to Chief of Staff, United States Army, May 11, 1943, ibid. See Exhibit I.

16/ Letter, Captain Hall to Colonel Bendetsen, June 7, 1943, ibid. See Exhibit J.

was submitted to Bendetsen's office by Warrant Officer Theodore E. Smith:

> I certify that this date I witnessed the destruction by burning of the galley proofs, galley pages, drafts and memorandums of the original report of the Japanese Evacuation. 17/

While these records were being destroyed, the altered version of the Final Report was printed and, on June 5, 1943, submitted to the War Department by General DeWitt.[18/] This date has a particular significance to the Hirabayashi and Yasui cases. Although arguments in these cases before the Supreme Court had taken place several weeks earlier, the Court's opinions were not issued until June 21, 1943. The Justice Department's request to the War Department for material relevant to these cases had been made in April and was still outstanding. Notwithstanding this request, and their knowledge that the Final Report had been officially requested, War Department officials did not release the Report until January 1944.

Justice Department officials gained access to the altered version of the Final Report only after its release to the press. The purge of War Department records gave them no hint that any other version of the Report had ever existed. Not until the recent discovery by Petitioners of a copy of the original version in the files of the Western Defense Command, and of the records relating to its alteration, did this shocking episode come to light. The deliberate alter-

---

17/ Memorandum, Warrant Officer Junior Grade Theodore E. Smith, June 29, 1943, Ibid. See Exhibit K.

18/ DeWitt, Final Report, p. vii.

ation and destruction of evidence material to issues raised in Petitioners' cases and decided adversely to them by the Supreme Court speaks for itself.

POINT TWO

OFFICIALS OF THE WAR DEPARTMENT AND THE DEPARTMENT OF JUSTICE SUPPRESSED EVIDENCE RELATIVE TO THE LOYALTY OF JAPANESE AMERICANS AND TO THE ALLEGED COMMISSION BY THEM OF ACTS OF ESPIONAGE

The alteration of the original version of the Final Report, and the destruction of records of its preparation, were directly related to the suppression of authoritative intelligence reports showing that the "evidence" upon which General DeWitt relied to support his assertions of a threat from Japanese Americans was false. These reports conclusively refuted both the disloyalty and espionage allegations made in the Final Report in support of mass evacuation.

Officials of the War Department and the Department of Justice were aware since early 1942 of reports that dealt with the disloyalty and espionage issues. These reports had been submitted by the Office of Naval Intelligence (ONI), the Military Intelligence Division of DeWitt's command (MID), the Federal Bureau of Investigation (FBI), and the Federal Communications Commission (FCC). Collectively, these reports refuted every allegation made in the Final Report. However, none of this exculpatory evidence was presented to the courts which considered Petitioners' cases. Instead, over the objections of the attorneys responsible for the briefs in these cases, the Justice Department knowingly presented to the courts the false factual picture created by DeWitt and the War Department in support of the incarceration program.

- - - - -

- - - - -

A. The Disloyalty and Espionage Allegations Made in the Final Report

Allegations that Japanese Americans constituted a disloyal element among the West Coast population, and that members of this group had committed acts of espionage, provided the twin foundations of DeWitt's justification of mass evacuation in the Final Report. DeWitt's actions could in fact be justified only on an asserted link between these separate allegations. Acts of espionage were in the province of military and civilian intelligence and law enforcement agencies. The mass evacuation and incarceration of all Japanese Americans depended on an assertion of widespread disloyalty among this group, and upon the related assertion that they were predisposed to sympathy to Japan and would commit acts of espionage to further Japanese war aims.

General DeWitt made such an explicit linkage between disloyalty and espionage in his Final Report. He expressed it in the following terms:

> In his estimate of the situation, the Commanding General found a tightly-knit, unassimilated racial group, substantial numbers of whom were engaged in pro-Japanese activities. . . . He had no alternative but to conclude that the Japanese [Americans] constituted a potentially dangerous element from the viewpoint of military necessity -- that military necessity required their immediate evacuation to the interior. . . . There were hundreds of reports nightly of signal lights visible from the coast, and of intercepts of unidentified radio transmissions. . . . The problem required immediate solution.

- - - - -

It called for the application of measures not then in being. 1/

Long before he submitted the Final Report to the War Department, DeWitt had expressed his belief that Japanese Americans were disloyal as a group in statements that literally reeked of racism. On January 4, 1942, more than a month before he recommended mass evacuation, DeWitt made the following statement to an official of the Department of Justice:

> I have little confidence that the enemy aliens are law-abiding or loyal in any sense of the word. Some of them, yes; many, no. Particularly the Japanese. I have no confidence in their loyalty whatsoever. I am speaking now of the native-born Japanese. . . . 2/

The Final Report included a revealing expression of DeWitt's belief that the "racial characteristics" of Japanese Americans predisposed them to disloyalty. DeWitt included in the Report the text of the "Final Recommendation" he submitted to the Secretary of War on February 14, 1942. The following statement appeared in this document:

> In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized',

---

1/ Final Report: Japanese Evacuation From the West Coast, 1942, Washington, D.C.: Government Printing Office, 1943 [hereafter cited as DeWitt, Final Report], pp. 8-9.

2/ Transcript, Conference in Office of General DeWitt, January 4, 1942, File 014.31, Box 7, Record Group 338 [Records of the Western Defense Command and Fourth Army], National Archives and Records Service, Washington, D.C. Emphasis added. See Exhibit L.

> the racial strains are undiluted. . . . It, therefore, follows that along the vital Pacific coast over 112,000 potential enemies, of Japanese extraction, are at large today. 3/

DeWitt's final public statement about the loyalty of Japanese Americans came shortly before his transfer from the Western Defense Command in June 1943. Testifying before a congressional committee on April 13, 1943, that "it makes no difference whether he is an American citizen or not."[4/]

These statements do more than document the consistency of DeWitt's hostility toward Japanese Americans as a racial group. His expression of "no confidence" in the loyalty of Japanese Americans led to the fabrication of "evidence" that members of this group had committed acts of espionage. The espionage allegations in the Final Report thus provide a classic example of the self-fulfilling prophecy in operation.

The Final Report shows the consequence of DeWitt's linkage of disloyalty and espionage. DeWitt included in his "Final Recommendation" for mass evacuation the following prediction that Japanese Americans would engage in acts of espionage:

3/ DeWitt, Final Report, p. 3. Emphasis added.

4/ Quoted in San Francisco Chronicle, April 14, 1943. The printed text of General DeWitt testimony does not contain the first statement quoted above. That testimony, as printed, read in relevant part: "I don't want any of them [persons of Japanese ancestry] here. They are a dangerous element. There is no way to determine their loyalty.... The danger of the Japanese was, and is now -- if they are permitted to come back -- espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese...." Hearings, House Naval Affairs Subcommittee to Investigate Congested Areas, 78th Cong., 1st Sess., Part 3, pp. 739-740.

> Hostile naval and air raids will be assisted by enemy agents signaling from the coastline and the vicinity thereof; and by supplying and otherwise assisting enemy vessels and by sabotage. 5/

Having predicted in the "Final Recommendation" that Japanese Americans would commit espionage, DeWitt was forced by the logic of his prophecy to include "evidence" of espionage in the Final Report. DeWitt made two separate allegations of espionage activities in his Report. One dealt with radio communications from the mainland to Japanese submarines off the coast; the other with the transmission of visual signals to offshore Japanese vessels.

DeWitt first stated that his recommendation of mass evacuation was:

> . . . in part based upon the interception of unauthorized radio communications which had been identified as emanating from certain areas along the coast. Of further concern to him was the fact that for a period of several weeks following December 7th [1941], substantially every ship leaving a West Coast port was attacked by an enemy submarine. This seemed conclusively to point to the existence of hostile shore-to-ship (submarine) communication. 6/

The second espionage allegation in the Final Report came in a section that charged the Department of Justice with having "impeded" the search for "arms, cameras and other contraband" in the possession of Japanese Americans by insisting

---

5/ DeWitt, Final Report, p. 33. Emphasis added.

6/ Id. at 4. Emphasis added.

that premises occupied by citizens could be searched only with the warrant required by the Fourth Amendment. DeWitt accompanied this criticism with the following statement:

> There were hundreds of reports nightly of signal lights visible from the coast . . . . Signaling was often observed at premises which could not be entered without a warrant because of mixed [i.e., alien and citizen] occupancy. 7/

It should be noted that these related allegations of disloyalty and espionage were the only "evidence" offered by General DeWitt to support the mass evacuation and incarceration of Japanese Americans. These allegations in the Final Report were presented to the Supreme Court in Petitioners' cases as the basis of the "military necessity" argument in support of the military orders at issue. It also deserves notice that DeWitt did not directly charge that any of the alleged acts of espionage had been committed by Japanese Americans. Presumably because no person -- of Japanese ancestry or otherwise -- was charged with espionage on the West Coast, DeWitt resorted to implication rather than accusation.

B. Officials of the War Department and the Department of Justice Suppressed the Report of the Office of Naval Intelligence on the Loyalty of Japanese Americans

1. Preparation and Contents of the ONI Report

The responsibility of the Office of Naval Intelligence (ONI) for the investigation of the Japanese American population on the West Coast originated in June 1939. At that time, in

---

7/ Id. at 8.

response to increasing tension between the United States and Japan, President Roosevelt ordered a reorganization of the government's intelligence activities on the West Coast.[8/] The "Delimitation Agreement" of June 4, 1940 further coordinated the operations of civilian and military intelligence agencies and specifically assigned primary responsibility for investigation of the Japanese American population on the West Coast to the ONI.[9/]

Among the most significant of the intelligence reports suppressed by government officials in Petitioner's cases was the ONI report on its investigation of the Japanese Americans submitted to the Chief of Naval Operations on January 26, 1942. Entitled "Report on Japanese Question," this document discussed in detail the question of the loyalty of Japanese Americans on the West Coast. It had been prepared by Lieutenant Commander Kenneth D. Ringle, the official most knowledgeable about Japanese Americans among the personnel of all federal intelligence agencies both before and during the war.[10/]

8/ United States Navy, Office of Naval Intelligence, "United States Naval Administration in World War II," n.d., pp. 66-69. See Exhibit M.

9/ Ibid.

10/ Memorandum, "Japanese Question, Report on," Lieutenant Commander K. D. Ringle to Chief of Naval Operations, January 26, 1942, File BIO/ND 11BF37/A8-5, Records of the United States Navy. See Exhibit N. Note the following statement of Ringle's background and experience: "(a) Three years of study of the Japanese language and the Japanese people as a naval language student attached to

[FOOTNOTE 10/ CONTINUED ON FOLLOWING PAGE]

Pursuant to his duties on the intelligence staff of the Eleventh Naval District, with headquarters in Los Angeles, Commander Ringle assumed primary responsibility for the investigation of the loyalty of Japanese Americans. He maintained close contact with Japanese Americans and with officials in other intelligence agencies. His periodic reports, in particular that of January 26, 1942, thus constituted the most expert and definitive intelligence on the loyalty question.

In his report of January 26, 1942, Commander Ringle concluded that the vast majority of Japanese Americans were loyal to the United States and presented little danger to military security. He admitted that a small number among the entire Japanese American population represented a potential military danger, noting that:

> . . . there are among the Japanese, both alien and United States citizens, certain individuals, either deliberately placed by the Japanese government or actuated by a fanatical loyalty to that country, who would act as saboteurs or agents. This number is estimated to be less than three percent of the total, or about 3500 in the entire United States. 11/

[FOOTNOTE 10/ CONTINUED FROM PREVIOUS PAGE]

the United States Embassy in Tokyo from 1928 to 1931. (b) One year's duty as Assistant District Intelligence Officer, Fourteenth Naval District (Hawaii) from July 1936 to July 1937. (c) Duty as Assistant District in charge of Naval intelligence matters in Los Angeles and vicinity from July 1940 to the present time." Pp. 3-4.

11/ Id. at 2.

Commander Ringle added to this estimate the significant statement that the identities of the potentially disloyal were easily discoverable:

> . . . of the persons mentioned . . . above, the most dangerous are either already in custodial detention or are members of such organizations as the Black Dragon Society, the Kaigun Kyokai (Navy League), or the Haimusha Kai (Military Service Men's League), or affiliated groups. The membership of these groups is already fairly well known to the Naval Intelligence service or the Federal Bureau of Investigation. . . . 12/

On the basis of these informed estimates and his personal knowledge of the Japanese Americans, Commander Ringle came to the following conclusion:

> That, in short, the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people; that it is no more serious than the problems of the German, Italian, and Communistic portions of the United States population, and, finally that it should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis. 13/

Most importantly, in accordance with the existing "Delimitation Agreement" between the federal intelligence agencies, Commander Ringle's report was available to both the Federal Bureau of Investigation and to General DeWitt through the staff of the Military Intelligence Division (MID) of the Western Defense Command.

- - - - -

12/ Ibid.

13/ Id. at 3.

2. The Government's Knowledge of the ONI Report

It is significant that the ONI Report came to the personal attention of both Attorney General Biddle and Assistant Secretary of War McCloy before General DeWitt issued the curfew and exclusion orders applicable to Petitioners. Biddle transmitted the report to McCloy on March 9, 1942, with a letter that read: "You will be interested in the enclosed confidential report of the Office of Naval Intelligence with respect to the Japanese situation on the West Coast."[14/] McCloy responded on March 21, 1942, with a letter that included the following:

> I spent some time on the West Coast, returning yesterday, and while out there I talked at some length with Commander Ringle and other officials of the Office of Naval Intelligence, 12th Naval District. I was greatly impressed with Commander Ringle's knowledge of the Japanese problem along the coast. 15/

Additionally, the substance and conclusions of the ONI Report came to the attention of officials of the Department of Justice during preparation of the Government's brief to the Supreme Court in the Hirabayashi case. Subsequent to his preparation of the report of January 26, 1942, Commander Ringle prepared, at the request of officials of the War Relocation

- - - - -

14/ Biddle to McCloy, March 9, 1942, File ASW014.311 [Eastern Defense Command, Exclusion Order Reports], Entry 47, Box 6, Record Group 107, Records of the Assistant Secretary of War, National Archives and Records Service, Washington, D.C. See Exhibit O.

15/ McCloy to Biddle, March 21, 1942, See Exhibit P.

Authority (WRA), an expanded 57-page report entitled "The Japanese Question in the United States."[16/] This report discussed in detail such questions as dual citizenship, the Shinto religion, the education in Japan of the American-born "Kibei" group, and the basic loyalty of Japanese Americans. On each of these questions, Commander Ringle presented authoritative data that contradicted or substantially qualified the allegations made in the Final Report of General DeWitt. In effect, the report prepared by Commander Ringle for the War Relocation Agency controverted every piece of "evidence" submitted to the Supreme Court on the loyalty issue by the Department of Justice in Petitioners' cases.

The ONI Report of January 26, 1942, along with excerpts from the report submitted to the WRA on June 15, 1942, was subsequently published in summary form in the October, 1942 issue of Harpers Magazine. This article was anonymously published under the title "The Japanese in America, The Problem and Solution," under the pseudonym "An Intelligence Officer."[17/] In April, 1943, this article came to the attention of Edward J. Ennis of the Department of Justice, who was then responsible for preparation of the Government's brief to the Supreme Court in the Hirabayashi case. Ennis subsequently identified Commander Ringle as the author of the magazine

---

16/ Memorandum, "The Japanese Question in the United States," Lt. Commander K. D. Ringle, June 15, 1942, "Commander Ringle File." Box 573, Record Group 210, Records of the War Relocation Authority, National Archives and Records Service, Washington, D.C.

17/ Harpers Magazine, Vol. 185, No. 1109 (October 1942), p. 489.

article and obtained copies of the reports on which it was based.[18/]

3. The Government's Suppression of the ONI Report

On April 30, 1943, Ennis informed Solicitor General Fahy of his knowledge of the ONI Report and its contents. Given the importance of the memorandum from Ennis to Fahy, it is quoted below at length:

> . . . I have repeatedly been told that the Army, before the war, agreed in writing to permit the Navy to conduct its Japanese intelligence work for it. I think it follows, therefore, that to a very considerable extent the Army . . . is bound by the opinion of the Naval officers in Japanese matters. Thus, had we known that the Navy thought that 90 percent of the evacuation was unnecessary, we could strongly have urged upon General DeWitt that he could not base a military judgment to the contrary upon Intelligence reports, as he now claims to do.
>
> Lt. Com. Ringle's full memorandum is somewhat more complete than the version published in Harpers and I think you will be interested in reading it . . . . [I]t is my opinion that this is the most reasonable and objective discussion of the security problem presented by the presence of the Japanese minority. In view of the inherent reasonableness of this memorandum and in view of the fact that we now know that it represents the view of the Intelligence agency having the most direct responsibility for investigating the Japanese from the security viewpoint, I feel that we should be extremely careful in taking any position on the facts more hostile to the Japanese than the position of Lt. Com. Ringle. . . . Furthermore, in

---

18/ Memorandum, Ennis to Solicitor General, April 30, 1943, File 146-42-20, #8, Records of the Department of Justice. See Exhibit Q.

> view of the fact that the Department of Justice is now representing the Army in the Supreme Court of the United States and is arguing that a partial, selective evacuation was impracticable, we must consider most carefully what our obligation to the Court is in view of the fact that the responsible Intelligence agency regarded a selective evacuation as not only sufficient but preferable. It is my opinion that certainly one of the most difficult questions in the whole case is raised by the fact that the Army did not evacuate people after any hearing or on any individual determination of dangerousness, but evacuated the entire racial group . . . . Thus, in one of the crucial points of the case the Government is forced to argue that individual, selective evacuation would have been impracticable and insufficient when we have positive knowledge that the only Intelligence agency responsible for advising General DeWitt gave him advice directly to the contrary.
>
> In view of this fact, I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that this represents the view of the Office of Naval Intelligence. It occurs to me that any other course of conduct might approximate the suppression of evidence. 19/

Despite this clear warning of the Government's duty to the Supreme Court, the Solicitor General ignored Ennis' memorandum. Although the Attorney General, the Assistant Secretary of War, and the Solicitor General each had personal knowledge of the existence and contents of the ONI Report, and knew that it controverted statements made to the Court on the loyalty issue, the Government's briefs to the Supreme Court in

- - - - -

19/ Ibid.

Hirabayashi and Yasui contained no mention whatsoever of the ONI Report.

4. The Impact of Suppression of the ONI Report on Petitioners' Cases

Suppression of the ONI report had a direct and adverse impact on the outcome of Petitioners' cases. The report made clear that allegedly disloyal members of the Japanese American population could easily have been identified and segregated. As a less restrictive alternative to the mass evacuation and incarceration of the entire group, this would have been an admittedly preferable course. However, in contradiction of the ONI Report, the Government claimed in its Hirabayashi brief that such an alternative was impossible:

> If those Japanese who might aid the enemy were either known or readily identifiable, the task of segregating them would probably have been comparatively simple. However, the identities of the potentially disloyal were not readily discoverable. 20/

The Government thus concluded that mass evacuation was necessary: "Since they [the disloyal] were not easily identifiable, the only certain way of removing them was to remove the group as a whole."[21/]

The Government made a similar claim in its Korematsu brief:

20/ Hirabayashi v. United States, 320 U.S. 81 (1943), Brief for the United States, p. 61.

21/ Ibid. These arguments were presented by reference to the Supreme Court in the Yasui brief. 320 U.S. 115 (1943), Brief for the United States, p. 8.

> There was a basis for concluding that some persons of Japanese ancestry, although American citizens, had formed an attachment to, and sympathy and enthusiasm for, Japan. It was also evident that it would be impossible quickly and accurately to distinguish these persons from other citizens of Japanese ancestry. 22/

The Government's claims on this issue clearly affected the opinions of the Supreme Court. The Court expressed its agreement with these claims in the following statement in its Hirabayashi opinion:

> Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment . . . 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 . . . such persons could not readily be isolated and separately dealth with. . . . 23/

The Supreme Court also cited this passage in the Korematsu opinion in upholding the exclusion order at issue. 24/

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

22/ Korematsu v. United States, 323 U.S. 214 (1944), Brief for the United States, p. 12. Footnote omitted.

23/ Hirabayashi v. United States, supra, 320 U.S. 81, 99.

24/ Korematsu v. United States, supra, 323 U.S. 214, 218.

The importance of the ONI Report to Petitioners' cases cannot be overstressed. Based on first-hand knowledge and access to all relevant information on the loyalty of Japanese Americans, it explicitly recommended against mass evacuation or other restrictive measures directed against Japanese Americans as a group. The ONI Report also directly refuted the unsupported disloyalty allegations made by General DeWitt in his Final Report. The suppression of this crucial document both from the courts and from Petitioners clearly constituted an egregious act of governmental misconduct.

C. Officials of the War Department Suppressed Reports of the Military Intelligence Division That Refuted the Espionage Allegations in the Final Report

Among the most important records that show the falsity of the espionage allegations made by General DeWitt in his Final Report are those of DeWitt's own Military Intelligence Division (MID, or G-2). The suppression of these G-2 reports is of particular significance to Petitioners' cases, since they were submitted to DeWitt personally by members of his staff before the recommendation for mass evacuation and since they directly refuted DeWitt's statements in the Final Report.

Beginning on January 3, 1942, MID officials submitted directly to DeWitt a weekly "G-2 Periodic Report" that included assessments of enemy capabilities and intelligence sources. These reports were based on radio monitoring, aerial and naval

- - - - -

- - - - -

- - - - -

reconnaissance, and reports from G-2 installations along the West Coast from San Diego to Alaska.[25] The first five of these weekly reports, dated January 3 through January 31, 1942, identically stated:

> The enemy's probable knowledge of our situation has not been gained by observation or reconnaissance but by information learned during peace and the activities of fifth-columnists. [26]

Beginning on February 7, 1942, and continuing through May 16, 1942 -- at which time all of the military orders applicable to Petitioners had been issued -- these G-2 reports contained a significant revision and uniformly stated:

> The enemy's probable knowledge of our situation has not been gained by observation or reconnaissance but by information learned during peace by the activities of accredited, diplomatic, military and naval attaches and their agents. [27]

As noted above, DeWitt cited in his Final Report as a justification for mass evacuation "hundreds of reports nightly of signal lights visible from the coast" and "the nightly observation of visual signal lamps from constantly changing

---

25/ The reports for this period are located in Records of the Western Defense Command, G-2 Section, Weekly Intelligence Reports, 1942-1946, Record Group 338, Boxes 28-29, National Archives and Records Service, Washington National Records Center, Suitland, Maryland. Those reports submitted through February 28, 1942, were signed by Colonel D. A. Stroh; those submitted through March 21, 1942, by Colonel J. H. Harrington; and those submitted through May 16, 1942 by Colonel John Weckerling.

26/ G-2 Periodic Report, No. 3, January 31, 1942. Id. Emphasis added. See Exhibit R.

27/ G-2 Periodic Report, No. 20, May 16, 1942, Id. Emphasis added. See Exhibit S.

locations...."[28] The obvious implication of these statements was that Japanese Americans had been signaling to Japanese submarines off the coast. However, an Air Force intelligence report submitted to DeWitt on February 26, 1942 stated:

> Numerous flares, signal lights, and unidentified naval surface craft have been reported, but not included in this report because of:
>
> (1) The unreliability of source, or
>
> (2) Improbability of information, or
>
> (3) Negative investigation reports have included more reasonable or more probable natural causes for reported phenomena. [29]

Although DeWitt's own intelligence staff could find no evidence of espionage by Japanese Americans, DeWitt included such allegations in his Final Report and suppressed the G-2 reports that refuted his allegations. Suppression of the reports that eliminated prior references to "fifth-column" activities had a direct impact on Petitioner's cases. The Government's briefs to the Supreme Court stressed the "fifth-column" threat allegedly posed by Japanese Americans, and the Court specifically noted in Hirabayashi "the menace of the 'fifth column'" in the context of the Court's expression of "grave concern" about the loyalty of Japanese Americans.[30]

- - - - -

28/ DeWitt, Final Report, p. 8.

29/ 4th Air Force Periodic Intelligence Report, February 26, 1942, note 25, supra.

30/ Hirabayashi v. United States, supra, 320 U.S. at 96.

Suppression of the exculpatory evidence contained in the G-2 reports thus constituted an act of governmental misconduct.

D. Officials of the War Department and the Department of Justice Suppressed Reports of the Federal Bureau of Investigation and the Federal Communications Commission That Refuted the Espionage Allegations in the Final Report

1. Initial Reports of the FBI and FCC on Espionage

Well before the outbreak of war between the United States and Japan, the Federal Bureau of Investigation (FBI) and the Federal Communications Commission (FCC) were actively engaged in the investigation of espionage activities on the West Coast and elsewhere in the country. After the Japanese attack on Pearl Harbor and the declaration of war on Japan, officials of both agencies worked closely with General DeWitt and his intelligence staff in this field. Reports of the FBI and FCC were available to DeWitt before his recommendation of the mass evacuation and incarceration of Japanese Americans that refuted the espionage allegations made in the Final Report. In addition, Justice Department officials failed to bring these reports to the attention of the courts or Petitioners despite their exculpatory nature and their obvious relevance to Petitioners' cases.

The FBI played a direct role in the investigation of espionage. Pursuant to a secret directive issued by President Roosevelt in 1939, the FBI was assigned to investigate cases of "actual or strongly presumptive espionage or sabotage" within the United States. Accordingly, prior to and during the war the FBI conducted investigations of alleged acts of espionage

or sabotage by Japanese Americans both on its own initiative and at the request of military intelligence agencies and state and local police.[31/]

In March 1941, the FBI participated in the "surreptitious entry" of the Japanese consulate in Los Angeles, an undertaking of the Office of Naval Intelligence under the leadership of Lt. Commander Ringle.[32/] Based on the lists of Japanese agents and sympathizers obtained in this raid and records seized during the subsequent arrest of Japanese agent Tachibana, the Japanese espionage network on the West Coast was dismantled in June 1941.[33/] The names of those discovered to be Japanese sympathizers or spies were added to the Justice Department's "ABC" list of dangerous aliens. Some 1,370 Japanese aliens on the "ABC" list were arrested within five days of the Pearl Harbor attack.

FBI Director J. Edgar Hoover ordered a follow-up investigation of possible Japanese American espionage after the consular break-in. On November 8, 1941, Nat J.L. Pieper, Special Agent in Charge of the San Francisco FBI office, reported to Hoover that:

> . . . practical results of espionage investigations of Japanese have been meager . . . [T]he reason for lack of practical results is that although surveillances, spot checks, and a thorough and logical investigation of individuals reported to be engaged in espionage activi-

---

31/ Note 8, supra.

32/ See Appendix, infra, note 7.

33/ Ibid.

> ties has been conducted, no evidence has been obtained indicating that any have been guilty of violating any federal statutes for which prosecution would lie. 34/

In the period that followed the outbreak of war, the FBI continued to investigate all reports of espionage and sabotage. A number of these reports were transmitted to the FBI by Army personnel under the command of General DeWitt. Included were reports that Japanese Americans had committed acts of sabotage against the electric power lines and had lit "arrows of fire" designed to point Japanese airplanes toward military targets. Hoover discussed these reports in a December 17, 1941, memorandum to senior members of his staff. Reporting on a telephone conversation with Pieper, Hoover noted that:

> . . . there was no sense in the Army losing their heads as they did in the Bonneville Dam Affair, where the power lines were sabotaged by cattle scratching their backs on the wires, or the 'arrows of fire' near Seattle, which was only a farmer burning brush as he had done for years. 35/

At no time in the period that preceded completion of the mass evacuation and incarceration of Japanese Americans did FBI reports substantiate any of the claims later made by General DeWitt in his Final Report of acts of espionage or sabotage.

34/ Memorandum, Special Agent in Charge N.J.L. Pieper to J. Edgar Hoover, November 8, 1941, File 100-71-1, Records of the Federal Bureau of Investigation. See "Memorandum on Pearl Harbor Attack and Bureau's Activities Before and After." Id.

35/ Memorandum J. Edgar Hoover to Mr. Tolson, Mr. Tamm, and Mr. Ladd, December 17, 1941, File 100-97-1-67, Records of the Federal Bureau of Investigation. See Exhibit T.

The Federal Communications Commission was responsible for all radio monitoring in the United States before and during the war. Shortly after Pearl Harbor General DeWitt requested that the FCC supplement existing stationary monitoring facilities with mobile direction-finding intercept units to detect shore-to-ship radio transmissions. Subsequently, on January 9, 1942, DeWitt and his staff met with George E. Sterling, Chief of the FCC's Radio Intelligence Division. Sterling informed DeWitt at this meeting that the FCC's round-the-clock surveillance of the entire radio communications spectrum would detect any illicit radio transmitters.[36/]

Following a discussion at this meeting of the FCC's capabilities and expertise, DeWitt established the Radio Intelligence Center (RIC) under the direction of the FCC. RIC operated as the central clearance agency on matters relating to radio intelligence and communications. Both the Army and Navy maintained direct telephone communications with RIC and had liaison personnel at the Center.[37/]

Sterling came away from the meeting with DeWitt on January 9, 1942 with an impression that DeWitt and his staff were incompetent in the radio intelligence field. He expressed this attitude in a candid and scathing memorandum dated January 9:

36/ Memorandum, "Conference With General DeWitt at San Francisco, Friday January 9th [1942], Files of the Radio Intelligence Division, Record Group 173, Records of the Federal Communications Commission, National Archives and Records Service, Washington, D.C. See Exhibit U.

37/ Memorandum, Fly to Biddle, April 4, 1944, Box 37, Folder 3, Fahy Papers, FDRL. See Exhibit V.

> The General launched into quite a discourse on the Japanese and other foreign language programs, radio transmitters operated by enemy agents in California sending messages to ships at sea, and a general discussion of the enemy aliens and all Japanese in the area followed.
>
> Since Gen'l DeWitt seemed concerned and, in fact, seemed to believe that the woods were full of Japs with transmitters, I proceeded to tell him and his staff the organization [of the FCC radio monitoring program]. I know it virtually astounded the General's staff officers . . . .
>
> Frankly, I have never seen an organization that was so hopeless to cope with radio intelligence requirements . . . . The personnel is unskilled and untrained. Most are privates who can read only ten words a minute. They know nothing about signal identification, wave propagation and other technical subjects, so essential to radio intelligence procedure. They take bearings with loop equipment on Japanese stations in Tokio . . . and report to their commanding officers that they have fixes on Jap agents operating transmitters on the West Coast. These officers, knowing no better, pass it on to the General and he takes their word for it. It's pathetic to say the least . . . .
>
> Furthermore, Army reports Navy stations as being Japs and vice versa . . . . Whenever a station cannot be identified they call F.C.C. Consequently, it is easy to understand the hundreds of calls that have been made to the F.C.C. office in S.F. They look to the F.C.C. as an authority on all matters pertaining to radio communications other than their own. 38/

Despite Sterling's assurance that the FCC had detected no illicit radio transmissions, and the constant communication of his staff with RIC personnel, DeWitt continued to accuse Japanese Americans of radio espionage. DeWitt's charges were

---

38/ Note 36, supra. Emphasis added.

accepted as fact at the highest levels of command. On January 25, 1942, only 15 days after DeWitt's meeting with Sterling, Secretary of War Stimson urged Attorney General Biddle to accept DeWitt's first written evacuation proposal on the basis of these unfounded charges:

> In recent conferences with General DeWitt, he has expressed great apprehension because of the presence on the West Coast of many thousand alien enemies. As late as yesterday, 24 January, he stated over the telephone that shore-to-ship and ship-to-shore radio communications, undoubtedly coordinated by intelligent enemy control were continually operating . . . . The alarming and dangerous situation just described, in my opinion, calls for immediate and stringent action. 39/

Although the FBI and FCC found no evidence of Japanese American involvement in espionage or sabotage, DeWitt deliberately included in his Final Report the discredited allegations of shore-to-ship signaling and radio transmissions. These allegations formed the core of the "military necessity" argument for the mass evacuation and incarceration of Japanese Americans. DeWitt included no mention in the Final Report of the FBI and FCC investigations and findings of which he had knowledge.

- - - - -

- - - - -

- - - - -

39/ Stinson To Biddle, January 25, 1942, Record Group 107, Records, the Assistant Secretary of War, National Archives and Records Service, Washington, D.C. Quoted in R. Daniels, The Decision to Relocate the Japanese Americans (J.B. Lippincott Co. 1975) pp. 23-24.

2. FBI and FCC Refutations of DeWitt's Espionage Allegations

As noted above, War Department officials withheld release of the Final Report until January 1944. The falsity of DeWitt's espionage allegations was thus concealed from the Justice Department during consideration of the Hirabayashi and Yasui cases by the Supreme Court. Justice Department officials learned of the Report's release on January 20, 1944, through an article in the Washington Post headlined "Japs Attack All Ships Leaving Coast." Attorney General Biddle shortly thereafter requested reports from the FBI and FCC on the veracity of DeWitt's charges. This action was prompted by Edward J. Ennis and John L. Burling of the Alien Enemy Control Unit, who were then responsible for preparation of the Government's brief to the Supreme Court in the Korematsu case.

FBI Director Hoover submitted a detailed report to the Attorney General on February 7, 1944, entitled "Reported Bombing and Shelling of the West Coast." In his cover memorandum to this report, Hoover summarized the FBI's findings:

> Certain statements were made in the report indicating that immediately after the attack on Pearl Harbor there was a possible connection between the sinking of United States ships by Japanese submarines and alleged Japanese espionage activity on the West Coast. It was also indicated that there had been shore-to-ship signaling, either by radio or lights, at this time.
>
> As indicated in the attached memorandum, there is no information in the possession of this Bureau as the result of investigations conducted relative to submarine attacks and espionage activity on the West Coast which would indicate that attacks made on ships or shores in the area

> immediately after Pearl Harbor have been associated with any espionage activity ashore or that there has been any illicit shore-to-ship signaling, either by radio or lights. 40/

In an additional comment on DeWitt's allegations of shore-to-ship signaling, Hoover stated:

> Every complaint in this regard has been investigated, but in no case has any information been obtained which would substantiate the allegations that there has been illicit signaling from shore-to-ship since the beginning of the war. 41/

Preceding the Attorney General's request for an FCC report on DeWitt's charges, John L. Burling met on February 23, 1944, with George E. Sterling, Chief of the Radio Intelligence Division of the FCC. Burling's report to Ennis of this meeting stated the following:

> Mr. Sterling read to me reports transmitted by his representatives of their discussions with General DeWitt's radio intelligence officers, in which it was explained to the Army men that their fixing operations were being poorly conducted . . . . His men also reported to the Army in every case in which the Army referred a complaint to them, and thus the Army had notice that every complaint was unfounded. 42/

40/ Memorandum, J. Edgar Hoover to the Attorney General, February 7, 1944, Folder - Japanese Relocation Cases III, Box 37, Fahy Papers Franklin D. Roosevelt Library, Hyde Park, N.Y. [hereafter cited as Fahy Papers, FDRL]. The date indicated is that of receipt of the memorandum by the Office of the Attorney General. See Exhibit W.

41/ Ibid.

42/ Burling to Ennis, February 23, 1944, Section 23, File 146-13-7-2-0, Records of the Department of Justice. Emphasis added. See Exhibit X.

On February 26, 1944, Attorney General Biddle requested a report from FCC Commissioner James L. Fly. In response to a request from Fly for material to assist in the FCC report, Sterling submitted a detailed memorandum dated March 25, 1944 on the activities of the Radio Intelligence Center established at DeWitt's order and its coordination with DeWitt's intelligence staff. This memorandum covered the period from December 1, 1941 to July 1, 1942 and concluded:

> During this entire period of operation, no illegal radio stations were found within the confines of the Evacuated Area of the Western Defense Command. 43/

Most significantly, in a report to Biddle dated April 4, 1944, Commissioner Fly brought Sterling's January 9, 1942 memorandum to the attention of the Attorney General. This report similarly concluded:

> There were no radio signals reported to the Commission which could not be identified, or which were unlawful. Like the Department of Justice, the Commission knows of no evidence of any illicit radio signaling in this area during the period in question. 44/

Although Biddle had received the reports from Hoover and Fly six months before it submitted its brief to the Supreme Court in Korematsu, the government's briefs make no mention whatsoever of the findings of the FBI and the FCC; nor was the existence of these reports ever disclosed to Korematsu's

---

43/ Memorandum to the Chief Engineer, March 25, 1944, note 36, supra. See Exhibit Y.

44/ Fly to Biddle, April 4, 1944, Folder 3, Box 37, Fahy Papers, FDRL. See Exhibit V.

attorneys. As will be discussed below, the veracity of the Final Report was allowed to go unchallenged before the Supreme Court although the Justice Department had in its possession authoritative evidence that the allegations against the Japanese Americans set forth in DeWitt's Report were patently false. Indeed, the FBI and FCC reports were suppressed even though Ennis had written to Biddle as early as February 26, 1944, the same day that Biddle had requested the FCC report, apprising him that:

> [The Final Report] stands as practically the only record of causes for the evacuation and unless corrected will continue to do so. Its practical importance is indicated by the fact that already it is being cited in the briefs in the Korematsu case in the Supreme Court on the constitutionality of the evacuation. 45/

Thus, the suppression of the FBI and FCC findings that began with the Hirabayashi and Yasui cases was again perpetrated on the Court in Korematsu.

The suppression of the ONI Report, the G-2 reports, and the findings and reports of the FBI and FCC constituted egregious governmental misconduct which prejudiced Petitioners and subverted the entire course of the judicial process in their cases.

- - - - -

- - - - -

45/ Memorandum, Edward Ennis to Attorney General Biddle, February 26, 1944, Box 37, Folder 3, Charles Fahy Papers, Franklin D. Roosevelt Library, Hyde Park, New York. See Exhibit Z.

POINT THREE

GOVERNMENT OFFICIALS FAILED TO ADVISE THE SUPREME COURT OF THE FALSITY OF THE ALLEGATIONS IN THE FINAL REPORT OF GENERAL DEWITT

As shown above, officials of the War Department and Department of Justice had personal knowledge that the allegations of disloyalty and espionage in the Final Report of General DeWitt were false. Reports submitted to these officials by responsible intelligence agencies provided a conclusive refutation of these allegations, and discredited the "military necessity" claim offered by DeWitt in support of the mass evacuation and incarceration of Japanese Americans. These reports contained exculpatory evidence of direct relevance to the central issues in Petitioners' cases, and their suppression constituted prejudicial misconduct by governmental officials.

Government attorneys responsible for the Supreme Court brief in the Korematsu case subsequently attempted to advise the Court of the falsity of the Final Report. At the insistence of the War Department, Justice Department officials disregarded this effort and prevented the Court from learning of the exculpatory intelligence reports. This failure to advise the Court of these crucial reports consituted a still further act of governmental misconduct.

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

- - - - -

A. Government Attorneys Attempted To Advise the Supreme Court of the Falsity Of The Final Report

As noted above, the War Department withheld the Final Report from the Justice Department until January 19, 1944, when it was released to the press.[1/] Justice Department officials then conducted an independent investigation of the Report's espionage allegations. After receiving reports from the Federal Bureau of Investigation and the Federal Communications Commission which directly refuted these allegations, government attorneys responsible for the Supreme Court brief in the pending Korematsu case attempted to advise the Court of their existence. Thus, John L. Burling, Assistant Director of the Alien Enemy Control Unit of the Justice Department, inserted the following footnote in the Department's 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 to shore-to-ship signaling 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 not ask the Court to take judicial

- - - - -

- - - - -

1/ See Point One, supra.

> notice of the recitals of those facts contained in the Report. 2/

The insertion of this significant footnote was designed to advise the Supreme Court that the Justice Department possessed evidence which refuted the espionage allegations in the Final Report. Burling explained the importance of this footnote in a memorandum to Assistant Attorney General Herbert Wechsler, who directed the War Division of the Department:

> 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 the Federal Communications Commission. There is no doubt that these statements are intentional falsehoods... 3/

The proposed footnote was set in print and circulated with the brief to War Department and Justice Department officials for final approval. Burling anticipated that the War Department would object to this repudiation of the asserted justification for General DeWitt's military orders. He appealed to Wechsler for support:

> I assume that the War Department will object to the footnote and I think that we should resist any further tampering with it with all our force. 4/

2/ Memorandum, John L. Burling to Assistant Attorney General Herbert Wechsler, September 11, 1944, File 146-42-7, Records of the Department of Justice. Emphasis added. See Exhibit AA.

3/ Ibid. Emphasis added.

4/ Ibid.

The Korematsu brief was due in printed form at the Supreme Court on October 5, 1944. During the last week of September, a printed copy was sent to Assistant Secretary of War John J. McCloy for his comments.

B. At the Insistence of the War Department, Justice Department Officials Altered the Burling Footnote and Thus Failed to Advise the Supreme Court of the Falsity of the Final Report

Shortly after they received the Korematsu brief, War Department officials undertook a shocking campaign designed to remove the footnote drafted by Burling. In a report to his superior, Edward J. Ennis, dated October 2, 1944, Burling described the War Department's campaign of intervention and manipulation:

> Although the War Department was furnished with a first draft of the brief last April and although it had a copy of the page proof for about a week, the War Department did not react to the brief until the morning of September 30 when Captain [Adrian S.] Fisher [of the staff of Assistant Secretary of War McCloy] called you and suggested a change. 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. 5/

When he learned that Solicitor General Fahy had stopped the printing of the government's brief at the insistence

---

5/ Memorandum, John L. Burling to Edward Ennis, October 2, 1944, ibid. Emphasis added. See Exhibit BB.

of McCloy, Ennis immediately prepared a memorandum to Assistant Attorney General Wechsler "strongly recommending that the footnote be kept in its existing form." Among the "various exhibits illustrating the falsity of the DeWitt report" that Ennis attached to this memorandum were the FBI and FCC reports previously submitted to the Attorney General. Wechsler in turn forwarded Ennis's memorandum and the appended documents to Solicitor General Fahy.[6/]

Ennis urged in this memorandum that the disputed footnote was necessary to advise the Supreme Court that the Justice Department knew DeWitt's espionage allegations to be untrue. He stated that alteration or removal of the footnote would amount to a breach of the Department's ethical responsibilities and an abuse of the judicial notice doctrine:

> 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. 7/

Ennis added that the Justice Department had an additional obligation to the Japanese Americans falsely accused by DeWitt of espionage activities:

> The general tenor of the report is not only that there was a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. Since this is not so it is

---

6/ Memorandum, Edward Ennis to Herbert Wechsler, September 30, 1944, Folder 3, Box 37, Fahy Papers, See Exhibit B.

7/ Ibid.

highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected. This is the only opportunity which this Department has to correct them. 8/

Despite this clear warning of the duty owed to the Supreme Court by the Department of Justice, neither Wechsler nor Fahy answered the memorandum submitted by Ennis. According to Burling, Fahy met with Captain Fisher at the request of Assistant Secretary McCloy on Saturday evening, September 30, 1944. Burling later reported to Ennis that at this meeting:

> 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 [Supreme Court] if it would merely refrain from reciting the report without affirmatively flagging our criticism thereof. 9/

At the conclusion of the September 30 meeting, Solicitor General Fahy directed Wechsler to reach a compromise on the disputed footnote by Monday, October 2. Accordingly, Wechsler drafted the following two alternatives as a substitute for the original footnote:

> 1. "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."
>
> 2. "We do not ask the court to notice judicially such particular details recited in the report as justification

---

8/ Ibid.

9/ Note 5, supra.

for the evacuation as the use of illegal radio transmitters and shore-to-ship signaling by persons of Japenese ancestry, which conflict with information derived from other sources." 10/

Wechsler read the alternative drafts to Captain Fisher by telephone on the morning of October 2. In this conversation, Wechsler explained that the first alternative was designed to "drop out any reference to matters in controversy" and that it had been phrased in "the gentlest conceivable way." 11/ After this conversation, Fisher called Burling at the Justice Department and told him that "although the War Department did not agree to either alternative, nevertheless the first would be preferable." 12/

The War Department's victory in persuading the Justice Department to alter the Burling footnote kept the Supreme Court from learning of vitally important exculpatory evidence which undermined the factual justification for DeWitt's military orders. The consequence of the government's failure to expose the falsity of the Final Report is apparent in the Supreme Court's opinion in Korematsu, for, in upholding the constitutionality of the exclusion order at issue, the

- - - - -

10/ Memorandum, Captain Fisher to McCloy, October 2, 1944, File 014.311, Western Defense Command Exclusion Orders (Korematsu), Box 9, Record Group 107, National Archives. See Exhibit CC.

11/ Transcript of telephone conversation, Fisher and Wechster, October 2, 1944, ibid. See Exhibit DD.

12/ Note 10, supra.

Court found that it "has a definite and close relationship to the prevention of espionage and sabotage."[13/]

The inherent incredibility of the Final Report was evident to Justice Jackson, who expressed skepticism in his dissenting opinion in Korematsu:

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

Evidence on the credibility of DeWitt's allegations existed at the time of Petitioner's trials and subsequent appeals. The failure of the government to advise the Court of this evidence constituted misconduct that both violated ethical standards of conduct and subverted the judicial process.

13/ Korematsu v. United States, supra, 323 U.S. 214, 218.

14/ Id. at 245.

POINT FOUR

THE GOVERNMENT'S ABUSE OF THE DOCTRINE OF JUDICIAL NOTICE AND THE MANIPULATION OF AMICUS BRIEFS CONSTITUTED A FRAUD UPON THE COURTS

Petitioners' cases proceeded from trial through decision by the Supreme Court on a record intentionally fashioned to assure their convictions. The acts of alteration, destruction and suppression of evidence alleged in the instant petition separately constituted misconduct that deprived Petitioners of their constitutional rights. The cumulative effect of these acts of misconduct was calculated to induce the courts to rely on false and misleading statements.

In addition, the government's abuse of the doctrine of judicial notice and its manipulation of amicus briefs were intentionally designed to place an equally false and misleading record before the courts. The acts of misconduct alleged above deprived Petitioners and the courts of a full and accurate factual record; those alleged below show that the records actually submitted to the courts by the government were tainted and presumptively affected the outcome of Petitioners' cases. The acts alleged below thus constitued a fraud upon the courts.

A. The Government Abused the Doctrine of Judicial Notice During the Course of Petitioners' Cases

During the entire course of Petitioners' cases, the government's attempt to demonstrate the alleged "disloyalty" of Japanese Americans involved abuse of the doctrine of judicial notice. The effort to show that the "racial characteristics" of Japanese Americans predisposed them to

disloyalty, and to the commission of espionage and sabotage, began, in fact, before any of the Petitioners were tried.

Minoru Yasui was the first of Petitioners to be tried. On May 29, 1942, the month before Yasui's trial took place, the U.S. Attorney for Oregon requested the advice of Maurice Walk, Assistant Solicitor of the War Relocation Authority:

> Insofar as the rules of evidence permit, I wish to introduce evidence to support the proclamation of the Western Defense Command ... affecting the Japanese by reason of their racial characteristics and belief which stamp and distinguish them from other nationalities. 1/

Walk responded on June 6, 1942, advising the U.S. Attorney to include in the trial record "facts justifying the exclusion of American citizens of Japanese descent from the declared military zones." He stated that, given the unavailability of evidence necessary to prove the disloyalty of Japanese Americans, reliance on judicial notice was necessary to establish the military's belief in collective disloyalty as evidentiary fact:

> In my judgment, we have got to recognize that the facts relied on to vindicate the legality of this differential treatment are not susceptible of proof by the ordinary types of evidence. We shall probably, therefore, be compelled to rely greatly on the doctrine of judicial notice. 2/

1/ Letter, Carl C. Donaugh to Maurice Walk, May 29, 1942, Box 337, Record Group 210 [Records of the War Relocation Authority], National Archives and Records Service, Washington, D.C. Emphasis added.

2/ Letter, Maurice Walk to Carl C. Donaugh, June 6, 1942. Id. See Exhibit EE.

The source and purpose of this advice on trial strategy is significant. As Assistant Solicitor of the WRA, Walk had no direct responsibility for the prosecution of Petitioners. However, the WRA administered the "relocation centers" in which Japanese Americans were incarcerated, and WRA officials anticipated legal challenges to their power to detain those being held in the centers. Walk's advice in the Yasui case was designed to utilize that trial as a "dry run" of a strategy based on the doctrine of judicial notice, for later application to expected challenges to incarceration. Walk made clear that the success of this strategy in the Yasui case would establish the "military necessity" foundation for subsequent exclusion and detention cases:

> It is of great importance to us, in planning the strategy of a case which will necessarily involve the validity of the detention of Japanese Americans as well as their exclusion from military areas, to know just how far we are likely to go with the doctrine of judicial notice. For this reason ... I hope that you will find it possible to urge the foregoing consideration upon the Court in the approaching trial of Minoru Yasui. 3/

In a lengthy memorandum to the U.S. Attorney in Oregon, Walk listed eleven "propositions" relating to the alleged existence and danger of a "fifth column" of Japanese Americans. These propositions reflected nothing more than supposition and racial stereotypes about Japanese Americans. The following excerpts from Walk's memorandum exemplify this bias:

3/ Ibid. Emphasis added.

> There is a Japanese fifth column in this country of undisclosed and undetermined dimensions. It is composed of American citizens of Japanese descent, and will be used as an instrument of espionage and sabotage. A fifth column exists by virtue of successfully pretending loyalty to the country of citizenship and successfully concealing all evidence of its activities from the constituted authorities.
>
> A great majority of American citizens of Japanese descent are loyal to this country; but it is impossible during this period of emergency to make a particular investigation of the loyalty of each person in the Japanese community. Such an investigation would be hampered in any case by the difficulties which the Caucasian experiences with Oriental psychology. 4/

Walk further advised that, under the doctrine of judicial notice, evidence should be introduced that dealt with those Japanese Americans educated in Japan, those who adhered to the Shinto religion and those who had "dual nationality" as a result of Japan's citizenship laws. Each of these statements of "fact" assumed the consequent disloyalty of Japanese Americans. Walk concluded by urging that the U.S. Attorney employ the judical notice doctrine in the Yasui trial to place these "propositions" on the record. 5/

4/ Ibid. Emphasis added.

5/ Ibid. For example, the reference to the "indeterminable" number of adherents of Shinto concluded: "It is impossible to predict how such persons would act if any army of the Emperor of Japan were landed upon our shores." The final three "propositions" were predicated on the assumpton that public hostility toward Japanese Americans would justify their detention. The Government's brief to the Supreme Court in Hirabayashi pressed this "preventive detention" argument, notwithstanding that it had no factual or constitutional support. Brief for the United States, pp. 31-32.

In response to this advice, the U.S. Attorney attempted to introduce "evidence" of racial characteristics of Japanese Americans in the Yasui trial. The government first sought to present this evidence through the testimony of an unidentified "expert witness." The U.S. Attorney informed the court of:

> ... the availability of a man who is familiar, by reason of long residence and contact, with the Orient, and in particular the Japanese people ... who is available to testify as to ... the Japanese as a race of people and their ideals and culture and their type of loyalty ... under which circumstances such as the present condition of war between Japan and the United States. 6/

Walk's strategy received an initial setback in the Yasui trial. Counsel for Yasui responded to the U.S. Attorney's attempt to place the "expert witness" on the stand with a statement that he would "object to any testimony or dissertation by some man as to his conclusions as to what some of the Japanese [Americans] might do under certain circumstances." 7/ The trial judge informed the U.S. Attorney

- - - - -

6/ The transcript of the Yasui trial is found in Yasui v. United States, 320 U.S. 115 (1943), Brief for the United States and Record. Record, pp. 206-207. Emphasis added. The Government also offered the testimony of an official of the Lumber and Sawmill Workers Union at the Yasui trial in order to show that hostility toward Japanese Americans "threatened to affect the very war production effort," and that "their own safety demands that there be a certain type ... of restriction" such as the curfew at issue. The District Judge sustained an objection to this testimony. Record, pp. 201-207.

7/ Id. at 207.

that "I have no interest in this matter at all," and the profered witness was withdrawn. 8/

Although government attorneys retreated from this approach in the subsequent Hirabayashi and Korematsu trials, the judicial notice strategy was refined for use in the appellate proceedings in Petitioners' cases. This strategy was outlined in a memorandum prepared by Nanette Dembitz of the Alien Enemy Control Unit of the Department of Justice. Entitled "Method of Presenting Facts Relevant to the Constitutionality of Japanese Evacuation Progam," this memorandum urged the following approach:

> It appears that facts as to the following matters should be presented to the Court: The number of persons of Japanese ancestry, both alien and non-alien, in the United States; ... the lack of assimilation of such persons in the population as a whole; the existence of methods by which the loyalty of such persons to Japan might have been encouraged, such as the activities of Japanese Consuls, the return of such persons to Japan for education, the dual citizenship of American citizens, and activities of Shinto priests; the engagement of such persons in espionage and sabotage 9/

After a canvass of existing precedent on this question, Dembitz offered the following advice:

> As to the facts in point with respect to the Japanese program, it appears that all of them could be established to the Court's satisfaction without the

---

8/ Id at 208.

9/ Memorandum, Nanette Dembitz to John L. Burling, August 11, 1942, File 31.090, Box 332, Record Group 210, National Archives. See Exhibit FF (only pp. 1-6 and 17-18 attached). Emphasis added.

> introduction of evidence and that even the citation of documentary authority would not be necessary with respect to many of them; however, it is obvious that as much documentary authority as is available should be used. It would also appear that the facts could be sufficiently established, without the use of evidence, so that the Court would refuse an offer of evidence to contradict these facts. 10/

Justice Department attorneys adopted the approach suggested by Dembitz in preparation of the briefs submitted to the Supreme Court in Petitioners' cases. The "racial characteristics" argument was presented most extensively in the government's Hirabayashi brief, with the "evidence" presented in that brief incorporated by reference in the Yasui and Korematsu briefs as well. 11/

The government sought judicial notice of "evidence" that allegedly proved the disloyalty of Japanese Americans and their consequent predisposition to commit acts of espionage and sabotage. However, government officials had knowledge of contrary evidence on each of these issues. The report of the Office of Naval Intelligence, submitted by Lieutenant Commander Ringle in January 1942, refuted the "disloyalty" claims made by General DeWitt and subsequently repeated in the government's briefs to the Supreme Court. Officials of the War and Justice Departments knew of the ONI

10/ Id. at 17. Emphasis added. It should be noted that this memorandum followed by a month the refusal by Judge Fee at the trial of Minoru Yasui to hear direct evidence on the disloyalty issue, on the ground of irrelevance.

11/ See these briefs generally.

report as early as March 1942. In March 1944, the Federal Bureau of Investigation and the Federal Communications Commission reported to the Justice Department that DeWitt's espionage allegations were false. Nonetheless, the government continued to press the doctrine of judicial notice on the courts so as to introduce "facts" which were either false or contradicted by evidence in the government's possession.

The Supreme Court's reliance on the "disloyalty" evidence presented under the judicial notice doctrine is evident in its opinions in Petitioners' cases, as illustrated in the following excerpt from Hirabayashi:

> 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. 12/

An examination of the records presented in these cases clearly reveals the government's abuse of judicial notice. Nanette Dembitz, who recommended that the government rely on this doctrine and who signed the government's brief in Hirabayashi, subsequently recanted her position and she authoritatively discussed the abuse of the judicial notice doctrine in Hirabayashi and subsequent decisions. In an article published June 1945 in the Columbia Law Review, entitled "Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions," Dembitz

---

12/ Hirabayashi v. United States, 320 U.S. 81, 99 (1943).

examined virtually every piece of "evidence" submitted to the Supreme Court in each of Petitioners' cases. She asserted that the doctrine of judicial notice is not applicable if "there is a bona fide dispute about the existence of the fact" at issue. She cited countering evidence of many of the "facts" presented to the Supreme Court and criticized the use of the doctrine to admit racial stereotype and public prejudices as evidentiary fact.[13/]

Dembitz concluded that the "facts" placed on record by the government were not facts susceptible to judicial notice:

> A "reasonable" man could not and would not have come to a positive conclusion, on the basis of the available documentary data, that most of the supposed influences toward disloyalty did not in fact exist; a belief in their existence could not be said to rest on "reasonable or substantial grounds" insofar as the phrase connotes that a fact is established by a preponderance of evidence after weighing of an adequate amount of data on both sides. [14/]

13/ 45 Col. L. Rev. 175, 185, n. 9. Ms. Dembitz quoted the statement in Hirabayashi that governmental authorities "have constitutional power to appraise the danger [posed by Japanese Americans] in the light of facts of public notoriety." She then noted that "the opinion itself shows that the danger was appraised not in the light of 'facts' reasonably established by consideration of an adequate amount of data but of widely held suspicions, such as much may be possessed by every group of society with respect to every other group. A typical instance is the statement, frequently and positively made, that the persons of Japanese ancestry have close filial ties and are thus easily dominated by their parents, as contrasted with the findings by reputable sociologists that the second-generation generally strive to disassociate themselves from the ways of their parents even more than in the usual immigrant families."

14/ Id. at 185-186. Emphasis added.

In view of the government's knowledge of contrary evidence on the central "disloyalty" issue, the long-range strategy initiated before Petitioners' trials and pursued during the entire course of their cases constituted an abuse of the doctrine of judicial notice and resulted in a fraud upon the courts.

B. The War Department Manipulated the Amicus Briefs of the West Coast States and Unlawfully Submitted "Evidence" Withheld From the Department of Justice

As noted above, in April 1943, the Justice Department had requested the Final Report of General DeWitt to assist in preparation of the Supreme Court brief in the Hirabayashi case. Because of their concern about certain statements in the Final Report on the "military necessity" issue, however, War Department officials withheld the Final Report from the Justice Department until January 1944.

Despite this act by War Department officials, they did release the initial version of the Final Report for presentation to the Supreme Court in the Hirabayashi case. General DeWitt personally delegated a member of his legal staff, Captain Herbert E. Wenig, to assist the Attorney General of California in preparing the amicus brief submitted on behalf of the three West Coast states.[15/] Captain

---

15/ Letter, Attorney General Robert Kenny to Colonel Joel Watson, May 1, 1943, Hirabayashi File, Record Group 153 [Records of the Judge Advocate General's Office], Washington National Records Center, Suitland, Maryland. Attorney General Kenny wrote as follows: "... I greatly appreciate the assistance being rendered this office by

[FOOTNOTE 15/ CONTINUED ON FOLLOWING PAGE]

Wenig was then a member of the Judge Advocate's staff of the Western Defense Command. Wenig prepared an amicus brief which included lengthy excerpts, without attribution, from the initial version of the Final Report. Most of these excerpts presented a "racial characteristics" argument designed to persuade the Court that Japanese Americans were inherently disloyal. The following excerpt from the amicus brief illustrates the central point of this argument:

> The Japanese of the Pacific Coast area on the whole have remained a group apart and inscrutable to their neighbors. They represent an unassimilated, homogeneous element which in varying degrees is closely related through ties of race, language, religion, custom and ideology to the Japanese Empire. 16/

[FOOTNOTE 15/ CONTINUED FROM PREVIOUS PAGE]

> Lieutenant [sic] Herbert E. Wenig, whom General DeWitt has designated to provide liaison with this office." It is additionally significant that the War Department also collaborated with the West Coast states in the preparation in 1944 of an amicus brief to the Supreme Court in the Korematsu case. The Judge Advocate General noted this collaboration in a letter to the Deputy Chief of Staff of the Western Defense Command: "This letter will confirm understanding just had with you and approved by General Emmons [who succeeded General DeWitt in September, 1943] that the Judge Advocate section collaborate fully, but informally, with the Attorneys General of the states mentioned in the preparation of a joint brief to be fled by them as amici curiae in the above mentioned case." Judge Advocate General to Deputy Chief of Staff, March 31, 1944, Korematsu File. Ibid.

16/ Brief of the States of California, Oregon and Washington as Amici Curiae, p. 11. Emphasis added. Compare the following statement in the Final Report: "Here was a relatively homogeneous, unassimilated element bearing a close relationship through ties of race, religion, language, custom, and indoctrination to the enemy." DeWitt, Final Report, p. 15. The extent of reliance in the brief of the West Coast States on the Final Report is substantial. Statements on pp. 10, 11, 14-20, 22-23, and 25-26 of the West Coast brief are taken directly from the latter source.

The amicus brief concluded that these "racial characteristics" created a reasonable suspicion that Japanese Americans would engage in espionage and sabotage:

> The facts just reviewed indicate that because of the racial, cultural, religious and ideological ties and sympathies with Japan and the various causes which have kept the Japanese apart, there would be a sufficient number that could be used as a fifth column in assisting in sabotage or espionage or giving aid in the event of an attempted attack. 17/

In a highly misleading manner, the amicus brief also presented to the Supreme Court the espionage allegations made in the Final Report. After reciting three alleged incidents of Japanese attack on the West Coast in 1942, the brief drew the following conclusion:

> There was an increasing indication that the enemy had knowledge of our patrols and naval dispositions, for ships leaving west coast ports were being intercepted and attacked regularly by enemy submarines. 18/

17/ Id. at 26.

18/ Id. at 10. The statement quoted above misleadingly compressed into one charge two allegations made against Japanese Americans in the Final Report, which read as follows: "In summary, the Commanding General was confronted with the Pearl Harbor experience, which involved a positive enemy knowledge of our patrols, naval dispositions, etc., on the morning of December 7th; [and] with the fact that ships leaving West Coast ports were being intercepted regularly by enemy submarines . . . ." DeWitt, Final Report, p. 18. Emphasis added. Notwithstanding the obvious suspicion of General DeWitt that Japanese Americans had aided in both the Japanese attack on Pearl Harbor and subsequent submarine attacks on shipping, he did not directly link the two episodes. In stating as a fact that such a linkage existed, the states' amicus brief misled the Supreme Court. See discussion of War Department involvement in the preparation of this brief under Point Three, infra.

The amicus brief assured the Supreme Court that the "facts" presented to the Court were deserving of judicial notice:

> ... the Court may take notice of many of the facts to be stated because they are generally notorious and are ... matters of public concern upon which the Court may inform itself by reference to documentary evidence of any other reliable source. 19/

These "generally notorious" facts were, in truth, no more than the unsupported allegations of an interested party. By making the Final Report available to the West Coast states, and delegating Captain Wenig to assist in preparing the amicus brief, General DeWitt sought to perpetrate a fraud upon the courts. By concealing the Final Report from the Department of Justice, while assuring its introduction through friendly amici, DeWitt manipulated the judicial process and in fact committed a fraud upon the Court. Significantly, when the Justice Department belatedly learned of DeWitt's actions after Supreme Court decision of Hirabayashi, it properly condemned his unlawful behavior:

> It is also to be noted that parts of the [Final Report] which, in April 1942 [sic] 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 erron-

- - - - -

19/ Id. at 8.

eous and intemperate brief which the States filed. 20/

In upholding the constitutionality of the military orders under which petitioners were prosecuted and convicted, the Supreme Court relied upon the very "facts" purportedly demonstrating the disloyalty of the Japanese Americans that the states' amicus brief, with the aid of General DeWitt, presented to the Court. That the government possessed other evidence refuting the charges asserted in the amicus brief, renders DeWitt's manipulation of the judicial process that much more egregious. The false factual picture presented to the Court by means of the government's abuse of judicial notice and manipulation of the states' amicus brief led the Court in Hirabayashi to conclude that the military orders at issue:

> ... were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of espionage and sabotage. 21/

Such a deliberate manipulation of the judicial process constituted a fraud upon the Court.

20/ Memorandum, Edward J. Ennis to Herbert Wechsler, September 30, 1944, Folder 3, Box 37, Fahy Papers. Emphasis added. See Exhibit B.

21/ Hirabayashi v. United States, supra, 320 U.S. at 94-95.

POINT FIVE

PETITIONERS ARE ALSO ENTITLED TO RELIEF ON THE GROUND THAT THEIR CONVICTIONS ARE BASED ON GOVERNMENTAL ORDERS THAT VIOLATE CURRENT CONSTITUTIONAL STANDARDS

Petitioners further allege that their convictions are based on governmental orders that violate current substantive constitutional standards. Nearly forty years ago, the Supreme Court sustained the constitutionality of the government's decision to impose a curfew on and then to evacuate all Japanese Americans living on the West Coast. In doing so, however, the Court did not in fact apply the same type of "strict scrutiny" of suspect classifications that would be applied today. The Court deferred to the government's unproven assertions that a grave danger of espionage and sabotage existed, that Japanese Americans should be regarded as potential saboteurs, and that an appropriate method of combatting this perceived danger was first to impose a curfew on all persons of Japanese ancestry and then to evacuate and detain this entire racial group.

In racial discrimination cases decided after Korematsu, the Court demanded far more from the government to justify the use of a racial classification that burdened or stigmatized a racial minority. The government now has the exceedingly difficult task of proving that it is essential to use such a classification to fulfill a compelling governmental interest and that no less restrictive alternative is available. The Court has consistently held, in cases decided after Korematsu, that the government has failed to meet this highly

demanding burden of proof. Moreover, the Court has stated that the government's burden is particularly great when the Court is reviewing a criminal conviction based on a racial classification.

Judged by today's standards, the government plainly did not offer sufficient proof to justify the racial classification challenged in Petitioners' cases. Thus, Petitioners' convictions violate their right to equal protection, as applied through the Due Process Clause of the Fifth Amendment. A petition in the nature of a writ of error coram nobis is the appropriate means of remedying this fundamental constitutional defect in Petitioners' convictions.

PRAYER FOR RELIEF

Petitioners respectfully submit that it would be impossible to find any other instance in American history of such a long standing, pervasive and unlawful governmental scheme designed to mislead and defraud the courts and the nation. By the misconduct set forth in detail above, the United States deprived petitioners of their rights to fair judicial proceedings guaranteed by the Fifth Amendment to the United States Constitution. Although successful to date, this fundamental and egregious denial of civil liberties cannot be permitted to stand uncorrected.

WHEREFORE, petitioner FRED TOYOSABURO KOREMATSU respectfully prays:

1. That judgment of conviction be vacated;

2. That the military orders under which he was convicted be declared unconstitutional;

3. That his indictment be dismissed;

4. For costs of suit and reasonable attorneys' fees;

5. For such other relief as may be just and proper.

Dated: January __, 1983

Respectfully submitted,

By _____
Peter Irons

By _____
Dale Minami
Minami, Tomine & Lew

APPENDIX

Petitioners have presented above those facts that relate to the issuance of Executive Order 9066 and enactment of Public Law 503, and the promulgation of the military orders applicable to Japanese Americans on the West Coast. Petitioners consider it necessary as well to recount in this Appendix those significant events that preceded and led to the adoption of these measures. Such a recounting will enable the Court to place in proper context the origins of the internment program and the allegations of governmental misconduct made throughout this Petition. In particular, the steps taken before the Pearl Harbor attack to combat espionage and sabotage, the political pressures that culminated in the internment program, and the concomitant debate among government officials over the necessity for and constitutionality of this program, are of central importance to this Petition.

A. Steps Taken By the Government Before the Pearl Harbor Attack to Combat Espionage and Sabotage

It is relevant to claims advanced by the Government during Petitioners' cases to recount the steps taken before the Japanese attack on Pearl Harbor to protect the West Coast area against potential espionage and sabotage. Predicated on apprehensions of an eventual state of war between Japan and the United States, planning in this regard began in June, 1939 with a secret directive issued by President Roosevelt. The President ordered that "the investigation of all espionage, counter-espionage and sabotage matters be controlled and handled" jointly by the Federal Bureau of Investigation [FBI],

the Military Intelligence Division of the Army [MID], and the Office of Naval Intelligence of the Navy [ONI].[1/]

A year later, on June 4, 1940, the President's order that such intelligence operations be "coordinated" by these three agencies was modified by a "Delimitation Agreement" that assigned to the FBI control over cases of "actual or strongly presumptive espionage or sabotage, including the names of individuals definitely known to be connected with subversive activities." Significantly, this agreement delegated to ONI primary responsibility for the collection and dissemination of intelligence relating to the Japanese American population, presumably because of the proximity of segments of this population to naval installations along the West Coast.[2/]

Within the United States Department of Justice, responsibility for prewar planning for the treatment of potential "alien enemies" was delegated to the Special Defense Unit. Personnel of this Unit compiled extensive lists of "subversive" and "dangerous" aliens of German, Italian and Japanese citizenship. In collated form, these lists were informally known as the "ABC" list, so called from the listing

- - - - -

- - - - -

- - - - -

- - - - -

1/ United States Navy, Office of Intelligence, "United States Naval Administration in World War II," n.d., pp. 66-69. See Exhibit M.

2/ Ibid.

of three categories of aliens in descending order of potential danger.[3/] By mid-1941, some six months before the Pearl Harbor attack, the "ABC" list included the names of more than 2,000 aliens of Japanese descent.[4/] This group included virtually the entire leadership of the West Coast population of Japanese Americans, the vast majority of them aliens by virtue of restrictive Federal legislation.[5/]

The FBI and military intelligence agencies submitted to the Special Defense Unit the names of Japanese Americans considered potentially dangerous for inclusion on the "ABC" list. Some of these names were taken from public sources such as the publications of Japanese American organizations and newspapers such as the Rafu Shimpo in Los Angeles.[6/] A more

---

3/ Those listed in category "A" were the "known dangerous" aliens, which included among the Japanese American population "fishermen, produce distributors, Shinto and Buddhist priests, influential businessmen, and members of the Japanese Consulate." Those in category "B" were considered "potentially dangerous" but had not been thoroughly investigated, while those in category "C" had not been connected to Japanese intelligence activities but "were watched because of their pro-Japanese inclinations and propagandist activities." This last group included Japanese language instructors, martial arts instructors, travel agents, and newspaper editors. Office of Naval Intelligence, "Japanese Organizations and Societies Engaged in Propaganda, Espionage and Cultural Work," ONI File A8-5/EF37, ONI Records, National Archives and Records Service, Washington, D.C.

4/ Ibid. See also Custodial Detention Files, File 100-2-60-3, Sections 180-190, Records of the Federal Bureau of Investigation. The "ABC" list was formally known as the Custodial Detention Index.

5/ The Immigration Act of 1924 excluded Japanese from admission into the United States. 43 Stat. 161. Federal law, also enacted in 1924, denied to the Japanese citizenship by naturalization. 8 U.S.C. §703 (1924).

6/ Note 3, supra.

significant source of names was the list of Japanese sympathizers and espionage agents seized in March, 1941 during an illegal break-in and burglary of the Japanese consulate in Los Angeles. This break-in was planned and executed by Lieutenant Commander Kenneth D. Ringle of ONI, with the aid of the FBI. This intelligence operation effectively dismantled a Japanese espionage network on the West Coast and led in June, 1941, to the arrest of Itaru Tachibana, a Japanese naval officer posing as an English language student. Along with the records photographed by Government agents during the consular break-in, and those seized when Tachibana was arrested, were lists of agents who had gathered intelligence on behalf of the Japanese government in the form of maps, lists of Army and Navy installations, data on defense factories, and the locations of power lines and dams. 7/

B. Steps Taken After the Pearl Harbor Attack to Deal With Japanese Americans Considered Dangerous

The significance to Petitioners' cases of the consular break-in and the arrest of Tachibana lies in subsequent conclusions by the FBI about their impact on Japanese intelligence operations. As noted above in Point Two, FBI officials concluded that the break-in and arrests had ended any

- - - - -

7/ This account is based on Kenneth D. Ringle, Jr., "What Did You Do Before the War, Dad?", The Washington Post Magazine, December 6, 1981, p. 54. Petitioners believe that FBI records of the consular break-in are located in File 65-13888, Records of the FBI. These records have been requested by Kenneth D. Ringle, Jr., but have not been released by the FBI.

substantial threat of espionage and sabotage on the West Coast by Japanese Americans.[8/] The available records of the FBI and military intelligence agencies disclose no evidence of espionage or sabotage in the period that followed Pearl Harbor. In fact, these records affirmatively disclaim the commission of such acts on the West Coast.[9/]

It is relevant as well to note that the Department of Justice moved, immediately after the Pearl Harbor attack, to arrest all those aliens of Japanese descent included in the "ABC" list. During the night of December 7-8, 1941, FBI and military agents, assisted by local police, arrested 736 alien Japanese on the West Coast. Within four days, the number of Japanese arrested reached 1,370. By the end of the "ABC" roundup in February, 1942, a total of 2,192 alien Japanese on the mainland had been arrested and interned for some period of time.[10/]

Following these arrests, the Attorney General directed that the Department of Justice establish a network of Alien Enemy Hearing Boards across the country. Most of the 92 hearing boards included one or more lawyers as members. Aliens who had been arrested and interned were afforded informal hearings at which, Biddle noted, "any

---

8/ Memorandum, J. Edgar Hoover to Mr. Tolson, Mr. Tamm, and Mr. Ladd, December 17, 1941, File 100-97-1-67, Records of the FBI. See Exhibit T.

9/ These records are discussed under Point Two, supra.

10/ Department of Justice, Press Releases, December 8 and 13, 1941, February 16, 1942; quoted in Jacobus tenBroek, et al., Prejudice, War and the Constitution, p. 101.

'fair' evidence could be admitted" that bore on the loyalty of the alien. Close to two-thirds of those initially detained were subsequently released outright or on parole by the hearing boards on a finding that they posed no danger to the United States.[11/] However, most of the Japanese Americans released after such a finding were then placed in Relocation Centers on the order of General DeWitt. Those Japanese Americans released from internment by the Department of Justice were placed in custody by the War Department on the basis of orders issued without hearings and predicated on an assumption that the "racial characteristics" of Japanese Americans as a group predisposed them to disloyalty and the commission of espionage and sabotage.

C. Political Pressures for the Evacuation of Japanese Americans

The public record discloses no evidence of any substantial public hostility toward Japanese Americans in the weeks that followed the Pearl Harbor attack.[12/] Similarly, the official record discloses no suggestions within the Government for restrictive measures against Japanese Americans as a

---

11/ Francis Biddle, In Brief Authority, pp. 208-209.

12/ "Agitation for a mass evacuation of the Japanese did not reach significant dimensions until more than a month after the outbreak of war." Stetson Conn, et al., United States Army in World War II: The Western Hemisphere: Guarding the United States and Its Outposts, p. 120. This volume, issued by the Office of the Chief of Military History, Department of the Army, in 1964, is part of the official history of the armed services during World War II. The Court is directed to Chapter V, "Japanese Evacuation From the West Coast," for an authoritative discussion of the origins of the mass evacuation program.

group for close to two months after Pearl Harbor. In fact, General DeWitt initially expressed opposition to a proposal that the Army institute the internment of all Japanese Americans in California. He expressed this opposition in a telephone conversation on December 26, 1941 with Major General Allen W. Gullion, Provost Marshal General of the Army. Gullion passed on to General DeWitt a recommendation for internment made by the Washington, D.C. representative of the Los Angeles Chamber of Commerce. General DeWitt responded to this recommendation as follows:

> I thought that thing out to my satisfaction . . . if we go ahead and arrest the 93,000 Japanese [in California], native born and foreign born, we are going to have an awful job on our hands are are very liable to alienate the loyal Japanese from disloyal . . . . I'm very doubtful that it would be common sense procedure to try and intern or to intern 117,000 Japanese in this theater . . . . I don't think it's a sensible thing to do.... An American citizen, after all, is an American citizen. And while they all may not be loyal, I think we can weed the disloyal out of the loyal and lock them up if necessary. 13/

During the month that followed this expression by General DeWitt of opposition to the evacuation or internment of Japanese Americans, public pressures for such moves remained relatively limited.[14/] However, the situation

---

13/ Telephone conversation, General DeWitt with General Gullion, December 26, 1941, File 311.3, Records of the Western Defense Command, Civil Affairs Division; quoted in id., p. 118.

14/ Note 12, supra. See also tenBroek, et al., Note 10, supra, pp. 73-80. This study is the product of the University of California Japanese American Evacuation and

[FOOTNOTE 14/ CONTINUED ON FOLLOWING PAGE]

changed dramatically following the release to the press on January 25, 1942, of the so-called "Roberts Report" on the Pearl Harbor attack. This report was issued by a commission appointed by President Roosevelt and chaired by Associate Justice Owen J. Roberts of the United States Supreme Court. In addition to finding that the Army and Navy commanders in Hawaii had been negligent in preparing for a possible Japanese attack, the report included the following statement:

> There were, prior to December 7, 1941, Japanese spies on the island of Oahu. Sone were Japanese consular agents and others were persons having no open relations with the Japanese foreign service. These spies collected, and through various channels, transmitted, information to the Japanese Empire respecting the military and naval establishments and dispositions on the island. 15/

Although unsupported by any cited evidence, the implied assertion that Japanese Americans had performed espionage activities on behalf of Japan was widely put in explicit terms by the West Coast press.[16/] Public concern about the "danger" posed by Japanese Americans quickly turned into a campaign of pressure on both military and civilian officials

---

[FOOTNOTE 14/ CONTINUED FROM PREVIOUS PAGE]

> Resettlement Study, an academic project begun in February, 1942 and supported by funding from the University of California, the Rockefeller Foundation, and the Columbia Foundation. Although not an official government project, this comprehensive study received the cooperation of the Research Branch of the Civil Affairs Division, Western Defense Command. Id., p. xiii.

15/ Congressional Record, Vol. 88, Part 8, p. A261.

16/ "The publication of the report of the Roberts Commission . . . on 25 January had a large and immediate effect both on public opinion and on government action." tenBroek, et al., Note 10, supra, p. 121.

for the mass evacuation of Japanese Americans from the West Coast.[17] DeWitt's exposure to this pressure is evident from his report of a January 27 meeting with Governor Culbert Olson of California. In a telephone conversation of January 29 with Major Karl R. Bendetsen of the Provost Marshal General's office, DeWitt made the following statement:

> There's a tremendous volume of public opinion now developing against the Japanese of all classes, that is aliens and non-aliens, to get them off the land, and in Southern California . . . they are bringing pressure on the government to move all the Japanese out. As a matter of fact, it's not being instigated or developed by people who are not thinking but by the best people of California. Since the publication of the Roberts Report they felt that they were living in the midst of a lot of enemies. They don't trust the Japanese, none of them. [18]

In addition to pressure for mass evacuation from state officials such as Governor Olson, military officials were subjected to pressure from members of the West Coast Congressional delegation. On January 30, 1942, Major Bendetsen represented Provost Marshal Gullion at a meeting in Washington with members of this delegation, at which he was presented with a six-point proposal for action against Japanese Americans in the form of a recommendation to President Roosevelt. This proposal included two significant elements:

> (1) A designation by the War Department of critical areas throughout the country and territorial possessions.

17/ Id., pp. 81-96.

18/ Telephone conversation, General DeWitt with Major Bendetsen, January 28, 1942; quoted in Conn, et al., Note 12, supra.

(2) Immediate evacuation of all such critical areas of all enemy aliens and their families, including children under 21 whether aliens or not. 19/

In a telephone conversation with Major Bendetsen on January 31, General DeWitt indicated his agreement with the recommendation of the West Coast Congressional delegation. DeWitt expressed his support for the mass evacuation of Japanese Americans as a protection against possible acts of sabotage: "The only positive answer to that question is evacuation of all enemy aliens on the West Coast, and their resettlement or internment and the positive control [of such a program] military or otherwise." General DeWitt made clear his endorsement of the mass evacuation of all American citizens of Japanese ancestry: "All Japanese, irrespective of citizenship." 20/

One fact of great significance emerges from this record: Between the month from the end of December, 1941 to the end of January, 1942, General DeWitt changed his position on mass evacuation from that of opposition as not "a

---

19/ Memorandum, Major Bendetsen to General Gullion, January 31, 1942, File PMG 384.4, Records of the Western Defense Command. According to Conn, et al., "The Congressional recommendations were a verbatim copy of a draft submitted by a representative of the Los Angeles Chamber of Commerce." Note 12, supra, p. 123, n. 27. Major Bendetsen interpreted this recommendation, in reporting to General Gullion on January 31, 1942, as "calling for the immediate evacuation of all Japanese from the Pacific coastal strip including Japanese citizens [sic] of the age of 21 and under. . ." Id, p. 123.

20/ Telephone conversation, General DeWitt with Major Bendetsen, January 31, 1942, Records of the Provost Marshal General, National Archives and Records Service, Washington, D.C.

sensible thing to do" to support of the evacuation of all persons of Japanese ancestry, "irrespective of citizenship." It will be shown below that during this period, and afterward as well, no evidence reached General DeWitt or any other responsible government official that indicated that Japanese Americans posed any danger of espionage or sabotage on the West Coast. In fact, intelligence reports prepared by the FBI and other federal agencies directly refuted all such allegations. The conclusion is inescapable that General DeWitt's endorsement of mass evacuation resulted both from his often-expressed racial hostility toward Japanese Americans and from pressure from state and congressional politicians.

D. The Debate Within the Federal Government Over Proposals for the Mass Evacuation of Japanese Americans

Officials of both the War Department and the Department of Justice initially opposed the proposals for mass evacuation. The grounds for such opposition included doubts about the military necessity for evacuation and the constitutionality of an evacuation program that included American citizens. This opposition was expressed at a meeting in the office of Attorney General Biddle on February 1, 1942, attended by Assistant Secretary of War McCloy.[21/]

At this meeting, Biddle submitted to McCloy the draft of a press release to be signed and issued jointly by

---

21/ Also in attendance at this meeting were Provost Marshal General Gullion, Major Bendetsen, FBI Director Hoover, Assistant to the Attorney General James H. Rowe, Jr., and Edward J. Ennis, Director of the Alien Enemy Control Unit of the Department of Justice.

the Attorney General and Secretary of War Stimson. The initial sections of this press release announced agreement by the two Departments on steps to bar enemy aliens from limited areas that surrounded vital military installations on the West Coast, none of which involved restrictions on citizens. The proposed release concluded with this sentence:

> The Department of War and the Department of Justice are in agreement that the present military situation does not at this time require the removal of American citizens of the Japanese race. 22/

At McCloy's request, the Attorney General agreed to withhold issuance of the proposed release until General DeWitt could respond to it. Provost Marshal Gullion called DeWitt later that day and read to him the text of the press release. General DeWitt was emphatic in his response to the sentence quoted above: "I wouldn't agree to that." 23/ As a consequence of this objection by General DeWitt, this sentence was removed from the press release.

Following the meeting on February 1 between the Attorney General and McCloy, Secretary of War Stimson became personally involved in the debate over mass evacuation. On February 3, Stimson met with General Gullion to discuss recommendations from General DeWitt for the designation of "military areas" from which Japanese aliens would be excluded by order of the Attorney General. Stimson recorded this conversation in his official diary as follows:

22/ Telephone conversation, General DeWitt with General Gullion, February 1, 1942. Note 20, supra.

23/ Ibid.

> General DeWitt . . . is very anxious about the situation and has been clamoring for the evacuation of the Japanese of the area surrounding the intensely important area at San Diego, Los Angeles, San Francisco and Puget Sound, where are located some of the most important airplane factories and naval shipyards. He thinks he has evidence that regular communications are going out from Japanese spies in those regions to submarines off the coast assisting in the attacks by the latter which have been made upon practically every ship that has gone out. If we base our evacuations upon the ground of removing enemy aliens, it will not get rid of the Nisei [native-born Japanese American citizens] who are . . . the more dangerous ones. If on the other hand we evacuate everybody including citizens, we must base it as far as I can see upon solely the protection of specified plants. We cannot discriminate among our citizens on the ground of racial origin. We talked the matter over for quite a while and then postponed it in order to hear further from General De Witt who has not yet outlined all of the places that he wishes protected. 24/

Two elements of this statement by Stimson require comment. First, General DeWitt had been personally informed, almost a month before this meeting, that reports of communications from the coast to Japanese submarines had been investigated by the Federal Communications Commission and found to be baseless. Second, Stimson at this point recognized that the proposed evacuation of American citizens of Japanese ancestry had no constitutional basis.

Notwithstanding the doubt expressed by Stimson, Assistant Secretary of War McCloy undertook to suggest to General DeWitt a way around the constitutional barriers to

---

24/ Entry of February 3, 1942, Henry L. Stimson Diaries, Yale University Library, New Haven, Connecticut. Emphasis added.

the evacuation of citizens from the major West Coast cities. In a telephone conversation with General DeWitt on February 3, after the meeting between Stimson and General Gullion, McCloy made the following suggestion:

> Now, my suggestion is that (after we have talked it over with General Gullion and Major Bendetsen) we might call those [cities] military reservations in substance, and exclude everyone -- whites, yellows, blacks, greens -- from that area and then license back into the area those whom we felt there was no danger to be expected from. . . . You see, then we cover ourselves with the legal situation is taken care of [sic] in a way because in spite of the constitution you can eliminate from any military reservation anyone -- any American citizen, as we could exclude everyone and then by a system of permits and licenses permitting those to come back into that area who were necessary to enable that area to function as a living community. Everyone but the Japs --. 25/

During this converstation with General DeWitt, McCloy requested that he submit to the War Department a formal reccommendation on the evacuation issue, and dispatched Major Bendetsen (who was shortly promoted to Lieutenant Colonel) to the West Coast to assist in drafting his recommendation. On February 10, 1942, Colonel Bendetsen submitted to General DeWitt a memorandum headed "Evacuation of Japanese from the Pacific Coast." This memorandum stated that there was "no disagreement in any quarter regarding the necessity for placing all Japanese in the same category" regardless of citizenship. This statement was in fact erroneous

---

25/ Telephone conversation, General DeWitt with Mr. McCloy, February 3, 1942. Emphasis added. Note 2, supra.

and misleading as an expression of the views of Secretary Stimson, who had recently stated to General Gullion his doubts about the constitutionality of any mass evacuation of citizens. Colonel Bendetsen then noted that it was "highly improbable that the Secretary will accept the recommendation of the entire evacuation [of Japanese Americans] from the coastal strip." This statement referred to the proposal by General DeWitt that Japanese Americans be evacuated from the entire area that extended some two hundred miles eastward form the coastline. Colonel Bendetsen concluded with the following statement:

> . . . any recommendation should be predicated on the military necessity involved and this in turn can be developed only after a consideration of all the factors such as loss of vegetable production which may be consequent [from farms operated by Japanese Americans], and other economic dislocations which may ensue. These later factors can be weighed only from the standpoint of the military disadvantages which may be involved. If from the military standpoint, the military disadvantage involved in the loss of vegetable production which may result from a complete evacuation from the Pacific Coast is sufficiently great to outweigh the military advantage, then and only then should the recommendation for evacuation be confined to selected area. 26/

The significance of this memorandum emerges in its contrast with the "Final Recommendation" submitted on February 14, 1942, by General DeWitt to Secretary Stimson. In balancing "military necessity" against the possible "loss of vegetable production" from the farms operated by Japanese Americans, Colonel Bendetsen demonstrated that the subsequent evacuation

---

26/ Memorandum, Colonel Bendetsen to General DeWitt, February 10, 1942, Records of the Western Defense Command.

recommendation was less a purely military decision than a matter of the "economic dislocation" that evacuation might produce.

E. The "Final Recommendation" and the Evacuation Decision

During the period that preceded receipt by the War Department of the "Final Recommendation" of General DeWitt, debate within the Government over the evacuation issue centered on the "licensing" proposal advanced by Assistant Secretary of War McCloy. Secretary of War Stimson and Attorney General Biddle maintained their constitutional doubts about the evacuation of Japanese American citizens during this period. Stimson met with McCloy on February 10, 1942, to review the interim proposal by General DeWitt that some 88 limited areas along the Coast (containing military installations, defense factories, and public utilities) be evacuated of all enemy aliens and Japanese American citizens. Following this meeting, Stimson recorded the following in his official journal:

> The second generation Japanese [native-born citizens] can only be evacuated as part of a total evacuation, giving access to the areas only by permits, or by frankly trying to put them out on the ground that their racial characteristics are such that we cannot understand or trust even the citizen Japanese. The latter is the fact but I am afraid it will make a tremendous hole in our constitutional system. 27/

On February 12, 1942, Attorney General Biddle addressed a letter to Stimson stating that the Department of

---

27/ Entry of February 10, 1942. Emphasis added. Note 27, supra.

Justice lacked the personnel and facilities to undertake a mass evacuation program. Biddle added the following to his letter:

> I have no doubt that the Army can legally, at any time, evacuate all persons in a specified territory if such action is deemed essential from a military point of view for the protection and defense of the area. No legal problem arises where Japanese citizens are evacuated; but American citizens of Japanese origin could not, in my opinion, be singled out of an area and evacuated with the other Japanese. However, the result might be accomplished by evacuating all persons in the area and then licensing back those whom the military authorities thought were not objectionable from a military point of view. 28/

It should be noted that the "licensing" proposal, as a means for the evacuation of Japanese Americans from limited "military areas" received no further consideration after February 11, 1942. On that date Stimson discussed the evacuation issue with President Roosevelt, on the basis of a memorandum summarizing the "questions to be determined re Japanese exclusion" by the President. This memorandum presented the following questions for decision by the President:

> (1) Is the President willing to authorize us to move Japanese citizens [American citizens of Japanese descent] as well as aliens form restricted areas?
>
> (2) Should we undertake withdrawal from the entire strip DeWitt originally recommended, which involves a number over 110,000 people, if we included both aliens and Japanese citizens?

28/ Letter, Attorney General Biddle to Secretary of War Stimson, February 2, 1942, Record Group 407, National Archives and Records Service, Washington, D.C.

(3) Should we undertake the intermediate step involving, say, 70,000 which includes large communities such as Los Angeles, San Diego, and Seattle?

(4) Should we take any lesser step such as the establishment of restricted areas around airplane plants and critical installations, even though General DeWitt states that in several, at least, of the large communities this would be wasteful, involve difficult administrative problems, and might be a source of more continuous irritation and trouble than 100 percent withdrawl from the area? 29/

Stimson discussed these questions with the President over the telephone on February 11, 1942. No record has been located of any notation of this discussion by the President, but Stimson recorded in his official journal of that day that he "fortunately found that [President Roosevelt] was very vigorous about it and [he] told me to go along on the line that I had myself thought the best." 30/

Stimson did not record which of the alternative courses he thought best. However, later that day McCloy stated in a telephone conversation with Colonel Bendetsen that "we have carte blanche to do whatever we want to do as far as the President's concerned" and that the President had specifically authorized the evacuation of citizens, subject only to the qualification, "Be as reasonable as you can." 31/

29/ Memorandum, for Record (unsigned), February 11, 1942, File 014.311, Records of the Assistant Secretary of War, ibid.

30/ Entry of February 11, 1942, Note 27, supra.

31/ Telephone conversation, Assistant Secretary McCloy with Colonel Bendetsen, February 11, 1942, File 311.3 (Tel Convs, Bendetsen, Feb-Mar 42), Records of the Western Defense Command.

Following this conversation, Colonel Bendetsen returned from San Francisco to Washington to meet with War Department officials on the evacuation issue. He brought with him the "Final Recommendation" of General DeWitt in the form of a memorandum to the Secretary of War headed "Evacuation of Japanese and other Subversive Persons from the Pacific Coast." Included in this memorandum were allegations about the commission of acts of espionage and sabotage by Japanese Americans and slurs on this group as members of an "enemy race." The knowing falsity of these allegations is discussed below.[32/] The significance of these statements in the "Final Recommendation" to this Appendix lies in their presentation to Stimson as justification for the mass evacuation of Japanese Americans from the West Coast. General DeWitt put his formal recommendation in the following words:

> That the Secretary of War procure from the President direction and authority to designate military areas in the combat zone of the Western Theater of Operations (if necessary to include the entire combat zone), from which, in his discretion, he may exclude all Japanese, all alien enemies, and all other persons suspected for any reason by the administering military authorities of being actual or potential saboteurs, espionage agents, or fifth columnists. 33/

F. Adoption of the "Final Recommendation" and the Issuance of Executive Order 9066

The "Final Recommendation" of General DeWitt, backed by verbal authorization from the President to proceed

---

32/ See discussion under Points Two and Three, supra.

33/ De Witt, Final Report, p. 36. Emphasis added.

with the drafting of an evacuation program, became the basis for a crucial series of meetings on February 17 and 18, 1942. Secretary Stimson first met on February 17 with Assistant Secretary McCloy, Colonel Bendetsen, Provost Marshal Gullion, and General Mark Clark, the latter representing General George C. Marshall, Chief of Staff of the Army. Stimson described the meeting in his official journal as follows:

> Finally we worked the matter into a situation where we could take immediate steps beyond the ones which I had already authorized General DeWitt on the coast to do. A proposed order for the President was outlined and General Gullion undertook to have it drafted tonight. War Department orders will fill in the application of this Presidential order. These were notified and Gullion is also to draft them. It will involve the tremendous task of moving between fifty and one hundred thousand people from their homes and ultimately locating them in new places away from the coast. 34/

On the same day, February 17, Attorney General Biddle sent a letter to President Roosevelt, objecting to mass evacuation as unnecessary. Biddle put his objections in the following words:

> For several weeks there have been increasing demand for evacuation of all Japanese, aliens and citizens alike, from the West Coast states. A great many of the West Coast people distrust the Japanese, various special interests would welcome their removal from good farm land and the elimination of their competition, some of the local California radio and press have demanded evacuation, the West Coast Congressional Delegation are asking the same thing and finally, Walter Lipman [sic] and Westbrook Pegler [nationally syndicated newspaper columnists] recently have taken up the evacuation cry on the ground that attack on the West Coast and widespread sabotage is imminent. My last

---

34/ Entry of February 17, 1942, Note 27, supra.

> advice from the War Department is that there is no evidence of imminent attack and from the F.B.I that there is no evidence of planned sabotage. 35/

Notwithstanding this objection to evacuation, Biddle met on the evening of February 17 with McCloy and General Gullion to draft a proposed Executive Order for submission to the President. Accompanying Biddle at this meeting were James H. Rowe, Jr., Assistant to the Attorney General, and Edward J. Ennis, director of the Alien Enemy Control Unit of the Department of Justice. In his memoirs, Biddle described this meeting as follows:

> General Gullion had an executive order ready for the President to sign. Rowe and Ennis argued strongly against it. But the decision has been made by the President. It was, he said, a matter of military judgment. I did not think I should oppose it any further. The Department of Justice, as I had made it clear to him from the beginning, was opposed to and would have nothing to do with the evacuation. 36/

The following day, February 18, 1942, Biddle met with Stimson and members of their staffs to go over the proposed Executive Order. In final form, the order was approved and taken to the White House by Rowe for submission to the President. Executive Order 9066 was signed by President Roosevelt on February 19, and its pertinent provisions are cited above in the Statement of Facts.

35/ Memorandum, Attorney General Biddle to President Roosevelt, February 17, 1942, Folder - C.F. Hawaii, Confidential File, President's Secreatry's Files, Franklin D. Roosevelt Library, Hyde Park, New York. Emphasis added.

36/ Note 11, supra, p. 219.

G. Conclusion

There can be no doubt that the decision to evacuate and intern the Japanese American population on the West Coast was a direct consequence of two facts: first, General DeWitt's capitulation to the pressures exerted by State and federal officials; and second, his belief that the "racial characteristics" of Japanese Americans predisposed them to disloyalty. Until the end of January 1942, DeWitt expressed opposition to mass evacuation and agreement that the Army could "weed the disloyal out of the loyal" among the Japanese Americans. The arrest and internment of those on the "ABC" list convinced the Department of Justice that no significant threat of espionage or sabotage remained on the West Coast.

However, following the publication of the sensational, but undocumented allegations of spying by Japanese Americans in Hawaii that were made in the "Roberts Report," and the pressures exerted on General DeWitt by Governor Olson and members of the West Coast Congressional delegation, General DeWitt submitted to the War Department a "Final Recommendation" for the evacuation of all persons of Japanese ancestry on the West Coast. This recommendation cited no evidence that Japanese Americans posed a danger of espionage or sabotage.

Responsible officials of both the War Department and the Department of Justice harbored serious doubts about the constitutionality of mass evacuation and restrictive measures directed at Japanese Americans as a group. Notwithstanding these doubts, they finally bowed to the claims of General DeWitt that "military necessity" required mass

evacuation. These officials consequently approved the "Final Recommendation" of General DeWitt and drafted for submission to the President the Executive Order that empowered General DeWitt to issue the military orders at issue in Petitioners' cases and to implement the mass evacuation and internment of the Japanese American population of the West Coast.

ATTORNEYS OF RECORD FOR PETITIONER
FRED T. KOREMATSU

Dennis W. Hayashi
Donald K. Tamaki
Michael J. Wong
Asian Law Caucus
1322 Webster Street, #210
Oakland, California 94612
(415) 835-1474

Robert L. Rusky
Hanson, Bridgett, Marcus,
Vlahos & Stromberg
333 Market Street, 23rd Floor
San Francisco, California 94105
(415) 777-3200

Peter Irons
429 Parkwood Lane
Leucadia, California 92024
(619) 452-3548

Karen N. Kai
746-35th Avenue
San Francisco, California 94121
(415) 387-9883

Russell Matsumoto
Maniwa & Matsumoto
1832 Buchanan Street, Suite 201
San Francisco, California 94115
(415) 921-9000

Dale Minami
Lorraine K. Bannai
Minami, Tomine & Lew
370 Grand Avenue
Oakland, California 94610
(415) 893-9100