> course, that which the Government does not have it cannot disclose. But this line of reasoning is far too facile, and clearly self-defeating. The language of Brady, Rule 16 and the Jencks Act includes no reference to the timing of possession and suppression. It is most consistent with the purposes of those safeguards to hold that the duty of disclosure attaches in some form once the Government has first gathered and taken possession of the evidence in question. Otherwise, disclosure might be avoided by destroying vital evidence before prosecution begins or before defendants hear of its existence. Hence we hold that before a request for discovery has been made, the duty of disclosure is operative as a duty of preservation.

Bryant, 439 F.2d at 650-651.

Even assuming the Justice Department was unaware of the existence of the two versions of the Final Report, and the different intelligence reports that contradicted the findings of the two versions of the Final Report, the War Department had its own duty to disclose the exculpatory evidence. At that time, the War Department was acting as an investigative agency for the Justice Department.

IV. GOVERNMENT ATTORNEYS ARE IMPUTED WITH KNOWLEDGE OF WAR DEPARTMENT AND OTHER INVESTIGATIVE AGENCIES.

Courts have consistently held that the nondisclosure by those involved with the prosecution of an individual may be imputed to the prosecutor. In United States v. Butler, 567 F.2d 885 (9th Cir. 1978), newly discovered evidence indicated that agents had told a government witness that dismissal or at least reduction of the charges pending against him was a strong possibility if he testified against the defendant. Despite the lack of knowledge by the prosecuting attorney of these promises, the court ordered a new trial and held:

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> [E]ven if the prosecutor's conduct could be explained by a lack of knowledge of promises made to his principal witness, he would still be responsible for the consequences of his nondisclosure.
>
> The Supreme Court said in Giglio v. U.S., 405 U.S. 150, 154:
>
> The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government ... to the extent this places a burden on the large prosecution offices, procedures and regulations can be established to carry that burden and to ensure communication of all relevant information on each case to every lawyer who deals with it.

Butler, 567 F.2d at 889.

In Freeman v. Georgia, 599 F.2d 65 (5th Cir. 1979), cert. denied 444 U.S. 1013 (1980), the court held that a police detective's knowing concealment of a witness amounted to the state's suppression of evidence favorable to the petitioner, which deprived him of due process. The lower court had found that the motivation for the concealment was personal and not an official attempt to prejudice the case against the petitioner and in any event lacked any possible material prejudicial affect. In rejecting this finding, the Court of Appeals held:

> We feel that when an investigating police officer willfully and intentionally conceals material information, regardless of his motivation and otherwise proper conduct of the state attorney, the policeman's conduct must by imputed to the state as part of the prosecution team. [Citations omitted.]

Id. at 69.

In the leading case of Barbee v. Warden, Maryland Penitentiary, 331 F.2d 842 (4th Cir. 1964), the court ruled that the defendant was entitled to have his conviction set aside

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because the prosecutor failed to disclose potentially exculpatory evidence which was withheld by the police. The court held that even though the police, rather than the prosecutor, withheld the information, the resulting denial of due process was the same:

> ... the effect of the nondisclosure [is not] neutralized because the prosecuting attorney was not shown to have had knowledge of the exculpatory evidence. Failure of the police to reveal such material evidence in their possession is equally harmful to a defendant whether the information is purposely, or negligently, withheld. And it makes not difference if the withholding is by officials other than the prosecutor. The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If the police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant.

Id. at 846.

The court emphasized that the State's duty to assure the fairness of the proceedings and to achieve justice extends beyond the prosecuting attorneys to the enforcement agency of the state itself:

> The duty to disclose is that of the state which ordinarily acts through the prosecuting attorney; but if he too is the victim of police suppression of the material information, the state's failure is not on that account excused. [Footnotes omitted].

Id. at 846.[4]

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[4] For reaffirmation of this basic principle, that any government misconduct is the responsibility of the prosecution, see Giglio, 405 U.S. at 154 (1972); Ray v. United States, 588 F.2d 601, 603 (8th Cir. 1978).

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V. THE PROSECUTION'S BAD FAITH IN INTENTIONALLY ALTERING AND DESTROYING EVIDENCE MATERIAL TO PETITIONER'S DEFENSES VIOLATED PETITIONER'S DUE PROCESS RIGHTS.

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

When the prosecution and affiliated Government agencies are responsible for the loss or destruction of evidence, the courts will find a due process violation if bad faith lies behind the Government's actions. This standard should be distinguished from the standard applicable to suppression cases discussed above. In suppression cases, a due process violation will be found on the basis of the materiality of the evidence, "irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963).

In 1974, the Ninth Circuit established an explicit test for vacation of convictions based on destruction of evidence. In United States v. Heiden, 508 F.2d 898 (9th Cir. 1974), the court was confronted with destruction of marijuana prior to appellant's trial. The court declared that

> When there is loss or destruction of such evidence, we will reverse a defendant's conviction if he can show (1) bad faith or connivance on the part of the Government or (2) that he was prejudiced by the loss of evidence.

Id. at p.902.

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In addition, the destruction of the Final Report was prejudicial to Petitioner's defense. The Government's claim of military necessity rested on the assumption that there was insufficient time to determine the loyalty of Japanese Americans on an individual basis. Yet, General DeWitt's own statement that insufficiency of time was not the reason for the orders, were destroyed with the original Final Report. Petitioner was thereby prejudiced in his ability to challenge the factual justification for the military orders put forth by the Government. The bad faith exhibited by the War Department in altering and destroying the original Final Report was so egregious and calculated that the court should presume that the evidence destroyed favored Petitioner. Arra, 630 F.2d 836.

VI. THE GOVERNMENT OWES PETITIONER AND THE COURTS A CONTINUING DUTY TO DISCLOSE.

The Government's misconduct continued after Petitioner's trial and appeal. In the later Korematsu case, the Government continued to mislead the Court regarding the evidence used to justify its treatment of Japanese Americans. Such conduct included suppression of exculpatory evidence refuting allegations of espionage and sabotage (Petition, pp. 34-61); failure to advise the court of evidence presented which it knew to be false (Petition, pp. 62-69); manipulation of the amicus briefs to knowingly present false evidence (Petition, pp. 62-69). The Government's duty to disclose exculpatory evidence continues after trial and conviction. United States v. Sheehan, 442 F.

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Supp. 1003 (D. Mass. 1977), aff'd 542 F.2d 1163 (1st Cir. 1976). As stated by the Supreme Court in Imbler v. Pachtman, 424 U.S. 409, 427, n.25 (1976), the prosecutor's duty is

> ... to bring to the attention of the court or proper officials all significant evidence suggestive of innocence or in mitigation. At trial this duty is enforced by the requirements of due process but after a conviction, the prosecutor also is bound by the ethics of his office to inform the appropriate authority of after acquired or other information that casts doubt upon the correctness of the conviction.

The Government's duty towards Petitioner was not dispatched because its misconduct was successful in obtaining a conviction, but rather its duty has continued through the years to require disclosure of the truth.

VII. GOVERNMENT ABUSE OF JUDICIAL NOTICE AND MANIPULATION OF AMICUS BRIEFS VIOLATED PETITIONER'S RIGHT TO DUE PROCESS AND CONSTITUTED A FRAUD ON THE COURTS.

The Government pressed the court to take judicial notice of certain racial characteristics of Japanese Americans that, the Government submitted, predisposed them to disloyalty. The Government took this position despite its possession of contrary evidence indicating that it was a subject of dispute and not appropriate for judicial notice. Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 Colum. L. Rev. 175 (1945). The Government in effect gained a criminal conviction based upon racist characterizations it represented as not being subject to reasonable dispute.

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This urging of judicial notice was buttressed by manipulation of the amicus brief filed by the States of California, Washington and Oregon. The original Final Report contained arguments based upon alleged racial characteristics. Because parts of the original Final Report damaged the Government's case it was withheld from the Justice Department by the War Department. Nonetheless the War Department put the derogatory material before the court through lengthy excerpts in the amicus brief.

Through judicial notice and the amicus brief, the Government knowingly used false evidence of sabotage and discredited racial slurs to justify as militarily necessary the curfew, evacuation, and internment orders imposed upon all Japanese Americans solely on the basis of their race.

These Government acts constitute an abuse of both Petitioner and the judicial system. Due process protection is not limited to particular, familiar, fact situations. Taylor, 648 F.2d at 571. The right to due process is not vitiated simply because the Government devises a new way to abuse it. These abuses, combined with the suppression of evidence and destruction of documents by the Government, constitute a relentless pattern of abuse in violation of elementary standards of justice and require the coram nobis relief sought by Petitioner.

VIII. CONCURRENT SENTENCE DOCTRINE REJECTED.

The Respondent in its pleadings and in arguments before this Court has contended that although Petitioner was convicted of

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violating both exclusion and curfew orders, this Court's coram nobis review should be limited to the curfew violation. The Government contends that because the Supreme Court, in using the Concurrent Sentence Doctrine, ruled only on the validity of the curfew order, this court should close its eyes to the violations perpetrated against Petitioner. The Government is thereby clearly attempting to avoid dealing with some of the crucial issues raised by the Petition.

The Ninth Circuit has recently reviewed this doctrine and rejected its further use altogether, stating:

> An additional reason counsels against maintenance of the doctrine in any form. Every federal criminal defendant has a statutory right to have his or her conviction reviewed by a court of appeals. 28 U.S.C. § 1291; Coppedge v. United States, 369 U.S. 438, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962). The statutory right to appeal is deemed so important that a district court judge is required to inform a defendant specifically of that right after trial and sentencing ... that right encompasses all convictions. The concurrent sentence doctrine, by permitting an appellate court to decline to review a conviction for reasons of judicial economy, impinges upon the defendant's statutory right.

(Emphasis added.) United States v. DeBright, 730 F.2d 1255, 1259 (9th Cir. 1984).

Where, as in the instant case, relief sought by Petitioner is based upon equitable grounds, to allow the Government to continue to hide behind procedure and not substance would be totally unjust. Particularly in a coram nobis setting, the court should look at all the facts to determine whether governmental misconduct violated the sanctity of the legal process.

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Furthermore, the Petition requests vacation of both curfew and exclusion convictions. If the court reviews only the curfew violation, that would still leave the exclusion conviction on the Petitioner's record. Indeed, since the Supreme Court ruled only on the curfew violation, this Court is now free to more fully examine Petitioner's exclusion conviction.

IX. LACHES DEFENSE FAILS AS A MATTER OF LAW AND EQUITY.

The Government has urged that laches bars Petitioner's application for relief. In relying upon this defense, the Government bears the burden of establishing the dates the suppressed documents became available to Petitioner. Transcript of Proceedings before Honorable Donald S. Voorhees, May 18, 1984, pp. 104-105. In addition, Petitioner has exercised due diligence in bringing this action, especially in light of the Government's unclean hands and lack of any showing of prejudice. Moreover, as a matter of law, laches is not a proper defense to a proceeding brought to remedy a fraud on the court.

A. Petitioner Exercised Due Diligence.

In Morgan, the Supreme Court did not speak in terms of laches but required the petitioner only to show "sound reasons" for his inability to seek earlier relief. Petitioner has done so in this case.

First, certain of the most critical evidence in Petitioner's case, proving that the Government knowingly withheld material evidence from the courts, was not made known to the public until 1981-1982. Thus, Ennis' memorandum to Fahy of April 30, 1943

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(Petition, Ex. Q) was only discovered after 1980 during the course of the work performed by the Commission on Wartime Relocation and Internment of Civilians. See, Hohri v. United States, 586 F. Supp. 769, 789 (D.D.C. 1984). Ennis' memorandum established that the Justice Department was aware of the significance of the ONI Report and, notwithstanding Ennis' concerns, knowingly withheld this evidence from the courts. Similarly, Ennis' and Burling's memoranda, memorializing the Government's continuing manipulation of the Final Report in its brief to the Supreme Court in Korematsu, were not discovered until 1981-1982. (Petition, Exs. AA and BB.)

Furthermore, evidence of the War Department's alteration and attempted destruction of the original version of the Final Report did not come to Petitioner's attention until 1981-1982. The technical availability of the original version of the Final Report and other relevant documents in the National Archives in the 1950s does not show that Petitioner had reasonable notice of or access to these documents. The discovery of the documents pertaining to Petitioner's case among the hundreds of thousands of documents in the National Archives was an arduous task, requiring substantially more than due diligence. Moreover, not all documents--particularly those of the FBI--are in the National Archives. Finally, the methods by which these documents are stored and retrieved make them realistically available only to those with special training in historical research. Given the extreme difficulties that even scholars have encountered in their

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research, the court cannot reasonably conclude that a layperson could have been able to discover these documents in the exercise of due diligence.[5] Petitioner has unquestionably shown sound reasons for his inability to file the instant petition earlier.

B. The Government Has Failed To Show Prejudice.

The Government has also failed to establish that it has been prejudiced by Petitioner's alleged delay. Despite its repeated assertion that witnesses have died and memories of living witnesses have faded, the Government has not made any showing whatsoever as to what testimony these witnesses would have been able to give to negate the plain import of the evidence offered by Petitioner in this case. This failure is especially significant since the petition is principally based on the Government's own documents. For instance, the Government has not identified any witnesses who will testify or any evidence which indicates that the Final Report was not altered as charged or

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[5] The Government has itself repeatedly recognized the difficult burden of locating and reviewing the documents relevant to this action. As of May 17, 1985, the Government emphasized the "hundreds of attorney and staff hours [consumed] reviewing two hundred thousand pages of potentially relevant documents in order to provide Petitioner with copies of several thousand documents that may not have been previously available to him." (Emphasis added.) Government's Proposed Prehearing Order, pp. 9-10. Similarly, over two years ago, in the first status conference in Korematsu on March 14, 1983, while emphasizing the enormous mass of material addressed by the Commission in its research, Government counsel stated:

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that it was not represented to be the definitive statement of the Government's position. Indeed, the Government's failure to name McCloy, Bendetsen, or Weschler as witnesses in this case--although these central actors are not only alive but have testified before various forums in recent years--only emphasizes the lack of merit in the Government's claim of prejudice.

C. The Government Is Estopped By Unclean Hands.

The Government's defense of laches invokes the equitable powers of this court. However, "he who comes into equity must come with clean hands." Precision Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814 (1945). This is especially true where, as here, the case involves issues of substantial public importance:

> Where a suit in equity concerns the public as well as private interests ..., this doctrine assumes even wider and more significant proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case, it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public.

Id. at 815.

The gravamen of the instant petition is a pervasive pattern of misconduct founded in the Government's suppression, alteration, and attempted destruction of evidence, together with

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(footnote continued)

> "I've been to the National Archives myself three times in the last three weeks and I was overwhelmed. They have literally a wall of documents." (Emphasis added.) (Transcript, 3/14/83, at 6-7.)

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a knowing presentation of false evidence in order to obtain Petitioner's convictions. Having achieved this result, the Government cannot now invoke equity to prevent redress of that injustice. "The equitable powers of this court can never be exercised in behalf of one who has acted fraudulently or who by deceit or any unfair means has gained an advantage." Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 245 (1933).

D. The Defense Of Laches Is Inapplicable Because The Misconduct Constitutes A Fraud On The Court.

Finally, since Petitioner has made a prima facie showing that the Government engaged in misconduct constituting a fraud on the court, Taylor, 648 F.2d at 570-571, the defense of laches is entirely inapplicable to this case. Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944), overruled on other grounds, Standard Oil of California v. United States, 429 U.S. 17 (1976).

As the Supreme Court declared in Hazel-Atlas, wherein it rejected the contention that relief from a ten year old judgment obtained on the basis of fabricated evidence was barred by laches:

> "But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be condoned for that reason alone. This matter does not concern only private parties.... It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not

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> so impotent that they must always be mute and helpless victims of deception and fraud."

Id. at 246; see also, Toscano v. C.I.R., 441 F.2d 930, 933-935 (9th Cir. 1971) (recognizing that lack of diligence is not a bar to relief for fraud on the court).

In sum, this case presents an injustice which is "sufficiently gross to demand a departure from rigid adherence" to procedural rules which might be applicable in other circumstances and which requires redress irrespective of the diligence of the parties. Hazel-Atlas, 322 U.S. at 244. "[W]here the occasion has demanded, where enforcement of the judgment is 'manifestly unconsionable,'" the courts will exercise their inherent equitable power "without hesitation." Id. at 244-245. As Justice Black proclaimed in Hazel-Atlas:

> "Equitable relief against fraudulent judgments is . . . a judicially devised remedy fashioned to relieve hardships which, from time to time, arise from a hard and fast adherence to another court-made rule . . . . Created to avert the evils of archaic rigidity, this equitable procedure has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations."

Id. at 248.

The injustices clearly established by Petitioner's evidence require no less from this court. The Government's spurious claim that Petitioner is guilty of laches must be rejected.

CONCLUSION

The Government's misconduct in securing Petitioner's convictions and defending those convictions on appeal offends the

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most fundamental notions of justice. Not only did the Government's misconduct seriously prejudice Petitioner and deny him the right to a fair trial, but the Government's misconduct also violated the sanctity of the courts and undermined the public's confidence in the administration of justice.

Through Petitioner's convictions, the Government won this Court's approval of military curfew and exclusion orders that applied to a group of individuals identified simply on the basis of ancestry. The Government now raises the doctrine of laches in an attempt to bar Petitioner's prayer for relief. This defense, however, should be rejected for several reasons, the most compelling of which is the Government's "unclean hands." Ironically, the Government seeks to invoke this Court's equitable powers to further conceal its misconduct and frustrate Petitioner's attempt to redress the injustice he has suffered for over forty years.

For these reasons, this Court should reject the Government's laches defense and grant the petition for writ of error coram nobis. By so doing, this Court will correct fundamental errors and prevent Petitioner from suffering further injustice.

DATED this 10th day of June, 1985.

Respectfully submitted,

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