

1 [The] Bureau had no evidence which would indicate that the
 2 Japanese-American population were a danger or that anything
 3 more was required than the couple of thousand Japanese
 4 aliens that we had picked up very quickly and detained
 5 because of possible loyalty to Japan . . .

6 ⁴
 7 (Tr. 203:15-20) Mr. Ennis further testified that the Department of Justice
 8 knew of these military and intelligence reports during the course of Peti-
 9 tioner's appeals through the Supreme Court but did not disclose them to the
 10 Court or to Petitioner. (Tr. 208:1-8; Tr. 209:5-15; Tr. 210:1-10) ⁵

11 C. MAGIC

12 The Government argues that the intercepted and decrypted Japanese
 13 diplomatic cables formed the basis for General DeWitt's military orders. The
 14 MAGIC cables are both factually incorrect and irrelevant to this coram nobis
 15 petition. The Government's argument seems to be that the substance of these
 16 MAGIC cables indicates that second generation Japanese Americans were being
 17 recruited into an espionage network and critical military information was
 18 being relayed by them to Japan. The Government then maintains this informa-
 19 tion was widely circulated in FBI, ONI and MID memos and reports. Therefore,
 20 according to what seems to be the Government's argument, this information
 21 formed the basis for General DeWitt's military orders. The evidence intro-
 22 duced at trial conclusively refutes this argument.

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24 ////

25 ⁴All of the Government's former G-2 and FBI trial witnesses testi-
 26 fied that they knew of no evidence that Japanese Americans had committed acts
 27 of espionage or sabotage.

28 ⁵Respondent at G.C.A., page 15 argues that it was not required to
 make disclosures because in 1943 there existed no procedure allowing for in
 camera review of classified documents. This argument is untenable. See,
United States v. Andolschek, 142 F.2d 503 (2nd Cir., 1944).

1 First, the cables do not establish that a Japanese American espio-
2 nage network was ever successfully implemented. The cables speak of Japan's
3 desire to create a network through the use of all resources, including com-
4 munists, labor unions and blacks, as well as Japanese Americans. (Ex. A-17)

5 Second, according to the evidence at trial, the military information
6 which was relayed to Japan was publicly available information which did not
7 require any clandestine network. For example, Exhibit 144, which is the
8 first half of a cable transmission submitted by Respondent (Ex. A-24),
9 reveals that the military information was released by the president of the
10 Boeing Company to a Senate Committee or was from public statements made by
11 General DeWitt. Exhibits 145 and 146 establish that military plane produc-
12 tion data, including contract award figures, payroll size and numbers of
13 employees, were available to and published by the newspapers.

14 Third, there is no evidence that the MAGIC cables or their substance
15 formed a basis for any of General DeWitt's military orders. The Government's
16 argument ignores General DeWitt's actual statement of his military considera-
17 tions as written in his first Final Report. Moreover, to the extent that the
18 substance of MAGIC was widely distributed to the ONI and FBI, those agencies
19 nonetheless concluded after further investigation that there was no factual
20 basis or need for the military orders. As Colonel John Herzig testified, any
21 responsible intelligence agency would use the raw information contained in
22 MAGIC and conduct further investigations before arriving at any conclusion.
23 Exhibits 149 and 150 illustrate the course of investigation by the ONI and
24 FBI.

25 A reading of the MAGIC cables submitted as exhibits by the Govern-
26 ment reveals that they are simply irrelevant to this coram nobis petition.

27 Assuming arguendo that MAGIC may have some probative value on the issue of

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1 military necessity, MAGIC still has no bearing on the suppression of excul-
2 patory evidence by the Government.

3 III. STANDARD OF REVIEW

4 The leading Ninth Circuit case regarding coram nobis is United
5 States v. Taylor, 648 F.2d 565 (9th Cir.), cert. denied, 454 U.S. 866
6 (1981). Coram nobis relief is warranted where Government abuses "offend
7 elementary standards of justice," cause "serious prejudice to the accused,"
8 or, even absent such prejudice, "undermine public confidence in the admini-
9 stration of justice." Taylor, 648 F.2d at 571. The Court noted that new
10 trials had been ordered when the prosecution knowingly uses perjured testi-
11 mony or withholds materially favorable evidence from the defense. 648 F.2d
12 at 571. Here the Government used false evidence, suppressed evidence and
13 misrepresented evidence to obtain a favorable determination with respect to
14 the constitutionality of Public Law 503 and the underlying curfew and evacua-
15 tion orders. The Court should, therefore, apply the standards of materiality
16 discussed in Petitioner's Hearing Memorandum and Post-Hearing Brief and in
17 Mooney v. Holohan, 294 U.S. 103 (1935), Brady v. Maryland, 373 U.S. 83
18 (1963), and United States v. Agurs, 427 U.S. 97 (1976).
19

20 In this case, the Government misconduct so violated the most funda-
21 mental standards of justice that the Court should grant the requested relief

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22 ////

23 _____

24 ⁶The Government cites United States v. Badley, _____ U.S. _____,
25 105 S.Ct. 3375, 53 LW 5048 (1985), for the proposition that, "in all Agurs
26 and Brady situations 'evidence is material only if there is a reasonable
27 probability that had the evidence been disclosed to the defense, the result
28 of the proceeding would have been different.'" This language, however, is
cited from Part III of Justice Blackmun's opinion which was joined by only
one other justice. Therefore, this portion of the opinion is not controlling.

1 based upon any reasonable standard of materiality. Contrary to the Govern-
 2 ment's misconstruction of the law, Petitioner does not bear the burden of
 3 proving that but for the Government's suppression of evidence and use of
 4 false evidence the outcome of Petitioner's trial would have been different.
 5 Under the Government's proposed new standard of review, a new trial will
 6 never be necessary because the Court would have already decided that the out-
 7 come would be different. Furthermore, common sense and logic dictate it
 8 would be impossible to know whether the outcome would be different unless the
 9 case, absent the false evidence and including the new evidence, was timely
 10 presented to the original trier of fact and original appellate courts.

11 IV. LACHES

12 The Court should exercise its equitable powers to bar the Govern-
 13 ment's laches defense on the following grounds:

14 A. The Government is estopped by unclean hands.

15 "He who comes into equity must come with clean hands." Precision
 16 Instrument Mfg. Co. v. Automotive Maintenance Mach. Co., 324 U.S. 806, 814
 17 (1945). This is especially true where, as here, the case involves issues of
 18 substantial public importance:

19 _____
 20 ⁷In United States v. Hastings, 461 U.S. 499, (1983), the Court
 21 acknowledges there are certain errors that may involve "rights so basic to a
 22 fair trial that their infraction can never be treated as harmless error."
 23 Hastings, 461 U.S. at 508, n. 6, citing Chapman v. California, 386 U.S. 18,
 24 23 (1967). Yet the Government cites Hastings for the proposition that
 25 "'considerations of justice,' 'judicial integrity,' and intentional 'illegal
 26 conduct' are not enough, standing alone, to warrant vacating a conviction if
 27 the resultant 'errors alleged are harmless' since 'the conviction would have
 28 been obtained notwithstanding the asserted error.'" G.C.A., at 11. Further-
 more, the Government's misconduct cannot be characterized as harmless error.
Hastings involved statements made by the prosecutor about the defendants'
 failure to testify on their behalf. By contrast, this case involves the
 suppression of evidence and the knowing use of false evidence to establish
 the constitutionality of Public Law 503 and the underlying curfew and evacu-
 ation orders.

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

8 Id. at 815.

9 The pervasive pattern of misconduct by the Government's suppression,
10 alteration, and attempted destruction of evidence, together with a knowing
11 presentation of false evidence in order to obtain Petitioner's convictions
12 should preclude the Government from now invoking equity to prevent redress of
13 that injustice.

14 B. The Government has failed to show prejudice.

15 The Government has also failed to establish that it has been pre-
16 judiced by Petitioner's alleged delay. Despite its repeated assertion that
17 witnesses have died and memories of living witnesses have faded, the Govern-
18 ment has not made any showing whatsoever as to what testimony these witnesses
19 would have been able to give to negate the plain import of the evidence
20 offered by Petitioner in this case. This failure is especially significant
21 since the Petition is principally based on the Government's own documents.
22 Indeed, the Government's failure to call McCloy, Bendetsen or Weschler as
23 witnesses in this case -- although these central actors are not only alive
24 but have testified before various forums in recent years -- only emphasizes
25 the lack of merit in the Government's claim of prejudice.

26 C. Petitioner exercised due diligence.

27 In Morgan, the Supreme Court did not speak in terms of laches but
28 required the petitioner only to show "sound reasons" for his inability to
29 seek earlier relief. Morgan v. United States, 346 U.S. 502 (1954). Fur-
30 thermore, Petitioner can only be found lacking diligence if his delay in

1 filing suit is both unreasonable and inexcusable and if the Government is
2 prejudiced by the lapse of time and changed conditions occasioned by such
3 delay. As stated before, the Government has failed to establish a prejudice
4 due to Petitioner's delay, and the Petitioner has demonstrated that the long
5 delay was both reasonable and justifiable.

6 Petitioner is not a professional archival researcher. From the
7 testimony of Hannah Zeidlik and Aiko Herzig-Yoshinaga, it is apparent that
8 the relevant documents which gave rise to this petition for writ of error
9 coram nobis are located in various geographic locations across the country
10 and the retrieval of those documents would require technical skills and know-
11 ledge of repositories of archival materials. Petitioner did not have the
12 financial resources or technical skills necessary to discover and retrieve
13 these documents.

14 Victor Stone, attorney for the Government, has had the financial and
15 personnel resources available to him as a Government attorney in this litiga-
16 tion. He represented to this Court that even he, after working on this case
17 over one year, determined that screening the relevant materials for this case
18 presented such difficulty that he would have to hire a historical researcher.
19 (Tr. 117:13-16, May 18, 1984) Moreover, as an attorney responding to spe-
20 cific allegations, Victor Stone was in a position to focus his archival
21 research towards obtaining specific information. Mr. Hirabayashi, working on
22 his own, with no special training or knowledge, could not reasonably be
23 expected in the exercise of due diligence to venture into the archives on a
24 generalized mission to discover governmental misconduct in the handling of
25 his original case.

26 Moreover, the Government would impose an onerous burden on
27 Mr. Hirabayashi to overcome a laches defense. To expect an ordinary person

1 to meet such a standard would create an undue burden such that coram nobis
2 petitioners would rarely, if ever, survive a laches defense.

3 Finally, Mr. Hirabayashi is not an attorney and has had no legal
4 training. Even if he had have flown to Washington, D.C., and to other
5 repositories year after year as documents became available or declassified,
6 it is unreasonable to expect that he would be in a position to determine
7 what causes of action he might have after examining the bulk of the documents
8 introduced as evidence in his trial on the coram nobis petition.

9 D. The defense of laches is inappropriate because the misconduct
10 constitutes a fraud on the Court.

11 Even assuming that Petitioner may not have been diligent, which is
12 not conceded here, the defense of laches nonetheless remains inappropriate.
13 As the Supreme Court declared in Hazel-Atlas, wherein it rejected the conten-
14 tion that relief from a ten-year old judgment obtained on the basis of
15 fabricated evidence was barred by laches:

16 But even if Hazel did not exercise the highest degree of
17 diligence Hartford's fraud cannot be condoned for that
18 reason alone. This matter does not concern only private
19 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.

20 Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944); see
21 also, Toscano v. C.I.R., 441 F.2d 930, 933-935 (9th Cir. 1971) (recognizing
22 that lack of diligence is not a bar to relief for fraud on the court).

23 This case presents an injustice which is "sufficiently gross to
24 demand a departure from rigid adherence" to procedural rules which might be
25 applicable in other circumstances and to require redress irrespective of the
26 diligence of the parties. Hazel-Atlas, 322 U.S. at 244. The injustices
27 clearly established by Petitioner's evidence require no less from this Court.

1 The Government's spurious claim that Petitioner is guilty of laches must be
2 rejected.

3 V. CONCLUSION

4 Forty-three years ago, a twenty-four year old college student had
5 such a deep and abiding faith in the United States Constitution and the
6 American principles embodied in this great document that he was willing to
7 stand virtually alone against the entire United States government. He
8 believed that the incarceration of over 120,000 people based solely on race
9 was contrary to the very foundation of these constitutional principles.

10 Today this same college student, now a professor emeritus, continues his
11 quest to set the record straight and insure that the Constitution stands in
12 practice for what it says in principle.

13 For his courageous stand, the Government in the instant proceedings
14 recognizes the Petitioner as a "standard bearer." Yet, since the Supreme
15 Court ruled in his case that the military orders were constitutional, and
16 since the Court later in Korematsu used this ruling as a legal basis justi-
17 fying the constitutionality of the evacuation of 120,000 people of Japanese
18 ancestry, carrying this particular standard has indeed been a heavy burden
19 shouldered by Petitioner.

20 Forty-three years ago, the Government prosecuted its case against
21 this "standard bearer" not because it believed that Petitioner himself was a
22 threat to the security of the United States, but rather because a military
23 program affecting 120,000 people of Japanese ancestry was at stake. In its
24 earnestness to assure that the military orders would be ruled constitutional,
25 the Government developed a win-at-all-costs campaign which resulted in vio-
26 lating Petitioner's constitutional rights to due process.

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1 In this instant coram nobis proceeding, the Government asserts no
2 misconduct ever occurred. The evidence clearly establishes that the Govern-
3 ment had in its possession throughout the original Court proceedings vast
4 amounts of information, including military and intelligence reports, which
5 directly refuted Government claims of military necessity. In the face of the
6 indisputable evidence of suppression and misrepresentation, the Government
7 now argues that the suppressed evidence was not exculpatory. This position
8 is untenable given the misrepresentations which the Government made to the
9 Supreme Court in support of the claims of military necessity.

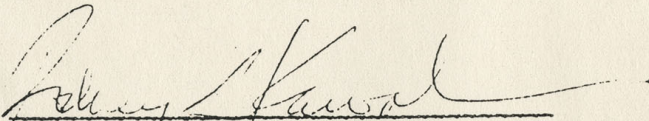
10 Given the Government's unwillingness to acknowledge its own miscon-
11 duct, it is imperative that the Court speak clearly through its ruling and
12 declare to the Government that suppression of exculpatory evidence will not
13 be condoned. The misrepresentations and suppression of evidence by the
14 Government violated the integrity of the judicial process, not only depriving
15 Petitioner of his due process rights but also resulting in a fraud upon the
16 Courts.

17 Mr. Hirabayashi brings this coram nobis Petition motivated by the
18 same steadfast belief in the Constitution that he maintained in challenging
19 the military orders of 1942. Mr. Hirabayashi seeks vindication on three
20 levels: 1. For himself as an individual defendant; 2. For the Japanese
21 American community whose constitutional rights were violated wholesale by the
22 evacuation program; and, 3. For all American citizens whose rights are pro-
23 tected by the Constitution. By granting the vacation of convictions based on
24 findings that Mr. Hirabayashi was denied his due process rights by virtue of
25 Governmental misconduct, this Court will assure Mr. Hirabayashi, the Japanese
26 American community, and all Americans that their rights under the Constitution
27 of the United States will be safeguarded.

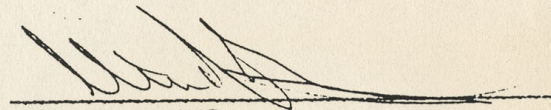
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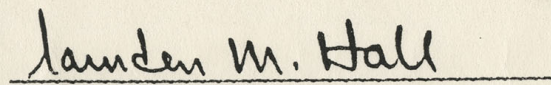
Respectfully submitted,



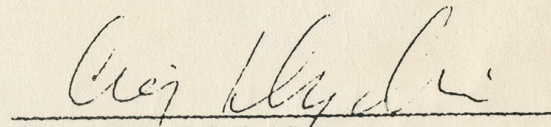
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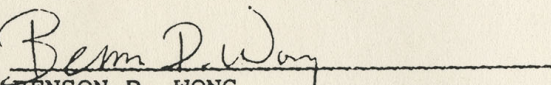
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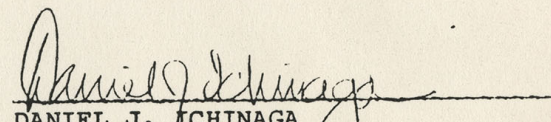
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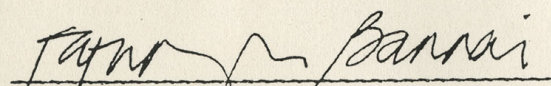
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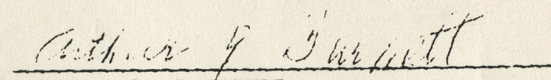
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