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

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

C. MAGIC

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

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[4] All of the Government's former G-2 and FBI trial witnesses testified that they knew of no evidence that Japanese Americans had committed acts of espionage or sabotage.

[5] Respondent 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).

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

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

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

A reading of the MAGIC cables submitted as exhibits by the Government reveals that they are simply irrelevant to this coram nobis petition. Assuming arguendo that MAGIC may have some probative value on the issue of

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military necessity, MAGIC still has no bearing on the suppression of exculpatory evidence by the Government.

III. STANDARD OF REVIEW

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

In this case, the Government misconduct so violated the most fundamental standards of justice that the Court should grant the requested relief

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

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

IV. LACHES

The Court should exercise its equitable powers to bar the Government's laches defense on the following grounds:

A. The Government is estopped by unclean hands.

"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:

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[7] In United States v. Hastings, 461 U.S. 499, (1983), the Court acknowledges there are certain errors that may involve "rights so basic to a fair trial that their infraction can never be treated as harmless error." Hastings, 461 U.S. at 508, n. 6, citing Chapman v. California, 386 U.S. 18, 23 (1967). Yet the Government cites Hastings for the proposition that "'considerations of justice,' 'judicial integrity,' and intentional 'illegal conduct' are not enough, standing alone, to warrant vacating a conviction if the resultant 'errors alleged are harmless' since 'the conviction would have been obtained notwithstanding the asserted error.'" G.C.A., at 11. Furthermore, 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 evacuation orders.

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

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. Indeed, the Government's failure to call 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. 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. Morgan v. United States, 346 U.S. 502 (1954). Furthermore, Petitioner can only be found lacking diligence if his delay in

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

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

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

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

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

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

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

Even assuming that Petitioner may not have been diligent, which is not conceded here, the defense of laches nonetheless remains inappropriate. 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.

Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944); 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).

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 to require redress irrespective of the diligence of the parties. Hazel-Atlas, 322 U.S. at 244. The injustices clearly established by Petitioner's evidence require no less from this Court.

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

V. CONCLUSION

Forty-three years ago, a twenty-four year old college student had such a deep and abiding faith in the United States Constitution and the American principles embodied in this great document that he was willing to stand virtually alone against the entire United States government. He believed that the incarceration of over 120,000 people based solely on race was contrary to the very foundation of these constitutional principles. Today this same college student, now a professor emeritus, continues his quest to set the record straight and insure that the Constitution stands in practice for what it says in principle.

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

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

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

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

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

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DATED this 4th day of October, 1985.

Respectfully submitted,

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