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Hirabayashi v. United States

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10-4-1985

## Petitioner's Brief Reply

United States District Court Western District of Washington

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AT SEATTLE  
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WESTERN DISTRICT OF WASHINGTON  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

GORDON K. HIRABAYASHI,	)	
	)	
Petitioner,	)	NO. C83-122V
	)	
vs.	)	PETITIONER'S REPLY BRIEF
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	
	)	

PETITIONER'S REPLY BRIEF

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1 I. INTRODUCTION

2 Petitioner is respectfully requesting the following relief from this  
3 Court:

- 4 1. Vacation of his two misdemeanor convictions under Public Law  
5 503;  
6 2. Dismissal of the indictments filed against him under Public Law  
7 503;  
8 3. Granting of his Petition for a Writ of Error Coram Nobis herein;  
9 4. Findings of Fact as bases for the above-requested relief that  
10 Petitioner was denied his due process rights by the Government  
11 by the suppression of material evidence.

12 II. THE GOVERNMENT MISCONDUCT

- 13 A. The Government misled the Court on the issue of military  
14 necessity.

15 Petitioner's defense against the indictments was that the statute  
16 and orders were unconstitutional. The Supreme Court's ruling on this chal-  
17 lenge of constitutionality turned upon the military necessity of General  
18 DeWitt's action. Upon this crucial issue, the Government misled the Supreme  
19 Court to believe that General DeWitt issued the military orders pursuant to a  
20 duly made factual basis of military necessity.

21 In reviewing the constitutionality of the challenged orders, the  
22 Court stated the issue as follows:

23 . . . our inquiry must be whether in light of all the facts  
24 and circumstances there was any substantial basis for the  
25 conclusion, in which Congress and the military commander  
26 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  
reasonably be expected to aid a threatened enemy invasion.

27 (Emphasis added.) Hirabayashi v. United States, 320 U.S. 81 at 95 (1943).

28 PETITIONER'S REPLY BRIEF - 1

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1 However, the Court was given only a limited set of facts by the Government  
2 through resort to judicial notice and the amici curiae. From this carefully  
3 tailored set of facts, the Government argued the military orders were issued  
4 as a matter of military necessity grounded upon a factual basis, despite pos-  
5 session by the Government of persuasive military and intelligence reports  
6 directly contrary to this position.

7 The Government in its brief to the Court asserted:

8 [the military orders were] founded upon the fact that the  
9 group [of Japanese residents] as a whole contained an  
10 unknown number of persons who could not readily be singled  
11 out and who were a threat to the security of the nation; and  
in order to impose effective restraints upon them it was  
necessary not only to deal with the entire group, but to  
deal with it at once.

12 (Ex. 99, p. 35)

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

16 (Ex. 99, pp. 61-62). The Government argued that the insufficiency of time  
17 determined the need to impose the military orders on the entire Japanese West  
18 Coast population. This is reflected in Mr. Ennis' testimony below:

19 Q. (By Mr. Hall) In the context of the Government's  
20 presentation of its case to the Supreme Court, either in  
21 written form or oral form, Mr. Ennis, how important to  
22 the Government's case was the concept that there was not  
sufficient time within which to make a distinction  
between the sheep and the goats?

23 A. Well, really, our formula or our argument that there was  
24 not time was the whole center of our argument, and as I  
25 understand it, that was the center of the Supreme  
26 Court's decision by the Chief Justice, who said that if  
27 the military commander believed that there were possible  
espionage agents or saboteurs in the group and there was  
not sufficient time to take -- to determine their  
existence, that then he could remove the whole group.  
It was the whole argument.

28 PETITIONER'S REPLY BRIEF - 2

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1  
1 (Tr. 243:19-244:7). The Government re-emphasized that position to the  
2 Supreme Court subsequent to oral argument before the Court. (Ex. 131)

3 Subsequently, the Court accepted the argument of the Government and  
4 stated:

5 We cannot say that the war-making branches of the Government  
6 did not have ground for believing that in a critical hour  
7 such persons could not readily be isolated and separately  
8 dealt with, and constituted a menace to the national defense  
9 and safety, which demanded that prompt and adequate measures  
10 be taken to guard against it.

11 320 U.S. at 99. The Court went on to conclude:

12 [the military orders] themselves followed a standard autho-  
13 rized by the Executive Order -- the necessity of protecting  
14 military resources in the designated areas against espionage  
15 and sabotage. And by the Act [Public Law 503], Congress  
16 gave its approval to that standard. We have no need to con-  
17 sider now the validity of action if taken by the military  
18 commander without conforming to this standard approved by  
19 Congress, or the validity of orders made without the support  
20 of findings showing that they do so conform. Here the  
21 findings of danger from espionage and sabotage, and of the  
22 necessity of the curfew order to protect against them, have  
23 been duly made . . . .

24 The military commander's appraisal of facts in the light  
25 of the authorized standard, and the inferences which he drew  
26 from those facts, involved the exercise of his informed  
27 judgment.

28 [Emphasis added.] 320 U.S. at 103. The Court clearly relied upon the  
Government's misrepresentation that General DeWitt, in his informed judgment  
of the facts, issued his orders as a matter of military necessity because

////

1 Respondent in its Closing Argument at page 40 misquotes Mr. Ennis'  
testimony representing that Mr. Ennis believed the position of the Government  
represented to the Supreme Court was appropriate. Mr. Ennis' actual testimony  
was: "[T]he statement in the brief was correct, if you accept the proposi-  
tion that there was a severe -- a serious enough danger in the Japanese  
community to have any exclusion program at all, which I did not . . . ."  
(Tr. 279:12-15)

PETITIONER'S REPLY BRIEF - 3

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1 there existed an unidentifiable group of Japanese residents who posed a  
2 threat of espionage or sabotage and the potentially disloyal could not be  
3 readily identified.

4 This misrepresentation was contrary to persuasive military and  
5 intelligence reports possessed by the Government at that time. Those reports  
6 established that:

- 7 1. There was no factual basis for concluding that the Japanese  
8 population posed a threat of espionage or sabotage (Ex. 41,  
9 Tab 37; Ex. 43, Tab 29; Ex. 76, Tab 30);
- 10 2. The information in General DeWitt's possession was that the  
11 military orders were not necessary (Ex. 40, Tab 31; Ex. 42,  
12 Tab 38; Ex. 38, Tab 32);
- 13 3. General DeWitt's actual assertion of military necessity was  
14 based upon his misinformed judgment that the loyal and  
15 potentially disloyal Japanese could not be identified re-  
16 gardless of how much time the identification required  
17 (Ex. 42, Tab 38); and
- 18 4. The potentially disloyal were readily identified such as not  
19 to require the imposition of the military orders on the  
20 entire Japanese population on the West Coast (Ex. 4, Tab 17;  
21 Ex. 32, Tab 4; Ex. 77, Tab 12).

22 1. The Proceedings Below

23 The Government now attempts to argue that it was under no obligation  
24 to come forward with the exculpatory evidence because Petitioner did not make

25 ////

26 ////

27 ////

28 PETITIONER'S REPLY BRIEF - 4

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1 a factual record disputing the existence of a war emergency. (Gov't. Closing  
2 Argument, "G.C.A." hereafter, p. 5)<sup>2</sup> This argument is transparently ground-  
3 less. First, Petitioner does not challenge the existence of a war emergency.  
4 His challenge then and now is that the military orders were unconstitutional  
5 and that they were not necessary to meet the "war emergency." Secondly,  
6 Petitioner's inability to perfect a factual record does not excuse the affir-  
7 mative misrepresentations by the Government to the Court.

8 Finally, the Government's position renders the Government's obliga-  
9 tion meaningless. It is illogical to require a defendant to demand produc-  
10 tion of evidence of which defendant has no knowledge. If the Government had  
11 disclosed the exculpatory evidence to Petitioner, he could have developed the  
12 factual record which the Government now criticizes Petitioner for failing to  
13 do.

14 Here the Government knew Petitioner's defense to the indictments was  
15 that the military orders were unconstitutional. Here the Government knew the  
16 Court's review of the constitutionality of the orders turned upon the mili-  
17 tary necessity for the orders. Here the Government argued a factual basis of  
18 military necessity directly contrary to the persuasive evidence in its pos-  
19 session. Therefore, the Government was under an obligation to disclose the  
20 exculpatory evidence to the Court and to Petitioner.

21 ////

22 ////

23 ////

24 ////

25 \_\_\_\_\_  
26 <sup>2</sup>Respondent misconstrues the record on this point. Nothing in the  
27 record reflects whether or not Petitioner attempted to solicit facts on the  
28 issue of military necessity.

PETITIONER'S REPLY BRIEF - 5

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1                                   2. Continued Misrepresentation

2                   Even after high Government officials debated amongst themselves  
3 about the duty to advise the Court of the contrary evidence (See, Ex. 2, Tab  
4 90; Ex. 35, Tab 36), the Department of Justice deliberately chose to continue  
5 its misrepresentations to the Court. Although Mr. Ennis believed a footnote  
6 placed in the U.S. Brief to the Court in Korematsu met the minimum standards  
7 for disclaiming any reliance on General DeWitt's factual assertions in sup-  
8 port of military necessity (Tr. 252:17-254:16; Tr. 325:20-362:3), Solicitor  
9 General Fahy, in oral argument before the Supreme Court, disclaimed the sig-  
10 nificance of the footnote such as to render it totally meaningless. (Ex. 98,  
11 Tab 19) More to the point, the footnote disclaimer did not sufficiently  
12 disclose to Petitioner and to the Court the body of persuasive exculpatory  
13 evidence which directly contradicted the Government's statements to the  
14 Court.

15                   B. The exculpatory military and intelligence reports.

16                   The first version of General DeWitt's Final Report (Ex. 4, Tab 7)  
17 was material to the issues before the courts in the prosecution of Petitioner  
18 because it established what General DeWitt's actual military considerations  
19 were in issuing his military orders. His true position was the insistence  
20 that the loyal and potentially disloyal Japanese could not be distinguished  
21 regardless of any consideration of time. This true expression of General  
22 DeWitt's position was withheld by the War Department from the Department of  
23 Justice attorneys, from Petitioner and from the courts in violation of the  
24 Government's obligation to disclose exculpatory evidence. U.S. v. Butler,  
25 567 F.2d 885 (9th Cir., 1978); U.S. v. Bryant, 439 F.2d 642 (D.C. Cir.

26 ////

27 ////

28 PETITIONER'S REPLY BRIEF - 6

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1 1971). The Government misconduct was compounded by the subsequent alteration  
2 of the Final Report.

3 The Ringle Report (Ex. 32, Tab 4) and FBI reports (e.g., Ex. 38,  
4 Tab 32) establish that the potentially disloyal were readily identifiable,  
5 contrary to what the Government represented to the Supreme Court. The  
6 Ringle, FBI and FCC reports also establish that there was no factual basis in  
7 support of General DeWitt's military orders and that there was no evidence of  
8 sabotage and espionage by Japanese Americans. Thus Mr. Ennis testified:

9 [T]he Department of Justice was responsible under the law  
10 for order and dealing with espionage and sabotage through  
11 our Federal Bureau of Investigation, and the Bureau did not  
12 feel that there was any evidence sufficient to support the  
13 proposed eventual evacuation of all persons of Japanese  
14 ancestry from the West Coast, and there were numerous con-  
15 ferences between the Attorney General and the Secretary of  
16 War and Mr. Stimson on that level, and the Assistant Secre-  
17 tary of War and Mr. Biddle's first assistant, and myself on  
18 the second level.

15 (Tr. 201:23-202:7)

16 ////

17 ////

19 <sup>3</sup> Among the crucial changes to the Final Report were the following  
20 changes made on page 9 of the Final Report:

21 "It was impossible to establish the identity of the loyal and the disloyal  
22 with any degree of safety. It was not that there was insufficient time in  
23 which to make such a determination . . . ." Ex. 4, Tab 17, page 9 (first  
24 Final Report).

23 "To complicate the situation no ready means existed for determining the loyal  
24 and the disloyal with any degree of safety." Ex. 29, Tab 85, page 9 (re-  
25 written Final Report).

25 Exhibit 14, Tab 67; Exhibit 101, Tab 68; and Exhibit 18, Tab 71  
26 establish that the changes were substantively significant alterations of  
27 General DeWitt's expressions of his bases for his military orders and that he  
28 resisted the alterations strenuously.

PETITIONER'S REPLY BRIEF - 7

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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  
aliens that we had picked up very quickly and detained  
because of possible loyalty to Japan . . .

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

8 C. MAGIC

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

20 ////

21 ////

22  
23 <sup>4</sup>All of the Government's former G-2 and FBI trial witnesses testi-  
24 fied that they knew of no evidence that Japanese Americans had committed acts  
of espionage or sabotage.

25 <sup>5</sup>Respondent at G.C.A., page 15 argues that it was not required to  
26 make disclosures because in 1943 there existed no procedure allowing for in  
27 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

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).<sup>6</sup>

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

21 ////

22 ////

23 \_\_\_\_\_  
24 <sup>6</sup>The 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  
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.

based upon any reasonable standard of materiality. 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:

<sup>7</sup>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.

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



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

28 PETITIONER'S REPLY BRIEF - 13

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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.

28 PETITIONER'S REPLY BRIEF - 14

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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.

27 ////

28 PETITIONER'S REPLY BRIEF - 15

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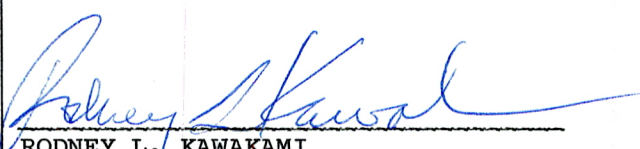
1 In this instant coram nobis proceeding, the Government asserts no  
2 misconduct ever occurred. The evidence clearly establishes that the Govern-  
3 ment had in its possession throughout the original Court proceedings vast  
4 amounts of information, including military and intelligence reports, which  
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.

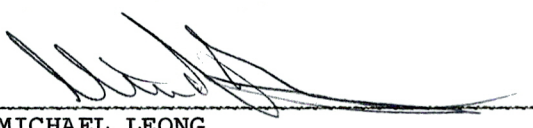
10 Given the Government's unwillingness to acknowledge its own miscon-  
11 duct, it is imperative that the Court speak clearly through its ruling and  
12 declare to the Government that suppression of exculpatory evidence will not  
13 be condoned. The misrepresentations and suppression of evidence 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.

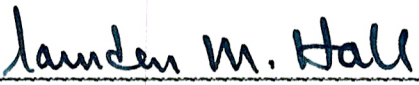
17 Mr. Hirabayashi brings this coram nobis Petition motivated by the  
18 same steadfast belief in the Constitution that he maintained in challenging  
19 the military orders of 1942. Mr. Hirabayashi seeks vindication on three  
20 levels: 1. For himself as an individual defendant; 2. For the Japanese  
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.


1 DATED this 4<sup>th</sup> day of October, 1985.

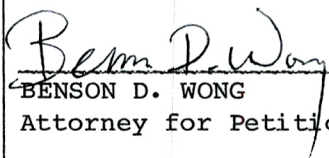
2 Respectfully submitted,

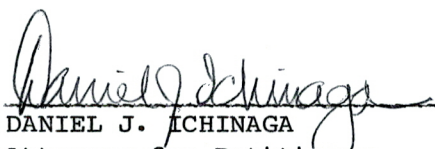
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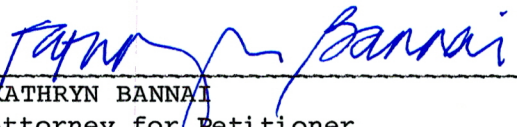
  
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