10-4-1985

Petitioner's Brief Reply

United States District Court Western District of Washington

CC TO JUDGE JUDGE DONALD S. VOORHEES

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GORDON K. HIRABAYASHI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. C83-122V

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

Petitioner is respectfully requesting the following relief from this Court:

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

II. THE GOVERNMENT MISCONDUCT

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

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

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

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

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

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

The Government in its brief to the Court asserted:

> [the military orders were] founded upon the fact that the group [of Japanese residents] as a whole contained an unknown number of persons who could not readily be singled 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.

(Ex. 99, p. 35)

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

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

> Q. (By Mr. Hall) In the context of the Government's presentation of its case to the Supreme Court, either in written form or oral form, Mr. Ennis, how important to 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?
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> A. Well, really, our formula or our argument that there was not time was the whole center of our argument, and as I understand it, that was the center of the Supreme Court's decision by the Chief Justice, who said that if 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.

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

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

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

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

> [the military orders] themselves followed a standard authorized by the Executive Order -- the necessity of protecting military resources in the designated areas against espionage and sabotage. And by the Act [Public Law 503], Congress gave its approval to that standard. We have no need to consider now the validity of action if taken by the military commander without conforming to this standard approved by Congress, or the validity of orders made without the support of findings showing that they do so conform. Here the findings of danger from espionage and sabotage, and of the necessity of the curfew order to protect against them, have been duly made . . . .
>
> The military commander's appraisal of facts in the light of the authorized standard, and the inferences which he drew from those facts, involved the exercise of his informed judgment.

[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

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[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 proposition 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)

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

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

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

1. The Proceedings Below

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

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a factual record disputing the existence of a war emergency. (Gov't. Closing Argument, "G.C.A." hereafter, p. 5)[2] This argument is transparently groundless. First, Petitioner does not challenge the existence of a war emergency. His challenge then and now is that the military orders were unconstitutional and that they were not necessary to meet the "war emergency." Secondly, Petitioner's inability to perfect a factual record does not excuse the affirmative misrepresentations by the Government to the Court.

Finally, the Government's position renders the Government's obligation meaningless. It is illogical to require a defendant to demand production of evidence of which defendant has no knowledge. If the Government had disclosed the exculpatory evidence to Petitioner, he could have developed the factual record which the Government now criticizes Petitioner for failing to do.

Here the Government knew Petitioner's defense to the indictments was that the military orders were unconstitutional. Here the Government knew the Court's review of the constitutionality of the orders turned upon the military necessity for the orders. Here the Government argued a factual basis of military necessity directly contrary to the persuasive evidence in its possession. Therefore, the Government was under an obligation to disclose the exculpatory evidence to the Court and to Petitioner.

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[2] Respondent misconstrues the record on this point. Nothing in the record reflects whether or not Petitioner attempted to solicit facts on the issue of military necessity.

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2. Continued Misrepresentation

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

B. The exculpatory military and intelligence reports.

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

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1971). The Government misconduct was compounded by the subsequent alteration of the Final Report.[3]

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

> [T]he Department of Justice was responsible under the law for order and dealing with espionage and sabotage through our Federal Bureau of Investigation, and the Bureau did not feel that there was any evidence sufficient to support the proposed eventual evacuation of all persons of Japanese ancestry from the West Coast, and there were numerous conferences between the Attorney General and the Secretary of War and Mr. Stimson on that level, and the Assistant Secretary of War and Mr. Biddle's first assistant, and myself on the second level.

(Tr. 201:23-202:7)

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[3]Among the crucial changes to the Final Report were the following changes made on page 9 of the Final Report:

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

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

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

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> [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. 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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