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

11 GORDON K. HIRABAYASHI,)
12)
13 Petitioner,)
14) NO. C83-122V
15 vs.)
16) PETITIONER'S HEARING
17 UNITED STATES OF AMERICA,)
18) MEMORANDUM
19 Respondent.)
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INTRODUCTION

Petitioner seeks issuance of a writ of error coram nobis to vacate his criminal convictions of October 20, 1942 of two violations of Public Law No. 503: failure to observe a curfew as required by Public Proclamation No. 3 and refusal to be evacuated as required by Civilian Exclusion Order No. 57. The relief requested by Petitioner is based on numerous acts of misconduct by different agencies of the Government during and after Petitioner's trial.

FACTS

I. OFFICIALS OF THE WAR DEPARTMENT ALTERED AND DESTROYED EVIDENCE AND WITHHELD EVIDENCE FROM THE JUSTICE DEPARTMENT, SUPREME COURT, AND PETITIONER.

Edward J. Ennis, Director of the Alien Enemy Control Unit of the Justice Department, was responsible for supervising preparation of the Government's briefs in Hirabayashi v. United States, 320 U.S. 81 (1943), which was set for argument before the Supreme Court on May 10, 1943. Ennis formally requested the War Department, the Government agency responsible for the evacuation program, to supply "any published material" in the Department's possession that would help in preparation for trial.

Pursuant to his outstanding request, Ennis was told in April 1943 that a report entitled "Final Report, Japanese Evacuation from the West Coast, 1942," prepared by General DeWitt, was being rushed off the press. DeWitt sent six printed and bound copies of this initial Final Report to the War Department. These copies were accompanied by cover letter dated April 15, 1943.

In April 1943, Assistant Secretary of War John J. McCloy received printed and bound copies of the Final Report, which contained the military's justification for the evacuation. Upon review of this report, McCloy objected to the Government's admission that it was impossible to determine the loyal from disloyal Japanese and that therefore the time needed to determine loyalty of the Japanese Americans had not been a factor in its decision to recommend evacuation. Second, McCloy objected to the racist implications of the assertion that it was impossible to

1
2 establish the identity of loyal individuals. McCloy understood
3 that these statements could potentially expose the Government's
4 violation of Petitioner's right to due process; destroy the
5 Government's credibility before the Supreme Court; and risk the
6 outcome of the Hirabayashi case.

7 As a result, McCloy directed that the Final Report be
8 altered and withheld from the Justice Department. All circulated
9 copies of the Report were recalled, galley proofs were destroyed,
10 and transmittal letters were redated. Without access to the
11 Final Report and without being advised as to the military's true
12 position, the Justice Department asserted in its Hirabayashi
13 brief to the Supreme Court that the evacuation of the Japanese
14 population on the West Coast was necessary because of the lack of
15 sufficient time in which to make loyalty determinations.

16 Although circulated within the War Department, War
17 Department officials withheld general release of the Final Report
18 until January 1944. The purge of the War Department records
19 erased any hint of the existence of the original Final Report.
20 The facts surrounding the suppression of this evidence came to
21 light after the recent discovery of a copy of the original Final
22 Report and of the documents relating to its alteration and
23 destruction.

24 II. OFFICIALS OF THE WAR DEPARTMENT AND THE JUSTICE DEPARTMENT
25 SUPPRESSED INTELLIGENCE REPORTS WHICH REFUTED ALLEGED
26 DISLOYALTY AND ESPIONAGE ACTS OF JAPANESE AMERICANS.

26 Since early 1942, officials of the War Department and the
27 Justice Department routinely received reports from the Office of
28

1
2 Naval Intelligence (ONI), the Military Intelligence Division of
3 DeWitt's Command (MID), the Federal Bureau of Investigation
4 (FBI), and the Federal Communications Commission (FCC). These
5 reports conclusively refuted all allegations of disloyalty and
6 espionage and discredited the "military necessity" claim offered
7 in support of the mass evacuation and incarceration of Japanese
8 Americans. However, none of this exculpatory evidence was
9 disclosed to the Petitioner or to the courts that considered
10 Petitioner's case.

11 A. Suppression of the ONI Report to the Chief of Naval
12 Operations on the Loyalty of Japanese Americans and
13 the Munson Reports.

14 By 1940 the ONI, pursuant to the "Delimitation Agreement,"
15 was assigned primary responsibility for investigation of the
16 Japanese American population on the West Coast. Among the most
17 significant of the intelligence reports suppressed by Government
18 officials in Petitioner's case was the ONI Report entitled
19 "Report on the Japanese Question" (the "ONI Report"), submitted
20 on January 26, 1942, and prepared by Lt. Commander Kenneth D.
21 Ringle at the direction of the Chief of Naval Operations.

22 Lt. Commander Ringle, recognized expert on Japanese
23 Americans and then officer in charge of naval intelligence
24 matters in the Los Angeles area, explicitly recommended against
25 mass evacuation or other restrictive measures directed against
26 Japanese Americans as a group. The report made it clear that
27 allegedly disloyal Japanese Americans, estimated at less than 3%,
28 could easily be identified and segregated. It concluded that the

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2 Japanese Americans were "Americanized," and that the vast
3 majority were loyal to the United States and presented little
4 danger to military security.

5 In accordance with the "Delimitation Agreement" between
6 federal intelligence agencies, the ONI Report was available to
7 the FBI and to General DeWitt through the MID. The ONI Report
8 came to the personal attention of both Attorney General Biddle
9 and Assistant Secretary of War McCloy before General DeWitt
10 issued the curfew and exclusion orders applicable to Petitioner.
11 The substance and conclusions of the ONI Report came to the
12 attention of Justice Department officials during preparation of
13 the Government's brief to the Supreme Court in Hirabayashi.

14 In an April 1943 memorandum from Ennis to Solicitor General
15 Fahy, Ennis acknowledged the ONI as the agency primarily
16 responsible for the intelligence work regarding the Japanese
17 Americans; recognized that a report written by Ringle for the
18 War Relocation Authority (WRA) was the most reasonable and
19 objective discussion of the security problem presented by the
20 Japanese minority; urged that care be taken in arguing any
21 position or facts more hostile to the Japanese than the position
22 set forth in the report; and urged careful consideration by the
23 Justice Department of the duty to advise the Court of the
24 existence of Ringle's WRA report and the fact that it represented
25 the view of the ONI.

26 Furthermore, just prior to the outbreak of the war,
27 Curtis B. Munson, a well-to-do Chicago businessman, was assigned

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2 to informally collect intelligence for President Roosevelt on the
3 ethnic Japanese on the West Coast and in Hawaii. He reported to
4 John F. Carter, an unofficial advisor to the President, who in
5 turn passed on these reports to Roosevelt. Munson wrote three
6 reports from November 1941 through December of 1942 and concluded
7 both before and after Pearl Harbor that there was no Japanese
8 "problem." He reported that the degree of loyalty within the
9 Japanese ethnic population was small and not demonstrably greater
10 than other racial groups and concluded that mass evacuation was
11 unnecessary and not militarily justified.

12 Although Attorney General Biddle, Assistant Secretary of War
13 McCloy, and Solicitor General Fahy each personally knew that the
14 ONI Report directly controverted the statements made to the Court
15 on the loyalty issue, the Government failed to disclose the ONI
16 Report or Munson's reports to the Petitioner. Moreover,
17 Government's brief to the Supreme Court in Hirabayashi failed to
18 mention these available intelligence reports.

19 B. Suppression of Reports of the MID, the FBI, and the
20 FCC that Refuted the Espionage Allegations in the
21 Final Report.

22 The reports of the MID, the FBI, and FCC show the falsity of
23 the espionage allegations made in the Final Report. Well before
24 the outbreak of the war between the United States and Japan, the
25 FBI and FCC were actively investigating espionage activities on
26 the West Coast and elsewhere in the country. The MID, FBI, and
27 FCC found no evidence of Japanese American involvement in
28 espionage or sabotage, yet both versions of the Final Report

1 included as a military justification the discredited allegations
2 of shore-to-ship signalling and radio transmissions.
3

4 III. THE GOVERNMENT FAILED TO ADVISE THE SUPREME COURT OF THE
5 FALSITY OF THE ALLEGATIONS IN THE FINAL REPORT.

6 Evidence contained in the reports submitted by responsible
7 intelligence agencies provided officials of the War Department
8 and the Justice Department with personal knowledge of exculpatory
9 evidence relevant to issues central to Petitioner's case. This
10 evidence discredited the "military necessity" claim offered by
11 the Government in support of the curfew restrictions and the
12 evacuation program.

13 The Government had a continuing duty to bring this evidence
14 to the Court's attention. After Hirabayashi, Ennis attempted to
15 advise the Court of the falsity of the Final Report in the
16 Government's brief to the Supreme Court in Korematsu v. United
17 States, 323 U.S. 214 (1944). However, at the insistence of the
18 War Department, the Justice Department disregarded this effort
19 and prevented the Court from learning of the exculpatory
20 intelligence reports and the falsity of the Final Report.

21 IV. THE GOVERNMENT'S ABUSE OF THE DOCTRINE OF JUDICIAL NOTICE
22 AND THE MANIPULATION OF THE AMICUS BRIEFS CONSTITUTED A
23 FRAUD UPON THE COURTS.

24 The Government employed the doctrine of judicial notice to
25 present to the Court the discredited allegation that "racial
26 characteristics" of Japanese Americans predisposed them to
27 disloyalty and to the commission of espionage and sabotage. The
28 Government made these allegations despite knowledge of contrary

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2 evidence in its possession. This abuse of the doctrine of
3 judicial notice by the Government resulted in a fraud upon the
4 Courts.

5 Though War Department officials withheld copies of the Final
6 Report from the Justice Department until January 1944, a
7 significant portion of the contents of the original Final Report
8 was effectively presented to the Supreme Court in the Hirabayashi
9 case through an amicus brief submitted by the Western States of
10 Washington, Oregon, and California.

11 By concealing the Final Report from the Justice Department,
12 yet assuring its introduction through friendly amici, the War
13 Department manipulated the judicial process and placed erroneous
14 and intemperate briefs before the Court. The false picture led
15 the Court to conclude that the military orders at issue were
16 justified by military necessity.

17 DISCUSSION

18 I. BECAUSE THE GOVERNMENT DEPRIVED PETITIONER OF HIS RIGHT TO
19 DUE PROCESS UNDER THE FIFTH AMENDMENT, HE IS ENTITLED TO
RELIEF BY WRIT OF ERROR CORAM NOBIS.

20 The writ of error coram nobis is available by statute, 28
21 USC § 1651(a), to challenge a federal criminal conviction
22 obtained by the Government through constitutional or fundamental
23 errors that render a proceeding irregular and invalid. United
24 States v. Morgan, 346 U.S. 502 (1954).

25 Coram nobis relief is warranted where government abuses
26 "offend elementary standards of justice," cause "serious
27 prejudice to the accused," or, even absent such prejudice,

1 "undermine public confidence in the administration of justice."
2
3 United States v. Taylor, 648 F.2d 565, 571 (9th Cir.), cert den.
4 454 U.S. 866 (1981). As stated in Taylor, the leading Ninth
5 Circuit case,

6 ... prosecutorial misconduct may so pollute a criminal
7 prosecution as to require a new trial, especially when
8 the taint in the proceedings seriously prejudices the
9 accused.... When a conviction is secured by methods
10 that offend elementary standards of justice, the
11 defendant may invoke the Fourteenth Amendment
12 guarantees of a fundamentally fair trial.... Moreover,
13 this principle is not strictly limited to those
14 situations in which the defendant has suffered arguable
15 prejudice, the principle is designed to maintain also
16 public confidence in the administration of justice.

17 (Emphasis added.) Id. at 571.

18 Because the Government's abuses in this case could
19 reasonably be deemed to have affected the outcome, Petitioner is
20 entitled to coram nobis relief vacating his conviction. It is
21 then for the Government to decide if it wants to seek a new trial
22 to determine guilt or innocence in fair proceedings. Although
23 the Ninth Circuit in Taylor did not state the extent of
24 prosecutorial malfeasance necessary to warrant relief, it is
25 clear from a close reading of the case that it is not necessary
26 for Petitioner to show that the result would have been different.
27 It is only necessary to show that the malfeasance could have
28 affected the result and thereby rendered the proceedings unfair
and offended elementary standards of justice. Id. at 571.

— In addition, coram nobis relief is warranted where
Government abuses seriously prejudice the accused or where, even
absent such prejudice, the abuses undermine the public confidence

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2 in the administration of justice or otherwise interfere with the
3 judicial process vital to a democracy. The Taylor decision
4 clearly states that guilt or innocence is not the fundamental
5 consideration in due process arguments. The court cites Justice
6 Frankfurter:

7 This Court has rejected the notion that because a
8 conviction is established on incontestable proof of
9 guilt it may stand, no matter how the proof was
10 secured. Observance of due process has to do not with
11 questions of guilt of innocence but the mode by which
12 guilt is ascertained. Irvine v. California, 347 U.S.
13 at 148, 74 S. Ct. at 391 (Frankfurter, J. dissenting.)

14 Id. at 571, n.20.

15 The Taylor court ordered the trial court to hold an
16 evidentiary hearing to determine if the abuses of the prosecution
17 were serious enough to warrant a new trial. Taylor, 648 F.2d at
18 574. It was not the purpose of the evidentiary hearing to
19 determine guilt or innocence. If the abuses were proven, then a
20 new trial would be ordered.

21 An examination of the facts in Taylor confirms that the
22 Ninth Circuit was not focusing on a standard requiring evidence
23 so extensive that it compelled a different result. The
24 petitioner in Taylor complained that the government falsely
25 asserted that it had subpoenaed a particular document and, since
26 the document was not produced, was allowed to place before the
27 court other evidence of the contents of the document. Petitioner
28 Taylor asserted that no subpoena was ever issued. The evidence
submitted in place of the document was damaging to petitioner's
case. The court ruled that "Taylor's claim of government fraud

1 would, if proven, meet the various tests for relief in the nature
2 of coram nobis." Taylor, 648 F.2d at 571. Thus, it was not
3 necessary for petitioner Taylor to prove that he would have been
4 acquitted but for the government's misconduct. Instead, it was
5 enough that the misconduct involved important evidence that
6 rendered the proceedings unfair.
7

8 If, as the Ninth Circuit states, the abuses in Taylor were
9 serious enough to warrant relief, the abuses in the case at bar
10 are vastly more serious and pervasive in the proceedings
11 involving Petitioner. Moreover, the particular abuses affect
12 matters specifically relied upon by the Court in reaching its
13 decision.

14 II. THE PROSECUTION'S USE OF FALSE EVIDENCE AND THE SUPPRESSION
15 OF MATERIALLY FAVORABLE EVIDENCE IN THE PETITIONER'S TRIAL
16 AND APPEALS CONSTITUTED A DENIAL OF DUE PROCESS AND
17 REQUIRES THAT PETITIONER'S CONVICTIONS BE VACATED.

18 A. Standards of Materiality.

19 In order to present the strongest possible case to the
20 courts, the Government placed before the trial court and
21 appellate courts a "tailored" factual record to support its claim
22 that "military necessity" justified the imposition of the
23 military curfew and exclusion orders. The record before the
24 courts contained false and inaccurate evidence to support this
25 justification. In addition, the Government suppressed evidence
26 which refuted its claim of "military necessity." Had the courts
27 been provided with accurate and credible facts, the military
28 orders and the federal statute making it a criminal offense to