

JUDGE DONALD S. VOORHEES

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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

RODNEY L. KAWAKAMI
ATTORNEY AT LAW
T & C BLDG., SUITE 201
671 SOUTH JACKSON ST.
SEATTLE, WA 98104
206/682-9932

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PETITIONER'S REPLY BRIEF - ii

RODNEY L. KAWAKAMI
 ATTORNEY AT LAW
 T & C BLDG., SUITE 201
 671 SOUTH JACKSON ST.
 SEATTLE, WA 98104
 206/682-9932

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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).

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
12 in order to impose effective restraints upon them it was
13 necessary not only to deal with the entire group, but to
14 deal with it at once.

15 (Ex. 99, p. 35)

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

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

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

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.

1 (Tr. 243:19-244:7).¹ 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

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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)

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 ////

1 a factual record disputing the existence of a war emergency. (Gov't. Closing
2 Argument, "G.C.A." hereafter, p. 5) 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.

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26 ² 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.

1 1971). The Government misconduct was compounded by the subsequent alteration
2 of the Final Report.³

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 ³Among 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.