

Judge Donald S. Voorhees
July 31, 1985

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 POST-HEARING BRIEF

PETITIONER'S POST-HEARING BRIEF

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I. INTRODUCTION

Petitioner seeks issuance of a writ of error coram nobis to vacate his October 20, 1942 criminal convictions 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 agencies of the Government during and after Petitioner's trial.

II. ISSUES

A. Did the Government suppress evidence, present evidence it knew or should have known to be false, or destroy evidence in its attempt to secure Petitioner's convictions and defend those convictions on appeal?

B. If so, should the Court grant Petitioner's prayer for relief and vacate Petitioner's convictions?

III. LEGAL STANDARDS

A. Relief is Warranted Because Government Misconduct Deprived Petitioner of His Right to Due Process Under the Fifth Amendment and Violated the Sanctity of the Courts.

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

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." United States v. Taylor, 648 F.2d 565, 571 (9th Cir.), cert. denied, 454 U.S. 866 (1981). As stated in Taylor, the leading Ninth Circuit case,

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1 prosecutorial misconduct may so pollute a criminal prosecu-
2 tion as to require a new trial, especially when the taint in
the proceedings seriously prejudices the accused. . . .
3 When a conviction is secured by methods that offend elemen-
4 tary standards of justice, the defendant may invoke the
5 Fourteenth Amendment guarantees of a fundamentally fair
trial. . . . Moreover, this principle is not strictly lim-
6 ited to those situations in which the defendant has suffered
arguable prejudice, the principle is designed to maintain
also public confidence in the administration of justice.

7 Id. at 571 (emphasis added). Guilt or innocence is not the fundamental con-
8 sideration in due process arguments. The Court cites Justice Frankfurter:

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

13 Id. at 571, n.20.

14 Here, the Government misconduct is so egregious that the Court
15 should find that the Government's misconduct deprived Petitioner of a funda-
16 mentally fair trial and appeal. Even absent a finding that Petitioner suf-
17 fered sufficient prejudice, Petitioner's convictions were secured by methods
18 that offend elementary standards of justice, violate the sanctity of the
19 courts, and undermine the public confidence in the administration of justice.
20 For these reasons alone, the Court should grant the petition for writ of
21 error coram nobis.

22 Although in Taylor, the Ninth Circuit expressly withheld judgment
23 "as to the extent of prosecutorial malfeasance or prejudice to appellant
24 necessary to warrant relief," Taylor, 648 F.2d at 574, n.28, this Court
25 should, however, rule that Petitioner need only show that the Government
26 misconduct could have affected the Court's determination of the constitution-

27 ////

28 PETITIONER'S POST-HEARING BRIEF - 2

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1 ality of Public Law 503 and the curfew and evacuation orders. The Government
2 misconduct, therefore, rendered the proceedings unfair..¹

3 1. Suppression of Evidence. In United States v. Agurs, 427
4 U.S. 97 (1976), the Court stated that the reversal of a conviction is war-
5 ranted where the omitted evidence raises a "reasonable doubt" that did not
6 otherwise exist. This does not mean that the accused must show that the omit-
7 ted evidence, if considered, would have resulted in acquittal. This is clear
8 from the fact that the Court states that the standard is higher than the
9 harmless-error standard, but is not so high as to require "probability" of
10 acquittal. Id. at 111. See also, United States v. Goldberg, 582 F.2d 384,
11 489 (9th Cir. 1978), cert. denied, 440 U.S. 973 (1979), (this test is stricter
12 than the harmless-error standard, but is not so severe as to require the
13 defendant to show that the undisclosed evidence probably would have resulted
14 in acquittal); and United States v. Imbruglia, 617 F.2d 1 (9th Cir. 1980).

15 Here, the suppressed evidence is material to the question of the
16 constitutionality of Public Law 503 because it was more than harmless-error
17 for the Government to suppress the intelligence reports indicating that the
18 security problems, if any, posed by the West Coast Japanese population did
19 not warrant the issuance of the military curfew and evacuation orders.
20 Petitioner need not prove that Public Law 503 probably would have been held
21 unconstitutional if the Supreme Court had considered the suppressed evidence.

22 2. Use of Evidence that the Government Knew or Should Have
23 Known to be False. The Court "has consistently held that a conviction

24
25 ¹The Taylor Court ruled that "Taylor's claim of government fraud
26 would, if proven, meet the various tests for relief in the nature of coram
27 nobis." Taylor, 648 F.2d at 571, n.22. Thus, it was not necessary for
petitioner Taylor to prove that he would have been acquitted but for the
government's misconduct. Instead, it was enough that the misconduct involved
important evidence that rendered the proceedings unfair.

obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." (Emphasis added.) Agurs, 427 U.S. at 103. Presumably this same standard applies where the prosecution knowingly uses false evidence. Thus, the Court should grant the petition if it determines that the false evidence used by the Government could have affected the judgment of the Court.

3. Destruction of Evidence. In United States v. Heiden, 508 F.2d 898, 902 (9th Cir. 1974), the Court declared that,

When there is loss or destruction of such evidence, we will reverse a defendant's conviction if he can show (1) bad faith or connivance on the part of the Government or (2) that he was prejudiced by the loss of evidence.

Id. at 902. After Heiden, the courts have suggested that prejudice will be presumed if there is intentional destruction of evidence by the prosecution. In United States v. Arra, 630 F.2d 836, 849-850 (1st Cir. 1980), the Court stated that,

It may be, though we do not now so decide that intentional wrongful misconduct on the part of the Government would warrant an assumption that the evidence destroyed would have been favorable to the defense.

IV. ANALYSIS

A. Suppression of Evidence.

Petitioner does not deny that he knowingly violated Public Law 503 and the underlying military curfew and evacuation orders. Instead, Petitioner argued and still argues that the Fifth Amendment "prohibits the discrimination made between citizens of Japanese descent and those of other ancestry." Hirabayashi v. United States, 320 U.S. 81, 89. In response to Petitioner's due process argument, the Government presented to the courts a

1 "tailored" factual record to support its argument that military necessity
2 justified the imposition of the military curfew and exclusion orders. The
3 Government attorneys and their agents suppressed exculpatory evidence that
4 would have permitted the Petitioner to rebut the Government's arguments. The
5 suppressed evidence, examined below, seriously prejudices Petitioner, offends
6 elementary standards of justice, and even absent prejudice, undermines public
7 confidence in the administration of justice.

8 In addition, it was more than harmless error for the Government to
9 suppress the following intelligence reports. Therefore, the evidence sup-
10 pressed by the Government raises a "reasonable doubt" that did not otherwise
11 exist.

12 1. The Delimitation Agreement. Discussion of the Delimitation
13 Agreement is essential to understanding the significance of the evidence that
14 was suppressed by the Government. In a memo dated June 26, 1939, President
15 Roosevelt directed that,

16 . . . the investigation of all espionage, counter-espionage,
17 and sabotage matters be controlled by the Federal Bureau of
18 Investigation of the Department of Justice, or the Military
Intelligence Division of the War Department and the Office
of Naval Intelligence of the Navy Department.

19 . . .

20 the directors of these three agencies are to function as a
21 committee to coordinate their activities.

22 . . .

23 . . . no investigation should be conducted by any investi-
24 gative agency of the Government into matters involving
actually or potentially any espionage, counter-espionage or
sabotage, except by the three agencies mentioned above.

25 (Exhibit 94, Tab 1)

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28 PETITIONER'S POST-HEARING BRIEF - 5

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