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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RODNEY L. KAWAKAMI  
ATTORNEY AT LAW  
671 SO. JACKSON SUITE 20  
SEATTLE, WA 98104

GORDON K. HIRABAYASHI, )  
 )  
Defendant Petitioner, )  
 )  
vs. )  
 )  
UNITED STATES OF AMERICA, )  
 )  
Plaintiff Respondent. )  
\_\_\_\_\_ )

NO. C83-122V  
(Former Crim. No. 45738)

GOVERNMENT'S PROPOSED  
PREHEARING ORDER

JURISDICTION

Jurisdiction is vested in this Court by virtue of:

1. After a jury trial in the United States District Court for the Western District of Washington, defendant was convicted of two misdemeanor violations of P.L. 503, 77th Cong., 2d Sess. (56 Stat. 173), failing to report to register for evacuation (Count One) and disobeying an 8 p.m. to 6 a.m. curfew (Count Two). On October 21, 1942, United States District Judge Lloyd L. Black denied the defendant's motion for new trial, entered judgment and sentenced the defendant to two concurrent three month terms of imprisonment. See 46 F. Supp. 657, overruling defendant's demurrer and plea in abatement.

2. After briefing and oral argument on appeal, the Ninth Circuit certified certain questions of law to the Supreme Court. See 140 F.2d 300-304 (reprinting Judge Denman's dissent from the certification). The Supreme Court proceeded to decide the entire case "as if it had been brought [there] by appeal." 320 U.S. at



85. Relying on the concurrent sentence doctrine, the Supreme Court reviewed and affirmed only the curfew violation (Count Two). Hirabayashi v. United States, 320 U.S. 81, 105 (1943).

3. On January 31, 1983, the defendant filed a collateral attack upon his conviction which he styled a petition for writ of error coram nobis.

4. Rule 60(b), Fed. R. Civ. P. states that "Writs of coram nobis ... are abolished ...." However, in United States v. Morgan, 346 U.S. 502 (1954) the Supreme Court interpreted 28 U.S.C. 1651, the All Writs Act, to encompass post sentence relief in those instances where a petitioner makes a post conviction motion for coram nobis relief in the original criminal case and successfully rebuts the presumption that the original "proceedings were correct" and carries "the burden" of proving that a factual error "of the most fundamental character" occurred without which a judgment more favorable to the petitioner would have been rendered (346 U.S. at 512). The petitioner must also prove that there are "sound reasons existing for failure to seek appropriate earlier relief" (346 U.S. at 512) and that there are current adverse legal consequences from the conviction (346 U.S. at 513).

#### ADMITTED FACTS

The following facts are admitted by the parties:

1. Pearl Harbor was bombed on December 7, 1941.
2. President Roosevelt issued Executive Order 9066 on February 19, 1942.



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3. Congress enacted Public Law No. 503, effective March 21, 1942.

4. Pursuant to Public Law No. 503, John L. DeWitt, Lieutenant General of the United States Army and designated Military Commander of the Western Defense Command, Fourth Army, issued Public Proclamation No. 3 on March 24, 1942 and Civilian Exclusion Order No. 57 on May 10, 1942.

5. Petitioner is and at all times has been a citizen of the United States.

6. Petitioner was indicted on May 28, 1942 and was convicted in this Court on October 21, 1942 of two counts of violation of Public Law No. 503, 56 Stat. 173.

7. Petitioner was sentenced by Judge Lloyd L. Black to a term of three months on each count, sentences to run concurrently.

8. Petitioner completed service of his sentence and was subsequently discharged from custody.

9. Following judgment and sentencing, notice of appeal was filed on October 23, 1942.

10. The record of Petitioner's case was ordered certified up to the Supreme Court on April 5, 1943.

11. Oral argument before the Supreme Court was held on May 10 and 11, 1943.

12. The Supreme Court opinion affirming petitioner's curfew conviction but not reaching his failure to report for evacuation was announced on June 21, 1943.



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13. A partial list of persons who have died includes: John L. DeWitt, Franklin D. Roosevelt, Kenneth D. Ringle, Henry L. Stimson, Charles Fahy, J. Edgar Hoover, Curtis Munson, James L. Fly, John L. Burling, George C. Marshall, Francis Biddle, James H. Rowe, Jr., Herbert Wenig, Morton Grodzins, Carey McWilliams, Frank Knox, Robert Kenny, Harlan Fiske Stone, William O. Douglas, Frank Murphy, Lloyd L. Black, J. Charles Dennis, William Denman, Delos Emmons, Allan Pomeroy, L. R. Forney, Nat Pieper, Sherman Miles, Irving Mayfield, Bruce Canaga, Theodore Wilkinson and Frank L. Walters.

#### FACTS NOT ADMITTED BUT NOT CONTESTED

Respondent does not admit nor contest the wisdom, as opposed to the legality, of the wartime curfew or evacuation orders.

#### FACTUAL CONTENTIONS

The respondent contends as follows:

1. Petitioner was aware or reasonably should have been aware of his current claims prior to the resolution of his direct appeal in 1943, or within a very few years thereafter.

2. Over the last forty years many relevant documents (a) have been discarded or (b) can no longer be located, and many material witnesses (c) have died or (d) can no longer recall important facts.

3. Classified World War II military intelligence information was openly withheld from the courts in this case in good faith either because disclosure could have compromised important ongoing wartime intelligence sources or because the classified information did not appear to refute the possibility



that espionage, sabotage or fifth column activity might be carried out by citizens of Japanese descent.

4. Assistant District Intelligence Officer Ringle's January 26, 1942 report was an expression of Ringle's individual opinion, it did not represent the official views of the Office of Naval Intelligence, and it was considered by the War Department but not accepted as a conclusive refutation of every rational basis for an 8 p.m. to 6 a.m. curfew.

5. Lieutenant General John L. DeWitt's April 15, 1943 draft of his Final Report on the Evacuation of the Japanese from the West Coast was an expression of DeWitt's individual opinion, and it was not approved by the War Department as its official version of all the 1942 events and classified intelligence information underlying the 8 p.m. to 6 a.m. curfew.

6. As of March 1942 the FBI, the Army Military Intelligence Division (M.I.D.), the Office of Naval Intelligence (O.N.I.) and the Federal Communications Commission (F.C.C.) did not provide General DeWitt with intelligence information which conclusively refuted every rational basis for an 8 p.m. to 6 a.m. curfew, nor did they provide him with an official agency policy statement opposing it.

And, assuming that the Court believes that this subject is within the scope of this Court's earlier order defining the subject matter of this hearing (which we deny), then:

7. The judicial notice arguments of the United States and of the amici -- about the cultural heritage and predisposition of



American citizens of Japanese descent -- were openly made sociological arguments based upon sociological materials of that era. They were neither based upon nor conclusively refuted by classified military intelligence information.

#### ISSUES OF LAW

1. Whether petitioner has shown sound reasons for failing to seek appropriate relief earlier.

2. Whether petitioner has shown present adverse legal consequences sufficient to create an actual case or controversy.

3. Whether petitioner (a) has carried his burden of rebutting the presumption of regularity that attaches to the original proceedings, and if so (b) whether petitioner has carried his burden of proving that intentional governmental misconduct occurred prior to his conviction which rendered "irregular and void" his misdemeanor curfew violation and (c) which "precluded" affirmance of his conviction on any other ground.

And, assuming that the Court believes that this subject is within the scope of this Court's earlier order defining the subject matter of this hearing (which we deny), then:

4. Whether the government had a constitutional obligation, after the affirmance of petitioner's conviction in the Supreme Court, to sua sponte initiate this collateral proceeding on petitioner's behalf.



## WITNESSES

On behalf of defendant:

1. DAVID LOWMAN, a former employee of the National Security Agency, will testify about, but not be limited to, the World War II interception and use by the United States intelligence community of Japanese diplomatic cables, the declassification and publication of which he participated in while at the National Security Agency. He will also testify about petitioner's exhibits and authenticate various documents.

2. DAVID F. TRASK, Chief Historian, U.S. Army Center of Military History, Department of the Army, will testify about, but not be limited to, the World War II interception and use by the United States intelligence community of Japanese diplomatic cables. He will also testify about respondent's documentary exhibits and their historical ramifications. He will also be used as a source for authentication of documents.

3. HANNAH ZEIDLIK, Chief, Historical Records Branch, U.S. Army Center of Military History, Department of the Army, will testify about the same subjects as David F. Trask.

4. DAVID KAHN, author of the non-fiction book on the World War II interception of Japanese cables, The Codebreakers (New York: Macmillan Co., 1967), will testify about the same subjects as David F. Trask.

5. THOMAS VORNBERGER, FBI Special Agent, Chief, Civil Discovery Review Unit No. 1, will testify about, but not be



limited to, the content, historical ramifications, and authenticity of FBI documents offered by respondent.

6. PHILIP MOSTROM, Supervisory FBI Special Agent, will testify about the same subjects as Thomas Vornberger.

7. BORIS PASH, who served in 1942 as an Army intelligence officer under General DeWitt's command, will testify about, but not be limited to, his first-hand knowledge of that army intelligence unit.

8. WILLIAM HAMMOND, who served in 1942 as an Army intelligence officer under General DeWitt's command, will testify about, but not be limited to, his first-hand knowledge of that Army intelligence unit.

9. RICHARD HAM, who served in 1942 as an Army intelligence officer under General DeWitt's command, will testify about, but not be limited to, his first-hand knowledge of that Army intelligence unit.

10. ROBERT MAYER, who served in 1942 as an FBI agent in the San Francisco, California FBI field office, will testify about, but not be limited to, his first-hand knowledge of that field office's operations.

11. RICHARD HOOD, who served in 1942 as an FBI agent in the Los Angeles, California FBI field office, will testify about, but not be limited to, his first-hand knowledge of that field office's operations.

12. MICHAEL ANDERSON, Assistant Archivist, National Archives and Records Administration, San Bruno, California, will be called



to testify and authenticate documents in the event counsel cannot stipulate to the authenticity of exhibits submitted.

13. ROLAND WILSON, Chief, Records Branch, National Archives and Records Administration, Suitland, Maryland, will be called to testify and authenticate documents in the event counsel cannot stipulate to the authenticity of exhibits submitted.

#### EXHIBITS

The exhibits the government will rely upon to rebut petitioner's case will consist of hundreds of historical publicly available documents and a few contemporary historical treatises commenting upon those historical documents. All of the documents respondent will rely upon have either long been available to petitioner and his witnesses at various archives and libraries under the control of the petitioner's witnesses Wolf, Nenninger, Scherrer, Washington, Emerson, Allard, Long, Hargett, Everly, Warner, Yahn and Hall, or copies are being supplied by the respondent for petitioner's use in this case. Petitioner's counsel has agreed, by telephone on May 17, 1985, to the time and method of delivery of these copies and that at the conclusion of this case, all such copies will be returned to the respondent.

Various demonstrative exhibits, including but not limited to time lines, organizational charts, blowups, etc. may also be offered. The short time permitted for the preparation of this portion of the prehearing order has been consumed by hundreds of attorney and staff hours reviewing approximately two hundred thousand pages of potentially relevant documents in order to



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provide petitioner with copies of several thousand documents that may not have been previously available to him. As a result it has not been possible in the allotted time to individually number respondent's exhibits.

## ACTION BY THE COURT

A. This case is scheduled for evidentiary hearing before the Court on June 17, 1985.

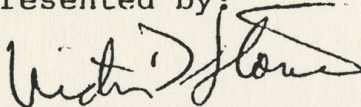
B. Briefs shall be submitted to the Court on or before June 10, 1985. This Order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

DATED THIS \_\_\_ day of \_\_\_\_\_, 1985.

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DONALD S. VOORHEES  
United States District Court

Presented by:



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VICTOR D. STONE  
Attorney for the United States



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CERTIFICATE OF SERVICE

A copy of this document has been electronically mailed this 17th day of May, 1985, to Rodney L. Kawakami, Attorney for Petitioner, at T&C Bldg., Suite 201, 671 South Jackson Street, Seattle, Washington 98104.



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VICTOR D. STONE