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Aiko:

Judge Bonham sent me a copy of his decision. He said your testimony was a determining, or the determining factor in his decision.

Phyllis

Hope you & Jack had a nice trip.

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

GORDON K. HIRABAYASHI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

NO. C83-122V

MEMORANDUM DECISION

Petitioner has filed a petition for a writ of error coram nobis, seeking the vacation of his conviction in October, 1942, for failing to report on May 11 or 12, 1942, to a designated Civil Control Station in Seattle, as required by Civilian Exclusion Order No. 57, and his conviction for failing, on or about May 4, 1942, to abide by Public Proclamation No. 3, requiring him to remain within his place of residence between 8:00 p.m. and 6:00 a.m.

Petitioner seeks to have these two misdemeanor convictions set aside on the ground that the government knowingly suppressed

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(2/10/42)

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1 evidence favorable to him or presented evidence which it knew, or  
2 should have known, was false in order to secure those convictions  
3 or to defend them on appeal.

4       Testimony at petitioner's trial or at the evidentiary  
5 hearing on his petition indicated that at the time of the acts  
6 for which petitioner was convicted, he was a twenty-four year old  
7 senior at the University of Washington. He was at that time a  
8 native-born, American citizen, having been born in Seattle,  
9 Washington, on April 23, 1918. His parents had been born in  
10 Japan but had emigrated to the United States. His father had  
11 arrived in the United States in 1907, his mother in 1914. Both  
12 of his parents were nineteen when they came to the United States.  
13 They were married in this country. Neither had ever returned to  
14 Japan. Petitioner himself had never been to Japan and had never  
15 corresponded with any Japanese in Japan. Petitioner was educated  
16 in the public schools of King County and Seattle. He had been  
17 active in the Boy Scouts and had become a Life Scout and an  
18 Assistant Scoutmaster. He was also active in the Y.M.C.A. at the  
19 University of Washington. He had been vice president of that  
20 organization and had attended Y.M.C.A. conferences in other  
21 states as a representative of the University Y.M.C.A. He had  
22 never before been arrested on any charge. He testified at trial  
23 that his parents had taught him and his brothers and sisters that  
24 they were American citizens and how to conduct themselves as



1 such; that he had not reported to the Civil Control Station nor  
2 remained in his residence during the curfew hours because of his  
3 honest belief that the evacuation and curfew orders were  
4 unconstitutional and violated his rights as an American citizen  
5 and that for him to obey them voluntarily would have been a  
6 waiver of his rights; that in the Boy Scouts and the Y.M.C.A. and  
7 at the University of Washington he had learned what was expected  
8 of him as an American citizen and what his rights were as an  
9 American citizen; and that he had at all times tried earnestly to  
10 conduct himself as a good American citizen.

11 At trial the Secretary-Manager of the University Y.M.C.A.  
12 testified that the petitioner had at all times conducted himself  
13 as a law-abiding American citizen, that he was a leader in the  
14 Y.M.C.A. and other student organizations and affairs; that he was  
15 well-respected by his fellow students; and that he bore a very  
16 fine reputation among the people of the community.

17 At trial there was evidence that petitioner had violated the  
18 curfew restriction on the single night of May 9, 1942.

19 After the issuance of Civilian Exclusion Order No. 57, which  
20 required petitioner to report on May 11 or May 12, 1942, to a  
21 designated Civilian Control Station in Seattle, he went with his  
22 attorney to the Seattle office of the F.B.I. and turned himself  
23 in. Although this is not clear on the record, petitioner must  
24 have stated to the F.B.I. that he was refusing to report to a  
25



1 control station. During his interview by an agent of the F.B.I.  
2 petitioner volunteered the information that for the past few  
3 nights in May he had not abided by the curfew restrictions  
4 imposed by Public Proclamation No. 3. The F.B.I. agent advised  
5 petitioner that no charges at all would be brought if he  
6 registered with the Civilian Control Station, but this,  
7 petitioner refused, as a matter of conscience, to do.

8 None of this testimony was challenged by the government  
9 either at petitioner's trial or during the hearing upon  
10 petitioner's application for a writ of error coram nobis. The  
11 government presented no evidence that petitioner was anything  
12 other than a law-abiding, native-born American citizen.

13 Petitioner was indicted in a two count indictment returned  
14 by a grand jury on May 28, 1942. Count I of the indictment  
15 charged that defendant had failed to report to a designated Civil  
16 Control Station on May 11 or May 12, 1942, as required by Civilian  
17 Exclusion Order No. 57, which was issued by the Military Commander  
18 of the Western Defense Command on May 10, 1942. Count II charged  
19 that on or about May 4, 1942, between 8:00 p.m. and 6:00 a.m.  
20 defendant was not within his place of residence, as required by  
21 Public Proclamation No. 3, which was issued by the Military  
22 Commander of the Western Defense Command on March 24, 1942.

23 Petitioner was tried on October 20, 1942, and was found by  
24 the jury to be guilty on each count. On the following day

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1 petitioner was sentenced to serve three months on each count, the  
2 two sentences to be served concurrently.

3 Petitioner's appeal was argued before the Supreme Court on  
4 May 10 and 11, 1943. The sentence of confinement imposed upon  
5 petitioner was affirmed by the Supreme Court on June 21, 1943.  
6 Hirabayashi v. United States, 320 U.S. 81, 87 L. Ed. 1774 (1943).

7 In affirming the sentence imposed upon petitioner, the  
8 Supreme Court considered only the charge in the second count, the  
9 one that charged petitioner with violating the curfew restrictions  
10 of Public Proclamation No. 3.

11 In an opinion authored by Chief Justice Stone, the Supreme  
12 Court stated:

13 The conviction under the second count is  
14 without constitutional infirmity. Hence we  
15 have no occasion to review the conviction on  
16 the first count since ... the sentences on the  
17 two counts are to run concurrently and  
conviction on the second is sufficient to  
sustain the sentence. 320 U.S. 81 at 105, 87  
L. Ed. 1774 at 1788.

18 In consequence, the conviction of petitioner on the first  
19 count (the failure by him to report to a Civil Control Station) has  
20 never been reviewed upon appeal. (His conviction on both counts  
21 had been appealed by him to the United States Circuit Court for the  
22 Ninth Circuit, but that court certified the entire record to the  
Supreme Court and did not itself act upon the appeal.)

23 In determining whether petitioner's convictions should be  
24 vacated, the Court has carefully considered the record of  
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1 petitioner's trial, the arguments made by the government in the  
2 brief submitted by it to the Supreme Court, the reasoning of the  
3 Supreme Court in its affirmance of the sentence imposed upon  
4 petitioner, the testimony of those who were called as witnesses at  
5 the hearing upon petitioner's petition, the voluminous exhibits  
6 which were admitted into evidence at the hearing, and the arguments  
7 made by counsel for petitioner and for the government in their  
8 post-hearing briefs.

9 The Court will first consider the conviction of petitioner for  
10 his failure to report to a designated Civil Control Station on May  
11 11 or May 12, 1942.

12 The background of Civilian Exclusion Order No. 57 is, in  
13 brief, as follows: after the attack on Pearl Harbor on December 7,  
14 1941, President Franklin D. Roosevelt issued Executive Order 9066,  
15 on February 19, 1942. That order authorized the Secretary of War  
16 or his designees to prescribe military areas from which any or all  
17 persons might be excluded. On February 20, 1942, Secretary of War  
18 Henry Stimson delegated his authority under Executive Order 9066 to  
19 Lieutenant General John L. DeWitt, the Commanding General of the  
20 Western Defense Command.

21 On March 2, 1942, General DeWitt issued Public Proclamation  
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1 No. 1. That proclamation divided the states of Washington, Oregon,  
2 California and Arizona into two military areas. The western  
3 portions of Washington, Oregon and California and the southern  
4 portion of Arizona were designated as Military Area No. 1. The  
5 balance of each of those states was designated as Military Area No.  
6 2. On March 21, 1942, the President signed Public Law No. 503,  
7 which had been enacted by Congress. That law made it a misdemeanor  
8 knowingly to disregard restrictions made applicable by a military  
9 commander to persons in a prescribed military area.

10 On March 24, 1942, General DeWitt issued Civilian Exclusion  
11 Order No. 1. That order affected about fifty Japanese families,  
12 residing on Bainbridge Island, Washington, and provided for their  
13 evacuation from that island one week later. Thereafter, further  
14 exclusion orders were issued from time to time for the various  
15 zones in Military Area No. 1.

16 The order which affected petitioner was Civilian Exclusion  
17 Order No. 57, issued by General DeWitt on May 10, 1942. That order  
18 provided that from and after May 16, 1942, all persons of Japanese  
19 ancestry were excluded from a designated geographical area (this  
20 area included petitioner's place of residence) and required a  
21 responsible member of each family and each person living alone to  
22 report on May 11 or May 12, 1942, to a designated Civil Control  
23 Station in Seattle. The instructions which were posted with the  
24 exclusion order made it plain that reporting was for the purpose of  
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1 receiving further instructions and that the excluded individuals  
2 were thereafter to be sent to an Assembly Center.

3 Because petitioner refused to report to the Civil Control  
4 Station, he was indicted for the crime of failing to comply with  
5 Exclusion Order No. 57, and was tried, convicted and sentenced for  
6 that offense.

7 Petitioner's appeal was heard by the Supreme Court on May 10  
8 and 11, 1943. Shortly before that hearing, General DeWitt  
9 transmitted to the Secretary of War and to General George C.  
10 Marshall, the Chief of Staff, printed copies of a document entitled  
11 "Final Report: Japanese Evacuation from the West Coast 1942." It  
12 included a printed letter of transmittal to the Chief of Staff,  
13 dated April 15, 1943. That letter stated in part:

14 "The evacuation was impelled by military necessity.  
15 The security of the Pacific Coast continues to  
16 require the exclusion of Japanese from the area now  
17 prohibited to them and will continue for the  
18 duration of the present war."

19 Chapter II of the report entitled "Need for Military  
20 Control and for Evacuation" contained the following  
21 statements:

22 "Because of the ties of race, the intense feeling of  
23 filial piety and the strong bonds of common  
24 tradition, culture and customs, this population [the  
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1 Japanese population] presented a tightly-knit racial  
2 group. It included in excess of 115,000 persons  
3 deployed along the Pacific Coast. . . . While it was  
4 believed that some were loyal, it was known that  
5 many were not. It was impossible to establish the  
6 identity of the loyal and the disloyal with any  
7 degree of safety. It was not that there was  
8 insufficient time in which to make such a  
9 determination; it was simply a matter of facing the  
10 realities that a positive determination could not be  
11 made, that an exact separation of the 'sheep from  
12 the goats' was unfeasible."

13 . . .

14 "He [the Commanding General of the Western Defense  
15 Command] had no alternative but to conclude that the  
16 Japanese constituted a potentially dangerous element  
17 from the viewpoint of military security -- that  
18 military necessity required their immediate  
19 evacuation to the interior."

20 On April 19, 1943, Edward J. Ennis sent a memorandum (Ex. 35)  
21 to Solicitor General Charles Fahy relative to the briefs to be  
22 filed with the Supreme Court on behalf of the United States in  
23 United States v. Hirabayashi, United States v. Yasui and United  
24 States v. Korematsu. Ennis was at the time the director of the

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1 Alien Enemy Control Unit of the Department of Justice and was in  
2 charge of the preparation of the briefs for the Supreme Court in  
3 those three cases. In pertinent part that memorandum read as  
4 follows:

5 "In my opinion minor differences of presentation of  
6 the Court's own authorities on the legal question  
7 of the war power, due process and martial law will  
8 have little influence on their decision in view of  
9 their own familiarity with this material and their  
10 scrutiny of the applicable law. The effective area  
11 for assisting the Court is in the presentation of  
12 the factual material. In this connection the War  
13 Department has today received a printed report from  
14 General DeWitt about the Japanese evacuation and is  
15 now determining whether it is to be released so  
16 that it may be used in connection with these cases.  
17 The War Department has been requested to furnish  
18 any published materials which may be helpful. I  
19 will continue further and so far as possible to  
20 document the facts which are not in the record but  
21 which may be judicially noticed on the  
22 constitutional question."

23 Coincidentally, on that same date Assistant Secretary of War,  
24 John J. McCloy had a telephone conversation with Colonel Karl R.

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