

University of San Diego

Digital USD

---

Trial Transcripts

Hirabayashi v. United States

---

5-7-1985

## Transcript of Proceedings, Hirabayashi v. United States (C83-122V), Western District of Washington

United States District Court - Western District of Washington

Follow this and additional works at: [https://digital.sandiego.edu/hirabayashi\\_transcripts](https://digital.sandiego.edu/hirabayashi_transcripts)

---

### Digital USD Citation

United States District Court - Western District of Washington, "Transcript of Proceedings, Hirabayashi v. United States (C83-122V), Western District of Washington" (1985). *Trial Transcripts*. 4.  
[https://digital.sandiego.edu/hirabayashi\\_transcripts/4](https://digital.sandiego.edu/hirabayashi_transcripts/4)

This Book is brought to you for free and open access by the Hirabayashi v. United States at Digital USD. It has been accepted for inclusion in Trial Transcripts by an authorized administrator of Digital USD. For more information, please contact [digital@sandiego.edu](mailto:digital@sandiego.edu).

86-3853

IN THE UNITED STATES DISTRICT COURT FOR  
THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LODGED  
RECEIVED

JUL 23 1986

GORDON HIRABAYASHI,  
Petitioner,  
vs.  
UNITED STATES OF AMERICA,  
Respondent.

AT SEATTLE  
CLERK U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
DEPUTY

No. C83-122V

TRANSCRIPT OF PROCEEDINGS in the above-  
entitled and -numbered cause, heard before the Honorable  
Donald S. Voorhees, Judge of the United States District Court  
for the Western District of Washington, commencing at 4  
o'clock p.m., May 7, 1985.

ORIGINAL

149

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

(The following proceedings  
occurred in the chambers of  
the Court:)

THE COURT: Good afternoon. Won't you  
please be seated?

Well, I am going to have to re-learn all  
your names. Mr. Kawakami?

MR. KAWAKAMI: That's me.

THE COURT: And is it Leong?

MR. LEONG: Leong.

THE COURT: Leong?

MR. LEONG: That's correct, Your Honor.

THE COURT: And Cam Hall; Mr. Barnett.  
Is it Kobayashi?

MR. KOBAYASHI: That's correct.

THE COURT: And Susan Barnes I know, and  
Victor Stone I know. You've grown a mustache since I  
last saw you, haven't you?

MR. STONE: No, I haven't.

THE COURT: Really? You young attorneys,  
I can never count upon what I'm going to see, either  
a mustache, a beard, or whatever.

MR. STONE: I'll take that as a compliment,  
Your Honor. I've been with the Department almost  
fourteen years, but I'll take it as a compliment any  
time I can get it.

1 THE COURT: You're still a young attorney.

2 Let me tell you, I have considered the  
3 motion for reconsideration and I'm not going to grant  
4 it. I have put a lot of thought and a lot of time  
5 myself in the prior order, and I might say - I think  
6 Susan Barnes knows this, but our practice on oral  
7 argument, it's requested a lot of times and if I'm  
8 inclined to grant a dispositive motion, I always grant  
9 oral argument. But if I read over the briefs and find  
10 that I am going not to grant it, then just for economy  
11 of time, I don't hear oral argument. We handle almost  
12 all of our motions without oral argument.

13 There was a mistake, an inadvertent one,  
14 and you pointed it out in your motion for reconsidera-  
15 tion, and that is on page 3 of my order, it is the  
16 Seventh Circuit. It's not the Ninth Circuit. That is  
17 United States v. Darnell. But I know this type of  
18 question has been handled in three different matters,  
19 Pittel, Baloney and myself, and I see no reason why we  
20 shouldn't -- I can see many compelling reasons to have  
21 a hearing here, so as I said before, I am going to deny  
22 the motion for reconsideration and adhere to the ruling  
23 I made before.

24 This matter is set down for June 17th;  
25 is that correct?

1 MR. KAMAKAMI: That's correct.

2 THE COURT: Have we worked out, in effect,  
3 a pretrial order on that evidentiary hearing, because  
4 I want to look at that.

5 MR. STONE: Before we get to that, Your  
6 Honor, have we closed the other matter? Do I not even  
7 get a moment to say a word?

8 THE COURT: That's it.

9 MR. STONE: Okay. I take exception, but --

10 THE COURT: If I let you say a word, then  
11 I'm going to let other counsel, and then we ought to  
12 set it down for a formal hearing on it, but as I hope  
13 you can believe me when I say that I've given a lot  
14 of consideration to what you've stated, and I think  
15 that this is a significant enough matter - it is a  
16 misdemeanor and the possibility or probability of  
17 this having an adverse effect upon him in court is  
18 somewhat remote, but nevertheless, he was a citizen of  
19 this country. He was found guilty of a crime and I  
20 think he deserves a chance to have a factual hearing,  
21 and the issues that I think I stated some time ago  
22 would be whether - essentially this - whether anything  
23 was suppressed at the time of his trial or at the time  
24 of his appeal that prejudiced him or denied him due  
25 process.

1 But I do want to see this pretrial or pre-  
2 hearing order, because I don't intend to take a lot of  
3 evidence about the unfairness of the underlying orders  
4 and so forth. What I do want to take evidence on is  
5 the evidence with respect to this particular complainant.

6 So I will ask again, have you been working  
7 upon the pretrial order?

8 MR. KAWAKAMI: We submitted a draft and  
9 they've submitted a draft, and we've kind of put it  
10 together, but I don't think we've really had a chance  
11 to talk and finalize it. I've submitted it to him  
12 and he hasn't had a chance to really review it. I am  
13 hoping that we'll be able to do something, since he is  
14 here, in the next day or so.

15 THE COURT: I hope so, too, because I would  
16 like to see it. I want to see the things you propose  
17 to introduce, the witnesses you propose to call, and  
18 the same with you.

19 MR. STONE: Well, to start with, Your Honor,  
20 we attempted to file our draft pretrial order, and in  
21 a conversation to which nobody on my side was a party,  
22 I was informed that it was -- I was told that it would  
23 not be filed.

24 The point of us trying to file it was in  
25 there we made specific objections because we believed

1       that the pretrial order that was being promulgated by  
2       the other side and that talks about things like whether  
3       General DeWitt's, which was never even mentioned in  
4       the brief in the Hirabayashi case, although it was in  
5       the Korematsu case, was improperly written --

6               THE COURT: Let me say on those things, I  
7       really have an open mind on those things, that is,  
8       whether in the brief in the Hirabayashi case or the  
9       other case, so these are things I would like to know.

10              MR. STONE: Okay. There were a whole  
11       series of issues which went way beyond whether or not  
12       the Government had some duty after this case was closed  
13       in 1944 to come back to them, which again has, as far  
14       as we could tell, nothing to do with your ruling that  
15       we were going to talk about what happened at the trial  
16       or on appeal.

17              There were a whole series of those things,  
18       and we tried to list our objections because we thought  
19       they went beyond what you had ordered. But they haven't  
20       been ruled upon because I was told it was not going to  
21       be filed, and so I thought those were the kinds of  
22       things we would discuss.

23              But we can still attempt to put together  
24       one order and underneath it, in parentheses or something  
25       else, talk about our objections, but I have strenuous

1 objections to the scope of the way it's been described  
2 by the petitioner.

3 MR. HALL: The form of the pretrial order  
4 contemplates the facts you agree on, the facts you  
5 don't agree on, that law that you agree on, the points  
6 of law you don't agree on, so if you have a bone to  
7 pick with something that we're alleging, we'll put it  
8 in the unagreed facts. We'll put what we're contending  
9 and you put what you're contending so this Court can  
10 see what the issues are. That's standard operating  
11 procedure.

12 MR. STONE: Well, that's what we did over  
13 a month ago, Cam, and I was told it wasn't to be filed.

14 THE COURT: Well, first, I am unfamiliar  
15 with what you wanted to file. We don't accept a pre-  
16 trial order proposed by one side. What we try to get  
17 and get in almost all cases - once in a while the  
18 parties cannot get together and generally I get them in  
19 here and tell them if you can't agree on a certain fact,  
20 then put it in your contentions - but in almost all  
21 cases in trials that are infinitely more complex than  
22 this, we get an agreed pretrial order, and that's what  
23 I expect to have here.

24 MR. STONE: Well, Your Honor, this goes to  
25 that. I understand, and you know this morning we just



1 argued the Yasui appeal in the Ninth Circuit, and some  
2 of the same cases and arguments were made there this  
3 morning, including, for example, whether the Court has  
4 power to grant a Rule 48(a) motion. But one of the  
5 things that repeatedly came up is whether or not this  
6 is a civil case or part of the criminal case, and I  
7 thought that the Court was quite clear that to the  
8 extent that civil procedures are used, they are by  
9 analogy. It is still part of the original criminal  
10 case.

11 I can understand us trying to put together  
12 a pretrial order. The thing that disturbs me the most  
13 is the suggestion that as in a normal civil case, with  
14 the filing of that pretrial order the suggestion that  
15 the original pleadings go out of the case. I don't  
16 think in a habeas or 2255 or in a case like this where  
17 the petition is the essential document, and so are the  
18 Government's responses, that those papers can go out  
19 of the case.

20 THE COURT: I don't think in this case they  
21 would go out, that is, the original -- I suppose there  
22 is an indictment, or was it an information?

23 MR. STONE: Well, for the purposes of this  
24 pleading, I think we're talking about their allegations  
25 about newly discovered evidence. It was originally an

1 indictment in this case, I believe.

2 THE COURT: Well, I think you can tell from  
3 my previous order what I am prepared to hear evidence  
4 on, and I want to see you try to put an order together,  
5 and then as Cam here has suggested, if you have objec-  
6 tion to certain things that the Petitioner proposes  
7 to put on, you may make your objection right in that  
8 pretrial order. It's really a pre-hearing order, and  
9 then I'll rule upon it, and I'll try to rule upon it  
10 before trial so all of us will know what will be  
11 received and what won't be received.

12 MR. STONE: That will affect somewhat maybe  
13 seriously the amount of evidence and who the witnesses  
14 are, Your Honor. That takes us to another serious  
15 problem.

16 THE COURT: That's why I'm trying to get a  
17 pre-evidentiary hearing order settled upon, or at least  
18 proposed, so I can make some rulings. It may be possible  
19 to have this matter heard with fewer witnesses than  
20 you might think, or that you might otherwise think.

21 MR. STONE: In that regard, Your Honor, you  
22 issued an order early on that you were not going to  
23 permit depositions of witnesses. You had said that  
24 you would reconsider that, or rethink it sometime in  
25 January. It has been brought up by the other side in

1 some of their pleadings and it has gotten to the point  
2 where we are also aware that that is still the out-  
3 standing ruling in that case.

4 Because of that ruling, we have not tried  
5 to depose Edward Ennis, who, as we pointed out in our  
6 last pleading to you, testified before Congress that  
7 his original internal memoranda had nothing to do with  
8 what actually transpired. They were merely his views  
9 on what he liked and did not like about certain draft  
10 pleadings that in fact were not filed that way, and  
11 that he considered those memoranda unimportant and  
12 still believes that the Supreme Court was not misled.

13 Now, from our perspective --

14 THE COURT: Let me ask you, because if I  
15 made a ruling that there would be no depositions taken --

16 MR. STONE: It's in the transcript of the  
17 oral hearing on May 18th of last year.

18 MR. HALL: Page 127.

19 THE COURT: Let me see it. I really had  
20 assumed since then that depositions would be taken.  
21 Maybe I said "without leave of Court.

22 Now, this is an entirely different ruling  
23 from what you said I said.

24 MR. STONE: Oh, okay.

25 THE COURT: I would be inclined -- here is

1        what I said. "I would be inclined myself to defer  
2        deposition discovery until after you get these other  
3        things filed, and then have another conference and let  
4        me look at it and see what discovery is needed, and let  
5        me rule on it."

6                I don't think anything has ever been brought  
7        to me by either party saying we want to depose so and  
8        so or so and so and what is the ruling?

9                MR. STONE: Previously the pleadings, some  
10       of the pleadings filed in January by the Petitioner did  
11       ask whether or not the inability to take depositions  
12       was a reason to deny filing the Government's draft,  
13       moving it from January 25th of March 2nd, or whenever  
14       it was filed.

15               The point is, we have - at least I have in  
16       my communication with the other side, have indicated,  
17       if you will examine those pleadings, that we felt that  
18       until you told us we could go ahead and depose some  
19       of these people who are in their eighties --

20               THE COURT: Let me tell you, I had assumed  
21       that depositions were being taken all this time.

22               MR. STONE: No. Cam, did you have the same  
23       understanding I had?

24               MR. HALL: I understood we couldn't take  
25       depositions until --

1 THE COURT: Without my leave.

2 MR. HALL: -- without your leave.

3 THE COURT: No one has come around and  
4 asked me.

5 MR. HALL: And that what you were waiting  
6 for was the pretrial order to be filed, or at least a  
7 preliminary pretrial order to be filed, so that you  
8 could take a look at what we were proposing.

9 THE COURT: I would have thought, just as  
10 an example, on laches, I would assume that the deposition  
11 of the Petitioner would have to be taken, to know -- to  
12 find out what he knew, and when. And I would have  
13 assumed depositions would be taken of other people as  
14 to what they knew, and when, Government counsel and  
15 so forth. We don't have much time between now and the  
16 17th.

17 MR. STONE: That's it, Your Honor. That's  
18 one of the reasons we've been sort of unable to desig-  
19 nate exactly which documents and which witnesses,  
20 because, perhaps wrongly, both sides thought that we  
21 were supposed to be waiting for word that said you can  
22 go ahead and commence that part of discovery.

23 THE COURT: That really is a poor excuse.  
24 I just won't accept it. When I say to you that I am  
25 going to defer depositions until I can have a chance

1 to consider it and rule upon it, and nobody has ever  
2 brought anything back to me about taking any deposition --

3 MR. STONE: Well, if you like, --

4 THE COURT: What would you expect me to do?  
5 Just sua sponte get out an order saying now take  
6 depositions?

7 MR. STONE: Well, I can, if you like, Your  
8 Honor, I can document that it's been brought up at  
9 least two more times since January of this year in  
10 pleadings filed in the case.

11 THE COURT: Has anybody made a motion to me  
12 to take any depositions?

13 MR. STONE: No. We've been waiting for  
14 some kind of a hearing to be set on the pretrial order,  
15 and Mr. Kawakami told me that after we made our filing  
16 as well as our motions, he was told by your office that  
17 you were too busy and it would be at least three weeks.  
18 He waited about three weeks and then called, and then  
19 this hearing was set.

20 MR. HALL: Part of the problem was there  
21 were exchanges of documents and interrogatories or  
22 something that were delayed. They were originally  
23 supposed to be done - and I could have my timing wrong -  
24 but for one reason or another they weren't finally  
25 served until March.

1 MR. STONE: They were about four or five  
2 weeks delayed.

3 MR. HALL: We were originally planning on  
4 doing something by the 25th of January, and then it  
5 slipped into March, and then it came to the point  
6 where I think there has been some back and forth with  
7 regard to the pretrial order, and we wanted to set up  
8 a status conference, and in a sense, it wasn't con-  
9 venient until today.

10 I will say this, though. The Petitioners  
11 are ready to go to trial with or without depositions  
12 on the 17th of June, although we would prefer,  
13 obviously, with regard to some key witnesses, to know  
14 what they're going to say ahead of time.

15 I would also suggest as a possible short-  
16 cut, that we do something that was done in State  
17 Funding, or rather the Initiative 350 case, and that  
18 is to have the testimony-in-chief, perhaps, submitted  
19 in writing and the witness then subjected to cross-  
20 examination and redirect. It would, I think, tend to  
21 streamline the case and I don't think there would be  
22 any great loss to the Court if the testimony-in-chief  
23 were submitted in writing or by affidavit, with the  
24 live witness being then available for cross and  
25 redirect.

1 THE COURT: Do you have any idea of the  
2 parties whose depositions you would like to take?

3 MR. HALL: There are two people, I think,  
4 at least, whose depositions we would like to take.

5 THE COURT: Who are they?

6 MR. HALL: Mr. McCloy and Mr. Bendetson,  
7 Captain Bendetson, of the people we expect that the  
8 plaintiff is going to want to call upon as a witness.  
9 There may be others and we will have a better idea  
10 when we know whom the Government is going to call as  
11 a witness. There may be others when we know more  
12 completely whom the Government is going to call, but  
13 we anticipate at least those two, if the Government is  
14 going to call them. If the Government is not going to  
15 call them, then we have no need to take the deposition.

16 THE COURT: Do you have any idea whose  
17 depositions you want to take?

18 MR. STONE: I was waiting to find out what  
19 experts they plan to call, Your Honor. Aren't they  
20 going to call any historians or experts?

21 THE COURT: I thought this pre-evidentiary  
22 order would lay everything out on the table so that  
23 all of you knew, you knew what they were going to do,  
24 they knew what you were doing to do.

25 MR. STONE: There is another section in



1 your hearing that said we did not have to list witnesses.  
2 It's in the transcript. If you want to hand it to me,  
3 I can find it. So neither side listed witnesses.

4 MR. HALL: The draft of the pretrial order  
5 that you gave me yesterday --

6 MR. KAWAKAMI: No, it doesn't have it.

7 THE COURT: Let me see the transcript that  
8 you say I said you don't need to list witnesses.

9 MR. STONE: After we came back, I believe,  
10 in here. The first part I have here is where Mr. Hall  
11 said he wanted to take preservation depositions, and  
12 Your Honor said, "I think that I would, if the Govern-  
13 ment takes it up, would deny the privilege to take  
14 preservation depositions to preserve testimony."

15 Then, when we got to the actual -- it says  
16 -- we're talking about the pretrial order and Ms.  
17 Bannai had said for the Petitioner, "You've talked  
18 about doing admitted facts and the exhibits. I take it  
19 we probably couldn't do the witness sections because  
20 we haven't had discovery."

21 THE COURT: Who said that?

22 MR. STONE: Ms. Bannai for the Petitioner.  
23 Mr. Hall said, "We will fill in as much of the format  
24 as possible and leave the rest blank," and you said,  
25 "That's right, with the privilege of putting the

1 witnesses in later." So I guess that's partly why we  
2 didn't --

3 THE COURT: I surely expected people to  
4 list as many witnesses --

5 MR. STONE: It's the next to the last page,  
6 I think.

7 THE COURT: Let me just read up to that.

8 At one point I said, addressing you, Mr.  
9 Hall, "I don't know whether you have live witnesses  
10 at this time that you intend to put on, other than  
11 perhaps the Petitioner." You said, "We may want to  
12 take -- I don't know whether they are adverse witnesses,  
13 but Mr. Ennis. I don't know. I think that's a  
14 definite possibility."

15 MR. HALL: I think we would want to call  
16 him as a live witness, if it is permitted by the Court.

17 THE COURT: Did he handle the appeal? Was  
18 he on the brief on appeal?

19 MR. KAWAKAMI: Yes, Your Honor.

20 THE COURT: I would certainly think he  
21 would be a person I'd like to hear from, one way or  
22 another, deposition or live.

23 MR. HALL: We've talked to him and he is  
24 available to appear as a witness.

25 THE COURT: Actually alive.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MR. HALL: And very alert.

THE COURT: I spoke about August 17th, Petitioner serving on opposing counsel his proposed segments of the pretrial order.

MR. STONE: That happened.

THE COURT: That happened. All right. Then you said you wanted five months to respond, January 25th. Did you respond?

MR. STONE: We subsequently asked you for a little bit of time because we were waiting for this, which we felt would color the situation greatly, but it has not affected the motions that we made, although we thought it would. We still think it does. It came out the end of February and within a week our side was filed.

THE COURT: All right.

Well, in the beginning it appeared to me that January 25th, all the filings would be in, and then I said -- I did say this, that I thought it would be better to stay discovery until those filings had been made, but then you asked for an extension until sometime in March.

MR. STONE: Ultimately we asked -- we did not wish to have a public paper filed until this was published first, and you allowed it.

1 THE COURT: The extension was until what  
2 time?

3 MR. KAWAKAMI: March 11th, I think.

4 THE COURT: I didn't realize that could  
5 have affected this ruling, what I said about discovery.

6 MR. STONE: They opposed it on that ground,  
7 Your Honor, in the papers.

8 THE COURT: Well, can I make a ruling right  
9 now about discovery, that is, anything that you all --  
10 any discovery that you all want to make in terms of  
11 deposing people?

12 MR. HALL: I think the first thing, we'd  
13 like to know who they are proposing to offer as wit-  
14 nesses and then decide if we want to take their deposi-  
15 tion, and I think they would be entitled to the same  
16 information from us.

17 THE COURT: What about that?

18 MR. STONE: I was going to turn that on  
19 its head, Your Honor, because it is the Petitioner who  
20 is alleging misstatements of various kinds. We're  
21 trying to figure out which are the ones that you're  
22 going to find relevant; which ones relate to his case.  
23 I don't personally have any interest, independently,  
24 in calling Mr. McCloy, whose recollection I don't think  
25 is strong enough to mean much now, or Mr. Bendetson,

1       whose recollection I also think has --

2               THE COURT:   Who was he?

3               MR. STONE:   Mr. Bendetson was for a while  
4       an aide to General DeWitt.  He was not a principal  
5       aide but he did -- he was sent out from Washington and  
6       he did get involved in a lot of the communications  
7       relating to the issuance of the executive order in  
8       1942, but that has nothing -- he did not work specifi-  
9       cally on this case at all.

10              THE COURT:   All right.  Let's do this.  
11       I'm trying a case starting tomorrow, but can you stick  
12       around until Friday?

13              MR. STONE:   I'll have to call my office.  
14       I had a plane out tomorrow morning at 8 a.m.

15              THE COURT:   Well, this thing has not  
16       progressed nearly as far as I had expected it to pro-  
17       gress.

18              MR. STONE:   I know, Your Honor.  I thought  
19       we were still arguing a motion for reconsideration  
20       today.  I wasn't informed we wouldn't be arguing.  In  
21       fact, I was informed just the opposite, that I would  
22       get a chance to argue it.

23              THE COURT:   Who informed you of that?

24              MR. STONE:   Well, that was the information  
25       I got from --

1 THE COURT: That's just wrong. You've got  
2 to get the answer from me.

3 MR. STONE: I was trying to find out what  
4 the situation would be, Your Honor.

5 THE COURT: Well, it seems to me, first on  
6 that, that you should have been aware of the fact that  
7 I made a ruling last June that I was going to have a  
8 hearing. I made another very considered ruling I was  
9 going to have a hearing. I think you should have been  
10 aware of the fact that I probably would adhere to those  
11 rulings, that I wouldn't change my mind.

12 MR. STONE: No, as a matter of fact, I  
13 didn't believe that, Your Honor, because there were two  
14 statements in that that are contrary to the law of this  
15 circuit, and I have to still present them to the  
16 Solicitor General. I know you don't want it argued --

17 THE COURT: We're going to have a hearing.

18 MR. STONE: Okay. I understand that.

19 THE COURT: I will interrupt the trial  
20 that I'm on, and let's met at say 3 o'clock on Friday,  
21 and we'll decide what depositions, but I think at that  
22 time the Petitioner should be prepared to indicate the  
23 live witnesses you intend to call.

24 MR. HALL: I think we're prepared to do  
25 that by a draft pretrial order, as I understand it,

1 right now.

2 Is that all right?

3 MR. KAWAKAMI: Sure.

4 MR. HALL: John Herzig, H-e-r-z-i-g; his  
5 wife, Akio Herzig-Yoshinaga, Y-o-s-h-i-n-a-g-a; Peter --

6 MR. STONE: These are experts now?

7 MR. HALL: -- Peter Irons. They're  
8 research-historians. Peter Irons.

9 MR. STONE: Is he going to resign as  
10 counsel in the case? He's listed as current counsel  
11 in the case.

12 MR. HALL: I don't know. He's counsel of  
13 record.

14 MR. STONE: He's counsel of record.

15 THE COURT: I wouldn't hear him if he's  
16 counsel of record.

17 MR. HALL: He wouldn't be if he's going to  
18 testify. He has done nothing in this case except sign  
19 a pleading.

20 MR. STONE: He said that he wrote the whole  
21 pleading.

22 MR. HALL: Edward J. Ennis, and Gordon  
23 Hirabayashi. Five witnesses.

24 THE COURT: Now, I think, -- you may not  
25 want to do it right now, although you may also have it,

1 but you should tell counsel as to what each of those  
2 people is going to testify to.

3 MR. HALL: I think we can do that off the  
4 record at the end. I think that Rod is probably better  
5 able to answer that than I.

6 THE COURT: All right. Then I'll make a  
7 ruling on Friday about what depositions can be taken,  
8 what discovery can be made.

9 MR. STONE: I may have to fly back and  
10 then fly back again to be here Friday. I don't know  
11 that I am able to stay through Friday, Your Honor.

12 MR. HALL: Could we do it by conference  
13 call on the phone?

14 THE COURT: You can handle it any way you  
15 want to. I prefer to make rulings face to face. I  
16 just find I'm more comfortable face to face.

17 MR. STONE: May I ask what happened to John  
18 J. McCloy and Mr. Bendetson, if they don't plan to call  
19 them?

20 MR. HALL: I didn't say we were going to  
21 call them. I was anticipating that you might be wishing  
22 to call them, and if that were the case, then we would  
23 want to take their depositions. I also said, I believe,  
24 if you don't intend to call them, then we find no need  
25 to take their depositions.



1 MR. STONE: I think it's possible we will  
2 call Mr. McCloy, depending on whether or not there is  
3 any question about the authenticity of documents that  
4 he may have received.

5 THE COURT: I don't think there's going to  
6 be a problem on that, do you, on authenticity?

7 MR. STONE: Well, I don't know, Your Honor.

8 MR. HALL: This is something else we've  
9 tried to get resolved through discovery. We've listed  
10 the documents we want to have authenticated. If there  
11 is a problem, then I guess there's a problem.

12 MR. STONE: There is a problem. Almost a  
13 year ago I asked for building location, record group  
14 number and box number of each of the records they  
15 wanted us to find. I have met informally two of their  
16 experts, John Herzig and his wife, Akio Yoshinaga, out  
17 at the National Record Center in Sutland myself, per-  
18 sonally. I've bumped into them twice there.

19 They have not -- and I'm sure they have it  
20 available to them -- they have not given me box and  
21 record group number of all the files. On some of them  
22 they have and on some they've given me a general  
23 location, but it is impossible in that record center  
24 -- there are millions of pieces of paper -- to find  
25 documents based only on a record group. I do need a

1 listing.

2 THE COURT: Have you propounded interroga-  
3 tories on that?

4 MR. STONE: I haven't done interrogatories,  
5 Your Honor, because I have been, in part, waiting to  
6 find out what was going to happen on our ruling.

7 THE COURT: That's no excuse. That is  
8 simply no excuse. I set it down for a hearing almost  
9 a year ago, and I think you should proceed upon the  
10 assumption that a hearing is going to be held.

11 MR. STONE: Well, Your Honor, --

12 THE COURT: This whole thing has been  
13 looking toward a hearing.

14 MR. STONE: If you don't mind my saying  
15 so, Your Honor, you gave me leave to renew my motion  
16 to dismiss. I pointed out how sensitive it was.

17 THE COURT: All I'm saying to you is you  
18 should proceed on the assumption that we're going to  
19 have a hearing. You might get me to reverse my ruling,  
20 but I think you should proceed upon the assumption that  
21 we're going to have a hearing.

22 MR. STONE: Okay. You also, as you your-  
23 self read, stayed the discovery aspects of the case,  
24 and I took that to be within the discovery aspects of  
25 the case.

1 THE COURT: Well, I was looking towards  
2 January 25th, notice we could put off discovery until  
3 January 25th. Then you still had certainly five full  
4 months, maybe six, -- no, it would be five months, so  
5 it appeared to me there was plenty of time for dis-  
6 covery before the hearing, but now of course there is  
7 not plenty of time.

8 Well, go ahead.

9 MR. STONE: At about that same time, in  
10 those pleadings where we asked to move it to March so  
11 that this document could come out before we would be  
12 in a position to make a public statement about what we  
13 felt was going on, the Petitioner said that because of  
14 the difficulty in getting discovery done after that,  
15 that's when they asked to have the date moved to  
16 September, which Your Honor declined. That was all  
17 part of that exchange.

18 THE COURT: Well, let me ask you all.  
19 What I've been trying to do is to hold to this early  
20 date because I thought Mr. Hirabayashi wanted that.

21 MR. KAWAKAMI: That's correct, Your Honor.

22 As far as the documents, I believe that  
23 we've listed the documents and we've submitted probably  
24 90 per cent of the documents that we intend to submit.  
25 There's a few odds and ends that we haven't. We've

1 also given him, to the best of our ability, the  
2 locations of those documents, and we got those from  
3 how our researchers got them. Our researchers go in  
4 and have to physically, as he said, look around, but  
5 that's the best location there is. If it says it's in  
6 this library, we can't direct them and tell them which  
7 step to look in. But we've given them to the best of  
8 our ability the location of probably 90 per cent of the  
9 documents. He's had that for quite some time.

10 In fact, most of the documents, the bulk of  
11 the documents are documents that were in the petition  
12 filed back in '83. So what interests us, as what  
13 interests you, is getting a pretrial order together so  
14 that we can get on with business, and we're still  
15 interested in finding out whether or not any specific  
16 document is going to be objected to on the basis of  
17 either authentication or whatever other basis he may  
18 have to object to any document, and that we would like,  
19 hopefully, to also be able to prepare and present to  
20 you by Friday, if we can work that out.

21 Those are obviously things that have to go  
22 in the pre-hearing order anyway, but we still feel  
23 that notwithstanding the squeeze that people seem to  
24 feel in, that we would be prepared to present our case  
25 on June 17th.

1 THE COURT: All right.

2 MR. STONE: I don't know, Your Honor, that  
3 starting right now in less than something like two or  
4 three weeks I can give a complete rundown of all the  
5 documents if we all dropped everything and put together  
6 exactly what it will look like to go into the documents.

7 THE COURT: Haven't you or your office  
8 been working on this?

9 MR. STONE: Yes. I have had -- in fact,  
10 I have some people working on this and they've been  
11 working on it, but it's an enormous project because it  
12 has not been narrowed down in terms of what the focus  
13 of the issues were that they were going to bring up.  
14 So they have sort of been globally culling the documents.

15 THE COURT: Didn't I sort of narrow it down  
16 a long time ago?

17 MR. STONE: Yes, you did, and their August  
18 17th statement came back and totally ignored that and  
19 went off and started talking about documents that had  
20 nothing to do with the trial or the appeal of the case,  
21 and we felt obligated to look at those, and they've  
22 raised the same issues they did in the petition.

23 THE COURT: Well, I would have thought that  
24 the thing might have been -- in fact, I know the thing  
25 you should have done at that point is come back to me

1 and said, "This is contrary to your order."

2 MR. STONE: All right. Well, that was what  
3 -- our objections listed that when we did file, and that  
4 was two months ago.

5 THE COURT: Filed with counsel.

6 MR. STONE: Two months ago. That's right.  
7 That's when we attempted to file them here, and then  
8 as you're saying, you thought we should have filed them  
9 there, but as I read the pretrial rules, that's where  
10 I thought it was going, and because we were under the  
11 impression that we were not getting to the discovery,  
12 it hasn't come out.

13 May I ask, Your Honor, if your trying to  
14 hold the date is primarily something that deals with  
15 the Petitioner's request? May I ask why? I don't  
16 believe there is any indication in the record that he's  
17 ill or not well, or that he has some around-the-world  
18 trip coming up in June. Is there a reason?

19 THE COURT: It's not that, but I cleared  
20 my calendar. That's the primary thing. I opened up,  
21 I think two weeks, ten days, something like that, and  
22 the next time I can open up this way will probably be  
23 in '86.

24 MR. STONE: I wonder if it were narrowed  
25 down if we couldn't possibly try and compress it some.

1 MR. HALL: That may occur, but I think we're  
2 quite anxious to get this matter resolved, starting the  
3 17th.

4 THE COURT: Well, I think the best thing  
5 to do is let's see each other on, I'd say at 2:30 this  
6 Friday afternoon.

7 MR. STONE: Again, I cannot commit whether  
8 I can be here, Your Honor. I'm inclined to think it's  
9 going to be difficult and I may not be able to be here.

10 THE COURT: Well, can Ms. Barnes take over?

11 MR. STONE: Maybe Ms. Barnes will have to be  
12 here.

13 THE CLERK: Your Honor, we have a hearing  
14 on Morrison on Friday.

15 THE COURT: Then I can't do it.

16 THE CLERK: Do you want me to continue it?

17 THE COURT: No, I really have got to hear  
18 that. Is that Friday afternoon?

19 THE CLERK: Yes, at 2 o'clock.

20 MR. KAWAKAMI: Did you say 3 or 2:30?

21 THE COURT: I thought I said 2:30, but we  
22 can't hear it because I find I have a conflict. I'm  
23 in a jury trial for the rest of this week and all of  
24 next week and possibly into the following week.

25 MR. STONE: May I ask whether or not your

1 your deputy can just look and see whether there is  
2 another hole in your calendar not so far down the line  
3 that you feel it's a substantial difference, but some-  
4 what down the line so that we're not trying to do this  
5 in a --

6 THE COURT: What is your reaction?

7 MR. KAWAKAMI: Well, Your Honor, we've  
8 worked awful hard ourselves in preparing for the 17th,  
9 and we're ready, and I don't know really that there has  
10 been a showing or any reasons why the Government can't  
11 be ready, either.

12 We've had the documents to them. They chose,  
13 for whatever reason, not to look at them, or if they  
14 looked at them, they don't know whether or not they're  
15 going to object to them. I don't exactly know why, and  
16 I think that we would certainly encourage that the trial  
17 date be kept. There are plans that we've made as well  
18 to have witnesses and so forth present and available,  
19 and Mr. Ennis is one of them.

20 THE COURT: Well, the earliest time that I  
21 probably could get together with counsel would be not  
22 next week but the following week, and even now I can't  
23 tell you when that would be because it depends on the  
24 trial that I'm going to go into Thursday, whether it  
25 lobs over into the following week.



1                   Let's look at not next week but the follow-  
2                   ing week.

3                   THE CLERK:   May 24th.

4                   THE COURT:   Is that a Monday?

5                   THE CLERK:   Monday, May 20th, we're starting  
6                   another trial.

7                   THE COURT:   What one is that?

8                   THE CLERK:   We're starting DeMuth.

9                   MR. HOGUE:   You know, Judge, they've moved  
10                  to vacate that DeMuth trial.

11                  THE COURT:   Is that also going to be two  
12                  days?

13                  THE CLERK:   Yes, Judge.

14                  MR. HALL:   I think, with all due respect,  
15                  putting this off to the week of the 20th, recognizing  
16                  the Court's problems, just compounds the difficulties  
17                  because of the fact that it will be less than a month  
18                  ahead of trial, and if you're going to compel deposi-  
19                  tions, say of Mr. McCloy, first you have to file papers  
20                  in whatever district he is in and have them served,  
21                  because presumably he wouldn't voluntarily submit  
22                  himself for deposition.

23                  If there is any way to do it --

24                  THE COURT:   I tell you, these are rulings  
25                  I hopefully expected to be making back in January, five

1 or six months ahead of trial.

2 MR. HALL: If there is any way of doing this  
3 at 4 o'clock any afternoon, if it would meet with the  
4 convenience of Court and counsel --

5 THE COURT: Well, I don't know how long  
6 this trial I am in right now is going to last, but let's  
7 look at tomorrow afternoon. Can you stay over until  
8 tomorrow afternoon?

9 MR. STONE: Well, it still means that I  
10 can't get back for the things I had on Thursday because  
11 of the way the planes work. We can't do it tomorrow  
12 morning, can we, before the trial?

13 THE COURT: I've got a trial.

14 MR. STONE: Bright and early? I can be  
15 here at 7, 8, whenever the Court is up. Part of my  
16 problem is that I do not have all the resources here,  
17 the paperwork, that would allow me to prepare what  
18 you're asking, I think.

19 THE COURT: Well, you know, when I set up  
20 a hearing like this, I really expect you to have your  
21 paperwork, because at least my thinking was that we  
22 would probably be working on this pretrial order today.

23 MR. STONE: As I say, Your Honor, I was  
24 under the misimpression that I was going to get a  
25 chance to argue a motion.

1 THE COURT: Well, suppose you lost the  
2 motion, then what were you going to do about the pre-  
3 trial order?

4 MR. STONE: Well, I thought we were going  
5 to talk about the fact that we each submitted different  
6 drafts, and we thought that the scope of the order  
7 which they suggested went way beyond what Your Honor  
8 had ordered. I'm still ready to talk about that, if  
9 you like.

10 THE COURT: Well, I don't think you really  
11 are ready to talk about -- have you submitted anything?

12 MR. STONE: We filed a draft pretrial order  
13 but it was sent back, yes. They've had it for two  
14 months.

15 MR. KAWAKAMI: Your Honor, we've tried to  
16 incorporate our draft that we've sent to counsel and  
17 the draft that he sent to us into a pretrial order  
18 with factual contentions agreed, disagreed, issues of  
19 fact and issues of law.

20 THE COURT: What does that look like now?

21 MR. KAWAKAMI: As far as I can see, it's  
22 complete other than the listing of witnesses and their  
23 objections to authenticity of documents.

24 THE COURT: Do you have a copy there for me?

25 MR. HALL: You can take my copy.

1 MR. STONE: I got to see it on the plane  
2 here. I don't think it's complete.

3 MR. HALL: It is not complete. It's a  
4 draft, but it's certainly more complete than anything  
5 else that exists.

6 THE COURT: I am prepared to stay here all  
7 night, if that suits your pleasure.

8 MR. STONE: I'm just getting this one now,  
9 Your Honor. Can I have a moment to confer with Ms.  
10 Barnes about this new document?

11 THE COURT: Yes.

12 Anything?

13 MR. STONE: Well, Your Honor, I think the  
14 thing that we concluded out there is -- and maybe it --  
15 I'm not sure whether or not at this stage it needs to  
16 take up your time, because I need to know from the  
17 Petitioners, and I can take it in my handwriting or  
18 they can provide it to me later, typed, the categories  
19 of their witnesses and what they're expecting to say,  
20 and maybe I need to go back with one of them here who  
21 is capable of doing that with me tonight to his office,  
22 and I'll sit there with him and let him hammer it out  
23 with me so I can turn around and try and see which  
24 witnesses I need to meet that testimony and what pieces  
25 of evidence I need to meet that testimony. Then I'll

1 be able to say, you know, this witness I think is outside  
2 your guidelines, or this witness is not outside your  
3 guidelines.

4 So maybe that is the first crucial step, and  
5 I'll be willing to stay with them - it doesn't have to  
6 be here; it may be better in their office where they've  
7 got some of their work papers, and then we can go over  
8 that. That will allow me to go back and immediately  
9 try and respond to that.

10 THE COURT: Well, I'm looking at the  
11 Petitioner's pre-hearing order, and it seems to be in  
12 order, that is, they've done the things they're supposed  
13 to do. Some of the things may be inadmissible and so  
14 forth, but I have also taken a look at the Government's  
15 proposed pre-hearing order and it's really just a legal  
16 brief.

17 MR. STONE: The first part of it is, Your  
18 Honor, until about page --

19 THE COURT: Page 9, 10, 11 --

20 MR. STONE: Yes. If you go to about page  
21 12 or 13, you will see that it --

22 THE COURT: There is more legal argument on  
23 page 13.

24 MR. STONE: Well, if you want to know what  
25 page the rest of it starts on --

1 THE COURT: I'll tell you what --

2 MR. STONE: Your Honor, if you'll look at  
3 the second half of it - I wish you would, please - you  
4 will see that they've simply incorporated the second  
5 half of mine into theirs. I wish you would. I don't  
6 want you to have the impression -- why don't you start  
7 opening it from the back?

8 THE COURT: Well, I've gotten about halfway  
9 through it and it's all legal briefs. I recognize that  
10 it's not in the form it should be in.

11 MR. HALL: In addition, with all due  
12 respect to counsel, and of course subject to the  
13 rulings of the Court, we would object to providing  
14 more information about what the witnesses are going to  
15 say than the rules contemplate. I think the rules  
16 contemplate a summary of what the witness is going to  
17 say, but I don't think the rules contemplate an  
18 encyclopedic recitation of what the witnesses are going  
19 to testify, and I think that it's up to counsel to  
20 determine what our evidence is going to be, what our  
21 proof is going to be, and I think that was easily done  
22 by virtue of the prior submissions that we've made  
23 and also the rulings of the Court.

24 Obviously we are not going beyond what the  
25 Court has ruled is proper, and what information we're

1 going to try to establish, and I think it's up to  
2 counsel to prepare his case.

3 THE COURT: I think as far as the witnesses  
4 are concerned, I do want a statement as to what they're  
5 going to testify to.

6 MR. HALL: I think that's fair, but I  
7 don't --

8 THE COURT: Not point by point, but the  
9 general areas that they're going to be testifying to.

10 MR. HALL: I think as far as general areas,  
11 that's what the rules contemplate, but I don't think  
12 they contemplate anything more precise than that, in  
13 all due respect.

14 THE COURT: I am trying to make an order  
15 here that I expect people to abide by, and I expect the  
16 Government to come forward with statements similar to  
17 those made by the Petitioner here with respect to  
18 witnesses and exhibits that the Government intends to  
19 introduce. Has that been done?

20 MR. KAWAKAMI: Your Honor, I believe that's  
21 a combination. The last one we gave you is a combina-  
22 tion of both. We took the order that you have in your  
23 hand now that the Government gave us and tried to take  
24 out the legal argument and put in what their contentions  
25 were, and their exhibits that they did list there, and

1 we've added that into the joint pre-hearing order, the  
2 draft that you have there.

3 THE COURT: Well, let me do this: Rather  
4 than trying to get them combined, which we normally  
5 do, I'm going to ask you to submit your -- that is, the  
6 Petitioner's proposed pretrial order, that is, his  
7 contentions, his witnesses, his exhibits, and I suppose  
8 we'd better have his issues of law, and then I'm going  
9 to ask the Government to do the same thing, and I want  
10 that done no later than next Friday.

11 Then, I'll have each of you file objections  
12 to what the other one has filed. I am asking for the  
13 Petitioner's and the Government's separate proposals  
14 by, I think I said --

15 MR. HALL: This Friday.

16 THE COURT: I was thinking the following  
17 Friday. That's May 17th.

18 MR. HALL: Isn't it possible, given the  
19 fact that we're supposed to be prepared to have it by  
20 this Friday, because if there are depositions going to  
21 be taken, and if we're to hold the trial date --

22 THE COURT: I intend to hold the trial  
23 date.

24 MR. HALL: I think we're prepared to submit  
25 a cleaned up version of what you already have by this



1 Friday.

2 MR. STONE: Your Honor, if they want to  
3 submit it by this Friday, then I will have their sub-  
4 mission to work on, because it's very hard to do it  
5 concurrently without knowing what I'm addressing. If  
6 they can do it by Friday, then I'll have the week to  
7 respond. They have just now handed me this stack of  
8 documents, and again, they are not all identified in  
9 a way that it's easy to find where they are. I mean I  
10 know there are additional things. If they can have it  
11 by Friday, please be my guest.

12 THE COURT: Why don't you do it by the  
13 10th; the Government by the 17th. Then, let me have  
14 each of you file objections to the other's filings by  
15 -- I'm going to be on vacation the early part of June  
16 so I know I won't be able to consider it prior to  
17 that. Let's have the objections by the 7th of June,  
18 and then prior to the 17th I will rule on the objec-  
19 tions and maybe exclude certain witnesses and certain  
20 documents.

21 MR. HALL: What do we do if we want to take  
22 a deposition?

23 THE COURT: I will be here, of course,  
24 until -- we have a Judicial Conference on the 27th.  
25 Why don't you bring it to my attention? You will be

1 getting the Government's pleading on the 17th. Bring  
2 it to my attention the following week, and you don't  
3 need to set it down on the regular motion calendar.

4 MR. HALL: So we can take depositions even  
5 before this process of pretrial orders and issues is  
6 resolved? I think we're probably going to have to.

7 THE COURT: Are these discovery or are  
8 they perpetuation depositions? If it's to perpetuate,  
9 there's no problem.

10 MR. HALL: No. It will be probably -- in  
11 a sense it will be to perpetuate, to find out what  
12 they're going to say at trial.

13 THE COURT: With respect to the Government,  
14 I would not let you just go out on discovery until we  
15 find out whether the Government is going to call a  
16 particular witness.

17 MR. HALL: That's right.

18 THE COURT: But as soon as they say "We're  
19 going to call this witness," then you could take that  
20 deposition.

21 MR. HALL: We don't intend to take Joe  
22 Doaks' deposition unless it shows up on the Government's  
23 list.

24 THE COURT: If it shows up on the Govern-  
25 ment's list, then you can take discovery, and the

1       Petitioner, the witnesses as listed, you can take their  
2       depositions.

3               Now, did you make a note of those dates,  
4       by any chance?

5               MR. HOGUE: I did not.

6               THE COURT: All right. Would you mark these  
7       down? The Petitioner is to file his proposed sections  
8       of the pretrial order May 10th; the Government, May  
9       17th, and any objections by either to the other  
10      person's proposal, other party's proposal, by June 7th.

11              Does that sound all right?

12              MR. HALL: And then after the 17th, then  
13      if we need to approach the Court for any assistance on  
14      depositions, we may. Otherwise we will proceed by  
15      agreement of counsel?

16              THE COURT: I think that's right, and then  
17      before the hearing on the 17th, that's Monday, the 17th,  
18      I would make some rulings with respect to proposals.  
19      Each of you are going to file objections to the other's  
20      witnesses, exhibits, and so forth. I'll try to make  
21      rulings on those before the 17th, or what we might even  
22      think about doing is on the 17th, make the rulings and  
23      then proceed to call the witnesses after that.

24              But let me look at it when they get back, and  
25      then I'll get word to counsel whether you can expect to

1 have witnesses on the 17th, or perhaps to make rulings  
2 on these objections.

3 MR. HALL: The only problem I can see with  
4 regard to the schedule, and I think we can work around  
5 it, is that counsel objects to the authenticity of some  
6 document that we've listed, and we haven't by the 10th  
7 listed a witness who will be necessary to authenticate  
8 that document, we may need to, for that limited purpose,  
9 list additional witnesses.

10 THE COURT: I think that would be all right.  
11 Now, we've got this set down for the 17th. How long  
12 do you think, realistically, it will take to hear your  
13 witnesses?

14 MR. KAWAKAMI: I think we've estimated --  
15 I think the last time we estimated about a week.

16 MR. HALL: Maybe less. If the Court were  
17 to streamline direct examination, for example, it could  
18 be done in less time. I would think certainly no more  
19 than a week for the Petitioner's case.

20 THE COURT: Any idea for the Government?

21 MR. STONE: I think that's going to depend,  
22 Your Honor, on how broad or narrow -- may I discuss that  
23 for just a moment?

24 THE COURT: Certainly.

25 MR. STONE: Are you confining them to

1 information which the prosecutorial attorneys in the  
2 District Court and the Appellate Courts were aware of  
3 at that time, because most of their documents that I've  
4 gotten, and most of the contentions that they have made  
5 go to military matters that the attorneys who worked on  
6 the case had no knowledge of at all, and I want to know  
7 to what extent that's going to be opened up here.

8 THE COURT: Well, why don't you make your  
9 objection and let me rule on it?

10 MR. STONE: Okay. I will, but that goes to  
11 whether or not we'll be done in two days or ten days.

12 MR. HALL: Of course the problem Mr. Stone  
13 raises is it's part of our contentions that the right  
14 arm of the Government didn't let the left arm of the  
15 Government know what the facts were, and the left arm  
16 of the Government was the part that was prosecuting  
17 Mr. Hirabayashi.

18 THE COURT: That's the thought that ran  
19 through my mind. That is, I don't want to make a ruling  
20 now that it's confined to just what the lawyers knew.  
21 If responsible parties of the Government knew, for  
22 example, that ONI said "We don't need to do this," or  
23 that the FBI said "We don't need to do this," even  
24 though the attorneys did not know that, it seems to me  
25 there is certainly an argument that could be made that

1 the Government could be charged with that, so I'm not  
2 going to make a ruling now.

3 MR. STONE: Your Honor, I guess I'm going  
4 to have to put it in my contentions, but I see us trying  
5 a totally different case than the petition that was  
6 brought in. The petition that was filed said one side  
7 of this issue, the one that said there is a problem  
8 with Japanese because of espionage and sabotage was  
9 totally devoid of evidence, and therefore it was not a  
10 question of a general balancing of considerations and  
11 coming out of the Supreme Court, which he has a right  
12 to do, and us not looking in hindsight and balancing,  
13 but since one side was totally devoid, it meant there-  
14 fore that that was exculpatory to and in fact exculpated  
15 the defendant.

16 So to the extent that there may be indi-  
17 vidual recommendations that suggest one or the other  
18 thing, as long as the Government, as I understand it,  
19 comes up with -- it seems to me the relevant evidence  
20 is, is there any evidence on the other side of the  
21 question. As long as we come up with evidence on the  
22 other side of the question, I don't understand why  
23 it's -- it's quite clear that there was some evidence  
24 on the side of the question that said that there were  
25 some people, because the Government, the Government

1 gave Mr. Ringle permission to publish his report in  
2 Harper's magazine. It says in the introduction to it  
3 that it was published with Government permission.  
4 Obviously the Government recognized there was some  
5 sentiment for not evacuating people, but the question  
6 is, was there any evidence on the other side of the  
7 question that said there is a danger here that the  
8 General has to consider.

9 So to the extent that every document that  
10 they view as exculpatory is going to be moved to be  
11 admitted, it seems to me that also goes way beyond what  
12 the issue is, which is, was one side of the balancing  
13 process totally devoid of evidence and therefore the  
14 General had no discretion. That is the question that  
15 I thought was being posed in the petition. Am I wrong?

16 THE COURT: Well, I don't want to make a  
17 ruling on that.

18 MR. STONE: Okay.

19 THE COURT: What I would like to have you  
20 do is put your objections to their witnesses and their  
21 exhibits, and they do the same with you, and then I'll  
22 make a ruling.

23 Why don't we start the actual trial of  
24 this on the 19th? Is that convenient for all of you?  
25 Do you have a witness you want to call, can that person

1 be called on the 19th?

2 MR. HALL: I think that he can.

3 THE COURT: I would like to free myself  
4 for a couple of days, the 17th and 18th, when I can  
5 really put my mind to these various objections.

6 Yes?

7 MS. BARNES: Your Honor, did you want to  
8 schedule trial briefs?

9 MR. HALL: So we'll start the trial, in  
10 effect, on the 17th but we'll know that it begins on  
11 the 19th. We will be available for the Court.

12 THE COURT: I'd like to have you be avail-  
13 able, be around here the 17th and 18th, but we'll not  
14 have any court hearings on those days unless I inform  
15 you to the contrary.

16 MR. HALL: We will plan to be available  
17 starting the 17th.

18 THE COURT: That's right. I keep calling  
19 it pretrial but it's really a pre-evidentiary hearing.

20 Thank you, Ms. Barnes. I would like to  
21 have the trial briefs filed no later than Monday, June  
22 the 10th.

23 Anything else?

24 MR. STONE: Well, the only problem that I  
25 have, Your Honor, is outside of a District Judge in



1 Reading, Pennsylvania who expects me and some pleadings  
2 there tomorrow, and some other things that I have  
3 going --

4 THE COURT: They've got you spread too  
5 thin back there.

6 MR. STONE: Well, that may be, Your Honor.

7 THE COURT: Why don't you give more  
8 responsibility to the United States Attorney out here?

9 MR. STONE: Well, part of the problem, Your  
10 Honor, is - and I don't think you can appreciate it  
11 unless you've been there, and the reason two primary  
12 experts are out there, and Peter Irons has been back  
13 there two or three times, there is the Record Center  
14 with thousands and thousands of boxes, cubic feet of  
15 files, and it's a lot easier to work close to those  
16 files than it is to try and work out here.

17 I just had the person who I think will be  
18 one of our experts flying all over the country trying  
19 to find records in other record centers, and being  
20 told things like "We can't help you because those  
21 records have not been appropriately broken down and  
22 classified, so unless you have a year and a half to  
23 sift through them all, we can't tell you where there  
24 may be things you want to look at."

25 That's the same thing that the Commission

1 found. There are an awful lot of files that are just  
2 not easily accessible, but that's part of the reason  
3 that I have been basically trying to concentrate myself  
4 and somebody else in a different division on these  
5 cases so we can get a feel for what there is to do.

6 THE COURT: It probably is more efficient,  
7 provided they don't spread you too thin.

8 MR. STONE: Well, I'm going to try -- I  
9 have two obligations which I think I can be pretty sure  
10 I'm going to have to cancel or severely curtail. They  
11 both have to do with the Bureau of Prisons. There are  
12 some obligations that I have with them, with both  
13 wardens and General Counsel's office, and I'm going to  
14 have to curtail that. I'm perfectly happy to do that.

15 I'm going to have a little more trouble  
16 with the judge in Reading, and that's one of the reasons  
17 -- have we eliminated tomorrow or this week?

18 THE COURT: Yes.

19 MR. STONE: Maybe I'll be able to make --  
20 to get tht out of the way or postponed in one way or  
21 another and see what we can do here, but I hope you  
22 will understand that it may be a little bit upside  
23 down but I'll just do my best to get it together.

24 THE COURT: You've had almost a year.

25 MR. STONE: Well, Your Honor, please, we

1 did not understand ourselves free to approach Mr. Ennis  
2 or even the Petitioner with a deposition. There was a  
3 certain amount of concern about the age of the people;  
4 a certain amount of concern about where they were and  
5 whether we were going to be doing that, but as I say,  
6 we'll make a stab at doing it as fast as we can, even  
7 if it's not quite in the neatest order that you hope to  
8 have it in.

9 THE COURT: Now, I'll tell you one thing  
10 I would like and that is this. On these briefs on the  
11 10th, I would like both of them -- I know the Govern-  
12 ment's brief is going to address this, but I would like  
13 to have you address this, too - and that is the scope  
14 of the evidentiary hearing. That is, should I confine  
15 myself to just what the attorneys may have known, or  
16 does it extend to all Government representatives -  
17 perhaps not all, but certain Government representatives.  
18 Do you understand?

19 MR. KAWAKAMI: Yes, Your Honor.

20 THE COURT: Because that will enable me to  
21 make rulings, or I think will facilitate rulings on  
22 witnesses and exhibits, the scope of the hearing.

23 MR. KAWAKAMI: Your Honor, do you have a  
24 length of trial briefs or --

25 THE COURT: Let me not put a limite -- I am

1 going to give you an upper ceiling, but I think 35  
2 pages. Would that be sufficient?

3 MR. KAWAKAMI: We were thinking probably a  
4 little higher for our brief.

5 THE COURT: What were you thinking?

6 MR. KAWAKAMI: We were thinking at least  
7 sixty pages. If you're not inclined to want --

8 THE COURT: Let me do say this to you.  
9 Counsel always think more pages will be more helpful,  
10 but they really are not more helpful. The more focused,  
11 the more pointed your briefs can be, the greater help  
12 they will be to me. I think you ought to be able to do  
13 it in forty pages, both of you.

14 All right. Anything else?

15 MR. KAWAKAMI: One other things, Your Honor.  
16 I just wanted to advise the Court that there are some  
17 amicus that may be submitted briefs and maybe that will  
18 cut down the size of ours.

19 MR. STONE: Your Honor, that's going to  
20 cause me to need to respond to every one of those. Can  
21 we resolve that now?

22 THE COURT: I don't think I need the amicus  
23 briefs. I know lots of people would like to speak, but  
24 it just means more reading for me. I would rather have  
25 one brief that speaks to the legal issues.

1 MR. HALL: Could we ask that this decision  
2 be kept open so that at the end of the hearing we might  
3 have an opportunity to raise it again?

4 THE COURT: Oh, we could leave it open, but  
5 I don't want to have any more reading material than  
6 I've got to read. You people are the ones that really  
7 know the issues.

8 MR. STONE: We're perfectly happy to have  
9 the amicii tell them whatever they want to say and  
10 then we can address it in one pleading.

11 THE COURT: I think there should be just one  
12 hearing brief on each side.

13 Now, anything else?

14 MR. HALL: I'm not sure this would happen,  
15 but it comes to mind. Would the Court have any objec-  
16 tion if the various amicii sign onto our brief, the  
17 one we file?

18 THE COURT: Well, they're not counsel of  
19 record, are they? I really don't think they should.

20 MR. KAWAKAMI: Perhaps I might inform the  
21 Court as to whom the amicii are going to be, and perhaps  
22 that might impact the decision. The California Attorney  
23 General's office have expressed the desire to partici-  
24 pate because of their prior participation back in '43,  
25 as amicii in the case, and also the other that

1 participated as amicus was the JCL, and for those  
2 reasons, they desire a chance to address the Court  
3 again.

4 THE COURT: I think I had better adhere to  
5 this ruling, because I've had experience in other cases,  
6 and if an amicus files a brief, I feel an obligation  
7 to read it, and I think I had better devote my time  
8 just to the briefs of the parties. Leave it open and  
9 maybe afterwards when I have more time, I can read  
10 their briefs.

11 All right. Anything else?

12 MR. STONE: I would just say before, as a  
13 last statement, just as they said they may have some  
14 witnesses who come in at the end to authenticate, I may  
15 have some pieces of paper, documents, which may come  
16 in after the 17th. I will limit them as much as I  
17 possibly can, but there are certain pieces of paper  
18 now which, interestingly enough, while they're avail-  
19 able, -- for example, I was just over at the archives  
20 last week and I asked for copies of a whole list of  
21 documents, and while anybody can walk in and look at  
22 them, you cannot get a copy until somebody else stamps  
23 them declassified on each sheet. They are declassified,  
24 but until it appears that they're declassified, they  
25 won't copy them for fear that one will get separated

1 from the others.

2 The result is, I have papers in various  
3 places awaiting people to declassify them that I'm  
4 going to be calling up and telling them they've got to  
5 see what resources they can to get them declassified,  
6 stamped that way, and out to me, but there are some  
7 which I can't just say "I want copies of those pieces  
8 of paper." They have been sitting on some of that for  
9 a while because what happens is it's not their piece  
10 of paper. Believe it or not, it can be a 1940's piece  
11 of paper and they've got to go back to British  
12 Intelligence and they've got to go to the person who  
13 censored them in 1942 so they can stamp them declassified.

14 MR. HALL: I would respectfully object to  
15 that because, as the Court has observed, this case has  
16 been at issue for at least a year. The hearing was  
17 set sometime ago. I think we're entitled to know by  
18 the 17th of May the documents on which the Government  
19 is going to rely, based upon the rulings of the Court  
20 as to the scope of this trial.

21 THE COURT: I think what we ought to do on  
22 the pretrial order -- I keep saying pretrial -- the  
23 pre-hearing order is the way we always have them, that  
24 is, if you're going to change them, you've got to come  
25 to the Court so the Court can grant leave.

1 MR. HALL: So I would request, and we're  
2 prepared to submit copies of whatever documents that  
3 we include in our pretrial order draft to counsel at  
4 his request. I would hope that counsel do the same.  
5 If after the 17th of May in counsel's case, or after  
6 the 10th of May in our case, if we wish to add docu-  
7 ments or presumably anything else, we could do it with  
8 the Court's permission but we have to address the Court  
9 on it.

10 THE COURT: Our pretrial order procedure  
11 requires the documents be submitted. That's what I  
12 want the Petitioner to do and what I want the Govern-  
13 ment to do, submit with your proposal copies of the  
14 documents that you propose to introduce.

15 MR. STONE: Well, I just want to be on  
16 the record, then, Your Honor, I frankly think that I  
17 need until May 31st to know that I have every document  
18 declassified and in my hand. You have put me on a  
19 May 17th date, which I didn't set. You did --

20 THE COURT: I put you on a January 25th  
21 date a year ago.

22 MR. STONE: Well, Your Honor, that did not  
23 include discovery, per what you orally stated. It did  
24 not include witnesses or documents.

25 THE COURT: You should have known what



1 exhibits you wanted a long time ago.

2 MR. STONE: Your Honor, I respectfully must  
3 point out to you that the other side has worked on this  
4 case since 1981. Now that is four years ago, and they  
5 handed me these just now.

6 THE COURT: I'm going to call it to a  
7 close.

8 MR. STONE: All right. We'll do what we  
9 can.

10 THE COURT: But I do expect you to exchange  
11 documents. Those that you cannot, you cannot, and I  
12 think the thing to do there is to make a notation,  
13 identify the document, say that you cannot do it at  
14 this time but we will furnish you a copy as soon as we  
15 get it declassified.

16 All right. Thank you so much.

17 (End of proceedings.)  
18  
19  
20  
21  
22  
23  
24  
25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  

CERTIFICATE

I, Vernon E. Sorensen, Official Court Reporter for the United States District Court, Western District of Washington, do hereby certify that I was present in court and in attendance upon the hearing of the foregoing matter; that I reported said proceedings in shorthand and thereafter caused the same to be transcribed under my direction;

I do further certify that the foregoing transcript of proceedings is a true and accurate transcript of said matter, to the best of my ability.

  
Official Court Reporter