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86-3853

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

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

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JAN 9 1986
CLERK U.S. DISTRICT COURT
AT SEATTLE
WESTERN DISTRICT OF WASHINGTON
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,
commencing at 9:30 o'clock a.m., June 17, 1985.

ORIGINAL

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1 THE COURT: Good morning.
2 Will you call the calendar, please?
3 THE CLERK: C83-122V, Gordon Hirabayashi
4 vs. United States of America.
5 THE COURT: Are the parties ready?
6 MR. KAWAKAMI: Yes, Your Honor.
7 THE COURT: Then, would you kindly make your
8 appearances?
9 MR. KAWAKAMI: Yes, Your Honor. My name is
10 Rod Kawakami and I represent the petitioner, Gordon
11 Hirabayashi.
12 MR. HALL: Your Honor, my name is Camden
13 Hall, of the firm of Foster, Pepper, as well, represent-
14 ing the petitioner, Mr. Hirabayashi.
15 MR. BARNETT: Arthur G. Barnett, representing
16 Mr. Hirabayashi.
17 THE COURT: All right, and Mr. Hirabayashi
18 is in court.
19 MR. HALL: Yes. This is Mr. Hirabayashi.
20 THE COURT: And the Government?
21 MR. STONE: Yes, we're ready to proceed on
22 motions this morning, Your Honor. I'm Victor Stone
23 from the Department of Justice.
24 MR. EDWARDS: I am Richard Edwards, also
25 from the Department of Justice.

1 THE COURT: All right. The first motion
2 that I want to take up is the motion by the Japanese-
3 American Citizens League and the American-Jewish League
4 for leave to file amicus briefs.

5 I have looked over those briefs and I am
6 going to deny the motion for filing amicus briefs for
7 two reasons: One is those briefs really address the
8 issue as to the constitutionality of the original orders
9 and not the issues in this particular case in this
10 particular hearing.

11 Secondly, if I grant the leave to appear
12 and to file the amicus briefs, then it imposes upon the
13 Government, really, the obligation to respond to those
14 briefs. So I am going to deny that motion.

15 All right. Then, the next motion, I believe,
16 is the motion of Petitioner to preclude the introduction
17 of documentary exhibits by the Government. Do you wish
18 to address that motion?

19 MR. HALL: Yes, Your Honor. My name is
20 Camden Hall, Your Honor, and I speak in support of the
21 motion.

22 The matter has been briefed, at least by
23 the Petitioner, and the authorities for our position
24 are stated in the brief. I would like to briefly,
25 however, just give a little background that may be

1 helpful to the Court in determining this case.

2 To begin with, as the Court well knows,
3 both from the standpoint of the Court having been a
4 practicing lawyer as well as a judge for some years now,
5 it is important that each side have an idea at the time
6 of trial what documents and, in general, what evidence
7 is going to be used by the opposing side so that the
8 philosophy behind the rules of civil procedure be
9 followed, and the philosophy behind the local rules be
10 followed, and that being that trials not be a matter
11 of ambush or surprise. Indeed, it also has a salutary
12 effect in making it possible to be more efficient in
13 the administration of justice and presumably shorten
14 the length of trials that might otherwise not occur
15 if there was not a disclosure of documents.

16 There has been a problem throughout this
17 case, Your Honor, with regard to the production of
18 documents from the Government and the response of the
19 Government to various discovery requests, and without
20 getting into detail, I think it is a matter of record
21 that there have been accommodations made from time to
22 time between counsel, but the fact of the matter is
23 there has been a lingering problem with regard to the
24 production of documents and various other discovery
25 requests.

1 The Court will recall that in May of 1984,
2 May 18th, to be exact, the Court asked the Government
3 how long it would take the Government to prepare its
4 case in response to the petition of Mr. Hirabayashi.
5 The Court said that it hoped that a pretrial order could
6 be entered that would establish that many of the
7 petitioner's and the Government's documents will be
8 "admitted as being genuine and their relevance admitted."
9 This appears at page 11 of the transcript.

10 The Court then set a time schedule in which
11 it requested, indeed ordered ultimately, that the
12 parties follow. The time schedule was that the
13 Petitioner should submit their draft pretrial order
14 by the 17th of August of last year --

15 THE COURT: Was that done?

16 MR. HALL: Yes, it was, Your Honor.

17 -- and also ordered that the Government
18 submit its draft of pretrial order on January 25th of
19 1985. The Government, as the date of January 25th
20 approached, and by the way, the Government asked for
21 five months after the filing of the Petitioner's pre-
22 trial order in order to prepare its case. As January
23 25th approached, the Government stated that there was
24 a report being published by Congress which it wanted
25 to include as a part of its submittal and this report

1 had not yet been made available and requested, indeed
2 moved over the objection of the Petitioner, for
3 additional time in which to file its pretrial order.

4 THE COURT: And that date was moved up to
5 when?

6 MR. HALL: March 11th, 1985, Your Honor,
7 and indeed --

8 MR. STONE: March 1, Your Honor. March 11
9 is the docketing date.

10 MR. HALL: March 1. Excuse me. March 11
11 or March 1. In any event, that date was met by the
12 Government.

13 The Court also ordered the trial was to
14 commence on June 17th of this year. On the 7th of May
15 of this year another hearing was held before Your Honor,
16 which I am sure you remember, and at that time Mr.
17 Stone, the attorney for the Government, stated that the
18 Government was not then able to designate exactly what
19 documents the Government will use because it was waiting
20 for word from the Court with regard to commencement of
21 depositions, and also, I believe, because of awaiting
22 word from the Court with regard to certain pending
23 motions.

24 Mr. Stone also stated at page 28 of the
25 transcript that he doubted he could within the next two

1 or three weeks give a complete rundown of all of its
2 documents. The Court, on the other hand, stated that
3 the Government's pretrial order which had been submitted
4 at that date was simply a legal brief and that while
5 Petitioners had shown that they could do what the rules
6 required, this has not yet been done by the Government.

7 The Court stated at page 38 of the trans-
8 cript that the Court expected the Government to come
9 forward with statements similar to those made by the
10 Petitioner in Petitioner's pretrial order regarding
11 witnesses and exhibits the Government intends to intro-
12 duce. The Court then set some deadlines for the parties
13 to follow, that being partly as a result of the fact
14 the Court resolved, I think, that the normal agreed pre-
15 trial order might not be possible in this case, and the
16 Court suggested, indeed ordered subsequently that the
17 parties do the following:

18 That the Petitioners prepare a draft pretrial
19 order and submit it to the Court by May 10th of this
20 year, pursuant to Local Rule 16; that the Government do
21 the same by May 17th, pursuant to Local Rule 16; that
22 objections to the various pretrial orders be lodged
23 simultaneously by the parties on June 7th of this year.

24 The Court stated that it expected the
25 Government to follow the pretrial order procedures and

1 submit documents with the Government's pretrial order
2 and to follow Rule 16(k) of the order.

3 The Petitioner filed its draft pretrial
4 order on the date required. The Government filed by
5 electronic process, or at least served by electronic
6 process, on the 17th of May a draft pretrial order, but
7 as the Court well knows by now, that draft pretrial
8 order did not include a list of exhibits, and as a
9 consequence, the Petitioners moved because of the
10 Petitioner's belief that the Government has failed to
11 follow the local rules, has moved that the Government
12 be precluded from providing and offering exhibits in
13 this proceeding, and that the Government be precluded
14 from offering testimony with regard to those exhibits.

15 We don't do this lightly, Your Honor, because
16 we understand the seriousness of this motion we make.
17 However, we believe that the motion is well founded
18 and indeed is established in the law, at least in the
19 Eighth and Third Circuits, if not the Ninth. We
20 weren't able to find any authoritative decisions in the
21 Ninth.

22 THE COURT: Well, the local rule is that
23 exhibits have to be listed. That's the rule we've
24 always gone by. It's the rule I enforce, so let me
25 hear from you, Mr. Stone. Where is your list of

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1 exhibits?

2 MR. STONE: If I can, Your Honor, I would
3 like to say right off --

4 THE COURT: Where is the list of exhibits?

5 MR. STONE: Your Honor, we do not have even
6 for our own working purpose a list of exhibits. However,
7 I have previously sent at Government expense a copy, a
8 physical copy, of almost all of the Government's exhibits
9 to the other side.

10 THE COURT: The list of exhibits is for the
11 Court's use; not just for opposing counsel.

12 MR. STONE: I don't have one, Your Honor.
13 We have been unable to put together a list. I came
14 here Saturday night on a plane with 17 cartons of
15 documents. I would say we have approximately 1,000
16 exhibits, most of which we have already sent to the
17 other side.

18 THE COURT: That doesn't solve the Court's
19 purpose. It may give them an idea that somewhere among
20 those 17 cartons of exhibits are the exhibits you're
21 going to use.

22 MR. STONE: That's true, Your Honor.

23 THE COURT: But it doesn't comply with the
24 rules.

25 I am going to grant the motion except for

1 this fact: I am going to ask counsel for the
2 Petitioner about this.

3 MR. STONE: Your Honor, before you grant
4 the motion, may I make a full argument on it?

5 THE COURT: Yes, you may.

6 MR. STONE: I would like to provide a little
7 background here, Your Honor, that I think has been mis-
8 stated on the record here by Mr. Hall, just so that
9 before the motion is made, we know exactly where we're
10 going with respect to this issue.

11 Last August you said that so the Government
12 would be able to respond, the Petitioner should file a
13 draft pretrial order and a copy to the extent they
14 could of a universe of exhibits. They filed it at the
15 right time and they served the Government with approxi-
16 mately 165 exhibits.

17 Within a few days I wrote them and said
18 "I cannot contest or investigate the completeness or
19 the authenticity of your exhibits unless you will give
20 me locations of those documents." They did not provide
21 me with any locations at all until after two more
22 requests, and then finally they did it in February of
23 this year. For all of that time they provided me no
24 locations, and their documents covered a 10-year span,
25 not including publications since the 10-year span, but

1 roughly ran from the late 1930's through the 1940's,
2 and they admitted that they came from all over the
3 country, libraries and archives from California to New
4 York to Washington, virtually all over the country.
5 So not until February did I even have an idea of where
6 these roughly 200 documents came from.

7 When I finally got an exhibit -- I want to
8 backtrack one second. The Government's list, the
9 Government's pretrial draft was supposed to be in your
10 hands January 25th. The Government came in and pointed
11 out that there was pending the publication of this
12 volume - this volume - which later has been published
13 and which in fact I have served on all parties after
14 it was published, and which contains I am very openly
15 ready to say and have since the date it was published,
16 contains the part of the Government's defense in this
17 case.

18 It is only one book and they got it within
19 days after I got it into my hands in February, I believe,
20 of this year. While waiting for that to be published
21 so that the Government's position would be on the
22 record, we asked for an extension of five weeks. You
23 granted that extension until March 1 and we filed our
24 draft document on March 1 and also served it on the
25 other side.

1 Now, if you go back to your order of last
2 year, you will see that at that time you said after
3 these two drafts are filed --

4 THE COURT: Let's go back to our --

5 MR. STONE: I will get to it, Your Honor,
6 if you will please let me --

7 THE COURT: I don't want to hear any more
8 argument about what I may have said back in May of '84.

9 MR. STONE: Okay. I don't want to go back
10 to that. There was supposed to be a status conference --

11 THE COURT: Let me ask you about this: You
12 filed this proposed pre-hearing order on March 1st in
13 which you did list a number of exhibits that you wanted
14 to introduce. That is the only list that I have
15 received and it's the maximum, it's the maximum of
16 exhibits that I am going to permit the Government to
17 introduce, but I will hear from the Petitioners with
18 respect to that list.

19 MR. STONE: Judge, may I -- will you allow
20 me to finish the argument, just to make a record? I
21 know you don't have to, but I would prefer you did.

22 THE COURT: Well, make it short.

23 MR. STONE: All right, Your Honor.

24 We have been under the gun since May
25 because we understood there was to be a status

1 conference in February --

2 THE COURT: Let me say this to you, Mr.
3 Stone. Since August of '84, you have known the position
4 of Petitioner. You have known the position they are
5 taking.

6 MR. STONE: Your Honor, you have not ruled
7 on the scope of this hearing even up until today. I do
8 not know whether I am responding to attorney misconduct,
9 whether I'm responding to General DeWitt's misconduct,
10 whether I'm responding to War Department misconduct,
11 whether I'm responding to the drafting of the Govern-
12 ment's brief in the Korematsu case a year after this
13 case was decided, whether I'm responding to the drafting
14 and revision of the final report of General DeWitt
15 published six months after this case was decided,
16 whether I'm responding to the correctness of the FBI's
17 1944 post decision in this case views, whether I'm
18 responding to the FCC's 1944 post decision views,
19 whether I'm responding to a memo written by Lieutenant
20 Commander Ringle and memos written by Mr. Munson which
21 have been public records since they were published in
22 Harper's magazine in 1942.

23 Now, if I am responding to all of those
24 items which go beyond the decision in this case in 1943
25 and go to 1944 and beyond, because there has been an

1 allegation that even since then the Government has had
2 an obligation to move and reopen the case on its own,
3 then I have at least seven different areas that I am
4 expected to cover, and we timely pointed out from the
5 materials in this book that there is a whole subject
6 called the Magic Background of Pearl Harbor which
7 involves teletypes which were classified at least
8 through the Pearl Harbor hearings of 1946, which is one
9 additional entire subject.

10 Now, I have asked since day one to know
11 what the scope was of this hearing. Since I have not
12 gotten a ruling, I have had to prepare upon all eight
13 of those issues. That is why it has been very difficult
14 with them not giving me any locations of documents until
15 February of this year, and no status hearing until May
16 7th, for me to know what it was I was preparing for.

17 In the meantime, when it came to them having
18 to designate their exhibits, Your Honor, you will find
19 that less than half of the 123 exhibits that they
20 designate in their list are numbered in accordance
21 with the numbers of the documents they gave us last
22 August. In other words, more than half of the documents
23 they wish to offer at this hearing, they did not advise
24 us of in the manner that you asked, so I certainly hope
25 if you're going to exclude our documents, you will

1 exclude every document on their list that does not have
2 the Petitioner's four-digit document number that
3 correlates to what they gave us last August, because
4 those are all new documents.

5 THE COURT: Well, let me say this to you,
6 and I know you know this. What I wanted to do during
7 the first two days of this hearing was to look at the
8 various lists of exhibits introduced or proposed by
9 both sides, make a ruling as to whether those exhibits
10 would be admitted or denied, and I would hear you with
11 respect to those particular exhibits that you now
12 challenge, but I don't have a list of exhibits from the
13 Government.

14 MR. STONE: Well, my problem, Your Honor,
15 is that I have roughly 50 exhibits that I know of, and
16 maybe a hundred, on each of those eight topics. I
17 am trying to get down to about 50.

18 THE COURT: What about the problem of the
19 Court and the problem of the Petitioner with respect to
20 your exhibits? You say you have a problem but you're
21 keeping your problem to yourself.

22 MR. STONE: We are not, Your Honor. We
23 stipulated by agreement before we walked in here that
24 we would not object to authenticity of documents. The
25 only objections we left open were relevance and

1 completeness and we agreed that it would take the
2 context and the Court's ruling in the context of the
3 witness to decide how that went to weight. We agreed
4 we would not exclude either of our documents, their
5 documents or mine. I am frankly very surprised to hear
6 them make the motion, because I supplied them probably
7 in excess of five thousand pages of documents.

8 THE COURT: Well, --

9 MR. STONE: They asked me how many of them
10 I planned to offer. All of them.

11 THE COURT: Well, I can understand their
12 objection, if you send out cartons of exhibits to them
13 and say we're going to use some of these as our
14 exhibits.

15 Now, let me go ahead. I'm going to go ahead.
16 I have heard from you all that I really intend to on this
17 particular issue, but in your March 1 -- at least I got
18 it on March 1 -- proposed pre-hearing order, you did
19 list a number of exhibits. Do you still propose to
20 introduce those?

21 MR. STONE: I propose to introduce those,
22 Your Honor, and I also propose as impeachment to
23 introduce as many of my documents as I can.

24 THE COURT: All right. Let me hear from
25 Mr. Hall. You might look at that March 1 pre-hearing

1 order.

2 MR. HALL: I have, Your Honor, and I think
3 that from our standpoint, while I guess for the record
4 we preserve our motion with regard to all exhibits,
5 from a practical standpoint, without waiving our motion
6 -- I don't know how to say this without waiving our
7 motion -- we don't have an objection to the Government
8 attempting to offer these eight exhibits, if that's what
9 they are. We may have an objection with regard to
10 relevancy or completeness or some other particular
11 objection, but at least for purposes of framing exhibits
12 to be offered by the medium of pretrial order, I guess
13 we would maintain that the Government has complied with
14 regard to these eight exhibits.

15 THE COURT: All right. Well, then, my order
16 is going to be this, and I think it's a generous one
17 because the last one which was the final one, the one
18 that I ordered to be filed listing all the exhibits,
19 the last one didn't list any exhibits on behalf of the
20 Government, but I will accept the March 1, 1985 list of
21 exhibits as being the proposed Government's exhibits,
22 and those we will look at and make a ruling as to
23 whether they will be admitted in whole or in part and
24 so on.

25 MR. STONE: Your Honor, may I just make one

1 further point for the record? I will have to consult
2 with the Department of Justice whether they will permit
3 me to go forward and agree that that will be my list.
4 Their instructions to me before I came were that I was
5 supposed to present this case in a way after forty years
6 that laid the whole record before the Court.

7 THE COURT: That's your problem.

8 MR. STONE: I understand that, but I cannot
9 represent officially that I do agree that I can go
10 forward on that original eight document list when I know
11 that I have roughly 400 documents that need to be pre-
12 sented to make this case.

13 THE COURT: All right.

14 MR. STONE: May I ask whether you will
15 certify the ruling you just made as an interlocutory
16 ruling?

17 THE COURT: No, I won't. We're going to go
18 ahead with the hearing.

19 MR. STONE: And preclude the Government
20 in what is essentially a documentary case from offering
21 its documents, on the basis of the local rule which is
22 a civil rule?

23 THE COURT: That's the ruling. It is really
24 based upon rulings that I've made heretofore, primarily
25 the ruling I made at the hearing on May 7th, but also

1 going clear back to May 18th, 1984, but that will be my
2 ruling.

3 MR. HALL: Your Honor, we have a satellite
4 motion that is a tagalong, if you will, to the one the
5 Court has just granted, and that is that the Government
6 be precluded from offering evidence with regard to the
7 documents which the Court has now ruled the Government
8 cannot offer.

9 THE COURT: Well, that goes along with it.
10 You can't have a witness testify about an exhibit that
11 is not admitted into evidence.

12 MR. HALL: Thank you, Your Honor.

13 THE COURT: Now, I know all of you attorneys
14 know this because I've said this before, that we had a
15 number of legal matters that really we needed to discuss
16 in conference rather than in court. Is there anything
17 else that I should cover out here?

18 MR. KAWAKAMI: No, Your Honor.

19 MR. HALL: There are, Your Honor, some
20 points that the Court may or may not wish to cover out
21 here. We have some motions in limine. One is to
22 exclude evidence regarding military necessity, which I
23 think the Court has already intimated it doesn't want
24 to hear evidence about, and we don't intend to present
25 evidence about military necessity.

1 THE COURT: I think that is one of the legal
2 issues we should take up in conference.

3 MR. HALL: All right. Then there are others
4 of that gender.

5 THE COURT: Of that nature?

6 MR. HALL: Of that nature.

7 THE COURT: All right. Anything else we
8 should take up out here in open court?

9 MR. STONE: Well, Your Honor, I would
10 prefer not to go into open court only because I think
11 that part of this case has been whether there is going
12 to be a public airing after forty years of whether
13 there was some kind of private misconduct. I know that
14 the Government feels that to the extent that there has
15 been a tremendous public interest, as evidenced by the
16 people inside this courtroom, as soon as we step out of
17 court we get barraged by the press and media on our
18 interpretation of what happened in court, and we would
19 prefer not to be put into that position.

20 The second thing is there is Department of
21 Justice policy that absent some compelling reasons, 28
22 CFR 50.9, all post and pre and actual trial proceedings
23 are to be open proceedings, and since there is no jury,
24 we don't really understand what would be saved by being
25 in chambers.

1 Finally, we think that to the extent that
2 there are issues to be discussed, they could probably
3 be just as well discussed out here. We would prefer to
4 stay out here.

5 THE COURT: That's fine. I just felt that
6 it would enhance expeditious examination of these issues
7 and resolution of them if we did it informally in
8 chambers.

9 I suppose what we should do is to first look
10 at the Respondent's objections to the Petitioner's pro-
11 posed order. Shouldn't I be hearing from Mr. Stone on
12 this, and then I'll come back to you.

13 MR. STONE: Well, Your Honor, in addition to
14 preserving our jurisdictional arguments, which we did
15 simply because we felt that was the proper place to
16 preserve our jurisdictional arguments, our primary
17 question is the one I mentioned to you before, that we
18 object to the litigation of a lot of issues that we
19 don't understand relate to the claim that's actually
20 being made in this case.

21 We understand that the only claim that is
22 left open, the actual claim in this case, as ruled in
23 the order that you issued in May, 1984, was whether or
24 not there was misconduct and not the wisdom of what
25 occurred in 1944 per se.

1 THE COURT: Yes, I think that's true.

2 MR. STONE: To the extent whether or not
3 there was misconduct, we think, frankly, that if you
4 will examine on its face the allegations that are made,
5 none of the allegations show any misconduct unless one
6 goes to the allegation of bad faith. In other words,
7 with respect to the judicial notice argument, the fact
8 that a party cites references in a brief and asks the
9 Court to take notice of something is not in itself an
10 improper act. It is only an improper act, assuming
11 arguendo, that prior we know something that is com-
12 pletely contrary to that, so it is only whether there
13 was some bad faith on their part, that they knew some-
14 think secretly different which would make the judicial
15 notice question somehow involve misconduct.

16 With respect to how the final report of
17 General DeWitt was written or revised, and we all know
18 that there is no book 600 pages long which is written
19 in a single draft. There is no misconduct with respect
20 to rewriting a book, unless --

21 THE COURT: Would you do this for me?
22 Would you point out in their proposed pre-hearing order
23 just what you're objecting to? I think I'm looking at
24 it on page 3, the factual contentions.

25 You know, I really hate to have you people

1 stand up through a long hearing. I normally don't
2 permit this, but if some of you want to sit in the jury
3 box, you may do so, and then if there are still excess
4 people, they could sit on that first bench right behind
5 Government counsel.

6 MR. STONE: Here it is, Your Honor.

7 THE COURT: Let's do this, if you will.
8 Would you wait just one moment before sitting on that
9 bench? Is the press on the first row right there? Why
10 don't you sit on the first bench right behind counsel,
11 behind Government counsel? That would empty a bench
12 there for spectators. But on the jury box, you can
13 still sit there. Why don't you move over and fill up
14 those seats. In the back row you might move over. I
15 guess that's enough.

16 All right.

17 MR. STONE: All right, Your Honor. I have
18 their proposed pre-hearing order open in front of me.
19 With respect to paragraph 26 on page 2, they state that
20 there are some factual discrepancies that I think are
21 rather minor --

22 THE COURT: You did point those out in your
23 response.

24 MR. STONE: Shall I skip the minor ones?

25 THE COURT: Why don't you give those to me?

1 MR. STONE: Okay. On No. 6 on page 2, they
2 state the conviction was on October 20th. I believe
3 that the record in this court will show it was October
4 21st.

5 THE COURT: All right.

6 MR. STONE: On paragraph 7 on that same
7 page, they state that there was a sentence of 90 days.
8 At least the Supreme Court record that I have says in
9 the judgment, the formal judgment, that it was con-
10 current three-month terms of imprisonment rather than
11 90 days.

12 THE COURT: All right.

13 MR. STONE: I'm not sure which is correct,
14 but I believe the record in the Supreme Court was.

15 With respect to paragraph numbered 11,
16 they show the oral argument began on the 10th. It lasted
17 May 10th and May 11th, according to the official Supreme
18 Court Reports - it's right at the beginning of that -
19 at which time the case was taken under submission.
20 There was, however, a reply brief filed by Mr.
21 Hirabayashi subsequent to that time, I believe it's May
22 13th, and the United States filed a memorandum on May
23 14th, which was the last pleading filed, and I don't
24 believe you have a copy of that memorandum. It's a
25 two-page memorandum that was filed before the case was

1 decided.

2 Okay. If we now go to Roman numeral III,
3 which is on page 3, let me take paragraph 1(a)1. It
4 talks about the exculpatory materials and they list
5 reports of the Office of Naval Intelligence, reports of
6 the Military Intelligence Division, contrary to Fifth
7 Column threats, materials reports of the Federal Bureau
8 of Investigation, material reports of the Federal
9 Communications Commission, and General DeWitt's final
10 report dated April 15th, 1943.

11 There is no such document. General DeWitt's
12 final report is not dated April 15th, 1943. There is
13 a draft which was never published and in fact was
14 recalled dated that date, but let's assume the date as
15 being that particular time.

16 If you will recall their original petition,
17 they came in here and said, Your Honor, that the
18 materials in the Government's possession, and by that
19 I believe they meant the War Department's possession,
20 in 1943, refuted and precluded the Government proceeding
21 in this case.

22 I need not remind you, I think, because I
23 think we've pointed this out before, the Government's
24 opening brief in the Supreme Court in this case said
25 "We do not rely nor do we present to the Court the

1 confidential classified military information upon which
2 this case is based." We ask the Court either to rule
3 on the basis of facts of which you may take judicial
4 notice, or if you can't, ultimately, it was a suggestion
5 that the case would have to be remanded. But the
6 Government specifically on the curfew matter said,
7 "Court, we think you can take judicial notice of a
8 war has begun; we lost most of our fleet at Pearl
9 Harbor, we therefore have very weak coastal protection
10 on the West Coast. We have vital airplane manufacturing
11 plants. In those circumstances, a curfew is not an
12 inappropriate measure.

13 THE COURT: What are you asking me to do?

14 MR. STONE: Well, what I'm going to say,
15 Your Honor, is that we did not ask the Court, the
16 Supreme Court, to take judicial notice of any classified
17 military information. We did not say that there wasn't
18 classified military information that went perhaps to
19 both views.

20 THE COURT: What do you want me to do?

21 MR. STONE: Our point is that as long as
22 there was -- I'll go back. To the extent that their
23 claim is that the military information refuted and
24 precluded the Government from going forward. It doesn't
25 matter what the specifics of these things are. It is

1 whether or not, ultimately, the Government can show
2 you any information which balanced the other side of
3 the scale, which was the reason that the Government
4 went forward. Without respect to that --

5 THE COURT: What do you want me to do?

6 MR. STONE: Well, I believe that the
7 suppression of these materials, whether they are
8 exculpatory or not, is not the issue in the case, nor
9 is alteration and destruction, as they put it, which
10 is Roman numeral B, General DeWitt's final report,
11 nor is D -- I want to skip C for a minute, hold it
12 back, nor is D the proper issue. Whether there was
13 improper assistance through amici, that had nothing to
14 do with the amici, had nothing to do with whether or
15 not the Government should go forward.

16 Suppression of exculpatory evidence which
17 came to the attention of the Government after the
18 case was decided by the Supreme Court? Well, again,
19 that goes to assuming that the Government had no valid
20 military reason when it started.

21 With respect to --

22 THE COURT: Would you wait? Do you want
23 me to strike these?

24 MR. STONE: I think everything but C needs
25 to be struck. Ultimately what they're saying in C is

1 the Government could not say to the Supreme Court "Take
2 judicial notice of something," if indeed the Government
3 well knew that it shouldn't have done that because it
4 had no right to do it, because when they looked in
5 their file it was an empty file.

6 That, as I understand it, is the essence of
7 the claim. It doesn't go to the details of these
8 things.

9 THE COURT: All right. I'm going to deny
10 the motion to strike these contentions. You may in the
11 end be absolutely right, but that goes to the matter of
12 weight and relevance. I'm going to deny the motion to
13 strike these contentions at this time, and it is the
14 burden of the Petitioner to sustain them.

15 MR. STONE: Do we move now on to Roman
16 numeral IV, issues of law?

17 THE COURT: Whatever you want to.

18 MR. STONE: The first issue of law is
19 whether the Government's failure to apprise the
20 Petitioner and the Court of General DeWitt's final
21 report which constitutes suppression of the evidence.
22 As an issue of law, the only issue -- that should be
23 struck. The only ultimate issue of law is did the
24 Government improperly ask the Supreme Court to take
25 judicial notice; did they do it in bad faith.

1 Now, I agree that they're going to have to
2 show that having done that, that that would be an error
3 of fundamental character, so I don't have any objection
4 to No. 2. I don't have any objection to No. 3, because
5 they do have to show that that prejudiced their case.

6 With respect to No. 4, again, it's not an
7 ultimate issue of law whether or not the destruction of
8 the draft report was Government misconduct. That's a
9 fact they want to show, to show that the Government
10 should not have asked for judicial notice.

11 Again, I have no objection to No. 5 because
12 that, I presume, is how they're saying that the mis-
13 conduct is really on the part of the War Department for
14 letting the Department of Justice go forward. I assume
15 that that's what that means.

16 THE COURT: Why don't you just read that
17 contention so the people in the courtroom will know
18 what you're talking about?

19 MR. STONE: The contention was suppression,
20 alteration or destruction of evidence by Government
21 officials other than by Department of Justice attorneys
22 constitutes a violation of Petitioner's due process
23 rights. The "other than by Department of Justice" --
24 the language "other than by Department of Justice
25 attorneys" is the language which I think is the language

1 which points to War Department officials, and I agree,
2 that I believe is what they're saying.

3 With respect to paragraph No. 6, whether
4 the Department of Justice had a duty to reopen Petitioner's
5 case, that's why we're here now. That is not independent
6 misconduct to make me the moving party. We're talking
7 about whether the War Department did something when the
8 case was litigated in 1943.

9 No. 7, whether the Department of Justice
10 had a duty to inform Petitioner of material evidence
11 which came into its possession subsequent to the
12 United States Supreme Court decision, that's identical
13 to No. 6.

14 No. 8, whether the Government's successful
15 request that the Supreme Court take judicial notice of
16 facts proving the disloyalty, et cetera, constituted a
17 denial of Petitioner's due process rights, that needs
18 to be struck because the Government never asked the
19 Supreme Court to take judicial notice of facts proving
20 disloyalty. The only thing it ever asked the Supreme
21 Court to take judicial notice of was that there was a
22 likelihood of air raids on vital military establishments
23 on the West Coast. That's all. In fact, it is con-
24 ceded that the vast majority of people involved were
25 loyal people, and this is not an exclusion case. It's

1 simply a question of curfew. It had nothing to do with
2 that particular issue.

3 With respect to issue No. 9, whether the
4 Government assisted amici in preparing an amicus curiae
5 brief to present certain contentions constitutes a
6 denial of Petitioner's due process rights, the assistance
7 to the amici, it seems to me, is not a question unless
8 they wanted to serve the amici and bring them in here.
9 The Government did not sign that amicus brief and as
10 far as I know, the amicus brief goes no further and
11 says nothing that the Government -- that the moving
12 party didn't say, which was "We think, Court, you should
13 take judicial notice of the circumstances and not go
14 into classified documents." What a party does with its
15 amicus is strictly up to them.

16 With respect to issue No. 10, whether
17 Petitioner's claim of governmental misconduct has not
18 previously been considered or resolved on appeal or in
19 other post-conviction proceedings. I presume that's
20 some kind of an exhaustion argument.

21 With respect to No. 11, whether they are
22 entitled to the issuance of a writ of error coram nobis
23 to correct fundamental errors, I assume that goes back
24 to the jurisdictional objection we made at the very
25 beginning and whether or not the Government has proved

1 its laches argument, so that even if they've proved what
2 they've said, have we shown laches.

3 No. 12, whether Petitioner is entitled to
4 the issuance of a writ of error coram nobis because the
5 Government knowingly altered or destroyed material evi-
6 dence, I think that's very important. That is maybe the
7 key thing they have to prove. When they say the
8 Government knowingly suppressed evidence, in other words,
9 whether the War Department allowed the Department of
10 Justice, as I said before, to go forward knowing it had
11 an empty trial, had nothing on the side of the scale that
12 said you need a curfew; therefore it was improper.

13 Finally, whether evidence is material because
14 it would have created a reasonable doubt that did not
15 otherwise exist, that has nothing to do with this case.
16 The question is whether the War Department should or
17 should not have allowed the Government to make a judicial
18 notice argument. That goes to something that happened
19 in the trial court, the burden of proof, proof beyond a
20 reasonable doubt, and as I understand this case, it was
21 decided with virtually no objection to the fact that a
22 test case was being made and that the Petitioner conceded
23 he violated the statute, particularly to the point of
24 making a test case and getting a constitutional challenge,
25 so whether -- the reasonable doubt standard has nothing to

1 do with this case.

2 THE COURT: And you're asking me to strike
3 certain of these?

4 MR. STONE: Now we get to the exhibits.

5 Yes, I'm asking you to strike --

6 THE COURT: I'm going to make the same
7 ruling that I made before. I'm not going to strike
8 them at the present time because I really have to look
9 at them in the context of the evidence and so forth,
10 but these are Petitioner's contentions as to what the
11 issues of law are, and some of them, I believe, are
12 issues in this case; some may not be, but I'm not going
13 to strike them at this time even though later I may rule
14 that they are not relevant issues.

15 MR. STONE: I wonder, Your Honor, if you
16 would make that same ruling towards my exhibits and
17 allow me to enter them conditionally and decide at the
18 end of the hearing whether you would strike them.

19 THE COURT: I would have if you had listed
20 them.

21 MR. STONE: Suppose I come in with some
22 kind of a list, even handwritten, by close of business
23 today?

24 THE COURT: Too late.

25 MR. STONE: I wish Your Honor would have

1 given us some notice --

2 THE COURT: Let me tell you, I gave you
3 notice way back on May 7th.

4 MR. STONE: No, Your Honor, there was no
5 ruling --

6 THE COURT: I don't want to talk about the
7 exhibits any more.

8 MR. STONE: Okay, Your Honor.

9 Do you want to proceed to the exhibits now?

10 THE COURT: That would be fine, yes.

11 MR. STONE: On their exhibit list.

12 THE COURT: Let me say on these that I
13 don't know really how I can rule on these without
14 looking at them. Do you have copies of the exhibits
15 in court?

16 MR. KAWAKAMI: Yes, Your Honor.

17 THE COURT: Maybe you should hand up a
18 list to me -- not a list, but a copy of those exhibits.

19 Let me say this to those of you in the
20 courtroom. If any of you become weary of this, feel
21 perfectly free to leave. Some people feel that when
22 they're in the courtroom they don't have the privilege
23 of leaving. But you do. Just create as little dis-
24 turbance as possible.

25 Wait until I get a copy of the exhibits.

1 Now, let me ask the Petitioner, and I may
2 not be looking at this right. The volume that I have
3 been handed are the judge's copies, and the first
4 Petitioner's exhibit in this volume is listed as
5 Memorandum, I assume from President Roosevelt - yes -
6 whereas the one listed on the order that I have, pro-
7 posed pre-hearing order, is a memo from Edward J. Ennis
8 to the Solicitor General.

9 MR. KAWAKAMI: Yes, Your Honor. What we
10 did in this instance is we reordered the exhibit list
11 pursuant to the presentation that we will be making.

12 THE COURT: Now, this says document No. 94.
13 Is that 94 on the list that I have previously seen?

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

15 THE COURT: All right. I think probably
16 we ought to take them in the order that they are, or
17 whichever would be most convenient for you, Mr. Stone.

18 MR. STONE: I haven't been given a set yet,
19 Your Honor.

20 THE COURT: I see. All right.

21 MR. STONE: Let's take, if you would, Your
22 Honor, I think I'd like to go in the order of the
23 volume that they have just reordered that we're looking
24 at.

25 THE COURT: That would be fine.

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MR. STONE: Okay?

THE COURT: That would be fine.

MR. STONE: Document No. 1, which is listed as 94, we would object to on the ground that it was not included in the Petitioner's 165 exhibits that they served on us in August of 1984, and you will see that it has no exhibit number on it similar to their -- virtually -- well, half of their other exhibits, and if you'll look at 94 on their list, you will see there is no designation after it like the one above it, like 93, which has a Petitioner's document number under it that relates to the original exhibits they gave us.

THE COURT: Were copies of these proposed exhibits ever given to counsel for the Government?

MR. KAWAKAMI: Yes, Your Honor.

THE COURT: When were they?

MR. KAWAKAMI: Pardon me?

THE COURT: When were they given to them?

MR. KAWAKAMI: I believe we gave the bulk of them pursuant to a set of interrogatories we sent to them and admissions for authenticity of documents.

THE COURT: When was that? I mean just roughly.

MR. KAWAKAMI: I believe it was June of '84, Your Honor.

1 THE COURT: What about that?

2 MR. STONE: We were told that the universe
3 of documents that they were selecting from was 165
4 documents which have a four-digit classification number
5 which we got with their pre-hearing order. This was
6 not included in that, and although they might have
7 conducted interrogatories on it, we had no idea this
8 was to be a document in the case. The fact that they
9 served it on us is no different, Your Honor, than the
10 fact that we have served on them to date 95 per cent
11 of our documents. They served us with at least twice
12 as many documents as they propose to use. It's the
13 same problem.

14 THE COURT: On the original propose pre-
15 hearing order, served, I believe, in August of '84, was
16 this document listed?

17 MR. KAWAKAMI: Let me see if I can find it,
18 Your Honor.

19 Your Honor, if you will look on page 12 of
20 our proposed pre-hearing order, we submitted No. 94.

21 MR. STONE: That's not your August '84 --

22 THE COURT: That is the latest one.

23 MR. STONE: That's the current one.

24 MR. KAWAKAMI: Oh, August? Your Honor,
25 apparently it wasn't in the original pretrial order.

1 However, in a letter dated February 20, 1985, we trans-
2 mitted that particular document to Mr. Stone's office.

3 THE COURT: I'm going to overrule the
4 objection to that document. That's No. 94.

5 MR. STONE: On the grounds they served it
6 on me, Your Honor?

7 THE COURT: Yes, and it seems relevant.

8 MR. STONE: I'm going to raise the same
9 objection to the next document. The next document is
10 also a document. If you'll look at their list, it's
11 document No. 5. It also has no four-digit number. It
12 also was not served on us before recently. It also
13 gave us no opportunity to investigate our private
14 source, its completeness, and the circumstances of it
15 until recently, which is one of the reasons we have been
16 unable to provide a list.

17 THE COURT: What is the original number of
18 that document?

19 MR. STONE: 95, and you will see it has no
20 designation after it, just like the document above it.

21 THE COURT: I'm going to overrule the
22 objection and admit that.

23 MR. STONE: I'm going to make an objection
24 to the third document which is the original document
25 No. 6 on exactly the same ground, and I don't believe

1 that that document was listed, Your Honor, but I have
2 never received a copy of that document from them, and
3 I have asked for it by telephone.

4 THE COURT: What is the number in the pro-
5 posed pre-hearing order?

6 MR. STONE: 96.

7 THE COURT: 96? When was that provided to
8 the Government?

9 MR. STONE: I will tell you, Your Honor,
10 I had a call to Mr. Kawakami approximately three weeks
11 ago, told them I had gone over the list and there were
12 several exhibits I did not have. By express mail the
13 next day he sent me a copy of one of the exhibits I
14 was missing. He neither sent me complete copies nor
15 furnished the missing documents other than the one
16 document that he sent me. This is among the documents
17 that I notified him by phone I did not ever have.

18 The same is true of the next three documents
19 in his original list, 97, 98, 99. The same thing is
20 true of 113. The same thing is true of 114 through
21 123. I have never been provided any of those. I have
22 asked for -- even if I was not to be provided pages of
23 114, copies of 114 through 123, that I at least be
24 given page numbers, because they are books, so I could
25 find the page references.

1 THE COURT: All right. Can you tell me
2 about No. 96?

3 MR. STONE: 96? It says --

4 THE COURT: I'm really asking counsel for
5 Petitioner. When was that furnished?

6 MR. KAWAKAMI: If I may have just a moment,
7 Your Honor?

8 THE COURT: Yes.

9 MR. STONE: There is one further objection
10 I have to 96. The document they provide does not
11 match the title they provide. The document says
12 Delimitation Agreement, delimitation of FBI, ONI, MID,
13 February 18, 1942. If you'll look at that document,
14 it's dated February 9, the one that they have in No. 3.
15 I have had people looking for some February 18 document,
16 and as far as I know, this is not the document, I think,
17 that they're talking about.

18 MR. HALL: February 18th shows on the last
19 page of the exhibit.

20 MR. KAWAKAMI: Your Honor, if I might, in
21 response to No. 96, apparently we did in a letter to
22 Mr. Stone indicate exactly where he could find the
23 document. The letter itself doesn't indicate that we
24 transmitted the document to him itself.

25 THE COURT: Does not?

1 MR. KAWAKAMI: Does not.

2 THE COURT: I think I must, then, exclude

3 96.

4 Then the next?

5 MR. STONE: Well, as long as we're at 96,

6 Your Honor, if you're looking on that list, the exact

7 same problem relates to 97, 98, 99 --

8 THE COURT: Which numbers are they in the

9 volume I have before me?

10 MR. STONE: That's going to be a little hard

11 to find. 97 is their current No. 99.

12 THE COURT: Do you have another volume for

13 me? Now, 97 is something that I think I that I should

14 look at, if there is anything to the contention about

15 the brief of the amicus. You certainly have access to

16 those in the Supreme Court Building, if not in the

17 Department of Justice.

18 MR. STONE: You're right, Your Honor, just

19 like they had access to my documents, but I had no idea

20 exactly what was coming. The same thing is true of 98

21 and 99.

22 THE COURT: Well, the transcript of the

23 proceedings in Korematsu and the brief of the United

24 States in Hirabayashi I certainly want to look at.

25 MR. STONE: The transcript of the proceedings

1 in Korematsu, and we can go back to that point if you
2 like, was not discovered in the archives, the National
3 Archives in Suitland, Maryland, until approximately one
4 month ago, and it is only a partial transcript.

5 I also object on the ground that it is only
6 a partial transcript. It is the transcript of one of
7 approximately four advocates in that case, and therefore
8 it does not reflect the argument of the other counsel
9 or the questions which the Supreme Court asked those
10 counsel.

11 THE COURT: Is this a transcript of the
12 proceedings before the Supreme Court?

13 MR. STONE: It is a partial transcript of
14 the proceedings before the Supreme Court.

15 THE COURT: Well, you could have proposed
16 the rest of the transcript if you had wanted to.

17 MR. STONE: No. It hasn't been found, Your
18 Honor. In fact, it was never ordered. The rest of the
19 transcript does not exist. The volume says "Partial
20 Transcript, pages 1 to end." What happened is the
21 Solicitor General at the time simply ordered only his
22 own oral argument transcript. No one ever ordered the
23 transcript of the other counsel, so the transcript
24 picks up and says, "Well, whatever we said yesterday,"
25 and things go on from there.

1 THE COURT: All right. I'm going to admit
2 that. Apparently it is -- at least it is the transcript
3 of what the Solicitor General stated before the Supreme
4 Court.

5 MR. STONE: That is true.

6 THE COURT: So 98 is all right. And 99,
7 the brief of the United States in Hirabayashi, is all
8 right. I'll admit that.

9 Then, the next one?

10 MR. STONE: No. 113, I have on there
11 "Original List." I have no idea what that is. I have
12 asked several times and --

13 THE COURT: What is the number in the volume
14 I have before me?

15 MR. KAWAKAMI: Your Honor, I believe 113
16 on our pre-hearing order is in the brown volume. It's
17 not in the black binder. I do believe we sent a copy
18 of that to Mr. Stone.

19 THE COURT: We're talking about 113; is
20 that correct?

21 MR. STONE: We're talking about 113 on their
22 proposed pre-hearing order. I don't know what its
23 current number is.

24 MR. KAWAKAMI: Your Honor, in the brown
25 volume it is No. 96.

1 MR. STONE: No. 96. I can state for a fact,
2 Your Honor, that the Government has never received this
3 item, and I will also state for a fact that I specifi-
4 cally brought that to the attention of Mr. Kawakami
5 approximately a month ago.

6 THE COURT: Now, these are G2 summaries,
7 No. 1 through 24, all of them in this one exhibit; is
8 that correct?

9 MR. KAWAKAMI: Yes, Your Honor.

10 THE COURT: Let me ask you, what is the
11 relevance of those? Those are U.S. Army summaries.

12 MR. KAWAKAMI: That is correct, Your Honor.

13 THE COURT: Would you want to stand when
14 you respond to me, please?

15 MR. KAWAKAMI: Sorry.

16 Basically, Your Honor, those particular
17 documents contain summaries of G2 investigations about
18 the situation on the West Coast, amongst other places,
19 and that particular No. 113 or No. 96 that you're look-
20 ing at, we submitted primarily to meet the Government's
21 objection regarding completeness of documents. We
22 selected the --

23 THE COURT: Can you point out one that says
24 anything about the West Coast?

25 Let me do this: I'm going to exclude 113,

1 but I'll give you permission to look through them and
2 if there is anything you think is relevant to this
3 hearing, bring it back to my attention.

4 MR. KAWAKAMI: Thank you, Your Honor.

5 THE COURT: All right.

6 MR. STONE: Now I'd like to proceed
7 collectively, if we could, just for a moment, for 114
8 through 122.

9 THE COURT: Can you tell me -- let's see.
10 Those are books, are they not?

11 MR. STONE: Yes. If you are going to take
12 judicial notice of published books, Your Honor, then I
13 certainly hope you will permit the Government to offer
14 the same or similar published material.

15 THE COURT: Right. My inclination is not
16 to admit the books. Let me ask about Francis Biddle
17 in brief authority. Anything stated by him in that?

18 MR. KAWAKAMI: Your Honor, we have not
19 intended to submit at trial any of the books. They
20 were meant merely as background information, if the
21 Court wished to have background on certain areas.

22 THE COURT: All right. So then 114 through
23 122 --

24 MR. STONE: Yes. I would just like to
25 point out for the record that they never told me that,

1 despite my request for designation of pages, so that
2 a substantial amount of time was spent on the Govern-
3 ment's part trying to figure out what parts of those
4 books were supposed to be relevant to this hearing.

5 THE COURT: So 114 through 122 I am
6 excluding as exhibits.

7 MR. STONE: And 123, there is nothing
8 actually listed there that is no more specific than
9 what the judge found the Government's position was.

10 THE COURT: Well, with respect to those
11 demonstrative exhibits, I'm going to let both counsel
12 talk to each other. I know you indicated you had some
13 demonstrative exhibits.

14 MR. STONE: Well, I would just as soon have
15 them all excluded, Your Honor.

16 THE COURT: Well, sometimes -- I am not
17 going to exclude them now without taking a look at them.
18 I think the time line, I think, is particularly
19 important to me as to when certain things happened.
20 Certain things may have happened in '44 which if they
21 had happened in '42 would be very relevant, and so
22 forth, so at the moment I am not going to exclude
23 those. The same thing would be true of your demon-
24 strative exhibits until I look at them.

25 All right. Next?

1 MR. STONE: Exhibits 57 through 68 of their
2 original numbered exhibits are not complete documents
3 on their face, and they were requested to provide us
4 with complete documents --

5 THE COURT: Would you give the numbers
6 again?

7 MR. STONE: Yes. They're almost identical.
8 It starts with 57 and it runs for the next twelve, and
9 they probably currently appear starting in the book at
10 page 44.

11 THE COURT: All right. Let me look at the
12 book first, and then let me hear from counsel for the
13 Petitioner as to the relevance of those.

14 MR. STONE: I'll be happy to specify what
15 the omission is.

16 THE COURT: These are G2 reports. By whom
17 are those made? I see the name Colonel Stroh, Who
18 was he?

19 MR. KAWAKAMI: Colonel Stroh was an Army
20 intelligence officer for G2. G2 is the intelligence
21 branch of the Army. There is, Your Honor, a whole
22 series of documents, G2 reports, starting from I believe
23 January 3rd and running through approximately the time
24 of Petitioner's arrest in May.

25 Our position with respect to these

1 particular documents would be that it indicates the
2 Government had knowledge of exculpatory evidence
3 regarding charges of espionage, sabotage and fifth
4 column activities.

5 THE COURT: I'll tell you what I'm going
6 to do on those. I'm going to exclude them but again
7 give you permission to call my attention to a par-
8 ticular one. I notice the first one does say sabotage.
9 "The fires which have been reported on Southern Pacific
10 Railroad property are apparently the work of a pyro-
11 maniac or a person with a grudge against the railroad."

12 If you can point out specific things on
13 these G-2 reports, then I'll hear the Government out
14 and make a ruling, but for the moment I think I should
15 exclude them because in reading through them, there is
16 just so much information that I know is not applicable
17 to this case.

18 Understand?

19 MR. KAWAKAMI: Would you prefer to do that
20 now or --

21 THE COURT: I think at the time of the
22 hearing.

23 MR. STONE: Your Honor, I will make one
24 concession. If you will permit me to provide the
25 missing pieces of those documents, I'll withdraw the

1 objection to those documents. My objection is most of
2 them start by saying "See sketch attached," and they
3 haven't provided the sketch, or they say "See attach-
4 ment" and they haven't provided the attachments. If
5 you will allow me to provide the attachments, which
6 obviously they must have notice of because they're
7 offering the documents, and have been for quite a while,
8 then I'll withdraw the objection to those, but I want
9 to point out it took an awful lot of --

10 THE COURT: Do you have the sketches?

11 MR. STONE: I have the sketches.

12 MR. KAWAKAMI: Your Honor, I believe the
13 sketches are all in here. What I attempted to do for
14 the convenience of the Court was merely take out certain
15 relevant reports in the universe of reports that I had
16 in the brown volume. I believe there is a complete
17 G-2 report in the brown volume which is similarly
18 marked 44. I think if you'll start with the brown
19 volume and look at 44, that should be what we think is
20 the complete report. If there are sketches or other
21 information that Mr. Stone would like to provide to make
22 the record complete, we have no objection to that.

23 THE COURT: Well, I'm going to make the
24 ruling on my own to exclude them, provisionally, unless
25 you can bring to my attention specific portions of those

1 reports that have application to this case.

2 MR. HALL: Your Honor, there are several
3 applications that are relevant in all of these docu-
4 ments, and perhaps the most important one is that the
5 Government maintained before the Supreme Court and
6 otherwise that one of the reasons why curfews and
7 other Draconian measures were necessary on the West
8 Coast was because of the imminent threat of invasion
9 on the West Coast by the forces of Japan, and yet these
10 reports indicate from the beginning to the end, those
11 which are in this book, that G-2 stated and believed,
12 apparently, that an invasion was not imminent on the
13 West Coast of the United States.

14 That's just one of the reasons why the
15 whole series of G-2 reports is important to us. There
16 are specific reasons with regard to specific items
17 referred to in here. For example, suspected sabotage
18 is mentioned in a G-2 report and then in a letter
19 report he says it wasn't sabotage. It was a train
20 bridge or trestle that burned down --

21 THE COURT: That's what I've got here.

22 MR. HALL: -- and they determined later on
23 that it was a hot box on a previous train that ignited
24 the trestle. There are other references in here with
25 regard to espionage which are modified from the G-2

1 report.

2 THE COURT: All right. Then, in light of
3 what you've said there, and I gather from what you now
4 have said, these G-2 reports are continuous from
5 January 3rd to some later date.

6 MR. HALL: I think they're on a weekly
7 basis. I believe that they are each of the weeks from
8 the beginning, which is document 44, of I believe 3
9 January '42 up to the time of Mr. Hirabayashi's arrest.

10 THE COURT: They go to No. 74 which is May
11 9th. Does that sound right?

12 MR. KAWAKAMI: That is correct, Your Honor.

13 THE COURT: All right. Well, in light of
14 the Government's concession, and I can see the
15 importance of the continuity of the reports, I will
16 admit 57 through 74, but they must contain the sketches
17 referred to, the ones that are admitted -- that the
18 clerk will get.

19 All right. Next?

20 MR. STONE: It's not always sketches.
21 Sometimes it says "attachments."

22 THE COURT: That will be fine.

23 MR. STONE: They have to have all the
24 attachments.

25 THE COURT: That will be fine.

1 I might tell all of you, we take a recess
2 at a quarter of 11 which is just six or seven minutes
3 away, for fifteen minutes, until 11 o'clock, so those
4 of you who may not want to stay could leave then
5 easily.

6 MR. STONE: The next objection I would like
7 to pose, Your Honor, on the list of documents are the --
8 actually it is the same objection that runs from
9 documents 1 through --

10 THE COURT: Now, these are the numbers in
11 the pre-hearing order?

12 MR. STONE: Yes. Documents 1 through 11,
13 if you will notice, are identified as having been
14 exhibits to the petition. Those documents -- do you
15 have the pre-hearing order, Your Honor?

16 THE COURT: I have the order, yes. I'm
17 looking at it.

18 MR. STONE: They are Nos. 1 through 11 and
19 are all identified as an exhibit to the petition. It
20 was made very clear at your meetings, your status con-
21 ferences on this case, that the petition and the
22 exhibits of the petition passed out of this case, and
23 we prepared this case on the basis of their documents
24 with a four-digit number which they gave us last August,
25 No. 12, 13, 14, 15, 16, 17, 18, 19, 20 and so on. As

1 you go down the rest of that page, you will see they
2 have a document with a four-digit number. It is not in
3 accord -- it violates Rule 16(k) which you invoked
4 against us to let them now go back to the petition and
5 take documents which were technically superseded last
6 August and not within the terms, passed out of the case
7 with the signing of the pre-hearing order.

8 THE COURT: Well, what I was saying about
9 the documents attached to the petition was that
10 Petitioners would have to relist the exhibits they wanted
11 to introduce in evidence. Now, let me find out the
12 numbers that you're referring to.

13 MR. STONE: Can I give you an example,
14 Judge?

15 THE COURT: Well, let me find out first the
16 numbers that you are referring to.

17 MR. STONE: Let me specifically start with
18 No. 93.

19 THE COURT: And that's 93 in the order?

20 MR. STONE: 93 in the order.

21 THE COURT: And what is that in my book?

22 MR. STONE: I don't know, but you're going
23 to need to look at 93 and 44.

24 MR. KAWAKAMI: That's No. 18 in your book,
25 Your Honor.

1 THE COURT: All right. 93 is 18?

2 MR. KAWAKAMI: Yes.

3 THE COURT: And 44 is what?

4 MR. KAWAKAMI: 44 is 39 in your book.

5 THE COURT: 39. All right.

6 MR. STONE: Now, if you look at those two

7 documents, Your Honor, you will see that they are

8 exactly the same. Their current Nos. 18 and 39 are

9 exactly the same. They intended to use the document

10 from their petition and they gave it a new number, and

11 if you'll look at their list that they gave you, it's

12 listed. Now, this is not in the book now, in the list.

13 It's listed as No. 93 with the document number that they

14 gave us last August of 5257, and if you go backwards

15 in the list now to document No. 44 in the list,

16 document 44 seeks to introduce it as an exhibit to the

17 petition, the same document.

18 THE COURT: All right. In my book No. 18

19 is not as clear, the reproduction is not as clear as 39,

20 so I'm going to strike 18 because it apparently is a

21 duplication. Isn't that correct?

22 MR. STONE: All right. Now, Your Honor, if

23 you will look at No. 39 and 107, and again they're

24 going to have to tell us where 39 --

25 THE COURT: Let me wait just one moment.

1 MR. STONE: Okay.

2 THE COURT: 93, which is 18, I am striking
3 that. No. 44, which is 39, I am admitting.

4 Next, Mr. Stone.

5 MR. STONE: If you will look at No. 107 in
6 the list and 39 in the list --

7 THE COURT: All right.

8 MR. STONE: -- you will see that No. 107 is
9 a document that was furnished to us with no identification
10 at all, and document No. 39 is exactly the same document
11 but listed as an exhibit to the petition again, so again
12 they have realleged a document after their exhibits to
13 the petition, the same document, and I presume they
14 want to offer it twice.

15 Now, if they can tell us where they are in
16 the book, we can proceed with the same thing we did a
17 moment ago. We're talking about --

18 THE COURT: 107 and 39.

19 MR. KAWAKAMI: That is correct. They're the
20 same.

21 THE COURT: I'll strike one, but give me the
22 number in the book. Could you do that?

23 MR. KAWAKAMI: I believe that's No. 21 in
24 your book. We have it listed as 107.

25 THE COURT: 107 is 21. How about 39?

1 MR. KAWAKAMI: Yes, Your Honor, that's the
2 same.

3 THE COURT: And what is the number of 39?

4 MR. KAWAKAMI: There is no number in 39.
5 It's the same as 107, so we would suggest striking No.
6 39 since it is the same as No. 107.

7 THE COURT: That will be 39 on the pre-
8 hearing order?

9 MR. KAWAKAMI: Pre-hearing order, that's
10 correct.

11 THE COURT: Let me do that. Now we are
12 looking at No. 107 which is 21 of the proposed exhibits,
13 and is there objection to that? No. 21?

14 MR. STONE: The objection to 21 is it was
15 never identified for the Government or turned over to
16 the Government as an exhibit.

17 THE COURT: Did you ever get a copy, Mr.
18 Stone?

19 MR. STONE: I got it as an attachment to
20 the petition, but they did not reallege it when they
21 went to serve us with the documents they were going to
22 use in the case, Your Honor, after the exhibits and the
23 petition passed out of the case.

24 THE COURT: When did you first list that
25 particular exhibit? Let me ask, was it listed in the

1 August pre-hearing order?

2 Well, let's do this. We are right at recess
3 time now. We'll take a recess until 11. When I come
4 back, you can tell me about that.

5 (Recess.)

6 THE COURT: Have you seen counsel for the
7 Government?

8 MR. HALL: Your Honor, counsel for the
9 Government has made a proposal to us with regard to
10 evidentiary issues which we are considering. We are
11 not prepared yet to make a decision.

12 Counsel for the Government also stated when
13 I last saw him about ten minutes ago that he was calling
14 the Department of Justice with regard to the proposal
15 that he had made to us and also with regard to a
16 mandamus issue which he alluded to earlier and asked us
17 to confer with him. He would request the Court to give
18 us time to confer so we wouldn't have to begin at 11
19 and I told him he could make whatever representations
20 along that line to the Court he wished.

21 That's all I know, Your Honor.

22 THE COURT: All right. That's fine. We
23 will just sit here.

24 You know, when I say the recess is from a
25 quarter to 11 until 11, I mean it. I know you spoke to

1 my law clerk, but don't change it unless I want it
2 changed. I try to start promptly at 9:30, 11, 1:30,
3 and 3 o'clock, and I expect you both to be here.

4 All right. I guess we're referring to 21.
5 Your objection to that?

6 MR. HALL: May we have a moment to consult
7 with counsel?

8 THE COURT: All right.

9 (Counsel confer.)

10 MR. STONE: All right, Your Honor, to pick
11 up where we left off.

12 THE COURT: That would be fine.

13 MR. STONE: I think we left off talking
14 about Nos. 107 and 39, if I'm correct.

15 THE COURT: I think there is a duplication.

16 MR. STONE: Exactly.

17 MR. KAWAKAMI: We'll withdraw No. 39 from
18 our pre-hearing order.

19 THE COURT: All right.

20 MR. STONE: They're going to withdraw 39.
21 Now, if you'll look at 108 and 6.

22 THE COURT: Well, let me ask about 107,
23 that's Exhibit 21.

24 MR. STONE: Oh. Well, I will point out that
25 that is not identified as one of the documents in the

1 universe of documents. It has no four-digit number
2 like virtually all of the documents numbered. If you
3 take a look at Nos., for example, 45 through all the way
4 down to and including 88 -- 83, every single one of those
5 documents has a four-digit identification number. That
6 whole group of forty documents, they are from the group
7 that we got in August '77.

8 This is a document, No. 107, that has no
9 such number. It was not within the group that was given
10 to us as designated with a four-digit number and there-
11 fore it is outside what we understood to be the universe
12 of documents that we were trying to look into the
13 history of.

14 THE COURT: I'm going to admit that, 107.

15 MR. STONE: All right. Now I'd like you to
16 look at No. 108 and No. 6. Again, we have a document
17 that was identified as No. 6 as an exhibit to the
18 petition.

19 THE COURT: Is there a duplication here?

20 MR. KAWAKAMI: Yes, Your Honor. We would
21 move to withdraw 108 and that would leave No. 6 in our
22 pre-hearing order, and it's No. 70 in your book.

23 THE COURT: Would you give me the last
24 number?

25 MR. KAWAKAMI: No. 70 in your book.

1 THE COURT: Seven-oh?

2 MR. KAWAKAMI: Seven-zero.

3 THE COURT: Yes.

4 MR. STONE: We will object to No. 70 in the
5 book which is No. 6 on the list for the reason that it's
6 only listed as an exhibit to the petition. It is not
7 numbered, as I pointed out, with a four-digit number
8 that shows it was realleged as one of the documents
9 within the scope of what we were expecting for five
10 months to consider concerning the issues that were to
11 be raised by us, so since it was not realleged as were
12 other documents, we had no reason to expect that it was
13 something to be brought up at this hearing and it passes
14 out of the case when you, Your Honor, signed a pre-
15 hearing order that put the petition and the Petitioner's
16 exhibits out of the case.

17 THE COURT: It was listed on the Petitioner's
18 proposed pre-hearing order.

19 MR. STONE: Well, Your Honor, we listed a
20 lot of things earlier in the case before you signed the
21 pre-hearing order, too, but it was never listed either
22 in August as a four-digit number, nor does it appear
23 that way now. It is not within the universe of 165
24 documents which they gave us.

25 THE COURT: I'm going to overrule the

1 objection and admit No. 70.

2 MR. STONE: Okay. Now, with respect to all
3 of the other exhibits in this list which were not served
4 to us in August with a four-digit number which was put
5 on by the Petitioner, the Petitioner's document numbers,
6 and that covers 1, inclusive, through 10 -- I'm sorry --
7 1 through 11 and picks up again at No. 30 through No. 44,
8 and it also includes Nos. 84 through 88, and includes
9 Nos. 94 to the end, not including ones we've already
10 covered --

11 THE COURT: Are these the numbers in the
12 pre-hearing --

13 MR. STONE: Those are numbers in their pro-
14 posed pre-hearing order.

15 THE COURT: All right.

16 MR. STONE: Every single one of those docu-
17 ments was not included, it was not realleged as an
18 exhibit for us to recognize within the scope of the 165
19 documents they served on us.

20 Some of those documents, as I pointed out
21 with the very first one I gave you, were realleged.
22 Some of those exhibits were realleged with a new document
23 number, and we have no objection if they've realleged
24 it with a new document number, but where they did not
25 reallege it with a new document number, we did not

1 understand it to be within the scope of the almost 200
2 documents that we were expected to respond to, absent
3 any ruling about the scope of the hearing. Therefore,
4 we object to any of those that they did not reallege.

5 THE COURT: Let me hear from counsel for
6 the Petitioner.

7 MR. KAWAKAMI: On those specific numbers,
8 Your Honor?

9 THE COURT: Yes, and those are the numbers
10 in the pre-hearing order.

11 MR. KAWAKAMI: First of all, Your Honor,
12 I'm not quite sure I understand the Government's
13 objection related to identification of documents. The
14 four-digit number which he continuously refers to is
15 an internal document number which we numbered for our
16 identification purposes, for clarification, but they're
17 not not there in each and every instance.

18 With respect to documents that were in the
19 petition, our position there is, if I understand his
20 objection correctly, is that he didn't have notice or
21 didn't have documents available to him, and that I find
22 hard to understand on the basis of what the document is.
23 That's the basis of our case. That is the petition
24 that was filed in the very first instance.

25 THE COURT: Were copies of these provided

1 to Government counsel?

2 MR. KAWAKAMI: Yes, Your Honor.

3 THE COURT: When was that done?

4 MR. KAWAKAMI: I believe that was done with
5 the petition.

6 THE COURT: Were they attached to the
7 petition?

8 MR. KAWAKAMI: Yes, Your Honor.

9 THE COURT: And would that be true of all
10 of these, 1 through 11, 30 through 44, 84 through 88,
11 94 through the end?

12 MR. KAWAKAMI: 1 through 11, Your Honor,
13 were all Petitioner's exhibits. That would be true of
14 1 through 11.

15 THE COURT: All right. I'm going to admit
16 those, then, 1 through 11.

17 MR. KAWAKAMI: The next set of numbers was,
18 Your Honor?

19 THE COURT: 30 through 44.

20 MR. KAWAKAMI: Yes, Your Honor. It would be
21 our position that each and every one of those documents
22 were submitted to the Government.

23 THE COURT: They were attached as exhibits
24 to the petition?

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

1 THE COURT: I will admit those, 30 through
2 44. I had already admitted 44, as a matter of fact.
3 84 through 88, I see they were attached to the petition.

4 MR. KAWAKAMI: Your Honor, 84 and 85 and 86
5 and 87 were attached to the petition.

6 THE COURT: All right. I'll admit those four,
7 84 through 87. And 88?

8 MR. KAWAKAMI: 88, I believe, was listed in
9 our pre-hearing order.

10 THE COURT: Was listed in their pre-hearing
11 order? What is the number of that particular exhibit
12 in the exhibit book?

13 MR. KAWAKAMI: That is 26, Your Honor.

14 THE COURT: Was a copy of that provided to
15 Government counsel? It's No. 88.

16 MR. KAWAKAMI: Yes, Your Honor, I believe
17 that that was supplied to the Government.

18 THE COURT: Has the Government had a copy
19 of that? It is a report of the work performance of RID,
20 which is Radio Intelligence Division.

21 MR. STONE: Not prior to the filing of our
22 pre-hearing draft on March 1, no. Not during the five
23 months that were given to them to respond.

24 THE COURT: Can you give me a date when it
25 was first provided to the Government?

1 MR. KAWAKAMI: Your Honor, if we could pass
2 on that one, we'll attempt to find some documentation.

3 THE COURT: All right. I'll defer ruling
4 on that. That's No. 88.

5 Then, 94 through the end?

6 MR. STONE: I think I skipped 91, Your Honor,
7 which is in the same category.

8 THE COURT: All right.

9 MR. KAWAKAMI: We will also attempt to secure
10 a date of when that was available to the Government.

11 THE COURT: Now, then, 94 through the end,
12 I have already admitted 94 and 95. 96 I have excluded.
13 97, 98 and 99 I have admitted. 107 I have admitted,
14 but you are proposing to exclude from 100 through 112.

15 Can counsel for the Petitioner tell me
16 about those? Were copies provided to the Government?

17 MR. KAWAKAMI: Your Honor, it's our position
18 to our understanding -- to my understanding, that
19 copies of all documents were provided to the Government.
20 I am not prepared at this particular moment to tell
21 the Court exactly when they were provided, but we can
22 do that and get back to the Court.

1 THE COURT: All right. Let me defer on 100
2 through 106, and 109 through 112. I think that takes
3 care of the exhibits, doesn't it?

4 Now, any other objections by the Government
5 to the pre-hearing order?

6 MR. STONE: Yes, Your Honor. We have an
7 objection, and I don't know if you think this should be
8 made now or later, but we have an objection to the
9 witnesses who are being listed. The first witness, as
10 we understand it, is being asked to testify about
11 historical ramifications, but his qualifications do not
12 say that he is an expert historian. Rather, it says
13 historian-slash-researcher; Professor of Political
14 Science.

15 He is not a history professor. My under-
16 standing is he has no degree of any kind in history.
17 He has it in other fields. We object to him as an
18 expert.

19 THE COURT: Yes, I have heard your objec-
20 tion.

21 What, specifically, is he going to testify
22 to? The part that I think would be relevant would be
23 if he were the one who searched for these various docu-
24 ments, and perhaps the difficulty of finding them, what
25 he found, and that sort of thing.

1 MR. KAWAKAMI: That's correct, Your Honor.
2 That is a large part of his testimony, Your Honor.

3 THE COURT: What else would he testify to?

4 MR. KAWAKAMI: He would testify, to the
5 extent permitted, as to some of the documents that he
6 has in fact found in research.

7 THE COURT: This says that he will testify
8 as to the historical ramifications. I don't think that
9 that testimony would help here, but I would permit him
10 to testify about his search for the documents, relevant
11 documents, where he found them, when he found them.

12 Anything else, specifically, that you can
13 think about?

14 MR. KAWAKAMI: No, Your Honor.

15 MR. STONE: As to the second witness,
16 Edward J. Ennis, --

17 THE COURT: Let me just make a little note
18 here.

19 MR. STONE: Okay. So that the scope of that
20 is the search for documents, then?

21 THE COURT: On Peter Irons.

22 MR. STONE: On Peter Irons.

23 THE COURT: That's right. What he found,
24 where he found them, how difficult it was for him to
25 find them, when he found them.

1 MR. STONE: The laches argument, essentially.

2 THE COURT: That would be part of it.

3 MR. STONE: With respect to --

4 THE COURT: Let me just make a note, will
5 you?

6 All right.

7 MR. STONE: With respect to the second
8 witness, Edward J. Ennis, I believe he is being called
9 as a fact witness. I have no objection to him being
10 called as a fact witness.

11 THE COURT: All right.

12 MR. STONE: With respect to the third wit-
13 ness, Aiko Herzig-Yoshinaga, again we have the same
14 objection as to the first person. To the extent that
15 you wish to have her called with respect to the diffi-
16 culty or authentication of documents, we have no objec-
17 tion. To the extent that she's to be called to comment
18 in any way on any historical questions, as far as we
19 know, she has no degree in history - please correct me
20 if I'm wrong - but I believe she also has no qualifi-
21 cations academically in history.

22 With respect to the --

23 THE COURT: Let me stop you right there.
24 What do you propose --

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

1 In that particular case she was also a researcher and
2 obtained many of the documents which we presented to
3 the Court.

4 THE COURT: All right. Then the ruling
5 would be essentially the same as with Irons.

6 MR. STONE: With respect to John A. Herzig,
7 once again we have an objection to him testifying about
8 the history of forced exclusion and imprisonment. He
9 has no degrees in history, and to the extent that he
10 participated as a fact witness, he participated in G2
11 in the Far East. He did not participate anywhere in
12 the Western Defense Command. He has no first-hand
13 knowledge of any of the circumstances in the Western
14 Defense Command, and he has no academic credentials
15 as an historian.

16 They ask on page 16, line 7, to have him
17 testify as to the historical ramifications of the
18 documents he reviewed. Once again, if they wish to
19 have him testify about how difficult it was to find
20 documents, I have no objection.

21 THE COURT: All right.

22 MR. KAWAKAMI: Your Honor, in addition to
23 that, Mr. Herzig would be called to testify related to
24 intelligence work and operations, not specifically in
25 this area but with respect to an overall general view

1 of military intelligence and how it comes together.

2 THE COURT: Yes. I'm going to exclude that
3 particular type of testimony. Is he going to testify
4 about documents? Did he himself search for documents?

5 MR. KAWAKAMI: Yes, Your Honor, he did.

6 THE COURT: I don't want to hear cumulative
7 testimony about the difficulty of finding documents.
8 I think you ought to use your best witnesses on that,
9 but if there are particular documents that he looked
10 for, that he found, then I'll permit that testimony.

11 MR. KAWAKAMI: Yes, Your Honor.

12 MR. STONE: With respect to the Petitioner
13 in the case, Your Honor, --

14 THE COURT: Would you wait just one moment?

15 MR. STONE: I'm sorry.

16 THE COURT: All right.

17 MR. STONE: With respect to the Petitioner
18 in the case, Your Honor, we don't believe that there
19 is any relevant testimony as a fact witness that he can
20 give on the issue presented, which is whether people
21 unbeknownst to him at that time, acted in bad faith
22 because they had no evidence which would have permitted
23 them making a judicial notice argument and therefore
24 doing all the various things they did.

25 He has no first-hand knowledge nor is he

1 alleged to have first-hand knowledge about how the
2 final report was written; first-hand knowledge of Mr.
3 Ringle; first-hand knowledge of any of the items they
4 list, any of the military intelligence documents.

5 He has no first-hand knowledge of any of
6 this at the time. He was simply arrested and had his
7 appeal prosecuted. As it points out in this paragraph,
8 it simply says he will testify about events leading
9 to his arrest, conviction and appeals. None of those
10 are disputed. As a matter of fact, Your Honor, if
11 you'll look at the very beginning, we have admitted in
12 the admitted facts the dates of his conviction and his
13 Supreme Court affirmance, so there is nothing relevant
14 as to whether there was Government misconduct.

15 It's very clear he could not have been a
16 party to it at the time, and we don't allege he was
17 a party to misconduct, so we don't think that there is
18 anything relevant to that issue, unless they can make
19 a proffer that we don't understand that would make his
20 testimony relevant.

21 THE COURT: All right. Let me hear from
22 Petitioner.

23 MR. KAWAKAMI: Your Honor, with respect to
24 the Petitioner, he's prepared to testify about whatever
25 is within his personal knowledge. We don't expect him

1 to testify to things related to suppression of evidence
2 because it would be our allegation that --

3 THE COURT: What is within his personal
4 knowledge that should affect the decision in this case?

5 MR. KAWAKAMI: Basically, Your Honor, he
6 would testify about his background, about what he knows
7 in his knowledge, what was available to him, about what
8 attempts he's made to correct the situation.

9 THE COURT: I think what I had better do
10 is to get a more specific proffer from you with
11 respect to his testimony before I permit him to testify.
12 Going through the issues in my mind, I really cannot
13 find anything with respect to those issues about which
14 he could testify, but let me defer on that and then
15 get a specific proffer from you before he's placed on
16 the stand. Then I'll make a ruling as to what if any-
17 thing he can testify to.

18 MR. KAWAKAMI: Fine, Your Honor.

19 THE COURT: All right. Next?

20 MR. STONE: Before we leave that subject,
21 Your Honor, can you tell me how much in advance we'll
22 see the proffer so we can prepare for cross?

23 THE COURT: Oh, I think a day ahead of
24 time. I'll make the ruling a day ahead of time.

25 MR. STONE: Okay. All of the other witnesses

1 are authentication witnesses from Mr. Wolfe right
2 through to the end, Mr. Hall, and we have agreed by
3 letter before we came in here to stipulate to authenti-
4 city and to allow the Court to decide on weight that
5 goes to completeness or context, but in terms of
6 authenticity and the use of copies instead of certified
7 copies and the use of that, we stipulate. and both
8 parties have agreed to that ahead of time.

9 THE COURT: Is that correct?

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

11 THE COURT: All right. Then let me ask
12 counsel for the Petitioner, do you then intend to call
13 any one of these later listed witnesses?

14 MR. KAWAKAMI: No, Your Honor. We don't
15 intend to call any witnesses regarding authentication.

16 THE COURT: All right. Then, let me hear
17 from the Government -- not the Government, but the
18 Petitioner with respect to the Government's pre-hearing
19 order.

20 MR. STONE: Excuse me, Your Honor?

21 THE COURT: Yes. Go ahead.

22 MR. STONE: Because we anticipated, perhaps
23 incorrectly, that we would be proceeding on the basis
24 of the final pre-hearing order rather than the earlier
25 one, I didn't bring one with me. Could you read each

1 paragraph as it's objected to so we know exactly what
2 it is?

3 THE COURT: Well, why don't we do this,
4 because I would rather have you have a copy, why don't
5 we adjourn now and resume at our regular time at 1:30,
6 and then we'll take up the Petitioner's objections to
7 the Government's proposed pre-hearing order.

8 Does that sound all right?

9 MR. STONE: Fine.

10 MR. KAWAKAMI: Your Honor, are you referring
11 to the last Government's proposed order?

12 THE COURT: Well, I would be referring to
13 two things; the last one, except with reference to
14 the exhibits, and I have said with respect to, I guess
15 it was the March order, certain exhibits that I would
16 permit that order to be filed as their list of exhibits.

17 Now, if you have any objection to those
18 exhibits, I'll hear your objections. Do you under-
19 stand?

20 MR. KAWAKAMI: Yes, Your Honor.

21 THE COURT: All right. Then, also, Mr.
22 Hall, you spoke about some kind of proposal having been
23 made between you.

24 MR. HALL: Yes, Your Honor.

25 THE COURT: Can you speak to me on that

1 now or would you prefer to do it after we resume?

2 MR. HALL: I would prefer to do it after
3 the recess, Your Honor, because I don't think Mr.
4 Hirabayashi has had ample opportunity to consider it.
5 It was tentatively made by the Government, and I don't
6 know if he now has authority to permanently make it.

7 THE COURT: All right. Then you can talk
8 about it during the lunch hour. We will resume here
9 at 1:30.

10 (Noon recess.)

1 AFTERNOON SESSION

2 (1:30 p.m., June 17, 1985)

3 THE COURT: Good afternoon.

4 Let's go back to the Petitioner's proposed
5 order. Is there anything further that I can rule on
6 that I deferred this morning?7 MR. STONE: On the Petitioner's order, Your
8 Honor, the Government's objections to it?

9 THE COURT: Yes.

10 MR. STONE: Well, I think we went through
11 the whole list and I think that I preserved at the
12 very beginning, just simply preserved my jurisdictional
13 objections that had been made before and overruled, and
14 I guess at the end I preserved the objections that deal
15 with the starting date of the hearing that I had
16 previously made objections to. They continue to be
17 overruled so I preserved those, and I just preserve
18 also for the record the exclusion of our documents.

19 Thank you.

20 THE COURT: All right. There were some
21 items that I deferred my ruling. Can you give me any
22 further information now or shall we defer that until
23 Wednesday?24 MR. KAWAKAMI: I can give you some infor-
25 mation on that now, Your Honor. First of all, I

1 believe in the transcript of May --

2 THE COURT: Can you give me an exhibit
3 number?

4 MR. KAWAKAMI: -- May 7th. I'm referring
5 to the transcript of our pre-hearing conference, Your
6 Honor.

7 THE COURT: You go ahead.

8 MR. KAWAKAMI: Your Honor, on page 40 of
9 the transcript, it's my understanding that during the
10 hearing we presented the Government with additional
11 documents which he acknowledges receiving on page 40.
12 The documents that we presented to him at that par-
13 ticular time were documents which we included in our
14 new pre-hearing order but were not in the original pre-
15 hearing order of August, and he acknowledges receiving
16 them at the hearing, although not specifically which
17 documents he received.

18 THE COURT: Which items does that have
19 reference to?

20 MR. KAWAKAMI: That has reference to the
21 documents which we reserved ruling on.

22 THE COURT: Is that No. 88?

23 MR. KAWAKAMI: I believe that's 88, 91,
24 100 through 106, and 109 to 112.

25 THE COURT: That was on May 7th; is that

1 correct?

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

3 THE COURT: Did you receive copies of
4 those, Mr. Stone?

5 MR. STONE: I received about 20 sheets of
6 paper. I can't tell you which of those I received at
7 that time, Your Honor. I did not receive copies of
8 all of them because subsequently I had to make a call
9 and say "I am still missing certain documents."

10 Of course the point of my objection before
11 was even as to the ones that I got copies of this past
12 May 7th, those were not documents which my experts
13 were able to look at during the five months you gave
14 me to have them look at them. They had no idea that
15 those were to be included.

16 THE COURT: All right. Then I will admit
17 88, 91, 100 through 106, and 109 to 112. Now, anything
18 else? I guess those are the only ones that I
19 deferred on; is that correct?

20 MR. HALL: That's what I have, Your Honor.

21 THE COURT: All right. Now, let's look
22 at the Respondent's proposed pre-hearing order, and
23 I'll hear the Petitioner's objections. If we're going
24 to talk about exhibits, then I'd want to talk about the
25 March 1 proposed order.

1 MR. KAWAKAMI: Your Honor, just a point
2 of clarification on page -- the Government earlier
3 felt there was a mistake in our pretrial order regarding
4 the conviction date of Mr. Hirabayashi, stating it was
5 October 21st. The transcript of record we have, and
6 it's in a blue volume of materials that we've submitted
7 to you, I think indicates that he was convicted on the
8 20th and actually sentenced on the 21st.

9 THE COURT: Does that sound right?

10 MR. STONE: Your Honor, as I understood
11 it, it was a one-day trial. It was a jury trial, and
12 that there was a verdict returned at the end of it,
13 but that the judgment was not filed in the court records
14 until the next day at the time of sentencing, which
15 is why I think that means the judgment runs from the
16 next day rather than the verdict. I think it's the
17 filing of the verdict, but please correct me if I'm
18 wrong. You should somewhere have the actual document.

19 THE COURT: All right. I don't think it
20 makes any difference at all.

21 MR. KAWAKAMI: No, Your Honor.

22 THE COURT: But was Mr. Hirabayashi
23 sentenced the day he was -- the day that the jury
24 returned the verdict, on the 21st?

25 MR. KAWAKAMI: He was sentenced on the

1 21st, I believe.

2 THE COURT: Immediately?

3 MR. KAWAKAMI: Yes.

4 THE COURT: All right. I think I will change
5 that date to October 21st.

6 MR. KAWAKAMI: That's fine, Your Honor.

7 THE COURT: I don't think it makes any
8 difference.

9 MR. KAWAKAMI: We have no objections, Your
10 Honor, to the factual contentions as presented,
11 reserving, of course, argument on the merits.

12 With respect to page 6 of the pre-hearing
13 order, issues of law, --

14 THE COURT: Now, is this the one of May
15 20th, the last one?

16 MR. KAWAKAMI: Yes; May 20th.

17 THE COURT: All right.

18 MR. KAWAKAMI: No. 2, whether Petitioner
19 has shown present adverse legal consequences sufficient
20 to create an actual case or controversy. It is our
21 position that this has been before the Court on two
22 separate occasions and the Court has already ruled on
23 that issue and it is not appropriate for further
24 hearing.

25 THE COURT: Right. I think I'll still leave

1 it in as an issue.

2 MR. KAWAKAMI: Your Honor, with respect,
3 then, to the witness list --

4 THE COURT: Would you wait just one moment?

5 MR. KAWAKAMI: With respect to the Govern-
6 ment's witness list, starting on page 7 --

7 THE COURT: We are now looking at the May
8 20 order?

9 MR. KAWAKAMI: That is correct.

10 THE COURT: All right.

11 MR. KAWAKAMI: First of all, it seems to me
12 that in order for us to pose objections, we would want
13 to know specifically, since the Court earlier this
14 morning precluded certain evidence, certain governmental
15 documents, I don't know exactly what they would be
16 testifying to, to make objections with respect to the
17 first four witnesses.

18 The first four witnesses apparently will
19 be testifying about documents or other things the
20 Government had intended to present.

21 THE COURT: Let's do this, because I think
22 it may be easier for the Court to rule. Let's go to
23 the Government's proposed exhibits in the other order,
24 and then maybe I can make a ruling with respect to the
25 witnesses.

1 MR. KAWAKAMI: Starting on page 16, Your
2 Honor, I believe the first at least three exhibits
3 or the first four exhibits are based on testimony that
4 was accumulated during a subcommittee hearing, and as
5 to those documents itself, we would object to those
6 documents on the basis that they were not under oath.
7 The witnesses were not under oath, were not subject to
8 cross-examination, and this is now a secondary source,
9 the book itself.

10 The witnesses are now available and would
11 be subject to cross-examination and would be able to
12 testify directly on the issue. I might also add that
13 the issue being discussed was not the issue before the
14 Court today.

15 THE COURT: All right. Well, first, Edward
16 J. Ennis is going to be called by the Petitioner?

17 MR. KAWAKAMI: That's correct.

18 THE COURT: And depending upon how he
19 testifies, then I would permit the Congressional
20 testimony perhaps to be used in rebuttal of his testi-
21 mony, but I would not consider the testimony before
22 Congress itself as being an exhibit.

23 Do you understand?

24 MR. KAWAKAMI: Yes, Your Honor.

25 THE COURT: So the actual Congressional

1 testimony will be excluded as an exhibit. And then
2 on Peter Irons, also before Congress, I would make the
3 same ruling, but here again, that testimony could be
4 used as rebuttal or really impeaching testimony with
5 respect to him.

6 All right.

7 MR. KAWAKAMI: That would also cover No.
8 3, Your Honor, I believe, and No. 4.

9 THE COURT: All right. The first part of
10 that, I will exclude that as an exhibit, that is,
11 what he testified to before the Congressional Committee,
12 but it can be used as rebuttal or impeachment as far
13 as he's concerned, and then down at line -- starting
14 at about line 18 where it says ". . . the volume
15 entitled Guarding the United States," and containing
16 the chapter --

17 MR. STONE: Your Honor, --

18 THE COURT: Go ahead.

19 MR. STONE: Before we get to line 18, may
20 I ask you, on line 5 there is a statement that the
21 Joint Congressional Committee investigating Pearl
22 Harbor is identified. It's an identifiable document,
23 the 1946 statement of the Joint Congressional Committee.

24 I presume that that is sufficiently identi-
25 fied as a separate document. What then follows is a

1 quote from that document and the document is identified
2 at that page of these hearings for them.

3 THE COURT: So what you want to do is
4 admit --

5 MR. STONE: The original document. Not
6 the testimony about it, but the original document,
7 which is identified and quoted from, and I have page
8 860 identified of the Congressional hearings which
9 specifically identifies that document.

10 THE COURT: Let me hear from the Petitioner
11 on that.

12 MR. KAWAKAMI: Yes, Your Honor. I have two
13 things in response to that. First of all, it seems to
14 me that that's a quote within a quote and it's not
15 the document itself, so I would object on that basis.

16 I would also object on the basis of
17 relevancy. The substance of the quote deals with
18 MAGIC, what is known as MAGIC or the MAGIC cables,
19 and it's our position that because this is a trial on
20 Governmental misconduct, MAGIC has nothing to do with
21 whether or not the Government suppressed, altered,
22 destroyed or fraudulently represented things to the
23 Court, and it's not relevant.

24 I think Mr. Hall was prepared and is pre-
25 pared to discuss more in depth. We had a motion earlier

1 this morning regarding MAGIC and our motion to exclude
2 evidence related to that.

3 THE COURT: All right. I am going to
4 exclude this particular statement from the Joint
5 Congressional Committee investigating Pearl Harbor.
6 The date was 1946, which is way after the events we're
7 talking about. Later on you are asking for the
8 admission of certain MAGIC documents. That's a
9 different matter.

10 MR. STONE: Your Honor, Pearl Harbor
11 occurred less than 60 days before the events in question
12 and is cited as one of the critical events in the
13 Hirabayashi opinion. This Congressional Committee was
14 looking into what was going on in the intelligence
15 community at the Pearl Harbor time. They were not
16 investigating 1946 events. They were investigating
17 December 1941 events. That's why it's relevant. That
18 is within 60 days of the question. It was one of the
19 precipitating factors mentioned in the Supreme Court
20 opinion and for that reason we believe anything that
21 appears in that Joint Congressional Committee hearing,
22 which was identified here, is certainly a document that
23 would be relevant.

24 At least I would ask you to provisionally
25 allow it and after you hear it, I am sure we will tie

1 it up. If you don't find it tied up, then you may tell
2 me so and rule at that time, but as to the time period,
3 it does not relate to 1946. That's why it's called
4 the Pearl Harbor investigation.

5 THE COURT: All right. I'm going to adhere
6 to my ruling and exclude that particular statement
7 from the 1946 report, but the documents themselves,
8 the MAGIC communications, if relevant, I would probably
9 admit.

10 All right. Then, I started to speak about
11 on page 17, commencing about line 18, it speaks about
12 this volume, and I have excluded other books and I am
13 going to exclude that particular book.

14 MR. STONE: Your Honor, we have certain
15 things that relate only to our laches argument. They
16 are being offered not to show the truth of what they
17 say in them, but simply to show the date on which that
18 particular piece of information first came into the
19 public way, and we would ask that that document be
20 admitted only for the purposes of making our laches
21 argument; not for the truth.

22 THE COURT: All right. I think that's fair
23 enough and I will admit it for that purpose.

24 MR. KAWAKAMI: Page 17, Your Honor, No. 4,
25 involves the testimony also before the Congressional

1 Subcommittee of David Lowman.

2 THE COURT: Is he going to be a witness?

3 MR. KAWAKAMI: He is listed as a witness,
4 Your Honor.

5 THE COURT: Will he be a witness?

6 MR. STONE: He will be a witness, Your HONOR.

7 THE COURT: All right.

8 MR. STONE: But if I may, Your Honor, you
9 will notice that it says "Identifying particular 'Magic'
10 cables," and then if you go on to page 18 I cite the
11 pages at which he has identified the cables, and the
12 cables that were enumerated in there are enumerated
13 pages 484 to 488 and that is included on the pages
14 listed on page 18, line 3, and so we think that any
15 cables which he specifically describes on those pages
16 in the testimony here, which they had, he specifically
17 identifies the cables, its date, its location, that we
18 would ask those cables, having been identified by us,
19 to be admitted.

20 THE COURT: On page 18, line 3, you have
21 pages 441 to 488. Are those pages where he identifies
22 the MAGIC messages?

23 MR. STONE: Yes. He identifies them in
24 those pages.

25 THE COURT: Let me hear from the Petitioner.

1 MR. KAWAKAMI: Your Honor, first of all,
2 I think that the testimony from the Congressional
3 Subcommittee indicated Mr. Lowman did go through volumes
4 of MAGIC and picked out certain select cables. It
5 would be our position, certainly, that the Government
6 has been precluded from introducing in evidence exhibits
7 related to MAGIC and we would not allow them to
8 selectively put in documents because it happened to be
9 in the Subcommittee report.

10 THE COURT: Well, I think the relevance
11 of being in the Subcommittee report is simply that
12 they were identified there, and I will permit Mr. Lowman
13 to testify about relevant MAGIC messages which were
14 identified in that Congressional hearing.

15 All right.

16 MR. KAWAKAMI: That is No. 2, then, on page
17 18?

18 THE COURT: What is the 2 that you are
19 picking up?

20 MR. KAWAKAMI: Line 5.

21 THE COURT: I was really referring to line
22 3, pages 441 to 488, where apparently certain MAGIC
23 messages were identified, and then it speaks about the
24 complete text of Nos. 119 and 174, so he could testify
25 to those and as to any other relevant ones that he

1 identified.

2 MR. KAWAKAMI: So that would include No. 2,
3 then, in the next paragraph?

4 THE COURT: Then on 2, the 26-page report
5 of ONI, the date was December 4, 1941?

6 MR. STONE: Yes, Your Honor, and it is also
7 reprinted verbatim again.

8 THE COURT: I would admit that.

9 MR. KAWAKAMI: And that would refer also,
10 then, to No. 3.

11 MR. STONE: Before we go to 3, Your Honor,
12 I just have one question on No. 2.

13 THE COURT: All right.

14 MR. STONE: It says, "repeated almost
15 verbatim and disseminated." I have a one-page cover
16 letter on the document which shows the dissemination.
17 Is that appropriate?

18 THE COURT: I think that would be fine.

19 MR. KAWAKAMI: Your Honor, we had, as I
20 said before, this morning a motion prepared on the whole
21 MAGIC cables area, and what we would like to do now,
22 if possible, is make -- because otherwise a lot of
23 these other elements relate to that as well, and we
24 would like to present that motion at this time related
25 to that particular subject.

1 THE COURT: Is your motion with respect
2 to the relevance of them?

3 MR. KAWAKAMI: Yes, Your Honor.

4 THE COURT: I'm going to deny that motion
5 because I don't think I can determine relevance until
6 I get into it. You won't believe this, but for a reason
7 entirely apart from this case, I have read through
8 most of the volumes of MAGIC over here at the public
9 library, for something entirely unrelated to this, and
10 I can see, or at least I feel that most of those have
11 no relevance to this action, but there may be some that
12 do. I think I would really have to look at specific
13 ones and make a ruling on a specific one.

14 MR. HALL: Your Honor, in your order of
15 May 24th, 1984, you ruled at the last page, Item 4,
16 that the Court wishes to make it clear that at the
17 evidentiary hearing it does not intend to re-examine
18 nor to rule upon the wisdom of the exclusion of curfew
19 orders of Lt. Gen. John L. DeWitt, and we assume that
20 that is a ruling to which the Court would adhere.

21 THE COURT: That's true. It may be true.
22 I don't know. It may be true that there is a MAGIC
23 message, say from Tokyo to the Japanese Ambassador
24 in Washington that these certain people on the West
25 Coast are potential saboteurs or something to that

1 effect.

2 MR. STONE: Your Honor, may I also ask to
3 have one attorney speak on a motion, because I thought
4 that was the rule and I feel like I've got quite a team
5 opposing me here.

6 THE COURT: I think we probably should do
7 that.

8 In any event, with respect to the MAGIC
9 messages, I'm going to have to look at those indi-
10 vidually and make a ruling as to whether they are or
11 are not relevant.

12 MR. KAWAKAMI: Your Honor, then I guess
13 I would preserve my objection, just for the record,
14 with respect to relevancy. I suppose I would also
15 object on the basis that the MAGIC cables themselves
16 were not provided us.

17 THE COURT: Well, counsel tells me that
18 in these pages here are identified the ones that
19 apparently Mr. Lowman felt were relevant at the time.
20 I gather that the -- tell me the subject matter of
21 this 1984 Congressional hearing. I think I know, but
22 you tell me.

23 MR. STONE: There is a copy that has been
24 lodged with the Court, Your Honor. The subject matter
25 is Japanese-American and Aleutian Wartime Relocation.

1 It goes into the intelligence reasons. It went beyond
2 curfew. It went into relocation, but as a result, it
3 covers the same period and the same motivations.

4 THE COURT: All right. So I'll permit
5 testimony as to those MAGIC messages which Lowman
6 identified before the Congressional hearing.

7 Now, anything further with respect to
8 Lowman?

9 MR. STONE: With respect to Lowman, Your
10 Honor?

11 THE COURT: I want to hear from the
12 Petitioner first.

13 MR. KAWAKAMI: Well, Your Honor, I would
14 object to all of page 18, and continuing on. I believe
15 the Court has ruled on No. 2. I would object on the
16 same basis, just for the record, with respect to all
17 of Mr. Lowman's testimony that was in the Congressional
18 hearing, related to MAGIC or not.

19 THE COURT: I gather from the Government's
20 proposed order here that all of these matters or all
21 of these documents which are identified here were those
22 which Lowman testified to before Congress; is that
23 right?

24 MR. STONE: And were in fact reprinted.

25 THE COURT: All right. I will admit

1 testimony, if relevant, on those items.

2 MR. KAWAKAMI: Your Honor, if the Court is
3 ruling that it will allow testimony on MAGIC by Mr.
4 Lowman, then we would like to bring up a point with
5 respect to one of our witnesses related to MAGIC as
6 well.

7 The Court earlier ruled on John Herzig's
8 testimony and the limits of his, and I believe that
9 we should be allowed to call him as a rebuttal witness.

10 THE COURT: Is he going to be here
11 throughout the hearing?

12 MR. KAWAKAMI: Yes, Your Honor. He is now
13 here in court.

14 THE COURT: I would hear you on rebuttal
15 testimony on him with respect to MAGIC messages. I
16 would like to see first what the Government proposes
17 to offer, and also, I would like to see what my ruling
18 is going to be on those before admitting testimony in
19 rebuttal.

20 MR. KAWAKAMI: So that takes us all the way
21 through No. 4, then, Your Honor?

22 THE COURT: I think it takes us to 5, yes.

23 I suppose the relevance of these is the
24 fact that they came from the United States Army
25 Intelligence file; is that correct, to show that they

1 were aware of it, even though they seem to be duplicates
2 of -- some of them were duplicates.

3 MR. STONE: That's right, Your Honor.
4 Some were duplicates and some were not duplicates
5 that show that they worked with it.

6 THE COURT: All right.

7 MR. KAWAKAMI: No objections.

8 THE COURT: That's on 5?

9 MR. KAWAKAMI: Yes, Your Honor.

10 THE COURT: All right.

11 MR. KAWAKAMI: Your Honor, 6 is the publi-
12 cation which you've already ruled on which should be
13 limited to the purpose of laches.

14 THE COURT: Laches.

15 MR. KAWAKAMI: I believe 7 is the same
16 thing. It's a publication.

17 THE COURT: I will admit that on laches
18 only, then. Is that right, Mr. Stone? Is that the
19 offer?

20 MR. STONE: Command Decisions?

21 THE COURT: No. 7.

22 MR. STONE: That's right, on laches.

23 THE COURT: All right.

24 MR. KAWAKAMI: On No. 8, Your Honor, the
25 Western Defense Command document dated May 3, 1943,

1 and reprinted in the 1984 Congressional hearing, pages
2 614-617, recounting at paragraph 1(b) and paragraph 5
3 with respect to suggestions by Assistant Secretary of
4 War in the April 15, 1943 draft of General DeWitt's
5 report, et cetera, and it has a quote from the
6 letter. I would object to that document also on the
7 basis of relevancy.

8 THE COURT: I think I should admit that.

9 MR. STONE: Your Honor, if I may, I really
10 find this bordering on offensive. They moved that
11 document in now in their list.

12 THE COURT: That's all right.

13 MR. STONE: This was earlier. Now they're
14 objecting to when I want to put it in.

15 THE COURT: That's fine. Anything else?
16 Shall we go to witnesses?

17 MR. KAWAKAMI: Yes, Your Honor.

18 THE COURT: I am now going to go to the
19 later proposed order, May 20th. Give me any objections
20 you have to their witnesses.

21 MR. KAWAKAMI: Number one, Your Honor,
22 David Lowman, and we would again, just for the record,
23 preserve our objection with respect to his testimony
24 relating to MAGIC. We also would like to point out
25 to the Court that again there are selective documents

1 that he selected and not all of the MAGIC cables will
2 be available to the Court.

3 THE COURT: All right. I'm going to permit
4 him to testify. If there are any MAGIC documents that
5 you feel should be admitted after he has testified,
6 then I'll hear from you.

7 MR. KAWAKAMI: No. 2, David Trask. I
8 believe that -- I'm not sure that he's going to testify
9 to the same thing. I wonder if we could get an offer
10 of proof with respect to what Mr. Trask and Hannah
11 Zetlef will be testifying to.

12 THE COURT: Yes. I would think David
13 Lowman, David Trask and Hannah Zeitlich, that the
14 Government should pick one of those witnesses because
15 they will testify about the same thing.

16 MR. STONE: No, they will not be testifying
17 about the same things. Mr. Lowman will be testifying
18 primarily about the relevance of MAGIC intelligence
19 because he has worked with that for over twenty-five
20 years. To the extent that David Trask and Hannah
21 Zeitlich do overlap, I will pick one of those, but I
22 would like to reserve the right that if one of them
23 says they can't recall a particular thing, if I need
24 the other to supplement, but I will not duplicate their
25 testimony. They do tend to testify about the same

1 subject matter.

2 THE COURT: All right. Then I will permit
3 you to choose from between Trask and Zeitlich but not
4 let either one of them duplicate the testimony of
5 Lowman.

6 MR. STONE: Well, Your Honor, they won't
7 quite duplicate it but they may corroborate it.

8 MR. KAWAKAMI: No. 4, Your Honor, David
9 Kahn, I believe he speaks to the same matter.

10 THE COURT: What about Kahn?

11 MR. STONE: Your Honor, David Kahn is
12 listed as a witness because they have challenged not
13 just the particular application of the MAGIC documents
14 to the decision to evacuate, in this case promulgate
15 a curfew order, but they've challenged, at least in
16 the original documents which they moved to exclude,
17 the importance of the whole entire MAGIC system of
18 information, and he is a witness who won't talk about
19 specific cables but does have the expertise to talk
20 about the broader question of MAGIC and its influence
21 on World War II intelligence generally. He is an
22 author of "The Code Breakers" which is one of the
23 first books on the subject.

24 THE COURT: You won't believe this but I
25 have read this book, entirely unrelated to this case.

1 MR. STONE: Okay. He would testify not
2 with respect to the MAGIC application to this case,
3 but the place of MAGIC in military intelligence
4 activities during World War II generally. He will not
5 duplicate Mr. Lowman.

6 THE COURT: Well, it says here he will
7 testify about the same subject as David Trask. I think
8 as between the two, Trask is the more authoritative
9 witness. He's testifying from inside the Government.

10 MR. STONE: Will you allow me to choose
11 between those two, Your Honor? Part of my problem is
12 that I wanted one witness, Your Honor, who is not only
13 a Government witness, Government employee, so it would
14 not ultimately look like I have only picked people who
15 worked for the Government.

16 If you like, I will hold Mr. Kahn back and
17 you can tell me if you think he is necessary later, but
18 I thought perhaps I should have one expert who is not
19 on the Government payroll and at least can't be
20 impeached on the ground that "Well, of course he's
21 going to say that because he works for the Government."

22 THE COURT: Well, of course, everything
23 that Kahn knows is hearsay. It's from talking to
24 people and perhaps reading.

25 MR. STONE: First person research when he

1 wrote his various books, Your HOnor.

2 THE COURT: Let me hear from the Petitioner
3 on Kahn.

4 MR. KAWAKAMI: Your Honor, again, I believe
5 he's a cumulative witness. I don't think he would
6 necessarily add any enlightenment to the proceedings.

7 THE COURT: Well, I have that same feeling.
8 I'm going to exclude Kahn but permit Trask.

9 MR. STONE: Well, Your HOnor, if I may,
10 would you please let me choose between them? I would
11 prefer to have Mr. Kahn so that I have one non-
12 Government employee witness, and if you will allow me,
13 I will make the choice and I will choose Mr. Kahn
14 over Mr. Trask because I want to have one witness who
15 is not a former Government employee. I think it's
16 very important. Will you allow me to make that choice,
17 Your Honor?

18 THE COURT: I can't myself visualize what
19 Kahn can testify to of his own knowledge.

20 MR. STONE: He's an expert, Your Honor.
21 He's not a fact witness. He is a world renown expert
22 on the MAGIC documents and their impact generally on
23 World War II intelligence. He has personally inter-
24 viewed most of the people who are now dead in order
25 to write his book in 1967.

1 I can tell you that Dr. TRask did not
2 interview those people earlier than 1967 before they
3 died so that he can now repeat what they told him. As
4 an expert witness, he is certainly allowed to tell you
5 what his expert opinion from his gather of information
6 was. Also, if I have Dr. Trask, then I have a con-
7 flict between what he testifies to and what Mrs.
8 Seitlich will testify to, so it puts me in another
9 bind.

10 So I prefer to have on those choices
11 David Kahn, if you will allow me, please.

12 THE COURT: What is the Petitioner's
13 attitude?

14 MR. KAWAKAMI: Your HOnor, my attitude is
15 that first of all, I don't believe that Mr. Kahn has
16 any historical credentials or anything other than as
17 the author of "Code Breakers." I would also ask, if
18 the Court is inclined to allow the Government to make
19 a choice as to who he allows to testify on which
20 subject, that we be notified now who the choice is
21 and what area that person will be testifying about.

22 THE COURT: Yes. Well, I think I must
23 exclude Kahn and admit Trask. Trask was actually,
24 I assume, inside the Department of the Army.

25 MR. STONE: Not true, Your Honor.

1 THE COURT: When was he in the ARmy?

2 MR. STONE: He was the chief historian of
3 the State Department before he became the chief
4 historian of the Army Department. His credentials, for
5 the most part, dealt with State diplomatic matters.
6 Mr. Kahn has a Ph.D. from Oxford in history. I will
7 object strongly if you force that choice upon me. I
8 would certainly ask the Court to allow me to choose my
9 own experts. If it's a question of which individual
10 is going to be on the stand, they're both going to
11 take the same amount of time to cover the same ground.
12 Please, Your Honor.

13 THE COURT: Well, again, as I say, I find
14 it hard to discern what Kahn could testify about of
15 his own testimonial knowledge.

16 MR. STONE: He will testify, Your Honor,
17 about his discussions with the people in the military
18 prior to 1967 that he engaged in in order to write his
19 book, and as an expert, what his expert view is.

20 He has lectured and written enumerable
21 times on these documents, the general importance of
22 MAGIC to U.S. World War II military history. Dr. Trask
23 was not going to testify particularly on that subject.
24 It was a satellite subject to him. His primary area
25 overlaps Mrs. Zeitlich's area, and so it handicaps me

1 or it handcuffs me and I lose my ability to have a
2 witness who can testify not about now the specific
3 cables which Mr. Lowman identifies, but generally the
4 place in history of the MAGIC interception, and I
5 really think I should be allowed to pick my own wit-
6 nesses, Your HONor. I don't think that's a question
7 in choosing between A or B which the Petitioner should
8 have a voice in. If you want to limit me to one of
9 the two, that's fair enough, but I do think it's my
10 choice as to whom I call, particularly when I've
11 listed them here.

12 MR. KAWAKAMI: Your Honor, our main concern
13 is knowing which one he decides to choose and what
14 specific area that person will be talking about. If he
15 chooses Mr. Kahn as his expert on MAGIC and we know
16 that, then we can prepare for that.

17 MR. STONE: I'll make that election right
18 now. I will choose Mr. Kahn, Ms. Zeitlich, and I will
19 leave out Dr. TRask.

20 THE COURT: Well, no. I said Trask or
21 Zeitlich.

22 MR. STONE: Right.

23 THE COURT: So you chose Trask.

24 MR. STONE: No. I chose Zeitlich.

25 THE COURT: I'm not going to let you do that.

1 I gave you the choice of Trask or Zietlich and you said
2 Trask, and then you said Trask or Kahn --

3 MR. STONE: No, I didn't, Your Honor. I'm
4 sorry if we have to read it back. I chose Mrs.
5 Zeitlich. My choices have been complicated by the fact
6 that I no longer can offer most of my documents. As a
7 result, my choices are very different than they might
8 have been earlier this morning.

9 As between Dr. Trask and Mrs. Zeitlich,
10 I choose Mrs. Zeitlich. As between Dr. TRask and
11 David Kahn, I choose David Kahn.

12 THE COURT: I'm going to give you a choice
13 between Zietlich and Kahn.

14 MR. STONE: They don't testify on any of
15 the same matters, Your HOnor. They're completely
16 exclusive.

17 THE COURT: You say about Zietlich, she
18 will testify about the same subjects as Trask.

19 MR. STONE: Yes. She will talk about the
20 documents which you have admitted just a few moments
21 ago that come out of the Army MID files. She located
22 them. She can tell you what they mean. She has been
23 an archivist, she has been a historian. She has worked
24 for the Army Historical Center since 1950. That's
25 35 years, Your HOnor. That's what she will testify

1 about.

2 She will not testify and direct her
3 attention primarily to MAGIC. It's a satellite subject
4 with her. David Lowman will testify about the cables
5 that I think are important in this case. David Kahn
6 will talk about the importance generally to World War II
7 of this series, this intelligence function. He will
8 not duplicate either of the above.

9 If I had all of my documents admissible,
10 Your Honor, I might choose differently, but I don't
11 and so I have to use the witnesses who actually handled
12 the documents which you have allowed me to put in now.
13 It won't help me to have Dr. Trask talk about documents
14 which I no longer can put in.

15 THE COURT: Well, I'm going to exclude Kahn.
16 I've given you a choice of Trask and Zeitlich. That
17 will be my ruling.

18 MR. STONE: Your Honor, may I ask that the
19 record be read back when you asked me if I could choose
20 between Trask and Zeitlich?

21 THE COURT: Well, it's not going to do you
22 any good to read it back. In light of what you've
23 said since then, I have decided -- and reading what
24 you say they're going to testify to, these three people
25 are essentially going to duplicate each other, and as

1 among the three, Kahn will have the least testimonial
2 value to me. So as between Trask and Zietlich, one or
3 the other.

4 MR. STONE: I will choose Hannah Zeitlich
5 and I will omit Dr. Trask, and if you will not also
6 let me call David Kahn, I will just have my exception.

7 THE COURT: All right. Then we'll admit
8 the testimony of Zietlich.

9 MR. STONE: No, YOur HONor. I guess I
10 didn't hear if you said omit or admit.

11 THE COURT: Frankly it's hard for me to
12 restate to you what I said, but I indicated of these
13 three people, they duplicate or triplicate each other,
14 so of the three, David Kahn is to me the least valuable.
15 So you can take your choice as between TRask and
16 Zeitlich.

17 MR. STONE: Okay, and I'll choose Zeitlich.

18 THE COURT: Did I hear you say you chose
19 Zeitlich?

20 MR. STONE: Yes.

21 THE COURT: All right. Then?

22 MR. KAWAKAMI: Your Honor, witness list
23 No. 5, 6, 12 and 13 of the Government's pre-hearing
24 order, I believe they're listed primarily for the
25 purpose of authentication of documents, and we have no

1 objection to them testifying as to authentication of
2 documents, if it is necessary, but to nothing else.

3 MR. STONE: We don't expect to call them,
4 Your Honor, because as we pointed out before, we have
5 stipulated ahead of time in an exchange of letters
6 to authentication, so I don't expect to need them.

7 THE COURT: All right.

8 MR. STONE: It would only be rebuttal of
9 something unexpected cropped up.

10 THE COURT: So 5 and 6 you will not call?

11 MR. STONE: 5 and 6, that's right.

12 THE COURT: And 12 and 13?

13 MR. STONE: That's right.

14 THE COURT: Will not call.

15 MR. STONE: That's right, Your Honor,
16 unless there is some question about the documents.

17 THE COURT: All right. Anything else?

18 MR. KAWAKAMI: No, Your Honor. I think as
19 to the other witnesses, we would reserve our right
20 after they testify as to the relevancy of their
21 testimony and so forth, but we have no objection other
22 than that to the remainder of the list.

23 THE COURT: All right. Now, anything left?
24 I know there is one question and that is the testimony
25 of Mr. Hirabayashi. Were you prepared to make an offer,

1 a specific offer?

2 MR. KAWAKAMI: Your Honor, I believe one
3 of the points related to Mr. Hirabayashi is the laches
4 argument, and he is prepared to give testimony related
5 to that.

6 THE COURT: All right. I would certainly
7 admit that, and I've been thinking about it over the
8 noon hour. I know from what was represented to me at
9 the first hearing and in newspaper reports and that
10 sort of thing about his citizenship, what he was doing
11 at the time, those things, I will admit testimony as
12 to that background material, and then as to when he
13 first became aware of certain documents.

14 MR. KAWAKAMI: That's fine, Your Honor.

15 THE COURT: Anything else?

16 MR. KAWAKAMI: No, Your Honor.

17 MR. STONE: I have something else, Your
18 Honor. You ruled this morning with respect to certain
19 documents that the problem was that there was no list
20 that was filed with the Court. You allowed me to go
21 back to the list that was filed. You also admitted
22 documents of the Petitioners which they attached as
23 attachments to their original petition but did not later
24 serve us with.

25 THE COURT: But did not what?

1 MR. STONE: Did not later again notify or
2 serve us with. At the time that the Government filed
3 its reponse last year in May, we attached an index, an
4 appendix of documents, which we reprinted, and it
5 includes 18 documents. We filed it with the Court at
6 that time. We filed the list of the index and the docu-
7 ments.

8 For the most part, they are the briefs in
9 this case of the various parties, but they also include
10 several other items which we reprinted which we again
11 ask only for the laches non-hearsay use. Since that
12 time there was a list on file with the Court; the other
13 side has gotten it. They've had the whole document
14 since last May. We would ask that any other documents
15 or the briefs in this case, whatever was in this 18-
16 document list, for the non-hearsay use, if we may have
17 that.

18 THE COURT: Any response from Petitioner?
19 I might say first that I do want to have the briefs.
20 Are they exhibits in the case?

21 MR. KAWAKAMI: Pardon me?

22 THE COURT: Are the briefs to the Supreme
23 Court or perhaps to the Circuit Court and the District
24 Court, are they going to be exhibits in the case?

25 MR. KAWAKAMI: We can make them available to

1 the Court. Not all of them were included in our exhibit
2 list.

3 THE COURT: Well, I would think that they
4 should be, that is, whatever brief was filed with the
5 District Court, with the Circuit Court, with the Supreme
6 Court, both sides, the Government and the Petitioner.

7 Now, as to the other, if these other docu-
8 ments were not listed in the March proposed order, I'm
9 not going to admit those, even though they were attached
10 to the Government's response.

11 Now, anything else?

12 MR. STONE: Yes, Your Honor. One of those
13 documents is listed in the Petitioner's list, and I had
14 understood that if they listed a witness or a document
15 it wasn't necessary for us to list it, so the one docu-
16 ment that was listed by them, I certainly hope --

17 THE COURT: You can certainly use that
18 for whatever -- is that what you mean? -- for whatever
19 advantage it might be to you.

20 MR. STONE: Well, it is a document which
21 they have now said they don't plan to use, but when they
22 filed the list they said they planned to use it.

23 THE COURT: Which one is it?

24 MR. STONE: It is on their list -- on their
25 list it is document No. 116, and on our index it was

1 document No. 12 filed last May, and we not only listed
2 but actually reproduced only the pages that we wanted
3 for non-hearsay use. It's only about twenty pages.

4 THE COURT: Is this the book, Morton
5 Grodzins'?

6 MR. STONE: "American Betrayed," that's
7 right, for the non-hearsay use.

8 THE COURT: Is the issue laches?

9 MR. STONE: The issue of laches.

10 THE COURT: All right. And you would
11 excerpt certain pages, I suppose, or what?

12 MR. STONE: Yes.

13 THE COURT: Let me hear from Petitioner.

14 MR. STONE: If I may while I'm on it, Your
15 Honor, they also listed - if I'm entitled to have it -
16 they also listed a No. 117, a document which there are
17 certain pages of which we had not previously listed
18 which we would also ask for the non-hearsay use of.

19 THE COURT: Is that on the issue of laches?

20 MR. STONE: No, but we would ask for non-
21 hearsay use of it. I have to go back and look at it
22 because I don't have those papers in front of me, so
23 I'm not able to say if it's on the issue of laches or
24 whatever.

25 THE COURT: Well, on that one, 117, let me

1 hear from you later after you've had a chance to look at
2 it. And with respect to 116, I am inclined to admit 116
3 because it was listed as one of your exhibits. I don't
4 know what it says, but if it lists certain documents
5 the went into the public domain at that time, I think it
6 does have relevance.

7 Do you want to speak to that, either of you?
8 All right. Then, I will permit the admission of 116 on
9 behalf of the Government. On 117 I will defer a ruling.

10 Now, anything else?

11 MR. HALL: YOur Honor, I have two additional
12 matters. At the hearing on the 7th of May of 1985 you
13 asked for the parties to address the issue of the scope
14 of the hearing, and while that is to some extent what
15 we've been doing, I would like for clarification, at
16 least, refer the Court to two of its rulings on prior
17 orders and find out for my mind if this is what the
18 Court intends to do.

19 THE COURT: All right.

20 MR. STONE: There is one matter that's still
21 on that sheet that I thought we were going to cover. May
22 I mention it before we get off?

23 THE COURT: Why don't we do that?

24 MR. STONE: Okay. You had reserved ruling
25 on No. 123 of their pre-hearing order, which were the

1 various exhibits including but not limited to time lines,
2 organizational charts, et cetera.

3 THE COURT: Yes. The same thing is true
4 with respect to yours.

5 MR. STONE: Well, mine are no longer useful
6 because the documents they are based on are no longer
7 admissible, so I will not have those. I have never been
8 privy to theirs so I don't know what they are. Can you
9 either give me a time by which they will be privy or
10 must I have them or something so we know when that will
11 be?

12 THE COURT: Can you show those to counsel
13 today?

14 MR. KAWAKAMI: Yes, Your Honor.

15 THE COURT: All right. Why don't you do
16 that?

17 All right. Then, Mr. Hall.

18 MR. HALL: Your Honor, at page 3 of your
19 order of May 24, 1984, you stated beginning at line 8,
20 "The evidentiary hearing will be confined to the
21 presentation of evidence bearing upon the issues as to
22 whether representatives of the Government knowingly
23 withheld material evidence from defendant and from the
24 Courts, and as to whether Petitioner was in consequence
25 denied due process at his trial or upon his appeal."

1 We would simply ask if this is still the
2 intention of the issue that the Court wishes to address
3 as opposed to, for example, the issue of military
4 necessity.

5 THE COURT: That is still my present con-
6 ception. Does the Government wish to address that?

7 MR. STONE: Yes, Your Honor. If I may just
8 explain, we don't really wish to talk about the wisdom,
9 the ultimate military necessity for curfew, but the
10 appearance of the military necessity for curfew, whether
11 that appeared to people who were acting at the time,
12 even if they were wrong in their perception of it, is
13 the quantum of whether they were acting in bad faith.

14 So while we don't want a ruling, we don't
15 plan to ask the Court in any way to go back on the
16 statement that President Ford made in 1976, that the
17 wisdom of the decision was itself something that we
18 think now was a mistake, a tragic mistake, we do have
19 to talk about whether the people at that time thought
20 they had military necessity; whether it appeared to them
21 that they had military necessity. Otherwise we can't
22 talk about whether they acted in good faith, whether
23 their file telling us to prosecute this case was empty.

24 THE COURT: I would be inclined to rule
25 with the Government on that. That is, if you introduce

1 evidence that say ONI said there is no need for it, I
2 think the Government is entitled to introduce other
3 evidence which indicated that there was a need for it.

4 MR. HALL: Except for the fact that I don't
5 believe this is a hearing where the Court is going to
6 balance who said what to whom in this sense. This is a
7 hearing in large measure to determine what was not made
8 available either to the Courts or to Mr. Hirabayashi at
9 the time of trial in the face of what representations
10 the Government was then making at the trial and to the
11 United States Supreme Court.

12 It's not a matter of exactly what the
13 Government did, but how the Government prosecuted its
14 case, and the fact that subsequent to the hearings
15 information has come out that we believe should have
16 been made available to the Court. We can't sit here
17 today and say that if this information had been made
18 available to the Court it would have changed the Court's
19 opinion. I don't think anyone can say that. But the
20 fact of the matter is, it is our position that this
21 information should have somehow been made available to
22 the Court and probably to Mr. Hirabayashi so the Court
23 would have had the benefit of it.

24 We're not going to ask the Court to balance
25 off whether or not General DeWitt had a reason to

1 believe what he did in the sense that perhaps the
2 Supreme Court argued. The Supreme Court said since, as
3 I read the Hirabayashi case that if the Commanding
4 General on the West Coast has a belief that this is
5 necessary, then who are they to argue with that.

6 The fact of the matter is our position is
7 to say that General DeWitt knew that the information
8 that he was representing in his final report was in
9 material respect false, and that this information and
10 the information which would have led the Court to a
11 realization of the falsehood should have been made
12 available to the Court and to Mr. Hirabayashi.

13 It is more than a semantic argument. We
14 don't intend to argue military necessity or that there
15 wasn't military necessity. What we intend to -- hope to
16 argue and to maintain before Your Honor is to establish
17 that the Government altered, withheld, et cetera, vital
18 information which should have been made available at
19 least to the Court in its consideration in regard to
20 Mr. Hirabayashi.

21 It is not necessarily the "what" issue.
22 It's what the Government did with regard to curfew and
23 the wisdom of the "what". I would say it's a question
24 of how the Government deported itself in connection
25 with the prosecution of Mr. Hirabayashi.

1 THE COURT: I think that I really have to
2 hear both sides of the question, so I'm going to rule
3 with the Government on this and permit them to intro-
4 duce any countervailing evidence they have.

5 MR. HALL: The next issue we have, Your
6 Honor, deals with the issue of present legal conse-
7 quences suffered by Mr. Hirabayashi. In the Government's
8 brief to the Court, it again alludes to the contention
9 that was raised that Mr. Hirabayashi has not suffered
10 sufficient adverse, present adverse legal consequences,
11 and I would like to call the Court's attention, if I
12 may, to the Court's order of April 29, 1985, at page 2,
13 paragraph 2, lines 7 through 19, where the Court states,
14 among other things: "This Court must acknowledge the
15 obvious fact of life that most criminal convictions do
16 in fact entail adverse collateral legal consequences,"
17 and continuing, "The possibility that this will be the
18 case is enough to preserve a criminal case from ending
19 in the limbo of mootness," end of the Court's citation.

20 What we're inquiring about, Your Honor, is
21 whether we need to submit more evidence on the issue of
22 present adverse legal consequences or if the Court is
23 satisfied, based upon the showing which has already
24 been made, as is inferred in the language of the Court
25 in the order I have just read, that it is not necessary

1 to take up more time with that issue.

2 THE COURT: I'm going to permit the
3 Government post-trial still to argue on that particular
4 issue. I don't know whether you need to put any more
5 evidence in. It seems to me it is more a legal matter
6 than it is evidentiary, but I will permit the Government
7 to argue that post-trial.

8 MR. STONE: Presumably to the extent that
9 we need to, if we think there is a fact relevant to
10 that, we can bring it to your attention at the time.

11 THE COURT: That will be fine.

12 Anything else, either side?

13 MR. STONE: I do have one thing, Your Honor,
14 that I would like to cover. I just want to strongly
15 object to one thing Mr. Camden Hall said. He made a
16 statement that I think is not the state of the law and
17 we will ultimately argue again, if need be.

18 THE COURT: You don't need to protest it
19 any more.

20 MR. STONE: Okay. Let me just say it in
21 one sentence and then I'll sit down. He said he doesn't
22 say -- he can't say now and he doesn't think the Court
23 has to say that whatever happened might have changed the
24 Supreme Court's opinion.

25 We understand that every coram nobis case

1 in this country with the exception of the Korematsu
2 decision issued in the Northern District of California
3 by a District Court which we think is an anomaly, every
4 other case has always said that in order to grant the
5 relief - not hold the hearing, but grant the relief, you
6 do have to make a finding it would have changed the
7 outcome of the case.

8 THE COURT: My mind is open on that. I'll
9 hear argument from both sides.

10 MR. STONE: Great! Thank you, Your Honor.

11 THE COURT: Now, anything else?

12 MR. HALL: Not to beat the horse any more,
13 but I don't believe I said "might have." I think the
14 Court knows that it might have. I don't think anybody
15 could come into court and say it would have.

16 THE COURT: Well, I'll hear argument from
17 both of you.

18 Now, anything else that we need to address
19 today? I know that we scheduled the hearing to begin,
20 as I know all of you know, Wednesday, and I think
21 probably we ought to adhere to that because -- are your
22 witnesses, the Petitioner's witnesses, scheduled for
23 Wednesday?

24 MR. HALL: Mr. Ennis is out of town and he
25 won't be arriving until noon or so tomorrow.

1 THE COURT: Then let's start Wednesday
2 morning at 9:30. I think there may be additional
3 problems that occur to you or to myself, so I would like
4 to see counsel at 9 o'clock on Wednesday in my conference
5 room, and then we'll start the hearing at 9:30.

6 MR. STONE: One matter that has been brought
7 up by the last statement, Your Honor. Because of our
8 attempt to put together the documents that we thought
9 were necessary, and also because of our desire to allow
10 depositions of all witnesses which the Petitioner came
11 and took of our expert witnesses, we did not have the
12 time to go personally and see Mr. Ennis. May we ask
13 that sometime after tomorrow noon that at least he be
14 made available to us, if he wishes to talk to us. It
15 doesn't have to be a deposition, just so that we can
16 have some advance notice of what's going on before he
17 testifies?

18 MR. HALL: What I understand Mr. Stone is
19 asking is that if Mr. Ennis can be made available, if
20 he wishes to talk to the Government, I have no objection.
21 I do have an objection otherwise because I think counsel
22 had it in his means to note up a deposition if he had
23 in fact tried to do so.

24 THE COURT: All right. Since the request
25 is that you want to speak to him to see whether he'll

1 talk to you --

2 MR. STONE: Phone number and address.

3 THE COURT: No objection to that, apparently.

4 MR. HALL: If Mr. Ennis is willing to talk
5 to the Government, I think that I am not in a position
6 to say he can't.

7 THE COURT: That's fine. That we will
8 adjourn until Wednesday morning at 9:30 in this court-
9 room, but 9 o'clock in my chambers.

10 (After adjournment, the Court
11 reconvened and the following
proceedings occurred:)

12 MR. HALL: Sorry to trouble the Court, but
13 we have a problem.

14 Mr. Lowman, about whom some comments were
15 made earlier, I understand lives in Hawaii, and when the
16 Court ordered that Mr. Lowman's deposition be taken, we
17 tried to make arrangements to take his deposition in
18 Hawaii but ran into some problems with regard to airline
19 flights.

20 As I understand it, and I wasn't involved
21 in the discussions, but counsel stated that he would
22 make Mr. Lowman available sometime after the 16th in
23 Seattle because Mr. Lowman was going to be arriving in
24 Seattle on the 16th. Counsel has now said he will make
25 Mr. Lowman available at 7:30 tomorrow night for a

1 deposition, and I submit most respectfully, Your Honor,
2 that that is late and it is also not convenient for me.
3 I'm going to be taking Mr. Lowman's cross-examination.
4 While I will not necessarily be taking his deposition,
5 I would be present at the deposition, and I would request
6 that Mr. Lowman's deposition be done possibly this
7 afternoon or tomorrow morning, or if absolutely
8 necessary, early tomorrow afternoon, but not at 7:30
9 tomorrow night.

10 THE COURT: All right. Let me hear from
11 counsel.

12 MR. STONE: Your Honor, I have at least
13 four objections to that arrangement. The first is
14 the facts were not stated accurately. We offered to
15 make Mr. Lowman available, which, by the way, was
16 ordered on an ex parte basis when he was described as
17 a non-expert. We offered to make him available in
18 Hawaii and we gave several dates, and my associate who
19 is sitting here, had the airline tickets, and we were
20 led to believe that an attorney would be there if we
21 wanted to take it. In fact, it was scheduled and the
22 taking of it was called off in my presence by Mr. Leong
23 when it was already scheduled way in advance of our
24 having to rush right here and prepare.

25 THE COURT: Where is Mr. Lowman now?

1 MR. STONE: I don't know if he's in his hotel
2 or if he's with his wife walking around town.

3 THE COURT: But he is here?

4 MR. STONE: I believe he's in town.

5 Now, what I have said to them is because I
6 don't know how much is left of my case, I must spend
7 this afternoon, this evening and tomorrow morning
8 figuring out how much is left that Mr. Lowman can
9 testify about. Therefore, not until tomorrow after
10 dinner am I available to at least talk to Mr. Lowman
11 and also pick my own time to be able to sit in that
12 deposition and be there for it.

13 Now, Mr. Hall has said he's not available,
14 but he's got a phone number, he's got two associates
15 who took all of the other depositions in the case. Mr.
16 Hall not not, as far as I know, at one. He has already
17 said he would probably not be asking questions. Unless
18 Mr. Leong and Mr. Kawakami are both unavailable, given
19 the fact that I have to reassess what is admissible and
20 the fact that I don't believe in the first place they're
21 entitled to depose my expert, which I have never been
22 given an opportunity to answer. In fact, I would like
23 to say for the record that I was very offended that no
24 one even tried to make a conference call or call the
25 local U.S. Attorney's office and find out what to do

1 with it, because we had an understanding that was stated
2 in the May 1984 hearing that if there was any urgent
3 ruling, the local U.S. Attorney's office would be
4 called or it would be done by conference call.

5 I was never called. In fact, I was not
6 subsequently notified by the Clerk of this Court that
7 it had been ordered until I got a letter a whole week
8 later, and then we ran around and we did get airplane
9 reservations which on Mr. Leong's representation we
10 cancelled.

11 Now, we're going to be very busy until
12 tomorrow evening, both Mr. Edwards and myself, and it
13 would be inconvenient -- I'm not sure I can get Mr.
14 Lowman -- but it would be an inconvenience before
15 tomorrow any time after dinner.

16 THE COURT: Let me ask counsel for Petitioner
17 how many days do you think this case will take?

18 MR. KAWAKAMI: One.

19 THE COURT: One?

20 MR. HALL. One. Maybe one and a half.
21 Certainly not more than that. Most of our case we
22 thought would be taken up with the introduction and
23 offering of exhibits. That has been essentially done.
24 I think the oral testimony will be fairly short and to
25 the point, assuming cross-examination isn't too

1 prolonged.

2 THE COURT: All right. Now, let me just ask
3 about tomorrow afternoon on this deposition, say late in
4 the afternoon, say 3 o'clock. Is that convenient, Mr.
5 Stone?

6 MR. STONE: Well, I can only say, Your Honor,
7 that they asked me what was convenient, and I don't find
8 it convenient before, having at least a full work day
9 to figure out what I have left. It is not convenient
10 for me before that time.

11 THE COURT: All right.

12 MR. STONE: They did set a date which they
13 decided --

14 THE COURT: Well, let's go from there. Why
15 don't we do this? Why don't we plan on taking his
16 deposition after the Petitioner has put in his case, and
17 then I think counsel should be able to work out a con-
18 venient time. If it takes one day, only one day, to put
19 in the Petitioner's case, then we could take that
20 deposition starting Thursday morning. If the case takes
21 a day and a half, perhaps Thursday afternoon. How does
22 that sound, Mr. Stone?

23 MR. STONE: That's fine, Your Honor.

24 THE COURT: Mr. Hall?

25 MR. HALL: Fine, Your Honor.

1 THE COURT: All right. So instead of taking
2 it tomorrow evening, we'll work on it after the
3 Petitioner has put in his case.

4 MR. STONE: With regard to us actually
5 marking exhibits, we are sort of in a quandary. We've
6 gotten stickers that say "Defendant's" exhibits but we
7 are not the defendants. On the other hand, the Clerk's
8 office said they had no "Respondent's" exhibits. I
9 think probably they have "Plaintiff's" exhibits, but
10 then you'll have Petitioner's Exhibits and Plaintiff's.
11 Is that okay, or would you like --

12 THE COURT: Let me just ask the clerk,
13 are they marked Plaintiff's and Defendant's.

14 THE CLERK: Yes, Judge, they are.

15 THE COURT: Because that's the way they're
16 printed. Let's put them in that way. We'll understand
17 that the Plaintiff is the Petitioner; Defendant is
18 Respondent.

19 MR. STONE: Okay. Maybe we'll try and mark
20 through them with a pen.

21 THE COURT: That will be fine.

22 MR. STONE: I don't want to confuse the issue
23 more than it is, Your Honor.

24 THE COURT: All right. Anything further.
25 I'll see you then at 9 o'clock in my chambers.

(Court adjourned.)