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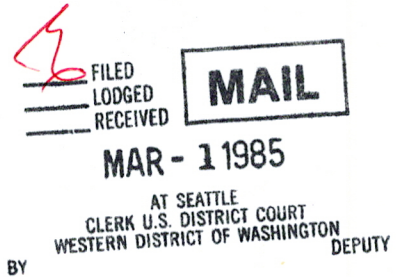
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CC TO JUDGE ~~JUDGE VOORHEES~~

NOTE ON MOTION CALENDAR:
MARCH 22, 1985

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

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

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

GOVERNMENT'S MEMORANDUM OF LAW IN SUPPORT
OF ITS ALTERNATIVE MOTION FOR A STAY

The United States, by Victor D. Stone, has moved for a stay of the proceedings in this case pending final appellate disposition of Yasui v. United States, app. pending (9th Cir. No. 84-3730) and in support thereof states the following reasons:

1. Resolution of all of the petitioner's allegations will require a difficult historical inquiry into the contents and distribution of World War II intelligence information, including the Magic cables. The Commission on

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1 Wartime Relocation and Internment of Civilians (hereinafter
2 "Commission") expended three years and \$1½ million.
3 Nevertheless, at a recent Congressional hearing, the Chief
4 Historian of the U.S. Army Center of Military History
5 stated:

6 * * * ... I cannot accept the historical
7 information and conclusions offered in
8 [the Commission's] report as
9 authoritative from the viewpoint of a
10 professional historian. * * * ... the
11 purpose of the report does not seem to
12 have been to present an historical
13 account that meets professional
14 standards, but rather, to argue the best
15 possible case for the victims of
16 Government actions in 1942. I have no
17 quarrel with those who prepared this
18 brief. I simply am unable to certify
19 this brief as a credible piece of
20 history. It simply doesn't measure up
21 to professional standards.
22 Unfortunately, a good brief may be poor
23 history, and poor history might make a
24 good brief.

25 Hearings on Japanese-American and Aleutian Wartime
26 Relocation and H.R. 3387, H.R. 4110 and H.R. 4322, 98th
27 Cong., 2nd Sess., Serial No. 90 (1985) at pp. 79-81,
28 hereinafter referred to as "1984 Cong. Hearing," a copy of
29 which we are lodging with the district court clerk's office.

30 That Congressional subcommittee has published a 989
31 page volume of hearings (1984 Cong. Hearings). Other
32 Congressional committees have also taken testimony (see 1984
33 Cong. Hearings, p. 708-709). As we have shown in the
34 Government's Proposed Prehearing Order, pp. 15-21, the
35 evidence before the Congressional subcommittee substantially
36 overlaps the evidence likely to be introduced at any hearing
37 in this case. Moreover, petitioner's affiant John A. Herzig

1 offered evidence at the Congressional hearing that there
2 were perhaps 38,000 World War II Magic intercepts and
3 several hundred thousand additional intercepted messages
4 from all sources (1984 Cong. Hearings, pp. 851, 857). In
5 sum, the Court must be particularly circumspect in embarking
6 upon evidentiary hearings in this area since it is
7 historically difficult and overlaps into an area of current
8 Congressional concern.

9 As we pointed out in our May 1984 Supplemental Points
10 and Authorities at pp. 12-15, this Court is not a "roving
11 commission." See Laird v. Tatum, 408 U.S. 13-15 & fn. 7
12 (1972) (Article III courts are not the forum for broad scale
13 investigations employing the subpoena power of federal
14 district court to probe into the Army's intelligence
15 gathering activities so that a litigant may seek redress for
16 injuries done to others.) Nor is historical review the
17 function of this or any other court. Valley Forge College
18 v. Americans United, 454 U.S. 464, 483-487 (1982) (the
19 federal courts were "not constituted as ombudsmen of the
20 general welfare"). Rather, it is uniquely the job of
21 Congress -- which continues to have "Japanese redress" bills
22 before it, see e.g., H.R. 442, 99th Cong., 1st Sess. (1985)
23 -- and not the courts to create commissions and redress
24 complaints of this sort. United States v. Sioux Nation of
25 Indians, 448 U.S. 371, 397, 401 (1980) (Congress has the
26 power to recognize and pay moral or honorary debts, although
27 the debt could obtain no recognition in a court of law);
28

1 Glidden v. Zdanok, 370 U.S. 530, 566-567 (1962) (same);
2 United States v. Realty Co., 163 U.S. 427, 440 (1896) (The
3 power of Congress extends to claims growing "out of general
4 privileges of right and justice" and based upon a moral or
5 honorary nature "although the debt could obtain no
6 recognition in a court of law.*** To no other branch of the
7 government than Congress could any application be
8 successfully made . . .").

9 2. This is the only legal action in which a factual
10 hearing into these allegations has been ordered. Indeed,
11 the order of a district court denying such a hearing is
12 pending appeal. See Yasui v. United States, app. pending
13 (9th Cir. No. 84-3730). See also, Hohri v. United States,
14 586 F. Supp. 769 (D.D.C. 1984), app. pending (D.C. Cir. No.
15 84-5460) (Civil damage suit dismissed without a hearing on
16 limitations grounds.) Since appellate guidance,
17 particularly Ninth Circuit guidance, will be forthcoming,
18 there is no reason for this Court to expedite a hearing in
19 the interim.

20 Resolution of the Yasui appeal (the appellate briefs
21 from which we are attaching herewith) should be especially
22 helpful. In that case, the government has relied upon very
23 similar Rule 48(a) and jurisdictional arguments proffered to
24 but either rejected by or deferred by this Court.
25 Consequently, if either the government's Rule 48(a)
26 dismissal power or the government's various jurisdictional
27 arguments are resolved in the government's favor in the
28

1 Yasui case, that would have nullified all the exceptional
2 effort and expense that had, in the interim, gone into an
3 evidentiary hearing in this case. On the other hand, if the
4 outcome of the Yasui appeal is that a hearing should be held
5 there, any hearing held in this case will occur in
6 approximately the same time frame as the hearing held in
7 that case, and given the forty year age of the case, will
8 not be substantially affected by the additional delay.

9 When on May 18, 1984 the government indicated to this
10 Court that it might appeal the order to hold a hearing,
11 petitioner's counsel stated that "the only problem" was that
12 preservation depositions should be taken in case elderly
13 witnesses should die (Tr. 107:line 23 - Tr. 108:line 6).
14 Not only did that consideration not move this Court to order
15 such preservation depositions, but the transcribed record of
16 the Commission and the published record of the Congressional
17 hearings now preserves in at least two places the testimony
18 of the elderly witnesses, i.e., McCloy, Bendetson, and Ennis
19 (see 1984 Cong. Hearings, pp. 117-151, 658-699). Not only
20 does the 1984 testimony show that these elderly witnesses
21 already have only very dim and probably only marginally
22 useful recollections of the key events (Ennis stated that in
23 the intervening forty years he forgot about his own internal
24 memoranda, 1984 Cong. Hearings, p. 661), but it also reveals
25 the stress of testifying to which these elderly witnesses
26 have already been subjected (McCloy: Every time I tried to
27 say anything [to the Commission] in favor of the United
28

States or in favor of the President of the United States, there were hisses and boos and stomping of feet . . . , 1984 Cong. Hearings, p. 125; Bendetsen (same), id. at p. 683).

In sum, in the event that this Court is not disposed to grant the government's renewed motion to dismiss but rather desires to defer ruling on the government's three jurisdictional objections at this time, then this Court should also defer holding such a burdensome hearing until the Ninth Circuit has ruled on the government's legal objections, and thereby grant the government at least that modicum of partial relief.

3. The June 1985 date for the hearing is inconvenient for other reasons as well.

a. Both at the May 18, 1984 hearing (Tr. 115) and again in petitioner's January 31, 1985 memorandum (in opposition to respondent's motion for extension of time), petitioner has stated "CAMDEN HALL, one of Petitioner's lead counsel, has a trial schedule conflict in June." (Id.) Another of petitioner's recent pleadings (1/24/85 Motion to Substitute Counsel) states that petitioner's other lead counsel in the case, Kathryn Bannai has now moved the Court for permission to withdraw as counsel of record since she no longer has a sufficient "amount of time ... to devote to the duties as counsel of record in this case." (1/24/85 Bannai Aff. p. 1, ¶ 2 & 3). Consequently, neither of petitioner's lead counsel who spoke in his behalf at the May 1984 hearing would be available to him in June.

1 b. In addition, petitioner has stated in his
2 January 31, 1985 memorandum that a postponement of the June
3 hearing date is appropriate given the complexity of this
4 historical inquiry and that "Justice demands that a fair
5 hearing will be preceded by a fair opportunity to prepare
6 for that hearing" (Petitioner's January 31, 1985 memorandum
7 at p. 5). Consequently, petitioner has requested that "the
8 date set for the evidentiary hearing be extended to
September 1985" (id. at p. 4).

9 We submit that it would indeed be unfortunate if after
10 waiting forty years, a hearing was held over petitioner's
11 objection that he did not get "a fair opportunity to prepare
12 for that hearing." Since a stay of the June 1985 hearing
13 date could alleviate this as well as the unavailability
14 problem of Camden Hall, these are further reasons to set off
15 the June 1985 hearing date.

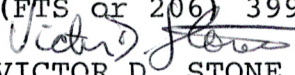
16 4. Since petitioner has previously moved this Court to
17 continue the June 1985 hearing until September 1985, and
18 since by that time the Yasui appeal should be nearing
19 resolution of many of the same legal issues both parties
20 have raised here, the government respectfully submits in
21 light of all the above considerations (the circumspection
22 this matter deserves, the unresolved jurisdictional issues
23 which the government has raised, and petitioner's objections
24 to a June hearing) that a stay of the June 1985 hearing date
25 pending final disposition of the Yasui case is both
26 appropriate and warranted.
27
28

For the foregoing reasons, the Court should grant
respondent's motion for a stay.

Respectfully submitted,

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