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MARCH 7, 1986

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MAR 3 1986

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

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

No. C83-122V

GOVERNMENT'S RESPONSE TO
PETITIONER'S MOTION TO
RECONSIDER

Comes now Victor D. Stone, attorney for respondent United States, and opposes petitioner's motion to reconsider. Much of petitioner's supporting arguments merely restate old arguments to which we have previously briefed our opposition and upon which we rely here. Our additional comments follow.

1. Petitioner's motion (pp. 4:9 - 5:5) quotes from the Government's 1943 Supreme Court brief and alleges that "the government argued and the Supreme Court accepted that curfew was one of the first early steps in the evacuation" (Pet. Mot. 5:3-5,

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1 and 8:2-3) and "that curfew was a necessary element of
2 evacuation" (Pet. Mot. 4:9-10).

3 Petitioner's quotations are out of context and his
4 allegation about what the Government argued is erroneous.

5 This same 1943 Government brief (at p. 44 n.63) raised the
6 concurrent sentence doctrine and took the position that "if the
7 conviction was proper on either count, it would be unnecessary to
8 consider the other count." The Government could not have taken
9 this position -- that the curfew conviction need not be addressed
10 -- if, as petitioner erroneously suggests, the Government was
11 urging "that curfew was a necessary element of evacuation."

12 To the contrary, we submit that the government never argued
13 "that curfew was a necessary element of evacuation." Petitioner
14 quotes from a footnote in the Government's 1943 brief (at p. 40
15 n.60), which in turn quotes H. Rep. No. 1906, 77th Cong., 2d
16 Sess., p. 2. We submit that petitioner misreads the quoted
17 House report. We read it to show that Congress clearly
18 understood that two distinct types of activities, a curfew and
19 evacuation, were contemplated and that each would be ineffective
20 without some kind of penalty provision. Indeed, the "as well as"
21 language quoted (Pet. Mot. at 4:19) supports our interpretation.

22 Moreover, the final sentence of the same paragraph of text
23 on p. 40 of the Government's 1943 brief emphasizes that the
24 curfew was clearly not a necessary element of or one of the first
25 early steps in the evacuation. Referring to the "common
26 understanding" in 1942 of Public Law 77-503, the Government

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1 quoted (at p. 40 n.61) the Chairman of the Senate Military
2 Affairs Committee on the floor of the Senate as follows:

3 "It is my understanding that in order to carry out
4 the objectives of the Proclamation, and thus keep clear
5 the military areas which have been defined by General
6 DeWitt, the commander of the western area, we are asked
7 to provide the department with authority to keep
8 certain individuals from entering or leaving military
9 zones, or not complying with any of the curfew laws, or
10 any regulations which might be established within those
11 zones" (Cong. Rec., Vol. 88, part 2, pp. 2722-2726).
12 (Emphasis added.)

13 The term "or," underlined above, would not have been used
14 and the entire quotation would not logically have appeared in the
15 Government's brief if the Government was urging "that curfew was
16 a necessary element of evacuation," as petitioner erroneously
17 suggests.

18 We also point out that as a historical matter, it is absurd
19 to argue that the curfew had no purpose except as a constituent
20 part of the Japanese American evacuation plan. From its
21 inception, the curfew applied to German and Italian aliens who
22 were never ordered to evacuate. Moreover, the curfew applied to
23 Italian aliens until October 19, 1942 (Ex. 4, p. 307) and German
24 aliens until the curfew was repealed on December 24, 1942 (id.),
25 months after the evacuation of the Japanese from the West Coast
26 was completed.

2. Petitioner argues (Pet. Mot. 3:23-26) that the
Government's Supreme Court arguments -- about the threat of
espionage and sabotage, the fact that time was of the essence,
and the fact that loyal and disloyal Japanese could not be

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1 separated immediately -- were contrary to the suppressed
2 evidence.

3 This is inaccurate. Not only did the declassified military
4 documents placed in evidence at the 1985 hearing show that
5 threats of espionage and sabotage were considered serious, but
6 Edward Ennis testified that holding even 5,000 loyalty hearings
7 would have taken "at least a year" (Tr. 275), and could not be
8 done immediately. This Court only found that General DeWitt's
9 personal views -- that loyal and disloyal Japanese could not be
10 separated either immediately or after a reasonable period of time
11 -- were suppressed. The official justification presented to the
12 Supreme Court in the government's 1943 supplemental memorandum
13 was that "in the circumstances" hearings were "not available to
14 solve the problem which confronted the county" or were
15 "reasonably thought to be unavailable . . ." (Ex. 131). That
16 justification is not inconsistent with General DeWitt's beliefs
17 and actions in the Spring of 1942. All the parties and the
18 Supreme Court were well aware of General's DeWitt's personal
19 views regarding not just the necessity for an immediate
20 evacuation, but regarding the necessity in 1943 for continuing
21 the exclusion. DeWitt's personal views clearly went farther than
22 necessary in the Spring of 1942 and farther than DeWitt's
23 military superiors (including the President) would endorse or
24 permit. But DeWitt's more extreme 1943 statements are
25 irrelevant. It is critical to note that there is no
26

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1 evidence that in 1942 General DeWitt privately believed that
2 there was no threat of espionage and sabotage, or that he was not
3 presented with a war emergency, or that loyal and disloyal
4 Japanese could be separated immediately. Consequently, these
5 three Government arguments (about which petitioner complains)
6 were supported by the evidence and were not "precluded" or
7 "refuted" (as alleged in the original petition) by anything which
8 this Court has found was suppressed.

9 3. Citing the original Hirabayashi opinion (320 U.S. at
10 103), petitioner relies on the statement that "the [Presidential]
11 Executive Order, the Proclamations [of General DeWitt] and the
12 [Congressional] statute are not to be read in isolation from each
13 other. They are parts of a single program and must be judged as
14 such." (Pet. Mot. 4:3-6.) We understand this Supreme Court
15 language to mean that neither the curfew orders nor the
16 evacuation orders should be judged only upon General DeWitt's
17 justifications without also considering the President's and the
18 Congress' justifications. This concurs exactly with our
19 view (Gov't. Pet. for Reconsideration, pp. 9-10) and underscores
20 the lack of dispositive importance attached to General DeWitt's
21 personal views by the 1943 Supreme Court.

22 4. Petitioner contends that the suppression of evidence
23 relating to the threat of espionage and sabotage "prejudiced
24 Petitioner's ability to present a defense" and "deprived him of
25 his constitutional rights to a fair trial" since the "suppressed
26

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1 evidence would have constituted the heart of Petitioner's defense
2 against the indictment." (Pet. Mot. 7:1-5.)

3 The record before this Court does not bear out this
4 assertion. Petitioner never made a fact oriented defense.
5 Instead he based his defense on issues of constitutional law.

6 The 1942 district court opinion in this case stated that
7 petitioner never sought to contest any factual issues at trial
8 (46 F. Supp. at 658-659):

9 The defendant, after filing an original demurrer,
10 later, pursuant to court permission, interposed an
11 amended demurrer to each such count of the indictment
12 upon the grounds that the orders and proclamations
13 involved are unconstitutional by virtue of being in
14 violation of the Fifth Amendment and of Article 4,
15 Section 2, Clause 1, of the Constitution of the United
16 States, and also are not authorized by Executive Order
17 of the President or by any valid legislative act or law
18 of Congress.

14 * * * *

15 The matter was presented to the court after oral
16 argument supplementing very extensive briefs which in
17 the aggregate cited about one hundred thirty court
18 decisions and several tests. It is obvious that no
19 analysis of such a mass of citations can be here
20 indulged in without most tediously extending this
21 opinion.

22 In substance and effect the defendant's position
23 is that regardless of how critical the war perils, of
24 how necessary and vital the military area, and of how
25 essential to American success in this conflict the
26 curfew provisions and evacuation orders applicable to
those of Japanese ancestry in such military area, may
be that the armed forces of this country and our
government are absolutely helpless to make or enforce
any such curfew provisions or exclusion orders until a
Constitutional amendment has been proposed, voted by
both houses of Congress, and finally adopted by
three-fourths of the states.

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1 Moreover, the summary of the trial evidence which petitioner
2 prepared and filed as his 1942 district court Bill of Exceptions
3 (the original is in this Court's 1942 file -- it is reprinted in
4 the 1943 Supreme Court transcript of record) also shows that
5 petitioner did not seek to develop any facts at trial.
6 Petitioner's Bill of Exceptions shows that the Government called
7 as a witness Captain Michael Revisto, officer of the U.S. Army in
8 Charge of Japanese Evacuation in Seattle under Lt. Genl. J.L.
9 DeWitt (original fol. 56, Sup. Ct. Record p. 33). Captain
10 Revisto was a G-2 intelligence officer (Tr. 804:1-3).
11 Nevertheless, the appellate record petitioner preserved does not
12 indicate that petitioner even sought to elicit any intelligence
13 information from Captain Revisto supporting or contradicting the
14 military necessity for the curfew or evacuation.

15 Finally, upon review, even the Supreme Court took note that
16 petitioner was not even attempting to challenge the factual basis
17 for the decision, stating (320 U.S. at 99) that petitioner "does
18 not deny that, given the danger, a curfew was an appropriate
19 measure against sabotage."

20 In sum, petitioner's hindsight determination that the
21 Government's action in 1942 thwarted a defense which "would have
22 constituted the heart of petitioner's defense" is flatly
23 contradicted by the original 1942 and 1943 record.
24
25
26


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1 For all the above stated reasons, and those contained in our
2 earlier pleadings, we submit that petitioner's motion for
3 reconsideration is not well founded and should be denied.

4 Respectfully submitted,

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