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3-18-1985

## Memorandum in Opposition to Government's Renewed Motion to Dismiss or in the Alternative, for a Stay

United States District Court Western District of Washington

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CC TO JUDGE \_\_\_\_\_

Honorable Donald S. Voorhees  
March 22, 1985

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FILED \_\_\_\_\_ ENTERED \_\_\_\_\_  
LODGED \_\_\_\_\_ RECEIVED \_\_\_\_\_

MAR 18 1985

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

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

GORDON K. HIRABAYASHI, )

Petitioner, )

vs. )

UNITED STATES OF AMERICA, )

Respondent. )

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

MEMORANDUM IN OPPOSITION TO  
GOVERNMENT'S RENEWED MOTION TO DISMISS,  
OR IN THE ALTERNATIVE, FOR A STAY

INTRODUCTION

Petitioner, by and through his attorneys, hereby files this Memorandum in Opposition to Government's Renewed Motion to Dismiss, or in the Alternative, for a Stay. The Government has cited no new relevant case law or presented any new arguments in support of its Renewed Motion to Dismiss or in the Alternative, for a Stay ("Motion"). Instead, the Government has restated arguments which are in its earlier pleadings and which have been previously addressed by this Court.

Petitioner, GORDON K. HIRABAYASHI, requests that the Court deny the Government's Alternative Motion for a Stay.

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MEMORANDUM IN OPPOSITION TO GOVERNMENT'S  
RENEWED MOTION TO DISMISS, OR IN THE  
ALTERNATIVE, FOR A STAY - 1

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1 MR. HIRABAYASHI and his attorneys will be prepared for the evi-  
2 dentiary hearing scheduled for June 17, 1985. Petitioner desires  
3 to proceed with the evidentiary hearing noted for June 17, 1985  
4 and opposes any stay in proceedings.

5 This Memorandum will respond to those arguments in the  
6 same order as they are raised in the Motion.

7 I. GOVERNMENT'S RENEWED MOTION TO DISMISS SHOULD BE  
8 DENIED.

9 A. JURISDICTIONAL REQUIREMENTS FOR CORAM NOBIS  
10 RELIEF HAVE BEEN SATISFIED.

11 1. Present adverse legal consequences. The  
12 Government argues that the "case or controversy" requirement of  
13 Article III of the Constitution of the United States has not been  
14 satisfied because Petitioner has failed to demonstrate the  
15 existence of present adverse legal consequences flowing from his  
16 convictions. The Government misconstrues the burden of proof re-  
17 quired in making such a showing. Petitioner has cited Sibron v.  
18 New York, 392 U.S. 40 (1968) and its progeny for the proposition  
19 that collateral legal consequences are presumed to exist and that  
20 burden of overcoming this presumption is borne by the  
21 Government. (See Petitioner's Reply to Government's Supplemental  
22 Points and Authorities ("Reply"), pages 4, 5 and 6.) The Govern-  
23 ment has failed to show there is no possibility of collateral  
24 legal consequences. This Court has already ruled that collateral  
25 consequences exist. (May 18, 1984, Tr. 99.)

26 The Government cites Lane v. Williams, 455 U.S. 624  
27 (1982), in support of its argument that collateral review of a

28 MEMORANDUM IN OPPOSITION TO GOVERNMENT'S  
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1 final judgment is not warranted unless the complainant suffers  
2 actual harm from the judgment that he seeks to avoid. The  
3 Court's decision in Lane requires a close reading. In that case  
4 the respondents challenged their mandatory parole requirements,  
5 not their underlying convictions or sentences. In its decision,  
6 the Court narrowly construed the Illinois statute and distin-  
7 guished collateral legal consequences attached to parole viola-  
8 tions from those which attach to convictions. Furthermore, the  
9 Court deliberately limited its holding to those facts. Id., at  
10 632. (See Reply, pages 6 and 7.)

11                   2. Laches. The Government argues that Peti-  
12 tioner is barred from seeking relief under a Writ of Coram Nobis  
13 because of laches. As part of its argument, the Government cites  
14 Maghe v. U.S., 710 F.2d 503 (9th Cir., 1983) (cert. denied),  
15 --U.S.--, 103 S.Ct. 3549, 77 L.Ed. 1396, (June 1983). As the  
16 Government correctly states, the petitioner in that case was  
17 denied relief because of his failure to present "sound reasons"  
18 justifying the delay in seeking relief. However, a review of the  
19 reasons presented and the Court's analysis are clearly distin-  
20 guishable from this proceeding. In Maghe the Court reasoned that  
21 petitioner knew the nature of and reasons for his undesirable  
22 discharge from the Army and that he had the ability to bring his  
23 petition in 1956. In this proceeding, Petitioner has had no op-  
24 portunity or ability to challenge his conviction until the docu-  
25 ments upon which he now relies were discovered. In fact, key  
26 documents to this proceeding were not available to Petitioner  
27 ////

28 MEMORANDUM IN OPPOSITION TO GOVERNMENT'S  
RENEWED MOTION TO DISMISS, OR IN THE  
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1 until 1982. (See Hohri v. U.S., 586 F.Supp. 769, 789 (D.C.D.  
2 1984). app. pending. (D.C. Cir. No. 84-5460).)

3 3. Error of fundamental character. Though  
4 the Government argues that there has been no showing of error "of  
5 the most fundamental character," Petitioner has previously  
6 addressed this argument. (See Reply, pages 18 through 22.)

7 II. GOVERNMENT'S MOTION FOR A STAY SHOULD BE DENIED.

8 A. THE GOVERNMENT SHOULD NOT BE GRANTED A STAY  
9 PENDING FINAL DISPOSITION OF THE PENDING AP-  
10 PELLATE PROCEEDINGS IN YASUI V. UNITED  
11 STATES AND HOHRI V. UNITED STATES BECAUSE  
12 THE ISSUES ON THOSE APPEALS ARE NOT RELEVANT  
13 TO THE EVIDENTIARY HEARINGS IN THIS PROCEEDING.

14 The Government requested that the Court Clerk lodge the  
15 appellate briefs in Yasui v. United States, (9th Cir. No. 84-  
16 3730), by letter dated February 28, 1985. Those briefs clearly  
17 show that the issues in the Yasui appeal are: (1) whether the  
18 Court had authority to grant the Government's motion under Rule  
19 48(a); (2) whether the Court erred in granting the Government's  
20 motion; (3) whether there existed a case or controversy; and  
21 (4) whether Yasui was entitled to a hearing on his petition for a  
22 Writ of Error Coram Nobis. These identical issues were resolved  
23 in Petitioner HIRABAYASHI's favor by this Court in its oral opin-  
24 ion rendered on May 18, 1984 and its Order dated May 24, 1984.

25 Hohri v. United States, supra, is distinguishable in  
26 that Hohri is a civil action seeking damages arising out of the

27 ////

28 MEMORANDUM IN OPPOSITION TO GOVERNMENT'S  
RENEWED MOTION TO DISMISS, OR IN THE  
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1 wartime internment of Japanese-Americans unlike this coram nobis  
2 petition which seeks vacation of a conviction. The Court in  
3 Hohri, id. at 790, specifically distinguished its ruling from the  
4 ruling rendered by Judge Patel in the coram nobis petition in  
5 Korematsu v. United States, No. 27635-W (N.D. Cal. Nov. 14,  
6 1983).

7 The evidentiary hearing in this matter was discussed at  
8 length and scheduled eight months ago following the May 18, 1984  
9 hearing. (Tr. 109: line 3 - Tr. 120: line 24.) As indicated in  
10 the remarks of Mr. Stone, it is preferable that this matter be  
11 heard on consecutive days without interruption (Tr. 111: lines 3-  
12 9). If it will continue to be difficult to obtain a trial date  
13 which allows for two consecutive weeks of trial, we have a  
14 special concern that the granting of a stay will result in a  
15 substantial delay.

16 Even assuming the Yasui and Hohri cases would have a  
17 potential impact on the scheduled hearing, it is uncertain when  
18 the Courts of Appeals in those cases will render their decisions  
19 and whether those decisions will be appealed to the United States  
20 Supreme Court. It is evident that a final adjudication on the  
21 appeals could be years away.

22 III. THE UNITED STATES CONGRESS IS NOT EMPOWERED TO  
23 GRANT THE RELIEF SOUGHT BY PETITIONER FOR VIOLA-  
24 TION OF DUE PROCESS.

25 The Government should not be granted their request for a  
26 stay for their cited reason that the evidentiary hearings would  
27 be "historically difficult and overlaps into an area of current

28 MEMORANDUM IN OPPOSITION TO GOVERNMENT'S  
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1 Congressional concern." (Government's Memorandum of Law in  
2 Support of its Alternative Motion for a Stay, at p. 3.) However,  
3 we are requesting relief for violation of due process that only  
4 the Court can grant. Action by Congress, if any, cannot give  
5 Petitioner the relief sought by the coram nobis Petition.

6 The Government cites the Hearings on Japanese-Americans  
7 and Aleutian Wartime Relocation and H.R. 3387, H.R. 4110 and  
8 H.R. 4322, 98th Cong. (2nd Sess., Serial No. 90 (1984)), herein-  
9 after referred to as "1984 Cong. Hearing." It is unclear why the  
10 Government cites these hearings as a basis for a request for  
11 stay.

12 In our view, the Congressional hearings are not relevant  
13 to this proceeding. The purpose of the hearings, in the words of  
14 Congressman Sam B. Hall, chairman of the Judiciary subcommittee  
15 responsible for convening the hearings, "is to objectively  
16 examine the recommendations of the Commission [Commission on  
17 Wartime Relocation and Internment of Civilians] regarding the  
18 American citizens and aliens of Japanese ancestry and regarding  
19 the Aleuts." (See 1984 Cong. Hearings, p. 3). Prompting the  
20 hearings were bills H.R. 4110, H.R. 4322 and H.R. 3387, which  
21 seek the enactment of legislation to remedy civil wrongs against  
22 Japanese-Americans and Aleutians (See 1984 Cong. Hearings, p. 1).

23 The record of the Hearings filed with this Court by  
24 Mr. Stone indicate that the testimonies were largely by prepared  
25 statement and were not under oath. Moreover, the testimonies  
26 were not subject to cross-examination by Petitioner. As a  
27 ////

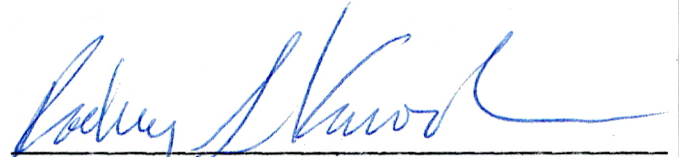
28 MEMORANDUM IN OPPOSITION TO GOVERNMENT'S  
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1 result, Petitioner continues to be faced with the increased  
2 probability that witnesses will become unavailable.

3 For the foregoing reasons, Petitioner opposes the  
4 granting of a stay in the proceedings.

5 DATED this 19<sup>th</sup> day of March, 1985.

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9 RODNEY L. KAWAKAMI  
10 Attorney for Petitioner  
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MEMORANDUM IN OPPOSITION TO GOVERNMENT'S  
RENEWED MOTION TO DISMISS, OR IN THE  
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