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Memorandum in Support of Petitioner's Motion for Reconsideration

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JUDGE DONALD S. VOORHEES
March 7, 1986

CC TO JUDGE _____

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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

MEMORANDUM IN SUPPORT OF
PETITIONER'S MOTION FOR
RECONSIDERATION; ORAL
ARGUMENT REQUESTED

I.
INTRODUCTION

Petitioner respectfully requests that the Court reconsider its denial of the vacation of Count II of the indictment. Petitioner believes the reasons which warrant such reconsideration include: the evidence which the Government concealed from the Supreme Court directly bore on the issue of the military considerations for the issuance of the curfew order; the concealed evidence contravened the justifications presented by the Government to the Supreme Court in support of the curfew order; the Supreme Court ruled on the validity of the curfew order based upon Government assertions justifying the curfew order; the Government concealment of evidence prejudiced

MEMORANDUM IN SUPPORT OF
PETITIONER'S MOTION FOR
RECONSIDERATION; ORAL
ARGUMENT REQUESTED - 1

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137

1 Petitioner's case; and the Supreme Court would not have affirmed
2 Petitioner's conviction on Count II had the Government not con-
3 cealed evidence from the Supreme Court.

4 II.

5 THE ACTUAL MILITARY CONSIDERATIONS FOR THE CURFEW
6 AND THE EXCLUSION ORDERS WERE IDENTICAL.

7 Chapter II of General DeWitt's Final Report (Ex. 4, Tab 7)
8 speaks of the considerations for the exclusion order and more
9 generally of the need for military control. It is obvious from
10 the face of the curfew order itself that General DeWitt was
11 consistent in his beliefs as stated in the Final Report that the
12 potentially dangerous Japanese Americans could not be distin-
13 guished from loyal Japanese Americans. Although the curfew order
14 applied to alien Germans and alien Italians, when directed to
15 those of Japanese ancestry the curfew order applied not only to
16 alien Japanese, but to native-born United States citizens as
17 well. This constituted a racial classification and treatment of
18 this group on the basis of race.

19 As with the exclusion order, General DeWitt issued the curfew
20 order in the face of responsible civilian and military intelli-
21 gence reports that potentially dangerous Japanese Americans were
22 identifiable and that any threat of espionage and sabotage by
23 Japanese Americans was neither imminent nor significant. (Ringle
24 Report, Ex. 32, Tab 4; FBI report, Ex. 38, Tab 32.) In fact, the
25 intelligence reports noted that because of their physical charac-
26 teristics, Japanese Americans were more easily observed and
27 therefore posed a lesser threat than Caucasian saboteurs. (Ex.

28 MEMORANDUM IN SUPPORT OF
PETITIONER'S MOTION FOR
RECONSIDERATION; ORAL
ARGUMENT REQUESTED - 2

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1 32, Tab 4, page 7.) Nevertheless, General DeWitt imposed the
2 curfew order only upon those Americans of Japanese ancestry.

3 Just as it was General DeWitt who made the decision that
4 military necessity required the exclusion of all persons of
5 Japanese ancestry from the West Coast, it was General DeWitt's
6 decision that military necessity required the imposition of
7 curfew. As the evidence now shows, his decision in both in-
8 stances was based not on military necessities but rather on
9 racism. Though German and Italian aliens were included, the
10 curfew order was directed to the entire Japanese population on
11 the West Coast, aliens and American citizens alike.

12 III.

13 THE JUSTIFICATIONS FOR THE CURFEW AND EXCLUSION ORDERS
14 ASSERTED BY THE JUSTICE DEPARTMENT TO THE SUPREME COURT
WERE IDENTICAL.

15 In its Brief to the Supreme Court, the Justice Department
16 asserted a single theory of military necessity in support of both
17 the exclusion and curfew orders. This theory was urged upon
18 asserted facts underlying the military orders (Ex. 99, pp. 10-32)
19 which drew no distinction between the two military orders. The
20 curfew order was predicated upon the same facts and consider-
21 ations.

22 The tri-part factual basis of the military necessity argument
23 was that the threat of sabotage and espionage by Japanese Ameri-
24 cans was great; that time was of the essence; and that the loyal
25 and disloyal Japanese could not be separated immediately. Though
26 contrary to the suppressed evidence, those facts were never-
27 theless presented to the Supreme Court by the Justice Depart-
28 ment.

MEMORANDUM IN SUPPORT OF
PETITIONER'S MOTION FOR
RECONSIDERATION; ORAL
ARGUMENT REQUESTED

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1 The curfew order, like the evacuation order, was but a part
2 of the overall evacuation program. The Supreme Court recog-
3 nized this in stating: "But the Executive Order, the Procla-
4 mations and the statute are not to be read in isolation from each
5 other. They were parts of a single program and must be judged as
6 such." Hirabayashi v. U.S., 320 U.S. 81, 103 (1943).

7 The Government's position before the Supreme Court was that
8 curfew was a measure taken supplementary to the evacuation. (Ex.
9 99, pp. 34 - 53.) To support the proposition that curfew was a
10 necessary element of evacuation, the government cited from the
11 Congressional Record the following statement: in support of the
12 Act of March 21, 1942:

13 In order to provide such protection it has been deemed
14 advisable to remove certain aliens as well as citizens
15 from areas in which war production is located and where
16 military activities are being conducted. To make such
17 removal effective, it is necessary to provide for
18 penalties in the event of any violation of the orders,
19 or restrictions which may be established, as well as to
20 enforce curfews, where they may be required. (Cite
21 omitted)

22 In arguing that the curfew and exclusion orders were tied
23 together, (Ex. 99, p. 40) the government further noted that:

24 Immediately subsequent to March 21, 1942, Proclamation
25 No. 3, issued on March 24, 1942, provided the curfew

26 /////
27 /////

28 MEMORANDUM IN SUPPORT OF
PETITIONER'S MOTION FOR
RECONSIDERATION; ORAL
ARGUMENT REQUESTED - 4

RODNEY L. KAWAKAMI
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1 for German and Italian aliens, and all persons of Japanese
2 ancestry, and announced that exclusion would thereafter be
3 issued. (Ex. 99, p. 41). In short, the government argued and
4 the Supreme Court accepted that curfew was one of the first early
5 steps in the evacuation.

6 IV.

7 THE SUPREME COURT ACCEPTED THE JUSTICE DEPARTMENT'S
8 ASSERTIONS OF MILITARY NECESSITY IN UPHOLDING THE
9 VALIDITY OF THE CURFEW.

10 In reviewing the validity of the curfew order, the Supreme
11 Court defined the issue as follows:

12 ... our inquiry must be whether in light of all the
13 facts and circumstances there was any substantial basis
14 for the conclusion, in which Congress and the military
15 commander united, that the curfew as applied was a
protective measure necessary to meet the threat of
sabotage and espionage which would substantially affect
the war effort and which might reasonably be expected
to aid a threatened enemy invasion.

16 (Emphasis added.) Hirabayashi v. United States, 320 U.S. 81 at
17 95 (1943). General DeWitt's actual military considerations for
18 the curfew order, the countervailing intelligence reports that
19 the Japanese did not constitute so grave a threat of espionage
20 and sabotage, and the intelligence reports that the potentially
21 disloyal Japanese could be segregated all constituted evidence
22 which went to the heart of the Supreme Court's review of the
23 curfew order and which contradicted the Justice Department's
24 presentation to the Supreme Court.

25 /////

26 MEMORANDUM IN SUPPORT OF
27 PETITIONER'S MOTION FOR
28 RECONSIDERATION; ORAL
ARGUMENT REQUESTED - 5

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1 Without the benefit of this body of contrary but suppressed
2 evidence, the Supreme Court deferred to the military judgment and
3 accepted the assertions of military necessity. The Supreme Court
4 concluded:

5 ... whatever views we may entertain regarding the
6 loyalty to this country of the citizens of Japanese
7 ancestry, we cannot reject as unfounded the judgment of
8 the military authorities and of Congress that there
9 were disloyal members of that population, whose number
10 and strength could not be precisely and quickly asser-
11 tained. We cannot say that the war-making branches of
the Government did not have ground for believing that
in a critical hour such persons could not readily be
isolated and separately dealt with, and constituted a
menace to the national defense and safety, which
demanded that prompt and adequate measures be taken to
guard against it.

12 320 U.S. at 99.

13 Here the findings of danger from espionage and sab-
14 otage, and of the necessity of the curfew order to
protect against, have been duly made ...

15 The military commander's appraisal of facts in the light
16 of the authorized standard, and the inferences which he
17 drew from those facts, involved the exercise of his
18 informed judgment. But as we have seen, those facts,
and the inferences which could be rationally drawn from
them, support the judgment of the military commander,
that ...

19 320 U.S. at 103.

20 V.

21 THE SUPPRESSION OF EVIDENCE IN PETITIONER'S CASE WAS
22 AN ERROR OF THE MOST FUNDAMENTAL CHARACTER WHICH PREJUDICED
PETITIONER'S CASE.

23 The evidence which was suppressed from the Supreme Court
24 establishes that all the assumptions of military necessity relied
25 upon by the Supreme Court in upholding the Petitioner's curfew

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27 MEMORANDUM IN SUPPORT OF
28 PETITIONER'S MOTION FOR

RECONSIDERATION; ORAL

ARGUMENT REQUESTED - 6

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1 conviction were false. Suppressed evidence would have constituted
2 the heart of Petitioner's defense against the indictment. Thus,
3 the suppression of the evidence prejudiced Petitioner's ability
4 to present a defense and deprived himm of his constitutional
5 rights to a fair trial and to due process, an error of a most
6 fundamental character.

7 The narrow confines of the Supreme Courts decision giving
8 deference to the military's judgment underscores the fact that
9 the outcome of the Court review would have been different had the
10 suppression not occurred. Revelation of the true facts would have
11 revealed to the Court that DeWitt's curfew order was not based
12 upon "informed Judgment" and that those charged with the respon-
13 sibility did not have "reasonable grounds" for the assertions of
14 military necessity. The war department immediately recognized
15 that DeWitt's actual considerations regarding loyalty were not
16 reasonable and were unfounded. In fact, this was the reason that
17 the Final Report was ultimmately changed. Thus, knowing the true
18 military justifications, the Court would not have concluded as it
19 did that, "we cannot reject as unfounded the judgment of the
20 military authorities ...".

21 The curfew order was a deprivation of fundamental liberties
22 affecting Americans only of Japanese ancestry. The existence of
23 more severe deprivations like those involvced in the exclusion
24 order does not make a curfew which singled out people on the
25 basis of race any less of a violation to fundamental liberties.
26 The military necessity urged by the Government was in support
27

28 MEMORANDUM IN SUPPORT OF
PETITIONER'S MOTION FOR
RECONSIDERATION; ORAL
ARGUMENT REQUESTED - 7

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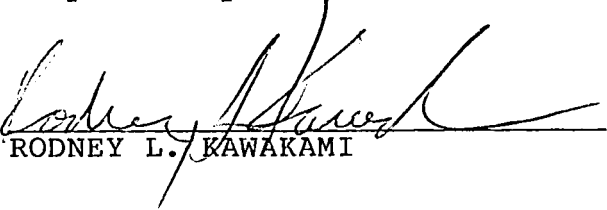
1 of an exclusion program which included curfew and exclusion
2 measures. The curfew order as one of the first steps in effect-
3 uating an illegitimate exclusion program cannot be validated by
4 isolating the curfew order out of the context of the exclusion
5 program.

6 VI.

7 CONCLUSION

8 Having met the elements required for a writ of error coram
9 nobis under United States v. Dellinger, 657, F.2d 140 (7th Cir.
10 1981), and having presented the above-stated reasons, Petitioner,
11 Gordon K. Hirabayashi, respectfully requests that based on the
12 above, the Court vacate his conviction on Count II of the indictment
13 against him.

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15
16 Respectfully submitted,

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19 RODNEY L. KAWAKAMI

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27 MEMORANDUM IN SUPPORT OF
28 PETITIONER'S MOTION FOR
RECONSIDERATION; ORAL
ARGUMENT REQUESTED - 8

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