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IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GORDON KIYOSHI HIRABAYASHI, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 10,308

Upon Appeal From The District Court Of The United States For The Western District Of Washington Northern Division

Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth circuit desires instruction for the proper decision of a cause.

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

STATEMENT OF CASE

This cause is pending before the United States Circuit Court of Appeals for the Ninth Circuit after argument on appeal from a judgment of conviction upon a jury verdict of guilty on each of two counts of an indictment returned in the District Court for the Western District of Washington, Northern Division. The first count of the indictment charges the appellant, Gordon Hirabayashi, is a native-born citizen of the United States of Japanese ancestry residing in Seattle, Kings County, Washington, within Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942 of Lt. Gen. John L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, pursuant to Executive Order 9066 of the President of the United States dated February 19, 1942; that Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942, pursuant to the provisions of the said Public Proclamation No. 1, ordered that from and after 12

o'clock noon May 16, 1942, all persons of Japanese ancestry be excluded from a particular described portion of the said Military Area No. 1 in Seattle, Washington, including the place of residence of the said appellant, required a responsible member of each family and each individual living alone, affected by the Civilian Exclusion Order to report on May 11 or 12, 1942 to the designated Civil Control Station in Seattle, Washington, and provided that any person who failed to comply would be subject to the criminal penalties of the Act of March 21, 1942; and that the appellant wilfully and knowingly failed and refused to report to the said Civil Control Station as ordered by the said Civilian Exclusion Order in violation of the said Act of March 21, 1942 which provides that whoever enters and remains in, leaves, or commits any act in any military area prescribed by a military commander designated by the Secretary of War under authority of an Executive Order of the President contrary to the restrictions applicable to any such area or the order of any such military commander, shall be guilty of a misdemeanor punishable by a fine not to exceed $5,000 or imprisonment of not more than one year or both if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was a violation. Executive Order 9066 authorizes the Secretary of War and the military commanders designated by him to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine from which any or all persons may be excluded and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his discretion.

The second count of the indictment charged that Lt. Gen. DeWitt's Public Proclamation No. 3 of March 24, 1942, pursuant to the authority of Executive Order 9066, required all alien Japanese, Germans and Italians and all persons of Japanese ancestry, including the appellant, residing or being within the geographical limits of Military Area No. 1, established by Lt. Gen. DeWitt's Public Proclamation No. 1 of March 2, 1942, after 6:00 a.m. March 27, 1942, to be within their places of residence daily between the curfew hours of 8:00 p.m. and 6:00 a.m.; and that the appellant on the evening of March ....., 1942, knowingly and wilfully was not within his place of residence and was elsewhere

after the curfew hour of 8:00 p.m. in violation of said Act of March 21, 1942.

In the District Court, and in his timely appeal from the judgment and sentence of conviction entered on October 21, 1942, based on appropriate and timely motions, objections and exceptions, the appellant did not deny that he is an American citizen of Japanese ancestry residing in the said military area and that he refused and failed to comply with the requirements of Civilian Exclusion Order No. 57 and the curfew requirement. He contends that the military control over American citizens here exercised is forbidden by the United States Constitution as interpreted in *Ex parte Milligan,* 4 Wall. 2 and other authorities. He also contends that neither the Congress nor the President has the power to command him, an American citizen not charged with any crime or disloyalty and solely on the basis of his Japanese ancestry, to report to a Civil Control Station in connection with the exclusion program and to remain in his place of residence during the curfew hours not applicable to other American citizens not of Japanese ancestry and that to do so deprives him of due process and equal protection of law. The appellant also contends, and the Government denies, that the Act of March 21, 1942 is an unconstitutional delegation to the military authorities of the power of Congress to define criminal conduct. The Government contends that the application of the military curfew and exclusion to all persons of Japanese ancestry is a valid exercise of the war powers of the President derived from the Constitution and the statutes of the United States. The Government also contends that the exclusion of all persons of Japanese ancestry was reasonable and constitutional in the military emergency which faced the military authorities on the West Coast at the beginning of the current war between the United States and the Empire of Japan.

This cause thus raises novel constitutional questions of great public importance pertaining to an exercise of the war powers to enforce two important regulations which form an important part of the wartime evacuation of the Pacific Coast Japanese population. This court is familiar with the decisions of the Supreme Court of the United States upholding broad exercises of the war powers of the Federal Government. On the one hand, however, this Court knows of no decision in which citizens residing in areas not subject to martial law have been required by

military authorities to observe a curfew and to report to military control stations for exclusion from a military area designated by the military authorities. On the other hand, this Court is sensible of the fact that the military authorities held the view that military exigencies of modern warfare imperiling the nation and existing on the Pacific Coast at the beginning of the present war were far more grave than any situation hitherto existing in any war with a foreign nation. No doubt because of the military authorities' view of the extreme peril facing the nation this exercise of the war powers of the Federal Government was employed. The question whether this exercise of the war power can be reconciled with traditional standards of personal liberty and freedom guaranteed by the Constitution, is most difficult. This Court, therefore, pursuant to Judicial Code, Section 239, amended (28 U.S.C. Sec. 346), certifies to the Supreme Court of the United States the following questions of law concerning which instructions are desired for the proper decision of the cause:

QUESTIONS CERTIFIED

1. Was Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942 excluding all persons of Japanese ancestry, including American citizens of Japanese ancestry, from and after 12 o'clock noon, May 16, 1942, from a particular area in Seattle, Washington within Military Area No. 1 established by General DeWitt's Proclamation No. 1 of March 2, 1942 and requiring a responsible member of each family, and each individual living alone, affected by the order to report on May 11 or 12, 1942 to the Civil Control Station in the said area in connection with said exclusion, a constitutional exercise of the war powers of the President derived from the Constitution and statutes of the United States.

2. Was Lt. Gen. DeWitt's Public Proclamation No. 3 of March 24, 1942 requiring all alien Japanese, Germans and Italians and all persons of Japanese ancestry, including American citizens of Japanese ancestry, residing or being within the geographical limits of Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942 to be within their place of residence between the curfew hours of 8:00 p.m. and 6:00 a.m. daily, a constitutional exercise of the said war powers.

3. If the answer to question One or the answer to question Two is in the affirmative, did the Act of March 21, 1942 (18 U.S.C. 97A) constitutionally make it a criminal offense for the appellant wilfully and knowingly to fail to report to the Civil Control Station as ordered or to remain outside of his place of residence during the curfew hours.

Filed March 27, 1943,

CURTIS D. WILBUR,
Circuit Judge.
FRANCIS A. GARRECHT,
Circuit Judge.
BERT EMORY HANEY,
Circuit Judge.
CLIFTON MATHEWS,
Circuit Judge.
WILLIAM HEALY,
Circuit Judge.

DENMAN, Circuit Judge, Dissenting:

I dissent from the certification on the grounds,

(1) Because the questions simply transfer to the Supreme Court the final decision of the matters pending here, namely, as to the guilt or innocence of the appellant referred to.

(2) Because, assuming the questions are proper for certification, they take from this court, with its peculiarly clearly defined judicial cognizance of facts of the relationship of Japanese descended citizens to the white citizens in the social fabric of the Pacific coastal areas involved, the valuable contribution which such a court of appeals as this may give to the consideration of issues of such major importance. If the case were to be certified, the facts should have been stated in the certificate.

(3) Because certain important admissions were made by both the Government and the appellant at the hearing before this court, pertinent to the final decisions of the case involved in the questions, of which the certificate makes no mention.

(4) Because, although the certificate asks the questions, in effect, a final decision of the guilt or innocence of the appellant,

the certificate purports to state but one of the many contentions made by appellant concerning the invalidity of the orders of General DeWitt, matters upon which we ask no advice, though they must be determined by the Supreme Court in its answers to the questions.

(5) I dissent from the war-haste with which the question involving the deportation of 70,000 of our citizens, without hearing, is hurried out of this court, with its peculiar qualifications for the consideration of the racial questions involved, on the plea of the Attorney General, one of the litigants, which, as I understand it, is that it will discommode the Supreme Court to reassemble to consider the case in the time in which it would mature for hearing before that Court upon petition for certiorari. In this connection, I note that the Supreme Court did reconvene in its vacation period in a case of lesser importance. Ex parte Richard Quiren, argued on July 29 and July 30, 1942.

This dissent will be more fully stated in an opinion which is now in preparation and should be before the court by airmail by Tuesday morning next.

WILLIAM DENMAN,
Circuit Judge.

(Endorsed) Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instruction for the proper decision of a cause, and dissent of Denman, C.J.

Filed March 27, 1943,

PAUL P. O'BRIEN,
Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GORDON KIYOSHI HIRABAYASHI, *Appellant,* vs. UNITED STATES OF AMERICA, *Appellee.*	No. 10,308

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

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Opinion of Denman, Circuit Judge, on his dissent from the certification of questions to the Supreme Court, and from the omission of facts therefrom.

DENMAN, Circuit Judge, dissenting:

Certain of my associates are of the opinion that it is not within the power of a participating member of the court to dissent from the decision of the court that it certify questions to the Supreme Court under section 239 of the Judicial Code (28 U. S. C. A. 346) or from the content of the certificate. With this contention I do not agree.

Certification is a judicial action vitally affecting the litigants, since it transfers from one tribunal to another the forum of adjudication of the questions certified. The primary issue argued here is one of classification of Japanese descended citizens from other citizens descended from aliens of countries with which we are at war. The validity of such a classification is entirely a question of fact largely in the ill-defined area of judicial notice. The Supreme Court in civil cases takes judicial notice of the laws of the several states, yet believes justice is better served if such questions are left to the respective circuit courts of appeals. If this be true of civil cases, it is true *a fortiori* of such criminal cases as those involving psychological facts which, in my opinion,

alone could warrant the discriminating cruelty with which these Mongoloid people have been treated.

Entirely apart from the question of costs of a second presentation to a distant tribunal, these unfortunate persons (if the certificate is granted) will have the decision of these questions of fact removed from the circuit court of appeals which is best qualified to find them. I dissent from a certification which seeks to avoid the exercise of our special knowledge of the psychology of these deported citizens.

If it be unusual for a judge of a court in which he is a participant to dissent from his associates on the matter of a certification, the occasion is even more unusual.

Under the threat of penitentiary sentences to these 70,000 American citizens who have relied on the right they believe the Constitution gives them, we are driving from their homes to internment camps, not men alone, as with the deportation of the Dutch by the Germans, but their wives and children, without giving the latter the choice to remain in their homes. We are destroying their businesses, in effect, as if such citizens were enemy aliens. The destruction of their business connections means for many that they will not be able to return to their native areas; in effect, as were the French Canadians so taken to Louisiana.

While none of the appellants had yet been interned, the deportation order was but the initial step in a single plan ending in imprisonment in barb wired enclosures under military guard. Descended from Eastern Asiatics, they have been imprisoned as the Germans imprisoned the Western Asiatic descended Jews.

The first omission of fact from the certificate, which I regard as prejudicial to the appellants, is the admission by the Government, at the hearing here, that not one of these 70,000 Japanese descended citizen deportees had filed against him in any federal court of this circuit an indictment or information charging espionage, sabotage or any treasonable act. This admission covered the five months from Pearl Harbor to General DeWitt's deportation order of May 10, 1942. I dissent from the absence of such an admission of fact from the certificate.

I also dissent from the omission from the certificate of the following facts concerning the issue of a "present danger of im-

mediate evil [sabotage and espionage][1] or an intent to bring it about,"[2] which would warrant General DeWitt's order, in effect, of deportation of citizens without trial for their immediate imprisonment. They are facts from which pertinent inferences may be drawn regarding the psychologic impulses and impelling convictions and personal loyalties and sympathies of a yellow Mongoloid body of citizens living in a predominantly Caucasian society and subject to legal and social compulsions because of race and color.

In the summary of such facts is rejected the blind war antagonism expressed in the statements that all Japanese descended people are treacherous because, after the refusal of her demands, Japan began an undeclared war at Pearl Harbor. This is no more true than that all Americans in 1853 then were treacherous because, similarly, unwarned by our Government, Commodore Perry, with his fleet of American war vessels, their guns moved into their port holes, their gunners' fuses lit, ready and intending to destroy

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[1]The President's military zone and deportation order of February 19, 1942, and its enforcing provisions, are

"Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, **from which any or all persons may be excluded,** and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. * * *

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to **enforce compliance** with the restrictions applicable to each Military area hereinabove authorized to be designated, **including the use of Federal troops** and other Federal Agencies, with authority to accept assistance of state and local agencies." (Emphasis supplied.)

[2]Justice Holmes in Abrams v. United States, 250 U. S. 616, 628.

the feeble fortifications our spies had reported, sailed into the port of Yedo (now called Tokyo) to compel Japan to open her commerce to the Yankee Clippers of the China trade,—a 90 years ago which is only yesterday to the Japanese schoolmaster and the Shinto priest.

It is a matter of common knowledge to people of detached thinking in Pacific Coast communities, formerly living among these deported citizens, that their Mongoloid features and yellow skins have among them persons of the same high spirit, intellectual integrity and consciousness of social obligation as have the surrounding Caucasians. What is also pertinent is the fact that they have the same contempt for any hypocrisy in their treatment by their white neighbors, and the same bitter resentment of a claim of their social inferiority as Americans have of the Nazi claim of Nordic racial supremacy. It is in the normal reactions of human beings to such treatment that are found factors in the problem of the validity of General DeWitt's orders.

Another admission of fact made at the hearing and not appearing in the record or in the certificate, is the presence among these citizens of a group of young men educated in Japan and returned to the United States to live in the Japanese communities. These men were admitted to be dangerously sympathetic with Japan in the present war.

What is peculiarly within our knowledge is that in our Pacific Coast schools, in their infancy and early childhood, the Japanese and Chinese children mix freely with their white companions. They are taught to revere the flag with the freedoms it connotes. When they reach adolescence, with its mating instincts and its inevitable affections, which often know no boundaries set by complexion or cheekbones or slant of the eyes, freedom is denied them in the most powerful of human instincts by the laws against intermarriage with the Caucasians.[2a] The strongest paternal discipline is exercised over the white children. They are told it is a degredation to mate with an Oriental; and the yellow skinned youth are made to feel a racial inferiority and in social contempt. Such facts are pertinent in determining whether General DeWitt is entitled to find, among a people suffering an humiliation so inconsistent with the equality of the flag teachings, that there will

[2a]California Civil Code § 60; 2 Idaho Gen. Laws Ann. § 31-206; Montana Civil Code § 5702; Arizona Code Ann. (1939) § 63-107.

be those who will hesitate or fail to perform a citizen's duty in aiding his soldiers against the saboteur or spy.

The second most powerful indicia in the war zone commanded by General DeWitt of separateness and implied racial inferiority of the Mongoloid people, are the laws prohibiting them from owning argicultural land.[3] Many of the Japanese who immigrated here were farmers. Yet under these laws no child of Japanese parentage can be born on his alien father's farm. State decisions[4] show the evasions and deceits employed to satisfy that farmer's historic land hunger, which led to our own early westward migrations of the last century. Whether or not it is still a proper concept that the farmers constitute the "backbone of the nation," these 70,000 citizens know that those in farming communities are separated from their white companions by a fundamental social distinction, sometimes the more bitter in its expression by their European descended neighbors because of the superiority often shown by the Japanese in both energy and agricultural skill. These facts are entitled to be considered with reference to the likelihood of disaffection among a class so treated, in determining General DeWitt's regulations for exclusion of dangerous people from the war areas bordering the Pacific.

A third distinction, the subject of long and repeated protest from Mongoloid China and Japan, is in the Congressional laws for the exclusion of their nationals from the immigration quotas of the Europeans, the Semitic and part Semitic Western Asiatics, and the Russians of part Mongoloid blood. Neither General DeWitt nor this court is concerned with the political or social justification of this stigma on the Mongolian, but both are concerned with its effect on proud spirited people so branded by the Congress. This court, however, is in a better position than any other to know the effect of such facts on the minds of some of the now deported citizens.

A fourth discrimination of race and color is the exclusion of these citizens from many labor unions. Nothing but the stress of war gives the special permits which allow the Chinese to work

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[3]1913 Cal. Stat. 260, 1 Deering Gen. Laws, Act 261; 5 Oregon Comp. Laws Ann. § 61-102; Washington, Rem. Rev. Stat. § 10582.

[4]People v. Osaki (1930) 286 Pac. 1025; People v. Entriken (1930) 288 Pac. 788; Takeuchi v. Schmuck (1929) 276 Pac. 345; People v. Nakamura (1932) 13 P. (2d) 805.

in some of our war industries. Despite the outstanding mechanical skill of the Mongolian people, the freedom to make a skilled living is denied to the youth taught in our schools to point their hands at the flag which, they are told, promises them the dignity of equality of opportunity among his fellows.

One is not here concerned with the vigorous dispute as to the wisdom of such laws, a dispute having on the one hand examples of persons of the United States and Latin America distinguished in statecraft, the sciences and the arts, who are of Eurasian blood, both immediate of Chinese and Japanese origin, and more remotely through the American Indian, and on the other the frustrated rejects from the societies of each blood.

Such questions are for the peace table. The case is solely concerned with the question whether such laws and social and industrial regulations have created a real and present danger on the eastern littoral of the Pacific, in a war which the Japanese military caste is waging after, with the aid of assassination, it destroyed an evolving Japanese democracy, having ideals in common with our own.

As a result of these and other discriminations of race and color, the Japanese of our Pacific Coast cities and towns live in segregated quarters. Though compelled to reside there by social rather than governmental force, there are many similarities with the ghettos of Europe,—among them the denial of intermarriage, of land owning, and participating in many of the livelihoods of manual skill.

Because of such limitation of social intercourse, people do not become familiar with the Mongolian physiognomy. The uniform yellow skin and, on first impression, a uniformity of facial structure, makes "all Chinks and Japs look alike to me," a common colloquialism. Hence arises a difficulty for General DeWitt's soldiers or the federal civil officers in picking out from the other Japanese crowded together in the segregated districts, and including men educated in Japan, the suspected saboteurs or spies or fugitives from a commando landing or hiding parachutists. Also the difficulty of identification of Japanese of known or suspected enemy aid, by descriptions telegraphed or written to white enforcement officers.

So far as concerns the imminence of danger of Japanese attack on the Pacific Coast, this court would be compelled to find that General DeWitt has a rational ground to expect it. It is a fact of general knowledge that in every Japanese air attack on cities and military establishments,—among them Chungking, Singapore, Midway, Rangoon, Dutch Harbor, and the British naval station in Ceylon,—enough planes passed through the defenses of warned and expectant commanders to cause a conflagration sufficient to destroy the wooden cities of our Pacific Coast.

What is commonly known on the Pacific Coast and not elsewhere, is the fact that, unlike London with hundreds of simultaneous fires in its brick and stone structures and yet no great moving front of conflagration, in wooden-built San Francisco there was a conflagration front of a mile length within five hours of the earthquake of 1906. It was a coalescence of but seven fires. There, luckily, the earthquake placed it on the lee-side of the city, but one started by the Japanese on its windward side, in its long maintained northwest trade wind, well could have the bulk of the city in flames in ten hours. The earthquake left the exterior of the city's frame buildings intact, save for some distortions which did not increase the conflagration hazard, but the present developed technique of shattering to pieces several acres of buildings with a single bomb, makes the debris of wooden material mere fuel piles for the succeeding inflammable projectiles. A similar conflagration danger exists in all the Pacific Coast cities. In all of them, General DeWitt well could fear the added menace of the saboteur's torches.

Since the questions certified, in effect, transfer the entire case to the Supreme Court, it is unjust to the appellant to omit from the summary of the contentions on which he relied, his claim of violations of Constitutional provisions other than the due process clause of the Fifth Amendment. He also urged here that such a classification of the Japanese descended citizens from others, in a unitary scheme leading to their imprisonment without a hearing, (1) made General DeWitt's Congressionally authorized regulation a bill of attainder prohibited by Article I of the Constitution; (2) was merely an incident of a single continuing plan to seize his person in violation of the Fourth Amendment, and (3) that the scheme providing for deporting people from their

homes to be imprisoned by the Military, without trial, is a cruel and unusual punishment in violation of the Eighth Amendment.

It is now nearly ten months since General DeWitt's deportation order was made. The highest court of this great circuit is fully able to decide the submitted questions. The difference in time between certification and certiorari after our decision, is about four weeks if diligence is used by the Government in filing its sustaining or opposing brief. The time no doubt could be shortened by the agreement of counsel for the appellants seeking the freedom of their clients.

Because of this difference in time, the Supreme Court may have to reconvene in June or July, as it did in the much lesser important cases of Ex parte Richard Quiren and others, argued July 29, and July 30, 1942. It is my opinion that a month's delay, coming after the elapse of the ten months in which the order in question has been in existence, does not warrant the avoidance of a decision of this circuit court of appeals on the matters of law and of fact involved in the appeals.

For the above reasons I dissent from the attempt by certification to avoid the decision of this appeal by this court, and if it is to be avoided from omitting from the certificate the facts above described. I cannot but regret that this opinion is an overnight effort, without the required revision, but the certificate signed by a majority of the court was first seen by me yesterday (March 27th) and ordered sent at once by airmail to the Supreme Court.

March 28, 1943.

WILLIAM DENMAN,
United States Circuit Judge

Endorsed: Opinion by Denman, Circuit Judge, on his dissent from the certification of questions to the Supreme Court, and from the omission of facts therefrom. Filed March 28, 1943. Paul P. O'Brien, Clerk.

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