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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1942

No. 871

MINORU YASUI,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MEMORANDUM BRIEF OF STATES OF CALIFORNIA, OREGON AND WASHINGTON AS AMICI CURIAE.

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In a companion case now pending before this Court, *Hirabayashi v. United States,* No. 870, the States of California, Oregon and Washington joined in a brief as amici curiae for the purpose of presenting their views on some of the important questions of law involved therein.

That case also involves the question of the liability of a person of Japanese ancestry charged under a Federal criminal statute (Public Law 503, 56 Stat. 173) with having disobeyed the curfew regulations

imposed upon all persons of Japanese ancestry living within certain Pacific Coast military zones. (Public Proclamation No. 3 (7 Fed. Reg. 2543) by Lieutenant General J. L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, March 24, 1942.

The decision to be rendered in this case and the *Hirabayashi* case will have an important bearing upon the more general question of the right of the military authorities in time of war to impose controls on civilians resident within the United States. In order to relieve the Court of the burden of reading a second brief on this subject, *amici curiae* respectively refer the Court to the brief filed in the *Hirabayashi* case and request that that brief, as it applies to the above mentioned specific and general issues, be considered as filed in the instant case.

THE OPINION OF THE COURT.

The Court below, while recognizing the emergency which called for action (Tr. 18, 19), held that the curfew regulations could not be enforced in a civil court against persons of Japanese ancestry who were American citizens because:

1. The issuance of regulations and making the violation of them a crime was a legislative function;

2. A military commander has no such legislative power (Tr. 31);

3. The Courts cannot enforce the regulations of a military commander (Tr. 43);

4. Nor could Congress make criminal the violations of the regulations (Tr. 44);

5. While such regulations could be issued under martial law, martial law cannot be validly established unless,

(a) It has been formally established by proclamation (Tr. 40);

(b) In a theater of active military operations the Courts have been closed and civil government is no longer able to function (Tr. 39—adopting the test of necessity of the majority dictum in *Ex parte Milligan,* 4 Wall. 2, 127 (1866));

The brief filed in the companion case deals fully with these contentions. However, the trial Court rendered judgment against the defendant Yasui because, after gaining his majority, he elected to be a subject of the Empire of Japan and thus, as an enemy alien, the curfew regulations could be properly enforced against him in criminal proceedings in a Federal Court (Tr. 46-51). Congress, the Court said, could make criminal the violation of regulations to be issued by the Commanding General with respect to enemy aliens (Tr. 46).

Amici curiae do not express any opinion on the judgment and finding that the defendant surrendered his right to American citizenship by electing to become a subject of Japan. Arising as it does, it is essentially a matter of federal concern. But it is submitted that such a finding should invoke the most

serious consideration of this Court. A number of the native-born Japanese residents of the Pacific Coast States may have affiliated themselves in one way or another with agencies of the Japanese Government as did the defendant herein. It is believed to be of the utmost importance that some guides be furnished as to the quantum of evidence required before a Court will be justified in finding that an election to surrender such a precious thing as American citizenship has been made. The claim of the Japanese Government that all persons of Japanese ancestry are or may elect to become citizens regardless of the place of birth might be properly examined at this time. Furthermore, the operation of the Japanese Nationality Law is a complex legal puzzle to many of the American Japanese resident within the Pacific Coast States.* The instant case presents an opportunity to examine this subject of dual citizenship and to state the principles upon which it operates with reference to the American law of citizenship. *Amici curiae* believe that the considerations concerning national citizenship should be kept free of the considerations which made the imposition of curfew a military problem.

Regardless of any question of the defendant's status as an enemy alien, the States of California, Oregon and Washington submit that the curfew regulation could be imposed on the defendant, whether alien or citizen, as a proper exercise of the war power. Such

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*House Select Committee Investigating National Defense Migration (Tolan Committee), Hearings, Part 29, Statement of Henry Tani, Executive Secretary of American Japanese Citizens League, p. 11150.

controls as curfew, when imposed upon civilians within military areas for the purpose of carrying out the federal function of protecting the States against invasion (Const., Art. IV, sec. 4) and defending a military area against attack, sabotage or espionage, are proper measures of limited martial law.

Dated, San Francisco, California,
May 7, 1943.

Respectfully submitted,

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Attorney General of the State of Oregon,

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Chief Assistant and Acting Attorney General of the State of Washington,

Attorneys for said States
as Amici Curiae.

Due service and receipt of a copy of the within is hereby admitted

this.....day of May, 1943.

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Attorneys for Appellant.

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Solicitor General of the United States,

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United States Attorney,

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Assistant United States Attorney,

Attorneys for Appellee.

RBC

SUPREME COURT OF THE UNITED STATES.

No. 871.—October Term, 1942.

Minoru Yasui, Appellant, *vs.* United States of America.	On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

[June 21, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

This is a companion case to No. 870, *Hirabayashi* v. *United States*, decided this day.

The case comes here on certificate of the Court of Appeals for the Ninth Circuit, certifying to us questions of law upon which it desires instructions for the decision of the case. § 239 of the Judicial Code as amended, 28 U. S. C. § 346. Acting under that section we ordered the entire record to be certified to this Court so that we might proceed to a decision, as if the case had been brought here by appeal. 318 U. S. —.

Appellant, an American-born person of Japanese ancestry, was convicted in the district court of an offense defined by the Act of March 21, 1942. 56 Stat. 173. The indictment charged him with violation, on March 28, 1942, of a curfew order made applicable to Portland, Oregon, by Public Proclamation No. 3, issued by Lt. General J. L. DeWitt on March 24, 1942. 7 Federal Register 2543. The validity of the curfew was considered in the *Hirabayashi* case, and this case presents the same issues as the conviction on Count 2 of the indictment in that case. From the evidence it appeared that appellant was born in Oregon in 1916 of alien parents; that when he was eight years old he spent a summer in Japan; that he attended the public schools in Oregon, and also, for about three years, a Japanese language school; that he later attended the University of Oregon, from which he received A.B. and LL.B degrees; that he was a member of the bar of Oregon, and a second lieutenant in the Army of the United States, Infantry Reserve; that he had been employed by the Japanese Consulate in Chicago, but had resigned on December 8, 1941, and immediately offered his services to the military authorities; that he had discussed with an agent of the Federal Bureau

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of Investigation the advisability of testing the constitutionality of the curfew; and that when he violated the curfew order he requested that he be arrested so that he could test its constitutionality.

The district court ruled that the Act of March 21, 1942, was unconstitutional as applied to American citizens, but held that appellant, by reason of his course of conduct, must be deemed to have renounced his American citizenship. 48 F. Supp. 40. The Government does not undertake to support the conviction on that ground, since no such issue was tendered by the Government, although appellant testified at the trial that he had not renounced his citizenship. Since we hold, as in the *Hirabayashi* case, that the curfew order was valid as applied to citizens, it follows that appellant's citizenship was not relevant to the issue tendered by the Government and the conviction must be sustained for the reasons stated in the *Hirabayashi* case.

But as the sentence of one year's imprisonment—the maximum permitted by the statute—was imposed after the finding that appellant was not a citizen, and as the Government states that it has not and does not now controvert his citizenship, the case is an appropriate one for resentence in the light of these circumstances. See *Husty* v. *United States,* 282 U. S. 694, 703. The conviction will be sustained but the judgment will be vacated and the cause remanded to the district court for resentence of appellant, and to afford that court opportunity to strike its findings as to appellant's loss of United States citizenship.

So ordered.