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

---

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

*Supreme Court rule 37 requires the certificate to state the facts from which the questions of law arise.

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 immediate 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

[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.

port holes, their gunners' fuses lit, ready and intending to destroy 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

[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.

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.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO. 3/29/43