

20 September 1944

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Communication to Captain Fisher by Telephone:

The basic justification for our proposed action in the Endo case is that it would be in accord with the facts as now personally known to the Commanding General, namely, that there is nothing in her record which warrants the continuance of her exclusion. Such action would be directly in line with the action taken in the Shiramizu case and in a number of other cases, and with the same justification. The fact that this action may or may not moot the Endo case is incidental. If it would not moot the Endo case, that is, if the issue there does not include the legality of the exclusion of the Japanese and detention as an incident thereof, then it is not clear why such action is opposed by the Department of Justice.

By Proclamation No. 8, dated June 27, 1942, the Commanding General, Western Defense Command, provided in part that persons of Japanese ancestry residing within the bounds of any established War Relocation Project area established in the Command are required to remain within such bounds at all times, unless a

"written authorization is granted for departure executed by or pursuant to the express authority of this headquarters * * *."

By letter dated 11 August 1942 to the Director, War Relocation Authority, the Commanding General, Western Defense Command "pursuant to the provisions of paragraphs 3 and 4, Public Proclamation No. 8 of the Commanding General, dated June 27, 1942 and subject to the limitations in paragraph 2 hereof," delegated authority to the Director, War Relocation Authority, and to persons designated in writing by him to grant written authorization to persons to

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leave and to enter War Relocation Project Areas.

It may be noted that paragraph 2 of said letter provided that certain jurisdiction was retained, in particular that part pertaining to release of persons of Japanese ancestry from any relocation center or project area for return to Military Area No. 1 or the California portion of Military Area No. 2.

This delegation of authority does not and cannot deprive the Commanding General, who is charged with the authority and responsibility for the exclusion, of the duty of controlling such exclusion and determining when it is no longer required by the military situation, and jurisdiction for such purpose was expressly reserved by him as above noted. The performance of that duty in this case should not in any way impinge upon nor impair the functions of WRA. Nor does it appear in fact that it had any such effect in the Shiramizu case. The Commanding General would be in an untenable position if he should undertake to subordinate the foregoing considerations and the proposed action to the program of the War Relocation Authority.

Furthermore, we are unable to see how the contemplated action could affect the Korematsu case in the Supreme Court. Even if in some way not apparent, the granting of exemption to Miss Endo could be used adversely in the Korematsu case, nevertheless, this chance should be taken in view of the more compelling need for the Commanding General to properly discharge his responsibilities. The Korematsu case involves a conviction for a criminal offense and puts in issue the validity of exclusion at the time the violation of the exclusion order was committed more than two years ago. The Endo case involves the legality of the continued detention up to the present of the petitioner in a War Relocation Center as an incident of the exclusion and evacuation program.

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It is not believed that any court would object to a change in the status quo of the individual while the suit is pending, as here proposed, if it is made clear to the court that the change is made in the discharge of the Commanding General's duty and responsibility with respect to exclusion and his determination if and when military necessity no longer requires its exercise with respect to this individual and others in a similar category. The court would not require the maintenance of the status quo for a period of two years, that is, the continued exclusion of the petitioner pending the final determination of the suit, if considerations of military necessity and the exercise of powers under Executive Order No. 9066 no longer warranted the maintenance of the status quo. The Supreme Court itself recognized in the Hirabayashi case that restrictive measures under said Executive Order were only temporary and subject to being removed when the occasion warrants.

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Read over the telephone to Captain Fisher, Office of the Ass't. Sec. of War, at 15:20, 20 Sept 44.

JOEL J. WATSON
Colonel, J.A.G.D.
Staff Judge Advocate.

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