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15 June 1944

MEMORANDUM FOR: Commanding General.

SUBJECT : Proposal to Rescind Executive Order 9066.

1. Pursuant to telephonic instructions from the Assistant Secretary of War (see transcript of telephone conversation No. 226, 13 June 1944, between Colonel Watson and Mr. McCloy; and No. 225, 12 June 1944, between CG, WDC, and Mr. McCloy), comment is submitted upon the suggestion that in connection with any modification of the existing exclusion program the following action be taken:

a. Rescind Presidential Executive Order No. 9066, basic Proclamations Nos. 1 and 2, this command, and the ancillary and amendatory proclamations to Nos. 1 and 2.

b. Issue a new Executive Order and Proclamation under which the modified exclusion program would be effected.

2. The benefit contemplated is that any legal attacks on the new procedure would be directed against the new Executive Order and its subsidiary proclamations and that persons questioning the new procedure might be required first to exhaust the administrative remedies therein provided before the courts would act, thus providing additional time before a court decision for the development of the new exclusion program. The placing of the new program under a new Executive Order, it is argued, would avoid an adverse decision on Executive Order No. 9066 and the validity of action taken under Executive Order No. 9066 would not be affected by a decision on the new program.

3. There are certain material considerations against the proposed action.

a. Executive Order No. 9066, Proclamations Nos. 1 and 2, this headquarters, and Public Law 503 were upheld by the Supreme Court in the Hirabayashi case on the ground that they formed part of a single program and were an exercise of the joint war powers of Congress and the President. (320 US 81, 1943). The issuance of a new executive order would be an exercise of the presidential war power alone and this question, namely, the power of the President acting alone to authorize a military commander to exercise control over civilians, was expressly reserved by the court in the Hirabayashi case. Furthermore, it is important to retain, as far as possible, the support which that decision lends to the original exclusion and the ancillary relocation program. While the decision was limited to the validity of curfew orders as applied to persons of Japanese ancestry, yet the reasoning of the case can most effectively be used in support of an exclusion program based upon Executive Order No. 9066, Proclamations Nos. 1

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and 2, and Public Law 503.

b. An adverse decision probably would concern only the particular action taken by the military commander under Executive Order No. 9066 and would not be directed against the Order itself.

c. A new proclamation revising the exclusion procedure, but issued pursuant to Executive Order 9066, would have the advantage of being grounded upon an order already upheld by the Supreme Court, while an attack upon a proclamation based on a new Executive Order, would call for a decision upon the validity of the underlying order.

d. At this time, when the military situation on the Pacific Coast has very materially improved, a strong objection to the proposal may be made on psychological grounds. As noted, the exclusion program, based upon Executive Order 9066, Proclamations Nos. 1 and 2, this headquarters, and Public Law 503, was inferentially upheld in the Hirabayashi case. Any procedure seeking to relax the exclusion restrictions would be more readily upheld by the courts where it appeared such relaxation was a logical development of the original exclusion program which had been approved. On the other hand, a new Executive Order and Proclamation, setting up a new procedure, would appear as an entirely new system of control over the excludees. The courts' consideration of this apparently new system, under conditions now existing, would undoubtedly be far more critical.

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