

Wednesday, 5 June, 1946

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INTERNATIONAL MILITARY TRIBUNAL
FOR THE FAR EAST
Chambers of the Tribunal
War Ministry Building
Tokyo, Japan

PROCEEDINGS IN CHAMBERS

On

Request of the Accused KIDO, Koichi,
for the Production of a Document
Pursuant to Section III, Article 9,
Subsection "O" of the Charter of the
International Military Tribunal for
the Far East, Dated April 26, 1946.

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Before:

HON. SIR WILLIAM WEBB,
President of the Tribunal and
Member from the Commonwealth of
Australia.

Reported by:

Lorraine Velden,
Court Reporter,
IMTFE.

Appearances:

For the Prosecution Section:

HON. JOSEPH B. KEENAN, Chief of Counsel,
and

MR. CARLYLE HIGGINS, Assistant to the
Chief of Counsel, acting on behalf
of the United States of America.

For the Defense Section:

MR. WILLIAM LOGAN, Counsel for the
Accused KIDO, Koichi.

For the Office of the General Secretary, IMTFE:

VERN WALBRIDGE, Colonel, CAC,
General Secretary;

EDWARD H. DELL, Judge,
Legal Adviser to the Secretariat; and

MR. C. WALTER BOWMAN,
Clerk of the Court.

The proceedings were begun at 1100.

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THE PRESIDENT: Well, what is this?

MR. LOGAN: If your Honor please, this is an application on behalf of Marquis KIDO to have the prosecution deliver his diary to him pursuant to Section III, Article 9, Subdivision "o" of the Charter.

THE PRESIDENT: What does that say?

MR. LOGAN: Section III is entitled, "Fair Trial for Accused," and Article 9 is entitled, "Procedure for Fair Trial," and under that is Subdivision "o", which is headed, "Production of Evidence for the Defense". An accused may apply in writing to the Tribunal for the production of witnesses or of documents. The application shall state where the witness or document is thought to be located. It shall also state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense. If the Tribunal grants the application the Tribunal shall be given such aid in obtaining production of the evidence as the circumstances require."

THE PRESIDENT: I think that is "e", isn't it?

MR. LOGAN: Oh, I read it as "o". It follows "d" so it should be "e".

THE PRESIDENT: That was "e"; yes.

MR. LOGAN: Marquis KIDO was first apprehended about December 21, 1945, and at that time I believe he was questioned in Mr. Keenan's office or home. He revealed at that time to Lt. Colonel Benjamin E. Sackett, one of the prosecution staff at that time, that he had a personal diary for the period of time from 1930 to 1945, inclusive; and upon request he voluntarily offered to surrender it to Lt. Colonel Sackett upon the understanding and promise that it would be returned to him. Lt. Colonel Sackett promised and agreed that the diary would be returned to him as soon as possible, and relying on this promise Marquis KIDO caused the diary to be delivered to him.

Since that time I understand that the prosecution, through a Mr. Sackett not related to Lt. Colonel Sackett, examined Marquis KIDO on approximately thirty different occasions at which time the diary was used to refresh Marquis KIDO'S recollection. He has not seen the diary since then and it has not been returned to him.

Within the past ten days I have made several requests on various attorneys for the prosecution, among whom are Mr. Sackett, Mr. Williams, Comyns Carr and Mr. Carlyle Higgins, to see if I could get the diary and I was told that photostatic copies of it

were being made and that certain portions of it were being translated into English.

As this diary consists of notations of many facts, historical events and statements which the accused KIDO has written, I understand, in his own handwriting, it--

MR. KEENAN: Do you concede that? Do you make that concession on behalf of KIDO?

MR. LOGAN: No, I said I understood that. I will take it up with my client to verify that if you wish me to.

MR. KEENAN: I wish you would, if KIDO will admit that these are historical statements.

THE PRESIDENT: You will also have to state the facts proposed to be proved by the witness or the document and the relevancy of such facts to the defense.

MR. LOGAN: I understand that, your Honor, and not having seen the document it is very difficult for me to do that. I state them to the best of my ability in item four of my application where I state: "This diary contains many facts, historical events and statements which the accused KIDO, Koichi verily believes are material and relevant to his defense."

THE PRESIDENT: You are supposed to state what it will prove. I think that is the meaning.

MR. LOGAN: I understand that, your Honor, and I have done the best I could under the circumstances. It is a document covering a period of fifteen years and if there are entries on every date that would mean over five thousand entries, and it would be almost a physical impossibility at this time for me to state those facts which we intend to prove from the diary which I have not seen.

THE PRESIDENT: Still there is a duty under the Charter. I have no authority to modify the Charter; however--

MR. LOGAN: And I might say, your Honor, that in view of the fact that the trial is coming on shortly -- I was also advised by one of the prosecutors, whom I have just named, that they intend to offer this document in evidence at its very early stages of the trial, and we certainly believe that we are entitled to have the original in view of the promise that was made; and if the original is required to be produced on the trial, I will guarantee its production.

THE PRESIDENT: I don't think that provision there contemplates that the document shall part out of the custody of the prosecution into the custody of the defense. I don't think it means that. That is not the purpose of that. It means it shall be produced

to the Court. It gives the Tribunal power to secure its production in court.

MR. LOGAN: I think, your Honor, what we are asking here is something more than has been covered in any of the provisions of the Charter; that is, we are asking for the fulfillment of a promise.

THE PRESIDENT: I have no jurisdiction over promises. My duty is strictly confined to the Charter. If that document is in the hands of the prosecution and is evidence at the time it is used, I have no power to transfer it from their possession to yours. All I can do is order the prosecution to produce it at the trial; but they may make it available to you; they may make a copy available to you.

MR. KEENAN: Might I state, Mr. President, the position of the prosecution?

This has been a rather summary proceeding -- very speedy hearing, very little notice -- but I wish to state that we regard the KIDO diary as one of the very important pieces of evidence in this entire prosecution and that under no circumstances would we consent of our own accord to parting with possession of it. I am not aware of any promises made by Mr. Henry Sackett, nor have I information at this time as to the number of interrogations of Colonel

Sackett, who left more than sixty days ago for the United States because of illness and who has been in the hospital since then and is not expected back, so, so much for representations made.

However, we have available for examination the excerpts from KIDO'S diary translated into the English language. We do not say that those are all of the excerpts that we will rely upon nor do we say that we will introduce all of them, but as a matter of accommodation to accused's counsel we will be glad to turn over to him a copy of that.

We are also in the process of having that diary completely photostated and, Mr. President, the mechanical difficulties in translation and in the reproduction of these photostated documents is of serious import and one that we have to keep constantly on the alert to see that we do not have a breakdown. There are four thousand pages of this diary. It will take quite a few days yet but we have asked to have it photostated and we are informed that it is in the process of being photostated. There is an estimate of approximately ten days in which they expect to have it finished. When and if they do, and we hope they will, we will turn over a photostatic copy or several -- well, we have only a limited number that

we need in our own prosecution, less than five -- but we will turn over a copy, a photostatic copy of this diary, which would be the equivalent of the diary itself if it were in the hands of the accused, just as soon as it comes off the plates and is assembled.

"We do not believe that we are obligated to do that and in making that suggestion we hope we are not establishing any precedent on any future occasion.

THE PRESIDENT: It is only fair to do it, of course.

MR. KEENAN: But we think that would comply with all the necessities of the occasion. We think that Marquis KIDO has an excellent memory and will remember the pertinent matters that he put down.

THE PRESIDENT: You have offered two things, if I understand you right. You have offered a copy of the excerpts that you have taken out --

MR. KEENAN: In English.

THE PRESIDENT: Yes, and to give photostatic copies after about ten days?

MR. KEENAN: Yes, of the original document.

THE PRESIDENT: On that undertaking, I will make no order.

(A document purporting to be the

excerpts referred to was given to Mr. Logan, counsel for accused KIDO, by Mr. Keenan.)

MR. LOGAN: We have it now, the excerpts.

MR. KEENAN: Those are English excerpts.

MR. LOGAN: Do I understand your Honor is making no order as to whether the original is to be deposited?

THE PRESIDENT: No. Where is that required? I think the purpose of that is to secure the production in court, not to transfer possession of documents.

MR. LOGAN: May we have--

THE PRESIDENT: On your papers I have met the petition as far as I can with the assistance of the prosecution who have given you these copies and offered you more.

MR. LOGAN: May I ask that the original be placed in custody of someone where it would be available to both parties?

THE PRESIDENT: No, the prosecution generally retains the documents until their production is ordered in the course of the trial.

MR. KEENAN: I might state, Mr. President, in that regard, they are required to be in the hands of the photostators as a mechanical process and that while that is being done, if we want it done as speedily

as possible, neither the prosecution nor the defense would have it available; and after it is photostated, of course, there would be no purpose in disturbing its custody.

THE PRESIDENT: Yes. That is the position.
On that undertaking I make no order.

MR. LOGAN: Thank you.

THE PRESIDENT: I can do no more than the prosecution has offered you on your papers at the present time.

(Whereupon, at 1115 the hearing
was closed.)

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