

University of San Diego

Digital USD

Petitions and Briefs

Hirabayashi v. United States

9-30-1944

Memorandum for Mr. Herbert Wechsler Re; Korematsu v. United States

United States Department of Justice

Follow this and additional works at: https://digital.sandiego.edu/hirabayashi_petitions

Digital USD Citation

United States Department of Justice, "Memorandum for Mr. Herbert Wechsler Re; Korematsu v. United States" (1944). *Petitions and Briefs*. 20.

https://digital.sandiego.edu/hirabayashi_petitions/20

This Book is brought to you for free and open access by the Hirabayashi v. United States at Digital USD. It has been accepted for inclusion in Petitions and Briefs by an authorized administrator of Digital USD. For more information, please contact digital@sandiego.edu.

Department of Justice

Alien Enemy Control Unit

Washington

EXHIBIT

B

September 30, 1944

Noted
C.7-

MEMORANDUM FOR MR. HERBERT WECHSLER

Re: Korematsu v. United States

I understand that the War Department is currently discussing with the Solicitor General the possibility of changing the footnote in the Korematsu brief in which it is stated that this Department is in possession of information in conflict with the statements made by General DeWitt relating to the causes of the evacuation. Mr. Burling and I feel most strongly that three purposes are to be served by keeping the footnote in its present form. (1) This Department has an ethical obligation to the Court to refrain from citing it as a source of which the Court may properly take judicial notice if the Department knows that important statements in the source are untrue and if it knows as to other statements that there is such contrariety of information that judicial notice is improper. (2) Since the War Department has published a history of the evacuation containing important misstatements of fact, including imputations and inferences that the inaction and timidity of this Department made the drastic action of evacuation necessary, this Department has an obligation, within its own competence, to set the record straight so that the true history may ultimately become known. (3) Although the report deals extensively with the activities of this Department and with the relationship of the War Department to this Department, the report was published without its being shown to us. In addition, when we learned of its existence, we were on one occasion advised that the report would never be published and, on another occasion when we asked that release be held up so that we could consider it, we were told that the report had already been released although in fact the report was not released until two weeks thereafter. In view of the War Department's course of conduct with respect to the report, we are not required to deal with the report very respectfully.

I

As to the propriety of taking judicial notice of the contents of the report, it will be sufficient to point out that (1) the report makes an important misstatement concerning our published alien enemy procedures;



(2) the report makes statements concerning radio transmissions directly contradicted by a letter from the Federal Communications Commission, and (3) the report makes assertions concerning radio transmissions and ship-to-shore signaling directly contradicted by a memorandum from the Federal Bureau of Investigation.

II

The wilful historical inaccuracies of the report are objectionable for two different reasons. (1) The chief argument in the report as to the necessity for the evacuation is that the Department of Justice was slow in enforcing alien enemy control measures and that it would not take the necessary steps to prevent signaling whether by radio or by lights. It asserts that radio transmitters were located within general areas but this Department would not permit mass searches to find them. It asserts that signaling was observed in mixed occupancy dwellings which this Department would not permit to be entered. Thus, because this Department would not allow the reasonable and less drastic measures which General DeWitt wished, he was forced to evacuate the entire population. The argument is untrue both with respect to what this Department did and with respect to the radio transmissions and signaling, none of which existed, as General DeWitt at the time well knew. (2) The report asserts that the Japanese-Americans were engaged in extensive radio signaling and in shore-to-ship signaling. The general tenor of the report is not only to the effect that there was a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. Since this is not so it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected. This is the only opportunity which this Department has to correct them.

III.

As to the relations of this Department to the report, the first that we knew of its existence was in April, 1942, when we requested Judge Advocate General Cramer to supply any published material in the War Department's possession on the military situation on the West Coast at the time of the evacuation to be used in the Hirabayashi brief in the Supreme Court. Colonel Watson, General DeWitt's Judge Advocate, stated that General DeWitt's report was being rushed off the press and would be available for consideration. I was then advised, however, that the printed report was confidential and I could not see it but I was given 40 pages torn out of the report on the understanding that I return them which, unfortunately, I have done. Because these excerpts misstated the facts as I knew them and misstated the relations between the Department of Justice and the War Department, I suggested to the Solicitor General that he might wish to discuss with the Attorney General the matter of the Attorney General taking up with the Secretary of War the question of showing us this report before it was released. Colonel Watson then advised me that Mr. McCloy was treating the report as a draft and my personal recollection is that Mr. McCloy stated in Mr. Biddle's presence that it was not intended to print this report. We did not hear about this report again until over six months later when I learned accidentally from Mr. Myer of WRA that he had a copy of the report which the War Department was going to publish. I borrowed his copy and then Mr. Burling called Captain Hall, Mr. McCloy's Assistant Executive Officer, and pointed out to him that the report undertook to discuss relations between the War and Justice Departments without giving us a chance to examine it and it was my understanding that Mr. McCloy did not intend to have the report released. Captain Hall admitted that Mr. McCloy had stated that the report was not to be issued but stated that he was sorry but the report had already been released and there was nothing that could be done. We accepted his statement as true and did not check on it until two weeks had passed without any publicity and then when the report was discussed in the newspapers we checked with the public relations office of the War Department and they advised that the report had just been released and had not been released at the time Captain Hall said it had.

It is also to be noted that parts of the report which, in April 1942 could not be shown to the Department of Justice in connection with the Hirabayashi case in the Supreme Court, were printed in the brief amici curiae of the States of California, Oregon and Washington. In fact the Western Defense Command evaded the statutory requirement that this Department represent the Government in this litigation by preparing the erroneous and intemperate brief which the States filed.

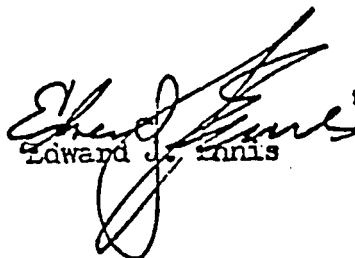
It is entirely clear that the War Department entered into an arrangement with the Western Defense Command to rewrite demonstrably erroneous items in the report by reducing to implication and inference what

had been expressed less expertly by the Western Defense Command and then contrived to publish this report without the knowledge of this Department by the use of falsehood and evasion.

For your information I annex copies of (a) my memorandum of April 20, 1943 to the Solicitor General, (b) my memorandum of January 21, 1944 to the Solicitor General, (c) my memorandum of February 26, 1944 to the Attorney General, and (d) a transcript of Mr. Burling's conversation of January 7, 1944 with Captain Hall which clearly brings out the evasion and falsehood used in connection with the publication of the report.

I also annex copies of memoranda from the FBI and of an exchange of correspondence between the Attorney General and the Chairman of the Federal Communications Commission which establish clearly that the facts are not as General DeWitt states them in his report and also that General DeWitt knew them to be contrary to his report.

RECOMMENDATION: In view of the Attorney General's personal participation in, and final responsibility for, this Department's part in the broad administrative problem of treatment of the Japanese minority, I urge that he be consulted personally on this problem. Much more is involved than the wording of the footnote. The failure to deal adequately now with this Report cited to the Supreme Court either by the Government or other parties, will hopelessly undermine our administrative position in relation to this Japanese problem. We have proved unable to cope with the military authorities on their own ground in these matters. If we fail to act forthrightly on our own ground in the courts, the whole historical record of this matter will be as the military choose to state it. The Attorney General should not be deprived of the present, and perhaps only, chance to set the record straight.


Edward J. Innis

The Solicitor General has gone over the revised page proof of the brief and has made certain additional changes. I desire to invite your attention particularly to the footnote which appears on page 11 of the revised page proof. As set out in the first page proof at page 26, the footnote read:

"The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944) is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and to shore-to-ship signalling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report."

As Mr. Fahy has revised it, it reads:

"The Final Report of General DeWitt (which is dated June 5, 1943, but which was not made public until January 1944) hereinafter cited as Final Report, is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. The recital in the Final Report of circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and shore-to-ship signalling by persons of Japanese ancestry, in conflict with the views of this Department. We, therefore, do not ask the Court to take judicial notice of the recital of those facts contained in the Report."

You will recall that General DeWitt's report makes flat statements concerning radio transmitters and ship-to-shore signalling which are categorically denied by the FBI and by the Federal Communications Commission. There is no doubt that these statements were intentional falsehoods, inasmuch as the Federal Communications Commission reported in detail to General DeWitt on the absence of any illegal radio transmission.

146-42-17
DEPARTMENT OF JUSTICE
1951
DIVISION OF INVESTIGATION

EXHIBIT
AA

ADMIN. SERVICE UNIT

dition, there are other misstatements of fact which seek to blame the Department with the evacuation suggesting that we were derelict in our duties. These are somewhat more complicated but they are nevertheless demonstrably false.

In view of the fact that General DeWitt in his official report on the evacuation has sought to justify it by making important misstatements of fact, I think it important that this Department correct the record as far as possible and certainly we should not ask the Court to take special notice of these facts.

The War Department has no proper complaint as to our disavowal of the recital of the facts. When we were preparing the Hirabayashi brief we heard that the report had been made and asked for a copy of it for our use. We were told that it was secret but that the Army would temporarily loan us certain pages torn out of the report. We did examine these pages in May 1943 and then returned them to the War Department. (Some of these pages were then turned up in a brief filed in the Hirabayashi case, without our knowledge, by the States of California, Oregon and Washington as amici curiae) Mr. McCloy advised Mr. Egan at this time that DeWitt's Final Report would not be made public.

We next heard of the report in January 1944. At Mr. Egan's suggestion, I called Captain Hall, who was Captain Fisher's predecessor, and I asked that the publication of the report be withheld until this Department might examine the full report and make comments concerning the report's discussion of the role played by this Department. Captain Hall stated that the report had already been published and it was too late to do anything about it. The report, however, was not published until two weeks later when it was released to the press. I verified this through the War Department's Publications and Public Relations officers and there was no question that Captain Hall's statement on this subject was untrue and that there would have been time to permit this Department to make representations with respect to the publication of a report placing the responsibility on the War Department in part for the necessity of the evacuation, had the War Department seen fit to permit this Department to inspect the report prior to publication.

In view of all these circumstances, it seems to me that the present characterization of the footnote is unfortunate. There is in fact a contradiction of information and we ought to say so. The statements made by General DeWitt are not only contrary to our views but they are contrary to a detailed information in our possession and ought to say so.

I press the point not only because I would like to see the footnote restored to its earlier form, if possible, but because it is now contemplated that the revised brief be submitted again to the War Department. I assume that the War Department will object to the footnote and I think we should resist any further tampering with it with all our force.

THE PARTIES MAY SUBSTITUTE A BETTER COPY OF THE APPENDIX IF ONE IS AVAILABLE.