FANCY DANCING IN THE MARBLE PALACE

Peter Irons *

On October 12, 1944, Solicitor General Charles Fahy took the podium to urge that the United States Supreme Court affirm the criminal conviction of Fred Korematsu. The crime involved was the defendant's refusal in 1942 to obey one of the military "exclusion orders" that forced the mass evacuation from the west coast and subsequent internment of more than 110,000 Americans of Japanese ancestry. Before he left the podium that afternoon, Fahy had knowingly and deliberately misled the Court on two crucial issues raised in this historic case. By an initial margin of one vote and a final six-to-three division, the Court affirmed the use of military power that Fahy had passionately defended.[1] The Court thus sanctioned the expulsion from their homes and detention of American citizens on the basis of ancestry alone. Fahy's role in the *Korematsu* case casts a shadow over an otherwise distinguished career as government counsel and federal judge.[2]

The transcript of Fahy's argument in *Korematsu* has an intrinsic historical importance that justifies its publication in this journal. Its recent discovery, which I recount briefly below, adds to the record of a seminal case in constitutional law, one that balanced the factors of race and ancestry against the weight of military control over civilians. But the discovery of this transcript in March 1985 has contemporary significance as well. It came too late to influence

* Associate Professor of Political Science, University of California, San Diego. I should note here that I have served as counsel to both Fred Korematsu and Gordon Hirabayashi in their *coram nobis* efforts.

1. Korematsu v. United States, 323 U.S. 214 (1944). Justice William O. Douglas voted at conference to reverse, and prepared a dissenting opinion, but he later switched his vote and withdrew his opinion. For an account of the Supreme Court deliberations in this case, see P. IRONS, JUSTICE AT WAR 319-42 (1983).

2. Lest anyone conclude that I harbor a personal animus toward Fahy, see my admiring account of his service (1935-1940) as general counsel of the National Labor Relations Board in P. IRONS, THE NEW DEAL LAWYERS 226-89 (1982). In that book, I characterized Fahy as a "legal craftsman" and wrote: "His job was to enforce a statute through the presentation of carefully selected cases in the courts, with meticulous attention to detail and the formulation of narrowly drawn issues the keys to success." *Id.* at 235. For tributes to Fahy after his death by his colleague, Judge David L. Bazelon, and former clerk, Prof. Sherman L. Cohn, see 68 GEO. L. J. i-vii (1979).

the outcome of Korematsu's recent challenge to his wartime conviction, a challenge that persuaded a federal judge in October 1983 to vacate the conviction and grant a *coram nobis* petition based on charges of governmental misconduct.[3] Although this transcript had been sought for inclusion in Korematsu's petition, other documents from government files (discussed below) formed a sufficient basis for Judge Patel to grant the petition, since the government did not contest the misconduct charges on their merits.[4]

The transcript has since been placed in evidence in a related case, a similar *coram nobis* petition filed by Gordon Hirabayashi to challenge his 1942 convictions for violation of military curfew and exclusion orders. Affirming the convictions in 1943, the Supreme Court ruled only on the curfew issue and evaded until the next year the exclusion issue raised in *Korematsu*.[5] At a two-week hearing in Seattle in June 1985, Judge Donald Voorhees allowed the transcript in evidence since Fahy had made specific reference in his *Korematsu* argument to the "military necessity" claims made at length in the *Hirabayashi* brief. Over the vehement objection of government lawyers that the Fahy transcript lacked relevance to the *Hirabayashi* case, Judge Voorhees permitted Hirabayashi's counsel to question the veracity and ethical propriety of Fahy's argument.

This brief commentary on the Fahy transcript will first discuss the circumstances of its discovery, a question raised at the recent hearing in Seattle. I will then try to place the transcript into the context of the heated arguments within the Justice Department over the issues of "military necessity" and detention, disputes that began during preparation of the government's Supreme Court brief in *Hirabayashi* in early 1943 and continued through argument of *Korematsu* in late 1944. Finally, I will discuss the relevance of this transcript to the recent *coram nobis* cases, two of which are pending at this writing, and conclude with my assessment of Fahy's behavior in these historic wartime cases.

I

I think a brief word on the discovery and provenance of this transcript is in order, although I will shorten this tale of legal archaeology. I began working in 1981 on a book about the Japanese

3. Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984) (opinion of Judge Marilyn Hall Patel).

4. The government's two-page response to the Korematsu petition called the evacuation and internment an "unfortunate episode" in American history and included a general denial of the misconduct allegations. Judge Patel considered the government's response "tantamount to a confession of error." 584 F. Supp. at 1413.

5. Hirabayashi v. United States, 320 U.S. 81 (1943).

internment cases. This book, published in 1983 as *Justice At War*, recounts in considerable detail the events discussed in this commentary, and provides the primary source citations to documents I cite below to the book, for ease in reference.[6] Early in my research, I requested from the Justice Department access to the original litigation files in these cases. Sad to say, I was first told, the files had been "lost" many years ago and no record existed of their disposition.

But with an unaccustomed—at least to me—diligence, Justice staffers continued their search and informed me in October 1981 that the missing litigation files had been located in a most unlikely place, the files of the Immigration and Naturalization Service, an agency with no involvement in these cases.[7] When the internment case files were finally opened for my inspection, they had not been screened and rested in three dusty cardboard boxes. Virtually the first document I examined in the *Korematsu* file was a memorandum from a Justice Department lawyer that warned Solicitor General Fahy not to pass on War Department "lies" to the Supreme Court. Another document in the *Hirabayashi* file cautioned Fahy that he risked the "suppression of evidence" in withholding crucial military intelligence reports from the Supreme Court.[8]

As I dug through these files, I eagerly looked for transcripts of the Supreme Court arguments that Fahy made in both *Hirabayashi* and *Korematsu*. My appetite was whetted by finding a partial transcript of his argument in the *Endo* case, which was argued the same day as *Korematsu*.[9] The *Korematsu* file included records showing that Fahy had ordered a transcript of his argument and that two copies had been delivered to his office. But I could find neither copy in the Justice Department files provided to me, and I had no reason to believe the file was incomplete.

Needless to say, the documents I found in the files became an

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6. P. IRONS, *supra* note 1.

7. Although the internment cases were prosecuted at trial by local U.S. attorneys and appeals would normally be handled by the Criminal Division of the Justice Department, they were actually handled by the Alien Enemy Control Unit, headed by Edward Ennis; this unit was established in December 1941 and abolished in 1946. Perhaps the title of this unit led someone to assume that its records should be sent to INS.

8. *See* P. IRONS, *supra* note 1, at 204, 288.

9. Ex parte Endo, 323 U.S. 283 (1944). This case involved a habeas corpus challenge by a young woman who filed a petition after reporting for detention. The Supreme Court unanimously concluded that Congress had not authorized the indefinite detention of concededly loyal citizens, although the constitutional challenge to detention was not decided.

I should add that before 1955, when the Court began recording and transcribing all oral arguments (transcripts and tape recordings are available from the National Archives), counsel were responsible for hiring a private court-reporting firm if they wanted transcripts. Fahy only had his own argument transcribed, and those of his opponents in *Korematsu* are not available.

important part of my book. After I interviewed the defendants in the criminal cases, their reaction to these records led to my involvement as an attorney in efforts to vacate their convictions on the ground of governmental misconduct. In order to complete the *coram nobis* petitions, I continued my search for the missing *Korematsu* transcript; no record existed of a similar *Hirabayashi* transcript. Over the next three years, I searched through Fahy's files in the Roosevelt Library in Hyde Park, New York, and in the Library of Congress. I asked the clerk and librarian of the Supreme Court to look for the transcript. I enlisted the help of Fahy's family in searching their attics and basements. Fahy's opponent in the case, Charles Horsky, looked in his files. I tracked down in Florida the retired head of the court-reporting firm that made the transcript. Fahy's secretary in 1944 and the person who ordered the transcripts, Mildred Fanebust, still worked in 1983 as secretary to Solicitor General Rex Lee. Ms. Fanebust searched her files, but neither she nor anyone else could locate the elusive document.

Almost convinced that my quest was quixotic, I gave up for two years. But, during a quick visit to the National Archives in March 1985, I asked an archivist if I could look again at the card-index file on the *Korematsu* case, from which I obtained the case-file number in 1981. The cards had since been closed to researchers, she told me, but she volunteered to look through them for me. Had I ever looked, she asked, for an "enclosures" file in the case? When I professed ignorance, she said that bulky or superfluous documents were often stored in such files. Five minutes later, a staffer at the Federal Records Center just outside Washington called back to report that the missing transcript was indeed in the "enclosures" file, the existence of which had never been disclosed in response to my longstanding Freedom of Information Act and judicial discovery requests.[10]

10. I recount this otherwise unexciting tale of the unanticipated reward for persistence because of its possible legal significance. The Justice Department lawyer now defending the government against Hirabayashi's misconduct charges has argued vehemently—and thus far with no success—that the *coram nobis* petition is barred by laches; the relevant evidence has been available for almost forty years, he claims, and Hirabayashi has waited too long to reopen his case. But at the Seattle hearing before Judge Voorhees in June 1985, Edward Ennis testified about the substance of the Fahy transcript, and I testified about my continuing search for it in countering the government's laches defense. Although Judge Voorhees has not ruled on the petition at this writing, he indicated in comments to the government's disputatious lawyer that he found no merit in the laches argument. At the conclusion of the hearing, Judge Voorhees asked both sides for posttrial briefs in place of closing arguments and set October 4, 1985, as the deadline for briefs. His ruling on the petition will come at some time after this date.

II

Let me turn now to the substance of Fahy's argument in *Korematsu*, and discuss what the transcript adds to our knowledge and understanding of the issues in the case. Two issues in particular require some background and context. The year before this argument, Fahy had defended the conviction of Gordon Hirabayashi on the ground that "military necessity" had justified the curfew and exclusion orders as a means of preventing espionage and sabotage by Japanese Americans. The government's *Hirabayashi* brief had outlined this argument at length, and the Supreme Court had unanimously echoed Fahy's claims that Army "findings of danger from espionage and sabotage," combined with findings of "disloyalty" among the Japanese Americans, made the curfew order an "appropriate measure" to deal with these dangers.[11]

When Fahy returned to the Court to defend the exclusion order that Korematsu had challenged, he concealed from the Justices all evidence of an internal insurrection that he had quashed just days before. At issue was the veracity of the *Final Report* of General John L. DeWitt, who had both urged and implemented the mass evacuation and internment of Japanese Americans. DeWitt had flatly charged in this official report to the Secretary of War that evidence of espionage by Japanese Americans had prompted his evacuation recommendation. DeWitt's report cited "hundreds of reports nightly of signal lights visible from the coast, and of intercepts of unidentified radio transmissions" from the mainland to offshore Japanese submarines as justification for evacuation.[12]

These espionage charges aroused the suspicions of two Justice Department lawyers, Edward Ennis and John Burling, who were responsible for the government's *Korematsu* brief. The two men prevailed on Attorney General Francis Biddle to ask the FBI and the Federal Communications Commission to investigate DeWitt's charges. Both agencies reported to Biddle that exhaustive investigations had completely refuted the espionage claims. FBI Director Hoover found no evidence that Japanese Americans "have been associated with any espionage activity ashore or that there has been any illicit shore-to-ship signaling, either by radio or lights."[13] FCC Chairman James L. Fly assured Biddle that his agency had investigated hundreds of reports of suspicious radio transmissions and that DeWitt's charges "indicating the existence of illicit radio signaling

11. 320 U.S. at 103-04.

12. P. IRONS, *supra* note 1, at 279.

13. *Id.* at 281.

cannot be regarded as well-founded."[14]

The reports from Hoover and Biddle prompted Ennis and Burling to draft a footnote for the *Korematsu* brief, designed to wave a red flag before the Justices. DeWitt's claim of "military necessity" and his supporting evidence of "the use of illegal radio transmitters and . . . shore-to-ship signaling by persons of Japanese ancestry," Ennis and Burling wrote, were "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."[15] It is hard to imagine a more pointed refutation of a document on which the government proposed to rest its defense of DeWitt's exclusion orders.

What happened after Ennis and Burling drafted their confessional footnote can only be summarized here. Before the printed brief reached the Supreme Court, Assistant Secretary of War John J. McCloy read the drafted footnote, called Fahy to complain, and prevailed on the Solicitor General to stop the printing presses and remove the offending language. After some indecision, Fahy complied with McCloy's request and finally approved substitute language drafted by Herbert Wechsler, who headed the War Division of the Justice Department. Assuring McCloy's deputy that he revised the footnote to refer to DeWitt's report "in the gentlest conceivable way," Wechsler settled on language that "we rely upon the Final Report only to the extent that it relates" to details of the evacuation process.[16] Fahy endorsed Wechsler's revision and sent the brief back to the printers.

The transcript of Fahy's argument shows the extent to which DeWitt's report dominated the proceeding. Charles Horsky and Wayne Collins, who shared the podium for Korematsu, both had denounced the report the previous day. Collins had argued that the public record provided no evidence of espionage or sabotage by Japanese Americans and that DeWitt's orders thus lacked any "rational basis" in fact; Horsky had also intimated that Fahy doubted the veracity of DeWitt's espionage charges. Pointing the Court to the watered-down footnote in the government's brief, Horsky suggested that it could be read as an admission that no evidence existed to support the charges.[17]

Fahy's response to these pointed remarks went far beyond the

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14. *Id.* at 283.

15. *Id.* at 284-92.

16. *Id.* at 291.

17. For an account of the oral arguments of Horsky and Collins, see *id.* at 311-15. This account is based on the handwritten notes made by an Army observer and an interview with

limits of partisan argument. Answering the claims that DeWitt had "no rational basis on which to make a military judgment," Fahy denied that "a single line, a single word, or a single syllable" in the report could cast any doubt on the "military necessity" basis for DeWitt's orders. Later in his argument, Fahy assured Chief Justice Stone that "the report proves the basis for the exclusion orders." This flat endorsement of a document the FBI and FCC had torn to shreds, and that Ennis had urged Fahy to repudiate, turned on its head the Solicitor General's dismissal of his opponents' arguments as "a neat little piece of fancy dancing." Fahy himself danced around the ambiguous footnote in denying that "the Government has repudiated the military necessity of the evacuation." His claim that "no person in any responsible position has ever taken a contrary position" was a flat out lie. As Director of the Alien Enemy Control Unit, Ennis had consistently opposed the evacuation, and Attorney General Biddle had made a futile objection to Roosevelt that the War Department had no military basis for the forced exodus of civilians.[18]

III

Fahy also misled the Court in his argument on a second major issue in the *Korematsu* case, that of the link between evacuation and detention. As the transcript demonstrates, this was a complex issue that confounded the Justices, spilled over into the related *Endo* case, and rested on evidence absent from the skimpy trial court record in the case. The issue of detention as a concomitant of evacuation was nonetheless crucial; Fahy's concession in *Endo* that Congress had not authorized the indefinite detention of loyal citizens forced him in *Korematsu* to minimize the connection. Fahy was fortunate that Wayne Collins, who defended Korematsu at trial, had neglected this question and had failed to build a record of documents and testimony for the Supreme Court.[19]

What Fahy wanted to avoid in his *Korematsu* argument was any admission that Fred Korematsu, had he reported as ordered to the assembly center at the required time on May 9, 1942, would have been held in detention for a period that had no predetermined limit. John Burling, who began his work on the *Korematsu* brief with the belief that Japanese Americans had been offered the chance

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Horsky. My account of Fahy's argument, at 315-17, is also based on the Army notes and is now superseded by the full transcript.

18. On Biddle's objections, see *id.* at 61-63. For Biddle's later reflections about his failure to press his objections more strongly, see F. BIDDLE, IN BRIEF AUTHORITY 213-26 (1962).

19. P. IRONS, *supra* note 1, at 295.

for "voluntary migration" from the west coast, changed his mind after a careful review of the record. "Contrary to the assumptions upon which we in this office have been going for some time," he wrote Fahy in April 1944, "the original detention was not ordered as a mere temporary expedient, to be in effect for a few days while the persons were removed from California, nor was it in any sense hypothetical or speculative." The offer of "voluntary migration" had in fact expired before Korematsu was compelled to report for evacuation.[20]

Burling pleaded with Fahy before the argument not to adopt the War Department's claim, expressed in the DeWitt report, that the "voluntary migration" program was abandoned *after* exclusion orders were issued, and only *after* the governors of interior states refused to allow Japanese Americans to settle in their states. Burling knew, and told Fahy, that detention in assembly centers, and subsequent indefinite detention in the relocation camps, had been decided as a policy well *before* the hostile governors met with Army officials on April 7, 1942. Burling's point was that Korematsu, even before he became subject to the exclusion order, could not have left his home town, and that on May 9 it became a crime to remain there. His only lawful alternative to this dilemma was indefinite detention.

When he appeared before the Supreme Court, Fahy ignored Burling's protests and claimed that mass evacuation was adopted only because voluntary migration "did not work" and only after "a great wall of hostility" was erected in the Rocky Mountain states. Fahy's bathetic evocation of "old men, old women, babies in arms, and children" being forced into the deserts and mountains "at the point of a bayonet" was, in truth, not the unfortunate alternative to voluntary migration but the calculated policy of the government.

Fahy additionally misled the Court in denying that Korematsu, had he reported for evacuation, would necessarily "have found himself in a relocation center." That is exactly where Korematsu would have found himself. Fahy's vague reference to "security reasons" as a basis for the release of some Japanese Americans from the assembly centers evaded two issues. First, release was entirely discretionary with Army officials; and second, those released were required to remain outside the west coast area designated as a "military zone." Nothing in the record countered Burling's claim that Korematsu faced an indefinite period of detention. Fahy knew this as he assured the Court that even after issuance of the exclusion order Korematsu "could go where he would." Korematsu could go

20. *Id.* at 293. The full account of this dispute between Burling and Fahy is at 292-302.

only one place on May 9, 1942, and that was a barbed-wire compound.

IV

What impact might this transcript have on the pending *coram nobis* cases that seek vacation of criminal convictions in 1942? The *Korematsu* petition has reached final decision, on a record that did not include this petition. But the available record, including many of the documents cited above, provided Judge Patel with adequate grounds for granting the petition. The full record of the case, she wrote, demonstrates the falsity of the espionage charges in the DeWitt report and "is replete with protestations of various Justice Department officials that the government had the obligation to advise the courts of the contrary facts and opinions." She also found "substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court." Without direct reference to Fahy, but with his role in the case obvious from the context, Judge Patel concluded that the "judicial process is seriously impaired when the government's law enforcement officers violate their ethical obligations to the court."[21]

In the two pending cases, *Yasui* and *Hirabayashi*, the Fahy transcript might well affect the outcomes, at least in adding to the weight of the evidence already before the courts. The attention given to the transcript at the recent *Hirabayashi* hearing in Seattle, and the interest that Judge Voorhees displayed in the testimony of Edward Ennis about his wartime conflicts with Charles Fahy, suggest that the transcript might well figure in the final opinion on the petition. The glaring disparity between the FBI and FCC refutations of DeWitt's espionage charges and Fahy's unbending endorsement of the report certainly adds weight to the misconduct charges raised in the *Hirabayashi* petition.

Finally, what does this argument transcript tell us about Fahy? He emerges from the printed page as a masterful advocate. Soft-spoken and short in stature, and nicknamed "Whispering Charlie"

21. 584 F. Supp. at 1418, 1420. I should note that the Supreme Court decided a third criminal case, one that challenged only the curfew and that was decided along with *Hirabayashi*. Yasui v. United States, 320 U.S. 115 (1943). The trial judge had held both that the curfew regulation was unconstitutional as applied to citizens and that Yasui had renounced his citizenship by employment in the Japanese consulate before the war. The Supreme Court sustained the conviction but reversed the judge on both issues. In February 1984, Judge Robert Belloni of the U.S. District Court in Portland, Oregon, vacated Yasui's conviction on the government's motion and dismissed his petition. Yasui has appealed this latter ruling and the case is currently pending before the Ninth Circuit Court of Appeals.

by the press, Fahy was adept in fielding (and sometimes deflecting) questions from the bench. He projected an image of openness and brought a reputation for integrity to the Supreme Court podium. What went wrong in the *Korematsu* case? Did he go over the line of ethical behavior, as Judge Patel's opinion concludes? And was Fahy the only culpable official?

The first of these questions is difficult to answer in this brief commentary. The conclusion that Fahy became trapped between the wartime pressures that gripped the entire government and his professional and ethical obligations is both true and simplistic. Such a formula could excuse virtually any act, as was attempted in far more extreme cases after the war by the Nuremberg defendants. Fahy was, however, a man of deep respect for military authority; he was inclined to defer to arguments of "military necessity" and to men like John McCloy. One need not borrow from psychobiography to understand Fahy as a man lacking in subtlety, who felt strongly that Japanese Americans should share the "hardships of millions of our people in the fight of the nation for its life."

The complete record leaves no real doubt that Fahy misled the Supreme Court in the *Korematsu* case. Edward Ennis, who ultimately swallowed his protests and signed the government's brief, told Judge Voorhees in 1985 that the crucial footnote represented "the narrowest path available to avoid censurable misconduct." Harried by his opponents and questioned sharply by the Court, Fahy strayed from that narrow path in vouching for every line, word, and syllable of DeWitt's tainted report.

One might argue that Fahy had no obligation to disclose the FBI and FCC reports to the Supreme Court, as Ennis and Burling urged. One might also note that Collins and Horsky, in defending Korematsu, cast doubt on DeWitt's espionage charges, doubt that was echoed in the scathing dissent of Justice Frank Murphy.[22] Full disclosure of every piece of potentially exculpatory evidence was not then a prosecutorial duty, and Ennis accepted Fahy's power to overrule him on this issue. However culpable in misleading the Court, Fahy had acceded to McCloy's protest over the original red-flag footnote. McCloy, who supported mass evacuation in 1942 and defended it four decades later as "retribution" for Pearl Harbor,

22. 323 U.S. 214, 233 (1944) (Murphy, J., dissenting). In addition to blasting the majority opinion as a "legalization of racism," Murphy tore the DeWitt report to shreds and noted that "there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand" at the time of evacuation. *Id.* at 241-42. This point, which echoed the arguments of Collins and Horsky, hardly answers the claim that Fahy had a positive duty to inform the Court of the existence and contents of the FBI and FCC reports.

certainly bears more blame and shame than Fahy in the final calculus of ethical failure.

But the Solicitor General speaks for the American people when he appears before the Supreme Court in its marble palace. If he does not address the Court fully and honestly, he betrays the people's trust and undermines the Court's integrity. In this case, Charles Fahy bears the responsibility for persuading the Court to violate the rights of Fred Korematsu, a man of quiet dignity who waited forty years for his ultimate vindication.

APPENDIX

IN THE SUPREME COURT OF THE UNITED STATES,
OCTOBER TERM, 1944.

FRED TOYOSABURO KOREMATSU, Appellant, vs. UNITED STATES OF AMERICA, Appellee,	No. 22.

Washington, D.C.,
Thursday, October 12, 1944.

The arguments in the above-entitled matter were resumed at 12 o'clock noon.

BEFORE:

CHIEF JUSTICE HARLAN F. STONE and
ASSOCIATE JUSTICES ROBERTS, BLACK,
REED, FRANKFURTER, DOUGLAS, MURPHY,
JACKSON, and RUTLEDGE.

APPEARANCES:

On behalf of Appellant:

Mr. Jackson H. Ralston
Mr. Wayne M. Collins
Mr. Charles A. Horsky.

On behalf of Appellee:

Mr. Charles Fahy, Solicitor General of the United States.

P R O C E E D I N G S.

THE CHIEF JUSTICE: Proceed with the case now on argument, No. 22, Korematsu against The United States. Mr. Fahy.

ORAL ARGUMENT ON BEHALF OF APPELLEE, BY MR. CHARLES FAHY, SOLICITOR GENERAL.

MR. FAHY: If the Court please, before entering into the main argument in support of this conviction, I should like to make a statement, and then pass it and revert to the subject matter later in the course of my argument. It grows out of the statements read to the Court toward the close of yesterday's session, from the Attorney General, Mr. Justice Byrnes, and Secretary Ickes, from which the Court might gain the impression that there was a division of opinion within the executive branch of the Government. I state that each of those statements was made with respect to a part of the program which I believe I shall be able to demonstrate to the Court is in no way involved in this case.

THE CHIEF JUSTICE: Will you refer to the place where they are printed?

MR. FAHY: They are printed in the amicus curiae brief, and were referred to in oral arguments.

The proposition which I desire to state in that connection—and then I wish to leave it, because I wish to have that before the Court and behind me before I enter the argument of the case—is that the Government stands four square and indivisible in support of this conviction and of the constitutionality of all issues which we believe are involved in this case.

The case is an unusual one. The Court is called upon to exercise, in the judicial function, a review of what was essentially a military order. That came about in this way: After the attack of Pearl Harbor, and after the military commander of the Western Defense Command, a command covering an area which had been activated as a theater of operations by the War Department, urged the War Department and the Executive, and the Office of the Secretary of War—the Office of the Secretary of War, supporting the commander in the field, urged the President, and the latter, in his capacity as President and Commander in Chief, on February 19th ordered that, in view of the necessity growing out of the large defense facilities on the West Coast and the threat of invasion there, the Secretary of War or the military commander designated by him, should have authority to prevent espionage and sabotage in the face of the threat of invasion, to exclude persons from the areas and to take such other steps as might be deemed wise in the discretion of the commanding general or that of the Secretary of War, to control espionage with respect to restrictions upon the rights of the people to be, enter, or remain in the area. That was February 19th.

The commanding general, Lieutenant General DeWitt, was designated by the Secretary of War, and under the authority thus given, created certain military areas by his public proclamation No. 1, of March 2nd, in which he stated that from large areas thereafter any and all persons may be excluded under the authority granted under the Executive Order of February 19th.

Thereafter the matter was urgently submitted to Congress by the Secretary of War, through the chairmen of the appropriate committees and the Speaker of the House of Representatives, to enact a statute so that these orders would not simply be carried out by the military, but that the civil branch of the Government would support the enforcement of necessary restrictions. That was done, after Congress was advised by the Chairman of the Military Affairs Committee, when the matter was under discussion, under the scope of the authority previously granted and then being exercised, the evacuation of persons of Japanese ancestry, citizens and non-citizens, was then under way under the Executive Order, and after the Tolan committee, which had studied the situation in the field with great thoroughness and temperateness, had reported to the Congress that the judgment of the military that there should be such evacuation could not seriously be questioned.

Congress enacted the statute here involved, making it a misdemeanor for any one to disobey any of the restrictions contained in orders made within the purview of the Executive Order of February 19, as ratified—as this Court held in the Hirabayashi case—by the act of Congress of March 21, 1942.

It is in that manner that the courts are asked to review what, as I stated a moment ago, was essentially a military movement in the field of operations—a very unusual situation, and one which, because of its character and the necessities of the manner in which war is conducted, should be subject to limited review. This Court said, in the Hirabayashi case, that the

review was one of a limited character and set forth the principles under which the judiciary should approach the review of such orders.

THE CHIEF JUSTICE: Your opponent says that Congress knew about the exclusion, but did not know about the segregation and detention.

MR. FAHY: Congress did know, Your Honor. I am now speaking of evacuation.

THE CHIEF JUSTICE: I thought you were speaking of the exclusion.

MR. FAHY: I was at the moment, Your Honor.

Public Proclamation No. 1, of March 2, 1942, notified all that persons would be excluded. It was reported on the floor of the Senate that evacuation had begun, before the act was passed. The Tolan committee report forecast the continuation of the plans for evacuation.

THE CHIEF JUSTICE: The act itself refers to exclusion.

MR. FAHY: The act itself refers specifically to exclusion.

After the statute was passed, exclusion orders in large number were issued. The way the program was carried on was that the military area as a whole was subdivided into zones, and individual exclusion orders with respect to each zone were issued seriatim, affecting those in the particular area described. Such individual exclusion orders were effective as of a certain date specified in the order. That was the manner in which the program was carried out in an orderly fashion.

Civilian Exclusion Order No. 34, of May 3, 1942, was the one which was applicable to the area where the petitioner resided. He knew of it, as he says in his testimony, which is a requirement, I believe, or a necessary element in the violation of the statute. He desired to remain there, believing that because he was a loyal American native-born citizen, it was beyond the power of the Government to require that he be removed, and so he disobeyed the order. An information was filed against him, alleging that disobedience, and he was convicted because, in fact, he had remained when the order said that he should go. That constituted the violation of the statute.

In the first place, we say that the order, as I have already related, was clearly within the scope of the statute, leaving as the first fundamental question in the case, "Was the application of the order to the respondent constitutional and consistent with due process if otherwise constitutional?"

That brings us to the question of the nature of the order in relation to the military situation, and the efforts made in this manner to protect the West Coast, under the threat of invasion, from espionage and sabotage.

The facts in that regard are essentially the same as those reviewed by this Court in the Hirabayashi case, fully briefed by the Government. Because the question was fully briefed in that case, it is briefed with less elaboration in this case.

It was suggested here yesterday, and it is argued with some vigor in the brief of the Amicus Curiae, that notwithstanding the decision of the Court in the Hirabayashi case that the orders were justified under the exercise of the war power, the Court did not then have before it all the facts, and that now, after the event, we know that the facts did not justify evacuation as a military measure.

THE CHIEF JUSTICE: What do you mean by that? Is it argued that there was no basis on which the military judgment could be founded?

MR. FAHY: It must be that, Your Honor, because that is the test. The final report of General DeWitt was held up to Your Honors yesterday as proving that he himself had no rational basis on which to make a military judgment. I am not going into the details of that report, because no doubt the Court will read it. However, I do assert that there is not a single line, a single word, or a single syllable in that report which in any way justifies the statement that General DeWitt did not believe he had, and did not have, a sufficient basis, in honesty and good faith, to believe that the measures which he took were required as a military necessity in protection of the West Coast.

THE CHIEF JUSTICE: Has each of us a copy of that report?

MR. FAHY: I think not, Your Honor; but I am sure the War Department can make them available.

THE CHIEF JUSTICE: Will you make them available?

MR. FAHY: Yes.

It is even suggested that because of some foot note in our brief in this case indicating that we do not ask the Court to take judicial notice of the truth of every recitation or instance in the final report of General DeWitt, that the Government has repudiated the military necessity of the evacuation. It seems to me, if the Court please, that that is a neat little piece of fancy dancing. There is nothing in the brief of the Government which is any different in this respect from the position it has always maintained since the Hirabayashi case—that not only the military judgment of the general, but the judgment of the Government of the United States, has always been in justification of the measures taken; and no person in any responsible position has ever taken a contrary position, and the Government does not do so now. Nothing in its brief can validly be used to the contary.

I hesitate to go over the military situation; but if the evacuation was within the war power, it grew out of the military situation exteriorally in relation to the situation interiorally on the West Coast, which this Court has heretofore fully reviewed.

It was even suggested here yesterday that that was all a mistake, because in June the battle of Midway turned back the threat of invasion. It is difficult to see how, because of the battle of Midway in June, or because of activities in the Solomon Islands in August, 1942, the threat of invasion of the Pacific Coast in the winter of 1941 and 1942 could have been said not to have existed. If it be true that the battle of Midway did stop or retard the threat of invasion after those measures had been taken, it cannot be said that prior to that there had not been a threat of invasion; and if it is said, let it be said to those who turned back that particular threat then, if they can be reached where they lie at the bottom of the Pacific Ocean, among the hulls of the warships which went down with them in that battle—contemporaneously with which, as a matter of fact, the Japanese did land upon the territory of the United States in the Aleutian Islands.

MR. JUSTICE JACKSON: What is the status of this report? It does not seem to be a report to Congress.

MR. FAHY: No. It is a report of the commanding general to the Secretary of War.

MR. JUSTICE JACKSON: Is it your view that the Court can take judicial notice of the facts which it recites?

MR. FAHY: Not all of them, Your Honor. I think the Court is required to take judicial notice only of those facts which are of the character of public general knowledge. Beyond that, as to the details in the report, certainly the Court is entitled, it seems to me, to consider them in proving what the general was thinking, his motive, and what he had before him when he made the judgment which he made. Otherwise I see nothing to be done, if the Court please, except that the case go back to be heard, and that all this be gone into in a trial, which the Government does not suggest.

MR. JUSTICE JACKSON: There is a difference on that point. One of the briefs takes very sharp issue with some of the statements of fact.

MR. FAHY: Yes.

MR. JUSTICE JACKSON: And in certain instances in which the report is silent as to dates, it is pointed out that the occurrences stated in the report were after the Japanese had all been evacuated. What is our duty in a case of that kind? Where do we get the facts, if the facts become important?

MR. FAHY: I do not think Your Honor can rely upon the facts other than those which are matters of common knowledge, or which come from sources of which the Court can take judicial notice, and from which such facts can be made available to the Court. If it should become important, we would make every effort to do that.

THE CHIEF JUSTICE: As I understood the argument of the other side, it was that this report, taken as a whole, could be taken to exclude the possibility of a basis for military judgment to continue these exclusion orders. We are dealing now only with exclusion orders.

MR. FAHY: Yes; that is their position.

THE CHIEF JUSTICE: Do you challenge that position?

MR. FAHY: We say that the report proves the basis for the exclusion orders. There is not a line in it that can be taken in any other way. It is a complete justification and explanation of the reasons which led to his judgment.

THE CHIEF JUSTICE: What about the point made in the discussion yesterday, that,

whatever it showed, we could or could not take it as being all that was known, or could be known, by the military authorities in forming this judgment?

MR. FAHY: If there is known to the Court, through all the sources available to the Court, sufficient from which the Court, in the absence of any rebuttal, could pass upon the question of the rationality of the military judgment, that would be an end of it. If, as a matter of fact, from all the Court can take judicial notice of, or consider in any other way, the Court is left in doubt as to whether there was a rational basis for the judgment, I think you have a different question. We stand on the proposition that there is sufficient, from what is known as a matter of public knowledge, and which is not controverted, to support the judgment. We are not speaking here, Your Honor, of merely the judgment of the commanding general in the area.

That brings me to a point which I wish to emphasize—

THE CHIEF JUSTICE: Before you come to that, does your brief make any analysis of the report, or give page references to the parts upon which you rely?

MR. FAHY: Yes.

MR. JUSTICE FRANKFURTER: Suppose the commanding general, when he issued Order No. 34, had said, in effect, "It is my judgment that, as a matter of security, there is no danger from the Japanese operations; but under cover of war, I had authority to take advantage of my hostility and clear the Japanese from this area." Suppose he had said that, with that kind of crude candor. It would not have been within his authority, would it?

MR FAHY: It would not have been.

MR. JUSTICE FRANKFURTER: As I understand the suggestion, it is that, as a matter of law, the report of General DeWitt two years later proved that that was exactly what the situation was. As I understand, that is the legal significance of the argument.

MR. FAHY: That is correct, Your Honor; and the report simply does nothing of the kind.

MR. JUSTICE MURPHY: Did the order affect Japanese, or Americans?

MR. FAHY: It affected all persons of Japanese ancestry, which included both Americans and aliens of Japanese ancestry.

MR. JUSTICE MURPHY: Assuming that the order was issued in good faith, and that the military necessity for it was clear, was any administrative provision made for an American citizen of Japanese blood to prove that he was loyal?

MR. FAHY: There was such a provision later, but not during the progress of the evacuation itself.

MR. JUSTICE REED: Did the defendant raise any question in regard to the reasonable basis of the order?

MR. FAHY: Your Honor, I think my answer should be "yes," because he filed very voluminous objections, and I think you could read into those objections as a whole a demurrer to the information.

MR. JUSTICE REED: A demurrer which would be directed at the basis of the order?

MR. FAHY: That is what I mean.

MR. JUSTICE REED: What about attacking the basis of information which General DeWitt had for issuing the order?

MR. FAHY: There was nothing but the demurrer, Your Honor.

MR. JUSTICE REED: Then, in your judgment, do we have to meet the question as to whether or not there was reasonable information which led the general to that decision?

MR. FAHY: I rather think so, Your Honor, for this reason: I think there would be no judicial review of such an order ordinarily; but here the Government, acting entirely properly, did not wish to carry out this order by forceful ejection unless it were necessary, so it came to Congress and called upon the civil branch of the Government to make noncompliance with the order a misdemeanor. That was in aid of enforcement. Having done that, the case is subject to review, and I think the review can probe whether or not the order was valid, because of those circumstances. In order to find that it was not valid, this Court would have to find that it was so arbitrary that it had no reasonable relation to the defense of the West Coast.

THE CHIEF JUSTICE: I suppose you agree that an order of this kind would always be

open to review on the basis of changed circumstances taking out from under it the support on which it originally rested.

MR. FAHY: Yes, Your Honor, under the same test which I have stated. However, in this case the review must be based on the circumstances which existed in May, 1942.

THE CHIEF JUSTICE: That is correct.

MR. FAHY: As to General DeWitt's report, Mr. Justice Frankfurter, he concludes his report, after reviewing all the reasons which had motivated him from a military standpoint, with the following statement:

"The Commanding General, charged, as he was, with the mission of providing for the defense of the West Coast, had to take into account these and other military considerations."

He had referred to them in the body of his report.

"He had no alternative but to conclude that the Japanese constituted a potentially dangerous element from the viewpoint of military security; and military necessity required their immediate evacuation to the interior. The impelling military necessity had become such that any measures other than those pursued along the Pacific Coast might have been too little and too late."

MR. JUSTICE FRANKFURTER: That does not preclude the conviction that a wiser man would not have so concluded.

MR. FAHY: Of course not. The military may make mistakes. We know of many that have been publicized during this war. I will not say "many." We know of some. For example, in the invasion of Sicily, hundreds of our own men were shot down by our own forces. Someone made a mistake.

THE CHIEF JUSTICE: The military necessity could not be measured wholly in terms of invasion. It included the dangers envisaged by the Presidential order, which related to espionage and sabotage.

MR. FAHY: That is correct. The report goes into that aspect of it. He views the situation from the standpoint of the deterioration, as he calls it, of the military situation in the Pacific in relation to the situation interiorally on the Pacific Coast, and comes to the judgment that under the threat arising from the exterior, with all the facilities on the West Coast, the danger was such that he could not feel secure in the defense of the Coast without the removal of this part of the population.

MR. JUSTICE FRANKFURTER: Is there anything in the record which shows, or can we take judicial notice of the fact that orders such as Civilian Exclusion Order No. 34 are automatically reported to the Secretary of War or the Chief of Staff?

MR. FAHY: They are published immediately in the Federal Register, Your Honor. Perhaps I am going a little beyond the record here. That brings me to the point which I started to make a few moments ago.

It is argued here, if the Court please, in addition to the contention that there was no military need, that the military commander, in carrying out this program through these orders, was exceeding his own authority. That argument has been made. It is one of the fundamental errors of the brief of the Amicus Curiae. They suggest to this Court a narrow basis of decision, that what was done was done by the general without the authority of his Government.

I have a word to speak for my Government now. It seeks no scapegoat in this case, be he general, or be he a civil employee engaged in subsequent phases of this difficult program. The Government hopes, with all earnestness, that this Court will reject any such basis of decision that the Government of the United States is not responsible for what, in fact, the Government did in this matter. It desires to stand or fall, as a Government, on whether or not the Constitution has been violated, and not on some squeamish approach to this case, on the ground that someone, in the execution of this program, has exceeded the authority which was granted to him. This is not an instance of a subordinate in some isolated case going beyond the scope laid down by the legislative or executive authority.

THE CHIEF JUSTICE: Is this part of your argument addressed to the argument on the other side that this order was pressed to an extent and scope which Congress did not contemplate in passing the legislation?

MR. FAHY: Yes, Your Honor.

THE CHIEF JUSTICE: I should like to interrupt just long enough to ask you whether

it appears in this record that this order was in any way reviewed by higher military authorities—the military hierarchy higher than General DeWitt?

MR FAHY: No; I cannot say that the record does show that. I am sure the record does not. The record is a very simple little record of what happened in the trial court.

THE CHIEF JUSTICE: I mean something of which we could take judicial notice.

MR. FAHY: Think of the scope of the program. It was notorious. It was one of the great measures taken internally in the United States in connection with this great War. Is it to be assumed, or can it be thought, that the War Department was unconscious of this, when every one else knew about it? Every one did know about it. Can it be thought that the Congress was unconscious of it when every one else knew about it? As a matter of fact, Congress was told about it, as I have already pointed out, before it passed the act in aid of the execution of the evacuation. The same thing applies, as I shall attempt to demonstrate, to the detention during evacuation.

If this is to be stricken down, if the Court please, let it be stricken down by a worthy instrument such as the due process clause of the Constitution, and not because it can be thought for a moment that the Government of the United States did not, in fact, do what the Government of the United States in fact did. That is all we think is involved in this case; but our opponents say that more is involved—that detention during evacuation is involved. I have felt that it was not involved, because the information in this case charges him with remaining where he had no right to be. That was all that was charged against him, and that was all that was tried. In page after page of objections in the demurrer which he filed to the information he raised no question of the invalidity of the assembly center, which is the detention aspect of the evacuation; and the question was not decided by the District Court or by the Circuit Court of Appeals. Of course, that is not controlling on this Court if the question is involved. I am convinced that the Court should not pass over into that phase of the program, to which he was never subjected, although 100,000 others were, and never raised the question. None of those who were subject to detention ever raised the question of the assembly center.

The reason why I think the Court should not reach into that phase of the program is that there is simply no way of saying, from this record, that he did object to that phase of the program. What this young man was fighting was exclusion. He said that he was an American citizen, and that the action in this case violated his rights. There is nothing from which the Court can say that if exclusion was valid, or if he knew he had to go, he himself would have preferred to go in another way than that which had been provided by the Government, as all the others went. For all we know, he had no objection to going in that manner if he had to go at all. He might well have preferred to go along with his fellows, his companions and neighbors, into the assembly center, if he was to go at all. But what he was protesting, and the issue which he was seeking to raise, was the fundamental issue in this case, as to whether or not he could be excluded.

THE CHIEF JUSTICE: Would you say that if he had wanted to raise the question he should have obeyed the exclusion order and, upon being subjected to physical restraint, he should have applied for a writ of habeas corpus? I suppose you agree that in such event he should have made application for a writ of habeas corpus.

MR. FAHY: Yes. I make that point in my argument, and in our brief we made several points along that line. However, I stress the fact that as a practical matter he may have preferred to go that way. He was not protesting the manner of going. He was protesting the right of the Government to make him go at all. That is what this case is.

Our opponents even go so far as to say not only that detention during evacuation is involved, but they suggest to this Court that it decide only whether detention violates the Constitution, and, by indirection, strike down the fundamental thing that was involved in this whole program, the evacuation, without ever deciding whether or not evacuation was within the war powers, but simply holding that because it was accompanied by detention, you can strike down the detention without ever saying a word about the constitutionality of the evacuation. I hope with all my heart and soul that in a program in which 110,000 of these persons have been evacuated, and he was convicted of remaining in spite of the order of evacuation, it will not now be held that evacuation was neither constitutional nor unconstitutional, but only that detention during evacuation was unconstitutional.

THE CHIEF JUSTICE: Are we to understand that there was no request for a ruling as to findings of fact?

MR. FAHY: No, if the Court please; but if detention during evacuation is involved, it was constitutional.

This is the story—

THE CHIEF JUSTICE: You are passing now the question of whether there was authority?

MR. FAHY: No. That is a part of the question as to whether it was valid.

THE CHIEF JUSTICE: I mean Congressional authority, not constitutional authority.

MR. FAHY: I was coming to the constitutional question.

THE CHIEF JUSTICE: Approach it in your own way; but is it your view that if the effect of this order was detention and segregation, and that the Congress did not have that in mind, therefore we cannot find any ratification in this statute for the order as it is now interpreted?

MR. FAHY: I think, if the Court please, that is the more logical development of the argument. Was it authorized?

THE CHIEF JUSTICE: We must decide that question before we come to any constitutional question.

MR. FAHY: The Executive Order, which was ratified by act of Congress—that is, the Executive Order of February 19th—itself provides that the right of any person to enter, remain, or leave, shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his direction. Also the order provided, in terms, authorization to the Secretary of War and the 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."

It went on to say that they were authorized to provide transportation, food, shelter, and other accomodations [sic] necessary in the judgment of the Secretary of War or the military commander.

The commanding general, under the authority of that order, after the act of Congress was passed, on March 27, in his proclamation, recited that it was necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating, to restrict and regulate such migration. The act of Congress itself, on its face authorized such controls as were exercised, in the phrase to which Chief Justice has referred.

THE CHIEF JUSTICE: That refers to exclusion.

MR. FAHY. The language of the act is:

"That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, * * * contrary to the order of the Secretary of War or any such military commander —"

And so forth.

THE CHIEF JUSTICE: Does that mean anything more than orders for exclusion?

MR. FAHY: It says more, Your Honor. It says:

"—whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, * * * contrary to the restrictions applicable—"

For example, curfew was a restriction which was applicable.

THE CHIEF JUSTICE: Curfew was a restriction about which Congress knew.

MR. FAHY: Yes. When Congress enacted the statute, it ratified whatever authority was in the Executive order, in the broad terms in which the Executive order stood.

THE CHIEF JUSTICE: Yes. The point I am making is that in interpreting what the Executive order meant, if there had been a practice of interpretation by military authorities which included arrest and personal restraint and confinement, that certainly would be a ratification. If Congress did not know about such practice, then you have the question whether, without that practical interpretation, you can say that the words themselves are broad enough to include detention.

MR. FAHY: The interpretation must be based on the breadth of the words themselves.

THE CHIEF JUSTICE: You are relying on the language?

MR. FAHY: On the language.

THE CHIEF JUSTICE: And the Presidential order.

MR. FAHY: Prior to the act, of course.

THE CHIEF JUSTICE: Yes.

MR. FAHY: That is correct.

MR. JUSTICE JACKSON: Was the act of Congress subsequent to the act complained of, or prior thereto?

MR. FAHY: It was prior.

I make the broad argument, in addition, Your Honor, which I made a moment ago, and which I shall not repeat, that here was a program carried out not simply by the general, but by the whole executive branch of the Government, with the full knowledge of everyone. The President brought in the civilian control by his order of March 18, prior to the act of Congress, which gave civilian authorities a part in supervising the evacuation and relocation program. In view of the nature of the program, I think it must be said that all branches of the Government concerned acquiesced and approved what was done. The whole matter was in the control of the Executive. The whole matter was known to Congress; and the executive authorities in particular positions of responsibility construed their authority, without let or hindrance, to include detention during evacuation. We say that that detention cannot be said to be beyond the scope of the authority, leaving the question of whether it was within the war powers, consistent with due process.

MR. JUSTICE RUTLEDGE: By evacuation you mean not merely the time necessary to get the person out of the area, but the whole period when he was to remain out of it?

MR. FAHY: Yes, Your Honor. I wish to explain what happened, so that the Court can judge the matter of detention. These persons were not prisoners. They were not in concentration camps. These are the facts:

An effort was made by the general to have the persons evacuated voluntarily migrate, beginning with his proclamations early in March. Out of the 112,000 under the pressure of the effort of uncontrolled, voluntary exclusion, only a net of about 5,000 left. I say "a net" because, in fact, about 10,000 moved from their places of residence, but 5,000 of those 10,000 moved into a more remote area in California and Washington, and later had to be evacuated from there under control.

The problem and the step which had been taken involved the evacuation of between 110,000 and 112,000 people. The voluntary part netted only 5,000. Then the general tried another method, of setting a deadline and saying, "If you do not go within a certain period voluntarily, then you will be moved." That did not work. The first such order, which was issued in March, would have affected 258 persons in the locality covered, and not a single one of them moved.

In addition, at that time a great wall of hostility grew up in the bordering States when they were faced with this great migration of persons of Japanese ancestry into those States. The governors of twelve States met, and all except one vigorously protested to the general that this simply could not be permitted, that these people could not be permitted to come flowing into those communities. One of the first things the civilian authorities did when they were brought into the picture, to take up the work at a certain point where the military could be permitted to let go, was to recommend that the uncontrolled migration stop. It had not worked. It was not accomplishing the evacuation. The civilian authority devoted itself to working out the problem in humanity and decency.

Yesterday our opponents suggested that General DeWitt in his final report says that from a purely military standpoint, all that was necessary was that they be required to leave; from which I suppose they wish this Court to draw the conclusion that detention in connection with leaving was unnecessary. What does that amount to? Surely it may be said from one point of view that from a strictly military standpoint the purpose was to have those people moved out of a certain area, and not to detain them anywhere; but in the face of the facts which I have briefly indicated, did they desire the Government in this case to run them out at the point of a bayonet, to force them out into the desert and into the mountains—old men, old women, babies in arms, and children—into a hostile area, unprovided for, without

transportation, without shelter, without food, and without protection? The Government of the United States had a right to move these people. Does the Bill of Rights require that it drive them out of the area like a herd of cattle? The stern hand of the Government which took hold brought about the evacuation. It had a right, a duty, and a responsibility. But if that were to be done, the stern hand could turn somewhat, as it did, into a gentle hand, to control this matter in a manner befitting this Government of ours. That was the reason why the detention of which they talk about occurred.

MR. JUSTICE MURPHY: How many were affected by the order?

MR. FAHY: 112,000.

MR. JUSTICE MURPHY: Do you know how many of them were American citizens?

MR. FAHY: About 60,000.

MR. JUSTICE REED: I do not understand that your opponents object to the creation of the resettlement area, but they object to the forcible detention in the resettlement area.

MR. FAHY: The alternative was to let them go, as I have described, Your Honor.

MR. JUSTICE REED: Was not the alternative to create resettlements where they could stay if they wished?

MR. FAHY: Does Your Honor mean shelters to which they would go voluntarily? That was attempted.

MR. JUSTICE REED: No. I mean voluntarily leaving, but once having been evacuated, as you express it, at the point of the bayonet, then a resettlement place was—

MR. FAHY: I did not say they were evacuated at the point of the bayonet. I said that was the alternative, unless it could be controlled, unless they could be required to go.

MR. JUSTICE REED: There was compulsory evacuation.

MR. FAHY: There was compulsory evacuation.

MR. JUSTICE REED: Then, as I understand, there was compulsory detention in the resettlement area. It was not voluntary detention.

MR. FAHY: That is correct. That is what I mean by compulsory evacuation.

MR. JUSTICE REED: Your opponents do not object to the creation of the resettlement area. What they object to is compulsory resettlement.

MR. FAHY: It was not a resettlement, Your Honor. What I am talking about is the assembly center. The assembly center was a place where they were required to go after voluntary evacuation had failed, as a temporary place where they were under detention, and required to go there as a means of movement out of the military area, under the supervision and control of the Government.

MR. JUSTICE REED: You are not going beyond evacuation. You are not going to take up at all in this case—

MR. FAHY: I go beyond evacuation to that extent only, so far as concerns the assembly center phase of the evacuation.

Perhaps I should point out, Your Honor, that there were three phases to the evacuation. First was the assembly center, the method which was finally adopted to accomplish the evacuation; second, the control and detention during evacuation, so that they would not be scattered out all over the hills; and then there was a third phase—

THE CHIEF JUSTICE: As I understand, what you are arguing is that segregation in an assembly center was so much an incident to the order of exclusion that it was appropriate and incidental to it, and was necessarily embraced within it.

MR. FAHY: It was necessary to it, Your Honor. Other measures had failed.

THE CHIEF JUSTICE: As I understand Justice Reed's suggestion, it is that the evils that you refer to would have been equally removed if the Government had established an assembly center to which these people could go or not, as they chose, and that you would have accomplished the purposes of the Presidential order and this legislation by an order excluding them from the military area. Then they could have gone to the assembly center without constraint, but with such aid as the Government may have chosen to give them, but without the necessity of an order confining them.

MR. FAHY: I understand.

THE CHIEF JUSTICE: I suppose the question is whether those suggestions are enough to cut under your argument that this segregation order was a necessary incident of exclusion.

MR. FAHY: Yes, Your Honor. I cannot see that there is any basis, or sufficient basis, on which this Court can say that this method was so improper under the circumstances, in the face of the alternative suggestion by Mr. Justice Reed, that it went beyond the powers of those who had to make the judgment. I suppose that evacuation may be accomplished in various methods.

THE CHIEF JUSTICE: Limited restraint is, of course, deprivation of liberty; and I suppose we ought not to read it into an order to exclude these people from a certain area merely by virtue of the fact that authority was given to exclude, unless it is pretty necessary.

MR. FAHY: Unless it is pretty necessary. I agree to that. I shall try to indicate what the judgment was on that, and the reasons for it. Evacuation without some control was not accomplishing evacuation. Not only that, but telephone calls and complaints of distress were coming in from the 5,000 who had already moved out. The communities bordering the evacuated area were at that time extraordinarily hostile.

THE CHIEF JUSTICE: Who was hostile?

MR. FAHY: The communities bordering the evacuated area; the adjoining States into which they would have had to go.

THE CHIEF JUSTICE: They would not have had to go there if you had had a segregation area to which they could have gone.

MR. FAHY: I am giving the reasons why the control was adopted, Your Honor. Signs were being posted on the roads to keep them out. Vigilante activities were occurring. The Government was responsible for this situation, because it had initiated the program. It was not as though those conditions had arisen without the action of the Government. The civilian authorities reviewed the situation when they came into the picture, and decided and recommended that in their judgment the control of evacuation was essential—and the general so stated at that time—not only to accomplish the evacuation, but to provide for the welfare of the evacuees, and to make the evacuation an orderly one.

THE CHIEF JUSTICE: Is there any suggestion here that it was necessary to place them under restraint to protect the areas from which they had been excluded?

MR. FAHY: We make that point in our brief, because it seems obvious to me that if they had been permitted to go at large, and particularly out of the communities where they had lived, unrestrained, it would have aggravated the situation. It seems obvious, too, that the lack of control, in view of the reasons for the evacuation with relation to espionage and sabotage, was something which fitted into the basic reasons for evacuation. I must point out, however, that that phase of it is not, I think, mentioned in the military reports as a reason for the detention aspect, as distinct from the prior voluntary evacuation.

MR. JUSTICE FRANKFURTER: Will you refresh my recollection? As I recall, the curfew hour in the Hirabayashi case was 9 o'clock. Suppose it had been a 24-hour curfew. Is there anything in the Hirabayashi opinion which would indicate that that would not have been within the tests of that case?

MR. FAHY: No. Of course, you would have the question then as to whether the method of the curfew was being used to accomplish real custody.

MR. JUSTICE FRANKFURTER: Of course, I am not passing judgment on what was wise or sensible; but in the setting of this case, as a matter of constitutional power and authority, is it conceivable that we would overrule the judgment that a 24-hour curfew would be required if any limited-hour curfew were required?

MR. FAHY: I should think not, Your Honor.

MR. JUSTICE FRANKFURTER: I mean on the basis of the tests involved in that case.

MR. FAHY: I think there might even be more question of that than of the detention which was involved in this case.

MR. JUSTICE FRANKFURTER: I was getting at it the other way. Suppose the curfew were for all but two hours of the day.

MR. FAHY: Certainly that would have been valid.

MR. JUSTICE FRANKFURTER: Then it comes down to the question of whether that was a feasible means of enforcing such an order in that environment, and with the means at the disposal of the military, considering the number of troops necessary to watch them, and so forth.

MR. FAHY: That is correct.

MR. JUSTICE FRANKFURTER: What is the difference whether there is limited detention within their homes, or whether more freedom is given? I am talking about power. I am not questioning whether it was a wise thing to do. Frankly, I think nothing should have been done; but that is not the question, is it?

MR. FAHY: That is not the question.

MR. JUSTICE DOUGLAS: Did the relocation phase of the program come into being subsequent to the evacuation order? What I have in the back of my mind is this: Was detention used as an intermediate step to ultimate relocation, or was it the end, in and of itself, at that time?

MR. FAHY: Detention in the assembly center?

MR. JUSTICE DOUGLAS: Detention in the assembly center.

MR. FAHY: It was used as an intermediate, temporary stage of evacuation, and nothing else. Detention in the assembly centers completely ceased in September, 1942. These huge places were set up, to which these 112,000 people were brought in connection with their removal from the military area. If they were to be in the area, they must have been in detention while they were in the area; so until they could be moved out of the area, they were detained in the assembly center, to accomplish the evacuation. It is a program which is long since over. There is no longer any detention center, and has not been since the fall of 1942.

THE CHIEF JUSTICE: Suppose we accept your opponents' premise that ultimate detention and segregation were the necessary results of exclusion in this case, first at an assembly center, and then at some other point of relocation. Suppose we accept that premise for purposes of argument.

MR. FAHY: Yes.

THE CHIEF JUSTICE: Then the question is whether physical restraint and detention, whether in the assembly center or as an immediate consequence of it at the place where they were sent, first, was within the order.

MR. FAHY: Yes.

THE CHIEF JUSTICE: Second, was it within the authority to make the order?

MR. FAHY: Yes.

THE CHIEF JUSTICE: And third, if so, whether it is constitutional.

MR. FAHY: That is the development of my argument. Prior to that, I make the argument that it is not involved in the case. My present argument is on the assumption that it is.

THE CHIEF JUSTICE: If it is not, most of the rest of the case disappears.

MR. FAHY: All except the evacuation.

MR. JUSTICE FRANKFURTER: In reading through the demurrer to the information I notice a certain phrase, and I wonder if it does not lend itself to the implication that it imposes upon the defendant a choice between exclusion and forcible evacuation. Are you saying that evacuation—

MR. FAHY: It was compulsory. He had to move under force of law.

MR. JUSTICE FRANKFURTER: But he could go where he would.

MR. FAHY: Yes. That is the way I interpret it. That was the situation originally.

MR. JUSTICE REED: I understand your argument in this case to be that so far as the information is concerned, it relates only to the exclusion. That is your first argument.

MR. FAHY: Yes; that is my first argument.

MR. JUSTICE REED: We do not even have the place of detention; but assuming that we take the place of detention into consideration, is it your position that that was a part of the process of evacuation?

MR. FAHY: Exactly.

MR. JUSTICE REED: But never under any circumstances must we take up and consider that we might look at the question of resettlement.

MR. FAHY: I come to that, Your Honor. I am just going back, in view of what Your Honor has said. I do not take up that question in this case on the merits. It is involved, if it is urged, in the Endo case, following this case. The reason I do not take it up on the merits in this case is that clearly, in my opinion, it is in any event not involved in this case, even if detention during evacuation is involved.

MR. JUSTICE JACKSON: It is necessarily involved, is it not, in the logic of decision? Do you suggest any ground on which this Court could say that you can detain these people in the way they were detained in a relocation center?

MR. FAHY: Temporarily, during evacuation, yes.

MR. JUSTICE JACKSON: Temporarily during evacuation. That would not justify detaining them permanently if hostility to them should continue.

MR. FAHY: That is correct, your honor.

MR. JUSTICE JACKSON: Where would detention to protect them end? What will ever terminate this business?

MR. FAHY: Your Honor, the matter had a development which must be viewed. Detention in the assembly centers, as I have pointed out, was a method of accomplishing evacuation.

MR. JUSTICE JACKSON: The reason it was compulsory, as I understand, was to protect them from the hostility of the people.

MR FAHY: That was one of the reasons. The other reasons were the reasons which I have stated, one of which was that voluntary evacuation had failed. They would not go voluntarily.

MR. JUSTICE JACKSON: They did not have any place to go, I suppose.

MR. FAHY: That is correct.

MR. JUSTICE JACKSON: They did not know where to go.

MR. FAHY: They would not know where to go. If they had to be moved, the Government had to do more than ask them to move, and that is what led to the assembly center. It is true that the War Relocation Authority itself was created by Executive order on March 18, and the War Relocation Authority, which is more directly involved in the Endo case, took over the final stage of the program.

Most of those who were in the assembly centers as part of the evacuation ultimately found themselves, of necessity under the program, in the third and last place so far as Government supervision was concerned, namely, the relocation center. But at the time this offense occurred, in early May, when this exclusion order as applied to Mr. Korematsu was issued, he could not say, and he cannot now say, that if he had gone, in the method prescribed, into an assembly center, he would ever have found himself in a relocation center. That, Mr. Justice Reed, is the reason I say that in no event is the final relocation phase of the program involved in this case, as distinguished from the Endo case.

THE CHIEF JUSTICE: Why do you say that he would not, under these orders, find himself in a relocation center?

MR. FAHY: Because not all who went to the assembly center were sent to a relocation center.

THE CHIEF JUSTICE: How were they excluded?

MR. FAHY: They were given permission to leave the assembly center.

THE CHIEF JUSTICE: On what basis?

MR. FAHY: For security reasons.

THE CHIEF JUSTICE: On what basis were they released?

MR. FAHY: They were permitted to go out, most of them, to accept positions, others to live with their families, and so forth. There were various miscellaneous reasons. Only about 2,000 were so released.

THE CHIEF JUSTICE: Was that on the ground that they were not dangerous?

MR. FAHY: Yes.

THE CHIEF JUSTICE: Did the Government set up any means of ascertaining who was dangerous and who was not?

MR. FAHY: It passed upon the individual cases on applications for permits to the headquarters of the Western Defense Command.

THE CHIEF JUSTICE: So he, after being in the assembly center, or on his way there, could have applied for leave?

MR. FAHY: Yes.

THE CHIEF JUSTICE: If he had applied for leave, would it have been considered?

MR. FAHY: There was no formal procedure or administrative machinery set up, but

individual applications were made to the headquarters of the Western Defense Command, and acted upon.

THE CHIEF JUSTICE: The Government had never established any procedure for the purpose of liberating people who were entitled to be liberated, in their judgment?

MR. FAHY: Oh, yes; it has since done so, Your Honor.

THE CHIEF JUSTICE: I mean at that time.

MR. FAHY: At that time, no. It was on the basis of permission. It was stated in the orders of detention in the assembly centers that they were to be detained unless permitted to leave; and such permissions were granted. But in addition to that, he could not say, because the program had not sufficiently developed—

THE CHIEF JUSTICE: Was that machinery established before this indictment was found?

MR. FAHY: Yes, if you call it machinery, Your Honor.

THE CHIEF JUSTICE: Call it a system, or program, or whatever you choose to call it.

MR. FAHY: Permissions were granted prior to that.

THE CHIEF JUSTICE: Was there anything in this case which would have prevented this petitioner from applying for the benefit of that machinery, system, or program?

MR. FAHY: He could have applied for a permit. There was nothing to prevent him from doing that.

MR. JUSTICE RUTLEDGE: There was nothing to assure him such a right, either.

MR. FAHY: No, sir.

MR. JUSTICE FRANKFURTER: Did you say that it was well known—I think you used the word "notorious"—or that it was provided in the order that a man could apply and obtain exemption?

MR. FAHY: The order says that he may not leave unless permitted to do so by the headquarters of the commanding general. Some were permitted to leave. But it seems to me, as a practical matter, that there was an equally strong reason for saying that the third and last stage, namely, the relocation center, is not involved. So far as anything in the record is concerned, he was not conscious—

THE CHIEF JUSTICE: What I am speaking about is this—and I do not know whether it comes into this case or not. Where there is an administrative procedure for relief from obligations and duties under a statute which may be unconstitutional, the minute you challenge the constitutionality of it you forfeit your right to claim the benefits of the statute. I am wondering whether you can say it was as simple as that in this case—whether he had notice of that procedure and did not resort to it.

MR. FAHY: If evacuation was valid on the basis on which it was undertaken, there had to be a control over the evacuees from the standpoint of the reasons for the evacuation. The reasons were that there was an unknown number of disloyal persons within a certain group which included, no doubt, a large number of loyal persons, and that the class had to be moved. Does it not necessarily follow from that, keeping in mind the purpose of the evacuation itself, that some time must be permitted for control over the class, until you can accomplish the very thing which led to the evacuation, and find out who were the loyal and disloyal ones? It seems to me that in itself is a sufficient justification for a period of detention, because the very purpose of the evacuation was to be rid, in a certain area, of those who might cause damage to the defense of the West Coast.

THE CHIEF JUSTICE: Does it appear anywhere how long that detention was, or how temporary it was?

MR. FAHY: It varied, Your Honor. It was a staggered program. They were moved from certain areas today, certain other areas the next week, and still other areas the following week. They went into the assembly centers, during the staggered period of time, and they went out the same way. The evacuation began in March. Everyone was out of the assembly centers the following September.

MR. JUSTICE RUTLEDGE: Assuming all that you say, and that the detention to make the sifting process would be within the constitutional power, still, under the order he was required to submit to it without any assurance that that process would be performed within some reasonable period of time, in order to be valid.

MR. FAHY: I think that is holding those in charge of the program under too rigid a method.

MR. JUSTICE RUTLEDGE: It is one thing to submit to imprisonment to go through a period of sifting to determine one's loyalty to his country. It may be an entirely different thing to submit to indefinite imprisonment, without any promise or assurance of opportunity for such sifting to take place.

MR. FAHY: This whole program took time. The Government has never, from the beginning to this day, denied the principle. It has been the theory of the Government, and of all those involved in any responsibility in this case, that these people must be restored to their full liberty of which they were deprived by reason of military necessity. In the face of the difficulties and magnitude of the program, it seems to me that every reasonable method has been devised to accomplish the desired result. No one can help but regret the time it has taken, but there has never been any denial of the goal. There has never been any difference of opinion about the goal which the Government set out to achieve, which was the eventual complete restoration of their rights and freedom as citizens.

In the same document referred to yesterday, containing the report of Mr. Justice Byrnes on the relocation program, the President, in his message to the Senate in response to its resolution, stated:

"With the segregation of the disloyal evacuees in a separate center—"

That was accomplished.

"—the War Relocation Authority proposes now to redouble its efforts to accomplish the relocation into family homes and jobs in communities throughout the United States, but outside the evacuated area, of those Americans of Japanese ancestry whose loyalty to this country has remained unshaken through the hardships of the evacuation which military necessity made unavoidable. We shall restore to the loyal evacuees the right to return to the evacuated areas as soon as the military situation will make such restoration feasible. Americans of Japanese ancestry, like those of many other ancestries, have shown that they can and want to accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and wellbeing. In vindication of the very ideals for which we are fighting this war, it is important for us to maintain a high standard of fair and equal treatment of the people of this minority, as of all other minorities."

That has been the position of the Government all through this program. It took time. It is one of the most difficult problems that the Government inside the United States has ever had to deal with, once the evacuation was decided upon. These people suffered hardships and inconveniences, and temporary deprivation of their liberties and freedom; but it must be viewed in the perspective of this whole war. Many persons endure, and are required to endure, dislocations and changes in their lives and fortunes. Millions of people, including hundreds of thousands of our own citizens, have already become casualties of the war. This program should not, under the Bill of Rights, be looked at as isolated from the whole, of which it is a part.

These citizens have been taken care of in the best manner, under the circumstances, that a fair and efficient government could possibly bring about. The personnel of the Government agencies involved are devoted to the task of restoring them, as soon as conditions will permit and administrative methods can be devised, to the complete freedom—assuming loyalty—of which they were temporarily deprived by reason of military necessity. I think that most of them have seen it that way, and have cooperated with the Government. It seems to me that those who have been injured—as many have, temporarily—should be asked to view the situation along with the great injuries, losses, sufferings, and hardships of millions of our people in the fight of the nation for its life.

Once you establish to your own satisfaction that this was a part of a necessary military measure to ward off, or assist in warding off the threat caused by the eruption of the Japanese, in combination with Hitler, to destroy the very life of the nation, you get a true perspective of the problem.