

University of San Diego

Digital USD

Trial Transcripts

Hirabayashi v. United States

6-19-1985

Transcript of Proceedings, Hirabayashi v. United States (C83-122V), Western District of Washington

United States District Court - Western District of Washington

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

Digital USD Citation

United States District Court - Western District of Washington, "Transcript of Proceedings, Hirabayashi v. United States (C83-122V), Western District of Washington" (1985). *Trial Transcripts*. 6.
https://digital.sandiego.edu/hirabayashi_transcripts/6

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 Trial Transcripts by an authorized administrator of Digital USD. For more information, please contact digital@sandiego.edu.

86-3853

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GORDON K. HIRABAYASHI,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

No. C83-122V

FILED ENTERED
LODGED RECEIVED

JAN 9 1986

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
BY DEPUTY

VOLUME II

June 19, 1985

ORIGINAL

MORNING SESSION

(9 a.m., June 19, 1985)

(The following proceedings occurred in the chambers of the Court:)

THE COURT: Good morning, all.

Are there any last minute problems?

MR. STONE: I guess we hadn't mentioned it, Your Honor, but I assume the witnesses will be excluded until they testify.

THE COURT: If you want that.

MR. STONE: Yes, I would like the rule invoked.

THE COURT: That will be fine. I'll put the burden on counsel to see that people who are going to testify not be in the courtroom until they are called. Mr. Hirabayashi, of course, can stay.

Anything further?

MR. HALL: We have a request. Since we have supplied copies of our exhibits to the Court and to counsel, we think in view of the Court's ruling on Monday, counsel ought to do the same for us so we don't have to guess at what counsel's exhibits are.

THE COURT: I think that's right, and of course I want a copy.

MR. STONE: Yes. We have been, until about

1 3 a.m. this morning trying to put together the bits and
2 pieces that we think will come in, and we have at least
3 four copies of anything that will come up, and if not
4 before, certainly by the time we get our hands on the
5 document and it's relevant. We still are not sure of
6 their order of witnesses and things. We will make sure
7 that there's a copy for the other side, a copy for you,
8 a copy for the witness, and of course we'll have one.
9 I believe every single piece of paper of our dozen or
10 so exhibits that are there are documents they have long
11 had. They have had this, which most of them come out
12 of, for months.

13 THE COURT: How many exhibits do you think
14 you'll have?

15 MR. STONE: Well, there are about 25 cables
16 in here that are designated which they cross-examined
17 with the deposition my witnesses on, so they know the
18 cables. That's about 25. I think we'll number them
19 separately.

20 THE COURT: I think that would be good.

21 MR. STONE: With odds and ends and other
22 bits and pieces, considering that's 25, I don't know
23 whether we will run as high as 50.

24 THE COURT: All right. Do you think you
25 can have copies for counsel and for myself by tomorrow?

1 MR. STONE: I will certainly try.

2 THE COURT: Why don't you get somebody on it?

3 MR. STONE: We'll try and do that this
4 evening if we can. I think we're about up to that point
5 now, pretty close to it. We won't have them bound, but
6 we'll have copies for you.

7 THE COURT: And they should be identified
8 with A numbers, Respondent's Exhibits A-1, A-2 and so
9 forth.

10 MR. STONE: Okay.

11 There is one item along that line, if I
12 might.

13 THE COURT: All right.

14 MR. STONE: It came up, as a matter of fact,
15 when we were trying to put together out of here the
16 things that you left in. Among the pages of Mr. Lowman's
17 testimony, remember his is 480 -- 448-480, he attached,
18 of course, two original documents which are in. He
19 referred to cables, and he attached a third original
20 document. It's in here. It's a three-page letter of
21 George C. Marshall, which everybody has had, and I'm
22 sure their researchers -- Aiku Yoshinaga brought it to
23 my attention --

24 THE COURT: Any objection to that exhibit?

25 MR. HALL: I don't have a present recollection

1 of what the exhibit is.

2 MR. STONE: It is this, this letter in Mr.
3 Lowman's testimony in those pages. It's a well-recognized
4 document.

5 THE COURT: What is the date of that letter?

6 MR. STONE: The date is 1944, 27 September
7 1944, which is about the time of the Korematsu brief.
8 That was filed in November, '44.

9 MR. HALL: This is the letter to Governor
10 Dewey who was running for president, telling him about
11 the "Magic" cables?

12 MR. STONE: Yes.

13 MR. HALL: And it says you can't read this
14 letter unless you promise to --

15 MR. STONE: I guess he knows about it, Your
16 Honor.

17 THE COURT: I have read it, I know, some
18 place or another.

19 MR. STONE: It's a three-page letter.

20 THE COURT: I don't myself see the relevance
21 of it.

22 MR. STONE: I understand.

23 THE COURT: But let me first ask you, do
24 you have any objection to its authenticity?

25 MR. HALL: I don't have an objection on

1 authenticity. We may have an objection on other grounds,
2 but I would like to read the letter again before I close
3 it. I think we would have a relevancy objection and we
4 may have other objections as well.

5 THE COURT: Why don't you submit it and
6 then --

7 MR. STONE: Okay. We'll talk about relevancy
8 when it comes up.

9 THE COURT: I won't exclude it because it
10 has not been listed, but I'll hear objections.

11 MR. STONE: Okay. I understand.

12 THE COURT: All right. Anything further?

13 MR. KAWAKAMI: Yes, Your Honor. We had, in
14 going over the pre-hearing order, I guess it was Monday --

15 THE COURT: Whose pre-hearing order?

16 MR. KAWAKAMI: That was the point, I guess,
17 because it wasn't a joint pre-hearing order as usual.
18 We didn't really object to some of the statements,
19 assuming that they would be decided by the law. For
20 example, if jurisdiction was stated by the Government
21 different than how we stated it, we were assuming that
22 -- in other words, I would like to preserve --

23 THE COURT: Preserve your position?

24 MR. KAWAKAMI: -- our objections.

25 THE COURT: I don't think you need to worry

1 about that because I think those are legal issues I'm
2 going to have to address after the hearing is concluded.

3 MR. STONE: So legal issues are preserved?

4 THE COURT: I think that's right, for all of
5 you.

6 Anything else?

7 Let me do ask about your exhibits.

8 MR. KAWAKAMI: Yes.

9 THE COURT: So that we'll be referring to
10 them in the same way. I think it would be better for
11 me if they were referred to by the number in the pre-
12 hearing order, but you have them, I know, in the order
13 in which you want to introduce them.

14 MR. KAWAKAMI: Yes, more or less.

15 THE COURT: And since they are in my book
16 in that way, maybe you could refer to them by both
17 numbers.

18 MR. KAWAKAMI: Sure. That's fine, Your Honor.
19 We have an index to the exhibits on the first page, or
20 the first part of it, and it has both numbers.

21 THE COURT: That's fine.

22 MR. KAWAKAMI: We'll try to refer to both
23 numbers.

24 THE COURT: I think the actual exhibit
25 number should be the number in the order.

1 MR. KAWAKAMI: That's fine, Your Honor.
2 THE COURT: But then you can say "In the
3 book it's No. 3."
4 MR. HALL: Haven't we already had them marked
5 in order in the book?
6 MR. KAWAKAMI: No. The clerk renumbered
7 them.
8 MR. HALL: With the number in the order?
9 THE COURT: That's right. She talked to me
10 about that and I felt that since all of my rulings, my
11 pre-hearing rulings, were based upon the numbers in the
12 order, that that is the number we had better use.
13 MR. STONE: So the actual document will have
14 on the sticker the number in the order?
15 THE COURT: That's right.
16 MR. STONE: Just so I've got it straight.
17 THE COURT: Yes, I think that's right.
18 THE COURT: But the copy that we gave to
19 you does not.
20 MR. STONE: Well, that raised another whole
21 problem. I had made my notes all over the earlier
22 copies. Now I've got two sets of five-inch thick
23 material. I've got the original set that I made notes
24 on and a new set that I don't have time to make new
25 notes on or punch holes and make the switch. I'm going

1 to be working with two sets in the courtroom anyway, if
2 I can.

3 THE COURT: Well, in any event, make the
4 reference to the number in the order, but then you can
5 also give me the tab number to make it easier for me to
6 find.

7 Now, I would assume that -- I'll just say
8 what I'm assuming. There is not going to be a lot of
9 testimony with respect to those exhibits.

10 MR. KAWAKAMI: That's correct, Your Honor.

11 THE COURT: They are going to be placed in
12 and sometime, obviously after the hearing, I'm going to
13 have to read through them.

14 MR. KAWAKAMI: That's right.

15 THE COURT: But nobody is going to try to
16 read into the record those exhibits.

17 MR. KAWAKAMI: Well, if I might, perhaps we
18 can go over what I thought -- how I thought we would
19 proceed.

20 THE COURT: All right. Go right ahead.

21 MR. KAWAKAMI: And we can modify it from
22 there. At least how I envision it would be that we
23 would -- or I would give an opening statement and that
24 Mr. Stone would either reserve opening or give an
25 opening statement.

1 THE COURT: Let me say on opening statement,
2 and I'm sure you are aware of this, I don't want a
3 statement - and I know you know this - I don't want a
4 statement about the unjustness of the curfew and this
5 and that, and the internment and so forth. What I do
6 want a statement on is the things that I think are
7 material here, that is, what you feel may have been
8 suppressed by the Government, that sort of thing.

9 MR. KAWAKAMI: Well, I don't know that I
10 knew that, but I know it now.

11 THE COURT: Yes. Those are the issues in
12 this hearing, that is, stated simply, did Mr. Hirabayashi
13 get a fair trial and a fair hearing before the Supreme
14 Court, or alternatively, as you contend from the pre-
15 hearing order, he did not get a fair trial because
16 certain things were concealed from the various courts.

17 MR. KAWAKAMI: I don't believe I have a
18 whole lot in there about that, Your Honor, but I do
19 think that there is --

20 THE COURT: About the fairness of the trial?

21 MR. KAWAKAMI: Well, no, I have a lot about
22 the fairness of the trial.

23 THE COURT: Oh, yes.

24 MR. KAWAKAMI: I'm saying that at least part
25 of my statement consisted of the matter which you don't

1 choose to hear about.

2 THE COURT: You could say, if you want to,
3 and I don't know exactly what has happened in Congress
4 and so forth, but there seems to be a general concession
5 by the President of the United States, by Congress and
6 so forth, that the interning and so forth were improper.
7 I mean you could say what has happened since that time
8 in fairly recent years, but I don't want a long argument.

9 MR. KAWAKAMI: That's fine. I guess what I
10 can say is that I don't intend to certainly dwell on the
11 point but I do intend to bring it up in some manner.

12 THE COURT: That's fine.

13 MR. KAWAKAMI: I will relate to it.

14 THE COURT: All right.

15 MR. KAWAKAMI: And then if we can proceed
16 with the order, I think --

17 THE COURT: Let me just say this: Are you
18 prepared with an opening statement?

19 MR. STONE: Well, I also wasn't exactly sure
20 of the lines, but I will improvise, too. Do you have
21 some --

22 THE COURT: Time limit?

23 MR. STONE: Yes. Outside time limit?

24 THE COURT: How much time do you want?

25 MR. KAWAKAMI: Perhaps 30, 45 minutes.

1 THE COURT: That really is too long for an
2 opening statement.

3 MR. KAWAKAMI: How long would you allow?

4 THE COURT: Well, I really think that 20
5 minutes ought to do it, but if you want 30 minutes I'll
6 give it to you.

7 MR. KAWAKAMI: Okay. Part of my opening
8 statement would be, hopefully, a framework. In other
9 words, going a little bit over how the pieces fit
10 so that when the testimony or the examination comes in --

11 THE COURT: Well, let's say 30 minutes.
12 The same for you, if you want it.

13 MR. STONE: I won't have quite as hard a
14 framework, Your Honor, because a certain amount of a
15 responding case is explaining the pieces, so there will
16 be a little more framework, I think, at the end. But
17 here we are.

18 THE COURT: Okay.

19 MR. KAWAKAMI: Then we intend to call, after
20 opening statements, Mr. Ennis who will testify. How
21 long do you think that will be?

22 MR. HALL: I think his direct examination
23 will take somewhere between an hour and an hour and a
24 half, and I don't have any idea about cross.

25 THE COURT: All right.

1 MR. KAWAKAMI: Then, after cross --

2 MR. STONE: I thought the order you gave me
3 yesterday was Irons, Herzig, and then Ennis.

4 MR. KAWAKAMI: No. It's the same in the
5 order. I didn't have the order that you were reading
6 from.

7 MR. STONE: Okay.

8 THE COURT: All right.

9 MR. KAWAKAMI: Then we were going to present
10 the exhibits, and what we wanted to do with respect to
11 the exhibits is, although we recognize the Court hasn't
12 had a full opportunity to read all the documents, we
13 would like to be able to at least present what we
14 thought were the relevant items of that particular or
15 that group of documents.

16 THE COURT: How many did you want to speak
17 about?

18 MR. KAWAKAMI: I suppose we can put it in
19 groups.

20 THE COURT: Well, let's try that.

21 MR. KAWAKAMI: And what we thought would be
22 perhaps maybe two hours. Is that too long?

23 THE COURT: That's all right.

24 MR. KAWAKAMI: Then we would present other
25 witnesses, Peter Irons and Aiko.

1 THE COURT: About the difficulty of finding
2 the exhibits, when they were found, and so on. All
3 right.

4 MR. STONE: Excuse me. Did I understand
5 that you are just going to, in effect, publish the
6 exhibits to the judge?

7 THE COURT: Apparently go over them, somewhat
8 summarily, and perhaps explain to me the relevance of
9 the groups.

10 MR. STONE: Shouldn't -- if I may ask, I
11 would kind of have thought that that's the point of the
12 closing argument, the explanation. If they ask the
13 right to do that, Your Honor, then I would guess it
14 would allow me also if I offer a document to talk about
15 it rather than just read it.

16 THE COURT: Whatever I let them do I would
17 certainly let you do.

18 MR. STONE: Sure. Okay.

19 MR. HALL: I think it's obviously a matter
20 of convenience for the Court, but I surmise it might be
21 convenient for the Court for us to give you some clue
22 as to where in these documents, some of which are long,
23 where we are relying on information.

24 THE COURT: Yes. Let me do say this, because
25 for the first time I've seen the volume of the documents.

1 I think after we get through, I know that all of you
2 know that I'm not going to be able to make a quick
3 ruling. So what I then would ask for would be a post-
4 trial brief in which all of these exhibits, both
5 Petitioner's and Respondent's, you point out to me the
6 specific page and paragraph, and so forth, you want me
7 to look at. It would, in effect, be a final argument.

8 MR. STONE: I certainly hope you'll give
9 us a fairly lengthy period of time to prepare that.

10 THE COURT: I will. I'll talk to you about
11 it.

12 MR. STONE: I have been doing about a month
13 of overtime and I have two children and a wife who will
14 divorce me if I cancel my vacation.

15 THE COURT: You may not have a wife. I'll
16 talk to you about it.

17 MR. KAWAKAMI: That's not in lieu of final
18 arguments, or --

19 MR. STONE: It could be, if you like.

20 THE COURT: Well, what I have done in other
21 cases, not like this because I've never had a case like
22 this, but it has helped me to have a written final
23 argument first, and then set up an oral final argument
24 after I've had a chance to look at the documents and so
25 on, and that is what I would propose to do here; to

1 first have a written pleading filed which would, in
2 effect, be written final argument. I'll talk to you
3 about timing and I'll give you plenty of time. Then,
4 after I've had a chance to do that, to read those, then
5 set it down for oral final argument.

6 MR. STONE: That will also give us a chance,
7 I gather, Your Honor, and although I hate to say this
8 to your reporter, that will give us a chance to get the
9 transcript and maybe even in our written arguments be
10 able to cite your testimony so that you will know exactly
11 what it is we're talking about.

12 THE COURT: Well, I tell you, I really take
13 awfully good notes of the testimony.

14 MR. STONE: I don't know if I take such
15 good notes.

16 THE COURT: Well, I doubt if you do because
17 you're busy asking questions and so forth. I would
18 doubt if a transcript would be needed, certainly of the
19 whole proceedings. I'm really trying to relieve my
20 reporter of doing it.

21 MR. STONE: I know it would help us
22 enormously.

23 THE COURT: That's up to you.

24 MR. STONE: It would help us enormously
25 for the very reason you mentioned, and me and my

1 assistant are so busy, so busy that he and I had to
2 split up what we're doing now so he could be preparing.
3 It's very tough to take notes.

4 THE COURT: We'll talk about it later, but
5 you bring it up, whether you need time for transcript.
6 I would really urge you not to order a transcript of
7 all of the testimony because I think it would just be
8 fruitless, but there may be certain people like Ennis.

9 MR. STONE: I have more or less already --
10 I must order the transcript, Your Honor. I have no
11 choice. Unfortunately, the Department has so many
12 different things that potentially relate to this and
13 the testimony. They get Congressional inquiries and
14 that's why I have been on the phone to Washington. In
15 the normal case I don't have to go and play tag with
16 Washington, D.C. I am in a different situation here.

17 THE COURT: All right. We'll talk about it.
18 Anything else?

19 MR. KAWAKAMI: Yes. There is one other item,
20 Your Honor, if I might. I suppose we tried to get over-
21 convenient in organizing our little book that wasn't in
22 accordance with the pre-hearing numbers.

23 THE COURT: I do think the way you've
24 organized them, that is, the way you intend to introduce
25 them is good, but if we can cross-index them so that if

1 a reference is made to a certain exhibit, I'll know
2 that that's tab 33, although it is Exhibit 56, it will
3 be helpful. But you go ahead.

4 MR. KAWAKAMI: There are three documents
5 that apparently got lost in the shuffle yesterday. This
6 would be in, I think, -- you don't have your book there,
7 but there are a series of Munson reports which were
8 attachments to or were transmitted with the Ringle
9 report in one of the transmittal letters to one of the
10 officials, and we had them separately listed. We have
11 them separately listed in our volume here, but was not
12 separately listed in the pre-hearing order.

13 THE COURT: All right. How are they identi-
14 fied in the pre-hearing order?

15 MR. KAWAKAMI: They weren't identified
16 specifically in the pre-hearing order.

17 MR. HALL: They were attachments.

18 THE COURT: Attachments to which of these
19 exhibits?

20 MR. KAWAKAMI: I believe it's No. 5, there
21 is a transmittal from the Chief of Naval Operations --
22 from the Commandant, Eleventh Naval District, to the
23 Chief of Naval Operations.

24 THE COURT: That doesn't seem to be No. 5
25 here.

1 MR. KAWAKAMI: Oh, I'm sorry. That would be
2 your 47.

3 THE COURT: All right. Now, did you provide
4 a copy to Government counsel?

5 MR. KAWAKAMI: Yes, Your Honor.

6 THE COURT: Was the attachment on it?

7 MR. KAWAKAMI: Was the attachment on it?

8 THE COURT: Attached to it?

9 MR. KAWAKAMI: We had provided the Munson
10 Report to him with respect to authentication in our
11 interrogatories. I can't represent that that was speci-
12 fically attached to this particular document, and I
13 would suspect even that the Ringle Report wasn't attached
14 to this specific document. I don't recall whether they
15 came to him as a group or individually.

16 MR. STONE: Are you wanting to get in what
17 says "Reference A?" Is that what you're suggesting?
18 Is that the document that was overlooked?

19 MR. KAWAKAMI: Well, there is Enclosure A.
20 No; Reference A, I believe, is -- yes, Reference A,
21 Enclosure A.

22 THE COURT: Any objection to that?

23 MR. STONE: Wait a second. I don't think I
24 fully grasp what's going on yet. If I may ask a question
25 or two, Your Honor?

1 THE COURT: All right.

2 MR. STONE: Is Reference A separately tabbed
3 in here somewhere, or is it missing?

4 MR. KAWAKAMI: Reference A is No. -- if you
5 have your book -- I believe it's No. 16.

6 MR. STONE: And Enclosure A is number? What
7 is Enclosure A numbered?

8 MR. KAWAKAMI: Enclosure A is the Ringle
9 Report.

10 MR. STONE: What number is that in here?

11 MR. KAWAKAMI: I believe that's No. 4.

12 MR. STONE: Okay. So we're into a listing
13 problem again. I'll tell you what, Your Honor. There
14 is another Munson Report --

15 MR. KAWAKAMI: Two other Munson Reports.

16 MR. STONE: -- two other Munson Reports that
17 weren't in here. If those are also admissible -- we
18 know of one but there are two more -- if any Munson
19 documents and cover letters to them are admissible, then
20 that's okay with me. If we're going to mess around with
21 it, and counsel tells me there are two more, maybe two
22 cover letters, then if they're all in here, that's okay
23 with me.

24 THE COURT: Is that all right?

25 MR. KAWAKAMI: That's fine, Your Honor.

1 THE COURT: All right.

2 MR. STONE: Do you want to give me the dates
3 of those other two either afterwards or now?

4 MR. KAWAKAMI: 14 and 15.

5 MR. STONE: No, no, no.

6 MR. HALL: They say their own dates.

7 MR. STONE: No; there's another one that's
8 not in here. That's why I brought that up. There is
9 an October 22 cover letter and Munson Report that
10 isn't in here.

11 THE COURT: Why don't you make a notation of
12 it?

13 It looks like we'll probably go to noon,
14 taking care of opening statements and that sort of thing.
15 Why don't you talk between yourselves --

16 MR. STONE: Any Munson document and cover
17 letter can come in.

18 THE COURT: So I gather. If one comes in,
19 they all come in. All right.

20 MR. HALL: Before we rest our case, and
21 presumably we'll do that some day --

22 THE COURT: When do you think you will rest?

23 MR. HALL: I think we'll probably rest
24 tomorrow, absent some unusually prolixed cross-
25 examination.

1 THE COURT: Are you through?

2 MR. HALL: Before we rest, we will probably
3 for the record want to make offers of proof with regard
4 to the documents which the Court excluded.

5 THE COURT: That would be fine.

6 MR. HALL: They will be very perfunctory,
7 but just so the record is clear.

8 THE COURT: That's fine.

9 Mr. Stone?

10 MR. STONE: Two things that go along the
11 same line that they just did. I'll take the last one
12 first. We will also want to make offers of proof.

13 THE COURT: Yes.

14 MR. STONE: The other one is almost the same
15 as the one they made. In changing around documents, et
16 cetera, on Monday, various documents that they proposed
17 and had noted, we had noted as well, and when theirs
18 came in, I didn't point out that the only difference
19 with some of ours was an additional usually one-page
20 cover letter; the same document but with a cover letter,
21 or same document with a different date stamp.

22 For the interest of completeness, I think
23 this may be three or four of those. Now, some of them
24 will fit because, for example, it's the same report and
25 it's got one page on top, but it's really the one page.

1 We had offered them originally to show, as
2 I mentioned in court and here, for example, additional
3 distributions. The documents are exactly the same but
4 they show distributions, and just as --

5 THE COURT: I would think the transmittal
6 letter should come in.

7 MR. STONE: Okay.

8 MR. HALL: I think we can probably work this
9 out.

10 THE COURT: I would think so.

11 MR. STONE: Can I mark those among the I
12 give to you, then, for tomorrow morning?

13 THE COURT: I think that would be fine.

14 MR. STONE: Okay.

15 MR. HALL: We may have an argument on an
16 evidentiary basis or some other reason, but as far as
17 authenticity, we don't have an argument about what he's
18 suggesting, or at least on the face of it, but we don't
19 know what he's talking about per se, and we would have
20 to look at them before we could --

21 THE COURT: All right. Then I'll hear from
22 you.

23 MR. STONE: I will be arguing distribution
24 on all of those.

25 THE COURT: That will be fine.

1 MR. HALL: There are two other problems
2 that I would like some guidance from the Court on. They
3 are brief.

4 Requests for admissions, answers to
5 interrogatories, and so forth, may become relevant as
6 a part of our case. How does the Court want to handle
7 those, because obviously the original documents have
8 been filed and I don't even know in some of the cases
9 where the originals are.

10 THE COURT: On the request for admissions --

11 MR. HALL: -- or answers to interrogatories.

12 THE COURT: I have handled those in past,
13 at least in some cases, as an exhibit. I think just
14 prepare an exhibit.

15 MR. STONE: Your Honor, I understood, based
16 on what they said at the last conference, that on the
17 signing of the pre-hearing order, that went out of the
18 case. They made all the admissions they wanted in
19 the beginning of their pre-hearing order and they asked
20 for whatever admissions I had in the beginning of my
21 pre-hearing order, and they said all the other pleadings
22 go out of the case.

23 So unless I am mistaken, I thought that was
24 the point of that order.

25 MR. HALL: They're not pleadings.

1 MR. STONE: Then they're not in the case.

2 THE COURT: Well, the pre-hearing order is
3 really supposed to cover everything that is going to be
4 offered. But let me have you go ahead and do what I
5 said, and then I'll hear from you, Mr. Stone, and we'll
6 look at it and then I'll make a ruling.

7 MR. HALL: Another question, we are going to
8 probably want to have some depositions published which
9 might be needed for cross-examination or something.

10 THE COURT: You don't really need to publish
11 them. We don't get copies filed, as you know, so that
12 I think if you're going to use a deposition, you
13 probably should leave a copy with the clerk. Give a
14 copy to the clerk.

15 MR. HALL: Is it the practice of the Court
16 here that if a deposition is used, for example, for
17 impeachment purposes or something, it's not necessary
18 to have a published?

19 THE COURT: Well, as I said before - I know
20 you know this - we don't publish the depositions here,
21 but it would not be made an exhibit or anything, if
22 you're using it for impeachment purposes only. If
23 you're reading out of it --

24 MR. HALL: Then it becomes evidence and
25 it's all right as it goes into the record.

1 THE COURT: Yes.

2 MR. HALL: But we file a copy so that the
3 clerk has a copy and if there is unfortunately an
4 appeal, the Appellate Court will know what we're talking
5 about because it would be a part of the record.

6 THE COURT: That would be right, and also
7 because if you're going to use it with a witness,
8 normally we'll give a copy to the witness and let him
9 look at it.

10 MR. HALL: Right.

11 THE COURT: And also, I sometimes like to
12 follow along.

13 MR. HALL: We may have a problem with some
14 of these. Did we get all the originals?

15 MR. KAWAKAMI: I don't think we got them
16 back because I believe -- didn't you file the originals?

17 MR. HALL: Of the depositions?

18 MR. KAWAKAMI: Oh, depositions.

19 MR. LEONG: We have most of the originals.
20 Some of them we're still waiting for signatures.

21 MR. HALL: If we have a problem with
22 depositions, we will try to work it out with Victor
23 before bothering the Court.

24 THE COURT: That would be fine.

25 Now, Mr. Stone, if the Petitioner ends,

1 say midday tomorrow, would you prefer to start the
2 following day or would you prefer to start right then,
3 or what would you prefer?

4 MR. STONE: I am sure I would prefer to
5 start the following day.

6 THE COURT: How many days do you think you'll
7 take?

8 MR. STONE: Well, to be honest, Your Honor,
9 I wasn't certain that the documents to which I'm going
10 to show distribution letters and things were going to
11 come in, or this three-page letter thing, and so I was
12 having some trouble figuring that out, and also figuring
13 out exactly what I could get my witnesses here. One
14 of them -- two of them have been calling me. Because
15 some of them are quite elderly and it's not so easy for
16 them to travel. None of them live in Seattle and only
17 one lives in the state.

18 I had thought that given the cross-examination
19 and everything else, that we would probably not wind
20 down until near the end of next week, Wednesday at the
21 earliest. I was hoping Friday at the outside, but I'm
22 not in a position really to say. Originally I was
23 relieved to hear - I talked with your clerk - that you
24 had the following two weeks open, that if we hung over --

25 THE COURT: I don't intend to hang over.

1 I may be hung over by that time, but I really intend to
2 get it done.

3 MR. STONE: Now that I know, Your Honor,
4 that we don't have to worry about closing arguments,
5 because at the minimum it's going to be reserved to do
6 after a written thing sometime in the future, I would
7 say we will be able to end by Friday, 4:30, in just the
8 time you've got blocked off.

9 THE COURT: In that event, I thought maybe
10 we'd have a lot of time, but in that event, I would ask
11 you, once they rest, really to pick up on your first
12 witness.

13 MR. HALL: We were going to take Mr. Lowman's
14 deposition, if you will recall. If we finished tonight
15 by 4, we could take it tomorrow morning, or if we
16 finished by noon tomorrow, we were going to take it
17 tomorrow afternoon. You might remember we discussed
18 this with the Court on Monday.

19 THE COURT: Are you suggesting that after
20 you rest that it be taken?

21 MR. HALL: Whatever half day is left, that
22 we take Mr. Lowman's deposition, and then commence.

23 THE COURT: All right. That sounds fine,
24 if you think you'll be through by tomorrow noon. Today
25 is Wednesday, so Thursday noon.

1 MR. HALL: Absent cross-examination problems,
2 I think we'll be done by tomorrow noon.

3 THE COURT: It seems to me, and of course
4 I haven't heard any of the oral testimony, but with
5 respect possibly to the issue of laches, that this is
6 primarily a documentary case.

7 MR. STONE: No, Your Honor.

8 THE COURT: You think it's not.

9 MR. STONE: It might have been, but I don't
10 have documents any more so I have got to try and get
11 testimony on the record.

12 MR. HALL: Of course we'll object to testi-
13 mony about documents that have been excluded.

14 THE COURT: I think that's right.

15 MR. STONE: I have expert witnesses and
16 they can talk from their expertise. That's the point
17 of an expert witness.

18 THE COURT: Well, we'll see.

19 All right. It is time to go out there, so
20 just as soon as you're out there, we'll start.
21
22
23
24
25

(The following proceedings
occurred in open court:)

THE COURT: Good morning. Will you call
the calendar, please?

THE CLERK: C83-122V, Gordon Hirabayashi
vs. The United States.

THE COURT: Are the parties ready?

MR. KAWAKAMI: Yes, Your Honor.

THE COURT: Very well. I said this at the
hearing the other day, but I hate to have you people
have to stand. Even though I normally don't permit
this, those of you may sit in the jury box and fill that
up. As far as the artists are concerned, I am going to
ask you to sit back there. I guess there are a couple
more seats here, if you would care to. Why don't you
just walk around the front of the jury box here?

Mr. Kawakami, are you prepared to give your
opening statement?

MR. KAWAKAMI: Yes, Your Honor.

May it please the Court: I wish to first
thank the Court on behalf of my client, Gordon
Hirabayashi, for this opportunity to present this coram
nobis petition.

This case is an American case. This is not
just Gordon Hirabayashi's case, and this is more than

1 just a Japanese-American case. This is truly an
2 American case.

3 Morton Grodzins in his book, "Americans
4 Betrayed," in discussing the evacuation and internment
5 of Japanese-Americans during World War II states in his
6 conclusion on page 374, "Japanese-Americans were the
7 immediate victims of evacuation, but larger consequences
8 are carried by the American people as a whole. Their
9 legacy is a lasting one of precedent and constitutional
10 sanctity for a policy of mass incarceration under
11 military auspices. This is the most important result
12 of the process by which the evacuation was made. That
13 process betrayed all Americans."

14 This is a case where an American citizen
15 with a deep and abiding faith in American principles
16 stood up and was one of the few voices to proclaim that
17 as an American, evacuation and incarceration based
18 solely on ancestry was contrary to the most fundamental
19 concept of what being an American is all about.

20 He believed so strongly in his principles
21 that he was willing to risk incarceration to put the
22 Government's actions to a legal test. Unfortunately,
23 however, the legal test failed.

24 The Government, in an earlier motion to
25 dismiss this coram nobis petition acknowledged the

1 contribution made by Mr. Hirabayashi to the cause of
2 civil liberty and characterized him as "A Standard
3 Bearer." However, the Government does not even today
4 seem to realize that carrying the weight of the standard
5 was then and continues to be today an incredible burden
6 on the Petitioner. The weight he carries on his
7 shoulders has never been lifted off, and has never, even
8 after forty years, gotten any lighter.

9 The coram nobis petition is a unique case
10 in several respects. First, the coram nobis proceedings
11 themselves are not commonplace legal proceedings. It's a
12 little known and seldom used type of procedure which
13 allows the Court to overturn a criminal conviction on
14 equitable principles. This the Court can do if funda-
15 mental errors were committed at trial which made the
16 procedure by which the defendant was convicted unfair.

17 It is, therefore, the procedure or process
18 by which the defendant was convicted at which the Court
19 should look. Second, the case is unique because it was
20 certainly not an ordinary conviction. This involved a
21 test case which ultimately was used to uphold the
22 constitutionality of the evacuation and incarceration
23 of 120,000 persons of Japanese ancestry.

24 Further, the three test cases, Hirabayashi,
25 Yasui and Korematsu, were the first and only court

1 decisions which legalized and gave judicial sanction to
2 discrimination against Americans based solely on
3 ancestry. But these were not true test cases. This was
4 not an "all the cards on the table and let the chips
5 fall where they may" fair fight. The Government was so
6 intent on defending the evacuation decision and to win
7 at all costs that it fixed the tests.

8 In doing so, it involved the Court in a
9 process which resulted in what Justice Murphy called
10 "The most sweeping complete deprivation of constitutional
11 rights in the history of this nation." The quote is
12 taken from Justice Murphy's dissenting opinion in
13 Korematsu.

14 Finally, our coram nobis petition is unique
15 in that it affords this Court a rare opportunity to
16 correct its own judicial record on this matter. The
17 executive branch has had its opportunity to confront its
18 mistakes and has, for example, in 1976, rescinded
19 Executive Order 9066.

20 The legislature has also been able to deal
21 with its role by repealing Public Law 503 under which
22 Petitioner was convicted. The legislature has also
23 commissioned a commission to study the internment of
24 American citizens during World War II and has also
25 had an opportunity to pass and enact the Japanese-

1 American Claims Act of 1948.

2 Up until our petition, it has only been the
3 judicial branch which has remained under the cloud cast
4 upon it in 1943. It is our hope that this Court will
5 issue a strong and direct warning to the Government and,
6 by doing so, remind the Government that the Government's
7 duty goes beyond prosecuting the guilty; that the
8 Government's duty, more importantly, is to see that
9 justice is done.

10 We are here today to determine whether or
11 not, as alleged by the Petitioner, governmental mis-
12 conduct precluded Mr. Hirabayashi from obtaining a fair
13 trial. As I understand the scope of the hearing, whether
14 or not the decision to evacuate was wise remains a
15 subject for debate at another time in another forum.

16 In the eyes of history, most of the scholars
17 who have looked at the sad episode of our past have
18 concluded that evacuation was wrong and not justified.
19 President Ford in his 1976 executive proclamation
20 entitled "An American Promise," in rescinding Executive
21 Order 9066, called the evacuation "a national mistake"
22 and "a setback of fundamental American principles."

23 It will, however, be our focus to examine
24 the method and means by which the Government obtained
25 their conviction; not whether there was in fact military

1 necessity. Even assuming for the sake of argument that
2 the military decision was wise, this case would then be
3 a classic case of ends not justifying the means. Since
4 this is a "means" and not an "ends" hearing, it is
5 critical that we demonstrate, as we believe we con-
6 clusively do, that there was exculpatory evidence which
7 was suppressed, altered and later destroyed. We also
8 believe the record will reflect that the Court made
9 material misrepresentations to the Court.

10 It is our position that evidence of a
11 potentially incriminating nature does not excuse the
12 Government's actions and only diverts attention away
13 from the central issues, and that is due process and
14 governmental misconduct. As stated by the Ninth Circuit
15 in Taylor, cited in our memo, "This Court has rejected
16 the notion that because the confiction was established
17 on incontestible proof of guilt, it may stand no matter
18 how the proof was secured. Observance of due process
19 has to be not with the question of guilt or innocence
20 but the mode by which guilt or innocence was ascertained."

21 Now, Your Honor, what I'd like to do next,
22 very briefly, is give a basic framework for our case
23 and the documents that will be presented. First of all,
24 we believe the documents refer to a delimitation agree-
25 ment, and the delimitation agreement was an agreement

1 between the intelligence gathering agencies, the FBI,
2 G-2 and ONI, and this agreement attempted to define the
3 lines of authority and provided for the sharing of
4 intelligence between the agencies.

5 Next, I would like to very briefly compare
6 three things for the Court. One is what the Government
7 knew; a brief outline of what we believe the Government
8 knew. Then I would like to go over very briefly what
9 the Government's positions were with respect to what they
10 knew. And, finally, I'd like to cover what the Government
11 represented to the Court.

12 Your Honor, we have prepared a timeline
13 which at this point we would like to put up, just for
14 demonstrative purposes.

15 Your Honor, in terms of what the Government
16 knew, starting with around December 17th, 1941, in
17 documents that we have presented or we will present to
18 the Court, there is a document which indicates first
19 that the FBI on December 17th, 1941, knew that the Army
20 would be requesting from them a list of persons whom
21 they considered dangerous. The FBI also at this time
22 did not believe that they could put over any plan to
23 clear people out of the area unless there were some very
24 imminent prospect of attack.

25 On 12-20-41, is the date of the last of

1 the Munson Reports. Mr. Munson had written several
2 reports.

3 THE COURT: Who is Munson?

4 MR. KAWAKAMI: Mr. Munson was a well-to-do
5 Chicago businessman who was performing an informal
6 investigation on behalf of the President of the United
7 States. He went around the West Coast gathering infor-
8 mation from the various intelligence agencies and wrote
9 a series of reports to the President, the last of which,
10 as I indicated, was on December 20, 1941.

11 On January 9th, 1942, the documents will
12 reflect that the Federal Communications Commission had
13 a conference with General DeWitt of the Western Defense
14 Command and advised General DeWitt at that time that
15 there was no evidence of any illegal transmissions.

16 At that time he also, after discussions
17 with DeWitt, formed the Radio Intelligence Division
18 which was under the control of the military but run by
19 personnel from the Federal Communications Commission.

20 On December 30th, 1941, the Chief of Naval
21 Operations has read or learned of the Munson Reports
22 and requests of his staff that they prepare for him a
23 report regarding the question of potential espionage
24 and sabotage by Japanese-Americans, and the person he
25 selected to do the report was Lieutenant Commander

1 Ringle.

2 Lieutenant Commander Ringle completed his
3 talk on January 26th, 1942, and submitted a report, the
4 conclusions of which indicated that it was not necessary
5 to evacuate Japanese and that most of the Japanese were
6 Americanized. Those who posed a risk of sabotage or
7 espionage could have been readily and easily identified.

8 On January 27th, 1942, the Attorney General
9 advises Congressman Ford that the Justice Department
10 did not deem it advisable to evacuate, and on February
11 14th, 1942, DeWitt issues his final recommendations in
12 which even he at that time acknowledges that there was
13 no sabotage or evidence of sabotage.

14 On 2-17-1942, the Attorney General advises
15 the President that the last advice from the War Depart-
16 ment that he obtained was that there was no evidence
17 of imminent attack and no evidence of planned espionage
18 or sabotage.

19 In March, March 9th, '42, we know that the
20 Attorney General of the United States has read and
21 sends to McCloy of the Department of War the Ringle
22 Report which was written on January 26th, 1942.

23 In March, March 21st of '42, Mr. McCloy in
24 a letter acknowledges that he received the report and
25 indicates that he in fact talked at length with Ringle

1 and that he was very impressed with Lieutenant Commander
2 Ringle's knowledge of the situation.

3 We know that on or about May 6th of '42
4 the War Relocation Authority specifically requested the
5 services of Lieutenant Commander Ringle to help them
6 with their job in settling the evacuees. We also know
7 that on April 15th, 1943, General DeWitt and his staff
8 circulates a printed and bound volume of what we will
9 call the final report. In that final report, the
10 salient points of that are that in General DeWitt's
11 opinion, shortness of time to separate the loyal from
12 the disloyal was not a factor in his decision. In the
13 second point that he makes, amongst others, was that in
14 his view you could not separate the loyal from the
15 disloyal.

16 Four days later, after Mr. McCloy reads
17 this version of the final report, Mr. McCloy requests
18 revisions to this final report, and he emphasizes two
19 changes that he wished to make, and that was one, that
20 loyalty could be determined, and (2) in his view time
21 was of the essence, was the argument that should be
22 posed.

23 Between April 19th, 1943 and June of 1943,
24 revisions in the final report were made. On June 29th,
25 1943, we have a document in which it was witnessed that

1 the galley proof pages, galley pages, drafts and memos
2 or the original final report were destroyed.

3 Then, Your Honor, we know that from docu-
4 ments we have received which occurred after the arguments
5 in Hirabayashi, which was on May 10th and May 11th of
6 1943, we know that the FBI from the beginning of the
7 war, at least through Mr. Hirabayashi's case and on
8 through including Mr. Korematsu's case, reported that
9 there was never any evidence of sabotage, espionage
10 or fifth column activity.

11 We also know from documents received from
12 the Federal Communications Commission that after their
13 investigation there was never any evidence of illicit
14 radio transmissions or signaling of any kind.

15 This is a short summary of the kinds of
16 evidence that the Government had in its possession.
17 The Government's position with respect to that evidence,
18 as near as we can determine, was as follows: First,
19 the Department of Justice felt that evacuation was not
20 necessary. Measures taken short of evacuation were
21 sufficient. The military, and therefore the War
22 Department, or the military and also the War Department
23 determined that there was a military necessity, although
24 they articulated it nowhere except in the final report.

25 The final report, in its first version,

1 again recommended that you cannot separate loyal from
2 disloyal, regardless of how much time there was or how
3 much time he had to do that, and (2) they specifically
4 state that time or shortness of time to separate the
5 loyal from the disloyal was not a factor.

6 Now, the final report in its altered version
7 contradicts and states the opposite; that loyalty could
8 be determined, but changes the time factor to state
9 merely that there were no ready means available to
10 determine loyalty. The intelligence community, which
11 I have already gone over, basically Munson and Ringle
12 reports, all indicated that evacuation was not necessary.
13 They also indicated that by and large, Japanese-Americans
14 were "Americanized." They further stressed that
15 potential disloyalty could and in fact was at the time
16 they wrote the reports, these people were already
17 rounded up, so it was very easy to identify and select
18 and to then detain and question those individuals.

19 They also emphasized that the Japanese
20 "problem" was blown way out of its true proportions.
21 This is, again, what positions the Government took with
22 respect to the evidence they had. What the Government
23 then represented with these facts to the Court was
24 that their facts regarding the Japanese population on
25 the West Coast, which they urged the Court to take

1 judicial notice of included alienage -- alienation
2 toward the Kebai -- these are just characteristics that
3 I'm going over. Kebai are Americans with Japanese --

4 THE COURT: Let me just ask you to go back.
5 Did you say the Government was urging the Courts to take
6 judicial notice of this?

7 MR. KAWAKAMI: Yes, Your Honor. That's
8 correct.

9 The Government, citing these racial
10 characteristics, urged the Court to take judicial notice
11 of them and, further, to take judicial notice of the
12 fact that because of these racial characteristics, that
13 the Japanese-Americans were therefore predisposed to
14 disloyalty.

15 The other characteristics, amongst others,
16 and I'll just list a few more that the Government urged
17 the Court to take judicial notice of included partici-
18 pation in Japanese organizations, Japanese language
19 schools, dual nationality, and the fact that apparently
20 most of the Japanese-Americans were concentrated or
21 lived on or near the West Coast war industries.

22 The Government also represented to the Court
23 that the identity of potentially disloyal American
24 citizens were not readily identifiable. They also urged
25 the Court, represented to the Court, that immediate

1 evacuation was necessary.

2 Finally, we contend that the Government
3 presented improperly through the amicus briefs of the
4 states of Washington, Oregon and California certain
5 selected facts which they obtained from the first
6 version of the final report, which they presented to
7 the Court in Hirabayashi, notwithstanding the fact that
8 the final report itself was suppressed and not before
9 the Court in Hirabayashi.

10 Your Honor, with that brief overview, we
11 would like to call our first witness, Mr. Edward Ennis.

12 THE COURT: Let me give Mr. Stone a chance
13 to respond.

14 MR. KAWAKAMI: I'm sorry.

15 THE COURT: Are you through with your
16 opening argument?

17 MR. KAWAKAMI: Yes.

18 THE COURT: Mr. Stone.

19 MR. STONE: Good morning, Your Honor.

20 Although I had anticipated a slightly
21 different opening statement, I feel obliged to respond
22 to as many of the points that were made in my co-
23 counsel's opening statement as I can, so please excuse
24 me if I don't look that composed.

25 I think that the Court is aware, as we all

1 are, that although I was -- well, the other side has
2 pointed out that in 1976, President Ford on behalf of
3 the Executive Branch called the treatment of Japanese-
4 Americans on a group basis a tragic mistake. That is
5 and that was and that will always be now the final
6 position of the Executive Branch of the Government.

7 The statement that was made a moment ago
8 that only the Legislative Branch or perhaps the Executive
9 Branch has taken back and apologized for the extreme
10 actions they took under the pressure of a wartime
11 emergency, and that the Judicial Branch still needs to
12 do something is to argue not something which had any-
13 thing to do with prosecutorial misconduct.

14 If a record was presented to the Supreme
15 Court that was improper, indeed if there was prose-
16 cutorial misconduct, that in no way taints the Judicial
17 Branch. That has nothing to do with the judges of
18 the Supreme Court. If there is a taint - if there is
19 a taint - it is a taint upon the Executive Branch, the
20 branch which has already issued a presidential pro-
21 clamation. So to say that there is some overriding
22 obligation that has never been cleared and that a cloud
23 still hangs over the Judicial Branch is totally absurd
24 in our view. It has nothing to do with reality.

25 The reality is when the case was presented

1 the Court, the Judicial Branch, certainly acted based
2 as it felt upon the case before it, and certainly there
3 is no even allegation that the Judicial Branch of the
4 Government ever engaged in any misconduct.

5 Now, the second thing that I think I need
6 to take up is the point made that this is a unique
7 case, a Japanese-American case. That has nothing to do
8 with this case. As Your Honor had ruled, the question
9 before the Court, the question that they later finally
10 got to, was whether or not there was something in the
11 way the case was prosecuted originally which was not
12 proper according to the rules of how a case is prosecuted.
13 That is no different than any other of hundreds of kinds
14 of criminal cases that are prosecuted every day and
15 handled every day in the court system.

16 If there was prosecutorial misconduct, then
17 yes, that is something which may or may not need to be
18 addressed, and it may or may not have affected the out-
19 come of his case or of any case. But that has absolutely
20 nothing to do with the subject matter of the prosecution.
21 If someone didn't present something to the Court that
22 they should have, or if someone didn't present evidence
23 to the other side that they should have, that can and
24 does happen, as this Court well knows, in every kind of
25 case, sometimes based on simple neglect of a prosecutor,

1 sometimes based on a prosecutor's particular view of the
2 evidence, that he in his own mind doesn't happen to
3 think it's exculpatory, and sometimes, I will concede,
4 it is based on a little bit of overzealousness which the
5 Court may find was not appropriate.

6 But there are various reasons and innumerable
7 neutral contexts in which a prosecutor can make a mistake
8 in determining what he should give to the other side. So
9 the Japanese-American aspect of this case has nothing to
10 do with it. As Mr. Kawakami has pointed out, the
11 Japanese community has long ago been apologized to by
12 the Executive Branch. They went to the Legislative
13 Branch and got the statute repealed. Those are all
14 points that the Government pointed out in our very first
15 motion to dismiss when we tried to make the point that
16 we are not trying to bring up again allegations of
17 Japanese-American espionage or whatever.

18 However, despite our coming in and suggesting
19 that it had long been conceded, now close to ten years
20 ago by President Ford, that there were lots of tragic
21 mistakes that people may have done in connection with
22 this episode because of the pressure in this very city,
23 among others, of the wartime emergency. That's not the
24 same thing as saying that there was a plan, a plot, a
25 conspiracy if you will, among those high decision makers

1 to deprive Japanese-Americans purely because of their
2 race.

3 Frankly, we find those allegations as a
4 whole to be not only spurious but also almost incredible.
5 To suggest that Franklin Roosevelt gave his go ahead and
6 his okay - a president who was the first one to try and
7 treat all Americans and enact laws in programs treating
8 all Americans as equals; a president who is considered
9 by the longest run of historians to have been on the
10 liberal spectrum of the political scene. That he and
11 Secretary of War Stimson, a person from a different
12 political party and different backgrounds, who also was
13 well known to be a liberal, and Attorney General Biddle,
14 also a lifelong public servant, and the prosecutors in
15 this case, one of whom is going to be their first
16 witness whose testimony will be that when he left the
17 Government where he held several important posts, became
18 a director and sat on the Board of Directors of the ACLU,
19 who had filed amicus briefs in this case and indeed has
20 sought leave to intervene again now. He sat as a
21 director for the ACLU and still does for the last forty
22 years, that he also is part of this conspiracy,
23 intentionally trying to deprive people - it doesn't
24 matter if they're Japanese-Americans - any American,
25 to suggest that he would prosecute a case like that,

1 that he intentionally wanted to deprive people of their
2 rights, not that perhaps he made a mistake, is to us
3 incredible.

4 To suggest that he and John Burling, two
5 people about whom you will hear very much, two people
6 whose views my opponent keeps saying were the Department
7 of Justice's views, even though they get overruled by
8 their superiors --

9 THE COURT: Let me hear what you intend to
10 introduce as evidence.

11 MR. STONE: Mr. Ennis will testify, Your
12 Honor, and I certainly hope he will testify that his
13 views were not the Attorney General's views, nor Mr.
14 Burling, who was his subordinate.

15 The allegation has been made that the
16 prosecutorial actions in this case were intentional
17 efforts to deprive these people of their constitutional
18 rights, and only that. There is no allegation that
19 simile extended to Filipinos, Koreans, Chinese, or other
20 people of the same racial characteristics who were
21 resident on the West Coast. Only Japanese-Americans
22 were singled out.

23 You heard Mr. Kawakami say how he's com-
24 plaining that the Government was improper in its brief
25 in the Supreme Court; that this is the crucial test of

1 their misconduct, in citing the fact that Kebai and
2 people who believed in the Shinto religion should have
3 to be dealt with more harshly than others perhaps.

4 In the first place, I want to be sure the
5 Court recognizes that the focus of the case in the
6 Supreme Court, the focus of the prosecution, the focus
7 of the opinion in this case was on whether there was a
8 curfew violation. The Supreme Court only accepted
9 certification of the Yasui case and this case when the
10 cases were certified up to it. It had an option if it
11 wished, because the petition for certification also
12 included the Korematsu case, but it didn't take that
13 case which was only an evacuation case. Instead, it
14 took the Yasui case, which was only a curfew case, and
15 it accompanied it by this case and chose only to reach
16 curfew issues, specifically reserving anything more.

17 The Government's brief that was filed in
18 the Supreme Court in this case opens its statement of
19 facts by saying that the Government and the Court is
20 well aware that the factors which went into the military
21 decision were not able during that wartime period to
22 be put on the record because we were in a war zone. We
23 were in a time of war even then, even more than a year
24 after the activities which were being complained about.

25 So the Government said very clearly, we

1 think where a curfew is involved, you may take judicial
2 notice of certain things which distinguish certain
3 citizens of Japanese extraction, and about those
4 characteristics which we don't have enough time to
5 separate people out.

6 Now, just to discuss those two things for
7 a moment. Was there anything outrageous about suggesting
8 that individuals who had been born in this country to
9 Japanese citizens and whose parents had sent them for
10 long periods of time to Japan for their primary education
11 and for their military training, and to retain their
12 dual citizenship and came back to this country, was there
13 at that time in the eyes of those people, the people
14 briefing this, as they thought about it in 1942 after
15 we had been attacked at Pearl Harbor, was there some-
16 thing to worry about with respect to other people? Or
17 with respect to people who were advocates or are
18 advocates of the Shinto religion?

19 I will direct the Court to Mr. Ringle's
20 memo which Mr. Kawakami makes so much of. Mr. Ringle --

21 THE COURT: I don't really want a final
22 argument.

23 MR. STONE: Okay, Your Honor.

24 THE COURT: What I do want you to do is
25 state what the Government intends to show.

1 MR. STONE: Okay. The Government intends
2 to show, Your Honor, that the evidence that will come
3 into the case will show that the factors which were
4 pointed to were perfectly legitimate factors which the
5 intelligence community as a whole at that time was busy
6 advising everybody was a problem. The only question
7 which the intelligence community brought up at that time,
8 the Government's evidence will show, was the question
9 of can we separate people out. Do we have enough time
10 to do it? Is the situation so emergent that we can do
11 that or not?

12 Now, much has been made of how the Department
13 of Justice felt differently. Well, first of all, I don't
14 think they were talking to the Department of Justice.
15 The evidence will show they're talking about Mr. Ennis
16 and Mr. Burling. Mr. Ennis will tell you, I hope, that
17 that was not his call to make at that time. It was the
18 call of the man who was put in charge of the war zone
19 to make, and he simply had to tell that to the Supreme
20 Court, which is exactly what he did. And he did it in
21 a very objective way.

22 He said to the Supreme Court both in this
23 case, and if you'll look at the oral argument which will
24 be a piece of evidence in the Korematsu case when the
25 Solicitor General's office was involved, they said,

1 "Court, we ask you, because the evidence which there is
2 is classified, it's not for public consumption, we ask
3 you to see if you can decide this on the basis of
4 judicial notice. If you can't, you may have to remand
5 it for a hearing. If you can, we think we win."

6 Now, what happened? In the first case that
7 only involved curfew, nine of the justices, a unanimous
8 court, agreed that they could uphold a curfew, an order
9 that didn't kick anybody out of his home; it didn't
10 evacuate anybody from his community; it didn't separate
11 families; did make people leave their possessions or
12 their jobs. They said unanimously that they could uphold
13 based on judicial notice.

14 THE COURT: When you say "this case," you're
15 talking about the first case?

16 MR. STONE: Yes. That's this case, the
17 Hirabayashi case. In this case none of the justices
18 were troubled that an incursion onto liberties could
19 not be justified by fears and potential threats of dis-
20 ruption in the Western Defense Command, espionage and
21 perhaps sabotage, not incidents

22 We will present the evidence, as you will
23 see, that in the certification documents that came to
24 the Supreme Court, Judge Denman of this Circuit, then
25 the Chief Judge, specifically pointed out in the Court

1 of Appeals, Mr. Ennis was the first one to admit to
2 Judge Denman that we didn't have any prosecution
3 pending of any of those 70,000 people for sabotage,
4 espionage or fifth column activity.

5 What General DeWitt had been talking about
6 was a threat, he felt, a fear that he had in 1942 at
7 the time in quesiton, and it was said to the Supreme
8 Court, very openly, "We think if you look at the facts
9 in public notice, that is enough to justify the fears
10 that were in the mind of General DeWitt. The Court
11 unanimously agreed.

12 Later on when the next case, the Korematsu
13 case, a year later gets to the Supreme Court, the
14 Government said the same thing. When the Supreme
15 Court disposes of the Hirabayashi case, they are very
16 clear, particularly, I believe, the dissents are very --
17 excuse me -- the concurring opinions - it was a
18 unanimous opinion with no dissents - but the concurring
19 opinions are very clear that they are not at all sure
20 that they could take judicial notice of something
21 more stringent, less preventative in nature, perhaps
22 more punitive in impact, even if not in intention,
23 that being curfew, and indeed that is precisely what
24 happens.

25 When the Supreme Court gets to look at the

1 Korematsu case, three of the justices who were perfectly
2 happy to concur in the first decision, feel obligated
3 to dissent, and one of them dissents very strongly from
4 the practices that are openly put before them. Justice
5 Murphy writes a ringing dissent with long footnotes,
6 making all the same arguments that Mr. Kawakami has
7 made, complaining about General DeWitt's final report,
8 complaining that there is no evidence, and taking up
9 the claim that they can't decide the case on judicial
10 notice. It has got to go back for a hearing.

11 But six of the justices did not agree. They
12 still felt there was probably enough to decide it on
13 judicial notice, even in an evacuation context. Now,
14 in later years some of those justices have said "I
15 think I decided the case wrong; maybe we should have
16 sent that part of the case back for hearing. But that
17 is a far cry from this case. And the Government's
18 position in the case was open and well known.

19 We will never know what would have happened
20 if the Court had taken up Mr. Hirabayashi's suggestion
21 at that time. Mr. Hirabayashi at that time, at Mr.
22 Korematsu's suggestion in those briefs, does not say
23 "We are entitled to those reports that we think show
24 our innocence." He didn't say that at all, because
25 they know they weren't entitled to classified military

1 information during wartime, and it was still wartime.
2 They said "We're entitled to a remand, we think, for an
3 evidentiary hearing."

4 Now, at that point the Government would have
5 been put in the position --

6 THE COURT: Let me say again, I don't really
7 want a final argument.

8 MR. STONE: The Government will show, Your
9 Honor, the Government will show that that is the open
10 process by which the case was decided, and everybody
11 was well aware of the options that were open to every-
12 body. The Supreme Court simply chose, we will show,
13 not to send the case back and put the Government in
14 the difficult position of deciding whether it would
15 produce classified material or dismiss the case.

16 Now, we have come in now, as you know, and
17 said we're happy to dismiss the case. That certainly
18 indicates where we're going. Instead, the prosecu --
19 Mr. Kawakami and Mr. Hirabayashi now are forcing us to
20 hold that evidentiary hearing. Our evidence at this
21 hearing is, in our view, going to be much different
22 than the evidence might have been forty years ago for
23 two distinct reasons.

24 The first is, for whatever reason, most of
25 the evidence that we assembled has been excluded, so we

1 will have to be in the position of making proffers to
2 the Court. The second reason is, even if our evidence
3 had not been excluded, forty years have passed. You
4 will hear Mr. Ennis sit on the stand, and I will be very
5 surprised if he can remember with the kind of clarity that
6 certain written documents may have what kinds of infor-
7 mation, the specifics, he actually had in his hands at
8 that time or that General DeWitt had in his hands at
9 that time. Documents are lost, memories fade, most
10 of the critical witnesses are all dead.

11 It happens that Mr. Ennis is still around,
12 so is Mr. Hirabayashi. General DeWitt is not here.
13 General DeWitt's G-2, Mr. Forney, is not here. Mark
14 Clark, who is on the chart that we've been shown by the
15 petitioners, is dead. General G-2, GHQ, who advised
16 Mark Clark, Robinett, who was at that time one of the
17 most well-respected intelligence officers in the United
18 States Army, is dead. President Roosevelt is dead. The
19 people who advised President Roosevelt are dead. J.
20 Edgar Hoover is dead. Mr. Ringle is dead. Mr. Ringle's
21 boss, Mr. Canaga, is dead. Mr. Canaga's boss is dead.
22 The heads of ONI are all dead.

23 Can we go back and figure out what was in
24 their minds? The Government's evidence will show that
25 the picture that has been drawn of Mr. Ringle, who was

1 an Assistant District Intelligence Officer, not even
2 the District Intelligence Officer, in a single Naval
3 District of fifteen Naval Districts, did not speak to
4 the Chief of Naval Operations. He was respected
5 because he was in a position where he had a lot of
6 information, but he didn't speak to the Office of Naval
7 Intelligence.

8 The Government's evidence will show that he
9 was not in a position to do that, to the extent that
10 we can, because he is not here to take the stand. Now,
11 I make this point, and I think it's quite important,
12 the evidence which Mr. Kawakami will present, which he
13 has already mentioned to you, shows that Mr. Ringle's
14 papers were widely distributed.

15 John J. McCloy, one of the supposed
16 conspirators to deprive these litigants of their rights
17 by prosecutorial misconduct, openly admits that Mr.
18 Ringle had a certain amount of expertise. He doesn't
19 say, as you would think if he were a conspirator, "This
20 guy doesn't know what he's talking about."

21 THE COURT: I don't want to say it again.
22 I simply want to know what the Government intends to
23 produce.

24 MR. STONE: The Government will show that
25 the people at that time treated the case in the best

1 way that they could; that in the Western Defense Command
2 the people who were involved acted in accordance with
3 normal customary procedures, acted like responsible
4 officials. If mistakes were made, they were due to the
5 impression of the war, and many of the mistakes were
6 not even apparent to them.

7 The Government will show that General DeWitt
8 acted in a way that he truly believed was correct, and
9 again, Mr. Irons may have concluded he made a mistake,
10 but the Government will show he acted according to his
11 beliefs.

12 The Government will also show that in
13 Washington the War Department exercised independent
14 control over what was going on, and that they acted
15 separately, and in fact, they acted based on different
16 information, information to which both Mr. Ennis and
17 probably most of the other individuals in this country
18 were not privy. The highest officials in Washington
19 consulted and relied on information that was ultimately
20 derived from the most important intelligence coup that
21 existed during World War II. The United States, on the
22 basis of some cryptological breakthroughs had secretly
23 been reading the diplomatic telegraph traffic that the
24 Japanese consuls were sending back and forth to their
25 home offices. The airways were open, obviously, and

1 people could intercept any signal, but the crypto-
2 logical experts had broken various codes and continued
3 to break the updated codes. The result was that
4 excellent information about the moves that the Japanese
5 government were making with respect to World War II
6 was given to this country.

7 Because it was such an important intelligence
8 breakthrough, there was a very strict control on who
9 was allowed to know (1) that we even had made the break-
10 through and had this project in being, which because
11 the evidence that was obtained by transcribed secret
12 messages was so amazing in their description of what
13 was going on, was entitled "Magic," and so they're
14 called "Magic" documents, because people thought that
15 the whole idea that we had broken these codes and
16 gotten terrific information, the Japanese continued to
17 us it, was like magic.

18 It was a very small circle of people who
19 was allowed to know that we had done that. There was
20 an even smaller circle of people who got to actually
21 handle the cables in their rollup form and who got to
22 see a cable and to read a cable. However, the
23 intelligence community as a whole, our evidence will
24 show, was given the meat of those cables on a regular
25 basis. It was distributed. It was run back and forth.

1 It was all over the intelligence community. That is
2 what our evidence will show.

3 And although to the lawyers who were
4 involved in that case, and the people who have drafted
5 the petition in this case, they may not see the meat
6 of that intelligence and how it affected the decision-
7 makers in the War Department, that is what we will show
8 you, that the meat of that intelligence was why people
9 in Washington had an independent basis to resist
10 rejecting the necessity for curfew.

11 Did they care much about -- our evidence
12 will show that they didn't care much about the final
13 report. That was a published document during the War.
14 The evidence will show that anything that is published
15 was not something that the War Department was relying
16 on during the war, because the evidence, as I have
17 already pointed out, shows the Government came in to
18 the Supreme Court and said, "We can't give you the
19 evidence because it is not something we can publish."

20 So our evidence will show you that the final
21 report of General DeWitt was not the final say-so on
22 the evacuation of the Japanese. Indeed, our evidence
23 will show you that the final say-so was the official
24 report of the evacuation of the Japanese which was
25 published in 1959 by the Government itself and written

1 by Stetson Kahn.

2 Now, ultimately we will show you through
3 that evidence that the decision-makers had a basis to
4 go ahead, although Mr. Ennis may have been unaware of
5 it, although General DeWitt may have been unaware of
6 it, although they may have had separate views that
7 allowed them to proceed, but that no one in this whole
8 circle was busy conspiring to deprive only one Oriental
9 group on the West Coast of their rights Only one.
10 Not the people of Korea or people of Chinese origin or
11 people of Filipino origin.

12 That's what our evidence will show. We
13 think that the evidence will also show that to the
14 extent that we can make a case, our evidence will show
15 you that our case has been irreparably damaged by time.
16 I was very pleased to hear in the opening, right at
17 the very beginning of Mr. Kawakami, that he spoke
18 about Morton Grodzins book, "American Betrayed."

19 Our evidence will show you that Morton
20 Grodzins went and spoke to Mr. Ennis in 1942, within
21 six months of the events that we're now trying to
22 unscramble; that he was given access to the Department
23 of Justice files in 1942, partly because Mr. Ennis
24 wasn't so happy with this whole series of events,
25 personally he was unhappy.

1 Mr. Grodzins published all of these in 1949.
2 Every critical document was published and discussed by
3 Mr. Grodzins in 1949, including Mr. Grodzins' suggestion
4 that maybe somebody should reopen this in the Supreme
5 Court. The only thing that was not published by Mr.
6 Grodzins, and maybe it was out of respect to Mr. Ennis
7 because Mr. Ennis agreed to be interviewed by him, was
8 Mr. Ennis's personal views rather than his institutional
9 views about the way the cases were handled.

10 But Mr. Ennis, our evidence will show you,
11 was himself counsel to the Japanese-American citizenry
12 and went around the country lobbying for that bill that
13 was discussed by Mr. Kawakami in opening, to give
14 redress to Japanese Americans. Mr. Ennis was and is
15 among one of the most ardent admirers of Japanese-
16 Americans in this country that there is.

17 THE COURT: Anything further about the
18 Government's evidence?

19 MR. STONE: The Government's evidence
20 ultimately will show you, Your Honor, that to the extent
21 that there has been any evidence out there that anybody
22 wants to discuss, either Mr. Ennis personally or Morton
23 Grodzins, was available to the defendant in this and
24 the other two cases since the late 1940's, and to come
25 back now, thirty years later, and tell us what Morton

1 Grodzins was saying back then, at a time when the
2 Government is unable to really reconstruct for you by
3 the testimony of witnesses what happened, and we all
4 have to surmise about the intent behind documents,
5 prejudices the Government's ability to stand here and
6 say the case was prosecuted in a proper fashion.

7 To the extent that the evidence may show
8 that it prejudices the Government's ability to defend
9 it, the actions that were taken, that's not an issue
10 in the case. So to the extent that there is a laches
11 problem, a problem with waiting too long, we are glad
12 that they have opened the subject of what Morton
13 Grodzins has done, because we certainly hope to ask
14 Mr. Ennis if he remembers Morton Grodzins.

15 Consequently, in sum, Your Honor, we will
16 try and show you that this case is not -- what is
17 before you right now, this hearing, has nothing to do
18 with Japanese-American rights. It has nothing to do
19 with the Commission on Wartime Relocation and Intern-
20 ment of Civilians which made recommendations for redress.
21 It has nothing to do with the Japanese-American Claims
22 Act of 1949.

23 Our evidence will show it has to do with
24 whether the prosecutors in one of many cases they
25 prosecuted, acted properly, and whether or not we can

1 show that at this late date is something that's very
2 difficult, thirty years after all the events have been
3 made a part of the public record.

4 Thank you, Your Honor.

5 THE COURT: All right. Ready to call your
6 first witness?

7 MR. HALL: We are, Your Honor.

8 At the outset, however, for the record, we
9 would like to indicate out of courtesy to counsel and
10 the Court, we didn't object to the references to
11 "Magic", but we will at the appropriate moment as evi-
12 dence is offered with regard to "Magic," which we
13 believe is not relevant or properly admissible in this
14 proceeding.

15 THE COURT: All right.

16 MR. STONE: Your Honor, then since I think
17 it is inappropriate to object to an opening argument,
18 when that objection was made Monday and it was over-
19 ruled, I would like to put on record, if I may, that
20 you previously ordered in chambers this morning that
21 counsel for Mr. Hirabayashi was not to dwell on
22 emotional matters but to deal with misconduct only,
23 and that he did not follow that order --

24 THE COURT: Wait a second. I think we can
25 carry on this proceeding in a civilized manner. Let's

1 go ahead. I think both of you, if you say Mr. Kawakami
2 did so, I believe you did the same thing, Mr. Stone.

3 MR. STONE: Yes, Your Honor. I responded.

4 THE COURT: I myself have some question
5 about the relevance of the "Magic" documents. I think
6 that you stated it properly at the conclusion of your
7 argument. What we are here to decide, really, is
8 whether the prosecution of this Petitioner was fair;
9 whether he was denied due process in the prosecution,
10 and we really are not concerned with the rightness or
11 wrongness of the decisions made back in those days.
12 But it is the prosecution, how it was carried on.

13 All right, Mr. Hall.

14 MR. HALL: Call Mr. Edward Ennis, please.
15 May I go out and get him?

16 THE COURT: Yes.

17
18 EDWARD J. ENNIS, called as a witness on behalf
19 of the Petitioner, being duly
sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. HALL:

22 Q Mr. Ennis, will you please state for the Court your full
23 name?

24 A Edward J. Ennis, E-n-n-i-s.

25 Q And what is your residence address, please?

1 A 150 East 77th Street, New York City.

2 Q How old are you?

3 A Seventy-seven.

4 Q Can you describe, please, for the Court your educational
5 background?

6 A Well, I'm a -- I went to Catholic preparatory school and
7 Catholic college in New Jersey and graduated from Columbia
8 University Law School in 1932.

9 Q Will you please describe for the Court your employment
10 background?

11 A Well, --

12 Q From 1932.

13 A From 1932 until 1946 I was employed by the Department of
14 Justice, U.S. Department of Justice, for one year as a law
15 clerk to a federal judge, and then as Assistant United States
16 Attorney for two or three years; then as an attorney in the
17 office of the Solicitor General of the United States in
18 Washington. Then back to New York for two years as chief
19 of the Civil Division of the U.S. Attorney's office, and
20 then back to Washington as General Counsel of the Immigration
21 and Naturalization Service, which was interrupted on December
22 7th, 1941 by the beginning of the war, and on that day I
23 became Director of the Alien Enemy Control Unit of the
24 Department of Justice where I remained until 1946.

25 Then I went back to New York in private

1 practice and I am now retired.

2 THE COURT: Would you tell me again, on
3 December 7th, '41, you became Director of?

4 THE WITNESS: Of the Alien Enemy Control
5 Unit of the Department of Justice.

6 Q (by Mr. Hall) Did you also have responsibilities after
7 December 7th, 1941, with regard to Hawaii, for example, and
8 if so, would you describe what your responsibilities were?

9 A Well, one project I did for the Attorney General and
10 Secretary Ickes of the Department of the Interior, which was
11 in charge of Hawaii which was then a territory of the United
12 States, and after about a year and a half of martial law
13 with all of the civilian courts closed, the Attorney General
14 and the Secretary thought that Hawaii should -- the civil
15 courts should be opened again and martial law should terminate,
16 and I was sent out to discuss that with Admiral Nimitz and
17 General Richardson, the Army Commander, and I failed to
18 persuade them that it was time to terminate military law and
19 put the civilian law back in.

20 Then I went back, I guess between six months
21 and a year later, when writs of habeas corpus were brought
22 by civilians who had been tried in the military courts, and
23 I went out as the attorney to represent the military in the
24 habeas corpus actions. I tried those cases in Hawaii and
25 argued them in the Court of Appeals in San Francisco and in

1 the U.S. Supreme Court.

2 Q How old were you on December 7th, 1941?

3 A Well, I was born in 1907, so what is that? Seven from
4 41?

5 Q Thirty-four?

6 A Thirty-four, yes.

7 Q You mentioned a few minutes ago that you worked as a
8 part of your responsibilities with the Department of Justice
9 in the Solicitor General's office. Would you just briefly
10 describe for the record what your duties were, in general,
11 when you were working with the Solicitor General?

12 THE COURT: You know, I would like to know
13 when he was there, too.

14 MR. HALL: Fine.

15 Q (by Mr. Hall) When did you work specifically in the
16 Solicitor General's office, and what were your duties?

17 A I think those two years were '37 and '38, and that's
18 really quite a simple office compared to what later I was
19 doing. The Solicitor General then only had about five
20 assistants and their job was to review the briefs in Supreme
21 Court cases, to review the briefs prepared in the various
22 divisions, Civil Division, Criminal Division, Antitrust
23 Division. That was our general work, and also to determine
24 what cases should be allowed to be appealed.

25 Then we would argue some of the cases. The

1 Solicitor General assigns the arguments and he assigned a
2 lot of them to the attorneys in his own office. In those
3 two years I argued more cases in the Supreme Court than
4 anyone in the United States except the Solicitor General
5 personally.

6 Q When you said you reviewed the briefs of the various
7 divisions, you were referring to the various divisions of
8 the Attorney General's office?

9 A Of the Department of Justice, yes. The Criminal
10 Division would prepare a brief for a Supreme Court case and
11 one attorney in the Solicitor General's office would review
12 it and be responsible for the final brief.

13 Q You mentioned that you were General Counsel at one point
14 for the Immigration and Naturalization Service?

15 A Yes.

16 Q Can you tell us approximately at what point in time
17 that was?

18 A Yes. It was a very short period, from June 1941 until
19 December, 1941. That position was created by Attorney
20 General Biddle for me because he felt that it was
21 inappropriate for all immigration cases to be handled in the
22 Criminal Division. He wanted to make them a part of the
23 civil operation.

24 So the Department of Justice had taken over
25 the Immigration Service from the Labor Department, so he set

1 up this job and offered it to me and I took it.

2 Q And during the period of time that you were General
3 Counsel for the Immigration and Naturalization Service, can
4 you briefly describe what your responsibilities and duties
5 were?

6 A Well, as I recall it, the General Counsel was probably
7 second in command to the Commissioner of Immigration, and I
8 began to set up a unit of lawyers to handle all the immigra-
9 tion legislation around the country, all the deportation
10 proceedings and all that sort of thing.

11 Q You stated you were appointed the Director on December
12 7th, 1941, of the Alien Enemy Control Unit of the Department
13 of Justice. First, can you tell us the circumstances which
14 caused you to become the Director and then tell us what the
15 Alien Enemy Control Unit was.

16 A Well, very briefly, the Department of Justice, which
17 included the Federal Bureau of Investigation, had the
18 general responsibility for being prepared for participation
19 in World War II which had begun on September 1, 1939. We
20 had a special unit which I did not control which prepared
21 lists of potential enemies, German and Japanese, principally,
22 which in case we got into the war would be arrested and
23 given hearings as to whether they should be interned. That
24 is aliens; not citizens.

25 I was involved in that because as General

1 Counsel of the Immigration Service, I was part of that
2 preparation. I recall we had no detention places so I asked
3 the Attorney General for permission to go to the Congress
4 and ask for some money to make plans to build detention
5 stations if we needed them. He said, "Oh, you can't do
6 that. You'd be a war monger. You can't do anything but
7 paper planning until and if we get into the war."

8 So part of my paper planning was on the
9 morning of -- that Sunday morning, December 7th, I was
10 sitting in my office, General Counsel of the Immigration
11 Service, worrying about the negotiations going on between
12 the Japanese group, which were in Washington at the time --

13 THE COURT: You know, I think I'm going to
14 interrupt you now and let's go ahead with the next question.

15 THE WITNESS: Oh, all right.

16 Q (by Mr. Hall) You mentioned a list of potentially
17 dangerous persons. Was this also called the ABC list, or
18 did it have a name?

19 A I don't recall that at this time, but it was a list
20 prepared from the investigative reports of the Federal
21 Bureau of Investigation, and we had developed a system that
22 upon the declaration of war with any country, that authority
23 would be issued to the FBI to pick up the people and then
24 we would process their cases.

25 THE COURT: We are right at recess time

1 so we'll take a recess until 11 o'clock.

2 (Recess.)

3 THE COURT: Would you want to take one of
4 these vacant seats here? There is one more seat here, if
5 one of you wanted to take it.

6 Q (by Mr. Hall) Mr. Ennis, you testified that on December
7 7th, 1941, Sunday, you were working in your office in
8 Washington, D.C.

9 A Yes.

10 Q And you heard about the events of Pearl Harbor?

11 A Well, the Border Patrol called me from Hawaii and said
12 that the city was being bombed. I of course called the
13 Attorney General, the Solicitor General, and told the operator
14 to call all the Assistant Attorney Generals and get them
15 into the Department.

16 Q Was there a meeting later that afternoon with, among
17 others, the Attorney General and Solicitor General?

18 A Well, in the evening, the Attorney General I believe
19 was in Detroit making a speech and the Solicitor General
20 was in Philadelphia doing something else, and we got every-
21 body together in the evening, at least.

22 Q Was it at that meeting in the evening when the Enemy
23 Control Unit was established?

24 A Yes. It was established orally. It may not have
25 actually been set up on paper until the next day or two, but

1 the operation began that evening. We actually issued orders
2 to the FBI on Sunday evening, and Monday hundreds of persons
3 of Japanese ancestry and some persons of German ancestry,
4 German aliens, were actually arrested.

5 Q Were you also involved on the evening of December 7th
6 and during December 8th in preparing any presidential
7 proclamations?

8 A Well, we had the proclamation declaring the Alien
9 Enemy program, the President issued that, and also the
10 proclamation of war against Japan, and then the next day
11 the German came in. That was all done in those first
12 couple of days, yes.

13 Q Now, can you explain, if you can recall, how you first
14 became aware of Gordon Hirabayashi?

15 A No. Mr. Hirabayashi was just -- would come to my
16 attention from the U.S. Attorney's office as one of the
17 persons who had violated one of the military orders.

18 Q What, if anything, was your responsibility with regard
19 to the judicial proceedings related to Mr. Hirabayashi?

20 A Well, very briefly, it had really nothing to do with
21 my business as administering the Alien Enemy Control Act
22 but as soon as any litigation started, the Attorney
23 had to place it some place, either in the -- this would
24 routinely have gone into the Criminal Division if
25 a routine matter, but since it involved what I was

1 with the Attorney General, it was put in my office, and so
2 I would then be in communication with the U.S. Attorney,
3 the office of the U.S. Attorney in whatever district the
4 case arose.

5 Q And what in particular were your responsibilities with
6 regard to the judicial proceedings relating to Mr.
7 Hirabayashi?

8 A To direct them through the U.S. Attorney's office.

9 Q At what stage in those proceedings? At the beginning
10 of the trial stage or at the appellate stage, or at the
11 stage before the Supreme Court? At which stage?

12 A Oh, no. Right before the indictment, right from the
13 beginning.

14 Q Did you take any role in the Government's presentation
15 of its case regarding Mr. Hirabayashi before the United
16 States Supreme Court?

17 A Well, I directed the preparation of the brief for the
18 Government.

19 Q And can you tell us as best you can presently reca'
20 what you did in connection with preparing the brief of
21 Government in connection with the Hirabayashi appeal
22 United States Supreme Court?

23 A I just had my assistants draft it and I revis
24 draft and sent it to Mr. Fahey, the Solicitor Ger
25 discussed it with him and his assistant on the I

1 case was Arnold Raum, R-a-u-m, who was on the
2 THE COURT: Would you spell t^{ief.}

3 the Solicitor General? ame of

4 THE WITNESS: Fahey, Charles Fal.
5 is F-a-h -- did Charlie spell it e-y or just y? It
6 Do you remember? now?

7 MR. HALL: May we show the witness 1
8 99?

9 THE COURT: That would be fine.

10 THE WITNESS: It's F-a-h-e-y or F-a-h-y.
11 I just don't remember.

12 Q (by Mr. Hall) Mr. Ennis, Exhibit 99 has been admitted
13 as an exhibit in these proceedings and already identified
14 as the brief of the United States, the opening brief of
15 the United States in the Hirabayashi case. Does that help
16 you in spelling the names?

17 A Yes, it certainly does. Fahy is F-a-h-y, Your Honor.

18 Q Now, in trying to construct the Government's argument
19 to the United States Supreme Court, do you have any
20 recollection of the process that was utilized in trying to
21 decide what information was to go into that brief, Exhibit
22 99?

23 A Well, generally, yes. We had an unusual situation.
24 You see, this was a -- this was questioned certified by the
25 Court of Appeals for the Ninth Circuit, and there was

1 practically no record at all. You see, this case was tried
2 below, perhaps not like it would be tried today with a long
3 factual record of the basis of the order, and we had to try
4 to write a brief to deal with these certified questions
5 pretty much on the basis of what we considered was public
6 facts subject to judicial notice.

7 Q Did the War Department provide you with any material or
8 evidence to assist you in preparing the Government's brief?

9 A No, I don't recall any assistance from the War Depart-
10 ment because there was an unusual relationship here, you
11 see. The Department of Justice had posed the necessity for
12 any evacuation, but under our system of government and by
13 statute, the Department of Justice were the lawyers for the
14 War Department like any other department, you see. And
15 although we were in communication with the War Department,
16 they were not wholly at ease with being represented by a
17 department which disagreed with their program.

18 Q You stated the Department of Justice opposed the
19 necessity of evacuation, and presumably communicated that to
20 the military. Can you explain in any more detail the nature
21 of the Department's position and how it was formulated and
22 what role you played in its disposition?

23 A Well, yeah, but very simply, the Department of Justice
24 was responsible under the law for order and dealing with
25 espionage and sabotage through our Federal Bureau of

1 Investigation, and the Bureau did not feel that there was
2 any evidence sufficient to support the proposed eventual
3 evacuation of all persons of Japanese ancestry from the
4 West Coast, and there were numerous conferences between the
5 Attorney General and the Secretary of War and Mr. Stimson
6 on that level, and the Assistant Secretary of War and Mr.
7 Biddle's first assistant, and myself on the second level.

8 I had conferences in which Mr. Stimson
9 was present but most of my dealings were with the Assistant
10 Secretary of War, John J. McCloy. And in the course of
11 this, I went out and visited General DeWitt twice in his
12 -- at the Presidio in San Francisco, arguing the Civil
13 Department's position that we didn't have enough evidence
14 to warrant the proposed evacuation, and listened to his
15 arguments and his principal assistant, Carl Bendetson, that
16 they felt that their proposal should be accepted.

17 This, you know, went on on a day to day
18 basis for all of January and until the President's order
19 was signed on February 19th of 1942.

20 Q Do you know if Mr. McCloy is still alive?

21 A Yes, he is.

22 Q And do you know if -- is it Colonel Bendetson -- is?

23 A Yes, he is.

24 Q Is he still alive?

25 A Yes.

1 Q Now, did you ever have a meeting with J. Edgar Hoover,
2 the Director of the Federal Bureau of Investigation, with
3 regard to the FBI's findings concerning sabotage and
4 espionage of Japanese and Japanese-Americans?

5 A Well, I don't recall a specific meeting between the
6 two of us, but I met with him and the Attorney General in
7 the course of this, explaining to him the military's
8 position and asking him for all the information from his
9 responsibility for the security of the United States from
10 the civilian point of view as distinguished from the
11 military's views.

12 Q And do you have, with regard to the general discussion
13 which you've just described, do you have a recollection
14 of what Mr. Hoover said to you and others in your presence?

15 A Well, only the general thing that his Bureau had no
16 evidence which would indicate that the Japanese-American
17 population were a danger or that anything more was required
18 than the couple of thousand Japanese aliens that we had
19 picked up very quickly and detained because of possible
20 loyalty to Japan, but that included having the Order of
21 the Golden Chrysanthemum or belonging to any organization
22 which had close ties with Japan, and primarily anybody who
23 had served in the military forces of Japan or Germany or
24 Italy. Those were prime aliens for detention, just as
25 American citizens would be if he were in those countries.

1 Let me say this about Hoover. I had very
2 little personal communication with Hoover. We disagreed on
3 many matters, and most of our communication, which was very
4 voluminous, was in memoranda. He felt we were letting out
5 too many of the arrested alien enemies, paroling them or
6 releasing them, and he would have liked a little stricter
7 program than that.

8 Q Now, you testified that you had one, two, or I don't
9 remember how many meetings with General DeWitt?

10 A I recall only two and that was -- that would be in
11 January and possibly very early in February before the final
12 decision was made.

13 Q To begin with, the meetings that you generally referred
14 to with J. Edgar Hoover of the Federal Bureau of Investiga-
15 tion, were these meetings that occurred after December 7th,
16 1941?

17 A Oh, yes, certainly.

18 Q And the meetings that you had with General DeWitt were
19 after December 7th, 1941?

20 A Oh, yes.

21 Q And did I get your testimony correctly that you
22 explained to General DeWitt the information that you had
23 received from J. Edgar Hoover?

24 A Yes, but you see, Biddle sent me out to talk to the
25 General about our views, the Civilian Department's views,

1 on the program, in which we said we had complete constitu-
2 tional authority over all aliens of any nationality and we
3 thought we had a very strong program and authority to
4 exercise the program in dealing with aliens of Japanese,
5 let's say, nationality or German nationality, and we
6 arrested and detained thousands, maybe four or five
7 thousand Japanese aliens during the war and had camps for
8 them which I visited and got Biddle to visit because I
9 wanted him to see the places where we were detaining
10 people.

11 I was sent out to explain the civilian
12 view to General DeWitt, and DeWitt, in turn, for me to
13 transmit back to the Attorney General what the military's
14 view was. I remember very clearly in his office he pulled
15 down a map of the Pacific and said that there is a possi-
16 bility of an attack by the Japanese Navy on the Panama
17 Canal, and it would be a possibility that troops would be
18 landed in Mexico and in civilian clothes they might come
19 up and mix with our Japanese-American population and be
20 indistinguishable, and made these arguments.

21 I of course told him that we didn't feel
22 there was enough factual basis for believing that our
23 American-Japanese population would assist the enemy to
24 warrant their entire removal, you know, a standoff.

25 Q When you told General DeWitt that the civilian agency

1 of the United States Government were not willing to
2 implement a program of measures against Japanese residing
3 in the United States, what was General DeWitt's response,
4 if you can recall?

5 A I don't recall a direct response, but it was perfectly
6 clear that he would consider that civilian authority would
7 not be exercised; that the option was the use of military
8 authority for that purpose.

9 Q And given the state of affairs that you've described,
10 the opinions of the Department of Justice on the one hand
11 and the opinions of General DeWitt on the other, who ultimately
12 became responsible for measures that were implemented
13 against Japanese citizens and aliens residing in the United
14 States with regard to issues such as determining areas of
15 exclusion, curfew, evacuation and those sorts of affairs?

16 A Well, it went in two stages. The Department of Justice,
17 we were willing to determine small areas from which all
18 aliens of any nationality and even Japanese-Americans could
19 be excluded, some eighty small areas of, you know, around
20 Army and military and Naval installations and the like, and
21 we did propose those, but we said we could not deal with
22 the exclusion of the population because we thought it was
23 factually unnecessary and that it was -- we didn't have
24 the -- we didn't have either the power or the ability to
25 deal with that question.

1 Q Did you come in contact with information that the
2 military was relying on with regard to, for example,
3 surreptitious radio signaling or surreptitious lights or
4 signaling from shore to ship, that subsequently became
5 investigated by the Federal Communications Commission?

6 A Oh, yes. We didn't accept as accurate or valid the
7 military's view that this kind of activity was going on.
8 We got the -- we asked the Federal Communications Commission
9 to check on that and we got contrary information.

10 Q And when you say you got contrary information, again
11 recognizing this was a few years ago, can you give us your
12 best recollection of the information you received?

13 A Well, in general, it was that the FCC identified
14 stations that were broadcasting and did not accept the
15 military view that there were clandestine messages going on
16 from Japanese agents to submarines and the like. We just
17 disagreed on that and we dealt with that -- we tried to deal
18 with that in the U.S. Supreme Court brief later.

19 Q Do you recall -- excuse me. Were you finished?

20 A Yes.

21 Q Do you recall if you communicated the information you
22 had from the Federal Communications Commission personnel
23 to General DeWitt in one of your one or two conversations
24 you had with him?

25 A I don't remember that now.

1 Q Do you recall as you sit here today whether the Govern-
2 ment in preparing the briefs in the Hirabayashi case, or in
3 presenting oral argument to the Supreme Court with regard
4 to the Hirabayashi case, informed the Supreme Court of the
5 opinions of the FBI with regard to the issue of Japanese
6 residents and Japanese citizens' loyalty and the findings
7 of the FBI that you've testified to?

8 A We did not.

9 Q Do you recall if the Government informed the Supreme
10 Court of the information which you had knowledge of from
11 the Communications Commission with regard to surreptitious
12 signaling, radio signals and the like about which you've
13 testified?

14 A I proposed that we include in our brief statements that
15 we had information different than the Western Defense
16 Command's information, but I was overruled by the Solicitor
17 General on that suggestion and we adopted an alternative of
18 putting in our brief a statement that the Government did
19 not rely upon any of the facts stated by the Western Defense
20 Command in its report, but only relied upon what facts we
21 stated in our brief, which did not include that kind of
22 communication.

23 Q Isn't it accurate that the information you've just
24 testified about related to the Korematsu case and not to
25 the Hirabayashi case?

1 A Oh, yes. I'm sorry. I telescoped those. We didn't get
2 to that disagreement until the Korematsu case which was the
3 following year. You had better -- well, you ask me how you
4 want me to explain that.

5 Q Just so we understand each other, I asked you a few
6 moments ago if you communicated to the Court in the
7 Hirabayashi case the information about which you've just
8 testified relative to the position of the Federal Bureau of
9 Investigation.

10 A No, we didn't consider -- we did not. We did not.

11 Q And then I asked you the same question with regard to
12 whether you communicated the information about which you've
13 testified regarding the findings of the Federal Communications
14 Commission.

15 A We did not.

16 Q And I'm asking you if you communicated to the United
17 States Supreme Court in the Hirabayashi case the difference
18 about which you've testified between the position of the
19 Department of Justice on the one hand and the military
20 authorities on the other with regard to the activities
21 engaged against the Japanese residents and citizens on the
22 West Coast?

23 A No. We, as attorneys for the War Department, we stated
24 its position so far as we believed judicial notice of the
25 public situation.

1 Q And again, just so that the record is clear, the infor-
 2 mation about which you've testified concerning Mr. Hoover and
 3 the FBI and the Federal Communications Commission and the
 4 difference of opinion between the Department of Justice on
 5 the one hand and the military authorities on the other hand,
 6 this information was available and known by you and the
 7 Department of Justice at the time that the Hirabayashi
 8 briefs were written and the argument in Hirabayashi was made
 9 in the Supreme Court?

10 A Yes.

11 Q Do you recall an event where there was a report of
 12 lights on a hillside in California which military authorities
 13 claimed were supposed to be signals to some ship out at sea?

14 A Yes, generally.

15 Q Can you describe -- we discussed this last night. Can
 16 you describe generally what you know and what the findings
 17 were with regard to this one instance?

18 A We had the FBI check that and we found in some
 19 instances it was farms where at night people used flash-
 20 lights to go to the outside toilets, for example. That's
 21 one thing we found.

22 We were getting different reports from
 23 activity on the West Coast from the FBI than we were getting
 24 from the military authorities.

25 Q Have you heard of something called the Ringle Report?

1 A Yes.

2 Q And have you heard about an article which appeared in
3 the Harpers magazine which I'll call to the Court's attention
4 and perhaps it can be offered to the witness. It is Exhibit
5 78, item 13, in the tablet.

6 Would the clerk mind giving the witness
7 Exhibit 78?

8 THE COURT: And your question was had he
9 heard about the article in Harpers magazine?

10 MR. HALL: Yes.

11 THE COURT: Is your question as of the
12 present time or at some prior time?

13 MR. HALL: There is evidence in the record
14 already that he heard about it at the time he was writing
15 the briefs in Hirabayashi. We're going to get to that.

16 Q (by Mr. Hall) Now, we have handed up to you what has
17 been admitted in evidence as Exhibit, I believe it's 78. I
18 recognize it may have been a while since you last saw this,
19 but do you have any present recollection as to whether the
20 document in front of you is the Harpers magazine article that
21 you later found out was authored by Lieutenant Commander
22 Ringle?

23 A Well, I haven't seen this article since '43 and I don't
24 remember the type setup of it, but I'm familiar with the
25 article.

1 Q Now, do you recall what if any role that article played
2 in connection with your considerations when you were pre-
3 paring the briefs and preparing for argument in the
4 Hirabayashi case, and maybe to help you I would ask the
5 clerk to hand up to you Exhibit 35, tab No. 36.

6 THE COURT: That exhibit number was?

7 MR. HALL: 35, tab 36.

8 A Well, I'm familiar with this memorandum from myself to
9 the Solicitor General of April 30th, 1943, discussing the
10 preparation of the brief, the Supreme Court brief in the
11 Hirabayashi case, yes.

12 Q (by Mr. Hall) Just as a matter of general background,
13 Mr. Ennis, why did you write a memorandum of this sort to
14 the Solicitor General, in general, and if you can remember
15 in particular why you wrote this, explain that. At least
16 explain why in general you might write a memorandum like
17 this.

18 A Well, the general and the specific answer is the same.
19 I would want to inform the Solicitor General that since we
20 were not dealing with a written record of evidence but were
21 preparing this case on the basis of what general knowledge --
22 what knowledge there was to support the curfew and the
23 exclusion orders, that this was part of the knowledge that
24 we had. The article which we found out, although it was not
25 signed by Lieutenant Commander Ringle, but was his article,

1 and I wanted the Solicitor General to know that we had more
2 facts than just the Western Defense Command's statement of
3 facts about the situation, which raised a problem for us,
4 you see.

5 THE COURT: I see you say in the memorandum
6 that even though you didn't know the Harpers article was
7 written by Lieutenant Commander Ringle, you had compared
8 that article with another memorandum which you knew he had
9 written, and you say, I believe, and you do say "A comparison
10 of this memorandum with the article leaves no doubt that
11 the author of the Harpers article is Lieutenant Commander
12 K. D. Ringle," on the second page.

13 THE WITNESS: That's correct, Your Honor,
14 which meant that we had Government security information
15 which conflicted with what we were given by the Army, which
16 was our client in this matter. Also the United States was
17 our client as well as the War Department, I believe.

18 Q (by Mr. Hall) Do you recall whether you had infor-
19 mation about something called the Delimitation Agreement
20 between the various agencies of the Government and military
21 branches with regard to the responsibility for coordinating
22 and developing expertise with regard to intelligence infor-
23 mation?

24 A I did at some stage get such information. I am not
25 aware that I knew it at this time.

1 Q Do you know as you sit here today whether the United
2 States Navy had any particular responsibility with regard
3 to gathering intelligence information prior to and after
4 December 7th, 1941?

5 A Yes. I learned in the course of the litigation after
6 the Hirabayashi case that the military just had an agree-
7 ment. The Navy was going to take care of intelligence
8 involving Japanese. They were going to take care of, in a
9 sense, the Pacific theater.

10 Q And calling your attention to the last full paragraph
11 on page 2 of your memorandum, Exhibit 35, I would like to
12 just read a sentence to call to your attention. The
13 sentence reads:

14 "Since the Naval officers believe that it
15 was necessary to evacuate only about 10,000 people they
16 could have identified by name, they did not feel that it was
17 necessary to evacuate all the Japanese."

18 Now, do you have any recollection as to
19 why, and Your Honor, I'm calling your attention to the
20 first sentence in the next to the last paragraph on page 2
21 of Exhibit 36.

22 THE COURT: I see. All right.

23 Q Why was this important in the context of Hirabayashi,
24 if you recall?

25 A Well, it was important because the position we were

1 taking for the Army and for the Government of the United
2 States was that evacuation of the whole group was necessary
3 because there was no time to pick out potential saboteurs
4 or espionage agents, and another department of the Govern-
5 ment was telling -- we had information from them that a
6 program was possible to deal with 10,000 people instead of
7 120,000.

8 Q Now, going over to page 3 of Exhibit 35, the first full
9 paragraph, if you read down in the second line it states in
10 part:

11 "Terms of the so-called Delimitation
12 Agreement: It was agreed that Naval Intelligence should
13 specialize on the Japanese while Army Intelligence occupied
14 other fields."

15 Does this refresh your recollection as to
16 whether you knew at the time you wrote this memorandum
17 about the division of authority between the Army and Navy?
18 A No. It's my recorded recollection, but this does not
19 refresh my present recollection that I knew at this time
20 rather than say a year later. It doesn't help me.

21 Q Do you have any reason to believe as you sit here today
22 that your recorded recollection is in any way inaccurate?

23 A No. This is, I believe, carefully prepared and it's
24 based on what information I had.

25 Q Now, in the middle paragraph on page 3 of Exhibit 36,

1 you state, in part:

2 "I feel that we should be extremely careful
3 in taking any position on the facts more hostile to the
4 Japanese --"

5 THE COURT: Give me the reference, will
6 you, please?

7 MR. HALL: Yes. It's Exhibit 35, page 3.

8 THE COURT: Page 3.

9 MR. HALL: The middle paragraph, starting
10 the third line from the bottom of that paragraph with the
11 words "I feel."

12 THE COURT: All right.

13 Q (by Mr. Hall) Quote:

14 "I feel that we should be extremely careful
15 in taking any position on the facts more hostile to the
16 Japanese than the position of Lieutenant Commander Ringle."

17 Can you tell us why you expressed that
18 feeling to the Solicitor General?

19 A Because that was the view of the Department of Justice
20 from the beginning, that there was no factual basis, and in
21 this we were supported by Mr. Hoover, that there was no
22 factual basis of dealing with the whole Japanese-American
23 community as dangerous.

24 Q In fact, did the Department of Justice in its brief
25 and argument to the Supreme Court in Hirabayashi take a

1 position more hostile to the Japanese than the position of
2 Lieutenant Commander Ringle?

3 A Did we?

4 Q Yes.

5 A I don't know whether I would want to call it hostile
6 to the Japanese. We took the position of the War Department.

7 Q Do you recall if the Ringle Report that you're alluding
8 to here in Exhibit 35 was revealed to the United States
9 Supreme Court in connection with your activities regarding
10 the Hirabayashi case?

11 A Certainly not by the Department of Justice.

12 Q I believe it's true, is it not, that the only reference
13 to the Ringle Report was a reference in a footnote in the
14 Government's brief to the Harpers article regarding the
15 Kebae population on the West Coast?

16 A Yes. In our Hirabayashi brief we did point out that
17 part of any security problem about our Japanese community
18 would be those American-Japanese born in the United States
19 who were educated in Japan and were called the Kebae, and
20 in the paragraph discussing that in our brief we footnoted
21 a reference to the Harpers article which included that
22 material and from which we got that information.

23 THE COURT: That reference, I would assume,
24 would be in support of your asking the Supreme Court to take
25 judicial notice of some danger?

1 THE WITNESS: To take judicial notice of
2 the fact that one group of that community were educated in
3 Japan and therefore an inference could be made that some of
4 them would be favorably disposed toward Japan.

5 Q (by Mr. Hall) In the next paragraph, page 3 of Exhibit
6 35, the one that starts with the word "Furthermore," --

7 A Yes.

8 Q If you'll drop down four lines in that paragraph, at
9 the phrase which begins "Consider most carefully," do you
10 see those words?

11 A Yes.

12 Q I would like to read the balance of that sentence to
13 you and then ask you a question about it. You state:

14 "We should consider most carefully what
15 our obligation to the Court is in view of the fact that
16 the responsible intelligence agency regarded a selective
17 evacuation as not only sufficient but preferable."

18 Do you see that reference?

19 A Yes.

20 Q Now, was the Court told that the responsible intelligence
21 agency regarded a selective evacuation as not only sufficient
22 but preferable as you allude to in the sentence which I've
23 just read?

24 A No.

25 Q Do you know why?

1 A We considered it most carefully and decided -- the
2 Solicitor General decided not to do it.

3 Q By the way, --

4 THE COURT: I'm sorry. I missed your
5 answer.

6 THE WITNESS: We considered it but it was
7 decided by the Solicitor General of the United States not
8 to refer to the difference of view of the military agencies.

9 Q (by Mr. Hall) By the way, I don't know if it's clear
10 in the record, it was the Solicitor General who was going
11 to argue the case in the United States Supreme Court, was
12 it not?

13 A Oh, yes.

14 Q And is that one of the reasons this memo was written,
15 so he could be prepared for argument?

16 A Well, no. Even if he were to assign the case to someone
17 else, he was responsible for the brief and it was more to be
18 responsible for what we said in our brief than a reference
19 to his oral argument. That would make no difference.

20 Q Isn't it true that one of the crucial points in the
21 Hirabayashi case involved whether individual and selective
22 evacuation would have been practical or impractical?

23 Let me refer you to something. If you'll
24 take a look at the last paragraph on page 3 of the exhibit
25 before you, Exhibit 35, and I'd like to read beginning in

1 the middle of that paragraph, the following, starting with
2 the words "These briefs." Do you see that reference?

3 THE COURT: Was that page 4?

4 MR. HALL: Page 3.

5 THE COURT: Page 3.

6 MR. HALL: The last paragraph, beginning
7 in the middle of the paragraph with the sentence that
8 starts "The briefs filed by appellants."

9 Q (by Mr. Hall) Do you see that reference, Mr. Ennis?

10 A Yes.

11 THE COURT: It's about ten lines from the
12 bottom.

13 THE WITNESS: Yes.

14 THE COURT: Do you see that?

15 THE WITNESS: Oh, yes. I'm reading it.
16 Yes, Your Honor. Yes, of course.

17 MR. HALL: I would like to read, if I may,
18 Your Honor, into the record the following quote.

19 Q (by Mr. Hall) "The briefs filed by appellants in
20 the Ninth Circuit particularly pressed the point that no
21 individual consideration was given, and I regard it as
22 certain that this point will be stressed even more, assuming
23 that competent counsel represents appellants in the Supreme
24 Court. Thus, in one of the crucial points in the case
25 the Government is forced to argue that individual selection

1 evacuation would have been impractical and insufficient when
2 we have positive knowledge that the only intelligence agency
3 responsible for advising General DeWitt gave him advice
4 directly to the contrary."

5 Did you receive any reaction from the
6 Solicitor General when you wrote these comments and the
7 other comments in Exhibit 35?

8 A No. I don't recall receiving any memorandum from the
9 Solicitor General either in this or subsequent cases
10 involving related problems.

11 Q Now, referring you now to the next page, page 4 of
12 Exhibit 35, I'd like to call your attention to the top
13 paragraph and read, if I may, into the record the following
14 quote:

15 "In view of this fact, I think we should
16 consider very carefully whether we do not have a duty to
17 advise the Court of the existence of the Ringle memorandum
18 and of the fact that this represents the view of the Office
19 of Naval Intelligence. It occurs to me that any other
20 course of conduct might approximate the suppression of
21 evidence."

22 Now, can you tell us, if you can, why you
23 wrote that paragraph to the Solicitor General?

24 A Well, that was my view.

25 Q And does that remain your view today?

1 A Yes.

2 Q What is your present opinion as to whether there was a
3 suppression of evidence concerning the Ringle Report in the
4 Hirabayashi proceedings?

5 A Well, suppression of evidence which I say here is a
6 little difficult in this case because we had no record and
7 no evidence in the sense of sworn testimony. We were dealing
8 entirely with what we should call to the attention of the
9 Court more or less as subject to judicial notice. We didn't
10 give any FBI reports; we didn't give this ONI report because
11 it was not really in the area of judicial notice, and I
12 proposed going out of the area of strict judicial notice
13 and giving this information in the Solicitor General's
14 brief, and all our brief contained was published matter
15 subject to judicial notice.

16 Q It's true, is it not, that the substance of the Ringle
17 Report was already published in Harpers magazine and there-
18 fore public?

19 A Yes.

20 Q Did you propose, for example, that the Government --

21 A May I add, it was not known as a matter of judicial
22 notice that it was -- that the Harper article was Lieutenant
23 Commander Ringle's work.

24 Q Did you propose to the Solicitor General that his
25 office go to the Department of the Navy or whoever was

1 appropriate and try to obtain permission to use the Ringle
2 Report in the Supreme Court case involving Gordon
3 Hirabayashi?

4 A Yes.

5 Q Do you know what happened as a result of your proposal?

6 A No.

7 Q Did anything happen, to your knowledge?

8 A I would think nothing happened.

9 Q And why do you say that?

10 A Well, if anything had happened, I think it was important
11 enough that I would probably recall it, although it's a very
12 long time.

13 THE COURT: Let me go back to about the
14 third question that you asked before this last one because
15 I missed it. Did you say, did you propose to the Solicitor
16 General, or did you propose to someone --

17 MR. HALL: To the Solicitor General.

18 THE COURT: Would you repeat the question.

19 MR. HALL: -- that you obtain authority
20 from the Navy or whoever else was necessary to utilize the
21 Ringle Report per se in their argument in the Hirabayashi
22 case.

23 THE COURT: And your answer was?

24 MR. HALL: He answered yes, he did.

25 THE COURT: Propose to the Solicitor General?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. HALL: Right.

THE WITNESS: In this memorandum.

MR. HALL: Yes.

THE COURT: All right.

MR. HALL: And then I asked him what happened and he said --

THE COURT: I got that. Now, would you wait just a moment so I can make a notation or two?

All right.

Q (by Mr. Hall) Do you presently have a belief as to whether the Government should have advised the Supreme Court of the Ringle Report so that the Supreme Court could have considered it in connection with the Hirabayashi proceedings?

THE COURT: Wait just a moment. I think that's really a decision that I must make.

Q (by Mr. Hall) Are you familiar with something that's been called a Final Report of General DeWitt?

A Yes, indeed.

Q I'd like to call your attention to Exhibit 1, please, which is tab 35.

For purposes of the Court and the record, this is a memorandum from Mr. Ennis to Mr. Fahy dated April 19, 1943, involving, among other things, the Hirabayashi case as well as the Yasui and Korematsu cases, and in the middle of the second paragraph, actually the

1 third paragraph, the center paragraph, you state the follow-
2 ing, if I may, Your Honor:

3 "The effective area for assisting the Court
4 is in the presentation of the factual material. In this
5 connection the War Department has today received a printed
6 report from General DeWitt about the Japanese evacuation and
7 is now determining whether it is to be released so that it
8 may be used in connection with these cases."

9 Can you describe the circumstances, again
10 as best you can recall, of how you came into possession of
11 this report that you allude to in Exhibit 1?

12 A This says the War Department had received it; not that
13 I had received it. I didn't receive any report from the
14 War Department at this time.

15 Q Do you recall receiving anything at or about this time
16 or during the time that you were preparing the Hirabayashi
17 brief and preparing for argument in the Hirabayashi case
18 that was reported to you as being a part of General DeWitt's
19 report?

20 A I don't know if it's in this memorandum, but I recall --
21 but not from '43. I recall from having read some of my
22 memoranda that I received thirty pages torn out of a report
23 which from the Western Defense Command contained statements
24 about the factual basis on which they relied.

25 Q Do you recall asking a Captain Hall for a copy of the

1 DeWitt report?

2 A Oh, indeed I do.

3 Q Who was Captain Hall?

4 A He was a personal assistant to Assistant Secretary of
5 War John McCloy. I don't know what his title was. He was
6 the man who received his phone calls and worked with him.

7 A lawyer.

8 Q A lawyer?

9 A Yes.

10 Q Can you recall what you asked Captain Hall to do and
11 what he said and so forth?

12 A Well, I told him I had heard that there was a report
13 and we wanted it, and Hall told me that there wasn't a report.
14 There was some internal memorandum or report within the
15 Department which was not to be released, and later I was
16 told that the report would -- might be released later, and
17 then again I was told that the report had been released and
18 it was too late to do anything about it.

19 See, the point is simply that the Army
20 had a report; we wanted to see it in advance because it was
21 discussing things the Department of Justice had done with
22 the Army and we naturally wanted to see how the Army had
23 stated our participation and stated their own participation
24 which we needed if we were going to defend them.

25 Q In the Hirabayashi and other cases?

1 A Yes, which are mentioned here, Korematsu, Yasui, and
2 Captain Hall had deceived me as to whether there was a
3 report, whether it was just an internal document, whether
4 there was to be a report and, if so, whether it was to be
5 released to the public or not, and then finally told me it
6 would not be released after it had actually been released,
7 and it was misdated by a year, and this report just very
8 simply was just withheld from the Department of Justice so
9 we could not examine it and request corrections.

10 Q Now, did you know that there were in fact two final
11 reports?

12 A No.

13 Q When did you first learn that there were two final
14 reports?

15 A You told me a day or two ago.

16 Q Do you know if there were any changes in -- assuming
17 for the sake of discussion there were two final reports, do
18 you know if there were any changes between the first and
19 the second?

20 A Yes. The purpose of having a second final report was
21 to make changes.

22 Q I would like to call to the Court's attention and to
23 the witness's attention, if I may, Your Honor, Exhibits 4
24 and 29.

25 THE COURT: And the tab on 4 is what?

1 MR. HALL: Is 17, and the tab on 29, I
2 believe, is 85.

3 In particular, I would like to call to the
4 Court and the witness's attention pages 9 of each of the two
5 exhibits.

6 THE COURT: Exhibit NO. 4, which is tab 17,
7 is entitled Final Report. Is it your position that that is
8 the final report?

9 MR. HALL: No. It is our position that
10 when it was issued there were ten copies printed, and that
11 General DeWitt intended this to be his final report, but the
12 documents already in evidence show that when Mr. McCloy
13 got a copy of it, he objected and insisted that there be
14 some revisions, and there were revisions. The first final
15 report was destroyed, as were the galleys, apparently,
16 except for one copy which survived to be produced in
17 connection with this lawsuit and a new report was printed.

18 THE COURT: So it is your position that 29,
19 then, is the final report?

20 MR. HALL: 29 is the last final report; 4
21 is the first final report. 4 also has some marginal
22 comments in it. I don't know if the evidence is going to
23 indicate whose comments they were, but we're relying, at
24 least at this point, on the printed parts and not on the
25 handwritten parts.

1 THE COURT: All right. Then you said to
2 look at page 9 of each of those reports.

3 MR. HALL: Page 9.

4 I don't want to make this unduly compli-
5 cated and I'd like to kind of wrap this line of inquiry up
6 before lunch, if I may. But I would like to also call the
7 Court and the witness's attention to the brief of the United
8 States, Exhibit 99, which I think has already been submitted
9 in front of you, or submitted to you, and there is no tab
10 number. It's not in the tab book. It's in the green book.

11 Now, again, with the permission of the
12 Court and the witness, I'd like to make some references to
13 various pages in the brief and ask the significance of those
14 references and then go to the DeWitt Report.

15 THE COURT: All right. Let me ask you
16 this: You said 99. What is the tab number of that?

17 MR. HALL: I don't think there is a tab
18 number, Your Honor.

19 THE COURT: Oh, I see. Apparently it's
20 tab 98. This is the brief for the United States?

21 MR. HALL: Correct.

22 THE COURT: All right. You go ahead.

23 Q (by Mr. Hall) I'm going to call -- what I've done here
24 is I've cut out pieces of pages so I can't exactly tell you
25 which paragraph it appears in on the page, but I have

1 highlighted some quotes from the brief which I would like to
2 call to the Court's attention, and I'll represent they are
3 on the pages that I'm going to refer to, although since I
4 don't have the pages in front of me, I can't tell you exactly
5 where.

6 MR. STONE: Your Honor, I would not object,
7 since the rest of us don't have that page, if his co-
8 counsel could sort of find it on the right page and give us
9 which place on the page, and give us some time to find it.

10 MR. HALL: Page 34.

11 MR. STONE: Of 99?

12 MR. HALL: There is a paragraph that
13 begins, "Although it may be assumed . . ."

14 THE COURT: You know, my copy bears some
15 numbers down at the bottom. The pages are up at the top.

16 MR. HALL: The pages are at the top and I'm
17 referring to the pages at the top.

18 THE WITNESS: The bottom number is 312 on
19 page 34.

20 MR. HALL: And the paragraph begins,
21 "Although it may be assumed . . ."

22 THE WITNESS: That's the first full para-
23 graph on the page.

24 Q (by Mr. Hall) On the fifth line from the bottom is the
25 following clause: "Prompt and decisive action was necessary."

1 Do you see that reference?

2 A I see it, yes.

3 Q Can you tell us why the Government in this context is
4 telling the United States Supreme Court that prompt and
5 decisive action was necessary?

6 A Well, if the program was to be done it had to be done
7 promptly as a matter of military necessity and emergency.

8 Q Why promptly, if you recall?

9 A Well, because an emergency and military necessity in
10 time of war always involves the matter of promptness.

11 Q Had you been informed in any way by the military
12 command, General DeWitt, or others that promptness was
13 necessary?

14 A Yes, that was their whole position.

15 Q Now I'd like to refer to page 35, if I may.

16 A 35? That's on 313, on the bottom.

17 Q There is a paragraph that begins, "Nor is there any
18 absence . . ." and six lines up from the bottom of that
19 paragraph, I would like to read the following clause - seven
20 lines above, starting with the semicolon:

21 "And in order to impose effective restraints
22 upon them, it was necessary not only to deal with the entire
23 group, but to deal with it at once."

24 A Just a minute. Where is that?

25 Q In the paragraph that begins "Nor is there any absence."

1 A That begins what?

2 Q Page 35, the paragraph that begins, "Nor is there any
3 absence."

4 A Yes, I have that.

5 Q Okay. If you'll count up from the bottom seven lines,
6 and you see a semicolon in the middle of the paragraph.

7 A Yes.

8 Q I have read the following, and if I may, Your Honor,
9 I'll repeat it.

10 "And in order to impose effective restraints
11 upon them, it was necessary not only to deal with the entire
12 group, but to deal with them at once."

13 Can you tell us, if you recall, why the
14 Government was making this argument to the United States
15 Supreme Court?

16 A Except to repeat my last statement, that the matter was
17 a matter of military necessity; had to be dealt with
18 immediately.

19 Q Now I'd like to refer you, if I may, to page 61.

20 A Of the brief?

21 Q Of the brief. And the top paragraph there, I think it
22 begins with the words --

23 A Wait a minute. That's page 339 on the bottom number.

24 THE COURT: It is.

25 Q I believe it begins with the words "Realm of

1 probability" at the top of the page.

2 A Yes. That's the top line.

3 Q If I may read starting the third line down with the
4 word "unknown."

5 "Unknown number of Japanese concentrated
6 in critical areas along the West Coast was so substantial
7 it was a matter of high military necessity to take prompt
8 and adequate precautionary steps."

9 Do you see that quote?

10 A Yes.

11 Q The same question: Why was the Government desiring to
12 inform the Supreme Court of that?

13 A That's just another argumentative statement in a brief
14 that the situation required prompt action.

15 Q And I'd like to call your attention, if I may, to
16 I think it's page 62. The top paragraph begins "Not readily
17 discoverable" and if you'll count down about two inches
18 from the top there is a sentence that begins "What was
19 needed."

20 A Yes.

21 Q I would like to read, with the Court's permission, the
22 following:

23 "What was needed was a method of removing
24 at once the unknown number of Japanese persons who might
25 assist the Japanese invasion and not a program for sifting

1 out such persons in the indefinite future."

2 Do you see that?

3 A Yes.

4 Q Can you advise us, please, in the minute which we have
5 before lunch, why the Government believed it was desirable
6 to make that point to the United States Supreme Court?

7 A To repeat what I said before, it is part of the argu-
8 ment that a mass movement was required because there was
9 no time, as the brief says, to have hearings and procedures
10 on an individual basis.

11 MR. HALL: Your Honor, it's noon.

12 THE COURT: All right. We'll take a
13 recess, then, until 1:30.

14 (Noon recess.)

15

16

17

18

19

20

21

22

23

24

25

1 AFTERNOON SESSION

2 (1:30 p.m., June 19, 1985)

3
4 EDWARD J. ENNIS, resumed the witness stand and
5 testified further, as follows:

6 DIRECT EXAMINATION (resumed)

7 BY MR. HALL:

8 Q Mr. Ennis, earlier in your testimony you will recall
9 I asked you some questions about the FBI and the FCC and the
10 differences between the Department of Justice and the
11 military with regard to the justification for exclusion
12 and other activities regarding Japanese on the West Coast,
13 and I asked you the question, had you communicated this
14 information about which you testified to the Supreme Court
15 and you said no.

16 I'd like to ask you another question,
17 whether you communicated the information about which you
18 testified this morning concerning the FBI and the FCC and
19 the difference of opinion between the Department of Justice
20 and the military to Mr. Hirabayashi or to his counsel.

21 A No. I had -- I did not.

22 Q Now, just before the lunch break we were reviewing
23 some excerpts from the Government's opening brief in the
24 Hirabayashi case, and in particular, as they related to the
25 claim that it was necessary to do something on the West

1 Coast at once, and I asked you several questions and you
2 gave several answers.

3 I'd like to now call your attention, if I
4 may, to Exhibit 29, which is tab 85, and that's the second
5 final report of General DeWitt at page 9.

6 MR. STONE: Your Honor, may I ask that we
7 refer to one as the draft and the other as the published
8 version? It does not say first and second anywhere on the
9 document. There is no evidence here of first and second.

10 THE COURT: I really think we understand
11 each other.

12 MR. STONE: Okay.

13 THE COURT: It's Exhibit 29 but tab 85 you
14 are referring to.

15 MR. HALL: Exhibit 29, tab 85. That's
16 correct, Your Honor.

17 Q (by Mr. Hall) Now, Mr. Ennis, do you have page 9?

18 A I do.

19 Q You will notice in the middle of that page --

20 THE COURT: Would you wait just one
21 moment? Oh, I see. All right.

22 Q In the middle of that page there is a paragraph that
23 begins "Because of the time race."

24 A Yes.

25 Q Do you see that paragraph?

1 A Yes.

2 Q Rather than clutter up the record, I would just like to
3 read the last half of that paragraph, starting with the
4 words "While it was believed." Do you see those words?

5 A Yes.

6 Q With the Court's permission, I would like to read the
7 following quote:

8 "While it was believed that some were loyal,
9 it was known that many were not. To complicate the
10 situation, no ready means existed for determining the loyal
11 and the disloyal with any degree of safety. It was necessary
12 to face the realities -- a positive determination could not
13 have been made."

14 Do you see that reference?

15 A I do.

16 Q Is that reference that I have just read to you con-
17 sistent with the position that the Government maintained in
18 its arguments in the Hirabayashi case with regard to the
19 points which you were testifying to before lunch?

20 THE COURT: Is this before the Supreme
21 Court?

22 MR. HALL: Yes.

23 THE COURT: Consistent with the position
24 taken by the Government before the Supreme Court?

25 MR. HALL: Before the Supreme Court. Yes,

1 Your Honor.

2 A Well, it's certainly different, whether it's incon-
3 sistent or not.

4 Q (by Mr. Hall) I asked you was it consistent; not
5 inconsistent. Consistent. Remember, this is the second of
6 the two versions.

7 A Well, it is inconsistent in that in our brief to the
8 Supreme Court our position was that there was no time
9 available to have due process hearings to possibly separate
10 a few goats from the many sheep, if I may use that analogy.

11 Q Okay. But this clause I read to you doesn't mention
12 the concept of time, does it?

13 A No.

14 Q Now, I'd like to call your attention, if I may, to the
15 first final report, Exhibit 4, tab 17.

16 THE COURT: That's fine.

17 A Exhibit 4?

18 Q Yes. Exhibit 4, tab 17. It's the other version that
19 you have in front of you, Mr. Ennis.

20 A Yes, but what page?

21 Q Page 9, please.

22 A 9? The same page?

23 Q Yes. To begin with, I'd like to call the Court's
24 attention to the fact that Exhibit 4, tab 17, is dated
25 April 15th, 1943.

1 THE COURT: Where does it bear that date?

2 MR. HALL: I think it's the second page of
3 the exhibit.

4 THE COURT: It seems to say April 15th.
5 Does that sound right?

6 MR. HALL: 1943. Right. And the other
7 exhibit, Your Honor, that we were referring to, Exhibit 29,
8 tab 85, is dated June 5, 1943, on the same page.

9 THE COURT: All right.

10 Q (by Mr. Hall) Now, Mr. Ennis, do you recall when the
11 oral argument in the Hirabayashi case was before the Supreme
12 Court?

13 A No.

14 MR. HALL: May I, Your Honor, refer to the
15 timeline that was introduced earlier?

16 THE COURT: Yes. I think the pre-hearing
17 order admits that date.

18 THE WITNESS: It's on the opinion. I think
19 it was in May.

20 MR. HALL: The timeline that was provided
21 the Court earlier, and I think the record will indicate,
22 the argument was around the 10th or the 11th or so of May.

23 THE COURT: That sounds right, does it not,
24 Mr. Stone?

25 MR. STONE: We have stipulated that it was

1 May 10th and 11th.

2 MR. HALL: And the decision was rendered
3 in the Hirabayashi case on the 21st of June of 1943.

4 Q (by Mr. Hall) Now, Mr. Ennis, I'd like to call your
5 attention to the middle paragraph on Exhibit 4, tab 17, the
6 document which is dated April 15, 1943.

7 THE COURT: On page 9?

8 MR. HALL: Yes.

9 Q The paragraph that begins with the words "Because of
10 the ties of race . . ."

11 A Yes.

12 Q Now, I'd like to read, starting in the middle of that
13 paragraph, from the words "While it was believed." Do you
14 see those words?

15 A Yes.

16 MR. HALL: With the Court's permission, I
17 would like to read the balance of that paragraph in the
18 record.

19 THE COURT: That's fine.

20 Q (by Mr. Hall) Quote:

21 "While it was believed that some were loyal,
22 it was known that many were not. It was impossible to
23 establish the identity of the loyal and the disloyal with
24 any degree of safety. It was not that there was insufficient
25 time in which to make such a determination; it was simply

1 a matter of facing the reality that a positive determination
2 could not be made that an exact separation of 'sheep from
3 the goats' was infeasible."

4 Do you see that reference?

5 A Yes, I do.

6 Q Now, can you tell us, Mr. Ennis, based upon your
7 involvement with the Hirabayashi case, with the preparation
8 of the brief and helping the Solicitor General prepare for
9 argument before the Supreme Court, if the words that I have
10 just read to you are inconsistent in any way from the
11 position maintained by the Government before the Supreme
12 Court in the Hirabayashi case?

13 A Yes, in that in our presentation to the Supreme Court,
14 we used the formula that there was no time to make a
15 separation which implied that it could have been made if
16 there were time.

17 Q Now, when we talk about no time to make a separation,
18 maybe it's unclear in the record as to what we're meaning.
19 Can you explain in your own words what concept you're
20 referring to when you talk about the words separation and --

21 A Well, part of our position opposing the mass evacuation
22 was as a matter of due process of law, if anybody could be
23 removed it could only be on the basis of a due process
24 hearing in which we would present evidence, either from the
25 FBI or from the military authorities, that the subject of

1 the hearing was a military danger. This kind of procedure
2 which we were then currently very familiar with, because we
3 actually held individual hearings on between five and ten
4 thousand aliens of enemy nationality, including perhaps
5 around five thousand aliens of Japanese nationality, and
6 that takes not months, really, but a matter of between a
7 year or two.

8 Q When did you first learn, Mr. Ennis, that there was a
9 difference in the DeWitt reports whereas one, the first
10 report, had the concept that "It was not that there was
11 insufficient time into which to make such a determination"
12 as opposed to the second report when that concept was
13 deleted. When did you first learn that there was that
14 difference in the two DeWitt reports.

15 A Yesterday when I learned that there was a first report
16 and not the one that was published and distributed of which
17 I had later received a copy. I mean I received a copy
18 whenever it was finally released in '43.

19 Q Now, --

20 A Or '44.

21 Q In the, if I can use the term, cosmic picture of the
22 Government's case against Mr. Hirabayashi as presented in
23 the Supreme Court, how important was the concept of time
24 or insufficiency of time within which to make determinations
25 between the sheep and the goats? How important was that

1 concept in your argument to the Supreme Court?

2 THE COURT: Let me ask you this: Did you
3 argue the case before the Supreme Court?

4 THE WITNESS: No. The Solicitor General
5 personally argued it.

6 THE COURT: Were you present?

7 THE WITNESS: Oh, yes.

8 THE COURT: So it would be the Solicitor
9 General's argument, or are you talking about the brief?

10 MR. HALL: I'm talking about the Govern-
11 ment's concept insofar as he has personal knowledge; the
12 Government's position insofar as he has personal knowledge.
13 He was actually involved in the trial.

14 THE COURT: Would this include the brief
15 and the argument?

16 MR. HALL: Correct, Your Honor.

17 THE COURT: All right. How much was the
18 matter of time important? Would you repeat the question?

19 Q (by Mr. Hall) In the context of the Government's
20 presentation of its case to the Supreme Court, either in
21 written form or oral form, Mr. Ennis, how important to the
22 Government's case was the concept that there was not
23 sufficient time within which to make a distinction between
24 the sheep and the goats?

25 A Well, really our formula or our argument that there

1 was not time was the whole center of our argument, and as I
2 understand it, that was the center of the Supreme Court's
3 decision by the Chief Justice, who said that if the military
4 commander believed that there were possible espionage agents
5 or saboteurs in the group and there was not sufficient time
6 to take -- to determine their existence, that then he could
7 remove the whole group. It was the whole argument.

8 Q Before yesterday had you ever been informed by anybody
9 to your recollection that General DeWitt had at any point
10 in time maintained the written position that appears in
11 Exhibit 4, tab 17, "It was not that there was insufficient
12 time in which to make such a determination - it was simply
13 a matter of facing the realities that a positive determina-
14 tion could not be made that an exact separation of the
15 'sheep from the goats' was infeasible?

16 A No.

17 Q When?

18 A When I saw this yesterday.

19 Q Was the first time?

20 A Yes.

21 THE COURT: That was the position in No. 4,
22 in April of '43?

23 MR. HALL: Exhibit 4, tab 17.

24 Q (by Mr. Hall) If you had in March, April and May of
25 1943 known that General DeWitt had put in writing the

1 concept which we've quoted from several times that appears
2 in Exhibit 4, tab 17, page 9 --

3 MR. STONE: Your Honor, this is calling
4 for a conclusion. I hear it coming. "If he had known."

5 THE COURT: Yes. I'm going to overrule
6 the objection.

7 MR. HALL: Your Honor, I would request
8 that counsel let me ask my questions before he interrupts.

9 THE COURT: That might be better, if you
10 will.

11 Q (by Mr. Hall) Mr. Ennis, if you had known in March,
12 April and May of 1943 that General DeWitt had expressed
13 the sentiments which appear on the quoted part of page 9,
14 Exhibit 4, tab 17, that we've been discussing, what would
15 you have done with that information in connection with
16 the preparation of the Government's case against Mr.
17 Hirabayashi in the United States Supreme Court?

18 THE COURT: Now, just so that I'll get it
19 clear, that's the sentiments expressed in the April 17, '43
20 version?

21 MR. HALL: Correct, Your Honor, the part
22 that I quoted in the middle paragraph starting with the
23 words, "While it was believed" to the end of that paragraph.

24 THE COURT: Do you want to look at that
25 before answering?

1 THE WITNESS: No, I'm familiar with it.

2 A I see from looking at them now and look at them for the
3 first time yesterday, I see this difference. It's difficult
4 for me to make a simple answer to this, for this reason.
5 If I had known that, I would have been in a very serious
6 position. In the first place, I believe that as the
7 attorney for the military -- I'll put it in the sense of
8 an attorney for DeWitt -- I would say that that is a very
9 dangerous position to take in the Supreme Court, because
10 you're denying that any evaluation has to be made of the
11 dangerous from the undangerous but that the undangerous
12 can be dealt with, because there were dangerous people
13 among them, without any attempt to do that.

14 I might have said we can't argue it that
15 way. We have to argue that there was no time to do it, and
16 I don't know what would have come out of that kind of
17 consultation between the Department of Justice where the
18 decision would finally be made by the Solicitor General and
19 the military authorities. I can't give you any very simple
20 answer to that. It would have presented a very serious
21 problem, in my mind.

22 Q (by Mr. Hall) If you had known this concept that
23 appears on page 9 of Exhibit 4, tab 17 --

24 THE COURT: If you will, why don't you put
25 that concept into words so we'll all understand the concept

1 you're talking about?

2 Q If in March, April or May of 1943 you had known that
3 General DeWitt had put in writing the concept which I'm
4 about to read again, I'm going to ask you what you would
5 have done in regard to communicating that to the Supreme
6 Court, and the concept is the following:

7 "While it is believed that some were loyal,
8 it was known that many were not. It was impossible to
9 establish the identify of the loyal and the disloyal with
10 any degree of safety. It was not that there was insufficient
11 time in which to make such a determination; it was simply
12 a matter of facing the realities that a positive determina-
13 tion could not be made that an exact separation of the
14 'sheep from the goats' was infeasible."

15 If you had known that, would you have felt
16 some duty to bring that concept to the Supreme Court's
17 attention?

18 A Well, I would have felt a duty to present it to the
19 Solicitor General and state that this complicated the argu-
20 ment of the appeal, but whether it would have been brought
21 to the Supreme Court's attention would have been his
22 decision - not mine.

23 Q I'd like to call your attention, Mr. Ennis, Exhibit 89,
24 tab 40, please.

25 Exhibit 89, tab 40, is a memorandum of

1 March 9th, and I believe it's March 9, 1944, from Mr. Ennis
2 to Mr. Paul Freund, F-r-e-u-n-d. Who is Mr. Freund, Mr.
3 Ennis?

4 A Mr. Freund, now retired, professor of constitutional
5 law at the Harvard Law School, was the first assistant to
6 the Solicitor General for many, many years. He was the
7 permanent first assistant in 1936 when I was there and he
8 was still the first permanent assistant to the Solicitor
9 General, running the Solicitor General's office for him.

10 THE COURT: Can you give me the year of
11 that memorandum?

12 MR. HALL: Well, I believe it's '44.

13 THE COURT: It is March 9, but the year
14 appears to be blank.

15 MR. HALL: Well, the reason I say '44 was
16 because the first version was not put out until April of '43.
17 This is dated March 9, and the first version was ultimately
18 basically destroyed, so I assume it has to be the second
19 version that was put out in June of '43.

20 MR. STONE: Your Honor, he's testifying as
21 a witness.

22 MR. HALL: Excuse me. I'm just --

23 THE COURT: No; I think it's all right
24 because I'm trying to determine the date. Let's let that
25 go. We'll determine that later.

1 Q (by Mr. Hall) Do you recall, at least recently,
2 reviewing this memorandum from you to Mr. Freund, Mr. Ennis?

3 A Well, I saw this for the first time, I think, yesterday.

4 Q Okay. Do you have any present understanding or
5 recollection of what was explained to you as being the pur-
6 pose for General DeWitt writing any version of his reports?

7 A Explained to me?

8 Q Yes. Why do you --

9 A I have an opinion of why he wrote it.

10 THE COURT: No, I think the question is --

11 Q Did anyone ever explain to you why General DeWitt wrote
12 any version of his final reports?

13 A No, I don't recall so.

14 Q Did you form an opinion as to why he wrote it? Tell
15 me yes or no first.

16 A Yes.

17 Q Then can you tell me on what you base your opinion as
18 to why General DeWitt wrote either one of the two versions?

19 A I base it on the contents.

20 Q And can you explain to the Court now what your opinion
21 is as to why General DeWitt wrote either one of the two
22 volumes of his final report?

23 A He wrote a report for two reasons: to give a report
24 on the operation, on the whole operation, and to give his
25 justification for the operation.

1 Q Now, your memorandum to Mr. Freund, Exhibit 89, tab 40,
2 forwards to Mr. Freund a copy of DeWitt's final report, and
3 then it says, if I may, Your Honor, quoting the next
4 sentence:

5 "This Department, the FBI and the FCC is
6 now engaged in a controversy with the War Department over
7 the numerous false statements in this report, including the
8 statement that there was shore to shore submarine radio
9 communication."

10 Do you see that sentence I've just read?

11 A Of course.

12 Q Can you tell the Court as best you can presently
13 recall, what information you have about false or misleading
14 or ambiguous statements that existed in General DeWitt's
15 report?

16 A Well, I could not give a very detailed recollection
17 at this time, but we felt from an examination of the report,
18 when we finally got it, that there were not only statements
19 of facts put forward as a justification for the report, but
20 also the report also included facts put forth as justifi-
21 cation which concededly occurred after DeWitt made his
22 order for the evacuation.

23 Now, part of that was this business of
24 shore to sea radio communications which we had the Federal
25 Communications investigate and we got reports that they had

1 no records of such communications but they were able to
2 identify the communications as being from licensed stations
3 and not underground, as it were, or communications.

4 Q Now, in the Hirabayashi case, do you recall learning at
5 some point in time that a version of General DeWitt's final
6 report was used in connection with the preparation of the
7 amicus brief by the Attorney Generals of the states of
8 Washington, California and Oregon?

9 A Yes. We learned that although we could not get the
10 report in any form until after the Hirabayashi case was
11 decided, that a comparison of the report when we got it
12 with the brief submitted by the three states, Washington,
13 Oregon and California by their Attorney Generals, actually
14 contained maps, for example, were included in the final
15 report, and as far as I recall, we didn't find any
16 quoted language, but things were stated in the report as
17 correct were stated inferences in the Attorneys General's
18 brief.

19 Q Now, to your knowledge, did anyone in the Department
20 of Justice supply to the Attorneys General of the states
21 of Washington, Oregon and California a version of the
22 DeWitt report for their use in their amicus brief to the
23 Supreme Court?

24 A Did anyone --

25 Q In the Department of Justice supply the DeWitt report

1 to the Attorneys General for their use?

2 A We didn't have it at the time of the Hirabayashi
3 briefing and even argument or decision. We didn't have it.
4 It was deliberately withheld from us.

5 THE COURT: You said even through argument.
6 You did not have it even through argument?

7 THE WITNESS: Argument or the decision of
8 the Court. No.

9 Q (by Mr. Hall) Do you recall an incident in the
10 Korematsu case with regard to a dispute over a footnote in
11 the Government's brief to the Supreme Court?

12 A Yes. I recall that more clearly than most of the
13 things.

14 Q Can you describe to the Court, please, in your own
15 words, this footnote incident and how it relates to General
16 DeWitt's report?

17 A Well, by that time we had -- we not only had DeWitt's
18 report but we had the evidence which had been gathering of
19 other views such as the Naval Intelligence views, and I
20 informed the Attorney General of the United States, the
21 Solicitor General of the United States, the attorney in
22 charge of the War Division of which my unit on the chart
23 was a part, that we were in the position of having infor-
24 mation contradictory to the facts, contradictory to the
25 facts stated in the DeWitt report as the basis of the

1 General's order for the evacuation of the area, and I said
2 we owed it to the Supreme Court at least to just state to
3 the Court that the Department of Justice had information
4 contrary and contradictory to the Army Administration, and
5 the reason I proposed that is that we were in addition to
6 being the attorneys for the War Department, as the law
7 required, we were also a department of the Government
8 dealing with this whole problem administratively, and
9 therefore I suggested that we put in a footnote to advise
10 the Court that we had information contradictory and contrary
11 to the information in the War Department report.

12 You see, from a procedural point of view,
13 the difficulty with these cases, both the Hirabayashi case
14 and the Korematsu case, there was no trial of facts, and
15 this was being presented to the Supreme Court on the basis
16 of information we supplied to them as a matter of either
17 judicial notice or what we provided, and we had different
18 information. I simply wanted a footnote that said to the
19 Court -- that would inform the Court that the Department
20 of Justice had different information on the security
21 situation on the West Coast than that advanced by the Army,
22 and we then had a lot of discussion about that.

23 THE COURT: Who is "they"? Who had the
24 discussion?

25 THE WITNESS: The Solicitor General and I

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

had discussions about that.

A (continuing) I remember one day he walked down the hall to the fifth floor - that's one of the few things I remember today rather than having recollection recorded - and he came into my office. We were very friendly. He said, "Ed, you know, I'm the Solicitor General. The brief has to be the way I say." And I said, "Yes, Charles, but of course I don't have to sign the brief."

And we finally then modified the footnote taking out my requested reference to different information and putting in the footnote statement that the Department of Justice does not rely on any of the facts stated in the final report, but only rely upon the facts that we state in our brief, which we thought were matters of judicial notice, and with that modification, which was what I proposed, that was what was submitted to the Court.

Q Was the DeWitt report, to your knowledge, provided to the Supreme Court in the Korematsu case?

A I did not remember that it had been, but recently I saw Mr. Fahy's oral argument and in that oral argument the Chief Justice asks him if he has a copy of the report, and he says no, and then the Chief Justice said, "Well, will you get copies for us?" and the Solicitor General says "Yes, I will."

MR. HALL: Your Honor, the exhibit to which

1 Mr. Ennis is referring is tab 19, which I believe is Exhibit
2 98.

3 A (continuing) Now I'm sure that was done because when-
4 ever the Court asks Government counsel for additional papers,
5 we see that they get them very promptly.

6 THE COURT: You hop to it?

7 THE WITNESS: Yes, hop to it. Exactly.

8 Q (by Mr. Hall) Now, to your knowledge, at any time was
9 the Supreme Court told that the Department of Justice had
10 information in its possession and knew of information which
11 refuted significant allegations in the DeWitt report?

12 THE COURT: I'm going to stop you. I missed
13 the first two or three words. Would you repeat your ques-
14 tion?

15 MR. HALL: "To your knowledge."

16 THE COURT: Would you repeat it?

17 MR. HALL: Yes.

18 Q (by Mr. Hall) Mr. Ennis, to your knowledge, was the
19 Supreme Court ever informed, including after it asked for
20 a copy of this report, that the Department of Justice had
21 in its possession information which refuted material
22 factual allegations contained in General DeWitt's report?

23 A I have to make a distinction. Would you mind repeating
24 that once more?

25 THE COURT: Let me repeat it, if you will.

1 You correct me.

2 To your knowledge, was the Supreme Court
3 ever informed that the Department of Justice had in its
4 possession information that refuted statements in the
5 DeWitt report?

6 MR. HALL: Significant statements. Signi-
7 ficant factual statements in the DeWitt report.

8 A It was never reported to me that the Court was informed
9 of such information, but I inferred that the Court was
10 from the criticisms of the report in the opinions of Mr.
11 Justice Murphy and Mr. Justice Jackson criticizing the
12 report.

13 THE COURT: I don't think that was in
14 response to your question. Isn't that correct?

15 MR. HALL: Yes.

16 THE COURT: I think you were saying that
17 you inferred that the Supreme Court got a copy of the
18 DeWitt report.

19 THE WITNESS: No, I inferred they got
20 other information contradicting the DeWitt report.

21 THE COURT: Oh, is that right?

22 THE WITNESS: Yes.

23 THE COURT: And you infer that from what
24 one or more of the justices said?

25 THE WITNESS: Both of the justices said

1 the report is full of erroneous statements, and the erroneous
2 statements they referred to were the information I tried to
3 get into the footnote.

4 Q (by Mr. Hall) Do you know if the Department of Justice
5 ever communicated to counsel for Mr. Hirabayashi that the
6 Department of Justice had information in its possession
7 which indicated that material factual representations in
8 the DeWitt report were erroneous?

9 A I have no such information.

10 Q Do you have any knowledge as to how the Justices
11 Jackson and Murphy, I believe it was, obtained the infor-
12 mation that they included in their dissents in the
13 Korematsu case?

14 A No.

15 THE COURT: I take it it was in the
16 Korematsu case that these statements were made about the
17 false statements in the DeWitt report?

18 THE WITNESS: Yes.

19 THE COURT: Not in the Hirabayashi.

20 THE WITNESS: Not in Hirabayashi. No, we
21 didn't have the DeWitt report then.

22 THE COURT: I see.

23 Q (by Mr. Hall) How important to the Government's case
24 was the fact that it called upon the Supreme Court to take
25 judicial notice of certain facts rather than presenting

1 a factual record or argument to the Court as the basis for
2 the Government's position in Hirabayashi?

3 THE COURT: You know, I'm sorry, but again
4 I just missed the first part.

5 MR. HALL: May I have the reporter read
6 it back?

7 THE COURT: Will you?

8 (Question read by reporter.)

9 A It was the whole case. There was no trial. There was
10 no trial of fact in any of these cases. Hirabayashi was
11 presented to the Supreme Court on the basis of facts which
12 the Department of Justice believed were matters of -- was
13 subject to judicial notice, and the Court didn't question
14 that basis for decision.

15 MR. HALL: One moment, please, Your Honor.

16 May the clerk please give the witness
17 Exhibit 131, which is --

18 THE COURT: Do you have the tab on that?

19 MR. HALL: I think it's in a brown
20 expandable folder, Your Honor. It's a two-page 8½ by 14
21 typewritten document.

22 THE COURT: That is 131 but it has no tab.

23 THE CLERK: That's right.

24 MR. HALL: Your Honor, Exhibit 131 has
25 already been admitted. It is a memorandum for the United

1 States before the United States Supreme Court in the
2 Hirabayashi case, two pages in length, and I would just like
3 to call the Court's attention to the entire document, but
4 in particular, the bottom paragraph on page 1 and the
5 entire paragraph on page 2, and if I may, read into the
6 record.

7 THE COURT: That would be fine. I do see
8 a date of May 14, 1943. That would have been after argu-
9 ment.

10 MR. HALL: This is after argument, and the
11 document says in the context in which it arose that
12 apparently petitioners have made a statement in their brief
13 to which the Government wished to file a post-argument
14 memorandum, and this is the post-argument memorandum.

15 MR. STONE: No. Excuse me, Your Honor.
16 That is a mischaracterization, and if you would like, I
17 will tell you why.

18 THE COURT: All right. You tell me why.

19 MR. STONE: If you read the first sentence
20 of this document, it says, "This memorandum is submitted
21 to clarify one point discussed in the appellant's brief,
22 reply brief, which we received today." It was received,
23 therefore, on May 14, and since the argument was on the
24 10th and 11th, this does not relate to the argument. It
25 relates to the reply brief received after argument.

1 MR. HALL: That's fine. We accept that.

2 THE COURT: Do you think the reply brief
3 was submitted after argument?

4 MR. HALL: Apparently it was. I don't
5 think it makes any difference.

6 THE COURT: That's fine.

7 MR. HALL: I'd like to quote from the
8 Government's memorandum to the United States Supreme Court.
9 I guess in context I need to go a little bit broader, if I
10 may.

11 THE COURT: Go ahead.

12 MR. HALL: Starting with the first para-
13 graph, second sentence, first paragraph: The reply brief,
14 that is to say the Petitioner's reply brief, states at page
15 13 that the Government argues, quote:

16 "No hearing could determine whether a
17 given individual was loyal or not, and attacks the
18 position thus stated as inconsistent with the foundation
19 upon which all justice rests, namely, that inquiry may
20 develop the truth. It is also stated that the Government
21 has used hearings in dealing with enemy aliens and in
22 proceedings for cancellation of naturalization on the ground
23 a person maintained allegiance to his native land.

24 "The position of the Government as to the
25 value of administrative hearings for persons of Japanese

1 ancestry affected by the evacuation program must be con-
2 sidered in the context of the problem. Our position is not
3 that hearings are an inappropriate method of reaching a
4 decision on the question of loyalty. The Government does
5 not contend that, assuming adequate opportunity for investi-
6 gation, hearings may not ever be appropriate and utilized
7 on the question of the loyalty of persons here involved.
8 It is submitted, however, that in the circumstances set
9 forth in our brief, this method was not available to solve
10 the problem which confronted the country. The situation did
11 not lend itself to the unique and pressing circumstances
12 to solution by individual loyalty hearings.

13 "In any event, the method of individual
14 hearings was reasonably thought to be unavailable by those
15 who were obliged to decide upon the measures to be taken."

16 And then it continues.

17 Q (by Mr. Hall) Is it not correct, Mr. Ennis, that this
18 position which I've just read was the Government's official
19 position in the Hirabayashi case?

20 A You mean the position stated in this memorandum?

21 Q Yes.

22 A Of course.

23 MR. HALL: We have no further questions
24 of Mr. Ennis at this time, Your Honor.

25 THE COURT: All right. Any cross-examination?

1 MR. STONE: Yes, Your Honor.

2 Excuse me, Your Honor, for one moment.

3 I just got a little discombobulated over lunch.

4 THE COURT: You take your time.

5

6 CROSS-EXAMINATION

7 BY MR. STONE:

8 Q Mr. Ennis, if I may ask a few questions, and if this
9 is out of order, I hope you will excuse me, in terms of
10 logical development here.

11 You were discussing when we came back from
12 the lunch break that you never discussed the differences
13 between the Department of Justice and the Department of War
14 with either -- in reaching a position to take in this case
15 with either the Supreme Court or counsel on the other side.

16 Would it have been the usual practice, is
17 it the usual practice for attorneys in the Solicitor's
18 office of the Department of Justice to discuss their
19 internal disagreements with their clients which ultimately
20 result in a position taken in a brief with the other side
21 or the Court?

22 A No, not at all.

23 Q Do you think there is anything improper in not dis-
24 cussing those disagreements as long as no ultimate mis-
25 representation is made?

1 A Generally not, but --

2 Q Okay.

3 A -- there are exception situations in criminal cases.

4 Q Okay. By the way, you were an Assistant U.S. Attorney

5 for quite a while, weren't you?

6 A For five years at least.

7 Q Prosecuted a lot of cases?

8 A Not many. I was in charge of the Civil Division and

9 I was asked by the United States Attorney to prosecute

10 several cases such as the first case under the Anti-

11 Racketeering Act.

12 Q But you supervised lots of cases?

13 A Oh, yes.

14 Q Would you say hundreds?

15 A Certainly.

16 Q Were you sensitive to the need to disclose information

17 that would be clearly say exculpatory to a defendant?

18 A Oh, of course. Yes.

19 Q If you had seen information in this case, not of a

20 policy question or procedural question but that you thought

21 was a material fact that was exculpatory, would you have

22 turned that over?

23 A If it fit that rule, yes.

24 Q With respect to whether the Department of Justice

25 should take a formal position in a brief to as a policy

1 matter either request judicial notice or, alternatively,
2 tell the Court it should develop the facts more, do you
3 think that difference in policy positions is exculpatory
4 standing alone?

5 A No.

6 Q I'm going to represent to you, because I don't have it
7 here, Your Honor, but I will ultimately tie it up if you
8 wish, that there was a petition for rehearing in the
9 Korematsu case after it was decided, and in that petition
10 for rehearing Mr. Korematsu's attorneys specifically asked
11 the Supreme Court to remand that case for a hearing as
12 dissenting Justice Murphy suggested they should. Do you
13 think that adequately describes the differences between
14 your preference in this case to have a full actual
15 exposition and the ultimate position that's taken which is
16 to adopt the judicial notice position?

17 MR. HALL: Objection.

18 A I don't remember --

19 THE COURT: Wait just a minute.

20 A I don't remember a petition for rehearing.

21 MR. HALL: That may solve the problem, but
22 I think counsel is referring to a document which is not in
23 evidence and is testifying about what the document says.
24 I would object for two reasons. First, it's not in evi-
25 dence, and I object to counsel testifying about it. If

1 Mr. Ennis remembers something about it, it may be a moot
2 issue, but if Mr. Ennis has something to offer along this
3 line, we would object.

4 THE COURT: I'm going to permit the
5 question. And your answer was?

6 THE WITNESS: I don't recall a petition
7 for rehearing, Your Honor.

8 MR. STONE: I can rephrase the question,
9 Your Honor.

10 Q (by Mr. Stone) If there is a petition for rehearing
11 which then brings up the difference in legal strategy, is
12 that in your view a sufficient airing of the problem to the
13 Justices of the Supreme Court?

14 THE COURT: I don't understand the question
15 myself.

16 MR. STONE: Okay.

17 Q (by Mr. Stone) The framework which was suggested in
18 the questions of my opponent to you before was that the
19 Department of Justice's decision to adopt a judicial notice
20 posture was an improper way to proceed. In the petition
21 for rehearing that was ultimately filed in the case, the
22 Petitioner made exactly that argument, after Mr. Justice
23 Murphy, by whatever means, obtained the same information
24 you wanted to put in the Government's footnote?

25 A Yes.

1 Q Is that in your view of the way the Supreme Court
2 practice is conducted a sufficiently proper way to air that
3 question of whether a rehearing is appropriate?

4 MR. HALL: Again, Your Honor, --

5 THE COURT: I think that's going to be a
6 matter of argument. I'll hear you, but I don't think it's
7 a proper question.

8 A Well, it's a way of doing --

9 THE COURT: Wait just a second.

10 THE WITNESS: Oh, excuse me, Your Honor.

11 THE COURT: I have just ruled and I'm not
12 going to permit the question.

13 THE WITNESS: Oh, I'm sorry. I didn't
14 understand the ruling.

15 THE COURT: I'll let you argue it.

16 Q (by Mr. Stone) Mr. Ennis, how many cases did you
17 argue in the Supreme Court? Dozens?

18 A Over a dozen.

19 Q How many cases did you brief, work on briefs?

20 A In the Supreme Court?

21 Q Yes.

22 A While I was in the Government?

23 Q Yes.

24 A Over twenty-five, thirty.

25 Q How many oppositions to cert petitions have you worked

1 on that were filed in the Supreme Court?

2 A More than that. More than fifty.

3 Q Were petitions for rehearing a proper way that a party
4 brings up an issue in the Supreme Court?

5 A Certainly.

6 Q When a brief was prepared for the Supreme Court, did
7 the Department of Justice feel bound, if it could not
8 convince its client agency to represent the client agency's
9 views if it could not convince the client agency otherwise?

10 A Would you repeat that?

11 Q Yes. When the Solicitor General argued in the Supreme
12 Court, was he representing the Department of Justice's
13 views on an issue?

14 THE COURT: I think you changed the
15 question. You started out, you said that when a brief
16 was prepared and filed in the Supreme Court, then was the
17 Department of Justice bound to --

18 Q -- bound to represent its client agency's views first,
19 or was it permitted to overrule its client agency?

20 A Well, that can't be answered simply. The Solicitor
21 General, by statute, represents the United States in the
22 Supreme Court of the United States, and he has to resolve
23 whether he's properly representing the whole United States
24 in representing the views of a particular department, and
25 there's often cases where there is a distinct difference

1 of view between the Solicitor General and what the
2 department wants to argue, and of course he prevails.
3 That's all.

4 Q Outside of the situation -- we heard the question
5 before that at the argument in the Korematsu case the
6 Supreme Court justices asked you for copies of the -- of
7 General DeWitt's final report.

8 A Asked the Solicitor General.

9 Q In that same transcript, do you recall the Solicitor
10 General making various -- explaining that footnote you
11 talked about and making it very clear that the Government
12 was nonetheless not relying on that final report?

13 A I don't think he ever referred to the footnote in his
14 oral argument. That was my recollection.

15 Q I'm trying to find that exhibit, Your Honor. That
16 will take me just a moment. Tab 19.

17 Do you still have that transcript in front
18 of you, Mr. Ennis?

19 A No.

20 I have it now. Thank you.

21 THE COURT: I suppose this is partial
22 transcript of the oral argument, Mr. Stone?

23 MR. STONE: Yes. This is only a partial
24 transcript because it does not have anything but the
25 argument of the Solicitor General in it. It continues from

1 what went before. Let me see if I can find where I need
2 to direct the Court's attention.

3 MR. HALL: Pages 6 and 7.

4 MR. STONE: Thank you.

5 Q (by Mr. Stone) At pages 6 and 7, Mr. Fahy says on
6 page 7:

7 "It is even suggested that because of some
8 footnote in our brief in this case indicating that we do
9 not ask the Court to take judicial notice of the truth of
10 every recitation . . ."

11 Does that in any way refresh your actual
12 recollection of what went on?

13 A No. It doesn't refresh my recollection at that time,
14 but it is obvious that he did.

15 Q So then the footnote must have been discussed; is that
16 right?

17 A No. This kind of a statement was made about the
18 footnote, but it's a curious statement, in my opinion.

19 Q Would you turn back one page, please, to page 6?

20 A Yes.

21 Q Right in the middle of the page there is a paragraph
22 sign and it begins:

23 "It was suggested here yesterday, and it
24 is argued with some vigor in the brief of the amicus
25 curiae, that notwithstanding the decision of the Court in

1 the Hirabayashi case, that the orders were justified under
2 the exercise of war power, the Court did not then have
3 before it all the facts and that now, after the event, we
4 know that the facts did not justify evacuation as a military
5 measure."

6 Is it clear to you that on the day before
7 the amicus curiae was arguing about whether or not the facts
8 showed something different than judicial notice would allow?

9 A I read this to mean that they felt that there were more
10 facts available than a year earlier in the Hirabayashi case.
11 It doesn't necessarily refer to judicial notice.

12 Q It does refer, however, to the argument on the day
13 before, does it not?

14 A Yes, of course.

15 THE COURT: This was the argument in the
16 Korematsu case?

17 MR. STONE: Yes, Your Honor.

18 THE WITNESS: Yes. In Hirabayashi we
19 naturally argued that there were more and different facts
20 than there were a year ago. They lost a year ago and were
21 now trying to present a different state of facts, or an
22 enlarged state of facts, shall we say.

23 MR. STONE: I can't tell from this list.
24 Do you have the amicus brief in the Korematsu case among
25 your exhibits?

1 MR. KAWAKAMI: I don't think so.

2 MR. STONE: You don't think so?

3 MR. KAWAKAMI: NO.

4 MR. STONE: If I can I'll move on and come
5 back to that later after the break, Your Honor.

6 THE COURT: That will be fine.

7 MR. STONE: There are quite a few exhibits
8 that I'll need that I don't have with me.

9 Q (by Mr. Stone) Mr. Ennis, let's go back for a moment
10 to the questions we were talking about before. With respect
11 to the individual hearings which were directly under your
12 cognizance as director of the Alien-Enemy Unit, those were
13 the same kinds of hearings you were -- those were the same
14 kinds of loyalty hearings that were suggested in place of
15 mass evacuation; is that right?

16 A No. No reference to the kind of hearings was made.
17 That's the kind we were using for enemy aliens.

18 Q Okay. And that involved -- for alien enemies, that
19 involved some kind of loyalty determination?

20 A No. It involved a -- well, loyalty or danger, you
21 might say.

22 Q Okay. Danger.

23 A They were presented -- the FBI -- the evidence in the
24 FBI reports on which the arrest was made was presented to
25 the a civilian review board of three people, and the

1 individual could bring in any witnesses they wanted to
2 controvert any facts. It was a kind of a preliminary due
3 process hearing.

4 THE COURT: Let me ask you, was that
5 hearing given only to aliens who had been arrested?

6 THE WITNESS: Oh, yes. There was no
7 occasion to give a hearing to anybody not apprehended.

8 Q (by Mr. Stone) But they were arrested based on a
9 presidential warrant; isn't that correct? They were not
10 arrested based on a court prosecution.

11 A No, no. They were based on what you could call an
12 administrative warrant. The FBI would present the evidence
13 to my unit. We're talking about thirty or forty lawyers,
14 I think, and they would issue an administrative warrant
15 to take that person into custody.

16 Q And somebody would put together a record and it would
17 be presented to these three hearing examiners; is that
18 right?

19 A Yes. We didn't have to put together a record. Yes,
20 it would be the FBI information. They say "What answer
21 have you got for that?" And also in addition to that, if
22 you have any separate evidence that you're loyal or not
23 dangerous to the country, the Board would listen to that,
24 make a decision, send it to my office in Washington, and
25 someone in my office would review it, and if we wanted

1 to return or release a person, we prepared an order to that
2 effect which would be signed by the Attorney General or for
3 the Attorney General.

4 Q The people who were picked up under that program were
5 recommended for apprehension how? By the FBI?

6 A Oh, no. The FBI wouldn't attempt to make decisions.
7 They would present the evidence which they thought indi-
8 cated a danger, and my office, after December 7th, '41,
9 would okay the apprehension.

10 Q Do you have any idea of the number of people, roughly,
11 who were picked up by the FBI within the first few days
12 after Pearl Harbor; the number of Japanese aliens?

13 A We started on Sunday night and I would suppose that in
14 three days it would run to nearly a thousand aliens of
15 Japanese nationality.

16 THE COURT: You're not confining it not
17 to Germans? It was Japanese?

18 THE WITNESS: No. The question was
19 Japanese.

20 THE COURT: I thought his was a broader
21 question, but it's perfectly all right. The number?

22 THE WITNESS: I would say between five
23 hundred and a thousand.

24 Q (by Mr. Stone) Was that as a result of FBI investi-
25 gations that had been going on for several months prior to

1 Pearl Harbor?

2 A Perhaps years. It was all of their information, all
3 FBI information on enemies of Japanese nationality.

4 Q And that was what it amounted to at about the time of
5 Pearl Harbor, picking up about a thousand people of
6 Japanese nationality?

7 A We had information on more people than that, but
8 before December 7th, before we got into the war, there had
9 already been -- this plan had all been laid out and they
10 already had okay to pick up maybe three or four hundred
11 on the night of December 7th, and then the administrative
12 procedure got rolling, you know. It went up to five
13 thousand eventually.

14 Q So that approximately five thousand people all of
15 Japanese origin?

16 A Yes.

17 Q So that approximately four thousand people were not
18 readily apprehended within the first few days of Pearl
19 Harbor?

20 A Oh, that's correct. Certainly.

21 Q When were you able to get the machinery to hold these
22 hearings functioning?

23 A Oh, well, I suppose it took certainly more than weeks.
24 I would say maybe a couple of months before we had these
25 civilian -- civilian volunteers. It's like the Selective

1 Service Board picked out all over the country and sent
2 material to the U.S. Attorney to hold hearings on the people
3 in detention. Months.

4 Q Months. So if December 7th was when the whole program
5 went into action, then you would estimate March or April
6 before you had hearing boards in place?

7 A Yes, I think so.

8 Q And you had approximately five thousand hearings of
9 Japanese aliens to hold?

10 A I think so, yes.

11 Q Can you estimate for me, or perhaps you know, how long
12 it would take those boards to dispose of five thousand
13 hearings in a due process fashion?

14 A Well, it was limited due process. It would take
15 certainly many months. I think at least a year.

16 Q Okay. And you mentioned before --

17 A All through '42 and part of '43.

18 Q And so while people were awaiting those hearings, they
19 were being held in custody without a hearing; isn't that
20 right?

21 A That's correct.

22 Q You mentioned before that J. Edgar Hoover was quite
23 upset because he thought you were releasing too many people;
24 isn't that right?

25 A Well, Mr. Hoover used his usual excellent

1 administrative technique. If anybody we released -- not all,
2 but a great many people we would parole and release, he would
3 just send a memorandum for the file saying "I disagree. I
4 think the person should be interned." Then if he went out
5 and blew up a bridge, Mr. Hoover was in the clear.

6 Q Do you think Mr. Hoover was sincere, though, on the
7 ones he disagreed with you on?

8 A Sincere?

9 Q Yes. Did he sincerely disagree or was he doing that
10 simply as a cover?

11 A I think that Mr. Hoover was the greatest bureaucrat
12 that's ever been in the Government. In cases he may have
13 been sincere; in other cases he may have been the bureaucrat
14 par excellence.

15 Q Do you know if various commanding generals -- excuse
16 me. If you put somebody into a -- if they did not pass
17 your hearing, they went to an alien enemy internment camp;
18 is that right?

19 A If they were ordered interned they went to an enemy
20 internment camp. If they were paroled, they were required
21 to report to some officer in their community every week or
22 month, or what not, and if they were released, they were at
23 large.

24 Q If they went to one of these camps, that was much
25 different than the evacuation camps that are discussed in

1 the Korematsu case; isn't that true?

2 A No. They were just sent to camps. I don't know any
3 detention camps. I went to all of them --

4 Q Could an individual get a work release --

5 THE COURT: Let him finish his answer.

6 A (continuing) I went to both the war relocation camps
7 and my alien enemy camps under my own supervision, and we
8 had family camps where certainly wives could join the
9 interned alien enemy, and we had single men's camps for
10 Japanese, single camps for Germans. I don't recall what we
11 did with the few Italians, I mean how we separated them,
12 but I don't think the camps were particularly different.
13 The people in charge were different. We had immigration
14 people in charge of the alien enemy camps, and War
15 Relocation Authority people in charge of the war relocation
16 camps.

17 Q Did the enemy alien camps have a work release program
18 or a college release program?

19 A Oh, no, no.

20 Q So those people were interned until 1946?

21 A Oh, no, no, no. Their cases were reviewed and a lot
22 of people that were interned were released. Their families
23 would come to see me and make a good case sometimes.

24 Q Right. But they went through the procedure you
25 described.

1 A Yes.

2 Q When the position was taken in the Supreme Court brief
3 that there was not enough time to hold hearings in the
4 immediate aftermath of Pearl Harbor, in the Hirabayashi
5 brief, did you believe that that was justified by the delay
6 in time it would have taken to hold hearings?

7 MR. HALL: I object to the form of the
8 question. I don't think the briefs talk about "time to
9 hold hearings in the immediate aftermath" of Pearl Harbor.

10 THE COURT: Well, I'll hear that in argu-
11 ment. Let's go ahead and assume what you say is correct.

12 MR. STONE: I will take that back and
13 rephrase it, Your Honor.

14 Q (by Mr. Stone) Do you believe -- did you believe that
15 there was sufficient time to hold hearings of the 120,000
16 people as to whom no specific folder was yet put together
17 by the FBI between December 7th and May 30th, 1942?

18 A Well, the subject of my reservation that I didn't
19 believe there was any evidence authorizing any program
20 against United States citizens, and the reservation that
21 the FBI was not involved in this - this was a military
22 program - and accepting the proposition that the military
23 were going to do this, certainly if they were going to do
24 it at all, it was a matter of immediate necessity and there
25 was no time for any hearings, even less due process like

1 the ones given alien enemies.

2 Q So then you agree with the statement you were asked
3 to read before from the brief in the Hirabayashi case --
4 so then you agree, if I am correct, with this statement in
5 the memorandum for the United States which was filed on May
6 14th in this case that the Government's -- that the method
7 was not available, individual hearing method was not
8 available to solve the problem which confronted the country,
9 individual loyalty hearings?

10 A Well, it was not -- this memorandum just explains what
11 we put in the brief and I agree that both the statement here
12 and the statement in the brief was correct, if you accept
13 the proposition that there was a severe -- a serious enough
14 danger in the Japanese community to have any exclusion
15 program at all, which I did not, but representing the Army,
16 if their judgment was taken that such a thing had to be
17 done, it was an appropriate argument to say there was not
18 time to separate dangerous from the mass of the undangerous.

19 Q As between the choice of holding individual hearings
20 before anyone was removed or moving them all and then
21 trying to separate, do I understand you to say that there
22 was no time to hold individual hearings first?

23 A VOICE: There was a threat of invasion.

24 THE COURT: Let me say this: If anyone
25 speaks from the audience, the next time it happens that

1 person is going to be excluded. Understand?

2 Q (by Mr. Stone) Excuse me. I understood you, Mr. Ennis,
3 to say you had certain legal objections to any controls on
4 anybody but an alien enemy.

5 A And factual objections. There was no factual basis
6 for the program.

7 Q Okay. I understand. But assuming that hearings were
8 to be held, individual hearings, you agree that they could
9 not be held for all 120,000 at that time. There was no
10 mechanism in place?

11 A Accepting General DeWitt's premise that this population
12 contained a lot of dangerous people, there was no mechanism
13 that I knew of to determine -- to separate the individuals
14 promptly. That's what we argued.

15 Q And the Solicitor General agreed with you?

16 A Yes. It was his brief.

17 Q And the War Department officials in Washington agreed
18 with you; isn't that right?

19 A I had no discussion with the war officials in
20 Washington. They wouldn't disclose to me their position.
21 They were disclosing it to the State Attorneys General.

22 Q Let's talk about that for a moment.

23 A Sure.

24 Q You said before -- you said two things that were
25 contradictory. At one point you said to me -- excuse me --

1 not to me -- you were testifying, you were looking at a
2 memo and you said it reflected and you recalled that some
3 pages were ripped out of General DeWitt's final report and
4 handed to you for assistance when you were preparing the
5 Hirabayashi Supreme Court brief.

6 A No. We obtained from some source other than the
7 Military Department, some other source who had gotten ahold
8 of the first version of the final report, we obtained some
9 thirty pages --

10 Q Yes. That's what I was talking about.

11 A -- under statement that I return them, and I did and
12 didn't make a copy.

13 Q Okay.

14 A I have no recollection of what was in those thirty
15 pages.

16 Q Those thirty pages were given to you so that you might
17 use them in the preparation of the brief; isn't that
18 correct?

19 A So that I might see what the War Department's con-
20 tentions were.

21 Q Thank you. Do you have any knowledge -- well, let me
22 ask you something else. Do you know who Herbert Wenig was?

23 A Very well.

24 THE COURT: Would you spell the name for
25 the court reporter?

1 MR. STONE: W-e-n-i-g.

2 THE WITNESS: First name is Herbert. He
3 was an officer -- well, he was an Assistant Attorney
4 General in California who became an officer in General
5 DeWitt's command.

6 Q (by Mr. Stone) Was he well known to Mr. Kenney, the
7 Attorney General of California?

8 A Oh, yes.

9 Q They were good friends.

10 A I don't know if they were friends, but they were well
11 known.

12 Q Okay. Before Mr. Wenig -- well, they knew each other
13 before Mr. Wenig went into the military?

14 A Yes.

15 Q Do you have any knowledge whether or not the parts of
16 General DeWitt's final report that appear to be used as a
17 draft for parts of the amicus brief in the Hirabayashi case,
18 do you have any knowledge whether or not those were the same
19 thirty pages that were shown to you before the Government's
20 Hirabayashi brief was filed?

21 A None whatever.

22 Q So as far as you know, they might have been the same
23 thirty pages?

24 A Certainly.

25 Q Did Mr. Wenig under any of the other circumstances

1 that you knew him, and you said you knew him well, ever do
2 anything that you thought was grossly improper as a lawyer?

3 A I knew nothing that he did even partially improper.

4 Q Do you think there was anything improper about him
5 speaking with Mr. Kenney, his former employer, who he knew
6 was filing an amicus brief on behalf of the Government in
7 this case?

8 A Yes, without informing the Department of Justice which
9 were the attorneys for the military, I thought it was
10 improper for the military to surreptitiously employ the
11 Attorney General as their attorneys who would argue things
12 that they felt the Department of Justice would not argue.

13 Q Did it materially alter the way this case was argued
14 and decided?

15 A Not in my opinion, no.

16 Q In other words, he might have personally done something
17 wrong but that's a question for the Bar Association back
18 then?

19 A I don't know. "Wrong" I don't think is right. I
20 thought it was inappropriate for the Army to behave that
21 way, but I'm not sure. Wenig may have been ordered to do
22 it. I wouldn't put any stress on his own personal behavior.

23 Q Do you think that the amicus brief filed in the
24 Korematsu case by the states of California, Oregon and
25 Washington did have any significant impact on the way the

1 Justices decided the case?

2 A I couldn't speculate on that, but I think it unlikely.

3 Q Is there any particular passage in the amicus brief
4 of the states of California, Oregon and Washington that
5 stands out in your mind as particularly offensive?

6 A No.

7 Q Is there anything improper, to your mind, if Mr. Wenig
8 had notified the Department of Justice in a client speaking
9 with attorneys for an amicus or filing a brief on the same
10 side as they are?

11 A You'll have to explain that question for me.

12 THE COURT: Excuse me just a moment. I
13 did not understand the question.

14 MR. STONE: Okay.

15 Q (by Mr. Stone) If Mr. Wenig had notified the Depart-
16 ment of Justice that he wanted to give the same thirty
17 pages that he had provided to you, and this is an assumption
18 because I know you cannot recall, but if had said to you,
19 "I wish to give the same thirty pages I have shown you to
20 the Attorney General of California; please call me if you
21 have some objection," would you have objected?

22 A It depends on what was in the thirty pages.

23 Q If you didn't object to what was in the thirty pages.

24 A No. If he said "Do you have any objection to my
25 giving them these thirty pages," I would probably have said

1 no.

2 MR. HALL: I believe this is speculation
3 on speculation.

4 THE COURT: I'm going to permit it.

5 It is right at recess time. We'll take a
6 recess now until 3 o'clock.

7 (Recess.)

8 Q (by Mr. Stone) Mr. Ennis, can you describe for us
9 whether or not on the two occasions -- well, can you tell
10 us whether or not the two occasions when you visited
11 General DeWitt on the West Coast before the decision to
12 evacuate was made, whether he seemed concerned about the
13 military situation? Was he confident about the United
14 States' ability to defend itself?

15 A No. General DeWitt when I visited him within three
16 weeks after Pearl Harbor and again in probably January, he
17 was very concerned by the fact that he had very little
18 capacity in his command to actually engage in any direct
19 military operations. He was very concerned about that, and
20 that our country was not prepared to deal with an invasion,
21 for example, and even indicated to me that he feared a
22 possible attack by the then successful Japanese Navy on
23 the Panama Canal, which would have been a reasonable way
24 to prevent any of our fleet from the Atlantic getting
25 quickly to the Pacific, and even the possibility of landing

1 troops in Mexico in civilian clothing who might attempt to
2 merge with our own population.

3 Q Of Japanese-Americans?

4 A Of Japanese-Americans.

5 Q In other words, they would use that as a staging area
6 to come north?

7 A Yes, that's correct.

8 Q When you say he was concerned about his lack of
9 materials, would that be just money and weapons, or his
10 lack of men as well, his lack of soldiers, troops?

11 A Well, personnel.

12 Q Did you have the feeling that his personnel out there
13 had been -- was a highly polished group that had been
14 expecting Pearl Harbor, or was he operating with a very
15 catch-as-catch-can --

16 A No, he had administrative forces; not combat troops.

17 Q And he feared combat; is that right?

18 A He said that was one of the risks. He pulled down the
19 map behind his desk in the Presidio and showed me the
20 possibility of the fleet going to the Panama Canal and
21 landing troops in Mexico.

22 Q Can you describe him as calm or nervous, generally?

23 A I don't remember. He was matter of fact. He was dis-
24 cussing the thing. You know, I was expressing our views
25 that the Department of Justice had. Then we were talking

1 early about what the Department of Justice, using the
2 civilian authority, could do to deal with the situation,
3 like we were prepared to create small areas from which
4 people could be excluded, whether all the people or all
5 alien enemies, or all alien enemies including persons of
6 Japanese nationality around air bases, airfields, military
7 bases, naval bases.

8 At that point, in the beginning, we were
9 sort of working together on what the civilian department
10 could do for us. Where we of course parted ways, in which
11 he later as the whole political situation developed,
12 decided that he wanted things that we wouldn't do for him
13 because we would not deal with citizens at all, you see,
14 except in the narrowest way which was excluding them from
15 military areas.

16 Q Was that because of the President's executive order
17 and your charge which was --

18 A This is before the executive order.

19 Q Excuse me. Is that because of the President's executive
20 order on December 7th and 8th that alien enemies were to be
21 controlled by virtue or at the direction of the Attorney
22 General?

23 A Well, it's a little broader than that. You see, Hoover,
24 the FBI, which was one division of the Department of Justice,
25 it had delegated to it the the general authority for the

1 security of the Continental United States. This idea of
2 the military in the absence of war or martial law, it's
3 kind of an exception. And so we hadn't gotten to the point
4 when I first talked to him, we hadn't gotten to the point
5 of military takeover of the problem, but we were talking
6 about what he could get out of civilian authorities, and
7 my explaining to him that we were limited by the Constitution
8 in dealing with citizens and we were limited by our beliefs,
9 including the views of the FBI, that there was no factual
10 basis for a mass restriction of the Japanese population.

11 Q Can you recall specifically any of the conversations
12 you had and the topics you discussed with him that troubled
13 him?

14 A No, it's just his general fear of sabotage or espionage.

15 Q Can I have the clerk hand a document to the witness,
16 please? It's marked for identification No. 2. Can you
17 hand this to the witness and one to the judge, please?

18 MR. HALL: May I inquire, Your Honor, is
19 this one of the documents that was admitted yesterday as a
20 result of --

21 MR. STONE: No. This is not a document
22 that's been admitted. I am simply marking for identification
23 to see if I can refresh the witness's recollection.

24 MR. HALL: If it's being shown to the
25 witness, I think it ought to be made an exhibit. We would

1 object to it being made an exhibit for the reason of the
2 Court's rulings yesterday.

3 THE COURT: Why don't you go ahead and
4 ask the question you want to ask of the witness.

5 MR. STONE: Are you suggesting I may not
6 attempt to refresh a witness's recollection?

7 THE COURT: You can't refresh his recollec-
8 tion unless he says "I don't have any recollection."

9 MR. STONE: Well, I just asked him if he
10 recalled the specific content of a conversation he had with
11 General DeWitt, and this document in the second paragraph
12 discusses General DeWitt's statements at that time.

13 THE COURT: Well, do you want to ask him
14 a question about whether DeWitt spoke about his appre-
15 hension? I think he's already spoken about that.

16 MR. STONE: Well, may I limit my question
17 to the second paragraph of this document alone?

18 THE COURT: No. You ask him the question
19 and see whether he needs refreshing.

20 Q (by Mr. Stone) Can you recall specific conversations
21 that you had with General DeWitt?

22 A No more than I told you.

23 THE COURT: With reference to what?

24 Q With reference to reasons for the evacuation.

25 A No. There were no conversations between me and DeWitt

1 about the evacuation, because the two occasions I spoke to
2 him early in the program, even General DeWitt didn't dream
3 that he would get such broad authority. We were talking
4 about making small areas are military installations.

5 MR. HALL: Your Honor, may I just ask a
6 housekeeping question?

7 THE COURT: Go ahead.

8 MR. HALL: Counsel said this was going to
9 be marked as Exhibit 2. Is this A-2 or --

10 MR. STONE: A-2 for identification.

11 MR. HALL: I'm just wondering about the
12 marking so I get my marking right for the record.

13 THE COURT: It should be A-2. We will
14 mark it A-2.

15 MR. HALL: A-2 for identification. Thank
16 you, Your Honor.

17 MR. STONE: May I show it to the witness?

18 THE COURT: I don't think so, because this
19 is a letter from Stimson to the Attorney General. He's
20 speaking about what he, Simpson, conversation he had with
21 DeWitt.

22 MR. STONE: Yes, I know, but it is recorded
23 recollection of a conversation with General DeWitt at that
24 time.

25 THE COURT: By Stimson.

1 MR. STONE: That's correct.

2 THE COURT: By Stimson. You're asking
3 this witness what he recalls of the conversation with DeWitt.

4 MR. STONE: That's correct, Your Honor,
5 because it seems entirely an inference if that is what
6 General DeWitt is speaking about, and if you notice, that
7 letter talks about --

8 THE COURT: Well, wait a second. You may
9 ask this witness if you want to, what if anything DeWitt
10 said to him about, for example, ship to shore and shore to
11 ship radio communications.

12 Q (by Mr. Stone) Mr. Ennis, can you recollect if the
13 topics that troubled General DeWitt were submarines off
14 the coast, off the West Coast?

15 A I don't recall any statement of a specific -- any
16 specific element of his concern about dangers from the local
17 population, what the specific concerns were, other than what
18 I told you about, an attack on the Panama Canal and landing
19 troops in Mexico which could infiltrate the local population.
20 I don't remember any other subject.

21 MR. STONE: Am I not allowed to refresh
22 his recollection with this document?

23 THE COURT: Not with a document where
24 Stimson says he had certain conversations with somebody.

25 MR. STONE: Well, Your Honor, the document

1 is addressed to the Attorney General. May I ask the witness
2 if he actually saw the document?

3 THE COURT: This particular letter?

4 MR. STONE: Yes.

5 Q (by Mr. Stone) Mr. Ennis, did you generally receive --

6 THE COURT: Wait a second. And then what
7 would you do if he saw the document? Then what would your
8 question be?

9 MR. STONE: Well, your objection, I
10 thought, Your Honor, was that it could not refresh his
11 recollection.

12 THE COURT: Right.

13 MR. STONE: But my understanding is that
14 Mr. Ennis typically got communications dealing with alien
15 enemies, even if they were addressed to the Attorney General.
16 This document comes out of the alien enemy files of the
17 Department of Justice. If he in fact got the document at
18 that time, he might be able to tell us what he thought
19 about it at that time or what the Attorney General thought
20 about it, or if he had any conversations about it at that
21 time.

22 THE COURT: All right. Do you have a copy
23 before you?

24 THE WITNESS: No, I do not.

25 THE COURT: Will you give that to him?

1 Now, I'll let you ask the question whether
2 he back at that time, at that time, saw that letter or a
3 copy of it.

4 MR. STONE: I would like to just state as
5 a matter of background that this letter is a recommendation
6 to make the specific --

7 THE COURT: Wait a second. I have seen
8 the letter.

9 MR. STONE: Okay.

10 THE COURT: I don't think you need to
11 state on the record what it is. The only question now is
12 do you recall seeing that letter.

13 MR. STONE: May I ask a foundation ques-
14 tion?

15 THE COURT: No. I've asked the question.

16 THE WITNESS: Your Honor, I do not recall
17 seeing this particular letter, but I must say that it is
18 in the area of documents that I would see because the
19 enclosures that they were asking for are the ones that I
20 would work out with the military. There might be communi-
21 cation between Stimson and Biddle, two members of the
22 President's cabinet, which he would not circulate, but this
23 is the sort of working thing that would come to me.

24 THE COURT: All right. Then you may ask
25 questions about it.

1 MR. HALL: Your Honor, for the record, in
2 view of the Court's ruling yesterday, if counsel knew in
3 advance that he was going to offer this exhibit, and he
4 must have known because he brought it with him from
5 Washington, D.C., it should have been listed in their pre-
6 trial order, and it was not.

7 MR. STONE: Your Honor, I will be glad
8 to --

9 THE COURT: Wait a second. I don't intend
10 for the Government to get in a lot of exhibits by indirection
11 that were not listed in the pre-hearing order. I made a
12 ruling about those that would be admitted, but on this
13 particular one, because he said this is the kind of
14 document that he would have seen, I'll permit you to ask
15 questions on it.

16 MR. STONE: Your Honor, my understanding,
17 because I don't want to run afoul of your order, is that I
18 may not put in documents which will prove certain facts.
19 I do not understand that at least with Mr. Ennis who was
20 there at the time, that I may not offer as many documents
21 as, for example, he has signed or that he can recall to
22 refresh his current recollection as a witness on the stand.

23 THE COURT: Let's take them up one by one.

24 MR. STONE: Fine.

25 THE COURT: I'm not going to rule along

1 the lines you've said.

2 MR. STONE: Okay. Sure.

3 Q (by Mr. Stone) Mr. Ennis, have you read the document?

4 A Yes.

5 Q You've previously stated to us just in your direct
6 testimony that you were involved in designating certain
7 restricted areas for the Attorney General to exclude people
8 from, and that that was prior, had nothing to do with
9 Executive Order No. 9066, it predated it in time; is that
10 right?

11 A That's correct, yes.

12 Q This letter deals with designating those areas, does
13 it not?

14 A I believe it does.

15 Q This letter is a recommendation from the Secretary of
16 War, Mr. Stimson, to designate those areas; isn't that true?

17 A Yes. It's to use our authority under the immediate
18 wartime proclamations to control aliens of enemy nationality.
19 This refers to alien enemies in California. It doesn't get
20 into the area which we subsequently refused to enter
21 citizens of Japanese descent.

22 Q Excuse me. You did, however, under that same power of
23 the Attorney General ultimately order a curfew as well;
24 isn't that true? Can you recall?

25 A I don't recall, but --

1 Q Okay. That's fine.

2 A We might have, yes.

3 Q With respect to looking at the second paragraph of this
4 letter addressed to the Attorney General, I'd like to read
5 the last sentence -- excuse me -- the second to the last
6 sentence. It says:

7 "A few days ago it was reported by
8 military observers on the Pacific Coast that not a single
9 ship had sailed from our Pacific ports without being
10 subsequently attacked."

11 Can the witness be handed what has been
12 called the first final report?

13 THE CLERK: Do you have the number, Mr.
14 Stone?

15 MR. STONE: Excuse me. It's the black
16 volume. Yes; the black volume.

17 Q (by Mr. Stone) Would you open that to page 4, please?

18 MR. HALL: Arabic or Roman?

19 THE COURT: That's Exhibit 4, tab 17;
20 isn't that correct?

21 MR. STONE: I have it in the black volume
22 but it may also be Exhibit 4, tab 17. I think that's true,
23 too.

24 Yes, Your Honor. That's good. Tab 17,
25 Arabic page 4.

1 A Yes.

2 Q (by Mr. Stone) I'm going to read the second sentence
3 and the third sentence, if I may. This is the first draft.
4 You call it the first version of General DeWitt's report,
5 and it is describing the Commanding General's reasons for
6 the evacuation. It states on the second sentence of Arabic
7 page 4:

8 "Of first concern to him (that is, the
9 General) was the fact that for a period of several weeks
10 following December 7th, substantially every ship leaving
11 a West Coast port was attacked by an enemy submarine."

12 Does that strike you as being similar to
13 this sentence which is the next to the last sentence in the
14 second paragraph:

15 "A few days ago it was reported by
16 military observers on the Pacific Coast that not a single
17 ship had sailed from our Pacific ports without being sub-
18 sequently attacked."

19 THE COURT: Let me ask, I thought you said
20 Roman numeral IV was the page.

21 MR. STONE: No, Arabic page 4.

22 THE COURT: Arabic 4. Well, I think that's
23 a matter of argument. If it is the same, it is the same.

24 Q (by Mr. Stone) Can you recall, looking at the letter
25 now, whether submarine attacks were one of the topics which

1 General DeWitt would have discussed with you or did discuss
2 with you when he was trying to designate particular areas?

3 MR. HALL: Object to the form of the
4 question. The question was, was this one of the topics
5 that General DeWitt would have discussed with --

6 Q (by Mr. Stone) Is this one of the topics that you can
7 recall General DeWitt discussing?

8 A No.

9 THE COURT: Are you saying he did not?

10 THE WITNESS: No.

11 THE COURT: He did not, or you don't
12 recall.

13 THE WITNESS: I don't recall, Your Honor.

14 Q (by Mr. Stone) The next sentence says, the next
15 sentence of General DeWitt's first volume says:

16 "This seemed conclusively to point to the
17 existence of possible shore to ship submarine communications."

18 Now if you'll turn to the letter, the
19 second sentence of the second paragraph says:

20 "As late as yesterday, January 24, he
21 stated over the telephone that shore to ship and ship to
22 shore radio communications, undoubtedly coordinated by
23 intelligent enemy control, were continually operating."

24 Can you recall if that is a subject which
25 he raised with you?

1 A No, I do not, but I think that ship to shore business,
 2 which is an inference from the fact that the ships were hit,
 3 was something that was later disputed.

4 Q This letter is dated January 25th, 1942; is that
 5 correct?

6 A Right.

7 Q The last sentence of that paragraph says:
 8 "General DeWitt's apprehension --"
 9 This is the last sentence of the second
 10 paragraph of this January 25th, 1942 letter from Henry
 11 Stimson, Secretary of War. It says:
 12 "General DeWitt's apprehensions have been
 13 confirmed by recent visits of military observers from the
 14 War Department to the Pacific Coast."
 15 When they use the term "War Department"
 16 back then, did they mean from Washington, D.C.?

17 A I believe so.

18 Q Would you have known -- do you know which military
 19 observers from Washington, D.C., would have been sent to
 20 the Pacific Coast at that time?

21 A No. Maybe G-2 people.

22 Q How well did you know Secretary of War Stimson?

23 A I only met him with Biddle when we were discussing
 24 this whole business in this period two or three times in
 25 his office.

1 Q Would you have taken his -- this sentence I just read
2 to you that he confirmed General DeWitt's observations by
3 visits of military observers from the Washington, D.C. War
4 Department --

5 A I would take the sentence literally that General DeWitt
6 certainly indicated he was apprehensive to these people.
7 That's all that says, General DeWitt's apprehensions, but
8 the basis for them is another matter.

9 MR. HALL: Your Honor, I think --

10 Q Would you have acted on --

11 THE COURT: Wait just a minute.

12 MR. HALL: I think that it's appropriate
13 at this point, maybe for ground rules purposes, to establish
14 breadth to which the military necessity argument is going
15 to be used. We're not urging military necessity. We're
16 talking about the --

17 THE COURT: I think that's right.

18 MR. STONE: Your Honor, I would be very
19 glad to explain the relevance.

20 THE COURT: In opening statement you
21 said --

22 MR. STONE: I'll be glad to explain the
23 relevance, Your Honor. I can either do it to you or with
24 my question to the witness.

25 THE COURT: You explain it to me.

1 MR. STONE: This document is dated before
2 any allegations in time that General DeWitt was subject,
3 according to the petition, to public pressure or media
4 pressure or political machinations. It is dated January
5 25th. It's dated at a time when there was no Executive
6 Order 9066 in operation. It's dated at a time before there
7 were congressmen who were holding hearings.

8 It is a private report of General DeWitt's
9 views which it says were confirmed, and it relates to
10 General DeWitt's actions which have nothing to do with U.S.
11 citizens of Japanese ancestry or with moving them all out
12 en masse. Nonetheless, it repeats to the Attorney General
13 and to the officer who has to handle the individual
14 exclusion proceedings the very same justification that's
15 repeated later.

16 THE COURT: All right. Then I will admit
17 the exhibit, but let's go on to another line of questioning.

18 MR. STONE: Okay.

19 MR. HALL: For the record, Your Honor, we
20 take exception to the exhibit for several reasons, not the
21 least of which the point is already made, plus the fact
22 that it doesn't anywhere infer that any Japanese Nationals
23 or Japanese people were responsible for any of the
24 allegations in this letter.

25 THE COURT: All right. I think that is a

1 matter of argument.

2 Incidentally, would you remove your hat,
3 please?

4 MR. STONE: I have another exhibit, Your
5 Honor, which Mr. Ennis signed at the time that deals with
6 the curfew program set up by the Attorney General. Can I
7 hand it to you and counsel and you'll decide whether I can
8 show it to him?

9 THE COURT: Pass it up.

10 MR. STONE: We'll mark it A-3.

11 MR. HALL: Your Honor, as a general
12 proposition, I object to this whole process because it's
13 clear now we're going to get a stream of correspondence
14 which I have never seen before this moment. I think counsel
15 had an obligation under the Court's rulings to list these
16 documents, and he knew that he was going to introduce them
17 because he brought them from Washington, D.C., and here
18 they are. We most strenuously object and particularly
19 object to the use of documents which we haven't seen without
20 an opportunity to fully review them.

21 MR. STONE: Your Honor, --

22 THE COURT: I'm inclined to agree.

23 MR. STONE: Hold it, Your Honor! May I
24 make my argument first before you rule?

25 MR. HALL: I will say this: I have not

1 ever seen this document before. He may have sent it to us
2 in another capacity, but among all the documents he sent to
3 us, we did not have any information as to which documents
4 he would use, and that was the purpose for the pretrial
5 order.

6 MR. STONE: Your Honor, --

7 THE COURT: Let me speak.

8 I made the ruling the other day, and it
9 was reported in the press, of course, that you were very
10 angry about the Court's ruling. I want to make it plain
11 that the ruling that I made was not an unusual ruling;
12 that this case was treated any differently than other
13 cases.

14 In this court we have a local rule that
15 all exhibits that either party wants to introduce are to
16 be listed and a copy given to the other party, so the
17 ruling that I made with respect to the Government's exhibits
18 was exactly the ruling that I've made in other cases and
19 would have made if this case were a different kind of case.

20 I did rule that because in March you had
21 identified certain exhibits, those exhibits, and I believe
22 this was with the consent of Petitioner's counsel, those
23 exhibits will be received. These other exhibits I am not
24 going to let you question on these other exhibits if they
25 have not been identified in the pre-hearing order or copies

1 given to counsel.

2 MR. STONE: Your Honor, may I respond now?

3 THE COURT: All right.

4 MR. STONE: In the first place, copies
5 were given to counsel, and I would ask, if Mr. Hall wants
6 to stand up --

7 THE COURT: Were they sent out in several
8 boxes or cartons?

9 MR. STONE: Yes, they were.

10 THE COURT: That doesn't count.

11 MR. STONE: And they were sent in boxes
12 to me.

13 THE COURT: That doesn't count.

14 MR. STONE: OKay.

15 THE COURT: They have got to be given to
16 counsel and said "These are the exhibits we intend to use."

17 MR. STONE: Fine. Second, Your Honor, I
18 understand it to be the rule in this as well as every other
19 Federal District Court that on cross-examination a witness
20 who has made a statement on direct, who can identify a
21 document, may be questioned from that document in order to
22 impeach him.

23 THE COURT: All right. If you have a
24 document on specific impeachment of his testimony, then I
25 probably would admit it.

1 MR. STONE: I'm also trying to refresh
2 his recollection. May I do that, too, on cross-examination?

3 THE COURT: I'm not going to allow you to
4 refresh his recollection as a subterfuge to get in exhibits
5 not identified to counsel. Now, if there is a document that
6 is impeaching of his testimony, then I'll look at it.

7 MR. STONE: Okay. I have several of those,
8 Your Honor, and I would like to say before we go forward,
9 I did not call this witness. It is purely chance that I
10 have documents with me that he has either signed or impeach
11 his testimony --

12 THE COURT: Well, let me ask you this: I
13 know you've known since August of last year, at least I
14 think this is true, that this witness would be called. Was
15 he listed as a witness in August?

16 MR. STONE: No, he was not. There were no
17 witnesses listed in August.

18 THE COURT: I see. In March?

19 MR. KAWAKAMI: Your Honor, at that time we
20 didn't list him as a witness. Neither side listed witnesses
21 at that time.

22 THE COURT: When was he first listed as a
23 witness?

24 MR. KAWAKAMI: He was first listed as a
25 witness in our pre-hearing order in May, I believe.

1 THE COURT: Yes, Mr. Hall?

2 MR. HALL: I just have one point. You said

3 you thought we stipulated yesterday that the documents the

4 Government had listed in March, or whatever it was, could

5 come into evidence. My position yesterday was that they

6 could be marked and I would have to look at them before I

7 could stipulate they could come into evidence, and as I

8 stand here now, I'm not sure what documents counsel is going

9 to submit pursuant to your ruling yesterday. That's what

10 counsel said he would supply by tomorrow so I could look

11 at them and then decide if we were going to object.

12 MR. STONE: Your Honor, this has nothing

13 to do with documents coming into evidence. This has to do

14 with documents being marked for identification only. I'm

15 not going to move them into evidence.

16 THE COURT: What is the next document?

17 A-3?

18 MR. STONE: Yes.

19 THE COURT: Let me see A-3. Do you have a

20 copy for me?

21 MR. STONE: A-3 is a document Mr. Ennis

22 signed at the time that we're talking about, and a memo

23 that he prepared at the time we're talking about, and it

24 does not relate --

25 THE COURT: Is this an impeaching document?

1 MR. STONE: This document relates to his
2 statement to me that he cannot recall the Attorney General's
3 curfew with any detail. It was an Attorney General curfew
4 ordered, Your Honor, before 9066 was enacted, and I'm trying
5 to refresh his recollection about that curfew. The only
6 reason I got into that subject, Your Honor, is because on
7 direct --

8 THE COURT: Let me look at this, will you?

9 MR. STONE: Sure.

10 THE COURT: This pertains to the curfew
11 and exclusion with respect to enemy aliens.

12 MR. STONE: That's right, Your Honor, but
13 that was a subject brought up on direct.

14 THE COURT: I don't think it has application
15 to this case.

16 MR. STONE: I know, Your Honor, but they
17 explored the Attorney General's restricted areas on direct.

18 THE COURT: Yes, they did. They explored
19 the fact that he was considering restricted areas.

20 MR. STONE: That's right.

21 THE COURT: Why don't you go ahead with
22 another line of questioning?

23 MR. STONE: Okay.

24 Q (by Mr. Stone) Mr. Ennis, in your job as Director of
25 the Alien Enemy Unit, were you in frequent contact with the

1 Director of the FBI?

2 A Personally, no. Mr. Hoover and I had most of our con-
3 tacts by either memoranda or my discussions with his
4 Associate Director, Edward Tamm, or Mr. Ladd.

5 Q Were they among the high officials?

6 A Oh, yes. They were his first assistants.

7 Q Can you recall whether in that time period the FBI,
8 those officials, Mr. Ladd or Mr. Tamm, reported to you that
9 they were making seizures on the West Coast of contraband
10 such as dynamite or explosives?

11 A I don't now recall it, but they may very well have
12 sent me -- they would have sent me memoranda to that effect.
13 We wouldn't have discussed it, I don't think.

14 MR. STONE: Your Honor, may I try and
15 refresh his recollection with one of those memoranda?

16 THE COURT: All right. Was it addressed
17 to him?

18 MR. STONE: No, Your Honor. This one is
19 addressed to the Director of the FBI from Mr. Ladd.

20 THE COURT: I don't see --

21 MR. STONE: Excuse me. It was addressed
22 to the Attorney General, and it comes out of the same alien
23 enemy file.

24 THE COURT: All right. Let's see if he's
25 seen that before.

1 MR. STONE: This is, for identification,
2 Respondent's Exhibit A-1.

3 MR. HALL: A-1?

4 MR. STONE: Yes, A-1.

5 THE COURT: Let me see it.

6 MR. STONE: The second page is the copy
7 addressed to the Attorney General. The cover letter is
8 simply on the first page.

9 THE COURT: All right. This particular
10 document refers to searches and seizures on enemy aliens.

11 MR. STONE: Yes, Your Honor. That's what
12 his jurisdiction covered.

13 THE COURT: Well, I'm going to exclude
14 this document as not relevant. We're not talking about
15 enemy aliens.

16 MR. STONE: I have another document, Your
17 Honor, which I would like to use which clearly shows that
18 it was sent to the Alien Enemy Control Unit, and talks about
19 Japanese evacuees.

20 THE COURT: Will you pass it up?

21 MR. STONE: Yes, Your Honor.

22 THE COURT: What is your designation?

23 MR. STONE: It is designated A-4.

24 I gave you the wrong one.

25 THE COURT: You certainly did.

1 MR. STONE: I gave the Court the wrong
2 cover letter. There are two copies of the cover letter.
3 Here is another copy.

4 THE COURT: Is the exhibit a letter of
5 June 7th?

6 MR. STONE: Oh, excuse me, Your Honor.
7 This is one of the exhibits that you've admitted. So I may
8 hand it to him.

9 THE COURT: Which one is it?

10 MR. STONE: It is, I think it may be the
11 last one which was listed on our March list.

12 THE COURT: Well, I'll tell you what I'm
13 going to do. I'm going to have you go ahead and conduct
14 your cross-examination without reference to these exhibits.
15 Then I would like to have you furnish them to counsel for
16 tomorrow. Maybe counsel -- I mean furnish them today, if
17 you can. I'll meet with counsel at 9 o'clock and then
18 let's look at the exhibits. Can you go ahead without
19 reference to the exhibits you want to introduce and cross-
20 examine him on the other things?

21 MR. STONE: Okay. To the extent that I can,
22 I would be happy to.

23 Q (by Mr. Stone) Mr. Ennis, you have been asked so far
24 whether or not questions that dealt with evacuation of both
25 aliens and Japanese of American descent from the West Coast.

1 Were the decisions that were made when these briefs were
2 written in the Hirabayashi and Korematsu cases different
3 when the issue of curfew was discussed? Did the same con-
4 siderations which the Department felt justified an evacuation
5 or did a lesser number come into play when trying to justify
6 a curfew?

7 THE COURT: Let me ask this: The general
8 question is perfectly proper, but I don't understand exactly
9 what the question was. You spoke about when the briefs were
10 prepared.

11 MR. STONE: Yes.

12 Q (by Mr. Stone) At the time when the briefs were pre-
13 pared, Mr. Ennis, there were two subjects, two issues
14 before the Supreme Court. One was was a curfew proper,
15 given the state of public knowledge and judicial notice.
16 A second and separate issue was was the concurrent conviction
17 and concurrent sentence for evacuation proper given the
18 judicial notice argument. The Supreme Court only reached
19 the question of curfew and did not accept certification in
20 the Korematsu case of the evacuation argument.

21 Did the Department's aguments on those two
22 points differ somewhat?

23 A No, not substantially.

24 Q Well, --

25 A Because although one was a lesser restriction, it was

1 equally based on what was in our view the difficulty of
2 classifying American citizens -- including American citizens.
3 That's for general curfew of the whole area. We in the
4 beginning agreed to a curfew around these limited areas,
5 military areas, which we were willing to set up. Now,
6 that's my recollection on it.

7 MR. STONE: Now, Your Honor, I'll leave
8 this until tomorrow.

9 Q You had said before that your personal view was that
10 the facts did not warrant evacuation and you tried to tell
11 that to General DeWitt.

12 A No, that was the Attorney General's official view, in
13 which I concurred.

14 Q Did the Attorney General also believe that the factual
15 situation was insufficient to warrant a curfew, an 8 p.m.
16 to 6 a.m. curfew, on the West Coast?

17 A Well, for limited areas around installations, but we
18 never authorized, as far as I can now recall, a curfew for
19 the whole West Coast for American citizens.

20 Q You believe it was only authorized for very limited
21 areas?

22 A For American citizens, but of course for enemy aliens
23 we would have no difficulty with that as a law matter.

24 Q You would have no difficulty --

25 A No legal difficulty, but we would not think that a

1 curfew was required for all aliens of any nationality for
2 any large area if it wasn't adjacent to a military
3 installation. That's my recollection.

4 Q Do you think that General DeWitt's decision -- excuse
5 me -- was General DeWitt's decision based on information to
6 which you were not privy at that time?

7 MR. HALL: Excuse me. I don't understand
8 which decision.

9 Q (by Mr. Stone) Was General DeWitt's recommendation
10 for curfew and evacuation based on material to which you
11 were not privy, or were you given access to the same
12 military information that he had?

13 A No, we were not given access to the information. We
14 believed that if the civilian authorities were to run the
15 show, we had to know from the FBI any sufficient basis for
16 a general curfew or for an evacuation of all persons of
17 Japanese descent, and General DeWitt's military reports were
18 not made available to us, and indeed, he hid his reasons
19 from us in this final report because he knew we would
20 insist on correcting it. He wouldn't even -- there's a long
21 description here of what we did with him. He wouldn't let
22 us see his description of our activities because he knew
23 we couldn't accept it.

24 Q Isn't it true that you were upset with General DeWitt
25 for his statements about the Department of Justice's role?

1 A We were upset by General DeWitt's failure to show us a
2 draft of what he proposed to say was our position, and to
3 mislead us by saying he had not made such a statement about
4 our position, which is the first dozen pages of the report.

5 Q Do you recall that memos about which you previously
6 testified, some of which were concurred in were to Mr.
7 Burling, suggests that Mr. Burling felt that the Department
8 of Justice was being attacked. Mr. Burling states that
9 General DeWitt is trying to blame the evacuation on the
10 Department of Justice's failure to issue mass raid
11 authorization.

12 A Well, we thought more that we were being evaded than
13 attacked, but it's true that part of his position was that
14 we wouldn't do what he requested because we didn't believe
15 it was factually necessary.

16 Q And that what he wanted was the ability to search and
17 seize multiple dwellings rather than individual dwellings?

18 A That might have been a detail of it. I don't remember.

19 Q So that there was considerable friction at that time
20 between you and General DeWitt as an institution between
21 certianly Mr. Burling and General DeWitt's command?

22 A No, Burling didn't have any more friction than anybody
23 else. There were differences of opinion between the
24 civilian Department and the military department as to what
25 was required in Continental United States.

1 Q Did you or Mr. Burling receive ONI or G-2 reports at
2 that time? Did you have any clearances to receive those
3 reports?

4 A I don't know whether clearance procedures were even in
5 effect back in the 1940's. I don't remember getting any
6 clearance on anything. Did we receive ONI reports?

7 THE COURT: I think that's the question,
8 yes.

9 A Yes. I'm trying to remember, Your Honor. I don't
10 recall.

11 Q You stated in the memo -- it is stated in the memo you
12 read before that you were surprised to see Commander Ringle's
13 ONI report. Does that help refresh your recollection that
14 you were not regularly on distribution for ONI reports?

15 A I would think that is correct, we were not on regular
16 distribution for ONI reports, and that receiving the Ringle
17 Report was a special, an exceptional case.

18 Q Does the fact that the Ringle Report was published very
19 shortly after it was written indicate to you at that time
20 that it did not contain particularly sensitive material?

21 A I didn't know that it was published.

22 Q It was published in Harper's magazine, if I can refresh
23 your recollection.

24 A Oh, the substance of his report was in that magazine
25 article?

1 Q Yes.

2 A Now, you asked me what did I conclude from that?

3 Q Does that strike you -- do you conclude that during
4 wartime publication of material like that meant that that
5 was not confidential information?

6 A Well, it meant that that one particular report, but
7 you know, it's of a general nature. It's not about particular
8 people or anything. It meant that that general estimation
9 of the Japanese situation on the West Coast was publishable.
10 Probably he got his superiors' approval. That sounds to me
11 like a fight between the Navy and the Army; not between the
12 Department of Justice and the Army.

13 Q In the opening brief of the United States in the Supreme
14 Court - this is in the green volume and it's tabbed 98 --

15 THE COURT: And that exhibit, I believe,
16 is 99.

17 THE WITNESS: 99.

18 THE CLERK: Yes, Judge.

19 Q (by Mr. Stone) If you'll please turn to page 12 at
20 the top, at the bottom it says 290 --

21 A Yes.

22 Q -- I would like to read -- I'll wait until everybody
23 gets the page. I would like to read something from the
24 first paragraph on page 12 of the Government's opening brief.
25 It begins:

1 "The military situation on the Pacific
2 Coast: The exact and detailed military situation affecting
3 the Pacific Coast after the attack on Pearl Harbor, which
4 was within the personal and official knowledge of the
5 President, the Secretary of War and General DeWitt, when
6 it was determined that the entire population should be
7 evacuated, was a closely guarded military secret."

8 Is that true?

9 A That's a good argument.

10 Q Was it true?

11 A I think so, yes.

12 Q And it then continues. The document continues:

13 "It was not a matter of public knowledge
14 then or now, and probably cannot be a matter of public
15 knowledge at least until the military authorities decide
16 that there is no possible military risk."

17 This was written and filed at a time when
18 we were still fighting the war. Is that second sentence
19 true?

20 A It's true as a matter of opinion, yes.

21 Q Does that indicate to you that there were facts not
22 on the public record which contributed to the decision by
23 the President, the Secretary of War and General DeWitt?
24 That's on lines 4 and 5.

25 A Well, you know, it's an opening statement in a brief.

1 I suppose it could be inferred that that's true, yes. We
2 then go on --

3 Q Would it be DeWitt's --

4 MR. HALL: Your Honor, I object.

5 THE COURT: I think he didn't finish his
6 answer.

7 A (continuing) I was just going to say that then we go
8 on and discuss the general military situation, Japanese
9 victories and all that sort of thing, West Coast industry,
10 fifth column threats.

11 Q (by Mr. Stone) Would you show me, Mr. Ennis, where you
12 go on and discuss any specific military reports?

13 A I said that we go on and discuss the Japanese victories;
14 not reports.

15 Q But you don't discuss any military reports in this
16 brief, do you?

17 A No, all judicial notice, public information.

18 Q No military intelligence information?

19 A No. We didn't think we were entitled to introduce
20 that.

21 Q But you don't discuss it and you told the Court it was
22 not available; isn't that right?

23 A That's right.

24 Q Commander Ringle's report was published in Harper's
25 magazine in 1942; isn't that true?

1 A I don't know whether it was his report. It was a
2 newspaper article with the same material in it. I haven't
3 compared them.

4 Q So presumably that material is not the material which
5 was not in the public way which these individuals were
6 relying on; isn't that right?

7 THE COURT: Well, I think that's a matter
8 of argument. Why don't you go ahead? You've made your
9 record. I think it's a matter of argument.

10 Q (by Mr. Stone) Do you believe, Mr. Ennis, that General
11 DeWitt had -- excuse me. I'll strike that.

12 Let's go back if we may to the black
13 volume, General DeWitt's, as you call it, first draft, the
14 first final report. If we can --

15 A The first final report?

16 Q Yes.

17 THE COURT: Let's get that out and the
18 exhibit number.

19 MR. STONE: Okay.

20 THE COURT: I think that's Exhibit 4, tab
21 17. Does that sound right?

22 THE CLERK: Yes, Judge.

23 MR. STONE: Yes, Your Honor.

24 THE WITNESS: Yes.

25 Q (by Mr. Stone) Before we get to that, was the same

1 kind of argument in the Hirabayashi case made in the
2 Korematsu case?

3 A That's my recollection.

4 THE COURT: Now, is that -- I don't know
5 what argument you're talking about.

6 MR. STONE: Excuse me. The argument about
7 military necessity.

8 Q (by Mr. Stone) Is the answer yes?

9 A Yes.

10 Q Is there any indication on the page we were looking at
11 before, which was Arabic page 4 of the very first version,
12 if you will look at the top where General DeWitt talks
13 about every ship leaving the West Coast port was attacked --

14 A Yes.

15 Q Is there any indication that that is the total sum of
16 all military information available to him at that time?

17 A No.

18 Q Is there any indication that he had authority from the
19 President of the United States to declassify military
20 intelligence information to put it into this report at that
21 time?

22 MR. HALL: Your Honor, is the question
23 does this report indicate he had that authority, or is he
24 asking the witness that?

25 MR. STONE: I'm asking if the report on

1 its face indicates.

2 THE COURT: That was my understanding.

3 A No, it doesn't indicate anything on the subject.

4 Q (by Mr. Stone) From your meetings with General DeWitt,
5 is he -- was he the kind of individual who would have taken
6 it upon himself, without authorization, to declassify
7 military information?

8 A I don't know.

9 Q Do you know if General DeWitt ever did act in an
10 unauthorized fashion in declassifying information?

11 A I have no information.

12 Q Do you know whether the FCC report which was provided
13 to you in 1944 was also provided to General DeWitt?

14 A I don't know.

15 Q Do you know if he was ever sked to comment on the FCC's
16 views?

17 A I don't know.

18 Q Do you know if the Army was ever asked to rebut the
19 FCC's allegations about General DeWitt?

20 A What allegations?

21 Q That General DeWitt's perceptions of -- excuse me. I
22 had better take that back.

23 Do you know, was there ever a meeting
24 between yourself or Mr. Burling and the War Department to
25 decide whether the FCC report was in fact correct?

1 A Not with me or Burling, no.

2 Q Was there ever such a meeting to decide whether --
3 excuse me. The FCC was a civilian agency; isn't that correct?

4 A That's correct.

5 Q The FBI was also a civilian intelligence agency; isn't
6 that correct?

7 A Correct.

8 Q Was there ever any meeting between representatives of
9 those civilian intelligence agencies and the military
10 intelligence agencies to decide whether or not the FBI's
11 conclusions that there was no signaling were correct?

12 A They routinely had meetings. What they discussed I
13 don't know.

14 Q But you don't know whether that particular FBI report
15 disagreeing with General DeWitt's conclusions was ever
16 resolved between military intelligence people and the FBI?

17 A No.

18 Q When is the first time you ever heard that the United
19 States was intercepting Japanese diplomatic cables and
20 decrypting them?

21 MR. HALL: Your Honor, I object to this
22 line of inquiry for the reasons made earlier.

23 THE COURT: I'll permit it.

24 A As a -- at some time, and I can't tell whether it was
25 while I was in the Government or later, I was informed, but

1 I think it was public knowledge that we had broken the
2 Japanese codes and even were following their ships just
3 before the December 7th, 1941 attack on Pearl Harbor.

4 Q (by Mr. Stone) In your official capacity at the
5 Department of Justice.

6 A No, I had no knowledge about it.

7 Q Were you ever -- am I correct in stating, then, that
8 you were never handed information and told that it came from
9 a decrypted cable?

10 A No, not at all.

11 Q Do you have any reason -- do you have any reason to
12 doubt that the information in those cables might have been
13 authentic? Was there any Government official who told you
14 in the 1940's --

15 THE COURT: Why don't you ask another
16 question?

17 MR. STONE: Okay.

18 Q (by Mr. Stone) In the 1940's when you did find out
19 about the interception of Japanese diplomatic cables, did
20 anyone tell you that they were of no merit?

21 A Well, I don't know whether I did find it out in the
22 forties, but generally, covering the whole face of my
23 private life and Government life, I was never told that our
24 interceptions were in any way inaccurate. I just assumed
25 they were accurate.

1 Q But information, to your knowledge, from those cables
2 played no part in any of your decisions in this case; isn't
3 that right?

4 A Yes. This was entirely a matter of the safety of the
5 Continental United States and the people of Japanese descent
6 there and had nothing to do, as far as I was concerned, with
7 any espionage or things of that nature, except for some
8 Japanese officials in Honolulu.

9 Q Did Mr. Burling, your subordinate, have a higher
10 clearance than you or access to the "Magic" information?

11 A I don't think either of us had any clearances at all.

12 Q Do you know if Mr. Biddle --

13 THE COURT: Just let me ask, isn't it a
14 matter of common knowledge that hardly anyone had access to
15 that information? The Secretary of War, Secretary of State,
16 Secretary of the Navy, the President, a few other people in
17 intelligence.

18 MR. STONE: Thank you, Your Honor. If that
19 is a matter of common knowledge, then I don't have to elicit
20 it.

21 MR. HALL: Without being obnoxious about
22 it, Your Honor, we would like to have a continuing objection
23 to inquiry about "Magic" so that the record is clear.

24 THE COURT: That's fine.

25 MR. STONE: But they are not objecting to

1 the fact that only a limited group knew about it; is that
2 right?

3 MR. HALL: I think that's true.

4 THE COURT: I think that's generally
5 accepted.

6 Q (by Mr. Stone) Mr. Ennis, did you attend meetings of
7 the Joint Chiefs of Staff?

8 A No.

9 Q Did you attend meetings with General George C. Marshall
10 during this period?

11 A No.

12 Q Did you attend meetings with the G-2 who were resident
13 in Washington?

14 A No.

15 Q Did Mr. Burling?

16 A No.

17 Q Did Mr. Biddle?

18 A I don't know. It's unlikely. He would deal with
19 Stimson; not with the G-2.

20 Q In discussing the footnote that was ultimately drafted
21 in the Korematsu brief, you stated before that its final
22 form sufficiently met your approval that you signed the
23 brief; isn't that correct?

24 A It was minimal, but yes, I signed the brief.

25 Q So that as it appeared you did not believe it was

1 misleading; isn't that correct?

2 A It wasn't misleading if it was carefully read, but if
3 it was ignored it was misleading.

4 Q Does the discussion in the dissent in the Korematsu
5 case and the discussion in the oral argument of that case
6 which I read to you before, directing attention to that
7 very footnote, indicate to you that it was carefully read?

8 A I think that the discussions in the opinions of Mr.
9 Justice Murphy and Mr. Justice Jackson indicate that the
10 point was taken that the Army's justification was disputed,
11 but I think that the reference you read to me from Mr.
12 Fahy's opinion was very obscure.

13 Q But he does mention the footnote; isn't that correct?

14 A Yes, he does.

15 Q How many oral arguments have you attended at the
16 Supreme Court?

17 THE COURT: Well, let's --

18 A A hundred.

19 Q Is it unusual --

20 THE COURT: Wait a second. When I speak
21 I expect you to stop asking questions.

22 MR. STONE: Excuse me.

23 THE COURT: Fahy's argument is in the
24 record; the brief is in the record; the opinions of the
25 Supreme Court dissents are in the record. I think you've

1 made your point.

2 MR. STONE: But Your Honor, can I tell you
3 what my point is?

4 THE COURT: Why don't you ask your question?
5 Then I'll rule on the question.

6 Q (by Mr. Stone) The question is, of the hundreds of
7 arguments you have attended, is it unusual to have a
8 specific Government footnote discussed at a Supreme Court
9 argument?

10 THE COURT: Go on to another question.

11 MR. STONE: Okay.

12 Q (by Mr. Stone) The documents that you were directed
13 to look at on direct examination indicated that Herbert --
14 that John Burling and yourself at the Department of Justice
15 drafted the various Government versions of the footnote
16 in the Korematsu case; isn't that correct?

17 A That's correct.

18 Q They also indicate that ultimately the Department of
19 Justice's decision was made by Herbert Wexler rather than
20 Charles Fahy; isn't that correct?

21 A No. Herbert was brought into the discussion by us
22 because he was head of the War Division. He wasn't as
23 directly involved, but I'm sure Herbert talked to Charles
24 Fahy about it.

25 Q As the footnote --

1 A We brought him into it because we wanted to show every-
2 body in this whole area of command what the problem was.

3 Q Mr. Wexler did not disassociate himself from the
4 footnote as it was finally drafted, did he?

5 A No.

6 Q Did Mr. Fahy?

7 A No.

8 Q Did the Attorney General?

9 A I doubt very much at the Attorney General knew anything
10 about it.

11 Q Oh, I'm sorry. The Solicitor General.

12 A No, of course not.

13 Q So that Mr. Burling, yourself, Mr. Wexler and Mr. Fahy
14 all agreed that it met the minimum standards of disclosure;
15 is that correct?

16 A Met minimum standards of disclosure?

17 Q To the Supreme Court of the narrowness of the
18 Government's reliance on the final report.

19 A Yes, that's right.

20 Q On the Supreme Court briefs you worked, were they
21 frequently rewritten?

22 A Well, it depended on what capacity I was in. If I were
23 an Assistant U.S. Attorney, it would be --

24 Q Excuse me. When you were in the Solicitor General's
25 office, was the first draft of a brief which you would

1 write as an assistant to the Solicitor the way the brief
2 ultimately was filed?

3 A I won't be technical, but I never wrote a first draft.
4 I would get a draft from the division, like the Criminal
5 Division, and I would make what changes I thought were
6 necessary, and very unusual for that brief to be changed.
7 Paul Fruend might have looked at it and might have suggested
8 a change, but at that level in the Solicitor General's office
9 you're writing the final draft. As you know, when you're
10 in one of the departments and presenting it to the
11 Solicitor General's office, that draft usually has some
12 changes made.

13 Q When you wrote the draft brief -- excuse me. Did you
14 write the draft brief or did Mr. Burling?

15 THE COURT: Let me tell you, if your point
16 is that Supreme Court briefs are frequently rewritten, I
17 would take judicial notice of that.

18 MR. STONE: Thank you, Your Honor.

19 THE COURT: The first draft is seldom the
20 final draft.

21 MR. STONE: Thank you.

22 Q (by Mr. Stone) Mr. Ennis, did the Department of
23 Justice make judicial notice arguments to the Supreme Court
24 more than say once a year?

25 A I couldn't give you any information on that at all. I

1 have no opinion about that.

2 Q Was the judicial notice argument a very unusual one
3 to you at that time? Did it strike you as very unusual to
4 ask the Supreme Court to take judicial notice of something?

5 A No, because it was a case without any specific record.

6 Q Judicial notice means exactly what? Would you tell us?

7 A Well, judicial notice means the Court --

8 THE COURT: I know. But let me ask this:
9 The question was asked you, was a judicial notice argument
10 an unusual argument to be made. I thought that you said
11 that in this case your argument was entirely on judicial
12 notice.

13 THE WITNESS: That's correct, because,
14 Your Honor, there was no ordinary factual record. There
15 was no real trial below, you see. There was no factual
16 record.

17 THE COURT: Is it unusual to have an argu-
18 ment in the Supreme Court based entirely on judicial notice?

19 THE WITNESS: Yes.

20 THE COURT: That is unusual?

21 THE WITNESS: Yes. I have never heard of
22 another one, other than these cases.

23 THE COURT: I see.

24 Q (by Mr. Stone) Do you think that that was recognized,
25 the unusualness of that point, in Justice Murphy's dissent?

1 Excuse me. Was the unusual practice or having to take
2 judicial notice of all the operative facts.

3 A Was that a basis of his dissent?

4 Q Yes.

5 A It was one --

6 THE COURT: I thought you said did he
7 recognize that fact.

8 MR. STONE: Yes. That's what I said.

9 A Yes. As I recall, he suggested that the case ought to
10 go back and be tried like any other case.

11 Q (by Mr. Stone) Are you familiar, Mr. Ennis, from your
12 extensive Supreme Court practice, with the way the justices
13 of the Supreme Court at that time discussed and distributed
14 their draft opinions before publication?

15 A Yes, pretty well. I started as a law clerk but not in
16 the Supreme Court, but one of the Courts of Appeals.

17 Q Was it common knowledge that the Supreme Court justices
18 distributed their draft opinions or dissents before publi-
19 cation?

20 A Yes, I believe so.

21 Q Was it common knowledge that the Supreme Court justices
22 met privately to orally discuss their opinions about a case
23 before publication?

24 A Well, one would walk to the other's office --

25 THE COURT: Let me ask, what is the

1 relevance of that?

2 MR. STONE: Well, I was trying to establish
3 for the record, Your Honor, that it is probable that Justice
4 Murphy made his views known to the other members of the
5 Supreme Court.

6 THE COURT: Before publication?

7 MR. STONE: Before publication.

8 THE COURT: I would take judicial notice
9 that it is always done.

10 MR. STONE: Thank you, Your Honor.

11 Q (by Mr. Stone) Mr. Ennis, do you recall being
12 interviewed by an individual named Morton Grodzins in 1942?

13 A Yes. He was a professor at the University of Chicago
14 and he wrote, perhaps, I think, about the first book about
15 the evacuation.

16 THE COURT: Now, it's in the record, but
17 for the court reporter, would you spell his last name?

18 MR. STONE: G-r-o-d-z-i-n-s.

19 THE COURT: And the year you said, I
20 believe, was 1942?

21 MR. STONE: Yes.

22 THE COURT: That was your question.

23 MR. STONE: Yes.

24 THE COURT: All right.

25 A I saw him as early as '42?

1 Q (by Mr. Stone) Mr. Grodzins' book --

2 A I don't recall.

3 Q Mr. Grodzins states that he saw you and he spoke with
4 you in the fall of 1942. Does that comport with your
5 recollection?

6 A No, but I would accept that. I thought I was pretty
7 busy then to talk to people writing books, but I may have.

8 Q Did he physically come up to the Department of Justice?

9 A He came to my office, yes.

10 Q Do you recall that he also spoke with the other
11 associates there such as -- not your associates necessarily
12 -- James Rowell of the Department of Justice, Mr. Burling
13 of the Department of Justice, Mr. Biddle, Mr. Fahy?

14 A Well, I don't know whether he spoke to Biddle and
15 Fahy, but he certainly spoke to Jim Rowell and Jack
16 Burling.

17 Q After you left the Government in 1944 --

18 A It was probably '46.

19 Q Excuse me. '46.

20 A Yes.

21 Q You did work on behalf of Japanese-American Citizens
22 League, didn't you?

23 A I helped them get that bill passed for some remunera-
24 tion for lost property, real and personal property.

25 Q You went around the country and lobbied for it?

1 A No. After it was passed, I don't think it had to be
2 lobbied, or whatever lobbying was done was probably done
3 by -- not by me -- by them in Washington. I went around
4 the country explaining to Japanese-American lawyers how to
5 deal with cases under the bill.

6 Q So that people could obtain --

7 A Yes.

8 Q -- remuneration.

9 A Remuneration, yes.

10 Q Have you been a director of the -- have you been an
11 officer of the American Civil Liberties Union?

12 A I've been a member of the Board of Directors since
13 1946, General Counsel for about twenty years, Chairman of
14 the Board for six years in the seventies, and I am still a
15 member of the Board of Directors. And I argued cases in
16 the Supreme Court for them, too.

17 THE COURT: You said Chairman of the Board
18 for how many years?

19 THE WITNESS: Six years, Your Honor.

20 Q (by Mr. Stone) Were you in the late 1940's when you
21 were doing this work friendly with any of the leading
22 spokespeople for the Japanese-American community?

23 A I had never met a person of Japanese ancestry until
24 after the war started and people would come to my office
25 to plead for the release of their parents. That's the way

1 I met members of the Japanese-American community.

2 Q Do you know Mike Masaoka?

3 A Very well. He is one of my closest friends.

4 Q When did you first meet him?

5 A I'm sure it was in '42.

6 Q Was he a friend of yours then?

7 A No. I met him as a representative of the Japanese-
8 American Citizens League.

9 Q From about what date can you tell us you became
10 friendly with him?

11 A After he came back from serving in the 442nd Battalion
12 of the Army and became the principal officer in the
13 Japanese-American Citizens League.

14 Q Is that about the same time you were helping Japanese-
15 American lawyers obtain redress?

16 A Yes.

17 Q So can you put that at about 1946?

18 A Yes, certainly.

19 THE COURT: Could I stop you just for a
20 moment? Would you spell his last name for the court
21 reporter?

22 THE WITNESS: M-a-s-a-o-k-a.

23 THE COURT: Thank you.

24 Q (by Mr. Stone) Did you recall this incident having
25 to do with the writing and rewriting of the footnote in

1 the Korematsu brief before the lawyers for Mr. Hirabayashi
2 came to you -- excuse me -- before Peter Irons who was
3 writing a book about this came to you?

4 A No. The whole matter had entirely left my memory until
5 Professor Irons a couple of years ago showed me my memoranda
6 to the Attorney General and the Solicitor General and Herb
7 Wexler, which have been referred to throughout this case.

8 Q That was in approximately 1981?

9 A '81? This is '85. I'd say '81 or '2.

10 Q In the late 1940's, you never mentioned this incident
11 to Mike Masaoka, did you?

12 A No. Mike is not a lawyer. There was never any dis-
13 cussion about it.

14 Q You have spoken with him about these cases, though,
15 haven't you?

16 A Well, I've spoken to Mike about the evacuation I am
17 sure many times, but I don't remember ever discussing the
18 legal cases.

19 Q And it never struck you during the late 1940's that
20 there remained to be corrected some intentional misconduct
21 in the handling of the Government's Hirabayashi brief that
22 you wanted to inform either the Japanese-American Citizens
23 League or the ACLU; is that correct?

24 A No, it never occurred to me.

25 Q Do you think -- does it occur to you now? Do you now

1 today believe that there is some intentional misconduct that
2 remains to be corrected?

3 A Well, from my point of view --

4 MR. HALL: That was a question that I
5 asked and the Court ruled it was a matter for the Court to
6 decide.

7 THE COURT: I think that's right. I think
8 that is my decision.

9 MR. STONE: Okay.

10 Q (by Mr. Stone) Do you, or did you, other than the
11 writing of the footnote in the brief in the Korematsu case,
12 suppress any evidence in any case you have ever worked on,
13 Mr. Ennis, unlawfully intentionally suppress any evidence
14 in any other case?

15 THE COURT: I really am not concerned
16 about other cases. If you want to confine it say to these
17 three cases, that would be fine.

18 Q (by Mr. Stone) Other than the writing of the footnote
19 in the Korematsu case, have you ever intentionally, without
20 reference to that, have you ever intentionally suppressed
21 evidence in these three cases?

22 A In these cases now, have I ever, apart from that
23 footnote reference --

24 Q Without reference to this particular set of allegations,
25 are there any other facts or matters about which you

1 intentionally suppressed evidence?

2 A No, but these are all public relations cases. There
3 wasn't any evidence in the sense we ordinarily use evidence
4 involved, but I must say no. I don't recall suppressing
5 anything except what I wanted to put in the footnote and
6 wasn't allowed to. That's an exceptional situation.

7 Q That was your preference, if I understand it correctly,
8 what you preferred to put in the footnote; isn't that correct?

9 A Yes. I just wanted to tell the Court we had other
10 security information other than DeWitt's self-serving
11 report.

12 Q What security information did you have?

13 A The information from the Navy, Lieutenant Commander
14 Ringle's Report.

15 Q The published version?

16 A Because of the published version, we would have merely
17 said -- we wouldn't quote anything. We would have said --
18 the footnote said, before it was changed, "We inform the
19 Court that the Department of Justice has information from
20 other security agencies of the United States that contra-
21 dicts or differs from what is in the final report, period."

22 Q And that would have referred to Mr. Ringle's Report?

23 A And the FCC, of course.

24 Q Was the FCC an intelligence agency?

25 A Yes. They were involved in watching all communications.

1 They were the ones that pointed out that the radio messages
2 that DeWitt was relying on were from all licensed stations.

3 Q But they were not under his command; is that not
4 correct?

5 A Of course not. They were a civil agency.

6 Q They were a civil agency. Do you know, Mr. Ennis,
7 whether the Supreme Court was aware of the Ringle Report,
8 the published Harper's magazine version, at the time they
9 decided the Hirabayashi case in the Supreme Court?

10 A Hirabayashi?

11 Q Yes.

12 A I don't know.

13 Q I thought you were questioned earlier this morning--

14 A I would think it unlikely.

15 Q I thought you were questioned earlier this morning
16 about the reference in the footnote in the Government's
17 brief.

18 A That was in the Korematsu case.

19 Q Excuse me?

20 A That was in the Korematsu case the next year.

21 Q Okay. Your Honor, I would like to hand the witness
22 a document which you have already ruled is admissible
23 although it is not yet numbered. It is the Court of Appeals
24 brief in the Hirabayashi case.

25 THE COURT: All right. This, I assume,

1 would be the Government's brief?

2 MR. HALL: I don't -- well, is this one of
3 the documents that wasn't listed in the Government's list?
4 It's not one of our documents.

5 THE COURT: Well, I don't know about that,
6 but I do know tht I said or I indicated that I wanted to
7 see those, so that even if it hasn't been marked, I would
8 like to have it in evidence.

9 MR. STONE: I would assume, Your Honor,
10 that the original briefs in the very case we're holding a
11 hearing in would be part of the record and need not be
12 offered as evidence, in any event.

13 THE COURT: I would certainly think that
14 I could take judicial notice of them. I would like them as
15 exhibits.

16 MR. STONE: Okay. We will mark it as A-5.
17 It's the appellant's reply brief in the Ninth Circuit,
18 Hirabayashi v. United States.

19 Q (by Mr. Stone) Mr. Ennis, would you please turn to
20 page 2 of that brief?

21 A Yes.

22 Q I'm going to read the last four lines on page 2, the
23 first two lines on page 3, and then three lines just before
24 the bottom of page 3 in that brief, beginning at page 2
25 in the statement of facts.

1 "The actual facts do not substantiate the
2 contention and give no basis for any such inference. In
3 the October, 1942 issue of Harper's magazine is an article
4 entitled 'The Japanese in America' which is a statement
5 made by an Army intelligence officer 'who for a number of
6 years was stationed on the West Coast and who during that
7 time had made a particular study of the Japanese population'.
8 We urge the Court to read that article and thereby obtain
9 the factual facts relative to the loyalty of the American
10 citizenship of Japanese ancestry on this coast."

11 Then if we jump down, it continues to cite
12 that article. It continues:

13 "In our opening brief we contended that
14 the basis for the exclusion order was the pressure brought
15 by certain groups, especially in California, who for years
16 through . . ."

17 and then begins to quote that article
18 again:

19 "The work of lecturers, radio commentators,
20 newspaper editors and others' had created indiscriminate
21 anti-Japanese agitation often referred to as 'The Yellow
22 Peril'. The facts disclosed by the intelligence officer
23 in that article completely refute the facts upon which
24 these 'Oriental Babies' made their unAmerican claims. This
25 is particularly true as to native born American citizens of

1 Japanese ancestry who were called the Nisei or second
2 generation, of which appellant is a member.

3 "In the article the intelligence officer
4 says at page 490: 'I consider that at least 75 per cent
5 of them (American born United States citizens of Japanese
6 ancestry) are loyal to the United States.'"

7 Does that quotation, Mr. Ennis, indicate
8 that the Harper's magazine article was openly brought to
9 the attention of the Ninth Circuit in this case?

10 A It certainly does. I also point out to you that this
11 copy was sent to Wendell Birge who was Assistant Attorney
12 General in charge of the Criminal Division, and I don't
13 recall ever seeing this brief.

14 Q You argued this case on appeal, didn't you?

15 A I believe I did, yes.

16 THE COURT: Which case on appeal?

17 THE WITNESS: Hirabayashi.

18 MR. STONE: This very case, Your Honor.

19 THE COURT: Are you talking about before
20 the Court of Appeals?

21 MR. STONE: Yes, I'm talking before the
22 Court of Appeals prior to certification to the Supreme
23 Court.

24 THE COURT: Is that true, you argued before
25 the Ninth Circuit?

1 THE WITNESS: Yes, I did, Your Honor.

2 That makes it pretty clear that I did see this brief, I
3 would say.

4 Q (by Mr. Stone) Do you have any evidence, Mr. Ennis,
5 from your two meetings with General DeWitt on the West
6 Coast that he had some personal animus toward people of
7 Japanese ancestry in particular?

8 A I don't have -- not based on my two meetings with him.

9 Q Do you believe that his decision -- do you believe
10 that his decision to issue military orders was based on
11 something other than his own perceptions of the military
12 situation?

13 A Well, let's see. His perception of the military
14 situation --

15 Q Misguided as it may have been.

16 A Yes. That, plus what the community would accept, yes.

17 Q Would it be fair to say that General DeWitt was
18 unfortunately simply overcautious in his perception of what
19 was necessary to defend the West Coast?

20 A No.

21 Q How would you amplify that?

22 A Well, I don't think you can say a General, a Commanding
23 General, is overcautious in defending an area when he does
24 something which I think was completely unnecessary.

25 Q Did you state before that you had a similar experience

1 with the Commanding General in Hawaii with respect to ending
2 military -- excuse me -- martial law in that he did not
3 follow your advice?

4 A It was only -- it was similar only in that I told both
5 of them that I thought their proposed exercise of military
6 power was unconstitutional.

7 Q Who were the military officials involved in the Hawaii
8 experience?

9 A Admiral Nimitz and General Richardson.

10 Q Did General DeWitt play any part in that particular
11 conflict?

12 A No, none whatever.

13 Q Did that particular instance revolve around moving
14 aliens or citizens of the United States?

15 A No. That involved military control of the whole
16 population.

17 Q And the military commanders rejected your advice; isn't
18 that correct?

19 A Yes, unfortunately they did, and my advice was correct
20 and the Supreme Court said that their military rule was
21 unconstitutional.

22 Q That case was also decided on the basis of judicial
23 notice; isn't that true, Mr. Ennis, because Admiral Nimitz
24 and General Richardson wouldn't offer the background for
25 their refusal to end martial law?

1 A Oh, no. They testified. They were my witnesses.
2 There was a two-volume trial of why they thought they had
3 to continue martial law. Both of them were witnesses at the
4 trial.

5 Q But they did disagree with your assessment; isn't that
6 right?

7 A Well, I only gave a legal assessment, which was right,
8 and they disagreed with it, which was wrong.

9 Q They disagreed not based on legal factors but on their
10 view of the military situation; isn't that correct?

11 A Yes, and my view that the war had moved so far to the
12 east that they were not entitled to retain martial law.

13 Q What did they believe?

14 A Oh, the Japanese might come back, and if that possi-
15 bility existed, it would be better not to have the civil
16 courts operating. They could run the island better.

17 Q Do you think that Admiral Nimitz or General Richardson
18 were intentionally misleading you when they disagreed with
19 you over your assessment?

20 A They didn't mislead me at all. I understood them
21 completely. They liked martial law. They liked running
22 the courts.

23 Q You ultimately, however, defended them; isn't that
24 right?

25 A Of course.

1 Q The Attorney General did not overrule you. He did not
2 agree with you; isn't that right?

3 A The Attorney General agreed with me.

4 Q Excuse me.

5 A He agreed with me.

6 Q Can you tell us, then, why he agreed to let the
7 Department of Justice defend their military decision to
8 maintain martial law?

9 A Because that's the responsibility of the Department
10 of Justice, to defend other departments of the Government.

11 Q In that situation --

12 A If we don't defend them, they'll try to defend them-
13 selves.

14 Q In that situation, the one involving martial law?

15 A They were defendants. It's --

16 Q Are you suggesting, Mr. Ennis, that the Department of
17 Justice has never asked a client agency to defend itself
18 because it disagreed with its position?

19 A I don't recall any instances.

20 Q Does the SEC get defended by the Department of Justice?

21 A Oh, no. There is a statute which says that they can
22 handle their own civil cases, but they, of course, in
23 criminal cases -- I've had cases where the SEC made
24 recommendations for prosecution, but they can do nothing
25 but make recommendations. The Department of Justice

1 decides whether to prosecute or not, but the statute says
2 in civil proceedings the SEC may handle themselves. Several
3 agencies have that power, but not the Army.

4 Q Were you in this instance involving martial law in
5 Hawaii briefed on military information privy to the same
6 military information --

7 THE COURT: Well, let me say this: I think
8 you've explored the martial law issue sufficiently.

9 MR. STONE: Okay. Do you want me to stop,
10 Your Honor?

11 THE COURT: Well, I'll give you another
12 fifty seconds.

13 MR. STONE: I'll stop, then.

14 THE COURT: Why don't you go ahead. Let's
15 use them up.

16 MR. STONE: I can't get right into some-
17 thing, Your Honor, that I can finish up that quickly. If
18 I may, --

19 THE COURT: That will be fine. Then, I
20 do want to see counsel tomorrow at 9 o'clock. Let's see
21 if we can't work out the Government's exhibits.

22 We will recess the trial until 9:30. I
23 will see you all at 9 o'clock.

24 MR. STONE: Thank you, Your Honor.

25 (Court adjourned.)