The Source: Briefs and Supreme Court Opinions in *Korematsu v. United States,* October Term, 1944

1 *Part Three of the Brief Submitted by the Solicitor General of the United States and the Department of Justice Supporting Korematsu's Conviction*

In this section of its three-part brief, the Justice Department spoke directly to the question of "whether the evacuation from the local region of persons of Japanese ancestry . . . was a valid exercise of the war power under the circumstances." The footnotes in this section were part of the Justice Department's brief and constituted an important part of its claim to factual evidence.

The situation leading to the determination to exclude all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2 was stated in detail in the Government's brief in this Court in *Hirabayashi v. United States*. . . . That statement need not be repeated here.[1] In brief, the facts which were generally known in the early months of 1942 or have since been disclosed indicate that there was ample ground to believe that imminent danger then existed of an attack by Japan upon the West Coast. This area contained a large concentration of war production and war facilities. Of the 126,947 persons of Japanese descent in the United States, 111,938 lived in Military Areas No. 1 and No. 2, of whom approximately two-thirds were United States citizens. Social, economic, and political conditions . . . were such that the assimilation of many of them by the white community had been prevented. There was evidence indicating the existence of media through which Japan could have attempted, and had attempted, to secure the attachment of many of these persons to the Japanese Government and to arouse their sympathy and enthusiasm for war aims. There was a basis for concluding that some persons of Japanese ancestry, although American citizens, had formed an attachment to, and

[1] The *Final Report* of General DeWitt (which is dated June 5, 1943, but which was not made public until January, 1944) . . . is relied on in this brief for statistics and other details concerning the actual evacuation. . . . We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the *Final Report* only to the extent that it relates to such facts.

Source: *Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law*, vol. 42, ed. Philip B. Kurland and Gerhard Casper (Washington, DC: University Publications of America, 1976), 213–15.

sympathy and enthusiasm for, Japan.[2] It was also evident that it would be impossible quickly and accurately to distinguish these persons from other citizens of Japanese ancestry. The presence in the Military Areas Nos. 1 and 2 of persons who might aid Japan was peculiarly and particularly dangerous. . . . The persons affected were at first encouraged and assisted to migrate under their own arrangements, but this method of securing their removal . . . was terminated by Public Proclamation No. 4. . . . It was necessary to restrict and regulate the migration from the Area in order to insure the orderly evacuation and resettlement of the persons affected. . . . The rate of self-arranged migration was inadequate, partly because of growing indications that persons of Japanese ancestry were likely to meet with hostility and even violence.

[2] In addition to the authorities cited in the *Hirabayashi* brief, see Anonymous (An Intelligence Officer), "The Japanese in America, the Problem and the Solution," *Harper's Magazine,* October, 1942. . . . See also "Issei, Nisei, Kibei," *Fortune Magazine,* April, 1944.

2 *Brief Submitted by Wayne M. Collins, Counsel for Appellant*

Collins's impassioned, ninety-eight-page (not so) brief made a variety of arguments against the military necessity for and constitutionality of evacuation and internment. The excerpts below, including the footnote, indicate the tone of Collins's brief and his arguments regarding General DeWitt's motives in interpreting Executive Order 9066 as an evacuation and internment order.

If [General DeWitt] really believed these people to be spies and saboteurs . . . why did he delay from December 7, 1941, to March 30, 1942, before removing the first contingent to assembly centers? . . . Was General DeWitt so blind that he didn't realize that in the interval between December 7, 1941, and the date of his unprecedented orders . . . boards of investigation could have examined the loyalty of each of the prospective deportees. . . . They could have been examined in less time than it took to build the shacks that were to house them.[1] The inconvenience and cost of examining would have been trifling. The cost of housing, evacuation and administration of his program has cost this country many

[1] The General issued several hundred individual civilian exclusion orders against "white" naturalized citizens of prior German and Italian allegiance whom he deemed dangerous. These were given individual hearings on the question of their loyalty. . . . If the General had time to provide examinations for these individuals can he be heard to deny he had time to examine Japanese descended citizens before evacuating them? His special treatment of these whites proves his bias against the native-born yellow citizen.

Source: *Landmark Briefs and Arguments of the Supreme Court of the United States*, 119, 152, 161, 163, 165, 196. (Bracketed text within the selections has been added by the editors to help fill in gaps and clarify unfamiliar terminology.)

millions. . . . Why did he keep secret the reasons he insisted upon this frenzied evacuation? How could this nation abide the secret reasons he carried in his head when we had neither evidence nor ground to believe him to have been the wisest man in the nation? What are the facts upon which he would justify the outrage he perpetrated? . . .

What one day will be celebrated as a masterpiece of illogic . . . appears in General DeWitt's letter of February 14, 1942, one month before the evacuation commenced. (*Final Report*, p. 34). He characterizes all our Japanese as subversive. . . . He states . . . that "the Japanese race is an enemy race" and the native-born citizens are "Americanized" but their "racial strains are undiluted" and being "barred from assimilation by convention" may "turn against this nation." . . . The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." . . .

Who is this DeWitt to say who is and who is not an American and who shall and who shall not enjoy the rights of citizenship? . . . General DeWitt let Terror out to plague these citizens but closed the lid on the Pandora's box and left Hope to smother. It is your duty to raise the lid and revive Hope for these, our people, who have suffered at the hands of one of our servants.

3 *Amicus Curiae Briefs Submitted by the American Civil Liberties Union*

Due to conflict within the ACLU, that organization was not Korematsu's attorney of record, but it did submit a "friend of the court" brief to persuade the Supreme Court to hear the *Korematsu* case and submitted another at the time of the hearing. These excerpts are taken from both briefs, as is footnote 1.

October 1943 Brief Asking the Supreme Court to Review the Judgment of the Ninth Circuit Court of Appeals

We believe that this case presents the question of the power of the military to detain citizens against whom no charges have been preferred. We contend that no such power has been granted by Congress, or could be constitutionally granted.

The issue is presented because the evacuation orders . . . made it quite plain that not evacuation only was required, but indefinite detention as well. . . . That the evacuation and detention were part of a single integrated program is made clear in a recently published report by the War Department. . . .

We submit that the Congress gave neither to the President nor to military authorities any power so far reaching, and that in the absence of legislation the President has no such power even in time of war. . . . It is only when martial law has been declared that executive authority may be exercised over citizens. . . . Finally, we submit that even the President and the Congress, acting together, may not detain citizens of the United States against whom no charges have been preferred. . . . The framers [of the Constitution] permitted the suspension of the writ of habeas corpus,* by which unlawful detention was normally challenged, but permitted such suspension only in time of invasion or insurrection . . . only at a time of direst immediate emergency, not at all as a precautionary measure.

Source: Landmark Briefs and Arguments of the Supreme Court of the United States, 81–83, 302–4.

October 1944 Brief Asking the Supreme Court to Overturn Fred Korematsu's Conviction

General DeWitt does try to show military necessity by reference to reported illegal radio signals which could not be located, lights on the shore, and the like. . . . The Government's brief . . . contains no reference . . . to illicit radio signals, signal lights . . . or to . . . hidden caches of contraband. . . . Moreover, in several respects the recital in the DeWitt Report is wholly inconsistent with the facts of public knowledge. It is well known, of course, that radio detection equipment is unbelievably accurate. . . . Secondly, the fact that no person of Japanese ancestry has been arraigned for any sabotage or espionage since December 7, 1941, certainly suggests, in view of the unquestionable efficiency of the F.B.I., that no such acts were committed. . . . Nowhere in [DeWitt's *Final Report*] is there a line, a word, about the reports of other security officers. General DeWitt does not tell us whether he consulted either the Director of the Federal Bureau of Investigation or the Director of the Office of Naval Intelligence. . . . Since no recommendation from either the Office of Naval Intelligence or the F.B.I. are referred to, one can only assume either that they were not sought or that they were opposed to mass evacuation.[1]

* A writ of habeas corpus is an order that a prison official bring a prisoner before a court to show that the prisoner has been arrested and detained for actual legal cause.—Eds.

[1] There is a fair indication that, whether or not its recommendations were asked, the Office of Naval Intelligence would have stated that mass evacuation was wholly unnecessary. In *Harper's Magazine* for October, 1942, there is an article by an anonymous officer . . . [which] is almost certainly from the Office of Naval Intelligence, which has always been understood as primarily concerned with Japanese intelligence work. The concluding paragraph states: "To sum up: the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people. It should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis."

4 *Amicus Curiae Brief Submitted by the Japanese American Citizens' League on Behalf of Fred Korematsu*

The JACL submitted a 200-page "friend of the court" brief that emphasized Japanese American assimilation and loyalty to the U.S. government. In response to the charge that Japanese American loyalty was in doubt because many Japanese Americans held dual citizenship, the JACL brief explained that, prior to 1924, Japanese law automatically conferred Japanese citizenship on any child born of Japanese parents anywhere in the world. After Japanese Americans persuaded the Japanese government to change that law, the percentage of U.S.-born children of Japanese descent holding dual citizenship plummeted by 85 percent.

It has been necessary to present the evidence concerning the assimilation, loyalty and contributions of Americans of Japanese ancestry because . . . [in] all the loose talk about "lack of assimilation" and "close-knit racial groups" there is no hint that the trained investigators who have pursued the subject for years were even consulted. . . . Dr. Robert E. Park, chairman of the Department of Sociology of the University of Chicago, directed a large-scale study of resident Orientals . . . [and] determined that the American of Japanese ancestry "born in America and educated in our western schools is culturally an Occidental, even though he be racially an Oriental." . . .

The civilians who, because they were influenced by Pearl Harbor sabotage rumors, became panic-stricken and requested evacuation . . . did not know the facts. Perhaps the politicians . . . too, were ignorant. But General DeWitt, who ordered the evacuation, certainly must have been aware of the truth and must have been cognizant of the grounds on which his fellow officer, General Delos C. Emmons, refused to order mass internment of the persons of Japanese descent in Hawaii.

Why then did General DeWitt, in spite of what he knew or could easily have learned, act upon the advice of racists and mean-spirited economic rivals? We contend that General DeWitt accepted the views of racists instead of the principles of democracy because he is himself a confessed racist. . . . On April 13, 1943, in testifying before the House Naval Affairs Committee in San Francisco, General DeWitt . . . said:

> A Jap's a Jap. . . . I don't want any of them. We got them out. . . . They are a dangerous element, whether loyal or not. It makes no difference whether he is an American citizen. Theoretically, he is still a Japanese and you can't change him.

Source: Landmark Briefs and Arguments of the Supreme Court of the United States, 504–6, 527–28.

5 *The Opinion of the Supreme Court*
Issued December 18, 1944

Justice Hugo L. Black issued the eight-page majority opinion of six of the Court's nine judges. Chief Justice Harlan Stone and Justices Stanley Reed, Felix Frankfurter, Wiley Rutledge, and William O. Douglas concurred. All of those justices, except for Chief Justice Stone were appointed to the Supreme Court by President Franklin Delano Roosevelt.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometime justify the existence of such restrictions; racial antagonism never can. . . . Executive Order 9066 . . . declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage." . . . In *Hirabayashi v. United States* . . . we sustained a conviction obtained for violation of the curfew order. . . . It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. . . .

We uphold the exclusion order as of the time it was made and when the petitioner violated it. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. . . . Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. . . . The contention is that we must treat these separate orders [for exclusion and for detention] as one and inseparable; that, for this reason, if detention in an assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand. . . . We cannot say . . . that his presence in that [assembly] center would have resulted in his detention in a relocation center. . . . It is sufficient here to pass upon the [exclusion] order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. . . . To cast this case in the outlines of racial prejudice, without reference to real military dangers which were presented, merely confuses the issue.

Source: United States Reports, vol. 323, Cases Adjudged in the Supreme Court at October Term, 1944, 214–24.

6 *Justice Owen J. Roberts, Dissenting from the Majority*

Justice Roberts was one of only two justices on the Supreme Court in 1944 who had not been appointed by President Roosevelt. In his five-page dissent, Justice Roberts criticized the majority's reliance on the *Hirabayashi* precedent and its claim that it was valid to rule narrowly on evacuation and not address the question of detention without trial.

The predicament in which the petitioner thus found himself was this: he was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the program of evacuation and relocation of Japanese makes it entirely clear . . . that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order. . . . The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. . . . If the exclusion . . . were of that nature the *Hirabayashi* case would be an authority for sustaining it. But the facts above recited . . . show that the exclusion was part of an overall plan for forcible detention. . . . The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. . . . We know that is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case?

Source: United States Reports, vol. 323, Cases Adjudged in the Supreme Court at October Term, 1944, 225–30.

7 *Justice Frank Murphy, Dissenting from the Majority*

Justice Murphy had voted with all the other justices in the 1943 *Hirabayashi* case, upholding a curfew for West Coast residents of Japanese descent. His written opinion in that case stated that such a curfew for one ethnic group bore "a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany" and "goes to the very brink of constitutional power." In his ten-page dissent from the majority's decision in *Korematsu*, Justice Murphy focused on balancing military necessity and citizens' constitutional rights.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgements of the military

Source: United States Reports, vol. 323, Cases Adjudged in the Supreme Court at October Term, 1944, 233–42.

authorities. . . . Their judgements ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the security of the nation. At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. . . . The military claim must subject itself to the judicial process of having its reasonableness determined. . . . The action [must] have some reasonable relation to the removal of dangers of invasion, sabotage, and espionage. But the exclusion of all persons with Japanese blood in their veins has no such reasonable relation . . . because [it] must necessarily rely for its reasonableness on the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage. . . . It is difficult to believe that reason, logic or experience could be marshalled in support of . . . this erroneous assumption of racial guilt. In [General DeWitt's] *Final Report* . . . he refers to all individuals of Japanese descent as "subversive," as belonging to an "enemy race" whose "racial strains are undiluted." . . . Justification for the exclusion is sought . . . mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgement. . . . A military judgement based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgements based upon strict military considerations. . . . I dissent, therefore, from this legalization of racism.

8 *Justice Robert Jackson, Dissenting from the Majority*

In his six-page dissent, Justice Jackson challenged the relevance of *Hirabayashi* as a precedent and distinguished between the immediate decisions of the military and the precedent-setting decisions of the Supreme Court.

It is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. . . . But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military

Source: United States Reports, vol. 323, Cases Adjudged in the Supreme Court at October Term, 1944, 242–48.

precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they were constitutional. . . .

Much is made of the danger to liberty from the Army program of deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however constitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution . . . the Court for all time has validated the principle of racial discrimination. . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own. . . . Nothing better illustrates this danger than does the Court's opinion in this case. It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi v. United States*, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. . . . Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. . . . Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.