Solicitor General Charles Fahy and Honorable Defense of the Japanese–American Exclusion Cases

by CHARLES SHEEHAN*

I. "WRENCHING THE TRUE CAUSE THE FALSE WAY"[1]

The exclusion cases draw limitless commentary. Their defenders, if any, are silent. Their detractors occupy a field rich with constitutional spoils. They long ago hollowed out and carried off the core of executive and military orders, legislative acts and judicial decisions. None could wish it otherwise.

The cause to right the great exclusion wrong took a turn sharply personal during a ceremony marking 2011 Asian American and Pacific Islander Heritage Month at the Department of Justice. Acting Solicitor General Neal Katyal[2] rose in the Department's Great Hall and traduced a predecessor. Charles Fahy, wartime Solicitor General,[3] drew "dark times" on his Office in defending the Japanese-American exclusion cases, said Katyal.[4]

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[1] William Shakespeare, The Second Part of King Henry the Fourth, act 2, sc. 1, l. 846.

[2] Acting Solicitor General of the United States, May 2010-June 2011.

[3] 1892-1979. Solicitor General of the United States, 1941-45. Naval Aviator, 1917-1919; General Counsel, National Labor Relations Board, 1935-40; Legal Advisor, Military Governor, Germany, 1945-46; Legal Advisor, U.S. Department of State, 1946-47; Chairman, President's Committee on Equality of Treatment and Opportunity in the Armed Services, 1948-50; Judge, Court of Appeals for the District of Columbia Circuit, 1949-1979.

[4] Posting of Mike Scarcella to The Blog of Legal Times, http://legaltimes.typepad.com/blt/ (May 24, 2011, 3:27 PM). Katyal closely aligns his accusations against Fahy with those of Peter Irons. Passim.

In a one page "confession of error" blog,[5] Katyal reported that Fahy knew of a "key" report "from the Office of Naval Intelligence," that Department "attorneys" warned Fahy that withholding it from the Supreme Court in the Hirabayashi case risked "suppression of evidence."[6] Besides dismissing these admonitions, Fahy also knew that "key" allegations justifying internment were false, yet failed to tell the Court in the Korematsu case.[7] The extra-judicial "confession" for Fahy which Katyal began while in office continued after he left it.[8]

New aspersions do not mean new questions. Over sixty-five years ago legal scholars struck quickly at fresh exclusion decisions. Much fault was found, none with government litigators.[9] Some twenty-five years ago, Solicitor General Charles Fried, in vigorously contested Supreme Court litigation, took the position precisely opposite Katyal's. In multiple briefs for the United States, Fried measured Fahy's conduct against Katyal-like charges, found no warrant for confessing error and roundly disputed any charge of Fahy misconduct.[10]

Another organ of government in the 1980s spoke also. Congress chartered the Commission on Wartime Relocation and Internment of Civilians "to gather facts to determine whether any wrong was

[5] The customary forum for confession of error by the United States is a federal courtroom, where the "confession" bar is high. The Supreme Court holds in dim regard the lone government official who, even in the course of litigation, offers "confession of error" for the "entire . . . executive and judicial branches." Sibron v. New York, 392 U.S. 40, 58 (1968).

[6] Posting of Neal Katyal, Acting Solicitor General of the United States, "Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases," http://blogs.usdoj.gov/blog.archives/1346 (May 20, 2011) 9 [hereinafter Katyal Blog].

[7] *Id.*

[8] E.g., Neal Katyal, former acting Solicitor General, The Justice Department in Times of War: Lessons from the World War II Cases, Judge George Bundy Smith Lecture, New York City Bar Association, Committee on Minorities in the Courts (April 15, 2013); The Solicitor General and Confession of Error: The Hirabayashi Case, Reed Lecture Series, Fordham University Law School (Mar. 8, 2012)(transcribed at 81 Fordham Law Review 3027 (2012-13) [hereinafter Reed Lecture]. *See also* Neal Katyal, Op-Ed, The Legacy of a Lonely Fight Against Japanese Internment, Wash. Post, Jan. 8, 2012, at B2 [hereinafter Katyal Op-ed].

[9] *See* discussion, *infra* at 508-11.

[10] *See* discussion, *infra* at 509-13.

committed" by the exclusion program.[11] The Commission held six months of hearings and took testimony of over seven hundred and fifty witnesses. It put the entire internment cases record to review by members of Congress, historians, public figures and a former Justice of the Supreme Court. While finding fault with Attorney General Biddle, who "did not argue" against the program to the President, the Commission found not a single instance of fault by government litigators.[12]

The full record lies open. As the Solicitor General carries the single attribute of being "learned in the law,"[13] Katyal may be asked whether, dispensing judgment on Fahy, he minds also those "stubborn things" John Adams stood before the mob—"facts."[14]

II. HIRABAYASHI

1. *"There was Fear of Japanese Attacks on the West Coast"*

Three floors above the Great Hall, on another spring day sixty-eight years before Katyal's speech, a memorandum appeared on the desk of Solicitor General Fahy. It was the last day of April 1943.

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[11] S. Rep. 96-751, 96th Cong., 2d Sess. 1, 3 (1980).

[12] Report of the Commission on Wartime Relocation and Internment of Civilians (hereinafter Commission), Personal Justice Denied (Washington: Government Printing Office, 1982) at 8-9 [hereinafter Personal Justice]. *See* discussion, *infra* at 509-11.

One district court extolled the "substantial indicia of trustworthiness" due Commission findings, Korematsu v. United States, 584 F. Supp. 1406, 1416 (N.D. Cal. 1984). It then broke from the Commission finding that no blame attached to government lawyers, observing that "facts . . . provided to the [Supreme Court]" by government lawyers "were those contained in a report [of General DeWitt]." *Id.* at 1418. Omitted by the district court was one crucial fact: the government offered the DeWitt report not for substantive facts of claims supporting military necessity, but for only "statistics and other details" pertinent to the exclusion program. *See* discussion, *infra* at 502-13.

[13] "The President shall appoint . . . a Solicitor General, learned in the law . . ." 28 U.S.C. 505.

[14] "'Facts are stubborn things,' [Adams] told the jury, 'and whatever may be our wishes, our inclinations, or the dictums of our passions, they cannot alter the state of facts and evidence.'" David McCullough, John Adams 68 (Simon and Schuster 2001).

Edward Ennis, Director of the Alien Enemy Control Unit, Department of Justice, was troubled. For any litigation, much less a constitutional war powers case during wartime, the hour was exceedingly late. In eight days the United States would file its brief with the Supreme Court seeking to uphold the curfew order under which Gordon Hirabayashi was convicted. Two days later the Court would hear oral argument.

Ennis was helping prepare the brief. The "Japanese problem," read his memorandum to Fahy, was "magnified out of its true proportion."[15] The scale of evacuation went well beyond that justified by "not more than 10,000 known Japanese" properly subject to removal, and should be handled on an individual basis.[16] Attached was a "report" Ennis claimed to be from a Navy intelligence officer.

The "Japanese problem" had spurred the war making branches of government to action shortly after the outbreak of hostilities.[17] On February 19, 1942, President Roosevelt issued Executive Order 9066 and authorized the Secretary of War and military commanders to "prescribe military areas in such places . . . as he or the appropriate Military Commander may determine, from which any and all persons may be excluded . . . subject to whatever restrictions the . . . Commander may impose in his discretion."[18]

Executive Order 9066 was based on "military necessity" to secure the national defense against sabotage and espionage.[19] It drew immediate government-wide "unity."[20] Attorney General Francis Biddle supplied a memorandum to the President "justifying the Executive Order and its broad grant of powers to the military."[21] Con-

[15] Memorandum from Edward J. Ennis, Director, Alien Enemy Control Unit, to Charles Fahy, Solicitor General (April 30, 1943) 1 [hereinafter Ennis Memorandum].

[16] *Id.*

[17] Personal Justice, *supra* note 12, at 49.

[18] 7 Fed. Reg. 1407 (1942).

[19] A "string of victories" was scored by Japan against the United States and allies in the war's early months, including at Guam, Midway, the Philippines and Thailand. Personal Justice, *supra* note 12, at 5. "There was fear of Japanese attacks on the West Coast." *Id.* Also abroad was the widespread belief propagated by the Secretary of the Navy, that sabotage and fifth column activity by ethnic Japanese in Hawaii assisted the Pearl Harbor attack. *Id.* West coast politicians also pressed for control of the ethnic Japanese. *Id.*

[20] Personal Justice, *supra* note 12, at 85.

[21] *Id.*

gress, with "no civil liberty opposition,"[22] fell to ratifying the military orders. On March 21, 1942, it decreed that anyone who "shall enter, remain in, leave or commit any act in any military area . . . contrary to the restrictions applicable . . . or contrary to the order of the . . . military commander, shall . . . be guilty of a misdemeanor."[23]

One commander, Lieutenant General John L. DeWitt, moved quickly.[24] On March 2, 1942, he designated certain "military areas" from which "persons or classes of persons as the situation may require" could be excluded or restricted.[25] On March 24, 1942, "persons of Japanese ancestry" in such areas were put under residential curfew between 8 PM and 6 AM,[26] and on May 10, 1942, another order excluded persons of Japanese ancestry from particular areas.[27] An immense burden lowered on west coast citizens of Japanese ancestry. Ensuing months saw over 100,000 people ordered from their homes and livelihoods and schools to "relocation centers" in the interior west.[28]

2. *The Ennis Memorandum*

A. "I Thought this Article Interesting even Though it was Substantially Anonymous"

In his opening passage, Ennis anchors his claim of a "magnified" Japanese threat on one source only—a popular magazine article.[29]

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[22] *Id.* at 99. In the legal community, likewise, "display of interest" in these momentous decisions was "exceedingly slight." Nannette Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 Col. L.R 175, 180 n.19 (1945) [hereinafter Racial Discrimination]. The Japanese American Citizens League (JACL) "strongly urged cooperation as evidence of loyalty." Jerry Kang, Denying Prejudice: Internment, Redress, and Denial, 51 U.C.L.A. L. Rev. 933, 943 (2004) [hereinafter Denying Prejudice].

[23] 18 U.S.C. 97a, 56 Stat. 173 (1942).

[24] DeWitt was Commanding General of the Western Defense Command, responsible for west coast security. Personal Justice, *supra* note 12, at 6.

[25] Public Proclamation No. 1, 7 Fed. Reg. 2320 (1942).

[26] Public Proclamation No. 3, 7 Fed. Reg. 2543 (1942). The curfew applied also to "all alien Germans, all alien Italians." *Id.*

[27] Civilian Exclusion Order No. 57 (1942).

[28] Personal Justice, *supra* note 12, at 2-3.

[29] ". . . Harpers Magazine for October 1942, which contains an article entitled The Japanese in America: The Problem and Solution. . . ." *Id.*

"I thought this article interesting even though it was substantially anonymous."[30] The article is "said to be by" an intelligence officer,[31] for Ennis had come upon a report by Lt. Com. K.D. Ringle, an Assistant District Intelligence Officer for the 11th Naval District, which included Los Angeles.[32] Comparing the report to the anonymous article "leaves no doubt" that Ringle authored the article.[33] Ennis pronounces it to warrant "much more significance,"[34] and attaches the report.

If the report is offered to redeem the anonymous article, Ennis leaves it to drift unused. Nearly one quarter of his memorandum is quotations from the supposed second-hand magazine article. From the supposed first-hand Ringle report Ennis quotes not a word.

B. "I Have . . . Been Most Informally . . . Advised"

Had Solicitor General Fahy read beyond the memorandum's unpromising start—a "substantially anonymous" magazine article—he would have seen Ringle rendered in a blur of roles and importance. Unprepossessing upon introduction as an "assistant" naval investigative officer "on duty" in the Los Angeles District since 1940,[35] Ennis then places him simultaneously "in charge of" 11th District naval intelligence,[36] and "represent[ing] the views" of "Naval Intelligence Officers" responsible for all Japanese counter-intelligence[37]—a presumably nationwide network.

As Ennis unfolds Ringle's high, if erratic, influence within the Navy, he also projects Ringle sway across the breadth of the military establishment. The Navy "loaned" Ringle to the Army to prepare a "background" intelligence report on the Japanese question.[38] Then came Army "permission" for Ringle to anonymously publish his find-

[30] Ennis Memorandum, *supra* note 15 at 1.

[31] *Id.* at 2. Whoever so "said" is not named, nor does Ennis identify his or her rank or place.

[32] *Id.*

[33] *Id.* at 2.

[34] *Id.* at 1.

[35] *Id.* at 2.

[36] *Id.*

[37] *Id.*

[38] *Id.* The Japanese evacuation program was administered by the Army War Relocation Authority. *Id.*

ings, resulting in the Harper's article.[39] Deeper military confidences follow, such as terms of the "delineation agreement" under which the Army was "bound by the opinion" of the Navy.[40]

The Department lawyer's purported deep knowledge of internal military affairs flows from two springs. One is naked assertion without first-hand information or official source: Ringle authored the Harper's article;[41] Ringle was "in charge of" 11th District intelligence;[42] Ringle obtained Army "permission" to anonymously publish his report;[43] Naval officers "believe" only limited evacuation necessary but "presumably" felt it "safer to keep quiet" than speak up and endorse the Ringle report;[44] "we now know it represents the views of the naval intelligence agency;"[45] the Army was "bound" to Navy "opinion" on the Japanese question.[46] Claims clash. The Army is "bound" unqualifiedly to Ringle's views and bound also "to a very considerable extent."[47] Ringle views are "Navy" views,[48] one page after they were "not of the Navy."[49] No assertion is accompanied by any stated support.

The other Ennis foundation is conceded hearsay: that Ringle was loaned to the Army Ennis knew "entirely unofficially;"[50] that Ringle views are Navy views "I have . . . been most informally . . . advised"[51]—or so "[i]t has been suggested"[52] or "has come to me informally;"[53] that a secret Army-Navy agreement ceded Japanese-ancestry policy to Navy dominion "I have repeatedly been told"[54]

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[39] *Id.*
[40] *Id.* at 2.
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.* at 3.
[46] *Id.*
[47] *Id.* at 4.
[48] *Id.* at 3.
[49] *Id.* at 2.
[50] *Id.* at 2.
[51] *Id.*
[52] *Id.*
[53] *Id.* at 4.
[54] *Id.* at 3.

although "I have not seen the document."[55] Ennis's claim to military privity strains utmost with his revelation of one armed services branch opining on the weight due the decision of another: Army attorneys "have advised that the Ringle memorandum represents the official Navy view."[56]

C. "It is My Opinion that this is the Most . . . Objective Discussion of the Security Problem"

As his memorandum enters its latter passages, the civilian lawyer shifts into the persona of a senior intelligence service official. "It is my opinion," states Ennis, "that [the Ringle report] is the most reasonable and objective discussion of the security problem."[57] This is so "in view of the inherent reasonableness of the [Ringle] memorandum."[58] He assumes the confiding institutional plural: "We have positive knowledge" that the Office of Naval Intelligence advised General De Witt against evacuation.[59] "[W]e now know" that the Ringle report speaks for naval intelligence.[60]

D. "[I]f in Fact"

The final page turns dark with warning. The Solicitor General should "consider very carefully" the "duty" to inform the Court of the Ringle report and its claim that the Japanese threat was "magnified."[61] Failing this duty would "approximate" the "suppression of evidence."[62] Yet, he concedes, the crucial "fact" girding up the ominous charge—that the Ringle report "represents the view of the Office of Naval Intelligence"[63]—"comes to me informally."[64]

Just past the grave admonition, Ennis vacillates. A fissure opens in the adamant, a tentative "if."[65] The indispensable hinge may be

[55] *Id.*
[56] *Id.* at 4.
[57] Id.
[58] Id.
[59] Id.
[60] Id.
[61] Id. at 4.
[62] Id.
[63] Id.
[64] Id.
[65] Id.

missing. Ringle may not speak for the Navy. Fahy, Ennis finally recommends, should confirm his claims. Fahy should inquire with the Secretary of the Navy whether, "if in fact," Ringle's views and naval intelligence actually "coincided."[66]

3. The Ringle Report

A. "The Following Opinions . . . are Held by the Writer"

With the diffident end to a badly listing presentation, the brief deadline days away, the Solicitor General could well have let the attached report go unread. The record shows no senior Office of Navy Intelligence or other military officials, nor any senior Department of Justice official, approaching the Solicitor General with cautionary information. Suppose Fahy nonetheless decoupled the attachment from its proponent. Fahy knew Ennis.[67] Who was Ringle, and just what were the contents of his report?

Ringle introduced himself as an "Assistant" District Intelligence Officer (DIO) in the 11th naval district.[68] Navy veteran Fahy would have noted his rank toward the middle to lower end of a many-rung organization. Superior to an Assistant DIO were the 11th District Commandant, the Chief of Naval Operations, Assistant Secretary of the Navy and Secretary of the Navy. In a parallel line was the Office of Navy Intelligence, headed by a Rear Admiral. Above all Navy components stood the War Department establishment. The command structure made Ringle a single assistant in a single component of a single service branch.

There was the matter of expertise. On the "Japanese question" nothing on the face of the report marked Ringle with wide or singular qualifications. Writing in January 1942, he claims "charge" of naval intelligence "in Los Angeles and vicinity from July 1940 to the

[66] *Id.*

[67] Ennis and Fahy began their professional association before the war, when both served on the Justice Department group advising the War Division on enemy alien policy. Memoirs of Charles Fahy, Columbia University Oral History Project Collection (1958) 123 [hereinafter Fahy Columbia History].

[68] Report on the Japanese Question, Lt. Commander K.D. Ringle to Chief of Naval Operations via Commandant, Eleventh District (Jan. 26, 1942) at II(1)(c) [hereinafter Ringle report].

present time."[69] He tells of three student years language study in Japan during the 1920s,[70] and a period as assistant DIO in Hawaii.[71]

Ennis touted Ringle's "loan" to the Army, his advising the Army against evacuation, the Army "bound" by his views, Army permission to anonymously publish those views in Harper's, his speaking for "the Navy" on the Japanese question.[72] About any of these high claims for his stature or influence Ringle is silent. He signaled quite the opposite. As he modestly commenced his report: "The following opinions . . . are held by the writer. . . ."[73]

B. "[T]he Most Potentially Dangerous Element of All"

One Ringle "opinion," seven weeks after Pearl Harbor and President Roosevelt's declaration of war, was that "the entire 'Japanese Problem' has been magnified out of its true proportion . . . and . . . should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis."[74] If Fahy read Ringle's succeeding pages, he would have seen matters of a far different cast, an opinion narrowed and hedged by a series of factually detailed claims. None cited any external source. All conveyed troubling information.

The majority of Japanese-born aliens were "at least passively loyal to the United States" and would "knowingly do nothing" to harm the United States.[75] Yet "they would not do anything to the injury of Japan."[76] "[M]ost might well do surreptitious observation work for Japanese interests if given a convenient opportunity."[77]

Other forebodings follow, more ominous. Among the Japanese-ancestry population were "certain individuals" either "deliberately placed" by Japan or "actuated by fanatical loyalty" to Japan who "would act as saboteurs or agents."[78] In number they are believed

[69] *Id.*

[70] *Id.* at II(1)(a).

[71] *Id.* at (b).

[72] *See* discussion, *supra* at 473-76.

[73] Ringle report, *supra* note 68, at I.

[74] *Id.* at (h).

[75] *Id.* at (b).

[76] *Id.*

[77] *Id.*

[78] *Id.* at (c).

"less than three percent of the total," their identities "fairly" well known to the Navy and FBI.[79]

Behind this shadow class stood "the most potentially dangerous element of all": American citizens of Japanese origin whose "formative" years passed in Japan.[80] "These people are essentially and inherently Japanese. . ."[81] The Japanese government may have "deliberately sent" these "agents" to the United States.[82] "[T]hey should be looked upon as enemy aliens and many of them placed in custodial detention."[83]

4. *The Keisker Memorandum*

"[The Ringle Report] Does Not Represent the Final and Official Opinion of the Office of Naval Intelligence"

In his memorandum's wavering close, Ennis urged that Fahy ask "if in fact" Ringle and Navy views "coincided." Whether Fahy communicated with naval leadership is not known. Had he done so he would have learned that the Chief of Naval Operations (CNO) indeed knew the Ringle report. CNO Commander Keisker received it from Ringle's superior. Just over two weeks after Ringle completed his report Keisker forwarded it to senior FBI official Edward Tamm.[84] The Ringle report, Keisker emphatically told Tamm, "**does not represent the final and official opinion of the Office of Naval Intelligence** on this subject . . ."[85]

Keisker, however, confirmed official Navy disavowal of the Ringle report to more organizations than just the FBI. At the bottom of Keisker's memorandum to Tamm were three "copy to" offices. The Military Intelligence Division and Special Defense Unit of the Department of Justice were listed. Between them was another: the

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[79] *Id.*

[80] *Id.* at (f).

[81] *Id.*

[82] *Id.*

[83] *Id.* Ringle gives no indication that federal authorities know the identities of these "agents."

[84] Memorandum from H.E. Keisker, Commander, U.S.N.R. to E.A. Tamm, Federal Bureau of Investigation (Feb. 14, 1942) [see http://home.comcast.net/~eo9066/1942/42-01/Ringle.html].

[85] *Id.* (bold in original).

"Enemy Alien Control Unit, Department of Justice." Its Director was Edward Ennis.[86]

5. The Government Brief

A. "[He] . . . Believed that it Was His Right . . . as an American Citizen to Refuse to Obey"

Fahy opened his Hirabayashi brief with a portrait of sturdy American virtue. Gordon Hirabayashi's parents, "subsequent to their conversion in the Christian religion . . . never returned to Japan."[87] Gordon was "active in the Boy Scout Movement and the University Y.M.C.A.,"[88] a child of the state public school system majoring in mathematics at the University of Washington when arrested.[89] No trace of disloyal leanings was found and any such suggestion rejected. Gordon "never [had] any connection with the Japanese living in Japan."[90] On his moral quality and patriot courage the introduction closes:

> He honestly believed that the exclusion order and curfew regulation discriminated against him purely on the basis of race or color and were unconstitutional and that for him to obey them voluntarily would be a waiver of his constitutional rights; that [he] believed that it was his right and his duty as an American citizen to refuse to obey the exclusion order and the curfew regulation and to defend the prosecution in order to have the constitutional questions determined.[91]

The young man's predicament opens a grim catalog of miseries endured by the west coast Japanese-ancestry population. Seven laws in six states bar alien Japanese land ownership or intermarriage with Caucasians.[92] Federal immigration law largely excludes Asians.[93] Their employment opportunities are severely

[86] *Id.* *See* discussion, *infra* at 22.

[87] Brief for the United States, Hirabayashi v. United States, No. 870 (Supreme Court 1943) at 82 [hereinafter Hirabayashi Brief] at 9-10.

[88] *Id.* at 10.

[89] *Id.* He had been convicted for violating orders requiring him to report to the Civil Control Station and failing to observe the curfew. *Id.* at 8-9.

[90] *Id.*

[91] *Id.* at 10-11.

[92] *Id.* at 20 nn.18-19.

[93] *Id.* at 20.

constrained.[94] They often live, or are kept, in physical isolation from the white population.[95] A published congressional report warns of "the possibility of civil disorder arising from local violence against the Japanese . . . [as] more than a mere theoretical possibility."[96]

These stark conditions are set in a broad frame of "historical facts" which "embrace the general military, political, economic, and social conditions."[97] This frame, however, exposed the weakness at the heart of the government case. The record, Fahy concedes, "does not contain any comprehensive account of the facts which gave rise to the . . . measures here involved."[98] The appellate attorney's usual quiver of hard evidence, of a trial record or judicial findings below, is empty. The government can only venture a plea that the Court give judicial notice to those "historical facts" and "conditions."[99]

The brief defending military acts of the Chief Executive turns aside virtually all military or executive branch support.[100] Fahy calls on fourteen Japanese-authored books, academic journals or encyclopedia entries, some multiple times, and twenty-four non-Japanese-authored academic sources.[101] Three times he looks to federal congressional reports and once to a state legislative report. The brief's lone military source, a War Relocation Authority quarterly study, "observed" facts supporting Hirabayashi—that "cleavage" between second generation Japanese youth born in the United

[94] *Id.* at 20 n.20.

[95] *Id.* at 21 nn. 21-22.

[96] *Id.* at 32.

[97] *Id.* at 11.

[98] *Id.* at 10-11.

[99] *See* John M. Ferren, Military Curfew, Race-Based Internment, and Mr. Justice Rutledge, Constitutional Commentary, vol. 28, no. 3, 252, 257 (2003) [hereinafter Military Curfew] ("[T]he trial record in Hirabayashi [was] more judicial notice than fact").

[100] Accounts of perils to American forces and the populations were many and alarming. In June 1942 the Japanese attacked in Alaska and Midway and shelled California and Oregon coasts. The Secretary of the Navy set Japanese naval superiority in the Pacific at three or four times that of the United States. Hirabayashi Brief, *supra* note 87, at 14. Reprisals were feared for the 1942 "Doolittle" bombing raid over Japan. *Id.* at 15. For all these facts, Fahy turned exclusively to the New York Times. *Id.* at 13-15.

[101] *Id.* at 12-32.

States and their first generation parents undermined the claim of a threat from Japanese-American youth.[102]

B. "[A] Question Which Does Not Admit of Any Precise Answer"

Fahy next widens the span of historical and general social conditions. As before, he conjures no implacable foes, wields no partisan fist. If the usual case is a chess match, each side striking the opponent from its end of the board, Fahy's brief plays a different game. He advances scarcely a single historical fact, social condition or argument without a qualifying "may" or "possibility." Points couple with counter-points. Military, social, political and historical factors move in a twilight of cautious statement. The advocate, believed Fahy, "should take care to recognize the strength of arguments available to his opponents . . . The case must be seen as a whole."[103]

Of "publicly known" facts about the west coast "military situation," the brief unfolds three categories, each alarm trimmed in tentative wording. There is the lurid tally of Japanese victories, invasions and occupations, only the allied victory at Midway preventing "immediate threat of occupation" of Hawaii.[104] Retaliatory bombing raids by Japan on the United States were, however, just "possible."[105] The "fifth column threat" was "of course . . . not subject to [advance] determination."[106] Concentration of war industries and military bases on the west coast presented a "possible" target for hostile Japanese ancestry residents.[107]

Consideration of social conditions tacks by the same rudder of thesis and antithesis. Fear that antagonistic practices toward the Japanese-American population may breed their loyalty to Japan is paired with concession that Japanese "reaction . . . to their treatment is a question which of course does not admit of any precise answer."[108] The alienage of first generation Japanese-born residents

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[102] *Id.* at 23 n.27.

[103] Charles Fahy, Effective Appellate Advocacy, by Frederick B. Weiner, 3 J. Legal Educ. 472 (1951) (book review). "To know the strength of the opposition is not to weaken one's own position." *Id.*

[104] Hirabayashi Brief, *supra* note 87, at 13-14.

[105] *Id.* at 15.

[106] *Id.* at 16.

[107] *Id.* at 18.

[108] *Id.* at 21.

"would tend" to cause them to have "some" connection with the Japanese government, making propaganda a "possibility."[109] Fahy concedes "no official" data on the number of dual Japanese-American nationals, offering only the "possibility" of their uncertain loyalties.[110] Shintoism, or emperor-worship, is "taken into account," but "difficult . . . to evaluate" if a threat at all.[111]

C. "Most Evacuees are Loyal to This Country"

Equilibrium holds to the end. Education of American-born children in Japan may breed loyalty to Japan, for which the brief cites the Harper's magazine article.[112] But the opposite may lay claim to truth, as "some of them have doubtless" emerged "antagonistic toward the Japanese Government."[113] West coast Japanese language schools represent a "potential" influence which "may" have indoctrinated pupils against the United States.[114] Japanese organizations and civil disorder against the Japanese are of concern, the former left to the conjecture of "[w]hatever may be" their significance,[115] the latter consigned to "[p]ossibility."[116]

The pendulum swing presentation halts but once, on the issue suffusing the entire case and the times. War was abroad. Over the Japanese-ancestry population blew winds of hysteria. Intemperance and racism fueled west coast politics and the press.[117] Widely held or not, Fahy denied any quarter to the view that Japanese-ancestry people were as a race disloyal to America.

Repeatedly he stifles that view. "Most evacuees are loyal to this country,"[118] as the brief adopts the findings of a congressional report. "[I]t may be assumed that a majority of Japanese residents on the west coast were loyal to the United States."[119] "[T]he majority

[109] *Id.* at 23.

[110] *Id.* at 24.

[111] *Id.* at 27.

[112] *Id.* at 29 n.46.

[113] *Id.*

[114] *Id.* at 30.

[115] *Id.* at 31.

[116] *Id.* at 32.

[117] *See* discussion, *supra* at 472-73.

[118] *Id.* at 21 n.23.

[119] *Id.* at 34.

of [persons of Japanese ancestry] might be regarded as loyal to the United States."[120] Fahy openly airs the charge of an officer of the Japanese-American Citizens League that the curfew order was "discrimination,"[121] then broadcasts the officer's patriotism—suggesting general Japanese-American patriotism—by quoting the officer's pledge to oppose "discrimination" only by "democratic means."[122]

The fair hand guided the brief from its opening testimonial to Gordon Hirabayashi, to its even-tenored survey of the military, historical, social and cultural scene, to its repeated repudiations of wholesale Japanese-American disloyalty. "[Fahy's] arguments," the Attorney General and preceding Solicitor General observed, "were like tentative judicial opinions advanced for the consideration of the Court. He was . . . balanced and objective, developing the government's point of view with such quiet skill and fairness that it was sometimes hard to realize that he was representing the United States."[123]

So the brief turned away rattling nation-at-war advocacy to settle on a plain proposition for the Court's consideration. Some small portion of the Japanese-ancestry population, difficult to identify and separate, may be disloyal.[124] A "disloyal minority, if only a few hundreds or thousands, strategically placed, might spell the difference between the success or failure of any attempted invasion"[125]—nearly the very words employed by Edward Ennis, nine weeks earlier, arguing Hirabayashi to the Ninth Circuit Court of Appeals in support of the curfew conviction.

6. "[The Critic] Did Not Easily Miss What He Desired to Find"[126]

A. "[H]e May Choose His Evidence For Only One Side . . . Weighed For Partisan Advantage"

The phrases "suppression of evidence" and "magnified out of its true proportion" are bright plumage, transfixing Katyal and certain

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[120] *Id.* at 61.

[121] *Id.* at 21 n.23

[122] *Id.*

[123] Francis Biddle, In Brief Authority 262 (Doubleday and Co. 1962) [hereinafter In Brief Authority].

[124] Hirabayashi Brief, *supra* note 87, at 61-62.

[125] *Id.* at 61. *See* discussion, *infra*, at 497-98.

[126] Selections from Notes on Antony and Cleopatra, Samuel Johnson on Shakespeare, at 231 (New Penguin Shakespeare Library) (1989).

critics of the exclusion litigation. The most prolific, in books, articles and judicial filings assessing the three chief cases—Hirabayahsi,[127] Korematsu[128] and Endo[129]—and allied to Katyal in condeming Fahy, is Peter Irons.

Irons is both historian and lawyer.[130] The historian muses on the "fuzzy line" between his two species of scholarship—"scholarship as myth and scholarship as advocacy."[131] Historians, says Irons, "bring their values, politics and prejudices to their work."[132] The more "conflictual" the issue the less cause for objectivity: "We do not demand neutrality of those who study the Holocaust or the history of slavery."[133] Towards Fahy's internment litigation Irons lays his motives bare: "I have no desire to conceal those values behind a mask of scholarly 'objectivity' or a veil of 'neutrality'."[134]

The historian is unchecked by lawyer Irons. A lawyer "may choose his evidence for only one side, or in such a way to partially distort the record."[135] The "evidence," for Irons, "is weighed for partisan advantage."[136] Such methods do not "cause [the advocate] qualms."[137]

B. "[T]he Hirabayashi Brief Made the 'Racial Characteristics' Argument"

If accurate quotation and scrupulous reference is the first tenet of the scholar and the lawyer—particularly when assuming the pre-

[127] Hirabayashi v. United States, 320 U.S. 81 (1943) (violation of curfew order).

[128] Korematsu v. United States, 323 U.S. 214 (1944) (violation of exclusion order).

[129] Ex parte Endo, 323 U.S. 283 (1944) (continued detention of loyal citizen).

[130] "I have been trained in both history and law." Peter Irons, Clio on the Stand: The Promise and Perils of Historical Review, 24 Cal. W. L. R. 337 (1988) [hereinafter Clio].

[131] *Id.* at 353.

[132] *Id.*

[133] *Id.*

[134] Peter Irons, A People's History of the Supreme Court (Penguin Books 1999) xv [hereinafter Supreme Court].

[135] Irons, Clio, *supra* note 130, at 354.

[136] *Id.* at 353.

[137] *Id.* Columnist George Will lately enlisted in the rolls of Irons's followers, writing admiringly of his work on Fahy, with generous quotations from his scholarship. Wash. Post, April 25, 2013, Op-Ed at A14 [hereinafter Will Op-Ed].

rogative to condemn and "confess error" for on one unable to speak for himself—Irons and Katyal must answer for much.

Irons states that Hirabayashi addressed those over "100,00 Americans . . . expelled" from their communities "for disloyalty."[138] He misstates on both counts. It was the curfew order, not an expulsion order, before the Court.[139] The premise of the curfew order was not the disloyalty of over 100,000 persons, but of the few "whose number . . . could not be precisely and quickly ascertained."[140]

Irons renders the government's Hirabayashi brief a "'racial characteristics' argument,"[141] featuring a "'racial characteristics'" section.[142] He provides no citation for the "'racial characteristics'" epithet. Indeed, it is absent from the brief. Language so raw does appear in one internment litigation brief: "the very strangeness of appearance of persons of Japanese ancestry." So observed the ACLU, defending Gordon Hirabayashi.[143]

Some words actually in the government brief are plucked out by Irons and Katyal, but first pruned and re-arrayed. Irons records Fahy's "conclusion that 'an unknown number of the Japanese may lack to some extent a feeling of loyalty toward the United States as a result of their treatment.'"[144] Then, says Iron, Fahy stated that such treatment "produced 'a consequent tie to Japan.'"[145]

The brief says neither. In the first "quote," Fahy said: "*it is entirely possible* that an unknown number of Japanese may lack to some extent. . . ."[146] In the second, Fahy said: the Japanese "*may feel* a consequent tie to Japan" as a result of such treatment.[147] The sentence opening the paragraph strikes the same hesitant note. Just how the Japanese ancestry population reacted to their place in so-

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[138] Irons, Supreme Court, *supra* note 134, at 348.

[139] Hirabayashi, 320 U.S. at 105.

[140] *Id.* at 99.

[141] Irons, Justice at War (Oxford University Press 1993) [hereinafter Justice at War] at 197.

[142] *Id.* at 196.

[143] Brief of ACLU as Amicus Curiae at 8, Petition for Writ of Certiorari, Korematsu v. United States, 321 U.S. 760 (1944) (No. 679).

[144] Irons, Justice at War, *supra* note 141, at 197.

[145] *Id.*

[146] Hirabayashi Brief, *supra* note 87, at 21 (emphasis supplied).

[147] *Id.* (emphasis supplied).

ciety "does not admit of any precise answer."[148] Irons lops off the nuanced Fahy subjunctive and grafts in its place the flat, false indicative—that Fahy declared a firm "conclusion" or found ties unequivocally "produced."[149]

Katyal employs like husbandry on the text. It is well he does not lay his accusations before the federal bench, which deals sharply with those failing to quote the record "exactly the way it was,"[150] particularly the "missing phrase" that "[makes] all the difference."[151] Katyal attests that the "brief had a whole bunch of pages about the 'racial characteristics of Japanese-Americans.'"[152] He neither cites one such page (there is none) nor, like Irons, cites the epithet he quotes. Katyal then has the brief claim that persons of Japanese ancestry "*were* . . . motivated by 'racial solidarity,'"[153] that Japanese language schools "*were* 'a convenient medium for indoctrinating people . . .'"[154] These expressions were not only never employed by Fahy. They falsify Fahy's exceedingly more tentative words: "*It is entirely possible*" that an "unknown number" of Japanese ancestry citizens "*may*" feel a sense of "racial solidarity."[155] Japanese schools "*may have afforded*" the medium for indoctrination.[156]

Katyal rebukes Fahy for "gross generalizations" of Japanese-Americans, "such as" that "*they* were disloyal."[157] The generalizations are all Katyal's. He blots out Fahy's thrice repeated rejections of wholesale Japanese-American disloyalty,[158] his spotlight on the

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[148] *Id.*

[149] Adjustments by Irons to the record reach beyond the briefs. He recounts Fahy's oral argument of Hirabayashi to the Supreme Court "in a soft but firm tone." Justice at War, *supra* note 141, at 226. No source citation is provided. Irons was not in court that day. The only account of the argument relates that Fahy "presented the Government's contention," 11 U.S. Law Week 3345, 3346 (May 18, 1943), omitting comment on his "tone."

[150] United States vs. Lopez-Avila, No. 11-10013, *slip op.* at 1743, 1754 (9th Cir., Feb. 14, 2012).

[151] *Id.*

[152] Reed Lecture, *supra* note 8, at 3033.

[153] Katyal Blog, *supra* note 6 (emphasis supplied).

[154] Reed Lecture, *supra* note 8, at 3034 (emphasis supplied).

[155] Hirabayashi Brief, *supra* note 87, at 21 (emphases supplied).

[156] *Id.* at 30 (emphasis supplied).

[157] Katyal Blog, *supra* note 6 (emphasis supplied).

[158] *See* discussion, *supra* at 483-84.

"democratic" principles espoused by a leading Japanese-American figure,[159] his refusal to press his case further than "possible" enemy cooperation by some,[160] even "if only a few hundreds or thousands."[161] Solicitor General Charles Fried rebukes Katyal, observing firm Fahy insistence on the general loyalty of the Japanese-ancestry population.[162]

C. "It Seems Doubtful that the Truth . . . Could Have Been Established Any Better"

The brief's misdeeds, according to Irons, stem from Fahy's "surgery" on the draft prepared by Nanette Dembitz, "the most junior member" of the litigation staff.[163] Fahy cut draft references to "the stimulation of prejudice by opportunistic policies ... as sources of hositility [*sic*]."[164] Fahy failed to retain the draft's "exculpatory" reference to "assaults and hoodlumism" to explain the "keen realization" by Japanese-Americans of prejudice toward them.[165] Thus the final brief was not "even-handed."[166]

Naivete may account for shock at a Solicitor General amending the first efforts of a fledging lawyer in major constitutional litigation, as it may explain Irons's incredulity at Justice Department debates "hidden" from the public and opposing attorneys.[167] Irons touts himself a seasoned federal court litigator,[168] making naivete implausible.[169] The relevance of perceptions of the Japanese-American population, or why one cause of their perceptions was "exculpatory"—or for whom—Irons leaves obscured. If his point is that

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[159] *Id.* at 13.

[160] Hirabayashi Brief, *supra* note 87, at 18.

[161] *Id.* at 61.

[162] *See* discussion, *infra* at 511-14. *See also* discussion, *infra* at 489-90 and nn.172-78.

[163] Irons, Justice at War, *supra* note 141, at 196-97.

[164] *Id.* at 197.

[165] *Id.*

[166] *Id.* at 196.

[167] *Id.* at 198.

[168] E.g., Irons, Clio, *supra* note 130, at 345 (established "legal teams" for multiple coram nobis law suits).

[169] Airing attorney-client and work product communications is precisely what does flout ethical standards.

the brief minimized harsh laws and policies towards Japanese-Americans, the fact was a four page government brief tally of just such state and national laws and policies.[170]

Dembitz reflected on the Hirabayashi brief in an account Irons deems "essential reading."[171] A critic of the exclusion jurisprudence,[172] Dembitz alludes to not a single instance of Fahy interference with her efforts. Quite the contrary, she expresses entire satisfaction with the final brief.

"Rather than" pressing hard facts, she observed, the brief declared no "positive conclusions."[173] It merely "asked the Court to judicially notice the bases for a belief" in loyalty toward Japan by "at least some."[174] Dembitz corrects Katyal's finding of a brief laden with "gross generalizations" of uniformly "disloyal" Japanese-Americans.[175] The brief positively negated the view that general "influences toward disloyalty did in fact exist."[176] A "reasonable man" reading the brief "could not" find in it "reasonable or substantial grounds" for belief in such influences.[177] Indeed, so tempered was the brief that "none of the assertions by the Government as to such bases were denied by Hirabayashi."[178]

Dembitz commends Fahy's balanced deployment of the public record. Japanese schools "on the one hand" were influenced by the government of Japan, but "on the other hand reputable authority stated the schools were innocuous."[179] Countering parental influence of first generation Japanese-ancestry citizens, experts recognized "marked cleavage" between first and succeeding generations.[180] "It seems doubtful," concludes Dembitz, "that the truth [regarding

[170] Hirabayashi Brief, *supra* note 87, at 20-23.

[171] Irons, Justice at War, *supra* note 141, at 371.

[172] Dembitz, Racial Discrimination, *supra* note 22, at 175 ("significant departures from social and legal precedent").

[173] *Id.* at 186.

[174] *Id.* at 185.

[175] Katyal Blog, *supra* note 6.

[176] Dembitz, Racial Discrimination, *supra* note 22, at 185.

[177] *Id.*

[178] *Id.*

[179] *Id.* at n.40, citing Hirabayashi Brief at 30-31.

[180] *Id.*, citing Hirabayashi Brief at 22-23.

influences toward disloyalty] could have been established any better" than by the authorities offered by the government.[181]

Irons nonetheless attacks the final brief's claim of the "virtual impossibility" of separating loyal from disloyal as not "a subject fit for judicial notice."[182] Dembitz, however, applauded the final brief's use of judicial notice for precisely that purpose,[183] and Dembitz observed not a single refutation of a single judicial notice proffer ever made by one of Hirabayashi's many lawyers.[184]

D. "[Ringle] Flatly Contradicted [Military Necessity]"

Katyal lauds Ringle's "key" report "written by naval intelligence"[185] and "represent[ing] the Office of Naval Intelligence's views."[186] Its findings were so "devastating"[187] that they "undermined the [internment] rationale"[188] and "flatly contradicted" its military necessity.[189] Katyal commends Ennis for "warning" Fahy against "suppression of evidence,"[190] a warning joined by other "attorneys"[191] and "government lawyers."[192]

Irons, likewise, deems Ringle "the official most knowledgeable about Japanese-Americans among the personnel of all federal intelligence agencies both before and after the war,"[193] and credits Ringle for "countering evidence."[194] The Ringle report, according to Irons, was addressed "to General DeWitt"[195] and "represented the

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[181] *Id.*

[182] Irons, Justice at War, *supra* note 141, at 198. Irons offers no authority for his judgment of judicial notice "fitness."

[183] Dembitz, Racial Discrimination, *supra* note 22, at 206.

[184] *Id.* at 185.

[185] Katyal Op-ed, *supra* note 8.

[186] Reed Lecture, *supra* note 8, at 3033.

[187] *Id.*

[188] Katyal Blog, *supra* note 6.

[189] Katyal Op-ed, *supra* note 8.

[190] Katyal Blog, *supra* note 6.

[191] *Id.*

[192] Katyal Op-ed, *supra* note 8.

[193] Irons, Justice Delayed at 148 (Wesleyan University Press 1989) [hereinafter Justice Delayed].

[194] Irons, Justice at War, *supra* note 141 at 205.

[195] Irons, Supreme Court, *supra* note 134 at 362.

views of the ONI."[196] As Katyal, Irons attributes to Ennis "the first whiff of legal scandal" in the internment cases.[197]

By the lights of Katyal and Irons, the "meticulous" Fahy[198]—"in his eighteen appearances before the [Supreme] Court [his] arguments were wholly sustained sixteen times and partially upheld twice"[199]—sharpened by years of New Deal constitutional litigation against much of the brightest legal talent of the age (John W. Davis,[200] Wendell Wilkie,[201] Charles Horsky[202] among them) should have been persuaded by the manifestly unmeticulous Edward Ennis and his "substantially anonymous" magazine author.[203]

Eight days before brief filing and ten days before oral argument, Ennis pushed before the Solicitor General a throng of conjecture and implausibility. From his "substantially anonymous" source flow gleanings "informally" or "unofficially" learned, tidings from documents "I have not seen" and military secrets of a nameless "we." The culminating "suppression of evidence" charge, far from the decisive thrust, devolves into the wavering "if in fact"—Ennis sloughing off on Fahy the burden to confirm Ennis's thesis that Ringle spoke at all for the military establishment.

Ringle, one assistant in a single naval intelligence district with modest experience on the "Japanese question," reported exclusively personal "opinions." Behind the "magnified" threat opinion, Fahy would have read a series of claims of certain alarm to national security officials on high wartime alert: Japanese-born aliens who "might well do surreptitious observations work for Japan," Japanese-Americans "deliberately placed" or "actuated by fanatical loy-

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[196] Irons, Justice at War, *supra* note 141 at 206.

[197] *Id.* at 204.

[198] Fahy "gained a reputation during his [1930s] NLRB service as a meticulous legal craftsman. . . ." *Id.* at 224.

[199] Fahy Is Appointed As Aide To Jackson, New York Times, Sept. 7, 1940 (reporting Fahy's appointment as Assistant Solicitor General).

[200] Associated Press v. NLRB, 301 U.S. 103 (1937).

[201] Schneiderman v. United States, 320 U.S. 118 (1942).

[202] NLRB v. Jones and Laughlin Steel Corp., 301 U.S. 1 (1937).

[203] *See also* Solicitor General, Wash. Post, Oct. 30, 1941, at 12 ("When a man gets a high Government appointment by sheer merit, the fact warrants particular attention . . . [Fahy] used no political pull. His record spoke for him and it was eloquent enough to persuade the President to pass over other less-qualified bidders") (reporting Fahy's appointment as Solicitor General).

alty" to Japan who "would act as saboteurs or agents," and "the most potentially dangerous element of all"—Japan-educated youth perhaps "deliberately sent" by Japan as "agents" to the United States.[204]

Far from "devastating" findings "flatly contradict[ing]" military necessity, as Katyal argues, the Harper's article-Ringle report actually magnified, not minimized, the Japanese-American threat. Indeed, the government employed the Harper's article to gird up military necessity in its Hirabayashi and Korematsu briefs.[205]

Besides mischaracterizing the case record, Katyal and Irons habitually misstate its facts. Katyal claims government "attorneys" and "lawyers" inveighed Fahy against defending Hirabayashi.[206] Just one attorney, Ennis, was ever documented doing so—before doubting himself, then reversing himself and giving full support to the government case in Hirabayashi and Korematsu.[207] Katyal names no attorney beyond Ennis. Irons has the Ringle report addressed "to General DeWitt."[208] It was not. It was addressed to Chief of Naval Operations Commander Keisker, alone. No record support puts the Ringle report in DeWitt's possession. As the Commission found: "Navy Intelligence . . . felt it had enough on its hands without contradicting or challenging the Army."[209]

Irons claims that the Ringle report assured that the identities of dangerous Japanese-American youth could be "readily ascertained" from government records.[210] This is false. The report said nothing of the government's capacity to ascertain members of this group.[211] The report did warn that youth "agents" of Japan should be "looked upon as enemy aliens."[212] Irons finds that the government brief in

[204] *See* discussion, *supra* at 478-79.

[205] *See* discussion, *supra* at 483 note 112 and *infra* at 501.

[206] Katyal Blog, *supra* note 6 (emphasis supplied).

[207] Ennis signed not only the Hirabayashi brief, but the Korematsu brief. *See* discussion, *infra* at 498 and 505.

[208] Irons, Supreme Court, *supra* note 134 at 362.

[209] Personal Justice, *supra* note 12, at 60.

[210] Irons, Justice at War, *supra* note 141 at 205.

[211] The Harper's article quoted by Ennis, not the Ringle report, claimed this group to be "readily ascertained." Ennis Memorandum, *supra* note 15, at 1. Irons confuses the two.

[212] Ringle report, *supra* note 69, at (f).

Hirabayashi "contained no mention whatsoever of the [Ringle] report,"[213] and Katyal that the brief makes "no mention" of the report.[214] Both err. The report was cited in the government brief.[215] Irons claims that the Ennis memorandum alerted Fahy to "intelligence reports."[216] This is false. There was one report—Ringle's—discussed in and attached to that memorandum.[217]

One record fact looms particularly large. Commander Keisker alerted Ennis fifteen months before his memorandum to Fahy that the Navy officially repudiated the Ringle report and denied it any military imprimatur. Yet Ennis persisted in peddling the disavowed report's personal "opinion" to Fahy as the definitive military position, employed it to threaten Fahy with "suppression of evidence." Katyal and Irons silently suppress Ennis's own "suppression of evidence."

E. "[W]ritten By Naval Intelligence"

In one narrow sense on one bureaucratic point, Katyal and Irons are quite correct. As Ringle was on the naval intelligence rolls, his report was "from" or "written by naval intelligence."[218] In any sense comprehending the basic structure of the United States government, or military, his was not a report "from" or "written by" naval intelligence.

First, Ringle was an assistant naval officer, not a senior naval official with authority to represent the entire organization. Even the Commission, perhaps not aware of the Keisker memorandum,[219] was skeptical of the assistant officer in one district. "It is difficult to

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[213] Justice Delayed, *supra* note 148, at 151.

[214] Reed Lecture, *supra* note 8, at 3033.

[215] Hirabayashi Brief, *supra* note 87 at 29 n.46 (in its Harper's article form—the only form in which Ennis quoted it in his memorandum to Fahy. *See* discussion, *supra* at 473-74). It was also cited in the government's Korematsu brief. *See* discussion, *infra* at 501 note 266.

[216] Irons, Supreme Court, *supra* note 134, at 362 (emphasis supplied).

[217] "I attach the Department's only copy of [the Ringle] memorandum." Ennis Memorandum, *supra* note 15, at 3.

[218] Katyal Op-ed, *supra* note 8. *See also* Irons, Justice at War, *supra* note 141 at 206.

[219] Below his signature, the Keisker memorandum notes: "DECLASSIFICATION ON 5/14/85." (emphasis in original). *See supra* at note 84.

judge how far one should go in equating Ringle's views with those of Naval Intelligence."[220] Solicitor General Fried disparaged resort to internment litigation documents "which do not reflect the opinions or policy of his superiors within the government."[221] Second, Ringle expressly circumscribed his report to his personal, not organizational, "opinions." Third, Commander Keisker positively disavowed those opinions as speaking for the Navy.

Katyal's denunciation of Fahy cuts wider than just Fahy. Endowing the Ennis memorandum and Harper's article-Ringle report with content explosive enough to annihilate the entire defense, the former Acting Solicitor General diminishes an elite legal office. The Office of the Solicitor General would, Katyal warrants, shrink back before a near-incoherent, ultimately wavering, staff-authored memorandum—presented eight days before brief filing. Impelled by inexorable "duty," the office would withdraw representation of the President and Congress at the peril of "suppression of evidence"—although the memorandum's author would willingly sign the supposedly flawed brief.

Katyal's Office of the Solicitor General would credit, say, one personal "opinion" of an un-endorsed, middle to lower-level officer in a Department of Defense field office, although that opinion disputes official Department policy, is contradicted by many specific findings in the same document and was affirmatively repudiated by senior Department leadership. The Solicitor General would nonetheless exalt that one opinion as "from" or "written by" the Department with all the weight of senior Department leadership behind it, and sweep away official Department policy.[222]

If Ringle were indeed the Ennis-Katyal-Irons-touted "official most knowledgeable" on the "Japanese question"—and his "opinion" of

[220] Personal Justice, *supra* note 12, at 54.

[221] Petition for Writ of Certiorari, Brief for the United States in Opposition at 4, Hohri v. United States, No. 88-215 (Supreme Court 1988) [hereinafter Hohri I]. (All pagination references to the Hohri line of cases are from the "www.justice.gov/osg/briefs" site).

[222] Katyal turns (see Katyal Blog, *supra* note 6) to a federal Court of Appeals decision criticizing War and Justice Department lawyers for ignoring the Ennis memorandum and Ringle report. Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987). That Court delved as lightly into the record as Katyal. It bypassed the memorandum beyond quoting its "suppression of evidence" charge, *id.* at 602; it overlooked the report beyond finding Ringle "expert" on the Japanese question and from the Office of Naval Intelligence. *Id.* at 603.

a "magnified threat" not swallowed up by his many positive alarms of specific Japanese-American threats—Ennis nonetheless knew then, as Katyal and Irons must know now, that senior leadership rejected Ringle's opinion. And if Katyal and Irons could strike from the record Keisker's repudiation of Ringle or strike his report's many warning of Japanese-American threats, they still must reckon with the ultimate word of Edward Ennis, dissolving in a cloud of doubt whether his "suppression of evidence" charge "if in fact" were true at all.

7. Edward Ennis, Government Lawyer

A. "[Ennis] Acted Outside the Rules and Proprieties of the Courts"

Edward Ennis—the anchor to which Katyal and Irons lash their case against Fahy—was, as his memorandum, shifting and unsteady.

He was, he represented, an "attorney in the solicitor general's office in Washington."[223] This was almost certainly not true during Fahy's tenure.[224] Ennis's own testimony renders it absolutely not true during the internment litigation years when he was Director of the Alien Enemy Control Unit,[225] and so identified himself in signing both the 1943 Hirabayashi and 1944 Korematsu briefs.[226] Irons cannot place Ennis in the Office of the Solicitor General. "Two groups of lawyers jockeyed for position" within the Justice Department on the Hirabayashi case,[227] "one in the Alien Enemy Control

[223] Interview of Edward J. Ennis, Earl Warren Project of the Regional Oral History Office, University of California, 1972, at 1 [hereinafter Ennis Interview]. George Will incorrectly elevates Ennis to the ranks of the presidentially appointed-confirmed by the Senate, placing him among Department of Justice "assistant attorney generals [*sic*]." Will Op-Ed, *supra* at note 137.

[224] Fahy's memoirs name many attorneys in his Solicitor General's office, e.g., Paul Freund, Alvin Rockwell, Warner Gardner, Fahy Columbia History, *supra* note 67, at 153-54, Edward Ennis not numbering among them.

[225] "[B]eginning on the night of December 7, 1941, I was director of the Alien Enemy Control Unit of the [Justice] Department . . ." Ennis Interview, *supra* note 223, at 1.

[226] Hirabayashi Brief, *supra*, note 87 at 82; Brief for the United States, Korematsu v. United States, No. 22 (Supreme Court 1944) at 59 [hereinafter Korematsu Brief].

[227] Justice at War, *supra* note 141, at 195.

Unit headed by Edward Ennis" and "the other in the office of Solicitor General Charles Fahy."[228]

Then there is December 7, 1941. According to Ennis (unquestioned by Irons) Ennis—still staff attorney or in another subordinate position before being made Unit Director "the night of December 7, 1941"[229]—led the Department of Justice that day. "Long-standing commitments," said Ennis, took Attorney General Biddle and Fahy "away from Washington."[230] Ennis "called the Solicitor General, who was in Philadelphia making a speech."[231] Ennis assumed all Justice Department responsibilities in the early hours after the attack. "Quickly drafting an emergency [alien] proclamation,"[232] Ennis "rushed this document to the White House."[233]

This was not Solicitor General Fahy's December 7th.[234] Word of the attack reached the east coast early that Sunday afternoon. Biddle was out of town, but "[Arnold] Raum called me at home, and I came down [to the Department of Justice]."[235] "One of our first responsibilities was to lay before the President the proclamation bringing the enemy control act into operation."[236] "I had talked with the President on the telephone earlier in the afternoon,"[237] and "in the late afternoon or early evening" took the proclamation to the White House. "The President was sitting up in bed with a rather large pad and pencil working on a composition of his own, which I assumed was his message to Congress asking for a declaration of a state of war."[238]

Independent sources verify Fahy's account. Entries on the White House appointment log for December 7th show a series of after-

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[228] *Id.*

[229] Ennis Interview, *supra* note 223, at 2.

[230] *Id.* at 3.

[231] *Id.* at 5, quoting Ennis.

[232] *Id.*

[233] *Id.*

[234] Irons declares his full access to Fahy's 1953 Columbia University Oral History Project Collection, Irons, Justice at War, *supra* note 141, at 373, yet accepts the Ennis account without addressing or resolving its large inconsistencies with Fahy's.

[235] Fahy Columbia History, *supra* note 67, at 150.

[236] *Id.*

[237] *Id.* at 151.

[238] *Id.*

noon meetings with Secretaries Stimson, Knox, Hull and General Marshall, with the next entry a 7:00 PM visit by "The Solicitor General."[239] The press reported Fahy at the White House that evening.[240] No record or source puts Ennis at the White House or in any position of responsibility that day.

Besides dubious truthfulness about his professional identity and activities, Ennis, reports even Irons, had slack regard for legal ethics. During the internment litigation when Ennis admonished Fahy on ethics, it was Ennis in open ethical breach. Ennis had a "frank discussion . . . which strained the judicial rules [and] conveyed to [the government's opponent] the opinion that Endo was the 'the only case the Department feels it will lose'."[241] Ennis also drafted a Court of Appeals document without disclosing his authorship and "acted outside the rules and proprieties of the courts and the adversary system."[242]

B. "'Incalculable Damage' On Military Installations 'Even if Only a Few Hundred' Had Attempted to Assist a Japanese Invasion"

In his April 30, 1943 memorandum to Fahy, Ennis challenged the veracity of a "magnified" Japanese ancestry threat. The government voice for precisely that threat, nine weeks earlier, was Edward Ennis.

On February 20, 1943, Ennis argued Hirabayashi to the Ninth Circuit Court of Appeals. Fahy supervised appellate litigation and would have known the government attorney's warning to the Court that day: "Japanese Americans might have inflicted 'incalculable damage' on military installations 'even if only a few hundred' had attempted to assist a Japanese invasion."[243] Ennis, it seems, "had

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[239] www.fdrlibrary.marist.edu/daybyday/daylog/December-7th-1941.

[240] Steven M. Gillon, Pearl Harbor (2011) at 106 ("Reporters noticed that Solicitor-General Charles Fahy had slipped into the White House at around 7:00 p.m.").

[241] Irons, Justice at War, *supra* note 141, at 182.

[242] *Id.*

[243] *Id.* at 179. These were nearly the precise words employed in the government's Hirabayashi brief. *See supra* at 484 and note 125. *See* Lawrence E. Davies, Upholds Japanese in Citizens' Rights, N.Y. Times, Feb. 21, 1943, at 23 (only account of Ennis oral argument).

little trouble standing up in court in defense of exceedingly broad claims of military power and necessity."[244]

The record thus brings Katyal and Irons to a fork. On the Japanese-ancestry threat, Ennis erred in February or erred in April. If his April claim sprang to sudden light on the heels of his February argument, his memorandum would be bound to explain to Fahy the basis for an otherwise inexplicably reversed position. It did not. No middle ground is available. Katyal and Irons must choose: credit the "incalculable damage even if only a few hundred" threat February-Ennis, or credit the "magnified" threat April-Ennis. The two lawyers stand, unequivocally, offering no rationale, with April-Ennis.

Katyal reports Ennis opposing the looming Hirabayashi brief,[245] Irons an Ennis "insurrection."[246] If so, what quickly cooling insurrectionist fires they were, for when Fahy filed the government brief on May 8th, beneath his signature was another: "Edward J. Ennis, Director, Alien Enemy Control Unit."[247]

8. *"Facts of Public Notoriety"*

Judicial notice was a slender limb upon which to advance authority for the curfew orders,[248] but judicial notice had long been welcome by the Court. The government brief cited twenty-seven Supreme Court precedents and five treatises or law review articles demonstrating its acceptance.[249] The nine Justices retained complete prerogative to refuse such notice. "If the Court looked hard, it would have found that there was nothing there—no facts particularly within military competence."[250] The Court elected to not "look hard." It demanded no testimony of military witnesses, no testing

[244] Eric L. Muller, Hirabayashi and Invasion Evasion, 88 N.C. L. Rev. 1333, 1349 (2010).

[245] Katyal Blog, *supra* note 6; Katyal Op-ed, *supra* note 8.

[246] Irons, Fancy Dancing in the Marble Palace, 3 Constitutional Commentary 35, 39 (1986) [hereinafter Fancy Dancing].

[247] Hirabayashi Brief, *supra* note 87, at 82.

[248] Without taking testimony or requiring factual proof, judicial notice allowed courts to take as proven facts so "notorious," Adkins v. Children's Hospital, 261 U.S. 55, 560 (1922), as to be considered "generally known." Brown v. Piper, 91 U.S. 37, 42 (1875).

[249] Hirabayashi Brief, *supra* note 87 at 11 nn.3 and 4.

[250] Personal Justice, *supra* note 12, at 237.

of military necessity against the findings of a trial judge.[251] It "chose not to review the factual basis for the military decisions . . . accepting without close scrutiny the government's representations."[252]

Chief Justice Stone's majority opinion surveyed the public record: military "conditions" in 1942, American forces lost in a string of Japanese attacks and conquests,[253] west coast concentration of military installations and industrial war production,[254] "social, economic and political conditions" of the Japanese ancestry population—more in "solidarity" than "assimilation" into larger society[255]—separate schools and education abroad in Japan for many youths,[256] federal and state legislation limiting Japanese citizenship, employment or intermarriage,[257] dual citizenship,[258] and the influence of the older on the younger generation.[259]

The combined force of such conditions "may well have tended to increase" attachments by the Japanese ancestry population to Japan.[260] There were "many considerations" which the President or Congress "could take into account" in assessing military necessity,[261] such as "facts of public notoriety"[262] or "findings" in military Proclamations.[263]

Satisfied that circumstances known to "those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision,"[264] every Justice of that renowned,

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[251] Dembitz decried the Court's "failure . . . unjustifiable" not to require more, Racial Discrimination *supra* note 22, at 188, Eugene Rostow its refusal to show "affirmative leadership." The Japanese-American Cases–A Disaster, 54 Yale L.J. 489, 504 (1945) [hereinafter Japanese Cases]. *See also* Ferren, Military Curfew, *supra* note 99, at 264 ("the court did not even purport to require trial court findings that General DeWitt had a basis for his judgment").

[252] Personal Justice, *supra* note 12, at 50.

[253] Hirabayashi, 320 U.S. at 93-94.

[254] *Id.* at 95.

[255] *Id.* at 96.

[256] *Id.* at 97.

[257] *Id.* at 96 n.4.

[258] *Id.* at 97.

[259] *Id.* at 98.

[260] *Id.*

[261] *Id.* at 99.

[262] *Id.* at 102.

[263] *Id.* at 103.

[264] *Id.* at 102.

largely New Deal-appointee bench, high in intellect and deep in civil liberties sympathies—Frankfurter, Jackson, Black and Douglas among them—embraced the government case without a dissenting word.[265]

IV. KOREMATSU

1. *"The Final Report . . . is Relied Upon . . . [only] For Statistics and Other Details Concerning the Actual Evacuation and [Subsequent] Events"*

As Fahy opened his Hirabayashi brief on the quality of Gordon Hirabayashi, so Fred Korematsu, convicted of violating a military exclusion order, glows early in Fahy's brief the following year:

> [Korematsu's] testimony, which was not controverted, showed that he has never renounced his American citizenship; that he has never departed from the continental limits of the United States; that . . . he does not possess any form of dual allegiance . . . He registered for the draft and testified that he is willing to bear arms for this country and to render any service requested of him in the war against Japan . . . his testimony also tended to show his lack of sympathy with Japan and his assimilation into the American community . . . [he] has continued to work and live in Alameda County . . . because of friendly relations with its residents, and particularly with a girl who was not of Japanese ancestry, and because he considers himself an American. . . .[266]

The military necessity path was freshly trodden. "The situation leading to the determination to exclude all persons of Japanese ancestry [from two areas] was stated in detail in the Government's brief in Hirabayashi . . . That statement need not be repeated here."[267] The "facts generally known in the early months of 1942 . . . indicated that there was ample ground to believe that imminent danger then existed of an attack by Japan upon the West Coast."[268] Military, cultural and other conditions from the Hirabayashi brief were repeated, including heavy concentration of war production

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[265] Justices Douglas and Murphy concurred. Hirabayashi's second conviction, for failing to report to a Civil Control Station, was not reviewed. Hirabayashi, 320 U.S. at 101.

[266] Korematsu Brief, *supra* note 226, at 4-5.

[267] *Id.* at 11.

[268] *Id.*

on the west coast and assimilation barriers put before the Japanese ancestry population.[269]

The movement of "some" Japan loyalists among the population made it "impossible quickly and accurately to distinguish these persons from other citizens of Japanese ancestry."[270] A Hirabayashi brief source—the Harper's article—fed those anxieties. As that earlier brief noted the article's warning of an active Japan-educated youth,[271] so did the Korematsu brief, this time adding reference the article's claim for its author: "an Intelligence Officer stationed for many years on the West Coast, whose primary duty was the study of the West Coast residents of Japanese ancestry."[272]

The Hirabayashi brief's "historical facts . . . susceptible of judicial notice,"[273] facts which "embrace the general military, political, economic, and social conditions,"[274] reappeared in the Korematsu brief's reference to "military judgment . . . with regard to tendencies and probabilities as evidenced by attitudes, opinions and slight experience."[275] Like the Hirabayashi brief, those "tendencies and probabilities" were unsupported by a single specific or even alleged act of espionage or disloyalty.[276] Openly conceded was the absence of any "conclusion based on objectively ascertainable facts."[277]

The months between Hirabayashi and Korematsu had produced one addition to the record. The June 1942 Final Report of General DeWitt was made public in January 1944.[278] It contained "a number

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[269] *Id.* at 12.

[270] *Id.*

[271] Hirabayashi brief, *supra* note 87, at 29 n.46.

[272] Korematsu brief, *supra* note 226, at 12 n.3 (referring to Harper's Magazine, October 1942 at 564).

[273] Hirabayashi brief, *supra* note 87, at 11.

[274] *Id.*

[275] *Id.* at 57.

[276] "The Justice Department, defending the [Hirabayashi and Korematsu orders] before the Supreme Court, made no claim that there was identifiable subversive activity." Personal Justice, *supra* note 12, at 50.

[277] Korematsu brief, *supra* note 226, at 57.

[278] J.L. DeWitt, Final Report: Japanese Evacuation From the West Coast, 1942 (Washington, DC: U.S. Government Printing Office, 1943) (hereinafter Final Report). The Report played no role in Hirabayashi, as it had yet "not been published." Dembitz, Racial Discrimination, *supra* note 22, at 184.

of factors" bearing on the evacuation program.[279] The Korematsu brief simultaneously noted and set aside the Final Report:

> The Final Report of General DeWitt . . . is relied on in this brief for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. 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.[280]

With these words, dispositive and clear, Fahy explicitly refused to rely on the Final Report except for a narrow band of facts. No part of the Report was used to justify or uphold military necessity. For all substantive claims it was ushered out of the courtroom and off the government stage.

2. *"[W]e Should Not Ask the Court to Take Judicial Notice of Those Facts"*

Behind abjuration of the Final Report lay bureaucratic brawls. For months, Army staff thwarted the two Justice Department attorneys preparing the Department's brief, Edward Ennis and John Burling. As the brief entered its final stage, each put his frustration into separate memoranda to the Department's Assistant Attorney General for the War Division, Herbert Wechsler. Left off either memorandum, unaddressed and uncopied, was Fahy.

Ennis and Burling alerted Weschler to one of six Final Report factors, false in their views, that west coast persons of Japanese ancestry were in communication with Japanese war vessels.[281] The two lawyers had reason for concern.

Attorney General Biddle had requested that J. Edgar Hoover and James Fly, heads of the Federal Bureau of Investigation (FBI) and Federal Communications Commission (FCC), respectively, investigate the veracity of claims that persons of Japanese ancestry were signaling "shore to ship." In February 1944, each reported back to Biddle. In no case, stated Hoover, had "any information been obtained which would substantiate the allegation that there has been

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[279] Personal Justice, *supra* note 12, at 6. Six such factors were noted. *Id.*

[280] Korematsu Brief *supra* note 226, at 11 n.2 [hereinafter footnote 2].

[281] One among the Final Report's six factors was "shore to ship" signaling. Personal Justice, *supra* note 12, at 7.

signaling from shore-to-ship since the beginning of the war."[282] Fly "was of the opinion that the Army's equipment was inadequate, and its personnel entirely incapable of determining whether or not the many reports of illicit signaling were well founded."[283] Biddle kept official silence on the error of the "shore to ship" charge, at least beyond confiding to certain Department of Justice attorneys, for the more than seven months before the brief was filed.

Burling wrote Weschler three weeks before the brief's filing date. He first recommended open disagreement with the Final Report's shore to ship signaling claim.[284] Burling's suggested remedy, however, was not correcting the false claim. Rather, he pressed that the claim be swept from the case altogether: "certainly we should not ask the Court to take judicial notice of those facts."[285]

3. *"[We Should] Refrain from Citing [the Final Report] as a Source [for] Judicial Notice"*

Five days before filing Ennis wrote Weschler.[286] Paralleling Burling's memorandum, Ennis first pushed to note the "conflict" between the shore to ship signaling claim and the FBI and FCC reports.[287] But, like Burling, rectifying inaccuracies did not fuel Ennis. His cause was wounded organizational pride, and vindication in the government brief.

The Army had dealt shabbily with the Justice Department. With months of feints and dissimulations, the Army concealed the draft Final Report from Department eyes and suggested that only Department fecklessness drove the Army to order evacuation. The wound being political, Ennis addresses the chief Department political official for relations with the military, Weschler. Chief lawyer Fahy warrants one offstage mention.[288]

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[282] Biddle, In Brief Authority, *supra* note 123, at 222.

[283] *Id.*

284 "[I]t is important that this Department correct the record." Memorandum from J.L. Burling to Herbert Wechsler, Assistant Attorney General (September 11, 1944) 2 [hereinafter Burling-Weschler]

[285] *Id.*

[286] Memorandum from Edward J. Ennis, Director, Alien Enemy Control Unit to Herbert Wechsler, Assistant Attorney General (September 30, 1944) [hereinafter Ennis-Weschler].

[287] *Id.* at 1.

[288] "I understand that the War Department is currently discussing with the Solicitor General the possibility of changing the footnote in the Korematsu brief . . ." *Id.* at 1.

Nearly one half of the Ennis memorandum is a bill of particulars of Army machinations to publish the Report "without its being shown to us."[289] Fifty lines tell the litany of "falsehood and evasion" by various Army officials at various dates, all aimed to keep the Report out of Justice Department hands until already public.[290] This "course of conduct" must not stand without Justice Department rebuke.[291]

Next in the catalog of Army-inflicted wounds is a twenty line history of the Report's "objectionable" suggestion of an Army "forced to evacuate" Japanese-Americans solely because the Justice Department was "slow" and obstructionist in responding to allegations of shore to ship signaling.[292] These "lies" should not "go uncorrected" by the brief.[293]

Nearly last, in ten lines, Ennis returns to the Final Report and shore to ship signaling claims "in conflict" with Justice Department information.[294] The proposed Ennis cure, as Burling's, is not correcting the error but ignoring the Final Report. Echoing Burling to Weschler nineteen days before, Ennis asks that the brief simply "refrain from citing [the Report] as a source to which the Court may properly take judicial notice."[295]

4. *"[T]he Supreme Court Should Not Take Judicial Notice of it at All, Even if They Find it in the Library"*

Hurried shuttling between Departments filled the last hours of briefing, a not unusual feature of high stakes federal litigation.[296] "[A]gencies with different mandates and constituencies will often disagree about the government's position."[297] The Solicitor General

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[289] *Id.* at 2.

[290] *Id.*

[291] *Id.* at 1.

[292] *Id.*

[293] *Id.* at 2.

[294] *Id.* at 1.

[295] *Id.*

[296] "I was surprised about the degree of disagreement throughout the executive branch in a wide variety of cases." Rex E. Lee Conference on the Office of the Solicitor General of the United States, 2003 B.Y.U. L. Rev. 1 (2003) at 72 (statement of (now Chief Justice) John Roberts).

[297] *Id.* at 12 (statement of (former Solicitor General) Theodore B. Olson.

"must have power to reconcile differences among his clients, to accept the views of some and to reject others."[298]

In the heat of final debate, Fahy made a notable appearance. Negotiations between the Army and Justice Department were stormy. The War Department dispatched its attorney, Adrian Fisher, to press Fahy to take judicial notice of the Final Report, ship to shore signaling falsehood and all. Fahy met Fisher with "one of the awesome bolts of lightning that occasionally could be delivered by Charles Fahy . . . when he felt something wrong was being proposed."[299] In words "firm, soft, but very hard to misunderstand,"[300] Fahy answered: "Captain, what I propose to do is to insert a section in the brief . . . which expressly disavowed [*sic*] this report and says the Supreme Court should not take judicial notice of it at all, even if they find it in the library."[301]

So came footnote 2. Fahy could have accommodated the core of the Final Report and excised just the one of six factors found false. Instead, he severed the tree at its base. He nullified the Report, in its entirety, for any bearing on or support for military necessity.

Footnote 2 fully answered Ennis and Burling. Ennis asked that the brief "refrain from citing [the Final Report] as a source of which the Court may take judicial notice."[302] Burling asked that the brief "not ask the Court to take judicial notice" of the Report's false signaling claims.[303] As they asked, footnote 2 piloted cleanly around the Report except for evacuation statistics and details. And, as on the Hirabayashi brief, below Fahy's signature on the Korematsu brief were the same two names: Edward Ennis and John Burling.[304]

5. *"This Singular Repudiation"*

The flag of ignominy sunken into the Final Report by footnote 2 was quickly seized. The ACLU trumpeted "[footnote 2's] singular re-

[298] Office of Legal Counsel, Memorandum Opinion for the Attorney General: Role of the Solicitor General, 1 Op. Off. Legal Counsel 228 (1977).

[299] Remarks of Adrian Fisher, Memorial Proceedings for Judge Charles Fahy, 633 F.2d LXXXVII, XCV (D.C. Cir. 1980) [hereinafter Fahy Memorial]. Fisher was later Dean, Georgetown University Law Center, 1969-1975.

[300] *Id.*

[301] *Id*

[302] Ennis-Weschler, *supra* note 286, at 1.

[303] Burling-Weschler, *supra* note 284, at 2.

[304] Korematsu Brief, *supra* note 226, at 59.

pudiation" of "military necessities," a repudiation which could have been caused "only by the existence of reliable conflicting information from other sources."[305] Footnote 2 swallowed the credibility of the entire Report, argued the ACLU, since of the Report's six threat factors the government brief, tellingly, made "no reference."[306]

At oral argument days later Fahy did nothing to salvage the Final Report from the perdition of footnote 2.[307] General DeWitt and his views were of dubious account in the exclusion order scheme. "We are not speaking here . . . of merely the judgment of the commanding general,"[308] nor of a program "carried out . . . simply by the general . . ."[309] The question before the Court was not whether "someone, in the execution of this program, has exceeded the authority which was granted to him."[310] "The military may make mistakes."[311]

Military necessity, rather, rose from the unified and comprehensive "judgment of the Government of the United States."[312] The entire house of government "desires to stand or fall, as a Government."[313] The evacuation issued from a collaborative exercise of war powers "carried out . . . by the whole executive branch of the Government, with full knowledge of everyone . . . [A]ll branches of the Government concerned acquiesced and approved what was done. The whole matter was in the control of the Executive. The whole matter was known to Congress."[314]

Ignoring the Final Report, he directed the Justices to the core of the Hirabayashi and Korematsu briefs, to "only . . . those facts . . .

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[305] Brief for the ACLU, Amicus Curiae, Korematsu v. United States, No. 22 (Supreme Court 1944) at 21 [hereinafter ACLU Brief].

[306] *Id.* (e.g., proximity of "Japanese settlements" to defense facilities, Japanese language schools).

[307] No official transcript exists. Supreme Court arguments were not transcribed until 1955. Irons reports finding a transcript, taken by a private service hired by Fahy, in Fahy records in the National Archives. *See* Irons, Fancy Dancing, *supra* note 246. It is from that version [hereinafter Transcript] that references are taken.

[308] *Id.* at 5.

[309] *Id.* at 9.

[310] *Id.* at 6.

[311] *Id.*

[312] *Id.* at 4.

[313] *Id.* at 6.

[314] *Id.* at 9.

of general public knowledge,"[315] only "those which are matters of common knowledge."[316] He quite openly foreshadowed the possibly fatal brink on which the case hung. Should the Court decline to notice "facts of public knowledge" and the foundation beneath military necessity thereby fall, "I see nothing to be done . . . except the case go back to be heard."[317]

6. *"[T]he Justice Department was Careful Not to Rely on DeWitt's Final Report as a Factual Basis for the Military Decision"*

The Court heeded the heavy tread of footnote 2, magnified in oral argument. The six Justice majority steered widely around the Final Report and hewed to Hirabayashi's record and reasoning:

> . . . [the Hirabayashi] curfew order . . . like the exclusion order here was promulgated pursuant to [the President's] Executive Order . . . As is the case with the exclusion order here, that prior order was designed as 'protection against espionage and against sabotage.' [quoting Hirabayashi, 320 U.S. at 81]. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which were aimed at the twin dangers of espionage and sabotage.[318]

Korematsu and Hirabayashi met "on the same ground:"[319]

> In light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area [since] exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage . . . Here, as in the Hirabayashi case . . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.[320]

The Final Report drew a single majority reference—one clause in one footnote which took the Report only in the "statistics" shackles

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[315] *Id.* at 4.

[316] *Id.*

[317] *Id.*

[318] Korematsu, 323 U.S. at 217.

[319] *Id.* at 219.

[320] *Id.* at 217-18.

placed on it by footnote 2.[321] One dissenter, former Solicitor General Jackson, broadcast footnote 2's blunt message. He observed "sharp disagreement as to the credibility of the DeWitt report,"[322] belittled it as not "real evidence."[323]

The Final Report aroused one Justice.[324] Neither government disavowal nor ACLU-exhorted "repudiation" diverted Justice Murphy. He shouldered aside the government's judicial notice case, seized the Report and dismembered it. For three pages he exposed its "mainly . . . questionable racial and sociological grounds"[325] and attacked its "semi-military conclusions."[326] In his five concluding lines the Justice noted something "intimated" by the Final Report: "unidentified radio transmissions and night signaling."[327] Even for the Report-devouring dissenter, shore to ship signaling drew but six, uncited words of attention.

The indifference of eight Justices toward the Final Report or its wholesale rebuke by the ninth was quickly registered by early scholars. Footnote 2 evidently did its work. Dembitz, critical of Korematsu's "insidious precedent,"[328] took footnote 2's unsubtle import as did Justice Jackson: "Distrust of [Final Report] justifications for the mass exclusions seems indicated by the Solicitor General's disclaimer of reliance on the General's Report except for very limited purposes."[329] Even Rostow, the most scathing contemporary critic of the internment decisions,[330] pronounced footnote 2 "the most significant comment on the quality of the General's report."[331]

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[321] The string citation (also citing two sets of congressional hearings for the same proposition) observed the Report's finding that five thousand Japanese-American citizens refused to swear unqualified allegiance to the United States. *Id.* at 219 n.2.

[322] Korematsu, 323 U.S. at 245 (Jackson, J., dissenting).

[323] *Id.*

[324] The other dissenter, Justice Roberts, did not mention the Report.

[325] *Id.* at 236.

[326] *Id.* at 236-37.

[327] *Id.* at 238-39.

[328] Dembitz, Racial Discrimination, *supra* note 22, at 239.

[329] *Id.* at 197 n.82.

[330] Rostow, The Japanese Cases, *supra* at 251, note 245, at 492 ("The opinions in the Japanese American cases are a breach . . . in the principle of equality").

[331] *Id.* at 520.

Two generations later, authorities persisted that the Final Report formed no part of the substantive government case. Footnote 2, a federal Court of Appeals found, showed the government "limiting reliance" on the Report.[332] After months of testimony, hearings and the entirety of the internment litigation record fresh-sifted, footnote 2 sounded the same clear note for the Commission: "[I]n its brief . . . the Justice Department was careful not to rely on DeWitt's Final Report as a factual basis for the military decision it had to defend."[333]

V. "EVERYONE IS ENTITLED TO HIS OWN OPINIONS, BUT NOT HIS OWN FACTS"[334]

1. *"Justice Department Lawyers Who Signed the Korematsu Brief Acknowledged the Limitations of Reliance on the Final Report"*

Katyal and Irons examine the record through a narrowly calibrated lens. Footnote 2 and oral argument, for them, did not void government reliance on the Final Report. Rather, the Report was poison, purposefully injected by Fahy into the minds of nine hapless and unwitting Justices.

Fahy, says Irons, withheld "vitally important" contrary evidence by forcing shore to ship signaling on the Court and deluding it into upholding exclusion as "necessary to the prevention of espionage and sabotage."[335] On the Final Report the government "rest[ed] its defense."[336] The majority "cited" the Final Report to "justify" evacuation,[337] and "upheld the constitutionality of the military order at issue on 'findings of fact' by General DeWitt."[338] Katyal, likewise,

[332] Hirabayashi v. United States, 828 F.2d 591, 602 (9th Cir. 1987).

[333] Personal Justice, *supra* note 12, at 88.

[334] Daniel Patrick Moynihan.

[335] Irons, Supreme Court, *supra* note 134, at 356, quoting Korematsu, 323 U.S. at 218.

[336] Irons, Fancy Dancing, *supra* note 246, at 40. *See also* Justice at War, *supra* note 142, at 303 (FBI and FCC reports, if public, "would have destroyed" government case).

[337] Irons, Supreme Court, *supra* note 134, at 363.

[338] Irons, Justice Delayed, *supra* note 193, at 157.

attacks Fahy's failure to inform the Court of the "key" shore to ship claim—a claim used to "justify" internment.[339]

The rebuttal to such charges is the case record, unless footnote 2 and Fahy's oral argument are swept from it. Both announced as plainly as words can that the government sealed the Report off from its case beyond "statistics and other details concerning the actual evacuation."[340]

So the Justices understood. The six-Justice majority did cite the Report, once, not "key," not to "justify" evacuation. In one footnote listing two sets of authorities in addition to the Report, it repeated the never-disputed statistic that some "members of the [Japanese-ancestry population] retained loyalties to Japan" by refusing to swear allegiance to the United States.[341] Thus ceased all majority recognition of the Final Report. The one Justice to confront the Report hardly succumbed to it. Justice Murphy, in dissent, took up Report claims, one by one, and mowed them down until the last—the shore to ship signaling claim Irons deems "vitally important" to the government's case and Katyal "key" to "justify" internment. This claim the Justice read as only "intimated" in relegating it to one six word reference.[342]

So understood the ACLU and critics.[343] So did a Circuit Court of Appeals.[344] So did the Commission Irons deems "the most authoritative and complete report of the internment program."[345] So did

[339] Katyal Blog, *supra* note 6.

[340] Korematsu Brief, *supra* note 226 at 11 n.2. Fahy stated at oral argument that "not a single line" of the Report countered DeWitt's "belie[f] that the measures which he took were required as a military necessity." Transcript, *supra* note 307 at 3. Solicitor General Fried observed that this reference to "what the General was thinking" did nothing to alter the far different grounds of "public" and "common" knowledge—and "judicial notice"—on which he "repeatedly emphasized" the government's military necessity case rested. Petition for Writ of Certioriari, Reply Brief for the United States at 4, Hohri v. United States, No. 86-510 (Supreme Court 1986) [Hohri II]. Fahy's oral argument "carefully avoided reliance on the questionable factual assertions in the Final Report." Hohri I, *supra* note 221 at 5 n.5.

[341] Korematsu, 323 U.S. at 219 and n.2 (citing House appropriation hearings, House immigration hearings and "other bills" expatriating U.S. nationals).

[342] *Id*. at 239.

[343] *See* discussion, *supra* at 505-06 and 508.

[344] *See* discussion, *supra* at 509.

[345] Justice at War, *supra* note 141, at 71 and 509.

the Office of the Solicitor General itself.[346] All stand in stout and unbroken refutation of Katyal and Irons.[347]

Even Irons himself so understands footnote 2, for he ultimately reverses himself, refutes Katyal and joins the stream of consensus that footnote 2 constituted positive government disavowal of the Final Report. "Justice Department lawyers who signed the Korematsu brief acknowledged the limitations of reliance on the Final Report as a document deserving of judicial notice by the Supreme Court."[348]

Indeed, the lone figure outside the ring and unable to absorb footnote 2—"I do not know what it means. I have read this footnote perhaps thirty times, and I still do not know what it means"[349]—is Katyal.

2. *"The Government Did Not Mislead the Court"*

The Department of Justice, in three briefs to the Supreme Court through the Solicitor General, met the Katyal-Irons charge that Fahy "misled this Court in Korematsu and Hirabayashi as to the lack of military necessity" for the exclusion.[350] Charles Fried was unequiv-

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[346] *See* discussion, *infra* at 511-14.

[347] Misinterpreting the record is one thing, misstating it another. Irons reports that Ennis sent his "memorandum to Fahy in September 1944, Irons, Supreme Court, *supra* note 134, at 362, and that Fahy "ignored Ennis." *Id.* at 363. (Irons elsewhere has the memorandum sent not to Fahy, but forwarded to Fahy by Wechsler. Irons, Justice at War, *supra* note 141, at 289). Irons also declares "a flat out lie" Fahy's statement that "no person in any responsible position" countered the evacuation program, since Biddle and Ennis opposed it. Irons, Fancy Dancing, *supra* note 246, at 41.

In fact, Ennis addressed his September 1944 memorandum to Weschler, and only Weschler. (Irons's variant claim that Weschler forwarded it to Fahy is unsupported). In fact, the Commission found that Biddle did not oppose the evacuation program. Rather, he testified to the legality of the Executive Order immediately upon its issuance. Personal Justice, *supra* note 12, at 4-5. "The [Executive Order] decision had been made by the President. It was a matter of military judgment. I did not think I should oppose it further." Biddle, In Brief Authority, *supra* note 123, at 219. As for challenging the Secretary of War, "I was new to the Cabinet, and disinclined to insist on my view to an elder statesman." *Id.* at 226. And in fact, Ennis and Burling freely signed, not opposed, the Hirabayashi and Korematsu briefs. *See* discussion, *supra* at 505.

[348] Irons, Supreme Court, *supra* note 134, at 301.

[349] Reed Lecture, *supra* note 8, at 3036.

[350] Hohri I, *supra* note 221 at 4.

ocal: "The government did not mislead this Court."[351] Even the Commission, he observeded, while "sharply critical" of the evacuation,"[352] uttered "not a word of criticism of the Department of Justice for the manner in which it litigated the wartime cases before this Court."[353]

In Korematsu, the Commission found the government "careful *not* to rely on DeWitt's Final Report as a factual basis for the military decision."[354] The government "could have relied" on the Report.[355] It "did not."[356] Footnote 2 interred the Report by "expressly disclaim[ing] any reliance on [it] insofar as it went beyond the inferential argument specifically set forth in the government's brief."[357] Fahy re-interred the Report at oral argument, "confirm[ing] . . . that the government carefully avoided reliance on the questionable factual assertions in the Final Report."[358] Government lawyers, who included Ennis and Burling, rendered the Report an entirely "disavowed document."[359]

Footnote 2—"[t]his explicit dis-incorporation" of the Report's substantive elements[360]—was "clearly understood . . . by the Court."[361] So it was understood by "other litigants" and "other observers."[362] "There is nothing in the Court's opinions to suggest that the Court relied on any assumptions about intelligence analyses that the government never claimed existed."[363] "[N]either the government's position nor the Court's decisions relied on intelligence reports or parts of . . . [the] Final Report that were contradicted by undisclosed evidence . . . in the government's possession."[364]

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[351] *Id.*

[352] *Id.* at 6 n.6.

[353] *Id.*

[354] *Id.* at 5 (emphasis supplied) (quoting Personal Justice, *supra* note 22, at 88).

[355] *Id.*

[356] *Id.*

[357] *Id.* (citing footnote 2).

[358] *Id.* at n.5.

[359] *Id.* at 6.

[360] Petition for Writ of Certioriari, Brief for the United States at 14, Hohri v. United States, No. 86-510 (Supreme Court 1986) [hereinafter Hohri III].

[361] *Id.*

[362] Hohri I, *supra* note 221, at 5.

[363] Hohri III, *supra* note 360, at 15.

[364] *Id.*

Fried addressed Katyal's charge that the falsity of the shore to ship signaling claim was withheld and deprived the Court of "key" information.[365] "[N]othing in the government's arguments depended in the least," Fried corrected Katyal, "on false factual assertions."[366] The Ringle, the FBI and the FCC reports "did not contradict the actual government factual assertions before the Supreme Court."[367] "Only by falsely equating" the government's actual argument with never-argued subversive activity could a claim of government duplicity arise.[368]

Again, Fried noted, the Commission concurred. The government "made no claim that there was any identifiable subversive activity."[369] The ACLU concurred. It conceded that no intelligence reports supported sabotage or espionage.[370]

3. *"What is Beyond Rational Debate . . . is that the Court Was as Competent in the 1940s as it Now to Reject . . . Judicial Notice"*

The government, said Solicitor General Fried, argued no more than judicial notice of cultural and other considerations from which the Court could, at its choosing, draw an "inference about the likelihood" of such acts.[371]

In Hirabayashi, such considerations were argued as making "entirely possible" that an "unknown number" of Japanese-American persons "may lack to some extent a feeling of loyalty to the United States."[372] In Korematsu, "similarly," the government argued general "tendencies and probabilities" to the same end.[373] Judicial notice was taken. "[F]acts of public notoriety" formed the "rational basis" on which the Court decided Hirabayashi.[374] On the "assumptions

[365] Katyal Blog, *supra* note 6.

[366] Hohri I, *supra* note 221 at 5.

[367] *Id.* at 4.

[368] *Id.* at 6, n.8.

[369] *Id.* at 4, quoting Personal Justice, *supra* note 12, at 50; *id.* at 6 and n.8.

[370] Hohri III, *supra* note 360, at 14, ACLU Brief, *supra* note 305, at 23.

[371] Hohri I, *supra* note 221, at 5, citing Hirabayashi brief at 18-32, Korematsu brief at 11-12, 21-23, 26, 54-55 and n.28.

[372] *Id.*, quoting Hirabayashi brief at 21, 34, 35.

[373] *Id.*, quoting Korematsu brief at 11-12 and 54-55.

[374] *Id.* at 6.

upon which [it] rested . . . in Hirabayashi"[375] the Court rested in Korematsu.[376]

In the end, concluded Fried, "'military necessity' was (and is) a matter of judgment rather than fact. Whether right or wrong and no matter how deferential, this Court's assessment of the government's judgment of 'military necessity' cannot be attributed to government deception."[377] "What is beyond rational debate . . . is that the Court was as competent in the 1940s as it is now to reject . . . judicial notice."[378]

4. *"[I]t Seemed to Me That I Should Present the Position of the United States"*

Declining to "borrow from psychobiography,"[379] Irons nonetheless declares Fahy "inclined to defer" to military authority at the sacrifice of professional standards.[380] Katyal recalls his "terrifying" Guantanamo Bay private practice litigation and "challenging the government in a time of war,"[381] but reports summoning valor enough to master the forces he regrets overmastered Fahy.[382] Of Fahy's heart and rigor an over sixty year record of public service gives full answer.

In 1917 Fahy volunteered for World War I combat. "Being unmarried and with no dependents I felt I should go into the service."[383] His open cockpit plane flew America's first night bombing raid through anti-aircraft fire on the German submarine base at Ostend, Belgium.[384] Returning from a later night raid—"[w]e lost the coast line on which we had principally counted to guide us back . . . [f]or a while it looked as if we were lost"[385]—his plane crashed on

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[375] *Id.*, quoting Korematsu, 323 U.S. at 219.

[376] *Id.*

[377] Hohri II, *supra* note 340, at 3.

[378] *Id.* at 10.

[379] Irons, Fancy Dancing, *supra* note 246, at 44.

[380] *Id.*

[381] Katyal Op-ed, supra note 8.

[382] "I took comfort from [Hirabayashi's] actions . . . his life gave me strength." *Id.*

[383] Fahy Columbia History, supra note 67, at 16.

[384] *Id.* at 26.

[385] *Id.*

a Dunkirk landing strip, darkened by ground crews fearing runway lights would draw fire from circling German warplanes.[386] Fahy suffered knee, chest and back wounds and was sent to London to convalesce. Upon recovery he was offered a naval aviation instructor position in the United States, but "preferred to go back to [his base] and was permitted to do so."[387] President Wilson awarded him the Navy Cross (after the Medial of Honor the second highest military decoration for valor) for "extraordinary heroism in combat."[388]

Five years out of law school and fresh from war, Fahy stood on the unpopular side of a racial divide. He represented a young Chinese man, Ziang Wan, accused of a triple murder in Washington, D.C. The proper noun used by the press for Mr. Wan was "Chinese."[389] From 1919 to 1925, through three trials, appellate rulings and a Supreme Court decision finding Wan's confession unconstitutional,[390] Fahy served on the defense team—the lone attorney to stay with Wan first moment to last. While awaiting the Supreme Court decision, suffering from tuberculosis contracted as a result of his World War I lung injury, Fahy had moved to Santa Fe, New Mexico, seeking a cure. He traveled back to Washington for the final trial, and acquittal, in 1925. For his services and expenses he was never paid. His compensation was an embroidered pillowcase.[391]

During the 1930s, Irons reports Fahy's public defiance of anti-Semitic assaults on his legal staff from powerful quarters. "Jewish lawyers created 'political liabilities' for . . . New Deal agencies. But . . . Charles Fahy (an Irish Catholic) not only hired many Jewish lawyers as General Counsel of the National Labor Relations Board but defended them vigorously against the political attacks of a congressional committee headed by a blatant anti-Semite."[392]

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[386] *Id.* at 27.

[387] *Id.* at 27-29.

[388] Fahy Memorial, *supra* note 299, at LXXXVII (1980).

[389] Washington Times, Jan. 2, 1920, at 1 ("Attorney For Chinese Expected To Ask Exhibits Be Struck").

[390] Wan v. United States, 266 U.S. 1 (1924) (confession forced and involuntary due to illness and prolonged interrogation (Justice Brandeis writing for the majority)).

[391] "Wan's meagre [*sic*] funds from his family in China were all absorbed in printing costs and the like, so there was no fee." Fahy Columbia History, *supra* note 67, at 47.

[392] Peter Irons, Jerome Frank on the Jewish Question: Wall Street Liberalism in the New Deal, 4 ALSA 53, 56 (1979-80).

Following World War II Fahy was Director of the Legal Division of the Office of Military Government for the United States in Berlin. "[T]he Judges at Nuremburg were having a little trouble getting counsel for the Nazis."[393] Fahy "turned the entire Occupation Forces to the notion of getting proper counsel for the defendants, who [*sic*] he hated."[394] He had "deep moral feeling and complete political bravery."[395]

In 1948, he headed President Truman's "Fahy Committee" on Desegregation in the Armed Services. The Army "entered objections every step of the way."[396] Generals Eisenhower and Bradley "vigorously opposed integration" as "destructive of white morale and . . . 'military efficiency.'"[397] "Charles Fahy was convinced that racial segregation was morally indefensible in the military forces . . . Relentlessly he argued . . . with the Secretary of the Army and the Army Chief of Staff . . . After nearly two years . . . Fahy and his committee prevailed . . ."[398] The resulting Executive Order launched desegregation of the Armed Services.

In 1953, on the Court of Appeals for the District of Columbia Circuit, Fahy, writing in dissent, upheld the "principle which opposes discrimination on account of race or color."[399] The majority struck down a criminal ordinance forbidding discrimination against restaurant patrons on the basis of race or color. The Supreme Court reversed the majority and adopted Fahy's position on equal access to public accommodations.[400]

In 1973, Watergate Special Prosecutor and former Solicitor General Archibald Cox, the Saturday Night Massacre looming, sought a "'good gray eminence to advise me.'"[401] He turned to Judge Fahy, "the man who had groomed him as a young lawyer in the solicitor

[393] Fahy Memorial, *supra* note 299, at XCVI.

[394] *Id.*

[395] *Id.* at XCV.

[396] E.W. Kenworthy, Executive Director, Fahy Committee on Desegregation of the Armed Services, Oral History Interview (1971) 22.

[397] Kenworthy, How Judge Fahy Desegregated the Armed Forces, N.Y Times, Sept. 29, 1979, at A18.

[398] *Id.*

[399] Thompson v. District of Columbia, 203 F.2d 579, 601 (D.C. Cir. 1953).

[400] District of Columbia v. Thompson Co., 346 U.S. 100 (1953).

[401] Ken Gormley, Archibald Cox, Conscience of a Nation 338 (Addison-Wesley 1997) (quoting Cox).

general's office."[402] At his swearing in as Special Prosecutor by Fahy, Cox had "told a small group of friends and family that . . . he hoped to emulate the qualities of Judge Fahy: 'candor, honor, sensibility, dedication to justice and unswerving rectitude without a taint . . . of self righteousness.'"[403]

The exclusion litigation produced a singular exhibition of Fahy character. Mitsuye Endo had been evacuated, relocated and cleared of any suspicion of disloyalty, yet Army regulations restrained her still. "I thought the executive branch . . . should abolish the regulations," Fahy recalled.[404] But "[c]ontrary to my recommendations and judgment it was felt that public acceptance of abolition of the regulations would require a Supreme Court decision."[405] "Because of the nature and importance of the case . . . it seemed to me that I should present the position of the United States."[406]

At oral argument in Endo the same day as the Korematsu argument, "I told the Court I could not argue it with the same conviction as the other [but that] I wished to present the matter as fairly as I could from the standpoint of the government."[407] Chief Justice Stone "immediately indicated grave uncertainty, to put it mildly, about the government keeping any restraints on Miss Endo [and] went after me about it."[408] "I thought to myself, 'Well, I wish you could get after some of those whom I've been trying to get to clear this matter up without even bothering you about it.'"[409]

5. *"[T]his Tidy Story is Nonsense"*

The warm stream of a popular cause truth may quietly submerge truth. Commentators anoint heroes or villains. Error by those sitting

[402] *Id.* In 1941, Cox had joined Fahy's Office of the Solicitor General staff. *Id.* at 51.

[403] *Id.* at 245.

[404] Fahy Columbia History, *supra* note 67, at 149.

[405] *Id.*

[406] *Id.*

[407] *Id. See also* Editorial, Unique Judge (Whispering Charlie) N.Y. Times, Sept. 18, 1979. "One dramatic day he announced in court that he could defend "with conviction" only portions of the Government's program of [internment]" (emphasis in original). Accord Irons, Justice at War, *supra* note 141, at 307 ("in the Endo case . . . Fahy was virtually willing to concede defeat").

[408] Fahy Columbia History, *supra* note 67, at 179.

[409] *Id.* The Court reversed the judgment. Endo, 323 U.S. 283.

in judgment is waved off—the regrettable but acceptable adjunct of the just cause.

Katyal and Irons are loud voices charging an exclusion litigation Supreme Court "duped by bad apples in the Departments of War and Justice who suppressed exculpatory evidence."[410] "But," say others, "this tidy story is nonsense. The wartime Court was no innocent tricked by conniving lawyers."[411]

Long and intense examination by the Commission produced "not a word of criticism" of government lawyers.[412] The Court, observed Solicitor General Fried, "was as competent in the 1940s as it is now."[413] Justice Douglas, of the Hirabayashi and Korematsu majorities, reflected:

> Our Navy was sunk at Pearl Harbor . . . the military judgment was that, to aid in the prospective defense of the west coast, the enclaves of Japanese ancestry should be moved inland . . . The decisions were extreme and went to the verge of wartime power . . . It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country. While our Joint Chiefs of Staff were worrying about Japanese soldiers landing on the west coast, they actually were landing in Burma . . . But those making plans for defense of the Nation had no such knowledge and they were planning for the worst.[414]

A generation later Justice Breyer placed responsibility squarely on the Court. The decision:

> suggested that the Court was unwilling or unable to make an unpopular decision that would protect an unpopular minority. This suggests a failure to carry out what Hamilton saw as a primary function of the Court's exercise of judicial review . . . Korematsu shows the practical need for the Court to assure constitutional accountability, even of the president and even in time of war or national emergency.[415]

Justice Jackson, who walked a professional path often crossing Fahy's, including the exclusion cases, sounds a sober middle note:

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[410] Kang, Denying Prejudice, *supra* note 22, at 935.

[411] *Id.*

[412] Hohri I, *supra* note 221 at 6 n.6.

[413] Hohri II, *supra* note 340, at 10.

[414] DeFunis v. Odegaard, 416 U.S. 312, 339 n.20 (1974).

[415] Stephen Breyer, Making Our Democracy Work, A Judge's View at 193 (2010) [hereinafter Making Democracy Work].

> That comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country will impress anyone who has served as legal adviser to a President in time of transition and public anxiety . . . A judge, like an executive adviser, may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves . . . A century and a half of partisan debate and scholarly speculation yields no net result.[416]

Contracting responsibility for the exclusion decisions on one man, Charles Fahy, absolves the many actors, political and judicial, whose decisions conceived and sustained the program. As Fahy observed at oral argument in Korematsu, "all branches of the Government . . . acquiesced and approved what was done. The whole matter was in the control of the Executive. The whole matter was known to Congress."[417] As Justice Breyer recently appraised the judicial part, it was "for the Court to assure constitutional accountability" for those Executive and Legislative acts.[418]

VI. "WHATSOEVER THINGS ARE TRUE . . . WHATSOEVER THINGS ARE JUST"[419]

Fahy exercised high responsibilities in terrible times. That his part be judged is altogether fair. He set his measure:

> My own feeling was that however undesirable I might think the mass evacuation had been, and however unnecessary I might have thought it to be from a military standpoint, the authority exercised through Congress, the President, the Secretary of War, and the responsible military commanders was a constitutional authority at the time it was exercised. I considered it to be my unequivocal obligation to seek to sustain their action with all the ability I could muster.[420]

There is heard a close, curious latter year echo of Fahy: "Lawyers represent clients, not causes . . . [a lawyer] must fulfill her role in the adversarial system and defend a client's views to the best of her

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[416] Youngstown Steel v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[417] Transcript, *supra* note 307 at 9.

[418] Breyer, Making Justice Work, *supra* note 415 at 193.

[419] Saint Paul, frontspiece, Conclusion, Freedom to Serve, Equality of Treatment and Opportunity in the Armed Services, Report by the President's Committee ("Fahy Committee"), U.S. Government Printing Office (Washington 1950).

[420] Fahy Columbia History, *supra* note 67, at 178-79.

ability, even when she disagrees with some or all of them."[421] Such is the counsel of Katyal himself on the advocate's high duty.

The exclusion case record of Solicitor General Charles Fahy is the coin passed through careless hands, its true features soiled under layers of error. On allegations hot but hollow, on a review of the record as vagrant as tendentious, in the teeth of decades of authoritative determinations altogether negating theirs, Katyal and Irons condemn Fahy.

Irons professes that his "scholarly 'objectivity' or a veil of 'neutrality'" is but a "mask,"[422] that "conflictual" circumstances do "not demand neutrality,"[423] that the lawyer "may choose his evidence for only one side . . . to partially distort the record,"[424] that "evidence" be "weighed for partisan advantage."[425] He is faithful to his creed. Katyal extols "absolute candor"[426] and shows himself false—for about Fahy he scarcely lodges a truthful word.

The most just cause to rectify the exclusion decisions, and the record of Charles Fahy, deserve better than shabby work.

[421] Neal Katyal, Gideon at Guantanamo, 122 Yale L.J. 2416, 2423 (2013).

[422] Irons, Supreme Court, *supra* note 134, at xv.

[423] Irons, Clio, *supra* note 130, at 353.

[424] *Id.* at 354.

[425] *Id.* at 353.

[426] Katyal Blog, *supra* note 6.