

SEP 11 1944

L. BURLING

CT: ROSENBERG v. U.S.

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

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

As Mr. Fahy has revised it, it reads:

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

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

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

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

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

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

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

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