

O MEL ZENIS

DATE: October 2, 1944

FROM: J. L. BURLING

SUBJECT: Korematsu v. U.S.OK  
EJS

So that our file may be complete, I am preparing the following memorandum pertaining to the inter-departmental negotiations on the footnote in the Korematsu brief dealing with the DeWitt report.

Although the War Department was furnished with a first draft of the brief last April and although it had had a copy of the page proof for about a week, the War Department did not react to the brief until the morning of September 30 when Captain Fisher called you and suggested a change. It became necessary for you to suggest the possibility to Captain Fisher that the brief had gone for final printing and, presumably as a result of this, Mr. McCloy called the Solicitor General and particularly referred to the footnote. Presumably at Mr. McCloy's request, the Solicitor General had the printing stopped at about noon.

After lunch you and I jointly prepared a memorandum strongly recommending that the footnote be kept in its existing form. This memorandum, together with various exhibits illustrating the falsity of the DeWitt report, was sent to Mr. Wechsler and by him to the Solicitor General.

Thereafter, at about six o'clock, Captain Fisher came to the Solicitor General's office and discussed the footnote. Captain Fisher took the position that he would not defend the accuracy of the report but that the Government would deal with sufficient honesty with the court if it would merely refrain from reciting the report without affirmatively flagging our criticism thereof. After this conference had gone on for a while, Mr. Wechsler joined it. He later indicated that the Solicitor General said he would think about it over Sunday but that he was disposed to keep the footnote in in some manner.

On the morning of October 2 the Solicitor General prepared a revised form by the terms of which this Department would refer to contradictory of reports only with respect to radio transmitting and signaling. Mr. Fuchs gave us a copy of the Solicitor General's version. (Exhibit A) and you and I agreed that an effort should be made to make clear that there were misstatements other than those pertaining to radio transmitting and signaling, particularly with respect to the activities of this Department.

I proposed a change in the wording so that the radio transmitting and signaling would be merely examples rather than the only thing of

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which the court was asked not to take judicial notice.

We then went over to speak to Mr. Wechsler. You called Mr. Fuchs from there and asked him to hold up the printer until a decision could be reached and he stated to you that the draft as written by the Solicitor General was in final form and the only question was whether you and I wished to sign the brief.

Mr. Wechsler spoke to Mr. Fuchs, however, and asked him to wait until after Mr. Wechsler could speak to the Solicitor General. Mr. Wechsler then proposed a change in the Solicitor General's draft along the same lines as mine and an entirely new phrasing. Mr. Wechsler then spoke to Mr. Fahy who agreed to either alternative and authorized Mr. Wechsler to speak to Captain Fisher. Mr. Wechsler then called Captain Fisher and read him the two versions (Exhibits B and C) and asked him to select whichever was the least displeasing to the War Department. Captain Fisher stated that he would call back in a half hour and, since Mr. Wechsler had to go out, he arranged to have Captain Fisher call me.

At noon Captain Fisher did call me and stated that he desired to maintain his position of objecting to any footnote but that, within the choice given, he greatly preferred Mr. Wechsler's version (C).

Captain Fisher and I then discussed the matter and he stated that, as a personal matter, he was not much concerned whether the Supreme Court took judicial notice of the DeWitt report at all but that he was concerned with inter-departmental friction and wear and tear. He was well pleased with Mr. Wechsler's suggestion since it minimized the appearance of controversy between the Departments.

I then informed Mr. Fuchs of Captain Fisher's choice and he and I agreed that the proof should be returned to the printer for final printing.