MEMORANDUM

EXHIBIT
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August 11, 1942

To: John L. Burling

From: Edgerton Bonbright

Subject: Method of Presenting Facts Relevant to Constitutionality of Japanese Evacuation Program

QUESTION: Is it preferable to include in the record evidence as to the facts which will be relied upon to justify the evacuation program, or merely to state such facts, with citation of documentary authority, in a brief?

CONCLUSION: The second alternative is preferable.

DISCUSSION

Summary of Facts to be Presented

It appears that facts as to the following matters should be presented to the Court: The number of persons of Japanese ancestry, both alien and naturalized, in the United States; the concentration of such persons in Pacific Coast States; the history of hostility toward such persons in such States; the lack of assimilation of such persons in the population as a whole; the existence of methods by which the loyalty of such persons to Japan might have been encouraged, such as the activities of Japanese Consuls, the return of such persons to Japan for education, the dual citizenship of American citizens, and the activities of Shinto Priests; the engagement of such persons in espionage and sabotage; the possibility of encouragement of hostility toward the Japanese by virtue of the war; the acts of violence toward the Japanese in the Pacific Coast States, and the possibility of civil disorder arising from their presence in such States; and the attitude or possible attitude of residents of other States towards the resettlement of such persons in such other States.

The Law as to Methods of Presenting Facts to the Court

It is clear from the opinions of the United States Supreme Court that the Court, in the determination of constitutional questions necessitating consideration of sociological, economic, or political circumstances, frequently considers certain facts as established, though there is no evidence of record pertaining thereto. On the other hand, the Court has in some cases stated that it could not determine a Constitutional question because of the absence of evidence pertaining to relevant facts and has remanded the case for the introduction of such evidence.

From a study of both types of cases it appears, as I shall demonstrate below, that the Court will determine matters of fact which are the basis for a Constitutional decision by utilizing any sources of information which yield convincing data. It will consider the facts as sufficiently established without evidence of record if it believes, either on the basis of its personal knowledge, documentary authority supplied by counsel, or documentary authority it has discovered by its own research, that the truth of the fact is generally accepted by the public or by those persons who are acquainted with the field of knowledge in issue. The mere fact that opposing counsel disputes the existence of the fact will not be sufficient reason for the Court to order a remand for the taking of evidence with regard thereto; the Court will follow this procedure only if it believes that the dispute is bona fide and that there is a real possibility that the alleged fact is untrue. Such a belief may be due to the Court's skepticism, based on its own knowledge, as to the existence of the fact, despite voluminous citation of authority by counsel;[1] counsel's failure to furnish authoritative support for his position; or the citation of sufficient authority

[1] Cf. Adkins v. Children's Hospital, 261 U.S. 525, 540 (1923), where the Court stated "We cannot close our eyes to the notorious fact that earnings in all occupations have greatly increased". In view of this fact it found "only mildly persuasive"..."a mass of reports, opinions of special observers and students, of the subject, and the like", offered by counsel to show that minimum wage statutes were responsible for rising wages.

by opposing counsel.[2]

While the theoretical basis for the Court's practice in Constitutional cases is not as clear as the practice itself, I shall attempt to suggest briefly the underlying theories. It is well-established as a matter of practice that the consideration of facts involved inthe determination of Constitutional questions is within the province of the judiciary; such consideration is not regarded as raising an issue of fact for determination by the jury or for a judge sitting as a jury.[3] This is apparently based on the principle that such facts are "matters of fact that are merely premises to a rule of law". [Frantis v. Atlantic Coast Line, 211 U.S. 210, 227 (1908)] Accordingly, they are for the Court to decide and to "ascertain as it sees fit." [Chastleton Corp. v. Sinclair, 264 U.S. 543, 548, (1923)]. "As the judge is bound to declare the law, he must know or discover the facts that establish the law" [Frantis v. Atlantic Coast Line, cited supra.]

While this theory would appear to offer a complete explanation of the Court's practice, the Court frequently refers to the doctrine of judicial notice as the basis for its reliance on facts outside the record in Constitutional cases. The most flexible category of facts which can be judicially noticed, under usual theories, consists of "facts of common knowledge." This category includes facts with which the Court believes every well-informed person is, and with which the judge is actually, acquainted. (See cases cited, infra, p.[illegible]). However, "common knowledge" is frequently also deemed to include facts of which the Court does not possess sufficient knowledge to

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2/ Cf. Borden's Co. v. Baldwin, 293 U.S. 194 (1934) discussed infra.

3/ Wigmore, Evidence (3rd ed. 1940), secs. 42, 2555; Barnett, External Evidence of the Constitutionality of Statutes, 32 Am. L. Rev. 88 (1924); Hikle, Judicial Determination of Questions of Fact affecting the Constitutional Validity of Legislative Action, 38 Harv. Law Rev. 6 (1924).

speak authoritatively without an investigation (see cases cited infra, p.[illegible]; in this type of case the phrase "common knowledge" appears to be stretched to mean knowledge which could be possessed on the basis of an investigation of sources of information recognized as authoritative in a given field of knowledge, though layman would not be likely to possess such knowledge without such an investigation. It is well-established that a court can, when it has determined to take judicial notice of a fact, and has insufficient preexisting knowledge regarding it, obtain relevant information from any source it sees fit, in order, according to the courts' language, to refresh its recollection.[4/]

Both because the facts involved in a Constitutional determination usually concern general social conditions and thus are within "common knowledge" and because the existence and validity of statutes are well-established independently as proper subjects for judicial notice,[5/] the consideration of the facts relevant to questions of Constitutional validity by the judge and his reference to pertinent

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4/ "It may be that the judge's information on the subject /of which he was to take judicial notice/ was at fault, and calculations and inquiries on the subject may have been necessary. Such is the case with reference to a great variety of subjects of general concern, of which courts are required to take judicial notice. Information to guide their judgment may be obtained by resort to original documents in the public archives or to books of history or science or to any other proper source." Hoyt v. Russell, 117 U.S. 401, 405 (1886). "Courts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper." Brown v. Piper, 91 U.S. 37, 42 (1875). See also Wigmore, Evidence, (3rd edition, 1940) Sec. 2568a; Thayer, Preliminary Treatise on the Law of Evidence (1898), pp. 307-308. See also Shanklein v. Miner, 299 U.S. 468, 475 (1937).

5/ See Prentis v. Atlantic Coast Line, cited supra; Town of South Ottawa v. Perkins, 94 U.S. 260, 267 (1878).

documentary material, may be viewed, in general, as grounded in the theory of judicial notice.[6]

[6] But see Wigmore op. cit. supra, sec. 2567, where it is indicated that a judge's consideration of facts should not be regarded as a matter of "judicial notice", unless such consideration is merely for the purpose of informing the jury that the fact is to be regarded as established prima facie; also Strahorn, The Process of Judicial Notice, 14 Va. Law Rev. 544 (1928). But cf. Murphy v. California, 225 U.S. 623, 629 (1912) and Jacobson v. Massachusetts, 197 U.S. 11 (1904) where there are indications that the Court may make conclusive determinations, even on issues properly triable by the jury, as a matter of judicial notice. There are also other bases on which it may be argued that the doctrine of judicial notice does not afford a general underlying explanation for the Court's procedure in the Constitutional cases. The Court has indicated in these cases that it might consider facts if relevant authority was furnished by counsel though it would not attempt to seek such authority on its own motion (Liggett Co. v. Baldridge 278, U.S. 105 (1928); however, under orthodox theory it was thought that there were certain rigid categories with respect to which the Court was required to take judicial notice, and that if the fact was within one of these categories, the Court would not compel the production of evidence nor ignore the existence of the fact (Hart v. Russell, 117 U.S. 401, 405 (1886); Ohio Life Insurance and Trust Co. v. Debolt, 16 How. 416, 434 (1853); but cf. Note, Consideration of Facts in "Due Process" Cases, 30 Columbia Law Review, 361, 372 (1930), and see School District v. Insurance Co., 101 U.S. 472 (1879)). Furthermore, while it appears that the taking of evidence with respect to Constitutional facts is merely for the enlightenment of the Court (see cases discussed infra), under the orthodox doctrine of judicial notice, consideration of such evidence, if it is because of the court's inability to ascertain the fact after investigation, would be within the province of the jury. Cf. The Montello, 11 Wall. 411, (1870).

The Court's caution as to the sources of information which it will utilize is readily apparent in the Constitutional cases as well as in the non-Constitutional judicial notice cases. In one case it used a "notorious fact" of which it had knowledge, without citation of authority, to dispute an allegation supported by voluminous documentary authority supplied by counsel. /Adkins v. Childrens Hospital, cit. supra./ In another case the Court, remarking that witnesses had not furnished any testimony on the point in issue, embarked on its own investigations on the basis that the courts will notice facts which are "well and universally known", the Court stated various facts as to the nature and use of oleomargarine, quoting in support of its statements encyclopedias and reports of the Secretary of the Treasury and the Department of Agriculture. /Schollenberger v. Pennsylvania, 171, U.S. 1, 8-10, (1897)./ In another case the Court indicated that it considered affidavits which were part of the record, documents submitted by counsel, and also its own knowledge in order to ascertain the existence of the same fact /United States v. Rio Grande Irrigation Co., 174 U.S. 690, 696-698, (1898)/. In another case the Court indicated that it would consider documents outside the record, if submitted, even for the purpose of contradicting testimony of record /Ohanleish v. Hiatt, 299, U.S. 468, 475 (1936)/. While the Court may inform itself through evidence, it may on the other hand reject offers of proof, if, on the basis of its pre-existing knowledge or other sources of information, it regards it as impossible for evidence to establish the fact in question./7/

The fact that the Court remands for evidence merely as a matter of expediency and that the cases of remands do not contradict the validity of the principles stated above, is apparent from the opinions in these cases. →

7/ See next page.

Nashville, C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935): The Court held that the fact that an underpass would promote safety, as found by the State court, was not sufficient to sustain the validity under the due process clause of the imposition on a railroad of the cost of the underpass and that the arguments of the railroad as to the existing highway facilities, the depletion of the railways revenues, etc., were also relevant. The Court remanded the case for findings with respect to these facts, stating that it was particularly important for the State Court to make such findings initially, since it might have judicial knowledge of local conditions which would not be possessed by the Supreme Court (pp. 428-433).11/

CONCLUSION

As to the facts in point with respect to the Japanese program, it appears that all of them could be established to the Court's satisfaction without the introduction of evidence and ~~xxxx~~ that even the citation of documentary authority would not be necessary with respect to many of them; however, it is obvious that much documentary authority as is available should be used. It would also appear that the facts could be sufficiently established, without the use of evidence, so that the Court would refuse any offer of evidence to contradict these facts. It must be borne in mind that with respect to the existence of ties to Japan, methods of inculcating loyalty to Japan, the existence of disloyalty, espionage, civil disorder, etc., it should only be necessary to establish the fact that the civil or military authorities had a reasonable basis for a belief in the existence of these matters, rather than the fact that such phoenomena actually existed. The reports of the Tolan Committee include most

11/ In Smith v. Texas, 233 US 630 (1914) the Court found that a state statute prohibiting persons from acting as railroad conductors unless they had specified prior experience violated the due process clause, pointing out that if it could not "take judicial knowledge" of the fact that other experience would also create a qualification for this work, the testimony established that fact.

of the necessary material and the Court, by virtue of its frequent use and citation of Congressional Committee reports, would be likely to consider its statements as authoritative.