SPOTTSWOOD THOMAS BOLLING,
ET AL.,

Petitioners,

—vs.— No. 413

C. MELVIN SHARPE, ET AL.,

Respondents.

Washington, D.C.
Wednesday, December 10, 1952.

The above-entitled cause came on for oral argument at 3:30 p.m.,

BEFORE:

FRED M. VINSON, *Chief Justice of the United States*
HUGO L. BLACK, *Associate Justice*
STANLEY F. REED, *Associate Justice*
FELIX FRANKFURTER, *Associate Justice*
WILLIAM O. DOUGLAS, *Associate Justice*
ROBERT H. JACKSON, *Associate Justice*
HAROLD H. BURTON, *Associate Justice*
THOMAS C. CLARK, *Associate Justice*
SHERMAN MINTON, *Associate Justice*

APPEARANCES:

GEORGE E. C. HAYES, ESQ., *on behalf of the Petitioner.*

JAMES M. NABRIT, JR., ESQ., *on behalf of Petitioners.*

PROCEEDINGS

MR. CHIEF JUSTICE VINSON: No. 413, *Bolling, et al.,* versus *C. Melvin Sharpe, and others.*

All right, Mr. Hayes.

OPENING ARGUMENT OF GEORGE E. C. HAYES, ESQ., ON BEHALF OF PETITIONERS

MR. HAYES: May it please the Court:

This case is here on a petition for a writ of *certiorari* addressed to the United States Court of Appeals for the District of Columbia Circuit. The jurisdiction of this Court to review by writ of *certiorari* is conferred by Title 28, United States Code, section 1254(l) and section 2101(e).

This case was on appeal to the United States Court of Appeals for the District of Columbia, where no judgment had been rendered, and no order had been entered, and the matter came up under the rule, as I have stated.

This case came before the court on a complaint and on a motion to dismiss, and the facts are, therefore, not controverted. The minor petitioners, Negroes, fully qualified to attend a junior high school in the District of Columbia, accompanied by their parents, made application to the Sousa Junior High School for admission, and they were denied admission to the Sousa Junior High School solely on the ground of race or color. Thereafter, through their attorneys, to each echelon in the administrative setup of the schools of the District of Columbia, they made application for admission, and finally to the Board of Education; and in each of these areas they were denied admission solely because of their race or color.

Thereafter, and having exhausted their administrative remedies, a suit was filed asking for a declaratory judgment and for injunctive relief. A motion was filed to dismiss. That motion was granted, and an appeal was taken. *Certiorari* was granted in this case on November 10, 1952.

Your Honors have listened for a number of hours to discussions with respect to this matter of segregation. In the case of the District of Columbia, in our opinion it presents an entirely novel

question, one which this Court has not been called upon to pass upon, and in which we specifically and solely present the question as to whether segregation is unconstitutional *per se*. There are no factual questions as to facilities; we raise no issue with respect to facilities. Our proposition is baldly as to whether or not the respondents have the power, the statutory or constitutional power, to deny to these pupils admission to the Sousa Junior High School.

MR. JUSTICE DOUGLAS: Where is the statute that is relied upon?

MR. HAYES: If Your Honor please, the statutes that are relied upon are in our brief beginning at page 23.

I want to call Your Honors' attention to the fact, at the very outset, that these statutes, contrary to the statutes to which Your Honors have listened for the last two days, nowhere, in and of themselves, require segregation. It, to our mind, is a matter solely of interpretation of these statutes as to whether or not segregation is required. Our opponents take the position that these statutes do require it.

MR. JUSTICE FRANKFURTER: Suppose we do not agree with your construction of the statute? Is that the end of the case?

MR. HAYES: No, Your Honor, that is not, because, if Your Honors were to determine that our construction of the statute was incorrect, and that by so much these statutes require segregation, we would then take the position that any such requirement is beyond the power of the Government to announce, and we would rely upon for that decisions of this Court as making that an impossibility.

MR. JUSTICE FRANKFURTER: So your argument is that as a matter of construction this is not mandatory, but just exercising discretion by the educational authorities?

MR. HAYES: That is right, sir.

MR. JUSTICE FRANKFURTER: And that in construing it, I suppose, that we should take into account that possibly a serious constitutional question is involved, even if on the face of it it does not yield to the construction that you argue; but you argue, in the third place, that if one cannot escape the constitutional question, then you assail it?

MR. HAYES: That is correct, sir; that is exactly our position, Mr. Justice Frankfurter.

MR. JUSTICE DOUGLAS: Has this statute that you refer to consistently been interpreted by the Board of Education as requiring segregation?

MR. HAYES: Yes, sir, Mr. Justice Douglas, it has.

MR. JUSTICE DOUGLAS: This is an old statute?

MR. HAYES: Yes, Mr. Justice Douglas; again, it has been in since 1864; originally there were the Acts of 1862, but the Acts here relied on go from 1864 forward.

MR. JUSTICE REED: Why do you say an "interpretation requiring segregation"?

MR. HAYES: When I say "interpreted as requiring," I mean by that, at any rate, they have required it.

MR. JUSTICE REED: That may be permissive.

MR. HAYES: From our point of view, yes. They take the position, as I understand it, that they are required. From our point of view, it could be purely permissive, and from our point of view they are, if anything at all, simply permissive, because they are in no sense—we take the position—mandatory.

MR. JUSTICE DOUGLAS: Do you set forth the legislative history of this statute?

MR. HAYES: No, Your Honor, we do not set it forth in any—

MR. JUSTICE DOUGLAS: Does it throw any light upon this?

MR. HAYES: I beg your pardon?

MR. JUSTICE DOUGLAS: Does it throw any light upon this?

MR. HAYES: I am sorry.

MR. JUSTICE DOUGLAS: Does it throw any light on this subject as to whether or not Congress intended there be segregation?

MR. HAYES: From our point of view it does not. We say that because it is our belief that Congress, by the statutes, has indicated that it did not intend it because had they so intended, certainly the legislature would have been competent to have spelled it out in a manner so entirely different from the statute that we face, because, as Your Honors well know, we have, for instance, the South Carolina statutes saying that these children shall never be educated together; we have the Virginia statute saying that they shall not be in the same schools. There is no language in any of these which say any such thing, and so we say that Congress has never said that.

MR. CHIEF JUSTICE VINSON: In seeking appropriations, the estimates that are put in, are they for the different schools in the city?

MR. HAYES: Yes, Your Honor.

MR. CHIEF JUSTICE VINSON: Does that show that the schools are for Negroes and schools for white?

MR. HAYES: It shows that, and we do not pretend that the legislature is not mindful of it.

MR. CHIEF JUSTICE VINSON: And Congress throughout the period of years has been mindful of it?

MR. HAYES: Yes, Your Honor. We take the position that being mindful or being mandatory or being constitutional are entirely different propositions.

MR. JUSTICE BLACK: What provisions of the Constitution do you assert this violates?

MR. HAYES: It violates, we will say, a number of them. I shall outline to you the manner in which we think they do violate it.

MR. JUSTICE BLACK: Which?

MR. HAYES: It violates the due process clause of the Fifth Amendment; it violates, as we conceive it, the civil rights statutes; it is in violation of the public policy that this Government has just seen fit to announce in the Charter of the United Nations; all of them, we think, are violated by any attempts to deny to these people, the petitioners, admission into the Sousa Junior High School.

MR. JUSTICE FRANKFURTER: Mr. Hayes, may I ask one other question?

MR. HAYES: Yes, Mr. Justice Frankfurter.

MR. JUSTICE FRANKFURTER: Do I understand you to say that this legislation is not mandatory, but permissive?

MR. HAYES: If at all, it would be nothing but permissive.

MR. JUSTICE FRANKFURTER: Wouldn't you, in your point of view, be attacking the constitutionality of legislation even if Congress authorizes it?

MR. HAYES: No, Your Honor, because from our point of view we take the position—if I stated it was permissive, then I am in error—we take the position that this language is neither mandatory nor permissive.

MR. JUSTICE FRANKFURTER: You say this does not even authorize it?

MR. HAYES: That is right, sir.

MR. JUSTICE FRANKFURTER: And you say for how many

years has the District been acting without authority?

MR. HAYES: We do not say "without authority"; we say that the fact that they acted with knowledge does not mean that the statute gives the authority.

MR. JUSTICE FRANKFURTER: If the statute does not give the authority, then it was *ultra vires* for the District to have been doing what they have been doing; is that right?

MR. HAYES: No, if Your Honor please, because our position is that when the District recognizes that a situation exists, and when they appropriate for the sake of the statement, to an existing situation, that that does not mean that they themselves are given the authority, nor does it mean that they are holding that it is mandatory; and this Court—

MR. JUSTICE FRANKFURTER: Still, somebody must have been doing something lawlessly for a good many years; is that it?

MR. HAYES: If Your Honor says "lawlessly," perhaps, I cannot go along with the idea of lawlessness; but it has been done without constitutional authority. I do say that.

MR. JUSTICE FRANKFURTER: Somebody has been asleep as to the illegality of what has been done?

MR. HAYES: No, I would not say "asleep as to the illegality." I say rather—

MR. JUSTICE FRANKFURTER: If I may say so, I am in deep sympathy with you in not trying to invalidate legislation if it can be dealt with otherwise. But I find a little difficulty in seeing how we can fail to reach the validity of this legislation unless you say that what has been done by the District authorities has been done, if not lawlessly, then without authority of law. How about that, would you accept that?

MR. HAYES: We would say, sir, if this Court were to determine that what has been done up to this time has been done validly, that then for the first time this Court has had the opportunity to say, "No, this is not the proper way." We say that this is the opportunity for this Court to say that any such attempt as this, based solely on the question of race or color, is not within the Constitution.

MR. JUSTICE FRANKFURTER: "Hereafter you have no lawful authority to do this, but we do not care about the past."

MR. HAYES: I would not want Your Honors' statement to indicate that we do not care about the past, but for the first time we

have had the opportunity to pass upon it, and we frown upon it.

If Your Honor please, as I have indicated, these three propositions I have outlined are as follows: We take the position, of course, that the court was wrong in having denied the relief sought, and in having granted the motion to dismiss.

This Government—and this is the point which seems to us so fundamental—that in these other situations where the question of these states has been involved, and where the question of equal facilities has been involved, that is one thing. But in our case, this Government of ours is being asked to support a statute having as its basis nothing other than race or color, and we say that this Government cannot afford to do just that.

As I have said, the question of the right of this Government to legislate for the District of Columbia is without question because they expressly have been authorized to legislate for the District of Columbia. But this Court, with respect to that, acting for the District of Columbia, has said that they cannot do it and violate one's constitutional rights. You have said so in *Capital Traction* v. *Hof*, and you said in *Callen* v. *Wilson* that, as a matter of fact, the right to administer for the District of Columbia is restricted by the fact that you cannot violate the constitutional rights of persons in so doing.

This Court has seen fit to pass upon rights which come within the purview of the due process clause of the Fifth Amendment, and have explained and expressed what the word "liberty" means, and this Court has seen fit to indicate and incorporate in that word "liberty" things which we believe point out the way as to what should be done in this instance.

Governmental restrictions on the right to teach a foreign language, the right of a parent to send his child to a private school, the right for them to acquire knowledge, the right of parents and pupils to a reasonable choice with respect to teachers, curricula, and text books, the right of parents to secure for their children the type of education which they think best, and which is not harmful, have been held by this Court to be fundamental educational rights protected from arbitrary Government action by the due process clause of the Fifth Amendment. That language is found in *Meyer* v. *Nebraska*, *Bartels* v. *Iowa*, *Pierce* v. *Society of Sisters*.

MR. JUSTICE BLACK: Were those cases decided under the Fifth Amendment?

MR. HAYES: They were decided under the Fourteenth Amendment, if Your Honor please, but under the due process clause of the Fourteenth Amendment, and this Court, however, in the case of *Farrington* v. *Tokushige* has seen fit to refer specifically to those three cases, indicating that the due process clause of the

Fourteenth Amendment, as referred to in those cases, is incorporated and is taken over and assumed as being part of the Fifth Amendment.

As far as the Fifth Amendment cases are concerned, and so in the *Takahashi* case, this Court, it seems to us, has embraced these educational cases that might be referred to as coming within the Fourteenth Amendment, and has said that the Fifth Amendment applies in instances where due process of law is concerned and that, if Your Honor please, is the exact situation that we have here.

I would not pretend, because it would not be candid to pretend, that in those cases there was not something having to do with economic situations, with the question of ownership; that there was not a question of it being brought by owners and teachers rather than by parents, so that for the sake of the statement someone might say it is dicta.

But I call the Court's attention to the fact that what you said in the *Farrington* case so entirely, as we conceive it, gave the concept of what this Court has in mind with respect to this question of liberty under this due process clause, and that there was no need to inquire whether or not it was in any sense any other than what this Court was embracing as being its doctrine.

MR. JUSTICE REED: Do you take the same position that the Virginia counsel did, that this legislation was intended to be inimical to the interests of Negroes?

MR. HAYES: That this legislation was—if Your Honor means by "inimical," the question of putting them in—simply segregating them?

MR. JUSTICE REED: As I understood previous counsel, they urged that Virginia had passed these laws in order to deprive Negroes of educational opportunities.

MR. HAYES: I think, if Your Honor please, that unquestionably the answer must be that legislation of this character was pointed solely at the Negro, and that it was done purely and for no other reason than because of the fact that it pretended to keep for him this place of secondary citizenship. I think it could have no other conceivable purpose. I have been concerned—

MR. JUSTICE REED: You do not think that it had any relation to these prior considerations?

MR. HAYES: I do not think it had the slightest relationship to that, if Your Honor please; I do not think anyone can pretend in this jurisdiction that it has any such purpose, because this question of the schools, if Your Honor please—this is the only governmentally constructed situation that has as its basis segregation in the District of Columbia, the only one, and to us it is entirely inconceivable and inconsistent that under those circumstances for any conceivable reason, that the argument can be had that it is necessary on account of any alleged difficulties that might arise.

This Court has seen fit to say that any legislation based on racism is immediately suspect. That is what this Court has said. In the *Hirabayashi* case this Court said that legislation of this character is suspect, and immediately that it is suspect we take the position that the burden then comes upon the Government to show as to why under those conditions any such thing should be allowed. We throw down that challenge to our friends on the other side, to indicate why this should be done if there be any purpose other than pure racism. If there be any answer other than it is purely on account of color, then we ask them to indicate to us what that situation is.

MR. CHIEF JUSTICE VINSON: Mr. Hayes, if it was solely due to racism, you mean that after the adoption of the Amendments—of course, they would not affect this particular area—that segregation continued solely for racism and, therefore, the Fourteenth Amendment should now declare that under such circumstances the resultant relationships were invalid as unconstitutional?

MR. HAYES: If Your Honor please, I say again—and this is said on something that I hope is not based on obsession because of the fact that I am a Negro—I say to you that I believe that any of the facts—the Fourteenth Amendment, which had in it the question of the equal protection clause—the equal protection clause, as I conceive it, was put into the Fourteenth Amendment not because of the fact that there was any attempt at segregation at that time, but it was the question of getting segregation for Negroes, not of administering it. It was a question of getting it, and I think that the Fourteenth Amendment, when it provided for citizenship, mindful of the situation, and saying that they should have full citizenship, I think that they could not consistently have had that in mind and passed that and, at the same time, had in mind the question of that, we shall segregate in schools.

MR. CHIEF JUSTICE VINSON: The point, to me, coming so close to the end of the War Between the States, so far as the District of Columbia is concerned—

MR. HAYES: Yes, sir.

MR. CHIEF JUSTICE VINSON: —were the people who were there in the Congress at the time the Amendments were passed,

and were there when ratified, and were there when this legislation was passed, and it is hard for me to understand that if it is racism, that it was not done deliberately, and the constitutional Amendments were so interpreted, and I assume that you would not go that far, would you, in regard to the war Amendments?

MR. HAYES: Mr. Chief Justice, I think that what was done was a matter of politics, was a matter of doing the thing which, at that time, was to them the opportune thing to do; it was the question of giving away this with the idea of pressing this which was the stronger thing. It was the idea of putting through this act and giving up this, because of the fact that this was the expedient thing to do; and I think that that very situation was what occasioned them not writing into any of these acts anything specific with regard to it, because in the same vein in which Your Honor indicates that this was an allowable circumstance, if they had intended that it should be a matter of segregation they could have written into this this, that Your Honor has indicated.

MR. CHIEF JUSTICE VINSON: I was just merely asking your view relative to the frame of mind in which the people who passed the Amendments had in this situation in the District of Columbia to have separate schools at the time when the Amendments—the Fourteenth Amendment was being ratified by the states—if they did this for the purpose of just punishing the Negro or was it their interpretation of what the Fourteenth Amendment meant?

MR. HAYES: I have attempted to indicate to Your Honor that in my opinion it was not given as punishment; it was given as an expedient. It was done as an expedient. It was done because, as a matter of fact, at that time it seemed for them, I presume, an expedient thing not to press for this particular thing, but rather to allow the amendment to go through. And, as I say, I think it is for that reason expressly that they put nothing into it other than what they did.

May I make just this one additional suggestion, because my time has already gone, and my associate, Mr. Nabrit, is going to argue the other points; but I do want to say in these Japanese war cases, where the Court took the position, as I said, that any segregated thing based upon race alone was suspect, they took the position that the only justification for the denial of constitutional rights can be found where there is pressing public necessity such as the severity of war, and even there the Court must be satisfied in sustaining such restrictions that: one, the purpose of the restriction is within the competency of the Government to effect—we say that this is not within the competency of the Government to effect; two, the restriction must be clearly authorized, and we call

attention to the fact that this Government of the United States, with express powers and implied powers only to carry those express powers, has no such indication as to such clear authorization and that they must, restrictions must have a reasonable relation to a proper purpose.

MR. JUSTICE FRANKFURTER: Mr. Hayes, before you sit down I would like to put to you a question because of the candor with which I know you will answer it. I do not suppose that anybody could deny that this legislation, all these enactments, concern drawing a line, drawing a color line. I suppose that is what this is all about. As to motives, the devil himself, as some one wise man said some time ago, "knoweth not the mind of man."

But I must want to ask you whether it is your position that the Fourteenth Amendment or the Fifth, for your purposes, automatically invalidates all legislation which draws a line determined because of race? I do not want to have trouble tomorrow or the day after tomorrow, but one has to look ahead these days. I wonder whether you would say, right off from your analysis of the Constitution, that marriage laws relating to race are *ipso facto*, on the face of things, unconstitutional?

MR. HAYES: I would say to Your Honor, in answer to the first question as to whether or not in my opinion—

MR. JUSTICE FRANKFURTER: Because I need hardly tell you there is a good deal of legislation in this country drawing the line in connection with it.

MR. HAYES: Oh, yes, I am aware of that, sir. But I think that the problem is an entirely different one. With respect to the first part of your query as to whether or not I think automatically it becomes—

MR. JUSTICE FRANKFURTER: I mean that that denial to the states and to the Congress of the United States and to the District is written in by plain implication of the Fourteenth and the Fifth Amendment; that is what I want to know.

MR. HAYES: I want to say my answer to that is, if Your Honor please: I think that the very purpose of this Court is the very answer to that question. I think that this Court is called upon with that question now properly posed to make the answer.

MR. JUSTICE FRANKFURTER: You mean as to schools?

MR. HAYES: Yes, sir; that is what your first question, I thought, was addressed to.

MR. JUSTICE FRANKFURTER: Yes.

MR. HAYES: I answered that by saying as to schools this Court is called upon to say that this sort of thing cannot happen because it is a violation of the due process clause of the Fifth Amendment, and the due process clause of the Fifth Amendment does not lend itself to any substantial proposition. You can have substantial equality but you cannot have substantial liberty.

MR. JUSTICE FRANKFURTER: Is that because no legislation which draws any line with reference to race is automatically outlawed by the Fifth and the Fourteenth Amendment? So that takes you over—I am violating my own rule against posing hypothetical cases and, particularly, one that is as full of implications as the laws relating to the marriage laws involved, but I think one has to test these things to see what is the principle which you are invoking before this Court. Is it all-embracing, is it the all-embracing principle, that no legislation which is based on differentiation of race is valid?

MR. HAYES: I am invoking rather the principle which I think this Court invoked in the *Hirabayashi* case when this Court said that legislation based upon race is immediately suspect; that is what I am invoking.

MR. JUSTICE FRANKFURTER: Well, that is a very candid and logical answer. That simply means that it can be valid. It is not an absolute prohibition; that good cause must be shown, or great cause must be shown for the rule.

MR. HAYES: That is right, sir; and it is for that reason that I move to the next position of public necessity that was pointed out in those cases, and of the fact that even with the public necessity you must meet the three requirements.

MR. JUSTICE BLACK: Why do you have to equate the Fourteenth Amendment and the Fifth Amendment provisions on that score?

MR. HAYES: I am not attempting to equate them, if Your Honor please. I am attempting rather to say that as far as the Fifth Amendment is concerned there is no possibility of equating. You cannot make a quantum with respect to one's liberty.

MR. JUSTICE BLACK: You have just referred to the fact that we said that under the Fifth Amendment such laws are suspect, which means that we look at them very carefully to see if they can discriminate on account of race, or distinguish on account of race. Do you think the same rule applies with reference to the Fourteenth Amendment, which was passed under entirely different circumstances and for entirely different purposes?

MR. HAYES: Yes. I think the Fourteenth Amendment has within it inherent those possibilities. They have inherent within it the due process clause as well as the equal protection clause.

MR. JUSTICE FRANKFURTER: But you have got to stand on the due process clause?

MR. HAYES: Yes, I am standing on due process.

MR. JUSTICE FRANKFURTER: I take it that was what Justice Black had in mind, and which was behind Justice Black's question.

MR. HAYES: If that be the answer, that is what I was attempting to say. I was not attempting to equate them. We are relying on due process.

MR. JUSTICE DOUGLAS: Your closest case in point so far as decisions go is *Farrington*?

MR. HAYES: Yes, Your Honor; and in fact, the *Farrington* case embraced the *Meyer, Bartels,* and the *Pierce* case. And that brings them into this.

ARGUMENT OF JAMES M. NABRIT, JR., ESQ., ON BEHALF OF THE PETITIONERS

MR. NABRIT: If the Court please:

It would appear necessary that petitioners make clear the position which they take in the midst of these five cases. It is our position, simply stated, that the respondents, the public school board officials in the District of Columbia, do not possess either the constitutional power or the statutory power to deny these minor petitioners admission to Sousa Junior High School solely because of race or color. Now, that, as we take it, is the sole question to be considered by this Court.

In considering that question, we would urge upon the Court that it consider whether these respondents possess that power under the due process clause, whether they possess it because these Acts of Congress compel it or authorize it, either, whether they possess it in the face of sections 41 and 43 of Title 8 of the United States Code, known as the Civil Rights Act of 1866, or whether they possess it in light of the pledge which this Government has given towards the implementation of human freedoms and rights without any distinction on the basis of race or color; in other words, not as a requirement of the charge but as a policy which is enunciated by the charge.

Now, it would appear to petitioners that it is necessary also for this Court to consider the fact that we are not dealing with the

State of South Carolina, we are not dealing with the State of Virginia, the State of Delaware, or the State of Kansas. We are not here concerned with those oversensitive areas of state and federal relation. That is not involved in this case. We are not involved in this case with the question of the sensitiveness of states with the projection of federal power.

We are concerned here solely with the question of the relationship of the Federal Government to its citizens. It might be assumed as the basis for our approach to this problem that we go back and look at something of the history of our Constitution. We know that when the Constitution was adopted, there were provisions in there which made it possible for us to have an institution of slavery. We also know that the juristic concepts were such, in *Dred Scott* v. *Sandford*, that it was decided that a Negro could not be a citizen.

But along came the Thirteenth, Fourteenth and Fifteenth Amendments. The Thirteenth Amendment removed slavery as a condition, as a status. The Fourteenth, so far as the federal citizens are concerned, gave citizenship to those born or naturalized in the United States. Now, those things together would appear to us to have removed from the Federal Government any power to impose racial distinctions in dealing with its citizens.

Now, we know that this is a government of limited powers, and we know that it has express powers, and one of these is to deal with the District of Columbia.

MR. JUSTICE MINTON: Is it your thought that the adoption of the Fourteenth Amendment's due process clause changed the meaning of the Fifth Amendment's due process clause?

MR. NABRIT: No, Mr. Justice. I thought, with the abolition of slavery and the federal citizenship conferred in the first section of the Fourteenth Amendment, that those two things robbed any dubious power which the Federal Government may have had prior to that time to deal with people solely on the basis of race or color.

MR. JUSTICE BLACK: Do you think that there is any doubt that they had complete power before that?

MR. NABRIT: No, not in the light of *Dred Scott* v. *Sandford*, I do not doubt it, because in the light of *Dred Scott* v. *Sandford*, they simply said that no matter whether you went to Missouri or where you went, you are a Negro and you cannot be a citizen, and as soon as you cannot be a citizen, you cannot come within the purview of these things about which we are talking.

MR. JUSTICE FRANKFURTER: We are talking about the District.

MR. NABRIT: That is right.

MR. JUSTICE FRANKFURTER: We are talking about the District.

MR. NABRIT: Yes, I am saying the District, because if you could not be a federal citizen—and that is what *Dred Scott* held—it was for jurisdictional purposes, but everybody in the country took it as a finding of a lack of status as far as Negroes were concerned in 1856.

MR. JUSTICE FRANKFURTER: You could not be a citizen merely by going to Missouri.

MR. NABRIT: Yes, I agree with you, Mr. Justice Frankfurter, if you say that the Court went further than it should have or had to. But I would say this, that after the citizenship that was conferred under the first clause of the Fourteenth Amendment, and after the abolition of slavery, that we would seriously question, as this Court questioned, the power of the Federal Government to deal with a federal citizen solely on the basis of his race. The only two cases that I can recall in the history of this Court where it is held that that could be done were in two cases where the Court said that there was an express power to wage war, that that was one of the all-embracing powers, and that as an implied power necessary to prevent sabotage and espionage, this Court said, under those circumstances, that a citizen of the United States might, one, be detained in his home overnight; and the other, be removed to a relocation center and there detained.

So this Court itself, even when it recognized the all-inclusiveness of the war power, when the security of the nation was at stake —this court has said, "We must test this detention, first, to see if it is authorized and see if the statute authorizes it." If it is a case like *Ex parte Endo*, or it is not authorized, it is not good. Even if it is authorized, there must be a relationship between the purpose and the statute, and when we find that, as the Court said, we are not satisfied. There must also be some purpose which it is within the competency of this Government to effect.

MR. JUSTICE REED: Who is to determine that?

MR. NABRIT: This Court.

MR. JUSTICE REED: And Congress cannot determine it for itself?

MR. NABRIT: No, sir. Never in the history of this country have the individual liberties of the citizen been entrusted in the hands of the legislators. The very founders of the Government refused to

agree to the Constitution itself until they could be satisfied, Jefferson and others, that they had a Bill of Rights, so as to protect individual liberties.

MR. JUSTICE REED: That would mean that we would examine the basis, the foundation, of congressional enactments relating to race, such as the Japanese cases?

MR. NABRIT: It is my position—

MR. JUSTICE REED: Who is going to make that determination as to whether it is necessary or proper or desirable? This Court?

MR. NABRIT: I would say this, that this Court, faced with a piece of legislation by Congress which did that, or an act under a piece of legislation which did that, would in my opinion test it by the same type of test that it used in *Korematsu* and in *Hirabayashi* and in *Endo*. This Court tested it by that same method and found that it had no such authority and released Mitsye Endo. In other words, we ask nothing different than that we be given the same type of protection in peace that these Japanese were given in time of war. We are not asking anything different.

We are simply saying that liberty to us is just as precious, and that the same way in which the Court measures out liberty to others, it measures to us; and Congress itself has nothing to do with it, except that in the exercise of a power which Congress has, if Congress determines that it has something that it must do as an implied necessity in order to carry out that power, and then we say it does not and we bring the question to this Court, this Court would decide it.

I cannot make the statement that there is no situation in which Congress might not use race. I do not know of one right now, except the war powers. But that certainly leaves it open for determination by this Court. But at the same time, I assert that there is absolutely no basis that can be produced that would be accepted in our country in 1952 that would justify Congress making it such a racial basis for the exclusion of a student from a high school in the District of Columbia.

MR. JUSTICE REED: Would that same test apply on it for Congress under the commerce clause?

MR. NABRIT: Under the commerce clause?

MR. JUSTICE REED: I just happened to choose that.

MR. NABRIT: I was trying to think of one under the commerce clause.

MR. JUSTICE REED: Or any of the other clauses?

MR. NABRIT: Or any of the other clauses, where the only purpose was the purpose of making a racial distinction, in affording it. For instance, if they say that no Negro can ride the trains, the answer is yes; it would apply precisely.

MR. JUSTICE REED: Could we examine the reasonableness of that decision?

MR. NABRIT: Because you have said already, Mr. Justice Reed, or this Court, that as soon as we see that, we suspect it. It is not to say that it is unconstitutional, but it is to say that it is suspect, and you have said in so many cases, race is invidious; race is irrelevant. So when we get over in the Federal Government where there is nobody to deal with, but just us, the Federal Government, we do not have to worry. We know it is irrelevant, invidious, odious, and suspect. So this Court should examine it.

[Whereupon, at 4:30 o'clock p.m., argument in the above-entitled matter was recessed, to reconvene at 12:10 o'clock p.m., December 11, 1952.]