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Responsibility, Lawyering, Justice

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The materials that follow present the following questions, among others.

1. Were the efforts of California lawyers to help persons of Japanese descent evade the prohibitions of the Alien Land Laws ethical? Were they improper lawyering?
2. Were Attorney General Warren's efforts to use those laws as a premise for creating a record to support exclusion ethical? Were they improper lawyering?
3. Was Warren's agreement to expand his map project and law enforcement meetings beyond counties where his office thought a case provable under the Alien Land Law might exist ethical? Was it improper lawyering?
4. Was James Rowe's reported disclosure to the ACLU that General DeWitt was contemplating mass exclusion ethical? Was it improper lawyering?
5. Was Attorney General Biddle's decision to defer to military officials and to hand the problem off to them—his choice not to object flatly on constitutional grounds—ethical? Was it improper lawyering?
6. Was prosecution of Alien Land Law cases after exclusion and internment occurred ethical? Was it improper lawyering?
7. Was James Purcell's tactical delay in waiting to press for a decision on Mitsuye Endo's *habeas* petition ethical? Was it improper lawyering?
8. Were Karl Bendetsen's authorship of the DeWitt report and related actions promoting exclusion ethical? Were they improper lawyering?
9. Were Edward Ennis's and John Burling's reported disclosures to the ACLU pertaining to *Ex parte Endo*, and Ennis's reported consultation with Baldwin concerning both *Endo* and *Korematsu*, ethical? Were they improper lawyering?
10. Was John McCloy's revision of the original DeWitt report ethical? Was it improper lawyering?
11. Were Edward Ennis's and John Burling's advocacy of disclosure in *Hirabayashi* and *Korematsu* ethical? Were they improper lawyering?
12. Was Herbert Wechsler's rewriting of note 2 in the *Korematsu* brief ethical? Was it improper lawyering?
13. Ennis and Burling signed briefs in *Korematsu* notwithstanding the absence of disclosure. Should they have resigned?
14. Was the DOJ's failure to disclose FBI, FCC, and ONI documents inconsistent with General DeWitt's report ethical? Was it improper lawyering?
15. Was coordination between General DeWitt's staff and West Coast states on those states' amicus briefs in *Hirabayashi* and *Korematsu* ethical? Was it improper lawyering?
16. Was the JACL's use of a WRA non-lawyer employee to write a substantial portion of the JACL amicus briefs in those cases ethical? Was it improper lawyering?
17. Who were "responsible persons" as referenced by Solicitor General Fahy at the *Korematsu* argument?
18. Was Fahy's *Korematsu* argument itself ethical? Was it improper lawyering?
19. Should Justice Roberts and Justice Frankfurter have recused themselves in view of Roberts's report on Pearl Harbor and the influence it had on exclusion?
20. What kind of a client was President Franklin Delano Roosevelt?
21. Do you find Professor Wechsler's reasons for proceeding with the *Korematsu* brief persuasive?

Between 1942 and 1946, approximately 112,000 persons of Japanese ancestry were ordered to leave their homes and were transported to internment camps where they were held under armed guard.[1] Four cases litigated before the United States Supreme Court dealt with orders related to this policy: *Hirabayishi v. United States,*[2] *Yasui v. United States,*[3] *Korematsu v. United States*,[4] and *ex parte Endo*.[5] Property deprivation related to internment was at issue in *Oyama v. California*.[6] This note discusses whether the Solicitor General of the United States violated a duty of candor in *Hirabayashi* and *Yasui* or in *Korematsu*. That question requires analysis of subsidiary questions relating to representation of entity clients generally, and of government clients in particular. It also provides opportunity for analysis of broader questions regarding the extent of the duty of loyalty.

[1] Standard reference works on the topics covered include Carey McWilliams, PREJUDICE: JAPANESE-AMERICANS, SYMBOL OF RACIAL INTOLERANCE (1944); Ruth E. McKee, United States Department of Interior, WARTIME EXILE: THE EXCLUSION OF THE JAPANESE AMERICANS FROM THE WEST COAST (1946); Dorothy Swaine Thomas & Richard S. Nishimoto, THE SPOILAGE (1946); Morton Grodzins, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION (1949); Jacobus tenBroek, Edward N. Barnhart, and Floyd W. Matson, PREJUDICE, WAR, AND THE CONSTITUTION (1954); Roger Daniels, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION (1962) (2ND Ed. 1977)(hereinafter Daniels, *Politics*); The United States Army, II: THE WESTERN HEMISPHERE: GUARDING THE UNITED STATES AND ITS OUTPOSTS (Washington, Office of the Chief of Military History, Department of the Army (1964)); Audrie Girdner & Anne Loftis, THE GREAT BETRAYAL, THE EVACUATION OF THE JAPANESE-AMERICANS DURING WORLD WAR II (1969); Frank F. Chuman, THE BAMBOO PEOPLE, THE LAW AND JAPANESE-AMERICANS (1976); Michi Weglyn, YEARS OF INFAMY (1976); Roger Daniels, CONCENTRATION CAMPS: NORTH AMERICA (Revised Ed. 1981); PERSONAL JUSTICE DENIED, REPORT OF THE COMMISSION ON THE WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (1982); Peter Irons, JUSTICE AT WAR (1983)(hereinafter, Irons, *Justice At War*); Charles McClain, Ed. THE MASS INTERNMENT OF JAPANESE AMERICANS AND THE QUEST FOR LEGAL REDRESS (1984); Roger Daniels, THE DECISION TO RELOCATE THE JAPANESE AMERICANS (1986)(hereinafter Daniels, *Decision*); JAPANESE IMMIGRANTS AND THE LAW (Charles McClain, Ed. 1994); Tetsuden Kashima, JUDGMENT WITHOUT TRIAL 29 (2003); Klancy Klark de Nevers, THE COLONEL AND THE PACIFIST (2004); Roger Daniels, THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR (hereinafter Daniels, *Rule of Law)*(2013). Works on the pre-internment treatment of Japanese persons include Herbert B. Johnson, DISCRIMINATION AGAINST JAPANESE IN CALIFORNIA: A REVIEW OF THE REAL SITUATION 69-71 (1907); California State Board of Control, CALIFORNIA AND THE ORIENTAL (1922); Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States I*, 37 POL. SCI. Q. 605 (1922); Raymond Leslie Buell, *The Development of the Anti-Japanese Agitation in the United States II*, 38 POL. SCI. Q. 57 (1923); Raymond Leslie Buell, *Some Legal Aspects of the Japanese Question*, 17 AM. J. INT'L LAW. 29 (1923)(hereinafter Buell, *Legal Aspects*).

[2] 320 U.S. 81 (1943).

[3] 320 U.S. 115 (1943).

[4] 323 U.S. 214 (1944).

[5] 323 U.S. 283 (1944).

[6] 332 U.S. 633 (1948).

I

A

Most internees lived in California, so California law provides relevant background to internment. Before it became a state, persons resident in California were in principle subject to Mexican law.[7] The Gold Rush brought immigrants from the Eastern United States, who were ignorant of Mexican law and who sought to enforce common law principles as custom.[8] When it became a state, California immediately repealed all existing laws,[9] replacing them with the common law.[10] From the first legislative session California enacted laws drawing racial categories. In 1850, California voided all marriages "of white persons with negroes or

[7] J. Ross Browne, REPORT OF THE DEBATES IN THE CONVENTION OF CALIFORNIA ON THE FORMATION OF A STATE CONSTITUTION (1850) Appendix at xxv; Walter Colton, THREE YEARS IN CALIFORNIA 249 (1850); Stephen J. Field, PERSONAL REMINISCENCES OF EARLY DAYS IN CALIFORNIA 21 (1893).
[8] The situation is surveyed in David McGowan, *California's Duty of Confidentiality: A Case Study in Code Interpretation*, https://privpapers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=32213, at 32-35.
[9] Statutes of California, 1850, Chap. 125, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.
[10] Statutes of California, 1850, Chap. 95, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.

mulattoes,"[11] a prohibition expanded in 1901 to prohibit marriage between white persons and "Mongolians."[12] Japanese persons were counted as "Mongolians" for purposes of this law.[13]

In 1850 California also enacted that "[n]o black or mulatto person, or Indian," could testify for or against a white person in a criminal matter.[14] Anyone with 50% or more "Indian" blood was deemed an Indian; 1/8 "Negro" blood or more made a person a "mulatto."[15] In *People v. Hall*,[16] the California Supreme Court reversed a murder conviction that rested on testimony from Chinese persons. The defendant was white, the victim Chinese. The Court reasoned that the legislature intended to protect "the White person from the influence of all testimony other than that of persons of the same caste. The use of these terms must, by every sound rule of construction, exclude every one who is not of white blood."[17] The court suggested that Chinese witnesses could be considered "Indian," but concluded that the reference to "black" witnesses

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[11] Statutes of California, 1850, Chap. 140, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf. Solemnization of such a marriage was a misdemeanor punishable by a fine of from $100 to $10,000 and imprisonment for a term of from three months to ten year. *Id.* § 4. In 1851 it was enacted that any "white male citizen" 21 years or older could become an attorney. Statutes of California, 1851 Chap. 4, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1851/1851.pdf.

[12] The history is recounted in Perez v. Sharp, 32 Cal. 2d 711 (1948), which struck the law on equal protection grounds. In the complex racial/legal politics surrounding California's anti-miscegenation laws, persons of Mexican ancestry could be treated as "white," and thus were able to marry white people but not Black or "Mongolian" people, although in popular understanding they were "Mexican." *See* Dara Orenstein, *Void for Vagueness: Mexicans and the Collapse of Miscegenation Law in California*, 74 PAC. HIST. REV. 377 (2005). This complexity is reflected in a 1933 amendment that expand the law to forbid marriages between whites and "Malay" persons, an amendment that responded to a judicial ruling that person of Philippine ancestry are not "Mongolians." Roldan v. Los Angeles County, 129 Cal. App. 267 (1933). The opinion in *Roldan* issued in January 1933. The statute was amended on April 20, 1933. Because the statutory text specified that all marriages within the statutory prohibition were "illegal and void," the amendment vitiated the marriage. For a history of the case, and of treatment of Philippine persons under such laws, *see* Leti Volpp, *American Mestizo: Filipinos and Antimiscegenation Laws in California*, 33 U.C. DAVIS L. REV. 795 (2000).

[13] *See Roldan*, 129 Cal. App. At 268-69.

[14] Statutes of California, 1850, Chap. 99(14), available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.

[15] *Id*. This prohibition applied even when a Black person was the victim of a crime committed by a white person. In *People v. Howard,* 17 Cal. 63 (1860), Stephen Field, then California Chief Justice, and future United States Supreme Court justice, held that the prohibition of Section 14 took precedence over Section 13, which made the victim of a crime a competent witness.

[16] 4 Cal. 399 (1854). This conclusion renders the other two categories named in the statute surplusage, thus violating a basic rule of statutory construction. The Court probably was not wrong about the legislature's subjective intention, however, as shown by the 1863 amendment mentioned above.

[17] *Id*. at 403. The opinion does not recite the facts in any detail. It appears that George Hall was indicted for the murder of Ling Sing in Nevada County. In the course of an attempted robbery of a Chinese mining camp, Hall shot Sing in the back with a shotgun. John Hall and Samuel Wiseman were indicted as accessories. The prosecution called twelve witnesses, three of whom were Chinese. The defense did not object on the ground of the statute. George Hall was convicted and sentenced to hang. His brother, John, and Wiseman were acquitted. Failure to object at trial notwithstanding, the Court reversed Hall's conviction. He was not retried, because one of the principal white witnesses was dead and the other could not be found. Michael Traynor, *The Infamous Case of* People v. Hall, Cal. Sup. Ct. Hist. Soc'y Newsletter, Spring/Summer 2017. For a survey of racial limitations on Chinese witnesses, *see* Gabriel J. Chin, "*A Chinaman's Chance" in Court: Asian Pacific Americans and Racial Rules of Evidence*, 3 U.C. IRVINE L. REV. 965 (2013).

"necessarily excludes all races other than the Caucasian."[18] A similar provision applied to civil cases.[19]

In 1863 the Crimes Act was amended to remove the prohibition against Black persons testifying; the amended act provided that no "Indian, or person having on half or more of Indian blood, or Mongolian, or Chinese shall be permitted to give evidence in the courts of the state in favor of or against any white person."[20] A corresponding amendment was made to the statute governing civil cases.[21] Both prohibitions were impliedly repeated with the adoption of the Codes in 1872.[22] As this history suggests, California's first experience with Asian discrimination focused on Chinese immigrants, who came to work on, among other things, the Trans-Continental railroad. Anti-Chinese prejudice was high among certain classes, and California enacted laws, and obtained federal action, designed to reduce the number of Chinese immigrants in the state.[23] Ironically in view of later events, Professor Roger Daniels concluded that early Japanese settlers in the United States "were received with great favor."[24]

[18] 4 Cal. at 404.

[19] Statutes of California, 1850, Chap. 142(306), available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf.. In 1851, the legislature lowered the fraction pertaining to "Indian" persons to ¼. Statutes of California, 1851, Chap. 5 (394)(3), available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1850/1850.pdf. California also enacted its own fugitive slave law in 1852, a portion of which precluded testimony from a person claimed to be a fugitive. Statutes of California, 1850, Chap. 33(1), available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1852/1852.PDF.

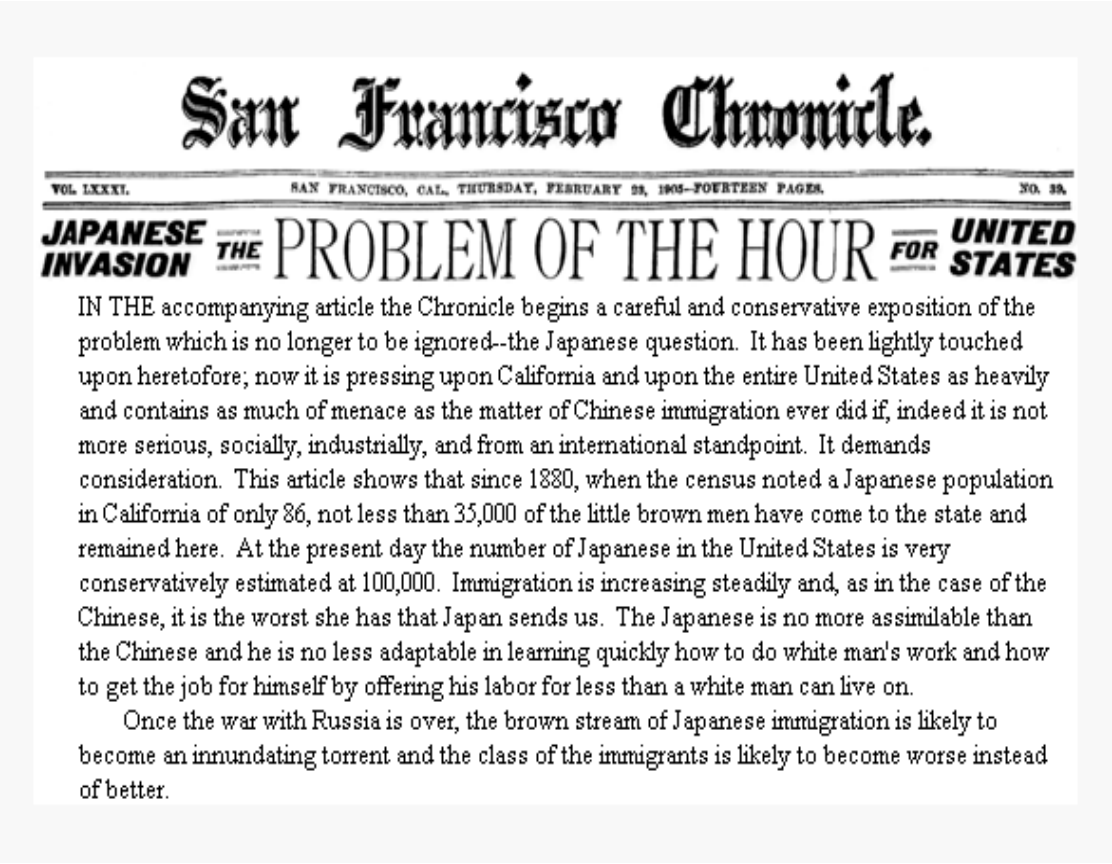
[20] Statutes of California, 1863, Chap. 70, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1863/1863.PDF. This prohibition was upheld against a challenge based on the Fourteenth Amendment in *People v. Brady*, 40 Cal. 198 (1870), which reversed the conviction of a white man accused of stealing a watch from a Chinese person because the victim was allowed to testify.

[21] Statutes of California, 1863, Chap. 68(3), available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1863/1863.PDF.

[22] People v. McGuire, 45 Cal. 56, 57 (1872)("the Legislature, by the passage of the Codes, has repealed all laws which exclude Chinamen from testifying in actions to which white men are parties.").

[23] Raymond Leslie Buell, *The Development of Anti-Japanese Agitation in the United States*, 37 POL. SCI. Q. 605, 606 (1922). Through a series of state and federal laws and overt hostility California had reduced its Chinese population from 132,000 in 1882 to 61,639 in 1920. Examples include the Chinese Exclusion Act, 22 Stat. (1882) 58. The original act was temporary but was extended to effectively become permanent, until repealed in 1943. Edwin E. Ferguson, *The California Alien Land Law and the Fourteenth Amendment*, 35 CAL. L. REV. 61, 63 n. 14 (1947).

[24] Daniels, *Politics, supra* note 1, at 3.



San Francisco Chronicle.

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JAPANESE INVASION THE PROBLEM OF THE HOUR FOR UNITED STATES

IN THE accompanying article the Chronicle begins a careful and conservative exposition of the problem which is no longer to be ignored--the Japanese question. It has been lightly touched upon heretofore; now it is pressing upon California and upon the entire United States as heavily and contains as much of menace as the matter of Chinese immigration ever did if, indeed it is not more serious, socially, industrially, and from an international standpoint. It demands consideration. This article shows that since 1880, when the census noted a Japanese population in California of only 86, not less than 35,000 of the little brown men have come to the state and remained here. At the present day the number of Japanese in the United States is very conservatively estimated at 100,000. Immigration is increasing steadily and, as in the case of the Chinese, it is the worst she has that Japan sends us. The Japanese is no more assimilable than the Chinese and he is no less adaptable in learning quickly how to do white man's work and how to get the job for himself by offering his labor for less than a white man can live on.

Once the war with Russia is over, the brown stream of Japanese immigration is likely to become an innundating torrent and the class of the immigrants is likely to become worse instead of better.

B

Japan historically prohibited emigration.[25] When it relaxed that prohibition, some Japanese citizens emigrated to Hawai'i, agreeing to indentured labor contracts as a condition of entry.[26] The United States annexed Hawaii in 1898, and these agreements were abrogated. Many Japanese persons then left Hawaii for California, and immigration from Japan continued.[27] Economics supported this immigration. Wages in Japan were low while labor in California—particularly agricultural labor—was at a premium, in part because California had succeeded in reducing its Chinese population.

Japanese immigration to California provoked reaction, in part because the immigrants sought to better their economic position. In 1900, a meeting sponsored by the San Francisco Labor Council passed a resolution calling for extension of the Chinese Exclusion Act to exclude Japanese immigrants as well.[28] James D. Phelan, then mayor of San Francisco and later a California senator, spoke at the meeting. In 1903, certain Japanese farm laborers hired to pick tree fruits demanded to renegotiate their contracts when the fruit had ripened and needed to be

[25] Buell, *Agitation, supra* note 1; Daniels, *Politics*, *supra* note 1, at 2.

[26] Daniels, *Politics, supra* note 1, at 5-6; Buell, *Agitation I, supra* note 1, at 606-608; 614; For a brief overview, *see* Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment,* 40 BOS. COLL. L. REV. 37, 45 (1998).

[27] Ferguson, 35 CAL. L. REV. at 63-64; Buell, *Agitation, supra* note 1, at 606-07.

[28] Buell, *Agitation, supra* note 1 at 608-09; Daniels, *Politics, supra* note 1, at 21-22.

picked.[29] In 1904, The American Federation of Labor, keen to reduce competition from Japanese workers, called for extension of the Exclusion Act to exclude Japanese immigration.[30] In 1905 a Japanese and Korean Exclusion League was formed in San Francisco, and an anti-Japanese convention was held in the city.[31] It advocated boycotts of Japanese-owned business, among other things.[32] The dispute was conducted in strikingly modern terms. One Fresno fruit grower wrote the San Francisco *Chronicle* that "the Japanese and Chinese do a class of labor that white men cannot do, and will not do at any price. It is not a question of cheap labor, or efficient labor, but of laborers of any kind at any price."[33] When a world-renowned Japanese seismologist, Dr. Omori, visited California following the 1906 San Francisco earthquake to study its effects, he was hit with a thrown rock and pelted with sand and dust in San Francisco, and punched in the jaw in Eureka, apparently on the presumption that he was attempting to break a local labor strike.[34]

C

Primary education drew racial lines as well. California's 1850 and 1851 school statutes imposed no racial limitation.[35] An 1860 amendment provided that "Negroes, Mongolians, and Indians, shall not be admitted into the public schools."[36] A district violating this provision risked losing its share of state funds. The amendment further provided, however, that districts could establish, and spend public money on, "a separate school for the education of Negroes, Mongolians, and Indians" and could use public money for that purpose.[37] An 1870 amendment

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[29] Daniels, *Politics, supra* note 1, at 9. Growers apparently complained that Chinese laborers had not done such things.

[30] *Id*. at 609. For a good theoretical discussion of the relationship between existing labor organizations and entrants such as the Japanese, *see* Edna Bonacich, *A Theory of Ethnic Antagonism: The Split Labor Market*, 37 AM. SOC. REV. 547 (1972).

[31] Johnson, *supra* note 1, 69-71. Johnson was a Methodist missionary who lived for 20 years in Japan. Daniels refers to this as the Asiatic Exclusion League, Daniels, *Politics, supra* note 1 at 28, a name that appears to have been adopted after 1905.

[32] *Id*. at 618.

[33] Quoted in Johnson, *supra* note 1, at 42.

[34] *Id*. at 73-75. Daniels suggests that Omori's presumably formal attire would have made it hard to mistake him for a strikebreaker. Daniels, *Politics, supra* note 1, at 33.

[35] The 1851 statute establishing schools provided, for example, that funding would be calculated based on the whole number of children in the State, without reference to race. Statutes of California, 1851, Chap. 126(II)(i), available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1851/1851.pdf. An 1855 amendment tied apportionment to the number of "white children" in a school district. Statutes of California, 1855, Chap. 185, sec; 12, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1855/1855.PDF#page=241

[36] Statutes of California, 1860, Chap. 329, § 8, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1860/1860.PDF#page=351.

[37] An 1866 amendment reflects the complex racial politics of the day. It provided that, unless otherwise provided by law, schools were open "for the admission of all white children" between five and 21 residing in a school district, though for good cause a school board could admit adults or children residing out of the district. (§ 53). The law further provided that a district could, by majority vote of the trustees or board, "admit into any public school half-breed Indian children, and Indian children who live in white families or under guardianship of white persons." (§ 56). It also provided that "Indian children not living under the care of white persons" and "[c]hildren of African or Mongolian descent" could not be admitted. If ten or more parents or guardians of such children petitioned for the creation of a separate school, however, then such a school "shall be established." Trustees had discretion to provide for the (presumably separate) education of a smaller number of such students. Finally, the law provided that when any number of non-white students were present "whose education can be provided for in no other way," a majority

continued the provision for separate schools, but the reference to "Mongolian" children was omitted, so even separate schools no longer had to teach Chinese children.[38]

Codification in 1872 moved these provisions into the Political Code. Under Section 1662 of the 1872 Political Code, schools were open to "all white children" between the ages of five and 21 residing in the relevant district. Presumably this section was meant to exclude both Chinese and Japanese children, though the Japanese population in 1872 was not large.[39] Section 1669 of the 1872 Code stated that "[t]he education of children of African descent, and Indian children, must be provided for in separate schools."[40] An 1874 amendment added a proviso that if a district failed to provide separate schools for such children, then they "must be admitted to the schools for white children."[41] This amendment reflected the influence of *Ward v. Flood*,[42] which upheld segregated schools only where schools for excluded children actually had been created. An 1880 amendment to Section 1662 omitted the word "white," and Section 1669 was deleted altogether.[43] In 1885, the absence of racially discriminatory language led the Court, in *Tape v. Hurley*,[44] to order the admission to a public school of a Chinese student. On March 5, 1885, the Superintendent of San Francisco schools published a letter in the *Alta California* urging the legislature to authorize the creation of segregated schools, stating "[w]ithout such action I have every reason to believe that some of our classes will be inundated by Mongolians. Trouble will follow."[45] On March 12, 1885, Section 1662 was amended to allow the establishment of "separate schools for the children of Mongolian or Chinese descent" and to preclude such children from attending other schools when a separate school had been established.[46]

This language was in effect when, in 1905, the San Francisco School Board passed a resolution to segregate both Japanese and Chinese children in schools.[47] The statute did not reference Japanese persons, and the text differed from the language construed in *People v. Hall* because Black students were not excluded.[48] Presumably the Board thought "Mongolian" broad

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of trustees could "permit such children to attend schools for white children" so long as a majority of parents did not object. (§ 58). Statutes of California, 1866, Chap. 342, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1865/1865_66.PDF#page=471.

[38] Statutes of California, 1870, Chap. 556 §§ 56-57, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1869/1869_70.PDF#page=888.

[39] James H. Deering, SUPPLEMENT TO THE CODES OF CALIFORNIA 107-108 (1893).

[40] *Id*.

[41] An Act to Amend the Provisions of the Political Code Relative to Public Schools, § 26, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1873/1873_74Code.PDF.

[42] 48 Cal. 36 (1874).

[43] Theodore H. Hittell. Codes and Statutes of the State of California 103-104 (1877-1880).

[44] 66 Cal. 473 (1885).

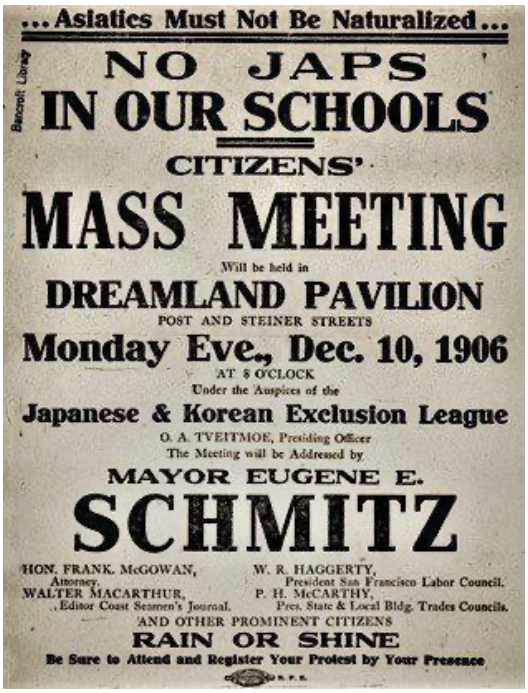
[45] 38 Daily Alta California, March 5, 1885.

[46] Chap 117, March 12, 1885.

[47] For context, *see* David Brudnoy, *Race and the San Francisco School Board Incident*, 50 CAL. HIST. Q. 295 (1971); Chuman, *supra* note 1, chapter two.

[48] Wysinger v. Cruikshank, 82 Cal. 588 (1890), confirmed that the race-neutral language of the 1880 amendment, followed by discriminatory language in the 1885 amendment that did not include Black students, foreclosed districts from sending Black students to segregated schools.

enough to support exclusion.[49] The Board did not act in 1905, but in 1906 passed a resolution directing school principals to send all Chinese, Japanese, and Korean children to the "Oriental School" that had been established near Chinatown, recently leveled by earthquake and far from the homes of many Japanese children.[50] Various reasons, consistently recurring over time, were advanced in the ensuing debate: Japanese immigrants could not assimilate, were not Christian, might intermarry with whites, and were a security risk.[51]



Japan had recently enjoyed notable military success against Russia, and an 1894 treaty between Japan and the United States gave Japanese citizens rights equivalent to those granted to the citizens of nations most favored by U.S. law.[52] The School Board's action thus presented a problem of diplomacy: British and German children were not placed in segregated schools, and the most favored nation provision thus precluded the School Board's action. President Theodore Roosevelt, who ultimately mediated that conflict, condemned the school board's action. "To shut [the Japanese] out from the public schools is a wicked absurdity," he told Congress.[53] His Secretary of Labor, Victor Metcalf, submitted a report on conditions in San Francisco that found that the Board's resolution was influenced by the Exclusion League, which claimed 78,500

[49] Johnson reports that it was recognized at the time that the term "Mongolian" could not be stretched to cover Japanese immigrants. A proposed amendment to Section 1662 would have extended the prohibition to "Indian children, Chinese children, Malay children, Corean children, Japanese children and all Mongolian children." Johnson, *supra* note 1, at 22.

[50] Quoted in Brudnoy, *supra* note 47, at 297. For contemporaneous reaction and the distance of the Oriental School from Japanese residences, *see* Johnson, *supra* note 1, at 25.

[51] On assimilation, intermarriage, Christianity, and patriotism, *see* Johnson, *supra* note 1, at 26-30. On security risks, *see* Buell, *Agitation, supra* note 1 at 633, and

[52] The treaty is discussed in *The Japanese School Question*, 1 AM. J. INT'L LAW 150 (1907). The school board argued that this MFN provision was limited to rights related to residence or travel, which did not include attendance at public school.

[53] Reprinted in Johnson, *supra* note 1, at 93.

members, most of whom belonged to unions.[54] The exclusion league and union affiliates organized a boycott of Japanese restaurants, which ended when Japanese restaurant owners paid off the organizers. Metcalf found violence against Japanese persons was common, reporting 19 separate cases.[55] He told local police officials that, if they did not get the situation in hand, the Federal government would intervene.[56] Southern legislators were appalled that the President would challenge a school board's power to segregate non-white children from whites.[57] The 1894 treaty provided a way to finesse the problem. Carefully noting that nothing compelled California to establish public schools in the first place, Elihu Root wrote that the question was not one of states' rights to segregate but of the treaty power under the Constitution.[58]

The school board incident was notable not only because it involved the President and questions of the treaty power, but because there were fewer than 100 Japanese children then in San Francisco schools, one-third of them citizens.[59] The incident also contributed to the "Gentleman's Agreement" between the United States and Japan, under which Japan agreed not to issue passports for entry solely to Hawaii or the United States, except for family reunification, and the United States agreed to enforce this effective prohibition.[60] Domestically, the administration agreed to withdraw two lawsuits it had filed against the San Francisco School Board, and the Board agreed to rescind its resolution.[61]

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[54] *Id*.

[55] *Id*. at 103-106.

[56] *Id*. at 107.

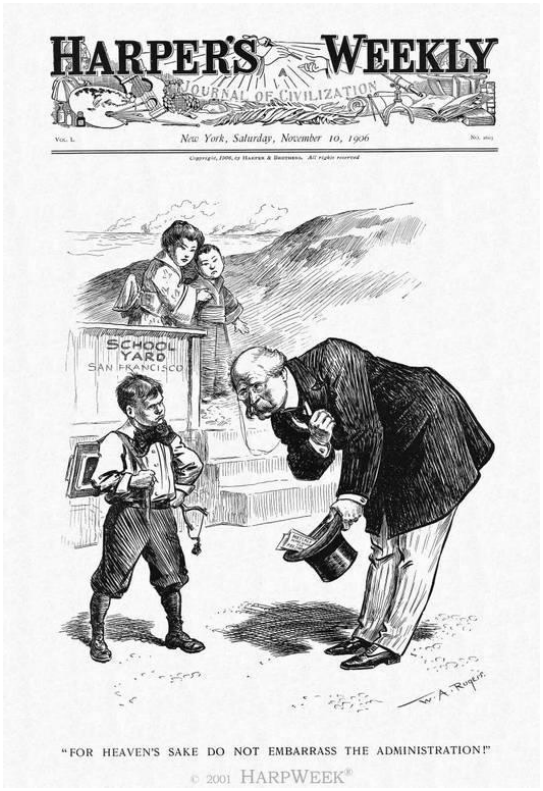
[57] Brudnoy, *supra* note 47, at 295, 305.

[58] Elihu Root, *The Real Questions Under the Japanese Treaty and the San Francisco School Board Resolution*, 1 AM. J. INT'L LAW 273 (1907). As he put it, the treaty "leaves every state free to have public schools or not, as it chooses, but it says to every state: `If you provide a system of education which includes alien children, you must not exclude these particular alien children.'" *Id*. at 278.

[59] Brudnoy, 50 CAL. HIST. Q. at 303. The number comes from the Metcalf report, reprinted in Johnson, *supra* note 1, at 96-97.

[60] Daniels, *Politics, supra* note 1, at 43-44.

[61] Buell, *Agitation, supra* note 1, at 627, 631. In one of the suits, the Federal Government argued that the relevant statute could not provide a basis for excluding Japanese children because they were not Mongolian. Johnson, *supra* note 1, at 47. Documents reflecting the agreement are reprinted in *id*. at 89-91.



D

The agreement did away with the resolution but did not stop Japanese immigration. Continuing immigration brought continued protests, including, in 1908, rumors that Japanese warships were stationed near Hawaii, accusations by the mayor of Portland that Japanese spies were procuring maps to the city, and stories run by the Hearst newspapers bearing titles such as "Japan May Seize the Pacific Coast."[62] Professed fears of Japanese invasion distinguished racial measures targeting Japanese persons from earlier discrimination against Chinese persons. Japan had modernized at an astonishing rate, defeated Russia in war, and seemed intent on becoming a global power.[63] That had not been true of China in the late nineteenth century. Racial measures against Chinese persons can be attributed to domestic paranoia over wages, intermarriage, and white dominance. With respect to measures against the Japanese, paranoia over security can be added to this list.[64] In 1909 Homer Lea, an adventurer with experience in China, wrote *The Valor of Ignorance,* a novel predicting that Japan would invade the Philippines and then conquer the West Coast.[65] The book might be considered no more than a cultural artifact of a particular time,

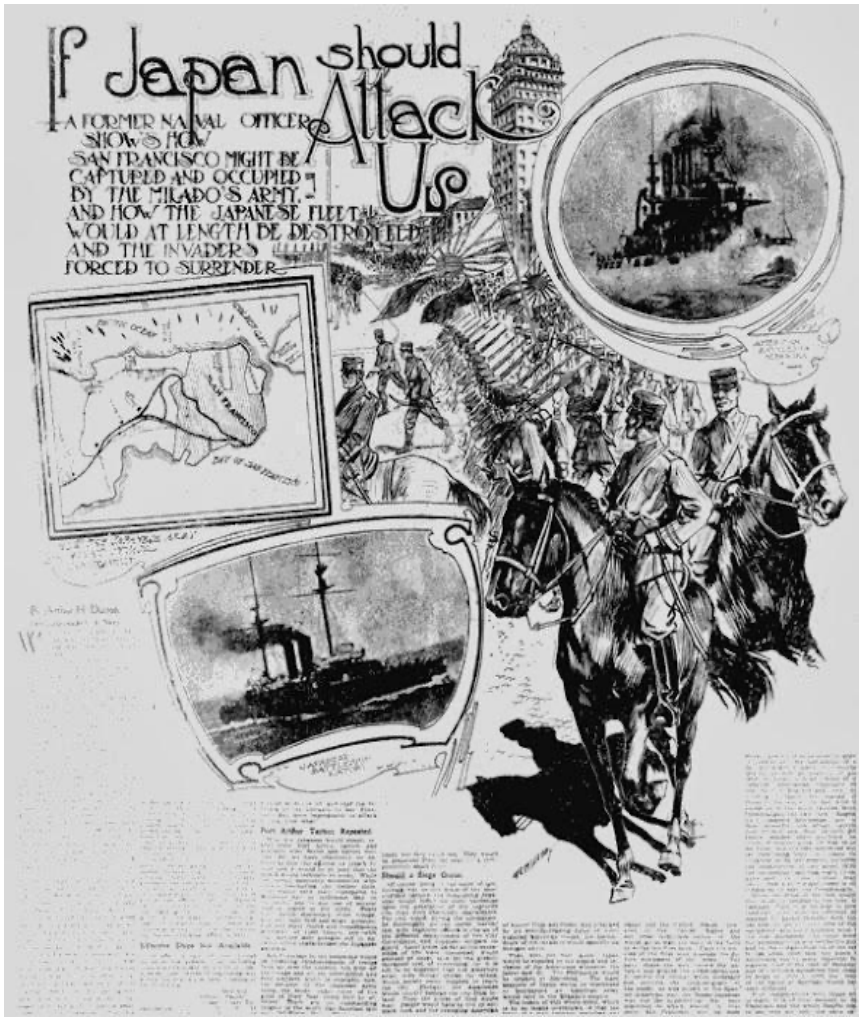
[62] Buell, *Agitation, supra* note 1, at 633.

[63] Japan's annexation of Korea in the early 1900s contributed as well. For the point generally, *see* Brian J. Gaines & Wendy K. Tam Cho, *On California's 1920 Alien Land Law: The Psychology and Economics of Racial Discrimination*, 4 STATE POL. & POL'Y Q. 271, 273 (2004)("by 1910, Japan had come to be regarded as one of the world's great powers. Following its victories in the Sino-Japanese War (1894–95) and the Russo-Japanese War (1904–05), Japan cast a far longer geopolitical shadow than China ever had").

[64] *See* Aoki, *supra* note 26, at 46-47.

[65] Daniels provides context on Lea's book and the genre of dystopic Pacific war fiction in Daniels, *Politics*, *supra* note 1, at 70-76.

had not Secretary of War Henry Stimson referenced it in his diary in February 1942, shortly before he decided in favor of internment.



Discrimination extended to property ownership. Federal law in the early twentieth century limited naturalization to "free white" persons, and in *Ozawa v. United States*,[66] the Supreme Court held that a Japanese person resident in Hawaii but born in Japan was not such a person within the meaning of the law. This Supreme Court ruling affirmed the trend of prior cases, and California took advantage of this trend with two laws restricting Japanese ownership of land. In his "wicked absurdity" message to Congress, Theodore Roosevelt had asked Congress for legislation allowing Japanese immigrants to become naturalized citizens, but he did not get it.

Such rulings provided support for California's first "Alien Land Law," passed in 1913.[67] That law prohibited alien persons ineligible for citizenship from owning or leasing land except to the extent provided by treaty.[68] Land acquired in violation of the law escheated to the State. The

[66] 260 U.S. 178 (1922).

[67] Statutes of California, 1913, Chap. 113, available at https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/Statutes/1913/1913.pdf.

[68] Japanese aliens could keep land they owned when the statute passed, but on their death the land had to be transferred to a person eligible to own under the Act. *Id.* § 4.

treaty exception recognized that the United States and Japan had signed a treaty of Commerce and Navigation in 1911. That treaty gave Japanese subjects the right to "carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops [and] . . . to lease land for residential and commercial purposes . . . ."[69] The law extended to corporations a majority of whose stock was owned by persons ineligible for citizenship, and it excluded land already owned by ineligible aliens and agricultural leases longer than three years. The 1913 law thus effectively eliminated the right of Japanese persons to own agricultural land or lease it for more than three years.[70] Reaction in Japan was strongly negative.[71] The law was shepherded through both state and national politics by Progressive Governor Hiram Johnson, who wrote with evident pride that "never again in California can the Japanese question be a political question, except as we shall want it to be."[72]

Japanese immigration continued notwithstanding the Gentlemen's Agreement, and World War I produced labor shortages, so the law was not enforced rigorously before 1920.[73] With the war ended, California's governor, William D. Stephens, asked the State Board of Control to draft a report describing conditions relating to Japanese, Chinese, and Hindu persons resident in California. He forwarded the report, entitled *California and the Oriental*,[74] to Secretary of State William Colby. Stephens's cover letter urged Congressional action to control immigration and summed up his view. He wrote that as of 1880 California's problem was "a threatened inundation of our white civilization" because of Chinese immigration.[75] Stephens thought enforcement of the Chinese Exclusion Act had substantially solved that problem, but that in the meantime "we have been developing an even more serious problem by reason of the influx to our shores of Japanese labor."[76] He complained that by "unquestioned industry and application, and by standards and methods that are widely separated from our occidental standards and methods," Japanese workers had come to control important agricultural industries:[77]

> The Japanese, by very reason of their use of economic standards impossible to our white ideals—that is to say, the employment of their wives and their very children in the arduous toil of the soil, are proving crushing competitors to our white rural populations. . . . in many of the country schools of our state the spectacle is

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[69] Quoted in Aoki, *supra* note 26, at 52 n.45.

[70] Ferguson wrote that the treaty protected the right to own residential or commercial property, but the text of the treaty only grants the right to lease land for such purposes.

[71] *E.g.* Herbert P. LePore, *Prelude to Prejudice: Hiram Johnson, Woodrow Wilson, and the California Alien Land Law Controversy of 1913*, 61 SO. CAL. Q. 99, 105 (1979)("On April 18, 1913, a crowd of approximately 20,000 Japanese in Tokyo cheered wildly as a member of the Diet demanded the Japanese fleet to be sent to California to protect Japanese nationals and Japan's honor").

[72] Quoted in Daniels, *supra* note 1, at 63.

[73] Ferguson, 35 CAL. L. REV. at 68-69. Governor William Stephens wrote in 1920 that the 1913 statute "has been evaded and broken through the resort to certain legal subterfuges which have almost frustrated the very purpose of the enactment." Daniels reports that proponents of the law knew it would be easy to evade even in 1913. Daniels, *supra* note 1 at 63.

[74] California State Board of Control, CALIFORNIA AND THE ORIENTAL 12 (1922).

[75] *Id.* at 7.

[76] *Id.* at 8.

[77] *Id.* at 8.

presented of having a few white children acquiring their education in classrooms crowded with Japanese. [78]

Stephens concluded that "the people of California only desire to retain the commonwealth of California for its own people; they recognize the impossibility of that peace-producing assimilability which comes only when races are so closely akin that intermarriage within a generation or two obliterates original lines. The thought of such a relationship is impossible to the people of California, just as the thought of intermarriage of whites and black would be impossible to leaders of both races in the southern states . . ."[79] Senator Phelan echoed these sentiments: "The Japanese . . . are impossible competitors, and drive the white settlers, whose standards of living are different, from their farms."[80] "We must preserve the soil for the Caucasian race," he concluded.[81]

The report itself surveyed demographic data but also advanced two arguments that echoed earlier concerns regarding security. Regarding Japanese fishermen, the report stated that their familiarity with the "coast line, harbors and defenses" would "be extremely dangerous to us and serviceable to an enemy if made available to such enemy during a period of war."[82] The report also noted that under Japanese law, everyone born of Japanese parents was a Japanese citizen, and thus subject to military service in Japan. Even children born in America, and thus U.S. citizens, "[owe their] first obligation of allegiance and military service to Japan."[83] The report cited only the Japanese law for this claim, phrased to invite a conclusion about subjective loyalty when it in fact describes one implication of Japanese rather than U.S. law.

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[78] *Id.* at 9. For a rejoinder to the report, *see* Sidney L. Gulick, *Japanese in California: A Critical Examination of (1) Report of the California State Board of Control; (2) Letter by Governor Stephens to Secretary Colby; (3) Hearings in California by the House Committee on Immigration and Naturalization*, 93 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 55 (1921).

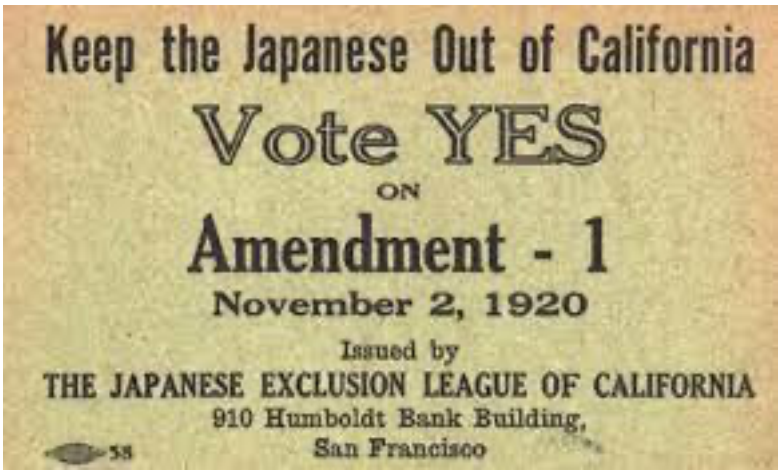
[79] *Id.* at 15. The assimilation point is significant, and bears detailed analysis. Governor Stephens's connection between assimilation and intermarriage was echoed by Secretary of War Henry Stimson shortly before exclusion was adopted as a policy. On the problem generally, *see* Robert E. Park, *Racial Assimilation in Secondary Groups With Particular Reference to the Negro*, 19 AM. J. SOC. 606, 611 (1919)(" the Japanese are quite as capable as the Italians, the Armenians, or the Slavs of acquiring our culture, and sharing our national ideals. The trouble is not with the Japanese mind but with the Japanese skin. The Jap is not the right color. . . . The Japanese, like the Negro, is condemned to remain among us an abstraction, a symbol, and a symbol not merely of his own race, but of the Orient and of that vague, ill-defined menace we sometimes refer to as the `yellow peril.'").

[80] James D. Phelan, *Why California Objects to the Japanese Invasion*, 93 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 16, 17 (1921).

[81] *Id. See also* Elwood Mead, *The Japanese Land Problem of California,* 93 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 55 (1921).

[82] *California and the Oriental, supra* note 74, at 107.

[83] *Id*. at 198.



The 1913 Alien Land Law had been sidestepped in some cases by vesting land title in children born in the United States, and thus citizens, or having an attorney or other citizen act as a trustee of a trust holding the land for the benefit of a minor. Corporations were also formed to hold such land, with 51% of the voting stock being issued to an attorney (or employee of the attorney) acting on behalf of the corporation.[84] Individual farmers could take successive three-year leases on a parcel and farm collectively as a *de facto* partnership.[85] And the statute did not prevent renewal of the permissible three-year lease of agricultural land, implying the possibility of successive renewals that might mimic ownership.[86]

In 1920, a strengthened version of the 1913 law was adopted by initiative.[87] Commenting on the 1920 law, in 1921 John S. Chambers, California's State Controller and Chair of the Japanese Exclusion League, wrote that "California has gone as far as she could go under the federal and state constitutions and the American-Japanese treaty. If she could have gone further she would have done so."[88] He identified as California's next goals the cessation of all immigration from Japan (achieved in 1924) and amending the Constitution to provide that "children born in this country of parents ineligible to citizenship themselves shall be ineligible to citizenship."[89] Like most racial commentary of the time on this topic, Chambers grounded his position in the supposed impossibility of assimilation, and he grounded that premise in the supposed impossibility of intermarriage.[90] He also cited Japanese economic ambition as grounds for legal sanctions against them, noting "[t]here are fewer Japanese in California working for white people than there are white people working for Japanese" and complaining: "At first they are willing to work for wages, then for a portion of the crop, then under a lease and finally by

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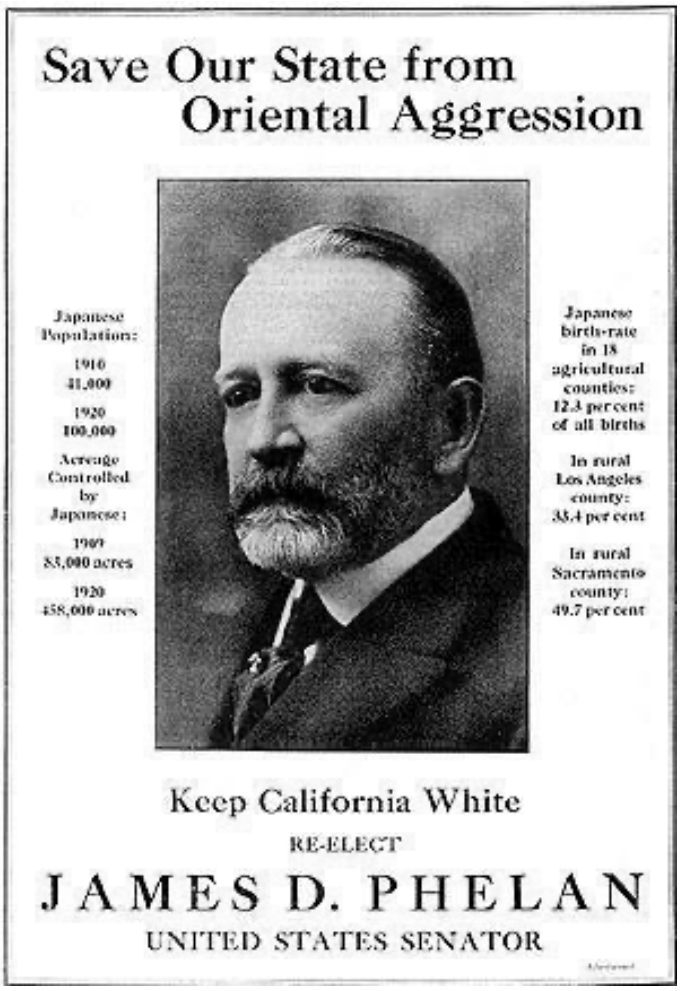
[84] *Id*. at 69. The report stated "[i]t is a source of deep regret that there are attorneys in the state who despite their oath . . . nevertheless sell their legal talent in aiding this breach of the spirit and purpose of the Alien Land Law." *Id*.
[85] Eiichiro Azuma, *Japanese Immigrant Farmers and California Alien Land Laws: A Study of the Walnut Grove Japanese Community*, 73 J. CAL. HIST. 14, 21 (1994).
[86] Aoki, *supra* note 26, at 56.
[87] Statutes of California 1921, page Lxxxiii. The 1920 law was more effective than the 1913 law. *See* Masao Suzuki, *Impotent or Important: Taking Another Look at the 1920 Alien Land Law*, 64 J. Econ. Hist. 125 (2004); Azuma, *supra* note 85; Yuji Ichioka, *Japanese Immigrant Response to the 1920 California Alien Land Law*, 58 AG. HIST. 157 (1984).
[88] John S. Chambers, *The Japanese Invasion*, 93 ANNALS OF THE AM. ACAD. POL. & SOC. 16, 23 (1921).
[89] *Id*. at 24
[90] *Id*. at 24-25.

hook or crook, if possible, they secure ownership."[91] V.S. McClatchy, a former newspaper publisher and leader of anti-Japanese sentiment at this time, echoed each point.[92]

Also in 1920, James Phelan ran for re-election to the Senate on a whites-only platform. He lost, but Phelan's platform reflected the use of anti-Japanese propaganda as a political tool. Carey McWilliams, a lawyer, journalist, and for a time Director of the Division of Immigration and Housing within the California Department of Industrial Relations, noted that "the `peak' years of anti-Japanese agitation" were "years in which Presidential elections were held:1908, 1912, 1916, and 1920."[93] The rhetoric was hard to control. In 1920, for example, "a band of several hundred white men, with the 'apparent connivance of the police,' rounded up fifty-eight Japanese laborers in Turlock, `placed them on a train, and warned them never to return.'"[94]



The 1920 law eliminated the three-year lease exception, precluded ineligible aliens from acquiring stock in an entity authorized to own land (unless a treaty guaranteed that right), required trustees to report to the State information that could ferret out evasion, established a

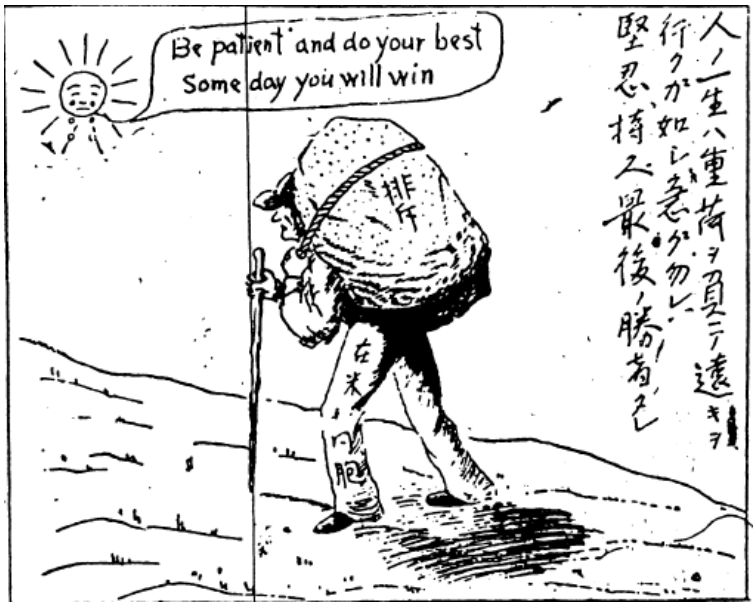
[91] *Id*. at 26.

[92] V.S. McClatchy, *Japanese in the Melting-Pot: Can They Assimilate and Make Good Citizens?*, 93 ANNALS OF THE Am. Acad. Pol. & Soc. 29 (1921).

[93] McWilliams, *supra* note 1, at 25.

[94] *Id.* at 62. Buell reports that those responsible were arrested, tried, and acquitted. Buell, *Legal Aspects*, *supra* note 1, at 43.

presumption that land was subject to escheat if consideration for a transaction was paid by an ineligible alien, and prohibited aliens ineligible to own land—including parents—from acting as guardians of property held in the name of children.[95] A trio of cases in 1923 upheld the law,[96] although in other contexts at this time the Supreme Court defended freedom of contract.[97] Japanese land ownership decreased as the law tightened.[98]



[95] This prohibition was stricken in *In re Estate of Yano*, 188 Cal. 645 (1922), as violating equal protection with respect to the parents, and as depriving the minor of her privileges and immunities, each under the 14th Amendment.
[96] The act itself was upheld in Frick v. Webb, 263 U.S. 326 (1923)(upholding ban on ownership of land by corporations with majority alien ownership), Porterfield v. Webb, 263 U.S. 225 (1923)(rejecting equal protection challenge), and Webb v. O'Brien, 263 U.S. 313 (1923)(holding that contract granting rights analogous to lease could violate the statute). The latter case concerned "cropping contracts," which attempted to evade the law in the form of a labor agreement. A person ineligible to own land farmed the land of another and was paid by a fraction of the crop. The contract at issue gave the tenant substantial control of the land, free from interference by the owner, with payment in the form of half the crop. A 1927 amendment held that proof that a defendant was Japanese was prima facie evidence that he or she was ineligible to own land; the defendant could rebut the presumption with proof of citizenship. A different section of the 1927 act created a presumption that proof that (i) a defendant acquired, possessed or used land combined with (ii) an allegation (not proof) that the defendant was ineligible under the statute (iii) shifted to the defense the burden of proving that the defendant was eligible. Statutes of California 1927 Chap. 528. The principal difference between the two presumptions was that the latter presumption could be applied to a charge of conspiracy in which a (presumably white) seller or agent transferred property to an ineligible defendant. This provision was upheld against an equal protection challenge in People v. Morrison, 125 Cal. App. 282 (Cal. Ct. App. 1932), appeal dismissed Morrison v. People of State of California, 288 U.S. 591 (1933). The U.S. Supreme Court upheld the first presumption on the ground that the defendant reasonably could be expected to prove his own eligibility. It struck the second because alleged conspirators might have no ability to do so.
[97] A point made well in Aoki, *supra* note 26, at 65-66. The analogy to *Lochner* is informative but imprecise, because aliens ineligible for citizenship stood on one side of these contracts though the freedom of white citizen landowners was restricted as well. They rationally sought a balance that would preserve the supply of labor without strengthening the bargaining position of the laborers. Azuma, *supra* note 85, at 27-28.
[98] Ferguson, 35 CAL. L. REV. at 71. The image above appeared in the newspaper *Shin Sekai* in 1921. The bundle is labeled "exclusion." Reprinted in Azuma, *supra* note 85, at 24.

In 1924, another Presidential election year, Congress barred immigration by persons ineligible to become citizens.[99] As noted earlier, citizenship was limited to "free white" persons, so this law effectively banned Japanese immigration.

During this period, it was claimed that persons of Japanese descent were monopolizing the best agricultural land.[100] And, as shown below, after Pearl Harbor, Attorney General Earl Warren suggested that the location of land owned or worked by persons of Japanese descent posed an unacceptable risk of espionage. In truth, however, the pattern of agricultural land occupation was determined in significant extent by the use of intensive farming techniques to render productive land that previously was written off as marginal.[101]

E

[99] Pub. L. 68-139, 45 Stat. 153 (1924), available at https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/43/STATUTE-43-Pg153a.pdf.

[100] *California and the Oriental,* *supra* note 74, at 8, 50. Writing in 1921, Chambers identified the problem as a risk off continued acquisition, noting that some might wonder "why all this agitation over 100,000 Japanese in a total California population of over 3,000,000, or the ownership or control by these people of half a million acres or so in a state that has 99,617,280 acres, and of which area 28,828,951 acres are in farms." Chambers, *supra* note 88, at 25. He answered:

> Watch the gopher at work. He starts to bore into a levee, and as he progresses he is joined by more of his kind; then, in due time, the other side of the embankment is reached, and a little stream of water passes through. As the dirt crumbles, a flow increases and unless promptly checked the bore soon becomes a wide gap with the water rushing through and overflowing the land. That is the flood that means loss, and perhaps eventual disaster.

Id.

[101] McWilliams, *supra* note 1, at 79-80.

Governor Stephens's 1922 invocation of Southern attitudes towards interracial marriages of Black and White couples to justify Californians' animosity to persons of Japanese descent[102] indicates that racist attitudes reinforced one another through the 1920s and beyond. During this period the federal government sought to foster good relations with Japan while California displayed overt hostility. In general, the federal government tried to persuade California to use a lighter touch but did not seek to punish it for the stringent measures it took.[103] Carey McWilliams made this point explicit:

> Theodore Roosevelt, William Howard Taft, Woodrow Wilson, and Calvin Coolidge were all forced to recognize a connection between the Oriental problem on the Pacific Coast and the Negro problem in the Deep South. Since the federal government had capitulated to the South on the Negro question, it found itself powerless to cope with race bigotry on the Pacific Coast. Whenever the West Coast racial creed was seriously challenged in Congress, or when the spokesmen for this creed were proposing new aggressions, representatives from the Deep South quickly rallied to their defense.[104]

F

With immigration and land ownership addressed in the 1920s, the 1930s saw an increase in concern over Japanese persons as security risks. Japan invaded Manchuria in 1931, establishing a compliant government for the area. Japan declared war on China in 1937, and Japan allied with Germany in 1940. In between, angered by Japan's aggression in China, the U.S. terminated its 1911 Treaty of Commerce and Navigation with Japan—the treaty whose provisions created an exception in the Alien Land Laws. For its part, the press, particularly the Hearst papers, kept alive some degree of anxiety over aggression from Japan.

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[102] *California and the Oriental*, *supra* note 1, at 15.

[103] The lawsuits filed by the Roosevelt administration in connection with the School Board incident constitute the brief exception that proves the rule.

[104] McWilliams, *Prejudice*, *supra* note 1 at 12.

Anti-Japanese legislation in California tapered off, though, as noted above, anti-miscegenation laws were extended to Filipino persons. Nisei children, citizens by birth, did not face the same language barriers as their Isei parents and were able to participate in school and related activities that helped them assimilate more fully in United States culture than their parents.[105]

[105] Grodzins, *supra* note 1, at 15. Nisei children were better educated than their White counterparts, for example. Thomas & Nishimoto, *Spoilage, supra* note 1, at 2 n.6

Security concerns increased throughout the 1930s. Since the 1920s the FBI had investigated Japanese persons whom the Bureau thought might be in league with organizations the Bureau monitored, such as Marcus Garvey's Universal Negro Improvement Association.[106] Such investigation intensified in the 1930s, as the FBI feared that Japanese persons in America might foment rebellion of non-white persons against white discrimination.[107] As the decade progressed, the War Department worried that Japanese persons would foment racial discontent among Black persons working in the defense industry, as a means of impeding U.S. mobilization.[108]

As early as 1936, President Roosevelt wrote a memorandum to the chief of naval operations referring to the possible need for "concentration camps" to be used to contain both alien and citizen Japanese persons in Hawaii "in the event of trouble."[109] (Regarding terminology, remember that in 1936, and for some time thereafter, writers using the phrase "concentration camps" would not have then known of slave labor camps or death camps operated by the Nazi regime.)

In 1939-40, the FBI began to compile a list of alien persons it thought might be security risks, and the Office of Naval Intelligence ("ONI") began to keep lists of groups it considered potentially subversive, membership in which could be used as a proxy to label a person a security risk.[110] The Justice Department's Special Defense Unit established a three-tier designation of risk levels, with A being the greatest risk and C the least. For example, membership in the German-American Bund or the American National Socialist League, both Nazi organizations, placed a German alien in category A.[111] The ONI compiled a similar list for Japanese persons. Organizations listed as reflecting high security risk included the Black Dragon Society, which one scholar described as "a patriotic, ultra-right wing extremist group,"[112] but also the Japanese-American Theater Association, the Japanese-American Student Conference, the Buddhist Federation, and the Japanese Historical Society.[113]

In March 1941, Lieutenant Commander Kenneth Ringle of the ONI organized a break-in at the Japanese Consulate in Los Angeles. Aided by local police, the FBI, and a safe cracker borrowed from prison, Ringle and his men copied documents in the consulate that disclosed the identities of members of a Japanese spy ring. The leader was arrested and deported.[114] In June 1941, Itaru Tachibana, a language officer with the Imperial Japanese Navy was arrested in Los Angeles for spying. He was accused of procuring Naval reports through a white man named Al

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[106] Kashima, *supra* note 1, at 31.

[107] Bob Kumamoto, *The Search for Spies: American Counterintelligence and the Japanese American Community* 1931-1942, THE AMERASIA JOURNAL 45, 50-51 (1979).

[108] *Id*. at 54-55.

[109] Kashima, *supra* note 1, at 29.

[110] *Id*. at 29, 37.

[111] *Id* at 29.

[112] Kumamoto, *supra* note 107, at 65.

[113] *Id*. at 62.

[114] Irons, *Justice at War*, *supra* note 1, at 22-23; Ken Ringle, *What Did You Do Before the War, Dad*, Washington Post Magazine, December 6, 1981 at 54.

Blake, whom he paid.[115] In November 1941, the FBI conducted raids on the Los Angeles Japanese Chamber of Commerce and the Central Japanese Association.[116]

President Franklin Delano Roosevelt ran an informal intelligence network through a journalist named John Franklin Carter.[117] Carter deputed Curtis B. Munson, a wealthy businessman, to tour the West Coast and report back on security risks. On November 7, 1941, Carter sent Roosevelt Munson's report. Munson concluded that in the event of war "[t]here will be no armed uprising of Japanese," though there would be sabotage by agents already infiltrated into the U.S. He estimated that in each naval district (there were three) about 250-300 suspects were under surveillance, of whom 50-60 in each district were considered serious risks. Munson referenced a captain of Naval Intelligence who had intercepted information sent from the U.S. to Japan and found most of it worthless. He concluded:

> For the most part local Japanese are loyal to the United States or, at worst, hope that by remaining quiet they can avoid concentration camps or irresponsible mobs. We do not believe that they would be at least any more disloyal than any other racial group in the United States with whom we went to war.[118]

By the end of November 1941, U.S. intelligence warned of imminent hostilities with Japan. A November 27, 1941, message from the Chief of Naval Operations began: "This dispatch is to be considered a war warning." On December 5, 1941, the FBI ordered an office in Juneau, Alaska to coordinate "the immediate apprehension of Japanese aliens in your district who have been recommended for custodial detention."[119]

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[115] Kumamoto, *supra* note 107, at 55.

[116] Kashima, *supra* note 1, at 36; Kumamoto, *supra* note 107, at 68.

[117] *Personal Justice Denied*, *supra* note 1, at 51.

[118] Quoted in *id*. at 53.

[119] Quoted in Kumamoto, *supra* note 107, at 69.

II

Japan's December 7 surprise attack on Pearl Harbor killed over 2,400 Americans and destroyed numerous vessels and planes. On December 7, ***Franklin Delano Roosevelt*** was president. He was a lawyer by training, and former Deputy Secretary of the Navy. His family money came from his mother, whose father was a merchant with extensive dealings with China.[120] Japan had been at war with China since 1937.

The War Department—Civilian Officials

Roosevelt's Secretary of War was ***Henry Stimson***. Born in 1867, Stimson was a graduate of Yale and Harvard Law School and was part of an elite New York law firm before becoming the United States Attorney in New York. A Republican, Stimson was Secretary of the War under President Taft and Secretary of State under President Hoover. He was a proponent of the Stimson Doctrine, which held that nations should not be allowed to retain territory gained by aggressive action, a doctrine that refused to acknowledge Japan's dominance over Manchuria.

One of Stimson's deputies was ***John J. McCloy***. Born in 1895, he attended Harvard Law School, pausing his legal studies to fight in World War I as *aide de camp* to Brigadier Gen. Guy H. Preston. McCloy saw limited service at the front as an artillery officer. He returned to practice law in New York. Among his cases was representation of Bethlehem Steel, which sought damages from Germany for sabotage resulting in a massive explosion at a warehouse near the Statue of Liberty. McCloy helped show that the explosion was caused by German agents. In 1941, Stimson made McCloy an assistant secretary of war. America had broken the code the Japanese used for military communications; McCloy was one of a very few officials cleared to read the decryptions, called "Magic."[121] In testimony in the 1980s, McCloy testified that before December 7 the Magic decryptions revealed that Japan had "a subversive agency" operating on

[120] *E.g.*, Jean Edward Smith, FDR (2007).

[121] *See* Kai Bird, THE CHAIRMAN 50-52, 77-92, 137 (1992). On the Bethlehem Steel case, *see* Irons, *Justice at War*, *supra* note 1, at 16.

the West Coast.[122] Among the persons involved in the internment decision, it appears that only Roosevelt, Stimson, and McCloy had access to these decryptions.

The Justice Department

Roosevelt's Attorney General was ***Francis Biddle***. Born in Paris in 1886, Biddle graduated from Harvard Law School, was private secretary to Justice Oliver Wendell Holmes, Jr., and was a former Chair of the National Labor Relations Board. He was a judge on the Third Circuit from 1939-1940 and Solicitor General 1940-1941. He was appointed Attorney General on September 5, 1941.

Charles Fahy was Solicitor General of the United States from November 1941 through 1945. He was a Navy pilot in World War I, receiving the Navy Cross. He was General Counsel of the National Labor Relations Board from 1935-1940. When appointed Solicitor General he had already argued 18 cases before the Supreme Court; his record was 16-2. In 1945, General Eisenhower asked Fahy to become director of the legal division of the U.S. administration in occupied Germany.

James Rowe was an Assistant Attorney General. Like Biddle, he was a Harvard Law School graduate and a former secretary to Justice Holmes. Rowe worked in various New Deal legal positions and, in 1939, became an assistant to President Roosevelt. He became Assistant Attorney General in 1941. He was on familiar terms with Roosevelt's staff, and attempted to draw the president's attention to the exclusion issue. (Rowe's oral history interview on these topics is here.)

Herbert Wechsler was Assistant Attorney General for the War Division of the Department of Justice (not to be confused with lawyers working for the War Department itself). Wechsler was a renowned law professor, instrumental in the drafting of the Model Penal Code, and later represented the New York Times in the Supreme Court argument that produced *New York Times v. Sullivan.*

Edward Ennis was the head of the Alien Enemy Control Unit at the Department of Justice. He graduated from Columbia Law School in 1932, worked as an assistant United States Attorney and then in the Solicitor General's office in the Justice Department. Ennis went back to New York to head the Civil Division of the U.S. Attorney's office, but he returned to Washington in July 1941 when Biddle asked him to become the general counsel of the Immigration and Naturalization Service. Ennis also worked with the Special Defense Unit, which had been established in 1939 to plan for the screening of enemy aliens in the event of war. Ennis eventually ran the Alien Enemy Control Unit within the Justice Department, which dealt with persons detained because they were suspected of being a security risk.[123] (Ennis's oral history interview on these topics is here.)

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[122] *Japanese-American and Aleutian Wartime Relocation*, Hearings on H.R. 3387, H.R. 4110, and H.R. 4322, 98th Cong. 2nd Sess (1984).

[123] Irons, *Justice at War*, *supra* note 1, at 14-15.

J. Edgar Hoover was director of the FBI, which was charged with compiling a list of suspicious "enemy aliens"—persons who were not U.S. citizens and whose ancestry traced to a country at war with the U.S.

The Army and Navy

Lieutenant General John DeWitt was commander of the Western Defense Command and of the Fourth Army.[124] DeWitt had served in the field in the Spanish-American War, and thereafter had focused on logistics and supply. He served four tours of duty in the Philippines, was commandant of the Army War College, and took up his post in San Francisco in 1939.[125] Alone among the persons discussed in this note, he was not a lawyer.

Major General Allen W. Gullion was the Provost Marshal General of the Army, responsible for law enforcement within the Army and, during this period, control of enemy aliens. He was a graduate of the West Point and the University of Kentucky College of Law. He began work as a military lawyer in 1917 and was named Judge Advocate General in 1937. He became Provost Marshal General in August 1941.

Col. Karl Bendetsen was an assistant to Gen. Gullion when the latter was Judge Advocate General. Bendetsen was placed in charge of the Aliens Division of the Provost Marshal General's office. He graduated from Stanford Law School. Other than Earl Warren, he was the only person discussed in this note to have grown up on the West Coast—in Aberdeen, Washington. He served as a liaison between Gullion, DeWitt, and McCloy.[126]

California Officials

Earl Warren was the Attorney General of California. A graduate of U.C. Berkeley, he had been the District Attorney for Alameda County. In 1942 he was elected Governor of California. In 1948 he was unsuccessful as a candidate for Vice President. He became Chief Justice of the United States in 1953.

A

A 1941 agreement between the Justice and War Departments gave the Justice Department responsibility within the continental United States for alien persons descended from countries with whom the United States might go to war. The Justice Department (FBI) would apprehend suspicious persons; the Army agreed to detain them.[127]

On the evening of December 7, the president authorized the FBI to arrest persons identified as subversive. Presidential proclamations dated December 7 and 8 authorized the detention of alien Japanese, German, and Italian persons deemed suspicious, authorized the Army to assist the FBI in rounding up such persons, and authorized the exclusion of enemy aliens "from any locality in which residence by an alien enemy shall be found to constitute a danger to the public peace and safety of the United States."[128] The proclamations also authorized

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[124] Conn, *supra* note 1, at 80.

[125] Irons, *Justice at War*, *supra* note 1, at 26.

[126] *Id*. at 31.

[127] Kashima, *supra* note 1, at 24-27; Conn, *supra* note 1, at 116.

[128] Conn, *Japanese Evacuation, supra* note 1, at 116-117.

the confiscation of items such as shortwave radios, cameras, or guns. The Attorney General was responsible for such activity on the West Coast.[129] On December 8, the United States declared war on Japan. By December 9, the FBI, with the cooperation of the army, had taken into custody over 1,000 Japanese persons and smaller numbers of German and Italian persons. On December 11, Italy and Germany declared war on the United States, which reciprocated that day. Between December 17 and 23, Japanese submarines sank two tankers and one freighter off the West Coast.[130]

Initial reactions, public and private, did not call for mass exclusion of Japanese persons.[131] In remarks dated December 8, 1941, Representative Coffee of Washington wrote, "[a]s one who has lived as a neighbor to Japanese-Americans, I have found these people, on the whole, to be law abiding, industrious, and unobtrusive. Let us not make a mockery of our Bill of Rights by mistreating these folks."[132] The Justice Department issued a press release on December 10, stating "[a]t no time will the government engage in wholesale condemnation of any alien group."[133]

On December 15, on his return from inspecting Pearl Harbor, Navy Secretary Henry Knox asserted that the attack succeeded because of "fifth-column work," implying subversion by Japanese in Hawaii.[134] His comments were reported widely.[135] On December 16, 1941, Munson wrote a second report, which Carter summarized for Roosevelt. Also on that date, Admiral Husband E. Kimmel and Lt. General Walter C. Short, the senior officers in Hawaii of the Navy and Army, respectively, were removed from their posts.[136] Attorney General Francis Biddle's notes of a December 19, 1941, cabinet meeting stated, "Knox told me, which was not what Hoover had thought, that there was a great deal of very active Fifth Column work going on both from the shores and from the sampans."[137]

On December 19, General DeWitt recommended to Army GHQ[138] that all enemy aliens be removed from coastal California.[139] This request did not distinguish Japanese from German or Italian aliens. On December 22, DeWitt asked the War Department to press the Justice Department to issue regulations implementing President Roosevelt's December 7 and 8 proclamations.[140] As late as December 26, 1941, Lt. Gen. John DeWitt, in charges of defense

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[129] Presidential Proclamation 2525, December 7, 1941.

[130] Irons, *Justice at War*, *supra* note 1, at 27.

[131] Grodzins, *supra* note 1, at 19, 63-64, 180-181, 209-217; Conn, *supra* note 1, at 117; Gerald Stanley, *Justice Deferred*, *A Fifty-Year Perspective on Japanese-Internment Historiography*, 74 SO. CAL. Q. (1992); Gary Okihiro & Julie Sly, The Press, Japanese Americans, and the Concentration Camps, 44 PHYLON 66, 68 (1983)

[132] Congressional Record (Appendix), December 8, 1941 at A5554.

[133] Quoted in Stanley, *supra* note 132, at 182.

[134] Okihiro & Sly, *supra* note 131, at 79; *Personal Justice Denied*, *supra* note 1, at 55.

[135] *Personal Justice Denied*, *supra* note 1, at 264.

[136] Irons, *Justice at War*, *supra* note 1, at 27.

[137] Notes of Cabinet meetings, Francis Biddle, Attorney General, Dec. 7, 1941. FDRL. Biddle Papers (CWRIC 3793).

[138] The acronym stands for "General Headquarters."

[139] Conn, *supra* note 1, at 117.

[140] Irons, *Justice at War*, *supra* note 1, at 28.

measures on the West Coast, stated in a telephone conversation with Major General Allen W. Gullion, Provost Marshall of the Army:

> [I]f we go ahead and arrest the 93,000 Japanese, native born and foreign born, we are going to have an awful job on our hands and are very liable to alienate the loyal Japanese from disloyal . . . . I'd rather go along the way we are now . . . rather than attempt any such wholesale internment . . . . An American citizen, after all, is an American Citizen. And while they all may not be loyal, I think we can weed the disloyal out of the loyal and lock them up if necessary.[141]

DeWitt did, however, want to expedite search and seizure for the items specified in the proclamations and he thought the Attorney General was moving too slowly to promulgate regulations allowing such activity.[142] On December 30, the Attorney General authorized issuance of search warrants based on reasonable cause (attested by the FBI) to believe that the house contained contraband, as well as warrants for the arrest of persons living in the house.[143] For its part, in December 1942 the FBI (Director Hoover) believed the Army was overreacting and that mass raids might alienate otherwise loyal persons.[144]

On January 4-5, Rowe met with Bendetsen and DeWitt in San Francisco. Based on Gullion's prior suggestion, DeWitt pressed for the power to search houses and cars of enemy aliens without cause and the power to exclude enemy aliens from areas he deemed strategic. [145] The latter demand was consistent with the President's proclamation, and Biddle largely agreed.[146] He also agreed to treat a representation that an enemy alien resided in a house as enough to show probable cause.[147] The Justice Department did not agree to conduct warrantless searches, or mass searches not based on some showing of cause. Nevertheless, the FBI began to search, for example, all fishermen (400) on Terminal Island near Los Angeles, looking for shortwave radios.[148] Sometime before January 20, Rowe told Roger Baldwin, head of the American Civil Liberties Union, that DeWitt was proposing to exclude all Japanese persons from the coastal area.[149]

On January 21, General DeWitt proposed exclusion zones divided into two categories. Enemy aliens would be excluded from all "Category A" zones, of which he identified 86. Enemy aliens would be permitted in eight "Category B" zones only with a permit. In California, over 7,000 enemy aliens would be excluded from Category A zones, only 40% of which would have been Japanese persons; the majority would have been Italian.[150] Secretary of War Stimson forwarded the recommendation to Attorney General Biddle along with a cover letter, drafted by the Provost Marshal General's Office, stating that General DeWitt expressed great concern over

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[141] Quoted in Conn, *supra* note 1, 117-118.

[142] Conn, *supra* note 1, at 118; Irons, *Justice at War*, *supra* note 1, at 30.

[143] Conn, *supra* note 1, at 118.

[144] Irons, *Justice at War*, *supra* note 1, at 27-28

[145] On exclusion, *see* Conn, *supra* note 1, at 118. On search, *see* Irons, *Justice at War*, *supra* note 1, at 34.

[146] Irons, *Justice at War*, *supra* note 1, at 35; Conn, *supra* note 1, at 119.

[147] Irons, *Justice at War*, *supra* note 1, at 35.

[148] *Id*. at 37.

[149] Irons, *Justice at War, supra* note 1, at 107.

[150] Conn, *supra* note 1, at 120.

ship-to-shore radio communications that he believed were coordinated by enemy aliens. The letter asserted that "not a single ship has sailed from Pacific ports without being subsequently attacked."[151] These statements were later shown to be incorrect.

B

Meanwhile, in early January 1942, California politicians began to lobby for exclusion of all Japanese persons. In typical California fashion, an actor with political interests was an early advocate. On January 6, 1942, Leo Carrillo wrote to Congressman Leland Ford. "My Dear Leland," he wrote:

> Why not urge legislation to compel all Japanese truck farmers who control nearly every vital foot of our California coast line with their vegetable acreage to retire inland at a safe distance from the California coast which has been declared a combat zone. Mexico has done this as a precaution and to we Californians that seems like good sense. Why wait until they pull something before we act. I travel every week through a hundred miles of Japanese shacks on the way to my ranch and it seems that every farm house is located on some strategic elevated point. Lets get them off the Coast and into the interior.[152]

Congressman Ford forwarded this telegram to Secretary of State Cordell Hull and, on January 16, 1942, to Hoover. In the latter letter Ford wrote that "I know that there will be some complications in connection with a matter like this, particularly where there are many native born Japanese, who are citizens." Nevertheless, he argued:

> if an American born Japanese, who is a citizen, is really patriotic and wishes to make his contribution to the safety and welfare of this country, right here is his opportunity to do so, namely, by permitting himself to be placed in a concentration camp, he would be making his sacrifice and he should be willing to do it if he is patriotic and working for us. As against his sacrifice, millions of other native born citizens are willing to lay down their lives, which is a far greater sacrifice, of course, than being placed in a concentration camp.[153]

Ford eventually sent seven similar communications, including to Attorney General Biddle and Secretary of War Stimson.[154] Biddle replied that citizens could not be interned unless the writ of habeas corpus was suspended; Stimson replied that the prospect of internment of over 100,000 persons presented "complex considerations," but indicated that the Army would be willing to provide internment facilities to the extent necessary.[155]

A commission to investigate Pearl Harbor, headed by Owen Roberts, reported on January 25, 1942. The report did not repeat the "fifth column" accusation but, in a list of factors that included Army failure to operate an aircraft warning system (radar) and Navy failure to fly long-range reconnaissance missions, the report did state that prior to December 7 there were Japanese

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[151] Quoted in *Id*.

[152] Telegram from Leo Carrillo to Congressman Leland Ford, Jan. 6, 1942.

[153] Ford repeated this sentiment on the floor of the House on January 20, 1942. 88 Cong. Rec. 500, 502 (1942).

[154] Grodzins, *supra* note 1, at 64-65.

[155] Irons, *Justice at War*, *supra* note 1, at 39.

spies on Oahu.[156] The report stated that Japanese espionage was centered in the Japanese consulate on Honolulu.[157] The Roberts report found Kimmel and Short guilty of dereliction of duty, but absolved those above and below them in the chain of command. When Justice Roberts returned to Washington D.C. he conveyed his personal doubts about the loyalty of ethnic Japanese persons on Oahu to Secretary of War Henry Stimson.[158] The Roberts report's reference to Japanese spies was accurate, but the report did not blame longtime residents, much less citizens. It did not state that the spies were of Japanese ancestry, rather than in the pay of Japan (though the reference to the consulate points in that direction).

Support for widespread Japanese exclusion increased after the Roberts report was released.[159] On January 27, Los Angeles County fired all its workers of Japanese descent. A January 29 editorial in Hearst's *San Francisco Examiner* stated:

> The only Japanese apprehended have been the ones the FBI actually had something on. The rest of them, so help me, are free as birds. There isn't an airport in California that isn't flanked by Japanese farms. . . . I am for immediate removal of every Japanese on the West Coast to a point deep in the interior. I don't mean a nice part of the interior either. Herd 'em up, pack 'em off and give 'em the inside room in the badlands. Let 'em be pinched, hurt, hungry, and dead up against it. . . . Personally, I hate the Japanese. And that goes for all of them.[160]

As January 1942 stretched into February, persons of Japanese descent were fired from public and private employment and were subject to economic and social boycotts.[161]

The Chief of Naval Operations had asked Ringle to report recommendations on what should be done with Japanese persons on the West Coast. Ringle issued a report on January 26, 1942. He concluded that the large majority of aliens (non-citizens) were at least passively loyal to the United States, and the number of persons who might act as saboteurs or agents was about 300. Ringle opined that these persons were known to the FBI or ONI and either were already detained or could be detained. Ringle thought Kibei—Japanese persons born in the United States, and thus citizens, but who had been educated in Japan and then returned—posed a special risk and he recommended that they be detained. He estimated that there were about 600-700 such

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[156] Available at http://www.ibiblio.org/pha/pha/roberts/roberts.html (finding of fact XVI).

[157] *Id*.

[158] *Personal Justice Denied*, *supra* note 1, at 264. According to Stimson's diary, "on January 20, 1942 "I dined at Justice Frankfurter's with Justice Roberts and McCloy." Stimson reports that Roberts thought

> The tremendous Japanese population in the Islands he regarded as a great menace particularly as a large portion of them are now armed under the draft. He did not think that the FBI had succeeded in getting under the crust of their secret thoughts at all and he believed that this great mass of Japanese, both aliens and Americanized, existed as a great potential danger in the Islands in case a pinch came in our fortunes.

CWRIC Files at 19598.

[159] The Tolan Committee, discussed in detail in Part III, found that after issuance of the Roberts report "public temper changed noticeably." Tolan Preliminary Report at 2. *See also* Okihiro & Sly, *supra* note 131, at 80.

[160] Quoted in *id.* at 72.

[161] Thomas & Nishimoto, *The Spoilage, supra* note 1, at 6.

persons in Los Angeles, and perhaps an equivalent number in the rest of Southern California. Ringle agreed with Munson, concluding:

> [T]he entire "Japanese Problem" has been magnified out of its true proportion, largely because of the physical characteristics of the people; that it is no more serious that the problems of the German, Italian, and Communistic portions of the United States population, and, finally that it should be handled on the basis of the individual, regardless of citizenship, and not on a racial basis.[162]

Ringle argued that "the Nisei could be accorded a place in the national war effort without risk or danger and that such a step would go farther than anything else towards cementing their loyalty to the United States."[163] He further noted "many of the persons and groups agitating anti-Japanese sentiment against the Issei and Nisei have done so for some time from ulterior motives," such as eliminating competition.[164] He opposed legislation introduced by Los Angeles representative Ford "providing for the removal and interment in concentration camps of all citizens and residents of Japanese extraction . . . ."[165] Ringle flew to San Francisco twice to meet with Bendetsen, with a view to conveying his findings, but he was not able to obtain such a meeting.[166] In late January, California political leaders, including Governor Culbert Olsen and Attorney General Earl Warren, contacted DeWitt and Bendetsen, advocating exclusion of both aliens and citizens of Japanese descent. DeWitt felt that "the best people of California" favored exclusion.[167]

C

On February 2, 1942, California Attorney General Earl Warren convened a Conference of Sheriffs and District Attorneys from throughout the state. Its purpose was to discuss using the Alien Land Law to displace Japanese persons from agricultural land near what might be considered strategic locations, such as airports. According to Assistant Attorney General Warren Olney, Warren originally intended to invite only sheriffs and district attorneys "of those few counties where we thought it was likely that there was a provable case. But at the suggestion of the army and navy and other federal authorities, he expanded the list of invitees to include the district attorneys and sheriffs from all counties where the federal government felt there was a security problem."[168]

At the meeting Warren argued that California was at risk of "fifth column activities" and "sabotage,"[169] a point he supported thus:

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[162] Report at 3 (emphasis in original).

[163] *Id*. at 7.

[164] *Id*. at 9. Lt. Commander Ringle specifically mentioned "Jugo-Slav fishermen who frankly desire to eliminate competition in the fishing industry."

[165] *Id*.

[166] Ringle, *supra* note 114.

[167] Irons, *Justice at War*, *supra* note 1, at 41.

[168] Warren Olney III, *Law Enforcement and Judicial Administration in the Earl Warren Era,* an oral history conducted 1970 through 1977 by Miriam F. Stein and Amelia R. Fry, Regional Oral History Office, The Bancroft Library, University of California, Berkeley, 1981, at 228.

[169] Conference transcript at 3.

> It seems to me that it is quite significant that in this great state of ours we have had no fifth column activities and no sabotage reported. It looks very much to me as though it is a studied effort not to have any until the zero hour arrives.[170]

More plainly, the future Chief Justice of the United States insisted that the absence of sabotage proved the risk of sabotage. Together with Congressman Ford's theory that truly loyal Japanese citizens would agree to be interned, this argument persisted in debates over internment.

Various district attorneys pointed out shortcomings in the use of the Alien Land Law as a security measure—judicial proceedings would take time, while removal was an immediate concern, for example, and Japanese citizen children had both the right to own land and the right for an alien parent to act as their guardian.[171] District Attorney Whelan of San Diego County suggested that, in view of the war, German and Italian aliens were ineligible for citizenship as well as Japanese persons. Warren replied that the "purpose of the Act was to limit ownership of land to the White race,"[172] and that use against German or Italian aliens would be inconsistent with that purpose. He also commented that an enforcement effort could produce results even without convictions, in the form of leases that would not be renewed: "We might not be able to put down on paper the exact results of our activity, but it will result in a lot of land going back into white ownership, at least it will to white use."[173]

Warren's meeting produced consensus that California officials would advocate that the Army and federal government take the lead on exclusion or confer on California officials the power to do so. One exchange between Warren and L.A. District Attorney Dockweiler is illustrative:

> [Warren] [Y]ou have about two or three thousand of them down on Terminal Island, right up against a naval establishment there, an air field . . . You wouldn't want to go down there and give those three thousand Japs a bums-rush off that place. . . .
> [Dockweiler] I would if General DeWitt would give me a letter to do it.
> [Warren] Oh yes, I will say. Of course that is true.[174]

Repeating a theme of maneuvering to place or avoid responsibility that ran through all discussions on the topic, Dockweiler stated "[m]y original idea was not to stop on the Alien Land Law to get them off, but to hammer at the authorities who have the powers to get them off the land and away from the coast. . . . And if they don't do it, then the people will know who is

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[170] *Id.* at 5. Professor Daniels attributes this argument to DeWitt and suggests that Warren got it from DeWitt. Daniels, *Decision, supra* note 1, at 25. Daniels describes Warren as a convert to DeWitt's view, though Warren was a California progressive, a member of the Native Sons of the Golden West, and thus had made the progressive anti-Japanese position part of his political ascent.

[171] The initial draft resolution presented at the meeting included a recital to which Warren objected: "Whereas, After careful consideration, analysis, and study of said Alien Land Law it is found and determined that said law cannot and will not meet the seriousness of the present situation and need, and the procedure thereunder is too cumbersome, dilatory, and inadequate to obtain immediate results." Conference transcript at 157.

[172] *Id.* at 31.

[173] *Id*. at 44. *See also id.* at 60 ("I think if we can clean this situation out, or as much as we can, and get it into white ownership or white possession, we are making ourselves more self-reliant than we otherwise might be").

[174] *Id*. at 80.

responsible."[175] Dockweiler also argued that citizens of Japanese descent—Nisei—were a greater risk than the older alien population because the citizens were younger.[176] For his part, Warren urged attendees to move past the weaknesses of the Alien Land Law by conjuring a hypothetical in which "there were some violations of the Alien Land Law in the neighborhood of some vital facility of the community" and "fifth column activities were engaged in and the whole defense program fell down" or "[m]aybe some people would get killed, and then they would have an investigation in California *like the one over in Pearl Harbor* and say . . . "[t]hose Japs were living right up there in violation of the law, right under those big power lines, when the zero hour struck . . . . "[177] He concluded, in a room filled partly with elected officials, "I wouldn't want to have that either on my conscience or on my record."[178]

From this discussion Warren conceived the idea of mapping Japanese land ownership. He conjectured that "if we really surveyed our counties accurately with respect to the Japanese ownerships and also with relation to our critical points, that we would find some things that would just dumbfound us."[179] He thought when the mapping was done and the facts were "made known to the Military and Naval authorities, [those facts] might bring about something very, very substantial in the State."[180] Warren volunteered to act as intermediary, providing local officials with locations the military deemed critical.[181] Local officials drew up the maps and sent them to Sacramento. One of the resulting maps for San Diego county is reprinted below. Warren also volunteered to assist district attorneys in pursuing alien land law cases: "I will prepare the necessary forms of complaints in escheat and indictment for violation of this Act, and any other thing that you think would be of interest to you."[182]

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[175] *Id*. at 81.

[176] *Id*. at 114 ("We have got to make a drive to do something about the American born Japs, not the alien Jap, but the American born. He is the danger").

[177] *Id*. at 74-75 (emphasis added).

[178] *Id*. at 75.

[179] *Id*. at 115. *See also id.* at 125.

[180] *Id*. at 116.

[181] *Id*. at 125.

[182] *Id.* at 124. The reader may note that the map reprinted in the text does not depict agricultural land. The Alien Land Law provided that aliens could acquire interests in land "in the manner and to the extent, and for the purposes prescribed by any treaty *now existing* between" the U.S. and the alien's nation of origin. Statutes of California 1923 Chap. 441 § 2 (emphasis added). The 1911 treaty between the U.S. and Japan was in effect when the statute was amended in 1923 and 1937, but the United States terminated the treaty in 1939 in response to Japan's assault on China. Kumamoto, *supra* note 107, at 51. Warren's subsequent synopsis of the law for district attorneys stated that abrogation of the treaty did not affect rights under the law. *Id*. at 5.

In general, in the latter part of January 1942 through February 1942, political forces in California hostile to the interests of Japanese persons mobilized to advocate for exclusion. The consequences for Japanese persons were severe. On January 26, 1942 Lieutenant Commander Ringle recited a list of challenges as of that date:

> [L]oss of employment and income due to anti-Japanese agitation by and among Caucasian Americans, continued personal attacks by Filipinos and other racial groups, denial of relief funds to desperately needy cases, cancellation of licenses for markets, produce houses, stores, etc., by California State authorities, discharge from jobs by the wholesale, unnecessarily harsh restrictions on travel, including discriminatory regulations against all Nisei preventing them from engaging in commercial fishing . . . [183]

D

While Warren and California law enforcers were mapping Japanese residents, the debates in Washington D.C. drew to a close. The War Department and Justice Department found it hard to agree on the contours of zones of exclusion, which had been agreed to in principle on January 4-5. DeWitt's January 21 zones for California were modest, as noted above. They implied exclusion of about 7,000 persons, 40% of whom were Japanese. His recommended zones of exclusion for Oregon and Washington included all of Portland, Seattle, and Tacoma.[184] This

[183] Ringle Report at 3. He later wrote: "[t]here already exists a great deal of economic distress due to such war conditions as frozen credits and accounts, loss of employment, cloning of businesses, restrictions on travel, etc. This condition is growing worse daily as the savings of most of the alien-dominated families are being used up." *Id*. at 8. Carey McWilliams elaborates on this point in McWilliams, *supra* note 1, at 128.

[184] Conn, *supra* note 1, at 229.

recommendation implied exclusion of an additional 10,700 enemy aliens; as had been the case in California, about 40% of that population was Japanese.[185]

On February 1, 1942, Gullion, Bendetsen, and McCloy from the Army met with Hoover, Rowe, Ennis, and Biddle from the Justice Department to discuss exclusion. The Justice representatives proposed a joint statement stating that the War and Justice Departments agreed that "the present military situation does not at this time require the removal of American citizens of the Japanese race." Gullion questioned the statement, and in a later conversation DeWitt concurred: "I wouldn't agree to that." DeWitt affirmed his view that both aliens and citizens needed to be excluded from restricted areas. Bendetsen then related his view of the Justice Department's position: "They say that if it comes to pass, if we recommend and it is determined that there should be a movement or evacuation of citizens, they say hands off, that it is the Army's job . . . ." DeWitt replied: "what they are trying to do, it looks to me just off the bat, without thinking it over, they are trying to cover themselves and lull the population into a false sense of security." The conversation continued:

> General DeWitt: I tell you Bendetsen, I haven't gone into the details of it, but Hell, it would be no job as far as the evacuation was concerned to move 100,000 people.
>
> Major Bendetsen: Put them on trains and move them to specified points.
>
> General DeWitt: We could to it in job lots, you see. We could take 4000 or 5000 a day, or something like that.

On February 4, 1942, Gullion spoke to General Mark Clark, who was to meet with Congress regarding the situation.[186] In this account, Gullion attributed to McCloy a comment McCloy supposedly made to Biddle:

> [Y]ou are putting a wall street lawyer in a helluva box, but if it a question of safety of the country, the Constitution of the United States, why the Constitution is just a scrap of paper to me. That is what McCloy said. But they are just a little afraid DeWitt hasn't enough grounds to justify any movements of that kind.[187]

During the call, Gullion told Clark that exclusion of only alien persons "doesn't touch citizens at all and personally I don't think that is going to cure the situation much." Bendetsen echoed this sentiment in a memorandum to Gullion on the same day. Bendetsen echoed an

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[185] *Id*. at 130.

[186] General Gullion characterized the Western Congressmen: "We've had a man 'up there, darn it, they are nothing but just a lot of bull."

[187] McCloy later denied making such a comment. Bird, *Chairman*, *supra* note 121, at 150 n.11. In a February 5 conversation with Gullion, DeWitt noted growing sentiment for exclusion in California:

> I tell you has just reached the point out here it don't make any difference what the Department of Justice says, the people are going to handle it locally thru the Governor and they are going to move those people to arable land and tillable land. They are going to keep them in the State. They don't want to bring in a lot of negroes and Mexicans and let them take their place.

argument advanced at Warren's February 1 meeting of law enforcers: Second-generation citizens—Nisei—were more dangerous than their immigrant parents:

> The average age of the alien Japanese is upwards of sixty years. A great majority of the males are old and ill. The Nisei or second generation (citizen) Japanese, has an average age of 30 years. Most of these have been indoctrinated with the filial piety which characterizes that race. Their affections, if any, for the United States will not be stimulated by the wholesale removal of their parents from their several homes. On the contrary, it would be a natural and only human reaction if, as it is to be expected, the Nisei were incensed by such action.

Bendetsen wrote that evacuation of all persons of Japanese descent plus alien Italians and Germans deemed dangerous

> has the widest acceptance among the Congressional Delegations and other Pacific Coast Officials. It is undoubtedly the safest course to follow, that is to say as you cannot distinguish or penetrate the Oriental thinking and as you cannot tell which ones are loyal and which ones are not and it is, therefore, the easiest course (aside from the mechanical problem involved) to remove them all from the West Coast and place them the Zone of Interior in uninhabited areas where they can do no harm under guard. . . . However, no one has justified fully the sheer military necessity for such action.

Finally, also on February 4, General DeWitt indicated that he might need to add Los Angeles and San Diego to his exclusion list. By February 12, he had added those cities and most of the San Francisco Bay Area, creating a list that implied exclusion of 89,000 enemy aliens, but only 25,000 of whom would be Japanese.[188] On February 10, Bendetsen wrote DeWitt a memorandum summarizing exclusion-related proposals. Bendetsen wrote that Stimson probably would accept a recommendation for exclusion from large zones, including the cities of San Diego and Los Angeles, but probably would not accept a recommendation for "the entire evacuation of the coastal strip." The official Army history notes that, as late as February 12, DeWitt himself had not proposed exclusion of any citizens,[189] though the 100,000-person figure mentioned in his February 1 recorded comments contemplated such action.

At Justice, Biddle continued to maintain that the Justice Department would not detain or exclude citizens, but he also continued not to insist that such an action would be unconstitutional if taken by the War Department and the Army. He instead took the view that any such action would have to be undertaken by the War Department on the basis of military necessity.[190] As a practical matter, as the scale of exclusion increased the Justice Department became less able to implement it.[191] Assembling and removing tens of thousands of persons was a military job.

Legislators from Western states lobbied for the same end.[192] Representative Ford "phoned the Attorney General's office and told them to stop fucking around. I gave them twenty

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[188] *Id*.
[189] *Id*.
[190] Irons, *Justice at War*, *supra* note 1, at 55-58.
[191] Conn, *supra* note 1, at 131.
[192] Grodzins, *supra* note 1, at 80-82.

four hours notice that unless they would issue a mass evacuation notice I would drag the whole matter out on the floor of the House and of the Senate and give the bastards everything we could with both barrels."[193] As pressure for exclusion built on the West Coast, Stimson wrote in his diary for February 10:

> The second generation [citizen] Japanese can only be evacuated either as part of a total evacuation, giving access to the areas only by permits, or by frankly trying to put them out on the ground that their racial characteristics are such that we cannot understand or trust even the citizen Japanese. The latter is the fact but I am afraid it will make a tremendous hole in our constitutional system to apply it. It is a terrific problem, particularly as I think it is quite within the bounds of possibility that if the Japanese should get naval dominance in the Pacific they would try an invasion of this country; and if they did we would have a tough job meeting them. . . . Many times during recent months I have recalled meeting Homer Lea when I was Secretary of War under Mr. Taft. He [Lea] was a little humpback man who wrote a book on the Japanese peril entitled "The Valor of Ignorance". In those days the book seemed fantastic. Now the things which he prophesied seem quite possible. [194]

On February 11, Stimson attempted to see Roosevelt to obtain a decision about exclusion. Roosevelt was too busy to see him, but in a phone call Roosevelt told Stimson "to go ahead on the line that I had myself thought the best."[195] As the February 10 entry notes, Stimson at this time apparently was considering whether a system using passes would work. On February 11, Warren and Los Angeles Mayor Fletcher Bowron visited DeWitt at the Presidio. According to Bowron, they both advocated exclusion run by the military.[196]

On February 12, renowned newspaper columnist Walter Lippman advocated removal of both Japanese aliens and citizens; he had been in touch with Warren and was familiar with his views.[197] On February 13, West Coast members of Congress wrote Roosevelt urging "the immediate evacuation of all persons of Japanese lineage and all others, aliens and citizens alike, whose presence shall be deemed dangerous or inimical to the defense of the United States from all strategic areas." Those were defined as "military installations, war industries, transportation and other essential facilities" and areas adjacent to such places.[198] A syndicated cartoon was also published on February 13:

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[193] Quoted in *Personal Justice Denied*, *supra* note 1, at 84. This account was given by Ford to Morton Grodzins in September 1942. The present author does not doubt that Ford communicated with the Justice Department to advocate exclusion, but suspects the *machismo* reflected in post-hoc recitation may be greater than was contained in the communication itself.

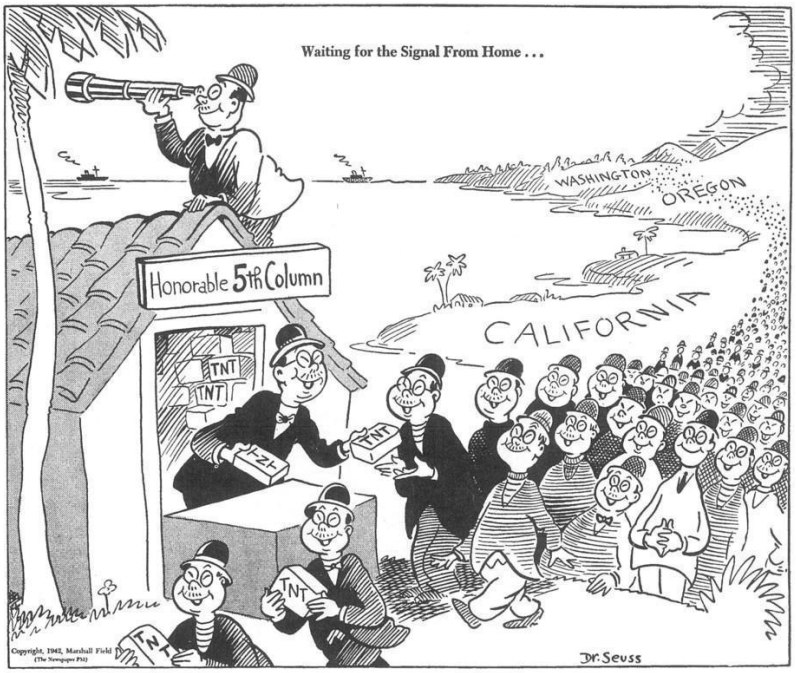
[194] Quoted in *Personal Justice Denied*, *supra* note 1, at 79.

[195] *Id*.

[196] *See* Abraham Hoffman, *The Conscience of A Public Official: Los Angeles Mayor Fletcher Bowron and Japanese Removal*, 92 SO. CAL. Q. 243, 255 (2010).

[197] *Personal Justice Denied*, *supra* note 1, at 80. On the connection with Warren, *see* Sumi K. Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption,* 19 B.C. THIRD WORLD L.J. 73, 101 (1998).

[198] Reprinted in Tolan Preliminary Report at 3.



On February 13, Bendetsen wrote a recommendation under DeWitt's name, which Bendetsen delivered to Stimson on February 16.[199] It sought the power to exclude any persons DeWitt deemed security risks, citizen or not. It stated in part:

> In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become "Americanized," the racial strains are undiluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects . . . . It, therefore, follows that along the vital Pacific Cost over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concreted action at a favorable opportunity. *The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken*.[200]

The argument in the last sentence repeats the argument Warren advanced at his February 2 meeting of California law enforcement officials.

On February 17, Stimson, McCloy, Bendetsen, and Gullion met with General Mark Clark, who was attached to the office of Gen. George C. Marshall, the Army Chief of Staff. Clark argued that mass exclusion would use too many troops that could be better used elsewhere. Stimson decided that DeWitt would get the authority he sought but would not get additional

[199] Conn, *supra* note 1, at 134.

[200] Quoted in *Personal Justice Denied*, *supra* note 1, at 82 (emphasis added).

troops.[201] That same day Biddle sent Roosevelt a memorandum opposing mass exclusion. He wrote:

> For several weeks there have been increasing demands for evacuation of all Japanese, aliens and citizens alike, from the West Coast states. A great many of the West Coast people distrust the Japanese, various special interests would welcome their removal from good farm land and the elimination of their competition . . . . My last advice from the War Department is that there is no evidence of imminent attack and from the F.B.I. that there is no evidence of planned sabotage.[202]

Biddle stated that he had designated every zone of exclusion the War Department had sought, and he stressed the practical problems with mass exclusion. He did not, however, tell the President that exclusion of Japanese persons on racial grounds would be unconstitutional.

On the evening of February 17, Stimson, McCloy, Bendetsen, Biddle, Rowe, and Ennis met at Biddle's house to resolve the issue. The War Department had decided in favor of mass exclusion already, and Biddle did not oppose.[203] He later wrote that Roosevelt had told him the issue was one of military judgment, and Biddle thought he should not oppose exclusion any further.[204] In his oral history comments, Rowe summarized the power dynamics of the meeting:

> The last meeting we had was with Stimson, Patterson and McCloy, and Biddle, Ennis, and myself. Stimson, you've got to remember, was a great man, and he created by his mere presence the atmosphere of the great old man who had come back once again to help his country. This affected Biddle strongly. I think Biddle makes this point in his own memoirs. He did defer to Stimson, as most of us did. But Ed Ennis went right after the great Stimson that morning. It was the last of the business, and I remember, you know, thinking "Fine, Ed, argue with Stimson."
>
> Stimson looked down his nose and said, "Mr. Ennis, we've just got to assume in this room that we're all men of goodwill."[205]

On February 19, 1942, President Roosevelt signed Executive Order 9066, which instructed the War Department to designate military areas in which "the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion."[206] On March 21, 1942, President Roosevelt signed Public Law 503, which specified criminal penalties for violation of an order issued pursuant to EO 9066.

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[201] Conn, *supra* note 1, at 135.

[202] Quoted in *Personal Justice Denied*, *supra* note 1, at 83.

[203] Conn, *supra* note 1, at 135.

[204] *Personal Justice Denied*, *supra* note 1, at 85.

[205] http://texts.cdlib.org/view?docId=ft667nb2x8&doc.view=entire_text .

[206] Two days later, Representative John Tolan stated at a committee hearing that "[t]hat Executive order yesterday was the recommendation, in almost the same words, of the Pacific coast [Congressional] delegation. Tolan Committee hearings at 11010.

E

EO 9066 did not cover Hawaii, which was placed under martial law on December 7, 1941 and remained under martial law until 1944. There were no legal barriers to the Army handling the Japanese population as it wished. But the Japanese population in Hawaii was a greater percentage of the total population than was true in California, Japanese workers did many vital jobs for which there were no obvious replacements, and pressure for evacuation came from outside the Army rather than from within.[207] After investigation, the Army concluded that there had been no sabotage committed by alien or citizen Japanese persons during or after the Pearl Harbor attack.[208]

As a result, the only Japanese persons excluded from Hawaii were those deemed suspicious prior the attack. They were arrested immediately, as were such persons on the West Coast. But though the War Department pressed repeatedly for internment of all persons of Japanese descent, the commanding general in Hawaii, Lt. General Delos Carleton Emmons, opposed general incarceration. He argued that Japanese workers were necessary to the war effort and that the military could not spare personnel to guard detention camps in Hawaii. Relocation to the mainland presented political problems because Japanese persons on the West Coast were already being incarcerated in assembly camps as a prelude to relocation away from the coast. He also consistently disagreed with claims that Japanese persons in Hawaii presented a general security risk. Hawaii never attempted to incarcerate all persons of Japanese descent. By the end of the war, approximately 1,875 Issei and Nisei, out of a population estimated at over 100,000, were transported from Hawaii to internment camps on the mainland.[209]

F

Pursuant to EO 9066, General DeWitt issued a series of proclamations and exclusion orders. For a brief period of time, beginning in early March and ending on March 27, DeWitt issued orders excluding persons of Japanese descent from certain areas, including all of the Western half of California, but these early orders contemplated voluntary compliance. Persons subject to them could not stay in the excluded area but were not subject to further compulsion; they could move anywhere outside the excluded area. In California, about 4,000 persons of Japanese descent moved East from the exclusion zone (Military Area No. 1) into Eastern California (Military Area Number Two). In June 1942, however, DeWitt extended exclusion to Area Two as well. After their first move, these persons who had voluntarily complied with the first order were sent to internment camps as well.[210]

As the 4,000 person figure suggests, many excluded persons had no connections outside the exclusion zones, and persons living adjacent to those zones—in essence Eastern California, border states such as Nevada and Arizona, and adjacent states including Utah—opposed immigration of excluded persons.[211] Carey McWilliams reported that businesses to the east of

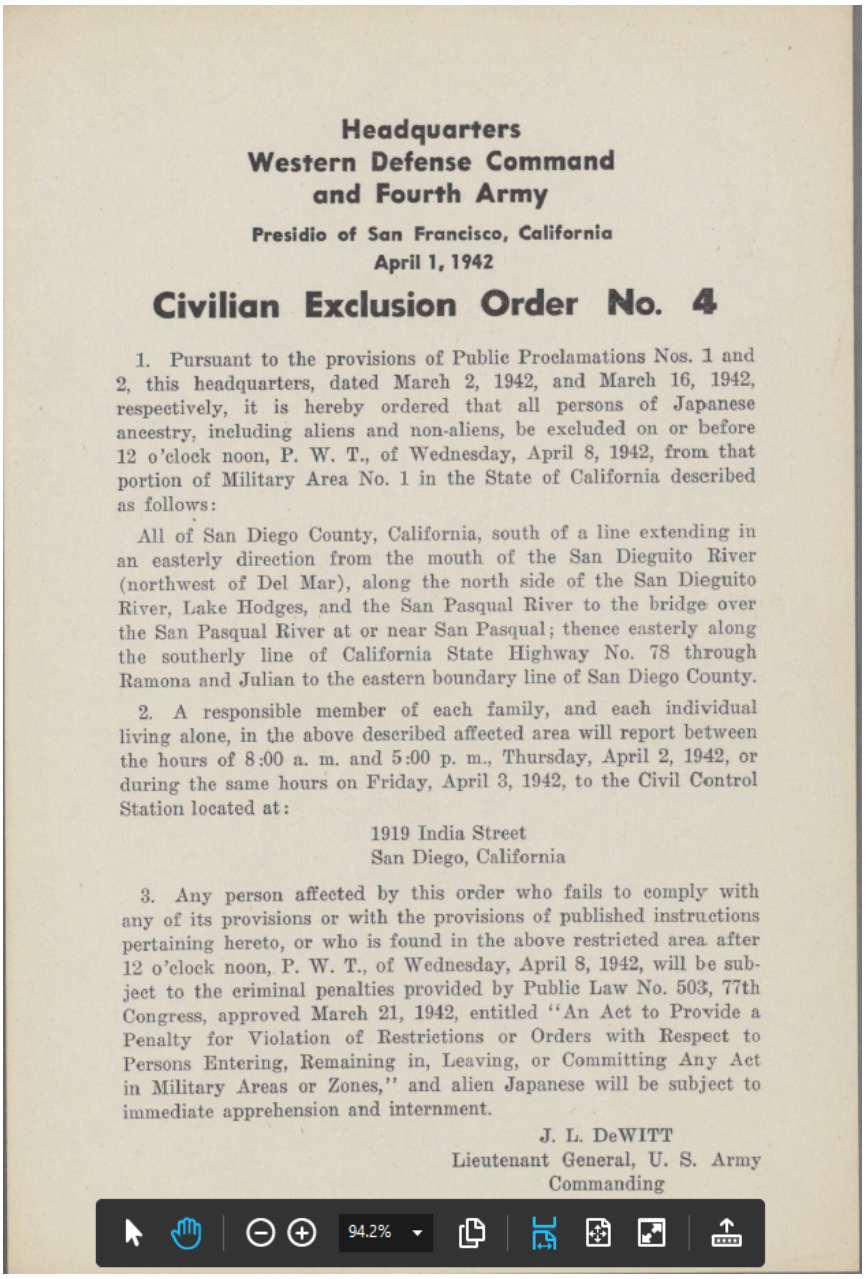
[207] Conn, *supra* note 1, at 207.
[208] *Id.*
[209] *Id*. at 206-214
[210] Thomas & Nishimoto, *The Spoilage, supra* note 1, at 9-11.
[211] McWilliams, *supra* note 1, at 130-131.

coastal California began posting signs such as: "This restaurant poisons both rats and Japs," and, in a barbershop, "Japs Shaved: Not Responsible for Accidents."[212] The Governor of Nevada wrote DeWitt to say "I do not desire that Nevada become a dumping ground for enemy aliens . . . ." He was willing to accept "concentration camps as well as . . . those who might be allowed to farm or do such other things as they could do in helping out." (Emphasis in original.) Meanwhile, the Governor of Utah favored: (i) having the federal government assume all responsibility for "handling the Jap problem" or giving the states enough money to "do the job"; (ii) excluded persons "should not only be self-supporting but should contribute to defense production"; (iii) states should decide on the work excluded persons should do; (iv) states should supervise that work using federal funding; (v) "Evacuees needed immediately for agricultural work, if production is not to suffer"; and (vi) sale of land or long-term leases to excluded persons should be prevented, and excluded persons "should return to former residence after emergency."

On March 27, DeWitt issued Public Proclamation Number 4. It forbade excluded persons from *leaving* the exclusion zones. They could neither stay nor go. This proclamation instead set the stage for a two-step process in which excluded persons were required to report to an assembly center and, eventually, to be shipped to an internment camp.[213] (The order reprinted below is an exclusion order carrying out Proclamation Four.)

[212] *Id*. at 131.

[213] Thomas & Nishimoto, *The Spoilage, supra* note 1, at 9-11.



Headquarters
Western Defense Command
and Fourth Army

Presidio of San Francisco, California
April 1, 1942

Civilian Exclusion Order No. 4

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that all persons of Japanese ancestry, including aliens and non-aliens, be excluded on or before 12 o'clock noon, P. W. T., of Wednesday, April 8, 1942, from that portion of Military Area No. 1 in the State of California described as follows:

All of San Diego County, California, south of a line extending in an easterly direction from the mouth of the San Dieguito River (northwest of Del Mar), along the north side of the San Dieguito River, Lake Hodges, and the San Pasqual River to the bridge over the San Pasqual River at or near San Pasqual; thence easterly along the southerly line of California State Highway No. 78 through Ramona and Julian to the eastern boundary line of San Diego County.

2. A responsible member of each family, and each individual living alone, in the above described affected area will report between the hours of 8:00 a. m. and 5:00 p. m., Thursday, April 2, 1942, or during the same hours on Friday, April 3, 1942, to the Civil Control Station located at:

1919 India Street
San Diego, California

3. Any person affected by this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto, or who is found in the above restricted area after 12 o'clock noon, P. W. T., of Wednesday, April 8, 1942, will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing Any Act in Military Areas or Zones," and alien Japanese will be subject to immediate apprehension and internment.

J. L. DeWITT
Lieutenant General, U. S. Army
Commanding

94.2%

Assembly centers were intended to furnish temporary housing for Japanese persons waiting to be excluded. Two notable centers in California were Santa Anita and Tanforan, both racetracks in which some persons were housed in horse stalls. The centers were run by the Army. James Purcell, who became Mitsuye Endo's lawyer, described Tanforan, in San Bruno, this way:

> My father had been a guard at Folsom Prison for many years and I grew up in that prison. I was unable to distinguish this "relocation center" at Tanforan from the prison except that the walls were barbed wire fences; more frequent gun towers; more difficulty of entering to see a client; and the convicts were better housed than my American citizen clients who were not accused of any crime.
>
> For example, the couple I went to see, with their three children, were occupying a stall which had formerly housed only one horse. The cracks in the beams of the

floor were at least one quarter inch wide. The stall had been whitewashed in some places over patches of manure.[214]

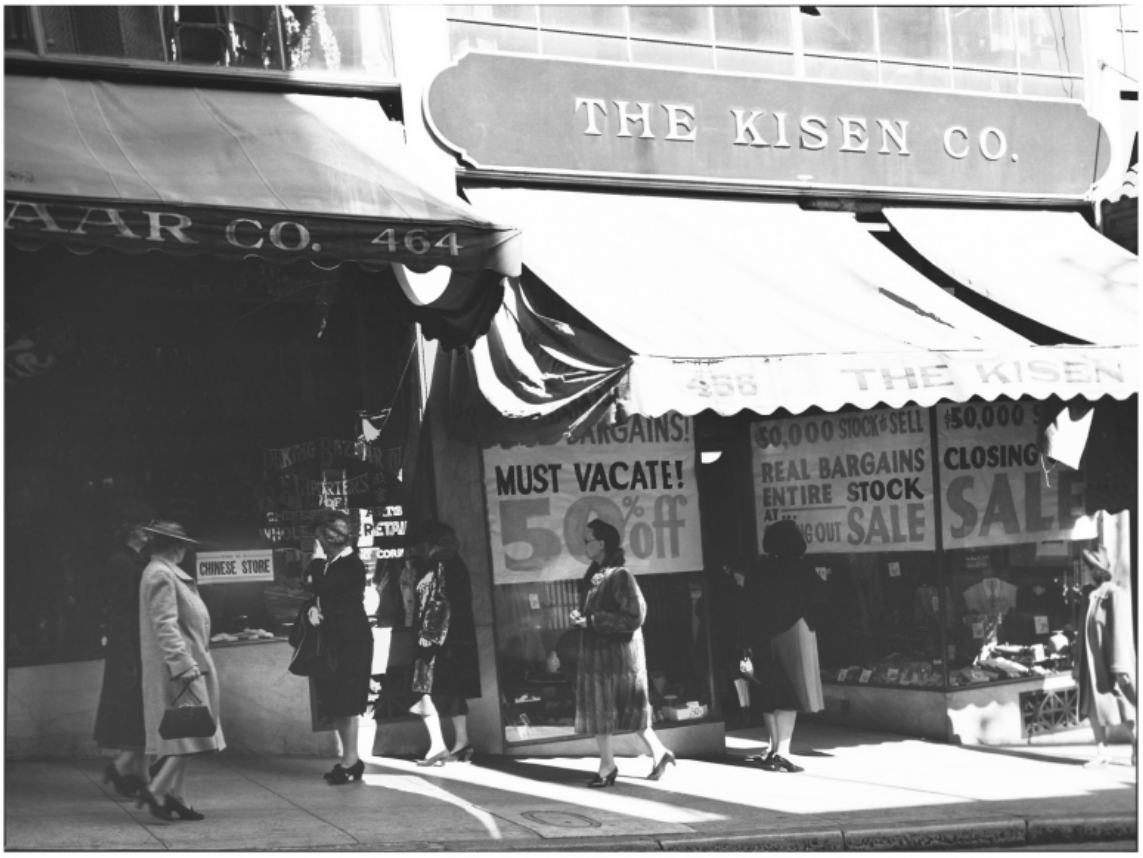
From assembly centers such as Tanforan, excluded persons were shipped to "relocation centers," which in much contemporary usage were referred to as "concentration camps," in California (Manzanar and Tule Lake), Arizona (Gila River and Poston), Idaho (Minidoka), Wyoming (Heart Mountain) and Arkansas (Rohwer and Jerome). The camps were run by a civilian agency created for that purpose, the War Relocation Agency (WRA).

Young "evacuees" wait for their baggage to be inspected upon arrival at the Turlock Assembly Center.
Dorothea Lange May 2, 1942

When the evacuation orders issued, the government had not established any custodian to care for the excluded persons' property. Business owners were forced to "either turn over their business to their creditors at great loss or abandon it entirely" while "commercial buzzards" took

[214] Purcell letter at 3.

"great advantage of this hardship, making offers way below even inventory cost, and very much below real value."[215] Some excluded persons stored their possessions in churches, and some churches were later vandalized to destroy those possessions.[216]



Business owner in San Francisco advertises a half-price sale prior to his "evacuation."
Dorothea Lange April 4, 1942

With respect to agricultural land, some groups favored exclusion as a means to appropriate land that Issei had shown could be profitably farmed. Austin E. Anson, representing the California Shipper-Grower Association, was quoted in the *Saturday Evening Post*, and later by Justice Murphy in dissent in *Korematsu*,[217] as saying:

> We're charged with wanting to get rid of the Japs for selfish reasons. . . . We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. . . . They undersell the white man in the markets. . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can

[215] The quoted statements are reprinted in Thomas & Nishimoto, *supra* note 1, at 8. McWilliams confirms that "the Japanese sustained enormous economic losses as a result of the evacuation . . . ." McWilliams, *supra* note 1, at 138.
[216] One such incident is recounted in McWilliams, *supra* note 1, at 217.
[217] Korematsu v. United States, 323 U.S. 214, 239 (1944)(Murphy, J. dissenting)(citation omitted).

take over and produce everything the Jap grows. And we don't want them back when the war ends, either.[218]

An oft-repeated story tells of a World War I veteran named Hideo Murata, who lived in San Luis Obispo County. In his youth, he had lived in Monterey, and Monterey County had given him a certificate of honorary citizenship as a testament to its "heartfelt gratitude, of honor and respect for your loyal and splendid service to the Country in the Great World War."[219] When Murata learned of the exclusion orders he consulted his friend the sheriff, who confirmed the order was real. Murata went to a hotel in Pismo Beach, checked in, and poisoned himself with strychnine.[220] His certificate was found in his pocket.

F

As the legal machinery of assembly and exclusion began to grind, The House of Representatives Select Committee Investigating National Defense Migration—more generally known, after its chair John H. Tolan of California, as the Tolan Committee—held hearings in Seattle, Portland, San Francisco and Los Angeles to assess the situation of persons of Japanese descent on the West Coast. The Committee existed before Pearl Harbor, and Carey McWilliams thought that holding hearings might defuse somewhat the increasing public antagonism towards Japanese persons—citizens and aliens alike. As it turned out, EO 9066 issued two days before the hearings began, but the record adduced in the hearings played an important role in subsequent events.

Attorney General Warren spoke on the first day of the hearing and his testimony sought to create a record to justify exclusion. The record he presented traced back to his February 2 meeting with California law enforcement officials. In that meeting he had hit upon the idea of mapping the Japanese population, and he began by referencing his demonstrative exhibits—the maps he had commissioned. He told the committee "along the coast from Marin County to the Mexican border virtually every important strategic location and installation has one or more Japanese in its immediate vicinity."[221] He recounted a claim by one sheriff that "Japanese farmers are working within a grenade throw of coast-defense guns" and cited letters he claimed showed that "our war industries also have numerous Japs in their vicinity . . . ."[222] He concluded "the Japanese population of California is, as a whole, ideally situated, with reference to points of strategic importance, to carry into execution a tremendous program of sabotage."[223] Warren also pointed to organized donations by Japanese persons in America to support Japan's efforts in its war against China.[224] He also mentioned his effort to bring the Alien Land Law to bear, noting

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[218] Quoted in McWilliams, *supra* note 1, at 127.

[219] Quoted in *id*., at 133.

[220] Elements of the story raise the question whether it is too apt to be true, and details of the story differ in different accounts, but residents of San Luis Obispo County believe it and, in 2017, placed a headstone to honor Murata. https://www.sanluisobispo.com/news/local/article157972209.html.

[221] Tolan Hearings at 10973.

[222] *Id.* at 10974.

[223] *Id*.

[224] *Id*. at 10976.

its deficiencies but crediting his February 2 conference with producing the maps he used as demonstrative exhibits.[225]

Warren also submitted as exhibits letters he had solicited from law enforcement officials around the State.[226] As noted earlier, at the February 2 meeting Warren evoked the Pearl Harbor investigation that had ended the careers of Admiral Kimmel and General Short, and Warren had stressed the need for enforcement officials to be and appear active against any possible sabotage threats. On February 17 and 18 he sent letters to law enforcement officials around the state that aimed to germinate this seed. The letters suggested the presence of a risk and sought an assessment of its extent by posing three questions:

> (1) What in your opinion is the extent of the danger, by way of sabotage and fifth-column activities in your jurisdiction and in the State as a whole, arising from the presence of enemy aliens?
>
> (2) Do you believe that the danger can be adequately controlled by treating all enemy aliens alike, regardless of nationality, or do you believe that we should differentiate among them as to nationality?
>
> (3) What protective measures do you believe should be taken with reference to each nationality or with reference to enemy aliens as a whole in order to eliminate the danger of sabotage and fifth-column activities?[227]

The responses brimmed with fear. C.B. Horrall, Los Angeles Chief of Police, reported that on December 8-9 "a large amount of loose hay was piled in the shape of an arrow pointing to one of our major aviation plants."[228] The Chief of Police of Marysville—over 150 miles inland and closer to Nevada than to the Pacific—worried that "this city being as close as it is to the coast the danger of sabotage and fifth-column activity in this territory is very grave . . . ."[229] The Imperial County district attorney and sheriff estimated that near El Centro—closer to Arizona than to the Pacific—"the danger from sabotage and fifth-column activities from these 800 alien Japanese enemies is tremendous and very serious."[230] The D.A. from Madera County—which stretches from near Fresno to the Eastern Sierras—thought it unusual that "both before and after December 7, the most influential Japanese in the county had an unusual number of Japanese calling at his residence at all hours of the day and night. These callers had good cars and seem to be persons of sorts. He had never had such string of callers before."[231] This lawyer had ideas:

> Our State and Federal laws, supported by a bill of rights, are entirely inadequate

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[225] *Id*. at 10980-81.

[226] These letters are reprinted in *id*. at 10988-11000.

[227] Quoted in the response of Thomas Whelan, District Attorney of San Diego County, *id.* at 10990.

[228] *Id*. at 10988. The comment was made apropos of "the fact that near the beaches we have large open areas which are utilized by Japanese truck farmers." *Id.* Near the beaches it is windy, but loose hay retained its arrow shape in this story nonetheless. Presumably this idea echoed claims, which the military found false, that arrows pointing to Pearl Harbor had been cut into the sugar cane field of Hawaii. For the falsification of that claim, *see* Findings at 49.

[229] *Id.* at 10994.

[230] *Id.* at 10996.

[231] *Id*. at 10997. The idea that the post-December 7 visits were to discuss the risk of reprisals appears not to have occurred to this writer.

> to meet the situation. If we are not to run the risk of disaster we must forget such things as the writ of habeas corpus, and the prohibition against unreasonable searches and seizures. The right of self-defense, self-preservation, on behalf of the people, is higher than the bill of rights. Martial law should be declared over all of California.[232]

One correspondent from the Central Valley was more measured. The Fresno D.A. thought there had not been any danger from alien enemies in the past but "[s]ince the Federal government has run all the enemy aliens off the various coastal locations and they have been moved into the [San Juaquin] valley it presents an entirely different picture."[233] Some letters, and witnesses, mentioned fire danger as a sabotage risk.[234]

Warren summarized the responses as showing "almost a universal conviction among law enforcement officers in California that there is grave and immediate danger of sabotage and fifth-column activities from the Japanese population and that their removal at once from the vicinity of vital establishments and areas is imperative in order to eliminate such danger."[235] He did not overclaim. The District Attorney for San Luis Obispo suggested that all alien Japanese persons should be shipped "back to Japan," and that if this were not possible "they should be placed where they will not compete against the interests of the American people. The best place for them is in a concentration camp without any frills and just the bare necessities for their existence."[236] The District Attorney for San Francisco opined "there is grave danger of sabotage and fifth-column activities in our jurisdiction, in the event of any invasion by the Japanese and, further, that even in the absence of such invasion, if utmost precautions are not taken, sabotage will be committed."[237] (He did not distinguish among Japanese, Italian, or German aliens, however.)

Several of Warren's correspondents favored treating all enemy aliens alike. The Chief of Police of Santa Paula, in Ventura County, opined:

> I can see no reason why we should attempt to control this danger without treating all enemy aliens alike. While it is true that there are many more Japanese than other enemy aliens, at the same time it is easy to recognize a Japanese as such. Other enemy aliens can mix with citizens of the United States with less chance of being identified as enemy aliens, especially as the enemy alien registration records are not available to local law-enforcement officers.[238]

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[232] *Id*. at 10997.

[233] *Id*.

[234] *Id*. at 10997 (Madera County); at 11011 (Warren: The fire hazards due to our climate, our forest areas, and the type of building construction make us very susceptible to fire sabotage"); at 11066 ("But it is the fire hazard that is the dangerous situation to Tulare County.").

[235] *Id*. at 10981.

[236] *Id*. at 10991. Whether Japan would welcome repatriation from a country with which it was at war was a questioned not explored.

[237] *Id*. at 10992.

[238] *Id*. at 10993.

Nevertheless, for Warren all this supported the conclusion that "the necessities of the present situation require the removal of the Japanese from a considerable portion if not from all of California."[239]

As a good lawyer, Warren also was prepared to rebut possible objections. Some worried that excluding Japanese persons would harm California agriculture, possibly to the detriment of the war effort. Warren had the foresight to obtain letters from various agricultural societies around the state, which he summarized as showing that "the removal of Japanese from California would have an appreciable but not a serious effect upon California agriculture."[240] Here, too, Warren did not exaggerate. The Associated Produce Dealers and Brokers of Los Angeles did find it relevant to note:

> A comprehensive system of associations set up for these small Japanese farmers has enabled them to regulate market supplies and reduce prices at will, to the point that the competing white grower has been forced out of production. However, there is a vast reserve of skilled white farmers who will resume the production of vegetables whenever they have any idea that it can be done without going up against this type of Japanese competition. This will not entail any serious rise in prices, generally speaking, as the difference between the Japanese controlled wholesale price is only a few cents per package less than the white growers' actual cost of production. However, if white growers are to take up the production of vegetables in place of Japanese quick action is imperative.[241]

Given their vested interest in eliminating competition, these letters were presumably no harder to get and put in the record than the letters from law enforcement officials.

Warren then reiterated an argument first vetted at his February 2 meeting:

> Unfortunately, however, many of our people and some of our authorities and, I am afraid, many of our people in other parts of the country are of the opinion that because we have had no sabotage and no fifth column activities in this State since the beginning of the war, that means that none have been planned for us. But I take the view that that is the most ominous sign in our whole situation. It convinces me more than perhaps any other factor that the sabotage that we are to get, the fifth column activities that we are to get, are timed just like Pearl Harbor was timed and just like the invasion of France, and of Denmark, and of Norway, and all of those other countries.
>
> I believe that we are just being lulled into a false sense of security and that the only reason we haven't had disaster in California is because it has been timed for a different date, and that when that time comes if we don't do something about it it is going to mean disaster both to California and to our Nation. Our day of

[239] *Id*. at 10981.

[240] *Id*. These letters are reproduced at *id*. 11000-09.

[241] *Id*. at 1107.

> reckoning is bound to come in that regard. When, nobody knows, of course, but we are approaching an invisible deadline.[242]

Warren also noted "that the consensus of opinion among the law-enforcement officers of this State is that there is more potential danger among the group of Japanese who are born in this country than from the alien Japanese who were born in Japan."[243] Though his testimony correctly reflected comments at his February 2 meeting, it sought to collapse the distinction between citizens (Nisei) and non-citizens (Issei). He then testified that race prevented a sound assessment of loyalty:

> We believe that when we are dealing with the Caucasian race we have methods that will test the loyalty of them, and we believe that we can, in dealing with the Germans and the Italians, arrive at some fairly sound conclusions because of our knowledge of the way they live in the community and have lived for many years. But when we deal with the Japanese we are in an entirely different field and we cannot form any opinion that we believe to be sound. Their method of living, their language, make for this difficulty.[244]

The Committee heard similar testimony from Robert H. Fouke, representing the Joint Immigration Committee, the sum of groups long interested in anti-Japanese measures, including the Native Sons of the Golden West and the American Legion, American Federation of Labor, and the Grange. Fouke recounted the Committee's role (then known as the Japanese Exclusion League) in adopting the Alien Land Laws, and echoed Representative Leland Ford's argument that aliens could prove their loyalty by being excluded from designated areas.[245] The City Manager of Oakland and other witnesses repeated the point as well.[246]

Mike Masaoka, National Secretary of the Japanese American Citizens League ("JACL"), a Nisei group limited to citizen members, testified as well:

> If, in the judgment of military and Federal authorities, evacuation of Japanese residents from the West coast is a primary step toward assuring the safety of this Nation, we will have no hesitation in complying with the necessities implicit in that judgment. But, if, on the other hand, such evacuation is primarily a measure whose surface urgency cloaks the desires of political or other pressure groups who want us to leave merely from motives of self-interest, we feel that we have every right to protest and to demand equitable judgment on our merits as American citizens.[247]

Masaoka stressed Nisei loyalty, but was hard pressed to comment on reports of alleged sabotage in Hawaii. Representative Tolan, for example, asked Masaoka to comment on "authentic pictures during the attack showing hundreds of Japanese old automobiles cluttered on

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[242] *Id*. at 11011-12.
[243] *Id*. at 11014.
[244] *Id*. at 11015.
[245] *Id.* at 11072.
[246] *Id*. at 11094.
[247] *Id*. at 11137.

the one street of Honolulu so the Army could not get to the ships."[248] Dave Tatsuno, President of the San Francisco JACL chapter, testified "Saturday, Attorney General Earl Warren said that because so far there hasn't been a single sign of fifth-column activity that is a sign that there is fifth-column activity. But I disagree with that. I don't think that is real logic."[249]

Representative Laurence F. Arnold, of Illinois, asked whether the Alien Land Laws had engendered resentment among persons of Japanese descent. Masaoka and Henry P. Tani, of the San Francisco JACL Chapter, testified that resentment might possibly exist among Issei but that Nisei could own land, prompting this colloquy:

> Mr. Arnold. Do you know of any instances where Japanese aliens have acquired property in this State in the name of their children in order to avoid the property laws?
>
> Mr. Tani. Sure. My father bought a house in my name and my sister's name and he had a lawyer named as trustee. That was the usual procedure, but we lived in that house.[250]

The Tolan Committee issued findings in May 1942. It concluded that "[l]iquidation of real and personal property held by evacuees is proceeding at a rapid pace, in many instances at great sacrifice."[251] The Committee rejected "any suggestion to intern all evacuees," though this was in fact done.[252] The Committee found the "main geographic pattern of Japanese population in California was pretty well fixed by 1910."[253] This finding was not as specific as Warren's maps, but was consistent with testimony that, for example, the Japanese colony on Terminal Island (a small island in Long Beach harbor) long predated the Naval facilities that were ostensibly under risk of sabotage.[254] Committee members cross-examined Messrs. Masaoka and Tatsuno on assumed incidents of sabotage at Pearl Harbor; a footnote in the Committee's Preliminary Report referenced evidence that no such sabotage occurred.[255] The Final Report reprinted a letter from Assistant Attorney General Rowe confirming that the FBI had found no evidence of sabotage at Pearl Harbor.[256]

In *Japanese-American Relocation Reviewed*, a volume in an oral history project conducted by the Bancroft Library at U.C. Berkeley, Mike Masaoka stated "probably more than any single person in my judgment at least—Earl Warren influenced the Executive decision to authorize and carry out the mass military evacuation and exclusion of all persons of Japanese

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[248] *Id.* at 11141.
[249] *Id*. at 11155.
[250] *Id.* at 11156.
[251] Findings at 13.
[252] *Id*. at 17.
[253] *Id*. at 93.
[254] Tolan Hearings at 11225 (Testimony of Michio Kunitani). Carey McWilliams confirms the point in McWilliams, *Prejudice*, *supra* note 1, at 119.
[255] Tolan Preliminary Report at 2 n.1.
[256] Findings at 49. The Citizens' Counsel of Hawaii submitted affidavits showing "there was no sabotage in the nature of cutting marks in the cane pointing the way to Pearl Harbor and also show[ing] there was no blocking of roadways in the vicinity," *id.*, the latter example being the one Chair Tolan used in cross-examination.

origin from all of California and the western halves of Arizona, Oregon, and Washington, without trial or hearing of any kind, at a time when all of our courts were functioning, early in 1942."[257] A trio of Berkeley professors disputed the blame placed on Warren on the ground that "there remains no proof that Warren ever publicly declared himself in favor of mass evacuation prior to mid-February" 1942, at which point the decision was essentially made.[258] Conceding the point regarding public statements leaves open the question whether Warren could be criticized for private actions or, perhaps more pertinently, for what he might have done differently.

III

Four legal challenges are relevant here.

A

Minori Yasui was a U.S. citizen, a second lieutenant in the Army reserve, and a graduate of the University of Oregon law school. (You may listen to an interview with Mr. Yasui, comprising 14 segments, here.) Unable to find good work as a lawyer in Oregon, at his father's suggestion Yasui took a job at the Japanese embassy in Chicago. After Pearl Harbor, Yasui returned to Oregon. His father had been arrested as a suspicious enemy alien, taken to Missoula Montana, given a hearing, and detained in custody. (He was released in 1945). Angered by his father's treatment, and by the racial nature of the exclusion orders,[259] on March 28, 1942, the day curfew orders took effect, Yasui walked into a Portland police station shortly after 6:00 pm and demanded to be arrested for violating the curfew order.[260]

Yasui was convicted in a bench trial held on June 12, 1942. The court did not rule until November; in the meantime Yasui was held for three months in the Portland assembly center and two months in the camp at Minidoka, Idaho.[261] In November the district court held that that "[i]f

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[257] Available at https://oac.cdlib.org/view?docId=ft1290031s&brand=calisphere&doc.view=entire_text.

[258] tenBroek et al, *Prejudice*, *supra* note 1, at 200.

[259] Dewitt's Public Proclamation 3 applied the curfew to German and Italian aliens but to "all persons of Japanese ancestry."

[260] Irons, *Justice at War*, *supra* note 1, at 81.

[261] https://www.uoalumni.com/s/1540/21/tabs.aspx?sid=1540&gid=3&pgid=10837&cid=26497&ecid=26497&crid=0&calpgid=586&calcid=27007.

Congress attempted to classify citizens based upon color or race and to apply criminal penalties for a violation of regulations, founded upon that distinction, the action is insofar void.[262] But though the government did not contest Yasui's citizenship, the court then found that Yasui had forfeited his citizenship by working at the Japanese consulate "as a propaganda agent for the Emperor." Though another American, named Murphy, "presumably not of Japanese extraction," did the same work, the court held Yasui "made an election and chose allegiance to the Emperor of Japan, rather than citizenship in the United States at his majority."[263]

Yasui was sentenced in November 1942. He then spent nine months in solitary confinement in Portland before being transferred back to Minidoka. Yasui was represented by Earl Bernard, a lawyer from Portland who was a family acquaintance. The ACLU did not participate in the case because Bernard did not ask for help and because the organization was wary of Yasui's work in the Japanese consulate in Chicago.

B

Gordon Hirabayashi was a senior at the University of Washington. Born in Washington, Hirabayashi gravitated toward Quaker religious teaching and registered as a conscientious objector to the draft. (You may listen to an interview with Mr. Hirabayashi, comprising 16 parts, here.) Civilian Exclusion Order 57 required Hirabayashi to register on May 11 for exclusion on

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[262] United States v. Yasui, 48 F. Supp. 40, 53 (1942). The district judge was James Alger Fee, a graduate of Whitman College and the Columbia law school, who had served as a lieutenant in the Army Air Corps from 1917-1919 and a member of the War Department's legal staff from 1919-1920. Though a Westerner, he referred to the Civil War as "the war between the states."

[263] *Id*. at 55. The net effect of Fee's decision was to allow Yasui's detention because Fee appeared concerned about his loyalty, but to disallow detention of civilians in general. Alone among the district court opinions in the four cases discussed here, Fee declined to defer to the military assessment of need:

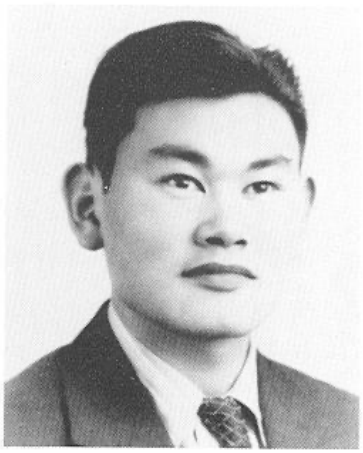
> the perils which now encompass the nation, however imminent and immediate, are not more dreadful than those which surrounded the people who fought the Revolution and at whose demand shortly thereafter, the ten amendments containing the very guarantees now in issue were written into the Federal Constitution[6]; nor those perils which threatened the country in the War of 1812, when its soil was in the hands of the invader and the Capitol itself was violated; nor those perils which engulfed the belligerents in the war between the states, when each was faced with disaffection and disloyalty in the territory in its control. Yet each maintained the liberty of the individual.

Id. at 44.

May 16. On May 16, 1942, Hirabayashi appeared at the FBI office (which his lawyer had called earlier) with a four-page statement entitled "why I refuse to register for evacuation." When arrested, he had in his possession a diary noting that he had violated the curfew order.[264]

Hirabayashi was charged with two counts: violating the curfew order and failing to report for exclusion.[265] He was imprisoned awaiting trial until October 20, 1942. His counsel opted for a jury trial, but Hirabayashi took the stand and admitted that he violated each order. He was convicted. The district court initially sentenced him to 30 days imprisonment on each count. Hirabayashi then said that he had been told that he would not be allowed to work outside the prison cell blocks if his sentence were less than 90 days. The court therefore sentenced him to 90 days on each count, to be served concurrently.

C



Fred Korematsu was a welder born in Oakland, California. (You may listen to an interview with Mr. Korematsu, comprising 11 segments, here.)[266] He failed to report to an assembly center on May 9, 1942, and was arrested on May 30, 1942. He had volunteered for the Navy in June 1941 but had been turned down because of ulcers. He had been a member of the Boiler Makers Union but was expelled after Pearl Harbor and lost his job. When arrested he bore scars from a plastic surgery procedure he underwent before the exclusion order took effect. It was intended to obscure his racial identity—he had planned to move to the Midwest with his fiancé and hoped the surgery would help him fit in there. She broke up with him after he was arrested. On September 8, Korematsu was tried and convicted of violating the exclusion order—remaining in an area in which he was not permitted. The trial court sentenced him to five years' probation but stated that pronouncement of judgment would be suspended.

[264] https://encyclopedia.densho.org/Gordon_Hirabayashi.

[265] The trial court opinion denying his legal challenge to the indictment United States v. Gordon Kiyoshi Hirabayashi, 46 F. Supp. 657, 659 (W.D. Wash. 1942).

[266] For a recent biography, *see* Lorraine K. Bannai, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE (2015).

D

Mitsuye Endo was born in 1920 in Sacramento, California.[267] She attended secretarial school and got a job with the State Department of Employment. Her brother served in the Army. The California State Personnel Board had required all employees of Japanese descent to fill out loyalty oath forms, as a preliminary step to terminating all of them. Attorney General Warren opined that such termination would be illegal,[268] but the Personnel Board proceeded anyway.[269] Termination was mooted by the exclusion orders, but lawyers who had planned to try to thwart termination followed up by visiting the Tanforan assembly center near San Francisco. They created their own questionnaire, designed to identify an internee who would make a sympathetic plaintiff to challenge detention and confinement in assembly and relocation centers.

Unlike Yasui, Hirabayashi, and Korematsu, Ms. Endo had obeyed the orders. Her complaint was that she was forcibly detained. On July 13, 1942, her counsel filed a petition for writ of habeas corpus. Unlike the challenges in the other cases, this petition directly contested the government's right to hold persons of Japanese descent. A hearing was held on July 20, 1942. At the end of the hearing, the district judge called for briefing within ten days and indicated that he would issue a ruling five days thereafter. Months of judicial silence ensued. Endo's lawyer felt the passage of time helped his client because the U.S. war effort fared poorly in the first half of 1942 but began to improve thereafter. Ms. Endo's counsel waited until June 1943 to nudge the court to rule, but by that time the Hirabayashi and Yasui cases were pending in the Supreme Court. Once that Court decided those cases, the district court in *Endo* denied the petition.

Ms. Endo was represented by James Purcell, a San Francisco attorney. The two never met or spoke in person.

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[267] Unlike the other three Plaintiffs, Ms. Endo did not sit for interviews or otherwise engage in publicity related to internment. She did provide an oral history account of her life in John Tateishi, AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS 60 (1984).

[268] G. Edward White, EARL WARREN: A PUBLIC LIFE 73-74 (1982).

[269] Ms. Endo recounts her termination in the oral history in Tateishi, *supra* note 268.

E

In these cases, the government had to decide how to justify curfew and exclusion (*Hirabayashi, Korematsu* and *Yasui)* and detention (*Endo)* in court. A June 1942 memorandum from Maurice Walk, Assistant Solicitor of the WRA, stated the problem as being that "the facts relied on to vindicate the legality of this differential treatment," by which he meant exclusion of Japanese citizens but not German or Italian aliens or citizens, "are not susceptible of proof by the ordinary types of evidence."[270] Walk's proposed solution was to ask the courts to take judicial notice of propositions including: "[t]here is a Japanese fifth column in this country of undisclosed and undetermined dimensions . . . composed of American citizens of Japanese descent"; "it is impossible to make a particular investigation of the loyalty of each person in the Japanese community" in part because of "the difficulties which the Caucasian experiences with Oriental psychology"; and "Americans of Japanese descent have been severely discriminated against, socially and economically, by the general American public . . . Americans of Japanese descent know this discrimination, and have been embittered by it.[271]

As it turned out, the trial courts felt able to proceed without receiving evidence. The government attempted to introduce one percipient witness in Min Yasui's case but they called him as a rebuttal witness when Yasui had not introduced any evidence in his case that the witness could rebut.[272] Judge Fee was not interested in a proffered expert witness, and the government did not ask formally that the court take judicial notice of anything. Judges in the other cases proceeded as if their own knowledge was sufficient. The government saved its judicial notice arguments for appeal.

F

Yasui and Hirabayashi were consolidated for review by the Court of Appeals for the Ninth Circuit, which chose to hear the case *en banc.* The appeal was argued on February 19, 1943. After argument the cases were certified to the U.S. Supreme Court pursuant to the then-governing provision, 28 U.S.C. § 346.[273] According to Professor Irons, in March 1943 Ennis and Burling met with the ACLU's Roger Baldwin and told him that *Endo* was the only case the Justice Department felt it would lose. As of that date, however, the district court had not ruled on Ms. Endo's *habeas* petition. Ennis and Burling reportedly advised Baldwin that Ms. Endo's counsel needed to expedite a ruling.[274] Professor Irons concludes that Ennis and Burling had in mind an expedited appeal of *Endo*, to be argued with the certified appeals in *Yasui* and *Hirabayashi.* In the event, however, the district court did not rule in *Endo* until the Supreme Court had decided *Hirabayashi*.

Two amicus briefs in *Hirabayashi* and *Yasui* are notable. The first, submitted by the states of California, Oregon, and Washington, supported exclusion. Professor Irons states that the brief was written by Herbert Wenig, a lawyer who had been on Warren's staff at the California attorney general's office but who had moved to the Army. Professor Irons believes Wenig's role

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[270] Memorandum at 1.
[271] *Id*. at 3-4.
[272] Irons, *Justice at War*, *supra* note 1, at 143.
[273] The current provision is 28 U. S. C. § 1254(2) and Supreme Court Rule 19.
[274] Irons, *Justice at War*, *supra* note 1, at 182.

violated judicial rules.[275] The second brief, filed on behalf of the JACL, is notable in two respects. It is a beautiful example of the use of facts as effective rhetoric, a so-called "Brandeis brief." It also, according to Professor Irons, was largely written by Morris Opler, a non-lawyer WRA employee who worked at the Manzanar camp.[276]

In *Hirabayashi v. United States*,[277] the Supreme Court affirmed Gordon Hirabayashi's conviction for violating the curfew order. The Court held that Public Law 503 ratified EO 9066 and gave it the force of law. Hirabayashi argued that the law, which did not specify any particular order or any set of persons to which it might pertain, was an unconstitutional delegation of power. Focusing on the curfew order, the Court disagreed. It held that after Pearl Harbor military officials had "ample ground for concluding that they must face the danger of invasion" and that the law did not require

> the military authorities to impose the curfew on all citizens within the military area, or on none. In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.[278]

The Court offered a non-exhaustive list of reasons it thought the military might reasonably distinguish Japanese citizens from others: "social economic and political conditions" might have impeded assimilation and fostered a sense of separateness among Japanese citizens,[279] many Japanese children attended Japanese-language schools, some of which were believed to proselytize for Japan,[280] approximately 10,000 citizen children (Kibei) had been sent to Japan for part of their education,[281] and under Japanese law many persons who were American citizens were also deemed Japanese citizens.[282]

With respect to the discrimination effected by the orders, the Court noted that the Fifth Amendment, unlike the Fourteenth Amendment applicable to states, contained no equal protection clause. The Court nevertheless stated that "[d]istinctions between citizens solely because of their ancestry are, by their very, nature odious to a free people whose institutions are founded upon the doctrine of equality," but concluded that "it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant."[283] The Court thus upheld Hirabayashi's conviction for violating curfew on

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[275] *Id.* at 180, 213.
[276] *Id*. at 192-193.
[277] 320 U.S. 81 (1943).
[278] *Id.* at 95.
[279] Here the Court cited the prohibition on Japanese aliens becoming citizens, the Alien Land Laws, and anti-miscegenation laws. 320 U.S. at 97 n.4.
[280] *Id* at 97 n.5. For this point the Court cited portions of the Tolan Committee Hearings.
[281] *Id.* at n. 6. For this point the Court cited a preliminary report of the Tolan Committee.
[282] *Id*. at n. 7
[283] 320 U.S. at 102.

this ground. Because his sentence for violating the order to report for exclusion ran concurrently with his sentence for the curfew violation, the Court declined to rule on that count.[284] Because Minori Yasui had only been convicted for violating curfew, the Court ruled against him on the same ground.[285] Neither case produced a ruling on the lawfulness of requiring Japanese citizens to report for exclusion.[286]

Hirabayashi and *Yasui* issued in 1943, the same year the military lifted a 1942 re-classification decision that rendered Nisei ineligible for military service. One result was the 100th Infantry Battalion, later integrated into the 442nd Regimental Combat Team, comprised of Nisei soldiers (though company-level officers were White).[287] The 442nd was recruited from Nisei in Hawaii, who were not interned, and from the camps themselves; their families remained in camps. (Daniel Inouye, later a senator from Hawaii, recalls a trip to the Rohwer, Arkansas camp here.)[288]

Army Sergeant Kazuo Komoto shows his Purple Heart to his brother, Susumu, during a visit to the Gila River camp, where his family is confined. Unidentified photographer October 31,1943

[284] *Id*. at 105.

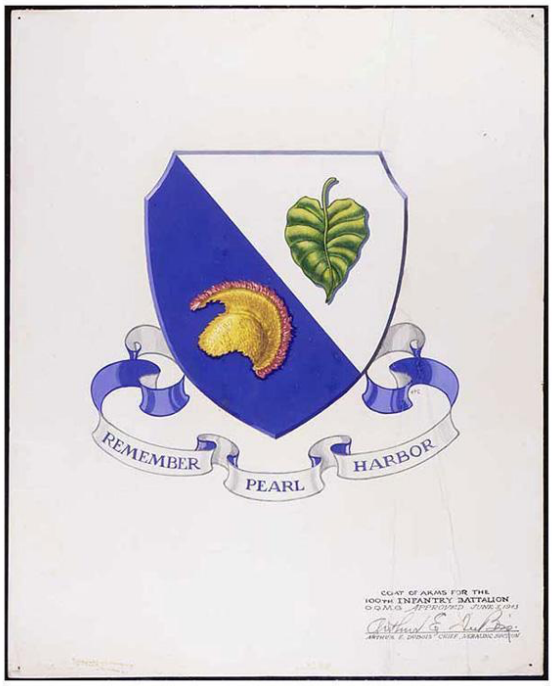
[285] Yasui v. United States, 320 U.S. 115 (1943). The government conceded that Yasui was a citizen, however. Because the trial court sentenced Yasui after finding that he was not a citizen, the Court remanded for resentencing in view of this concession.

[286] Jerry Kang has analyzed these moves as an example of the kind of formalist evasion consistent with, though likely not intended by, a school of thought recommending procedural dodges in service of a modest prudence in the Supreme Court's willingness to tackle controversial issues. Jerry Kang, *Denying Prejudice: Internment, Redress and Denial,* 51 U.C.L.A. L. Rev. 933, 987 (2004).

[287] The 100th Infantry Battalion was activated on June 12, 1942, and integrated into the 442nd in August 1944.

[288] For an extended interview with Senator Inouye, *see* *https://www.youtube.com/watch?v=6jsdoVqkeBg*. For a post-war story about the regiment, *see* https://www.youtube.com/watch?v=4AZmEfzdqTM.

Soldiers from the 442nd fought in Italy and were among the troops who liberated Dachau. The regiment's slogan was: "Go for Broke." The motto of the 100th Infantry Battalion was: "Remember Pearl Harbor."



In addition, approximately 6,000 persons of Japanese descent served in the Pacific Theater as translators for the Military Intelligence Service.[289] Some of these soldiers were recruited from internment camps.[290] Their duties included attempting to secure the surrender of Japanese soldiers ensconced in caves on Iwo Jima and Okinawa.

By 1944, internment was two years old, internees were now subject to the draft, and it was clear that Japan was at no risk of invading California.[291] Yet internment continued even absent that risk, and even though continued internment both denied internees their liberty and worsened their economic circumstances. In 1944, Carey McWilliams noted that wages paid in the camps were insufficient to pay fixed-cost obligations such as life insurance premiums. "As a consequence, it is estimated that the residents of the two centers in Arizona alone are being pauperized at the rate of about $500,000 a year."[292] Substantial evidence suggests that President Roosevelt delayed ending internment until after the 1944 presidential election.[293] This political

[289] James C. McNaughton, NISEI LINGUISTS, JAPANESE AMERICANS IN THE MILITARY INTELLIGENCE SERVICE DURING WORLD WAR II (2006); https://www.nationalww2museum.org/war/articles/military-intelligence-service-translators-interpreters.

[290] https://barbedwiretobattlefields.org/videos/military-intelligence.mp4.

[291] Eric Muller has shown that informed military opinion thought invasion unlikely even in 1942. Eric L. Muller, Hirabayashi *and the Invasion Evasion*, 88 N.C. L. Rev. 1333 (2010). Available at: http://scholarship.law.unc.edu/nclr/vol88/iss4/5. Note, however, that as late as February 10, 1942, Secretary Stimson was worrying about a possible invasion, albeit at some future time.

[292] *Id*. at 140.

[293] *E.g.*, Bird, *supra* note 121 at 171. McWilliams surveyed the politics surrounding the WRA. McWilliams, *supra* note 1, at 232.

decision ultimately forced the Court to confront detention, though it still was able to limit the scope of its decisions.

As noted above, the district court denied Mitsuye Endo's petition shortly after the opinion in *Hirabayashi* issued. Her case was thus ready for appeal just as the Supreme Court remanded *Korematsu*, having found that the district court's judgment was appealable. [294] The Ninth Circuit then affirmed Korematsu's conviction without further argument, relying on *Hirabayashi.* According to Professor Irons, the DOJ's Ennis met with the ACLU's Baldwin to advise him on how to best position the cases for appeal.[295] The Ninth Circuit certified *Korematsu* to the Supreme Court, and the two cases were argued on October 11-12, 1944.

Because Fred Korematsu had been arrested for violating the exclusion order, the Court could not sidestep the exclusion aspect of the military orders as it had done in *Hirabayashi*. Relying on its analysis in *Hirabayashi*, the Court ruled that

> exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.[296]

The Court noted that Korematsu challenged the conclusion that the mainland was in danger of invasion in May 1942, when the exclusion order pertaining to Korematsu was issued. But the Court dismissed the challenge:

> Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin.[297]

Finally, the Court noted that Fred Korematsu had been convicted only of remaining in an exclusion zone, not for failing to report to an assembly center for detention followed by actual exclusion. The Court therefore declined to rule on orders to report to assembly centers or on the actual detention of citizens in what the Court—objecting to the term "concentration camps"—

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[294] Korematsu v. United States, 319 U.S. 432, 433 (1943).

[295] Irons, *Justice at War*, *supra* note 1, at 260.

[296] Korematsu v. United States, 323 U.S. 214, 218 (1944).

[297] 323 U.S. at 218-219.

referred to as "relocation centers."[298] The dissents of Justices Roberts, Murphy, and Jackson, bear reading in full. The opinion in *Korematsu* issued on December 18, 1944.

Ex Parte Endo was argued on October 12, 1944, the second day of argument in *Korematsu*. Before argument, the government offered to release Ms. Endo provided she did not return to California. She declined.[299] The opinion in *Ex Parte Endo* issued December 18, the same day as *Korematsu*. Because Mitsuye Endo complied with all applicable orders, hers was the only case that did not challenge a particular order but instead challenged the power of the United States to hold her in detention. The Court ruled that Public Law 503, which provided penalties for defying an order issued by a military commander pursuant to EO 9066, did not authorize detention of loyal citizens, as the government conceded Ms. Endo was:

> We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion, we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.[300]

Noting that "[n]either the Act nor the orders uses the language of detention,[301] the Court nonetheless appeared to approve of some period of detention as ancillary to exclusion:

> We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not, of course, mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purposes of this case that initial detention in Relocation Centers was authorized.[302]

The Court nonetheless ordered Endo released because the governing statute and orders were anti-sabotage measures and Mitsuye Endo's conceded loyalty showed she did not pose a risk of sabotage.[303] The net result of the four cases was that the Court found curfew and exclusion lawful, assumed initial detention was also lawful, but held that detention could not persist once loyalty was established.

The opinion in *Endo* issued on Monday, December 18, 1944. On Sunday, December 17, the WRA announced that persons in internment camps whose records were clean for two years would be released and would be permitted free movement.[304] The WRA thus effectively revoked DeWitt's exclusion orders and freed Mitsuye Endo the day before the Supreme Court announced her freedom. Hearsay evidence recounted by Endo's lawyer, James Purcell, and

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[298] Id. at 223.
[299] Irons, *Justice at War, supra* note 1, at 253.
[300] 323 U.S. at 297.
[301] *Id*. at 300.
[302] *Id*. at 301.
[303] *Id*. at 302.
[304] Irons, *Justice at War, supra* note 1, at 345.

repeated by historian Roger Daniels, claims that Justice Frankfurter alerted John McCloy to the date the Court's decision would be released and, presumably, to its content.[305]

IV

In 1980 a Commission on Wartime Relocation and Internment of Civilians ("CWRIC") was established to review the exclusion policy and recommend appropriate remedies. The CWRIC held 20 days of hearings and took testimony of over 750 witnesses. These hearings led to congressional hearings, which led eventually to enactment of Public Law 100-383, which provided certain compensation for American citizens and lawful residents who had been interned.[306]

A

The CWRIC's research also led a group of lawyers to file petitions for the common law writ of error *coram nobis* seeking to vacate the convictions of Min Yasui, Gordon Hirabayashi, and Fred Korematsu. (Mitsuye Endo, it will be recalled, had no conviction to vacate.) The petitions were based on allegations that lawyers for the United States suppressed evidence and engaged in other misconduct in relation to the three cases. The petition claimed that in arguing these cases the government altered evidence offered to support exclusion and suppressed evidence, notably the Ringle report, contradicting the case for exclusion. Improper coordination between the War Department and Western States was also alleged.

The alteration allegation concerned General DeWitt's final report on exclusion. The report recited arguments justifying exclusion. It included references to the number of Japanese organizations on the West Coast, referenced concern over "unauthorized radio communications" emanating from the coast,[307] as well as "illicit signalling" and "nightly observation of signaling lamps," [308] and asserted that for weeks following December 7 "substantially every ship leaving a West Coast port was attacked by an enemy submarine."[309] He noted that a "spot raid" (without a warrant) in Monterey yielded "more than 60,000 rounds of ammunition and many rifles, shotguns and maps of all kinds."[310] DeWitt pointed out that over "two-thirds of the total Japanese population on the West Coast were not subject to alien enemy regulations," by which he meant that they were U.S. citizens.[311] He also recounted the Justice Department's unwillingness to administer a mass exclusion.[312] The report echoed without citation Warren's Tolan Committee testimony arguing that the location of Japanese residences and farms was suspicious,[313] and

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[305] *Id. See also* Roger Daniels, *The Japanese American Cases 1942-2004: A Social* History, 68 Law & Contemp. Prob. 159, 161 (2005).
[306] President Reagan's signing remarks are available at: https://www.youtube.com/watch?v=kcaQRhcBXKY.
[307] *Id*. at 4, 8.
[308] *Id*.
[309] *Id*.
[310] *Id*. at 8.
[311] *Id*. at 9.
[312] *Id*. at 7-8.
[313] *Id*. at 9-10.

Warren's argument that the numerous Japanese organizations provided evidence of coordination and control.[314]

DeWitt sent a bound copy to John McCloy on April 15, 1943. In an April 19, 1943 telephone call, McCloy complained to Col. Bendetsen that the report arrived in bound form "[b]ecause we worked together on this thing . . . it contains a lot of stuff that I question the wisdom of and it certainly complicates it to get it in a printed form such as this." McCloy complained in particular that the report was "self-glorifying and too self-serving" and that it implied that Japanese persons would not be allowed to return to the area under General DeWitt's command. Whether return would be allowed in 1943 was a hotly debated issue on which McCloy and the Army differed. According to Bendetsen's May 3, 1943 notes, McCloy sought to remove language in DeWitt's report stating the internment would last the duration of the war and he sought to rewrite a portion of the report stating that it was impossible to determine whether a person of Japanese descent was loyal; McCloy favored language stating that exclusion was necessary because there was not enough time to do so.[315] The final report was rewritten to reflect McCoy's change, and the original copies were recalled and destroyed.

With respect to suppression, the Ringle report had been sent to Attorney General Biddle in March 1942, and Biddle sent the report to McCloy, who replied that he had met Ringle and been favorably impressed with him.[316] After Japanese persons were interned in camps under WRA authority, Ringle assembled a compilation of his memoranda for use by the WRA. This compilation did not include Ringle's opposition to exclusion, which had already occurred by this time, but it did include portions of the January 1942 report stating the large majority of Japanese aliens were at least passively loyal, that at least 75 percent of citizens were loyal, and that the riskiest persons were already in detention.[317] In October 1942, a version of the Ringle compilation appeared under an anonymous byline ("An Intelligence Officer") in *Harpers Magazine.*

On April 19, 1943, Ennis wrote a memorandum to Solicitor General Fahy noting that on that date the Justice Department received "a printed report from General DeWitt about the Japanese evacuation" and was reviewing it to determine whether to release it publicly so it could be referenced in the government's briefing.[318] On April 30, 1943, Ennis sent Fahy a memorandum describing the article and connecting it to Ringle. Ennis also attached a copy of the Ringle memorandum, which he had obtained. Ennis wrote that the Justice Department had erred in not bringing Naval Intelligence into discussions over internment in early 1942 and attributed this failure to Secretary Knox's anti-Japanese comments. Ennis reported that he had been told

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[314] *Id*. at 11-12. Compare Tolan Hearings at 10974-980.

[315] Item 27 on the linked document.

[316] In contrast, McCloy had met with Munson as well, but had not been impressed. Bird, *Chairman*, *supra* note 121, at 155.

[317] Compilation at 6.

[318] *Id.* In 1986, at a hearing on the *coram nobis* petition in Gordon Hirabayashi's case, Ennis testified that the War Department did not provide the full report but only selected pages. Hirabayashi v. United States, 828 F.2d 591, 599 (9th Cir. 1987). This testimony is corroborated by Ennis's February 26, 1944 memorandum to Attorney General Biddle.

that before the war the Army and Navy had agreed in writing to a division of intelligence labor, and that under this agreement the Navy was responsible for Japanese-related intelligence.

Recall that the Ringle report had advocated exclusion only of persons identified as suspicious, Kibei (citizens sent to Japan for their education) and parents of Kibei. Ennis urged Fahy that, "in view of the fact that the Department of Justice is now representing the Army" and "is arguing that a partial, selective evacuation was impracticable,"

> [W]e should consider most carefully what our obligation to the Court is in view of the fact that the responsible Intelligence agency regarded a selective evacuation as not only sufficient but preferable. . . . certainly one of the most difficult questions in the whole case is raised by the fact that the Army did not evacuate people after any hearing or on any individual determination of dangerousness, but evacuated the entire racial group. . . . In one of the crucial points in the case the Government is forced to argue that individual, selective evacuation would have been impractical and insufficient when we have positive knowledge that the only Intelligence agency responsible for advising Gen. DeWitt gave him advice directly to the contrary.[319]

Ennis suggested that the Justice Department consider whether it had a duty to advise the Court of the Ringle memorandum: "It occurs to me that any other course of conduct might approximate the suppression of evidence."[320] The filed brief made no reference to Ringle and cited the *Harper*'s article in one footnote. Fahy signed the brief as Solicitor General, and Ennis signed as Director, Alien Enemy Control Unit.

As noted above, *Korematsu* and *Endo* were argued in 1944. In connection with these cases, Ennis increased his efforts to have the Justice Department disavow factual representations made in the DeWitt report. On February 26, 1944, Ennis wrote Attorney General Biddle a memorandum recommending that the Justice Department correct on the public record misstatements in DeWitt's report. In part this memorandum disputed DeWitt's portrayal of the Justice Department, but Ennis referenced a memorandum from J. Edgar Hoover to Biddle disputing the report,[321] and Ennis stated that the Federal Communications Commission had confirmed that DeWitt's references to illegal radio transmissions were untrue.[322] Ennis suggested Biddle write the FCC seeking its views directly, which Biddle did. The FCC's response (including a detailed memorandum) stated that after December 7, 1941 the FCC had closely monitored radio transmissions on the West Coast and found "no radio signals reported to the Commission which could not be identified, or which were unlawful."[323] In addition, as noted above, Biddle had received the original Ringle report in March 1942 and shared it with McCloy.

In view of their dissatisfaction with the DeWitt report, Ennis and Burling attempted to disavow it in the government's brief in *Korematsu.* The brief was due in October. On September

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[319] Memorandum at 3.

[320] *Id.* at 4.

[321] The FBI previously had expressed a low opinion of Army intelligence regarding Japanese persons on the West Coast.

[322] This memorandum is from Justice Department lawyer John L. Burling recounting information received from the FCC. The FCC followed up with its own memorandum.

[323] Response at 3.

11, 1944, Burling sent a memorandum to Herbert Wechsler documenting changes to a footnote in the government's brief pertaining to the DeWitt report. Burling wrote that the original text of the footnote stated that the government relied on the DeWitt report only "for statistics and other details concerning the actual evacuation and events subsequent thereto." The note then said that DeWitt's "recital of circumstances justifying the evacuation as a matter of military necessity . . . 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 information in 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.***"[324] Burling reported to Wechsler that Solicitor General Fahy had altered the last sentence to state that the DeWitt report's description was "in conflict with the views of this Department. We therefore do not ask the Court to take judicial notice of those facts contained in the report."[325] Burling sought to enlist Wechsler in restoring the original language because he thought Fahy's revision suggested the difference between Justice and DeWitt was a matter of interpretation whereas Burling considered it a matter in which the FCC established facts and DeWitt had lied about them.

The brief, with Fahy's revised footnote, was sent to the War Department. It was due to be filed on October 5. According to a memorandum Burling wrote to Ennis for the purpose of documenting events, on September 30, 1944, a War Department official (Captain Fisher) called Ennis and asked for a change to the footnote. According to Burling, "it became necessary for [Ennis] to suggest the possibility . . . that the brief had gone for final printing," at which point McCloy called Fahy and "the printing stopped about noon."

That same day, Ennis wrote Wechsler a memorandum stating that Ennis and Burling felt strongly that:

> (1) This Department has an ethical obligation to the Court to refrain from citing [the DeWitt report] it as a source of which the Court may properly take judicial notice if the Department knows that important statements in the report are untrue and if it knows as to other statements that there is such contrariety of information that judicial notice is improper. (2) Since the War Department has published a history of the evacuation containing important misstatements of fact, including imputations and inferences that the inaction and timidity of this Department made the drastic action of evacuation necessary, this Department has an obligation, within its own competence, to set the record straight so that the true history may ultimately become known.

Ennis asked Wechsler to inform Biddle of the dispute, because "[m]uch more is involved than the wording of the footnote. The failure to deal adequately now with this Report cited to the Supreme Court either by the Government or other parties, will hopelessly undermine our administrative position in relation to this Japanese problem. We have proved unable to cope

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[324] Memorandum (emphasis added).

[325] *Id.* Burling told Wechsler that DeWitt's statements regarding radio transmitters and shore-to-ship signaling were "intentional falsehoods" because the FCC had discredited the reports and reported its findings to DeWitt. Burling also accused DeWitt of making other false statements that sought to blame the Justice Department for the evacuation.

with the military authorities on their own ground in these matters. If we fail to act forthrightly on our own ground in the courts, the whole historical record of this matter will be as the military choose to state it."

On the evening of September 30, Ennis, Burling, Captain Fisher, and Wechsler met regarding the footnote. On October 2, Solicitor General Fahy prepared a revised version of the footnote that contradicted DeWitt's report only with respect to issues on which the FCC and FBI contradicted the report. Ennis and Burling proposed a revision in which those items were treated as examples of more general flaws and were told that the Solicitor General's draft was final and all that remained was for them to decide whether to sign the brief. Wechsler intervened, however, and rewrote the footnote to present two alternatives to the War Department.

As recounted by Captain Fisher at the War Department, the first alternative asked the Court to take judicial notice of DeWitt's report only insofar as recited in the brief; the second alternative stated that the government did not seek judicial notice of facts relating to transmitters or signaling because on those topics DeWitt's report conflicted with information the government possessed. Captain Fisher did not agree to either but stated the first was preferable. Footnote two of the government brief thus read:

> 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. 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.

Ennis and Burling both signed the government's brief.

> In an oral history recorded in 1978, Professor Wechsler summarized this episode:
>
> These were nice cases for testing the role of the government lawyer. The thing about those briefs is that they declined to make arguments that the War Department in particular wanted to be made, which we considered to be specious, either in law or in fact, the primary importance being refusing to make arguments that were specious in fact, because those are the arguments that can mislead a court. The War Department had an entirely misguided conception of what the record was in the Korematsu case. We refused, for example, to draw any strength from the Commanding General's report, because we regarded it as spurious.[326]

[326] *The Reminiscences of Herbert Wechsler*, available at https://dlc.library.columbia.edu/catalog/cul:pc866t1j28 at 192. (April 18, 1981 interview by Norman Silber and Geoffrey Miller)(hereinafter Wechsler, "Oral History"). Wechsler elaborated somewhat on exclusion in *Some Issues for the Lawyer*, in INTEGRITY AND COMPROMISE: PROBLEMS OF PUBLIC AND PRIVATE CONSCIENCE 117 Robert M. McIver Ed. (1957) (hereinafter Wechsler, "Some Issues for the Lawyer").

B

Based largely on the foregoing, the District Court for the Northern District of California granted Fred Korematsu's petition for writ of *coram nobis*.[327] The government opposed the petition sought to vacate Korematsu's conviction under Federal Rule of Criminal Procedure 48. The court found that Rule 48 did not apply. In a somewhat ironic twist, the court was asked to take judicial notice of the CWRIC's *Personal Justice Denied* report and several of the documents linked above (submitted as exhibits to the petition). The court took limited judicial notice of the report. The court declined to take judicial notice of the documents but found it could consider them for non-hearsay purposes.[328] Judge Patel concluded that the final footnote in the government's *Korematsu* brief "made no mention of the contradictory reports" and concluded that "[t]hese omissions are critical."[329] Judge Patel found that

> Omitted from the reports presented to the courts was information possessed by the Federal Communications Commission, the Department of the Navy, and the Justice Department which directly contradicted General DeWitt's statements. Thus, the court had before it a selective record.
>
> Whether a fuller, more accurate record would have prompted a different decision cannot be determined. Nor need it be determined. Where relevant evidence has been withheld, it is ample justification for the government's concurrence that the conviction should be set aside. It is sufficient to satisfy the court's independent inquiry and justify the relief sought by petitioner.[330]

Judge Patel did not cite a legal requirement for production of information from the FCC, FBI, or ONI. The government appealed this order but then withdrew the appeal.[331]

Minori Yasui's petition for a writ of *coram nobis* was denied. In his case, the government responded with a motion to dismiss the indictment against him, vacate his conviction, and deny his petition.[332] This was in essence the same Rule 48 motion denied in *Korematsu.* The motion was granted in Yasui's case. Yasui filed a notice of appeal, which the government moved to dismiss as untimely. The Ninth Circuit agreed with the government and remanded for the district court to determine whether the untimely filing was due to excusable neglect. Mr. Yasui died during the course of appellate proceedings, mooting his petition.

Gordon Hirabayashi's petition produced an evidentiary hearing, and thus the most complete record in these cases.[333] Because Hirabayashi's case was argued in 1943, the 1944 record Ennis assembled was not relevant to Hirabayashi's petition. The court thus focused on and accepted Hirabayashi's argument that McCloy's changes to the DeWitt report materially changed its import by masking the degree to which DeWitt's conclusion rested on stereotypes and suggesting instead that there was insufficient time to make individual determinations of

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[327] Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984)(the Hon. Marilyn Hall Patel).

[328] Fed. R. Evid. 803(1)(present sense impression) and (16)(ancient documents.

[329] 584 F. Supp. At 1418.

[330] *Id*. at 1419.

[331] Hirabayashi v. U.S., 828 F.2d 591, 594 (1987)

[332] Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985).

[333] Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986).

loyalty.[334] The court found that "a copy of the original version of the Final Report was never made available to the Justice Department" which therefore wrongly "assumed and argued to the Supreme Court that the military necessity arose out of a lack of time to make a separation rather than out of an impossibility of making that separation."[335] The court found:

> The error of which petitioner complains is that, during the pendency of his appeal before the Supreme Court, neither he nor his counsel was informed by the government of the reason given by General DeWitt in the original version of his Final Report for the exclusion of all persons of Japanese ancestry from the West Coast. That statement was in essence that the military necessity, requiring the exclusion, was the impossibility of separating the loyal persons from the disloyal ones no matter how much time was devoted to that task.
>
> It was General DeWitt who made the decision that military necessity required the exclusion of all persons of Japanese ancestry from the West Coast. The central issue before the Supreme Court in the appeal of petitioner from his conviction on the first count was whether exclusion was in fact required by military necessity. Nothing would have been more important to petitioner's counsel than to know just why it was that General DeWitt made the decision that he did.[336]

The court noted testimony by Edward Ennis that, had he known of DeWitt's statement in 1943, "it would have presented `a very serious problem' and that it would have been `very dangerous' to take that position before the Supreme Court."[337] The court found that failure to disclose DeWitt's original justification to Hirabayashi and to the Supreme Court prejudiced him with respect to his conviction for failure to report to an assembly center and thus granted his petition on that count.[338] The court denied the petition with respect to the curfew violation on the ground that it had been superseded by exclusion orders and that failure to disclose DeWitt's justification for exclusion did not undermine Hirabayashi's conviction for violation of the more modest curfew order.[339]

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[334] *Id*. at 1454.

[335] *Id*.

[336] *Id*. at 1456. Ennis testified during the *coram nobis* trial that he inferred from the dissenting opinions in *Korematsu* that the Court had been informed of information refuting the DeWitt report. He stated: "Both of the justices said the report is full of erroneous statements, and the erroneous statements they referred to were the information I tried to get into the footnote." June 19, 1985 Tr. 266-57. Ennis testified that when litigating *Hirabayashi* the Justice Department received 30 pages from the DeWitt report from a source other than the War Department. He did not recall the content of those pages. *Id*. at 281.

[337] Hirabayashi v. United States, 627 F. Supp. at 1456.

[338] *Id*. at 1457.

[339] During the *coram nobis* trial Ennis testified that the internment cases were unusual because "there was no real trial below . . . . [t]here was no factual record." June 19, 1985 Tr. 330. The cases proceeded on the basis of public information. When asked whether he suppressed evidence, Ennis testified:

> There wasn't any evidence in the sense we ordinarily use evidence involved, but I must say no. I don't recall suppressing anything except what I wanted to put in the footnote and wasn't allowed to. That's an exceptional situation. . . . we wouldn't quote anything. We would have said -the footnote said, before it was changed, "We inform the Court that the Department of Justice has information from other security agencies of the United States that contradicts or differs from what is in the final report, period."

The Ninth Circuit affirmed, in an opinion by Judge Mary Schroeder.[340] In response to the government's argument that the record did not support a finding of prejudice, the Ninth Circuit recounted Ennis as testifying that in 1943 the War Department had given him "only a few selected pages" and depicted Ennis as testifying that had he seen DeWitt's real comments he would have informed the Supreme Court.[341] The latter point overstates the district court's description of the testimony. On the former point, in 1944 Ennis stated to Wechsler that he had received 40 pages of the original DeWitt report, which he regrettably returned to the War Department.[342] The change the court found prejudicial occurs on page nine of the final report. If in 1943 the War Department gave Justice the summary material at the beginning of the report, it is possible that the Justice Department briefly did possess the original language.

Professor Jerry Kang questions the prejudice finding, arguing that DeWitt's racism was notorious and DeWitt's statements to newspapers following a congressional hearing that "I don't want any Jap back on the Coast," "There is no way to determine their loyalty," and "A Jap is a Jap" were reprinted in Hirabayashi's reply brief, mentioned at Minori Yasui's argument, and quoted in Justice Murphy's dissent in *Korematsu* a year later.[343] Contrary to the Ninth Circuit's reference to the special credence given statements made by the Solicitor General,[344] and its affirmance of the district court finding that Hirabayashi was prejudiced by a lack of government candor, Kang faulted the prejudice argument as implying that candor would have changed the Supreme Court's mind when, in his view, it wouldn't have.

To synthesize Professor Kang's points: a Court dominated by justices appointed by Franklin Roosevelt; a Court that in its *Endo* opinion quoted, with exquisite unacknowledged irony, FDR's praise for the loyalty of most persons of Japanese descent;[345] a Court that in *Hirabayashi* ignored an order to report for exclusion and ruled only on a curfew violation, thus collapsing the two convictions, yet in *Korematsu* affirmed a conviction for remaining in an exclusion zone when the only alternative was to report to an assembly center, which was a preliminary step on the road to internment,[346] thus separating on the most formal of grounds an inseparable government policy; a Court that ruled on Mitsuye Endo's *habeas* petition as a matter of statutory interpretation and refused to entertain any constitutional challenge to her arrest, transportation, and imprisonment —*that* Court could and would do whatever it wanted. Professor Kang's view implies that, had full disclosure been made, the Court would have had no trouble concluding that the power to determine military necessity was vested in the War Department and its designees, not the FBI, not the FCC, and not the DOJ.

Id. at 338. The *Harpers* article adapting Ringle's work was apparently cited by Hirabayashi in his reply brief in the Ninth Circuit. *Id*. at 342-43.

[340] Hirabayashi v. U.S., 828 F.2d 591 (1987).

[341] *Id*. at 599.

[342] Memorandum at 3.

[343] Kang, *supra* note 286, at 987.

[344] 828 F.2d at 602.

[345] *Id*. at 961.

[346] *Id*. at 962.

C

No transcript exists for the *Hirabayashi* or *Yasui* Supreme Court arguments. Professor Peter Irons, who also acted as one of petitioners' counsel in the *coram nobis* proceedings, discovered a partial transcript of the *Korematsu* argument after the evidentiary hearing in Gordon Hirabayashi's case.[347] Professor Irons wrote that the transcript showed Solicitor General Fahy misleading the Court in certain respects.[348] Professor Irons believed the following comment misleading:

> The final report of General DeWitt was held up to Your Honors yesterday as proving that he himself had no rational basis on which to make a military judgment. I am not going into the details of that report, because no doubt the Court will read it. However, I do assert that there is not a single line, a single word, or a single syllable in that report which in any way justifies the statement that General DeWitt did not believe he had, and did not have, a sufficient basis, in honesty and good faith, to believe that the measures which he took were required as a military necessity in protection of the West Coast.[349]

Professor Irons took issue with another statement Fahy made:

> It is even suggested that because of some foot note in our brief in this case indicating that we do not ask the Court to take judicial notice of the truth of every recitation or instance in the final report of General DeWitt, that the Government has repudiated the military necessity of the evacuation. It seems to me, if the Court please, that that is a neat little piece of fancy dancing. There is nothing in the brief of the Government which is any different in this respect from the position it has always maintained since the Hirabayashi case—that not only the military judgment of the general, but the judgment of the Government of the United States, has always been in justification of the measures taken; and no person in any responsible position has ever taken a contrary position, and the Government does not do so now. Nothing in its brief can validly be used to the contrary.[350]

Professor Irons judges this statement "a flat out lie" because Ennis, as Director of the Justice Department's Alien Enemy Control Unit, "had consistently opposed the evacuation, and Attorney General Biddle had made a futile objection to Roosevelt that the War Department had no military basis for the forced exodus of civilians."[351] This judgment raises the question of who was in a responsible position with respect to the decision, or, perhaps, what Fahy meant or the

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[347] Two reviews of *Justice at War* comment on this dual role. Stanley I Kutler, *At the Bar of History: Japanese Americans versus the United States*, 10 AM. B. FOUND RES. J. 361, 365 (1985)("Government certainly did not fully reveal many facts that would have damaged But the dimensions of that scandal may be less imposing than tends, particularly when we examine the full scope of the government's action"); Aviam Soifer, *Lawyers and Loyalty*, 12 REV. AM. HIST. 575, 579-580 (1984)(" Irons the historian seems too conscientious to provide Attorney Irons with quite the *legal* scandal he needs").

[348] Peter Irons, *Fancy Dancing in the Marble Palace*, 3 CON. COMM. 35 (1986). A copy of the transcript is appended to this article.

[349] *Id*. at 48.

[350] *Id.* at 49.

[351] *Id*. at 41.

Court understood by such a comment. The Justice Department defended internment, but it was initiated by the War Department.

Professor Irons was one of the pioneers in research on the conduct of lawyers in the exclusion cases. (Ms. Aiko Herzig-Yoshinaga was an important researcher as well; it was she who found the lone remaining copy of the original DeWitt report and noticed the difference from the revised report). With the *coram nobis* cases submitted, and in the context of the *Korematsu* transcript, he noted that one could argue that the Justice Department had no legal obligation to disclose the FBI and FCC reports to the Supreme Court because disclosure of all exculpatory evidence was not then a prosecutorial duty.[352] The Delphic footnote two in the *Korematsu* brief thus might not have violated positive law.[353] But Professor Irons found Fahy's presentation at argument inexcusable: "Charles Fahy bears the responsibility for persuading the Court to violate the rights of Fred Korematsu, a man of quiet dignity who waited forty years for his ultimate vindication."[354]

In the world after September 11, 2001, the internment cases received renewed attention with respect to American conduct against terrorism. On May 20, 2011, acting Solicitor General Neal Katyal issued a formal confession of error for the lack of candor the Ninth Circuit found in the *Hirabayashi coram nobis* appeal. In an article explaining his decision, Katyal recognized that in government practice it is common to have to deal with departments holding differing views:

> This is a very common thing. It happens today in the government. You have this dispute between different agencies—the State Department wants one thing, the Pentagon wants another; or HHS wants one thing, Treasury wants another. The general counsels often come back to you and they say, "Well, let's finesse the issue. Let's just write something that kind of genuflects to both sides." They think it solves the problem, because if you are writing a memo or something like that, it is a pretty good solution. You just paper over a disagreement.[355]

As discussed above, footnote two in the government's *Korematsu* brief reflected such an exercise. Katyal wrote, understandably, "I have read this footnote perhaps thirty times, and I still do not know what it means."[356] Like Professor Irons, he specifically faulted Fahy's argument, though he felt the broader error was ignoring the calls of Ennis and Burling for greater candor.[357]

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[352] *Id*. at 44. At the *Hirabayashi coram nobis* trial Ennis testified that he, Burling, Wecshler, and Fahy all concluded that the footnote in the *Koreamatsu* brief met "the minimum standards of disclosure" to the Supreme Court. June 19, 1985 Tr. at 328.

[353] Ennis testified at the *coram nobis* proceeding that "I believe that we took the narrowest way to deal with the problem, but I think by doing that we avoided any censurable misconduct." *Id*. at 377.

[354] *Id*. at 45. Solicitor General Fahy's grandson defended Fahy's conduct in an exchange of articles with Professor Irons. Charles Sheehan, *Solicitor General Charles Fahy and the Honorable Defense of the Japanese-American Exclusion Cases*, 54 AM. J. LEGAL HIST. 469 (2014); Peter Irons, *How Solicitor General Charles Fahy Misled the Supreme Court in the Japanese American Internment Cases: A Reply to Charles Sheehan*, 55 AM. J. LEGAL HIST. 208 (2015); Charles T. Sheehan, *Charles Fahy's "Brilliant Public Service As Solicitor General": A Reply to Peter Irons*, 55 AM. J. LEGAL HIST. 347 (2015).

[355] Neal Kumar Katyal, *The Solicitor General and Confession of Error*, 81 Fordham L. Rev. 3027, 3036 (2013).

[356] *Id*. at 3037.

[357] *Id*.

D

Late in life, Ennis, Rowe, and Wechsler each discussed whether they should have resigned in view of the policy the Justice Department was asked to defend. Returning from the meeting at which it became clear that mass exclusion would occur, Rowe recounts trying to talk Ennis out of resigning. Ennis later said that at the time he viewed his job as being to argue for his position but then accept and then carry out whatever decision his superiors made.[358] He also noted that, had he and Burling resigned, lawyers with fewer reservations and greater willingness to defer to the military would have even greater influence.[359]

Herbert Wechsler offered a distinction based on the exclusion decision itself and the obligation to defend it. He wrote:

> In the Department of Justice it is a fair statement of the case to say that the view held was that no special security measures were required, that the danger, if there was a danger, could be met by identifying individuals whom there was cause to fear and dealing with them in accordance with the law. . . .[360]

Noting that Attorney General Biddle "presented this position forcefully" to President Roosevelt, Wechsler pointed out that the Justice Department did not prevail in that argument but that Biddle thought—correctly as it turned out—that the Supreme Court would uphold mass exclusion.[361] Biddle therefore took the position that the Justice Department would not exclude persons of Japanese ancestry but that the War Department could do so if it was willing to accept responsibility.[362]

Wechsler made clear that President Roosevelt bore ultimate responsibility for the decision, and posed the question this way:

> So the way you have to ask this question is, was there a resigning issue? And if it was, the time to resign was when the order was made, not at the litigation stage.[363]
>
> [T]he interesting question about all this is really the resigning question. When is the right thing to do to get out, or to put it in another way, when should you feel compromised by participating at all in a proceeding that may result in sustaining something that you would feel regret about having sustained?[364]
>
> Should I have declined to assume the preparation of a brief in support of the constitutionality of what the President of the United States had ordered on the recommendation of his distinguished Secretary of War? I might have done that. In fact, however, I did not. I did superintend the preparation of that brief. It

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[358] Irons, *Justice at War*, *supra* note 1, at 350.
[359] *Id*. at 351.
[360] Wechsler, *Some Issues for the Lawyer, supra* note 326, at 122.
[361] *Id*.
[362] *Id*. at 123.
[363] Wechsler, *Oral History, supra* note 326, at 194.
[364] *Id*. at 196.

> presented the strongest arguments that I felt could be made in support of the validity of the action taken by the President . . . .[365]
>
> I did it because it seemed to me that the separation of function in society justified and, indeed, required the course of action I pursued; that is to say, that it was not my responsibility to order or not to order the Japanese evacuation . . . . It was the responsibility of the President of the United States, who had been elected by the people of the United States. Neither was it either Mr. Biddle's responsibility or my responsibility to determine whether the evacuation was constitutional . . . .
>
> I suggest to you, in short, that one of the ways in which a rich society avoids what might otherwise prove to be insoluble dilemmas of choice is to recognize a separation of functions, a distribution of responsibilities, with respect to questions of that kind, and this is particularly recurrent in the legal profession.[366]

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The internment decision has many aspects and may be viewed from many angles. One of them is a willingness to assume responsibility. Ultimate responsibility rested with President Roosevelt. It is therefore notable that, based on Stimson's diary, Roosevelt appears to have delegated the matter to Stimson, leaving only light fingerprints on the decision, though Roosevelt of course signed EO 9066.[367] In the cabinet-level debates, Biddle argued that the case for exclusion had not been made, and he said the Justice Department would not participate in interring citizens, but he stopped short of denouncing the program as unconstitutional. He accepted what he reported as Roosevelt's view—that it was a question for the military. Warren challenged California law enforcement officials by asking rhetorically whether any of them would want to accept responsibility should exclusion not be pursued and should sabotage then occur. For all his protests and accusations of "suppression of evidence," Ennis did not resign but did attach his signature to the Supreme Court briefs in the exclusion cases. In contrast, Stimson, McCloy, Gullion, DeWitt, and Bendetsen were willing to accept responsibility for ordering exclusion and drafting a justification for it. Warren was willing to accept responsibility for helping create—some might say fabricate--a record that Bendetsen could rely on to justify DeWitt's orders.

Warren's example shows that responsibility is relevant both to what one does and to what one chooses not to do.[368] In view of his actions, DeWitt and Bendetsen knew that California's law enforcement community would back exclusion, and provide testimony and demonstrative exhibits (the maps) that could be cited as a record justifying exclusion. Contrary views, such as those of the FBI and FCC, could be dealt with under the general principle that responsible

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[365] Wechsler, *Some Issues for the Lawyer*, *supra* note 326, at 123-124.

[366] *Id*. at 124.

[367] Professor Daniels describes Roosevelt as refusing to make the choice while employing charm and equivocation to avoid doing so. Daniels, *Decision, supra* note 1, at 44-45.

[368] A point Professor Daniels makes about mayors in Daniels, *Decision*, *supra* note 1, at 20-21. *See also*, Eugene V. Rostow, *The Japanese American Cases: A Disaster*, 54 YALE L. J. 489, 496 (1945)("Quite clearly, a conflict took place between the military authorities on the West Coast and some of the representatives of the Department of Justice over the justification for such action. But no one in the Government would take the responsibility for overruling General DeWitt and the War Department which backed him up.").

officials must be given latitude to make judgments among conflicting points of view. As Solicitor General Katyal noted, such judgments are both necessary and common. One can imagine a world in which Warren marshalled the California law enforcement community to attest to the generally law-abiding ways of the Issei and Nisei, and to commit to identifying and putting an end to unlawful activity by specific persons. One wonders what course policy would have taken if those most familiar with the land and the people on it opposed exclusion rather than incited it. But that is not what Warren did.

This note began by surveying California law relating to Black and Indian persons, including laws against mixed-race marriage. We also have seen President Roosevelt placing responsibility for decisions with Secretary of War Stimson. It is therefore informative to close with an excerpt from Stimson's diary. His entry for Saturday, January 24, 1942—before the exclusion decision was made—describes his frustration in "trying to stop one of those entirely unnecessary rat holes which are constantly being thrown into our path by the Administration." The issue was a speech to be given by Archibald MacLeish, a well-known poet who was then Librarian of Congress. MacLeish's speech was to be "delivered to a colored audience in New York on the subject of the alleged Negro discrimination by the Navy." Stimson met with MacLeish for an hour and "told him how I had been brought up in an abolitionist family; my father fought in the Civil War, and all my instincts were in favor of justice to the Negro." Stimson told MacLeish

> of my experience and study of the incompetency of colored troops except under white officers, and the disastrous consequence to the country and themselves which they were opening if they went into battle otherwise, although we were doing our best to train colored officers. I pointed out that what these foolish leaders of the colored race are seeking is at the bottom social equality, and I pointed out the basic impossibility of social equality because of the impossibility of race mixture by marriage.

According to Stimson, MacLeish "listened in silence and thanked me" but "I am not sure how far he is convinced." Internment historian Roger Daniels puts the point this way: "racism—a belief that human races have inherent characteristics that determine their cultures, usually involving the notion that one's own race is superior and has the right to rule others—is a seamless web."[369]

V

1. Were the efforts of California lawyers to help persons of Japanese descent evade the prohibitions of the Alien Land Laws ethical? Were they improper lawyering?
2. Were Attorney General Warren's efforts to use those laws as a premise for creating a record to support exclusion ethical? Were they improper lawyering?
3. Was Warren's agreement to expand his map project and law enforcement meetings beyond counties where his office thought a case provable under the Alien Land Law might exist ethical? Was it improper lawyering?
4. Was James Rowe's reported disclosure to the ACLU that General DeWitt was contemplating mass exclusion ethical? Was it improper lawyering?

[369] Daniels, *Politics*, *supra* note 1, preface to the Second Edition.

5. Was Attorney General Biddle's decision to defer to military officials and to hand the problem off to them—his choice not to object flatly on constitutional grounds—ethical? Was it improper lawyering?
6. Was prosecution of Alien Land Law cases after exclusion and internment occurred ethical? Was it improper lawyering?
7. Was James Purcell's tactical delay in waiting to press for a decision on Mitsuye Endo's *habeas* petition ethical? Was it improper lawyering?
8. Were Karl Bendetsen's authorship of the DeWitt report and related actions promoting exclusion ethical? Were they improper lawyering?
9. Were Edward Ennis's and John Burling's reported disclosures to the ACLU pertaining to *Ex parte Endo*, and Ennis's reported consultation with Baldwin concerning both *Endo* and *Korematsu*, ethical? Were they improper lawyering?
10. Was John McCloy's revision of the original DeWitt report ethical? Was it improper lawyering?
11. Were Edward Ennis's and John Burling's advocacy of disclosure in *Hirabayashi* and *Korematsu* ethical? Were they improper lawyering?
12. Was Herbert Wechsler's rewriting of note 2 in the *Korematsu* brief ethical? Was it improper lawyering?
13. Ennis and Burling signed briefs in *Korematsu* notwithstanding the absence of disclosure. Should they have resigned?
14. Was the DOJ's failure to disclose FBI, FCC, and ONI documents inconsistent with General DeWitt's report ethical? Was it improper lawyering?
15. Was coordination between General DeWitt's staff and West Coast states on those states' amicus briefs in *Hirabayashi* and *Korematsu* ethical? Was it improper lawyering?
16. Was the JACL's use of a WRA non-lawyer employee to write a substantial portion of the JACL amicus briefs in those cases ethical? Was it improper lawyering?
17. Who were "responsible persons" as referenced by Solicitor General Fahy at the *Korematsu* argument?
18. Was Fahy's *Korematsu* argument itself ethical? Was it improper lawyering?
19. Should Justice Roberts and Justice Frankfurter have recused themselves in view of Roberts's report on Pearl Harbor and the influence it had on exclusion?
20. What kind of a client was President Franklin Delano Roosevelt?
21. Do you find Professor Wechsler's reasons for proceeding with the *Korematsu* brief persuasive?