

THE PRESIDENTIAL INTERNMENT POWER ESTABLISHED BY THE 1942 INTERNMENT OF AMERICANS SUSPECTED OF DISLOYALTY

Paul Lyon

INTRODUCTION

At any time that the federal government should decide that the United States is threatened by an “incursion”¹ which the President can identify with a specific racial or ethnic group, he may legally and constitutionally arrest and indefinitely detain all members of that group in the country, whether or not they are citizens of the United States.² The deprivation of liberty is obviously intended to be limited to the duration of any hostilities with the foreign governments specifically identified by the military with the racial group, but there is no explicit provision in law to this effect; nor is there any provision requiring a formal declaration of hostilities. The law could easily be extended to include residents of the United States who are or were originally citizens of nations conquered or occupied by enemy nations, even if the subjugated countries are officially allied with the United States in war with the conquering enemy.³ The legal mechanism and rationale for the mass arrest of American citizens based upon their race is in place and ready to use. This is proven by an examination of the 1942 internment of 112,000 Americans of Japanese descent, showing that no case and no statute has made such an internment illegal or unconstitutional,⁴ and that the resulting executive instrument, the Internment

¹ LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW*, Vol. One, 4-6, 658-59 (Foundation Press 2000), and citing *DaCosta v. Laird*, 471 F.2d 1146, 1157 (2d Cir. 1973) (judiciary will not interfere with tactical military judgments in a lawful undeclared war in which Congress has acquiesced); 50 U.S.C.S. § 21 (2003).

² *Toyosaburo Korematsu v. United States*, 323 U.S. 214, 223 (1944).

³ 50 U.S.C.S. § 5(b)(1) (2003).

⁴ Reggie Oh and Frank Wu, *The Evolution of Race in the Law: The Supreme Court Moves From Approving Internment of Japanese Americans to Disapproving Affirmative Action for African Americans*, 1 Mich. J. Race & L. 165, 167 Winter, 1996.

power, is currently within the discretion of the president.

A third of the 1942 Internees were not yet citizens;⁵ but there is nothing specific about either the history of the times or the use of the law then that necessarily confines the Internment power to its use against residents according to their immigration or visa status, just as there is nothing in it specifying its use against any particular minority group. The President retains the power to suspend the civil rights of a portion of the population based solely on its race. The power is not dependent upon a finding after due process that a group is altogether dangerous or even objects to national military aims. In England, for example, thousands of loyalty hearings were held to determine whether individuals of shared enemy heritage posed a threat to the besieged homeland.⁶ It was summarily determined that a state of emergency existed in the United States which made such hearings inconvenient.⁷

The people were removed by the military to ten camps, two each in Arkansas, Arizona, and California, and others in Idaho, Wyoming, Utah, and Colorado.⁸ Since it was the government's intention to eliminate the perceived threat to coastal defenses by those who were considered politically loyal by bloodline to the enemy,⁹ all persons in the target race were ordered out of their homes regardless of age, sex, citizenship status, or actual political affiliation.¹⁰ Conditions in the camps were miserable and obviously intended to humiliate the inmates and emphasize the distrust and bigotry that sent them there. They were by no means conditions as low as suffered by targeted groups in Europe, Asia, and Russia, but Japanese immigrants to America may have ex-

⁵ RICHARD WHITE, "IT'S YOUR MISFORTUNE AND NONE OF MY OWN," A HISTORY OF THE AMERICAN WEST 510-511 (University of Oklahoma Press 1991).

⁶ *Korematsu*, 323 U.S. at n. 16, 242 ("During a period of six months, the 112 alien tribunals . . . set up by the British Government . . . examined approximately 74,000 German and Austrian aliens . . . About 64,000 were freed . . . and only 2,000 were interned.").

⁷ KEVIN STARR, *EMBATTLED DREAMS. CALIFORNIA IN WAR AND PEACE, 1940-1950*, 90 (Oxford, 2002).

⁸ WARREN A. BECK AND YNEZ D. HAASE, *HISTORICAL ATLAS OF THE AMERICAN WEST* 63, 77 (University of Oklahoma Press, 1989).

⁹ "We must move the Japanese in this country into a concentration camp somewhere, someplace, and do it damn quickly . . . Don't kid yourselves and don't let someone tell you there are good Japs." Rep. Alfred Elliott, speech to the United States House of Representatives, Dec. 9, 1941, quoted in STARR, *supra* note 7, at 63-64.

¹⁰ DAVID MAS MASUMOTO, *COUNTRY VOICES. THE ORAL HISTORY OF A JAPANESE AMERICAN FAMILY FARM COMMUNITY* 51 (Inaka Countryside Publications, 1987) (The "evacuation" orders were addressed "To All Persons of Japanese Ancestry").

pected better treatment here than in Japan.¹¹

The government, under pressure of sudden war and the fear of the imminent invasion of California, promptly blurred the line between citizen and noncitizen, young and old, male and female, loyal and disloyal, and made everyone in the group criminal suspects.¹² The pertinent distinction is between citizen and noncitizen, but inasmuch as the President gave the military the power to “remove” all persons it deemed dangerous to national security, the distinction was immediately irrelevant.¹³ Given the fact that America is fundamentally a people deriving from all races and nations, many of us arrive and become Americans through an ambiguous passage in which, at some undefined point between generations, we cease to be foreigners, or “aliens.” Most ethnic groups find themselves, early on, straddling categories of legal status. The immigrant Japanese were no different, and found their families consisting of a mix of full citizens, resident aliens in the process of citizenship, and many in transit as students or potential immigrants.¹⁴ No doubt some had no intention of ever renouncing Japanese allegiance.¹⁵

Executive Order [EO] 9066¹⁶ in essence ordered the military to designate “military areas . . . from which any or all persons may be excluded.” By statute, it was a federal misdemeanor to remain in an area from which you were excluded;¹⁷ but it is circular reasoning to state that the cause of your arrest is not having volunteered to be arrested, which is what the Order and statute actually required when considered

¹¹ Haruo Abe, Part 4, Self-Incrimination, Japan, in CLAUDE R. SOWLE, ED., *POLICE POWER AND INDIVIDUAL FREEDOM* 268-269 (Aldine Publishing Co. 1962) (Before the Constitutional reforms of 1947, civil rights in Japan were restricted by the government and the chief means of criminal conviction was by coerced confession.).

¹² MASUMOTO, *supra* note 10, at 41-42.

¹³ Exec. Order No. 9066, 3 C.F.R. Cum. Supp. 1092, Feb. 19, 1942, President Franklin D. Roosevelt.

¹⁴ Cultural categories for Japanese immigrants include one for students temporarily returning to Japan for study. Ten thousand Japanese-American children, American-born, had “been sent to Japan for all or a part of their education.” *Hirabayashi v. United States*, 320 U.S. 81, 97 (1943).

¹⁵ After release from the camps, “about 4,000 left the country for Japan.” WHITE, *supra* note 5, at 513. In July 1944, all those who refused to swear allegiance to the United States were counted as 16,684, out of the 61,000 remaining in detention. *Ex parte Mitsuye Endo*, 323 U.S. 283, 294 n. 19 (1944).

¹⁶ Exec. Order No. 9066, *supra* note 13.

¹⁷ 18 U.S.C.S. § 1383 (2003), *repealed by* 90 Stat. 1258 (1976); 50 U.S.C. App. § 1989b-7 (2003).

together.¹⁸ Once an individual is identified as a member of a suspect group, under this type of authority it is irrelevant whether the suspicion is founded on a constitutionally repulsive basis such as racial prejudice. The civilian authority abrogates its power to the military, including the power to ensure enforcement of the Constitution.

EO 9102¹⁹ set up the War Relocation Authority [WRA], ostensibly a civilian bureau directed by Milton S. Eisenhower. However, the actual evacuation of the suspected population and security at the camps was conducted by the military, and the Wartime Civil Control Administration (WCCA)²⁰ was technically in the War Department under the Civilian Affairs branch of the Western Defense Command and headed by Col. Bendtsen, who appears to have been rapidly promoted into the role from major rank.²¹ What this means is that the Internment was a thoroughly military project, with a military rationale to begin with, and conducted by the War Department. The United States Army was deployed to enforce a federal mass-arrest warrant.²² Due to the numbers of suspects involved, it was necessary at first to order them to report to racetracks and fairgrounds to be booked before transportation to remote military outposts.²³

President Gerald R. Ford formally dismissed the authority of EO 9066,²⁴ and deemed it terminated *nunc pro tunc* upon the date of Proclamation 2714,²⁵ which officially recognized the cessation of the hostilities of World War II more than a year after Hiroshima and Nagasaki. For 30 years, then, the authority to intern citizens under EO 9066 had remained in effect; as to noncitizens, their property and assets were still subject to forfeiture, under the Trading With the Enemy Act

¹⁸ *Korematsu v. United States*, 323 U.S. 214, 230, 232 (1944).

¹⁹ Exec. Order No. 9102, 1 C.F.R. Cum. Supp. 1123, March 18, 1942, President Franklin D. Roosevelt.

²⁰ The WRA set up by EO 9102 was to operate in conjunction with the WCCA.

²¹ STARR, *supra* note 7, at 93-94. Maj. Karl Bendtsen, Chief of the Aliens Division of the Office of the Provost Marshal under Lt. Gen. John L. DeWitt, began to prepare plans for the "evacuation of Japanese" in January, 1942; was promoted to Lt. Col. in February; and soon became one of the youngest full Colonels in the United States Army.

²² *Korematsu*, 323 U.S. at 232.

²³ In Fresno County, 10,000 people were lodged beginning in May 1942, at the Fresno County Fairgrounds and at a facility in Pinedale, many of them in horse stables. MASUMOTO, *supra* note 10, at 47.

²⁴ Proclamation No. 4417, 3 C.F.R. 100.735-1, 8, (Feb. 19, 1976), President Gerald R. Ford.

²⁵ Proclamation No. 2714, 1 C.F.R. 1946 Supp., 2.1, 77, (Dec. 31, 1946), President Harry S. Truman.

(TWEA), until the Treaty of 1951.²⁶ Authority for the Internment was therefore intact until 1976. Bear in mind, however, that this was not just authority for the Western States' Internment of 1942, which is not even explicitly described in the Order. The Order was never rescinded. The only thing to discourage a future Internment is President Ford's pale "resolution" in his Proclamation "that this kind of action shall never again be repeated."²⁷

What kind of action? The Internment of citizens only? For there is clear legal standing authority, which cannot be undone by Presidential Proclamation, for the arrest and detention of noncitizens in time of war, and the seizure of their property.²⁸ Moreover, under *Korematsu*, the Supreme Court has held that the mass military arrest of a racial group deemed to be threat to national security is Constitutional if it is later strictly scrutinized.²⁹ Certainly there is no precedent for binding future presidents (or even a particular president during his own term in office) to previously proclaimed decisions or vows, which were never codified. If anything, history has shown that the president will consistently override Constitutional restraints in a national emergency, especially following an attack on American territory or the homeland.³⁰

I. THE RACIST BASIS OF THE 1942 INTERNMENT

When the Internment Orders were issued, no one mounted a legal protest effectively against overwhelming public support among Americans of the majority races.³¹ Local politicians and newspapers in California urged the measure in the first instance.³² Local newspapers in Fresno County at first called for fairness, caution, and respect for "good Americans of foreign descent," but community leaders began to call for their removal because their presence was "a problem so-

²⁶ *Orme v. Northern Trust*, 102 N.E.2d 335, 410 Ill. 354, 361-362 (1951), *cert.denied* 343 U.S. 921.

²⁷ Proclamation No. 4417, *supra* note 24.

²⁸ E.g., TWEA, 50 U.S.C.S. Appx. §1 et seq. (2003), and Enemy Alien Act [EAA], 50 U.S.C.S. § 21 (2003), originally Act July 6, 1798, ch. 66, §1, 1 Stat. 577.

²⁹ *University of California v. Bakke*, 438 U.S. 265, 291 (1978). See also, Oh and Wu, *supra* note 4, at 167 (" . . . *Korematsu* remains controlling case law, establishing the related rules that racial classifications are suspect and subject to 'strict scrutiny' by the judicial system, although they are not necessarily unconstitutional as a result.").

³⁰ E.g., "Military Order of November 13, 2001; Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," President George W. Bush.

³¹ MASUMOTO, *supra* note 10, at 46.

³² STARR, *supra* note 7, at 92. The *Los Angeles Times* ran editorials calling for removal February 25, 26, and 27, 1942.

cially if not from a military standpoint.”³³

The Pacific states were confronted with a severe labor shortage at the outbreak of the war.³⁴ Thousands of Japanese American workers within months had to leave their jobs in Fresno County, worsening the labor shortage and giving locals second thoughts about the Internment,³⁵ while the mass incarceration of Japanese-Americans, which incidentally resulted in the loss of farms, homes, and businesses in the Western States,³⁶ was viewed by some as an economic advantage to competing Whites.³⁷

Urban areas of Washington and California experienced a huge population influx starting in 1942, as the labor shortage was filled by African-American immigration from Texas and Louisiana and *bracero* migrants.³⁸ The newcomers had to compete with low-income workers for housing and public services, and the *braceros* were exempt from the draft.³⁹ In the weeks following Pearl Harbor, Japanese-Americans were accused of quietly plotting the Pacific invasion of the American homeland.⁴⁰ All of these circumstances inflamed whatever bigotry was already present against citizens and noncitizens of Japanese descent. The

³³ MASUMOTO, *supra* note 10, at 41.

³⁴ John Modell, *Japanese-Americans: Some Costs of Group Achievement*, IN CHARLES WOLLENBERG, ED., *ETHNIC CONFLICT IN CALIFORNIA HISTORY* 118 (Tinnon-Brown, 1970). The Internment caused a severe labor shortage in California, in which approximately 20,000 farmworkers and other laborers went to the camps.

³⁵ MASUMOTO, *supra* note 10, at 51-52.

³⁶ *Id.* at 48. The Wartime Civil Control Authority required the registration of Japanese farmers in early April 1942, in anticipation of evacuation, in order to ensure farm productivity for the war effort. Advertisements soon appeared for substitute farmers for cropland to be soon vacated “by Japanese tenants under evacuation orders.” Evacuation service centers were set up to avoid “undue loss” by the evacuees, and although “no Japanese [was] compelled under law to dispose any property or take any action in connection with personal or business affairs,” many sold out at a loss because of the uncertainty of their destination or time of return.

³⁷ WHITE, *supra* note 5, at 511 (“Herbert H. Maw, the governor of Utah . . . asked that 10,000 to 12,000 Japanese be handed over to his state with an appropriate federal subsidy to guard them and force them to work.”).

³⁸ *Id.* at 504.

³⁹ *Id.* at 504.

⁴⁰ WHITE, *supra* note 5, at 510 (“The very fact that they had done nothing became proof of their bad intentions. For that, as Earl Warren, the attorney general of California, emphasized, ‘was the most ominous sign in our whole situation.’ The Japanese were supposedly lulling their fellow Californians into a false sense of security.”); C. JOHN YU, “TIMELINE RELATED TO INTERNMENT” (hereinafter TIMELINE) available at academic.udayton.edu/race/02rights/intern01.htm (“‘Unless something is done it may bring about a repetition of Pearl Harbor,’ said Earl Warren . . . calling Japanese Californians the ‘Achilles heel of the entire civilian defense effort.’”).

Internment acted indirectly, as well, to increase tensions *between* minority groups.⁴¹ As an aggravating factor, in some cases, the Japanese-American population was doused with the same kind of outrageous pseudoscientific propaganda suffered by the European Jews. The attempt was made to link the Japanese, without reference to their actual place of residence or citizenship, with traditional imaginary enemies. It was suggested that they were ethnically related to the American Indians, popularly known to be underhanded and cruel.⁴² It was generally accepted by elected officials that they were inherently treacherous; that it was a cultural trait of the Japanese to be sneaky.⁴³ A Southern congressman even stated that they were equally as subversively threatening as “the Negroes.”⁴⁴

Japanese-Americans, just as other groups throughout American history who could be conveniently recognized and demonized according to the needs of the day, were also said to be “savages” who wanted to carry off and rape White women, and behaved like animals.⁴⁵ In

⁴¹ DAVID COLBERT, *EYEWITNESS TO THE AMERICAN WEST* 313-314 (Viking/Penguin Group, 1998); (Maya Angelou wrote that “[a]s the Japanese disappeared [from San Francisco], soundlessly and without protest, the Negroes entered The Japanese area became San Francisco’s Harlem in a matter of months No member of my family and none of the family friends ever mentioned the absent Japanese. It was as if they had never owned or lived in the houses we inhabited [Blacks and Whites] were obliged to work side by side in the war plants, and their animosities festered”).

⁴² RICHARD SLOTKIN, *GUNFIGHTER NATION: THE MYTH OF THE FRONTIER IN TWENTIETH-CENTURY AMERICA* 319 (Harper Collins Publishers, Inc., 1993).

⁴³ AKIRA IRIYE, *POWER AND CULTURE, THE JAPANESE-AMERICAN WAR 1941-1945* 123 (Harvard Univ. Press, 1981) (“The Japanese [according to Capt. H.L. Pence, U.S. Navy, member of the State Department security technical subcommittee of the postwar policy committee, Dec. 1942-May, 1943, on the question of what to do with a defeated Japan] were ‘international bandits and not safe on the face the earth.’ The only way to ensure peace was to destroy them; ‘Japan should be bombed so that there was little left of its civilization, so that the country could not begin to recuperate for fifty years.’ Such drastic measures he insisted, were necessary because this ‘was a question of which race was to survive, and white civilization was at stake.’ ‘We should kill them before they kill us,’ he asserted, even going so far as to call for ‘the almost total elimination of the Japanese as a race.’”); TIMELINE, *supra* note 40 (Congressman Leland Ford, telegram to Secy. of State Cordell Hull, requesting “that all Japanese Americans be removed from the West Coast,” in which he wrote “I do not believe that we could be any too strict in our consideration of the Japanese in the face of the treacherous way in which they do things.”).

⁴⁴ SLOTKIN, *supra* note 42, at 320.

⁴⁵ WHITE, *supra* note 5, at 511 (“Idaho Governor Chase Clark explained that the Japanese ‘live like rats, breed like rats, and act like rats. We don’t want them becoming permanently located in our state.’”); Alison Dundes Renteln, *A Psychohistorical*

combat, they devalued life (if it is possible to devalue it any less than to wage war), and did not fight fairly.⁴⁶ They taught us how to fight dirty early in the war.⁴⁷

Within American territory, some among them might be saboteurs or spies, and their "loyalty" was primarily to Japan, based on their racial ties: citizens of Japanese descent would work to make their alleged compatriots succeed in an invasion.

The immediate cause for inflamed racism in early 1942 was, of course, Pearl Harbor. Residents of California felt that invasion was imminent, and there had been an incident of actual shelling of an oil field at Goleta in February,⁴⁸ as well as attacks on the coast and fear of such attacks since the day after Pearl Harbor.⁴⁹ There had been sightings of purported Japanese submarines and airplanes, and blackout drills were regularly held,⁵⁰ but the expected attack never came, even during 1942, when the United States and the Allies were losing battles to Japanese forces on a regular and disheartening basis.⁵¹ It did nothing to quiet the fears of Californians to realize that Hawaii, in the path of any Japanese invasion, was yet secure in spite of the strong advantage enjoyed by the Japanese armed forces just after the destruction of the American fleet; or that Hawaii contained more people of Japanese descent than the mainland.⁵² On the same racist grounds used to arrest Californians, Hawaii should have been absolutely doomed, being as it was packed with silently-plotting spies and saboteurs.

Instead of Americans of Japanese descent waging a subversive campaign to undermine the coastal defense, they tolerated their imprison-

Analysis of the Japanese American Internment. HUMAN RIGHTS QUARTERLY 17.4 618, 634-642 (1995).

⁴⁶ SLOTKIN, *supra* note 42, at 319, 321.

⁴⁷ *Id.* at 524.

⁴⁸ BECK AND HAASE, *supra* note 8, at 77.

⁴⁹ STARR, *supra* note 7, at 34-35, 37, 63-65 (Submarine I-17 of the Japanese Imperial Navy and eight others of the Submarine Force Detachment of the First Submarine Group attacked shipping along the coast in December, 1941, and January, 1942, sinking three ships and shelling oil tanks north of Santa Barbara. Unidentified aircraft flew over the Golden Gate Bridge on December 8, 1941, which the Los Angeles Times called "Enemy Planes," and 15 similar aircraft flew over Los Angeles before dawn on February 25, 1942, instigating a tremendous antiaircraft barrage.).

⁵⁰ *Id.* at 65.

⁵¹ GERHARD L. WEINBERG, A WORLD AT ARMS. A GLOBAL HISTORY OF WORLD WAR II 310-319 (Cambridge University Press, 1994) (The Japanese in the first stage of Pacific War held naval and air superiority, and had defeated Allied forces to occupy Guam, Wake Island, and the Philippines.).

⁵² BECK AND HAASE, *supra* note 8, at 77.

ment with their families peaceably,⁵³ and sent their youth to fight the Axis powers in the European theater.⁵⁴

In fact, there were a number of plans floated by the Japanese command regarding how to conduct the war against the Allies, and none of them called for the imminent invasion of the West Coast. The two chief plans were to invade Australia and New Zealand, occupy them, then move through the Pacific via Fiji and Samoa. The “MI Plan” (probably representing “Midway,” and the plan apparently followed, at least in the beginning), called for a major defeat of the U.S. Navy at Midway, followed by a possible invasion of Alaska, with the later occupation of Hawaii and the West Coast.⁵⁵ By mid-1942, the Japanese were put on the defensive and unable to carry on with any of their longterm plans for Asia. The war had been waged, according to strong elements in the Japanese government, to unify Asia, not to conquer and occupy North America.⁵⁶ By 1943, it was becoming important to hope for “chances of accommodation” with the Allies, and there was absolutely no plan for an invasion of the United States.⁵⁷ By September 1943, top officials presented the Emperor with the strong possibility that the United States would win the war in the next year, and that Japan should establish an absolute-minimum defensive perimeter with the home islands at the center.⁵⁸ California, in other words, was not in the sites of the Japanese military after the sinking of some tankers off the coast in early 1942.

The most commonly used term for Californians targeted for mass arrest was “disloyalty,” which was attributed to the character of being of Japanese descent.⁵⁹ That is, a sham scientific, or “psychological”

⁵³ STARR, *supra* note 7, at 94.

⁵⁴ *Id.* at 95 (In the segregated military of World War II, Japanese Americans constituted the 100th Infantry Battalion and the 442nd Regimental Combat Team, which together suffered 9,486 casualties in seven major campaigns, including 650 killed in action. Besides the Purple Hearts, these two units, two of the most decorated units in the war, were awarded 568 decorations.).

⁵⁵ EDWIN P. HOYT, *GUADALCANAL 4-5* (Stein & Day, 1982).

⁵⁶ IRIYE, *supra* note 43, at 70-71.

⁵⁷ *Id.* at 98.

⁵⁸ *Id.* at 116-117.

⁵⁹ Yoshiye Togasaki, interviewed by Tom Tiede, *American Tapestry*, in COLBERT, *supra* note 41, at 309. (“When the rumors of the camps could not be ignored, and when Japanese-Americans started being thrown out of work, I went to the president of the Council of the Churches of the State of California to ask for his help, and do you know what he said to me? He said that I was just a traitor. He said, ‘How do I know how to trust you? I don’t know you from anything—you’re Japanese, so you’re not trustworthy.’ That was the way people thought . . .”).

trait was found in one racial group as a basis for legal action taken against them. Why this trait should suddenly have been discovered in 1941, until that moment having been dormant and harmless, was merely another way of saying that America had been tricked.

A look at the map will show that the Internment camps were located in arid regions, requiring heavy irrigation, and otherwise designated as rangeland; these areas are at a safe distance from the California Central Valley, coastal fishing, large commercial centers, and even forest and wheat ranges.⁶⁰ In fact, the treatment of the Internees is a repeat of the dislocation of Native Americans to the wastelands, and there was no intention to move the Internees to places where they could work or farm. Many of the camp authorities were from the Bureau of Indian Affairs, which, of course, had rich experience in controlling subversive "savages."⁶¹

Fresno County, as an example, which lost a fair share of its farmers to Internment, is "the richest single agricultural area in the nation,"⁶² lying just over the mountains from Manzanar, described as "a very dirty place . . . very dusty . . . and it was a very fine grit that covered everyone and everything. It was in the beds and in the food."⁶³ It was, in fact, a dustbowl created by the loss of water to Los Angeles.⁶⁴ Here is where thousands of Internees were taken from Fresno County. This was not the first time that the American government had ordered the military to move some of its people out to the barrens.⁶⁵

No one now claims that the Internment was morally justified,⁶⁶ even under the circumstances of tense fear immediately after Pearl Harbor. In retrospect, Americans believe that it was wrong, and the American government has made efforts to acknowledge the error.⁶⁷ Yet *Kore-*

⁶⁰ BECK AND HAASE, *supra* note 8, at 63.

⁶¹ WHITE, *supra* note 5, at 511.

⁶² BECK AND HAASE, *supra* note 8, at 63.

⁶³ COLBERT, *supra* note 41, at 311.

⁶⁴ *Id.*

⁶⁵ See, e.g., HENRY STEELE COMMAGER, DOCUMENTS OF AMERICAN HISTORY, 7th ED. 259-261 (Meredith Publishing Co., 1963) (treaty between the United States and Creek, Cherokee, and other Nations, for the removal of Southern tribes to Indian Territory west of the Mississippi River, Dec. 29, 1835, and President Andrew Jackson's Seventh Annual Message to Congress, Dec. 7, 1835, outlining the plan for Indian Removal to inhospitable lands in what is now Oklahoma).

⁶⁶ But see AP article *Controversy Swirls Over Congressman's Remarks About Japanese*, FRESNO BEE, Feb. 17, 2003 at B-4 ("We were at war. They [Japanese-Americans] were an endangered species. . . For many . . . it wasn't safe for them to be on the street," according to Rep. Howard Coble of North Carolina).

⁶⁷ COLBERT, *supra* note 41, at 312. The federal government apologized formally at

matsu stands, maintaining the rationale for the Internment power which may be exercised in the future according to presidential discretion.

II. THE LEGAL FRAMEWORK OF THE 1942 INTERNMENT

The Presidential Internment power appears to have gained initial legal strength from two entrenched pieces of legislation: the TWEA, dating from the early 20th Century, and the Enemy Alien Act (EAA), originally enacted in 1798. TWEA permits the seizure of property; EAA the deprivation of liberty. While there is some precedent for their use only during times of formally declared war, the EAA as well as some new manifestations of the Internment power have been used virtually without check by the executive branch to control the presence of perceived enemies, particularly in a state of emergency or imminent threat of attack.⁶⁸

TWEA was not the authority for the Internment, but along with the EAA⁶⁹ provided the template for executive action against perceived resident enemies, as well as the precedent for unconstitutional treatment of noncitizens based upon the accident of genealogy, in time of war against their ancestral homeland. The actual definition of the class of subject persons under TWEA was “natives, citizens, or subjects of any nation with which the United States is at war, other than citizens of the United States, wherever resident and wherever doing business, as the President, if he shall find the safety of the United States or successful prosecution of the war shall so require, may, by proclamation, include within the term ‘enemy.’”⁷⁰ However, the definitions are “merely illustrative,”⁷¹ and that of “enemy” does not equate legally with that of “noncitizen.” To fit the category allowing the government

the time of reparations in 1988, and Fred Korematsu was awarded the Presidential Medal of Freedom in 1998, the highest civilian honor.

⁶⁸ J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 NEW YORK UNIV. L.R. 1402, 1410 (Dec. 1992); see *Narenji v. Civiletti*, 617 F.2d 745, 749 (D.C.Cir. 1979), cert. denied 446 U.S. 957 (1980) (special restrictions on natives or citizens of Iran due to actions against U.S. citizens in Iran); 50 U.S.C. § 1701 (2003) (declaration of national emergency and exercise of Presidential powers during unusual and extraordinary threat to the United States). The most recent restrictions on the rights of noncitizens are not noted here as beyond the scope of the article.

⁶⁹ 50 U.S.C.S. § 21 (2003).

⁷⁰ 50 App. U.S.C.A. § 2(c) (2003).

⁷¹ *Nagano v. Clark*, 88 F.Supp. 897, 898 (D.C.Ill. 1950), rev. on other grds., 187 F.2d 759, aff'd 342 U.S. 916, citing *Clark v. Uebersee Finanz-Korporation*, 332 U.S. 480, 488-489 (1947).

to take one's property under TWEA, the court held that it need only demonstrate "enemy taint."⁷² To be tainted in this way, expressly not within the statutory definition, did not however operate to permit the person to show that he in fact *lacked* a "real enemy taint."⁷³

Even though noncitizens are afforded fundamental rights under the Constitution,⁷⁴ the corrosion of the principle underlying such an extension began in modern times with TWEA, which in its application provided the framework for the 1942 Internment. Under the TWEA, noncitizens' property and assets were subject to forfeiture if their native countries were at war with the United States.⁷⁵ Under the Internment, any forfeitures were the indirect consequences of the hurried evacuation and relocation; however, TWEA accustomed the government to involve itself in peaceable noncitizen residents' assets and property on an accusatory basis, and provided a framework for the courts to address the issues of loyalty, status, and ethnic ties to foreign states. Action taken under TWEA is an exemption to the ordinary Constitutional protection extended to noncitizens.

Given the fact that subject individuals could also be merely natives of countries occupied by the enemy, and were not released from application of the TWEA until formal treaties of peace were executed,⁷⁶ their Constitutional rights depended upon an interpretation of international relations far removed from the *res*, and arguably irrelevant to it. Technically, the subject persons' political positions or beliefs were of no account;⁷⁷ citizens were not subject to the Act. However, in practice, if the individual acted like an American, was apparently assimilated into American society, was a solvent participant in the economy, and was Caucasian, he found an exemption in court.⁷⁸ This flexibility

⁷² *Id.* at 898.

⁷³ *Id.* at 898-99 (" . . . although the Government may show facts indicating an enemy taint not strictly within the definition of 'enemy' in Section 2, facts bringing a party squarely within the statutory definition may not be disregarded.").

⁷⁴ *TRIBE*, *supra* note 1, at 973 ("It would seem that, with only a very few special exceptions, resident aliens ought to enjoy the same constitutional rights . . . as are possessed by American citizens"), citing *Kwong Hai Chew v. Colding* 344 U.S. 590, 596 (1953).

⁷⁵ 50 U.S.C.A. App. §§ 1 *et seq.*; 2(c) (2003).

⁷⁶ *Japanese Government v. Commercial Cas. Ins. Co.*, 101 F.Supp. 243, 246 (D.C.N.Y. 1951).

⁷⁷ 50 U.S.C.A. App. § 2(a); (c) (2003).

⁷⁸ *Heiler v. Goodman's Motor Express Van & Storage Co.*, 105 A. 233, 236, 92 N.J.L. 415 (1918) (enemy alien was "within the class of peaceable citizens of the enemy country living here under the protection of our laws and attending to their everyday affairs without participation in the hostilities"); *Schulz v. Raimis*, 164 N.Y.S. 454,

found full expression in World War II, when neither Germans nor Italians were arrested en masse on account of their racial or ethnic ties to the enemy;⁷⁹ those ties apparently not having been regarded as a threat to the national security. This flexibility began in World War I, when resident enemy aliens who were Caucasian were permitted exemption from TWEA's confiscation of property.⁸⁰

If it were actually the case that national security required the Internment, and seizure of property and assets, of those living in the United States in 1942 who had blood ties to enemy nations, one would have expected to see, at the very least, the detention of tens of thousands of citizens of German descent and the loss by sudden discount sale of their farms and homes. Under TWEA, Americans of Norwegian, French, Polish, Czechoslovakian, Ukrainian, Italian, Spanish, Chinese, and Filipino ancestry, among others, could all have had their property confiscated by the government between 1941 and 1946.⁸¹ Obviously, the law could not be fairly and fully enforced without dire effects on large parts of the populations of major American cities. Selective enforcement that began with TWEA became the method of the Internment power, and will by necessity be the method in its future application.⁸² The courts in the World Wars found themselves closely

462, 99 Misc. 626 (1917), *aff'd* 166 N.Y.S. 567, 100 Misc. 697 (Under a pre-existing treaty, alien enemies of German nationality, notwithstanding the existence of a state of war, have the right to collect their debts by legal process.).

⁷⁹ 250 Italian Americans were interned for up to two years. Paula Branca-Santos, *Injustice Ignored: The Internment of Italian Americans during World War II*, 13 PACE INT'L L. REV. 151, 164 (Spring 2001).

⁸⁰ *Vowinckel v. First Fed. Trust Co.*, 10 F.2d 19, 21 (9th Cir. 1926) (enemy alien "was not an enemy, because he never acquired a domicile in the enemy country," even though he had joined the German army).

⁸¹ 50 U.S.C.A. App. § 2(c) (2003).

⁸² Chief Justice William Rehnquist made public "his prediction for the future . . . limited to what might be described as the constitutional war powers . . . during constitutionally declared wars," in 1998, "that the Executive Branch will prosecute the war abroad and have its way with civil liberties at home, while the Supreme Court merely stands by, for the most part, perhaps disapproving the most grievous and least justified domestic transgressions, but even then usually only after-the-fact." He goes on to analyze the Internment decisions, attempting to justify them, and "tries to defend the military for erring on the side of military security in an uncertain emergency," invoking "the tradition of the Alien and Sedition Act of 1798." Thomas E. Baker, *At War with the Constitution: A History Lesson from the Chief Justice*, 14 B.Y.U. J. PUB. L. 69, 70-71; 73-74 (1999). When asked what he himself would have done at the time of the Internment, i.e., whether he would have ordered or approved it, the Chief Justice of the United States Supreme Court stated as follows:

"Oh, I think one of the most difficult things in the world to do, is to second-guess

examining the political affiliations, ethnic bonds, and “allegiance” of citizens and potential citizens, as well as of foreigners who were invested in American business. The same unprecedented and undemocratic legal “reasoning” culminates in the incoherent *Korematsu* decision. Besides being squarely founded on unconstitutional racial distinctions, by its very nature, and by virtue of the American demographic composition, the Internment power is not only contrary to due process of law but to the requirement of equal protection.

There would be no reimbursement for property lost under the TWEA during the war.⁸³ Besides the explicit provision extending confiscations after cessation of hostilities, TWEA had been “specifically exempted” after World War I from a 1921 Joint Resolution that certain laws and proclamations “should be construed as though the World War had ended and the then present or existing emergency expired.”⁸⁴ The condition of war with Japan, which granted authority under TWEA to confiscate the assets and property of Japanese nationals, officially existed until ratification of the peace treaty in 1951.⁸⁵

The Supreme Court has held that the resident alien has a presumed allegiance to his state of citizenship, and, in the event of war with that state, he is liable to expulsion, internment, and loss of property and assets without compensation.⁸⁶ It is on the basis of such reasoning that the short step was taken from the presumption of loyalty based upon

people who were in leadership positions at that time. You know, it’s very easy, in the atmosphere of the late 1990s, to say something was a very bad thing to have done. That doesn’t mean that it was not a very bad thing to have done.”

Id., n. 9, citing interview by Brian Lamb on *Book TV*, C-SPAN 2, October 25, 1998.

⁸³ *Kaneko v. United States*, 122 F.3d 1048, 1054 (1997); 50 U.S.C.S. Appx. § 5(b)(1) (2003).

⁸⁴ 50 U.S.C.A. Appx. p. 17, note citing Joint Res. March 3, 1921, c. 136, 41 Stat. 1359 (2003).

⁸⁵ *Japanese Government v. Commercial Cas. Ins. Co.*, 101 F.Supp. 243, 246 (D.C.N.Y. 1951). *Accord*, *Frabutt v. N.Y., C., & St. L.R. Co.*, 84 F.Supp. 460, 464-465 (Pa. 1949); *Ex Parte Arakawa*, 79 F.Supp.468, 472 (Pa. 1947); *Industrial Comm. of Ohio v. Rotar*, 179 N.E. 135, 124 Ohio St. 418, 424 (1931).

⁸⁶ *Harisiades v. Shaughnessy*, 342 U.S. 580, 588 (1952), *reh.denied* 343 U.S. 936 (“Though the resident alien may be personally loyal to the United States, if his nation becomes our enemy his allegiance prevails over his personal preference and makes him also our enemy, liable to expulsion or internment, and his property becomes subject to seizure and perhaps confiscation. But it does not require war to bring the power of deportation into existence or to authorize its exercise. Congressional apprehension of foreign or internal dangers short of war may lead to its use. So long as the alien elects to continue the ambiguity of his allegiance his domicile here is held by a precarious tenure.”).

nationality to the presumption of loyalty based upon *race* where the race and nationality of the enemy was perceived as being identical; thus, a member of the “enemy *race*” was made subject to the same loss of rights regardless of his actual *nationality*. This is the racist core of the enormous mistake of the Internment.

If it were not an official racist act, one would expect to see the law applied to enemies and those of enemy “taint,” or race, equally. However, case after case show that, in practice, the courts often exempted Caucasians, at least in World War I. For example, a German citizen living and working in New Jersey sued for civil damages in World War I following a traffic accident, and the court allowed the suit though disallowed by TWEA,⁸⁷ stating that the enemy alien rule is not applicable to a citizen of an enemy country peaceably residing and doing business here with the implied license and permission of the government; there being “absolutely nothing to show that [he was] within” any of the classes denounced by TWEA “or the presidential proclamation.”⁸⁸ Likewise, in one case, a noncitizen who returned to Germany to serve in the German army medical corps was held not to be an enemy of the United States under the TWEA upon reentering.⁸⁹

Land was seized from Japanese-Americans on the pretext of the “taint” of their race in spite of the ambiguous generational status within families. In one case, a noncitizen gave over land to his son, a citizen, but it was found that the son would not act with respect to title contrary to his father’s interest in the business to which the land was essential. The court found that he therefore controlled use of the land, making it subject to confiscation; and, by extension, making the American citizen a “national of a designated enemy country, Japan,” apparently because of the *loyalty* of the son to the old country through his father.⁹⁰ The allegiance of Japanese Americans was presumed to follow bloodlines even for persons born in the United States. On the other hand, following a pattern set 25 years before, German Americans

⁸⁷ *Schulz v. Raimes*, 164 N.Y.S. 454, 464.

⁸⁸ *Heiler v. Goodman’s Motor Express Van & Storage Co.*, 105 A. 233, 236, 92 N.J.L. at 423 (1918). *Contra*, *Ex parte Graber*, 247 F. 882, 887 (N.D. Ala. 1918) (The President is the exclusive judge of whether someone is an alien enemy to be restrained.).

⁸⁹ *Vowinckel v. First Fed. Trust Co.*, 10 F.2d 19, 21 (9th Cir. 1926) (the alien had never established domicile in Germany in spite of his military service).

⁹⁰ *Fujino v. Clark*, 71 F.Supp. 1, 9-11 (D. Haw. 1947), *aff’d* 172 F.2d 384; *cert. denied* 337 U.S. 937, *reh. denied* 338 U.S. 839; The Court based its decision on a strict application of property law, citing “factual control” of the property rather “than the niceties of legal title.”

and noncitizens could escape the status of “enemy,” even in the case of a New Jersey corporation owned entirely by alien Germans, which was deemed a domestic corporation and not subject to seizure.⁹¹

EAA applies during time of war or threatened “invasion or predatory incursion” to arrest and detain “all natives, citizens, denizens, or subjects” over the age of 14 within the United States “and not actually naturalized,” leaving to executive fiat to determine details and delegate authority.⁹²

The key word in the catalog of persons subject to Internment under the EAA is *denizen*. *Denizen* was defined as a person bearing some relation to the enemy country though an American resident. He retained some sort of vague allegiance, placing him in “a kind of middle state between an alien and a natural born subject,” who “partakes of them both.”⁹³ In fact, one might still be an enemy if he had changed citizenship to a non-enemy nation⁹⁴—a situation which begs the question of whether an American citizen who had been born in Japan might be found to be an enemy of the United States.

In fact, *denizen* is defined in common law as one “who holds a position midway between being an alien and a natural-born or naturalized subject,”⁹⁵ a status which is useless if not meaningless in our immigration law. The only possible reasonable description of the status is that of one not having formally been granted citizenship but, because residing here and assimilating according to the American custom, as well as having been granted certain rights here,⁹⁶ not really a complete alien. It turns out, then, that *denizen* is a middle category created in acknowledgment, at least in practice, of the unique American method of acquiring citizens from all over the world. However, in World War II, the United States military, put in charge of the Internment, saw Americans and resident aliens simplistically in terms of “us and

⁹¹ *Schulz*, 164 N.Y.S. at 454 (A corporation is a legal entity the creature of a U.S. state, and is thus not an enemy alien despite the status of the owners.). This case should be read together with *Fujino, id.*, to show the disparity between treatment of the different races over a thirty-year span, during two wars, by the use of technical applications of business and property law.

⁹² 50 U.S.C.S. §. 21 (2003); *United States ex rel. Von Heymann v. Watkins*, 159 F.2d 650, 654 (2d Cir. 1947).

⁹³ *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858, 860-861(2d Cir. 1943).

⁹⁴ *Ex parte Gregoire*, 61 F.Supp. 92, 93 (N. D. Cal. 1945) (native of Germany who fought in the German army in WWI and was connected to the German high command in Paris fit within the statute).

⁹⁵ BLACK'S LAW DICTIONARY 446 (7th ed. 1999).

⁹⁶ *Id.*

them,” without the sophistication of constitutional analysis, and in fact outside of the law, such that, in practice, the same equivocal “category” of *denizen*, or “half American,”⁹⁷ permitted the Internment of citizens based on their race.

Without actually rendering citizens subject to loss of rights, the legal use of implicit categories of “half American” or “denizen,” as definitions of “enemy” opens the door theoretically, especially in conjunction with ideas of enemy “taint” and racial allegiance, to unconstitutional deprivation of liberty and property due to the transitional and frequently ambiguous status of immigrants. The purpose of the EAA was to arrest any who might “be likely to favor a hostile nation or government” because of ties of nativity or allegiance and “therefore commit acts dangerous to public safety if allowed to remain at large.”⁹⁸ This would necessarily include many who were not quite either citizens or aliens—*denizens* of foreign countries.

However, the meaning of the words in the catalog of enemy types is a question of law,⁹⁹ suggesting that the words do not retain all of their common meanings, and that they carry connotations permitting a stretch of terms such as in the use of the phrase “enemy taint.” “Each word is to have a significant and different meaning. They include all who by reason of ties of nativity or allegiance are likely to favor the enemy nation.”¹⁰⁰ In short, an alien enemy under EAA is one who owes allegiance to a foreign power at war with the United States—without reference as to whether he is actually a citizen, in spite of the added phrase “not actually naturalized.”¹⁰¹ Clearly, *denizen* contains multitudes, and even constitutes a broader category, which includes both citizen and noncitizen.

In 1934,

“[a] surprisingly large number of aliens living within the United States are persons without a country. Long absence from the native country without any evidence of returning often dissolves the original nationality”¹⁰² “Foreigners who reside in a country for permanent or indefinite

⁹⁷ The author’s own term.

⁹⁸ *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 902-903 (2d Cir. 1943) (Austrian technically an alien enemy, but had never embraced German allegiance); see also, *Citizens Protective League v. Byrnes*, 64 F.Supp. 233, 233-234 (D.D.C. 1946) (Germans deported as enemy aliens for “their nativity or feeling of allegiance”).

⁹⁹ *United States ex rel. Zdunic v. Uhl*, 137 F.2d 858, 860 (2d Cir. 1943).

¹⁰⁰ *United States ex rel. D’Esquiva v. Uhl*, 137 F.2d 903, 906 (2d Cir. 1943).

¹⁰¹ *Breuer v. Beery*, 189 N.W. 717, 194 Iowa 243, 244 (1922).

¹⁰² CATHERINE SECKLER-HUDSON, *STATELESSNESS: WITH SPECIAL REFERENCE TO THE UNITED STATES* 124 (Digest Press, 1934).

purposes, [with the intent to remain], are treated universally as inhabitants of that country.' The laws of many countries carry this principle into effect, specifically providing that the citizenship of such of the subjects who have left the country and stayed abroad for a certain length of time shall be considered to have expired. Aliens falling under the operation of such laws who reside in this country without having become naturalized United States citizens have no nationality"¹⁰³

The United States cannot discriminate between aliens of such nations and others who do not adhere to such a rule. These, though, are precisely the "stateless" citizens, or *denizens*, we have demonstrated in our history were the most wanted for nation-building and national identity. For example, Armenians after World War I who had come to the United States lost their original citizenship when the planned independent Armenian state was not realized after the treaty with Turkey.¹⁰⁴ No provision having been made for acquisition of American citizenship, and unable to claim other nationality, these Armenians were "stateless persons"¹⁰⁵ who found themselves in the *denizen* category as pre-Americans.

The EAA grants extraordinary powers to the president, providing that a state of war exists.¹⁰⁶ In practice, while it has not been used in an undeclared war, "the decision to terminate its delegation of powers rests, in practical terms, with the President himself, and the limited judicial review available under the Act does not extend to claims that the President has abused his discretion,"¹⁰⁷ and is "[o]ne of the most sweeping delegations of power to the President to be found anywhere in Statutes at Large,"¹⁰⁸ empowering the President to execute "rules of his own making—subject . . . to virtually no check from the courts through judicial review."¹⁰⁹ EAA "has survived intact to the present. Its constitutionality was never seriously questioned by Jefferson or Madison . . . or subsequently by a majority of any court."¹¹⁰ "Congress has not narrowed this provision . . . despite subsequent court rulings that the Constitution does confer certain protections on persons in the United States who are not citizens,"¹¹¹ and it has "remained the

¹⁰³ *Id.* at 125.

¹⁰⁴ *Id.* at 134 (Treaty of August 10, 1920).

¹⁰⁵ *Id.* at 134.

¹⁰⁶ Sidak, *supra* note 68, at 1406.

¹⁰⁷ *Id.* at 1406.

¹⁰⁸ *Id.* at 1407, citing, n.29, Ludecke v. Watkins, 335 U.S. 160, 171 (1948).

¹⁰⁹ *Id.* at 1408.

¹¹⁰ *Id.* at 1407.

¹¹¹ *Id.* at 1408.

law of the land, virtually unchanged since 1798.”¹¹²

The United States Attorney General established 100 Enemy Alien Hearing Boards in World War II to make findings as to Internment under the EAA—not at all the same thing as Internment under the Executive Orders. Under the EAA, internees were “permitted to engage in remunerative employment outside the camp, principally in agriculture and public works,”¹¹³ a situation inconsistent with such places as Manzanar, a wasteland far from population centers. Actual enemy aliens were therefore treated *better* than interned citizens.

III. CONSTITUTIONALITY AND REMEDY

At the outset of World War II, there were almost a million persons in the United States who might be classified as enemy aliens under the TWEA and EAA, fewer than 5% of whom were native Japanese.¹¹⁴ The problem that was thus presented was how to arrest a single group which was identified with the enemy, but was not legally a group the majority of whom were enemy aliens. This was resolved by designating a large and important part of the United States a temporary military reservation, or “zone,” from which the military, by specific executive order of the president, could exclude *anyone* deemed a threat.¹¹⁵ The commanding general of the zone containing the majority of Japanese immigrants and citizens simply declared that they had to leave, and enforced the order by arresting them.¹¹⁶

The 1940 census figures showed that most of the people of Japanese descent on the mainland would become Internees, and that two-thirds of them were natives of the United States. In 1930, California had contained 70% of the Japanese in the United States, who by 1940 owned over 5,000 farms comprising 226,000 acres, valued at \$65.8 million dollars.¹¹⁷

Within four days of the “Day of Infamy” speech, the Federal Bureau of Investigation had arrested over a thousand “enemy alien” Japanese and Japanese-Americans.¹¹⁸ By February, it had arrested another thousand.¹¹⁹

¹¹² *Id.* at 1407; *Watkins* 335 U.S. at 162.

¹¹³ Sidak, *supra* note 68, at 1417, citing 1943 Att’y Gen. Rep. 9.

¹¹⁴ *Id.* at 1416.

¹¹⁵ Exec. Order No. 9066, *supra* note 13.

¹¹⁶ *Korematsu v. United States*, 323 U.S. 214, 223 (1944).

¹¹⁷ STARR, *supra* note 7, at 55.

¹¹⁸ TIMELINE, *supra* note 40.

¹¹⁹ *Id.*

In December and January, California officials were urging the federal government to take the resident enemy away and do something with them, without being very specific.¹²⁰ At the end of January, "Attorney General Francis Biddle began the establishment of prohibited zones forbidden to all enemy aliens," and "German, Italian, and Japanese aliens were ordered to leave [the] San Francisco waterfront areas."¹²¹

Lt. Gen. DeWitt stated in January that "evacuation will not be undertaken except under conditions where frequent and continuous bombing [of the West Coast] can be expected."¹²² However, the first order for the Japanese American evacuation from the coast was issued in March, when it was plain that the orders would not depend on the outbreak of actual combat.¹²³ The western boundary of the evacuation divided many towns in Fresno County within the city limits, placing all evacuees to the east of Highway 99, and forcing some residents of Kingsburg, Selma, and Fowler to move across the highway.¹²⁴ Japanese were urged to continue to farm to support the war effort and show loyalty in spite of the uncertainties inherent in the situation.¹²⁵ On February 15, 24-hour notice was given to the Japanese fishermen of Terminal Island of military seizure of their property, and 500 families were evicted.¹²⁶

DeWitt established the WCCA, with Col. Bendetsen as director, on March 11, and this was followed a week later by the president's Executive Order 9102, establishing the WRA.¹²⁷ Within four months, the

¹²⁰ *Id.* ("The Agriculture Committee of the L.A. Chamber of Commerce recommended that all Japanese nationals be put under 'absolute Federal control.' . . . The California State Personnel Board voted to bar all 'descendants of natives with whom the United States [is] at war' from all civil service positions." In February, the "California Joint Immigration Committee urged that all Japanese Americans be removed from the Pacific Coast and any other vital areas." In addition, in February, a "Portland American Legion post urged the removal of 'enemy aliens, especially from critical Coast areas,'" and "[t]he West Coast congressional delegation requested that the President remove 'all persons of Japanese lineage . . . aliens and citizens alike, from the strategic areas of California, Oregon and Washington.'")

¹²¹ *Id.*

¹²² MASUMOTO, *supra* note 10, at 42.

¹²³ *Id.* at 45.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ STARR, *supra* note 7, at 91. Exec. Order No. 9066, *supra* note 13, was signed February 19.

¹²⁷ STARR, *supra* note 7, at 93-94.

mass arrest was effected of over 110,000 people.¹²⁸

None of these activities were outside the scope of legal government and civic duties. Executive action was being taken to shore up the homefront defenses for what everyone understood would be a difficult war. The United States had suffered a “surprise attack” (as though an honorable enemy would be inept enough to announce its plan in advance), and, as far as anyone could tell, the Japanese had had excellent advance intelligence—the kind that required spies in our midst. This is still the popular idea of the Pearl Harbor plan.¹²⁹

The first federal action was to set up “zones” or “areas” which needed to be cleaned out of all possible subversive individuals.¹³⁰ It is obvious that the government, especially in wartime, has the power to secure not just military installations, but civilian areas vulnerable to attack or invasion. Not knowing the full extent of the Japanese plan, Pearl Harbor was easily interpreted as the first strike of a West Coast invasion.¹³¹ This called for a strategic military response, and the problem was approached as one involving the presence of potential enemy individuals behind our lines. Rather than strictly a question of race, it was a matter of *location*. This is why the initial executive decree—the warrant for the Internment—is phrased so oddly: it simply grants the military the power to clear an “area” of undesirables.¹³²

The actual authority derives from the combination of the misdemeanor statute (for violation of an Executive Order to leave or stay in a “zone”) and the presidential power to direct either the Secretary of War (now Defense) or any military commander to clear an area of “any or all persons.”

When challenged, the Internment power was upheld first in *Hirabayashi*,¹³³ which held that the power can apply Constitutionally to a citizen of the United States. Justice Murphy, who led the resistance to the power in the Supreme Court, concurred but “indicated reservations.”¹³⁴ The next year, Murphy wrote his powerful dissent in *Kore-*

¹²⁸ *Id.* at 94.

¹²⁹ See, e.g., *Pearl Harbor* (2000), in which Japanese residents of Pearl Harbor are depicted as preparing and signaling the attack; *Hirabayashi v. United States*, 320 U.S. 81, 97 (1943).

¹³⁰ TIMELINE, *supra* note 40 (“The U.S. Army established 12 ‘restricted areas’ in which enemy aliens were restricted by a 9 p.m. to 6 a.m. curfew, allowed to travel only to and from work, and not more than 5 miles from their home.”).

¹³¹ *Hirabayashi*, 320 U.S. at 94.

¹³² Exec. Order No. 9066, *supra* note 13.

¹³³ *Hirabayashi*, 320 U.S. 81, 106.

¹³⁴ CHESTER J. ANTIEAU AND WILLIAM J. RICH, *MODERN CONSTITUTIONAL LAW*, 2nd

matsu, in which the Court held that the Internment power falls under the War power of Congress and the Executive.¹³⁵ That same year, Murphy concurred in *Endo*, holding that it was within the power of the WRA to detain citizens long enough to separate the loyal from disloyal and to help with their relocation (which had been caused by the detention to begin with).¹³⁶

EO 9066 was deemed terminated upon the issuance of Presidential Proclamation 2714, of December 31, 1946, formally proclaiming on that date the cessation of World War II.¹³⁷ However, as stated, 9066 was not deemed terminated at that date until 1976. In a legal sense, the military for thirty years retained the delegated power to remove anyone from any designated zone in the event of imminent attack or "whenever [the Secretary of War] or any designated Commander deems such action necessary or desirable . . ." ¹³⁸ The question is therefore whether President Ford's Proclamation 4417 removed the Internment power, and whether, if it did so, it could simply be recalled into full force "whenever . . . necessary or desirable."¹³⁹

The power to issue Executive Orders is intact and acknowledged, as well as the joint War Power.¹⁴⁰ The recognition that exercise of the War Power does not depend upon a formally declared war,¹⁴¹ and the recognition, bolstered by *Korematsu*, that rights of citizens can and will be violated in times of national emergency or anticipated threat of attack upon the homeland or territories of the United States, all com-

ED. 3 Sect. 44.104, 328 (West Group, 1999); *Hirabayashi*, 320 U.S., at 114 ("In voting for affirmance of the judgment I do not wish to be understood as intimating that the military authorities in time of war are subject to no restraints whatsoever, or that they are free to impose any restrictions they may choose on the rights and liberties of individual citizens or groups of citizens in those places which may be designated as 'military areas.'")

¹³⁵ *Korematsu v. United States*, 323 U.S. 214, 218 (1944).

¹³⁶ *Antieau and Rich*, *supra* note 134, at 327-29; *Ex parte Endo*, 323 U.S. 283, 303 (1944).

¹³⁷ Proclamation No. 4417, *supra* note 24.

¹³⁸ Exec. Order No. 9066, *supra* note 13.

¹³⁹ *Id.*

¹⁴⁰ *TRIBE*, *supra* note 1, at 658 ("Tactical military judgments within a lawful war [which may be an undeclared war conducted with the mutual participation of Congress and the President] . . . posed purely political questions since 'no judicially discoverable or manageable standards' were available for reviewing such judgments."), citing *DaCosta v. Laird*, 471 F.2d 1146, 1153, 1157-1158 (2d Cir. 1973).

¹⁴¹ *Id.* at 658-659 (citing a "history . . . of executively ordained conflict" dating back at least to the Civil War).

bine to secure the Internment power in spite of President Ford's Proclamation 4417.

A common thread has been running through federal cases since *Korematsu*, in which its holding is cited as *authority* for the "strict scrutiny" of invidious racial requirements by the government,¹⁴² but also in which it is apparently a majority opinion that it was decided wrongly and that it mars our tradition of equal justice.¹⁴³ This is an example of the rule of law by dissent.¹⁴⁴ Whereas no court will say that *Korematsu* should be followed in addressing contemporary legal issues, and many will explicitly denounce it, it continues to stand as cited precedent for the proposition that the government may deprive citizens of liberty based solely upon their race in spite of Justice Murphy's ringing reassertions:

¹⁴² *E.g.*, *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 215, (1995) (racial classifications are subject to the "most rigid scrutiny" under *Korematsu*); *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring); *University of California v. Bakke*, 438 U.S. 265, 287, 291 (1978) (All racial or ethnic classifications are not *per se* invalid, but, since *Hirabayashi* and *Korematsu*, "call for the most exacting judicial examination."); *Smith v. Avino*, 91 F.3d 105, 110 (11th Cir. 1996); *Sylvia Develop. Corp. v. Calvert Co., Mich.*, 48 F.3d 810, 821 (4th Cir. 1995).

¹⁴³ *E.g.*, *Richmond v. J.A. Croson*, 488 U.S. 469, 501 (1989) (citing Murphy's dissent in *Korematsu* for authority that "blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis"); *United States v. Zapata-Ibarra*, 223 F.3d 281, 283 (5th Cir. 1999) (that the cases of "*Korematsu*, *Dred Scott*, and even *Plessy*" are "on the list of our most shameful failures . . ."); *United States v. Smith*, 73 F.3d 1414, 1423 (6th Cir. 1996) (Jones, J., Concurring) ("I predict that unless we apply the lesson of *Korematsu* . . . we will be forced to relive that tragedy."); *Giano v. Senkowski*, 54 F.3d 1050, 1063 (2nd Cir. 1995) (Calabresi, J., dissenting) (" . . . *Korematsu* . . . is the most tragic example of judicial failure to require facts before infringing on admitted constitutional rights. It is also an especially apt instance, for the Supreme Court has itself come to recognize that it was the dissenters in that case who had it right.").

¹⁴⁴ Murphy's dissent in *Korematsu* actually restates the moral and legal authority against the Internment in such a way as to overshadow the majority opinion. *See also*, *Reno v. Flores*, 507 U.S. 292, 344-345 (1993) (Stevens, J., dissenting) (" . . . the Court's holding in *Korematsu* obviously supports the majority's analysis . . ." though "I understand the majority's reluctance to rely on *Korematsu*."); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 633 (1990) (Kennedy, J., dissenting) ("strict scrutiny may not have sufficed to invalidate early race-based laws of most doubtful validity, as we learned in *Korematsu* . . ."); *Fraise v. Terhune*, 283 F.3d 506, 531 (3rd Cir. 2002); *Philips v. Perry*, 106 F.3d 1420, 1440 (9th Cir. 1997) (Fletcher, J., dissenting) ("The dangers of unquestioning deference to the military are demonstrated by decisions such as *Korematsu* ' . . . one of the Court's most embarrassing moments, and . . . thoroughly repudiated by history,'" citations omitted.)

Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast 'all persons of Japanese ancestry, both alien and non-alien,' . . . [b]eing an obvious racial discrimination . . . deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.¹⁴⁵

In 1982, with the Report of the Commission on Wartime Relocation and Internment of Civilians,¹⁴⁶ public recognition of the wrong and acknowledgement of its error began to move the government toward actual restitution for the "fundamental injustice" of the Internment.¹⁴⁷ The restitution was symbolic, of course, if only for the fact that people cannot be paid adequately for deprivation of their freedom; in addition, to declare legislatively that a historical event was unjust, and even to offer repayment for some of the loss resulting, is not the same thing as to make it illegal in the future. In 1984, a federal court overturned the original conviction of Korematsu,¹⁴⁸ but the Supreme Court has not overturned its own decision that Korematsu, or someone in his position, might constitutionally be convicted under the law.

¹⁴⁵ *Korematsu v. United States*, 323 U.S. 214, 234-235, 242 (1944).

¹⁴⁶ PERSONAL JUSTICE DENIED, THE REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, Pub. L. No. 100-383 Sect. 1, 102 Stat. 903 (1988).

¹⁴⁷ President Bill Clinton distributed checks of \$20,000 to surviving internees on October 1, 1993, pursuant to the Civil Liberties Act of 1988, 50 App. U.S.C.A. sec 1989, along with a formal apology for the denial of fundamental liberties during World War II.

¹⁴⁸ *Korematsu v. United States*, 584 F.Supp. 1406, 1420 (N.D.Cal. 1984).

We should take no comfort in the fact that there is some executive hesitation in making such wartime orders as they pertain to citizens. There was no hesitation in the Internment Order 9066—it had been planned for months.¹⁴⁹ To its chief administrator, Gen. DeWitt, citizenship was “‘a scrap of paper’ that could not dispel the fact that, as he put it, ‘a Jap’s a Jap. They are a dangerous element, whether loyal or not.’”¹⁵⁰

Taking this line of thinking to its extent officially, any group of Americans which the military determined was “a dangerous element” during a time of crisis, such as when terrorist attacks seem pending, could be rendered the “enemy” and subject to the same restrictions and deprivations as enemy aliens under the EAA. The only remedy for a mass Internment would be the writ of habeas corpus.¹⁵¹ Enemy persons under the EAA are arrested by virtue of a presidential warrant, without recourse to a magistrate, and the warrant need not disclose the grounds of the warrant,¹⁵² though they may have hearings on the sole issue of whether they are in fact enemy aliens.¹⁵³ There is, however, no judicial review of the executive order directing removal.¹⁵⁴ In the habeas corpus hearing, the only issue is whether in fact the subject meets the definition of an enemy alien, and it is not further reviewable because it is essentially an executive function within presidential discretion.¹⁵⁵ Finally, the Constitution provides that the Writ may be suspended in cases required by the public safety¹⁵⁶ (for a possible example, when there is the threat of an attack on American soil), leaving, by executive command, no remedy whatever.

IV. CONCLUSION

Americans no doubt believe that the mistake of the 1942 Internment has been brought to light and somehow corrected by restitution payments and a repetition of language of remorse. Unquestionably, Japanese-Americans will never again be corralled and held indefinitely in

¹⁴⁹ STARR, *supra* note 7, at 93.

¹⁵⁰ *Id.* at 95.

¹⁵¹ *United States ex rel. Hack v. Clark*, 159 F.2d 552 (C.A.III. 1947).

¹⁵² *Minotto v. Bradley*, 252 F. 600, 603 (DC.III. 1918).

¹⁵³ *United States ex rel. Hoehn v. Shaughnessy*, 175 F.2d 116, 117 (2nd Cir. 1949), *cert.denied* 338 U.S. 872; *United States ex rel. Schlueter v. Watkins*, 158 F.2d 853, 854 (2nd Cir. 1946).

¹⁵⁴ *Ludecke v. Watkins*, 335 U.S. 160 (1948), *reh.denied* 335 U.S. 837.

¹⁵⁵ *Ex parte Gilroy*, 257 F. 110, 112 (D.C.N.Y. 1919); *Ex parte Graber*, 247 F. 882 (D.C.Ala. 1918).

¹⁵⁶ U.S. CONST. art. I, § 9.

remote camps on the suspicion that they are all, by virtue of their race, spies and saboteurs. There will never be another attack by the Japanese government on Pearl Harbor, a decisive battle with the Japanese fleet at Midway, or innocent Americans held under military guard at Manzanar. In President Ford's words, the Internment was one of "our national mistakes," because "Japanese-Americans were and are loyal Americans," (seemingly allowing for the Internment of "disloyal" Americans). Ford states that "there is concern among many Japanese-Americans that there may yet be some life in that obsolete document," and that he issues a . . .

call upon the American people to affirm with me this American Promise—that we have learned from the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve that this kind of action shall never again be repeated.

The difficulty with the Proclamation as worded is that, while the old document (EO 9066) is obsolete concerning Japanese-Americans, Japanese-Americans are not mentioned in the document anyway. President Ford simply does not have the power to make 9066 the last such document ever to be issued, or even rescind its effect in modern times, any more than he has the power to reach back and erase it from history. Moreover, an "American Promise" that "this kind of action shall never again be repeated" has no legal effect, and is no more than the irrelevant recognition that it should not ever again happen to Japanese Americans. "This kind of action," if by that is meant the encroachment on the civil liberties of targeted racial groups due to international conflict, has happened since 1976 and will happen again, and the President of the United States certainly reserves to himself or herself the Internment power as one weapon in the arsenal of defense of the United States.