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NATIONAL SECURITY, NATIONAL ORIGIN, AND THE CONSTITUTION: 75 YEARS AFTER EO9066†

Geoffrey R. Stone†

I am honored to have the opportunity to address this issue, not only because of its importance in American history, but also because of the lessons we must learn from our own experience. It is essential for us to remember, perhaps especially at the present moment, what we as a nation are capable of. We must never forget that we are capable of doing things we might under other circumstances never imagine. We must always be vigilant and we must always remember that “it” *can* happen here.

As history teaches, war fever often translates into xenophobia. To some extent this is understandable, for in wartime individuals with a connection to an enemy nation are, in fact, more likely to pose risks of espionage, sabotage and subversion. But how a nation addresses these concerns speaks volumes about its values, its sense of fairness, and its willingness to judge individuals as individuals.

I

Japan’s attack on Pearl Harbor on December 7, 1941, killed more than 2,000 Americans and destroyed much of the Pacific fleet.¹ Within the next few days, the United States declared war against Japan, Germany, and Italy.² Two months later, on February 19, 1942, President Franklin Roosevelt signed Executive Order 9066, which authorized the army “to designate the military areas from which any or all persons may be excluded.”³ Although the words “Japanese” or

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1. GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* 286 (2004); *Hawai’i Chronicles III: World War Two in Hawai’i*, in *PARADISE OF THE PACIFIC* 37 (Bob Dye ed., 2000).

2. STONE, *supra* note 1, at 286; Joint Resolution of December 8, 1941, Pub. L. No. 77-328, 55 Stat 795.

“Japanese American” never appeared in the order, it was understood to apply only to persons of Japanese ancestry.⁴

Over the next eight months, almost 120,000 individuals of Japanese descent were ordered to leave their homes in California, Washington, Oregon, and Arizona.⁵ Two-thirds of these individuals were American citizens, representing almost 90 percent of all Japanese Americans.⁶ No charges were brought against these individuals. There were no hearings. They did not know where they were going, how long they would be detained, what conditions they would face, or what fate would await them. They were ordered to bring only what they could carry, and most families lost everything.⁷

On the orders of military police, these men, women, and children were assigned to temporary detention camps, which had been set up in converted racetracks and fairgrounds.⁸ Many families lived in crowded horse stalls, often in unsanitary conditions.⁹ Barbed wire fences and armed guard towers surrounded the compounds.¹⁰

From there, the internees were transported to one of ten permanent internment camps, which were located in isolated areas in wind-swept deserts or vast swamplands.¹¹ Men, women, and children were confined in overcrowded rooms with no furniture other than cots. They once again found themselves surrounded by barbed wire and military police, and there they remained for three years.¹²

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3. STONE, *supra* note 1, at 286 (quoting Exec. Order No. 9,066, 3 C.F.R. 1092 (Cum. Supp. 1943).
 4. STONE, *supra* note 1, at 286; 3 C.F.R. 1092–93.
 5. STONE, *supra* note 1, at 287; Fu-jen Chen & Su-lin Yu, *Reclaiming the Southwest: A Traumatic Space in the Japanese American Internment Narrative*, 47 J. SW. 551, 552 (2005).
 6. STONE, *supra* note 1, at 287; accord Timothy P. Maga, *Ronald Reagan and Redress for Japanese-American Internment*, 28 PRESIDENTIAL STUD. Q. 606, 607 (1998).
 7. STONE, *supra* note 1, at 287; accord Maga, *supra* note 6, at 607.
 8. STONE, *supra* note 1, at 287; Jason Scott Smith, *New Deal Public Works at War: The WPA and Japanese American Internment*, 72 PAC. HIST. REV. 63, 73 (2003).
 9. STONE, *supra* note 1, at 287; Smith, *supra* note 8, at 73.
 10. STONE, *supra* note 1, at 287; accord Kristine C. Kuramitsu, *Internment and Identity in Japanese American Art*, 47 AM. Q. 619, 622 (1995).
 11. STONE, *supra* note 1, at 287; accord Kuramitsu, *supra* note 10, at 620.
 12. STONE, *supra* note 1, at 287; BRIAN MASARU HAYASHI, *DEMOCRATIZING THE ENEMY: THE JAPANESE AMERICAN INTERNMENT* 88, 91–92 (2004); Kuramitsu, *supra* note 10, at 620.

All of this was done even though there was not a single documented act of espionage, sabotage, or treasonable activity by any American of Japanese descent.¹³

Why did this happen? Certainly, the days following Pearl Harbor were dark days for the American spirit. Fear of possible Japanese sabotage and espionage was rampant, and an outraged public felt an understandable desire to lash out at those who had attacked the nation.¹⁴ But this act was also very much an extension of more than a century of racial prejudice against what was termed the “yellow peril.”¹⁵ Laws passed in the early 1900s denied immigrants from Japan the right to become naturalized American citizens, to own land, and to marry outside of their race.¹⁶ In 1924, immigration from Japan was halted altogether.¹⁷

Nonetheless, in the immediate aftermath of Pearl Harbor, there was no clamor for the mass internment of Japanese aliens or Japanese Americans. Attorney General Francis Biddle assured the nation that there would be “no indiscriminate, large-scale raids” on American citizens.¹⁸ The military governor of Hawaii assured Japanese Americans that “there is no intention or desire on the part of federal authorities to operate mass concentration camps.”¹⁹

Eleanor Roosevelt announced that “no law-abiding” Americans “of any nationality would be discriminated against by the government”²⁰ and Judge Jerome Frank—a distinguished federal judge and

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13. STONE, *supra* note 1, at 287; *see* COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 95–96 (1983) [hereinafter CWRIC] (discussing the lack of congressional challenges to Executive Order 9066 despite the absence of espionage evidence).
 14. STONE, *supra* note 1, at 287; CWRIC, *supra* note 13, at 67–68.
 15. STONE, *supra* note 1, at 287.
 16. *Id.*; Keith Aoki, *No Right to Own: The Early Twentieth-Century Alien Land Laws as a Prelude to Internment*, 19 B.C. THIRD WORLD L.J. 37, 38–39 (1998).
 17. STONE, *supra* note 1, at 287; *see* Terrace v. Thompson, 263 U.S. 197, 222 (1923) (upholding Washington Alien Land Law); Porerfield v. Webb, 263 U.S. 225, 233 (1923) (upholding California Alien Land Law); Ozawa v. United States, 260 U.S. 178, 198 (1922) (upholding policy making Japanese immigrants ineligible for naturalized citizenship); PETER IRONS, JUSTICE AT WAR 12 (1983).
 18. STONE, *supra* note 1, at 289; 1942 ATT’Y GEN. ANN. REP. 14.
 19. STONE, *supra* note 1, at 289; Jane L. Scheiber, *Internal Security, the Japanese Problem, and the Kibei in World War II Hawaii*, 35 U. HAW. L. REV. 415, 425 (2013).
 20. STONE, *supra* note 1, at 289; GREG ROBINSON, BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS 71 (2001).

close friend of President Franklin Roosevelt—observed that “[i]f ever any Americans go to a concentration camp, American democracy will go with them.”²¹ Moreover, on December 10, three days after Pearl Harbor, FBI director J. Edgar Hoover reported that almost all the persons of foreign ancestry that the FBI had identified as possible threats to the national security had already been taken into custody.²²

In the weeks that followed, however, a demand for the removal of all persons of Japanese ancestry reached a crescendo along the West Coast.²³ The motivations for this outburst of anxiety were many and complex. Certainly, it was fed by fears of a Japanese invasion.²⁴ By mid-January, California was awash in unfounded rumors of Japanese sabotage and espionage. General John DeWitt, the top army commander on the West Coast, was determined not to be caught up short as his counterpart had been in Hawaii. Several days after Pearl Harbor, DeWitt reported as fact rumors that a squadron of enemy airplanes had passed over California, that there was a planned uprising of 20,000 Japanese Americans in San Francisco, and that Japanese Americans were aiding submarines by signaling them from the shore.²⁵ The FBI and other government agencies promptly debunked all of those rumors as false.²⁶

On January 2, the Joint Immigration Committee of the California legislature issued a manifesto falsely charging that American citizens of Japanese descent could “be called to bear arms for their Emperor” and that Japanese-language schools were teaching students that “every Japanese, wherever born or residing,” owed primary allegiance to “his Emperor and to Japan.”²⁷

Two days later, the newspaper columnist Damon Runyon erroneously reported that a radio transmitter had been discovered in a rooming house that catered to Japanese residents. Who could

21. STONE, *supra* note 1, at 289; GEOFFREY PERRETT, *DAYS OF SADNESS, YEARS OF TRIUMPH* 217 (1985).

22. STONE, *supra* note 1, at 290; ERIC K. YAMAMOTO ET AL., *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* 97 (2001).

23. STONE, *supra* note 1, at 290; YAMAMOTO ET AL., *supra* note 22, at 97–98.

24. STONE, *supra* note 1, at 290; IRONS, *supra* note 17, at 26–27.

25. STONE, *supra* note 1, at 290; NEAL DEVINS & LOUIS FISHER, *DEMOCRATIC CONSTITUTION* 206 (2d ed. 2015).

26. STONE, *supra* note 1, at 290; ROBINSON, *supra* note 20, at 84–85; IRONS, *supra* note 17, at 26–27, 280–84.

27. STONE, *supra* note 1, at 291; CWRIC, *supra* note 13, at 67–68.

“doubt,” he asked, “the continued existence of enemy agents among the Japanese population?”²⁸

On January 14, Congressman Leland Ford insisted that the United States place “all Japanese, whether citizens or not,” in “inland concentration camps,” and the American Legion demanded the internment of all 93,000 individuals of Japanese extraction then living in California.²⁹

Such demands were further ignited by the January 25 report of the Commission on Pearl Harbor, which was chaired by Supreme Court Justice Owen Roberts.³⁰ The report, which was hastily researched and written, erroneously asserted that persons of Japanese ancestry in Hawaii had facilitated Japan’s attack on Pearl Harbor.³¹ A few days later, a journalist, Henry McLemore, wrote a column in the San Francisco Examiner calling for “the immediate removal of every Japanese on the West Coast.”³² He added, “Personally, I hate the Japanese. And that goes for all of them.”³³

On February 4, California Governor Culbert Olson declared in a radio address that it was “much easier” to determine the loyalty of Italian and German aliens than of Japanese Americans.³⁴ “All Japanese people,” he added, “will recognize this fact.”³⁵

In a similar vein, California’s attorney general and future Chief Justice of the Supreme Court, Earl Warren, argued that whereas it was relatively easy to find out which German or Italian Americans were loyal, it was simply too difficult to determine which Americans of Japanese ancestry were loyal and which were not.³⁶ In Warren’s words, when dealing with the Caucasian race, there were methods to test their loyalty, but the Japanese were different, because “if the

28. STONE, *supra* note 1, at 291; ED CRAY, CHIEF JUSTICE: A BIOGRAPHY OF EARL WARREN 117 (1997).

29. STONE, *supra* note 1, at 291; CRAY, *supra* note 28, at 117; IRONS, *supra* note 17, at 38.

30. STONE, *supra* note 1, at 291; *see generally* ATTACK UPON PEARL HARBOR BY JAPANESE ARMED FORCES, S. DOC. NO. 77-159 (1942).

31. STONE, *supra* note 1, at 291–92; GARY Y. OKIHIRO, THE COLUMBIA GUIDE TO ASIAN AMERICAN HISTORY 116 (2001).

32. STONE, *supra* note 1, at 292; YAMAMOTO ET AL., *supra* note 22, at 99.

33. STONE, *supra* note 1, at 292; YAMAMOTO ET AL., *supra* note 22, at 99.

34. STONE, *supra* note 1, at 292; CRAY, *supra* note 28, at 117.

35. STONE, *supra* note 1, at 292; CRAY, *supra* note 28, at 117.

36. STONE, *supra* note 1, at 292.

Japs are free, no one will be able to tell a saboteur from any other Jap.”³⁷

General DeWitt initially resisted demands for “wholesale internment,” insisting that “we can weed [out] the disloyal [from] the loyal and lock them up, if necessary.”³⁸ In early January, he condemned the idea of mass internment as “damned nonsense,” but as political pressure mounted, DeWitt changed his tune.³⁹ In late January he stated, “[t]he Japanese race is an enemy race . . . [and] it makes no difference whether he is an American citizen, he is still a Japanese. This was not true,” he emphasized, “of Germans and Italians. To the contrary,” he said, “[w]e needn’t worry about the Italians [and the Germans.] But we must worry about the Japanese all the time until he is wiped off the map.” After all, he added, “a Jap’s a Jap.”⁴⁰

Similar sentiments and words were expressed throughout the West Coast. But throughout this period, Attorney General Francis Biddle strongly opposed internment as “ill-advised, unnecessary, and unnecessarily cruel.”⁴¹ In late January, the California congressional delegation attempted to pressure Biddle to support internment. Biddle replied that he knew of no way in which “Japanese born in this country could [constitutionally] be interned.”⁴²

In the first two weeks of February, Biddle continued to argue the point. On February 7, over lunch with the President, he told Roosevelt that mass evacuation of Japanese Americans was inadvisable and impermissible, because “the army had offered ‘no reasons’ that would justify it as a military measure.”⁴³

37. Geoffrey R. Stone, *It Can Happen Here: The 75th Anniversary of the Japanese Internment (Part I)*, HUFFPOST (Nov. 19, 2017), https://www.huffingtonpost.com/entry/it-can-happen-here-the-75th-anniversary-of-the-japanese_us_5a10b5e2e4b0e6450602eb9c [<https://perma.cc/T2QW-QDGZ>]; JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 136 (2006).

38. STONE, *supra* note 1, at 292; OKIHIRO, *supra* note 31, at 115; FRANCIS BIDDLE, IN *BRIEF AUTHORITY* 215 (1962).

39. STONE, *supra* note 1, at 292; BIDDLE, *supra* note 38, at 215.

40. STONE, *supra* note 1, at 292; YAMAMOTO ET AL., *supra* note 22, at 99; CWRIC, *supra* note 13, at 66.

41. STONE, *supra* note 1, at 293; BIDDLE, *supra* note 38, at 213; John Leo, *An Apology to Japanese Americans*, TIME (June 24, 2001), <http://content.time.com/time/magazine/article/0,9171,149131,00.html> [<https://perma.cc/EMY7-99FV>].

42. STONE, *supra* note 1, at 293; BIDDLE, *supra* note 38, at 215.

43. GEOFFREY R. STONE, *WAR AND LIBERTY, AN AMERICAN DILEMMA: 1970 TO THE PRESENT* 71 (2007); IRONS, *supra* note 17, at 53.

Two days later, he wrote Secretary of War Henry Stimson that the Department of Justice would not “under any circumstances” participate in the internment of American citizens on the basis of race.⁴⁴ Biddle informed Stimson that J. Edgar Hoover had concluded that the demand for mass evacuation was based on nothing more than “public hysteria”⁴⁵ that the FBI had already taken into custody all suspected Japanese agents, and that Hoover himself had accused General DeWitt of “getting a bit hysterical.”⁴⁶

But the public clamor on the West Coast continued to build. The American Legion, the Native Sons and Daughters of the Golden West, the California Farm Bureau Federation, the Chamber of Commerce of Los Angeles, and all the West Coast newspapers cried out for the prompt removal of Japanese aliens and citizens alike.⁴⁷

The attorney general of Washington chimed in that he favored the removal of all “citizens of Japanese extraction” and the attorney general of Idaho announced that all Japanese Americans should “be put in concentration camps for the remainder of the war,” adding pointedly, “we want to keep this a white man’s country.”⁴⁸

On February 14, General DeWitt officially recommended that all persons of Japanese extraction should be removed from “sensitive areas.”⁴⁹ Shortly thereafter, Attorney General Biddle spoke with Roosevelt by phone. At the end of the conversation, a dejected Biddle agreed that he would no longer resist the mass incarceration of Japanese Americans.⁵⁰ According to Biddle, his Justice Department lawyers were “devastated.”⁵¹

A few days later, on February 19, President Franklin Roosevelt signed Executive Order 9066.⁵² The matter was never discussed in the cabinet, and the President did not consult his primary military advisors, the Joint Chiefs of Staff.⁵³

44. STONE, *supra* note 43, at 71; BIDDLE, *supra* note 38, at 218.

45. STONE, *supra* note 43, at 71; DON WHITEHEAD, *THE FBI STORY: A REPORT TO THE PEOPLE* 189 (1956).

46. STONE, *supra* note 43, at 71; RICHARD GID POWERS, *SECRECY AND POWER: THE LIFE OF J. EDGAR HOOVER* 249 (1987); IRONS, *supra* note 17, at 28.

47. STONE, *supra* note 43, at 72; BIDDLE, *supra* note 38, at 217.

48. STONE, *supra* note 43, at 72; CRAY, *supra* note 28, at 120; IRONS, *supra* note 17, at 72.

49. STONE, *supra* note 43, at 72; CRAY, *supra* note 28, at 120.

50. STONE, *supra* note 43, at 72; IRONS, *supra* note 17, at 62.

51. STONE, *supra* note 43, at 72; IRONS, *supra* note 17, at 62.

52. Exec. Order No. 9,066, 3 C.F.R. 1092 (Cum. Supp. 1943).

53. STONE, *supra* note 43, at 72–73; *see* IRONS, *supra* note 17, at 56–65.

The public rationale for the decision, laid out in General DeWitt's Final Report on the Evacuation of the Japanese from the West Coast, was that time was of the essence and that the government had no reasonable way to distinguish loyal from disloyal persons of Japanese descent.⁵⁴

This report has rightly been condemned as a travesty.⁵⁵ It relied upon unsubstantiated and even fabricated assertions; the FBI had, indeed, already taken into custody those individuals it suspected of potential subversion, and two weeks before Roosevelt signed the Executive Order, General Mark Clark and Admiral Harold Stark testified before a House committee that the danger of a Japanese attack on the West Coast was "effectively nil."⁵⁶ The argument of military necessity was simply not credible.

II

Why, then, did Franklin Roosevelt sign the Executive Order? Robert Jackson, who had served as Roosevelt's Attorney General before being appointed to the Supreme Court, once observed that Roosevelt was a "strong skeptic of legal reasoning" and, despite his reputation, was not a "strong champion of civil rights. He had the tendency," Jackson said, "to think in terms of right and wrong, instead of legal and illegal. [And b]ecause he thought his motives were always good for the things that he wanted to do, he found difficulty in thinking that there could be legal limitations on them."⁵⁷

Jackson's successor, Attorney General Francis Biddle, also speculated about why Roosevelt signed Executive Order 9,066. "I do not think," he said, that "he was much concerned with the gravity or implications of this step. He was never theoretical about things. The military might be wrong. But they were fighting the war [and p]ublic opinion was on their side,"⁵⁸ so "there was no question of any

54. STONE, *supra* note 43, at 73; JOHN DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST, at vii (1942).

55. STONE, *supra* note 43, at 73; LORRAINE K. BANNAI, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 85 (2015).

56. STONE, *supra* note 1, at 295; ROBINSON, *supra* note 20, at 110.

57. STONE, *supra* note 1, at 295; ROBERT JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT 74 (2003).

58. STONE, *supra* note 1, at 296; Geoffrey R. Stone, *It Can Happen Here: The 75th Anniversary of the Japanese Internment, Part II*, HUFFPOST (Nov. 19, 2017, 6:34 PM), https://www.huffingtonpost.com/entry/it-can-happen-here-the-75th-anniversary-of-the-japanese_us_5a121186e4b023121e0e9439 [<https://perma.cc/YZ3L-V4PN>]; BIDDLE, *supra* note 38, at 219.

substantial opposition [to the order].”⁵⁹ Undoubtedly, public opinion played a key role in the thinking of both the military and the President.

In fact, there was almost no public protest of Roosevelt’s decision. Even most civil liberties groups stayed relatively quiet. Although Roosevelt explained the order in terms of military necessity, there is little doubt that domestic politics played a key role in his thinking, particularly because 1942 was an election year and Roosevelt was hardly immune to politics.

As the legal historian Peter Irons has observed, the internment decision “illustrates the dominance of politics over law” in a wartime setting.⁶⁰ In his speculation about Roosevelt’s thinking, Biddle noted that, “ultimately, the Supreme Court must decide the issue.”⁶¹ And, indeed, so it did, in a series of critical decisions addressing the constitutionality of different aspects of the military orders.

III

In June [of] 1943, the Supreme Court handed down its decision in *Hirabayashi v. United States*.⁶² Gordon Hirabayashi was born in 1918 in Auburn, Washington.⁶³ His father ran a roadside fruit market.⁶⁴ His parents were pacifists.⁶⁵ He attended the University of Washington, where he assumed a leadership role in the YMCA and the Japanese Students Club.⁶⁶ In the summer of 1940, he traveled to New York City to attend a program at Columbia University, where he participated in passionate debates about pacifism and social activism.⁶⁷

After President Roosevelt signed Executive Order 9066, Hirabayashi, with the assistance of a local legislator and the local ACLU, decided to challenge the constitutionality of General DeWitt’s curfew order by intentionally violating the order and then turning

59. STONE, *supra* note 1, at 296; Stone, *supra* note 58; BIDDLE, *supra* note 38, at 219.

60. STONE, *supra* note 1, at 296; Stone, *supra* note 58; IRONS, *supra* note 17, at 42.

61. STONE, *supra* note 1, at 297; Stone, *supra* note 58; BIDDLE, *supra* note 38, at 219.

62. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

63. STONE, *supra* note 1, at 297; *Hirabayashi*, 320 U.S. at 84.

64. STONE, *supra* note 1, at 297; IRONS, *supra* note 17, at 89.

65. STONE, *supra* note 1, at 297; IRONS, *supra* note 17, at 89.

66. STONE, *supra* note 1, at 297; IRONS, *supra* note 17, at 89.

67. STONE, *supra* note 1, at 297; IRONS, *supra* note 17, at 89.

himself in to the FBI.⁶⁸ The case made its way to the Supreme Court and Chief Justice Harlan Fiske Stone wrote the opinion of the Court upholding Hirabayashi's conviction.⁶⁹

Although Stone observed privately that he was shocked that the United States had "subjected U.S. citizens to this treatment," he nonetheless upheld the constitutionality of the curfew.⁷⁰ "The war power of the national government," he wrote, "is the power to wage war successfully. We cannot say that the war-making branches of the government did not have ground for believing that in a critical hour such persons constituted a menace to the national defense and safety."⁷¹

Although conceding that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people," Stone nonetheless argued that,

it by no means follows that, in dealing with the perils of war, Congress and the Executive are precluded from taking into account those facts and circumstances which are relevant to measures for our National Defense and which may, in fact, place citizens of one ancestry in a different category from others.⁷²

Justice Frank Murphy informed his colleagues that he intended to dissent, arguing that the guaranties of the Bill of Rights are not suspended by the mere existence of a state of war.⁷³ Justice Felix Frankfurter, however, persuaded Murphy not to dissent, arguing that it would undermine "the great reputation of this Court" if Murphy were to accuse his colleagues of betraying the Constitution and "behaving like the enemy."⁷⁴

The following year, in *Korematsu v. United States*,⁷⁵ the Supreme Court upheld the Exclusion Order by a vote of six to three.⁷⁶ Fred Korematsu was born in 1919 in Oakland, California.⁷⁷ After graduating from high school, he worked as a shipyard welder. In June 1941,

68. STONE, *supra* note 1, at 298; Stone, *supra* note 58.

69. *Hirabayashi v. United States*, 320 U.S. 81, 83, 105 (1943).

70. Stone, *supra* note 37; IRONS, *supra* note 17, at 232.

71. *Hirabayashi*, 320 U.S. at 93, 99.

72. *Id.* at 100.

73. Stone, *supra* note 37; *see also* IRONS, *supra* note 17, at 246.

74. Stone, *supra* note 37; *see also* IRONS, *supra* note 17, at 246.

75. 323 U.S. 214 (1944).

76. *Id.* at 224.

77. STONE, *supra* note 43, at 76; IRONS, *supra* note 17, at 93-94.

he sought to enlist in the U.S. Navy, but was turned down because of gastric ulcers.⁷⁸ On May 30, 1942, the police in California stopped and questioned Korematsu, who was then walking down the street with his girlfriend.⁷⁹ He said he was of Spanish-Hawaiian origin.⁸⁰

The police took him in for questioning, and he then admitted his real name and nationality.⁸¹ He explained that the rest of his family had been sent to an internment center, located in a converted race-track, but that he had not reported, because he was trying to earn enough money to move to the Midwest with his girlfriend, who was Italian.⁸² He maintained that General DeWitt's Exclusion Order was unlawful.⁸³ His case too made it to the Supreme Court.⁸⁴

Justice Hugo Black delivered the opinion for the majority.⁸⁵ "We cannot reject as unfounded," he said, "the judgment of the military authorities that there were disloyal members of the Japanese American population, whose number and strength could not be precisely and quickly ascertained. We are not unmindful of the hardships imposed upon a large group of American citizens, but hardships," he wrote, "are part of war, and war is an aggregation of hardships."⁸⁶

"All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure," he added, "and to cast this case into outlines of racial prejudice confuses the issue. Korematsu was not excluded from the West Coast because of any hostilities of his race, but because the military authorities decided that the urgency of this situation demanded that all citizens of Japanese ancestry be segregated from the area. We cannot," he concluded, "by availing ourselves of the calm perspective of hindsight, now say that at that time these actions were unjustified."⁸⁷

The three dissenting justices were Owen Roberts, Frank Murphy, and Robert Jackson.⁸⁸ Justice Roberts argued that it was patently

78. STONE, *supra* note 43, at 76; IRONS, *supra* note 17, at 94.

79. STONE, *supra* note 43, at 76; IRONS, *supra* note 17, at 93.

80. Stone, *supra* note 37; IRONS, *supra* note 17, at 93.

81. Stone, *supra* note 37; IRONS, *supra* note 17, at 94–95.

82. Stone, *supra* note 37; IRONS, *supra* note 17, at 94–95.

83. Stone, *supra* note 37.

84. *See* *Korematsu v. United States*, 323 U.S. 214 (1944).

85. *Id.* at 215.

86. Stone, *supra* note 37; STONE, *supra* note 43, at 76; *Korematsu*, 323 U.S. at 218–19.

87. Stone, *supra* note 37; STONE, *supra* note 43, at 76; *Korematsu*, 323 U.S. at 219, 223–24.

88. STONE, *supra* note 43, at 77; *Korematsu*, 323 U.S. at 225, 233, 242.

unconstitutional for the government to insist that individuals submit “to imprisonment in a concentration camp” for no reason other than their “ancestry.”⁸⁹

Justice Murphy wrote a particularly angry dissent. “No adequate reason is given,” he said, “for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of German and Italian individuals.”⁹⁰ “Moreover,” he added, “there was no adequate proof that the Federal Bureau of Investigation and military and naval intelligence services did not have the espionage and sabotage situation well in hand during this period.”⁹¹ The government, Murphy charged, had gone beyond “the very brink of constitutional power” and had fallen into the “ugly abyss of racism.”⁹²

IV

On December 17, 1944, the Roosevelt Administration announced that it would end the internment and release the internees.⁹³ There had been a lengthy struggle within the Administration about when to end the internment. In December of 1943, Attorney General Biddle strenuously argued for the immediate release of all loyal Japanese Americans.⁹⁴ In May 1944, Secretary of War Stimson made it clear to Roosevelt that the internment could be ended “without any danger to defense considerations.”⁹⁵

Nonetheless, the President chose to postpone the decision, explaining that “the whole problem, for the sake of internal quiet, should be handled gradually.”⁹⁶ In plain truth, Roosevelt did not want to release the internees until after the 1944 presidential election, because such a decision might upset voters on the West Coast.⁹⁷

89. Stone, *supra* note 37; STONE, *supra* note 43, at 77; *Korematsu*, 323 U.S. at 226 (Roberts, J., dissenting).

90. Stone, *supra* note 37; STONE, *supra* note 43, at 77; *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting).

91. Stone, *supra* note 37; STONE, *supra* note 43, at 77; *Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting).

92. Stone, *supra* note 37; *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

93. STONE, *supra* note 43, at 78; Stone, *supra* note 37.

94. STONE, *supra* note 43, at 78; Stone, *supra* note 37.

95. STONE, *supra* note 43, at 78; IRONS, *supra* note 17, at 277.

96. STONE, *supra* note 43, at 79; IRONS, *supra* note 17, at 273.

97. STONE, *supra* note 43, at 79; EMILY ROXWORTHY, *THE SPECTACLE OF JAPANESE AMERICAN TRAUMA* 176 (2008).

In the years immediately after World War II, attitudes about the Japanese internment began to shift. In the Evacuation Claims Act of 1948, Congress authorized compensation for specific property losses suffered by the internees.⁹⁸ Several factors spurred the enactment of this legislation, including the growing sense of guilt and international condemnation of the internment.⁹⁹ The process for obtaining compensation was agonizingly slow, however. By 1958, only 26,000 internees had received any compensation.¹⁰⁰ Moreover, as one critic acidly observed, “[t]he goal of the program was not to offer reparations for the moral, constitutional, reputational, and dignitary wrongs done to Japanese Americans, but only to compensate them for lost ‘pots and pans.’”¹⁰¹

Many participants in the Japanese internment reflected on the roles they played. Some knew at the time that internment was unconstitutional and immoral. In April of 1942, Milton Eisenhower—Dwight Eisenhower’s brother—who was the national director of the War Relocation Administration, which was responsible for running the detention camps, lamented that “When this war is over, we, as Americans, are going to regret the injustices” we have done.¹⁰² Two months later, as a matter of principle, he resigned his position.¹⁰³

Francis Biddle, who had vigorously and consistently opposed internment, continued to deplore the government’s action.¹⁰⁴ In 1962, he wrote that internment had “subjected Americans to the shame of being classed as enemies of their native country without any evidence indicating disloyalty.”¹⁰⁵ He observed that, unlike citizens of German and Italian descent, “Japanese Americans were treated as ‘untouchables,’ as a group that could not be trusted and had to be [imprisoned] only because they were of Japanese descent.”¹⁰⁶

In 1974, former Chief Justice Earl Warren, who had played a pivotal role in the Japanese internment as California’s attorney

98. STONE, *supra* note 43, at 79.

99. *Id.*

100. *Id.*

101. *Id.*; YAMAMATO ET. AL, *supra* note 22, at 240–41.

102. STONE, *supra* note 43, at 79; S.P. Mackenzie, *What Happened Was Wrong*, in *REPICTURING THE SECOND WORLD WAR* 109 (Michael Paris ed., 2007).

103. STONE, *supra* note 43, at 79; Robert Aitken & Marilyn Aitken, *Japanese American Internment*, 37 *LITIG.* 59, 60 (2011).

104. STONE, *supra* note 43, at 79.

105. *Id.*; RAYMOND F. GREGORY, *NORMAN THOMAS: THE GREAT DISSENTER* 198 (2008).

106. STONE, *supra* note 43, at 79–80; GREGORY, *supra* note 105, at 198.

general, conceded that Japanese internment was “not in keeping with our American concept of freedom and the rights of citizens.”¹⁰⁷ In later years, he admitted privately that he regretted his own actions in the matter.¹⁰⁸

Moreover, the Court’s decisions in *Hirabayashi* and *Korematsu* became constitutional pariahs. Indeed, the Supreme Court has never cited either decision with approval of its result.

Over the years, the immorality of the Japanese American internment has continued to reverberate. As part of the celebration of the Bicentennial of the Constitution in 1976, President Gerald Ford issued a Presidential Proclamation in which he acknowledged that we must recognize “our national mistakes as well as our national achievements.”¹⁰⁹ “February 19,” he noted, “is the anniversary of a sad day in American history,” for it was “on that date in 1942, that the Executive Order 9066 was issued.”¹¹⁰ Ford observed that “we now know what we should have known then,” that the evacuation and internment of loyal Japanese Americans was “wrong.”¹¹¹

In 1983, the Commission on Wartime Relocation and Internment of Civilians, which Congress had created to review the implementation of Executive Order 9066, unanimously concluded that the factors that shaped the internment decision “were race prejudice, war hysteria and a failure of political leadership,” *not* military necessity.¹¹²

That same year, Fred Korematsu and Gordon Hirabayashi filed petitions to have their convictions set aside for “manifest injustice.”¹¹³ A year later, federal Judge Marilyn Patel granted Korematsu’s petition.¹¹⁴ Patel found that in its presentation of evidence to the federal courts in the course of Korematsu’s prosecution and appeal, including in the Supreme Court, the government had “knowingly and intentionally failed to disclose critical information that directly contradicted key statements on which the government had asked the Courts

107. STONE, *supra* note 43, at 81; EARL WARREN, *THE MEMOIRS OF EARL WARREN* 149 (1977).

108. Proclamation No. 4,417, 41 Fed. Reg. 7,741 (Feb. 19, 1976).

109. *Id.*

110. TETSUDEN KASHIMA, *JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II* 212 (2003).

111. Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 665 (1997).

112. *Id.* at 666.

113. STONE, *supra* note 43, at 83; *Korematsu v. United States*, 584 F. Supp. 1406, 1417 (N.D. Cal. 1984).

114. ROGER DANIELS, *PRISONERS WITHOUT TRIAL* 100 (1993).

to rely.”¹¹⁵ Judge Patel observed that the Supreme Court’s decision in *Korematsu* “stands as a constant caution that in times of war or declared military necessity, our institutions must be vigilant in protecting constitutional guarantees.”¹¹⁶

Three years later, a federal Court of Appeals vacated Gordon Hirabayashi’s conviction.¹¹⁷ In an opinion by Judge Mary Schroeder, the court found serious deceit in the United States’ presentation of its case to the Supreme Court.¹¹⁸ Judge Schroeder found that the original version of Judge DeWitt’s final report, which was designed to justify the military orders, did not “purport to rest on any military exigency, but instead declared unequivocally that because of traits peculiar to citizens of Japanese ancestry, it would be impossible to separate the loyal from the disloyal.”¹¹⁹ When officials of the War Department received DeWitt’s report in early 1942, they ordered him to excise the racist overtones and to add statements of military necessity.¹²⁰ Copies of the original report were then burned.¹²¹

When officials of the Department of Justice were preparing to argue the *Hirabayashi* case in the Supreme Court, they sought all materials relevant to General DeWitt’s decision-making, but the War Department did not disclose to the Justice Department the original version of the report.¹²² Judge Schroeder found that, given the importance the justices attached to the government’s claims of military necessity in *Hirabayashi* and *Korematsu*, “[t]he reasoning of the Supreme Court would probably have been profoundly affected had it been advised of the suppression of evidence that would have established unequivocally the real reason for the Exclusion Order.”¹²³

In the last year of this presidency, Ronald Reagan signed the Civil Liberties Act of 1988, which officially declared that the Japanese internment was a “grave injustice,” explained that the program of exclusion and internment had been “motivated largely by racial prejudice,” and offered an official Presidential apology and reparations to each of the Japanese American internees who had suffered

115. Grossman, *supra* note 111, at 667.

116. STONE, *supra* note 43, at 83; Stone, *supra* note 37.

117. *Hirabayashi v. United States*, 828 F.2d 591, 598 (9th Cir. 1987).

118. STONE, *supra* note 43, at 83; *Hirabayashi*, 828 F.2d at 598.

119. STONE, *supra* note 43, at 83; *Hirabayashi*, 828 F.2d at 598.

120. STONE, *supra* note 1, at 306.

121. *Id.*

122. *Id.*; IRONS, *supra* note 17, at 206–18, 278–310.

123. STONE, *supra* note 1, 306–07; *Hirabayashi*, 828 F.2d at 603–04.

“discrimination, deprivation of liberty, loss of property, and personal humiliation at the hands of the U.S. government.”¹²⁴

V

I would like to close with a final note about Fred Korematsu. For the rest his life, Korematsu continued to challenge what he saw as the abuse of government authority.¹²⁵ In 1998, President Bill Clinton honored him with the Presidential Medal of Freedom, the highest honor the United States can bestow upon a citizen.¹²⁶ In the fall of 2003, to my astonishment, Fred Korematsu contacted me.

The Supreme Court was about to hear the case of *Rasul v. Bush*.¹²⁷ Rasul and others had been captured during the United States invasion of Afghanistan after the 9/11 attack on the United States.¹²⁸ Rasul claimed that he was not a member of the Taliban, but was with them at the time of his capture because he was being held by them as a prisoner.¹²⁹ The government designated Rasul an enemy combatant, however, and shipped him off to the military base in Guantanamo Bay.¹³⁰

The Bush Administration denied Rasul access to counsel, the right to a trial, and any knowledge of the charges against him.¹³¹ A group of independent lawyers then brought suit in federal court claiming that this procedure violated Rasul’s constitutional rights.¹³² When the case made its way to the Supreme Court of the United States, Fred Korematsu reached out to me, because I had recently published a book on civil liberties in wartime.¹³³ He asked me to write an *amicus curiae* brief to the Supreme Court in his name. It was, as you might expect, a great honor for me to have had the opportunity to do so.

124. STONE, *supra* note 1, 307; Civil Liberties Act of 1988, Pub L. No. 100-383, 102 Stat. 903-04 (codified as amended at 50 U.S.C. §§ 4211–4220).

125. BANNAI, *supra* note 55, 190–216.

126. *Remarks on Presenting the Presidential Medal of Freedom*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/?pid=55813> [<https://perma.cc/C72S-T5G2>] (last visited Mar. 10, 2018).

127. 542 U.S. 466 (2004).

128. *Id.* at 470–71.

129. *Id.* at 471–72.

130. *Id.* at 471.

131. *Id.* at 472.

132. *Id.* at 471.

133. *See* STONE, *supra* note 1.

Fred Korematsu died a few months after the Supreme Court ruled in favor of *Rasul*, holding that the United States government had violated his right to petition the federal courts for a writ of habeas corpus.¹³⁴ I would like to think that Fred Korematsu's name on that brief served powerfully to remind the Justices of the Court's own past failures and inspired them not to make the same mistake again.

134. *Rasul*, 542 U.S. at 484.