"A Judicial Perspective on Miscarriages of Justice

75 Years After Japanese-American Internment"

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On February 19, 1942, during World War II, President Franklin Delano Roosevelt signed and issued Executive Order 9066. "WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage . . . . NOW, THEREFORE, . . . I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded. . . ." That wording is responsible for the shorthand reference commonly used to describe Executive Order 9066, the "Exclusion Order."

Congress implemented the Order on March 21, 1942, 75 years ago this week, by enacting Public Law 503. Under that statute, any excluded person who

entered or remained in a prohibited zone was—if the person knew or should have known of the existence and extent of the restrictions—guilty of a misdemeanor and subject to imprisonment for up to a year, a fine of up to $5,000, or both. To place the seriousness of the fine in perspective: according to a quick calculation on the Internet, $5,000 in 1942 U.S. dollars equates to the buying power of more than $77,000 in 2017, more than a fifteen-fold increase.

The effect of the Exclusion Order and Public Law 503 was to cause the relocation and internment of about 122,000 persons of Japanese descent in the western United States. Both foreign-born Japanese-Americans (*issei*, meaning "first generation" in the United States) and American-born Japanese-Americans (*nisei*, the second generation who, because they were born in the United States, obtained citizenship by birthright under the United States Constitution) were covered. After encouraging the voluntary evacuation of large swaths of the western states, which had been designated as sensitive military areas, the Western Defense Command involuntarily removed and detained West Coast residents of Japanese ancestry. Men, women, and children were moved to assembly centers, then evacuated and confined in isolated, fenced, and guarded relocation centers, known as internment camps. The 10 camps were located in remote areas of Wyoming, California, Utah, Arizona, Colorado, Idaho, and Arkansas. Almost

70,000 of the evacuees (about 57%) were American citizens. None of the internees found themselves in a camp on account of having been charged with a crime, and there was no recognized process by which to appeal the incarceration. All lost personal liberty; most lost their homes and other property as well. Ironically, *nisei* were encouraged to serve in the armed forces, and some were drafted. More than 30,000 Japanese-Americans served in the United States armed forces during World War II, in segregated units, often with great bravery and distinction. There is no reported instance of sabotage or espionage by a Japanese-American during World War II, including in the geographic areas—such as Hawaii and the middle and eastern parts of the country—not covered by exclusion and internment.[1]

Even today, the Exclusion Order remains fresh in the memories of those who were forced to leave their homes and spend months or years in internment camps. And in the United States, the Exclusion Order is regarded, almost universally, as a miscarriage of justice. Although the Exclusion Order and subsequent internment have been front-page news in the United States in the last few weeks, and have been marked by many ceremonies, educational programs, and remembrances—because of the 75th anniversary—it may not be familiar to you. In keeping with the theme of this Symposium, my remarks will cover several aspects of the Exclusion Order.

(1) How do I define "miscarriage of justice"?

(2) What conditions led to the promulgation of the Exclusion Order?

(3) What legal challenges were brought, and how were they resolved?

(4) How and when did American law and society broadly come to recognize the Exclusion Order as unjust?

1. How Do I Define "Miscarriage of Justice"?

I begin by defining what I mean by a "miscarriage of justice." Black's Law Dictionary—the preeminent legal dictionary in the United States—defines a miscarriage of justice as "[a] grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[2] That is a somewhat narrow definition, because it is limited to judicial proceedings. Indeed, the phrase "miscarriage of justice" sometimes refers to an even more limited circumstance: A situation in which a person who is actually innocent is convicted of a *criminal* offense.[3]

But there are broader meanings of the phrase that extend the concept of a miscarriage of justice beyond the context of judicial proceedings. Two Canadian scholars, Kent Roach and Gary Trotter, have argued that "concerns about miscarriages of justice should be triggered whenever a person is detained in a manner that does not provide sufficient safeguards for the determination of

whether the criteria for detention accurately apply to that person." That definition would include a situation in which a person is detained for a long period without any mechanism for establishing innocence, even if the person were never subject to criminal prosecution. But Roach and Trotter's definition is largely procedural, focusing on the concept of due process. It does *not* include detentions or convictions under "laws that may be substantively unjust." So if a detainee or a prisoner receives "adequate protections against the risk of detention [or conviction] that is not authorized by law," there is no "miscarriage of justice," according to Roach and Trotter—no matter how unjust the underlying law that authorizes the detention or conviction might be.[4]

An even broader definition has been proposed by Professor Clive Walker of the University of Leeds. Professor Walker includes situations in which "suspects or defendants or convicts are treated by the State in breach of their rights, whether because of, first, deficient processes or, second, the laws which are applied to them or, third, because there is no factual justification for the applied treatment or punishment." Professor Walker's definition also encompasses situations in which "suspects or defendants or convicts are treated adversely by the State to a disproportionate extent in comparison with the need to protect the rights of others."[5] Walker's definition, unlike Roach and Trotter's, counts situations in

which detainees are validly found guilty of violating a law, but the law itself is fundamentally unjust or unfair.[6]

It is this broad definition that comes closest to what I mean in these remarks by a "miscarriage of justice." For purposes of this talk, I define a miscarriage of justice as a legal act (whether within a court proceeding or not) that is clearly mistaken (as when an innocent person is convicted or imprisoned) or is clearly unfair or improper (as when procedural due process is lacking, or when the law underlying the conviction or imprisonment is morally repugnant).

Roughly speaking, there are two types of miscarriages of justice—those that result from ordinary human frailty or human error, and those that are tied to systemic social forces. Earlier this month, the United States Supreme Court noted the distinction between these two types of miscarriages of justice in the context of deciding whether it is permissible to question jurors, after a trial, about their biases expressed during deliberations. If a juror holds a bias in favor of a particular party for personal reasons, that bias may very well taint the proceedings, but the error is one of a "single jury . . . gone off course." By contrast, a juror infected with *racial* bias represents part of a larger problem, "a familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice."[7]

One example of the *first* type of miscarriage of justice can occur when a

heinous crime stirs up public fervor, leading authorities to settle on a suspect too quickly, and tempting the jury to convict merely for the sake of closure. The Sam Sheppard prosecution was a famous miscarriage of justice of this type in the United States. Sheppard was a neurosurgeon who lived near Cleveland, Ohio, with his wife and son.[8] In July 1954, Sheppard's wife was bludgeoned to death in their bedroom in the middle of the night. Sheppard maintained his innocence from the beginning and claimed that an intruder had killed his wife, but authorities quickly focused on him as the chief suspect. The local press soon began publishing articles and editorials unfavorable to Sheppard. Some stories centered on Sheppard's personal life and speculated that an extramarital affair may have motivated him to kill his wife. One editorial urged the county coroner to conduct an inquest; another urged the police to arrest Sheppard. Indeed, Sheppard was arrested the same day the latter editorial appeared.[9]

The press barrage did not abate following Sheppard's arrest. Coverage of the ongoing investigation of the crime and the pre-trial proceedings inundated the Cleveland media market. The threat of unfair prejudice increased when local papers published the names of the 75 people who comprised the jury pool. Every single one of those prospective jurors received letters and telephone calls from friends and anonymous sources regarding the upcoming trial.[10] During jury

selection, the press continued to publish and air stories and editorials that were highly prejudicial to Sheppard, and little effort was made to shield prospective jurors from that coverage.[11] During the trial, too, the jurors "were subjected to newspaper, radio and television coverage of the trial while not taking part in the proceedings. They were allowed to go their separate ways outside of the courtroom, without adequate directions not to read or listen to anything concerning the case."[12]

The trial itself featured a "carnival atmosphere," as the United States Supreme Court later described it.[13] The trial took nine weeks. Although the jury was sequestered during its deliberations, which lasted for several days, jurors were allowed to make telephone calls home. No effort was made to ensure that jurors used the telephone only to call home.[14] The jury convicted Sheppard of murder, and he was sentenced to life in prison.[15]

More than ten years later, in 1966, the United States Supreme Court granted Sheppard's petition for a writ of habeas corpus. The Supreme Court ruled that the trial judge's failure "to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom" deprived Sheppard of the right to a trial by "an impartial jury free from outside influences." The Court ordered that Sheppard be released or retried.[16] The

State elected to re-try him, and this time he was acquitted.[17]

A personal note, to explain in part why the Sheppard case intrigues me: one of my cousins was a court reporter at the first Sheppard trial and always told his family that Dr. Sheppard was innocent.

The *Sheppard* case illustrates an important aspect of miscarriages of justice caused by human frailty—often, they can be avoided, minimized, or rectified through the use of procedural safeguards. In the *Sheppard* case, the writ of habeas corpus provided a mechanism by which Dr. Sheppard could challenge his conviction in federal court and receive a hearing by judges unprejudiced by the massive publicity surrounding his case.

But habeas corpus is a procedural safeguard of last resort.[18] By its nature, it can only *rectify* a miscarriage of justice. Other procedural mechanisms help to prevent wrongful convictions or detentions in the first place. Some of those mechanisms are ingrained in Anglo-American law. For instance, the requirement in a criminal case that the government bears the burden of proving guilt beyond a reasonable doubt is a background principle that guards against miscarriages of justice.

Other procedural safeguards owe their existence to particular, past miscarriages of justice. The Confrontation Clause of the Sixth Amendment to the

United States Constitution provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." That provision derives from the English rule that a witness's prior testimony or written statement could not be used against a criminal defendant at trial unless the defendant had had an earlier opportunity to cross-examine the witness.[19] In turn, that rule owed its existence, at least in part, to the infamous trial of Sir Walter Raleigh in 1603. Raleigh was convicted of treason based on the accusations of his supposed accomplice, Lord Cobham—accusations that Lord Cobham made in a letter and in a private, out-of-court examination that Raleigh had not attended. Raleigh claimed that Cobham would tell a different story under cross-examination in front of a jury, but the judges at his trial refused to compel Lord Cobham to appear and submit to questioning, and instead allowed Cobham's out-of-court statements to be read to the jury. Raleigh was sentenced to death[20] and eventually was executed,[21] but the injustice of denying him the right to confront Cobham at trial did not go unrecognized. One of the judges who presided over the trial later said that "the justice of England has never been so degraded and injured as by the condemnation of Sir Walter Raleigh."[22]

Another example of a safeguard in American law is the common law "corpus delicti rule." The term "corpus delicti" means "body of the crime" in

Latin. Under the corpus delicti rule, an out-of-court confession may not be admitted into evidence in a criminal trial unless the prosecutor introduces some evidence, independent of the confession, that the crime described in the confession actually occurred. That is, the "body of the crime" cannot be established by an out-of-court confession alone.[23]

I could easily spend the rest of my time with you discussing the array of procedural protections, new and old, that help to prevent individual mistakes in individual cases. But for the remainder of this talk, I want to focus on the Exclusion Order as a paradigmatic example of the *second* type of miscarriage of justice—the systemic miscarriage of justice, one caused by, or related to, larger social forces. I will start by examining some of the root causes of the Exclusion Order, including the political and social climate that led to its promulgation.

2. <u>What Conditions Led to the Promulgation of the Exclusion Order?</u>

On December 7, 1941, Japanese forces mounted a surprise attack on the United States naval base at Pearl Harbor, Hawaii. The attack left more than 2,000 people dead, diminished the United States' naval power in the Pacific, and caused the United States to enter World War II.

Less than 24 hours after the attack, President Roosevelt signed a proclamation that allowed authorities to apprehend any Japanese alien "deemed

dangerous to the public peace or safety of the United States."[24] In fact, officials at the Department of Justice had been planning for the possible arrest and internment of Japanese, German, and Italian aliens for months.[25] Thousands of Japanese, German, and Italian aliens suspected of being loyal to their countries of origin were arrested even before Roosevelt signed the proclamation.[26]

In an apparent effort to minimize wrongful detentions, the Department of Justice set up a network of Alien Enemy Hearing Boards to allow detained aliens to prove their loyalty to the United States. But, as Professor Peter Irons has pointed out, the Hearing Boards treated Japanese aliens very differently than they treated German and Italian aliens. According to Irons, more than three-quarters of the enemy aliens were either Germans who belonged to pro-Nazi groups or Italians who were members of fascist organizations. Yet fewer than half the Germans and Italians were interned after their hearings, while more than two-thirds of the Japanese aliens remained in internment camps.[27]

That differential treatment is not surprising. Though Italian and German immigrants undoubtedly faced discrimination in the United States, Japanese immigrants, and even the American-born children of Japanese immigrants, were still considered "the other" by many Americans, and they were subject to overt racism.[28] During his presidential campaign in 1912, for instance, Woodrow Wilson

warned that Americans could not "make a homogenous population out of a people who do not blend with the Caucasian race." The Governor of California, William D. Stephens, made similar statements in 1920, arguing that "race self-preservation" counseled in favor of the total exclusion of Japanese immigrants.[29]

Japanese immigrants were treated differently under the law, as well. Until 1952, only aliens who were "free white persons [or] of African nativity [or] descent" were permitted to become naturalized citizens of the United States.[30] And beginning with the Immigration Act of 1924, the United States banned the entry of Japanese immigrants altogether.[31] Those laws help to explain the fact that more than 40% of the interned Japanese-Americans were not citizens, even though most had been settled in the United States for many years.

None of this is to say that fears of Japanese agents in the United States and fears of Japanese aggression were unfounded. For instance, in March 1941, intelligence officers conducted a raid in Los Angeles that uncovered evidence of a Japanese espionage network. Japanese spies had compiled data on Army and Navy installations, defense factories, power stations, and dams.[32] And of course Japan, unlike Germany and Italy, had attacked American forces in American territory, and continued to attack American ships off the West Coast of the United States in the months following the attack on Pearl Harbor.[33] My own state of Oregon

experienced the only deadly foreign attack on the mainland of the United States during World War II, when a Japanese balloon bomb exploded and killed five children and a pregnant woman nearly 300 kilometers inland.[34] But it is undeniable that people of Japanese descent—both aliens and citizens—were treated differently than people of German and Italian descent in the United States during World War II. It is equally undeniable that the disparity in treatment was largely attributable to a perception that the Japanese were too "different" to be truly American, that their "otherness" made them somehow suspect.

The proclamation signed by President Roosevelt following the attack on Pearl Harbor provided that the Department of Justice and the War Department each had a role to play in determining what actions to take with respect to aliens of Japanese descent who were deemed to be enemies.[35] In the months following Pearl Harbor, officials from those two departments held differing views on what the appropriate response should be. On December 19, 1941, less than two weeks after the attack on Pearl Harbor, Lieutenant General John DeWitt, the Army officer responsible for defense of the West Coast, argued that "all alien subjects fourteen years of age and over" from Japan, Germany, and Italy should be collected from the West Coast and moved farther inland.[36] A week later, frustrated by what he perceived to be the Department of Justice's lack of a sense of urgency in drafting

regulations to implement President Roosevelt's proclamation, General DeWitt told FBI Director J. Edgar Hoover that the Army would consider asking President Roosevelt to transfer to the War Department all "powers regarding alien enemies."[37]

Representatives from the two departments, War and Justice, met in San Francisco in early January 1942 to work out a coherent strategy for implementing President Roosevelt's proclamation. The War Department wanted to set up an alien registration program that would require all aliens to carry identification. The War Department also wanted the authority to restrict aliens from areas surrounding military installations and sensitive infrastructure. The Department of Justice readily agreed to those requests. But a third request made by General DeWitt and the War Department gave the Department of Justice pause: General DeWitt sought sweeping powers to conduct suspicionless searches of the homes and vehicles of aliens. He proposed to conduct "mass raids" to uncover radio transmitters that he believed were being used to communicate information to Japanese forces about the movement of American ships. This suggestion amounted to a request to suspend the Fourth Amendment to the United States Constitution, which generally requires that government officials obtain a warrant from a judicial officer in order to search a person's residence or other property, and further requires that any warrant be

supported by probable cause to suspect that the residence or other property contains evidence of a crime. The Justice Department declined to acquiesce in that sweeping request, but did evince a willingness to accommodate the War Department. Attorney General Francis Biddle agreed that the probable cause requirement for issuance of a warrant could be met simply by providing a "statement that an alien enemy is resident in such premises."[38]

While the Department of Justice and the War Department were arguing over how to enforce the December proclamation, momentum was building for more aggressive actions to be taken against Japanese aliens, and even against American citizens of Japanese descent. Some Navy officers asked General DeWitt to include American citizens of Japanese descent in the order excluding aliens from areas surrounding military installations and sensitive infrastructure. Congressman Leland M. Ford of California wrote letters to Attorney General Biddle and Secretary of War Henry Stimson, urging the internment of all people of Japanese descent—aliens and citizens alike—in internment camps away from the coast. Other members of Congress from California soon joined in the effort and began applying pressure to the Department of Justice.[39]

The push for internment was helped along by the release of the Roberts Report on January 25, 1942. The report was an effort to determine what errors had

allowed the surprise attack on Pearl Harbor to take place. The report concluded that most of the blame lay with military commanders, but it also included a finding that a Japanese espionage network in Hawaii had sent information to the Japanese in advance of the attack. The report suggested—without any evidentiary support—that the espionage ring included Hawaiians of Japanese ancestry.[40]

The Roberts Report spurred a change in public opinion toward Japanese-Americans. Two days after the report was published, Los Angeles County dismissed all county workers of Japanese descent.[41] The Governor of California urged General DeWitt to consider at least a limited evacuation of Japanese-Americans from cities on the West Coast. By January 29, DeWitt was of the opinion that relocation of Japanese-American citizens had to occur "sooner or later."[42]

On January 30, several members of Congress from the West Coast, who had been pushing for relocation, met with representatives from the War Department and the Department of Justice in Washington, D.C. The congressional group had already devised a removal plan; they proposed that the plan be overseen and implemented by the War Department, rather than by the Department of Justice. The representatives from the War Department were enthusiastic about the plan; the Justice Department lawyers, on the other hand, were furious. They reported back

to Attorney General Biddle, who set up a meeting with the War Department.[43]

At that February 1, 1942, meeting, Biddle and other top lawyers at the Justice Department argued that there was no need to relocate American citizens of Japanese descent. They tried to convince the War Department representatives to issue a joint press release stating, in relevant part, that "the present military situation does not at this time require the removal of American citizens of the Japanese race." But the representatives from the War Department refused to sign off on the press release, arguing that they should wait to obtain input from General DeWitt before issuing a statement.[44]

Over the next two days, officials at the War Department and DeWitt tried to forge a compromise relocation plan. Unable to devise one, they agreed that DeWitt would submit a formal recommendation within 10 days concerning evacuation. During that 10-day period, Karl Bendetsen, a young lawyer in the War Department who was a staunch advocate of mass exclusion, played a crucial role. First, he prepared a memorandum urging the internment of all Japanese aliens designated as enemies, with "an open offer to the families of such alien enemies to accompany them in internment facilities." A few days later, Bendetsen was sent to California to "confer with General DeWitt" and help him draft his recommendation.[45]

Less than a week before DeWitt was scheduled to give his recommendation, officials at the War Department learned that he was leaning toward recommending mass relocation. Secretary of War Stimson became uneasy; he had doubts about both the constitutionality and the military necessity of that course of action. Stimson decided to ask President Roosevelt himself whether he would be willing to authorize mass evacuation. Stimson's decision proved fateful. Roosevelt did not give a direct answer, but suggested that he would back any reasonable plan that Stimson supported and would be willing to transfer authority for implementing the plan to the War Department. When Bendetsen became aware of Roosevelt's comments, he interpreted them to mean that Roosevelt would support mass relocation. With that understanding, Bendetsen put the finishing touches on the recommendation that General DeWitt was set to give to the War and Justice Departments.[46]

General DeWitt recommended that more than 100,000 people of Japanese ancestry be evacuated from the West Coast. DeWitt's memorandum—written by Bendetsen—argued that "[t]he Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized', the racial strains are undiluted." The memorandum also concluded that the lack of any evidence of

sabotage by Japanese-Americans in the two months since Pearl Harbor was actually proof that an attack was imminent.[47] That is, the less evidence he could find of a conspiracy, the more certain he was that an effective, hidden conspiracy existed.

On February 17, War Department officials—including Bendetsen, who arrived in Washington, D.C. that day with DeWitt's recommendation in hand—met and outlined a plan for the next day's meeting with the Justice Department. A draft of an executive order was prepared. Meanwhile, some Justice Department lawyers made a last-ditch effort to persuade President Roosevelt to reject any War Department recommendation that included mass evacuation. In a letter to Roosevelt, Attorney General Biddle noted that "the military authorities and the FBI have indicated that" there was no imminent threat of sabotage, and that fears to the contrary were unfounded.[48]

That evening, three lawyers from the War Department and three lawyers from the Department of Justice met in what turned out to be the two departments' last battle over the legality and advisability of mass relocation. But the outcome of the battle already had been determined—Biddle had called Roosevelt before the meeting and told him that he would support whatever plan the War Department put forward. He did not tell his two associates that he had capitulated.[49]

For the next two days, Biddle worked with the War Department lawyers to polish the text of a proposed executive order. On February 19, 1942, President Roosevelt signed Executive Order 9066, the Exclusion Order.[50]

Once the Exclusion Order was in place, events moved quickly. On March 2, General DeWitt issued Public Proclamation No. 1, which designated large swaths of the West Coast as a military area from which people could be excluded. In a press release, DeWitt stated that "[e]ventually orders will be issued requiring all Japanese including those who are American-born to vacate all of Military Area No. 1." The press release also encouraged voluntary resettlement, noting that "Japanese and other aliens who move into the interior out of this area . . . in all probability will not again be disturbed."[51]

General DeWitt's efforts to encourage Japanese-Americans to move away from the West Coast were not particularly successful. Among other reasons, no criminal enforcement mechanism yet existed to punish those who stayed, a shortcoming of the evacuation scheme that Congress would soon address with Public Law 503. At around the same time that Congress was enacting Public Law 503, President Roosevelt created the War Relocation Authority to help the War Department with the mechanics of relocation.[52]

As of late March 1942, the ostensible plan was to exclude Japanese-

Americans from the West Coast, but to allow them to resettle in the interior of the country. However, General DeWitt ordered the construction of some 15 "assembly centers" to be used for the temporary housing of evacuees, primarily those who "were unable to undertake their own evacuation, or who declined to leave until forced to."[53] In Portland, where I live, the assembly center was located at a livestock exhibition center.[54]

A series of events quickly turned those assembly centers into the last stop for Japanese-Americans on the way to internment camps. First, beginning on March 24, General DeWitt issued a series of orders that directed Japanese-Americans to report to assembly centers. Then, on March 27, DeWitt issued Public Proclamation No. 4, called the "freeze order," which forbade Japanese-Americans living in Military Area No. 1 from leaving the area without permission. The freeze order was intended to stop the flow of Japanese-American migration to the interior until the War Relocation Authority could work with states to develop resettlement plans. State authorities, however, were hostile to the idea of resettling Japanese-Americans. The governors of Utah and Idaho told the War Relocation Authority that the evacuees should be "put into camps" and forced to work. The governor of Wyoming said that his constituents "have a dislike of any Orientals, and simply will not stand for being California's dumping ground."[55]

In the face of that opposition, the prospect of resettlement vanished, and internment became inevitable. The War Department and the War Relocation Authority agreed that the evacuees would stay in assembly centers and relocation centers under Army control.[56] In two proclamations issued in May and June 1945, General DeWitt "prohibited evacuees from leaving Assembly Centers or Relocation Centers except pursuant to an authorization from [his] headquarters."[57]

The internment camps were not pleasant. Internees lived in crowded quarters behind barbed-wire fences.[58] As Peter Irons has written, "the camps had been designed with no thought for family life and privacy. The walls that separated the barracks compartments were made of thin plywood and failed to contain the noise of children and family squabbles. The barracks set aside for single people had no walls, and bunks were divided only with sheets and blankets."[59] Medical care was substandard,[60] and clothing was often hard to come by.[61] Guards sometimes terrorized internees by shooting at them.[62]

Before turning to the legal challenges mounted against exclusion and internment, I want to make a few observations about the events and conditions that led to the Exclusion Order. As the brief history just outlined suggests, the order did not respond to any specific or particularized threat; to the contrary, there was much to suggest that mass evacuation of the type allowed by the Exclusion Order

was completely unnecessary to ensure national security. Given that fact, and given the fact that German-Americans and Italian-Americans were not treated with nearly the same suspicion as Japanese-Americans, it is obvious that racism against people of Japanese descent played a large role in the development and implementation of the Exclusion Order. Paranoia supplanted proof. Group suspicion replaced individualized suspicion.

Earlier in American history, both German immigrants and Italian immigrants had suffered prejudice and had experienced their own miscarriages of justice. For example, in 1886, in what is known as the Haymarket Affair in Chicago, Illinois, eight people were convicted of bombing the crowd at a labor demonstration; five were born in Germany and one more was of German descent. Many of the defendants were not even present at the rally when the bomb went off. Ultimately, four of the defendants were executed and one committed suicide in prison; the remaining defendants were eventually pardoned, with Illinois Governor John Peter Altgeld describing them as victims of "hysteria, packed juries, and a biased judge."[63] In 1920, Italian immigrants Nicola Sacco and Bartolomeo Vanzetti were convicted of murder; they were executed in 1927. Though it is still unclear whether they committed the crime of which they were convicted, there is no doubt that their trial was fundamentally unfair. Fifty years after their execution,

Massachusetts Governor Michael Dukakis issued a proclamation declaring that Sacco and Vanzetti had been unfairly tried and convicted.[64]

By the time of World War II, though, most European immigrants were well assimilated into mainstream American life and culture. But prejudice against Japanese-Americans remained robust. As discussed earlier, Japanese immigrants were not permitted to become naturalized citizens, and no Japanese immigration at all was allowed after 1924. One likely explanation for the difference in treatment is that people of Japanese descent, unlike people of Italian or German descent, were perceived as being unable to commit fully to the United States and the principles of American democracy. The legal scholar Natsu Taylor Saito has described this kind of prejudice as being a hybrid of racism and xenophobia.[65] The term she uses is "foreignness"—a type of bias that presumes that a set of people are "un-American."[66] When people are seen as essentially "foreign" in this sense, it is not surprising that their loyalty might be doubted. As Saito puts it, those subject to discrimination because of their perceived "foreignness" are considered "'faux' citizens, against whom 'real Americans' can unite in times of crisis."[67]

It seems quite likely that the Exclusion Order stemmed from this toxic form of racism, which simply did not allow many Americans to see Japanese-American citizens and residents as "true" Americans. That distrust, when combined with a

genuine fear of Japanese attacks, eventually led to exclusion and internment. I will turn next to discussing some of the most famous cases dealing with the Exclusion Order.

3. What Legal Challenges Were Brought, and How Were They Resolved?

The first of the challenges occurred in *Hirabayashi v. United States*[68] and *Yasui v. United States*,[69] which the Supreme Court decided on the same day in 1943. Both cases involved curfew orders that General DeWitt had promulgated.

Gordon Hirabayashi was an American citizen living in Seattle, Washington, and attending the University of Washington. He was charged with violating two orders: a curfew order that required him to be in his home during the evening, and an order requiring him to report to a Civil Control Station for the purpose of being removed from the area.[70]

Minoru Yasui's case was similar. He was also an American citizen, born and raised in Oregon. Yasui served as a second lieutenant in the Army Reserve and had "immediately offered his services to the military authorities" following the attack on Pearl Harbor. Like Hirabayashi, he was arrested for violating a curfew order.[71]

Hirabayashi and Yasui each challenged his conviction on the ground that the military orders, by discriminating on account of ancestry, violated the guarantees

of due process and equal protection found in the United States Constitution. The Supreme Court acknowledged that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[72] Nevertheless, the Court concluded that "[t]he adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant."[73]

The Court cited several "facts and circumstances" that, it concluded, could have suggested to the President and Congress that Japanese-Americans posed a greater threat to national security than other groups. Perversely, the Court relied heavily on the "isolation" of Japanese-Americans and the "relatively little social intercourse between them and the white population"—factors that the Court acknowledged were driven, in part, by a long history of anti-Japanese animus. Giving great deference to the military, the Court wrote that it could not "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of th[e] [Japanese-American] population, whose number and

strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."[74]

Hirabayashi's and Yasui's convictions for violating the curfew laws were upheld, but the Supreme Court did not reach the question whether the order requiring Hirabayashi to report for evacuation was constitutional.[75] Though no member of the Supreme Court dissented, Justice Frank Murphy—the child of Irish immigrants—wrote a concurrence in the *Hirabayashi* case emphasizing the narrowness of the decision. Before concluding that the "urgent necessity of taking prompt and effective action to secure defense installations and military operations against the risk of sabotage and espionage" in 1942 justified the curfew order, Murphy wrote the following:

> Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. . . . Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the lands of their forefathers. As a nation we embrace many groups, some of them among the oldest settlements in our midst, which have isolated themselves for religious and cultural reasons.

> Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.[76]

Justice Murphy's concurrence is remarkable for its invocation of the treatment of Jews in Nazi Germany. A year and a half later, Murphy would again draw a connection between the treatment of Japanese-Americans and the treatment of Jews in Europe, this time in his dissenting opinion in the famous *Korematsu* case, which I will discuss shortly.

After his legal battle ended, Yasui spent time in an internment camp.[77] Hirabayashi refused to be inducted into the armed forces, arguing that a questionnaire that he was required to complete, which demanded that he renounce any allegiance to the emperor of Japan, was racially discriminatory. He spent a year in federal prison for his refusal.[78] As I will discuss in a moment, Hirabayashi and Yasui would eventually receive apologies from the United States, though not until after they returned to court to overturn their convictions.

The best known case dealing with Japanese internment was *Korematsu v. United States*, decided by the Supreme Court in 1944.[79] Fred Korematsu, an American citizen, was convicted of violating one of the exclusion orders issued by General DeWitt.[80] Korematsu argued that the only way he could have complied with the many orders issued by DeWitt was to report to a detention center; in effect, then, he had been convicted for failing to submit to internment.[81]

The Supreme Court rejected that argument and limited its inquiry to the exclusion order that Korematsu had actually been convicted of violating. The majority opinion reasoned that, because "[Korematsu] has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated." The majority opinion closed by reiterating the holding of *Hirabayashi*—that exclusion was justified because "[t]here was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified."[82]

Unlike *Hirabayashi* and *Yasui*, however, *Korematsu* was not unanimous. Three Justices refused to segregate the exclusion order that Korematsu was

convicted of violating from the separate orders requiring that he report to an assembly or relocation center.

Justice Owen Roberts wrote that *Korematsu*, unlike *Hirabayashi* and *Yasui*, was "not a case of keeping people off the streets at night . . , nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States." So construed, Justice Roberts found Korematsu's conviction to violate the Constitution.[83]

Justice Murphy wrote a separate dissent. He acknowledged that military "judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation." "At the same time," he wrote, "it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."[84] For Justice Murphy, it

was clear that the reasons offered by the Government were premised on unfounded prejudice against Japanese-Americans. He wrote that

> [t]he main reasons relied upon by those responsible for the forced evacuation do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.
>
> * * *
>
> No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.[85]

A third dissent was written by Justice Robert Jackson, who would later prosecute Nazi war criminals at the Nuremberg Trials. Jackson's dissent is not as

fiery as Murphy's. It is subtle and even ambivalent—not ambivalent about the constitutionality of interning citizens solely because of their race or ancestry, but about the proper role of courts during times of war. Jackson described the orders at issue in *Korematsu* as "an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law," wrote Jackson, "I should suppose this Court would refuse to enforce it."[86] But Jackson, echoing the ancient principle "*inter arma silent leges*," or "in time of war the laws are silent,"[87] acknowledged that "[i]t would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality." For Jackson, the corollary to the principle that military operations need not be bounded by the Constitution was the idea that courts of law should not be asked to pass upon the constitutionality of military orders, for doing so runs the risk of making bad precedent.[88]

Korematsu has never been directly overruled.

On December 18, 1944, the same day on which it handed down its divided opinion in *Korematsu*, the Court issued a unanimous opinion in *Ex parte Endo.* There, the Court granted the habeas corpus petition of an American citizen of

Japanese descent who was being held in an internment camp.[89] As in *Korematsu*, the Court managed to avoid the larger question of the legality of detention. The Government had conceded that the habeas petitioner, Mitsuye Endo, was loyal.[90] The Court seized upon that concession to hold that the continued detention of a concededly loyal citizen could not be justified under the Exclusion Order or its implementing orders and laws.[91]

By the time the decisions in *Korematsu* and *Ex parte Endo* issued, steps had already been taken to release some Japanese-Americans from the internment camps. In fact, just one day before the release of those opinions, the War Department—perhaps tipped off by someone at the Supreme Court about the impending release of the *Endo* decision—issued a press release announcing that "those persons of Japanese ancestry whose records have stood the test of Army scrutiny during the [preceding] two years" would be allowed to leave the internment camps after January 2, 1945. Yet some 20,000 Japanese-Americans remained interned on the ground that they harbored a "pro-Japanese attitude."[92]

The last internment camp did not close until March 1946.[93] Some internees were reluctant to leave the camps, because they had no money or property left. The United States government provided very limited assistance to internees.[94] Many internees returned to find their belongings stolen and their old

neighborhoods filled with anti-Japanese signs.[95]

4. How and When Did We Recognize the Injustice of the Exclusion Order?

Finally, on a more optimistic note, I will discuss the road to recognition of the Exclusion Order as a miscarriage of justice. Often, miscarriages of justice are evident only in hindsight and with the benefit of perspective—particularly those committed during times of danger in the name of public safety. But even in the midst of a war that ravaged the world, many people realized the fundamental injustice of the mass evacuation and internment of Japanese-Americans. As already discussed, Justice Frank Murphy correctly saw the military's justifications for its actions for what they were—unsupported assumptions about Japanese-American loyalty premised largely on racism. The *Washington Post*, for its part, ran a contemporaneous editorial critical of the *Korematsu* decision entitled, "Legalization of Racism."[96]

But wider recognition—official and unofficial—of the Exclusion Order and internment as a miscarriage of justice was slow to spread. In 1948, Congress passed the Japanese American Claims Act, which provided $38 million to settle claims by Japanese-Americans who had lost property due to internment or evacuation during the war. That same year, though, Congress refused to make a formal judgment about the propriety of evacuation and internment. A report of the

Senate Committee on the Judiciary stated that "[t]he question of whether the evacuation of the Japanese people from the West Coast was justified is now moot."[97]

For 25 years following the end of World War II, most of the public paid little attention to the Exclusion Order and internment. Professor Roger Daniels, a preeminent scholar of Japanese-American internment, has posited that "there was simply no place in the 'Victory Culture' which dominated the postwar quarter-century for what could be called an American war crime, particularly one that claimed 120,000 victims. Many of those victims themselves wanted to hear no more about it while many of the younger Nisei and Sansei"—*sansei* is the term for Japanese-Americans whose grandparents came from Japan—"literally knew nothing about it, including some who had been born in the camps." Moreover, there was no effort made to teach the younger generation about the Exclusion Order. According to Daniels, "[m]any college texts . . . said nothing at all about the Japanese American wartime ordeal," nor was there "any mention of it in a secondary school text before 1965."[98]

Finally, in the late 1960s and early 1970s, recognition of the essential injustice of the Exclusion Order began to grow. Young Japanese-American activists successfully lobbied Congress to repeal the Emergency Detention Act,

which had been enacted during the early days of the Korean War and which was modeled on the Exclusion Order. Many of those young activists also pushed for redress in the form of a formal apology and monetary compensation.[99]

In 1976, President Gerald Ford repealed Executive Order 9066 on the 34th anniversary of its promulgation. The message accompanying the repeal of the Exclusion Order noted that an "honest reckoning" of history had to make room for the acknowledgment of "our national mistakes."[100] Encouraged by President Ford's action, the Japanese American Citizens League, the leading Japanese-American civil rights advocacy organization, sought redress from the United States government.[101]

That effort eventually led Congress and President Jimmy Carter to create, in 1980, the Commission on Wartime Relocation and Internment of Civilians.[102] The Commission was tasked with reviewing the Exclusion Order and its effects[103] and, to that end, it held twenty days of hearings at which more than 750 witnesses spoke. The Commission issued its final report in 1982 and 1983.[104] The report contained the following finding:

> The promulgation of Executive Order 9066 was not justified by military necessity, and the decisions which followed from it . . . were not driven by analysis of military conditions. The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership. Widespread ignorance of

> Japanese Americans contributed to a policy conceived in haste and executed in an atmosphere of fear and anger at Japan. A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.[105]

The Commission recommended that each surviving victim of the Exclusion Order should receive $20,000; that Congress should issue a formal apology; and that all convictions for violating General DeWitt's orders should be overturned.[106] In 1988, Congress passed the Civil Liberties Act, which provided for monetary compensation to Japanese-Americans who had been affected by the Exclusion Order and included a formal apology by Congress on behalf of the American people.[107]

One of the discoveries that the Commission made during its investigation was that the Justice Department lawyers who represented the United States in the *Hirabayashi* and *Korematsu* cases had knowingly misstated facts in their briefs to the Supreme Court.[108] In particular, the lawyers had suppressed the Ringle Report, a document prepared in 1942 by intelligence officer Kenneth Ringle that concluded that "the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people."[109] Ringle went on in his report to say that Japanese-Americans should be afforded *individual* hearings

"for the express purpose of deciding, on the basis of logic and reason and in view of the circumstances in each case, whether or not the individual is to be considered in the class of the potentially dangerous."[110] Despite—or, perhaps of—the fact that the Ringle Report seriously undercut the justifications offered for mass exclusion and internment, Justice Department lawyers elected not to mention the report to the Supreme Court.

That misconduct on the part of the Justice Department opened the door for Koramatsu, Hirabayashi, and Yasui to challenge their convictions using the writ of *coram nobis*. *Coram nobis*—meaning "the error before us"[111]—is a legal mechanism "by which [a] court can correct errors in criminal convictions where other remedies are not available."[112] A federal court in California granted Fred Korematsu's petition for a writ of *coram nobis* and vacated his conviction, relying on the fact that "the government [had] deliberately omitted relevant information and provided misleading information in papers before the court" in the *Korematsu* case, thus calling into doubt the Supreme Court's ruling in particular and public confidence in the administration of justice generally.[113]

Gordon Hirabayashi's conviction was also vacated using the writ of *coram nobis*, though he relied on a separate incident of government misconduct—the War Department's alteration and destruction of a report prepared by General DeWitt

that made clear that individual "loyalty" hearings were not conducted, not because of practical infeasibility, but because of racist assumptions about Japanese-Americans.[114] As my colleague Judge Mary Schroeder wrote in Hirabayashi's *coram nobis* case in 1987:

> The [Supreme] Court's divided opinions in *Korematsu* demonstrate beyond question the importance which the Justices in *Korematsu* and *Hirabayashi* placed upon the position of the government that there was a perceived military necessity, despite contrary arguments of the defendants in those cases. The majority in *Korematsu* reaffirmed the Court's deference in *Hirabayashi* to military judgments.
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> * * *
>
> The [trial] court [did not] err in deciding that the reasoning of the Supreme Court would probably have been profoundly and materially affected if the Justice Department had advised it of the suppression of evidence which established the truthfulness of the allegations made by Hirabayashi and Korematsu concerning the real reason for the exclusion order.[115]

Unfortunately, Minoru Yasui died before his *coram nobis* petition could be granted.[116]

The most recent formal apology from the United States government came in 2011, when Acting Solicitor General Neal Katyal—whose parents immigrated to the United States from India[117]—issued a statement in which he noted the mistakes of the Solicitor General's Office during the Exclusion Order cases. In particular, Katyal pointed to the Solicitor General's suppression of the Ringle Report and the

government's reliance on "gross generalizations about Japanese Americans" to defend the Exclusion Order.[118]

Discrimination against Japanese-Americans has dissipated; in this respect our ideals have prevailed over our prejudices. People of Japanese descent have achieved acceptance and success. Two examples: Portland business executive Bill Naito was a leading real estate developer, importer, civic leader, and philanthropist, after whom a major thoroughfare is named. And my distinguished colleague, Senior Judge Wally Tashima, was the first Japanese-American appointed to a United States Court of Appeals. Yet the Exclusion Order touched them both. Bill Naito's family moved from Oregon to Utah when he was a teenager, so they could avoid internment; and Bill kept a framed copy of the Exclusion Order in his office. Judge Tashima and his family, who lived in California, were interned in Arizona for about three years when he was a boy. So, although Japanese-Americans now participate fully in the mainstream of American life, echoes of past indignity linger.

I close with a few thoughts about what we can learn from the Exclusion Order. Social recognition of a systemic injustice can be slow to arrive. There is room for optimism that the pace of recognition may accelerate in the world of social media and of instant, nearly universal communication. Other factors that

can make us more aware of miscarriages of justice like the Exclusion Order include increased travel and consequent familiarity with other countries and other cultures, greater diversity within our own country, and post-World War II global developments such as the formation of the United Nations and the signing of human rights treaties.

As I mentioned earlier, Supreme Court Justice Frank Murphy was the child of Irish immigrants to the United States. As a child of immigrants and a Catholic growing up in a small town in Michigan, he faced his fair share of discrimination and abuse.[119] In jurisprudence, as in so many things, biography is not destiny. Still, it is hard to believe that Justice Murphy's experiences growing up did not inform the closing paragraph of his dissent in *Korematsu*:

> 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.[120]

Thank you for your kind attention.

ENDNOTES

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APPENDIX

The photographs in this appendix were all taken by American photographer Dorothea Lange. Lange had worked for the United States government during the Great Depression of the 1930s, documenting the hardships faced by rural Americans during that period. The War Relocation Authority hired her to document the evacuation and relocation process, but her photographs were suppressed by the government for the duration of World War II. Some of the photographs were marked "impounded" by military personnel.

Following the war, the photographs were deposited in the National Archives, where they remain today. All of the photographs are available online at the following address: https://catalog.archives.gov/id/536000

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EXECUTIVE ORDER

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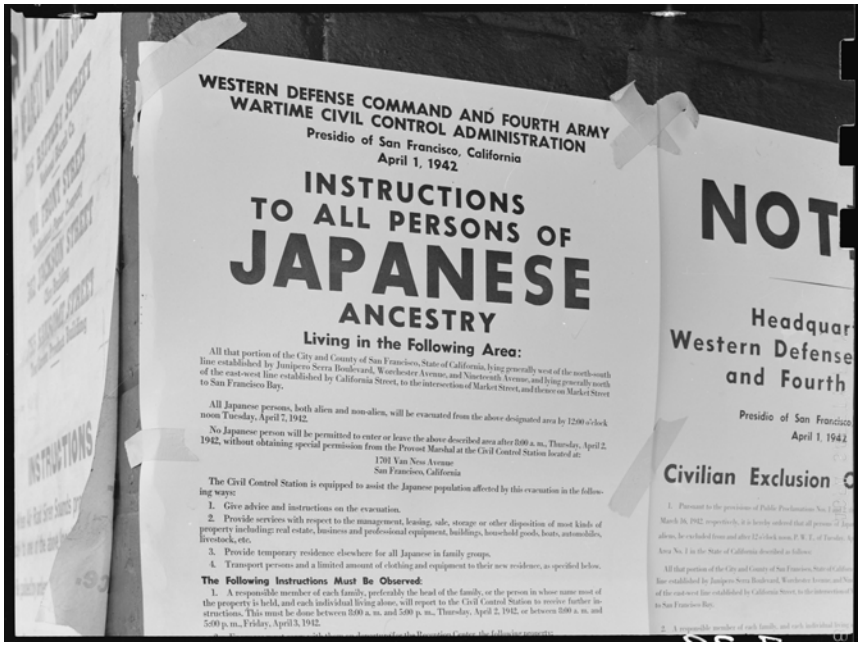
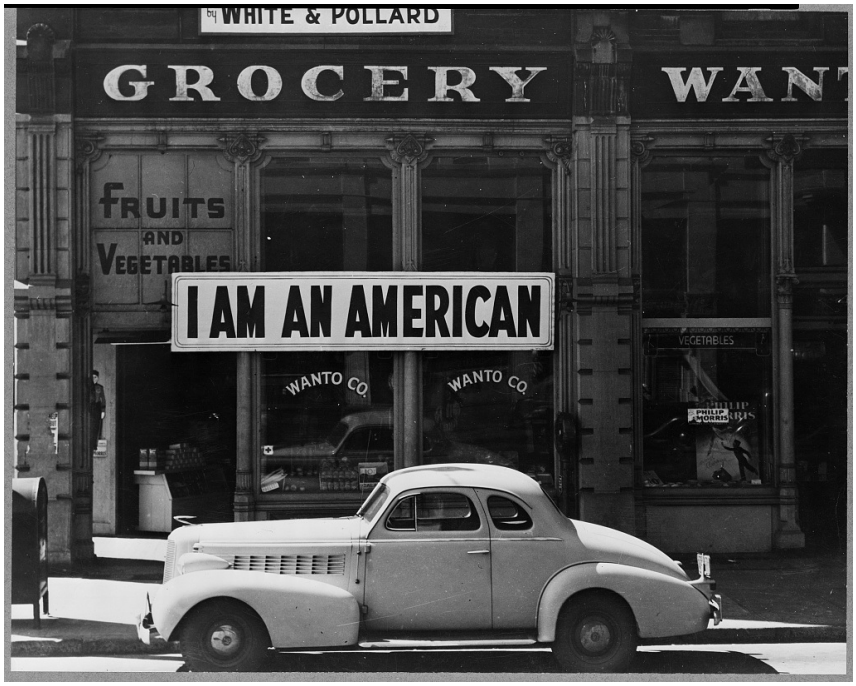
AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS

WHEREAS the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military



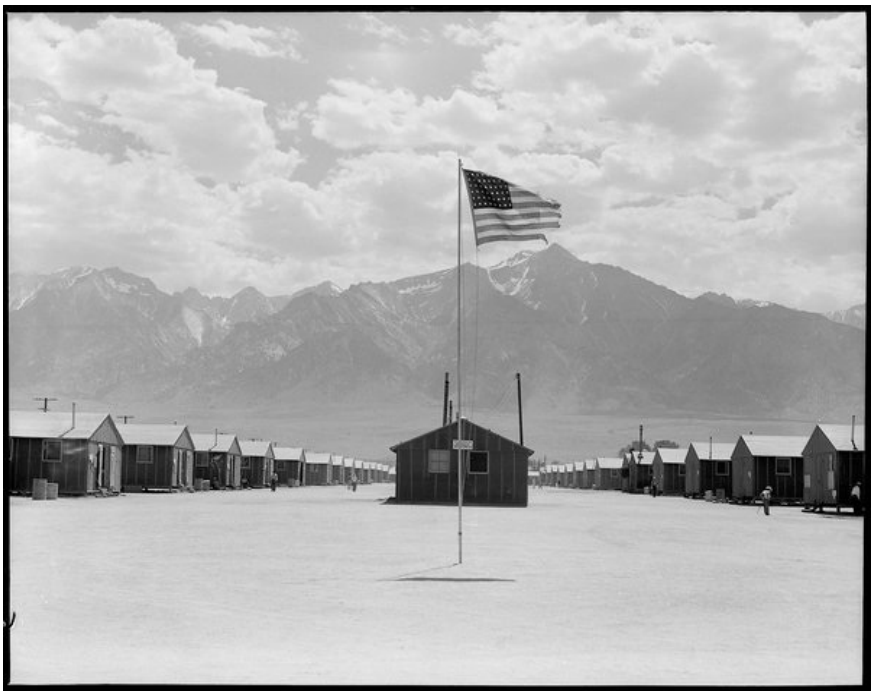
Notification of exclusion order posted in San Francisco.



Sign posted by Japanese-American business owner the day after the attack on Pearl Harbor.

A close-out sale—prior to evacuation—at a store operated by a proprietor of Japanese ancestry on Grant Avenue in Chinatown in San Francisco.

Oakland, California. A young evacuee guards the family baggage prior to departure to an assembly center. Her father was, prior to evacuation, in the cleaning and dyeing business. Note the identification tag she wears around her neck.



Manzanar Relocation Center, Manzanar, California. Street scene of barrack homes.

Tule Lake Relocation Center, Newell, California. A wintry view of early construction work on the Tule Lake schools. All work is done by the internees.