

# HIRABAYASHI AND THE INVASION EVASION\*

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*This Article presents archival evidence demonstrating that government lawyers made a crucial misrepresentation to the United States Supreme Court in the case of Hirabayashi v. United States, 320 U.S. 81 (1943), the case that upheld the constitutionality of a racial curfew imposed on Japanese Americans in World War II. While the government’s submissions in Hirabayashi maintained that the curfew was a constitutional response to the serious threat of a Japanese invasion of the West Coast, new archival findings make clear that military officials foresaw no Japanese invasion and were planning for no such thing at the time they ordered mass action against Japanese Americans. The archival record also demonstrates that at the time that Justice Department lawyers filed their brief in Hirabayashi emphasizing a threatened invasion, they knew that top military officials had denied the risk of invasion in communications to Congress. The Article seeks to understand how Justice Department lawyers came to make such a misrepresentation and demonstrates that the Hirabayashi decision deserves to be as fully and resoundingly repudiated as the Court’s better-known decision in Korematsu v. United States, 323 U.S. 214 (1944).*

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## INTRODUCTION

Few decisions of the United States Supreme Court stand as thoroughly discredited as *Korematsu v. United States*,<sup>1</sup> the 1944 case that upheld the constitutionality of the mass exclusion of Japanese Americans from the West Coast in the spring of 1942. *Korematsu* announced a principle of extremely demanding judicial review of racial laws<sup>2</sup> but applied that principle so loosely that later generations have repudiated the Court's analysis. In 1995, the Supreme Court acknowledged that *Korematsu*'s approval of racial exclusion was an "error," a "fail[ure] to detect an illegitimate racial classification."<sup>3</sup>

Hiding in the shadow of *Korematsu* is another Supreme Court decision upholding racial wartime restrictions on Japanese Americans: *Hirabayashi v. United States*.<sup>4</sup> In that 1943 case, the Court unanimously upheld the dusk-to-dawn curfew that the government imposed on Japanese Americans a few weeks before launching the mass exclusion program upheld in *Korematsu*.<sup>5</sup> One might assume that *Hirabayashi* has shared *Korematsu*'s ignominious fate. To some extent, this is true. In the 1980s, federal courts invalidated the criminal convictions in both the *Hirabayashi* and *Korematsu* cases by issuing coram nobis writs on account of government misconduct in the prosecution of the cases.<sup>6</sup> While the Supreme Court has never formally overruled the holding of either of the cases, both have been vitiated on their facts. To the extent that the federal government's apology and redress<sup>7</sup> in the 1980s for the wartime repression of Japanese Americans implicitly condemned the Supreme Court's wartime endorsement of that repression, the condemnation would seem to apply equally to both cases.

Yet *Hirabayashi* has somehow managed to avoid the full repudiation that has been heaped on the later and better-known exclusion case. Over the decades, members of the Court have cited

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1. 323 U.S. 214 (1944).

2. *Id.* at 216.

3. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 236 (1995).

4. 320 U.S. 81 (1943).

5. *Id.* at 101.

6. *See Hirabayashi v. United States*, 828 F.2d 591, 608 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984); *see also Yasui v. United States*, 772 F.2d 1496, 1499-500 (9th Cir. 1985) (remanding case for determination of whether coram nobis writ could be issued despite the fact that Yasui had not appealed his original criminal conviction within the standard ten-day limit).

7. *See Civil Liberties Act of 1988*, 50 U.S.C. app. §§ 1989b to 1989-4(f) (2006).

*Hirabayashi* without evident disdain.<sup>8</sup> Just six years ago, in a dissenting opinion in *Hamdi v. Rumsfeld*,<sup>9</sup> Justice Thomas unapologetically cited *Hirabayashi* for the proposition that the judiciary should defer to the executive's characterizations of the factual predicates for wartime detentions, without drawing disapproval from any of his fellow Justices. State courts and lower federal courts have occasionally cited the case without disapproval as well.<sup>10</sup>

The survival of *Hirabayashi* is troubling because, of the two decisions, *Hirabayashi* is the more potent in today's world. The military order that the Court upheld in *Korematsu* imposed a burden of epic proportions: the wholesale eviction, on short notice, of tens of thousands of American citizens from a huge swath of territory on the mainland of the United States, on the basis of the simple fact of their ancestry.<sup>11</sup> One need not be too much of a Pollyanna to think that such a draconian racial order is unlikely to be repeated. The order upheld in *Hirabayashi*, by contrast, imposed a much less burdensome restriction—the requirement that a citizen of Japanese ancestry merely stay home after dark unless he had the government's permission to go out.<sup>12</sup> The point is not that the curfew imposed no hardships, for surely it did.<sup>13</sup> The point is instead that in our post-September 11 world, it is far easier to imagine the government imposing (and a frightened public demanding) a race- or religion-based emergency security measure that is akin to a curfew than to mass racial detention. Unlike *Korematsu*, the *Hirabayashi* case arguably still “lies about like a loaded weapon,”<sup>14</sup> one might say, waiting to be brandished in defense of such a measure.

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8. See *Adarand*, 515 U.S. at 214; *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 611 (1987); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978); *DeFunis v. Odegaard*, 416 U.S. 312, 339 (1974) (Douglas, J., dissenting); *New York Times Co. v. United States*, 403 U.S. 713, 722 (1971) (Douglas, J., concurring); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 n.12 (1963).

9. 542 U.S. 507, 584 (2004) (Thomas, J., dissenting). Justice Thomas again cited *Hirabayashi* without evident disapproval in *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 752 (2007) (Thomas, J., concurring).

10. See *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1364 (Fed. Cir. 2004); *Padilla v. Rumsfeld*, 352 F.3d 695, 713 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004); *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 655 n.11 (9th Cir. 2002); *In re Isiah B.*, 500 N.W.2d 637, 641 (Wis. 1993).

11. See COMM'N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 2–3 (1982) [hereinafter PERSONAL JUSTICE DENIED].

12. See *Hirabayashi v. United States*, 320 U.S. 81, 88 (1943).

13. See ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II 20–22 (2001).

14. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

The survival of *Hirabayashi* is also troubling because it appears less susceptible than *Korematsu* to impeachment in the court of history. In the early 1980s, careful research in War Department and Justice Department archives turned up proof of misrepresentation and evidence suppression in the government's submissions to the Supreme Court in *Korematsu*.<sup>15</sup> The deceptions were all in the service of exaggerating what might be termed the "internal" component of the national security crisis the nation faced in 1942—the threat that Japanese Americans would commit acts of domestic sabotage and espionage within the United States.<sup>16</sup>

In an important 2004 article, Professor Jerry Kang argued that the deceptions in *Korematsu*, although egregious and unethical, probably did not cause the Court to uphold the mass exclusion; the Court's own racism did.<sup>17</sup> But however influential the government's misconduct may or may not have been in *Korematsu*, that misconduct probably did not influence the outcome of *Hirabayashi*, for a simple reason of timing.<sup>18</sup> The most important attorney misconduct in the *Korematsu* case was the submission to the Court of a sanitized version of a military report that misrepresented the true reasons for mass exclusion. But when Justice Department lawyers submitted their *Hirabayashi* brief in the spring of 1943, they did not yet have that report in hand, and they did not rely on it in their brief. That report only became available later, in time for the briefing of *Korematsu*.<sup>19</sup> So the important archival research of the early 1980s that revealed attorney misconduct and undermined the Court's *Korematsu* opinion was not nearly as damning to *Hirabayashi*. That decision therefore comes to us comparatively clear of the taint of attorney misconduct that the archives yielded a quarter century ago.<sup>20</sup>

Now the archives continue their work of revelation. This Article presents new evidence of a different misrepresentation in the Supreme Court litigation—one that directly impugns *Hirabayashi*.

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15. See PETER IRONS, *JUSTICE AT WAR*, at viii–ix (1983).

16. See Thomas Y. Fujita-Rony, *Korematsu's Civil Rights Challenges: Plaintiffs' Personal Understandings of Constitutionally Guaranteed Freedoms, the Defense of Civil Liberties, and Historical Context*, 13 TEMP. POL. & CIV. RTS. L. REV. 51, 64 (2003).

17. See Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 *passim* (2004).

18. Professor Kang makes a version of this point in *Denying Prejudice*, attributing the insight to Margaret Chon. See *id.* at 989.

19. See IRONS, *supra* note 15, at 202–06.

20. *But cf.* *Hirabayashi v. United States*, 828 F.2d 591, 603–04 (9th Cir. 1987) (affirming district court's conclusion that the *Hirabayashi* Court's reasoning would have been different had the Justice Department not suppressed certain evidence).

The misrepresentation concerns what might be termed the “external” component of the national security threat in early 1942—the danger that Japanese military forces posed to the West Coast of the United States. In the words of the government’s brief in *Hirabayashi*, “[t]he principal danger to be apprehended was a *Japanese invasion*”<sup>21</sup> which “might have threatened the very integrity of our nation.”<sup>22</sup> With the Japanese “at the crest of their military fortunes,” the brief maintained, military officials found it “imperative” to “take adequate protective measures against a possible *invasion of the West Coast*.”<sup>23</sup> The nighttime curfew on Japanese Americans was one such measure.

This depiction of a Japanese invasionary threat found a sympathetic audience in the Supreme Court in *Hirabayashi*. Chief Justice Stone, writing for the unanimous Court, accepted that the men “charged with the responsibility of our national defense had ample ground for concluding that they must face the danger of invasion,”<sup>24</sup> a danger that concurring Justice Douglas insisted was “not fanciful but real.”<sup>25</sup> Singling out Japanese Americans for curfew was reasonable, according to the Chief Justice, because of their “ethnic affiliations with an invading enemy.”<sup>26</sup>

Archival records now make clear that all this talk of a Japanese invasion bore no relationship to the military situation in the eastern Pacific in early 1942—not just the military situation we can see with the benefit of hindsight, but the one that *the military actually perceived at that time*.<sup>27</sup> Top army and navy officials viewed a Japanese invasion of California, Oregon, or Washington as impracticable in early 1942.<sup>28</sup> They were neither anticipating nor preparing for any such assault.<sup>29</sup> Indeed, during the key time period of early 1942, the Army was more concerned with *scaling back* the defense of the West Coast from land attack than with bolstering it.<sup>30</sup>

These assessments of the Japanese threat to the West Coast were, of course, secret. But archival records clearly show that top

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21. Brief of Appellee at 65, *Hirabayashi v. United States*, 320 U.S. 81 (1943) (No. 870) [hereinafter *Hirabayashi Brief*] (emphasis added) (on file with the North Carolina Law Review).

22. *Id.* at 61.

23. *Id.* at 33 (emphasis added).

24. *Hirabayashi*, 320 U.S. at 94.

25. *Id.* at 105 (Douglas, J., concurring); *cf. infra* note 128 (suggesting that Justice Douglas may have been influenced by private conversations with a military official).

26. *Hirabayashi*, 320 U.S. at 101 (majority opinion).

27. *See infra* notes 138–210 and accompanying text.

28. *See infra* notes 138–210 and accompanying text.

29. *See infra* notes 138–210 and accompanying text.

30. *See infra* notes 178–95 and accompanying text.

military officials shared them with members of Congress in early February of 1942, not long before President Roosevelt signed the executive order that authorized the curfew and exclusion of Japanese Americans.<sup>31</sup> Records also reveal that Justice Department lawyers may have learned of these assessments at the same time, and definitely learned of them by the fall of 1942.<sup>32</sup>

This last piece of archival evidence is perhaps the most disturbing: the Justice Department lawyers who prepared the government's brief in *Hirabayashi* in 1943 knew that military officials had foreseen no reasonable risk of a Japanese invasion of the West Coast in early 1942, yet knowing this did not stop them from urging the Court to take judicial notice of the fact that "[t]he principal danger" preoccupying military officials in early 1942 "was a Japanese invasion."<sup>33</sup> These lawyers, it must be emphasized, were not without scruples. They were lawyers who, in other contexts in the Japanese American wartime litigation, protested the military's distortions of the supposed *internal* threat that Japanese Americans posed and lobbied to purge the government's *Korematsu* brief of misrepresentations on that issue.<sup>34</sup> Yet they distorted the supposed *external* Japanese military threat.

How could these lawyers have presented such a significant falsehood? That is the most difficult question that this Article asks, but the question defies an easy answer. Perhaps the lawyers simply quieted their doubts and their consciences by telling themselves that their information was not concrete enough to lead them to do anything but zealously advocate for their client. But a partial answer may also lie in the power of what Jerry Kang has called "racial schemas," the cognitive web of racial categories and meanings that undergird our decisions and actions in matters touching on race.<sup>35</sup> One of the central components of the "Yellow Peril" mythology that captured American minds in the early twentieth century was the image of "Orientals" as an invading horde, an indistinguishable mass of people flooding over our western frontier.<sup>36</sup> These Justice Department lawyers proved themselves able to resist—even to protest—certain aspects of this racial schema when military officials sought to smear American citizens as an *internal* threat. But the

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31. See *infra* notes 194–208 and accompanying text.

32. See *infra* notes 215–30 and accompanying text.

33. *Hirabayashi* Brief, *supra* note 21, at 65.

34. See IRONS, *supra* note 15, at 278–302.

35. See Kang, *supra* note 17, at 956–58.

36. See *infra* notes 253–68 and accompanying text.

invasion component of this schema may have proved too powerful for even them, leading them to repress what they knew about the Japanese enemy in favor of what most everyone feared.

This is just speculation. We cannot know for sure what led Justice Department lawyers to argue so powerfully to the Supreme Court that the military imposed a racial curfew to meet a Japanese invasion, a threat the lawyers knew the military did not actually foresee. If the speculation is correct, however, then it might lead us to wonder about the impact of our society's mental schemas for "Islamic terrorists" on even the best and most ethical military and Justice Department lawyers who have been, and will be, called upon to defend our counterterrorism policies in court. Even if the speculation is not correct, and we are left unsure of what led otherwise well-intentioned lawyers to distort the external threat to the nation's security, we still know a good deal more from these archival disclosures about the bankruptcy of the Supreme Court's *Hirabayashi* decision than we knew before. And what we now know should lead us to condemn that decision just as loudly and clearly as we do the more notorious *Korematsu* case.

#### I. DEFENDING THE WEST COAST: FROM WAR PLAN ORANGE THROUGH THE CURFEW

The specific timing, location, and method of Japan's attack at Pearl Harbor came as a surprise to American military planners, but the idea of war with Japan did not. While American policy makers in the years after the conclusion of World War I thought the country could avoid war with most of the country's potential rivals, that confidence never fully extended to Japan.<sup>37</sup> American military planners nervously eyed the expansion of the Japanese military in the 1920s, Japan's invasion of Manchuria in 1931, and its growing military conflict with China that ensued through the rest of that decade. To prepare against the threat of conflict with Japan, they developed War Plan Orange, a strategy premised on the idea that the United States might go to war alone against Japan. War Plan Orange contemplated an aggressive American naval campaign in the western Pacific near the Japanese Islands themselves.<sup>38</sup> It did not envision significant

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37. 2 CTR. OF MILITARY HISTORY, *AMERICAN MILITARY HISTORY* 64 (Richard W. Stewart ed., 2005).

38. Louis Morton, *Germany First: The Basic Concept of Allied Strategy in World War II*, in *COMMAND DECISIONS* 11, 14 (Kent Roberts Greenfield ed., 1960); see HENRY G. GOLE, *THE ROAD TO RAINBOW: ARMY PLANNING FOR GLOBAL WAR, 1934-1940*, at 85-91, 95-101 (2003).

action in the eastern Pacific, or a Japanese assault on the West Coast of the United States.<sup>39</sup>

Changing world conditions in the 1930s, both in Europe and in the Far East, led American war planners to abandon their color-coded plans for solo American military action in favor of a new set of plans that envisioned the United States engaging in a two-ocean war, in the company of allies, against multiple enemies.<sup>40</sup> Dubbed “Rainbow,” these strategies took the form of five numbered plans that envisioned five distinct scenarios of American military involvement in war against the Axis Powers in both the Atlantic and the Pacific.<sup>41</sup> “Rainbow 5” was the plan that came closest to approximating the conditions that actually developed in December of 1941.<sup>42</sup> Under the assumptions of Rainbow 5, the United States would go to war against the Axis Powers in concert with Great Britain and France; American forces would first assure the defense of American dominance in the Western Hemisphere and then project themselves in the Atlantic against the European Axis nations.<sup>43</sup> American forces would maintain a posture of strategic defense in the Pacific until success in Europe allowed the redeployment of American power for aggressive operations against Japan in the Pacific.<sup>44</sup> The fall of France to the Nazis in June of 1940 rendered Rainbow 5’s assumption of an alliance with France moot, but American planners, with President Roosevelt’s acceptance, nonetheless continued to develop Rainbow 5 as the likeliest plan for war.<sup>45</sup> Thus, when the sun set on December 6, 1941, the American military had plans on hand for the eventuality of an aggressive engagement in the Atlantic and a defensive position in the Pacific designed to sustain the country’s key strategic positions along a huge triangle stretching from Panama in the south to Hawaii in the west and Alaska in the north.<sup>46</sup>

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39. In *WAR PLAN ORANGE: THE U.S. STRATEGY TO DEFEAT JAPAN 1897–1945* (1991), Edward S. Miller notes that analysts in the Naval War College in 1911 “were confident that an invasion was ‘too fantastic to be seriously contemplated.’” *Id.* at 41 (quoting *NAVAL WAR COLL., STRATEGIC PLAN OF CAMPAIGN AGAINST ORANGE 6–7* (Mar. 15, 1911), *microformed on* Roll 1, 2(b) (Scholarly Microfilms)). Miller notes parenthetically that “[h]ysterical leaders who uprooted loyal Japanese-Americans from the West Coast in 1942 would have benefited from reading these cool assessments.” *Id.*

40. *See* Morton, *supra* note 38, at 22–23.

41. *See id.* at 23.

42. *See id.* at 25.

43. *See id.* at 24.

44. *See id.*

45. *See id.* at 44–46.

46. *See id.* at 47.

The events of December 7, 1941, obviously complicated the assumptions of Rainbow 5. Japan's simultaneous and successful attacks on the U.S. Far East Air Force in the Philippines and the U.S. Pacific Fleet at Pearl Harbor dealt a blow to the American strategic position in the central and western Pacific and stripped the United States of its capacity for offensive action against Japan.<sup>47</sup> Hawaii had been one corner of the defensive triangle that Rainbow 5 imagined, and that plan did not contemplate the destruction or disabling of eight battleships and hundreds of airplanes there.<sup>48</sup> Nonetheless, Rainbow 5 was still the war plan that most closely mirrored the strategic situation confronting the United States, and so that was the plan that the military activated.<sup>49</sup>

The implementation of Rainbow 5 made for big changes in the Western Defense Command ("WDC"), a unit within the army that the War Department had activated in June of 1941 for the defense of the region including Washington, Oregon, California, Montana, Nevada, and Arizona.<sup>50</sup> Upon learning of the extent of the damage to the Pacific Fleet, Lieutenant General John DeWitt, the commanding general of the WDC, raised the defense level from Category B, which was what Rainbow 5 had contemplated with an intact Pacific Fleet in Hawaii, to Category C.<sup>51</sup> This category saw "minor attacks" as "probable," rather than merely "possible" as Category B did,<sup>52</sup> and required, in addition to the deployment of defenses of harbors and key industrial facilities, "the manning of primary seacoast artillery armament on a 24-hour a day basis, the establishment of outposts along sensitive shoreline areas outside Harbor Defenses, and the inauguration of extensive beach patrols."<sup>53</sup> Rumors of sightings of enemy submarines, ships, and planes spread quickly. All were quickly debunked, but in this atmosphere of post-Pearl Harbor alarm, the War Department decided to elevate the WDC's status to a "theater of operations" on December 11, 1941, the day that Germany declared war on the United States.<sup>54</sup> This designation carried clout. A theater of operations was, in effect, a combat zone over which a commanding

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47. See 2 CTR. OF MILITARY HISTORY, *supra* note 37, at 77-78.

48. See *id.* at 78.

49. See STETSON CONN ET AL., *GUARDING THE UNITED STATES AND ITS OUTPOSTS* 80 (2000).

50. See 1 W. DEF. COMMAND, *HISTORY OF THE WESTERN DEFENSE COMMAND* 1 (1945).

51. See CONN ET AL., *supra* note 49, at 80-81.

52. See *id.* at 81-82; 1 W. DEF. COMMAND, *supra* note 50, at 12.

53. 1 W. DEF. COMMAND, *supra* note 50, at 12.

54. See CONN ET AL., *supra* note 49, at 83.

general had near-total authority.<sup>55</sup> The Army rushed nine anti-aircraft regiments to the WDC by December 17, 1941, as well as two divisions and a number of combat and support regiments.<sup>56</sup> By the end of the year, some 250,000 U.S. troops were in the WDC on patrolling, anti-aircraft, and anti-sabotage duties.<sup>57</sup> This did not satisfy General DeWitt, the WDC Commander; he continued to press his superiors for more.<sup>58</sup>

The FBI and the Justice Department also took action against sabotage and espionage in the days after Pearl Harbor. Using lists of potentially dangerous aliens they had compiled in anticipation of war, agents swept through the Japanese population centers of the West Coast as early as the evening of December 7, arresting Japanese, German, and Italian enemy aliens on their lists.<sup>59</sup> Within days, several thousand aliens were in Justice Department detention, of whom a large majority—some two thousand—were Japanese.<sup>60</sup> From that point on, the Justice Department took the position that these detentions of aliens, coupled with certain additional regulations requiring enemy aliens to submit to searches and surrender certain radios and cameras, were a sufficient response to the rather limited threat of espionage and sabotage that the FBI believed the West Coast's Japanese and Japanese American population presented.<sup>61</sup>

Despite looming public fears, Japanese military operations near the West Coast in the months after Pearl Harbor were minimal, confined to a few submarine ventures. Four submarines perpetrated eight or nine attacks on shipping off the California coast, sinking two tankers and damaging a freighter.<sup>62</sup> On February 23, 1942—four days after President Roosevelt signed the executive order that authorized the exclusion of Japanese Americans—one of those four Japanese

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55. See Memorandum from Brigadier Gen. Mark W. Clark to Gen. George Marshall 2 (Jan. 27, 1942), *microformed on* Reel 50, Item 1766 (George C. Marshall Research Center [hereinafter Marshall Center Microfilm]).

56. See CONN ET AL., *supra* note 49, at 83.

57. See *id.* at 83–84.

58. See 1 W. DEF. COMMAND, *supra* note 50, at 14 (“Troop requirements greatly exceeded the number of units available and all requests for additional troop assignments could not be filled.”).

59. See TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II 47–48 (2003).

60. See ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE 303 (2d ed. 2002).

61. See IRONS, *supra* note 15, at 27–58 (tracing the Justice Department's attempts to resist plans to exclude all Japanese resident aliens and Japanese Americans from the West Coast).

62. See CONN ET AL., *supra* note 49, at 86–87.

submarines surfaced a mile and a half off the coast near Santa Barbara and lobbed thirteen rounds of ammunition at an oil refinery, causing negligible damage.<sup>63</sup> Japan's efforts closer to home during this time period were, on the other hand, far more numerous, intense, and successful. By the end of April of 1942, the Japanese controlled "Burma, Malaya, Thailand, French Indochina, the Netherlands Indies, . . . the Malay Archipelago, . . . the islands of New Guinea, New Britain, and . . . the Solomons,"<sup>64</sup> were well on their way to control of the Philippines,<sup>65</sup> and were in a position to menace Australia and New Zealand.<sup>66</sup>

Notwithstanding this string of Japanese successes, General DeWitt at the Presidio in San Francisco did not initially favor restrictive action against American citizens of Japanese ancestry, even though he distrusted them.<sup>67</sup> His principal concern in December and much of January was to seek authority for more aggressive restrictions on enemy aliens rather than citizens of suspect ancestry.<sup>68</sup> However, in January pressure began to mount for action against citizens as well. Some of this pressure came from Provost Marshall General Allen Gullion and his aide Captain (soon Colonel) Karl R. Bendetsen; some of it came from nativist groups and agricultural organizations that had wanted to force the Japanese out for years; some of it came from the West Coast's congressional delegations and state political leaders; some of it came from the public's response to the publication of an investigative report implying (falsely, as would later be learned) that espionage by Japanese Americans had contributed to the Pearl Harbor attack; and some of it came from a rabid press.<sup>69</sup> As January turned to February, Justice Department lawyers Edward Ennis and James Rowe struggled to defeat the military's incipient proposal to evict not just Japanese aliens but

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63. *See id.*

64. 2 CTR. OF MILITARY HISTORY, *supra* note 37, at 89.

65. *See id.* at 89–92.

66. *See id.* at 89.

67. *See* GREG ROBINSON, A TRAGEDY OF DEMOCRACY: JAPANESE CONFINEMENT IN NORTH AMERICA 66–67 (2009).

68. *See id.* at 68–69.

69. *See id.* at 68–73. The scholarship on these various factors that led to the military's decision for mass exclusion of citizens is deep. In addition to Peter Irons's *Justice at War*, important works include PERSONAL JUSTICE DENIED, *supra* note 11, at 25–116; ROGER DANIELS, ASIAN AMERICA 186–282 (1988); MORTON GRODZINS, AMERICANS BETRAYED 19–225 (1949); GREG ROBINSON, BY ORDER OF THE PRESIDENT 8–124 (2001); JACOBUS TENBROEK ET AL., PREJUDICE, WAR AND THE CONSTITUTION 11–208 (4th prtg. 1970); MICHU WEGLYN, YEARS OF INFAMY 33–155 (1976).

American citizens from the coast.<sup>70</sup> They failed; the War Department had the upper hand in the interagency battle and managed, by February 11, to secure the President's agreement to a program of exclusion of aliens and citizens alike.<sup>71</sup> With the support of a recommendation, signed by DeWitt but drafted by Bendetsen, that called "[t]he Japanese race . . . an enemy race," President Roosevelt signed Executive Order 9066 on February 19, 1942.<sup>72</sup> That order gave the Secretary of War, and through him General DeWitt, the blanket authority to "prescribe military areas . . . from which any or all persons may be excluded."<sup>73</sup>

Empowered by the executive order, the military now moved against Japanese aliens and Americans of Japanese ancestry. The first move was to secure legislation from Congress to enforce the curfew and exclusion orders that the military was planning to announce. On February 22, 1942, Karl Bendetsen of the Provost Marshal General's Office submitted to Assistant Secretary of War John McCloy a draft of legislation that would make it a felony punishable by up to five years' imprisonment and a \$5,000 fine for a "person to 'enter, leave, or remain in' any military area" from which a military order had barred him.<sup>74</sup> This was a bit too harsh for McCloy; he converted the crime to a misdemeanor and trimmed the maximum term to one year before passing the bill along to the House and Senate armed services committees on March 9.<sup>75</sup> Committee consideration of the bill in both committees was lightning fast, and both houses of Congress passed it on voice votes on March 19.<sup>76</sup> Two days later, on March 21, President Roosevelt signed it into law as Public Law 503.<sup>77</sup> From that moment on, it was a federal misdemeanor punishable by up to a year in jail and a \$5,000 fine for any person knowingly to "enter, remain in, leave, or commit any act in any military area or military zone prescribed . . . by any military commander designated by the

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70. See IRONS, *supra* note 15, at 42-45, 61-62.

71. See *id.* at 62-64.

72. See PERSONAL JUSTICE DENIED, *supra* note 11, at 82-85.

73. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

74. See IRONS, *supra* note 15, at 65 (quoting Memorandum from Karl Bendetsen, Assistant Chief of Staff, Wartime Civil Control Admin., to John J. McCloy, Assistant Sec'y of War, War Dep't (Feb. 22, 1942), *microformed on* Box 6, RG 107 (National Archives and Records Administration [hereinafter NARA])).

75. See *id.* at 65-66.

76. See *id.* at 67-68.

77. See Act of Mar. 21, 1942, Pub. L. No. 77-503, 56 Stat. 173 (codified at 18 U.S.C. § 97a (Supp. II 1942), recodified at 18 U.S.C. § 1383 (1952)), *repealed by* Act of Sept. 14, 1976, Pub. L. No. 94-412, § 501(e), 90 Stat. 1258.

Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of . . . any such military commander.”<sup>78</sup>

Then, quickly, came the restrictions. On March 24, General DeWitt signed Public Proclamation Number 3, which ordered all alien enemies and American citizens of Japanese (but not German or Italian) ancestry to stay home from 8:00 in the evening to 6:00 in the morning and to stay within a five-mile circle of their homes and workplaces during the day.<sup>79</sup> That same day, he also signed the first of what would be many months’ worth of Civilian Exclusion Orders directing Japanese aliens and American citizens of Japanese ancestry to leave their homes.<sup>80</sup> This began the odyssey of detention for Japanese Americans, an ordeal that would take them behind barbed wire and last for more than four years.<sup>81</sup>

On the evening of March 28, 1942, Minoru Yasui, a Japanese American attorney in Portland, Oregon, began walking up and down his city’s streets in the hope that he would be arrested for violating the curfew provision in Public Proclamation Number 3. He even had his secretary phone the police to alert them that he was out and about after curfew. But when no police officer would oblige, Yasui walked into a precinct house and demanded to be arrested. The police agreed, and a test case of the lawfulness of the curfew was born.<sup>82</sup>

Yasui was joined in protest early in May by Gordon Hirabayashi, a senior at the University of Washington in Seattle. Wishing to create a test case of the military order directing him to report for exclusion from the coast, which he viewed as illegal and immoral, Hirabayashi turned himself in to the FBI in Seattle on May 16, 1942, bringing with him a diary that detailed not only his refusal to report for exclusion but also repeated violations of the curfew over the preceding days. The FBI placed Hirabayashi under arrest that day; later in the month a federal grand jury indicted Hirabayashi for two violations of Public

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78. Act of Mar. 21, 1942, Pub. L. No. 77-503, ch. 191, 56 Stat. 173, 173, *repealed by* Act of June 25, 1948, Pub. L. No. 80-772, ch. 645, § 21, 62 Stat. 683, 868.

79. Public Proclamation No. 3, 7 Fed. Reg. 2543 (Apr. 2, 1942).

80. See IRONS, *supra* note 15, at 70.

81. The story of the detention of Japanese Americans in so-called “assembly centers” in the summer of 1942 and in so-called “relocation centers” from the fall of 1942 into 1945 is beyond the scope of this Article, but has been told in other works. For one example, see MULLER, *supra* note 13, at 22–40.

82. See IRONS, *supra* note 15, at 81–87.

Law 503, one for resisting exclusion and one for violating the curfew.<sup>83</sup>

A third test case materialized on May 30, 1942, when police in San Leandro, California, picked up Fred Korematsu on suspicion of violating the military's exclusion order. Korematsu initially pretended not to be Japanese American; indeed, he had had plastic surgery in March in order to conceal his ethnic identity. But his story did not hold up, and officers were able to confirm that he was Japanese American and had not complied with a May 9 military order directing him to report for detention at the assembly center at the Tanforan Racetrack south of San Francisco. He too was charged with a misdemeanor under Public Law 503.<sup>84</sup>

By the end of 1942, all three of these Japanese American resisters had been convicted in federal district courts. Their challenges would soon move to the appellate courts and the United States Supreme Court. Although Hirabayashi was the last of the three men to be tried, his was, for procedural reasons, the first case that the Supreme Court reached on the merits.<sup>85</sup>

## II. DEFENDING THE CURFEW IN COURT: THE CENTRALITY OF A THREATENED JAPANESE INVASION

The government lawyers assigned to defend the constitutionality of General DeWitt's orders in the *Hirabayashi*, *Yasui*, and *Korematsu* cases had a clear-cut, two-step case to make. First, they had to demonstrate to a court's satisfaction that, at the time of the orders, the military was confronting a grave external threat to the West Coast of the United States. Second, they had to show that military officials had a reasonable foundation to believe that American citizens of Japanese ancestry, as a group, posed enough of an internal risk in the context of that external threat to warrant the orders of mass curfew and exclusion. The difficulty for the government lawyers lay in the

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83. See *id.* at 87–92; James A. Hirabayashi, *Four Hirabayashi Cousins*, in *NIKKEI IN THE PACIFIC NORTHWEST* 146, 155–58 (Louis Fiset & Gail M. Nomura eds., 2005).

84. See IRONS, *supra* note 15, at 93–99; *OF CIVIL RIGHTS AND WRONGS: THE FRED KOREMATSU STORY* (POV 2000).

85. Korematsu's case did not reach the Court on the merits until the fall of 1944 because the Supreme Court first needed to determine whether the trial court's order was final and appealable. See *Korematsu v. United States*, 319 U.S. 432, 433–36 (1943). Yasui's case was argued in the Supreme Court alongside Hirabayashi's, and the Court decided it the same day, but on the question of the constitutionality of the curfew, the Court simply invoked by reference its reasoning in the *Hirabayashi* case. See *Yasui v. United States*, 320 U.S. 115, 117 (1943).

problem of proof: how to sustain these criminal provisions of Public Law 503 without laying bare volumes of top-secret military and intelligence information about those external and internal risks?

The solution to this problem began to take shape very early, in the preparation for the first of the criminal trials, Minoru Yasui's, in Portland, Oregon, in June of 1942. Maurice Walk, a lawyer with the newly formed War Relocation Authority ("WRA"), proposed to the United States Attorney handling Yasui's trial that the government try to prove as much of its case as possible through the doctrine of "judicial notice."<sup>86</sup> At the time, this doctrine allowed a court to take as proven those facts which it saw as being so "notorious"<sup>87</sup> as to be "generally known,"<sup>88</sup> without first taking any actual testimony on those facts.<sup>89</sup> The United States Attorney adopted this suggestion at the *Yasui* trial, presenting most of its case on the issues of both external and internal threat through a memorandum of law rather than trial testimony.<sup>90</sup> Later, the Solicitor General of the United States would embrace this "judicial notice" approach in its own submissions to the Supreme Court in all of the Japanese American cases.<sup>91</sup>

Relieved of the obligation to present specific testimonial or documentary evidence on the military threat to the West Coast in early 1942, government lawyers focused from the start on one external threat to the near-total exclusion of any other: the threat of a Japanese invasion. This section of the Article documents this emphasis on invasion. It does so at the risk of redundancy; the references to invasion in the government's briefs and oral arguments were constant, and in this telling they may become tedious. But the

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86. See IRONS, *supra* note 15, at 137–38.

87. *Adkins v. Children's Hospital*, 261 U.S. 525, 560 (1922).

88. *Brown v. Piper*, 91 U.S. 37, 42 (1875).

89. Since that time, the principle of judicial notice has been codified in the Federal Rules of Evidence. See FED. R. EVID. 201.

90. See Memorandum of Law, *United States v. Yasui*, No. C-16056 (W.D. Or. undated), *microformed on* Papers of the Commission on Wartime Relocation and Internment of Civilians [hereinafter CWRIC Papers], Reel 7, frames 259–98 (NARA) [hereinafter *Yasui Memorandum*].

91. Justice Department attorney Nanette Dembitz authored an internal memorandum advocating this approach in 1943, as the Solicitor General's Office geared up to defend the *Yasui* and *Hirabayashi* convictions. See Memorandum from Nanette Dembitz, Attorney, War Dep't, to John L. Burling, Attorney, War Dep't (Aug. 11, 1942), *microformed on* CWRIC Papers, Reel 5, frames 291–308 (NARA). The Solicitor General's Office adopted Dembitz's suggestion in framing the briefs in those cases. See, e.g., *Hirabayashi Brief*, *supra* note 21, at 11; see also Nanette Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 185 (1945) (noting the government's use of the "judicial notice" doctrine).

recurring detail is necessary to show how divorced from reality the government's factual submissions were.

The premise of a threatened Japanese invasion of the West Coast appeared in the very earliest moments of the government's strategizing of the defense of General DeWitt's orders. In the early June 1942 memorandum that WRA attorney Maurice Walk wrote to the United States Attorney in Portland on the *Yasui* case, he urged the prosecutor to contend that it would be "impossible to predict how [Japanese Americans] w[ould] act *if a Japanese army of racial brothers were landed upon our shores.*"<sup>92</sup> This is just the approach that the prosecutor took; his memorandum of law argued that "the question [was] what type of conduct can reasonably be expected of those of Japanese ancestry now or in case of *an attempted invasion* by the Imperial Japanese forces of our coastal areas."<sup>93</sup> Rather than commit the government to a specific factual claim, the prosecutor proceeded by rhetorical questions and hypotheticals, but they all proceeded from the premise of a Japanese invasion. "Suppose," the prosecutor wrote, "that the area encompassed by Lieutenant General DeWitt's orders should be suddenly subjected to an airborne invasion."<sup>94</sup> In such a case, the prosecutor asked, wouldn't a Japanese American likely sympathize with the efforts of "the Japanese war machine?"<sup>95</sup> Might not "the military and citizenry, fighting for its very life, . . . attack and attempt to kill *all* persons of Japanese ancestry in such a confused area of operations?"<sup>96</sup> Noting, presumably, the Japanese occupation in early June 1942, of two islands at the end of the Aleutian chain, the government's memorandum noted that "[t]here has been actual invasion[,] and *a further invasion may take place at any moment.*"<sup>97</sup> In light of this threat to "the territorial and political integrity of the United States,"<sup>98</sup> the memorandum argued, "[f]rom a military standpoint there was no alternative to the establishment"<sup>99</sup> of the mass curfew on Japanese Americans.

When the *Yasui* and *Hirabayashi* cases reached the United States Court of Appeals for the Ninth Circuit, the responsibility for briefing and argument shifted from the local United States Attorneys in

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92. IRONS, *supra* note 15, at 138 (emphasis added).

93. *Yasui* Memorandum, *supra* note 90, at 6 (emphasis added).

94. *Id.* at 7.

95. *Id.* at 6–7.

96. *Id.* at 7.

97. *Id.* at 29 (emphasis added).

98. *Id.* at 8.

99. *Id.* at 29.

Portland and Seattle to Edward Ennis, the director of the Justice Department's Alien Enemy Control Unit. Ennis, a New Deal liberal and civil libertarian who had occupied many important Justice Department positions since 1937,<sup>100</sup> was a fierce internal critic of the military's Japanese American program since its inception, and had privately fought against War Department officials to stave off mass action against Japanese Americans in January and February of 1942.<sup>101</sup> But in defending the misdemeanor convictions of Yasui and Hirabayashi in the court of appeals on February 20, 1943, Ennis emphasized the external threat of a Japanese invasion of the West Coast. Under tough questioning from a skeptical appellate judge about the absence of subversive activity by Japanese Americans before or since the Pearl Harbor attack, Ennis conceded that there had been no such activity, but argued that the internal threat of even a little bit of such activity had to be considered in the context of the enormous external threat the coast was facing. Ennis urged the court to appreciate the "incalculable damage" that "even . . . only a few hundred" American citizens of Japanese ancestry could have done if they had supported a Japanese invasion of the West Coast.<sup>102</sup>

Once the cases reached the United States Supreme Court, the government's invasion theory blossomed even more fully. The government's merits brief in *Hirabayashi*, drafted by a team of several lawyers including Ennis, emphasized at the outset that while "[t]he exact and detailed military situation affecting the Pacific Coast after the attack on Pearl Harbor . . . was a close and guarded military secret," a number of "publicly known" facts about the military situation supported General DeWitt's actions.<sup>103</sup> One of these facts was that "the Island of Oahu constituted the . . . last stronghold of defense lying between Japan and the West Coast;" because of the attack on Pearl Harbor at Oahu, the brief argued, "at the time of the initiation of the evacuation program here in issue, it was the utmost military importance to prepare against *an invasion* of the Pacific Coast" and to consider "whether any condition existed within the West Coast area which might obstruct its successful defense in the event of *an attempted invasion*."<sup>104</sup>

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100. See IRONS, *supra* note 15, at 14–15.

101. See *id.* at 42–46, 61–63.

102. Lawrence E. Davies, *Upholds Japanese in Citizens' Rights*, N.Y. TIMES, Feb. 21, 1943, at 23. This newspaper article is the only extant account of the oral argument in the Ninth Circuit; no transcript survives.

103. Hirabayashi Brief, *supra* note 21, at 15.

104. *Id.* (emphasis added).

The brief contended specifically that it was “[t]he events which had occurred between the attack on Pearl Harbor and the enactment of [Public Law 503] on March 21, 1942” that “amply warranted” the legislation.<sup>105</sup> Military developments during that time period created a “military situation [that] was so grave” as to place “the danger of an enemy attack . . . far within the realm of *probability*.”<sup>106</sup> The military was therefore “[f]aced with the responsibility of repelling a possible *Japanese invasion* which might have threatened the very integrity of our nation” in a situation where the disloyalty of even a small number of Japanese Americans “might spell the difference between the success or failure of any *attempted invasion*.”<sup>107</sup> In such an emergency, loyalty screening would not work: “What was needed was a method of removing at once the unknown number of Japanese persons who might assist a *Japanese invasion*, and not a program for sifting out such persons in the indefinite future.”<sup>108</sup> “A hearing to determine what a particular Japanese would do in the event that the Japanese forces should succeed in effecting a *landing* on the Pacific Coast” would have been impracticable, the government’s brief maintained.<sup>109</sup> Such a hearing would have had to probe deeply the mind of that person to determine whether it could be freed from “the ties of kinship or other intangible forces which might bind him to the members of an *invading Japanese army*.”<sup>110</sup> The emergency facing the coast did not leave the military time for such a complex luxury.

The government’s brief also invoked this supposedly threatened invasion in responding to Hirabayashi’s claim that General DeWitt’s orders discriminated on the basis of race by singling out Japanese Americans. “The objection that the exclusion measure was invalid because it did not include Italians and Germans is without substance,” the government argued, because “[t]he principal danger to be apprehended was a *Japanese invasion*, and the possible assistance to attacking Japanese forces would be most likely to come from the Japanese residing on the West Coast.”<sup>111</sup> It was no denial of due process, according to the government, for the military to “strike at the evil where it [was] most felt.”<sup>112</sup>

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105. *Id.* at 45.

106. *Id.* at 60–61 (emphasis added).

107. *Id.* at 61 (emphasis added).

108. *Id.* at 62 (emphasis added).

109. *Id.* at 63 (emphasis added).

110. *Id.* (emphasis added).

111. *Id.* at 65 (emphasis added).

112. *Id.*

The threat of a Japanese invasion appears to have pervaded Solicitor General Charles Fahy's oral argument to the Supreme Court in the *Hirabayashi* case as well. We cannot be completely certain of the precise words that Fahy used at argument because no verbatim transcript survives.<sup>113</sup> But a lengthy summary of the argument, including directly quoted passages, appeared in the *United States Law Week* shortly after the argument,<sup>114</sup> and a transcript of Fahy's oral presentation to the Court a year later in the *Korematsu* case does survive.<sup>115</sup> From these sources, we can be certain that Fahy's *Hirabayashi* argument only intensified the government's focus on invasion.

The issue of invasion first arose at the *Hirabayashi* argument not in the Solicitor General's argument, but in that of Hirabayashi's attorney, Harold Evans, as he tried to persuade the Court that Public Law 503 had excessively and unconstitutionally delegated legislative authority over civilians to the military. Evans noted that a Civil-War-era precedent, *Ex parte Milligan*,<sup>116</sup> had struck down military jurisdiction over civilians and distinguished zones of military operations, where military authority over civilians might be permissible, from zones of no imminent conflict, where military authority over civilians was impermissible. Justice Reed reacted skeptically to Evans's use of *Milligan*: if *Milligan* made clear that Congress and the President could together authorize martial law where the proper conditions exist, he asked, then wasn't the distinction in *Milligan* inapplicable in Hirabayashi's challenge to a military regulation along the West Coast, where, presumably, those conditions existed? Evans replied bluntly: "[I]t must be remembered that Hawaii is 2,400 miles from the Coast, Midway 1,300 miles, and Attu [at the tip of the Aleutian chain] 2,600 miles. It cannot be said because of the military activity in those areas that California was about to be invaded." Justice Douglas was not persuaded. Wasn't the question of whether California was about to be invaded "within the exercise of military judgment," he asked. Evans replied that it was not, and that the simple distances the Japanese military would have to travel to launch an invasion "sp[oke] for themselves."<sup>117</sup>

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113. See Peter Irons, *Fancy Dancing in the Marble Palace*, 3 CONST. COMMENT. 35, 37–38 (1986).

114. 11 U.S.L.W. 3345 (1943).

115. See Transcript of Solicitor General's Oral Argument, *Korematsu v. United States*, 323 U.S. 214 (1943) (No. 22), reprinted in Irons, *supra* note 113, at 46, 46–60.

116. 71 U.S. (4 Wall.) 2 (1866).

117. 11 U.S.L.W. at 3346.

Solicitor General Fahy did nothing to dispel the apparent impression of Justices Reed and Douglas that the military could reasonably have anticipated an invasion at the time of General DeWitt's challenged orders. Instead he upped the ante, characterizing the conditions facing the United States in the Pacific at that time as "the most serious threat that had ever occurred in [the country's] history."<sup>118</sup> According to the reporter for *United States Law Week*, Fahy contended that

[w]ith the threat of invasion, . . . the well-known use of the technique of the fifth column, the prevalence of sabotage in the Pearl Harbor attack, the widespread successes of the Japanese armed forces, [and] the alien character of at least one-third of the Japanese on the West Coast, . . . it was not unreasonable for those charged with the defense of the West Coast to fear that in case of an invasion there would be among this group of people a number of persons who might assist the enemy.<sup>119</sup>

The dry account of the *Hirabayashi* argument in the *United States Law Week* could not capture the Solicitor General's spirit and tone in communicating this claim about a Japanese invasion. Seventeen months later, however, Solicitor General Fahy presented oral argument to the Court in the *Korematsu* case, and the surviving transcript of that argument hints at his forcefulness on the subject. In *Korematsu*, the Court took up the question of the constitutionality of the mass exclusion of Japanese Americans from the West Coast and of their detention in the camps.<sup>120</sup> In the context of assailing the supposed military basis for General DeWitt's orders, counsel for *Korematsu* emphasized the American victory at Midway in early June of 1942.<sup>121</sup> The Solicitor General scoffed at the notion that the

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118. *Id.* at 3347.

119. *Id.*

120. The Court resolved only the exclusion issue in *Korematsu*, leaving the detention issue for resolution on non-constitutional grounds in *Ex parte Endo*, 323 U.S. 283, 283–307 (1944). See *Korematsu v. United States*, 323 U.S. 214, 221–22 (1944). For more on what may have led the Court to handle the issues of curfew, exclusion, and detention in this sequential fashion, see Kang, *supra* note 17, at 948–55, 958–65.

121. No transcript of *Korematsu*'s attorneys' presentation to the Court survives, neither did a summary of the argument appear in *United States Law Week*. The only extant account of the petitioners' portion of the argument is the one that Peter Irons was able to reconstruct from sketchy notes taken by a courtroom spectator that he found in the National Archives. See IRONS, *supra* note 15, at 312–14. It is also possible to infer certain themes in *Korematsu*'s attorneys' presentation from the surviving transcript of the Solicitor General's oral argument. See Transcript of Solicitor General's Oral Argument, *supra* note 115, at 46–60.

Midway victory was relevant to the validity of General DeWitt's exclusion orders. "It is difficult to see how, because of the battle of Midway in June, . . . the threat of invasion of the Pacific Coast in the winter of 1941 and 1942 could have been said not to have existed."<sup>122</sup> Fahy pressed on: "If it be true that the battle of Midway did stop or retard the threat of invasion after those measures had been taken, it cannot be said that prior to that there had not been a threat of invasion."<sup>123</sup> And here Fahy unsheathed his sharpest rhetorical sword. If, he maintained, someone wished to say that no threat of coastal invasion existed before Midway, "let it be said to those who turned back that . . . threat, if they can be reached where they lie at the bottom of the Pacific Ocean, among the hulls of the warships which went down with them in that battle."<sup>124</sup> Even the ghosts of American sailors came to court that day to testify to the threat of a Japanese invasion.

In all of the government's briefing and argument in the *Hirabayashi* case, there was but a single sentence that raised the specter of any external threat to the coast short of an outright invasion. It was a sentence in the portion of the government's brief that summarized the facts of "the military situation on the Pacific coast"<sup>125</sup> of which the government wished the Court to take judicial notice. After noting that "it was [of] the utmost military importance to prepare against an invasion of the Pacific Coast" and "incumbent to consider" whether anything might hinder its defense "in the event of an attempted invasion," the government added that "[t]here was also a danger, even in the absence of attempted invasion, of bombing raids on the West Coast, particularly in view of the American raid over Japan for which reprisal raids seemed possible."<sup>126</sup> It was this "threat of invasion and attack" which "inevitably created apprehension of the use by the enemy of the so-called fifth column technique of warfare."<sup>127</sup> This lone reference to possible bombing raids did little to detract from the overall thrust of the government's argument that the chief danger to which General DeWitt's orders

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122. Transcript of Solicitor General's Oral Argument, *supra* note 115, at 49.

123. *Id.*

124. *Id.*

125. *Hirabayashi* Brief, *supra* note 21, at 12.

126. *Id.* at 15. The "American raid over Japan" to which the brief referred was the so-called "Doolittle Raid" of April 18, 1942, in which sixteen U.S. bombers took off from an aircraft carrier in the mid-Pacific and bombed industrial sites in Tokyo, Yokohama, Yokuska, Nagoya, Kobe, and Osaka. See generally DUANE P. SCHULTZ, *THE DOOLITTLE RAID* (1988) (providing a comprehensive history of the raid).

127. *Hirabayashi* Brief, *supra* note 21, at 16.

responded was a landing of a Japanese invasion force on the territory of California, Oregon, or Washington.

The government's emphasis on a Japanese invasion was not lost on the Justices of the Supreme Court. In the published opinions, Justice Douglas's concurrence drove home the threat of invasion most forcefully. "The threat of Japanese invasion of the west coast was not fanciful but real," Justice Douglas maintained, citing no authority but presumably relying on the government's representations of the military situation.<sup>128</sup> He approvingly cited the opinion of the United States District Court for the Western District of Oregon in *Yasui v. United States* for the propositions that all of the zones subject to General DeWitt's orders were " 'threatened during this period with a full scale invasion,' " a danger that was " 'imminent and immediate.' " <sup>129</sup> In Justice Douglas's view, "national survival [was] at stake"<sup>130</sup> with " 'invasion imminent.' " <sup>131</sup>

Chief Justice Stone's majority opinion was only slightly less emphatic in taking judicial notice that the West Coast was facing a threat of Japanese invasion. It "c[ould] not be doubted," he wrote for the Court, that military officials "had ample ground for concluding that they must face the danger of invasion."<sup>132</sup> In this "time of war and threatened invasion," military officials did not violate the Constitution by drawing a racial line that would be impermissible in calmer times.<sup>133</sup> After all, experience showed that those with "ethnic affiliations with an invading enemy" posed "a greater source of danger than those of a different ancestry," said the Chief Justice.<sup>134</sup> The majority opinion did hedge its bets a bit more than Justice Douglas's concurrence; twice it referenced a possibility of "air raids" alongside that of invasion.<sup>135</sup> But the central risk—and the central justification for the race-based curfew—was invasion. In an important passage, Chief Justice Stone acknowledged that a "[d]istinction

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128. *Hirabayashi v. United States*, 320 U.S. 81, 105 (1943) (Douglas, J., concurring). It is also possible that Justice Douglas derived some of his confidence from his own extracurricular contacts with John DeWitt. See IRONS, *supra* note 15, at 238 ("Douglas encountered DeWitt on the West Coast the previous summer and he filled him with horrible stories about Japanese submarines lurking off the coast.").

129. *Hirabayashi*, 320 U.S. at 105 n.1 (quoting *United States v. Yasui*, 48 F. Supp. 40, 44–45 (W.D. Or. 1942)).

130. *Id.* at 106.

131. *Id.* at 105 n.1 (quoting *United States v. Yasui*, 48 F. Supp. 40, 45 (W.D. Or. 1942)).

132. *Id.* at 94 (majority opinion).

133. *Id.* at 100.

134. *Id.* at 101.

135. *See id.* at 94, 99.

between citizens solely because of their ancestry” such as the one that General DeWitt’s curfew order drew was “odious to a free people” and ordinarily “a denial of equal protection.”<sup>136</sup> That principle “would be controlling” in *Hirabayashi*, the Chief Justice wrote, “were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion,” required military officials to “scrutinize every relevant fact bearing on . . . loyalty,” including ancestry.<sup>137</sup> The threat to the territorial integrity of the United States was just too big for ordinary equal protection principles to apply.

### III. “DEFENDING AGAINST VERY LITTLE OR NOTHING”: THE REAL SITUATION ON THE WEST COAST

On February 20, 1942, as the ink dried on Executive Order 9066, the office of General George C. Marshall, the Army Chief of Staff, received an urgent message from British Field Marshal Sir John Greer Dill.<sup>138</sup> Dill, who was serving as Britain’s chief military representative in the United States, reported to Marshall that officials in Ottawa would soon be debating the defense of Canada’s Pacific coast, and that in that connection the Canadian Chief of General Staff had “raised . . . [t]he question of the scale of attack on the West Coast.”<sup>139</sup> Dill sought confirmation from Marshall of the validity of the opinion of the British Chiefs of Staff, which he quoted:

So long as the United States maintain a battle fleet in the Pacific, large scale seaborne expeditions against the western seaboard of North America and the employment of capital ship forces in this area are considered impracticable. The most probable enemy threat is carrier-borne air attacks and sporadic naval bombardment, but a small scale destructive raid cannot be ignored. In view of the great distances over which these operations would have to be undertaken it is probably not necessary to provide a strong scale of defence except at selected points of great importance which can be covered by the normal form of coast and air defenses supplemented by mobile land and air striking forces.<sup>140</sup>

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136. *Id.* at 100.

137. *Id.*

138. Letter from J.G. Dill, Field Marshal, British Army, to George C. Marshall, Chief of Staff, War Dep’t (Feb. 20, 1942), *microformed on* Reel 27, Item 1157 (Marshall Center Microfilm).

139. *Id.*

140. *Id.*

Later that same day, Brigadier General Dwight D. Eisenhower, the Assistant Chief of Staff, sent a note to Dill explaining that Marshall had been called away from the office but quoting the precise reply he gave before he left: “I am in concurrence with the conclusions of the British Chiefs of Staff with reference to the Japanese threat to the West Coast.”<sup>141</sup>

In truth, the British Chiefs of Staff’s assessment was an overstatement of the Japanese risk to the coast that American military planners and intelligence officials estimated and were preparing to meet. A variety of formerly secret and classified documents from the period between December of 1941 and March of 1942 reveal that a Japanese invasion of the West Coast was not, as Justice Douglas later wrote in his *Hirabayashi* concurrence, a “real” and “imminent” threat, but virtually no threat at all.

Within the U.S. Army, intelligence about enemy operations was the province of G-2, its intelligence division.<sup>142</sup> That division produced a stream of secret reports cataloguing enemy activity in all theaters of operation and describing “enemy capabilities” for future action. A review of the reports from the relevant time period reveals that G-2 never even mentioned the possibility of an invasion of the West Coast.

From December 10, 1941, through December 23, 1941, G-2 reported only sporadic enemy submarine activity off the Pacific Coast and virtually no enemy activity in Hawaii.<sup>143</sup> In its December 23 summary, G-2 listed the following as “enemy capabilities”:

- (1) Surprise attacks against HAWAII or any portion of the PACIFIC COAST, including the PANAMA CANAL and ALASKA, by air, or possibly, by naval action.
- (2) Harassing attacks by submarines or surface craft, including commerce raiders, against shipping in the Pacific Ocean east of 170° West Meridian.
- (3) Greatly intensified attacks of MALAYA, BORNEO and PHILIPPINES and other objectives in the FAR EAST.

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141. Memorandum from Dwight D. Eisenhower, Assistant Chief of Staff, War Dep’t, to J.G. Dill, Field Marshal, British Army (Feb. 20, 1942), *microformed on* Reel 27, Item 1157 (Marshall Center Microfilm).

142. See BRUCE BIDWELL, *HISTORY OF THE MILITARY INTELLIGENCE DIVISION, DEPARTMENT OF THE ARMY GENERAL STAFF, 1775–1941*, at 117 (1986).

143. See G-2 Estimates Nos. 5–18, Dec. 10–23, 1941, at 1, National Archives and Records Administration, College Park, Maryland [hereinafter NARA College Park], Record Group [hereinafter RG] 499, Entry 128.

(4) Attacks on the Maritime Provinces of eastern SIBERIA to eliminate menacing Russian air power, while continuing action elsewhere.<sup>144</sup>

G-2 noted, however, that “negative reports” as to items (1) and (4) on the list—attacks on the Pacific Coast and Siberia—led “to the assumption that Japan [would] confine itself” to items (2) and (3) “for the present.”<sup>145</sup>

Intelligence reports remained more or less the same in the period from December 24, 1941, through January 3, 1942<sup>146</sup>: sporadic suspicions of submarine activity off the Pacific Coast and around Hawaii and, on January 1, certain “indications” of surface vessels “both near and distant from the California coast” that went uncorroborated.<sup>147</sup> G-2’s overall estimate of “enemy capabilities” in this period did not change. “Surprise attacks” along the coast by carrier-borne aircraft, possibly accompanied by naval action, remained a Japanese “capability,” the intelligence division reported on January 3, 1942, but G-2 did not believe that the Japanese military actually contemplated such activity at the time.<sup>148</sup>

On January 14, 1942, G-2 reported speculation that the “Axis” might be planning a “surprise attack with dramatic timing against our important installations including important aircraft industries and naval establishments either in the continental UNITED STATES or elsewhere” in order to subvert pan-American unity in connection with a conference opening in Rio de Janeiro on January 15.<sup>149</sup> But we know that G-2 did not think much of this speculation, because that day it revised *downward* the likelihood of enemy activity in its assessment of “enemy capabilities.” While it continued to note an abstract capability of “surprise attacks” by air, but not by land, along the coast, which the Japanese did not intend to pursue, G-2 removed “harassing attacks by submarines or surface craft . . . against shipping” from the list of actions the enemy was likely planning.<sup>150</sup>

For the next month, G-2’s estimates of enemy capability remained the same. G-2 reported speculation of occasional enemy

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144. G-2 Estimate No. 17, 4:00 PM 22 Dec. to 10:00 PM 23 Dec., at 2, NARA College Park, RG 499, Entry 128.

145. *Id.*

146. See G-2 Estimates Nos. 19–27, Dec. 24, 1941 to Jan. 3, 1942, at 1, NARA College Park, RG 499, Entry 128.

147. See G-2 Estimate No. 24, 1:00 PM 31 Dec. to 1:00 PM 1 Jan. 1942, at 1, NARA College Park, RG 499, Entry 128.

148. G-2 Estimate No. 26, Jan. 3, 1942, at 2, NARA College Park, RG 499, Entry 128.

149. G-2 Estimate No. 33, Jan. 14, 1942, at 1, NARA College Park, RG 499, Entry 128.

150. *Id.* at 3.

submarine activity, but little was confirmed, and G-2 noted repeatedly that “no hostile ground forces [we]re believed to be nearer than . . . about 2000 miles west by south of the HAWAIIAN ISLANDS.”<sup>151</sup> The only predicted enemy activity in the Pacific was intensified attacks along its western rim; G-2 did not anticipate “surprise attacks” along the West Coast of the United States by air or sea, harassment of shipping, or attacks on Siberia.<sup>152</sup>

A Japanese submarine’s shelling of an oil refinery near Santa Barbara, California, on February 23, 1942<sup>153</sup> led G-2 to upgrade its assessment of enemy capabilities slightly. In its periodic reports for the interval from February 21 through March 7, G-2 predicted that the enemy would confine itself not just to intensified attacks along the western rim of the Pacific but also to surprise air attacks along the West Coast.<sup>154</sup> But it explained that any such surprise attacks would be “sporadic” and “undertaken as a spectacular stunt in the Axis war of nerves to be renewed at times considered psychological by the Japanese.”<sup>155</sup> By the time of the periodic report for March 14, 1942, G-2 had again dropped surprise coastal air attacks from its list of enemy capabilities that the Japanese were likely to pursue, though it noted that they remained at least possible at “anytime.”<sup>156</sup>

After March 15, G-2’s reports of enemy activity along the West Coast tailed off almost entirely. Most entries were along the lines of “[n]othing to report,”<sup>157</sup> reconnaissance with “negative results,”<sup>158</sup> and “marked decrease in reports of submarines [in the eastern Pacific and

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151. G-2 Periodic Report, 12:00 Noon Jan. 31, 1942, at 1, NARA College Park, RG 499, Entry 125; G-2 Periodic Report, 12:00 Noon Feb. 7, 1942, at 1, NARA College Park, RG 499, Entry 125; G-2 Periodic Report, 12:00 Noon Feb. 14, 1942, at 1, NARA College Park, RG 499, Entry 125.

152. See G-2 Periodic Report, 12:00 Noon Jan. 31, 1942, *supra* note 151, at 1; G-2 Periodic Report, 12:00 Noon Feb. 7, 1942, *supra* note 151, at 1; G-2 Periodic Report, 12:00 Noon Feb. 14, 1942, *supra* note 151, at 1.

153. See *supra* text accompanying note 63.

154. See G-2 Periodic Report, 12:00 Noon Feb. 28, 1942, at 1, NARA College Park, RG 499, Entry 125; G-2 Periodic Report, 12:00 Noon Mar. 7, 1942, at 2, NARA College Park, RG 499, Entry 125.

155. See G-2 Periodic Report, 12:00 Noon Feb. 28, 1942, *supra* note 154, at 4.

156. See G-2 Periodic Report, 12:00 Noon Mar. 14, 1942, at 4, NARA College Park, RG 499, Entry 125.

157. See G-2 Estimate No. 75, Mar. 17, 1942, at 1, NARA College Park, RG 499, Entry 128; G-2 Estimate No. 80, Mar. 25, 1942, at 1, NARA College Park, RG 499, Entry 128; G-2 Estimate No. 84, Apr. 1, 1942, at 1, NARA College Park, RG 499, Entry 128.

158. G-2 Estimate No. 76, Mar. 19, 1942, at 1, NARA College Park, RG 499, Entry 128.

Alaska] during the past week.”<sup>159</sup> Nothing in any of these G-2 reports for March and April—or any of the preceding or following months—indicated any imminent or even foreseeable threat of a Japanese invasion of the West Coast or the presence of any of the manpower or materiel that would be necessary for such an assault.

It was not simply the case that G-2 foresaw no threat of an invasion of the mainland in the key time period of late 1941 and early 1942. In fact, G-2 did not foresee a Japanese invasion *even of the Hawaiian island of Oahu*, thousands of miles closer to Japan. On January 30, 1942, the Army’s War Plans Division asked G-2 for its “estimate of the scale of a Japanese attack which may be made on the Hawaiian Islands within the next three to six months.”<sup>160</sup> G-2’s Executive Officer listed the following three possibilities in reply:

- a. Air and naval raids on outlying islands.
- b. Harassing air and naval raids on Oahu.
- c. Combined air, naval, and ground operations to seize one of the large undefended islands for future use as a base for an attack on the fortress of Oahu.<sup>161</sup>

Naturally, military planners and intelligence officials knew that Yokohama was more than 4,200 miles distant from Seattle and more than 4,500 miles from San Francisco, and that either voyage across the entire Pacific would take at least eighteen days’ sailing at ten knots and fifteen days’ sailing at twelve knots.<sup>162</sup> At a bare operational minimum, any coastal invasion would have required Japanese control of Hawaii, which, at 2,000 miles distant from San Francisco, was still an eight- or nine-day sail away. Yet G-2 did not envision the capacity for a Japanese invasion of Oahu for the three-to-six-month period starting in February of 1942.

This surely helps explain why, in the period in question, the Pacific Coast of the continental United States was officially in “a state of non-invasion” for the purposes of determining unity of command between army and naval forces. Under an April 18, 1942, agreement between Army Chief of Staff George Marshall and Chief of Naval

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159. G-2 Estimate No. 77, Mar. 21, 1942, at 1, NARA College Park, RG 499, Entry 128.

160. Letter from Colonel Ralph G. Smith, Executive Officer of the Assistant Chief of Staff, G-2, to Assistant Chief of Staff, War Plans Division (Jan. 30, 1942), RG 165, WPD General Correspondence, NARA College Park #4544-43, Box 254.

161. *Id.*

162. See Office of the Commanding Gen., W. Def. Command, Current Intelligence Estimate and Intelligence Plan 2 (May 10, 1942), NARA College Park, RG 449, Entry 118, Decimal 381, Box 15.

Operations Ernest King, Army and Navy commanders were to have varying command hierarchies depending on whether a region was in “a state of army-opposed invasion,” “a state of fleet-opposed invasion,” or “a state of non-invasion.”<sup>163</sup> A state of army-opposed invasion was one in which “major landing operations [were] projected by the enemy on or near the territory of the United States”; a state of fleet-opposed invasion was a situation in which “enemy forces in strength have advanced or are expected to advance into the sea areas” of the military command.<sup>164</sup> A state of non-invasion “indicate[d] a condition where operations of the enemy are not projected within the [region], except by raids, submarine operations, or sporadic attacks.”<sup>165</sup> On April 18, 1942, the day the agreement took effect, General Marshall and Admiral King officially declared the Pacific Coast to be in a state of non-invasion,<sup>166</sup> and that designation never changed throughout the war.<sup>167</sup>

Although General DeWitt at the Western Defense Command was privy to G-2’s intelligence reports and estimates of enemy capability, he took at least a slightly more worried view of the Japanese capacity for land-based invasion late in 1941. On December 31, 1941, through the Adjutant General of his Command, DeWitt circulated to all commanding generals under him a memorandum entitled “Defense of the Western Theater.”<sup>168</sup> In describing the need for “[d]efense against external enemies,” the memorandum noted that the only coastal attacks ranking as “probable” were “minor” ones,<sup>169</sup> and then ranked the three types of conceivable attacks in decreasing order of likelihood. “[I]t is apparent,” the memorandum said, “that attacks (raids) by air or air borne troops are the most probable.”<sup>170</sup> “The next most probable attack,” it continued, was “from raids by enemy vessels without any attempt at landing

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163. See CONN ET AL., *supra* note 49, at 43.

164. Western Sea Frontier General Order No. 1-43, Dec. 24, 1942, at 3, NARA College Park, RG 499, Entry 118. The document is dated December 24, 1942, but because the document itself references dates and events that came later than that, the document’s date is surely erroneous.

165. *Id.*

166. *See id.*

167. See CONN ET AL., *supra* note 49, at 43.

168. Letter of Command from Lieutenant Gen. DeWitt, W. Def. Command, through Fred A. Meyer, Assistant Adjutant Gen. to Commanding Gens., W. Def. Command (Dec. 31, 1941), *microformed on* RG 499, Box 14 (NARA College Park).

169. *Id.* at 1.

170. *Id.*

troops.”<sup>171</sup> Finally, the memorandum concluded, “the least probable attack is by landing parties.”<sup>172</sup> But the memorandum conceded that it was “not probable that any landing attempt w[ould] be made unless against a worthwhile objective such as detector stations, marine oil terminals, important factories or manufacturing plants, [or] important utilities.”<sup>173</sup> In places where beaches gave access to those, defense would require “observation, . . . obstacles, and limited field fortifications.”<sup>174</sup> But for beaches that did not give access to such “worthwhile objectives,” the memorandum noted, “observation [was] the only protection necessary.”<sup>175</sup>

To be sure, DeWitt’s assessment at the end of 1941 fell far short of predicting, or even contemplating, an outright invasion of the continental United States; it did nothing more than list targeted landing parties as the least probable of three sorts of “minor” attacks that could be foreseen. Yet even this suggestion ran beyond the G-2 intelligence that might have supported it; as already noted, G-2 never asserted that coastal attacks by Japanese landing parties were probable, or even possible.<sup>176</sup> At the time of DeWitt’s year-end memorandum, G-2 saw no enemy capability beyond “surprise” air attacks, possibly supported by naval action, and it did not think Japan would act on that capability.<sup>177</sup>

DeWitt’s maverick belief in the possibility of even a limited form of land-based coastal attack was not lost on his superiors in Washington, D.C., principally because he tried their patience by asking for more and more soldiers to defend against such an attack. Late in December, for example, DeWitt requested the assignment of many thousands of new troops—“an additional infantry division (triangular), or at least its three infantry regiments,” as well as “a horse-mechanized cavalry regiment.”<sup>178</sup> The request was referred to Lieutenant General Lesley J. McNair, the member of the Army general staff responsible for training and mobilization. Evaluating DeWitt’s request, McNair could not hide his impatience with DeWitt’s demands. “The Western Defense Command is being

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171. *Id.* at 2.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. *See supra* notes 143–59 and accompanying text.

177. *See supra* notes 143–59 and accompanying text.

178. Letter from Lieutenant Gen. L.J. McNair, U.S. Army, to Commanding Gen., Field Forces (Dec. 23, 1941), *microformed on* RG 165, Item 4612-5, Box 259 (NARA College Park).

organized to repel serious landing attacks,” he observed; it already had “six infantry divisions and a great many auxiliary units,” and “[m]ore [were] being requested almost daily.”<sup>179</sup> But, McNair urged, “such a conception of the functions of this command is definitely unsound . . . under the present circumstances,” because “[t]he Pacific Coast . . . seems subject to nothing more serious than air or naval raids.”<sup>180</sup> If the Eastern Theater were also organized on such a scale—and, McNair noted, it would be equally “logical” to do that, presumably because Germany posed an East Coast threat at least equal to Japan’s in the West—then “a large proportion of the troops in [the] continental U.S. [would] be devoted to defending against very little or nothing.”<sup>181</sup> McNair was unequivocal in “recommend[ing] that General DeWitt’s request be denied,” and he pressed further, urging that Army “headquarters undertake a detailed study of the troops required by the Western Defense Command and the Eastern Theater,” with an eye toward bringing those commands into line “with the emphasis to which their importance entitles them.”<sup>182</sup>

“Very little or nothing” was a far cry from the “possible *Japanese invasion* which might have threatened the very integrity of our nation”<sup>183</sup> that Justice Department lawyers trumpeted in their *Hirabayashi* brief. But this was not just the idiosyncratic view of Lieutenant General McNair; Army Chief of Staff George Marshall adopted it as well. On December 31, 1941, Colonel Walter Smith, one of Marshall’s assistants, reported that “General Marshall approves the . . . recommendation that General DeWitt’s request for an additional division be denied and that [General Headquarters] undertake a detailed study of the troops required by the Western Defense Command and the Eastern Theater.”<sup>184</sup> And more ominously for General DeWitt, Colonel Smith reported that the top army general “consider[ed] it important that the role of the Western Defense Command be clarified and generally understood.”<sup>185</sup> General Marshall, in other words, shared General McNair’s view that the Western Defense Command had no business organizing itself to repel

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179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Hirabayashi* Brief, *supra* note 21, at 61 (emphasis added).

184. Letter from Colonel Walter B. Smith, Sec’y, U.S. Army, to Chief of Staff, Gen. Headquarters (Dec. 31, 1941), *microformed on* RG 165, Item 4612-5, Box 259 (NARA College Park).

185. *Id.*

landing attacks that would not materialize, and needed to be retooled to meet the true threat rather than the threat that General DeWitt seemed to imagine.

In aid of “clarifying” the role of the Western Defense Command, General Marshall ordered his Deputy Chief of Staff, Brigadier General Mark W. Clark, to take an inspection trip to the WDC in mid-January of 1942.<sup>186</sup> Marshall directed Clark to focus particularly on whether the Pacific Coast should be stripped of its designation as a “theater of operations,” whether command over troops guarding industrial facilities should be transferred from the WDC to specific Corps Area Commanders, and whether “mobile troops now employed on purely defensive measures” should “gradual[ly be] reduc[ed].”<sup>187</sup> In other words, Marshall was asking Clark to inspect the WDC and advise him on whether and how significantly General DeWitt’s command should be reduced and redirected toward meeting the West Coast’s true security needs.

General Clark scrutinized the situation on the coast for five full days and replied to the Army Chief of Staff by memorandum on January 27, 1942. On the question of stripping the designation of “theater of operations” from the Western Defense Command, Clark was unequivocally in favor: “the theater of operations, which [was] activated on the West Coast pursuant to War Department radio of December 11th, [should] be rescinded.”<sup>188</sup> Clark reported that General DeWitt was “unalterably opposed” to the idea because, among other things, “a theater having just been created, to abolish it so soon thereafter m[ight] have a detrimental effect upon both military and civilian personnel on the Pacific Coast.”<sup>189</sup> But Clark was equally adamant. He noted that a theater of operations had a well-established mission that included management of combat and comprehensive control of most aspects of life in the area under the theater commander’s control. “From a tactical point of view,” Clark insisted, “all that is needed to protect the West Coast is a functional command with the mission of defending the coastal frontier against air and naval surface raids.”<sup>190</sup> The command should therefore be

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186. Telegram from George C. Marshall to Commanding Officer, Barksdale Field (Jan. 18, 1942), *microformed on* Reel 17, Item 706 (Marshall Center Microfilm).

187. *Id.*

188. Memorandum from Brigadier Gen. Mark W. Clark to Gen. George Marshall, *supra* note 55, at 3.

189. *Id.* at 1.

190. *Id.* at 2.

“relatively strong in air, antiaircraft and harbor defense forces, but correspondingly weak in number of mobile troops.”<sup>191</sup>

General Marshall circulated Clark’s recommendations to a number of other units for comment, including the office of Provost Marshal General Allen Gullion. In a memorandum for the Deputy Chief of Staff on February 2, 1942, Gullion howled in protest at Clark’s suggested rescinding of the designation of the Western Defense Command as a theater of operations.<sup>192</sup> The basis of Gullion’s protest was revealing, because it did not dispute Clark’s assessment that the West Coast was in danger of nothing more than air and naval surface raids. At that moment in early February, Gullion and his assistant Karl Bendetsen were locked in conflict with attorneys from the Justice Department over the necessity and legality of removing Japanese Americans from their homes along the coast; they were gearing up to take their case to the President that he should sign what would become Executive Order 9066.<sup>193</sup> What frightened Gullion about Clark’s proposal was *not* that removing the designation of “theater of operations” would heighten the vulnerability of the West Coast to a Japanese invasion. It was that removing that designation would endanger the incipient program *to exclude Japanese Americans*. His reasoning deserves quotation in full:

At the present time, serious consideration is being afforded the mass evacuation of all Japanese from the West Coast, citizen and alien alike. The Attorney General opposes this action and states that so far as American citizens of Japanese extraction are concerned, his Department will have nothing to do with the proposal. . . .

If we do not adhere to the designation “theater of operations,” one of the bases for this action, viz., military necessity, will have been materially weakened. To have designated the Western Defense Command as a theater of operations upon the outbreak of war and subsequently during the progress of the war to have discarded that designation will strengthen the argument of the Attorney General before the President against mass evacuation.<sup>194</sup>

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191. *Id.*

192. Letter from Gen. Allen W. Gullion to Deputy Chief of Staff (Feb. 2, 1942), *microformed on Reel 50, Item 1766, at 2* (Marshall Center Microfilm).

193. See IRONS, *supra* note 15, at 48–58; ROBINSON, *supra* note 69, at 96–106 (discussing the disagreement between Attorney General Francis Biddle and Gullion regarding removal of Japanese Americans).

194. Letter from Gen. Allen W. Gullion to Deputy Chief of Staff, *supra* note 192, at 2.

In other words, the Western Defense Command needed to remain a theater of operations not because Japanese ground troops might come *in*, but because the Provost Marshal General did not want to endanger the plan for kicking Japanese Americans *out*.<sup>195</sup>

In short, the archival records of the secret reports of military intelligence and the classified debates among uniformed personnel about the defense of the West Coast reveal no planning for—or even discussion of—a possible Japanese invasion of the West Coast in late 1941 and early 1942. Neither, it bears emphasizing, do any of the secret records of G-2, the War Plans Division, or Army headquarters reveal any planning for, or even discussion of, the contingency of a land-based invasion of the West Coast at some point in the middle or distant future.<sup>196</sup> One searches these records in vain for evidence that the eviction of Japanese Americans from the coast was one component of a larger contingency plan for the possibility of a coastal invasion. Interestingly, what one does find at this time in the records of war planners is evidence of the earliest preparations for the Allied invasion of Normandy that would eventually occur in 1944.<sup>197</sup> Planners were thus keenly aware of the staggering demands of manpower, machinery, and support that it would take to launch an invasion with a chance at success *simply across the one hundred miles of channel waters that separated England from France*. It is difficult to imagine that those conceptualizing a Normandy invasion in the spring of 1942 could simultaneously have indulged the idea that the Japanese planned to invade California, Oregon, or Washington, or

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195. The War Department never acted directly on General Clark's recommendations; his suggestions were superseded by a more comprehensive set of reorganizations of the War Department and chains of command that unfolded over the months that followed. See CONN ET AL., *supra* note 49, at 37–44. The Western Defense Command remained a “theater of operations” until late October of 1943. See *id.* at 44.

196. On June 7–8, 1942, a small Japanese force invaded the lightly-defended islands of Attu and Kiska at the very western tip of the Aleutian island chain. See PERSONAL JUSTICE DENIED, *supra* note 11, at 321. The Japanese occupation continued until the middle of 1943, when American forces dislodged the Japanese from Attu and the Japanese abandoned Kiska. See *id.* at 322. At the time of the invasion of these remote islands, U.S. military intelligence officials were aware of the likelihood of a Japanese invasion but did not see it as connected to any Japanese objective of invading the continental United States. Rather, military intelligence officials understood the Japanese objectives in the Aleutians as diverting attention from the assault on the Midway Islands, see *id.* at 320, and protecting the flank of an assault on Siberia to eliminate the menace of Russian air power. See Office of the Commanding Gen., W. Def. Command & Fourth Army, Current Intelligence Estimate & Intelligence Plan 13 (May 10, 1942), RG 499, Entry 118, Box 15 (NARA College Park).

197. See Memorandum from the Chief of Staff to the President (1942), *microformed on* Reel 116, Item 2696 (Marshall Center Microfilm).

that the immediate exclusion of Japanese Americans was necessary to prepare against such an invasion.

These reports and debates were all secret and classified. But that does not mean that the truth about the external threat to the West Coast was a secret that the military held tight within itself. The opposite is true: military officials briefed members of the House of Representatives and the Senate about the external threat during the key time period, and candidly told them that the coast was not in danger of invasion.

One of the officials who testified to this effect was none other than General Mark W. Clark, just days after he returned from his January 1942 inspection tour of the Western Defense Command. The occasion was a February 3 meeting of an informal House–Senate Committee on Defense of the West Coast that California Senator Hiram Johnson had appointed a day earlier at a meeting of the House and Senate delegations of the coastal states.<sup>198</sup> Chaired by Senator Rufus Holman of Oregon, this committee’s charge was “to consider immediate plans for an impregnable defense of the Pacific coast,”<sup>199</sup> and its first action was to ask Army Chief of Staff George Marshall and Chief of Naval Operations Harold Stark to appear before it and explain the threat to the West Coast and the preparedness of the military to meet it.<sup>200</sup> Admiral Stark attended in person; Marshall sent his deputy, General Clark.<sup>201</sup>

Testimony at the February 3 meeting was not recorded because of the need for confidentiality, but the substance of Stark’s and Clark’s comments survives in notes taken by Senator Homer T. Bone of Washington and in a letter written by the committee’s chairman, Senator Holman, to Senator Hiram Johnson. According to Senator Bone, writing the day after the meeting, both Clark and Stark told the gathered Senators and Representatives that “an invasion effort was

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198. See H.R. 1911, 77th Cong. 3 (2d Sess. 1942). The committee consisted of Senators Rufus Holman, Charles McNary, and Homer Bone, and Representatives John Tolan, Edward Izac, Albert Carter, Harry Englebright, Frank Buck, Carl Hinshaw, Charles Kramer, and Ward Johnson of California, Martin Smith, Charles Leavy, and Henry Jackson of Washington, James Mott of Oregon, and Anthony Dimond of Alaska. See Letter from Senator Hiram W. Johnson to Senator Rufus C. Holman (Feb. 3, 1942), *microformed on* Reel 10, frame 443 (NARA).

199. See H.R. 1911, at 2.

200. See Letter from Senator Hiram W. Johnson to Senator Rufus C. Holman, *supra* note 198.

201. See Memorandum from H.T.B. 1 (Feb. 4, 1942), *microformed on* Records of the Japanese Evacuation and Resettlement Study [hereinafter JERS], Reel 4, frame 277b (Bancroft Library).

out of the question” and “was not expected by the military or naval administration.”<sup>202</sup> “The most the enemy could hope to do,” the military officials stated, “would be to possibly have a submarine throw a few shells into some city which would be a futile operation from the standpoint of practical results.”<sup>203</sup> They conceded that “it was also remotely possible that what amounts to a ‘landing party’ of a handful of men might attempt a pure ‘suicide operation’ on the beach somewhere but they would be mopped up before they would be able to reach any objective worthy of mention.”<sup>204</sup> Senator Holman’s letter, drafted six days after the meeting, was consistent with Bone’s notes. “Admiral Stark expressed the opinion that it would be impossible for the enemy to engage in a sustained attack on the Pacific Coast at the present time,”<sup>205</sup> Holman wrote. Holman’s recollection was that Stark had described “sporadic raids” as “possible, and perhaps even probable,” but Stark had also “emphasized . . . that such raids would be sporadic and would have little, if any, bearing on the course of the war.”<sup>206</sup>

What is most striking about this congressional testimony from Admiral Stark and especially from General Clark, who had just completed an inspection of the Western Defense Command and was privately urging its termination as a theater of operations, is its consistency with the intelligence data of the time. The opinion that G-2 was reporting to the War Department’s top brass in the early months of 1942 was that sporadic harassing air- and naval-supported raids on the Pacific Coast were possible, but G-2 foresaw no risk of a Japanese invasion.<sup>207</sup> This is precisely what Clark and Stark shared with Senator Holman’s committee; they neither overdramatized nor underplayed the external threat to the West Coast as the military knew it. It was therefore not just a strict military secret in the late

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202. *Id.*

203. *Id.*

204. *Id.*

205. Letter from Senator Rufus C. Holman to Senator Hiram W. Johnson 1 (Feb. 9, 1942), *microformed on JERS*, Reel 4, frame 283b–284a (Bancroft Library).

206. *Id.* at 1–2. To much the same effect was a letter from Rufus Holman to Navy Secretary Frank Knox on February 27, 1942, in which Holman complained about rumored plans to shift some of the operations of West Coast industries inland as a protective measure. “If we have a Navy in the Pacific and if we have any reasonable quantity of airplanes available for offensive or defensive purposes,” Holman wrote, “it seems clear to us as laymen that the only likelihood of air attack from the Japanese will be a possible occasional token bomb by some small aircraft carrier bent on a suicide mission,” which “could not be other than a minor menace to our industries, in its worst aspect.” Letter from Senator Rufus C. Holman to Frank Knox, Sec’y of the Navy (Feb. 27, 1942), *microformed on CWRIC Papers*, Reel 10, frame 448 (NARA).

207. *See supra* text accompanying notes 149–59.

winter of 1942 that the West Coast faced nothing like the threat of invasion that the government's *Hirabayashi* submissions would later emphasize. Members of Congress knew this as well.

There is only one place in the historical record of the time where a top government official mused about a threat of a Japanese invasion of the West Coast, but it was not in an official document. It was, rather, in a private diary—that of Secretary of War Henry Stimson. The seventy-four-year-old Cabinet member wrote the following in his entry for February 10, 1942, a day when he had spent time with his top deputy John J. McCloy going over maps of the West Coast that showed the areas from which General DeWitt wanted the Japanese excluded:

[The dangers posed by Americans citizens of Japanese ancestry] are a terrific problem, particularly as I think it is quite within the bounds of possibility that *if the Japanese should get naval dominance in the Pacific they would try an invasion of this country*; and if they did, we would have a tough job meeting them. The people of the United States have made an enormous mistake in underestimating the Japanese. They are now beginning to learn their mistake. Many times during recent months I have recalled meeting Homer Lea when I was Secretary of War under Mr. Taft. He was a little humpback man who wrote a book on the Japanese peril entitled “The Valor of Ignorance”. In those days the book seemed fantastic. Now the things which he prophesied seem quite possible.<sup>208</sup>

What Homer Lea had “prophesied” in *The Valor of Ignorance* was an all-out Japanese onslaught on California, Oregon, and Washington—an invasion by hundreds of thousands of Japanese troops that, because of Japanese might and American unpreparedness, would net the invaders first the Pacific Northwest, then Los Angeles and Southern California, and finally San Francisco and northern California.<sup>209</sup> With the western states captured, Japan would set up an impenetrable defensive barrier along the mountains to the east of the captured territory; American forces would not only fail to reclaim its conquered western flank but would tumble into internal disarray, with the result that “this heterogeneous Republic, in its principles,

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208. Diary of Henry L. Stimson (Feb. 10, 1942), *microformed on CWRIC Papers*, Reel 17, frame 202 (NARA) (emphasis added).

209. See HOMER LEA, *THE VALOR OF IGNORANCE* 256–308 (1909).

shall disintegrate, and again into the palm of re-established monarchy pay the toll of its vanity and its scorn.”<sup>210</sup>

The fears of a Japanese invasion that Henry Stimson voiced to himself in his diary on February 10 were at odds with every piece of military intelligence flowing through the department he headed. To be sure, Stimson premised his fears on the counterfactual assumption of Japanese naval dominance in the Pacific Ocean; that assumption took his musings out of direct conflict with the contemporaneous views and plans of the Army’s Chief of Staff, the Chief of Naval Operations, the Army’s G-2 division, and the War Plans Division. But the source of Stimson’s worries—Homer Lea’s panicked image of an invading Yellow Peril leaving “[t]he towns along the seaboard of the Pacific coast . . . destroyed and the American flag . . . no longer . . . loitering over the wide waters of this sea”<sup>211</sup>—provides us with at least a hint of one thing that might have led government lawyers to regale the Supreme Court in *Hirabayashi* with a scary story of plans to meet a threatened invasion that did not exist.

#### IV. WHAT THE LAWYERS KNEW, AND WHEN THEY KNEW IT

It would not be an exaggeration to say that the only official government documents of the World War II era in which anyone expressed a worry about an invasion of the West Coast in late 1941 and early 1942 were the government’s submissions to the Supreme Court in the *Hirabayashi* case, where, as noted earlier, lawyers elevated a Japanese invasion to the central threat facing that region.<sup>212</sup> At first glance, this might seem an entirely innocent, or at least excusable, deviation from military reality. Justice Department lawyers were naturally not on the distribution list for G-2’s intelligence reports on enemy capabilities, just as they were not party to the internal debates on General Clark’s proposal that the Western Defense Command be stripped of its designation as a theater of operations to bring it into alignment with the rather modest external threat of sporadic air raids that the coast actually faced. Moreover, as noted earlier, Justice Department lawyers adopted a strategy of asking the Supreme Court to take judicial notice of the security situation on the West Coast.<sup>213</sup> This allowed the lawyers to build their account of the external risk to the coast by citing newspaper articles

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210. *Id.* at 308.

211. *Id.* at 36.

212. In referring to “official” documents, I do not here include Henry Stimson’s private diary. *See supra* text accompanying note 208.

213. *See supra* text accompanying notes 86–91.

and other allegations in the public domain rather than military documents.

But the possibility of wholly unwitting attorney error is shattered by other important archival documents. These records reveal that the lawyers who drafted the submissions in *Hirabayashi* were on notice that the military was not in fact anticipating, or even envisioning, a Japanese invasion. While the lawyers were not privy to the raw intelligence data, they did learn the conclusions that top military officials drew from that data. And they knew that those conclusions were far less dire than the emergency they depicted in their *Hirabayashi* submissions.

As noted earlier, Admiral Stark and General Clark told the ad hoc House–Senate Committee on Defense of the West Coast that “an invasion effort was out of the question”<sup>214</sup> on February 3, 1942. Two days later, several Justice Department officials appeared before a different ad hoc House–Senate Committee made up of members of the West Coast congressional delegations; this committee’s charge was to investigate “question[s] of enemy alien and sabotage control” along the West Coast.<sup>215</sup> Appearing for the Justice Department were Attorney General Francis Biddle, Assistant Attorney General James Rowe, Justice Department attorney Philip Burling, and Assistant Attorney General Edward Ennis, the director of the Justice Department’s Enemy Alien Control Unit.<sup>216</sup> (Ennis and Burling would both sign the government’s brief in *Hirabayashi* in May of 1943.)<sup>217</sup> Here the lawyers got their first glimpse of the true coastal threat that the military understood the country to be facing. The Attorney General emphasized to the committee that while the Justice Department had been quick to take action against Japanese aliens in the “prohibited areas” that the military had thus far designated, the evacuation of United States citizens was a different matter: “[i]f there [was] to be wholesale evacuation[,]” the surviving notes of the meeting have the Attorney General saying, “such a tremendous job must devolve on the Army,” which “must determine the risk and undertake the responsibility for evacuating citizens of Japanese descent.”<sup>218</sup> Republican Congressman Richard Welch of California

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214. See *supra* note 202 and accompanying text.

215. See H.R. 1911, 77th Cong. 2 (2d Sess. 1942).

216. See Notes of the Meeting of the Committee on Alien Enemies and Sabotage 5 (Feb. 5, 1942), *microformed on* JERS, Reel 4, frame 281b (NARA).

217. See *Hirabayashi* Brief, *supra* note 21, at 82.

218. Notes of the Meeting of the Committee on Alien Enemies and Sabotage, *supra* note 216, at 5.

then “pointed out that he had asked the Army and Navy if there was any possibility of a raid on the West Coast and . . . they had replied negatively . . . .”<sup>219</sup>

It is important not to make too much of this statement by Congressman Welch to the Attorney General. We cannot be sure that it was recorded with precision by the anonymous note-taker at the committee hearing, and there is reason to suspect that it may not have been, since Admiral Stark and General Clark had told the other joint House–Senate committee two days earlier that the military *did* anticipate Japanese “raids,” but not an invasion.<sup>220</sup> In addition, Congressman Welch appears to have cited this military conclusion skeptically, since he went on to note that “the Army had moved the headquarters of the 9th Corps Area from the Presidio in San Francisco to Salt Lake City,”<sup>221</sup> an odd thing to do if the military was not expecting Japanese “raids.” Finally, what Welch was relating was hearsay. Still, his statement to the Attorney General, in the presence of Ennis and Burling, at least suggests that those lawyers knew as early as February of 1942 that the military was not anticipating a Japanese invasion of the West Coast.

Evidence from the fall of 1942, however, makes this much clearer. Late in September, a young graduate student named Morton Grodzins travelled to Washington, D.C., from the University of California at Berkeley to gather data for the Japanese Evacuation and Resettlement Study (“JERS”), a research project that was examining the genesis of the program to exclude Japanese Americans from the coast.<sup>222</sup> During this trip, Grodzins managed to obtain extraordinary access to many top legislative and executive branch officials, including influential members of the House and Senate and top lawyers at the Justice Department. Grodzins’s working hypothesis was that political pressure played a far greater explanatory role in the creation of the exclusion policy than was then generally understood. In response to Grodzins’s requests, most members of the West Coast congressional delegations allowed the graduate student to examine, catalogue, and even copy their files from the period in the late winter of 1942—then just eight months or so earlier—when the Japanese American policy had been set. The records they supplied included the

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219. *Id.*

220. *See supra* note 206 and accompanying text.

221. Notes of the Meeting of the Committee on Alien Enemies and Sabotage, *supra* note 216, at 5.

222. A good source on the Japanese Evacuation and Resettlement Study is VIEWS FROM WITHIN: THE JAPANESE AMERICAN EVACUATION AND RESETTLEMENT STUDY (Yuji Ichioka ed., 1989).

correspondence they had received from individual constituents and lobbying groups as well as the minutes and memoranda of the several formal and informal congressional committees that had formed in February of 1942 to examine the adequacy of coastal defenses and the risks of Japanese American sabotage and espionage.<sup>223</sup> At the same time, Grodzins was having lengthy discussions with Justice Department lawyers, including Edward Ennis of the Alien Enemy Control Unit, and profiting from astonishing access to Justice Department records.

By October 10, 1942, Grodzins had had the chance to review and copy the records of Senator Hiram Johnson of California, who very early in February had convened the two ad-hoc House-Senate committees on coastal defense and on espionage and sabotage, as well as the records of Senator Rufus Holman of Oregon, the chair of the coastal defense committee, and Mon Wallgren of Washington, who had chaired the committee on espionage and sabotage. The records that Grodzins gathered included Senator Homer T. Bone's notes of the February 3 meeting of Senator Holman's committee indicating that General Mark Clark and Admiral Harold Stark had deemed a Japanese invasion "out of the question."<sup>224</sup> They also included Senator Holman's February 9 letter to Senator Johnson relating that Admiral Stark had described a "sustained attack" on the coast as "impossible" when he spoke to the coastal defense committee and had instead reported that the military envisioned only "sporadic raids" with "little, if any, bearing on the course of the war."<sup>225</sup>

On October 10, Grodzins sat down for a session with Edward Ennis of the Justice Department.<sup>226</sup> Sadly, Grodzins's notes of that interview do not survive, but several days later, while writing notes of meetings on October 13 with legislators, Grodzins dashed off a note to himself—presumably a reminder of an important exchange from

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223. Some of these materials are preserved in the records of the Japanese Evacuation and Resettlement Study. *See, e.g.*, JERS, Reel 4, frames 277b–284a (Bancroft Library).

224. Memorandum from H.T.B., *supra* note 201, at 1.

225. Letter from Senator Rufus Holman to Senator Hiram W. Johnson, *supra* note 205, at 1–2.

226. *See* Handwritten Note, JERS, Reel 10, frame 385; GRODZINS IN WASHINGTON REPORT #13, at 4–5, (Oct. 12, 1942), CWRIC Papers, Reel 10, frames 394–95 (Bancroft Library).

his October 10 conversation with Ennis that he had neglected to write down earlier.<sup>227</sup> This is what Grodzins wrote:

Note on talk to Ennis, Oct. 10: I asked Ennis about the congressional response to the testimony of Admiral Stark to the effect that the West Coast could not be successfully attacked in force: "The congressmen simply told the Navy representative to go to hell and that ~~he~~ Stark didn't know what he was talking about. They pointed out the errors at Pearl Harbor and said that they refused to accept his professional advice. Their attitude was 'we know better: we refuse to have another Pearl Harbor in Los Angeles.'"<sup>228</sup>

This is a very important jotting. At a bare minimum, it demonstrates that by October 10, 1942—many months before the drafting and filing of the government's brief in *Hirabayashi*—Edward Ennis knew that the Chief of Naval Operations had told legislators in early February of 1942 that Japan could not attack the West Coast in force. But it is also quite likely that Ennis knew even more than this about those early February discussions in the congressional committee. We know that Grodzins had already obtained copies of notes and memoranda about those discussions, and while we cannot be certain that Grodzins shared those with Ennis that day, we do know that he had a strong and cooperative relationship with the Justice Department lawyers and that he shared his findings with them on other occasions. More importantly, though, it is crucial to note the precise question that Grodzins asked Ennis and the precise answer that Ennis gave. Grodzins did not ask Ennis whether he knew what Admiral Stark had said to the congressmen about the external threat to the coast; he asked Ennis *what the congressmen's response to that testimony had been*. And Ennis answered fully, telling the researcher that the congressmen had dismissed the military's views. Clearly, then, Ennis *already knew* what had transpired before the House–Senate committee on February 3; he did not learn it from Grodzins. He knew that two of the highest-ranking officers in the Army and Navy reported the military's assessment at that time that the Japanese could not manage an assault on the West Coast larger than mere raids. The historical record does not allow us to know exactly when Edward Ennis learned this, though one reasonable possibility is that he learned it just two days after it happened, on February 5, 1942, when Ennis himself went to Capitol Hill along with the Attorney

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227. See Letter from Senator Rufus Holman to Senator Hiram W. Johnson, *supra* note 205, at 1.

228. *Id.* The word "he" is lined out in the original, and "Stark" is added in handwriting.

General and Philip Burling to testify to members of those same West Coast delegations about the dangers of sabotage and espionage.

The precise date is not important, however. What matters is that Edward Ennis knew all of this *long* before the *Hirabayashi* case even reached the Supreme Court. This evidence reveals that when Ennis and Burling signed a brief contending that the “principal danger to be apprehended was a Japanese invasion,”<sup>229</sup> Ennis (and probably Burling) had reason to know that the military was *not* planning to meet a Japanese invasion. They urged the Court to take judicial notice of a military “fact” that they knew top military officials had told Congress was not a fact.<sup>230</sup>

#### V. DID THE LAWYERS LIE?

It would be easy at this point to charge the Justice Department lawyers with *lying* to the Supreme Court in *Hirabayashi* about the threat of a Japanese invasion. This Article has marshaled circumstantial evidence that their “judicial notice” strategy allowed them to depict as true something they knew to be false. That certainly sounds like a lie.

There is, however, reason to pause before leveling such a charge at these lawyers, and it goes beyond the general hesitation that ought to accompany any charge of willful deception by a lawyer. The reason is that the literature has given us a very different narrative about Edward Ennis and his work on matters involving Japanese Americans in World War II. In this narrative, he was something much closer to a hero than a villain. We know that in early February of 1942, Ennis opposed the military’s plan for mass exclusion and fought to prevent it. At the conclusion of the meeting in which he lost that fight, he had been so angry that he had “almost wept” on the taxi ride back to his

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229. *Hirabayashi* Brief, *supra* note 21, at 65.

230. It is a shame that the notes of Morton Grodzins’s October 10 meeting with Ennis have been lost, because Grodzins eventually claimed that at that meeting, Ennis drew an explicit connection between the testimony of Stark and Clark to the Wallgren committee and the foundation of the mass exclusion program. In *Americans Betrayed*, Grodzins writes that “Edward Ennis . . . pointed out that this testimony *destroyed one of the main arguments for mass evacuation of Japanese citizens and aliens*, i.e., that an organized fifth column could spring up at the point of an enemy attack.” GRODZINS, *supra* note 69, at 74. Grodzins here cites to his now-lost field notes of his October 10 meeting, so it is impossible to know whether these words were Grodzins’s or Ennis’s. If they were Ennis’s, that would show even more clearly Ennis’s awareness of the gap between what he knew military officials said about the external threat in early 1942 and what appeared in the *Hirabayashi* brief.

office and had to be “convince[d] . . . that it was not important enough to make him quit his job.”<sup>231</sup>

In addition, as Peter Irons explains in *Justice at War*, the definitive account of the Supreme Court litigation, in 1943 and 1944 Ennis came into possession of materials that undermined the accuracy of the military’s negative assessments of the loyalties of Japanese Americans, and pressed Charles Fahy, the Solicitor General, to bring the government’s submissions into line with those materials.<sup>232</sup> Ennis pressed only mildly in the *Hirabayashi* litigation, because the material he then had at hand, reports of the opinion of a naval intelligence officer on Japanese Americans’ loyalties that was more sanguine than the military had thus far provided, was in tension with the tone of the *Hirabayashi* brief but did not flatly contradict it.<sup>233</sup> He and Burling objected far more loudly in the *Korematsu* litigation in 1944 when they battled to prevent the Solicitor General from relying on allegations of subversive activity by Japanese Americans in a self-serving report by General DeWitt that the lawyers knew to be inaccurate.<sup>234</sup> They went so far as to threaten not to sign the *Korematsu* brief because of its tendency to mislead the Court on the degree of internal risk that Japanese Americans posed,<sup>235</sup> and ultimately signed a modified version of that brief only out of institutional loyalty.<sup>236</sup> In later years, Ennis—who served for many years after the war as the general counsel to the American Civil Liberties Union<sup>237</sup>—expressed regret that he and Burling had not resigned in protest rather than continuing to work on the defense of the Japanese American cases.<sup>238</sup>

Ennis thus proved himself to be sensitive to the illegality of the military’s treatment of citizens and to its misrepresentations on the question of *internal* security risks. The literature depicts him as neither an unscrupulous man nor an unethical lawyer; indeed, within the wartime Justice Department, he emerges as perhaps the most ethically attuned member of the staff. Yet in May of 1943, he signed his name to the government’s brief in *Hirabayashi*, with information

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231. IRONS, *supra* note 15, at 62 (quoting Ennis’s Justice Department colleague James Rowe).

232. *See id.* at 278–93.

233. *See id.* at 202–06.

234. *See id.* at 278–92.

235. *See id.* at 290.

236. *See id.* at 292.

237. *See id.* at 349.

238. *See id.* at 350–51.

at hand that contradicted the brief's fear-mongering about a Japanese invasion of the West Coast. How can we explain this paradox?

One possibility is that Ennis did not feel he had a firm enough foundation to complain about the inaccuracy of the *Hirabayashi* brief's assertions about a Japanese invasion. As noted earlier, neither Ennis nor any other Justice Department lawyer was party to the raw military intelligence reports or to the internal military memoranda that revealed the absence of planning for, or discussion of, a Japanese invasion. The historical record proves only that Grodzins *told* Edward Ennis in the fall of 1942 that top military officials had asserted to Congress that the country faced no invasionary threat. The record suggests, but does not prove, that Ennis received copies of congressional memoranda confirming those assertions from Grodzins at that time, and that Ennis and Burling may also have heard of them from a congressional source all the way back in February of 1942. In the later debates about the *Korematsu* brief, Ennis had more concrete proof of the brief's inaccuracies, in the form of paper copies of versions of General DeWitt's final report and documents from both the FBI and the Federal Communications Commission.<sup>239</sup> Thus, it is possible that the lawyers felt that however inconsistent with reality the *Hirabayashi* brief's "judicial notice" theory was on the question of a Japanese invasion, their evidence of that inconsistency was not concrete enough to take up the chain of Justice Department command.

This, however, seems unlikely. Edward Ennis *did* complain to Solicitor General Charles Fahy during the preparation of the *Hirabayashi* brief about potential misrepresentations on a different matter, and did so on the strength of data he acknowledged to be less than concrete. In October of 1942, *Harper's Magazine* published an anonymous report by "An Intelligence Officer" asserting that only a subset of Japanese Americans posed a security threat in early 1942, and that it would have been possible for the military to identify that sub-group rather than excluding the group en masse.<sup>240</sup> Shortly before the Solicitor General's Office filed the brief, Ennis learned that the anonymous author of the *Harper's* article was Kenneth Ringle, an official in the Office of Naval Intelligence, and that Ringle had said similar things in a memorandum he had prepared for the War

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239. *See id.* at 278–302.

240. *See* An Intelligence Officer, *The Japanese in America: The Problem and a Solution*, HARPER'S, Oct. 1942, at 489, 490–93.

Relocation Authority.<sup>241</sup> These allegations were in tension with the then-circulating draft of the *Hirabayashi* brief, which maintained that individual screening had not been feasible. Ennis took the initiative to bring these inconsistencies to the attention of the Solicitor General, saying that the brief's failure to mention Ringle's WRA memorandum "might approximate the suppression of evidence."<sup>242</sup> Ennis was comfortable making this charge because, he explained to Fahy, he had been "*most informally*, but altogether reliably, advised that both the article and the WRA memorandum prepared by Ringle represent the views, if not of the Navy, at least of those Naval intelligence officers in charge of Japanese counter-intelligence work."<sup>243</sup> If Ennis was comfortable going to Fahy when only informally made aware of this military opinion contradicting the brief, it is hard to understand why he would have refrained from mentioning the inconsistency on the threat of invasion for fear that his evidence of the military's view was insufficiently formal and concrete.

There is, however, another possibility, one that reconciles the lawyers' complicity in misrepresenting the external threat with their vigilance against misrepresenting the internal threat. It may be that Edward Ennis never really came to sense an inconsistency between the *Hirabayashi* brief and the military reality on the question of a Japanese invasion. The *objective* inconsistency between those things may never have entered his *subjective* awareness; he may have continued to believe that military officials in early 1942 were preparing to meet a Japanese invasion even after learning that top army and navy officials had told Congress otherwise. This theory has two components, one of them documentable and one speculative.

What is documentable is that however vigilant Edward Ennis may have been for military caricatures of Japanese Americans, he had little trouble standing up in court in defense of exceedingly broad claims of military power and necessity. Even though he acknowledged in an August 1944 memorandum that military witnesses at trial tended to "go beyond and not correctly reflect the military judgment"<sup>244</sup> of top Army and War Department officials, he willingly

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241. See IRONS, *supra* note 15, at 202–03.

242. See *id.*, at 204 (quoting Memorandum from Edward Ennis, Director, Alien Enemy Control Unit, Justice Department, to Charles Fahy, Solicitor General (Apr. 30, 1943)).

243. See *id.* at 202 (emphasis added) (quoting Memorandum from Edward Ennis, Director, Alien Enemy Control Unit, Justice Department, to Charles Fahy, Solicitor General (Apr. 30, 1943)).

244. ERIC L. MULLER, *AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II* 114 (2007) (quoting Memorandum from

called those witnesses to defend both the military's continued use of martial law in Hawaii as late as April of 1944<sup>245</sup> and the military's program of individually excluding certain Japanese Americans from returning to the West Coast as late as February of 1945.<sup>246</sup> In both cases, Ennis elicited testimony about the supposed continuing (or even escalating) peril facing Hawaii and the West Coast at those late points in the war that strained belief to the breaking point.<sup>247</sup> He did this to support and defend the broadest of military claims of unfettered power over civilians on U.S. territory. Thus, while Ennis may have internally protested the coarsest of the military's racial caricatures of Japanese Americans, he proved himself quite receptive to some of the military's wildest and most self-serving accounts of national security and threats to the coast.

This credulous stance is apparent in the writings of another of the *Hirabayashi* brief's authors, Justice Department attorney Nanette Dembitz. It was Dembitz who had advocated for reliance on the "judicial notice" doctrine in depicting the invasionary threat facing the West Coast.<sup>248</sup> It was also Dembitz who, within months of the Court's *Korematsu* decision, published a law review article sharply criticizing the Court for accepting, rather than testing, the very military judgments imposing racial burdens that she had helped to defend.<sup>249</sup> The article was, in a sense, Dembitz's awkward and thinly veiled *apologia* for her own role in advocating for the mistaken conclusions that the Court had reached, but interestingly, she saw no error in having urged the Court to assume the serious threat of coastal invasion that military leaders had told Congress did not exist. Instead, in the otherwise at least implicitly contrite article, Dembitz

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Edward J. Ennis, Dir., Alien Enemy Control Unit, Justice Dep't, to John L. Burling, Alien Control Unit (Aug. 14, 1944) (on file with the North Carolina Law Review) which quotes Memorandum from Edward J. Ennis, Dir., Alien Enemy Control Unit, Justice Dep't, to John L. Burling, Alien Control Unit (Apr. 14, 1944) (on file with the North Carolina Law Review)).

245. See ROBINSON, *supra* note 67, at 235–36.

246. See MULLER, *supra* note 244, at 124–30.

247. In the Hawaii case, Ennis called Army and Navy officials to testify that in April of 1944, Hawaii remained "vulnerable to invasion, with its safety dependent on military judgment." ROBINSON, *supra* note 67, at 235. Cross-examination devastated these claims. See *id.* at 236. In the West Coast case on individual exclusion in early 1945, Ennis elicited testimony that because of their "banzai" and "face-saving attitude[s]," the Japanese were *likelier* to assault the West Coast as their military fortunes collapsed than they had been earlier in the war. See MULLER, *supra* note 244, at 126.

248. See Memorandum from Nanette Dembitz, Attorney, War Dep't to John L. Burling, Attorney, War Dep't, *supra* note 91, at 17–18.

249. See Dembitz, *supra* note 91, at 224–39.

*defended* that invocation of judicial notice: she wrote that “[t]he only circumstance as to which the military would have had information which could not be disclosed—the danger of invasion—was the one fact on which there was also ample public knowledge . . . .”<sup>250</sup> Like her colleague Edward Ennis, Dembitz seemed to remain willing to believe the worst case scenario for the West Coast’s exposure to Japanese invasion, even as she faulted the military for tendering other distortions and the Court for unquestioningly accepting them.

Thus, it is possible to document a sort of blind spot in the vision of the government lawyers litigating *Hirabayashi*, a proclivity to credit and defend the direst of depictions of external threats to national security and territorial integrity. But we might speculate that this blind spot was especially profound in *Hirabayashi* because the supposedly grave invasionary threat to the coast was a *Japanese* threat. We saw earlier that Secretary of War Henry Stimson allowed himself to muse in his private diary about the possibility of a land-based Japanese invasion in February of 1942, even while all of the data and planning in his department ran in the opposite direction.<sup>251</sup> The touchstone of Stimson’s fears was Homer Lea’s *The Valor of Ignorance*, a small and hysterical volume published in 1909 that predicted a successful Japanese invasion of California, Oregon, and Washington.<sup>252</sup> Stimson’s diary entry did not reflect an idiosyncratic fear; it reflected a ubiquitous characterization of the Japanese (and of Asians generally) that dominated the public culture of the first third of the twentieth century. In modern terms, it was one important component of the racial schema<sup>253</sup> of the “Oriental” that stalked the American mind.

Traveling through China in the late nineteenth century, Rudyard Kipling was moved to observe that while “[t]here are three races who can work,” the Chinese were the only race that could “swarm”; they would “work and spread” and eventually “overwhelm the world.”<sup>254</sup> This was an English-language elaboration on the idea of the “*gelbe Gefahr*,” or “Yellow Peril,” that Kaiser Wilhelm II of Germany envisioned threatening all of Europe in 1895.<sup>255</sup> The idea of the

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250. *Id.* at 206.

251. *See supra* notes 208–211 and accompanying text.

252. *See* LEA, *supra* note 209, *passim*.

253. *See* Kang, *supra* note 17, at 956–57.

254. RUDYARD KIPLING, *FROM SEA TO SEA* 255–56 (Garden City, N.Y., Doubleday McClure & Co. 1899).

255. *See* Stanford M. Lyman, *The “Yellow Peril” Mystique: Origins and Vicissitudes of a Racist Discourse*, 13 INT’L J. POL. CULTURE & SOC. 683, 689 (2000); RICHARD AUSTIN THOMPSON, *THE YELLOW PERIL, 1890–1924*, at 1–2 (1978).

“Yellow Peril” cast people from Asian countries in many of the same ways as the ideology of the day depicted all non-white “others”: incapable of assimilation, impoverished, vile, and terrifyingly fecund. But it added the distinctive feature that Kipling called “swarming”: as Roger Daniels notes, “[o]nly against Orientals was it seriously charged that . . . peaceful immigrants were but a vanguard of an invading horde to come.”<sup>256</sup>

From our early-twenty-first-century American vantage point, it is difficult for us to reconstruct, let alone understand, the racial essentialism that animated the Yellow Peril idea and allowed it to root itself so firmly in the national consciousness. But this was the heyday of the American fascination with the “science” of racial eugenics and its insistence that attributes of personality and tendencies of behavior were racially determined and passed on from generation to generation through the genes.<sup>257</sup> Thinkers in the American mainstream—Brooks Adams, the grandson and great-grandson of American presidents, was one—saw the “white race” in inevitable conflict with the “yellow,” and lesser, race of the East.<sup>258</sup> Adams, writing around the turn of the century, saw the principal danger as an alliance of the Chinese and the Russians; Homer Lea, writing at the end of the twentieth century’s first decade, located the threat in Japan. But one thing that united the various Yellow Peril thinkers was the belief that the fertile Asian peoples posed a population threat to the white or Nordic peoples.<sup>259</sup> Their eastern territory could not contain them; they would seek to spread to lands under white control.

Of course, these were among the views that led American policy to slow and then stop Asian immigration into the United States in the first quarter of the twentieth century.<sup>260</sup> But it is important to note that the Yellow Peril ideology of that era focused not just on the peaceful arrival of immigrants; it led people to dread a forcible military invasion of American territory. The Hearst newspapers gave voice to this terror as early as December of 1906, when the *San Francisco Examiner* ran a front-page story with the headline “Japan

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256. ROGER DANIELS, *THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION* 68 (1962).

257. See ELOF AXEL CARLSON, *THE UNFIT: A HISTORY OF A BAD IDEA* 183–98 (2001).

258. See THOMPSON, *supra* note 255, at 21–31.

259. See *id.* at 63–90.

260. See Keith Aoki, “Foreign-ness” & Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes, 4 *ASIAN PAC. AM. L.J.* 1, 34 (1996).

Sounds Our Coasts,” claiming that “Brown Men Have Maps and Could Land Easily.”<sup>261</sup> Admiral (and Congressman) Richmond Pearson Hobson sounded a more detailed warning in 1907 in a two-part Hearst series that ran under the headline “Japan May Seize the Pacific Slope.”<sup>262</sup> H.G. Wells imagined a combined Japanese–Chinese assault on the West Coast in his popular 1908 novel *The War in the Air*.<sup>263</sup> As noted earlier, Homer Lea charted out the specifics of a three-pronged Japanese invasion of the West Coast in his 1909 work *The Valor of Ignorance*, which would conveniently be reprinted in a new edition in 1942 just after the Japanese attack on Pearl Harbor.<sup>264</sup> Perhaps the most graphic of the peddlers of the invasion story was Lothrop Stoddard, “a founding father of the American eugenics movement,”<sup>265</sup> who presented an invasion of the West Coast as one component of what Robert Lee has aptly called a “racial apocalypse”<sup>266</sup> in which, as Stoddard put it, “[t]he White race and with it a million years of human evolution might soon be irretrievably lost, swamped by the triumphant colored races.”<sup>267</sup> The title of Stoddard’s leading work aptly captured the imagery of the Yellow Peril’s central fear; he called his book *The Rising Tide of Color Against White World-Supremacy*. The Japanese were a *tidal* force, a wave breaking over the dikes protecting white dominance of the North American continent.<sup>268</sup>

There is no reason to think that Edward Ennis or the other *Hirabayashi* brief writers consciously entertained the rabid depictions of the Asian horde that marked the Yellow Peril era, although recent scholarship suggests that Ennis was not immune to racial assumptions about Japanese Americans.<sup>269</sup> But this account of the early-century zeitgeist is what makes Henry Stimson’s February 1942 diary entry so revealing of a turn of thought that may still have been common before Pearl Harbor and that the Japanese attack surely revived. Stimson had access to all of the military’s data and reporting. None of

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261. DANIELS, *supra* note 256, at 70.

262. *Id.* at 71.

263. H.G. WELLS, *THE WAR IN THE AIR passim* (1908).

264. See HOMER LEA, *THE VALOR OF IGNORANCE* (2d ed. 1942) *passim*.

265. ROBERT G. LEE, *ORIENTALS: ASIAN AMERICANS IN POPULAR CULTURE* 136 (1999).

266. *Id.*

267. LOTHROP STODDARD, *THE RISING TIDE OF COLOR AGAINST WHITE WORLD-SUPREMACY* 20 (1920).

268. See *id.* at 225–98. Lyman’s explication of the “Yellow Peril” characterization of the Japanese in *The “Yellow Peril” Mystique* is also thorough and excellent. Lyman, *supra* note 255, at 698–710.

269. See ROBINSON, *supra* note 67, at 236–38.

it foresaw or counseled preparation for a Japanese invasion of the coast. Nonetheless, Stimson's mind wandered to the thirty-plus-year-old, Yellow-Peril-inflected predictions of Homer Lea; suddenly they did not seem to him so fantastical. This is powerful, and unusually direct, evidence of the operation of a racial schema: the uncertainties of the day led Stimson's mind past what he knew to something he had long latently feared, a Japanese invading horde. At least in this private moment of journaling, the schema of the Japanese as an invading racial enemy fought with the facts for primacy in Stimson's mind.

Might this phenomenon have had a broader life than this one brief moment in Henry Stimson's diary? There is no way to know this; we can only speculate.<sup>270</sup> But if it did, it suggests a way to reconcile the otherwise baffling inconsistency in the wartime lawyering on the *Hirabayashi* case. On this view, the lawyers may have been sufficiently aware of certain aspects of the Japanese racial schema to spot them when they surfaced in the military's depiction of the internal risks that Japanese Americans posed. And this speculated awareness led them to fight against the inclusion in the government's brief of facts and arguments that crassly played on the component of the schema that depicted American citizens of Japanese ancestry as racially inscrutable, untrustworthy, and given to subversive and disloyal behavior. But the component of the racial schema that drew Japan as a force bent on territorial invasion may have been too strong in their minds. It may have run too deep and subverted full awareness of the facts they had at hand. It may have led them, after learning that top military officials were neither expecting nor preparing for invasion, to sign a brief depicting the military as "[f]aced with the responsibility of repelling a possible Japanese invasion which might have threatened the very integrity of our nation . . . ."<sup>271</sup>

Looking for a way to rationalize the behavior of Edward Ennis and his colleagues, this Article has roamed far into guesswork. Perhaps it has roamed further than they deserve. The invasion component of the Japanese racial schema was surely powerful in 1942, but it did not prove powerful enough to sway the intelligence analysts of G-2, the military planners in the War Plans Division, or the top brass of the Army and Navy in their evaluations of the

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270. Greg Robinson has persuasively argued that Stimson's boss, President Franklin D. Roosevelt, was quite beset by this racial schema. GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 242-43 (2001).

271. *Hirabayashi* Brief, *supra* note 21, at 61.

Japanese threat to the coast. These military officials and units might have been expected to be at least as susceptible to the invasion schema as were the lawyers in the Justice Department,<sup>272</sup> but they proved themselves able to avoid it in their internal assessments of the Japanese threat. This tends to undermine the idea that the factual assertions in *Hirabayashi* were an unintended presentation of a racial schema rather than conscious misrepresentations.

We will never know for sure what led these lawyers to sign a brief that so vigorously presented facts contradicting what they had reason to know. Perhaps they knew that real military opinion contradicted the brief's claims about invasion but felt that they lacked hard enough data to prove it to their superiors. Perhaps the prevailing racial schema of the invading Oriental somehow blinded them to the falsehood of the *Hirabayashi* brief's dire and alarmist claims about preparations for an invasion. Or, however inconsistent the invasion story was with what military leaders had told Congress, perhaps they saw that they could support that story through judicial notice of "facts" in the public record, and thereby further the interests of their client.<sup>273</sup>

#### VI. THE LESSONS OF THE INVASION EVASION

For more than twenty years, we have known that the litigation of *Korematsu v. United States* was infected by falsehoods. The government misrepresented to the Supreme Court the nature and degree of the internal threat that Japanese Americans posed to the nation's security. Now we also know that the litigation of *Hirabayashi v. United States* was infected by comparable falsehoods about the external threat the nation faced.

To a significant extent, the Court ended up resting its opinion in *Hirabayashi* on those falsehoods. As noted earlier, Chief Justice Stone emphasized the extreme threat to the territory of the

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272. For a discussion of the racial schemas that governed the military's loyalty-screening programs for Japanese Americans in World War II, see MULLER, *supra* note 244, at 16–20, 42–44.

273. This Article has focused on the civilian attorneys in the Justice Department who drafted and signed the *Hirabayashi* brief. It does not address the roles of lawyers outside the Justice Department, particularly in the military and the War Relocation Authority, who may have reviewed and commented on drafts of the brief, particularly the section concerning the threat of invasion. The archival record does not reveal any commentary on the brief's invasion allegations from those quarters. It stands to reason, however, that lawyers in the offices of the Army Judge Advocate General and the Assistant Secretary of War would have been at least as aware of the inaccuracy of the invasion theory as the Justice Department lawyers were.

continental United States in evaluating the reasonableness of the curfew order that Gordon Hirabayashi had defied.<sup>274</sup> As Stone framed the Court's opinion, it was that extreme territorial threat—the invasion risk that concurring Justice Douglas insisted was “not fanciful but real”<sup>275</sup>—that disengaged the ordinary equal protection norm condemning ancestry-based distinctions.

Can we say that these misrepresentations about invasion *caused* the Supreme Court to uphold Gordon Hirabayashi's conviction for violating the curfew? This is closely related to the question so thoroughly mooted by Professor Jerry Kang in *Denying Prejudice*: did the government's deceptions in the Japanese American cases of World War II, including *Hirabayashi*, cause legal prejudice to the litigants, in the sense of operating as a “but-for” cause of the Court's decision to uphold the wartime measures at issue?<sup>276</sup> To varying degrees, the courts that granted writs of error coram nobis to Gordon Hirabayashi and Fred Korematsu in the 1980s found that the government's misrepresentations about the internal threat that Japanese Americans posed approached that degree of prejudice.<sup>277</sup> While the courts ultimately finessed the precise question of legal prejudice, both courts clearly labeled the government misconduct as

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274. See *supra* notes 132–136 and accompanying text.

275. *Hirabayashi v. United States*, 320 U.S. 81, 105 (1943) (Douglas, J., concurring). Several decades later, with *Hirabayashi* and *Korematsu* under attack, Justice Douglas dug in his heels and defended the decisions, making even greater claims about the military's fear of an imminent coastal invasion than the government had actually dared to make in 1943. See *DeFunis v. Odegaard*, 416 U.S. 312, 339 n.20 (1974) (Douglas, J., dissenting). “We were advised on oral argument,” Douglas recalled,

that if the Japanese landed troops on our west coast nothing could stop them west of the Rockies. The military judgment was that, to aid in the prospective defense of the west coast, the enclaves of Americans of Japanese ancestry should be moved inland, lest the invaders by donning civilian clothes would wreak even more serious havoc on our western ports. The decisions were extreme and went to the verge of wartime power; and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country. While our Joint Chiefs of Staff were worrying about Japanese soldiers landing on the west coast, they actually were landing in Burma and at Kota Bharu in Malaya. But those making plans for the defense of the Nation had no such knowledge and were planning for the worst.

*Id.*

276. See Kang, *supra* note 17, at 979–97.

277. See *Hirabayashi v. United States*, 828 F.2d 591, 601–03 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406, 1418–19 (N.D. Cal. 1984). A district court vacated Minoru Yasui's conviction without addressing the question of prejudice. See ERIC K. YAMAMOTO ET AL., RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 318 (2001).

“critical”<sup>278</sup> and as “profoundly and materially affect[ing]” the outcome.<sup>279</sup>

Kang disagrees; in his view, to attribute responsibility for the bad outcomes in the wartime cases to the misrepresentations of government lawyers about the supposed internal threat of Japanese Americans is to collaborate in a historical whitewashing of the Court’s own responsibility for those outcomes.<sup>280</sup> He notes, among other things, that the Court was a highly independent agent in the Japanese American cases, working hard, and even twisting appellate procedure, to segment the legal issues those cases presented in order to allow it to uphold both the curfew and the exclusion of Japanese Americans, while avoiding constitutional evaluation of their continued detention.<sup>281</sup> He also makes the crucial point that the Supreme Court was at least as captive as the military to the racist schema that cast American citizens of Japanese ancestry as inherently suspicious and given to subversion.<sup>282</sup> The Court, Kang argues, would therefore likely have upheld the curfew and mass exclusion against constitutional challenge even if the government had not misrepresented to it the nature and degree of the internal threat of sabotage and espionage that Japanese Americans threatened.<sup>283</sup>

All of this analysis, however, is premised on a narrow set of falsehoods solely about the internal threat posed by Japanese Americans. We now know that that the deceptions in these cases were much broader; they also included a misrepresentation of the external threat that the West Coast faced and that military officials were preparing to meet. Would the Justices have upheld the racial curfew as a reasonable military measure if they had known that the government’s submissions *both* exaggerated the internal threat *and* overstated the external threat?

It is tempting to speculate that this might have led the Court to invalidate the curfew. At oral argument in the *Korematsu* case, Justice Frankfurter extracted from the Solicitor General a concession that General DeWitt would have acted illegally if he had issued an exclusion order against Japanese Americans believing that there was “no danger from . . . Japanese operations,” but seeing an opportunity “to take advantage of [his] hostility and clear the Japanese from th[e]

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278. *Korematsu*, 584 F. Supp. at 1418.

279. *Hirabayashi*, 828 F.2d at 603–04.

280. See Kang, *supra* note 17, at 985–86.

281. See *id.* at 943–48, 949–55.

282. See *id.* at 986.

283. See *id.* at 985–95.

area”<sup>284</sup> despite the absence of danger. Perhaps the disclosures *both* that the government had no evidence of subversive activity by Japanese Americans *and* that the military was not preparing for a coastal invasion would have led a majority of the Court to see the case as approaching Justice Frankfurter’s hypothetical. On the other hand, because the *Hirabayashi* decision was unanimous, the disclosure that the military was not preparing for a Japanese invasion when it ordered the curfew would have had to prompt at least five of the Justices to invalidate the military’s actions. And to reach that conclusion, those Justices would have had to be free of, or to surmount, the prevalent racial schema of the “invading Oriental” to the extent that it existed in their own minds. This seems unlikely. Thus, the question of whether the invasion distortion amounted to the sort of legal prejudice necessary to issue a writ of error coram nobis and set aside a long-final criminal conviction is certainly a close and difficult one.

But it is crucial to recognize that this question, however interesting and important, risks distracting us from the important task of assessing the overall integrity and validity of that wartime decision. The question that concerned the federal courts in the coram nobis cases of the 1980s arose in the unique context of efforts to invalidate individual judgments of criminal conviction many decades after they had become final. As noted above, those efforts forced the courts to take a position on whether the wartime Supreme Court had been duped by government lies into reaching unjust outcomes, or whether the Court had, in effect, reached them on its own. Today, however, we face no such choice. Gordon Hirabayashi long ago got his writ. We are no longer considering anyone’s entitlement to relief from a final criminal judgment. We are considering simply whether *Hirabayashi v. United States* is a legitimate decision that deserves any of the respect that we typically accord to Supreme Court precedent.

On this score, it matters little whether the government misled the Supreme Court into a grossly mistaken analysis or whether the Court got there on its own. What matters is that the analysis was grossly mistaken. The *Hirabayashi* opinion stated a principle of government power during wartime that was both broad and timeless:

In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the

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284. These words from Frankfurter’s question to Fahy are reproduced in Transcript of Solicitor General’s Oral Argument, *supra* note 115, at 50.

many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.<sup>285</sup>

Where “those charged with the responsibility of our national defense” find themselves “in time of war and of threatened invasion,” the Court reasoned, the courts must leave those officials room to draw the sorts of “[d]istinctions between citizens solely because of their ancestry” that are, in the absence of those dangers, “by their very nature odious to a free people whose institutions are founded up on the doctrine of equality.”<sup>286</sup> All of these pronouncements, we now know, rested on falsehood, which makes *Hirabayashi* as odious as the racial distinctions of which it approved, not to mention as odious as the reviled *Korematsu* case, which approved of comparable racial distinctions on a foundation of falsehood.

We might draw two additional lessons from the collapse of *Hirabayashi*, neither of which is particularly heartening. The first is a warning about the potentially blinding power of racial schemas in the wake of attacks by foreign enemies. Edward Ennis proved himself willing at times to protest internally (though never, it must be noted, to resign) when he saw certain racial misrepresentations. Yet it appears that even he may have been seduced by the piece of the Yellow Peril narrative that cast the Japanese as the twentieth century’s reprise of the Genghis Khan and his Golden Horde. This sobering possibility invites us to cast a questioning look at the racial-religious schema that we lay atop the external enemy of our own day, the “radical Islamist.” How are we to distinguish the real harm that some violent organizations and individuals intend for the United States from the cataclysmic designs we project onto the caricature of the “jihadi” and the “Islamofascist” that has haunted the national consciousness since September 11? Mistaken intelligence information about an Arab leader’s intent to use weapons of mass destruction has already struck the nation as plausible enough to launch a war. Government lawyers defending the indefinite detention of American citizens as enemy combatants have already depicted them as posing incalculable danger,<sup>287</sup> only to turn around and either submit them to

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285. *Hirabayashi v. United States*, 320 U.S. 81, 95 (1943).

286. *Id.* at 100.

287. See James Risen & Philip Shenon, *U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1.

ordinary civilian criminal trial<sup>288</sup> or release them outright into the hands of a foreign nation.<sup>289</sup> In the years to come, will Justice Department lawyers defending antiterrorism measures be able to free themselves of the schema enough to distinguish the nation's real risks from its most fantastic fears?

The second lesson of *Hirabayashi*'s demise flows from the first. We now see that the bankruptcy of *Hirabayashi* lay in the Court's willingness to ground a strengthened executive power and a weakened norm of equal treatment on an erroneous depiction of the nation's security. That depiction was false, but because of its overlap with a racial schema, to many people (including, very likely, some of the Justices of the Supreme Court) it also seemed plausible. Tragically, this risk of falsehood and mistake is ever present. Officials of the military and of central intelligence will always know the most about the external threats that the nation faces. For reasons of necessity or strategy, they will always try to wrap what they know in a shell of secrecy. And the courts will always be outside the shell.

*Hirabayashi* thus illustrates the danger of building rules of constitutional law on a foundation of supposed facts that are actually known only to military and intelligence officials. This was Justice Robert Jackson's famous dissenting position in the *Korematsu* case. "In the very nature of things," Jackson wrote, "military decisions are not susceptible of intelligent judicial appraisal."<sup>290</sup> He continued:

They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence, courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.<sup>291</sup>

How true these words ring! Perhaps Justice Jackson had already come to suspect that a year earlier, when he and his eight Brethren upheld the curfew in *Hirabayashi*, they had done so on the strength of a "mere"—and erroneous—declaration of military need. If, as Justice Jackson maintained, the split decision in *Korematsu* demonstrated the

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288. *Um, About That Dirty Bomb?* N.Y. TIMES, Nov. 23, 2005, at A26.

289. *Hamdi Returned to Saudi Arabia*, WASH. POST, Oct. 12, 2004, at A2.

290. *Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

291. *Id.*

risk that courts would make bad constitutional law by trying to review military orders on unknown “facts,” the unanimous decision in *Hirabayashi* demonstrated it even more poignantly.

Justice Jackson was an optimist.<sup>292</sup> As Professor John Q. Barrett has noted, Jackson was willing to argue that judges should remove themselves from reviewing the constitutionality of military orders because he trusted that Americans would elect honest Presidents who would appoint military officials disinclined to abuse their power<sup>293</sup>—and that if Americans ended up with officials less wise and restrained than this, they would replace them.<sup>294</sup> But Jackson was also realistic; he recognized the danger that the *Korematsu* precedent would pose in the hands of unscrupulous officials in dangerous times. The Court in *Korematsu* mistakenly “validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.”<sup>295</sup> And that principle, Jackson said, would “lie[ ] about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”<sup>296</sup>

*Korematsu* was not the only loaded weapon that the Court mistakenly left lying about. *Hirabayashi* also validated a principle of racial discrimination in confining American citizens to their homes. We know now that it was based on a falsehood that appealed to a visceral racial schema. Time, archival discoveries, and changes in law have entirely emptied *Korematsu* of its ammunition. *Hirabayashi*, however, still has an old bullet or two in its barrel. It is time to finish disarming that loaded weapon.

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292. John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's Korematsu Dissent*, LAW & CONTEMP. PROBS., Spring 2005, at 57, 73.

293. *See id.*

294. *See Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

295. *Id.*

296. *Id.*