

How Earl Warren Previewed Today's Civil Liberties Debate—And Got it Right in the End

Sandhya Ramadas†

INTRODUCTION

Earl Warren is revered for his tenure as Chief Justice of the U.S. Supreme Court and for his legacy as the icon of American civil liberties,¹ but a dark moment lurked in his past. In late 1941 and early 1942, as the Attorney General of California, Warren confronted a host of difficult questions involving constitutional law, civil liberties, and race relations. With the United States still reeling from the bombing of Pearl Harbor, and with the dawn of the involvement of American combat troops in World War II, Warren advocated for the relocation and internment of both Japanese Americans and Japanese immigrants living in the United States.

† J.D. Candidate, 2009, University of California, Berkeley, School of Law (Boalt Hall); M.A., Université de Paris I (La Sorbonne), Sciences Politiques, 2004. B.A., Harvard University, 2003. I would like to thank Professor David Sklansky for sparking my interest in Earl Warren, and Professor Erin Murphy, without whose insight, criticism, commentary, and constant encouragement I could not have completed this project. I would also like to thank Jeffrey Crawford, archivist at the Cal. State Archives in Sacramento, to whom I am indebted for leading me to these documents, and the staff of the Cal. State Archives for their help and patience. I am also grateful to John Kecker for taking the time to share his personal insights on the Chief Justice, his former mentor. Finally, I would like to thank Cynthia Hsu and the editors at the *Asian American Law Journal* for their thoughtful comments and edits.

1. See *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (declaring separate-but-equal public education to be unconstitutional). See also *Green v. County Sch. Bd.*, 391 U.S. 430 (1968) (rejecting a “freedom of choice” desegregation plan designed to prevent integration); *Griffin v. County Sch. Bd.*, 377 U.S. 218 (1964) (holding that public school closure in Prince Edward County, Virginia amounted to a denial of equal protection); *Goss v. Bd. of Educ.*, 373 U.S. 683 (1963) (striking a desegregation plan permitting students to transfer to schools in which their race would be a majority as a pretext for maintaining segregation); *Cooper v. Aaron*, 358 U.S. 1 (1958) (holding that the Supremacy Clause of the Constitution mandates that state officials desegregate public schools); *Bd. of Trs. v. Frasier*, 350 U.S. 979 (1956) (per curiam) (affirming a lower court injunction forbidding the University of North Carolina from barring admission to undergraduate students on the basis of race); *Lucy v. Adams*, 350 U.S. 1 (1955) (per curiam) (reinstating injunction that enjoined and restrained officials at University of Alabama from preventing Autherine Lucy from enrolling); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (reading an inherent equal protection clause into the Fifth Amendment to declare segregated schools in the District of Columbia as a violation of the Constitution). For information on Warren’s criminal procedure cases and reforms, see *infra* Part III.B.3., “Protecting the Individual: The Criminal Procedure Revolution.”

How did this heralded champion of individual freedom once decide to subordinate civil liberties to security? Two documents released in 2006 by the California State Archives, which houses Warren's California papers, shed light on his decision-making process. The first is a speech Warren delivered in June of 1942 to the Stanford Law Society entitled "Martial Rule in a Time of War." The second is a set of 138 letters sent from February 17 to 24, 1942 by California law enforcement in response to Warren's request for suggested solutions to the "alien problem" in California. These documents have never before been the subject of scholarly publication.

This Article is an attempt to focus on Warren's decision-making process concerning Internment in light of these newly released documents. It is also an attempt to analyze the lifetime transformation of Warren's attitude surrounding civil rights and the protection of individual liberties, as well as document Warren's progression from Internment advocate to civil rights proponent. Given the documented current of racism that underlay the Internment decision, many scholars have argued that Warren's changed attitude towards civil rights was influenced by his changed views of race over his lifetime.²

But another factor that arguably influenced Warren's transformation, and one that has been less explored by scholars, was his changing view of the law's role and function in our society. This Article argues that Warren began his legal career with a vision of the law as predominantly a means of securing state stability; by the end, he viewed state power as the ultimate threat and the law as the predominant mean of safeguarding citizens against it. This Article does not attempt to remove Warren's decision to advocate for Internment from its racial context, nor does it attempt to minimize that context. Rather, it attempts, with the information contained in these two newly released documents, to analyze Warren's support for Internment in the context of his views on the role of the law, and to trace the evolution of Warren's concept of the role of the law throughout his lifetime.

Although Warren's concept of the role of the law in relation to the state and the individual arguably changed over his lifetime, it is clear that Warren consistently adhered to a respect for the rule of law throughout his career. In other words, Warren maintained a respect for the technical

2. See Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73 (1998); see also Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179 (1998); Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1 (2002). For a general discussion of racism and Japanese Internment, see JACOBUS TENBROEK, EDWARD N. BARNHART, & FLOYD W. MATSON, *PREJUDICE, WAR AND THE CONSTITUTION* (1970); LEONARD J. ARRINGTON, *THE PRICE OF PREJUDICE: THE JAPANESE-AMERICAN RELOCATION CENTER IN UTAH DURING WORLD WAR II* (The Faculty Ass'n, Utah State Univ. 1962); ERIC K. YAMAMOTO, ET AL., *RACE, RIGHTS, AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT* (2001).

existence of and legitimacy of laws, even in times of crisis. If the law did not accomplish the ends sought (in the wartime context of World War II, the end sought was the preservation of state security), Warren changed the law rather than broke it. As Leo Katcher noted in his biography of Warren, "In all his official actions, Warren meticulously observed the law. He would not permit any state body to seize on the war as a means of going beyond the law."³ Instead of breaking or circumventing the law, Warren chose to subscribe to a new law—what he called limited martial rule.⁴ In his speech to the Stanford Law Society, Warren defined "martial rule" as "rule that exists when the military authorities carry on government or some governmental functions in domestic territory during time of war."⁵ He distinguished it from the more common term of "martial law," which involves military law taking precedence over civilian law.⁶

Rather than ignoring constraints imposed by the law, Warren chose martial rule as his solution; he reshaped the law to ensure that California and its citizens were protected in this context of the "theater of war."⁷ In doing so, he solicited input from California law enforcement. Warren's choice to solicit input demonstrates his seriousness and respect for his task of proposing a change to the law, and thus, arguably, his respect for the law as it existed at the time and for the process of modifying the law.

However, even while remaining committed to the technical legitimacy of the law, Warren advocated a plan to sweep away the civil liberties of the Japanese and Japanese Americans. He used the law to deprive individuals of their civil liberties. Warren's trajectory from advocating Japanese Internment to later authoring *Brown* and championing civil liberties arguably indicates that while he respected the technical legitimacy of the rule of law throughout his life, he changed his views on the law's proper function. His earlier ordering of priorities allowed law to be used to deprive individuals of civil liberties for the sake of national security. Later in his life, however, he interpreted the law's function to be a protector of civil liberties against incursion by the state. While previously, *state* sovereignty was the law's paramount and only goal, later, for Warren, the law became the protector of an *individual's* sovereignty against the power of the state.

While we might applaud Warren's lifetime commitment to the legitimacy of the law, we now, in retrospect, condemn Warren's initial view of the role of the law as a subordinator of civil liberties for the protection of the state. It may not be possible to answer conclusively *why*

3. LEO KATCHER, *EARL WARREN: A POLITICAL BIOGRAPHY* 146 (1967).

4. Earl Warren, Address to the Stanford Law Society: Martial Rule in Time of War 2 (June 4, 1942) (transcript available in the California State Archives, Earl Warren Papers).

5. *Id.* at 2.

6. *Id.*

7. *Id.* at 7.

Earl Warren changed his position on civil liberties throughout his lifetime, but it is possible to examine *how* that change happened in looking at what factors contributed to that change. Some of those closest to Warren have attempted to answer the *why*. For example, John Keeker, Warren's former and final law clerk, observed that Warren began his career as a politician (a District Attorney, Attorney General, and Governor)—a man of *action* who had little time nor incentive to think deeply about his actions—and ended it as a Supreme Court Justice—a man of *reflection*—whose sole job was in fact to reflect on the law, its purposes, and his own jurisprudential choices.⁸ It was likely Warren's career change, along with his accumulated experience, that left him well-positioned to evaluate his wartime decisions with 20/20 hindsight, and it is the wisdom of Warren's experience that leaves us with guidance for what to do in our own time of crisis. These two newly-released documents indicate that Warren's changing view of the role of law likely was a contributing factor, perhaps of great significance, to the evolution of his perspective over time.

On September 11, 2001, the United States faced its first attack on American soil since Pearl Harbor. The subsequent actions of the Bush administration dealing with the attacks and their aftermath can be analyzed through the changes in Warren's own views on the role of the law. Unlike Warren, President Bush and his administration chose to circumvent the law rather than to change the law as Warren did to fulfill certain goals. Rather than adopting Warren's later concept of the law's role as a protector of civil liberties from the state's incursion, the Bush administration espoused a view that paralleled Warren's initial World War II view of the law: the law for the Bush administration was a protector of state security above all else, even if that protection involved the deprivation of civil liberties.

Now, at the early stages of the new Obama administration, President Obama has taken steps to distinguish himself from his predecessor, while at the same time maintaining some of the previous administration's policies in relation to state secrecy and the "War on Terror."⁹ It remains to be fully seen how President Obama will perceive the legitimacy and role of the law in this time of crisis. At this juncture, it is particularly appropriate to reflect on the experiences of a leader and legal scholar such as Warren, who was committed both to liberty and security during a time of similar crisis.

This Article begins with a discussion of the historical context surrounding the decision to intern Japanese Americans and Japanese immigrants,¹⁰ including Warren's role in Internment. Next, the Article

8. Interview with John Keeker, Partner, Keeker & Van Nest LLP, in S.F., Cal. (Aug. 4, 2008).

9. See *infra* Part V.D., "The Obama Administration and the Future of Civil Liberties."

10. In this Article, the term "Japanese Americans" refers to American citizens of Japanese descent. The term "Japanese" or "Japanese immigrants" refers to persons of Japanese citizenship residing in the United States.

examines Warren's decision-making process, exploring his speeches, articles, Congressional testimony, and the letters Warren solicited and received from California's local law enforcement. The article then discusses Warren's career following his time as Attorney General of California, from Governor of California to Chief Justice, including Warren's final reflections on his decision to intern the Japanese and his changing concept of the role and function of the law from depriver to protector of civil liberties. Finally, the Article examines the modern-day takeaway from Warren's evolving concept of the law and the law's legitimacy, possible parallels to the role of the law as perceived by the Bush administration in its "War on Terror," and the Obama administration's likely attitude towards the protection of civil liberties.¹¹

I. HISTORICAL CONTEXT

A. *A Timeline of Japanese Internment*

December 7, 1941 left the nation, but especially California, in an atmosphere of panic and confusion. As the first attack by a foreign power on American soil since the War of 1812,¹² Pearl Harbor struck fear into the hearts of California residents in all parts of the state. Internment was a direct result of the hysteria following Pearl Harbor. As then mayor of Los Angeles and close ally of Earl Warren, Fletcher Bowron, described, "After Pearl Harbor, everything was in a state of confusion. . . All the time, the stories of Japanese sabotage and espionage kept coming in."¹³ Bowron himself was one of those who kept the stories "coming in" and fueled suspicions and tension among Californians. He described to the public the suspicious behavior of the Japanese fishermen and farmers who were waving lights along the shoreline.¹⁴ Bowron was not the only prominent leader contributing to the atmosphere of panic. After San Francisco endured three air raid alerts on Monday, December 8, 1941, Western Defense Command Lieutenant John DeWitt noted that "death and destruction are likely to come to this city at any moment."¹⁵

The immediacy and surprise of Pearl Harbor left Californians, and the nation, with an "anything-could-happen" mentality. California Governor Culbert Olson declared a state of emergency, claiming, "Enemy forces for

11. At the time the Article was written, President Obama was less than 100 days into his first term. This Article reflects on the decisions made by the Obama administration until mid-March 2009.

12. See, e.g., STUART MURRAY, *ATLAS OF AMERICAN MILITARY HISTORY* (2005); JERRY K. SWEENEY AND KEVIN B. BYRNE, EDs., *A HANDBOOK OF AMERICAN MILITARY HISTORY: FROM THE REVOLUTIONARY WAR TO THE PRESENT* (1997).

13. KATCHER, *supra* note 3, at 141.

14. ED CRAY, *CHIEF JUSTICE* 115 (1997).

15. *Id.*

invasion from air or sea may be hovering about us.”¹⁶ Warren noted in his memoirs, “California was immediately declared to be a theater of operations after the Pearl Harbor attack, and we were defenseless.”¹⁷

The government, federal and state, was quick to blame alien spies for the act of sabotage. The federal government, using prepared lists, conducted well-publicized arrests of enemy aliens who were considered a security risk; they included 595 Japanese Americans, and 186 German and Italian Americans.¹⁸ Eleven days after Pearl Harbor, at a Washington press conference, Secretary of the Navy Frank Knox referred to Pearl Harbor by noting that “the most effective fifth-column work¹⁹ of the entire war was done in Hawaii.”²⁰ The military and the public feared another major act of sabotage or insurgency from people of Japanese ancestry living within the United States, or as Walter Lippmann famously noted in his column, “[a] blow [that] is well organized and that . . . is held back until it can be struck with maximum effect.”²¹ Fear also stemmed from “the experience with Fifth Columns in Europe,” which according to Herbert Wenig, was “[a]ll we had to go on . . . It was our job to make sure that there wasn’t one here.”²² Internment was the policy solution devised to address this fear of sabotage.

Internment was not limited to one decision at one moment; rather, it was a series of proclamations and orders that quickly stripped Japanese Americans of their homes, farmland, and liberties. The event that arguably sealed the inevitability of Internment was the shelling of Santa Barbara by a Japanese submarine in 1942.²³ One week after the incident, on March 2, 1942, and speaking on the heels of the Santa Barbara-induced mass hysteria, General John DeWitt issued Public Proclamation Number One, informing all Japanese immigrants and Japanese Americans that they at some point would be subject to exclusion from “Military Area No. 1” (the

16. *Id.*

17. EARL WARREN, *THE MEMOIRS OF EARL WARREN* 145 (1977).

18. CRAY, *supra* note 14, at 115.

19. “Fifth column” is defined as “a clandestine group or faction of subversive agents who attempt to undermine a nation’s solidarity by any means at their disposal.” *Fifth Column*, in *ENCYCLOPEDIA BRITANNICA* (2008), available at <http://www.britannica.com/EBchecked/topic/206477/fifth-column>. The term is attributed to Emilio Mola Vidal, a Nationalist general during the Spanish Civil War. *Id.* “As four of his army columns moved on Madrid, the general referred to his militant supporters within the capital as his ‘fifth column,’ intent on undermining the loyalist government from within.” *Id.* The term also refers to a subpopulation assumed to have loyalties to countries other than the one in which they reside, or who support some other nation in war efforts against the country in which they live. Terry Martin, *The Origins of Soviet Ethnic Cleansing*, 70 *J. MODERN HIST.* 813 (1998).

20. CRAY, *supra* note 14, at 116.

21. Walter Lippmann, *The Fifth Column*, *L.A. TIMES*, Feb. 13, 1942, available at http://www.digitalhistory.uh.edu/learning_history/japanese_internment/lippmann.cfm.

22. KATCHER, *supra* note 3, at 150.

23. *Id.* at 145.

entire Pacific coast to about one hundred miles inland).²⁴ Previously, Japanese immigrants and Japanese Americans had been subject to President Franklin D. Roosevelt's Executive Order 9066, issued on February 19, 1942, which authorized military commanders to designate "military areas" at their discretion "from which any or all persons may be excluded," both

24. *Id.*, CRAY, *supra* note 14, at 122. The text of Public Proclamation No. 1 reads as follows (available at http://runker_room.tripod.com/tiestalk/pp1.htm): WESTERN DEFENSE COMMAND AND FOURTH ARMY WARTIME CIVIL CONTROL ADMINISTRATION, Presidio of San Francisco, California, May 3, 1942, INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY Living in the Following Area:

All of that portion of the City of Los Angeles, State of California, within that boundary beginning at the point at which North Figueroa Street meets a line following the middle of the Los Angeles River; thence southerly and following the said line to East First Street; thence westerly on East First Street to Alameda Street; thence southerly on Alameda Street to East Third Street; thence northwesterly on East Third Street to Main Street; thence northerly on Main Street to First Street; thence north-westerly on First Street to Figueroa Street; thence northeasterly on Figueroa Street to the point of beginning. Pursuant to the provisions of Civilian Exclusion Order No. 33, this Headquarters, dated May 3, 1942, all persons of Japanese ancestry, both alien and non-alien, will be evacuated from the above area by 12 o'clock noon, P. W. T., Saturday, May 9, 1942.

No Japanese person living in the above area will be permitted to change residence after 12 o'clock noon, P. W. T., Sunday, May 3, 1942, without obtaining special permission from the representative of the Commanding General, Southern California Sector, at the Civil Control Station located at: Japanese Union Church, 120 North San Pedro Street, Los Angeles, California. Such permits will only be granted for the purpose of uniting members of a family, or in cases of grave emergency.

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways: (1) Give advice and instructions on the evacuation. (2) Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property, such as real estate, business and professional equipment, household goods, boats, automobiles and livestock. (3) Provide temporary residence elsewhere for all Japanese in family groups. (4) Transport persons and a limited amount of clothing and equipment to their new residence.

The Following Instructions Must Be Observed: (1) A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 A.M. and 5:00 P.M. on Monday, May 4, 1942, or between 8:00 A.M. and 5:00 P.M. on Tuesday, May 5, 1942. (2) Evacuees must carry with them on departure for the Assembly Center, the following property: (a) Bedding and linens (no mattress) for each member of the family; (b) Toilet articles for each member of the family; (c) Extra clothing for each member of the family; (d) Sufficient knives, forks, spoons, plates, bowls and cups for each member of the family; (e) Essential personal effects for each member of the family. All items carried will be securely packaged, tied and plainly marked with the name of the owner and numbered in accordance with instructions obtained at the Civil Control Station. The size and number of packages is limited to that which can be carried by the individual or family group. (2) No pets of any kind will be permitted. (3) No personal items and no household goods will be shipped to the Assembly Center. (4) The United States Government through its agencies will provide for the storage, at the sole risk of the owner, of the more substantial household items, such as iceboxes, washing machines, pianos and other heavy furniture. Cooking utensils and other small items will be accepted for storage if crated, packed and plainly marked with the name and address of the owner. Only one name and address will be used by a given family. (5) Each family, and individual living alone will be furnished transportation to the Assembly Center or will be authorized to travel by private automobile in a supervised group. All instructions pertaining to the movement will be obtained at the Civil Control Station.

Go to the Civil Control Station between the hours of 8:00 A.M. and 5:00 P.M., Monday, May 4, 1942, or between the hours of 8:00 A.M. and 5:00 P.M., Tuesday, May 5, 1942, to receive further instructions.

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

citizens and non-citizens.²⁵ On March 24, 1942, shortly after Executive Order 9095, which created the office of Alien Property Custody,²⁶ and Public Proclamation Number Three, which declared a curfew for all persons of Japanese ancestry,²⁷ General DeWitt began issuing civilian exclusion orders.²⁸ The final exclusion order, Civilian Exclusion Order No. 34, was issued on May 3, 1942, ordering all people of Japanese ancestry, whether citizens or non-citizens, to report to assembly centers where they would live until being moved to permanent “relocation centers.”²⁹ These exclusion orders exclusively targeted the Japanese: “[n]o relocation policy was ever implemented with respect to [the Germans and Italians], even after America’s formal declaration of war.”³⁰

In December 1944, the Supreme Court in *Ex parte Endo* held the detainment of loyal citizens unconstitutional, signaling the end of Japanese American Internment.³¹ However, in *Korematsu v. United States*, handed down the same day, the Court held that the exclusion process as a whole was constitutional.³² Neither *Ex parte Endo*, nor Japan’s surrender on September 2, 1945, immediately ended Internment. Some Internment camps were kept open as late as March 20, 1946.³³ By the war’s end, 4,724 Japanese Americans had been deported,³⁴ 110,000 had been interned in detention facilities,³⁵ and not a single Japanese American or Japanese immigrant had been convicted of espionage.³⁶ Decades later, the Northern District of California would find that the U.S. government’s decision to intern Japanese Americans and Japanese immigrants was based not on military necessity but on “broad historical causes[, including] race prejudice, war hysteria and a failure of political leadership[.]” and that “[a]s a result, ‘a grave injustice was done to American citizens and resident

25. Exec. Order No. 9066, 28 C.F.R. 74.3 (1942-1945).

26. Exec. Order No. 9095, terminated by Exec. Order No. 9788, 26 C.F.R. 303.1 (1946).

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

28. *Id.* at 88-89.

29. See *Korematsu v. United States*, 323 U.S. 214, 221-222 (1944), *superseded by statute* Congress Apologies for the Relocation of Japanese Americans in WWII, Pub. L. 100-383, § 2(a), 102 Stat. 903, *as recognized in* *Adarand Constructors v. Peña*, 515 U.S. 200, 214 (1995). Fred Korematsu’s conviction was set aside by the Northern District of California’s granting of his petition for writ of *coram nobis*. *Korematsu v. United States*, 584 F. Supp. 1406, 1409 (N.D. Cal. 1984) (“It was uncontroverted at the time of conviction that petitioner was loyal to the United States and had no dual allegiance to Japan. He had never left the United States. He was registered for the draft and willing to bear arms for the United States.”) [hereinafter *Korematsu II*].

30. G. EDWARD WHITE, EARL WARREN: A PUBLIC LIFE 67 (1982).

31. *Ex parte Endo*, 323 U.S. 283 (1944).

32. *Korematsu*, 323 U.S. 214.

33. BRIAN HAYASHI, *DEMOCRATIZING THE ENEMY: THE JAPANESE AMERICAN INTERNMENT* 203 (2004).

34. *Id.*

35. Manzanar National Historic Site, <http://www.nps.gov/manz/> (last visited Apr. 21, 2008).

36. See Japanese American Internment Resource Library, University of Connecticut, Asian American Studies Institute, Homepage, <http://web2.uconn.edu/aasi/Research/jarl.html> (last visited Mar. 9, 2009).

aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained by the United States during World War II.”³⁷

B. Warren's Role

Warren was arguably “one of the individuals most responsible for bringing the relocation program [or internment] into being.”³⁸ He was in the prime position to influence other policy makers, both military and federal.³⁹ While Warren did not issue formal orders, design the Internment and relocation program, or administer it himself, he “more than fully cooperat[ed] with the military in the shaping of the program” and was the “most visible and effective California public official advocating Internment and evacuation.”⁴⁰ In fact, key decision makers in the process relied on information and evidence from Warren’s office.⁴¹ For example, maps delineating the locations of Japanese homes and farms, which were ordered by Warren and produced by California law enforcement, became “justification . . . in DeWitt’s final report on evacuation.”⁴² Whether or not Warren or DeWitt intended to personally influence each other’s opinions, themes from DeWitt’s rationale for Internment were found in Warren’s congressional testimony on the matter.⁴³ Warren himself was also

37. *Korematsu II*, 584 F. Supp. at 1416-17 (citing Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 18 (Washington, D.C., 1982)).

38. WHITE, *supra* note 30, at 74.

39. *Id.*

40. *Id.* at 71.

41. *Id.* at 75.

42. CRAY, *supra* note 14, at 123.

43. For example, DeWitt notes, “It could not be established, of course, that the location of thousands of Japanese adjacent to strategic points verified the existence of some vast conspiracy to which all of them were parties. Some of them doubtless resided there through mere coincidence. It seems equally beyond doubt, however, that the presence of others was not mere coincidence. It was difficult to explain the situation in Santa Barbara County, for example, by coincidence alone.” LT. GEN. J. L. DEWITT, FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST (1942) [hereinafter FINAL REPORT], at ch. II, available at <http://www.sfmuseum.org/war/dewitt1.html>.

In his testimony before the Tolan Commission, Warren stated, “I do not mean to suggest that it should be thought that all of these Japanese who are adjacent to strategic points are knowing parties to some vast conspiracy to destroy our State by sudden and mass sabotage. Undoubtedly, the presence of many of these persons in their present locations is mere coincidence, but it would seem equally beyond doubt that the presence of others is not coincidence. It would seem difficult, for example, to explain the situation in Santa Barbara County by coincidence alone.” *Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones: Hearing on H. R. 113 Before the H. Select Comm. Investigating National Defense Migration*, 77th Cong. 10974 (1942) [hereinafter *Hearing*] (statement of Earl Warren, Attorney General of California). This quote was part of Warren’s prepared statement submitted to the Tolan Commission, which was submitted within two weeks after his date of testimony on February 21, 1942. DeWitt’s report was dated January 9, 1942. CRAY, *supra* note 14.

Warren also echoed the theme of military necessity found in DeWitt’s letter to the Army Chief of Staff which accompanied his report. DeWitt noted, “The evacuation was impelled by military necessity. The security of the Pacific Coast continues to require the exclusion of Japanese from the area now prohibited to them and will so continue as long as that military necessity exists.” DEWITT, FINAL

influenced by the context of the times, including the panicked public sentiment. The military in Hawaii warned Warren's office of "widespread sabotage."⁴⁴ In an exchange between Warren and Naval Commander Admiral John Greensdale, Greensdale emphasized the lack of resources in California to defend the West Coast, to which Warren replied, "Well, my God! We have thousands and thousands of Japanese here. We could have an invasion here."⁴⁵ Warren's words echoed sentiments of the general population—paranoia and fear—and mirrored the xenophobic views Americans held at the time. On January 30, 1942, over a month after Pearl Harbor, Warren publicly stated his fear of sabotage by the Japanese and Japanese Americans: "the Japanese situation as it exists in this state today may well be the Achilles' heel of the entire civilian defense effort."⁴⁶ Warren's fear of attacks on American soil by persons of Japanese ancestry was not only influenced by the public, but it also, in turn, influenced public sentiment, military actions, law enforcement perceptions, and the position of politicians on Internment.

1. *Influence on Military Strategy*

Warren's position affected the military's response to the perceived threat of Japanese sabotage. Warren coordinated Internment with military authorities;⁴⁷ he believed that since the state did not possess the power to intern the Japanese,⁴⁸ that he should cooperate with the military,⁴⁹ the body authorized to conduct such activities under the Constitution. This cooperation consisted of a series of meetings. On January 29, 1942, four days after Supreme Court Justice Owen Roberts released his report on Pearl Harbor, which claimed that Japanese spies had helped to carry out the attacks,⁵⁰ Warren "met with army officers and considered their concerns."⁵¹ He noted that a stricter enforcement of the Alien Land Law,⁵² which prohibited "aliens ineligible for citizenship" from owning land or property in California but permitted three year leases, might be a partial solution to the Japanese threat.⁵³ In a separate meeting, he told General DeWitt, then commander of the Western Defense Command, that he favored the

REPORT, at vii-x.

44. CRAY, *supra* note 14, at 115.

45. *Id.*

46. WHITE, *supra* note 30, at 69; KATCHER, *supra* note 3, at 142.

47. WHITE, *supra* note 30, at 70.

48. KATCHER, *supra* note 3, at 142.

49. WHITE, *supra* note 30, at 70.

50. CHIEF JUSTICE OWEN ROBERTS, ATTACK UPON PEARL HARBOR BY JAPANESE ARMED FORCES, S. Rep. No. 77-159 (1942), available at <http://www.ibiblio.org/pha/pha/roberts/roberts.html>.

51. Cho, *supra* note 2, at 91

52. Cal. Alien Land Law of 1913, 1 Deering's Gen. Laws, Act 261 (amended 1948) (declared unconstitutional by *Sei Fujii v. State*, 38 Cal. 2d 718 (Cal. 1952)).

53. Cho, *supra* note 2, at 92

evacuation of the Japanese.⁵⁴ In the meeting of the California Joint Immigration Committee on February 7, 1942, Warren made the argument for expediency in the face of imminent danger, labeling a potential political approach to the Japanese as “too cumbersome” and stating that the only body that could protect California “is the armed forces of the government.”⁵⁵ It was this appeal to state security that arguably paved the way for violations of civil liberties as a necessary casualty of wartime.

Warren also put pressure on various military personnel, and maintained close connections with them to advance his view. For example, Warren began to pressure U.S. Attorney General Francis Biddle, who was originally opposed to Internment, via messages from the U.S. Assistant Attorney General Tom C. Clark.⁵⁶ Warren, in his respect for the bounds of the law, explained to Clark that he believed Internment had to be conducted through the military in order for it to be “lawful.”⁵⁷ Warren also hired Herbert Wenig, a Judge Advocate General (JAG) attorney, to join his staff and study the relationship between military law and civilian defense in California.⁵⁸ Wenig prepared a memo for Warren on the legal consequences of proposed defenses, including Internment and evacuation,⁵⁹ indicating again that for Warren, it was important that any actions taken be legal. Warren’s request for Wenig’s memo also indicates a sense of thoughtfulness inherent in his legal decision making: he truly wished to see all sides, all possible arguments, before he made his decision. Even though Wenig was later hired by General DeWitt when war broke,⁶⁰ Warren maintained a connection with Wenig and kept him as his liaison between his own office and DeWitt’s.⁶¹ These interactions with military personnel indicate Warren’s constant attempt at conformity with the law—Warren pressured the military to see his point of view (providing, in some ways, a democratic check to the military) and wanted to ensure that their methods conformed with legal standards at all times.

Warren also maintained a close and mutually-influential relationship with DeWitt himself. Warren himself remarked that he was “in constant touch with [DeWitt],”⁶² and DeWitt included many of Warren’s statements as justifications in his final report advocating for Internment.⁶³ DeWitt, who himself declared the exclusion orders that precipitated Internment, had a fairly intransigent, and racist, view of Internment: “It makes no difference

54. *Id.*

55. KATCHER, *supra* note 3, at 143.

56. *Id.*

57. *Id.* at 144.

58. WHITE, *supra* note 30, at 70.

59. *Id.*

60. *Id.* at 70-71.

61. *Id.*

62. WARREN, *supra* note 17, at 145.

63. KATCHER, *supra* note 3, at 147.

whether the Japanese is theoretically a citizen. He is still Japanese. Giving him a scrap of paper won't change it."⁶⁴ Warren, however, might have been more convinced than even DeWitt of the appropriateness of Internment, because it was Warren who had to convince DeWitt of its merits.⁶⁵ On February 11, 1942, Warren held a meeting with Fletcher Bowron, Tom Clark of the Department of Justice, and General DeWitt with the aim of helping DeWitt with his decision-making process.⁶⁶ Three days later, on February 14, 1942, DeWitt recommended to the War Department that "all persons of Japanese descent be removed from 'sensitive areas.'"⁶⁷

2. *Influence on Law Enforcement*

Warren's influence on Internment policy did not end with the military. As Attorney General, he also spoke for and compiled the opinions of California's law enforcement officers.⁶⁸ He noted in his memoirs, "I kept law enforcement officers throughout the state thoroughly advised of everything that affected civilian defense."⁶⁹ Most importantly, on February 2, 1942, Warren called a pivotal conference of one hundred California law enforcement officers.⁷⁰ At this conference, in San Francisco, Warren reminded law enforcement officers that the absence of incidents or attacks in California since Pearl Harbor meant that "there will be a great event of sabotage" to come.⁷¹ In fact, the inspiration for Warren's statement was DeWitt himself who told the Army's provost martial just a week earlier, "The fact that nothing has happened so far is more or less . . . ominous."⁷² Also at the conference, Warren called for the enforcement of the Alien Land Law and agreed with law enforcement's consensus that all alien Japanese should be evacuated.⁷³ In addition, prior to the conference, he had asked law enforcement to bring maps of their counties detailing the land holdings of first-generation Japanese immigrants (Issei) and second-generation Japanese Americans (Nisei).⁷⁴ The Attorney General later used these maps in his Congressional testimony in front of the Tolan

64. *Id.* at 141.

65. Cho, *supra* note 2, at 104. It is unclear why exactly DeWitt was more hesitant than Warren or needed convincing. But Katcher notes that Warren did exert influence on the military. "No other California official was more responsible for [Internment] than Warren. True, he had the support of the military, in General DeWitt, and the Justice Department, in Tom Clark. If they had not agreed with him, there would have been no exclusion. But to a great extent Warren exerted influence on both. As an example, DeWitt included many of Warren's charges and statements in his 'Final Report' on the action as justification." KATCHER, *supra* note 3, at 147.

66. Cho, *supra* note 2, at 104.

67. CRAY, *supra* note 14, at 121.

68. *Id.* at 123.

69. WARREN, *supra* note 17, at 145.

70. Cho, *supra* note 2, at 92.

71. CRAY, *supra* note 14, at 118.

72. *Id.* For a comparison of DeWitt and Warren's language, see *supra* note 43.

73. CRAY, *supra* note 14, at 119.

74. *Id.* at 118.

Commission to suggest there was a strategic pattern among Japanese habitations which created a “disturbing situation” for American security.⁷⁵

3. *Influence on Politicians*

Warren’s testimony at public hearings influenced the stance politicians took on Internment, leading them to support Internment because of his emphasis on the urgency of the situation and the threat of potential new attacks. His most notable testimony took place before the House Select Committee Investigating National Defense Migration, better known as the Tolan Commission,⁷⁶ where he gave his first public recommendation for Japanese confinement. Describing his plan in his memoirs, he wrote:

I testified for a proposal which was not to intern in concentration camps⁷⁷ all Japanese, but to require them to move from what was designated as the theater of operations, extending 750 miles inland from the Pacific Ocean. Those who did not move by a certain date were to be confined to concentration camps established by the United States Government.⁷⁸

Warren believed his solution gave the Japanese a choice about their fate, although it is what we would now label as a “false choice”: the Japanese could leave their homes and “voluntarily” move 750 miles inland, or be forcibly moved to detention centers. Warren’s Tolan Commission testimony, especially his thoughts on the “strategic” location of the Japanese throughout California, provided both the military and legal rationales for Internment.⁷⁹

4. *Influence on Public Sentiment*

On February 7, 1942 Warren met with famed journalist and American thinker Walter Lippmann,⁸⁰ a nationally-syndicated columnist with a deep interest in politics who influenced many with his words.⁸¹ Following his conversation with Warren, Lippmann published a column that warned of the “imminent danger” of attack and concluded that the lack of attacks on

75. *Hearing*, *supra* note 43, at 10973.

76. The Commission was named for its chairman, Representative John H. Tolan of California.

77. The term “concentration camps” was one of the official terms used by the U.S. government during World War II to describe places where the Japanese were interned, in addition to the terms “assembly centers,” “relocation centers,” and “Internment camps.” Roger Daniels, *Incarceration of the Japanese Americans: A Sixty-Year Perspective*, 35 HIST. TEACHER 4-6 (2002), available at <http://www.historycooperative.org/journals/ht/35.3/daniels.html>. Because the term “concentration camps” has been criticized for suggesting an analogy to the Jewish Holocaust, the National Park Service has made a conscientious effort to avoid using the term, but other institutions still use the term in conjunction with “Internment camps.” *MANZANAR COMMITTEE, REFLECTIONS: THREE SELF-GUIDED TOURS OF MANZANAR iii-iv* (1998); Press release, Japanese American National Museum, American Jewish Committee, Japanese American National Museum Issue Joint Statement about Ellis Island Exhibit Set to Open April 3 (Mar. 13, 1998), available at <http://www.janm.org/press/release/52>.

78. WARREN, *supra* note 17, at 148.

79. Cho, *supra* note 2, at 100.

80. CRAY, *supra* note 14, at 119.

81. *Id.*

American soil and the apparent silence from Japanese saboteurs did not imply that danger would not befall America:

[F]rom what we know about Hawaii and about the Fifth Column in Europe, this is not, as some have liked to think, a sign that there is nothing to be feared. It is a sign that the blow is well organized and that it is held back until it can be struck with maximum effect.⁸²

Here, Lippmann echoes Warren's Tolan Commission testimony, that a lack of visible threats or attacks does not indicate reprieve from future destruction.⁸³ In his column, Lippmann "cast the evacuation not as racism unleashed but as prudent military necessity."⁸⁴ His emphasis on martial law and on necessity was the same theme Warren would discuss in his Stanford speech a few months later.⁸⁵

Lippmann's column was highly-circulated and the focus of much national attention.⁸⁶ It was read by federal officials, including the President's Chief of Staff George Marshall, who sent it to Secretary of War Henry Stimson, who then passed it on to Assistant Secretary of War John McCloy; it was most probably read by the President himself.⁸⁷ Further testimony of the perceived influence of Lippmann's column, and of Warren's connection to it, came from the then Santa Barbara District Attorney. He congratulated Warren after Executive Order 9066, which excluded the Japanese from designated military areas, saying, "I have no doubt that the presidential order stems back to the article written by Lippmann following [his conversation] with you."⁸⁸

Lippman's column points to the immense influence Warren had on the plan for Internment, even though Warren himself was not its architect. Warren was instrumental in shaping the public response to Pearl Harbor and to Internment itself through his conversation with Lippmann. Furthermore, Lippman's emphasis on military necessity came directly following his conversation with Warren. While Warren could have chosen to emphasize the racist elements of the decision to intern the Japanese, he instead focused on imminent danger and chose to share his military rationale with the public. Perhaps Warren hoped that a justification based on military principals and expediency would better legitimize his decision in the eyes of the public. In addition, his advocacy for martial rule would perhaps send the public a signal that he had his deep respect for the law and wished, above all, to maintain order.

82. Lippmann, *supra* note 21.

83. *See Hearing, supra* note 43, at 11011-12.

84. CRAY, *supra* note 14, at 123.

85. *See* Warren, Address to Stanford Law Society, *supra* note 4.

86. Gary Y. Okihiro and Julie Sly, *The Press, Japanese Americans, and the Concentration Camps*, 44 *PHYLON* 67 (1983).

87. *Id.*

88. CRAY, *supra* note 14, at 120.

C. A Notable Lack of Dissent

While Warren was a “vital moving force in the formulation of the Japanese relocation program[,]”⁸⁹ he was not alone in these efforts. In fact, not a single California political leader publicly opposed the evacuation and Internment of the Japanese.⁹⁰ Most shared his views on martial law and Internment, including leading officials from California’s law enforcement community.

In a letter dated February 18, 1942, Warren followed up a previously sent telegram⁹¹ with a letter to all sheriffs, district attorneys, and chiefs of police “in the larger cities” in California.⁹² Warren asked for their views on the “law enforcement problems arising from the presence of enemy aliens.”⁹³ Warren asked for this input hoping that he would receive it in time for his testimony about the views of law enforcement in California before the Tolan Commission on February 21.⁹⁴ Urging a response by February 20th, Warren asked three questions of law enforcement:

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

89. WHITE, *supra* note 30, at 71.

90. *Id.* at 75.

91. Telegram from Earl Warren, Att’y Gen. of Cal., to California District Attorneys, Sheriffs, and Chiefs of Police (Feb. 17, 1942) (on file with the Cal. State Archives). This telegram was Warren’s immediate response to receiving Lamb’s letter confirming his appointment with the Tolan Commission. The content was nearly identical to that contained in the letter sent February 18th. *Compare* Letter from Earl Warren to California Law Enforcement, *infra* note 92, *with id.*

92. Letter from Earl Warren, Att’y Gen. of Cal., to various California law enforcement (Feb. 18, 1942) (on file with the Cal. State Archives).

93. *Id.* at 1.

94. *Id.* Warren shared several of the letters he received with the Tolan Commission via his prepared statement to the Commission. *See Hearing, supra* note 43, at 10988-11000. This statement was submitted after his oral testimony, but is included in the record of his testimony. *Id.* And, while Warren did submit some of the letters in his report, it is also possible that the themes in the letters he received prior to his testimony date informed his oral statement to the Commission as well. It is impossible to discern which letters were received before his testimony or his prepared statement, and whether or not he chose the letters he included in his prepared statement based on the date he received them. Moreover, the date on the letters themselves, and the date they were received would have varied, and each letter might not have taken the same amount of time to arrive.

Warren included sixteen letters from law enforcement out of 138 total that were available in his files (note that it is possible that he received more than 138 letters, and that these were not included in his archival files). *Id.* He called this section of his prepared statement “Exhibit B: Letters to Attorney Gen. Warren from Law Enforcement Officers on the Enemy Alien Problem.” *Id.* The difference in the letters he chose to share with the Tolan Commission in his prepared statement, and the themes and messages in the letters overall, was not very significant. For example, a slightly higher percentage of the letters he shared with the Tolan Commission expressed specific concern about the Japanese (61.5%) than the overall group of letters (49.2% overall) in response to his second question, on whether all enemy aliens should be treated alike, regardless of nationality.

(3) What protective measures do you believe should be taken with reference to each nationality or with reference to enemy aliens as a whole in order to eliminate the danger of sabotage and fifth-column activities?⁹⁵

Warren's files in the California State Archives contain 138 responses from law enforcement officials around the state. Despite the fact that Internment was known to be an "option on the table" that was being considered as a possible response to Pearl Harbor,⁹⁶ Warren notably did not find much dissent from his views. Even though some respondents expressed slight hesitation about Internment, no letters openly condemned or warned against the action of Internment.⁹⁷

There was a sense in some of these letters, however, that people were well aware of the constitutional and moral implications of the decision to intern the Japanese, even if they were not ready to fully admit to them. This is not to say that all or even many of the letters expressed hesitations about Internment; in fact a majority of the letters advocated for Internment,

95. Letter from Earl Warren to California Law Enforcement, *supra* note 92, at 1-2. By choosing these questions to ask, Warren emphasized some, and eliminated other questions from the original six topics suggested by Lamb. Compare *id.* with letter from Robert K. Lamb to Earl Warren, *infra* note 179. Warren chose, for example, not to discuss the "implications of and alternatives to martial law" with the California law enforcement. Compare letter from Earl Warren to California Law Enforcement, *supra* note 92, at 1-2 with letter from Robert K. Lamb to Earl Warren, *infra* note 179. Perhaps Warren felt more comfortable sharing his own opinion on this subject with the Commission, or perhaps it was such an important subject to Warren that he did not want to risk soliciting information on it that might contradict his own. Warren also did not ask about steps that had already been taken to deal with the "aliens." Compare letter from Earl Warren to California Law Enforcement, *supra* note 92, at 1-2 with letter from Robert K. Lamb to Earl Warren, *infra* note 179. Lamb's letter also mentioned any steps California had already taken to restrict activities of aliens; whether the state has taken any steps to seize the property of "enemy aliens"; and whether any steps have been taken to "take care of those removed or about to be removed." Letter from Robert K. Lamb to Earl Warren, *infra* note 179, at 1-2. Perhaps Warren chose not to ask this question because he himself knew that no steps had been permitted to be taken in the state in particular, besides those sponsored by the federal government like E.O. 9066. Warren also added the question, not suggested by Lamb's letter, as to whether all enemy aliens should be treated in the same manner, regardless of their country of origin. Compare letter from Earl Warren to California Law Enforcement, *supra* note 92, at 1-2 with letter from Robert K. Lamb to Earl Warren, *infra* note 179, at 1-2. In some ways, to Warren, the distinction between ethnic groups was crucial and he sought more information on this, perhaps as a way to validate some of his racist feelings towards the Japanese, and to affirm his correctness in never advocating for the internment of Germans or Italians, both of whom were Axis powers and World War II enemies of America.

96. "By January 2, [1942,] the Joint Immigration Committee of the California Legislature sent a manifesto to California newspapers summing up 'the historical catalogue of charges against the ethnic Japanese,' who were 'totally unassimilable' according to the manifesto. The manifesto declared that all persons of Japanese descent were loyal to the Emperor, and attacked Japanese language schools as teaching Japanese racial superiority. The committee had the support of the Native Sons and Daughters of the Golden West and the California Department of the American Legion, which in January demanded that all Japanese with dual citizenship be 'placed in concentration camps.'" Andrew E. Taslitz, *Stories of Fourth Amendment Disrespect: From Elian to the Internment*, 70 *FORDHAM L. REV.* 2257, 2306-07 (2002).

97. Out of 138 letters, five claimed either a lack of insufficient information or a desire to pursue a solution that was not based on racial classification, but none of these letters advocated against or spoke out specifically against plans for Internment of the Japanese.

many contained overtly racist statements, and nearly all had racial overtones. However, some law enforcement did express varying degrees of reluctance surrounding Internment, for a variety of reasons. For example, while Santa Clara County's District Attorney John Fitzgerald condemned "a solution to the present problem exclusively along racial lines," he maintained his focus on Japanese Americans and Japanese immigrants.⁹⁸ He seemed torn between condemning racial solutions, and yet voicing his own race-based fears, noting:

I will admit, however, that I believe there is a great danger today from the Japanese population, and particularly from those Japanese who, although born here, have received a liberal amount of their education in Japan. Still, I cannot bring myself to believe that the entire Japanese population is disloyal to this country.⁹⁹

Fitzgerald stated he needed more information before he could decide on whether deportation was the right answer to the problem,¹⁰⁰ and added his concerns, which were practical ones, that "the conditions here, in my opinion, do not justify any action that would disrupt too much our productive ability and our natural every-day business life."¹⁰¹

As the Santa Clara District Attorney's words indicate, most of the hesitation with Internment expressed in these letters was not a concern about constitutional or civil liberties, but rather economic or practical concerns (i.e., lack of information). It is possible that those who might have had moral opposition to Internment chose to make practical rather than moral objections because, given the political context of Internment, practical objections were more likely to be accepted by politicians (like Warren to whom they were writing) and their own communities. Practical concerns were the focus of the Chief of Police of Albany's letter. He was concerned with the "terrific amount of checking and double checking" necessary for a plan like Internment, and the lack of information provided to local law enforcement as to who aliens are, which could be mitigated by fingerprinting and registration at the local post office.¹⁰² However, he also voiced concerns aligned with notions of civil rights and of the presumption of protecting the innocent, noting "that we cannot send all people of foreign birth from this area because of the attitude or the doubt we have of one or

98. Letter from John P. Fitzgerald, Dist. Att'y, Santa Clara County, to Earl Warren, Att'y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives), at 1.

99. *Id.*

100. *Id.* at 2 ("As to what action is best to take or whether there should be wholesale deportation of these people is something that I cannot answer until I have completed the survey that I am making at the present time.").

101. *Id.*

102. Letter from L.G. Jester, Chief of Police, City of Albany, to Earl Warren, Att'y Gen. of Cal. (Feb. 20, 1942) (on file with the Cal. State Archives), at 1.

two.”¹⁰³ In addition, the Yuba County sheriff did not share much information because he did not think sabotage was probable, nor did he think the local law enforcement should take on protective measures; rather, the government should do so.¹⁰⁴ The San Mateo County sheriff did not advocate for Internment in his telegram for practical reasons. He requested that aliens moving from county to county should report their movement and supply their data to the sheriff’s office because at the moment, the sheriff’s offices did not receive any of this information.¹⁰⁵

Some, including the Contra Costa County sheriff¹⁰⁶ and the Glenn County District Attorney,¹⁰⁷ declined to state their opinions about these matters. Their reasons for not providing an opinion were not overtly related to civil liberties concerns—the Contra Costa sheriff was afraid of his views being misinterpreted or having little impact on the final decision,¹⁰⁸ and the Glenn County District Attorney stated that there were no Japanese in his county and therefore, counties “more vitally affected by the presence of such aliens” should be the ones to provide Warren with their answers.¹⁰⁹

Others, while they did not necessarily balk at the idea of Internment, did advocate for less extreme means of dealing with the fear of sabotage. The most disapproving letter by far was sent from the Santa Clara County sheriff, Wm. J. Emig. He believed in the loyalty of California’s citizens, even those who were aliens: “I do not doubt that there are many aliens of enemy nationalities residing in this State and who, for various reasons, have not become citizens, who are thoroughly loyal to America and American institutions.”¹¹⁰ He also contended that “above all things that the American reputation for fairness should be maintained,” meaning not that enemies be allowed the opportunity to attack but that “those aliens who have committed no overt or subversive act, should be regarded simply as potentially dangerous, and so controlled to prevent this danger from becoming actual.”¹¹¹ However, he remained an advocate for “an orderly

103. *Id.*

104. Letter from Charles J. McCoy, Sheriff, Yuba County, to Earl Warren, Att’y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives).

105. Telegram from James J. McGrath, Sheriff, San Mateo County, to Earl Warren, Att’y Gen. of Cal. (Feb. 21, 1942) (on file with the Cal. State Archives).

106. Letter from John A. Miller, Sheriff, Contra Costa County, to Earl Warren, Att’y Gen. of Cal. (Feb. 20, 1942) (on file with the Cal. State Archives).

107. Letter from Clyde H. Larimer, Dist. Att’y, Glenn County, to Earl Warren, Att’y Gen. of Cal. (Feb. 18, 1942) (on file with the Cal. State Archives).

108. Letter from John A. Miller to Earl Warren, *supra* note 106 (“I am extremely sorry but I do not desire to express any opinion on this matter whatsoever, as I doubt very much whether my views would have any bearing with you or the committee. More than likely my views would be misinterpreted no matter how I presented them and therefore it is best that you proceed without them.”).

109. Letter from Clyde H. Larimer to Earl Warren, *supra* note 107.

110. Letter from Wm. J. Emig, Sheriff, Santa Clara County, to Earl Warren, Att’y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives), at 2.

111. *Id.*

controlled migration to the middle states.”¹¹² The Glendale Chief of Police answered Warren’s third question by asking for a program where all Japanese “will have an opportunity to be employed in some gainful occupation such as agriculture.”¹¹³ While he was not opposed to relocating the Japanese, he also gave a warning to Warren of the problems of hysteria.¹¹⁴ “Everyone attempting to solve this problem should keep in mind that two wrongs do not make a right and whatever program is established should definitely protect the foreign born residents of our state and care should be exercised not to permit hysteria or mob-psychology to prevail.”¹¹⁵

Why did Warren not heed the few warnings against hysteria, paranoia, and even the hints at possible civil liberties violations as articulated by California law enforcement in these letters? Why did he not see these letters as reason enough to abandon Internment as a response to Pearl Harbor, and to testify to its dangers in front of the Tolan Commission? There are several possible explanations, none of which are certain because Warren himself did not comment on his use of these letters. It is possible that Warren, like other leaders at the time, simply gave in to the wartime paranoia of the moment, which can overtake even the greatest of leaders. It is also possible that Warren himself knew that if he did not present a publicly strong solution to Pearl Harbor and to the fear of potential future attacks, that the public would remain frightened and would not be assured of their safety in a time of war; he might have felt pressure to a certain degree, as the chief law enforcement officer of California, to soothe the public’s anxiety. Along similar lines, Warren’s concern for state security might have trumped any concerns about civil liberties. The need to promote state security, coupled with the racism of the times, which certainly had an influence on Warren, arguably facilitated his ignoring or overlooking of any possible dissent to Internment.

II. WARREN’S DECISION TO SUPPORT INTERNMENT

Warren appears to have had two major motivations for his decision to promote Internment as a response to the attack on Pearl Harbor. The first underlying reason, which he did not present directly to the public, was the racism and xenophobia of the times toward people of Japanese ancestry and Asian Americans generally. These feelings permeated the rhetoric surrounding his second motivation, which was the protection of state security. State security was the outward justification for Internment he

112. *Id.*

113. Letter from V.B. Brown, Chief of Police, City of Glendale, to Earl Warren, Att’y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives), at 2.

114. *Id.*

115. *Id.*

presented to California and the nation. The focus of this Article is on the latter, the outward justification, and how Warren's views on the law and its protection of state security changed after his time as California's attorney general.¹¹⁶

A. *Racism and Xenophobia*

Racism, lamentably one of Warren's motivations, was the overarching motivation behind Internment. Anti-Asian discrimination, "one of California's traditions,"¹¹⁷ was even ingrained in its laws. California's Alien Land Law, which prevented aliens from owning land, was defended by Warren's predecessor, Attorney General Ulysses S. Webb.¹¹⁸ Warren was arguably a product of his environment. He was raised in Bakersfield, California, where the anti-Asian sentiment was strongly felt and considered to be an integral part of American Progressivism.¹¹⁹ He was also a member of the "anti-Oriental"¹²⁰ Native Sons of the Golden West,¹²¹ "an exclusive organization dedicated to preserving California 'as it has always been and as God himself intended it shall always be—the White Man's Paradise.'"¹²²

When discussing possible solutions to the potential sabotage of the Japanese, Warren emphasized that Japanese Americans differed from other foreign nationals:

[W]hen we are dealing with the Caucasian race, we have methods that will test the loyalty of them; and we believe that we can, in dealing with the Germans and Italians, arrive at some fairly sound conclusions. . . . when we deal with the Japanese, we are in an entirely different field and we cannot form any opinion. . . [because of] [t]heir method of living.¹²³

116. It is quite possible to argue that Warren's presentation of state security as the justification for Internment was merely a cover for racist motivations. However, even though racism played a large role in the decision, the wartime context also featured heavily. After all, Warren did not advocate Internment in a time of peace. While the extremity of his solution might have been motivated by racist tendencies, which I would argue were present in him no more than they were present in the rest of society at the time, this Article is an attempt to focus on the legal justifications he provided, and how, if at all, those concepts of the law evolved over time in Warren's own jurisprudence. This is not to minimize the racial context but rather to shift the focus to Warren's jurisprudence on the topic, which is a much less-discussed subject.

117. WHITE, *supra* note 30, at 68.

118. *Id.* at 68-69.

119. Cho, *supra* note 2, at 86-87.

120. WHITE, *supra* note 30, at 31, 69, 162.

121. *Id.* at 69.

122. NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 74 (University Press of Colorado, 2007) (quoting Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* 364 n.41 (Washington, D.C., 1982)). See generally Kevin Allen Leonard, "Is That What We Fought for?" *Japanese Americans and Racism in California, The Impact of World War II*, 21 W. HIST. Q. 463 (1990). The Native Sons describe themselves today as a fraternal organization founded in 1875 "to perpetuate in the minds of all native Californians the memories of one of the most wonderful epochs in the world's history—the Days of '49." Native Sons of the Golden West, About Us, <http://www.nsgw.org/about.htm> (last visited Mar. 8, 2009).

123. WHITE, *supra* note 30, at 71.

Here, Warren was making the distinction between the Japanese on one hand, and the Germans and Italians on the other hand—*i.e.*, a distinction between white and non-white cultures. Moreover, Warren's words imply a racist notion of perpetual foreignness of Japanese Americans. Even recent German and Italian immigrants were seen as less suspect than second- or third-generation Japanese American citizens.

Warren made additional statements revealing racist ideology and his adherence to the philosophy of the Native Sons of the Golden West, including—according to biographer Leo Katcher—Warren's Tolan Commission testimony.¹²⁴ Warren's recollection of his testimony, however, was that he was simply going along with the politics of the time. "The atmosphere was so charged with anti-Japanese feeling that I do not recall a single public officer responsible for the security of the state who testified against a relocation proposal."¹²⁵ The true motivations of Warren's decision to intern the Japanese lie somewhere in between Katcher's description and Warren's own view: Warren was motivated by a variety of factors to pursue Internment, and one of these, as Katcher emphasizes, was certainly racism.

Racism against people of Japanese ancestry was sadly not unique to Warren alone. Just as Warren was undoubtedly influenced by the racism of his time, local law enforcement, in their letters to Warren, reflected the general population's heated racist tendencies in voicing their opinions about Internment.¹²⁶ Most racist arguments were used as justifications for interning both Japanese immigrants and Japanese Americans. For example, the Chief of Police of the City of Bell wrote that separate treatment of immigrants and American citizens would be "supercilious."¹²⁷ "Do you

124. KATCHER, *supra* note 3, at 144. The Native Sons of the Golden West openly opposed Chinese, Mexican, and Japanese immigration and fought for the disenfranchisement of Japanese Americans during World War II. See Leonard, *supra* note 122.

125. WARREN, *supra* note 17, at 148. While Warren is correct that no one testified before the Tolan Commission in opposition to Internment, some public officials did oppose Internment publicly. Edward J. Ennis of the Department of Justice recognized that Japanese Americans were loyal, and spoke out against the injustice and danger of proposals for mass relocation. A More Perfect Union: Japanese Americans and the United States Constitution, <http://americanhistory.si.edu/perfectionunion/resources/touring.html> (last visited March 13, 2009). The FBI's J. Edgar Hoover also opposed removal. *Id.* Refuting General DeWitt's reports of disloyalty on the part of Japanese Americans, Hoover sent a secret six-page memo to Attorney General Francis Biddle in which he wrote about Japanese American disloyalty: "Every complaint in this regard has been investigated, but in no case has any information been obtained which would substantiate the allegation." Asian American Studies Institute: Japanese American Internment Resource Library, <http://web2.uconn.edu/aasi/Research/jarl.html> (last visited Mar. 13, 2009).

126. From the list of local law enforcement who sent these reply letters, one can see that the names are all of Caucasian origin, making it likely that all of these local leaders who replied to Warren's letter were white men.

127. Letter from W.B. Steele, Chief of Police, City of Bell, to Earl Warren, Att'y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives).

believe there are degrees in banditry?"¹²⁸ Alameda County District Attorney Ralph Hoyt noted that both Japanese Americans and Japanese immigrants posed a particular threat to Californians because, due to "extreme racial differences between Japanese and Americans, the Japanese, as a group, are for Japan and against the United States in this war."¹²⁹ Those who used racial overtones or messages in their letters largely did not support separating aliens and American citizens. The sheriff of Tehama County wrote, "A Jap is still a Jap and should not be treated as a citizen."¹³⁰ Similarly, the sheriff of San Joaquin County noted that the danger posed by the Japanese was due to the fact that they "can never be assimilated in the white race due to their coloring. They will always be a people within a people."¹³¹ The Chico Chief of Police wrote, "a Japanese is always a Jap regardless of where they are born,"¹³² and Pomona's Chief of Police wrote that Americans must try to control "Mr. Jap."¹³³ The Yolo County District Attorney callously remarked on the distinction between the loyal and disloyal:

But how are we to separate the sheep from the goats? . . . The American people distrust [the Japanese]. . . . They know their cunning ways from experience. There are so many of them. . . . They look so much alike that if one should detect a Japanese doing sabotage it would be difficult to identify him as the culprit. . . . The people here simply distrust them. They don't want them around.¹³⁴

The strength of the racist tendencies of a letter often correlated with the extreme nature of solutions advocated in a given correspondence. The same Chief of Police of the City of Bell wrote that humanitarian concerns should not even be considered when arriving at a solution, noting, "[I]t is not a question of whether we can protect ourselves in a humanitarian manner, it is only a question of whether we can protect ourselves."¹³⁵ The Marin County sheriff contrasted Japanese Americans with Italian Americans, who "are known to be of distinctly American ideas and

128. *Id.*

129. Letter from Ralph E. Hoyt, Dist. Att'y, Alameda County, to Earl Warren, Att'y Gen. of Cal. (Feb. 20, 1942) (on file with the Cal. State Archives), at 2.

130. Letter from J.N. Froome, Sheriff, Tehama County, to Earl Warren, Att'y Gen. of Cal. (Feb. 27, 1942) (on file with the Cal. State Archives).

131. Letter from Ansbro, Sheriff-Coroner, San Joaquin County, to Earl Warren, Att'y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives).

132. Letter from C.E. Tovee, Chief of Police, City of Chico, to Earl Warren, Att'y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives).

133. Letter from J.B. Ashurst, Sheriff, City of Pomona, to Earl Warren, Att'y Gen. of Cal. (Feb. 21, 1942) (on file with the Cal. State Archives).

134. Letter from C.C. McDonald, Dist. Att'y, Yolo County, to Earl Warren, Att'y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives).

135. Letter from W.B. Steele to Earl Warren, *supra* note 127, at 2.

ideals.”¹³⁶ He then went on to suggest that both Japanese Americans and Japanese immigrants should be “eliminated from restricted areas” and advocated a plan that smacked of Nazi Germany—that all other enemy aliens might “wear a badge of distinctive type and color which would be easily recognizable.”¹³⁷

Racism pervaded law enforcement’s discourse at the time, and Warren’s own comments reflected that racism. However, his outward justification for Internment, which he presented publicly, was the need to preserve state security during a time of war.

B. *The Preservation of State Security*

Warren presented his justification for Internment in speeches, articles, and Congressional testimony. Persons of Japanese ancestry ought to be removed from society, according to Warren, because of the danger they posed to state security. The alleged danger these individuals posed, based on rumor, speculation and paranoia, served as the impetus for Internment, even though there was no evidence of actual danger.¹³⁸ Warren realized,

136. Letter from Walter B. Sellmer, Sheriff, Marin County, to Earl Warren, Att’y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives).

137. *Id.*

138. Much of the information in General DeWitt’s report, on which Warren and other leaders relied on at the time in their decision to advocate for Internment, was subsequently proven to be false. In *Korematsu II*, the court found that the Court in the original *Korematsu* decision had not been provided with a complete record, noting, “[w]here relevant evidence has been withheld, it is ample justification for the government’s concurrence that the conviction should be set aside. It is sufficient to satisfy the court’s independent inquiry and justify the relief sought by petitioner.” *Korematsu II*, 584 F. Supp. at 1419. The *Korematsu II* court, in the appendix to its decision, cited in its entirety a memorandum from Herbert Weschler to the Department of Justice detailing the “wilfull inaccuracies” of the DeWitt report. *Id.* at 1421-22. The memorandum noted:

The chief argument in the report as to the necessity for the evacuation is that the Department of Justice was slow in enforcing alien enemy control measures and that it would not take the necessary steps to prevent signaling whether by radio or by lights. It asserts that radio transmitters were located within general areas but this Department would not permit mass searches to find them. It asserts that signaling was observed in mixed occupancy dwellings which this Department would not permit to be entered. Thus, because this Department would not allow the reasonable and less drastic measures which General DeWitt wished, he was forced to evacuate the entire population. The argument is untrue both with respect to what this Department did and with respect to the radio transmissions and signaling, none of which existed, as General DeWitt at the time well knew. The report asserts that the Japanese Americans were engaged in extensive radio signaling and in shore-to-ship signaling. The general tenor of the report is not only to the effect that there was a reason to be apprehensive, but also to the effect that overt acts of treason were being committed. Since this is not so it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected. This is the only opportunity which this Department has to correct them.

Id. (citing Memorandum from Herbert Weschler to the Department of Justice, September 30, 1944).

It is important to note that the Northern District did not question the Executive’s prerogative

whether by his own reflections or through concerns of local law enforcement, that Internment would violate the civil liberties of American citizens. Instead of circumventing constitutional due process protections, he decided to advocate for a new form of law—martial rule—to temporarily replace the customary legal protections during wartime. Warren’s support for martial law indicates that even in times of war, he was unwilling to disrespect the technical legitimacy of the law as it existed.

1. *Stanford Speech: Martial Rule in a Time of War*

Warren delivered a speech to the Stanford Law Society entitled “Martial Rule in Time of War” on June 4, 1942, about one month after DeWitt had issued the final exclusion order sealing the fate of Japanese Americans.¹³⁹ In it, one can find a detailed exploration of martial rule and its history, and Warren’s interpretation of the concept as applicable, indeed essential, to California during World War II.

Martial rule, according to Warren, is based on “one simple, fundamental principle”—military necessity.¹⁴⁰ The “present state of total war” left the United States with the “duty and power . . . to preserve itself,”¹⁴¹ and martial rule, then, was a necessary form of national “self-defense against any actual or threatened danger.”¹⁴² The extent to which martial rule can be applied is determined by necessity, defined as the amount of force necessary to “repress illegal force.”¹⁴³

Warren contended that the “enemy alien problem” is one that should be treated as a military, rather than a civil problem.¹⁴⁴ He provided several reasons for the military nature of the situation. Armies, in a time of war, are more expedient, and can help ease the strain placed on local civilian government.¹⁴⁵ Warren also saw the elevation of order and security over individual rights as merely temporary. “Whatever controls the Army needs for conduct of the war, these controls of martial rule will pass with the passing of the war emergency. With peace our state and local governments

to rely on such information, but rather the propriety of revealing to the Court some facts and not others. *Id.* at 1419 (“There is no question that the Executive and Congress were entitled to reasonably rely upon certain facts and to discount others. The question is not whether they were justified in relying upon some reports and not others, but whether the court had before it all the facts known by the government.”). Moreover, Warren did not appear to know about the impropriety of DeWitt’s report; he instead relied on its information and that of his advisors to make his decisions. Perhaps, as has been alluded to earlier in this Article, Warren ought to have questioned and critically examined the conclusions presented by his advisors. However, his failure to do so is perhaps an indication to us of the tendency of even the greatest leaders to succumb to the pressures of wartime paranoia.

139. Warren, Address to Stanford Law Society, *supra* note 4.

140. *Id.* at 2.

141. *Id.* at 2-3.

142. *Id.* at 3.

143. *Id.*

144. *Id.* at 20.

145. Warren, Address to Stanford Law Society, *supra* note 4, at 20.

and our constitutional rights will then again come unto their own.”¹⁴⁶ In other words, the protection of the nation state against the foreign enemy allowed for a temporary deprivation of civil liberties.

The core of Warren’s legal analysis, and what gives us a glimpse into his legal decision-making at the time, is his explanation and exploration of the case *Ex parte Milligan*.¹⁴⁷ In a 5-4 decision, the Court in *Milligan* held that Congress would not have had power to authorize a military commission to deprive Milligan of a jury trial, that martial rule would be confined to territory where courts ceased to function due to invasion, and that martial rule was only acceptable when civilian authority had been deposed due to warfare.¹⁴⁸ Warren, however, chose to focus his speech on the dissent, which argued that when a nation is involved in a war, and some portions of the country are exposed to invasion, Congress can determine in which states the danger is imminent enough to justify the authorization of military tribunals.¹⁴⁹ The dissent in *Milligan* noted that the test for when martial rule ought to be applied was constructive necessity, rather than the cessation of the courts test applied by the majority.¹⁵⁰

Warren’s application of *Milligan* to the context of World War II and Internment reveals his notion of the role of the law as a protector of the state during wartime. In Warren’s opinion, the Court would have adopted the dissent in *Milligan* as its majority view in the context of World War II and Pearl Harbor. If Internment was ever challenged in the courts, Warren believed “the majority view in the *Milligan* case that martial rule cannot be based upon a threatened invasion will be modified in line with the view expressed by the minority in that case.”¹⁵¹ Warren supported this reasoning with rhetoric focused on fear, destruction, and the advancement of weapons technology. “The concept of . . . war must expand with progress in the means of destruction,”¹⁵² and according to Warren, those means are “the long-range bombing plane, the far-roving submarine,” which “make the home front a theater of operations.”¹⁵³ The new type of warfare used during World War II created the constructive necessity that Warren required to modify the law in order to protect the safety of Americans. Warren stressed in his speech the difference between *Milligan*’s context, the Civil War, and the current war, where battles are no longer isolated and all portions of the nation are faced with the “imminent danger of attack”¹⁵⁴

146. *Id.* at 21.

147. *Ex parte Milligan*, 71 U.S. 2 (1866).

148. *Id.*

149. *Id.* at 140.

150. *Id.* at 54.

151. Warren, Address to Stanford Law Society, *supra* note 4, at 7.

152. *Id.*

153. *Id.*

154. *Id.*

and “total war.”¹⁵⁵

For Warren, the new way of waging war created a “compelling necessity” that can only be handled by a military government.¹⁵⁶ He believed the court would uphold the blackout and dim-out regulations of the army, and the removal of the Japanese, because both were justified by necessity.¹⁵⁷ This war, a borderless war, he noted, left every citizen vulnerable. “Enemy planes have no nice regard for state and county lines or neat questions of jurisdiction. The solution of these problems may have to be found in martial rule.”¹⁵⁸

Warren’s acknowledgment that one cannot legally deprive a citizen of civil liberties through civilian courts and systems, and his assumption that any action taken must conform to the system of laws, appear to form the basis of his emphasis on the military as the best means of dealing with the “enemy alien problem.” For Warren, the attack on U.S. soil, the ability of enemies to more easily reach American soil with planes and submarines, and the proximity of California to Japan differentiated this war from previous wars and required stricter measures than ever before. If the military took the lead on Internment, Warren believed that this temporary deprivation of liberties—which would end, as he noted, with the end of the war emergency—would conform to the principles of law.

Warren’s views on martial rule expressed his desire that all actions to protect the State conform to the rule of law. He provided detailed, legal justifications concerning when martial rule was justified, and why martial rule, in turn, justified the deprivation of civilian liberties during a time of war. For Warren, obeying the law was paramount. And because Warren believed he was bound by the law in all of his decision making, if the law did not fit neatly with special circumstances, such as an emergency war situation, the State could modify the law to ensure the law’s continued protection of the State against its enemies. Rather than completely ignoring the law in a time of difficulty, Warren chose to modify its scope. His 1942 comments in his California Bar Journal article further evince his commitment to the rule of law.

2. *State Bar of California Comments*

Warren echoed themes of preserving State security in comments he wrote in the Journal of the State Bar of California’s July-August issue in 1942.¹⁵⁹ Warren argued that “the present state of total war” created sufficient necessity to justify martial law in order for the nation to preserve

155. *Id.* at 18.

156. *Id.* at 8.

157. Warren, Address to Stanford Law Society, *supra* note 4, at 8.

158. *Id.* at 19.

159. Earl Warren, *War-Time Martial Rule in California*, 17 J. ST. B. CAL. 185 (1942).

itself.¹⁶⁰ As in his Stanford Speech, Warren also admitted that he was using *Milligan's* dictum to justify the "right of the military authorities to exercise control over civilians in a time of war."¹⁶¹ However, even though Warren intended this to be primarily a legal argument for an audience of attorneys, he alluded to "racial consciousness," the "imminence of attack," and the "influence of assimilability" to justify his position.¹⁶² The argument of non-assimilability surfaced again in Warren's testimony for the Tolan Commission, in which he argued that Japanese Americans' inability to be indistinguishable among Americans, in part, rendered them vulnerable as easy targets of hate mongering and violence.¹⁶³ In other words, Warren believed that Internment was necessary not only for the security of the State itself, but also for the security of Japanese Americans. However, Warren possibly used this testimony as a tactic to provide more legitimacy to the argument for Internment, by asserting that Internment would not just protect some Americans, but *all* Americans, including Japanese Americans.

3. *Input from Local California Law Enforcement*

Even though Warren did not specifically inquire about martial law or its ramifications, several letters in response to his February solicitation of input from local law enforcement echoed the themes found in Warren's speeches and reflections on Internment. While some local law enforcement officers, such as the District Attorney of Madera County, advocated for martial law generally,¹⁶⁴ most law enforcement officers specifically advocated for a type of martial law under which local law enforcement would receive the powers required to control the alien situation.

The District Attorney of Madera County emphasized the inadequacy of state and federal laws to deal with the situation of the Japanese:

If we are not to run the risk of disaster[,] we must forget such things as the Writ of Habeas Corpus, and the prohibition against unreasonable searches and seizures. The right of self-defense, self preservation, on behalf of the people is higher than the Bill of Rights. Martial law should be declared over all of California.¹⁶⁵

The Madera County District Attorney advocated for removal and Internment, as well as for methods of dealing with the consequences of those actions, including suits for damage claims, after the conclusion of the war. He acknowledged, "[Internment] may result in injustice but we

160. *Id.* at 201-02.

161. *Id.* at 191.

162. *Id.* at 195.

163. *Hearing, supra* note 43, at 1105-06.

164. Letter from George Mordecai, Dist. Att'y, Madera County, to Earl Warren, Att'y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives).

165. *Id.* at 2.

cannot help it. This is the fortune of war.”¹⁶⁶

The Santa Cruz County District Attorney also recommended martial law but in a limited form with unspecified limits.¹⁶⁷ He emphasized granting further authority to local authorities, including himself, to “take into custody and detain . . . any enemy alien” and to “take into custody and detail for proper federal authorities, any enemy alien found within the prohibited area.”¹⁶⁸ He hoped that the efforts of the army and FBI would support and supplement local law enforcement (“the local Police Department, Sheriff’s Office and Highway Patrol”).¹⁶⁹ The Los Angeles County District Attorney, in stressing the problematic nature of American-born Japanese in Los Angeles County and the notion that evacuation could not happen without an invocation of martial law, highlighted some of the problems that might arise from detaining Japanese Americans, including:

[S]erious interference with . . . work and activities . . . possible interruption to the defense industry and annoyance to many persons and difficulties of enforcement . . . impracticability of paper boundaries . . . necessity . . . to take care of ‘must crops’ under Japanese operation; [and] making proper arrangements for Internment . . . and . . . removal.¹⁷⁰

Notably, none of the District Attorney’s concerns related to civil liberties; rather, he focused on the practical workings of the home front during wartime, and the security of the nation.

The Kern County District Attorney did not hesitate to present martial law as the adequate solution to potential sabotage: “I do not believe that adequate protective measures against sabotage and Fifth Column activities are possible unless martial law is declared throughout the state.”¹⁷¹ However, he presented an alternative: if statewide martial law was not possible, the Federal Government should “file with the County Clerk of each county a list of all alien registration, [and] that said list [should] be open to all sheriffs, District Attorneys, Police Chiefs, Constables and Marshals on demand.”¹⁷² The Kern County D.A’s alternative plan, then, proposed to permit disclosure not normally possible in civilian settings as well as sharing of information between federal and state agencies and offices, so that local counties would have the authority and information

166. *Id.*

167. Letter from Ben Knight, Dist. Att’y, Santa Cruz County, to Earl Warren, Att’y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives), at 3.

168. *Id.*

169. *Id.*

170. Letter from John F. Dockweiler, Dist. Att’y, Los Angeles County, and Clyde C. Shoemaker, Assistant Dist. Att’y, Los Angeles County, to Earl Warren, Att’y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives), at 2.

171. Letter from Tom Scott, Dist. Att’y, Kern County, to Earl Warren, Att’y Gen. of Cal. (Feb. 19, 1942) (on file with the Cal. State Archives), at 2.

172. *Id.*

necessary to protect their respective areas. The Stanislaus County District Attorney echoed the need for information and authority for local law enforcement:¹⁷³

[I]f either the Army or the FBI do not have the man power to enforce the regulations relative to aliens[,] local police officers should be given some authority to act. For example, the so-called curfew restriction with reference to aliens affects part of our country but local peace officers have no authority whatever to enforce it and there are no federal authorities available. We fail to see how results can be [e]ffective unless enforcement is placed in the hands of some personnel, presently available, in the affected areas.¹⁷⁴

Similarly urging for more power for local law enforcement, the Kings County District Attorney and Sheriff both advocated martial law, but with the caveat that local law enforcement receive the necessary information and powers to properly handle the situation.¹⁷⁵ In advocating restrictions on Japanese Americans with dual citizenship or with immigrant relatives, Kings County supported martial law: “If this can only be handled under martial law, then martial law should be declared.”¹⁷⁶ Local law enforcement, the District Attorney, and Sheriff called for access to copies of the federal registration of aliens, or, if this was not possible, then authority to fingerprint and photograph all aliens at the local sheriff’s office.¹⁷⁷ Focusing again on expediency and increased powers for local law enforcement, the Humboldt County Sheriff asked the Federal government to set up “an agency in each county with authority to act in all emergency cases without a lot of red tape . . . these agencies should handle the registration of all local aliens, and have control of all aliens in the area.”¹⁷⁸ The theme that emerges from these letters is that of law enforcement coordination coupled with the need for efficient and rapid procedures in a time of emergency.

Martial law was Warren’s way of assuring that Internment—which he believed was necessary for state security—conformed to the law. Warren’s Tolson Commission testimony also echoed the need for State security, and was perhaps the most significant of his own statements on martial rule. Warren’s testimony directly influenced General DeWitt’s subsequent proclamation of orders and the Congressional and Federal response to the Japanese threat, while making his views on Internment available to the

173. Letter from Leslie A. Cleary, Dist. Att’y, Stanislaus County, to Earl Warren, Att’y Gen. of Cal. (Feb. 18, 1942) (on file with the Cal. State Archives), at 2.

174. *Id.*

175. Letter from O.H. Clyde, Sheriff, Kings County, and Roger R. Walch, Dist. Att’y, Kings County, to Earl Warren, Att’y Gen. of Cal. (Feb. 18, 1942) (on file with the Cal. State Archives), at 1.

176. *Id.*

177. *Id.* at 1-2.

178. Letter from A.A. Ross, Sheriff, Humboldt County, to Earl Warren, Att’y Gen. of Cal. (Feb. 20, 1942) (on file with the Cal. State Archives), at 1.

entire news-reading public—not just law students and professors at Stanford or readers of the California Bar Journal.

4. *Tolan Commission Testimony*

On February 18, 1942, Earl Warren received a letter from Robert Lamb, the staff director of the House Committee Investigating National Defense Migration.¹⁷⁹ That letter confirmed the date and time of Warren's testimony (February 21st at 2 p.m.) and outlined several suggestions of topics likely to be discussed by the Committee. Lamb's list of six topics included an overview of dangers posed to California and National Security by the presence of "enemy aliens and native-born citizens of enemy alien parentage"; the implications of and alternatives to martial law; the rights of native-born citizens versus rights of enemy aliens; any steps California had already taken to restrict activities of aliens; whether the State had taken any steps to seize the property of enemy aliens; and whether any steps had been taken to "take care of those removed or about to be removed."¹⁸⁰ Immediately upon receiving the letter, Warren sent a teletype or telegram to California's local law enforcement officials—sheriffs, district attorneys, and chiefs of police—soliciting answers to aid him in his testimony before the Commission.¹⁸¹ Warren's prompt response to Lamb's letter—a solicitation of input from law enforcement in California—arguably indicated his respect for the law: he saw the modification of the law as a serious undertaking that required the solicitation of input. Lamb's letter did not ask or suggest that Warren survey law enforcement; the letter asked only for Warren's personal opinion of the situation based on his position as the chief law enforcement officer of California.¹⁸² Warren's actions here confirmed the meaning of his words in his speeches and letters—that a technical respect for the law ought to always exist, even in situations of dire emergency.

Warren divided his testimony before the Tolan Commission into his testimony on the day of the hearing itself and a prepared statement, which he submitted after his actual, in-person testimony. Warren requested permission to submit this prepared statement in light of his conference with law enforcement earlier that month. He did not have the time to prepare his findings from the letters he received from law enforcement or incorporate their maps of strategic Japanese locations; as such, he wanted an extra two weeks to prepare his report.¹⁸³ Warren's prepared statement focused

179. Letter from Robert K. Lamb, Staff Director, House Comm. Investigating Nat'l Def. Migration, to Earl Warren, Att'y Gen. of Cal. (Feb. 18, 1942) (on file with the Cal. State Archives).

180. *Id.* at 1-2.

181. Telegram from Earl Warren, *supra* note 91.

182. Letter from Robert Lamb to Earl Warren, *supra* note 179, para. 2.

183. *Hearing*, *supra* note 43, at 11009. When Warren actually submitted his statement to the

mainly on the pattern of Japanese locations in the State, and the threat Japanese Americans posed to the State due to their continuing connections with Japan. Warren's testimony emphasized military necessity as the rationale for Internment, and contained his proposal for the Internment of Japanese Americans.

a. Warren's prepared statement

In his statement, Warren explained his view that Japanese locations in California were not coincidence but part of a strategic plan. Using the maps he had asked California's law enforcement to prepare at the February 2nd meeting, he testified that "virtually every important strategic location and installation has one or more Japanese in its immediate vicinity."¹⁸⁴ Warren attempted to distance himself from what would seem to be conspiracy theory; he admitted that some positions could be "mere coincidence," but from these maps, he concluded "it would seem equally beyond doubt that the presence of others is not coincidence."¹⁸⁵ The maps revealed Warren's fear "that the Japanese population is . . . ideally situated . . . to carry into execution a tremendous program of sabotage on a mass scale."¹⁸⁶ And by communicating this fear to the Tolan Commission, Warren effectively brought that fear closer to an embodiment in the law. His statement also urged the Internment of both American citizens and foreign nationals because, in Warren's mind, distinguishing between the loyal and disloyal was too difficult a task for law enforcement.¹⁸⁷ Warren dedicated a significant portion of his statement to describing the close relationship between Japanese Americans and Japan via their civic and cultural organizations.¹⁸⁸

b. Warren's testimony

While Warren's statement smacks of racism against the Japanese, his in-person testimony focused on military necessity and an actual, proposed solution to the perceived potential for sabotage.¹⁸⁹

Warren began his testimony by affirming Roosevelt's Executive Order 9066, which had been passed the day before his testimony.¹⁹⁰ He also urged the Commission to consider that American citizens were likely

Tolan Commission is unclear. Representative Tolan suggested that Warren take "the next 10 days or 2 weeks" to prepare his statement, but, here, there is no recorded date of when the statement was submitted. *Id.*

184. *Id.* at 10973.

185. *Id.* at 10974.

186. *Id.*

187. *Id.*

188. *Id.* at 10974-75.

189. This is not to say that Warren was not influenced by racist ideology, but rather that he was influenced by many factors, one of which was wartime necessity.

190. *Hearing, supra* note 43, at 11009.

involved in “fifth-column activities”¹⁹¹ and that the enemy problem included not just aliens but also “descendants of aliens.”¹⁹² To Warren, the alien problem was “not only . . . Federal . . . but a military problem,” and, thus, the military needed to be in charge of the solution.¹⁹³ Again, Warren prioritized expediency, a central consideration in times of war: civil government was not well-equipped to handle this particular problem because it lacked the expediency necessary for the urgency of the situation. He noted, “[U]ntil we are able to go into court and beyond the exclusion of a reasonable doubt establish the guilt of those elements among our American citizens, there is no way that civil government can cope with the situation.”¹⁹⁴ Warren’s words reveal the influence of the emergency situation of the war on his legal philosophy and his continued respect for the legitimacy of the law. If the court system controlled the law during war time, the State would be required to find each individual guilty beyond a reasonable doubt before confining them. In other words, civil law presented certain limitations that another form of rule of law—martial rule—would not present. To escape the restrictions of civilian law, Warren advocated changing the law rather than circumventing it.

Wartime fears shaped Warren’s concept of rule of law, revealed in his paranoid rhetoric about the war. If the State delayed protection or used civil law rather than martial rule, then disaster, “a Pearl Harbor incident,” would befall California.¹⁹⁵ Warren then discussed why California was the “most likely objective in the Nation” for potential attacks,¹⁹⁶ and how local law enforcement was too poorly equipped to handle the situation without assistance.¹⁹⁷ If local law enforcement were to enforce safety without any assistance from the military, the effect would be “just like putting a blindfold over a man’s face and asking him to go out and fight someone that he cannot see.”¹⁹⁸

Representative Tolan pressed Warren on the constitutionality of any solution to the Japanese problem. Warren believed that E.O. 9066 was constitutional and deeply supported it due to its basis in the philosophy of martial rule. “[I]t does transfer the solution of this problem to the military authorities who are charged with the defense of this area and therefore, have the right morally and legally and every other way to take any

191. Fear of fifth-column activities likely resulted from the activity that directly preceded Warren’s testimony. At the time Warren testified, American forces had just arrived in Great Britain, and the Germans had begun a U-boat offensive against the east coast of the United States. The History Place, World War II in Europe Timeline, <http://www.historyplace.com/worldwar2/timeline/ww2time.htm#1942> (last visited Apr. 21, 2008).

192. *Hearing, supra* note 43, at 11010.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.* at 11010-11.

197. *Id.* at 11013-14.

198. *Hearing, supra* note 43, at 11013.

2009] *EARL WARREN AND TODAY'S CIVIL LIBERTIES DEBATE* 105

protective measures that are necessary to ensure the security of the area.”¹⁹⁹ This is the first time Warren seems to invoke morality in conjunction with Internment. In some ways, Warren perhaps viewed Internment as a morally correct decision, at least at the time, given the perceived threat the Japanese posed to the safety of Americans. The most interesting exchange in Warren’s testimony again emphasized the perceived expediency of martial rule over a legal or court-based system of adjudication:

Chairman: In other words, there are two alternatives—the suspension of the writ of habeas corpus or martial law. Is that right?

Earl Warren: Yes sir.

Chairman: We are putting them all on the same footing. I think, like you, that it is absolutely constitutional. But if we took it direct, we would be in the courts for the duration of the war fighting that thing out. Is that not so?

Earl Warren: Yes.

Chairman: Well, we haven’t the time to fight it out in the courts. That is the way we feel. Isn’t that right?

Earl Warren: Yes.²⁰⁰

Martial law was constitutional and expedient during a time of war. The State could still uphold the rule of law, in Warren’s mind, if it used martial rule and only deprived civil liberties within that legal framework, for a limited duration, and for the sake of national security in an emergency situation.

Warren proposed a solution involving resettlement of the Japanese, the only practical solution in his eyes, and a solution that could be handled by civil government.²⁰¹ The army would handle restrictions on travel into strategic areas.²⁰² Evacuees would be removed from such strategic areas, and would be divided into two groups, “dangerous” and non-dangerous. Travel in strategic areas would require a permit, which would not violate civil rights, according to Warren. “We don’t consider that an invasion of our civil rights . . . [a]nd I think that every loyal citizen should welcome such a system.”²⁰³

Even though Warren’s plan curtailed the civil liberties of Japanese immigrants and Japanese Americans, he saw the need to impose limitations on his proposal out of respect for the rule of law. He urged the establishment of an office of Alien Property Custodian to protect the property of Japanese and Japanese Americans during resettlement.²⁰⁴ “I don’t believe that people should be permitted to exploit even our enemy

199. *Id.* at 11019.

200. *Id.*

201. *Id.* at 11020.

202. *Id.*

203. *Id.* at 11022.

204. *Hearing, supra* note 43, at 11023.

aliens. I think there should be some Federal agency that would supervise those matters to see that no one is taken advantage of by designing people.”²⁰⁵ Regarding future appeals from internees regarding their Internment, Warren believed that appeals and “final decisions should rest with those charged with the responsibility for defending the area. . . . the military,”²⁰⁶ a philosophy embodying a respect for the law in the context of martial rule. Finally, while Warren was willing to allow reentry into society from resettlement for certain internees, Warren’s support limited reentry to only dire “hardship cases.”²⁰⁷ These limitations and exceptions could indicate that Warren was not wholly committed to violations of civil liberties, and only favored what he believed to be necessary in a time of war. Another possible and more cynical interpretation is that Warren merely paid lip service to notions of civil liberties. Overall, these limitations and exceptions to martial law seem to indicate that, while legitimacy and efficiency were paramount to Warren, some concern for rights inevitably figured into his decision-making, even though concerns for security eventually trumped all other concerns.

III. WARREN’S POST-INTERNMENT CAREER AND REFLECTIONS ON INTERNMENT

After the war, when Warren had the benefit of hindsight, he reflected on his views of Internment. His views changed over time, from immediately after Internment and the war, when he was reluctant to admit fault or wrongdoing, to his final years, when he was emotionally moved by the plight of the Japanese. While he never issued a formal apology for his involvement in Internment, Warren attempted, with time, to distance himself from that period of his life, and also to more clearly emphasize the precedence of individual rights over national security. This emphasis was possibly a result of a visible evolution of Warren’s concept of law, and the benefit of hindsight. Later in his life, Warren began to see the placement of the protection of a nation’s safety first as undesirable when that prioritization resulted in the sacrifice of individual sovereignty for state tyranny. He no longer saw the law as a means of protecting safety to the detriment of individual liberties; instead, the law existed to protect individual liberties and to defend the individual, when necessary, against the power of the state itself.

A. *Governor of California*

After his time as State Attorney General, the citizens of California

205. *Id.*

206. *Id.* at 11021.

207. *Id.*

elected Warren to be Governor, and Warren again defended his position on Internment. In 1943, toward the beginning of the gubernatorial term, Warren's political ally Alfred J. Lundberg sent him a letter urging him to reflect on his decision to intern Japanese Americans; "take a long view[.]" he put it, of Japanese Internment and relocation.²⁰⁸ In his reply, Warren staunchly defended Internment. He saw Internment as the only means of securing the state and the nation against potential disloyalty and did not think of Internment as based in "feeling[s] of race prejudice or hatred."²⁰⁹ Rather, he believed the inability of the government to determine the loyalty of Japanese Americans left Internment as the only solution.²¹⁰ Warren noted, "[i]f there were any reasonable way of determining the loyalty of these individuals, I would be the first to insist upon their having the right to all the freedoms that we have. Unfortunately, I believe there is no way of determining this fact"²¹¹

Over twenty years later, John Weaver's request to quote Warren's letter to Lundberg in his 1967 biography of the Chief Justice forced Warren to confront his past words. Warren requested that Weaver not publish the letters, and Warren tinged his comments with what seemed to be regret. Warren noted that relations with the Japanese community were "so splendid [that] I would not like to see the matter reopened, especially piecemeal The situation is such that I would feel badly to see it disturbed, and to be the instrument for stirring up emotion and controversy would embarrass me and I am sure the Court."²¹² One can interpret Warren's use of the words "embarrass" and "controversy" in several ways. These words were, in some ways, an acknowledgement of the controversial nature of his decision, as well as the fact that his contemporaries on the Court might also have not accepted the decision he made. These words may also speak to the notion that even Warren felt slightly embarrassed by his own decision. Warren did not, however, forbid Weaver from publishing his letters, and did not shy away from his own words. He appeared to be a person who did not deny his words or actions, but one who stood by them firmly, without admitting fault. "I did write the letters, and I would not equivocate about it. Neither would I prohibit you or anyone else from publishing them if it is your belief that it is essential in order to tell the entire story."²¹³ Perhaps, then, Warren was ready, to some extent, to acknowledge and confront the moral implications of his decision. This difference in thought that came about during this twenty-four year time

208. CRAY, *supra* note 14, at 158.

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.*

213. *Id.* Weaver never published these letters. See JOHN WEAVER, WARREN: THE MAN, THE COURT, THE ERA (1967).

span is also reflected in Warren's term on the Supreme Court.

*B. Associate Justice and Chief Justice of the
United States Supreme Court*

1. NYU Speech: The Bill of Rights and the Military

In 1962, Warren delivered a speech at New York University's School of Law that included his first public reflection on Internment and the home-front during wartime after his transition to the Supreme Court Justice. Entitled "The Bill of Rights and the Military," Warren's article focused on Supreme Court decisions involving the "relationship between action taken in the name of the military and the protected freedoms of the bill of rights."²¹⁴ Warren's thesis was that while the Court has mostly held that the military is subordinate to and separate from civil society, only "a most extraordinary showing of military necessity in defense of the nation" can "support[] an assertion of substantial violation of a precept of the Bill of Rights."²¹⁵ Warren spent the article drawing a distinction between wartime and peacetime decisions of the court.

Warren began his section on the time of war with an indirect acknowledgement of the constitutional violations that occurred during Internment. He conceded that "[m]ilitary judgments sometimes breed action that, in more stable times, would be regarded as abhorrent" and that with hindsight, it is possible that judges would conclude that "some actions advanced in the name of national survival had in fact overridden the strictures of due process."²¹⁶ *Ex parte Milligan*,²¹⁷ which Warren had cited in his Stanford Speech twenty years before, and *Hirabayashi*,²¹⁸ the decision that condoned the imposition of curfews on the Japanese during World War II eventually paving the way for *Korematsu*,²¹⁹ were to Warren quintessential wartime decisions. They demonstrated "circumstances in which the Court will, in effect, conclude that it is simply not in a position to reject descriptions by the Executive of the degree of military necessity."²²⁰ He notes that in cases similar to *Hirabayashi*:

214. Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 182 (1962).

215. *Id.* at 197. This seems to be consistent with Warren's views from his Stanford speech, where he contended the fear of "sabotage" from Japanese and Japanese Americans ought to be handled as a military, rather than a civil situation. For Warren, World War II and Pearl Harbor seem to fall into the category of "military necessity."

216. *Id.* at 191-92.

217. 71 U.S. (4 Wall.) 2 (1866).

218. *Hirabayashi*, 320 U.S. at 81 (holding that the application of curfews against members of a minority group were constitutional when the nation was at war with the country from which that group originated).

219. *Korematsu*, 323 U.S. at 214 (upholding the constitutionality of Executive Order 9066, which required Japanese Americans in the western United States to be excluded from a described West Coast military area).

220. Warren, *supra* note 214, at 192.

[O]nly the Executive is qualified to determine whether, for example, an invasion is imminent. In such a situation, when time is of the essence, if the Court is to deny the asserted right of the military authorities, it must be on the theory that the claimed justification, though factually unassailable, is insufficient.²²¹

While this statement appears to be a defense of Internment and the decision of the Court in *Hirabayashi*, Warren left open the question of the actual constitutionality of Internment, stating rather cryptically, “[T]he fact that the Court rules in a case like *Hirabayashi* that a given program is constitutional, does not necessarily answer the question whether, in a broader sense, it actually is.”²²² With these words, Warren was perhaps trying to leave room for the idea that Internment might not have been constitutional, without actually admitting directly to its unconstitutionality. He went on to emphasize the lesson from *Hirabayashi*, that situations where the judiciary “refrains from examining the merit of the claim of necessity” must be kept to an “absolute minimum.”²²³ Warren ultimately concluded that the government may choose to sacrifice liberties in order to uphold security, making his article a sort of justification of the actions he promoted in California as Attorney General. He noted, “Where the circumstances are such that the Court must accept uncritically the Government’s description of the magnitude of the military need, actions may be permitted that restrict individual liberty in a grievous manner.”²²⁴

Warren contrasted decisions made during times of necessity with those made during periods of relative peace. He specifically compared the time period contemporaneous with his speech—the Cold War—to the context of World War II and *Hirabayashi*:

[M]ost of the cases the Court has decided during this period indicate that such a capitulation to the claim of military necessity would be a needless sacrifice. These cases have not been argued or decided in an emergency context comparable to the early 1940’s. There has been time, and time provides for a margin of safety. There has been time for the Government to put to the proof with respect to its claim of necessity; there has been time for reflection; there has been time for the Government to adjust to any adverse decision. The consequence is that the claim of necessity has generally not been put to the Court in the stark terms of a *Hirabayashi* case.²²⁵

This distinction perhaps explains why Warren was reluctant to convict

221. *Id.*

222. *Id.* at 193.

223. *Id.*

224. *Id.*

225. *Id.*

individuals of dodging the draft or of being members of the Communist party in the 1950s and 1960s; he likely considered World War II “an emergency context,” while the Cold War, the time in which he delivered this speech and a time which did not feature any combat or attacks on American soil, provided the government with adequate “time for reflection.”²²⁶ Warren further distinguished World War II from the Cold War by contrasting, in a footnote, two Supreme Court cases, *Ex parte Quirin*,²²⁷ and *Abel v. United States*.²²⁸ *Ex parte Quirin* was justified according to Warren because the Supreme Court decided it at the outset of World War II, “at a time when the outlook for the survival of the free world was dim.”²²⁹ In *Quirin*, the Court reviewed President Roosevelt’s wartime decision to convene a secret military tribunal in July of 1942, which resulted in the conviction and death sentence of eight German men (two of whom were U.S. citizens) accused of spying during the War.²³⁰ The Court unanimously approved of Roosevelt’s use of the military tribunal to try these men.²³¹ According to Warren, however, *Abel*, on the other hand, merited no such justification of the deprivation of an individual’s rights because it was not during such a time of war.²³² In *Abel*, the government accused Abel of espionage, and the Court bestowed on Abel a full civilian trial and the necessary constitutional protections.²³³ The United States, Warren added, had already faced a time of “formidable problems” during the time of the Constitutional Convention, where the states faced the threat of invasion from some Indian tribes, the French, English, and Spanish.²³⁴ He argued that this period of “precarious peace” did not result in a “call for a garrison state,” and “we should heed no such call now [during the Cold War].”²³⁵ He concluded his discussion of peace time with a reminder: “In times of peace, the factors leading to an extraordinary deference to claims of military necessity have naturally not been as weighty.”²³⁶

Taken in the context of Warren’s decision to intern the Japanese, this speech echoes the “time of emergency” rhetoric of Warren’s Tolan

226. See *infra* notes 237-247 and accompanying text.

227. 317 U.S. 1 (1942).

228. 362 U.S. 217 (1960).

229. Warren, *supra* note 214, at 193-94, n.33.

230. *Quirin*, 37 U.S. at 1.

231. *Id.*

232. Warren, *supra* note 214, at 193-94, n.33.

233. *Id.* *Abel* was in fact primarily about the propriety of search and seizure, and the exclusionary clause of the Fourth Amendment. 362 U.S. at 217. While the majority held that evidence obtained in a search of the defendant’s hotel room by the INS was legal and admissible in *Abel*’s trial for espionage, Warren concurred with Brennan’s dissent, that the search did not conform to the Fourth Amendment. *Id.* at 248-56 (Brennan, J., dissenting). In his speech, however, Warren used *Abel* to emphasize that even those accused of espionage are entitled to a full trial in today’s society, but that wartime circumstances called for different results in *Quirin*. Warren, *supra* note 214, at 193-94 n.33.

234. *Id.* at 193.

235. *Id.*

236. *Id.*

Commission testimony, and appears to be a defense, albeit indirectly, of his involvement in the Internment decision. However, even though Warren stood behind Internment in this speech, his text reflects an increasing acknowledgment on his part that Internment itself may have been unconstitutional. Warren's legal decisions as Supreme Court Justice and Chief Justice indicated his growing support for civil liberties and his modified concept of the role of the law: the law not only served to protect safety, but now, its role involved the protection of individual liberties.

2. *Legal Decisions: Conscientious Objectors and Communists*

As a Justice and as Chief Justice of the Supreme Court, Warren was a fairly clear supporter of individual liberties and due process during the Cold War and the Vietnam War. Warren's decisions were likely based on thoughts expressed in his *N.Y.U. Law Review* article that World War II and the Cold War were supremely different contexts, one involving imminent danger and the other a time of relative peace. Two types of cases emerge in particular as decisions made in the context of war during Warren's tenure on the Court: conscientious objector cases during the Vietnam and Korean Wars and cases involving members of the Communist party during the height of the Cold War.

Warren's stance on the due process rights of conscientious objectors changed over time; he increasingly, and fairly consistently, favored the due process rights of conscientious objectors over the need to protect the nation in a time of war. One of the few cases where Warren appeared to choose military needs over due process was early in his career on the Court. In *United States v. Nugent*, Warren signed on to the majority opinion, written by Chief Justice Vinson, holding that under the Selective Service Act of 1948,²³⁷ draft registrants were not entitled to examine the FBI reports of investigations of their backgrounds and reputations for sincerity at the required Department of Justice hearing to determine the registrant's deferability.²³⁸ The Court also held that the statute construed in this way did not amount to a denial of due process of law.²³⁹

Within the same year as *Nugent*, however, Warren's stance on the rights of conscientious objectors appears already to be changing. In *Dickinson v. United States*, a draft registrant challenged the selective service authorities' refusal to allow him draft exemption for his status as a minister. He was subsequently convicted of violating the Universal Military Training and Service Act.²⁴⁰ The authorities' denial of exemption was based on the fact that the registrant spent five hours per week in

237. 62 Stat. 604, 613 (1948) (codified as amended at 50 U.S.C. app. § 456(j) (2000)). The original statute was amended in 1967 to eliminate the requirement of a hearing.

238. *United States v. Nugent*, 346 U.S. 1 (1953).

239. *Id.* at 9.

240. *Id.* at 390. See 50 U.S.C. app. § 456(g) (2000).

“secular employment” as a radio repairman.²⁴¹ In the majority opinion written by Justice Clark and signed by Warren, the Court issued a three-part holding that (1) although determinations of fact by selective service authorities are not generally open to judicial review, nonetheless those authorities may not deny a legitimately claimed exemption merely because of suspicion and speculation; (2) the registrant involved in the instant case was squarely within the statutory exemption; and (3) the registrant’s right to exemption was unaffected by his incidental secular employment.²⁴² Central to this opinion was the ability of the Court to review decisions made by the selective service authorities, a concept Warren would likely not have endorsed during World War II when he sought deferral to the military on the best course of action.²⁴³ In subsequent years, Warren either signed on to or wrote the opinions in a host of draft-related cases, in which he fairly consistently upheld due process and liberties over military authority.²⁴⁴

Similar to his protection of the liberties and due process rights of conscientious objectors, Warren, during the Cold War, upheld the liberties of Communist Party members under the First Amendment and vigorously

241. *Dickinson*, 346 U.S. at 393, 396.

242. *Id.* at 396-97.

243. *See Hearing*, *supra* note 43, at 11021.

244. *See* *McKart v. United States*, 395 U.S. 185 (1969) (Warren in majority) (holding (1) the defendant was entitled to exemption from military service as a sole surviving son, notwithstanding that his mother had died; and (2) his failure to appeal his I-A reclassification and failure to report for his preinduction physical did not bar a challenge to the validity of such reclassification as a defense to his criminal prosecution for refusal to submit to induction); *Oestereich v. Selective Serv. Sys. Local Bd. No. 11*, 393 U.S. 233 (1968) (Warren in majority) (holding (1) Selective Service Board had no statutory authority to use the regulations governing delinquency for the purpose of depriving the registrant, who the Board held was “delinquent” for having returned his registration certificate to the Government in order to express his dissent from the participation by the United States in the Vietnam war—of his statutory exemption because of conduct unrelated to the merits of granting or continuing that exemption, and (2) under these circumstances preinduction review was not precluded by 10(b)(3) of the Act, proscribing preinduction judicial review of the classification or processing of any registrant, and limiting such review to a defense in a criminal prosecution); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963) (Warren in majority) (holding section 349(a)(10) of the Selective Service Act was invalid as imposing punishment without the procedural safeguards of the Fifth and Sixth Amendments); *Gonzales v. United States*, 364 U.S. 59, 66 (1960) (Warren, J., dissenting) (arguing that petitioner, who claimed exemption from selective service based on his religious beliefs as a Jehovah’s Witness and who was denied such an exemption, was deprived of a right to a full hearing in a “miscarriage of justice”); *Johnston v. United States*, 351 U.S. 215 (1956) (Warren, J., dissenting) (arguing pertinent statutory provisions should not be construed so as to require an accused—here, conscientious objectors ordered by draft board to report for civilian work to a hospital located in a district other than the one in which he resided—to suffer trial at a distant place); *Sicurella v. United States*, 348 U.S. 385 (1955) (Warren in majority) (holding defendant’s willingness to participate in a theocratic war as a Jehovah’s Witness was not inconsistent with the statutory requirement of opposition to participation in war “in any form,” particularly in view of his statements that no “carnal” weapons or “weapons of warfare” would be used by him in such a war); *Gonzales v. United States*, 348 U.S. 407 (1955) (Warren in majority) (holding although the Universal Military Training and Service Act did not state so in terms, it required by implication that the registrant receive a copy of the Justice Department’s recommendation and be given a reasonable opportunity to reply).

opposed the House Committee on Un-American Activities (HUAC).²⁴⁵ Interestingly, HUAC and other “anti-Communist” groups within society considered Communists “saboteurs” and labeled them with language similar to that used to describe Japanese Americans and Japanese immigrants in World War II.²⁴⁶ Warren’s opposition to HUAC ran contrary to his earlier positions on martial rule during World War II, when Warren was willing to endorse a sweeping plan that did not even attempt, at a minimum, what HUAC did to sort out the loyal from the disloyal. Then why did Warren defend the accused Communists and oppose HUAC so vigorously? Warren’s answer to this question from his speeches and texts

245. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967) (Warren in majority) (holding (1) statutes requiring or authorizing the removal of faculty members for seditious utterances were unconstitutionally vague because a teacher could not know the extent to which the utterance must transcend mere statement about abstract doctrine; (2) statutes banning state employment of any person advocating or distributing material which advocates forceful overthrow of government were unconstitutionally vague as possibly prohibiting advocating the doctrine in the abstract; and (3) statutes making Communist Party membership prima facie evidence of disqualification unconstitutionally abridged freedom of association by not permitting rebuttal by proof of inactive membership or absence of intent to further unlawful aims); *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (Warren in majority) (holding that since Arizona statute requiring state employees to take a loyalty oath did not require a showing that an employee was an active member with the specific intent of assisting in achieving the unlawful ends of an organization which had as one of its purposes the violent overthrow of the government, the statute infringed unnecessarily on the freedom of association protected by the First Amendment to the Federal Constitution, made applicable to the states through the Fourteenth Amendment, and was unconstitutionally broad); *Gojack v. United States*, 384 U.S. 702 (1966) (Warren in majority) (overturning conviction of defendant for refusing to answer questions concerning his and other persons’ affiliations with the Communist Party in front of a subcommittee of the House Committee on Un-American Activities because the subject of the inquiry was never specified or authorized by the Committee, as required by its own rules, nor was there a lawful delegation of authority to the subcommittee to conduct the investigation); *Lamont v. Postmaster Gen.*, 381 U.S. 301 (1965) (Warren in majority) (holding a federal statute requiring a request in writing as a prerequisite to the delivery of unsealed mail from abroad containing Communist propaganda material, as applied, violated the addressees’ right of free speech); *Gastelum-Quinones v. Kennedy*, 374 U.S. 469 (1963) (Warren in majority) (holding deporting the alien for membership in the Communist Party within the meaning of 241(a)(6)(C) of the Immigration and Nationality Act of 1952, was not supported by substantial evidence where the record merely showed that the alien, for a period during 1949 and 1950, paid dues to and attended several meetings of a club of the Communist Party in Los Angeles); *Braden v. United States*, 365 U.S. 431 (1961) (Warren in dissent) (arguing defendant’s conviction for refusal to answer questions put forth by the subcommittee of the House Un-American Activities Committee regarding his associations— including a question whether he was a Communist Party member when he signed a letter urging opposition to certain bills in Congress— and subsequent conviction for contempt violated the First Amendment); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 115 (1961) (Warren, Ch. J., dissenting) (arguing that registration provisions of the Subversive Activities Control Act violated the constitutional privilege against self-incrimination); *Noto v. United States*, 367 U.S. 290, 300 (1961) (Warren, Ch. J., dissenting) (arguing present prosecution was barred by 4(f) of the Internal Security Act, which provides that neither the holding of office nor membership in any Communist organization shall constitute a violation per se of any criminal statute and as such, the indictment should be dismissed).

246. See, e.g., NORMAN A. GRAEBNER, *THE NEW ISOLATIONISM: A STUDY IN POLITICS AND FOREIGN POLICY SINCE 1950* 227 (Ronald Press, 1956) (quoting Senator Joseph McCarthy, of HUAC, as saying “you cannot offer friendship to tyrants and murderers. . . without advancing the cause of tyranny and murder” and that “coexistence with Communists is neither possible nor honorable nor desirable.”).

prior to and surrounding these decisions would be his belief that the Cold War, the time period of the Communist scare, was a time of “imperfect peace” and as such, emergency executive wartime decisions were not essential to the nation’s security.²⁴⁷ However, this distinction is not necessarily the most plausible when taken in a historic context. The Cuban Missile Crisis, for example, yielded thirteen days of extremely tense confrontations between the then-Soviet Union and the United States that easily could have escalated into a full-scale war. Moreover, the advent and proliferation of nuclear weapons after the Second World War only exacerbated the feelings of emergency throughout the United States. The children participating in bombing drills at elementary schools, the families with bomb shelters, and law enforcement at the time would likely have hesitated to call the Cold War a time of “imperfect peace,” as to them, the threat of sudden death by nuclear bombs seemed all too real. It is important to remember that this distinction between “emergency” and “imperfect peace” was Warren’s own creation, his attempt at a legal justification for his actions. Arguably, like all of us who grow and change with experience and age, Warren defended the accused Communists because of his increased awareness of the costs of the State’s stripping individuals of their civil liberties. Perhaps these rulings were his way of signaling this change; perhaps, internally, he was recognizing the mistakes of his decision twenty years earlier and viewing the rule of law increasingly as a guarantor of rights, not as a means to protect safety while sacrificing individual liberties.

3. *Protecting the Individual: The Criminal Procedure Revolution*

Warren’s appreciation of the law as a protector of individual rights changed over time, replaced by a concept of the law as a protector of individual rights against the potentially tyrannical state. A fear of the unchecked power of the state was evident in several key Fourth Amendment cases the Supreme Court decided during his tenure as Chief Justice. For example, in *Terry v. Ohio*,²⁴⁸ Warren famously defined the scope of the exclusionary rule for what is now known as a “Terry stop,” or the stop of a suspect on the street by a police officer. The justification for such a stop, Warren noted, cannot be based on good faith alone because then “the protections of the Fourth Amendment would evaporate, and the people would be ‘secure in their persons, houses, papers, and effects,’ only in the discretion of the police.”²⁴⁹ Warren also expressed his outrage at the notion that the arrest of an individual—ripe with opportunity for state abuse—constituted merely a “petty indignity”:

247. Warren, *supra* note 214.

248. 392 U.S. 1 (1968).

249. *Id.* at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

[It] is simply fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.²⁵⁰

Along similar lines, Warren wrote the majority opinion in *Miranda v. Arizona*²⁵¹ and was in the majority in *Mapp v. Ohio*²⁵² and *Katz v. United States*,²⁵³ ensuring the protection of the individual accused from the potentially coercive powers of the state (here, the police). In addition, and in keeping with his belief that the rule of law functioned to protect individual liberties against possible state usurpation, Warren also attempted to level the playing field between the state and its accused by holding that criminal suspects have a right to counsel during police interrogations²⁵⁴ and by requiring state courts to provide counsel in criminal cases for defendants unable to afford their own attorneys.²⁵⁵ Warren attempted to not only use the law to prevent the government from usurping key liberties from individuals, but gave individuals tools to protect themselves from government intrusions. Instead of the shield it had been during Internment, protecting the country from outside harm, the law was now a sword, fighting back the government and state on behalf of its individual citizens.

4. Repeal of Title II of the Federal Internal Security Act

In 1970, close to the final years of Warren's life, Warren publicly called for the repeal of Title II of Federal Internal Security Act, which had provided for summary detentions in times of national emergency.²⁵⁶ On March 18, 1970, Warren wrote to the Japanese American Citizens League, which was to that date the closest Warren came to an acknowledgement of the wrongness of his actions as Attorney General. "Title II is not in the American tradition,"²⁵⁷ he said. "I express these views as the experience of

250. *Id.* at 16-17.

251. 384 U.S. 436 (1966) (holding that both inculpatory and exculpatory statements made in response to interrogation by a defendant in police custody will be admissible at trial only if the prosecution can show that the defendant was informed of the right to consult with an attorney before and during questioning and of the right against self-incrimination prior to questioning by police, and that the defendant not only understood these rights, but voluntarily waived them).

252. 367 U.S. 643 (1961) (holding that evidence obtained in violation of the Fourth Amendment, which protects against "unreasonable searches and seizures," may not be used in criminal prosecutions in state courts, as well as federal courts).

253. 389 U.S. 347 (1967) (extending Fourth Amendment protection from unreasonable search and seizure to protect individuals in a telephone booth from wiretaps by authorities without a warrant).

254. *Escobedo v. Illinois*, 378 U.S. 478 (1964).

255. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

256. CRAY, *supra* note 14, at 159; *see* 50 U.S.C. § 781 (repealed 1993).

257. CRAY, *supra* note 14, at 159.

one who as a state officer became involved in the harsh removal of the Japanese from the Pacific Coast in World War II, almost 30 years ago.”²⁵⁸ While this approaches an acknowledgment of wrongdoing, and while Warren made a point of emphasizing his support of the repeal in his memoirs as evidence of his support for the Japanese,²⁵⁹ the repeal itself was largely “symbolic” in nature according to one of Warren’s biographers, Ed Cray.²⁶⁰ Despite its symbolic nature, this act was a confirmation of a change in attitude in Warren, and a personal acknowledgment of his involvement in Internment.

C. *Final Reflections*

During the last years of his life, Warren expressed an increased sense of disappointment, perhaps even remorse, with his role in Japanese Internment. The observations of his law clerks, his writings, and his interviews reflect a transition in Warren’s thinking, from a staunch defender of his decision to intern the Japanese, to a reflective individual willing to shed a critical light on his own decision making process. It is important to note, however, that Warren never issued a public apology for his role in Internment.

1. *Law Clerk Perspectives*

Recollections from Warren’s law clerks demonstrate this shift in Warren’s perspective, from one defending his actions vigorously to one regretting his involvement in relocation and Internment. To some of his clerks, Warren seemed reluctant to admit fault in his Internment decision. For example, when having lunch with his clerks one day, Warren teased one of his clerks for the violations of voting rights in his Southern state.²⁶¹ The clerk responded, “Wait a minute. What was the name of the guy in California who put all the Japanese in concentration camps during World War II?”²⁶² Dead silence followed.²⁶³ But Warren began to laugh, and responded “Well, I get your point. But that was clear and present danger. We really thought their fleets were going to land in California and I didn’t think I had any choice.”²⁶⁴ In addition, Warren’s law clerks were also surprised by his lack of willingness to cite dissenting opinions from the Internment cases, even where those opinions would have been helpful support for his own written opinions. For example, in his equal protection

258. *Id.*

259. WARREN, *supra* note 17, at 149-50.

260. CRAY, *supra* note 14, at 159.

261. HOWARD SCHWARTZ, *SUPER CHIEF: EARL WARREN AND HIS SUPREME COURT: A JUDICIAL BIOGRAPHY* 16 (1984).

262. *Id.*

263. *Id.*

264. *Id.*

opinion *Bolling v. Sharpe*, Warren failed to cite Justice Murphy's concurrence in *Hirabayashi*²⁶⁵ or Justice Murphy's dissent in *Korematsu*.²⁶⁶ These opinions would have directly supported Warren's Fifth Amendment equal protection arguments in *Bolling*, where he noted that "discrimination may be so unjustifiable as to be violative of due process."²⁶⁷ Instead, to support his contention that "classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect," Warren cited the *majority* opinions of *Hirabayashi* and *Korematsu*, which was striking to some of his clerks.²⁶⁸ Richard J. Flynn, one of the Chief Justice's law clerks, recalled that Warren was "receptive to the [majority] cites we gave, but I didn't think we could have pushed him any further. We didn't talk about the Exclusion Cases with him. We knew better."²⁶⁹ And as Matthew J. Perry noted in his article on Justice Murphy, "[B]oth *Hirabayashi* and *Korematsu* upheld the racial classifications based on Japanese ancestry and the Court hardly utilized the 'scrutiny with particular care' that *Bolling* suggests. Thus, on their faces, these opinions are not particularly firm precedents upon which to base this new doctrine."²⁷⁰ Warren's refusal to cite Justice Murphy's concurrence in *Hirabayashi* reveals Warren's difficulty in acknowledging what Justice Murphy noted: "It does not follow, however, that the broad guaranties of the Bill of Rights and other provisions of the Constitution protecting essential liberties are suspended by the mere existence of a state of war."²⁷¹ Warren perhaps also did not want to acknowledge that he had overstepped constitutional bounds and committed action based on racism, as Justice Murphy acknowledged in his *Korematsu* dissent: "This exclusion of 'all persons of Japanese ancestry, both alien and non-alien' from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism."²⁷² It is true that it is difficult to blame Warren entirely for his actions during the Internment decision: after all, the atmosphere at the time was fraught with paranoia and fear of attack. However, later, his words would reflect that

265. 320 U.S. at 110 (Murphy, J., concurring) ("Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals.")

266. 323 U.S. at 239-40 (Murphy, J., dissenting) ("A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.")

267. 347 U.S. at 497.

268. Matthew J. Perry, *Justice Murphy and the Fifth Amendment Equal Protection Doctrine: A Contribution Unrecognized*, 27 HASTINGS CONST. L.Q. 243, 253 (2000).

269. *Id.*

270. *Id.* at 250.

271. 320 U.S. at 110 (Murphy, J., concurring).

272. 323 U.S. at 234 (Murphy, J., dissenting).

while he might have been contextually somewhat justified in making the choice that he did, morally, and as an advocate of civil liberties, he was ashamed of his choice.

While Warren said publicly that he had no “outstanding regrets” about his decision to intern the Japanese, he confidentially confided much of his thought process and feelings to his former law clerks, including Michael Heyman, Professor of Law Emeritus at the University of California, Berkeley, School of Law,²⁷³ and John Keeker, a prominent San Francisco defense attorney,²⁷⁴ revealing his regret for his decision. Warren’s former clerk Scott Bice believed that Warren’s regret arose out of his increased sensitivity to discrimination.²⁷⁵ Bice noted, “[Warren] felt bad about what happened. In retrospect, given what he had learned over the years, given his heightened sensitivity to racial discrimination and so forth, he recognized that as a very sad day in American history.”²⁷⁶ Other clerks attributed Warren’s lack of public acknowledgement and failure to take responsibility for his decision as part of his outwardly strong persona. Admitting fault “would be showing too much vulnerability,” remarked Keeker.²⁷⁷ Keeker’s insight reveals the difficulty of separating the personal traits of Warren—for example, his desire to avoid showing vulnerability—from Warren’s reflections. How much of Warren’s lack of public apology was due to his desire to keep a strong, outer persona, and how much of it was due to a genuine lack of belief in the wrongness of his actions? This, of course, is a difficult question to answer without interviewing Warren directly. His memoirs and an interview at the Regional Oral History Project in Berkeley, California, while not completely answering this question, remain the most direct, personal reflections on Internment from Warren himself.

2. *Memoirs*

Warren’s memoirs were published in 1974 after his death, and were written from early 1970 until his death on July 9, 1974.²⁷⁸ Until his memoirs, Warren never apologized publicly for advocating Internment.²⁷⁹ It is debatable whether Warren’s memoirs even consisted of an apology in and of themselves. In them, Warren did acknowledge that racial prejudice did exist and “stemmed largely from some of our farming communities.”²⁸⁰

273. CRAY, *supra* note 14, at 520.

274. In 1970, Warren told Keeker, his last law clerk, that his “biggest regret of public life was Japanese Internment.” Interview with John Keeker, Partner, Keeker & Van Nest LLP, in San Francisco, Cal. (Aug. 4, 2008).

275. CRAY, *supra* note 14, at 520.

276. *Id.*

277. *Id.*

278. WARREN, *supra* note 17.

279. *Id.* at 159; SCHWARTZ, *supra* note 261, at 16.

280. WARREN, *supra* note 17, at 147.

He also described the plan of interment he had proposed to the Tolan Commission, to remove all aliens who did not move 750 miles away from the coast, and acknowledged the hardships Internment imposed on the Japanese.²⁸¹ He conceded that his plan allowed no plausible alternative to Internment for the Japanese:

Of course, for most of them it was the same as directing their confinement, because the limited time prescribed for removal, the fact that their businesses were turned over to the Alien Property Custodian, the problem of their having no time to look for employment in an unfamiliar part of the country, the language barrier, and the race antagonism occasioned by the war made any other alternative remote indeed.²⁸²

Warren's memoirs were certainly tinged with regret. The following excerpt seems to hold the key to Warren's feelings about his decision:

I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens. Whenever I thought of the innocent little children who were torn from home, school friends, and congenial surroundings, I was conscience-stricken. It was wrong to act so impulsively, without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. It demonstrates the cruelty of war when fear, get-tough military psychology, propaganda, and racial antagonism combine with one's responsibility for public security to produce such acts.²⁸³

This is the closest Warren arrives to an apology. Here, he readily admitted the toll the war, the paranoia, and the propaganda took on his concept of the role of law. Labeling Internment as "not in keeping with our American concept of freedom and the rights of citizens" indicated his changing concept of the law's role: during World War II, the law served the single goal of protecting the safety of Americans from the threat of sabotage, but in this quote, he indicated that the law is a force that delineates and protects our rights as citizens, and is immutable, even in the face of war. Warren even acknowledged the racism of the times, but in a later excerpt, he noted that he did not believe he himself was racist:

I have always believed that I had no prejudice against the Japanese as such except that directly spawned by Pearl Harbor and its aftermath. As district attorney, I had great respect for people of Japanese ancestry, because during my years in that office they created no law enforcement problems. Although we had a sizable Japanese population, neither the young nor the old violated the law.²⁸⁴

281. *Id.*

282. *Id.*

283. *Id.* at 149.

284. *Id.*

Warren appeared to admit here that he might have harbored feelings of racism directly after Pearl Harbor, but he also presented a strange definition of respect: the Japanese earned his respect because they were law-abiding individuals. In some ways, his definition seems to miss the point, that acceptance involves transcending appearances and actions, and entails looking at individuals as fellow human beings rather than as members of a particular group. Perhaps the champion of civil rights still had not fully overcome the prejudices that surrounded him in his past.

Prior to his memoirs, Warren had explained his Internment decision to his family as contextual: “You have to put yourself in my place at the time.”²⁸⁵ However, his strong outer persona and his justifications seemed to disappear towards the end of his life. Warren’s regret was strikingly apparent towards the very end of his life, in his personal interview with the Regional Oral History Office at U.C. Berkeley. In 1972, Warren discussed Internment, and “mentioned the faces of the children separated from their parents.”²⁸⁶ As he did, “tears rolled down his face, and the interview was temporarily halted.”²⁸⁷ Earl Warren, the great champion of civil liberties, had just given the most public glimpse into his personal feelings about Internment, just a year before his death.

IV. AN EXAMINATION OF WARREN’S VIEWS

This Article is an attempt at studying and analyzing Warren’s rhetoric and views during one of the most difficult and controversial decisions of his lifetime. An analysis of Warren’s rationale indicates that his concept of the function of law in American society changed over time. In Warren’s wartime decision to endorse Internment, he still managed to uphold his belief in the legitimacy of the law, a value which remained constant throughout his legal career. But during Internment, he additionally supported a view of the role of the law as a protector of the state against outside threats, even at the expense of civil liberties. It is this view that evolved over Warren’s career, from his time as Attorney General in World War II, to his time as Supreme Court Justice and Chief Justice.

A. *World War II: Legitimacy and State Sovereignty*

In a time of great threat, Warren remained committed to legitimacy. For Warren, legitimacy for the law involved respect for the law itself and fostering that respect among citizens and fellow law enforcement. For example, when Warren solicited input from California law enforcement

285. CRAY, *supra* note 14, at 159.

286. WHITE, *supra* note 30, at 77.

287. *Id.*

and requested a report from Herbert Wenig on the consequences of Internment,²⁸⁸ his thoughtful reflection and contemplation of the consequences of his actions indicated a seriousness about the law and a respect for it that might foster legitimacy in the eyes of citizens. The seriousness, reflection, and contemplation involved in Warren's decision-making reflect not only the high value he places on legitimacy, but also his means of operating in a tense, emergency situation—soliciting information from as many possible sources and assessing that information—and perhaps his means of assuring himself as well as the public of the legitimate nature of his own decision.

“Legitimacy” to Warren also meant following the letter of the law. If the current law did not fulfill current need (i.e. protecting state sovereignty), then a new law must be put into place. The fact that Warren believed that temporary deprivations of civil liberties were permissible²⁸⁹ implies that he believed that above all else the law served to protect the security of the state. To ensure the fulfillment of this goal, Warren blurred the lines between the military and law enforcement, keeping a close relationship with military personnel.²⁹⁰ This suggests that for Warren, the law's primary function was not, as he later believed, to protect the individual from state power, but rather to protect against concerns, such as the infringement of state sovereignty by a foreign enemy, that outweigh concerns of state abuse of individual rights.

B. Post-World War II: Legitimacy and Individual Sovereignty

After Internment, especially toward the end of his life, Warren's concept of the role or function of the law changed. He now saw the law as a protector of individual sovereignty against the power of the state.

As an example of his evolution, Warren did not keep the close relationship he had previously maintained with military authorities during World War II. This was partly due to his change in functions (he was no longer a law enforcement officer but rather a judicial official), but also due to his changed attitude regarding the amount of deference deserved by the military. To Warren, fairness involved checks on the authority of the government and the military, as evidenced in his opinions as Justice of the Supreme Court in cases involving draft evaders and suspected communists,²⁹¹ and in those involving Fourth Amendment protections in criminal procedure.²⁹² For Warren, the fear of the abuse of state power was

288. *Id.* at 70.

289. *See supra* note 199 and accompanying text.

290. *See supra* notes 47-67 and accompanying text.

291. *See supra* notes 237-247 and accompanying text.

292. *See supra* notes 248-255 and accompanying text.

now greater than the fear of an outside threat. The worst enemy for Warren was not foreign invaders: it was now a tyrannical state.²⁹³

V. CONTEMPORARY APPLICATIONS

What can we glean from Warren's earlier concept of the law as a servant of state security? The portion of Warren's earlier view of the law's function (his Internment view) most worthy of emulation was his unwavering commitment to its democratic values and legitimacy. With the solicitation of letters from California's law enforcement, and discussions with the military, he sought the input of his fellow leaders. He was also unwilling to circumvent the law to achieve his goal of state security. The Bush administration, however, rejected this emphasis on legitimacy. It instead adopted a view of the law's function that Warren himself rejected after Internment: the law as a tool to protect the sovereignty of the nation state against foreign enemies, even at the expense of civil liberties.

A. *Similar Wartime Scenarios*

The context of war draws ready parallels to the current state of our country post-9/11. Much of the rhetoric Warren used in 1942 to describe the situation in the recently attacked United States, and to describe the fears facing all Americans, is strikingly similar to the rhetoric of our post-9/11 world. Concepts such as "death and destruction are likely to come . . . at any moment,"²⁹⁴ "imminent danger,"²⁹⁵ "military necessity,"²⁹⁶ and that a lack of attacks necessarily foreshadows a "day of reckoning,"²⁹⁷—which comprised the post-Pearl Harbor rhetoric of 1941 and 1942—could just as easily have been used in the aftermath of September 11th. For example, as President Bush famously noted in his January 29, 2002 State of the Union address:

States like these, and their terrorist allies, constitute an axis of evil, arming to threaten the peace of the world. By seeking weapons of mass destruction, these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred. They could attack our allies or attempt to blackmail the United

293. An interesting, and perhaps unanswerable question, is how Warren would have reacted if there had been another attack on American soil during his lifetime that was similar to Pearl Harbor, such as September 11th. Based, however, on the principles with which he ended his life, and his fear of a tyrannical state, Warren would likely have been loathe to subordinate civil liberties to any sort of concerns about safety.

294. CRAY, *supra* note 14, at 114 (quote by General DeWitt, speaking about San Francisco after Pearl Harbor).

295. Lippmann, *supra* note 21; CRAY, *supra* note 14, at 119.

296. DEWITT, *supra* note 43.

297. CRAY, *supra* note 14, at 121.

States. In any of these cases, the price of indifference would be catastrophic.²⁹⁸

The similarities between 1941 and the War on Terror do not end at mere rhetoric. In fact, there are six ways we are currently experiencing a strikingly parallel situation to Warren's war time. First, we are currently facing a new type of warfare that allows the enemy to readily reach our shores. Like Warren and others who warned of the new technology such as "the long-range bombing plane, the far-roving submarine," which "make the home front a theater of operations,"²⁹⁹ the United States did not suspect that our own airplanes would be used as missiles to strike us in the heart of our financial center. Second, both wars began as an attack on the American home front which drew us into war: one, World War II, the other, the global War on Terror. Just as Pearl Harbor was the first attack on American soil by a foreign power since the Revolutionary War, September 11th was the first such attack since Pearl Harbor. Third, we have a highly-demonized population group and pervasive race-based attitudes: instead of the Japanese and Japanese Americans, we fear people of Arab descent and followers of Islam. Fourth, we fear the actions of insiders, "the enemy" who acts locally and engages in sedition to sabotage America. The Japanese and Japanese Americans were described during World War II as saboteurs, "fifth-column elements." The United States describes Al Qaeda, a known terrorist group, and the forces responding to it in Iraq as insurgents, and Americans engaged in the war as "terrorists" or "traitors."³⁰⁰ Arrests of individuals and groups living in our neighborhoods have only increased the fear of potential "terrorists" living in our midst.³⁰¹ Fifth, like the Santa Cruz County District Attorney and sheriff who sought local authority to "take into custody and detain . . . any enemy alien" for federal authorities,³⁰² we have created numerous local agencies and empowered already existing agencies to assist our national goal of eradicating terrorism, including a focus on agency coordination.³⁰³

298. George W. Bush, U.S. President, State of the Union Address (Jan. 29, 2002), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=29644>.

299. Warren, Address to Stanford Law Society, *supra* note 4, at 7.

300. This use of descriptors is even more interesting, considering that Al Qaeda is a known terrorist group, while Japanese Americans and Japanese immigrants were simply an ethnic group merely suspected of committing treason or espionage.

301. See, e.g., H.G. Reza, *Member of Local Terrorist Cell Gets 22-Year Sentence; Man Joined Radical Islamic Group in Prison, Then Helped Plan "Truly Frightening" Attacks on Jews, Military Facilities*, L.A. TIMES, June 24, 2008, at B8; Dan Eggen, *Alleged Leader of "Sleeper Cell" Arrested in N.C.; Ties to Detroit Group Cited*, WASH. POST, Nov. 15, 2002, at A28.

302. Letter from Ben Knight to Earl Warren, *supra* note 167, at 3.

303. Walter Pincus & Dana Priest, *Spy Agencies Faulted; Senate Cites Lack Of Coordination*, WASH. POST, May 13, 2003, at A17; Spencer S. Hsu, *Area Leaders Want Crisis Coordinator; Position Would Organize Communication Among Federal, Local Agencies*, WASH. POST, Dec. 14, 2001, at B1. Groups such as the Council on American-Islamic Relations (CAIR) have also noticed the similarities between the two wartime scenarios, even organizing a remembrance pilgrimage to the Internment camp

Sixth, and finally, our initial response to September 11th was not as different from Pearl Harbor as we might have hoped it to be. According to the American Civil Liberties Union (ACLU), thousands of Arab and South Asian men were “rounded up and incarcerated” in the hours following the September 11th terrorist attacks.³⁰⁴ These men, the ACLU notes, were held for months “under extraordinarily restrictive and, in some cases, abusive conditions,” and none of the men detained and questioned was publicly charged with terrorism.³⁰⁵ The National Security Entry Exit Registration System (NSEERS), another response to September 11th, was announced by Attorney General John Ashcroft in 2002 and strikingly resembles one of the plans proposed by local law enforcement in response to Warren’s letter.”³⁰⁶ NSEERS required all male nationals over the age of fifteen from twenty-five countries (all Arab and Muslim countries) to report to the government to register and be fingerprinted, photographed and questioned.³⁰⁷ Such prioritization of national security has given way to violations of civil liberties.³⁰⁸

Manzanar in April 2007. Munira Syeda, *Pilgrimage to Manzanar*, S. CAL. IN FOCUS, May 2007, at 1, <http://www.infocusnews.net/PDFs/InFocusOnline-May07.pdf>.

304. AMERICAN CIVIL LIBERTIES UNION, SANCTIONED BIAS: RACIAL PROFILING SINCE 9/11 4 (2004), available at <http://www.aclu.org/FilesPDFs/racial%20profiling%20report.pdf>. This provides an interesting parallel to the government’s actions after Pearl Harbor.

305. *Id.* at 5.

306. See Letter from O.H. Clyde to Earl Warren, *supra* note 175 (advocating for mandatory local registration of all Japanese Americans and Japanese).

307. NSEERS required port-of-entry registration for nationals of Iran, Iraq, Libya, Sudan, and Syria. NSEERS also required that any other non-citizen, non-permanent residents determined in advance by the U.S. Department of State or the INS, or as they enter the country by INS inspectors be subject to registration. This system began on September 10, 2002. Certain non-citizens who were in the United States prior to September 10 (and thus were not required to be fingerprinted or photographed when they entered the United States) were been required to register in person at INS offices. This procedure was required of males over the age of sixteen who entered the United States legally on particular types of visas (primarily student, work, and tourist) from certain countries. There were four groups of countries involved: Group 1: Iran, Iraq, Libya, Sudan or Syria; Group 2: Afghanistan, Algeria, Bahrain, Eritrea, Lebanon, Morocco, North Korea, Oman, Qatar, Somalia, Tunisia, the United Arab Emirates, Yemen; Group 3: Pakistan, Saudi Arabia; Group 4: Bangladesh, Egypt, Indonesia, Jordan, Kuwait. As of May 2003, 82,581 individuals had complied with the domestic portion of the program. Of these people, at least 13,153 were put into deportation proceedings. Although the program originally included a requirement for the remainder to reregister annually, this was later eliminated by the Department of Homeland Security, which gained jurisdiction over the program. However, while NSEERS was technically ended and replaced with US-VISIT, the Department of Homeland Security retained the right to recall any individual that had registered at any time for further investigation. ASIAN AMERICAN LEGAL AND DEFENSE EDUCATION FUND, SPECIAL REGISTRATION: DISCRIMINATION AND XENOPHOBIA AS GOVERNMENT POLICY (2004), available at http://www.aaldef.org/images/01-04_registration.pdf. In 2003, NSEERS was replaced by U.S. Visitor and Immigrant Status Indicator Technology (US-VISIT), a U.S. immigration and border management system that collects and analyzes biometric data (such as fingerprints) and checks them against database that claims to track individuals deemed by the United States to be terrorists, criminals, or illegal immigrants. See DHS.gov, US-VISIT program, http://www.dhs.gov/xtrvlsec/programs/content_multi_image_0006.shtm (last visited Apr. 21, 2008).

308. See generally DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY, at pt.4 “After 9/11: Fighting a

B. Legitimacy Rejected

In a time of threat arguably equal to our own, Warren remained committed to legitimacy and transparency: he solicited opinions of law enforcement to ensure “buy-in” of his ideas and testified before Congress to publicly share his opinions and subject himself to the scrutiny of the public and other branches of government. The Bush administration, however, maintained a policy of secrecy above all else and did not follow Warren’s concept of legitimacy. The Executive branch maintained a slew of classified documents, releasing some begrudgingly and with copious redactions,³⁰⁹ and continually refused to testify before Congress.³¹⁰ In addition, while the Supreme Court paid some “lip-service” to this idea that the law in and of itself deserves respect (by giving, in *Hamdi v. Rumsfeld*, some deference to the concept of due process, giving enemy combatants very limited due process and confrontation rights in a trial setting),³¹¹ it seems only to be doing so in order to contribute to fostering legitimacy in the eyes of the public. What is not apparent in 9/11 legal decisions that was evident in Warren’s thoughts on legitimacy is the importance of seriously contemplating the consequences of one’s decisions, soliciting input, and doing everything possible to follow the law. At the time of this Article’s publication, there has been a notable lack of public hearings and investigations into the events of 9/11; for example, even the 9/11 Commission Report was severely redacted when presented to the American public. Transparency might lead to a more open questioning of the government’s position, or at the very least a public sense of ownership of the decisions being made by the government in response to 9/11. Under the Bush administration, we were left instead with a forced democratic process, where each branch failed to check the other, and all acted towards the same end of protecting state sovereignty against the enemy. Finally, unlike Warren, who respected the law as an institution by convincing others to first change the law when it did not suit the goal of state security, the Bush administration chose to subvert and ignore the rule of law with warrantless wiretapping by the National Security Administration in direct violation of the Federal Intelligence Surveillance Act,³¹² and with its

War on Terror, at Home and Abroad” (3d ed. 2006).

309. See, e.g., Dana Priest, *A Clash on Classified Documents; Politics Drives Some Releases, Critics Say*, WASH. POST, Mar. 31, 2004, at A12; Philip Shenon, *Bush Weighing Decision on Release of Classified Documents to Sept. 11 Panel*, N.Y. TIMES, Oct. 28, 2003, at A18.

310. See, e.g., Michael Abramowitz & Dan Eggen, *Administration Again Rebuffs Senators; Rove Ordered Not to Cooperate; Gonzales Refuses to Alter Testimony*, WASH. POST, Aug. 2, 2007, at A6; Dan Eggen & Joby Warrick, *Ex-CIA Official May Refuse to Testify About Videotapes*, WASH. POST, Jan. 19, 2008, at A3; David Johnston & Carl Hulse, *Aide to Attorney General Refuses to Testify About Dismissals*, N.Y. TIMES, Mar. 27, 2007, at A17; David Johnston, *Rove, Still Under Subpoena, Remains Unlikely to Testify*, N.Y. TIMES, Aug. 14, 2007, at A14.

311. 542 U.S. 507, 509 (2004).

312. See, e.g., Greg Miller, *Accord Reached on U.S. Wiretaps; Deal Would Expand Federal*

flouting of the Geneva Convention in its decision to use torture against Guantanamo detainees.

Moreover, the Bush administration succumbed to the dangerous side of legitimacy—using war mongering and propaganda that accompany paranoia to cull favor from the public. If the government is concerned with appearing legitimate in the eyes of its citizens, it might resort to using inflammatory rhetoric in order to garner support for various initiatives or actions, as the military and even Warren did during World War II. Internment and NSEERS registration reflect the message contained in Warren's own Tolson Commission testimony: that any "loyal" citizen should welcome a permit requirement for travel in strategic areas for the protection of the United States.³¹³ As President George W. Bush has similarly noted, "Either you are with us, or you are with the terrorists."³¹⁴ Even more extreme, the government can resort to creating its own public relations engine, trying to support its actions with positive reinforcement from the outside media.³¹⁵ The quest for public affirmation and legitimacy can lead to distortions of the rule of law, and to delusions: one might start believing in the correctness of his or her actions, rather than realizing the legal or moral flaws with the decision. Warren did come close to this sense of delusion, but time and experience led him to modify his concept of the law. The Bush administration, however, committed itself to an idea of law as first and foremost a protector of state sovereignty against the enemy. Our government commenced its actions out of fear, and continued to act out of fear throughout the tenure of the Bush administration. These actions based in fear left us, among other things, with the Abu Ghraib prison scandal,³¹⁶ the notorious torture memo,³¹⁷ and numerous civil rights abuse allegations in Guantanamo Bay.³¹⁸ Fear leads to frightening consequences

Powers and Shield Telecom Firms, L.A. TIMES, June 20, 2008, at A1; Greg Miller, *Spy Chief Sheds Light on Wiretaps; The Intelligence Director Confirms that the FISA Court Ruled Against Bush's Surveillance Program*, L.A. TIMES, Aug. 23, 2007, at A14; Maura Reynolds & Greg Miller, *U.S. Lawmakers Signal Plans to Monitor Spying; The Type of Oversight is Unclear as Moderate Republicans and Bush Loyalists Approach Reviews and Potential Legislation Differently*, L.A. TIMES, Feb. 18, 2006, at A21.

313. See *Hearing*, *supra* note 43, at 11022.

314. George W. Bush, U.S. President, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at http://www.dhs.gov/xnews/speeches/speech_0016.shtm.

315. David Barstow, *Behind TV Analysts, Pentagon's Hidden Hand*, N.Y. TIMES, April 20, 2008, at A1.

316. See, e.g., Evan J. Wallach, "Terrorism on Trial": *The Logical Nexus Between the Decision to Deny Application of the Third Geneva Convention to the Taliban and Al Qaeda and the Mistreatment of Prisoners in Abu Ghraib*, 36 CASE W. RES. J. INT'L L. 541 (2004); John T. Parry, "Just for Fun": *Understanding Torture and Understanding Abu Ghraib*, 1 J. NAT'L SECURITY L. & POL'Y 253 (2005).

317. Memorandum from John Yoo, Deputy Asst. Att'y Gen., Dept. of Justice, Office of Legal Counsel to William J. Haynes II, Gen. Counsel for the Department of Defense (Mar. 14, 2003), available at <http://www.aclu.org/safefree/torture/34745res20030314.html>.

318. See, e.g., Elizabeth Dahlstrom, Note, *The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT'L L. 662 (2003); Jennifer A. Lohr, Note, *A "Full And Fair" Trial: Can the Executive Ensure It Alone? The Case for Judicial Review of Trials by*

for civil liberties if we consider the law something to be ignored or discarded. There is also a danger in adhering to the law's legitimacy, and merely creating new law to protect safety while subordinating civil liberties.³¹⁹ The optimal combination seems to be what Warren arrived at towards the end of his life: that the law's legitimacy ought to be respected, but that its role should be as a protector of individual liberties against incursion by the state.

C. State Security Above Individual Liberties

Warren's original concept of the role of the law—that its primary function was to protect the state against foreign enemies—was applied in force during the Bush administration. And like Warren during World War II, we “consoled [ourselves] with the thought that [violations of civil liberties] w[ere] occasioned by [our] obligation to keep the security of the state.”³²⁰ In its jurisprudence during the Bush Presidency, the Supreme Court seemed to affirm this notion, holding that appeals and “final decisions should rest with those charged with the responsibility for defending the area . . . the military.”³²¹ Similar to the Court in *Hirabayashi*, the Court conceded authority to the Executive and found violations of civil liberties constitutional in *Hamdi v. Rumsfeld*—a suit brought on behalf of Yaser Esam Hamdi, a U.S. citizen being detained indefinitely as an “illegal enemy combatant.”³²² Here, the Court held that the government possessed the power to detain unlawful combatants, but ruled that detainees who are U.S. citizens must have the ability to challenge their detention before an impartial judge. Justice Sandra Day O'Connor, for the majority, wrote that while unlawful enemy combatants required notice of the charges and an opportunity to be heard, because of the burden on the Executive of ongoing military conflict, normal procedural protections such as placing the burden

Military Commissions at Guantanamo Bay, 15 DUKE J. COMP. & INT'L L. 387 (2005).

319. See, e.g., the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (Patriot Act), Pub.L. No. 107-56, 115 Stat. 272 (2001).

320. WARREN, *supra* note 17, at 149

321. *Hearing*, *supra* note 43, at 11021.

322. 542 U.S. at 533. *Hamdi* was preceded by *Rumsfeld v. Padilla*, 542 U.S. 426 (2004). In *Padilla*, the Court had an opportunity to decide whether the President had the power to militarily detain a U.S. citizen by classifying him or her as an “enemy combatant.” Jose Padilla, an American citizen, was taken into custody after exiting a flight from Pakistan to Chicago O'Hare airport. Padilla, who was arrested on the basis of a search warrant issued by the U.S. District Court for the Southern District of New York, was initially held as a “material witness,” and then, as an “enemy combatant.” As such, he could be detained indefinitely without legal recourse or access to counsel. At issue was whether the Congressional Authorization for use of Military Force post September 11th gave to the President the powers to militarily detain a U.S. citizen by classifying the detainee as an “enemy combatant.” If the president did not have such power, he would be in violation of the Non-Detention Act which provides that “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” The Court, however, did not decide the most pressing issue but rather, ruled that Padilla's habeas petition had been filed improperly. The case was remanded for dismissal without prejudice, leaving the main issue of the case unresolved and allowing Padilla to refile his petition.

of proof on the government or the ban on hearsay need not apply.³²³ With reasoning similar to Warren's justification for the deprivation of civil liberties during World War II,³²⁴ Justice O'Connor noted: "[T]he exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."³²⁵ *Hamdi* and Justice O'Connor's opinion emphasize the potential dangers when the rule of law is considered ignorable and disposable in times of emergency or war: civil liberties are trampled or thrown aside for the sake of national security.³²⁶

D. *The Obama Administration and the Future of Civil Liberties*

At the time of this Article's publication, President Barack Obama's administration is in its infancy, making it difficult to gauge what the impact of the Obama administration will be on civil liberties, especially during this time of continued war. However, President Obama has made apparent the areas in which he seeks to distinguish himself from the previous administration, and ways in which he will continue the Bush administration's policies. In the first few weeks of his presidency, President Obama decided to close Guantanamo,³²⁷ to publicly condemn torture,³²⁸ to disclose the notorious "torture memos" from the previous administration,³²⁹ to jettison the term "enemy combatant" from the American legal vocabulary,³³⁰ and to pull U.S. troops out of Iraq by August 31, 2010.³³¹ However, while seeking distance from some of the Bush administration's policies on the "War on Terror," the Obama administration holds on to others, including warrantless wiretapping³³² and

323. 542 U.S. at 533-34.

324. See *supra* notes 199-207 and accompanying text.

325. 542 U.S. at 533.

326. As of late, the Court appears to making steps towards acknowledging the rights of Guantanamo Detainees. See *Boumediene v. Bush*, 128 S. Ct. 2229 (2008) (finding that the constitutionally guaranteed right of habeas corpus review applies to persons held in Guantanamo and to persons designated as enemy combatants on that territory). Whether this is a new trend or an anomaly in the Court's rulings remains to be seen.

327. See Mark Tran & Matthew Weaver, *Barack Obama: Administration Drafts Order to Close Guantánamo Camp Within Year*, THE GUARDIAN, Jan. 21, 2009, available at <http://www.guardian.co.uk/world/2009/jan/21/guantanamo-barack-obama-draft-order-closure>.

328. See "America Does Not Torture," *Obama Tells Congress*, REUTERS, Feb. 24, 2009, available at http://www.reuters.com/article/reutersComService_2_MOLT/idUSTRE51O0RY20090225; *Obama Names Intel Pick; Vows No Torture*, ASSOCIATED PRESS, Jan. 9, 2009, available at <http://www.msnbc.msn.com/id/28574408/>.

329. See Neil A. Lewis, *Memos Reveal Scope of Power Bush Sought in Fighting Terror*, N.Y. TIMES, Mar. 3, 2009, at A1.

330. Del Quentin Wilber & Peter Finn, *U.S. Retires "Enemy Combatant," Keeps Broad Right to Detain*, WASH. POST, Mar. 14, 2009, at A6.

331. Peter Baker, *With Pledges to Troops and Iraqis, Obama Details Pullout*, N.Y. TIMES, Feb. 28, 2009, at A6.

332. Glenn Greenwald, *Obama's Efforts to Block a Judicial Ruling on Bush's Illegal*

the preservation of the state secrets privilege.³³³ While the Obama administration seeks to keep certain materials privileged within the context of national security, the courts, particularly the Ninth Circuit, appear to be putting transparency above national security in their rejection of the Government's appeals.³³⁴ It remains to be seen if the Obama administration will move our nation's policies towards Warren's latter conception of the law as a protector of individual liberties against state incursions, or whether, like the previous administration, this administration will subscribe to the ultimate goal of national security, even at the expense of civil liberties. It also remains to be seen whether President Obama will uphold the legitimacy of the law, like Warren did his entire life, whether he will disregard the law in favor of national security and other goals, or whether he will choose to uphold the law's legitimacy by emphasizing that actions taken—even those that curtail civil liberties—are within the purview of the law. It is only with time that we will know whether Candidate Obama's platform of hope will translate into President Obama's policies that favor civil liberties.

CONCLUSION

This Article is an attempt to understand the decision-making process of a great man who in difficult times made a choice that detrimentally affected the lives of many and the perceptions of our country both internally and externally. These two newly-released documents—Warren's 1942 Stanford speech and the letters he solicited from law enforcement—provide a newer context for the decision-making process of Warren and his contemporaries during a time of war. Warren during World War II saw the law as a protector of state security, but continued to value the law's legitimacy during a time of crisis. Like Warren and the trajectory of his

Eavesdropping, salon.com, Feb. 28, 2009, available at http://www.salon.com/opinion/greenwald/2009/02/28/al_haramain/.

333. See Edith Honan, *Groups Caution Obama Not Breaking from Bush Secrecy*, REUTERS, Feb. 19, 2009, available at <http://www.reuters.com/article/politicsNews/idUSTRE51113T20090219>; Glenn Greenwald, *Obama Fails His First Test on Civil Liberties and Accountability—Resoundingly and Disgracefully*, salon.com, Feb. 9, 2009, available at http://www.salon.com/opinion/greenwald/2009/02/09/state_secrets/.

334. See Devlin Barrett, *Court Rejects Obama Bid to Stop Wiretapping Suit*, ASSOCIATED PRESS, Feb. 27, 2009, available at http://news.yahoo.com/s/ap/20090227/ap_on_go_pr_wh/warrantless_wiretaps. This disjoint between the courts and the President regarding secrecy and wiretapping indicates that perhaps the nature of the office of the Presidency is such that the President must be a person of action rather than one of slow and deliberate reflection. Perhaps the type of deliberate thoughtfulness Warren possessed at the end of his life was symptomatic of his judicial career, and would be difficult for any sitting Executive to maintain. Is the nature of the Office of the President such that state security must always be upheld, and such that there is no room to contemplate adverse consequences on civil liberties? Is it the judiciary's role then to serve the deliberately thoughtful role that Warren served at the end of his life? I do not attempt to answer these questions in this Article, but leave these for other scholars to pursue if they are so inclined.

career, we too will hopefully, under the Obama administration, subscribe to the concept of the law as a sword that fights the potential tyrannical nature of the state for the protection of our individual liberties. It remains to be seen whether we will learn from Warren's own decision and life trajectory the dire consequences of subordinating individual liberties to national security, and heed the prescient words of Judge Marilyn Hall Patel in her opinion in *Korematsu II*:

As historical precedent [*Korematsu*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.³³⁵

335. *Korematsu II*, 584 F. Supp. at 1420.