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The status of persons of japanese ancestry in the United States and Canada during world war II: a tragedy in three parts

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Résumé de l'article

Dès l'attaque de Pearl Harbor par le Japon, le 7 décembre 1941, les États-Unis et le Canada ont tous deux pensé que leur sécurité était menacée par la présence de personnes d'origine et de descendance japonaises sur la côte du Pacifique, où existait déjà un fort sentiment anti-japonais. Les droits des individus paraissent avoir été tout à fait oubliés par ceux qui, dans les deux pays, furent chargés de remédier à cette situation plutôt imaginaire que réelle. Sans qu'il ne soit tenu compte de la nationalité et de la loyauté des personnes, tout un groupe ethnique a été ainsi obligé d'abandonner ses biens et placé de force dans des centres de détention éloignés du foyer et du lieu de travail habituel.

Aux États-Unis, ce déplacement massif fut le résultat d'*Executive Orders*, de *Relocation Orders* et de *Civilian Exclusion Orders*. Au Canada, cette déportation fut décidée par ordres en conseil. La *British Columbia Security Commission*, composée de trois personnes, eut la responsabilité d'organiser et de diriger l'évacuation de toutes les personnes de race japonaise de certaines régions de la Colombie Britannique. Cette Commission eut à déterminer le moment de l'évacuation, le mode de transport, l'endroit de détention, etc. . .

Aux États-Unis, quatre-vingt-dix jours après que l'évacuation eut été entreprise sous surveillance militaire, 110,142 personnes avaient été déplacées à partir de certaines régions des États de Californie, de Washington, d'Oregon et d'Arizona. Au Canada, une fois que la Commission de sécurité de la Colombie Britannique eut accompli son travail, toutes les personnes d'origine et de descendance japonaises, soit environ 21,000 personnes, avaient été repoussées à l'intérieur d'une bande de terre large de cent milles partant de la côte du Pacifique.

Aux États-Unis, les Japonais purent contester ce déplacement pendant qu'il eut lieu, avant la fin de la guerre. Au Canada, ce ne fut possible qu'après la guerre, et que relativement à la validité des ordres de déportation.

Dans le cas des États-Unis, trois cas ont été examinés par la Cour suprême. Dans deux causes, *Hirabayashi* v. *United States* (1943) et *Korematsu* v. *United States* (1944), le pouvoir du Gouvernement des États-Unis d'agir ainsi en temps d'urgence a été affirmé. Dans une troisième, Ex *Parte Mitsuye Endo*, l'idée que le Gouvernement peut dans ces circonstances détenir une personne loyale a été rejetée. Dans ce jugement le juge William O. Douglas a écrit :

« Un citoyen reconnu comme fidèle ne pose aucun problème d'espionnage ou de sabotage. La fidélité est une matière du coeur et de l'esprit, et non de race, de croyance, ou de couleur. Celui qui est fidèle n'est par définition ni espion ni saboteur. Quand le pouvoir de détenir dérive du pouvoir de protéger l'effort de guerre de l'espionnage et dit sabotage, la détention qui n'a aucun rapport avec cet objectif est sans autorisation ».

Au Canada, la Cour suprême s'est divisée sur la question de la validité de la déportation des épouses, des enfants de moins de seize ans et des sujets britanniques résidant au Canada. Le Conseil privé fut toutefois d'avis que les ordres en conseil devaient être envisagés dans leur ensemble et qu'ils n'étaient pas ultra vires.

D'un point de vue rétrospectif, le traitement des Japonais-américains et des Japonais-canadiens pendant la deuxième guerre mondiale montre qu'en temps d'urgence, même l'homme raisonnable et juste peut parfois oublier les droits d'autrui et agir d'une façon très étrange.

The status of persons of japanese ancestry in the United States and Canada during world war II: a tragedy in three parts*

Edward G. HUDON**

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* Cet article est extrait d'un chapitre d'une thèse soutenue à l'Université Laval au mois de mai 1976, pour l'obtention d'un doctorat en droit.

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INTRODUCTION

December 7, 1941, the date on which Japan attacked Pearl Harbor, was characterized by Franklin D. Roosevelt, President of the United States, as a date which would "live in infamy"[1]. Without a doubt, that date was, and perhaps still is, considered by both Japanese-Americans and Japanese-Canadians as one which *unjustly* cast *them* "in infamy". For, long before Pearl Harbor, anti-Japanese sentiment was rampant on the West Coasts of both the United States and Canada. Once Pearl Harbor had been attacked in the manner that it was, that event served to

1. Address to the Congress of the United States, December 8, 1941, asking that a state of war be declared between the United States and Japan. *Congressional Record*, v. 87, Part 9, pp. 9504, 9505; *The Public Papers and Addresses of Franklin D. Roosevelt*, Compiled with Special Material and Explanatory Notes by Samuel I. Rosenman, New York, Harper & Brothers, 1950, 1941 volume, pp. 514-515.

intensify to no end an already unjust atmosphere of intolerance, suspicion, and discrimination. In both the United States and Canada, Pearl Harbor caused anti-Japanese sentiment to be fanned to the point where concern for individual liberty appears to have been forgotten by those in authority as they dealt with a security problem which was imagined to exist. People of Japanese ancestry were summarily taken from their homes and deprived of their property as they were removed from West Coast areas in both the United States and Canada and placed in internment camps. In both countries, this was done regardless of nationality and without proof of the lack of loyalty to either the United States or Canada, as the case might be[2].

A. The mass arrest of an entire people

1. *Canada*

In Canada this was done by Orders in Council[3]; in the United States it was done by Executive Orders[4]. In both countries, the West Coast Japanese—men, women, and children—were taken into custody not because they had done something wrong, but because of the fear that they might. In effect, this amounted to the mass arrest of an entire people without indictment and without charges having been made against them. In the United States, over 100,000 people were uprooted and transported to camps where they were made to live under virtual prison conditions, far from their homes[5]. In Canada, approximately 21,000 people were involved, with some being moved from their homes on as little as twenty-four hours notice or less[6]. Basically, the only reason for this action in both countries was that the military thought that it would take too long for individual loyalty investigations to be conducted[7].

2. For a discussion of what took place in Canada, see Forrest E. La Violette, *The Canadian Japanese and World War II; A Sociological and Psychological Account*, University of Toronto, 1948. For a critical account of the action taken by the Government of the United States, as well as for citations to numerous other publications on the subject, see Eugene V. Rostow, "The Japanese American Cases—A Disaster, 1945", 54 *Yale Law Journal* 489.
3. See La Violette, *Op. cit. supra* note 2, Chap. 3, "Moving Time".
4. See Rostow, *Op. cit. supra* note 2. In addition, see the Appendix to Final Report, *Japanese Evacuation from the West Coast, 1942*, Washington, D.C., G.P.O., 1943, for memoranda, correspondence, and various documents that relate to the World War II relocation of the Japanese.
5. Rostow, *Op. cit. supra* note 2, p. 490.
6. La Violette, *Op. cit. supra* note 2, pp. 64-65.
7. Rostow, *Op. cit. supra* note 2, p. 490.

2. *The United States*

In the United States, on December 10, 1941, the President of the United States issued proclamations concerning Japanese, German, and Italian alien enemies setting forth the conduct to be observed and enjoining them[8]

> to preserve the peace towards the United States and to refrain from crime against the public safety, and from violating the laws of the United States and of the States and Territories thereof; and to refrain from actual hostility or giving information, aid or comfort to the enemies of the United States or interfering by word or deed with the defense of the United States or the political process and public opinions thereof; and to comply strictly with the regulations which are hereby or which may be from time to time promulgated by the President.

The Proclamation stated further that all alien enemies were liable to restraint or to give security, to removal from specified areas, or to departure from the United States in the manner provided by law and as prescribed in regulations duly promulgated by the President[9]. The duties and the authority of the Attorney General of the United States and of the Secretary of War regarding the conduct and the movement of alien enemies within the continental United States, as well as in other areas within the jurisdiction of the United States, were set forth and regulations issued[10].

B. CANADA'S 1939 DEFENCE OF CANADA REGULATIONS AS A PRECEDENT

In essence, this was the same type of action which Canada had taken in 1939 at the start of World War II. At that time, sub-paragraph (7) of Regulation 24 of the Defence of Canada Regulations provided that when these Regulations came into force, public notice of the fact would be given by Proclamation[11]. Accordingly, in the *Canada Gazette* for September 12, 1939, it was stated that since the Regulations had come into force on September 3rd, public notice was given of Regulation number 24 which dealt with the arrest, detention, and internment of enemy aliens in Canada[12].

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8. 6 *Federal Register* 6321 (Japanese), 6323 at 6324 (German), 6324-6325 (Italian).
9. *Ibid.*
10. *Ibid.*, pp. 6321-6323, 6324, 6325.
11. *The Canada Gazette, Extra*, September 13, 1939.
12. *Ibid.*

The regulation stated that so long as they peacefully pursued their ordinary occupations, all enemy aliens in Canada would be allowed to continue to enjoy the protection of the law and would be accorded "the respect and consideration due to peaceful and law abiding citizens"[13]. The regulation provided further that they would not be arrested, detained or interfered with, provided they complied with the requirements prescribed in the Regulation with respect to registration[14],

> unless there [was] reasonable ground to believe that they [were] engaged in espionage, or [were] engaging or attempting to engage in acts of a hostile nature, or [were] giving or attempting to give information to the enemy, or unless they otherwise contravene[d] any law, Order in Council, or Proclamation.

The Proclamation set forth under what circumstances enemy aliens would be arrested and detained[15], who had the power to effect the arrest and detention[16], and under what conditions persons so arrested and detained would be released[17]. Thus, the stage was set for the now lamented events which were to follow.

PART I

The Relocation of Persons of Japanese Ancestry
The United States

A. THE FIRST STEP—THE EXECUTIVE ORDERS

In the United States, the first step toward the relocation of civilians was taken in an Executive Order dated February 19, 1942, which was filed February 21, 1942, and which was published in the *Federal Register* of February 25, 1942[18]. This was Executive Order No. 9066 which superseded designations by the Attorney General of prohibited and restricted areas under the Proclamations of December 7 and 8, 1941[19]. Executive Order 9066 authorized and directed the Secretary of War and the Military Commander whom he might from time to time designate "to prescribe military areas in such places and of such extent as he or the appropriate Military Commander [might] determine, from which any or all persons [might] be excluded, and with respect to which, the right of

13. *Ibid.*, Regulation 24 (1).
14. *Ibid.*
15. *Ibid.*, Regulation 24 (2).
16. *Ibid.*, Regulation 24 (3).
17. *Ibid.*, Regulation 24 (4).
18. 7 *Federal Register* 1407.
19. 6 *Federal Register* 6321, 6323, 6324.

any person to enter, remain in, or leave [should] be subject to whatever restrictions the Secretary of War or the appropriate Military Commander [might] impose in his discretion"[20].

Following this, on March 20, 1942, there was the publication of Executive Order 9102 which established the War Relocation Authority in the Executive Office of the President, and defined its functions and duties[21]. The Executive Order provided for the appointment of a Director of the Authority who would be responsible to the President. The Director was authorized and directed

> to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision.

On March 21, 1942, Executive Order 9066 was ratified and confirmed by the Act of March 21, 1942, which made it a misdemeanor punishable by fine and/or imprisonment for one to[22]

> enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, . . . if it appear[ed] that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof.

B. THE SECOND STEP—THE RELOCATION PROCLAMATIONS

Executive Order 9102 was implemented by a series of Public Proclamations which were issued by General J. L. De Witt, Commanding General of the Western Defense Command. The first of these dated March 2, 1942, filed March 25, 1942, and published in the *Federal Register* of March 26, 1942 applied to any "Japanese, German, Italian alien, *or any person of Japanese Ancestry*" who was a resident of Military Areas Nos. 1 and 2 which encompassed all or parts of the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah, and Arizona, and the Territory of Alaska[23]. The Proclamation stated that such persons or classes of persons as the situation might require, would, by subsequent proclamation, be excluded from Military Area No. 1 and

20. 7 *Federal Register* 1407.
21. 7 *Federal Register* 2165.
22. 56 Stat. 173 (1942).
23. 7 *Federal Register* 2320, 2321 (Emphasis added).

from certain zones of Military Area No. 2. The Proclamation required any "Japanese, German or Italian alien, *or any person of Japanese Ancestry*", a resident of Military Zone 1 who changed his habitual place of residence to execute a "Change of Residence Notice" at a United States Post Office[24]. The Proclamation also adopted and continued in full force and effect the designation of prohibited areas made by the Attorney General of the United States under the Proclamations of December 7 and 8, 1941, as well as the instructions, rules, and regulations prescribed by him.

There were other Public Proclamations. Thus, a second one dated March 16, 1942, filed March 27, 1942, and published in the *Federal Register* of March 28, 1942, added four more Military areas—Nos. 3, 4, 5 and 6 encompassing the entire States of Idaho, Montana, Nevada, and Utah—"from which any or all persons m[ight] be excluded, and with respect to which the rights of any persons to enter, remain in, or leave s[hould] be subject to whatever restrictions the Secretary of War or the appropriate Military Commander m[ight] impose in his discretion"[25]. There was a third Public Proclamation dated March 24, 1942, filed April 1, 1942, and published in the *Federal Register* of April 2, 1942, which imposed a curfew on all Japanese, German and Italien aliens, and on all persons of Japanese ancestry living or working within substantially all of the six Military areas. Also, this proclamation forbade persons of Japanese ancestry from having in their possession, using, or operating within these six Military areas any of the following: firearms, weapons or implements of war or component parts thereof, ammunition, bombs, explosives or component parts thereof, short-wave radio receiving sets having certain frequencies, radio transmitting sets, signal devices, codes or ciphers, and cameras[26].

C. The third step—The civilian exclusion orders

In addition to the Public Proclamations issued by the Commanding General of the Western Defense Command, there were also Civilian Exclusion Orders. Thus, Exclusion Order No. 24 excluded persons of Japanese ancestry from the countries of Contra Costa, San Joaquin, and Alameda, California[27]. Nos. 25 and 26 excluded persons of Japanese ancestry from portions of Multnomah County, Oregon[28]; Nos. 32 and 33

24. *Ibid.*, p. 2321 (Emphasis added).
25. 7 *Federal Register* 2405.
26. 7 *Federal Register* 2543, 2545.
27. 7 *Federal Register* 3966.
28. *Ibid.*

excluded persons of Japanese ancesty from portions of the City of Los Angeles[29]; No. 34 from portions of Alameda County, California[30]; No. 35 excluded them from the County of San Mateo, California[31]; Nos. 36 and 37 excluded them from portions of the City of Seattle, Washington[32]; and No. 36 from certain portions of the State of Arizona[33].

D. THE EFFECT OF THE COMPULSORY MASS MIGRATION JAPANESE-AMERICANS

Once the evacuation of persons of Japanese ancestry from the West Coast of the United States was undertaken, within a period of ninety operating days 110,442 persons had been subjected to a compulsory organized mass migration which was conducted under military supervision[34]. This involved the establishment of Assembly Centers. In some instances, fairgrounds or race tracks were used; in others, abandoned Civilian Conservation Corps camps, the Pacific Live Stock Exposition facilities, old mill sites, or migrant camps served the purpose[35]. It also involved the construction and the equipment of Relocation Centers. In all, there were ten of these located in Utah, Arizona, Colorado, Wyoming, Arkansas, California, and Oregon[36].

All of this was done in spite of the fact that on the West Coast of the United States there were no instances of sabotage by persons of Japanese ancestry and in spite of the fact that the courts were open and in full and free operation. No such measures were taken in Hawai with respect to persons of Japanese ancestry although they comprised 32% of the population as against 1.2% on the West Coast, and although access to military installations were substantially the same in both areas[37].

29. *Ibid.*, pp. 3966, 3967.
30. *Ibid.*, p. 3967.
31. *Ibid.*, pp. 3967, 3968.
32. *Ibid.*, p. 3968.
33. *Ibid.*, pp. 3968, 3969.
34. *Final Report, Japanese Evacuation From the West Coast, 1942*, Washington, D.C., G. P. O., 1943, p. viii.
35. *Ibid.*, Chap. XIII, "Assembly Center Location, Construction and Equipment."
36. *Ibid.*, Chap. XXI, "The Construction and Equipment of Relocation Centers." For the exact location and the description of the Centers, see pp. 249-264.
37. Rostow, *Op. cit. supra* note 2, pp. 496, 497.

PART II

Relocation of Persons of Japanese Ancestry
The Dominion of Canada

A. The declaration of a state of war between Canada and Japan

In Canada, on December 7, 1941, by Order in Council the Privy Council took note of the fact that on that day Japan had "wantonly and treacheously attacked British territory and British forces, and also United States territory and United States forces; that Japan's actions [were] a threat to the defence and freedom of Canada and other nations of the British Commonwealth; . . . that it [was] expedient that a proclamation should be issued declaring the existence of a state of war between Canada and Japan"[38]. On the following day, December 8, such a proclamation was issued which declared and proclaimed that war existed and had existed between Canada and Japan "as and from the 7th day of December, 1941"[39].

B. The first orders in council affecting Japanese-Canadians

On December 7, 1941, by Order in Council the Defence of Canada Regulations (Consolidation) 1941 were amended to require the registration of persons of Japanese nationality by extending the provisions of Regulations 24, 25, and 26 to them[40]. On December 16, 1941, by another Order in Council persons of the Japanese race sixteen years or older who resided anywhere in Canada were ordered to register with the Royal Canadian Mounted Police[41]. This was an extension to the entire country of an order dated January 7, 1941, which had required that persons of the Japanese race who were residents of British Columbia register with the Royal Canadian Mounted Police[42].

Another Order in Council dated December 16, 1941, prohibited the operation of any vessel in waters adjacent to the West Coast of Canada "without the authority in writing of the Commissioner of the Royal Canadian Mounted Police, or other officer designated by him for the

38. P. C. 9592, *Proclamations and Orders in Council Relating to the War*, Ottawa, King's Printer, 1942, v. 5, pp. 349, 350.
39. *Ibid.*, p. 350.
40. P. C. 9591, *Ibid.*, pp. 348, 349.
41. P. C. 9760, *Ibid.*, p. 359.
42. *Ibid.*

purpose"[43]. Any vessel operated in violation of this Order was subject to seizure and detention, and any person who contravened the Order was, on summary conviction, subject to fine and imprisonment[44].

Then, by an Order in Council dated January 13, 1942, persons of Japanese racial origin were prohibited from serving on fishing vessels off the Coast of British Columbia or from holding fishing licenses[45]. On January 31, 1942, this was followed by an Order in Council which constituted a committee for the disposal and putting back into service of some 1,100 Japanese fishing vessels worth between two and three million dollars which had been impounded[46]. Although this was justified as a war measure that had been taken for reasons of the national defence and security of Canada, it was but one chapter in a long standing history of anti-Japanese feeling and agitation in the fishing industry of British Columbia. It involved the taking of property of Japanese-Canadians who were citizens of Canada[47].

C. THE RELOCATION ORDERS IN COUNCIL

Next, there was the Order in Council amending and rescinding Defence of Canada Regulation 4, and replacing it with a new Regulation which established "protected areas" from which not only enemy aliens could be removed, but which also authorized[48]

> the detention of *any persons, other than enemy aliens*, ordinarily resident or actually present in such protected area in order to prevent such persons from acting in any manner prejudicial to the public safety of the State.

Dated January 16, 1942, and published in the *Canada Gazette, Extra*, of January 27, 1942, it was soon followed by an Order in Council dated February 17, 1942, which authorized the formation of a Canadian Construction Corps[49], and by another one dated February 19, 1942, which authorized the establishment of work camps for enemy aliens who were removed from British Columbia[50].

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43. P. C. 9761, *Ibid.*, p. 367.
44. *Ibid.*
45. P. C. 251, *Ibid.*, v. 6, pp. 33, 34.
46. P. C. 288, *Ibid.*, v. 6, pp. 35, 36.
47. See La Violette, *Op. cit. supra* note 2, Chap. 9, "The Fishing Boats", pp. 203-208.
48. P. C. 365 dated 16th day of January, 1942, and published in the *Canada Gazette, Extra*, 27th January, 1942; *Proclamations and Orders in Council Relating to the War, Loc. cit. supra* note 36, v. 6, pp. 44, 45.
49. *Ibid.*, pp. 120-122. Actually, the effect of this Order in Council was deferred by a later order in Council dated March 31, 1942, P. C. 2542, *Ibid.*, p. 259.
50. *Ibid.*, pp. 125, 126.

Three other Orders in Council, P. C. 1457 and P. C. 1486, dated February 24, 1942[51], and P. C. 1665, dated March 4, 1942[52], effectively settled the fate of Japanese-Canadians for the duration of the War and even longer. The first, P. C. 1457, amended the Defence of Canada Regulations by adding Regulation 39E which provided that after the date of the Regulation and for the duration of the War, no person of the Japanese race and no Japanese company would have the capacity "to acquire or hold land or growing crops in Canada"[53]. The Minister of Justice could, however, grant to a person of the Japanese race or to a Japanese company a licence to acquire or hold land or growing crops "if it appeared to him to be in the public interest so to do"[54].

The second of these Orders in Council, P. C. 1486, amended Regulation 4 of the Defence of Canada Regulations (Consolidation 1941) by arming the Minister of Justice with the authority to require any and all persons to leave protected areas, and granting him authority "to prohibit any or all persons from entering, leaving, or returning to such protected area except as permitted pursuant to such order"[55]. The Order also granted the Minister of Justice the power to impose on any and all persons resident or present in a protected area "such restrictions as [might] be specified in the order in respect of their employment or business, their movements or places of residence, their associations or communications with other persons, their activities in relation to the dissemination of news or the propagation of opinions or otherwise with respect to the conduct of any such persons"[56]. The Minister could also prohibit or restrict such persons in the possession or use of specified articles, and he could[57]

> authorize the detention, in such place and under such conditions as he [might] from time to time direct, of any or all persons ordinarily resident or actually present in such protected area.

D. The British Columbia Security Commission

The third of these Orders in Council, P. C. 1665, established regulations respecting a three-member Commission to be known as the British

51. *Ibid.*, pp. 135, 136, 137.
52. *Ibid.*, pp. 167-171.
53. Regulation 39 E (1), P. C. 1457, *Ibid.*, p. 135.
54. Regulation 39 E (4)(a).
55. P. C. 1486, *Proclamations and Orders in Council Relating to the War, Loc. cit. supra* note 36, v. 6, pp. 136, 137. The Order substituted a new paragraph 2 for the old paragraph 2 of Regulation 4.
56. *Ibid.*
57. *Ibid.*, 2(e).

Columbia Security Commission which would have the duty "to plan, supervise and direct the evacuation from the protected areas of British Columbia of all persons of the Japanese race"[58]. The Commission had the duty to determine "the time and order of the evacuation of such persons, the mode of transport and all matters relative to the placement of such persons"[59]. Moreover, it had the responsibility to provide "for the housing, feeding, care and protection of such persons in so far as the same [might] be necessary"[60]. The Order provided further[61]:

> 11. (1) The Commission shall have power to require by order any person of the Japanese race, in any protected area in British Columbia, to remain at his place of residence or to leave his place of residence and proceed to any other place within or without the protected area at such time and in such manner as the Commission may prescribe in such order, or to order the detention of any such person, and any such order may be enforced by any person nominated by the Commission so to do.
>
> (2) The Commission may make orders respecting the conduct, activities and discipline of any person evacuated under the provisions of these Regulations.

The Order stipulated that persons of the Japanese race evacuated from a protected area could voluntarily turn over property located in such an area to the Custodian provided for by the 1939 Regulations respecting Trading with the Enemy. It also provided that property which a person of the Japanese race could not take along with him when he was evacuated should be vested in, and be subject to, the control of this Custodian[62]. Property, rights, and interests so vested in and made subject to the control and management of the Custodian, or the proceeds thereof, were to be dealt with "in such manner as the Governor in Council [might] direct"[63].

Another succession of Orders in Council completed the British Columbia Security Commission's control throughout Canada over the movement, the employment, and the residence of persons of Japanese residence or ancestry. P. C. 2483, dated March 27, 1942, amended P. C. 1665 by granting the Commission greater "protective control" over persons of the Japanese race which was defined to mean "any person of the Japanese race required to leave any protected area of British Columbia by Order of the Minister of Justice under Regulation 4, as amended, of the

58. P. C. 1665, *Ibid.*, p. 167 at 169.
59. *Ibid.*
60. *Ibid.*
61. *Ibid.*
62. *Ibid.*, Section 12, "Custody of Japanese Property".
63. *Ibid.*

Defence of Canada Regulations (Consolidation) 1941"[64]. P. C. 2541, dated March 30, 1942, empowered the Commission to issue relief to indigent persons of the Japanese race, to provide public employment for them, and to arrange for the care of their dependents[65].

Then, P. C. 3213, dated April 21, 1942, gave the Commission authority to enter into agreements with the Government of any Province relative to the placement in such Province of persons of the Japanese race who were evacuated from the protected areas of British Columbia under the provisions of the Regulations[66]. Finally, P. C. 8173, dated September 11, 1942, amended P. C. 1348 which established work camps for Japanese Nationals by extending its provisions to other persons of Japanese racial origins[67].

E. The effect of the compulsory relocation of Japanese-Canadians

The relocation of Japanese-Canadians took place very much in the same manner that the relocation of Japanese-Americans did in the United States, except for the fact that there were fewer of the former than there were of the latter—about 21,000 as against over 100,000. In Canada as in the United States, there was a staging area. That was the Hastings Park Exhibition Grounds at Vancouver which served as the assembly point through which most of those relocated passed as they were sent to various places in the interior. Until better facilities could be prepared at the Park, even women and children were made to live in inadequately prepared livestock buildings[68].

By the time the British Columbia Security Commission had completed its work, all persons of Japanese origin or ancestry had been cleared from a strip of Canada's West Coast which was 100 miles wide. Some were sent to road camp projects, some to sugar-beet or other special projects; others were kept in detention or sent to internment camps[69]. Former mining and ghost towns were used, as well as other facilities. In some instances, families were kept together, in others they were not when men were sent to road camps[70].

64. P. C. 2483, *Ibid.*, pp. 252, 253.
65. P. C. 2541, *Ibid.*, p. 258.
66. P. C. 3213, amending P. C. 1665, *Ibid.*, v. 7, p. 34.
67. P. C. 8173, amending P. C. 1348, *Ibid.*, v. 8, pp. 170, 171.
68. See La Violette, *Op. cit. supra* note 2, p. 63 et *seq.*, "Hastings Park".
69. For a breakdown of what was done with the evacuees, see *Ibid.*, p. 96.
70. *Ibid.*, Chap. 5, "Interior Settlements".

PART III

The World War II Japanese-American and Japanese-Canadian Questions in the Courts

Thus, during World War II the experience of the Japanese-Canadians was in many ways very similar to that of the Japanese-Americans. In one respect, however, there was a marked difference. The Japanese-Americans could contest the action that the American Government took toward them at the time it occurred even though the War had not ended[71]. On the other hand, as long as the War continued there was nothing that the Japanese-Canadians could do. They had to wait until the War had ended before they could bring any form of court action. And even then, they could not contest the validity of the war-time course of action which the Canadian Government had followed under the authority of the *War Measures Act*. All that they could do was to contest the validity of an extension beyond the end of hostilities of the war-inspired actions of the Canadian Government which could find support only in the fact that they were war-time measures[72].

The litigation which took place in both the United States and Canada over this war-related treatment of citizens of Japanese ancestry gives emphasis to the difference that exists between the systems of government of the two countries. It also lends support to the assertion that a Bill of Rights—even one which is entrenched as is that of the United States Constitution—often does not suffice.

A. THE LITIGATION IN THE AMERICAN COURTS—THE WAR-TIME JAPANESE-AMERICAN CASES

1. *The Hirabayashi Case*

Hirabayashi v. United States[73] was the first World War II Japanese-American case to reach the Supreme Court of the United States. It was argued on May 10 and 11, 1943, and was decided on June 21 of the same year. It involved a violation of the curfew provisions of Executive Order No. 9066[74] which had been ratified and confirmed by the

71. For the American cases see Rostow, *Op. cit. supra* note 2.
72. The one Canadian Supreme Court case is discussed by La Violette, *Op. cit. supra* note 2, Chap. XI, "The Supreme Court Case".
73. (1943) 320 U.S. 81.
74. *Loc. cit. supra* note 19.

Act of March 21, 1942[75]. Two questions were presented. The first was whether the 8:00 p. m. to 6:00 a. m. curfew restriction, which applied only to persons of Japanese ancestry, was adopted by the Military Commander in the exercise of an unconstitutional delegation by Congress of its legislative power. The second was whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries, in violation of the Fifth Amendment[76].

The appellant had violated the curfew order. Also, he had ignored a Civilian Exclusion Order and had failed to report to the Civil Control Station of a designated area to register for evacuation from the military area. It was brought out in his defense that he was an American citizen by birth who had never been a subject of, nor borne allegiance to, the Empire of Japan; that he was educated in the public schools of the State of Washington and was a senior at the University of Washington at the time of his arrest; that he had neither ever been to Japan nor ever had any association with Japanese residing there. His parents had come to the United States from Japan, but had never returned there.

In an opinion written by Mr. Chief Justice Stone, the Court held that it was within the constitutional authority of the Congress and of the Chief Executive to prescribe the curfew order as an emergency war measure; that the order did not unconstitutionally discriminate against persons of Japanese ancestry; and that at the time and in the manner in which it was applied, the curfew order was within the boundaries of the war power.

As it arrived at its decision, the Court reviewed the events which surrounded the issuance of the curfew order—Pearl Harbor and its aftermath. And in the light of the conditions with which the President and the Congress were confronted in the early months of 1942, the challenged orders were upheld as valid defense measures, the purpose of which was to safeguard the military area in question from the danger of sabotage and espionage at a time of threatened air raids and invasion by Japanese forces. As for the fact that the order was directed only at persons of Japanese ancestry, the Chief Justice wrote for the Court[77]:

> Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be

75. *Loc. cit. supra* note 22.
76. *Loc. cit. supra* note 73, p. 83.
77. *Ibid.*, p. 99.

> isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

As for the claim that the order was in violation of the Fifth Amendment because it discriminated against citizens of Japanese ancestry, the Court disposed of that with the statement: "The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. . . Congress may hit at a particular danger where it is seen, without providing for others which are not so evident or so urgent". Then the Court recognized that "legislative classification or discrimination based on race alone has often been held to be a denial of equal protection"[78]. But in the light of the facts, the circumstances, and the war setting in which the order was issued, it could not say that there was no ground for differentiating citizens of Japanese ancestry from other groups in the United States. The fact alone that the shores of the United States were threatened by Japan rather than by another enemy power, the Court held, "set these citizens apart from others who h]ad] no particular associations with Japan"[79]. The Court continued[80]:

> We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety.

2. *The Korematsu Case.*

Although Justices Douglas, Murphy, and Rutledge wrote concurring opinions in *Hirabayashi v. United States*, the decision of the Court still had the support of a unanimous Court. But that was not the case in *Korematsu v. United States*[81], argued and decided the latter part of 1944, in which an order excluding Japanese-Americans from a Military Area was upheld. In that case there were three dissents: one by Justice Roberts[82], one by Justice Murphy[83], and one by Justice Jackson[84].

The petitioner in the case, a person of Japanese ancestry whose loyalty to the United States was not questioned, had been convicted of

78. *Ibid.*, p. 100.
79. *Ibid.*, p. 101.
80. *Ibid.*, pp. 101, 102.
81. (1944) 323 U.S. 214.
82. *Ibid.*, p. 225.
83. *Ibid.*, p. 233.
84. *Ibid.*, p. 242.

violating Exclusion Order No. 34, dated May 3, 1942[85], which was issued pursuant to Executive Order 9066[86]. As in the case of *Hirabayashi*, the prosecution of the petitioner and his conviction were founded on the provisions of the Act of March 21, 1942[87], which ratified and confirmed Executive Order 9066, and provided penalties for violations of orders and proclamations issued pursuant to it. The Order which the petitioner had violated excluded all persons of Japanese ancestry, both alien and non-alien, from described portions of Military Area No. 1.

Not only did the petitioner challenge the assumptions on which the Court had rested its conclusions in *Hirabayashi*, but he also urged that by May, 1942, when the Order in question was promulgated, all danger of the invasion of the West Coast of the United States had disappeared. As it rejected the petitioner's contentions, the Court repeated what it had said in *Hirabayashi*—that it could not reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of the country's Japanese population "whose number and strength could not be precisely and quickly ascertained"[88].

The exclusion of those of Japanese origin from the Military area was, like the curfew of the *Hirabayashi* case, deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of which the Court had no doubt was loyal to the United States. As in the earlier case, it was because of this that the Court could not reject the finding of the military that "it was impossible to bring about an immediate segregation of the disloyal from the loyal"[89]. And in support of this finding, the Court pointed out that subsequent to the exclusion, it had been confirmed that there were members of the group who retained loyalties to Japan. Some 5,000 Americain citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and renounce allegiance to the Japanese Emperor. Indeed, several thousand of the evacuees had requested repatriation to Japan.

As it upheld the exclusion order as of the time it was made as well as of when the petitioner violated it, the Court was mindful of the hardship that this imposed on a large group of Americans. However, it justified this with the statement[90]:

85. 7 *Federal Register* 3967.
86. *Loc. cit. supra* note 19.
87. *Loc. cit. supra* note 22.
88. *Loc. cit. supra* note 81, p. 218.
89. *Ibid.*, p. 219.
90. *Ibid.*, pp. 219, 220.

> But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

3. *The Endo Case.*

A third case, *Ex Parte Mitsuye Endo*[91], which was decided on the same date that *Korematsu* was, came to the Supreme Court on a certificate of the Court of Appeal for the Ninth Circuit. Certain questions of law were certified and, according to the procedure set forth in Title 28, United States Code, § 346 (now § 1254), instructions were asked for the decision of the case. The opinion of the Court was written by Mr. Justice Douglas.

Again the case involved an American citizen of Japanese ancestry, a woman who was evacuated from Sacramento, California, in 1942 under the authority granted by Executive Orders 9066 and 9102[92]. The appellant was one of those subject to Civilian Exclusion Order No. 52, dated May 7, 1942 which excluded from Sacramento "all persons of Japanese ancestry, both alien and non-alien", beginning on May 16, 1942[93]. On May 15, 1942, she was evacuated to the Sacramento Assembly Center, and on June 19, 1942, she was sent to the Tule Lake Relocation Center.

Civilian Restrictive Order No. 1, dated May 19, 1942[94], applied to Assembly Centers, and Public Proclamation No. 8, dated June 27, 1942[95], applied to Relocation Centers. The former required all persons sent to Assembly Centers to remain within their bounds unless specifically authorized to leave. The latter placed restrictions on the right of persons of Japanese Ancestry to enter, remain in, or leave Relocation Centers. Failure to conform to the provisions of Public Proclamation No. 8 made one subject to the penalties prescribed by the Act of March 21, 1942[96]. Later, by a letter dated August 11, 1942, the War Relocation Authority was authorized to issue permits "for ingress to and egress from" War Reloca-

91. (1944) 323 U.S. 283.
92. *Loc. cit. supra* notes 19 and 21.
93. 7 *Federal Register* 3559, 3560.
94. 7 *Federal Register* 982.
95. 8 *Federal Register* 8346.
96. *Loc. cit. supra* note 22.

tion Project Areas such as that at Tule Lake to which the appellant was sent[97].

There were three main features to the program of the War Relocation Authority: (1) there was the maintenance of Relocation Centers as interim places of residence for evacuees; (2) there was the segregation of loyal from disloyal evacuees: (3) the continued detention of the disloyal and, to the extent possible, the relocation of those found to be loyal[98]. And in so far as those who were found loyal under the third feature of the Authority's program were concerned, a procedure was established so that they could obtain leave from the Relocation Centers. But even if a person found loyal applied for leave, certain conditions had to be met such as the availability of employment which had to be approved by the Authority, the availability of personal financial resources with which the applicant could take care of himself or herself, the approval by a Relocation Officer of the Place where the applicant planned to live if granted leave, etc. But even if an applicant satisfied all of the conditions and requirements of which there were 14[99], leave could still be denied if it was determined that the proposed place of residence was in a locality where "community sentiment [was] unfavorable", was in an area which had not been cleared for relocation, or if the area was one which had been closed by the Authority to the issuance of indefinite leave[100].

The appellant was granted leave clearance on August 16, 1943, but she did not make application for indefinite leave. Instead, she petitioned for a writ of *habeas corpus*, alleging that she was a loyal and law-abiding citizen of the United States against whom no charge had been made, that she was unlawfully detained, and that she was confined in the Relocation Center under guard and against her will. All of this was conceded by both the Department of Justice and by the War Relocation Authority. Yet, these agencies of the Government maintained that detention for an additional period even after clearance for leave had been granted was an essential step in the evacuation program. In support of this it was argued that there had to be an orderly relocation to avoid a dangerously disorded migration of unwanted people to unprepared communities—that unsupervised evacuation could result in hardship and disorder[101].

97. *Final Report, Japanese Evacuation from the West Coast, 1942, Loc. cit. supra* note 34, p. 530.
98. *Loc. cit. supra* note 91, p. 291.
99. *Ibid.*, pp. 292, 293.
100. *Ibid.*, p. 293.
101. *Ibid.*, pp. 296, 297.

The Court would have none of this. It held that the appellant should be given her liberty for the simple reason that the War Relocation Authority had no authority to subject concededly loyal citizens to its leave procedure, regardless of what other authority it may have had to detain other classes of citizens. In the words of the Court[102]:

> A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.
>
> Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the regional evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else.

B. THE CANADIAN LITIGATION—THE JAPANESE-CANADIANS AND THE END OF THE WAR

1. *The National Emergency Transitional Powers Act, 1945.*

After the hostilities of World War II had ended, the Parliament of Canada took measures to continue some of the powers that the Governor in Council had exercised during the War under the authority of the *War Measures Act*. It enacted the *National Emergency Transitional Powers Act, 1945*[103], which authorized the Governor in Council to "do and authorize such acts and things, and make from time to time such orders and regulations, as he [might], by reason of the continued existence of the national emergency arising out of the war against Germany and Japan, deem necessary or advisable" for certain specified purposes[104]. The Act provided that all orders and regulations made under it and while it continued in force, together with the orders and regulations made under

102. *Ibid.*, p. 302.

103. *An Act to confer certain transitional powers upon the Governor in Council during the National Emergency arising out of the War*, 9-10 George VI, Chap. 205, Assented to 18th December, 1945.

104. *Ibid.*, p. 2.

and pursuant to the *War Measures Act*, should be deemed to be regulations[105].

By its terms, the Act was to take effect January 1, 1946, after which date, for the purposes of the *War Measures Act*, the war against Germany and Japan should be deemed no longer to exist[106]. The Act was to expire on December 31, 1946, unless addresses were presented to the Governor-General by the Senate and the House of Commons praying that it continue in force longer, in which case it could be extended but not for more than one year[107].

2. *The Deportation Orders.*

After the war had been declared ended, action was taken to carry out the provisions of three Orders in Council for the deportation of Japanese-Canadians, Japanese Nationals who were residents of Canada, and the wives and children of such Japanese-Canadians and Japanese Nationals. The three Orders in Council, Numbers 7355, 7356, and 7357, were made under the authority of the *War Measures Act*. They were dated December 15, 1945, sixteen days before the *National Emergency Transitional Powers Acts, 1945*, took effect and the War declared ended.

The first order authorized the Minister of Labour to order deported to Japan the following[108]:

> (1) Every person sixteen years of age or older, other than a Canadian National, who was a national of Japan resident in Canada and who (a) had, since the date of the declaration of war against Japan on December 8, 1941, made a request for repatriation; or, (b) had been in detention under certain regulations and still was detained on September 1, 1945.
>
> (2) Every naturalized British subject of the Japanese race of sixteen years or over resident in Canada who had made a request for repatriation, provided that such person had not revoked such a request in writing prior to midnight, September 1, 1945.
>
> (3) Every natural born British subject of the Japanese race of sixteen years of age or over resident of Canada who had made a request for repatriation, provided that such person had not revoked in writing such request prior to the making of an order for deportation by the Minister.
>
> (4) The wife and the Children under sixteen years of age of a person for whom the Minister of Labour made an order for deportation.

105. *Ibid.*, Section 2 (2).
106. *Ibid.*, Section 5.
107. *Ibid.*, Section 6.
108. For the full text of Order in Council 7355, see *Reference as to the Validity of Orders in Council of 15th Day of December, 1945 (P. C. 7355, 7356, and 7357), in Relation to Persons of The Japanese Race*, [1946] S.C.R., 248, 254-257.

The second Order, No. 7356, provided that any person, "being a British subject by naturalization under the *Naturalization Act*, Chapter 138, R.S.C. 1927", who was deported from Canada under the provisions of Order in Council P. C. 7355, should as and from the date upon which he left Canada in the course of such deportation "cease to be either a British subject or a Canadian national"[109].

The Third Order, No. 7357, provided for a Commission to inquire into "the activities, loyalty, and the extent of co-operation with the Government of Canada during the war of Japanese nationals and naturalized persons of the Japanese race in Canada in cases where their names [were] referred to the Commission by the Minister of Labour for investigation with a view to recommending whether in the circumstances of any such case such person should be deported"[110]. At the request of the Minister of Labour, the Commission could inquire into the case of any naturalized British subject of the Japanese race who had made a request for repatriation and make recommendations as it might deem advisable. And any person of the Japanese race who was recommended for deportation by the Commission would be deemed subject to deportation under Order in Council 7355. Any such person recommended for deportation would cease to be either a British subject or a Canadian national, "as and from the date on which he le[ft] Canada in the course of such deportation"[111].

3. *The Supreme Court of Canada and the Orders in Council.*

The validity of the three Orders in Council was submitted to the Supreme Court of Canada by the Governor-General in Council[112]. The question presented was whether the three Orders were "*ultra vires* of the Governor in Council in whole or in part and, if so, in what particular or particulars and to what extent?"[113].

Although it was sharply divided on the validity of various provisions of the three Orders, the Supreme Court held that they contained legislation which could have been adopted by the Parliament of Canada. Furthermore, it held that under the *War Measures Act* "the Governor in Council was empowered to adopt any legislation that Parliament could have adopted; that such legislation was expressly and impliedly adopted be-

109. For the full text of this Order, see *Ibid.*, 257, 258.
110. The full text of this Order appears at *Ibid.*, 258, 259.
111. *Ibid.*, 258.
112. For the full text of the reference see *Ibid.*, 252-254.
113. *Ibid.*, *252*.

cause it was deemed necessary or advisable for the security, defence, peace, order and welfare of Canada by reason of the existence of war; that the Governor in Council was the sole judge of the necessity or advisability of these measures and [that] it [was] not competent to any Court to canvass the considerations which may have led the Governor in Council to deem such orders necessary or advisable for the objectives set forth"[114].

As the Court reached its decision, five of the seven Justices who heard the case wrote opinions both for themselves and others as they stated their respective positions. Chief Justice Rinfret and Justices Kerwin and Taschereau considered the Orders in Council not *ultra vires* the Governor in Council either in whole or in part. With the exception of the part of Number 7355 which related to the wives of persons ordered deported and their children under sixteen years of age, Justices Hudson and Estey thought the Orders not *ultra vires*. Justice Rand thought the Orders *intra vires* except for the parts that related to the compulsory deportation of natural born British subjects resident in Canada, and the part which related to wives and children under sixteen. Justice Kellock thought that these two same parts of Order 7355 were *ultra vires*. Justices Rand and Kellock thought that parts of both Orders 7356 and 7357 were *ultra vires* in some respects[115].

4. *The Privy Council and the Orders in Council.*

Thus, a majority of the Supreme Court of Canada had found invalid the part of Order Number 7355 which related to the wives and children under sixteen of persons ordered deported. But once the case reached the Privy Council, that body was of the opinion that a determination of the Orders "as a whole" was necessary to arrive at a conclusion on the matters before it in the appeal. For that reason, their Lordships proposed to deal with the Orders "in their entirety"[116]. Then, citing *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.*[117], the law was said to be undisputed[118]. Under the Provisions of the *British North America Act*, property and civil rights in the Provinces were committed to the Provin-

114. *See opinion of the Chief Justice at Ibid.*, 265, 267.
115. For a summary of the various positions taken by the individual Justices, see the Privy Council's opinion in the case, *Co-Operative Committee on Japanese Canadians v. Attorney-General for Canada*, [1947] A.C. 87, 93-94.
116. *Ibid.*, p. 101.
117. [1923] A.C. 695.
118. [1947] A.C. 87, 101.

cial Legislatures. On the other hand, in a sufficiently great emergency such as that arising out of wars, the Dominion Parliament had to be left with considerable freedom to judge what those interests were. Yet, if it was clear that no emergency had arisen or no longer existed, there could be no justification "for the exercise or continued exercise of the exceptional powers"[119]. But, even when the question was whether a measure was *ultra vires*, very clear evidence that an emergency had not arisen or no longer existed was required"[120].

By way of corollary, it was added that it was "not pertinent to the judiciary to consider the wisdom or the propriety" of a particular policy embodied in emergency legislation[121]. It was also observed that when considering a question of *ultra vires*, the judiciary was not concerned with whether or not the executive would, in fact, be able to carry into effective operation the emergency provisions which the Dominion Parliament had either directly or indirectly made[122].

The validity of the *War Measures Act* had not been attacked, but that of the Orders had. For that reason, the Privy Council considered not only the points advanced in behalf of the appellants, but also any other grounds on which the Orders could be criticised. And as it proceeded to examine the Orders, it noted that for Orders to be valid "it is necessary first, that on the true construction of the *War Measures Act*, they fall within the ambit of the powers duly conferred by the Act on the Governor in Council, second, that, assuming the orders were within the terms of the *War Measures Act*, they were not for some reason in law invalid"[123]. Then, point by point and objection by objection, the Privy Council proceeded to consider the Orders and find them all valid.

First, there was the point that, in its true construction, the *War Measures Act* did not authorize Orders for the deportation of British or Canadian nationals, and that in some respects the Act should receive "a limited construction"[124]. It was argued that as a matter of the construction of the Act, certain limitations were implied. The *Colonial Laws Validity Act, 1865,* was pointed to as one such limitation—that by that Act the ambit of Orders made pursuant to the *War Measures Act* had to be confined to Orders which would not be repugnant to the *British Nationality and Status of Aliens Act, 1914-18*, an Act of the Imperial Parliament. This

119. *Ibid.*
120. *Ibid.*, pp. 101, 102.
121. *Ibid.*, p. 102.
122. *Ibid.*
123. *Ibid.*
124. *Ibid.*

was rejected on the basis that it was the date when the delegated power was exercised, not the date when the *War Measures Act* was passed, that mattered in so far as the 1865 Act was concerned. For, it was said, the statutory law of the United Kingdom is not static and there was no reason to impute that the Parliament of Canada had legislated on the basis that this law is static.

Another point was that the *War Measures Act* did not authorize Orders that had an extra-territorial effect as deportation must. But this was shortly disposed of with the statement, "Extra-territorial constraint is incident to the exercise of the power of deportation"[125]. And if that was not sufficient, there was the *Canadian Extra—Territorial Act, 1933*[126].

A third argument was that the *War Measures Act* should be construed as authorizing only such Orders as were "consistent with the accepted principles of international law" which, it was claimed, would not support Orders that would mean the forcible removal of British subjects to a foreign country[127]. Their Lordships were willing to accord some weight to such an argument in an appropriate case, but they found that the principles on which that argument rested had no place in the construction of the *War Measures Act*, an Act which vested powers in time of war, invasion, and actual or apprehended insurrection.

The next argument involved the meaning of the word "deportation". It was argued that as used in the Act it meant that only "aliens" fell within the category of persons who could be deported. After noting that dictionaries did not altogether agree on the meaning of "deportation", the Privy Council accepted that of the Oxford English Dictionary which defined the word as "the action of carrying away; forcible removal, especially into exile; transportation"[128]. It then took the view that as a matter of language, the word "deportation" was not misused when applied to persons who were not aliens, and that whether or not in its application it was confined to aliens depended on the construction of the statute in which it was found. As for its use in the *War Measures Act*, an Act directed to dealing with emergencies and phrased in sweeping terms, the word appeared in a combination that lumped together "arrest, detention, exclusion and deportation". Therefore, it was used in the general sense and was applicable to all persons "irrespective of nationality"[129]. It was

125. *Ibid.*, p. 104.
126. *An Act respecting Extra-territorial Operation of Acts of the Parliament of Canada*, 24-25 George V, Chap. 39, Assented to 23rd May, 1933.
127. P. 104 of the Opinion of the Privy Council, *Loc. cit. supra* note 115.
128. *Ibid.*, p. 105.
129. *Ibid.*

applicable to all persons who at the time were subject to the laws of Canada.

The Privy Council had no trouble whatever with whether the *War Measures Act* authorized the making of an Order which provided that deported persons should cease to be either British subjects or Canadian nationals. In the light of the views that it had already expressed and under the general power granted by Section 3 of the Act, it mattered not what the nationality of a person ordered deported was.

The next question considered by the Privy Council was whether the *Colonial Laws Validity Act, 1865*, applied to Orders of the Governor in Council. In deciding this it rejected the contention that the Orders were not law to which the *Statute of Westminster, 1931* and the limitation which it imposed on the authority of the Parliament of the United Kingdom to legislate for the Dominions, applied[130]. These orders were made through the machinery set up by the Parliament for that purpose. Therefore, at the time they were made, the legislative activity of Parliament was present and that made them "law" as of the date of their promulgation.

As for the provision of Order Number 7355 which authorized the deportation of the wives and children under sixteen of persons for whom an order for deportation was made, there was some incompleteness in the recitals of the statute. The Order did not show that this was thought necessary for the security, peace, order, defence or welfare of Canada. But the Privy Council found that to be "of no moment" since, in its opinion, it was the substance of the matter which had to be considered, and there was not apparent any matter which justified the judiciary in coming to the conclusion that the power "was in fact exercised for an unauthorized purpose"[131]. The primary concern of the Governor in Council was the deportation of those mentioned in the first part of the Order in Council, but it was not a proper inference from the terms of the subsections of the Order that the Governor in Council did not deem it advisable for the security, defence, peace, order and welfare of Canada to also order the deportation of wives and children under sixteen of these persons.

The Privy Council was no more impressed than the Supreme Court of Canada had been with the argument that at the time the *National Emergency Transitional Powers Act, 1946*, was passed no emergency existed which justified the Parliament of Canada to empower the Gover-

130. 22 Geo. V, c. 4 (U.K.), *An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930.*

131. Pp. 107-108 of the Privy Council's opinion, *Loc. cit. supra* note 115.

nor in Council to continue the Orders in question. Hostilities had ended, but the preamble to the Transitional Act stated clearly why it was thought necessary to enact such a statute. The matter was said to be governed by the principles laid down in *Fort Frances Pulp & Power Co. v. Manitoba Free Press Co.* which clearly supported the Parliament's power to enact such a law[132].

The final argument was that the words "of the Japanese race" were so vague "as to be incapable of application to ascertainable persons". However, this argument was very summarily disposed of in the simple statement "that in their Lordships' opinion they [were] not"[133].

None of the Orders in Council were found *ultra vires*.

AFTERMATH AND CONCLUSION

On February 19, 1976, Gerald R. Ford, President of the United States, signed Proclamation 4417 which confirmed the termination of Executive Order number 9066 dated December 7, 1941, that had authorized the internment of Japanese-Americans during World War II. As he signed this Proclamation, President Ford noted that Executive Order number 9066 ceased to be effective with the end of World War II[134]. However, he also noted that because there was no formal statement of the termination of the 1941 Executive Order, "there remains some concern among Japanese-Americans that there yet may be some life in that obsolete document"[135]. He expressed the conviction that the Proclamation which he was signing "should remove all doubt on that matter"[136].

At first blush it would seem shocking that, at this late date, it should be thought even remotely necessary that there should be a document such as Proclamation 4417 to reassure any American of his security and well-being. For, as President Ford had signed the proclamation he had spoken in part as follows[137]:

132. (1923) A. C. 695, cited at pp. 101 and 108 of the Privy Council's opinion, *Ibid.*

133. *Ibid.*, p. 109.

134. For President Ford's remarks as well as the text of Proclamation 4417, see *Weekly Compilation of Presidential Documents*, Washington, D.C., Government Printing Office, v. 12, no. 8, pp. 245, 246.

135. *Ibid.*, p. 245.

136. *Ibid.*

137. *Ibid.* For accounts of an apology which Pierre Trudeau, The Prime Minister of Canada, has recently been said to have offered Japan for Canada's detention of Japanese-Canadians during World War II, see "*Trudeau fait des excuses au Japon*". *Le Soleil*, 26 octobre 1976, p. C 13; "PM gives warcamp apology to Japanese", *The Gazette*, Oct. 26, 1976, p. 2. Cf. "Irked Trudeau denies 'apologizing' to Japan", *Montreal Star*, Nov. 17, 1976, p. A-18.

> We now know what we should have known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans. On the battlefield and at home the names of Japanese-Americans have been and continue to be written in America's history for the sacrifices and the contributions they have made to the well-being and to the security of this, our common nation.

Yet, it should be remembered that at the time the internment of persons of Japanese ancestry took place during World War II in both the United States and Canada, there were strong and influential voices that expressed full support for the now lamented event that was taking place. On the American scene, one of the strongest voices was that of Earl Warren who was then Attorney General of California, later became Governor of California, and then was named Chief Justice of the United States[138].

On the Canadian scene, it has been written that the internment of Japanese-Canadians has been justified on the basis that "the Americans forced our hands"[139]. But however true or false that may be, at the time of the Pearl Harbor attack, organized public opinion in British Columbia was more anti-Japanese than ever and very influential. American influence was not needed for British Columbians to urge the complete evacuation of Japanese-Canadians from Canada's West Coast which eventually took place[140]. As professor La Violette pointed out in his book on the World War II Japanese-Canadian question, "British Columbia had its own motives"[141].

Viewed in retrospect, the treatment which persons of Japanese ancestry received in both the United States and Canada during World War II confirms the belief that, in times of stress and grave national emergency, even the most rational and the fairest of men can forget the rights of others and do strange things. And when that happens, the presence or absence of a Bill of Rights does not seem to matter—not even the presence of one that is as firmly entrenched in a constitutional framework as is that of the Constitution of the United States. Perhaps at least a partial explanation for this can be found in Justice Louis D. Brandeis' statement in *Olmstead* v. *United States* when he wrote in a different context: "The

138. See Hearings Pursuant to H. Res. 113, *Select Committee Investigating National Defense Migration*, U.S. House of Representatives, Seventy-Seventh Congress, Second Session, Part 29, San Francisco Hearings, February 21, 23, 1942, Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones, pp. 11009-11011 *et seq.*; Morton Grodzins, *Americans Betrayed: Politics and the Japanese Evacuation*, Chicago, University of Chicago, 1949, p. 93 *et seq.*

139. See Forrest E. La Violette, *Op. cit. supra* note 2, p. 43.

140. *Ibid.*, pp. 43, 45, 53.

141. *Ibid.*, p. 43.

greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding"[142]. But such an explanation, and certainly it must be considered a valid one, can hardly be reassuring to even a Mrs. Shig Nishio who, twenty-one years later, was willing to dismiss her experience as a World War II Japanese-American internee with the statement: "There is no bitterness now. It was just something that happened"[143].

142. Brandeis, J., dissenting, 277 U.S. 438, 472 et 479 (1928).

143. Statement published in *The Los Angeles Times*, November 8, 1965, quoted in John D. Weaver, *Warren: The Man, The Court, The Era*, Boston, Little, Brown, 1967, p. 114.