

I

“Let’s Not Get Rattled”

THE FEDERAL BUILDINGS stretched along Constitution Avenue in Washington stood virtually deserted on December 7, 1941. Depending on their cultural bents, government workers relaxing at home that Sunday afternoon tuned their radios to the “National Symphony Hour” or the football game between the hometown Redskins and the Philadelphia Eagles. Pressing duties, however, placed two lawyers among the corporal’s guard of officials at their desks that quiet day. As general counsel of the Immigration and Naturalization Service, Edward J. Ennis worked in the annex to the block-square headquarters of the Department of Justice at Tenth Street. The office of Assistant Secretary of War John J. McCloy was located in the cavernous Munitions Building, a mile away at Twentieth Street.

The duties that required Sunday service of Ennis and McCloy stemmed from fears of an imminent breakdown of the strained diplomatic negotiations between Secretary of State Cordell Hull and Admiral Kichisaburo Nomura, the Japanese ambassador in Washington. Should the two countries sever relations, or even go to war, the Justice Department would become responsible for internal security measures, while the War Department would shoulder the tasks of national defense. Contingency plans for American involvement in the war that already engulfed Europe, and its potential expansion to the Pacific, had existed for more than two years. With relations between Japan and the United States at the breaking point, Ennis and McCloy were working under pressure to update the wartime plans of their respective departments.

Long-standing commitments had taken both Attorney General Francis Biddle and Solicitor General Charles Fahy away from Washington

on December 7. Secretary of War Henry L. Stimson had spent that morning in his office but had left around noon for lunch at Woodley, his imposing urban estate. In the absence of their superiors, Edward Ennis and John McCloy were the ranking officials of their departments that afternoon.

While these two lawyers reviewed documents and conferred with aides, Secretary of State Hull waited patiently in his office close by the White House for the arrival of Ambassador Nomura and special envoy Saburo Kuruu. A courtly Tennessean, Hull respected Nomura as an experienced diplomat. Close in age—Hull at seventy was Nomura's elder by only six years—the two men knew each other well and shared a plain-spoken yet reserved temperament. The Japanese diplomats had promised to present Hull at this meeting with their government's reply to the latest American proposal for resolving the growing rift between the two Pacific powers. Hull was fully aware, however, that Nomura had been increasingly shunted aside by the Japanese militarists whose conquest of Manchuria and dreams of an "East Asian Co-Prosperity Sphere" had led to alliance with Hitler and Mussolini.

Hull consequently harbored no illusions that his meeting with Nomura and Kuruu would lead to diplomatic resolution of conflicts rooted in power politics. The most that Hull expected from this meeting, scheduled at Nomura's request for one o'clock, was additional time to prepare for the inevitable outbreak of war in the Pacific. Accustomed to Japanese punctuality, the Secretary of State became understandably concerned when an hour passed without the arrival of his expected visitors. Hull was also concerned that President Franklin D. Roosevelt, who was expecting a report on the outcome of the diplomatic meeting, might conclude that the Secretary of State had neglected to inform the Chief Executive.

Hull's concerns gave way to shock when he received a call from Roosevelt shortly after two o'clock, reporting that Japanese planes had bombed the American naval fleet berthed at Pearl Harbor in Hawaii. The President had learned of the sudden attack only minutes before from Secretary of the Navy Frank Knox. The smoke from bombed ships and planes still billowed over Pearl Harbor when Nomura and Kuruu arrived at Hull's office. Roosevelt had instructed Hull to "receive their reply formally and coolly and bow them out." Without a mention of the Japanese attack, the Secretary of State accepted from his visitors their government's message that "it is impossible to reach agreement through further negotiations" and dismissed them. Hull later learned that Ambassador Nomura had been given no forewarning by his superiors of their plans to bomb Pearl Harbor.¹

Throughout the afternoon of December 7, millions of Americans remained glued to their radios as fragmentary reports of the surprise attack grew into accounts of disaster. Secretary Hull and his State Department staff were as helpless as these stunned citizens to respond to the outbreak of war. Responsibility for the defense of the United States, both internal and external, abruptly shifted to the Department of Justice and the War Department.



Edward Ennis was in his Justice Department office on December 7 “because,” he later recalled, “I was very concerned about the breakoff of relationships with the Japanese ambassador in Washington. I was very scared about it, apparently more scared than they were at Pearl Harbor. While I was working I got a call from the immigration office in Honolulu, saying that Pearl Harbor was under attack.” Ennis realized immediately the need to inform his superiors and to mobilize the departmental staff. “I called the Attorney General, who was in Detroit making a speech to a Polish organization; then I called the Solicitor General, who was in Philadelphia making a speech. Then I told the telephone operator to call all the assistant attorneys general and bring them into the office.”²

Ennis next moved to implement the wartime contingency plans of the Immigration and Naturalization Service, that branch of the Justice Department with jurisdiction over the legal status of more than four million aliens resident in the United States. Over a million of these people were citizens of Japan, Germany, and Italy. Attorney General Biddle had earlier delegated to him, Ennis later explained, the task of “planning facilities to house enemies of aliens nationality if we got into the war.” Ennis had been working on these internment plans when he received word of the Pearl Harbor attack. Quickly drafting an emergency proclamation that authorized the “summary apprehension” of any Japanese alien by the Justice Department, Ennis rushed this document to the White House. President Roosevelt signed the proclamation that evening.³

The immediate moves of War Department officials in Washington were limited. Military commanders around the world, linked by a radio communications network, learned within minutes of the Pearl Harbor attack and unsealed the wartime plans locked in safes. John J. McCloy first acted to protect key installations in Washington against possible sabotage. “When news of the attack arrived,” he recalled, “I immediately began doing what I could to implement plans for the security of

the nation's capital which this startling event demanded." Within hours, armed troops ringed the White House, the Capitol building, and other important government offices at McCloy's orders.⁴

As the afternoon of December 7 wore on, McCloy received "urgent reports" from military officials on the West Coast who sought instructions on measures to defend against a follow-up Japanese attack. He quickly authorized the imposition of civil defense plans that included black-outs and restrictions on vehicular traffic. Four days later, on December 11, Secretary of War Stimson designated the eight western states within the Western Defense Command as a "theater of operations" under military control. This Army organization had been commanded since December 1939 by Lieutenant General John L. DeWitt, who also commanded the troops of the Fourth Army from his headquarters at the Presidio in San Francisco.

At the time Ennis and McCloy first reacted to the Pearl Harbor attack, no group seemed a more likely target of retribution than the 117,000 Japanese aliens and American citizens of Japanese descent who lived in the West Coast states. Linked by color and culture to an enemy nation accused of military "treachery" and diplomatic deceit, Japanese Americans might well have expected a repetition of the vigilante terror experienced by German Americans during World War I. This latter group shared the racial heritage of most Americans, had largely become "assimilated" into the English-speaking society, and numbered more than five million. Nonetheless, hysterical press accounts of the "rape of Belgium" and a drumbeat of official propaganda designed to promote hatred of "Huns" led to retaliation against German Americans that ranged from verbal harassment to lynchings.⁵

The suddenness of the "sneak attack" on Pearl Harbor boded ill for the much smaller and more isolated Japanese American population. Surprisingly, the initial reaction in the area most stricken with "Pearl Harbor panic" was one of tolerance and understanding. Most of the "thousands of Japanese here and in other coast cities," the Los Angeles *Times* editorialized on December 8, were "good Americans, born and educated as such." This prestigious paper, published in the city with the country's largest concentration of Japanese Americans, urged its readers that "there be no precipitation, no riots, no mob law."⁶

In the first days after Pearl Harbor, the West Coast press gave prominent display to statements by Americans of Japanese descent proclaiming their loyalty. Beneath its editorial of December 8, the *Times* quoted the offer of the Japanese American Citizens League of its "fullest cooperation and its facilities" to the government. The press also did its best to calm the fears of a jittery public. "Let's Not Get Rattled," the

Times cautioned in a December 10 editorial. It would take several Japanese aircraft carriers “together with a good-sized fleet of covering war vessels and fuel supply ships, to carry on a sustained campaign” against the West Coast, the paper noted. “Could such an aggregation of surface craft sneak up on this Coast undetected by our now aroused sky scouting forces?” Echoed by other prominent West Coast papers, such assurances helped to calm public fears and to protect the Japanese American minority from retaliation. Scattered incidents of window breaking and assaults on Japanese Americans failed to mar the general record of restraint.⁷

Some six weeks after Pearl Harbor, however, the tide of public opinion abruptly shifted. Both in the press and in statements by public officials, demands for the removal of Japanese Americans from the West Coast replaced calls for tolerance. On January 16, 1942, Los Angeles congressman Leland Ford urged in identical letters to Navy Secretary Frank Knox and FBI director J. Edgar Hoover that “all Japanese, whether citizens or not, be placed in inland concentration camps.” Two weeks later the Los Angeles *Times* reversed its editorial stance and argued that “the rigors of war demand proper detention of Japanese and their immediate removal from the most acute danger spots” among the West Coast. Flowing toward the White House through the tributaries of public opinion, these currents of concern about the Japanese Americans began as a trickle and ended as a torrent.⁸

The force of these and similar demands produced their intended impact. On February 19, 1942, seventy-four days after Pearl Harbor, President Roosevelt signed Executive Order 9066. Through his directive, Roosevelt conferred on Secretary of War Stimson and his subordinates authority to designate military zones “from which any or all persons may be excluded.”⁹

By the end of 1942, prodded both by “exclusion orders” signed by General DeWitt and the threat of criminal prosecution under Public Law 503, passed by Congress to enforce DeWitt’s orders, all but a handful of the Japanese Americans on the West Coast had been herded behind the barbed wire of ten “relocation centers” scattered from California to Arkansas. Not until the middle of 1946—almost a year after the surrender of Japan in the wake of the Hiroshima and Nagasaki bombings that ushered in the atomic age—did the last residents of these dusty, barren camps return to their West Coast homes.

The tidal-wave shift in attitudes toward the Japanese Americans over the ten weeks between Pearl Harbor and Executive Order 9066 raises a crucial question: What factors led to the replacement of pleas for tolerance with demands for the evacuation and internment of this entire ra-

cial minority? The complex answer to this question involves forces of both historic and immediate origin. The historical background of hostility directed at Orientals—first the Chinese and then the Japanese—rode on powerful currents of nativism and prejudice. Decades of exposure to the “Yellow Peril” fever had infected the West Coast population. Calls for restraint by the press in the weeks after Pearl Harbor could not have cured the virulent disease of racism.

More recently, two years of war in Europe—despite official American neutrality and widespread isolationist sentiment—had provoked fears that fascism might prevail in its drive for world domination. Hitler had overrun all of Europe; the French had been humiliated and Germans were at the gates of Moscow. England, the sole survivor of the Nazi blitzkrieg, was barely holding out. While its Axis partners terrorized Europe, for a decade Japan had been engaged in its own aggression in Asia. And in the weeks that followed Pearl Harbor, graphic reports of brutality by Japanese troops as they overran the Philippines shocked the American public. Against this backdrop of historic hostility and recent horror, the dikes of tolerance that initially protected the Japanese Americans from retribution were soon eroded and swept away.

However significant these background pressures were to Roosevelt’s order, they fail to explain fully why more than six weeks elapsed after Pearl Harbor before demands for evacuation and internment gained any official support. They fail as well to explain why those government officials, both military and civilian, who initially opposed or doubted the necessity for Executive Order 9066 eventually set aside their constitutional objections and pragmatic qualms. It is an element of great importance to these questions that all but one of the federal officials most directly involved in the internal debate that preceded the President’s order were lawyers. Only General DeWitt, among this group of War Department and Justice Department officials, lacked legal training. These men presumably brought to their wartime positions an awareness of the constitutional restraints on governmental action directed against racial and national minorities, and of the rights and protections of citizenship. Each of these officials acknowledged during this debate, with varying degrees of conviction, the constitutional barriers to the evacuation and internment of Japanese Americans.

In the end, however, these lawyers abandoned their doubts and objections—some quickly and others with much anguish—and turned their legal talents to the defense of Executive Order 9066 and Public Law 503. They continued to debate, both among themselves and with the lawyers who defended the handful of Japanese Americans who challenged DeWitt’s orders, the balance between the government’s “war

powers” and the constitutional demands of due process and equal protection. The initial rounds in this debate, those that began with Pearl Harbor and ended with the internment decision, are the subjects of this and the next two chapters. The institutional politics that influenced this dispute, however, can be understood only in the context of the racial politics that affected the status of Japanese Americans.



It is ironic that, almost without exception, every argument made to justify the internment of Japanese Americans had its origin in earlier campaigns to rid the West Coast of the Chinese. The irony stems not only from the status of the Chinese during World War II as “honorary Caucasians”—a reflection of sympathy toward a country invaded by the Japanese—but also from the fact that the first immigrants from Japan were welcomed as superior to the despised Chinese. In 1869, when Chinese immigrants constituted 10 percent of California’s population and anti-Chinese agitation dominated the state’s politics, the *San Francisco Chronicle* noted that “the objections raised against the Chinese . . . cannot be alleged against the Japanese.” Japanese immigrants included “gentlemen of refinement and culture” who, reported the press approvingly, “have brought their wives, children, and . . . new industries among us.” Roger Daniels, a leading historian of the Japanese in America, concludes: “If there was a single word of protest raised against these early immigrants, I have failed to find record of it.”¹⁰

With the long-sought passage by Congress of the Chinese Exclusion Act in 1882, the California nativist movement led by Denis Kearney (himself a recent immigrant from Ireland) turned its demagoguery against the Japanese. For another decade, however, the small number of Japanese offered a less visible target than had the Chinese. As late as 1890, the federal census recorded only 2,039 Japanese, both immigrants and native-born, in the continental states, although some 30,000 worked as contract laborers on Hawaiian sugar plantations. Over the next two decades, lured by higher wages on California farms and as replacements for the excluded Chinese, many of these Hawaiian workers and others from rural areas in Japan arrived on the mainland. Made up largely of young, uneducated single men, this group of immigrants was given none of the welcome accorded their predecessors. After a decade of relative silence, Kearney surfaced in 1892 to revive his anti-Oriental crusade. The Japanese, he declared, were “another breed of Asiatic slaves” recruited by unscrupulous “Shylocks . . . to fill up the gap made vacant by the Chinese who are shut out by our laws.”¹¹

Kearney's new crusade made little headway at the time—the scattering of Japanese in California had not yet aroused fears of another yellow peril—but the twin themes of his anti-Japanese oratory set the tone for later and more influential evangelists of exclusion. Kearney aimed one theme at working-class whites afraid of job competition: the Japanese, he charged, would “demoralize and discourage our domestic labor market” by working at subsistence wages. His second theme was directed at the middle class and its concern for moral purity: the Japanese attending public school were “fully developed men who know no morals but vice” and who would “debauch” their younger female classmates. Kearney cleverly turned against the Japanese their desire to escape from poverty and their eagerness to learn English even by attending grade school as teenagers or adults. Similar charges were, of course, the staples of other nativist and racist crusades: they had been used on the East Coast to great effect against Kearney's own Irish compatriots, and against Italians and Jews. But with farm labor at a premium in California's booming agricultural economy, Kearney and other anti-Japanese agitators found little support within the state's political leadership at the time.¹²

During the first decade of the twentieth century, the trickle of Japanese immigration became what the San Francisco *Chronicle* termed a “raging torrent.” Compared to the total West Coast population, though, the number of Japanese arrivals was small, never exceeding 2 percent of the California population, the state where most Japanese settled. Two factors, however, led in 1905 to a revival of Kearney's quiescent crusade under the leadership of powerful politicians and California's economic elite. The first was that Japanese farm laborers, who saved most of their small wages, bought parcels of barren land and turned them into thriving truck farms. Although farms owned by Japanese occupied only 1 percent of the cultivated land in California, by 1919 they produced more than 10 percent of the total value of California produce. Japan's stunning victory in its war with Russia in 1905 and recognition of its emergence as a Pacific power also stirred fears about the potential disloyalty of Japanese immigrants.¹³

Spurred by such fears and by a press campaign with headlines such as THE YELLOW PERIL—HOW JAPANESE CROWD OUT THE WHITE RACE, calls for immigration restriction picked up political support. Organization of the Oriental Exclusion League in May 1905, a group made up largely of trade unions, and its alliance with the business-dominated Native Sons of the Golden West, combined normally antagonistic elements into a potent anti-Japanese coalition. The first target of the League's lobbying was the San Francisco school board. On October 11,

1906, the board bowed to pressure and ordered the transfer of all Japanese students to the segregated school for the Chinese. Word of this action soon reached Japan, whose government lodged a protest with the State Department. Most of the ninety-three Japanese students were aliens protected by a “most favored nation” clause in the 1894 treaty between the two nations. The ensuing diplomatic protest embarrassed President Theodore Roosevelt, who apologized to Japan and authorized Secretary of State Elihu Root to cooperate with the Justice Department in challenging the school board’s action in federal court.¹⁴

The flap over school segregation alerted Roosevelt to the growing strength and determination of the anti-Japanese movement in California. Eager to cement good relations with Japan, Roosevelt had proposed in his annual message to Congress in November 1905 that it enact legislation “specifically providing for the naturalization of Japanese who come here intending to become American citizens.” Federal law at the time limited naturalization to aliens who were either “free white persons” or “persons of African descent.” Roosevelt’s proposal fell victim, however, to the surge of exclusionist sentiment. As part of his deal with California officials to settle the school segregation issue, Roosevelt agreed to seek from Japan an agreement to limit further emigration to the United States. Diplomatic negotiations that extended until 1908 finally resulted in the so-called “Gentlemen’s Agreement” under which Japan withheld passports to the United States from all but “laborers who have already been in America and to the parents, wives and children of laborers already resident there.”¹⁵

The Gentlemen’s Agreement effectively shut off the flow of male Japanese workers, but under its exceptions some 118,000 additional immigrants (many of them “picture brides” selected in Japan through arranged marriages) arrived in the United States between 1908 and 1924. West Coast nativists loudly protested this “loophole” and renewed their efforts for a complete halt to further Japanese immigration. While they conducted this campaign in Washington through the West Coast congressional delegation, a parallel effort in California succeeded in 1913 with passage by the state legislature of the Alien Land Law. In barring further land purchases by Japanese aliens and limiting leases on agricultural land to three years, nativists and farm-bloc legislators thought they had ended competition from productive Japanese farmers. Like the Gentlemen’s Agreement, however, this law contained a loophole since it did not apply to land ownership or purchases by citizens. Japanese farmers promptly transferred land titles to their native-born children or other citizens willing to act as proxy owners. An attempt to close this loophole through a 1920 law prohibiting Japanese aliens from acting as

guardians of their native-born children, passed overwhelmingly by referendum vote, similarly failed to evict Japanese farmers when the California courts struck the new law down as a violation of the Fourteenth Amendment to the U.S. Constitution.¹⁶

Frustrated by the state courts, the anti-Japanese movement found allies in the Supreme Court and Congress. The Alien Land Law of 1913 was directed, not at Japanese by name, but at "aliens ineligible for citizenship." Despite the limitation of federal naturalization to members of the white and black races, some federal courts had granted citizenship to applicants born in Japan. In 1922, in the *Ozawa* case, the Supreme Court put an end to this practice. Takao Ozawa, although born in Japan, had lived in the United States for twenty years, was a graduate of a Berkeley, California, high school, and had studied at the University of California. Ozawa and his family "had attended American churches and he had maintained the use of the English language in his home," the Court noted approvingly. "That he was well qualified by character and his education for citizenship is conceded," added Justice George Sutherland in his unanimous opinion. The Court admitted that distinctions of race had "no sharp line of demarcation" but nonetheless rested on "numerous scientific authorities, which we do not deem it necessary to review," for its holding that Ozawa "is clearly of a race which is not Caucasian" and which Congress had power to exclude from citizenship.¹⁷

Two years after the *Ozawa* decision, the campaign against the Japanese scored its culminating victory in congressional passage of the Immigration Restriction Act of 1924. Two decades of lobbying finally paid off in the provision that completely barred further Japanese immigration. This "national origins" act, which restricted immigration from other countries to quotas based on ethnic representation in the population reported in the 1890 census—and thus favored immigrants from Great Britain and the "Nordic" countries of northern Europe—was an outgrowth of the nativist and eugenics movements directed primarily against immigrants such as Italians and Polish and Russian Jews, whose introduction into American society might change the national character. Arguments for immigration restriction had been based on claims that such people were "unassimilable" into the dominant Anglo-Saxon society; differences in language and complexion, and the persistence of Old World cultures, buttressed such allegations. Only the Japanese, however, were singled out in the 1924 law for total exclusion. Japan's annual immigration quota would have been only one hundred persons in any event.¹⁸

Arguments for the restriction of immigration from eastern and southern Europe, rooted in alleged "national" differences, took on an

overtly racist cast against the Japanese. “We cannot make a homogeneous population out of a people who do not blend with the Caucasian race,” Woodrow Wilson stated during his 1912 presidential campaign. Similarly, California governor William D. Stephens urged Japanese exclusion in 1920 “entirely on the principle of race self-preservation and the ethnological impossibility of successfully assimilating this . . . flow of Oriental blood.” The cruel irony of such a position, adopted by the Supreme Court in 1943 in the *Hirabayashi* case with a more tactful phrasing, was that Japanese Americans had struggled with particular success between 1924 and 1941 to achieve their goal of assimilation. Barred from citizenship by the Supreme Court, Japanese parents sent their native-born children to public schools where they mingled freely with their Caucasian classmates and adopted American customs of speech and dress. Many Japanese joined Christian churches, with Methodists and Presbyterians predominating, or worshipped in Americanized Buddhist churches; only a small minority of the older generation adhered to the emperor-worshipping Japanese cult of Shinto.¹⁹

Nonetheless, differences in age and citizenship between the two Japanese generations separated many families and created cultural tensions. The immigrant generation (known as Issei) was significantly older than the native-born group (known as Nisei)* when World War II began; in 1940, almost two-thirds of the Issei were forty-five or older, while a similar proportion of the Nisei were under twenty-one. An age gap of forty years separated many fathers from their children, and older parents often lacked facility in English and clung to Japanese customs and traditions. To the extent that Japanese aliens had failed to assimilate themselves into the dominant Caucasian culture, this phenomenon can only be considered a classic case of “blaming the victim.” Kept from citizenship by Congress and the courts, and proud of their cultural heritage, Japanese aliens became visible targets after Pearl Harbor for those who found in their “lack of assimilation” evidence of potential disloyalty. Those who leveled such charges, and extended them to native-born citizens of Japanese ancestry as well, included the government lawyers who defended in court the evacuation and internment programs authorized by Franklin D. Roosevelt.²⁰



This turbulent history of anti-Japanese agitation forms an essential background for understanding the debates within the government that preceded the signing of Executive Order 9066. The often acrimonious dis-

* Issei (pronounced ee-say) is the Japanese term for first generation; Nisei (pronounced nee-say) is the term for second generation.

putes among those men—the military and civilian officials most responsible for the framing of Roosevelt's order—during the ten weeks that followed Pearl Harbor and after, stemmed perhaps more from practical considerations than from purely constitutional concerns. Each of them was pressured by wartime duties, and each felt the ties of institutional loyalty. But legal questions loomed over the conflicts about the treatment of Japanese Americans at every stage of this internal debate. Positions on these questions differed from one official to the next, and few had the time or desire during this hectic period to record at length a thought-out analysis. Two of these men, however, personify the conflicts within this group of lawyers.

Chance alone had made Edward J. Ennis and John J. McCloy the first high officials in their respective departments to learn of the Pearl Harbor attack. This fortuity is worth notice, for the responses of Ennis and McCloy to this dramatic event do more than illustrate the professional dilemmas that confront government lawyers during wartime. They exemplify as well opposing approaches to the inherent conflict between emergency powers and individual rights. The policy disputes between these two men arose during the seventy-four days that followed Pearl Harbor, continued until the war ended, and surfaced forty years later in their differing reflections on the internment program that Ennis denounced and McCloy defended. In addition, each man played a primary role in the litigation that arose from challenges to Executive Order 9066. In these respects, Ennis and McCloy offer contrasting and continuing examples of the pervasive conflict between personal conscience and professional obligation.

Like many of his Depression-era colleagues, Edward Ennis looked to federal employment for both security and challenge after his graduation from Columbia Law School in 1932. An Irish Catholic and native New Yorker, Ennis joined the staff of the United States attorney in Manhattan after a year's experience as clerk to a federal circuit court judge. Seasoned by two years in the U.S. attorney's office, he shifted to Justice Department headquarters in Washington in 1937, where he worked in the small and clubby office of the Solicitor General, preparing briefs and arguing cases before the Supreme Court. After another two years, Ennis returned to New York to head the civil division of his former office.

With war on the horizon, Attorney General Francis Biddle brought Ennis back to Washington in July 1941 as general counsel of the Immigration and Naturalization Service. At Biddle's request, Ennis worked with Lawrence M. C. Smith, the career Justice Department lawyer who headed the Special Defense Unit, set up two years earlier to prepare

plans for the screening and possible detention of “enemy aliens” in case of war. From reports submitted by FBI and military intelligence agents, Smith collected lists of Japanese, German, and Italian aliens subject to internment as disloyal or dangerous, and Ennis undertook to organize the facilities for their possible internment.²¹

Like many other young government lawyers, Ennis brought political liberalism and a long-standing concern for civil liberties to his New Deal service. It was these sympathies that had persuaded Biddle to recruit Ennis for the touchy task of dealing with aliens whose legal rights were minimal. The infamous Alien Act of 1798, still on the statute books, gave to the executive branch the power to deport aliens, a power the courts had rarely circumscribed with due process protections. As one scholar has noted, aliens were subject to deportation “without accusation, without public trial, without confrontation of witnesses, without defense, and without counsel.” The most recent example of “deportation delirium” had been the forcible return to Russia in 1919 of anarchist Emma Goldman and two hundred other radicals on the “Red Ark.” At the outset of World War II, Francis Biddle was, as he later wrote, “determined to avoid mass internment and the persecution of aliens that had characterized the First World War.” In Biddle’s opinion, Ennis was “ideally suited” to direct the alien enemy program—“imaginative yet practical, able to stand up to the ‘brass hat,’ and fully sharing my views . . . that everyone in our country, what ever his racial or national origin, should be treated with fairness.”²²

John J. McCloy, the War Department official most responsible for decisions about the treatment of Japanese Americans, was ahead of Ennis by a decade in legal practice and thirteen years in age. Born in Philadelphia in 1895, McCloy was a birthright Republican who moved from preparatory school to Amherst College to Harvard Law School, which he entered in 1916. With American entry into World War I, McCloy interrupted his law studies to join the Army and rose from lieutenant to captain during service at the front in France. After the armistice, McCloy returned to Harvard and was graduated in 1921. Wall Street practice attracted him, and for the next nineteen years he worked on corporate cases in both New York and Europe; he joined the prestigious firm of Cravath, deGersdorff, Swaine, and Wood in 1924, became a full partner in 1929, and remained with the firm until 1940.²³

McCloy’s lengthy involvement in the celebrated “Black Tom” sabotage case brought him to the attention of Secretary of War Stimson in 1940 and helps to explain his later fixation on possible sabotage on the West Coast. This cloak-and-dagger case began on the night of July 29, 1916, when scores of railroad cars filled with munitions exploded on

the piers of Black Tom Island near Jersey City, killing several people and shattering the glass of many office buildings across the river in Manhattan. Suspicion that German saboteurs had engineered the explosion led to several arrests, and a rash of lawsuits seeking compensation for damages were quickly filed by railroads and insurance companies. McCloy entered the case for the Cravath firm in 1930, after the Mixed Claims Commission set up after the war to settle damage claims against Germany ruled the explosion an industrial accident. Unsatisfied claimants then retained McCloy's firm to challenge this finding. "Thus began McCloy's participation in the case," a Cravath partner later wrote, "to which he was to devote major attention for the next ten years." McCloy's sleuthing and legal research in both Europe and America finally produced proof of German sabotage. A quarter-century after the explosion, the Supreme Court finally confirmed in 1941 (after McCloy had joined the War Department) the claims of the Cravath clients.²⁴

According to McGeorge Bundy, Stimson's official biographer, McCloy's work on the "Black Tom" case and the "wide knowledge of German subversive methods" he gained from it made him a "great find" as a consultant and special assistant to the Secretary of War on counterintelligence work. McCloy joined the War Department in this role in October 1940, and six months later he became Assistant Secretary of War with responsibility for political affairs. For the next five years, Bundy wrote, McCloy "was the man who handled everything that no one else happened to be handling" in the War Department. Bundy characterized McCloy as "so knowing in the ways of Washington that Stimson sometimes wondered whether anyone in the administration ever acted without 'having a word with McCloy.'" ²⁵

Among those with whom McCloy had frequent words about politics and policy during the war was Felix Frankfurter, the irrepressible Supreme Court justice under whom McCloy had studied at Harvard. The two men, McCloy later recalled, kept in touch daily by phone and visited each other's homes regularly. Frankfurter, who had served under Stimson as assistant U.S. attorney in New York before World War I, maintained an insatiable appetite for news of War Department policies and cultivated during World War II his contacts with both Stimson and McCloy. In turn, Frankfurter capitalized on his intimate and long-standing friendship with President Roosevelt to provide his War Department friends with easy access to the White House. Frankfurter's role in this ménage à trois provided the two Republicans in the War Department a pipeline to the President that their Democratic Justice Department counterparts, Ennis and Biddle, lacked.²⁶

The outcome of the debate between Ennis and McCloy over Exec-

utive Order 9066 reflected the contrasts between the respective cabinet members under whom they served. Francis Biddle, a prototypical “Philadelphia lawyer” wedded by his Main Line heritage to the Pennsylvania Railroad and the Republican party (the two were synonymous in the state’s politics for a century), prepped at Groton and was graduated *cum laude* both from Harvard College and Harvard Law School. A coveted Supreme Court clerkship with Oliver Wendell Holmes in 1911 preceded twenty-three years of corporate law practice in Philadelphia. Unlike most of his peers, however, Biddle experienced a mid-life conversion to the Democratic party and entered Roosevelt’s New Deal administration in 1934 as chairman of the first National Labor Relations Board. Frankfurter quipped that he had a “la de da” personality, but Biddle displayed a core of toughness in dealing with union and industry leaders alike in this post. After he retreated to corporate practice in 1935, Biddle returned to public service four years later, first in a brief stint as a federal circuit court judge and then in an equally brief appointment as Solicitor General in the Justice Department.²⁷

With the elevation of Attorney General Robert Jackson to the Supreme Court in June 1941, Biddle became his acting successor; in early September the Senate confirmed Roosevelt’s nomination of Biddle to head the Justice Department. Biddle exhibited in this post a concern for civil liberties that belied his conservative past. He beefed up the Civil Liberties Unit established in 1939 and employed dusty statutes that dated to the Reconstruction Era to bring federal prosecutions of state officials in cases of police brutality, lynchings, election discrimination, and peonage. Biddle’s efforts on behalf of blacks brought to the Supreme Court the *Screws* and *Classic* cases, precursors of later civil rights enforcement by the Justice Department. Against this record, Biddle also showed a sensitivity to “national security” claims. He authorized the prosecution of the Trotskyite leaders of the Socialist Workers Party under the 1940 Smith Act sedition statute, a move he later regretted.²⁸

Conscious of his role as a “new boy” in Roosevelt’s wartime cabinet, Biddle deferred to his senior colleagues and to the President. “I tried never to bother the President with anything that was not essential,” he later wrote. Biddle struck many people as “casual” in manner and appearance, his deputy James Rowe recalled, and this aspect of his personal style placed Biddle at a disadvantage in conflicts with his fellow cabinet members. He particularly found it hard to differ with Secretary of War Stimson, whom he described later as a “heroic figure of sincerity and strength.” Biddle found it hard to “talk shop” with Stimson, a reticence that took on importance during their face-to-face meetings over the evacuation issue.²⁹

It is easy to understand Biddle's deference to Stimson. Although he had only a year's seniority over Biddle in Roosevelt's wartime cabinet, Stimson outranked him by twenty years in age and two terms of previous cabinet service. Born in New York City in 1867, Stimson attended Phillips Andover Academy, Yale College, and Harvard Law School. After sixteen years of Wall Street practice in the law firm founded by Elihu Root, Stimson began four decades of episodic government service in 1906 as United States attorney in New York. Responding to the importunings of Republican presidents, Stimson served as Secretary of War under William Howard Taft from 1911 to 1913 and as Herbert Hoover's Secretary of State from 1929 to 1933. A genuine elder statesman by 1940, but still at seventy-three an articulate and aggressive interventionist, Stimson was a perfect candidate for the bipartisan "war cabinet" Franklin Roosevelt hoped to fashion as an answer to the fulminations of Republican isolationists.³⁰

Stimson's recruitment to the cabinet was arranged by his former protégé and long-time admirer, Felix Frankfurter. According to Bruce Allen Murphy, the justice's campaign to place Stimson in the cabinet began in May 1939 after a White House conversation at which Roosevelt expressed a lack of confidence in Secretary of War Henry Woodring. Over the next year, Frankfurter canvassed possible replacements with his friend Grenville Clark. Confident that he could pick Woodring's successor, Frankfurter quickly settled on Stimson and deputized Clark to approach him about the post. Citing his advanced age, Stimson at first demurred but then agreed that Frankfurter could convey his willingness to serve. Stimson attached several conditions, however: that he have carte blanche to choose an assistant; that Roosevelt support an immediate conscription program; and that Stimson be permitted to advocate publicly that the United States provide aid to its European allies. Frankfurter's suggestion of Stimson "struck fire" with the President. On July 9, 1940, the Senate voted without dissent to confirm Stimson in his third cabinet post in three decades.³¹



At the time of the Pearl Harbor attack, Stimson and McCloy clearly outmatched their Justice Department counterparts in influence and access to the White House. The responsibilities of his position, however, gave Edward Ennis the first move in the governmental chess game that made pawns of the Japanese Americans. Ennis had planned his opening move carefully and chose to make it against a group of Japanese aliens previously singled out for detention. This limited program created con-