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Yoshinori H.T. Himel
University of California-Davis

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Americans' Misuse of "Internment"

Yoshinori H. T. Himel*

In any age, careful users of language will make distinctions;
careless users of language will blur them.**

I. INTRODUCTION

Many Americans have used the word "internment" to denote World War II's civil liberties calamity of mass, race-based, nonselective forced removal and incarceration of well over 110,000 Japanese American civilians, most of them American citizens.¹ But the word "internment," a term of art in the international law of war, does not describe that community-wide incarceration. Instead, it invokes an internationally agreed legal scheme

* The author is an attorney in Sacramento, California, who teaches at the School of Law, University of California, Davis. All views expressed here are his and should not be attributed to the School or to those who have helped him. The author gratefully acknowledges noted historian Roger Daniels, Charles Phelps Taft Professor Emeritus, University of Cincinnati, for explaining internment's misuse for decades and for reviewing more than one draft; Patricia Biggs of the Manzanar National Historic Site, National Park Service, for insightful comments; Rose Masters of the Manzanar National Historic Site, for sharing research; Professor Lorraine K. Bannai of the Seattle University School of Law, for a review at an academic conference; Lane Ryo Hirabayashi, George and Sakaye Aratani Professor of the Japanese American Incarceration, Redress, and Community, at the University of California, Los Angeles, for supporting relevant conferences and research efforts; Donald Teruo Hata, Emeritus Professor of History, California State University, Dominguez Hills; Allan A. Ryan, of Harvard Business School Publishing; the late Richard C. Wydick, Professor Emeritus, School of Law, University of California, Davis; and Barbara Takei, whose work to tell the story of the Tule Lake concentration camp inspired this paper.

** Bryan A. Garner, *Word Usage*, Chicago Manual of Style 262, para. 5.217 (16th Ed. 2010).

¹ TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II ix (2003) ("nearly 117,116" people incarcerated in the "ten so-called relocation centers").

under which a warring country may incarcerate enemy soldiers² and selected civilian subjects of an enemy power.³ As this paper reflects, under the law, alienage is basic to civilian internment.

The US Department of Justice (DOJ) indeed selected and interned thousands of Issei aliens (members of the Japanese American community's first or immigrant generation, aliens because they were statutorily barred from naturalization).⁴ Additionally, thousands of Nisei (members of the Japanese American community's second generation, US citizens by birthright)⁵ renounced their US citizenship; DOJ then classified them as aliens and interned them.⁶ Although the precise numbers may be uncertain, well over 7,000 Issei from the mainland, Hawai'i, and Alaska, and well over 5,000 Nisei renunciants, involuntarily became DOJ internees.⁷ These Japanese American alien internments, the legal context surrounding them, and the human stories behind them are worthy of attention.

Currently, the National Park Service and others are paying increased attention to the sites of Japanese alien internment and their histories in two ways. First, the park service recently has financially assisted nonfederal organizations in interpreting DOJ internment camps. These include the Santa Fe Internment Camp,⁸ Fort Abraham Lincoln, near Bismarck, North

² See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, at Art. 4.

³ See, e.g., Geneva Convention Relative to the Protection of Civilians in Times of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, at Arts. 42, 43 & 44 (concerning "enemy alien" civilians).

⁴ In the 1942 Japanese American community, the Issei, although lawful permanent US residents, were forced to remain aliens because 8 U.S.C. § 359 (1870) limited naturalization to whites and Africans, thus excluding Japanese. The Supreme Court so held in *Ozawa v. United States*, 260 U.S. 178 (1922).

⁵ The Nisei had birthright citizenship under U.S. Const. amend. XIV, § 1, as held by the Supreme Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁶ See *infra* part VII.B. (concerning DOJ at Tule Lake).

⁷ KASHIMA, *supra* note 1, at 124-25.

⁸ See NAT'L PARK SERV., NATIONAL PARK SERVICE ANNOUNCES \$2.9 MILLION IN GRANTS TO PRESERVE AND INTERPRET WORLD WAR II JAPANESE AMERICAN

Dakota,⁹ Tuna Canyon, in southern California,¹⁰ Fort Missoula internment camp in Montana,¹¹ and Crystal City Family Internment Camp in Crystal City, Texas.¹² Second, as a federal land management agency the park service has begun to manage, research, and interpret national monument sites at Honouliuli, an army internment camp on Oahu, Hawai'i,¹³ and at Tule Lake, a concentration camp in northern California.¹⁴ Tule Lake briefly became a DOJ internment camp for newly created aliens in the Japanese American community in an extraordinary wartime transformation discussed below.¹⁵

The problem this paper addresses—conflation of mass incarceration with internment—may stem in part from our relative lack of discussion of Japanese alien internment. University of Washington Professor Tetsuden

CONFINEMENT SITES (Jun. 12, 2014), https://www.nps.gov/manz/learn/news/upload/PressRelease_FY2014JACSGrantAwards_6-12-14-1.pdf (announcing grant to Colorado State University for historic markers, publications, and websites re Santa Fe Internment Camp and others).

⁹ See NAT'L PARK SERV., NATIONAL PARK SERVICE ANNOUNCES 1.4 MILLION IN GRANTS TO PRESERVE AND INTERPRET WORLD WAR II JAPANESE AMERICAN CONFINEMENT SITES (Apr. 2, 2013),

<http://home.nps.gov/applications/release/print.cfm?id=1456>.

¹⁰ See *FY 2015 Grant Awards*, NAT'L PARK SERV. 3, http://www.nps.gov/jacs/downloads/2015JACSGrantAwards_ProjectSummaries.pdf (last visited Feb. 28, 2016).

¹¹ See NAT'L PARK SERV., HERITAGE PARTNERSHIPS PROGRAM INTERMOUNTAIN REGION (2013),

https://www.nps.gov/nhl/contact/imro/IMR_HPP_2013Report_MT.pdf (reporting on assistance to "Fort Missoula Alien Detention Camp Interpretive Projects").

¹² See NAT'L PARK SERV., HERITAGE PARTNERSHIPS PROGRAM INTERMOUNTAIN REGION 3 (2013), https://www.nps.gov/nhl/contact/imro/IMR_HPP_2013Report_TX.pdf (reporting on assistance to Friends of the Texas Historical Commission interpretation projects at Crystal City Family Internment Camp and others).

¹³ See *A National Monument in the Making*, NAT'L PARK SERV., <http://www.nps.gov/hono/index.htm> (last visited Feb. 28, 2016).

¹⁴ See *Welcome to the Tule Lake Unit of World War II Valor in the Pacific National Monument*, NAT'L PARK SERV., <http://www.nps.gov/tule/index.htm> (last visited Feb. 28, 2016).

¹⁵ See *infra* Part VII.B.

Kashima says that most literature on the Japanese American imprisonment concentrates on mass incarceration, not alien internment (notable exceptions include the cited book itself).¹⁶ Kashima gives three reasons for the literature's disproportional emphasis on the "assembly centers and relocation centers."¹⁷ "First, they held the largest number of inmates. Second, these inmates were mostly American citizens, a fact that epitomizes the injustice of a government incarcerating its own citizens. Third, the most accessible government documents and other source materials pertain to these two types of centers."¹⁸ This author hopes that scholars, like the park service and perhaps in cooperation with it, will develop further our nation's awareness and discussion of its Japanese alien internment.

More discussion of Japanese alien internment may multiply the occasions for confusion because the word's misuse generates ambiguity. But more discussion of internment also offers reason and opportunity to prevent any such ambiguity. To stop misleading ourselves and the public, we as lawyers and Americans should take this opportunity to restrict "internment" to its correct legal meaning.

II. THIS PAPER'S ORGANIZATION

Part III introduces the connection between internment and alienage through dictionary definitions. The part addresses both legal dictionaries and general dictionaries.

Part IV examines the current meaning of internment as a legal term of art. The part examines domestic federal law, federal government practice for

¹⁶ KASHIMA, *supra* note 1, at 4.

¹⁷ *Id.* The mass incarceration of the Japanese American community generally had two stages—first, short-term incarceration in "assembly centers" operated by the Army's Wartime Civilian Control Agency, and second, long-term incarceration in "relocation centers" operated by the War Relocation Authority. *Id.* at 10.

¹⁸ *Id.* at 4.

over 200 years, and two international agreements currently protecting interned soldiers and civilian aliens.

In Part V, the paper turns to the period when America actually interned a portion of its Japanese American community—World War II. The part shows that in the 1940s both domestic federal law and a prewar Geneva convention on prisoners of war (POWs) governed alien internment; that the United States and Japan agreed to extend the POW convention from captured soldiers to interned alien civilians; and that the convention mandated numerous specific protections for the interned aliens. The part concludes by explaining the internment responsibilities of the US Department of Justice.

Part VI focuses on the action that is mischaracterized as “internment of the Japanese Americans”—the federal government’s mass incarceration of persons of Japanese descent regardless of citizenship.¹⁹ Its point A shows that mass incarceration had a wholly different legal basis from internment—executive order, not international agreement. Point B then shows that the mass incarceration—at least of the American citizen majority—brought with it none of internment’s international law protections.

Part VII, taking a cue from originalism, shows the executive branch’s contemporaneous and formally expressed view that internment pertained to aliens. Its point A shows that the War Relocation Authority (WRA)—created for mass incarceration of Japanese Americans—contemporaneously, specifically, and repeatedly disclaimed operating internment camps. Point B shows that when thousands of Japanese Americans in WRA custody at the Tule Lake camp were transformed from American citizens into aliens, the WRA referred to the DOJ as responsible for interning aliens. Then, when DOJ took custody of the newly-created aliens, it ordered them interned, used that specific term, and did so expressly because of their alienage. Point

¹⁹ For details on the places of mass incarceration, see KASHIMA, *supra* note 1, at 10-11.

C, the final point on the wartime governmental nomenclature, shows that the Supreme Court's wartime opinions on the Japanese American community's forced removal and mass incarceration never used "internment" to refer to that action, but only to a nation's treatment of enemy aliens.

Part VIII asks how the misuse of "internment" became commonplace. It concludes that one cause was a historical accident in politics that ultimately led to redress for incarceration of Japanese Americans through the Civil Liberties Act of 1988.

Part IX contrasts internment with mass incarceration in moral acceptability as viewed by legal authorities. It shows that authorities in all three branches of government, and legal commentators, find mass incarceration (unlike internment) unacceptable.

Part X considers the viewpoint of the Japanese American community, whose trauma the government sought to belittle by euphemisms like "relocation." It shows that after long debate, the community's best-known national organization rejects internment's misuse as euphemistic, and that the community's online source for Japanese American wartime history also rejects the misuse.

Part XI shows how mislabeling the mass incarceration as internment fosters miscommunication. It explores two cases, one from Tule Lake's history of transformation and the other from contemporary political reporting, where the misuse can mislead. In the second case, one newspaper's misuse caused a second newspaper to publish a misleading report.

The conclusion, Part XII, summarizes the reasons to end the conflation of mass incarceration with internment. The reasons include the formal lexicon, the radical moral and legal differences between internment and the mass incarceration of Japanese Americans, the historical official nomenclature, respect for the Japanese American community's deliberation and self-

determination, and the need for clarity in our discourse. It calls for lawyers and Americans to return to internment's correct meaning.

III. LEGAL AND GENERAL DICTIONARIES DEFINING INTERNMENT OFTEN CONNECT IT WITH ALIENAGE

Because this paper discusses a term's meaning, it reviews that term's treatment in dictionaries. It refers to legal dictionaries first.

A. Law Dictionaries Connect Internment and Alienage

Ballentine's Law Dictionary defines "internment" as "The detention of a resident enemy alien during the existence of a declared war between his country and the United States."²⁰ A second meaning refers to POWs: "The confinement of prisoners of war in the interior of a country."²¹ A third meaning, involving neutral powers during war, is "the act of a neutral nation in detaining ships, sailors, soldiers or property of a belligerent."²² Underscoring internment's connection with alienage, Ballentine's includes a separate entry for "interned alien."²³

Bouvier's Law Dictionary defines "internment" with brevity: "Used of foreign troops of a belligerent coming into neutral territory."²⁴ This definition, echoing the third meaning in Ballentine's, also connects internment with alienage.

The Random House Webster's Dictionary of the Law contains no entry for "intern," "interned," "internee," or "internment."²⁵ The Modern Dictionary for the Legal Profession similarly contains no relevant entry.²⁶

²⁰ *Internment*, JAMES A. BALLENTINE, BALLENTINE'S LAW DICTIONARY 654 (3d ed. 2010) (available on LEXIS) (citing *Johnson v Eisentrager*, 339 US 763, 774 (1950)).

²¹ *Id.*

²² *Id.*

²³ *Interned alien* in *id.*

²⁴ *Internment*, JOHN BOUVIER, I BOUVIER'S LAW DICTIONARY 1657 (3d rev. 1914).

²⁵ JAMES E. CLAPP, RANDOM HOUSE WEBSTER'S DICTIONARY OF THE LAW (2000).

Black's Law Dictionary defines "intern," "internee," and "internment." Its definitions currently do not mention alienage.²⁷

B. General Dictionaries Connect Internment and Alienage

General dictionaries have value in legal discussion and therefore are relevant here. The unabridged Webster's Third New International Dictionary, in defining "internment," mentions internment "of enemy aliens."²⁸

The unabridged Funk & Wagnalls New International Dictionary defines "internment camp" as "a military station for the detention of prisoners of war and enemy aliens."²⁹ Its definition of "intern" includes "to confine . . . enemy aliens" and, in neutral countries, soldiers and instruments of warring countries.³⁰

The American Heritage Dictionary, while not calling itself an unabridged dictionary, has adherents. Its definitions of "intern," "internee," and "internment" do not mention alienage.³¹

The multi-volume Oxford English Dictionary (OED) presents the most complete definitions of any general dictionary; its definitions often include historical quotations.³² The OED defines "internment camp" as "a detention camp for prisoners of war and aliens."³³

²⁶ GERRY W. BEYER, MODERN DICTIONARY FOR THE LEGAL PROFESSION (4th ed. 2008).

²⁷ *Intern, internee, internment*, BLACK'S LAW DICTIONARY 939, 942 (10th ed. 2014) (available on WESTLAW).

²⁸ *Internment*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1181 (2002).

²⁹ *Internment camp*, FUNK & WAGNALLS NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE COMPREHENSIVE EDITION 664 (1997).

³⁰ *Intern* in *id.*

³¹ *Intern, internee, internment*, AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 916, 917 (5th ed. 2011).

³² See OXFORD ENGLISH DICTIONARY (2d ed. 1998).

³³ *Internment*, VII OXFORD ENGLISH DICTIONARY 1125 (referring to second definition (b), for the word's use as an attribute or adjective).

The OED's definitions of internment's other forms, when interpreted with the aid of the historical quotations, also connect internment with alienage. For the transitive verb "intern," the OED uses four historical quotations.³⁴ Three quotations referred to physical confinement of aliens or foreign soldiers: "Certain prisoners in a foreign country . . . described as having been 'interned'"; "Poles interned in Russia"; and "To disarm troops crossing the neutral frontier and to intern them till the conclusion of peace."³⁵ The fourth quotation referred not to physical confinement but, metaphorically, to a political state of mind: "Calderon retains a Spanish accent, and is accordingly interned . . . in that provincialism which we call nationality."³⁶

To define the noun "internment" as an act of confinement, the OED uses two quotations. The first quotation, "two months' imprisonment or internment in a fortress" (quoting 1870 *Spectator* 24 Dec. 1534), covered more than internment.³⁷ The second quotation, "it may be hoped that internment in their own capital is all the confinement the army of Paris will have to submit to" (quoting 1871 *Daily News* 30 Jan.), occurred during the Franco-Prussian War and referred to Prussia's interning the army of Paris as enemy soldiers.³⁸ Thus, by explicit definition or by quotation, the OED defines internment as an action toward enemy alien civilians or soldiers.

C. A Dictionary's Prospect of Connecting Internment and Alienage

An indication exists of incipient change in a dictionary's definition of internment. In a telephone conversation, Bryan A. Garner, *Black's Law Dictionary's* editor in chief, acknowledged the author's letter asserting the

³⁴ *Intern*, VII OXFORD ENGLISH DICTIONARY 1121 (referring to second definition (2), for the word's use as a transitive verb referring to confinement).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* (referring to first definition (a), for the word's use as a noun.)

³⁸ *Id.*

internment misuse proposition and said that Garner had redrafted the definition for the next edition of Black's.³⁹

IV. AS A CURRENT FEDERAL AND INTERNATIONAL LAW TERM OF ART, INTERNMENT REFERS TO ALIENS

This part discusses internment as currently defined in the relevant bodies of law. Those areas are domestic federal law relating to war, and the international law of war. The current legal scheme is relevant because the misuse of "internment" is a problem in today's discourse.

A. National Law and Historical Practice Govern America's Internment of Enemy Alien Civilians

The Alien Enemies Act authorizes the president to apprehend "subjects of the hostile nation" at least 14 years old "as alien enemies."⁴⁰ The act thus defines enemy aliens. It allows the president to direct, by proclamation, the "manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted."⁴¹ The phrase "in what cases" contemplates selectivity.

Internment of selected civilian enemy aliens is a United States practice having two centuries' standing. During the War of 1812, the United States forced some British merchants to move upriver away from their New York City businesses.⁴² Similarly, during World War I the United States interned some US-resident German and Austro-Hungarian nationals in camps.⁴³

³⁹ Telephone interview with Bryan A. Garner, Editor in Chief, Black's Law Dictionary (Mar. 1, 2016).

⁴⁰ 50 U.S.C § 21 (1918).

⁴¹ *Id.*

⁴² ROGER DANIELS, WORDS DO MATTER: A NOTE ON INAPPROPRIATE TERMINOLOGY AND THE INCARCERATION OF THE JAPANESE AMERICANS 1–2 (2005), http://www.nps.gov/tule/learn/education/upload/RDaniels_euphemisms.pdf.

⁴³ *Id.*

B. A Geneva Convention Provides for Internment of POWs

Geneva Convention III, concerning soldiers, governs internment and other treatment of POWs.⁴⁴ Centrally, POWs are “persons . . . who have fallen into the power of the enemy” who also are “members of the armed forces of a Party to the conflict.”⁴⁵ “The Detaining Power may subject prisoners of war to internment.”⁴⁶

C. A Geneva Convention Provides for Internment of Civilian Enemy Aliens

Similarly, Geneva Convention IV⁴⁷ governs internment and other treatment of civilians who are “enemy aliens,” narrowly defined as those aliens whom the detaining power’s enemy treats and protects as its nationals.⁴⁸ Convention IV’s Article 42 authorizes “internment” of such alien civilians, but “only if the security of the Detaining Power makes it absolutely necessary” (implying that only selected enemy alien civilians may be involuntarily interned).⁴⁹

Article 42 also provides for internment if “any person . . . voluntarily demands internment” (thus authorizing an interning authority’s custody of, for example, an interned alien’s citizen child who “voluntarily demands” to be interned with the parent).⁵⁰ A practice of “voluntary” internment can relieve some families of hardships of separation; an example predating

⁴⁴ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 2, at Art. 4.

⁴⁵ *Id.* at Art. 4.A.1. This article extends the Convention’s protection of soldiers even to militia and others who are not regular soldiers. *Id.* A nation may hold even its own citizen as a POW, if the citizen has been a combatant against the nation: “There is no bar to this Nation’s holding one of its own citizens as an enemy combatant.” *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004).

⁴⁶ Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 2, at Art. 21.

⁴⁷ Geneva Convention Relative to the Protection of Civilians in Times of War, *supra* note 3, at Art. 42.

⁴⁸ *Id.* at Arts. 4, 44.

⁴⁹ *Id.* at Art. 42.

⁵⁰ *Id.* at Art. 42; *see also id.* at Arts. 41, 43.

Geneva Convention IV was DOJ's family reunification internment camp at Crystal City, Texas.⁵¹

V. DURING WORLD WAR II, FEDERAL STATUTE AND INTERNATIONAL LAW PROVIDED THE LEGAL BASIS FOR INTERNMENT OF SELECTED JAPANESE ALIENS

Because current indiscriminate uses of the word “internment” (such as “internment of the Japanese Americans”) fail to distinguish between the two radically different legal schemes of alien internment and mass incarceration as they existed during World War II, the first of these, as applied to Japanese aliens, is relevant to this paper's discussion of the wartime events and nomenclature; accordingly, this part describes it. Although the internment legal scheme has changed in certain respects since World War II (for example, the relevant Geneva convention regulation of civilian internment has moved from a POW convention to a civilian convention), a comparison of the World War II internment scheme with the current internment scheme⁵² reveals no change to one essential feature—the connection between civilian internment and alienage.

A. Federal Statute Provided for Internment of Enemy Aliens

During World War II, consistent with the United States' historical wartime practice mentioned in Part IV, point A, above, the Alien Enemies Act authorized the president to direct, by proclamation, the “manner and degree of the restraint” of enemy alien civilians.⁵³ Thus, when President Roosevelt immediately after Pearl Harbor issued a set of three presidential proclamations on the subject of “alien enemies” (one on Japanese aliens,

⁵¹ See KASHIMA, *supra* note 1, at 63.

⁵² See *supra* Part IV.

⁵³ 50 U.S.C § 21 (1918).

one on German aliens, and one on Italian aliens), each proclamation began by citing and quoting the Alien Enemies Act.⁵⁴

The proclamation on Japanese aliens, after quoting the Alien Enemies Act, defined Japanese "alien enemies" as "natives, citizens, denizens or subjects of Empire of Japan being of the age of fourteen years and upwards."⁵⁵ It assigned initial responsibility for Japanese alien internment to the attorney general and the secretary of war by these terms:

I hereby charge the Attorney General with the duty of executing all the regulations hereinafter prescribed regarding the conduct of alien enemies within the continental limits of the United States, Puerto Rico, the Virgin Islands and Alaska, and the Secretary of War with the duty of executing the regulations which are hereinafter prescribed and which may be hereafter adopted regarding the conduct of alien enemies in the Canal Zone, the Hawaiian Islands and the Philippine Islands. Each of them is specifically directed to cause the apprehension of such alien enemies as in the judgment of each are subject to apprehension or deportation under such regulations.⁵⁶

The proclamation prohibited possession of firearms, shortwave receivers, signal devices, cameras, or "papers, documents or books in which there may be invisible writing; photograph, sketch, picture, drawing, map or graphical representation of any military or naval installations or equipment or of any arms, ammunition, implements of war, device or thing used or intended to be used in the combat equipment of the land or naval forces of the United States or any military or naval post, camp or station."⁵⁷

⁵⁴ See Pres. Proc. No. 2525, 55 Stat. 1700 (Dec. 7, 1941); see also Pres. Proc. No. 2526, 55 Stat. 1705 (Dec. 7, 1941); Pres. Proc. No. 2527, 55 Stat. 1707 (Dec. 8, 1941).

⁵⁵ Pres. Proc. No. 2525, *supra* note 54 (referring to the portion headed "Conduct to be Observed by Alien Enemies").

⁵⁶ *Id.* (referring to the portion headed "Duties and Authority of the Attorney General and the Secretary of War").

⁵⁷ *Id.* (referring to the portion headed "Regulations").

In a perhaps hyperbolic application of that prohibition, children's elementary school drawings of Panama Canal locks, labeled with the children's names and found in the children's home, were later attributed to the children's father, Masao Yasui, an Issei farmer from Hood River, Oregon.⁵⁸ A hearing officer asked Mr. Yasui, "Didn't you have these maps and diagrams so you could direct the blowing up of the canal locks?" and told him, "we think . . . you had intent to damage the Panama Canal."⁵⁹

The proclamation also prohibited going to or from numerous categories of places without permission, including "any place . . . not generally used by the public."⁶⁰ The proclamation prohibited attendance at "meetings . . . or gatherings" of "any organization . . . hereafter designated by the Attorney General."⁶¹

B. The United States Applied a Geneva Convention on POWs to Interned Japanese Alien Civilians

International agreement extended the scope of the 1929 Geneva Convention on POWs during World War II to protect the civilian Japanese nationals interned by the United States.⁶² On December 18, 1941, 11 days after Pearl Harbor, the United States proposed "to extend and apply the provisions of the Geneva Prisoner of War Convention to any civilian aliens that it might intern" and "hoped" that Japan would reciprocate.⁶³ Japan

⁵⁸ See KASHIMA, *supra* note 1, at 60 (citing Minoru Yasui, *Minidoka*, in JOHN TATEISHI, ED., AND JUSTICE FOR ALL 67 (1984)).

⁵⁹ *Id.*

⁶⁰ Pres. Proc. No. 2525, *supra* note 54, para. 12 (referring to the portion headed "Regulations").

⁶¹ *Id.* para. 13.

⁶² See Convention Between the United States of America and Other Powers, Relating to Prisoners of War, July 27, 1929, 47 Stat. 2021 (1932) [hereinafter 1929 Convention] (later replaced, see Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, *supra* note 2).

⁶³ Tetsuden Kashima, *American Mistreatment of Internees During World War II: Enemy Alien Japanese*, in ROGER DANIELS, SANDRA C. TAYLOR, & HARRY H. L. KITANO, EDS.,

agreed to the application of that convention, *mutatis mutandis*⁶⁴ (that is, with necessary changes), to civilian aliens.⁶⁵

C. The 1929 Convention Gave Japanese Alien Internees Multiple Protections

The 1929 Convention provided numerous legal protections to alien internees. "Prisoners of war may be interned," but they "may not be confined or imprisoned except as an indispensable measure of safety or sanitation, and only while the circumstances which necessitate the measure continue to exist."⁶⁶ Thus, Japanese alien internment was selective incarceration with a requirement of necessity, not mass incarceration. The 1929 Convention required housing "affording all possible guarantees of hygiene and healthfulness" and set minimum space requirements.⁶⁷ It set minimums for food quantity and quality.⁶⁸ It contained requirements for health care.⁶⁹ It governed internees' labor, including types of jobs, working conditions, wages and hours, and injury compensation.⁷⁰ It gave internees rights to complain to the interning authorities and to "representatives of the protecting Powers" concerning their conditions of captivity,⁷¹ and it gave representatives of the protecting power the right to "go to any place, without

JAPANESE AMERICANS: FROM RELOCATION TO REDRESS 52, 54 (1991) (quoting Howard S. Levie).

⁶⁴ A literal translation of *mutatis mutandis* is "what are to be changed having been changed."

⁶⁵ See John J. Culley, *The Santa Fe Internment Camp and the Justice Department Program for Enemy Aliens*, in DANIELS ET AL., JAPANESE AMERICANS: FROM RELOCATION TO REDRESS 57, 59 (summarizing the actions of the United States, Japan, DOJ, and INS, in extending the 1929 Convention to civilian enemy alien internees).

⁶⁶ 1929 Convention, *supra* note 62, at Art. 9.

⁶⁷ *Id.* at Art. 10.

⁶⁸ *Id.* at Art. 11.

⁶⁹ *Id.* at Arts. 14, 15.

⁷⁰ *Id.* at Arts. 27–34.

⁷¹ *Id.* at Art. 42.

exception, where prisoners of war are interned.”⁷² If an internee misbehaved, the 1929 Convention prohibited any punishment beyond arrest for 30 days.⁷³

D. DOJ Had Alien Civilian Internment Responsibilities

As directed by the presidential proclamation⁷⁴ quoted in section A, above, two agencies divided the labor of interning alien enemy civilians: DOJ, acting through its Immigration and Naturalization Service, and the US Department of War.⁷⁵ Kashima describes a three-step process. First, the individual was designated as an enemy alien, was arrested early in the war, and was kept in DOJ holding centers until a hearing before an Alien Enemy Hearing Board.⁷⁶

Regarding that hearing, the 1929 Convention gave an internee the right to complain of conditions of captivity to the captors.⁷⁷ An agreement between the DOJ and the war department, partly implementing and partly derogating that right, gave internees the so-called “privilege of having a hearing before the Alien Enemy Hearing Board” on the internee’s final disposition.⁷⁸ The hearings came with no right to legal counsel, charges against the individual were undisclosed, certain facts were irrebuttable, and the presumption was of guilt, not innocence.⁷⁹ The hearing could provide a basis for the DOJ’s later decisions.

In the second step, if the alien internee was male, and if the hearing board recommended his permanent internment, the army took jurisdiction.⁸⁰ In the

⁷² *Id.* at Art. 86.

⁷³ *Id.* at Art. 54.

⁷⁴ Pres. Proc. No. 2525, *supra* note 54.

⁷⁵ KASHIMA, *supra* note 1, at 105.

⁷⁶ *Id.*

⁷⁷ 1929 Convention, *supra* note 62, at Art. 42.

⁷⁸ KASHIMA, *supra* note 1, at 58.

⁷⁹ *Id.* at 59.

⁸⁰ *Id.* at 105.

early war years, the Japanese alien internee population was predominantly Issei and male.⁸¹ Edward Ennis, director of DOJ's Alien Enemy Control Unit, called DOJ's internment of an American citizen accused of being a Japanese alien a "mistake," and, in a further confirmation of the connection between internment and alienage, called hypothetical legislation providing for such custody "unconstitutional."⁸² Third, beginning in early 1943, the army returned control of alien internees to the DOJ.⁸³

VI. MASS INCARCERATION: A LEGAL SCHEME DISTINCT FROM INTERNMENT

A. The Mass Incarceration Had a Separate Legal Basis from Internment

In contrast to the treaty- and statute-based legal scheme governing internment of aliens, an executive order, not international law or federal statute, served as the legal basis for the government's incarceration of the Japanese American community by race, regardless of citizenship. Executive Order 9066 (E.O. 9066) authorized the secretary of war to "prescribe military areas . . . from which any or all persons may be excluded," and to provide "transportation, food, shelter, and other accommodations" for those excluded.⁸⁴ That executive order directed "other Federal Agencies" to furnish the excluded persons with transportation, shelter, and other services to assist the military.⁸⁵ Another executive order created the WRA, or War Relocation Authority, and directed its head to "provide for the relocation" of "the persons or classes of persons designated under" E.O. 9066 "in appropriate places."⁸⁶ E.O. 9066—as a basis for mass incarceration and not

⁸¹ *Id.* at 106.

⁸² *Id.* at 65.

⁸³ *Id.* at 105.

⁸⁴ Exec. Order No. 9066, 3 C.F.R. 1092 (1942).

⁸⁵ *Id.*

⁸⁶ Exec. Order No. 9102, 7 Fed. Reg. 2165 (Mar. 18, 1942).

for internment—specifically distinguished itself from the pre-existing “regulations for the conduct and control of alien enemies” administered by the DOJ.⁸⁷

B. The Mass Incarceration Lacked Internment’s Legal Protections

American citizens of Japanese ancestry incarcerated by the WRA lacked internees’ rights.⁸⁸ Their incarceration was mass, not selective. Because of the lack of selectivity, the US citizens in mass incarceration also lacked the perhaps dubious “privilege” of a hearing on their fate, described in Part V, point D, above.

Of substantial importance, the government failed to treat these US citizens as having the right to complain of imprisonment conditions. They lacked the international law right, given by Article 42 of the 1929 Convention, to seek assistance on their conditions of captivity from Spain, the protecting power for Japanese enemy aliens in the United States; nor could Spain’s representatives “go to anyplace” where these Americans were kept.⁸⁹ In July 1944, during a hunger strike in the Tule Lake concentration camp’s stockade, representatives of the Spanish Consulate, including the

⁸⁷ Exec. Order. No. 9066, *supra* note 84.

⁸⁸ The historical question of whether and in what respects the WRA treated the Issei aliens in its mass-incarcerated population as internees is beyond this piece’s scope. Did the WRA afford these aliens the right, under 1929 Convention Article 42, to complain of the conditions of their captivity to United States authorities? Did the WRA “leave clearance” procedure as applied to these aliens, with its controversial Questions 27 and 28, satisfy this requirement? Did the WRA allow these aliens access to consular representatives of Spain as the Protecting Power under 1929 Convention Article 42? Did the WRA allow these aliens (with the aid of humanitarian intermediaries) to supplement the worse-than-internment WRA food with foods from Japan? Whatever internment-like rights the aliens in WRA custody might have had, the present point is the contrast between the legal rights of internees and the WRA’s general practice, shown by its treatment of its American-citizen majority, of affording those it incarcerated none of the international-law rights of internees.

⁸⁹ *Cf.* 1929 Convention, *supra* note 62, at Art. 42.

Vice-Consul, visited the camp.⁹⁰ They requested permission to interview individuals in the stockade; but the WRA denied permission because the individuals were "American citizens and thus outside the jurisdiction of the Spanish Consul."⁹¹ The Vice-Consul requested that the persons held in the stockade be released immediately; but the WRA refused, again on the ground that the prisoners were American citizens.⁹²

Nor did the US citizens incarcerated by the WRA have an effective right to inform the captors themselves of their requests on their conditions of captivity. Again, internees had this right under 1929 Convention Article 42.⁹³ Instead, "supposedly troublesome persons were subject to swift reprisals for their failure to obey camp rules."⁹⁴ Even a peaceful protest of conditions at some WRA camps was likely to occasion reprisals. Inmates at the widely known and reviled Manzanar WRA camp in southern California, for example, "knew that raising questions or taking action of any sort could lead to immediate arrest and transfer."⁹⁵ Thus, these inmates, despite being US citizens and despite having been convicted of no crime, lacked effective First Amendment free speech protection.

Although 1929 Convention Article 54 allowed disciplinary punishment, it made "arrest" the severest type of internee punishment and limited arrest to 30 days.⁹⁶ But WRA "punishment included incarceration in special centers created to isolate these inmates from the rest of the prisoner population."⁹⁷

⁹⁰ Barbara Takei, *Legalizing Detention: Segregated Japanese Americans and the Justice Department's Renunciation Program*, 19 J. OF THE SHAW HIST. LIBR. 75, 82 (2005) (citing FBI, *Summary of Information, War Relocation Authority and Japanese Relocation Centers* 192-93 (Aug. 2, 1945), FBI Headquarters files, RG 60, Entry 38B, National Archives II).

⁹¹ *Id.*

⁹² *Id.*

⁹³ 1929 Convention, *supra* note 62, at Art. 42.

⁹⁴ KASHIMA, *supra* note 1, at 127.

⁹⁵ *Id.* at 148.

⁹⁶ 1929 Convention, *supra* note 62, at Art. 54.

⁹⁷ KASHIMA, *supra* note 1, at 127.

That arguably was not simple arrest. Nor does anything indicate that such isolation was limited to 1929 Convention Article 54's 30-day arrest maximum for internees.

And the punishment of US citizens did not end at transfers to isolation centers. "The WRA and the U.S. Army used fear and terror, and even condoned homicide, in order to control the inmates."⁹⁸ To mischaracterize such a brutal regime as "internment" is to mock the protections of international law.

Alien internees had one final right of interest to incarcerated persons everywhere, for they could invoke the 1929 Convention Article 11 standard requiring that food (for POWs, and therefore for civilian alien internees) be "equal in quantity and quality to that of troops at base camps."⁹⁹ As a result, "The quality of food in the alien camps was better than in the relocation camps."¹⁰⁰ Hironori Tanaka, among others transferred from Tule Lake to DOJ's Fort Lincoln internment camp, wrote back to family at Tule Lake about better conditions at his new place of confinement.¹⁰¹ Fort Lincoln "was a huge improvement over Tule Lake . . . The food was excellent."¹⁰² As shown above, DOJ-interned aliens had all of the abovementioned rights;¹⁰³ WRA-incarcerated American citizens lacked all of them.

⁹⁸ *Id.*

⁹⁹ 1929 Convention, *supra* note 62, at Art. 11.

¹⁰⁰ Harry H. L. Kitano & Roger Daniels, *Part III: Life in the Camps*, in DANIELS ET AL., JAPANESE AMERICANS FROM RELOCATION TO REDRESS 24.

¹⁰¹ JOHN CHRISTGAU, "ENEMIES": WORLD WAR II ALIEN INTERNMENT 161 (1985).

¹⁰² *Id.* ("[t]he barracks were warm. Each dormitory room had its own shower. The Germans [interned at Fort Lincoln] were hospitable, sharing their canteen, casino, and theater. There was an indoor swimming pool [and] a skating rink.").

¹⁰³ *See* 1929 Convention, *supra* note 62, at Arts. 11, 42, 54.

VII. THE GOVERNMENT CONFIRMED THAT THE MASS INCARCERATION WAS NOT INTERNMENT

No fact suggests any official view during World War II that internment included incarceration of a nation's own citizens. On the contrary, as shown below, the government contemporaneously, specifically, and repeatedly used "internment" to mean internment, and other terms to denote the WRA's mass incarceration.¹⁰⁴ The Supreme Court's usage also confirmed internment's connection with alienage.

A. The WRA Confirmed That Its Action Was Not Internment

WRA records confirm that the agency's contemporaneous view, and indeed insistence, was that its camps were *not* internment camps. Details on three critical records, in chronological order, follow.

First, a WRA memorandum dated October 2, 1942, issued by WRA Director Dillon S. Myer and copied to all staff members by Tule Lake director Elmer L. Shirrell said, "The evacuees are not 'internees.' They have not been 'interned.'"¹⁰⁵ The memorandum pointed out that internment requires a hearing (a process not available to the WRA's US citizen prisoners), and it warned against confusing the WRA's "relocation centers" with "internment camps administered by other agencies."¹⁰⁶

¹⁰⁴ *But see* GREG ROBINSON, BY ORDER OF THE PRESIDENT 260-61 (2001), (stating that Secretary of War Henry Stimson "referred to the 'relocation centers' as 'internment camps.'" The statement identified no source. In an email on May 17, 2016, albeit from Finland, where professor Robinson lacked his documents, he recalled that "my reference concerns only internal communications. I believe that Stimson used the phrase 'internment camps' in his diaries, and may have used it in his letter to Roosevelt advising the creation of a JA combat unit." Apparently Stimson's calling the places of mass incarceration "internment camps" reflected personal idiosyncrasy, not agency position.).

¹⁰⁵ Memorandum from D. S. Meyer, Dir., War Relocation Auth., to All Staff Members (Oct. 2, 1942), RG 210, National Archives (reprinted in PAUL TAKEMOTO, NISEI MEMORIES: MY PARENTS TALK ABOUT THE WAR YEARS 172 (2006)). The text is appended.

¹⁰⁶ *Id.*

Second, a WRA circular published in May 1943 said, “The relocation centers, however, are NOT and never were intended to be internment camps.”¹⁰⁷ “It is also important to distinguish between the residents of relocation centers and civilian internees. Under our laws, aliens of enemy nationality who are found guilty of acts or intentions against the security of the Nation are being confined in internment camps which are administered not by the War Relocation Authority but by the Department of Justice.”¹⁰⁸

Some might question whether our government could, consistent with Fifth Amendment due process, incarcerate a resident for being “guilty of . . . intentions” without acts. The WRA’s point, in its published circular, was that some such process accompanied DOJ internment, but that not even such a flimsy imputation of guilt accompanied mass incarceration.

Third, a WRA memorandum written to educate WRA staff, dated October 22, 1943, from B. R. Stauber, chief of the Relocation Planning Office, to John Baker, chief of the Reports Division, both at WRA headquarters, explained “the difference between an internment camp and a concentration camp.”¹⁰⁹ In defining “internment camp,” the memo referred specifically to the 1929 Convention.¹¹⁰ It observed that internees’ treatment was regulated by international law and that “internees have the benefit of visits and counsel by representatives of a protecting power.”¹¹¹ By contrast, the operation of a “concentration camp”—such as the WRA’s camps—generally was “a matter internal to the country operating it.”¹¹²

¹⁰⁷ WAR RELOCATION AUTHORITY, *Relocation of Japanese-Americans* 2 (May 1943), UNIV. OF WASH. SPECIAL COLLECTIONS, <http://www.lib.washington.edu/specialcollections/collections/exhibits/harmony/exhibit/documents/war/wrapam> (last visited Apr. 9, 2016) (emphasis in original). After “internment camps,” the sentence added “or places of confinement.”

¹⁰⁸ *Id.* at 4.

¹⁰⁹ Memorandum from B. R. Stauber to John Baker (Oct. 22, 1943), RG 210, National Archives. The text is appended.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

B. DOJ, an Interning Agency, Expressly Interned Citizens Turned Aliens

As shown earlier, the DOJ was responsible for the confinement of a number of civilian enemy aliens. Calling the DOJ facilities internment camps, calling their prisoners internees, and treating the internees as protected by international and federal internment law are not problematic—although the individuals' selection for internment and the imperfect application to them of internment's legal protections may be.¹¹³

But one WRA camp in particular saw an extraordinary change in the citizenship and imprisonment statuses of thousands of its prisoners, from birthright US citizenship to alienage, and from WRA mass incarceration to DOJ internment. That camp is Tule Lake.

From December 1944 to March 1945, almost 6,000 American citizen Nisei in WRA custody at Tule Lake lost their birthright citizenship through renunciation.¹¹⁴ How that happened, who initiated it, and why, are beyond this piece's scope.

During that time, however, two departments, the DOJ and the US Department of the Interior (DOI), and their agencies, the INS and the WRA, discussed possible changes in the administration of Tule Lake.¹¹⁵ In that discussion, a memorandum dated April 5, 1945, from WRA Director Dillon S. Myer to his superior, the secretary of the interior, said that it was "in some respects appropriate that the segregation center [i.e., the Tule Lake camp] should be administered by that department of the government which is generally responsible for the internment of enemy aliens."¹¹⁶ Thus, the

¹¹³ See generally Kashima, *supra* note 63 (criticizing DOJ's internment of Japanese aliens).

¹¹⁴ DONALD E. COLLINS, *NATIVE AMERICAN ALIENS: DISLOYALTY AND THE RENUNCIATION OF CITIZENSHIP BY JAPANESE AMERICANS DURING WORLD WAR II* 84 (1985).

¹¹⁵ Memorandum from Dillon S. Myer, Dir., War Relocation Auth. 2 (Apr. 4, 1945), RG 210, Entry 16, Sub Classified Gen File 41.133, National Archives (copy on file with author).

¹¹⁶ *Id.*

head of the WRA, consistent with that agency's oft-expressed position, once again connected internment with alienage, and he accordingly suggested that the DOJ could be the Japanese aliens' interning agency.

Ending this discussion, on August 31, 1945, Attorney General Tom C. Clark ordered that 4,212 native-born Americans who had renounced their US citizenship, "being Japanese nationals," be "interned" at the Tule Lake Segregation Center.¹¹⁷ And on October 10, 1945, the interning DOJ took physical control of the Tule Lake facility from the WRA.¹¹⁸ That is, the Tule Lake WRA mass incarceration camp became a DOJ internment camp.

The DOJ general order's language underscores that the change in the inmates' imprisonment—from mass incarceration by an agency of one cabinet-level department, DOI, to internment by another department, DOJ—turned on the individuals' transformation from US citizens into aliens. Thus, once again, in the view of the responsible federal administrative agencies, alienage was critical to internment.

C. The Supreme Court's Wartime Opinions Did Not Call the Mass Incarceration "Internment"

Finally, and consistent with the WRA's and DOJ's contemporary interpretation of the word, the opinions in the Supreme Court's four wartime decisions on the forced removal and mass incarceration of Japanese Americans rarely mentioned "internment," never mischaracterized the Japanese American community's forced removal or mass incarceration as

¹¹⁷ General Order, In the Matter of Certain Japanese Nationals (Aug. 31, 1945), RG 85, Entry 318, National Archives. The text is appended.

¹¹⁸ JACOBUS TENBROEK, EDWARD N. BARNHART & FLOYD W. MATSON, PREJUDICE, WAR AND THE CONSTITUTION: CAUSES AND CONSEQUENCES OF THE EVACUATION OF THE JAPANESE AMERICANS IN WORLD WAR II 174 (1954) ("Military police were withdrawn from all centers and on the basis of an agreement reached with the Department of Justice early in the year, Tule Lake was turned over to that department, patrolmen of the Immigration and Naturalization Service replacing the military police on October 10, 1945.").

"internment," and indeed used "internment" correctly.¹¹⁹ In the four Supreme Court cases—*Hirabayashi*, *Yasui*, *Korematsu*, and *Ex Parte Endo*—the sole mention of internment was in Justice Murphy's *Korematsu* dissent, where he accurately described Britain's treatment of German and Austrian enemy aliens as internment.¹²⁰

And in 1950, shortly after the war, the Supreme Court, in deciding whether a German who never resided in the United States, but was convicted by a US military commission of having illegally fought against the United States in China after Germany's surrender could seek habeas corpus relief, explained internment under the Alien Enemies Act¹²¹ as follows:

The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a 'declared war' exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act.¹²²

Thus, the Supreme Court, like the executive branch, explicitly recognized the connection between internment and alienage.

VIII. HOW DID INTERNMENT'S MISUSE BECOME COMMONPLACE?

Despite the correct use of the term during and after World War II, a number of books and media, especially since 1980, some 35 years after the war's end, have misused phrases like "internment of the Japanese Americans" to conflate the WRA mass incarceration with internment.

¹¹⁹ See *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex Parte Endo*, 323 U.S. 283 (1944).

¹²⁰ *Korematsu*, 323 U.S. 214, 242 n. 16 (Murphy, J., dissenting).

¹²¹ 50 U.S.C. § 21 (1918).

¹²² *Johnson v. Eisentrager*, 339 U.S. 763, 774 (1950).

Google’s Ngram Viewer,¹²³ which graphs data from books, chronicles the misuse by showing the frequency of occurrence of words and phrases over time. For the phrase “internment of the Japanese Americans,” it shows a sharp increase to a peak frequency of over 0.000000120 percent in the early 1980s, followed by other peaks at about the same level.¹²⁴

Not all of the phrase’s occurrences necessarily were misuses, for in some of the phrase’s occurrences, a writer used the phrase to criticize the misuse. An example is “Words Do Matter: A Note on Inappropriate Terminology and the Incarceration of the Japanese Americans.” In that 2005 essay, Roger Daniels urged scholars “to cease using . . . the stock phrase ‘the internment of the Japanese Americans.’”¹²⁵

How did the “internment” misuse become commonplace so many decades after the wartime events it purports to describe? Given the paucity of concentration on Japanese alien internment identified by Kashima,¹²⁶ a possible cause is an incident in politics leading to the Commission on Wartime Relocation and Internment of Civilians Act of 1980 (1980 Act),¹²⁷ and ultimately to the Civil Liberties Act of 1988 (1988 Act).¹²⁸ Daniels, later a consultant to the commission set up by the 1980 Act, tells of an interaction with a member of Senator Daniel Inouye’s staff in 1979.¹²⁹ The staff member read him a draft of what became the 1980 Act.¹³⁰ Daniels says

¹²³ The author is indebted to Bryan A. Garner for introducing him to the Ngram Viewer tool.

¹²⁴ Google Ngram Viewer: Internment of the Japanese Americans, GOOGLE BOOKS, <https://books.google.com/ngrams> (with case sensitivity off, type “Internment of the Japanese Americans”).

¹²⁵ DANIELS, *supra* note 42, at 11.

¹²⁶ See KASHIMA, *supra* note 1, at 4; See *supra* Part I.

¹²⁷ Commission on Wartime Relocation and Internment of Civilians Act of 1980, 50 U.S.C. app. § 981 (1980).

¹²⁸ H.R. 442, 100th Cong. (1988) [hereinafter 1988 Act]. In several respects, the 1988 Act did not differentiate between mass incarceration and internment.

¹²⁹ DANIELS, *supra* note 42, at 1.

¹³⁰ *Id.*

he explained to the staff member why "internment" is inappropriate and why "incarceration" is more accurate.¹³¹ The staff member understood the difference and said the bill's text would be changed.¹³² But the next day, the staff member said that Senator Inouye had not awaited Daniels' vetting to secure other senators' co-sponsorships and that Senator Inouye would not countenance any changes.¹³³ That is how "inappropriate, euphemistic language" about the wartime mistreatment of Japanese Americans was written into a law setting the path to redress for the same Japanese Americans.¹³⁴ Congress based its misuse of "internment" in 1980 not on deliberation, but on happenstance.

IX. LACK OF MORAL LEGITIMACY DIFFERENTIATES MASS INCARCERATION FROM INTERNMENT

American authorities in all three branches of government, and legal commentators, have rejected the World War II mass incarceration, E.O. 9066 as its legal basis, and the "military necessity" put forward to justify it. No such rejection of the idea of internment (as distinguished from its execution) has occurred. Here are statements from each branch.

A. Judicial Branch

The Ninth Circuit as early as 1949 criticized the forced removal as "unnecessarily cruel and inhuman treatment of these citizens," and criticized "incarceration for over two and a half years under conditions in major respects as degrading as those of a penitentiary and in important respects worse than in any federal penitentiary."¹³⁵ It rejected the claim of military necessity as based on a "Nazi-like doctrine of inherited racial

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Acheson v. Murakami*, 176 F.2d 953, 954 (9th Cir. 1949).

enmity, stated by the Commanding General ordering the deportations as the major reason for that action.”¹³⁶ And on *coram nobis* review of Fred Korematsu’s wartime conviction in 1984, the convicting US District Court found his treatment by the federal government to be a “profound and publicly acknowledged injustice.”¹³⁷ The district court further found “that the government knowingly withheld information from the courts when they were considering the critical question of military necessity in this case.”¹³⁸ There was “substantial support in the record that the government deliberately . . . provided misleading information in papers before the court. The information was critical to the court’s deliberation.”¹³⁹

B. Legislative Branch

Congress in 1971 enacted the Non-Detention Act, providing that “no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”¹⁴⁰ As the Second Circuit’s review of the legislative history found, “almost every representative who spoke in favor” of that measure “described the detention of Japanese-American citizens during World War II as the primary motivation for their positions.”¹⁴¹ Furthermore, Congress repudiated the World War II forced removal and imprisonment¹⁴² of Japanese Americans by the 1988 Act.¹⁴³

¹³⁶ *Id.* While the plaintiffs in that case were incarcerated at the Tule Lake camp, the cited facts—the forced removal, the incarceration for over two and a half years, the bad physical conditions, General DeWitt’s assumptions of race-wide enmity—were true of the mass incarceration generally. *Id.*

¹³⁷ *Korematsu v. United States*, 584 F. Supp. 1406, 1413 (N.D. Cal. 1984). The writ of error *coram nobis* exists to correct errors in criminal convictions where other relief is wanting. *Id.* at 1411.

¹³⁸ *Id.* at 1417.

¹³⁹ *Id.* at 1420.

¹⁴⁰ 18 U.S.C. § 4001(a) (1971).

¹⁴¹ *Padilla v. Rumsfeld*, 352 F.3d 695, 720 (2d Cir. 2003).

¹⁴² *Cf. KASHIMA*, *supra* note 1, at 9 (use of “imprisonment”).

The 1988 Act included provisions to “acknowledge the fundamental injustice,” to apologize, and to set up monetary redress of \$20,000 per person and public education.¹⁴⁴

C. Executive branch

President Ford rescinded the mass incarceration’s legal basis, Executive Order 9066, on February 19, 1976, in a proclamation to “affirm” and “resolve that this kind of action shall never again be repeated.”¹⁴⁵ President Reagan signed the 1988 Act on August 10, 1988.¹⁴⁶ Reagan’s successor, President Bush, in letters sent with redress checks to the incarceration’s survivors, conveyed apology by “your fellow Americans.”¹⁴⁷ Bush’s successor, President Clinton, sent letters of explicit presidential apology.¹⁴⁸ And in 2011, the acting solicitor general of the United States confessed error in the wartime solicitor general’s representations to the Supreme Court leading to *Hirabayashi* and *Korematsu*.¹⁴⁹ Thus, the branch that issued and carried out Executive Order 9066, and sought to justify it by “military necessity,” has abandoned it.

¹⁴³ 1988 Act, *supra* note 128. Arguably the 1988 Act did not repudiate alien internment generally, but based its action in part on criticism of internment as applied to Japanese aliens. *See id.*

¹⁴⁴ *See id.* at § 1.

¹⁴⁵ Proclamation No. 4417, 3 C.F.R. 100 (Feb. 19, 1976),

<https://www.fordlibrarymuseum.gov/library/speeches/760111p.htm>.

¹⁴⁶ ROGER DANIELS, *THE JAPANESE AMERICAN CASES: THE RULE OF LAW IN TIME OF WAR* 159 (2013).

¹⁴⁷ *Id.* at 162.

¹⁴⁸ *Id.* at 162–63.

¹⁴⁹ Neal Katyal, *Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases*, DEP’T OF JUST. (May 20, 2011), <http://www.justice.gov/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases>.

D. Commentators

Dean Chemerinsky has placed *Korematsu* “on the list of the worst Supreme Court rulings” because of its “social and human impact,” its “judicial reasoning,” and its “subsequent doctrinal effects.”¹⁵⁰ A recently-honored biography of Fred Korematsu says, “Legal commentators have been unanimous in condemning the Supreme Court’s decisions in the *Korematsu*, *Hirabayashi*, and *Yasui* cases.”¹⁵¹ And Eric Muller wrote that “to the extent that *Korematsu* stands at all today [in 2002], it stands as a deeply discredited decision. Eight of the nine currently sitting Justices on the Court have either written or concurred in opinions describing *Korematsu* as an error [footnote omitted]—even as spectacular an error as the Court’s *Dred Scott* decision.”¹⁵² “It seems safe to say that the majority

¹⁵⁰ Erwin Chemerinsky, *Korematsu v. United States: A Tragedy Hopefully Never To Be Repeated*, 39 PEPP. L. REV. 163, 166, 168, 169 (2011).

¹⁵¹ LORRAINE K. BANNAL, ENDURING CONVICTION: FRED KOREMATSU AND HIS QUEST FOR JUSTICE 103 (2015); *Book Award*, SCRIBES: THE AM. SOC’Y OF LEGAL WRITERS, <http://www.scribes.org/#!book-award/ycdfw> (last visited Apr. 6, 2016).

¹⁵² ERIC L. MULLER, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 (2002) (citing *Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting) (“I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court’s jurisprudence beside *Korematsu* and *Dred Scott*”); *Adarand Constructors, Inc., v. Peña*, 515 U.S. 200, 236 (1995) (O’Connor, J., joined by Rehnquist, C.J., and Kennedy, Scalia, and Thomas, JJ.) (“*Korematsu* demonstrates vividly that even ‘the most rigid scrutiny’ can sometimes fail to detect an illegitimate racial classification. . . . Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.”); *id.* at 244 (Stevens, J., dissenting, joined by Ginsburg, J.) (referring to the “shameful” and “invidious” burdens that the government imposed on Japanese Americans during World War II, some of which the Court upheld in *Korematsu*); *id.* at 275 (Ginsburg, J., dissenting, joined by Breyer, J.) (“(T)he enduring lesson one should draw from *Korematsu*” is that “scrutiny the Court described as ‘most rigid’ nonetheless yielded a pass for an odious, gravely injurious racial classification.”); *Metro Broadcasting v. F.C.C.*, 497 U.S. 547, 633 (1990) (Kennedy, J., dissenting, joined by Scalia, J.) (“Even strict scrutiny may not have sufficed to invalidate early racebased laws of most doubtful validity, as we learned in *Korematsu*.”).

opinion in *Korematsu* would not command a single vote today, let alone a majority."¹⁵³

Thus, internment and mass incarceration differ radically in their legal and moral acceptability. To describe mass incarceration as "internment" may be to misrepresent a horror by a euphemism.

X. TODAY'S JAPANESE AMERICAN COMMUNITY REJECTS THE INTERNMENT MISUSE AS A EUPHEMISM

The Japanese American community's members suffered psychological trauma from their wartime incarceration.¹⁵⁴ The official euphemisms used to deny and minimize that trauma inferably aggravated it. Against this background, the community has decided to stop mislabeling the mass incarceration as "internment."¹⁵⁵ A resolution adopted in 2010 by the best-known national organization of Japanese Americans (the Japanese American Citizens League or JACL) calls "internment" a misnomer and a euphemism.¹⁵⁶ The resolution followed decades of advocacy chronicled by researcher and activist Aiko Herzig-Yoshinaga.¹⁵⁷

¹⁵³ MULLER, *supra* note 152, at 586.

¹⁵⁴ See COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 297-300 (1997). See also ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG, & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 197 (2D ED. 2013).

¹⁵⁵ See *A Resolution of the National Council of the Japanese American Citizens League to Support the 'Power of Words' Proposal which Relates to Euphemisms and Misnomers in Reference to the World War II Experience of Japanese Americans*, NAT'L COUNCIL OF THE JAPANESE AMERICAN CITIZENS LEAGUE 1 (2010), <http://www.nps.gov/tule/learn/education/loader.cfm?csModule=security/getfile&PageID=373751> (last visited Apr. 6, 2016).

¹⁵⁶ *Id.*

¹⁵⁷ Aiko Herzig-Yoshinaga, *Words Can Lie or Clarify: Terminology of the World War II Incarceration of Japanese Americans*, DISCOVER NIKKEI (Feb. 10, 2010), www.discovernikkei.org/en/journal/article/3246.

A 2013 handbook elaborates on the JACL's position by distinguishing the "internationally acknowledged and utilized procedure defined legally as internment" from the forced removal and incarceration of Japanese Americans "irrespective of whether they were citizens or not."¹⁵⁸ The handbook's section on "internment" points out that the term "does not apply" to the WRA's mass incarceration because most persons incarcerated by the WRA were American citizens and because internment "refers to the confinement or impounding of enemy aliens."¹⁵⁹

The Denshō Encyclopedia is "a free and publicly accessible website that provides concise, accurate, and balanced information on many aspects of the Japanese American story during World War II."¹⁶⁰ Denshō asks its contributors "to limit the use of the term 'internment' to the legally permissible detention of enemy aliens and not to refer to the mass forced removal and incarceration of Japanese Americans, most of whom were U.S. citizens."¹⁶¹

XI. CONFLATING INTERNMENT WITH MASS INCARCERATION CAUSES MISINFORMATION

A. Tule Lake's Transformation from Mass Incarceration to DOJ Internment

The misuse of "internment," by conflating internment with the mass incarceration of the Japanese American community, promotes

¹⁵⁸ JAPANESE AMERICAN CITIZENS LEAGUE, POWER OF WORDS HANDBOOK: A GUIDE TO LANGUAGE ABOUT JAPANESE AMERICANS IN WORLD WAR II 4 (April 27, 2013), <https://jacl.org/wordpress/wp-content/uploads/2015/08/Power-of-Words-Rev.-Term.-Handbook.pdf>.

¹⁵⁹ *Id.* at 10.

¹⁶⁰ *About the Encyclopedia: Overview*, DENSHŌ ENCYCLOPEDIA, <http://encyclopedia.densho.org/about/> (last visited Apr. 9, 2016).

¹⁶¹ *Do Words Matter? Euphemistic terminology: Why describing the experiences of Japanese Americans during WWII with words like, "internment" and "relocation," is misleading and inaccurate*, DENSHŌ ENCYCLOPEDIA, <http://encyclopedia.densho.org/terminology/> (last visited May 1, 2016).

misinformation. As this paper earlier showed, renunciation-related events transformed thousands of prisoners from American citizens into aliens and from inmates at a place of mass incarceration, WRA's Tule Lake Segregation Center, into internees at DOJ's Tule Lake internment camp.¹⁶² To mischaracterize the mass incarceration, including incarceration at Tule Lake as it existed *before* that transformation, as "internment" is to imply, incorrectly, that the renunciants started out as aliens. In fact, as Nisei they were American citizens by birth; had they been aliens, they would have had no American citizenship to renounce.

B. News Conflation

News media misuse of "internment" is another source of misinformation. For example, the New York Times, paraphrasing (not quoting) a presidential candidate's remark, used "internment" in successive sentences in an attempt to *contrast* (a) the mass incarceration ("He said he was not endorsing something as drastic as the camps where American citizens of Japanese descent were interned") with (b) alien internment ("the internment of thousands of noncitizen Japanese, Germans and Italians" by "a president highly respected by all").¹⁶³ The repetition of internment could cause a reader to miss the distinction.

In fact, one such reader was the staff of a second newspaper. That newspaper misreported the New York Times story as contrasting (a) "something as drastic as *the Japanese internment camps*" (emphasis supplied) with (b) alien internment (again, the respected president's

¹⁶² See *supra* part VII.B.

¹⁶³ Maggie Haberman, *Trump Deflects Withering Fire on Muslim Plan*, N.Y. TIMES (Dec. 8, 2015), http://www.nytimes.com/2015/12/09/us/politics/donald-trump-muslims.html?_r=0. Of the statements attributed to the candidate, the story put only "a president highly respected by all" in quotation marks. *Id.*

action).¹⁶⁴ That is, the misreport truncated “American citizens of Japanese descent” to read as “Japanese,” suggesting Japanese aliens, and used the resulting term to modify “internment camps.” The misreport thus appeared to refer to Japanese alien internment twice. A puzzled reader of the second newspaper could ask, how did Japanese alien internment change from bad to good between one sentence and the next?

We expect news media to be clear. No newspaper should use English so unclearly as to compel its readers to take the time and make the effort to resolve the apparent contradiction between two adjacent uses of “internment.” Yet internment’s misuse brought about just that wasted time and effort.

XII. CONCLUSION: RADICAL MORAL AND LEGAL DIFFERENCES, RESPECT FOR HISTORY, COMMUNITY SELF-DETERMINATION, FORMAL LEXICON, AND PRACTICAL COMMUNICATION NEEDS, COMPEL REJECTION OF INTERNMENT’S MISUSE

“Internment” does not, and should not, refer to both of two legal schemes that differ radically in moral acceptability and legal standing. Part IX, above, shows the legal community’s repudiation of World War II’s race-based mass incarceration, while because of its longevity and legal legitimacy the institution of internment does not provoke the same reactions.

Internment’s legal differences from mass incarceration are striking. First, internment is based on federal statute and international consensus, but the World War II mass incarceration originated with executive orders.¹⁶⁵ Second, the legal scheme of internment has been used for centuries, while the mass incarceration legal scheme was short-lived.¹⁶⁶ Third, the mass

¹⁶⁴ *Trump stands by no-Muslims plan*, SACRAMENTO BEE 11A (Dec. 9, 2015) (crediting but inaccurately paraphrasing the above-cited *New York Times* story).

¹⁶⁵ See *supra* Part IV; see *supra* Part VI.A.

¹⁶⁶ See *supra* Part IV.A.

incarceration legal scheme was narrowly limited to this country; although some other nations may have engaged in race-based mass incarceration, there has been no international consensus adopting E.O. 9066. Fourth, internment implicated international and domestic legal safeguards (even if imperfectly realized as to Japanese aliens),¹⁶⁷ but the mass incarceration scheme entirely lacked those safeguards.¹⁶⁸

On the practical need for effective communication, using the same name for the distinct legal schemes of internment and mass incarceration is ineffective because it derogates the formal lexicon.¹⁶⁹ By making our use of the English language ambiguous, it promotes misinformation.¹⁷⁰ Internment's misuse disrespects history by denying a scarce and perhaps even praiseworthy act—a government's candid, non-euphemistic, proper use of language during a war.¹⁷¹ The internment misuse became commonplace by happenstance, not deliberation.¹⁷² The misuse denies self-determination by contravening the Japanese American community's well-considered decisions after years of suffering and of principled internal debate.¹⁷³

We owe our readers the effort of carefully making distinctions, as Bryan Garner puts it, not carelessly blurring them.¹⁷⁴ To protect the language's integrity and therefore our own opportunity to use it carefully, we as lawyers and Americans should reject the misuse that conflates internment with race-based mass incarceration. We should use internment only with its original and correct meaning.

¹⁶⁷ See *supra* Part V.C.

¹⁶⁸ See *supra* Part VI.B.

¹⁶⁹ See *supra* Part III.

¹⁷⁰ See *supra* Part XI.

¹⁷¹ See *supra* Part VII.

¹⁷² See *supra* Part VIII.

¹⁷³ See *supra* Part X.

¹⁷⁴ See Bryan A. Garner, *Word Usage*, CHICAGO MANUAL OF STYLE 262 (16TH ED. 2010).

Documents appended:

1. WRA memorandum dated October 2, 1942, Myer by Shirrell to Staff
2. WRA memorandum dated October 22, 1943, Stauber to Baker
3. In the Matter of Certain Japanese Nationals, Department of Justice General Order dated August 31, 1945

Appendix 1:

WAR RELOCATION AUTHORITY

Tule Lake Project

Newell, California

October 2, 1942

MEMORANDUM TO: ALL STAFF MEMBERS

Following is a copy of a memorandum from D. S. Myer received October 2, 1942:

*"MEMORANDUM FOR: Regional Directors and Project Directors.
SUBJECT: Use of the terms "Japanese", "Camps" and "Internment."*

The words that we use in correspondence, in reports, and in conversation with the evacuees exercise a great deal of influence in determining the attitude of the evacuees and of the American public toward the activities of the War Relocation Authority. It is, therefore, distinctly worthwhile for employees of the Authority to make an effort to avoid using certain terms that are misleading and inappropriate.

It is inaccurate to refer to the persons who have been evacuated from the West Coast as "Japanese." The Japanese are the people who live in Japan. The persons who have been evacuated from the West Coast are people of Japanese ancestry, but they are not "Japanese" in all cases. With a few exceptions, they have come to the United States because they want to live here, and two-thirds of them are citizens of the United States.

It is even more objectionable, of course, to refer to the evacuees as "Japs". They do not like the word; nor would you if they were an American

of Japanese ancestry. "Japs" means the subjects of the Japanese Emperor, living in Japan.

The term "camp", when used to refer to a relocation center, is likewise objectionable. It leads people to confuse the relocation centers administered by the War Relocation Authority with the detention camps and internment camps administered by other agencies.

The evacuees are not "internees". They have not been "interned." Internees are people who have individually been suspected of being dangerous to the internal security of the United States, who have been given a hearing on charges to that effect, and have then been ordered confined in an internment camp administered by the Army.

In lieu of the misleading, question-begging, and emotion-laden terms "Japanese", "Japs", "camps", and "internees", employees of the War Relocation Authority should refer to the persons who have been evacuated from the West Coast as evacuees, and to the projects as relocation centers. Some people have been referring to the evacuees as "colonists". This term is not objectionable, but the term "evacuee" seems preferable. Where the context makes the meaning clear, the term "resident" is, of course, also acceptable.

I should appreciate your calling the contents of this memorandum to the attention of the members of your respective staffs.

*/s/ D. S. Myer
Director"*

A handwritten signature in cursive script that reads "Elmer L. Shirrell". The signature is written in dark ink on a white background.

*Elmer L. Shirrell
Project Director*

Appendix 2:

OCT 22 1943

Mr. John Baker

B. R. Stauber

With respect to the items side-lined in blue, I wonder if it might not be worthwhile sending a short notice to the Project on the difference between an internment camp and a concentration camp. The difference, as I understand it, is about like this.

An internment camp is a place where nationals of a country with which the interning country is at war are maintained [sic] during the period of hostilities. The basis of internment differs in different countries, but in general the practice is to intern such enemy nationals as are deemed dangerous to the successful prosecution of the war effort. In the United States a careful procedure of hearings and reviews is followed, although immediately after the out-break of war a considerable number of persons were detained until hearings could be arranged. Because of the action of the United States in adopting toward civilian internees the applicable policies from the Geneva Prisoners of War Convention, the treatment of internees is subject in a sense at least to international law. This includes the right of representatives of the protecting power to visit and communicate with internees in private, that is, out of the hearing or company of the representative of the interning power.

A concentration camp, on the other hand, is a device used for the control of what may be called political prisoners in a particular country. Thus, it is my understanding, that in Russia persons whom the Secret Police apprehended might be taken to a concentration camp where they might be kept more or less permanently. Much the same thing, I understand, has

happened in Germany. Only in exceptional cases is assignment to a concentration camp a matter of interest to any other nation. Occasionally, apparently, a citizen of one country has been thrown into a concentration camp in another country; but by and large it is my understanding that a concentration camp is a place where political prisoners of a particular country are "taken care of."

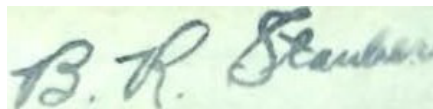
To summarize: An internment camp, generally speaking, is conducted along lines on which there is a certain amount of agreement between nations. Provisions of treatment are substantially reciprocal in character and internees have the benefit of visits and counsel by representatives of a protecting power.

A concentration camp, on the other hand, is pretty largely a matter internal to the country operating it and the "residents" are for the most part nationals of the country operating the camp.

There seems to be a good deal of confusion on the point, particularly since people are inclined to confuse the type of treatment which is said to characterize concentration camps with the treatment accorded residents of internment camps. Largely, I think, because internment camps are subject to international law, treatment of internees of one country is pretty largely reciprocal to the treatment accorded by the other country.

BRStauber:al

10/19/43

A handwritten signature in dark ink on a light green background. The signature reads "B. R. Stauber" in a cursive, slightly slanted script.

Appendix 3:

In the Matter of
CERTAIN JAPANESE NATIONALS

GENERAL ORDER

The persons whose names appear on the attached list, in the number of 4,212, being Japanese nationals residing at the Tule Lake Segregation Center, are hereby ordered interned at that Center.

/s/ Tom C. Clark
ATTORNEY GENERAL

August 31, 1945
Dated, Washington, D.C., [sic]