

18 September 1945

MEMORANDUM FOR THE CHIEF OF STAFF

SUBJECT: Pending Litigation in Western Defense Command (Alexander v. DeWitt et al, USDC, S.D. Calif.; Sup. Ct. LA and Wilcox v. DeWitt, USDC S.D. Calif.; Mun. Ct. City of San Diego, Calif.

1. There are now pending in the Federal Court for the District of California, Southern Division, the Superior Court of Los Angeles County, California, and in the Municipal Court for the City of San Diego, California, suits seeking to recover damages against me and others who formerly served in the Western Defense Command.

2. These actions have been brought by Kenneth Alexander and Homer Glen Wilcox for damages which it is alleged they suffered when they were forcibly removed from the exclusion areas of the Pacific Coast in 1943 when they entered the exclusion areas in violation of the exclusion orders which had been issued against them.

3. These individuals were excluded by me as Commanding General, Western Defense Command and Fourth Army, because they were deemed to be potentially dangerous to the security of the Pacific Coast and military necessity required their exclusion therefrom. This action was taken pursuant to the authority vested in me under Presidential Executive Order No. 9066.

4. Alexander has filed one suit in the Superior Court for Los Angeles County, California, against General Delos C. Emmons who succeeded me as Commanding General of the Western Defense Command, myself and others, which action asks for damages in the amount of \$105,000. None of the defendants have been served. Another action based on the same cause of action has been filed by Alexander in the Federal District Court for Southern California, also against General Emmons, myself and others, which seeks damages in the amount of \$157,200. I have not been served in this case. Homer Glen Wilcox has filed two actions against General Emmons, myself and others, one in the Federal District Court for Southern California, seeking \$3,500 damages and another in the Municipal Court for the City of San Diego, California, seeking damages in the amount of \$100. It is believed that no service has been effected against any of the defendants in the Wilcox suits. I have not been served in this case.

5. It became necessary to employ force to secure compliance by Alexander and Wilcox with the exclusion orders issued against them when the Department of Justice declined, for reasons known to you and the Assistant Secretary of War, to prosecute Alexander and Wilcox for violation of Public Law 503, 77th Congress, which had been enacted on the recommendation of the Secretary of War and the Attorney General with specific regard for securing enforcement of orders issued pursuant to Executive Order No. 9066. The forcible removal of Alexander and Wilcox was undertaken with the full approval and direction of the War Department communicated to me by the Assistant Secretary of War, the Honorable John J. McCloy, and with the full advance knowledge of the Department of Justice which had previously, in a similar case, authorized its representatives (United States Marshal's Office at San Francisco) to participate in a forcible exclusion.

6. It is important to emphasize that Alexander's and Wilcox's forcible removal was not ordered until after the Federal District Court for Southern California (Judge Holzer presiding) had denied an injunction to Wilcox who had sought to restrain me from enforcing the individual exclusion order which had been issued against him. The decision by Judge Holzer that legal authority existed for the exclusion of Wilcox and that, therefore, Wilcox was not entitled to an injunction restraining the Commanding General of the Western Defense Command from enforcing the exclusion order, established as the law of the Federal District at that time that the exclusion orders against both Alexander and Wilcox could be enforced by force if necessary. It was against such a background and after such a ruling by the court that the War Department authorized and I enforced the exclusion orders against Alexander and Wilcox. The detailed information concerning both Alexander and Wilcox's cases is available in the Office of the Judge Advocate General and the Office of the Judge Advocate, Western Defense Command.

7. Recently a motion for a summary judgment was granted in the Alexander case, which is pending in the Federal District Court, by Judge Hall as to General Emmons and two other defendants on the ground that the cause of action was one for damages arising out of Alexander's forcible removal and that there was no showing that General Emmons and the other appearing defendants were concerned with or responsible for the forcible ouster. However, the Alexander and Wilcox actions in the various named courts are still pending as to me. I have not been served with process in these cases because before the filing of the suits I was relieved from command of the Western Defense Command and Fourth Army and assigned to duty at Washington, D. C. as Commandant of the Army and Navy Staff College.

8. The defense to these actions with respect to the question of the right to employ force for the purpose of enforcing individual exclusion orders has been embarrassed by a recent ruling by Judge Pierce Hall, who ruled in another case in the Federal District Court for Southern California (Ochikubo v. Bonesteel) that the military authorities did not have the right to use force to secure compliance with the exclusion orders issued under Executive Order No. 9066, because Congress by passing Public Law 503 had indicated that prosecution under that law was to be the exclusive method by which exclusion and other orders issued under Executive Order No. 9066 were to be enforced. The plaintiff, Ochikubo, was a Japanese against whom General Bonesteel had issued an individual exclusion order and he sought to restrain General Bonesteel from employing force to remove him in the event he returned to the West Coast. On the basis of the reasoning stated above, Judge Hall granted an injunction restraining General Bonesteel and others from using force to enforce the exclusion order. An appeal has been taken to the Ninth Circuit Court of Appeals, which appeal is still pending. However, since the Japanese capitulation all exclusion orders have been revoked and the Department of Justice has indicated that they consider that the Ochikubo case is moot. Consequently, it is believed that the Government's appeal will be dismissed.

9. Should the Government believe it advisable, I am willing, as I have been in the past, to have my appearance entered in the Alexander and Wilcox cases in order that they may be disposed of. So far, however, counsel for the Government has deemed it prudent to defer entering my appearance. It would appear highly desirable to have the pending cases disposed of at this time while members of the Judge Advocate General's Department and the Attorney General's Staff who are familiar with the litigation are in the Government service, witnesses are available, and while there remains a more favorable judicial atmosphere in which to have the questions considered than that which will undoubtedly exist two or three years hence when both the public and the courts have begun to forget the real dangers which we sought to avert by the actions in question.

10. a. These cases are official cases growing out of official acts taken by me pursuant to War Department authorization and direction and, therefore, the defense of the cases rests with the Government. However, there is a possibility that the litigation might result in judgments for damages against me and thus I would be subjected to personal liability. Therefore, I request that the War Department now take anticipatory action to hold me harmless against this contingency before the time when inevitable changes in War Department personnel occur and while the facts and circumstances are familiar to those who acted for the War Department in

these cases and who may later leave such duties. I request that an official determination be now made by the War Department that the actions taken by me in carrying out my responsibilities under Executive Order No. 9066, with reference to Alexander and Wilcox, were taken for reasons of military necessity, in good faith and in the performance of official duty and now make a decision that the War Department will seek to obtain Congressional relief to hold me and the other defendants in these cases harmless from personal liability for the payment of damages should a judgment be entered against me or any of the co-defendants who acted under my direction.

b. I would appreciate a copy of whatever official papers are filed pertaining to this request which I urge to be expedited.

c. I would also appreciate it if a copy of this memorandum (furnished herewith) were transmitted to The Judge Advocate General with instruction to make such arrangements as are necessary to keep me fully informed of all developments in these cases.

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