INTERNMENTS, THEN AND NOW: CONSTITUTIONAL ACCOUNTABILITY IN POST-9/11 AMERICA

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I. INTRODUCTION 72

II. THE JAPANESE AMERICAN INTERNMENT: "OVERRULED IN THE COURT OF HISTORY"? 73

A. Acknowledgment of a Wrong 73

B. Identifying the Dangers of the Internment 74

III. ASSESSING THE WAR ON TERROR THROUGH THE INTERNMENT LENS 75

A. Detentions Without Constitutional Safeguards 76

B. Penalizing (Presumed) Political Opinions and Political Expression 80

1. Punishing Political Opinion: A Brief History 81

2. Conflating Intelligence and Criminal Investigations 82

3. Criminalizing Dissent 85

C. Ethnicity (or Its Surrogates) as a Proxy for Crime 87

D. Expanding Executive Power, Again 92

1. Assertions of an Executive Power to Detain and Interrogate 92

2. Congressional Checks on Executive Power 94

3. Judicial Responses 95

IV. CONSTITUTIONAL ACCOUNTABILITY: THE MISSING PIECE 97

> We believe that the German people bear a common political responsibility for outrages secretly committed by the Gestapo and the SS. What are we to think of our own part in a program which violates every democratic social value, yet has been approved by the Congress, the President and the Supreme Court?
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> – *Eugene V. Rostow*[1]

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I. INTRODUCTION

Following the September 11, 2001 attacks on the Pentagon and World Trade Center towers, governmental policies as well as private actors overtly targeted Arab Americans, Muslims, and those of (or perceived to be of) Middle Eastern and South Asian descent.[2] These developments prompted concern that the United States' so-called War on Terror[3] would be used to justify a large-scale internment of civilians on the basis of their race, ethnicity, national origin, or religion, along the lines of the internment of Japanese Americans during World War II.[4] Arab Americans and Muslims living in the United States were not, however, incarcerated en masse, and many civil libertarians breathed a collective sigh of relief.

Was this relief warranted? Did the legal, political, and educational efforts to discredit the Japanese American internment bear fruit in post-9/11 America? To understand the extent to which the dangers represented by the Japanese American internment are still with us, we must first consider what it is about the internment that we find most problematic, and then evaluate the extent to which those dangers have been minimized or intensified in the post-9/11 era. Part I of this Article briefly reviews critiques of the World War II internment and adapts a framework articulated by Yale law professor Eugene Rostow in 1945 as a lens through which to assess contemporary developments.

Part II discusses how the executive's power to act unilaterally to detain and otherwise infringe on the most basic human and constitutional rights of persons under U.S. jurisdiction has been dramatically expanded in the name of national security. Congress, for the most part, has passed legislation which enables, rather than constrains, these programs of detention and interrogation, and the Supreme Court has provided limited restrictions, primarily preserving the right of the courts to review petitions for habeas corpus but indicating a willingness to defer to the executive in much the same manner as it did in deciding the Japanese American internment cases.

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1. Eugene V. Rostow, *The Japanese American Cases: A Disaster*, 54 YALE L.J. 489, 533 (1945).

2. *See* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM 17–71 (2003). *See generally* Muneer I. Ahmad, *A Rage Shared By Law: Post-September 11 Racial Violence as Crimes of Passion*, 92 CAL. L. REV. 1259 (2004) (discussing race-based violence in both public and private sectors).

3. As early as September 12, 2001, President George W. Bush had framed the U.S. response to the attacks as "the first wave of the war against terrorism." *See* Stephen P. Marks, *Branding the "War on Terrorism": Is There a "New Paradigm" of International Law?* 14 MICH. ST. J. INT'L L. 71, 71 (2006). The Obama administration has attempted to steer away from use of the term, with limited success. *See* David C. Morrison, *Behind the Lines: Our Take on the Other Media's Homeland Security*, CQ HOMELAND SEC., April 6, 2009, *available at* 2009 WLNR 6802932; Kevin Howe, *Words redefine "war on terror,"* MONTEREY COUNTY HERALD, June 9, 2009, at A1.

4. *See, e.g.*, Susan M. Akram & Kevin R. Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. ANN. SURV. AM. L. 295, 337 (2002); Laurence Tribe, *Military Tribunals Undermine the Constitution*, COUNTERPUNCH, Dec. 8, 2001, *available at* http://www.counterpunch.org/ltribe1.html. *See generally* Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307 (2006).

Part III considers whether focusing on the relationship between the U.S. government's policies during World War II and in the post-9/11 era will result in any concrete change, or whether we are simply documenting another iteration of a pattern that has permeated U.S. history. Striking similarities exist between measures now taken in the name of fighting terrorism, the internment of Japanese Americans, and the U.S. government's long history of incarcerating people on charges of sedition or "disloyalty."[5] The Article concludes that for this information to be of any consequence, the issue of individual and governmental accountability must be confronted.

II. THE JAPANESE AMERICAN INTERNMENT: "OVERRULED IN THE COURT OF HISTORY"?[6]

A. Acknowledgment of a Wrong

In 1944 the Supreme Court upheld the conviction of Fred Korematsu for violating the military orders excluding Japanese Americans from the West Coast. Relying upon the logic it had earlier invoked to uphold the convictions of Gordon Hirabayashi and Minoru Yasui for violating a curfew imposed upon Japanese Americans, the Supreme Court refused to "reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population. . . . [who] could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety." [7] While the Court purported to be ruling solely on the legality of the curfew and exclusion orders, it was upholding the mass internment of approximately 120,000 persons—old and young, U.S. citizens and permanent residents—on the basis of their ancestry.[8]

Justice Murphy said in dissent that the exclusion policy "falls into the ugly abyss of racism";[9] and Justice Roberts summarized the majority's decision as "convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry."[10] Justice Jackson observed that "the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens."[11]

After decades of concerted activism, research, public education, and political pressure raising awareness of the injustices of the Japanese American

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5. *See* COLE, ENEMY ALIENS: DOUBLE STANDARDS, *supra* note 2, at 105–53; NATSU TAYLOR SAITO, FROM CHINESE EXCLUSION TO GUANTÁNAMO BAY: PLENARY POWER AND THE PREROGATIVE STATE 78–84 (2007).

6. Korematsu v. United States, 584 U.S. F. Supp. 1406, 1420 (N.D. Cal. 1984) (describing the Supreme Court's decision in the *Korematsu* case as having been "overruled in the court of history").

7. Korematsu v. United States, 323 U.S. 214, 218 (1944) (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)); *see also* Yasui v. United States, 320 U.S. 115 (1943).

8. *See generally* COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 83 (1997) [hereinafter CWRIC]; MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS 36–37 (1996).

9. *Korematsu*, 323 U.S. at 233 (Murphy, J., dissenting).

10. *Id.* at 226 (Roberts, J., dissenting).

11. *Id.* at 246 (Jackson, J., dissenting).

internment, as well as renewed legal challenges, lower federal courts vacated the convictions of Korematsu and Hirabayashi in the 1980s.[12] Acting on the findings of the Commission on the Wartime Relocation and Internment of Civilians ("CWRIC"), Congress passed the Civil Liberties Act of 1988, which provided an official apology and minimal redress to surviving internees.[13] At that point there was widespread belief that the World War II internment of Japanese Americans had been legally as well as politically repudiated, despite the fact that *Korematsu* and related Supreme Court decisions upholding the internment had never been formally overruled, and no legislation passed clearly prohibiting such practices.[14] Vacating Korematsu's conviction in 1984, District Judge Patel concluded optimistically that legal scholars and Supreme Court justices had characterized the *Korematsu* decision as an "anachronism" and that the "government acknowledged its concurrence with the Commission's observation that 'today the decision in *Korematsu* lies overruled in the court of history.'"[15]

B. Identifying the Dangers of the Internment

Should we be concerned about the Japanese American internment being repeated in post-9/11 America? To assess that issue, we must first identify which aspects of the internment are of most concern. In 1976 President Gerald Ford acknowledged that the "evacuation" of Japanese was a "mistake," stating, "We now know what we should have known then—not only was that evacuation wrong, but Japanese-Americans were and are loyal Americans."[16] His proclamation did not, however, explain why it was wrong, except insofar as the military's presumption of disloyalty had been incorrect. The text of the Civil Liberties Act of 1988 was more specific, noting that the government's actions "were carried out without adequate security reasons . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."[17] However, the Act did not address what would have constituted "adequate security reasons," leaving room for judicial deference regarding future executive determinations of security threats.

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12. *See* Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984). In Minoru Yasui's case, the writ was denied and the government's motion to vacate his curfew conviction granted; Yasui's appeal of the denial was mooted by his death. *See* Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985). *See generally* Lorraine K. Bannai, *Taking the Stand: The Lessons of Three Men Who Took the Japanese American Internment to Court*, 4 SEATTLE J. FOR SOC. JUST. 1 (2005); Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. REV. 933 (2004) (discussing these challenges to the Supreme Court's internment decisions of the 1940s).

13. *See* CWRIC, *supra* note 8; Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903 (1988).

14. *See* Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. VA. L. REV. 571, 586 (2002) (noting that "[e]ight of the nine currently sitting Justices on the Court have either written or concurred in opinions describing *Korematsu* as an error"); *see also* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 993 (2002). *But see* Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 LAW & CONTEMP. PROBS. 255, 278 n.128 (2005) (explaining why "we should be cautious about reading too much into the cases that Muller cites").

15. *Korematsu*, 584 F. Supp. at 1420.

16. Gerald R. Ford, Proclamation No. 4417, "An American Promise," (Feb. 20, 1976), *reproduced in* ERIC K. YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 400 (2001).

17. *See* Civil Liberties Act, *supra* note 13, § 2(a).

Much of the criticism of the internment has focused on "racial profiling": specifically the presumption made by the military and sanctioned by the Supreme Court that Japanese Americans, unlike German or Italian Americans, could be presumed disloyal by virtue of their national origin.[18]

In a scathing critique written shortly after the Supreme Court issued the *Korematsu* decision, Eugene Rostow situated the question of racial profiling in the context of governmental actions which punish political belief.[19] He highlighted the danger of acting upon (presumed) political opinion rather than criminal activity, particularly when the constitutional protections guaranteed to criminal defendants are disregarded.[20] Rostow summarized the implications of the Supreme Court's refusal to find the internment unconstitutional as follows:

> (1) protective custody, extending over three or four years, is a permitted form of imprisonment in the United States; (2) political opinions, not criminal acts, may contain enough clear and present danger to justify such imprisonment; (3) men, women and children of a given ethnic group, both Americans and resident aliens, can be presumed to possess the kind of dangerous ideas which require their imprisonment; (4) in time of war or emergency the military, perhaps without even the concurrence of the legislature, can decide what political opinions require imprisonment, and which ethnic groups are infected with them; and (5) the decision of the military can be carried out without indictment, trial, examination, jury, the confrontation of witnesses, counsel for the defense, the privilege against self-incrimination, or any of the other safeguards of the Bill of Rights.[21]

Because this articulation incorporates both the problems of racially-based governmental policies and the dangers inherent to giving the executive branch unfettered power in matters of national security, I have elected to employ Rostow's framework—adapting it to focus on executive assertions of power—in comparing the U.S. government's conduct of its War on Terror with its internment of Japanese Americans during World War II.

III. ASSESSING THE WAR ON TERROR THROUGH THE INTERNMENT LENS

This Article focuses on the Japanese American internment's establishment of a significant precedent for the unconstrained exercise of executive power. The executive branch now invokes "national security" to imprison or to impair significantly the rights of U.S. citizens and non-citizen residents on the basis of

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18. *See* Eric L. Muller, *Inference or Impact? Racial Profiling and the Internment's True Legacy*, 1 OHIO ST. J. CRIM. L. 103, 108 (2003).

19. *See generally* Rostow, *supra* note 1. This is often referred to as the authoritative or seminal critique of the internment cases. *See, e.g.*, Stephen I. Vladeck, *The Long War, the Federal Courts, and the Necessity/Legality Paradox*, 43 U. RICH. L. REV. 893, 921 (2009) (reviewing BENJAMIN WITTES, LAW AND THE LONG WAR: THE FUTURE OF JUSTICE IN THE AGE OF TERROR (2008)); A. John Radsan, *Second-Guessing the Spymasters with a Judicial Role in Espionage Deals*, 91 IOWA L. REV. 1259, 1302 n.178 (2006). An October 2009 search of legal journals yielded ninty-seven references to Rostow's article, but only a handful examined his arguments in any detail, one such exception being Philip Tajitsu Nash, *Moving for Redress*, 94 YALE L.J. 743, 746–48 (1985) (reviewing JOHN TATEISHI, AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS (1984)).

20. *See* Rostow, *supra* note 1, at 532.

21. *Id.*

political opinion, rather than criminal activity, presuming in that process that ethnicity or national origin is reliably correlated to political belief. The next sections consider the extent to which the following have been deemed acceptable in post-9/11 America: (A) domestic internment of both citizens and non-citizens, without otherwise applicable constitutional safeguards; (B) imprisonment for political beliefs—whether explicitly or as a result of the indirect criminalization of such beliefs; (C) the presumed correlation of political ideology with particular ethnic or national origin groups; and (D) the expansion of unilateral executive power to accomplish these ends in the name of national security.

A. Detentions Without Constitutional Safeguards

Immediately after the 9/11 attacks, U.S. government officials appeared to consider implementing a domestic internment program in the name of national security. The Justice Department disappeared and detained thousands of non-citizens, many of them permanent residents, holding them indefinitely without charge and interrogating them without access to counsel.[22] Initially, Attorney General John Ashcroft announced the rising number of these "terrorism suspects," but refused to disclose who was in custody, where they were being held, or whether they had been charged with crimes.[23]

When a coalition of human rights and civil liberties organizations filed a request under the Freedom of Information Act ("FOIA"),[24] the Justice Department announced that it would no longer release even the number of those detained.[25] In the meantime, the Attorney General had issued a directive cautioning federal agency and department heads against releasing information pursuant to FOIA requests.[26]

We do know that the Justice Department ultimately incarcerated over 5000 individuals allegedly suspected of terrorism, and that while only a handful were charged with terrorism-related offenses, hundreds were subsequently deported.[27] Like the Japanese American internment, this program indefinitely detained a large number of persons in the name of "national security," while investigating the equivalent of their "loyalty." The criteria for arrest were never

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22. *See* COLE, ENEMY ALIENS: DOUBLE STANDARDS, *supra* note 2, at 30–31.

23. *See* David Cole, *No Reason to Believe: Radical Skepticism, Emergency Power, and Constitutional Constraint*, 75 U. CHI. L. REV. 1329, 1341 (2008) (reviewing ERIC A. POSNER & ADRIAN VERMEULE, TERROR IN THE BALANCE: SECURITY, LIBERTY, AND THE COURTS (2007)); Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35, 72–73 (2005).

24. Freedom of Information Act Pub. L. No. 89–487, 80 Stat. 250 (1966).

25. *See* Letter to Melanie Ann Pustay, Office of Information and Privacy, Department of Justice, Oct. 29, 2001), *available at* http://www.cnss.org/dojfoia.htm (request for information); Amy Goldstein and Dan Eggen, *U.S. to Stop Issuing Detention Tallies*, WASH. POST, Nov. 9, 2001, at A16; Memorandum, John Ashcroft, Attorney General, to Heads of All Federal Departments and Agencies, Oct. 12, 2001, *available at* http://news.lp.findlaw.com/hdocs/docs/doj/ashcroft-foia-memo10122001.pdf.

26. *See* Center for National Security Studies v. U.S. Department of Justice, 331 F.3d 918 (2003), *cert. denied*, 540 U.S. 1104 (2004).

27. *See* COLE, ENEMY ALIENS: DOUBLE STANDARDS, *supra* note 2, at 25–26; NANCY CHANG, SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES 69 (2002).

specified, but it appears that immigration status, country of origin, and religious or political association played a primary role in the selection of detainees.[28]

Some officials also considered interning U.S. citizens post-9/11. In July 2002, U.S. Civil Rights Commissioner Peter Kirsanow predicted that there may be a "return to *Korematsu*," suggesting Arab Americans might be interned en masse if the United States suffered another major terrorist attack.[29] In February 2003, Howard Coble, head of the House Subcommittee on Terrorism and Domestic Security, said that the decision to intern Japanese Americans during World War II had been appropriate.[30] Coble denied supporting mass incarceration of Arab Americans, yet said that some Japanese Americans "probably were intent on doing harm to us, just as some of these Arab-Americans are probably intent on doing harm to us."[31] The less-than-enthusiastic public responses to these initiatives may have sent the message that mass civilian detention programs were not feasible, at least if conducted in such a public manner.[32]

Somewhat more successful was Attorney General John Ashcroft's vision of internment via military tribunals. In 2002, he announced that the government was considering plans to reinstitute "detention centers" for U.S. citizens deemed "enemy combatants" based on the threat they posed to national security.[33] The cases of Yaser Hamdi and Jose Padilla illustrate[34] that the executive branch was more than willing to label U.S. citizens in this manner, detaining them as Rostow warned, without any of the protections guaranteed by the Bill of Rights.[35] In both cases, the government argued that the 2001 Authorization for Use of Military Force justified the detention of U.S. citizens, whether captured in a war zone or arrested on U.S. soil, and the Supreme Court upheld these individualized internments.[36]

On November 13, 2001, President George W. Bush issued an Executive Order authorizing military tribunals to try persons believed to be associated with

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28. *See infra* notes 124–128 and accompanying text.

29. *See* Emil Guillermo, *Dangerous Talk*, S.F. CHRON., July 30, 2002, http://www.sfgate.com/ cgi-bin/article.cgi?file=/gate/archive/2002/07/30/eguillermo.DTL; Press Release, Am.-Arab Anti-Discrimination Comm., ADC Update: ADC Calls for the Removal of U.S. Civil Rights Commissioner (July 20, 2002), *available at* http://www.bintjbeil.com/adc/020720_kirsanow.html.

30. *See California Legislature Rebukes N.C.'s Coble; Congressman Offended by Saying Internment Was to Protect Japanese*, CHARLOTTE OBSERVER, June 3, 2003, at 2B.

31. *Id.*

32. *See infra* notes 210–213 and accompanying text.

33. *See* Jonathan Turley, *Camps for Citizens: Ashcroft's Hellish Vision*, L.A. TIMES, Aug. 14, 2002, at B11.

34. *See generally* Sarah A. Whalin, *National Security Versus Due Process: Korematsu Raises Its Ugly Head Sixty Years Later in Hamdi and Padilla*, 22 GA. ST. U. L. REV. 711 (2006); Chris K. Iijima, *Shooting Justice Jackson's "Loaded Weapon" at Ysar Hamdi: Judicial Abdication at the Convergence of Korematsu and McCarthy*, 54 SYRACUSE L. REV. 109 (2004).

35. *See* Rostow, *supra* note 1, at 532.

36. *See* Authorization for Use of Military Force, Pub. L. No. 107–40 (2001); *see also* Hamdi v. Rumsfeld, 542 U.S. 507 (2004) (plurality agreeing that the Authorization for Use of Military Force authorized detention of a U.S. citizen captured in Afghanistan); Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005), *cert denied*, 547 U.S. 1062 (2006) (holding that the government could detain U.S. citizens arrested in the United States as "enemy combatants"). Padilla was ultimately indicted on criminal charges. *See* Leila Nadya Sadat, *A Presumption of Guilt: The Unlawful Enemy Combatant and the U.S. War on Terror,* 37 DENV. J. INT'L L. & POL'Y 539, 546–47 (2009).

al Qaeda without indictment, jury, or the ability to bring petitions for habeas corpus or otherwise appeal their convictions to regularly constituted courts.[37] These tribunals were to be applicable only to non-citizens; however, in many significant respects the relevant provisions of the Bill of Rights have been interpreted to apply to *all persons* subject to U.S. jurisdiction.[38] If measures targeting non-citizens are constitutional, then they could easily be extended. Furthermore, history demonstrates that the initial targeting of non-citizens often paves the way, politically, for extending repressive measures to citizens.

Citizenship status does not appear to have had a significant impact on the government's decision to label persons suspected of terrorism as "enemy combatants" or to bring charges against them in military, rather than civilian, courts.[39] The government avoided resolving the question of the constitutionality of treating citizens in this manner by transferring Padilla to the civilian judicial system, where he was convicted on criminal charges, and releasing and deporting Hamdi in exchange for renunciation of his U.S. citizenship.[40]

For most non-citizens, such as the nearly 800 men and boys once held at Guantánamo Bay,[41] the central legal question has been whether they can be detained indefinitely without due process or review of "enemy combatant" status. Initially, the Supreme Court may have hoped Congress would step in to ensure that such detentions complied at least minimally with the United States'

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37. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror, 66 Fed. Reg. 57833 (November 13, 2001). *See also* John W. Whitehead & Steven H. Aden, *Forfeiting "Enduring Freedom" for "Homeland Security:" A Constitutional Analysis of the USA Patriot Act and the Justice Department's Anti-Terrorism Initiatives*, 51 AM. U. L. REV. 1081, 1120 (2002).

38. *See* COLE, ENEMY ALIENS: DOUBLE STANDARDS, *supra* note 2, at 72–82, 129–53; *see, e.g.,* Yick Wo v. Hopkins, 118 U.S. 356 (1886) (applying Fourteenth Amendment equal protection to non-citizens); Wong Wing v. United States, 163 U.S. 228 (1896) (applying Fifth and Sixth Amendment protections to non-citizens facing criminal charges); Yamataya v. Fisher, 189 U.S. 86 (1903) (applying Fifth Amendment due process protections to non-citizen); Bridges v. Wixon, 326 U.S. 135 (1945) (finding that permanent residents have First Amendment rights); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (finding a non-citizen a "person" under the Fifth Amendment); Plyler v. Doe, 457 U.S. 202 (1982) (holding that children of undocumented immigrants have a right to public education under the equal protection clause of the Fourteenth Amendment). *But see* United States v. Verdugo-Urquidez, 494 U.S. 259, 271 (1990) (denying Fourth Amendment protection to nonresident aliens outside of United States, and appearing to limit, in dicta, constitutional protections to non-citizens with "previous significant voluntary connection with the United States").

39. *See generally* Hiroshi Motomura, *Immigration and We the People After September 11*, 66 ALBANY L. REV. 413 (2003) (arguing that citizenship does matter, but that anti-terrorism measures targeting non-citizens also affect citizens).

40. *See supra* notes 34, 36. On Hamdi's release, see A. John Radsan, *Irregular Rendition's Variation on a Theme by Hamdi*, 33 N.C. J. INT'L L. & COM. REG. 595, 608–09 (2008). *See generally* Saad Gul, *Return of the Native? An Assessment of the Citizenship Renunciation Clause in Hamdi's Settlement Agreement in the Light of Citizenship Jurisprudence*, 27 N. ILL. U. L. REV. 131 (2007). The Supreme Court did find in *Hamdi v. Rumsfeld,* 542 U.S. 507 (2004), that due process required a U.S. citizen being held as an enemy combatant to be given "meaningful opportunity" to contest the basis of his detention, but did not require adherence to the full range of constitutional protections.

41. *See* Melissa A. Jamison, *The Sins of the Father: Punishing Children in the War on Terror*, 29 U. LA VERNE L. REV. 88, 98–99 (2008) (putting the approximate number of detainees at 775, and noting that between six and sixty were under the age of eighteen when detained).

legal obligations,[42] but Congress instead denied habeas review to the Guantánamo detainees by passing the Detainee Treatment Act of 2005 ("DTA"),[43] and the Military Commissions Act ("MCA"),[44] which applied the DTA retroactively and authorized military trials with drastically limited provisions for due process.

The Supreme Court ultimately held in *Boumediene v. Bush* that the MCA unconstitutionally suspended the writ of habeas corpus and that the detainees had the right to bring habeas petitions to federal court even though they were being held outside the formal territorial boundaries of the United States.[45] The *Boumediene* majority asserted that "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing" and that the court "must have sufficient authority to conduct a meaningful review of both the cause for detention and the executive's power to detain."[46]

Viewed through the lens of the dangers illustrated by the Japanese American internment, it may be said that the Supreme Court stepped in to preserve its jurisdiction, thereby preventing the executive branch from *expanding* the power to intern confirmed in *Korematsu*. The Court gave no indication, however, that the government's rationale for internment would be scrutinized any more thoroughly than it was in the World War II cases, and failed to address the status of those detained either in prisons in territories occupied by U.S. forces or in secret locations in third countries.[47]

On January 22, 2009, President Obama issued an Executive Order mandating that the Guantánamo detention facilities be closed within a year.[48] But in his May 21, 2009 "Remarks by the President on National Security," he distinguished between those detainees who would be (1) charged and tried in U.S. criminal courts, (2) tried by military commissions, (3) released pursuant to

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42. *See* Martin J. Katz, *Guantánamo, Boumediene, and Jurisdiction-Stripping: The Imperial President Meets the Imperial Court*, 25 CONST. COMM. 377, 420–21 (citing, for example, Justice Breyer's invitation in *Hamdan v. Rumsfeld,* 548 U.S. 557, 636 (2006) to the president to ask Congress for the legislative authority to create military commissions); *see also* Rasul v. Bush, 542 U.S. 466 (2004) (recognizing detainee's right to petition for habeas corpus).

43. Detainee Treatment Act of 2005, Pub. L. No. 109–148, 119 Stat. 2680 (2005).

44. Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (2006).

45. Boumediene v. Bush, 128 S.Ct. 2229 (2008); on the issues of extraterritoriality, *see id*. at 2251–58. *See generally* Erwin Chemerinsky, *The Constitution and National Security*, 25 TOURO L. REV. 577 (2009) (providing context for the *Boumediene* decision); *see also* Katz, *supra* note 42, at 377–78, 418–20 (2009) (citing *Boumediene,* 128 S.Ct. at 2275; *Hamdi,* 542 U.S. at 507, 520–21; and *Rasul*, 542 U.S. at 466, 485 (on the length and indeterminacy of the detentions)).

46. *Boumediene*, 128 S.Ct. at 2269.

47. *See* European Parliament, Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (Jan. 1, 2007), http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf (especially paragraph 42, noting the use of at least 1245 flights operated by the CIA between 2001 and 2005, as well as an unspecified number of military flights transporting detainees). *See generally* Margaret L. Satterthwaite, *Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 GEO. WASH. L. REV. 1333 (2007); David Weissbrodt & Amy Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, 19 HARV. HUM. RTS. J. 123 (2006).

48. Exec. Order – Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the-_press_office/ClosureOfGuantanamoDetentionFacilities.

court orders, (4) transferred to other countries, and (5) those "who cannot be prosecuted yet who pose a clear danger to the American people."[49] The last category is the most problematic. The president said of this group, "We must recognize that these detention policies cannot be unbounded. They can't be based simply on what I or the executive branch decide alone. That's why my administration has begun to reshape the standards that apply to ensure that they are in line with the rule of law. . . ."[50] This statement is troubling for several reasons. Lawful detention exists only for those subject to criminal prosecution or incarceration as prisoners of war—that was the underlying problem with the Japanese American internment. Obama emphasized the need for "fair procedure,"[51] but what can this mean if there are no articulable grounds for lawful confinement? Finally, after acknowledging that the decision should not be made by the executive alone, the president proposed only that his administration—i.e., the executive branch—would develop new standards.

At this point, it is difficult to discern how the Bush or Obama administrations' policies on the War on Terror differ significantly from those of the Roosevelt administration during World War II.[52] Federal authorities now have numerous means "to effectuate preventive detention after 9/11," among these "immigration law, the material witness statute, broad criminal statutes penalizing material support of terrorist groups, and the Authorization for Use of Military Force."[53] They have used these powers to detain thousands of persons for months and years, in the absence of evidence that they posed any threat to national security, and without charging them with crimes.[54] It is quite clear that today, as in the Japanese American internment, "protective custody, extending over three or four years, is [still] a permitted form of imprisonment in the United States,"[55] and continues to be imposed without regard for those provisions of the Bill of Rights applicable to persons being prosecuted for crimes.

B. Penalizing (Presumed) Political Opinions and Political Expression

In the Japanese American internment cases, the Supreme Court accepted the government's argument that mass incarceration was required as a matter of "military necessity" because there was no way of distinguishing "loyal" from

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49. White House, Office of the Press Secretary, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09.

50. *Id.*

51. *Id.*

52. As of mid-October 2009, only twelve prisoners held at Guantánamo Bay had actually been released, and there were reports that the U.S. prison at the Bagram Air Force Base in Afghanistan was to be expanded. *See* Warren Richey, *Obama's Guantánamo, Counterterror Policies Similar to Bush's?* CHRISTIAN SCI. MONITOR (Oct. 15, 2009), at 2; *see also* Eisuke Suzuki, *A Samurai's Confessions: Obama's Realism Mirrors Bush's Policy*, BUS. RECORDER (May 27, 2009), *available at* 2009 WLNR 9980116.

53. David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CAL. L. REV. 693, 698 (2009).

54. *Id.* at 703–06.

55. Rostow, *supra* note 1, at 532.

"disloyal" individuals of Japanese ancestry.[56] Internment for disloyalty, in the absence of some concrete criminal act through which such disloyalty is manifested, is imprisonment on the basis of political opinion.[57] The punishment of political opinion—actual or presumed—in the current War on Terror can be seen in measures that blur the lines between intelligence-gathering and criminal investigations, as well as those that expand the definition of criminal activity to include conduct protected by the First Amendment.

1. Punishing Political Opinion: A Brief History

The U.S. government has a long history of criminalizing political opinion, beginning with the 1798 Alien and Sedition Acts,[58] passed amidst claims by the Federalists that Jeffersonians were attempting to impose the French Revolution's "Reign of Terror" on the United States.[59] In 1917 the Justice Department attempted to convince President Woodrow Wilson to use military courts martial to try civilians accused of interfering with the war effort.[60] This attempt proved unsuccessful, but Congress did pass an Espionage Act making it illegal to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" about the United States.[61] This was followed by the 1918 Sedition Act, which prohibited virtually all criticism of the U.S. government or its war effort.[62]

The security rationale has been invoked in times of peace as well as war. J. Edgar Hoover, director of the Federal Bureau of Investigation ("FBI"), began compiling investigative files on millions of Americans in 1924,[63] and by 1940 had announced his intention to create an index which would enable the FBI to locate immediately any person wanted for "national security" reasons,[64] even though the Justice Department was not authorized to investigate the activities of citizens who had not violated federal law.[65] The Smith Act of 1940 made it a crime to "knowingly or willfully advocate, abet, advise or teach the duty, necessity, desirability or propriety" of overthrowing the government or assassinating

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56. *See Korematsu*, 323 U.S. 214. *See generally* Rostow, *supra* note 1; Eric K. Yamamoto, *Korematsu Revisited – Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 SANTA CLARA L. REV. 1 (1986).

57. *See* Rostow, *supra* note 1, at 532.

58. Alien Enemy Act, ch. 58, 1 Stat. 577 (1798) (current version at 50 U.S.C. § 21 (2000)); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801); on the Alien Enemy Act. *See generally* J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 NYU L. REV. 1402 (1992).

59. *See* RICHARD O. CURRY, FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980S 5 (1988).

60. *See* SANFORD J. UNGAR, FBI 41–42 (1976).

61. *See* Espionage Act of 1917, ch. 30, 40 Stat. 217 (1917); *see also* ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA FROM 1870 TO 1976, at 108 (2001).

62. *See* Sedition Act, ch. 75, 40 Stat. 553 (1918); *see also* Debs v. United States, 249 U.S. 211, 214 (1919); Goldman v. United States, 245 U.S. 474 (1918); Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1125–27 (1989).

63. *See* UNGAR, *supra* note 60, at 48–49.

64. *See* WARD CHURCHILL & JIM VANDER WALL, AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT 26–29 (2d ed. 2002); UNGAR, *supra* note 60, at 103.

65. *See* UNGAR, *supra* note 60, at 49.

government officials.[66] In 1947, President Harry S. Truman issued an executive order authorizing the Justice Department to investigate "infiltration of disloyal persons" within the government and to create a list of subversive organizations in the United States.[67]

The Emergency Detention Act, passed as part of the Internal Security Act of 1950 ("The McCarran Act"), sanctioned mass internment by requiring all members of "communist front" organizations to register with the federal government and authorizing the creation of detention centers to incarcerate those registrants upon presidential declaration of an "internal security emergency."[68] In 1971 this was superceded by a provision that "[n]o citizen shall be imprisoned or otherwise detained except pursuant to an Act of Congress,"[69] which constrains unilateral executive action, but does not preclude such detentions.

After the 9/11 attacks, the Bush administration quickly limited the protections guaranteed by the Bill of Rights in ways likely to penalize political beliefs or associations. Some of the most dramatic measures were included in the USA PATRIOT Act, which significantly expanded the power of law enforcement and intelligence agencies.[70] Among other things, the USA PATRIOT Act authorizes the government "to detain *any* non-citizen terrorism suspect without charges, albeit for a short period of time."[71] Such suspects are identified broadly to include persons "engaged in any . . . activity that endangers the national security of the United States."[72]

2. Conflating Intelligence and Criminal Investigations

Since 2001, anti-terrorist legislation has blurred the lines between "foreign intelligence gathering" and criminal investigations, and expanded the powers of intelligence and law enforcement agencies.[73] To give just a few examples, the Foreign Intelligence Surveillance Act of 1978 ("FISA")[74] and the Wiretap Act of 1968[75] were amended to allow, among other things, geographically unrestricted

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66. Alien Registration (Smith) Act of 1940, ch. 439, 54 Stat. 670 (1940); *see also* MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR 75–79 (1990).

67. CHURCHILL & VANDER WALL, *supra* note 64, at 32.

68. Emergency Detention Act of 1950 (Title II of the Internal Security Act of 1950), Pub. L. No. 81–831, 64 Stat. 987, 1019–31 (1950) (repealed in 1971). *See generally* Masumi Izumi, *Alienable Citizenship Race, Loyalty and the Law in the Age of "American Concentration Camps," 1941-1971*, 13 ASIAN AM. L.J. 1 (2006) (documenting the use of the Japanese American internment as a model for the Emergency Detention Act).

69. Act of Sept. 25, 1971, Pub. L. No. 92–128, 85 Stat. 347 (1971). *See* Stephen I. Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 521 (2009).

70. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107–56, 115 Stat. 272 (2001) [hereinafter USA PATRIOT Act]; *see generally* Heather Hillary & Nancy Kubasek, *The Remaining Perils of the Patriot Act: A Primer*, 8 J. L. SOC'Y 1 (2007).

71. Vladeck, *The Case Against National Security Courts, supra* note 69, at 521.

72. *Id.*; *see also* USA PATRIOT Act, *supra* note 70, § 412.

73. *See* Whitehead & Aden *supra* note 37, at 1101–13 (2002); *see also* CHANG, *supra* note 27.

74. Foreign Intelligence Surveillance Act, Pub.L. No. 95–511, 92 Stat. 1783 (1978) (amended 2008).

75. Wiretap Act of 1968, Pub. L. No. 90–351, 82 Stat. 197, 211–23 (1968) (passed as Title III of the Omnibus Crime Control and Safe Streets Act).

("roving") wiretap warrants against unspecified persons, tracking of telephone and internet calls without notice, expanded access to voicemail messages and e-mail communications, the ability to subpoena financial and business records without notice to the targeted parties, and "sneak and peek" warrants of homes or offices without prior notification.[76] These developments are significant both because they allow the government to gather more information on the activities of U.S. citizens and residents, thereby chilling constitutionally protected speech and association,[77] and because "intelligence," which focuses on political beliefs and associations, now serves as the basis for criminal prosecutions or indefinite detentions without trial.

The USA PATRIOT Act also expanded the definition of "foreign intelligence information." Rather than being defined in terms of attacks, sabotage, or espionage by agents of foreign powers, it now encompasses "information whether or not concerning a U.S. person, with respect to a foreign power or foreign territory that relates to (i) the national defense or the security of the United States; or (ii) the conduct of the foreign affairs of the United States."[78] Under this definition, the opinion of any American citizen or permanent resident concerning any aspect of U.S. foreign policy could qualify as "foreign intelligence information" susceptible to investigation by governmental authorities.

As Jude McCulloch and Sharon Pickering observe, the rationale for gathering and sharing such information is based upon a law enforcement model which attempts to prevent crime by criminalizing "pre-crime" activity: "Counter-terrorism pre-crime measures envisage specific serious harms and criminalize those whom it is believed will commit these imaginary future harms."[79] Furthermore, the anticipated crimes at issue are framed in terms of "national security," an inherently politicized construct.[80] This politicization is illustrated by the United States' long history of using intelligence agencies to repress the lawful activities of individuals and organizations perceived to threaten the status quo, and the documented record of having manipulated criminal prosecutions to further political aims.[81]

In 1976, the Senate Select Committee to Study Governmental Operations with Respect to Intelligence Activities, chaired by Senator Frank Church (the "Church Committee"), held numerous hearings and issued a four-volume report

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76. *See* USA PATRIOT Act, *supra* note 70, §§ 201, 202, 206, 207, 209, 210, 213, 214, 215, 216, 218, 355, 356, 358; *see also* Whitehead & Aden, *supra* note 37, at 1103–13, 1131; *see generally* Peter P. Swire, *The System of Foreign Intelligence Surveillance Law*, 72 GEO. WASH. L. REV. 1306 (2004); William C. Banks, *And the Wall Came Tumbling Down: Secret Surveillance After the Terror*, 57 U. MIAMI L. REV. 1147 (2003).

77. *See generally* Linda E. Fisher, *Guilt By Expressive Association: Political Profiling, Surveillance and the Privacy of Groups*, 46 ARIZ. L. REV. 621 (2004); Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201 (2004).

78. *See* USA PATRIOT Act, *supra* note 70, § 214.

79. Jude McCulloch & Sharon Pickering, *Imagining Future Crime in the "War on Terror,"* 49 BRIT. J. CRIM. 628, 629 (2009).

80. *See id*. at 630; *see generally* Fisher, *supra* note 77; Eric Lardiere, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L. REV. 976 (1983).

81. *See* Socialist Workers Party v. Attorney General, 642 F. Supp. 1357 (S.D.N.Y. 1986); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1084–86 (2002).

documenting thousands of illegal and unconstitutional operations engaged in by federal agencies such as the FBI and CIA over several decades with the explicit intent of destroying and discrediting social and political movements they considered a threat to the status quo.[82] The Church Committee recommended several remedial measures, including strictly separating the gathering of domestic and foreign intelligence and applying the equivalent of a reasonable suspicion standard to terrorism investigations.[83] These recommendations have not been meaningfully implemented, and the government has moved in precisely the opposite direction in the current War on Terror.[84]

There is also considerable evidence that local police forces, often working with federal agencies through Joint Terrorism Task Force agreements, have been gathering political intelligence on activists for many decades.[85] In March 2002, for example, the American Civil Liberties Union of Colorado discovered that the Intelligence Bureau of the Denver Police Department had extensive files on over 3000 individuals and more than 200 organizations.[86] These contained information on organizational membership, attendance at meetings, attendance at political rallies, descriptions of individuals' homes and vehicles, bumper stickers and t-shirts, but virtually nothing connecting the surveillance targets to any criminal activity.[87] Grossly inaccurate information—such as the depiction of the Nobel peace prize-winning American Friends Service Committee as a "criminal extremist" organization—had been disseminated to dozens of intelligence and law enforcement agencies.[88] As Mark Cohen, subject of one of the files, observes,

> When intelligence is gathered in a criminal case, presumably the information can be traced to a specific source, and the defendant will have a chance to refute it when the case is prosecuted. However, when it is gathered solely for intelligence purposes and widely disseminated . . . . [t]argeted individuals and organizations . . . may never know why certain punitive actions are taken against them, and may be unable to locate and thereby discredit the source of false accusations.[89]

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82. *See* Saito, *Whose Liberty*, *supra* note 81, at 1078–1104. *See generally* Senate Select Comm. to Study Gov't Operations with Respect to Intelligence Activities, Final Report: Intelligence Activities and the Rights of Americans, S. Rep. No. 755, 94th Cong., 2d Sess. (1976); WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WARS AGAINST DISSENT IN THE UNITED STATES (2002).

83. *See* William C. Banks, *The Death of FISA*, 91 MINN. L. REV. 1209, 1226 (2007); Fisher, *supra* note 77, at 665.

84. *See* Saito, *Whose Liberty*, *supra* note 81, at 1104–11.

85. *See* Handschu v. Special Servs. Div., 605 F. Supp. 1384 (S.D.N.Y. 1985), *aff'd* 787 F.2d 828 (2d Cir. 1986) (limiting the political surveillance activities of the New York Police Department); Mark Cohen, *Report from the Field: The Denver Spy Files*, The New Centennial Review, Vol. 6:1, 95–101 (2006); related documents are available at http://www.aclu-co.org/spyfiles/documents.htm (accessed October 11, 2009).

86. *See* Cohen, *supra* note 85, at 96.

87. *Id.* at 95–96.

88. *Id.* at 95–97.

89. *Id.* at 99. *See also* Rebecca K. Smith, *"Ecoterrorism"?: A Critical Analysis of the Vilification of Radical Environmental Activists as Terrorists*, 38 ENVTL. L. 537, 565 (2008) (noting the inclusion of anarchists and environmental and animal rights activists as "potential terrorists" in the National Crime Information Center's Violent Gang and Terrorist Organization File, an electronic database

The dangers articulated by Cohen are sharply illustrated by the case of Maher Arar, a dual citizen of Canada and Syria, who was detained by U.S. immigration officials while changing planes in New York City in 2002. "Rendered" to Syria, Arar was held for nearly a year in a tiny underground cell, interrogated, and tortured before being returned to Canada.[90] An official Canadian inquiry concluded that there was no evidence linking Arar to any terrorist activity or organization,[91] but did find that U.S. authorities had probably relied upon grossly inaccurate information provided by the Royal Canadian Mounted Police ("RCMP") in deciding to detain and render Arar.[92] Further, the commission concluded that the RCMP's false descriptions were likely a byproduct of blurring the lines of responsibility between the RCMP, trained to engage in criminal prosecutions, and the Canadian Security Intelligence Service.[93]

As Diane Amann observes, blurring the distinction between surveillance and punishment transforms detention from "a way to secure presence for trial or absence from battle until war ends" into "a way to assure custodial interrogation unfettered by the niceties of legal process."[94] Put another way, it is a method for detaining, questioning, or otherwise intimidating and punishing people on the basis of information or presumptions about their political views or associations, rather than evidence of criminal activity.

3. *Criminalizing Dissent*

The 1996 Antiterrorism and Effective Death Penalty Act authorized the secretary of state to list "foreign terrorist organizations"—much like the list of "subversive" organizations authorized by President Truman in 1947—and made provision of material support to such groups a felony, even if the aid supports entirely lawful activities.[95] The 2001 USA PATRIOT Act expanded these measures by creating a new "terrorist exclusion list," expanding the definition of

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created without notice to designated persons and available to a wide range of law enforcement agencies).

90. *See* Arar v. Ashcroft, 414 F. Supp.2d 250 (E.D.N.Y. 2006), *aff'd* 532 F.3d 157 (2d Cir. 2008); Jules Lobel, *Extraordinary Rendition and the Constitution: The Case of Maher Arar*, 29 REV. LITIG. 479, 482–484 (2008).

91. Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, Report of the Events Relating to Maher Arar (2006), *available at* http://publications.gc.ca/pub?id=298241&sl=0; *see also* Lobel, *supra* note 90, at 485.

92. *See* Julian N. Falconer & Sunil S. Mathai, *The Anti-Terrorism Act and the Arar Findings: Democracy Protected or Democracy Eroded?*, 21 NAT'L J. CONST. L. 49, 58 (2006).

93. *Id.* at 61 (quoting Commission of Inquiry, *supra* note 91, Vol. I at 68).

94. Diane Marie Amann, *Punish or Surveil*, 16 TRANSNAT'L L. & CONTEMP. PROBS. 873, 873 (2007).

95. Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104–132, 110 Stat. 1214 (1996), 8 U.S.C. §1189(a); *see* DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 119–23 (2d ed. 2002); William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 AM. U. L. REV. 1, 109 (2000). *See generally* David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247 (1996) (describing dangers in anti-terrorism bills subsequently enacted as Antiterrorism and Effective Death Penalty Act).

"terrorist" organizations, and increasing the penalty for providing material support to designated organizations.[96]

The USA PATRIOT Act targeted citizens more directly by creating the crime of "domestic terrorism," broadly defined to encompass "acts dangerous to human life that are a violation of the criminal laws of the United States or of any State," which "occur primarily within the territorial jurisdiction of the United States," and which, among other things, are intended to "influence the policy of a government by intimidation or coercion."[97] The Homeland Security Act of 2003 extended the definition of "terrorism" to include not only acts "dangerous to human life" but also those "potentially destructive of critical infrastructure or key resources."[98] Political protest of any governmental policy can now constitute domestic terrorism if minor laws are broken and life, infrastructure, or resources are endangered. Association is also penalized by the "material support" provisions of these laws.[99] Attempts to criminalize political opinion have not been limited to those associated with organizations linked, however tangentially, to foreign terrorist organizations. Environmental and animal rights activists have been labeled "terrorists" and their organizations surveilled and infiltrated.[100] In 2002 the Domestic Terrorism Section Chief of the FBI's Counterterrorism Division defined "ecoterrorism" as "the use or threatened use of violence of a criminal nature against innocent victims or property by an environmentally-oriented subnational group for environmental-political reasons" and testified that the Earth Liberation Front and the Animal Liberation Front were the FBI's top priority in terms of domestic terrorism.[101] The broad scope of this definition and the application of the "terrorism" label to conduct which is criminalized specifically on the basis of an underlying "environmental-political" motivation establishes the nexus between terrorism prosecutions and political belief quite straightforwardly.[102] Such definitions of "terrorist activity" also preclude

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96. USA PATRIOT Act, *supra* note 70, §§ 805, 810(d); *see* COLE & DEMPSEY, *supra* note 95, at 153. *See generally* Islamic American Relief Agency v. Unidentified FBI Agents, 394 F. Supp. 2d 34 (D.D.C. 2005) (upholding designation and blocking of assets of group identified as a global terrorist organization).

97. USA PATRIOT Act, *supra* note 70, § 802(a).

98. Homeland Security Act, Pub. L. No. 107–296, 116 Stat. 2135 (2002); *see* 6 U.S.C. § 101 (2007) (noting the current definition).

99. *See* USA PATRIOT Act, *supra* note 70, § 805; Cole, *Out of the Shadows*, *supra* note 53, at 704. *But see* Humanitarian Law Project v. Mukasey, 552 F.3d 916 (9th Cir. 2009), *cert. granted sub nom* Humanitarian Law Project v. Holder, 130 S. Ct. 49, 77 USLW 3679, and 78 USLW 3059 (U.S. Sept. 30, 2009) (finding that the ban on material support did not impose guilt by association and was unlikely to substantially chill constitutionally protected speech). *See generally* Tasia E. McIntyer, *Protecting Against Terrorism or Symbolic Politics? Fatal Flaws in Ohio's Criminal Terrorism Statute,* 43 CASE W. RES. L. REV. 203 (2005) (noting the dangers in parallel state legislation).

100. *See* Smith, *"Ecoterrorism?" supra* note 89, at 571–75.

101. *Id*. at 553, citing Eco-terrorism and Lawlessness on the National Forests: Hearing Before the Subcomm. On Forests and Forest Health of the H. Resources Comm., 107th Cong. 107–83 (testimony of James F. Jarboe); *see also* Jared S. Goodman, *Shielding Corporate Interests from Public Dissent: An Examination of the Undesirability and Unconstitutionality of "Eco-Terrorism" Legislation,* 16 J. L. & POL. 832, 833 (2008).

102. *See generally* Dara Lovitz, *Animal Lovers and Tree Huggers Are the New Cold-Blooded Criminals?: Examining the Flaws of Ecoterrorism Bills*, 3 J. ANIMAL L. 79 (2007); Ethan Carson Eddy, *Privatizing the*

recognition of armed struggle as a potentially legitimate means of realizing the internationally acknowledged right of all peoples to self-determination.[103] In other words, as John Alan Cohan observes, the USA PATRIOT Act's definition of domestic terrorism "does not clearly distinguish terrorism from legitimate forms of political violence."[104] For similar reasons, Robert Odawi Porter notes that it threatens American Indian nations by eliminating—or at least deterring—their ability "to engage in 'disobedient' actions against the colonizing government in order to protect and defend their inherent and treaty-recognized rights."[105] Although this strategy may be the only one remaining to American Indians struggling to exercise their sovereignty and ensure their survival as Indigenous peoples, with the advent of the War on Terror, such actions may now be deemed terrorism rather than legitimate forms of political protest.[106] As Porter notes, "If the United States can justify taking control of Afghanistan and Iraq in the name of national security, it certainly seems true that arresting an entire Indian nation—if need be—would not be out of the question."[107]

In summary, it is clear that the expansion of intelligence and police powers, combined with an increasingly elastic definition of terrorism, have rendered the possibility of imprisonment—possibly mass incarceration—on the basis of political belief a very real danger in the current War on Terror.

C. Ethnicity (or Its Surrogates) as a Proxy for Crime

The current War on Terror has generated much discussion about whether measures which target those who are (or are presumed to be) Muslim, Arab American, or of Middle Eastern descent, constitute discrimination based on race or ethnicity of the sort manifested during World War II. To invoke Eugene Rostow's framing again, does the U.S. government assume that membership in a particular ethnic group is a valid proxy for the kinds of political opinions and associations presumed to justify detention?

On February 19, 1942 President Franklin Delano Roosevelt issued Executive Order 9066, giving military commanders the unfettered authority to "exclude" "any or all persons" from any "military areas" they chose to designate,[108] and Congress imposed criminal sanctions on persons who would "enter, remain in, leave, or commit any act in any military area . . . contrary to the restrictions

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PATRIOT Act: The Criminalization of Environmental and Animal Protectionists as Terrorists, 22 PACE ENVT'L. L. REV. 261 (2005).

103. *See* Common Article 1 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, Dec. 16, 1966; International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, Dec. 16, 1966; *see also* Paul R. Williams & Francesca Jannotti Pecci, *Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination*, 40 STAN. J. INT'L L. 347, 348 (2004) (noting that in 2004, over one third of the groups or individuals on the Treasury Department's list of "Specially Designated Global Terrorists" were associated with movements for self-determination).

104. John Alan Cohan, *Necessity, Political Violence and Terrorism*, 35 STETSON L. REV. 903, 931 (2006) (noting that the Boston Tea Party falls well within its definition).

105. Robert Odawi Porter, *Tribal Disobedience*, 11 TEX. J. CIV. LIBS. & CIV. RTS. 137, 138 (2006).

106. *Id.* at 170–78.

107. *Id.* at 182.

108. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

applicable to such areas."[109] Federal intelligence agencies had long since created a list of persons to be detained in the event of war with Japan, and most of those identified had been arrested within seventy-two hours of the attack on Pearl Harbor.[110] Nonetheless, the orders issued by Lieutenant General John L. DeWitt pursuant to Executive Order 9066 excluded from the West Coast "all persons of Japanese ancestry, both alien and non-alien."[111]

The government's purported justification was that there was insufficient time to distinguish the "loyal" from the "disloyal,"[112] i.e., in Rostow's terms, to determine *which* Japanese Americans held "the kind of dangerous ideas which require their imprisonment."[113] That it was a race-based measure was starkly confirmed when a priest running an orphanage in Los Angeles asked Lieutenant Colonel Karl Bendetsen, the officer responsible for implementing the internment, whether it was necessary to send children of less than one-quarter Japanese ancestry. Bendetsen is said to have replied "that if they have one drop of Japanese blood in them, they must go to a camp."[114] More generally, DeWitt's *Final Report* stated plainly that time was *not* an issue in assessing the loyalty of Japanese Americans; rather, it was simply "infeasible" to distinguish the "sheep from the goats" because—as he put it elsewhere—a "Jap is a Jap" and "the Japanese race is an enemy race."[115]

The Supreme Court's reluctance to confront such explicitly race-based measures can be seen in Justice Black's majority opinion in *Korematsu*. Responding to Justice Murphy's accusation that the Court was "fall[ing] into the ugly abyss of racism,"[116] the majority asserted, "To cast this case into outlines of racial prejudice . . . merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire."[117] The majority's logic is mind-boggling. Other than ancestry, what could connect interned U.S. citizens to the military dangers posed by the Japanese Empire?[118] Employing McCulloch and

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109. Act of Mar 21, 1942, Pub. L. No. 77–503, 56 Stat 173 (1942); *see also* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 66–68 (1983). Senator Robert Taft (R-Ohio), the only legislator to object, observed that "this is probably the 'sloppiest' criminal law I have ever read or seen anywhere." *Id.* at 68.

110. CWRIC, *supra* note 8, at 54–55 (discussing the "ABC List" compiled by the FBI and the Office of Naval Intelligence). On contemporaneous governmental acknowledgments that security reasons did not dictate mass internment, see SAITO, CHINESE EXCLUSION, *supra* note 5, at 68–70.

111. Civilian Exclusion Order No. 57 of May 10, 1942, 7 Fed. Reg. 3725 (1942). Previously, DeWitt had imposed a curfew on "all enemy aliens and all persons of Japanese ancestry." *See* Public Proclamation No. 3 of March 24, 1942, 7 Fed. Reg. 2543 (1942).

112. *See* IRONS, *supra* note 109, at 207–12; *see also* Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179, 234 (1998).

113. Rostow, *supra* note 1, at 532.

114. *See* WEGLYN, *supra* note 8, at 77, 291 n.1.

115. *See* IRONS, *supra* note 109, at 208; CWRIC, *supra* note 8, at 66.

116. Korematsu v. United States, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).

117. *Id.* at 223.

118. *See supra* notes 110–114, and accompanying text; *see also* LORRAINE K. BANNAI & DALE MINAMI, INTERNMENT DURING WORLD WAR II AND LITIGATIONS, IN ASIAN AMERICANS AND THE SUPREME COURT 755, 774 (1992).

Pickering's framework discussed above,[119] the internment was a "pre-crime" measure to detain without probable cause or even reasonable suspicion, except to the extent that national origin could be equated, legally, with such suspicion. The authorities assumed that at least some persons of Japanese ancestry would be "disloyal" and, therefore, likely to engage in espionage or sabotage. National origin became a proxy for criminal predisposition.[120]

Similar presumptions have guided the United States' current War on Terror. In 2002, the Justice Department announced that its "first and overriding priority" was "to prevent, detect, disrupt, and dismantle terrorism while preserving constitutional liberties."[121] To that end, it was "engaged in an aggressive arrest and detention campaign of lawbreakers with a single objective: To get terrorists off the street before they can harm more Americans."[122] As David Cole observed, because "the Constitution prohibits detaining people on grounds of future dangerousness," Attorney General Ashcroft "resorted instead to *indirect* methods—pretextual law enforcement."[123]

Although the government refused to disclose specifics concerning the thousands incarcerated by the Justice Department in the immediate wake of the 9/11 attacks, it appears that virtually all were non-citizen men of Arab, Middle Eastern, or South Asian origin.[124] In 2001 and again in 2004, the FBI and immigration authorities intensified a program of "voluntary" interviews, targeting some 8000 people selected on the basis of age, gender, and national origin.[125] This appeared to be "a threshold step in the creation of intelligence dossiers on individuals and organizations in the Muslim and Arab community."[126] By May 2003 approximately 1100 non-citizens had been detained under the Justice Department's Absconder Apprehension Initiative, which "expressly targets for prioritized deportation the 6000 Arabs and Muslims among the more than 300,000 foreign nationals" subject to orders of deportation.[127] By the end of that year, another 2870 had been detained pursuant

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119. *See supra* note 79, and accompanying text.

120. *See* IRONS, *supra* note 109, at 54.

121. Department of Justice, Unified Agenda, Dec. 9, 2002, 67 Fed. Reg. 74158-01 (2002).

122. *Id.*

123. COLE, ENEMY ALIENS: DOUBLE STANDARDS, *supra* note 2, at 23–24.

124. *See supra* notes 23–28, and accompanying text.

125. *See* Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 464–72 (2005); Fox Butterfield, *A Police Force Rebuffs F.B.I. on Querying Mideast Men*, N.Y. TIMES, Nov. 21, 2001, at B7. On the problems such interviews can later pose in the naturalization process, see Heena Musabji & Christina Abraham, *The Threat to Civil Liberties and Its Effect on Muslims in America*, 1 DEPAUL J. FOR SOC. JUST. 83, 88–89 (2007).

126. *See* Chicago Area Organizations and Social Justice Activists Ask FBI to Make 'Spy Files' Public, ACLU of Ill., Dec. 2, 2004, http://www.aclu-il.org/news/press/2004/12/prominent_chicago_area_organiz.shtml. On pre-9/11 targeting of Muslims and Arabs, *see* Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 52–55 (1999).

127. *See DOJ Focusing on Removal of 6,000 Men from Al Qaeda Haven Countries*, 79 No. 4 INTERPRETER RELEASES 115 (2002); *see also* COLE, ENEMY ALIENS: DOUBLE STANDARDS, *supra* note 2, at 25. The measures taken against Japanese Americans during World War II also included deportations, many of which were not voluntary. *See* Korematsu. v. United States, 323 U.S. 214, 219 (1944); *see also* WEGLYN, *supra* note 8, at 253–65.

to a special registration program which applied to immigrants from "certain designated countries," all of which, with the exception of North Korea, were in North Africa, the Middle East, or South Asia, and included persons with dual citizenship.[128]

While these programs utilized immigration laws, they were not intended simply to remove "illegal aliens," but to detain them pending investigation. Rather than allowing immigration judges to release detainees on bond or allowing the detainees to leave the country, Justice Department officials kept those they deemed of "special interest" in custody until the FBI had investigated and "cleared" them of any ties to criminal or terrorist activity.[129] People detained on the basis of their ethnicity, religion, or national origin were imprisoned for pretextual reasons, presumed guilty of endangering the national security, and held until governmental investigators were satisfied of their innocence. This use of federal immigration powers to detain some 5000 persons on the pretextual basis of precluding threats to national security, but actually based on their national origin, conforms to Rostow's warning that after *Korematsu* persons of given ethnic groups could be "presumed to possess the kind of dangerous ideas which require their imprisonment."[130] Compared to the Japanese American internment, the overall number of domestic internees in the War on Terror has been smaller and more predominantly male. The government also employed this strategy in World War II, initially arresting a few thousand Japanese Americans, predominantly although not exclusively men, on the basis of individualized suspicion.[131] As Rostow observed, on the West Coast the policy of mass evacuation and internment "emerged piecemeal."[132]

In light of this history, that the government did not detain entire ethnic groups after the 9/11 attacks is less reassuring, especially in light of the widespread public hostility expressed against Muslims, Arabs, and anyone who might possibly "look like a terrorist."[133] Perhaps we have avoided that scenario thus far only because of the lack of an organized political lobby and the fact that, as of 2000, there were more than three million people of Arab descent living in the United States.[134]

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128. *See* Mary M. Sevandal, *Special Registration: Discrimination in the Name of National Security*, 8 J. GENDER RACE & JUST. 735, 737–42 (2005) (noting also that by September 30, 2003, over 290,000 Arab and Muslim non-citizens had been registered); Twibell, *supra* note 125, at 444–45.

129. COLE, ENEMY ALIENS: DOUBLE STANDARDS, *supra* note 2, at 30–35. Of the 2870 special registration detainees, only 143 were charged with crimes, "the vast majority of which were not terrorist-related." Sevandal, *supra* note 128, at 740.

130. Rostow, *supra* note 1, at 532.

131. *See* Kang, *Denying Prejudice*, *supra* note 12, at 937; *see also* Rostow, *supra* note 1, at 492–93.

132. Rostow, *supra* note 1, at 495–96. He attributed its ultimate parameters to these realities: "German and Italian aliens were too numerous to be arrested or severely confined, and they were closely connected with powerful blocs of voters. There were too many Japanese Americans in Hawaii to be moved. The 100,000 persons of Japanese descent on the West Coast thus became the chief available target for the release of frustration and aggression." *Id.* at 497.

133. *See* William B. Rubenstein, *The Real Story of U.S. Hate Crimes Statistics: An Empirical Analysis*, 78 TUL. L. REV. 1213, 1234–40 (2004). *See generally* Margaret Chon, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215 (2005); Ahmad, *supra* note 2.

134. *See* Arab American Institute, Arab Americans: Demographics, *available at* www.aaiusa.org/arab-americans/22/demographics.

The large-scale detentions and the special registration program implemented post-9/11 fit particularly well into a detention model proposed in 1986 in a secret National Security Decision Directive issued by President Ronald Reagan.[135] Reagan's directive authorized the creation of an interagency Alien Border Control Committee whose mission was to ensure that "terrorists" did not enter or remain in the United States.[136] According to Susan Akram, one strategy considered by the Committee was

> to implement a "registry and processing procedure" to keep information on aliens in the United States. Under this proposal, the CIA, FBI, and other agencies were to "immediately provide" the [Immigration and Naturalization Service ("INS")] with "names, nationalities and other identifying data and evidence relating to alien undesirables and suspected terrorists believed to be in . . . the U.S."[137]

Another proposal, entitled "Alien Terrorists and Undesirables: A Contingency Plan," suggested using immigration laws "to apprehend and detain aliens from designated countries—all of them, except Iran, being Arab countries," and suggested "a strategy of detaining aliens apprehended 'as a result of any special projects undertaken by INS.'"[138]

In the context of preventive detention, "[p]re-crime laws and the coercive measures that travel with them mobilize prejudice around identity and lead to intensified politicization of policing and law."[139] Because specific evidence of criminal activity is not available, "'race,' ethnicity and religion are used as proxies for risk."[140] Governmental reliance upon such proxies lends credibility to the profiling of persons on the basis of presumed race, national origin, or religion by local law enforcement agencies, private businesses, and vigilante groups. As the courts have upheld not only the government's programs of preventive detention and interrogation but the private sector's use of similar criteria,[141] popular prejudices are reinforced and the likelihood of hate crimes increases as

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135. Akram, *supra* note 126, at 93 (identifying the document as National Security Decision Directive 207). Tellingly, the directive only became public as a result of FOIA requests filed in conjunction with litigation concerning a group of Palestinians known as the "LA 8" whom the government was attempting to deport because of their criticism of U.S. foreign policy. *See* David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J. L. & RELIG. 267, 285–86 (2000–2001).

136. Akram, *supra* note 126, at 93. On an earlier "anti-terror" campaign targeting Arabs in the United States during the administration of Richard Nixon, see Akram & Johnson, *supra* note 4, at 314.

137. Akram, *supra* note 126, at 93–94.

138. *Id.* at 94.

139. McCulloch & Pickering, *supra* note 79, at 635.

140. *Id.*

141. *See, e.g.*, Dasrath v. Continental Airlines, Inc., 467 F.Supp. 2d 431 (2006) (granting summary judgment for airline in discrimination case, on the grounds that the airline's decision to remove plaintiff was reasonable). *See generally* Elbert Lin, Case Comment, *Korematsu Continued . . . Dasrath v. Continental Airlines, Inc., 228 F. Supp. 2d 531 (D.N.J. 2002),* 112 YALE L.J. 1911 (2003) (discussing the similarities between the court's logic in assessing the threat and the Supreme Court's reasoning in *Korematsu*).

well.[142] Girardeau Spann observes that the "liberty costs" of countering terrorism have, in essence, been diverted onto racial, ethnic, and religious minorities.[143]

D. Expanding Executive Power, Again

The War on Terror has been marked by the consistent expansion of executive power, an issue identified by Rostow as one of the most problematic legacies of the internment. The George W. Bush administration relied upon a conception of the "unitary executive" which came to mean, in Robert Sloane's terms, "a broad (many would say exorbitant) scope of purportedly inherent executive power, the pedigree of which is frequently unclear."[144] Rather than restraining the executive branch, Congress has consistently passed legislation enabling it, and the Supreme Court has been reluctant to intervene.

1. Assertions of an Executive Power to Detain and Interrogate

The expanded version of the "unitary executive" appears on many fronts of the War on Terror, most visibly, perhaps, in the Bush administration's defense of the torture of detainees. In the now-famous "torture memos" of August 2002, Deputy Assistant Attorney General John Yoo and Assistant Attorney General Jay Bybee, both in the White House Office of Legal Counsel, argued that the conduct of U.S. interrogators could not be classified as a war crime because the president had asserted that the Geneva Conventions did not apply to al Qaeda,[145] and that "courts and prosecutors should reject prosecutions that apply federal criminal laws to activity that is authorized pursuant to one of the President's constitutional powers."[146] In other words, the power claimed by the executive was not to be constrained by domestic or international law.[147] Nor was it to be checked by other branches of the federal government for "[c]ongressional

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142. *See* Girardeau A. Spann, *Terror and Race*, 45 WASHBURN L.J. 89, 98 (2005); Akram & Johnson, *supra* note 4, at 313–36. *See generally* Margaret Chon, *Walking While Muslim*, 68 LAW & CONTEMP. PROBS. 215 (2005).

143. Spann, *supra* note 142, at 98. Michael L. Krenn, *"America's Face to the World": The Department of State, Arab-Americans, and Diversity in the Wake of 9/11*, 7 J. GENDER, RACE & JUST. 149, 153–55 (2003); *see also* Lindsay N. Wise, *People Not Equal: A Glimpse Into the Use of Profiling and the Effect a Pending U.N. Human Rights Committee Case May Have on United States' Policy*, 14 WASH & LEE J. CIVIL RTS. & SOC. JUST. 303, 305–10 (2008). *See generally* Dalia Hashad, *Stolen Freedoms: Arabs, Muslims and South Asians in the Wake of Post 9/11 Backlash*, 81 DENV. U. L. REV. 735 (2004).

144. Robert D. Sloane, *The Scope of Executive Power in the Twenty-First Century: An Introduction*, 88 B.U. L. REV. 341, 343–44 (2008). *See generally* Karl Manheim & Allan Ides, *The Unitary Executive*, L.A. LAWYER, Sept. 29, 2006, at 24 (providing historical overview of such claims); Steven G. Calabresi, *The Unitary Executive, Jurisdiction Stripping, and the Hamdan Opinions: A Textualist Response to Justice Scalia*, 107 COLUM. L. REV. 1002 (2007) (arguing that the executive power "vesting clause" found in Article II of the Constitution cannot be used, even with congressional support, to divest the Supreme Court of its jurisdiction under Article III).

145. Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., to Alberto Gonzales, White House Counsel (Aug. 1, 2002); *see also* Owen Fiss, *The Example of America*, 119 YALE L.J. POCKET PART 1, 3 (2009); Jordan J. Paust, *Above the Law: Unlawful Executive Authorizations Regarding Detainee Treatment, Secret Renditions, Domestic Spying, and Claims to Unchecked Executive Power*, 2007 UTAH L. REV. 345, 356–59 (2007).

146. Memorandum from Jay S. Bybee, Assistant Attorney Gen., to Alberto Gonzales, White House Counsel, Aug. 1, 2002. *See also* Manheim & Ides, *supra* note 144, at 31–32.

147. *See* Manheim & Ides, *supra* note 144, at 32.

measures that would bar such practices were ruled inapplicable; interagency voices that contested this view were ignored."[148]

The executive branch asserted a prerogative to arbitrarily detain as well as interrogate.[149] Using powers claimed under the immigration laws, the Justice Department incarcerated thousands of people in the weeks and months following the 9/11 attacks.[150] By early 2002, prisoners captured in Afghanistan were being brought to hastily-constructed holding facilities at Guantánamo Bay to be interrogated and detained indefinitely.[151] The CIA established secret prisons of its own, and began a process of extrajudicial rendition, sending persons arrested in the United States to countries where they would be tortured and interrogated.[152]

The administration of Barack Obama has rescinded or modified some of these policies, but not on the grounds that they represented an unconstitutional extension of executive power.[153] In January 2009, President Obama issued an Executive Order requiring that interrogations of detainees in armed conflict comply with Army interrogation guidelines, including the Geneva Conventions.[154] Obama mandated the closing of the prison camp at Guantánamo Bay, although that promise has not been fulfilled, and he directed the CIA to close "as expeditiously as possible any detention facilities that it currently operates."[155] The president has not halted extraordinary renditions,[156] precluded future use of military commissions, nor banned the practice of "targeted

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148. Deborah Pearlstein, *The Constitution and Executive Competence in the Post-Cold War World*, 38 COL. HUM. RTS. L. REV. 547, 574 (2007).

149. *See* Stephen I. Vladeck, *The Detention Power*, YALE L. & POL'Y REV. 153, 181–95 (2004). *See generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

150. *See supra* notes 27, 127–128 and accompanying text.

151. *See* Matthew Ivey, *A Framework for Closing Guantánamo Bay*, 32 B.C. INT'L & COMP. L. REV. 353, 355–57 (2009).

152. *See* Robert Johnson, *Extraordinary Rendition: A Wrong Without a Right*, 43 U. RICH. L. REV. 1135, 1136–46 (2009); Thomas F. Berndt & Alethea M. Huyser, *Ghost Detainees: Does the Isolation and Interrogation of Detainees Violate Common Article 3 of the Geneva Conventions?* 33 WM. MITCHELL L. REV. 1717, 1719–21 (2007).

153. *See generally* John C. Crook, *President Issues Executive Order Banning Torture and CIA Prisons*, 103 AM. J. INT'L L. 331 (2009); Daphne Barak-Erez, *Terrorism Law Between the Executive and Legislative Models*, 57 AM. J. COMP. L. 877, 878 (2009) (observing that the Executive Orders issued by Obama in January 2009 did not make it clear that the Bush administration's model of waging war on terrorism was necessarily changing).

154. Exec. Order – Ensuring Lawful Interrogations (Jan., 22, 2009), *available at* www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/. *See also* Press Release, White House, Background: President Obama signs Executive Orders on Detention and Interrogation Policy (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/BACKGROUNDPresidentObamasignsExecutiveOrdersonDetentionandInterrogationPolicy/.

155. *Id.*

156. *Id. See also* Exec. Order – Review of Detention Policy Options (Jan. 22, 2009), *available at* www.whitehouse.gov/thepressoffice/ReviewofDetentionPolicyOptions (creating a Special Interagency Task Force on Detainee Disposition); Greg Miller, *CIA Retains Power to Abduct; Obama Preserves the Rendition Program, A Counter-terrorism Tool Whole Role, Officials Say, Might Expand*, L.A. TIMES, Feb. 1, 2009, at A1.

killings."[157] While the changes being made to specific programs may result in fewer instances of gross injustice, it must be noted that President Obama is simply issuing new Executive Orders and/or rescinding previous ones, not limiting the scope of executive power in any systematic way.

2. Congressional Checks on Executive Power

During World War II, Congress quickly criminalized failure to comply with military orders, funded the internment program, and subsequently passed legislation expanding the president's detention authority.[158] In the War on Terror, Congress has played a much more active role, passing hundreds of laws to implement executive policies. In the abstract, this would seem to alleviate some fears concerning the unilateral assertion of executive power, but it appears that in many instances Congress has been content to rubber stamp executive policy without careful consideration.

Perhaps the most obvious example was the rapid passage of the USA PATRIOT Act, a 342-page bill introduced on October 23, 2001, approved by both the House and Senate, and signed into law just three days later, after Attorney General Ashcroft had threatened members of Congress that the blood of future victims would be on their hands if they delayed in passing the bill.[159] Congress has been more than willing to follow the executive's lead in stripping federal courts of jurisdiction over detainees held as "enemy combatants," passing the Detainee Treatment Act, which purported to remove such detainees from the reach of the federal judiciary,[160] and the Military Commissions Act of 2006,[161] which attempted to shield the commissions from both the Geneva Conventions and federal judicial review.[162]

In both *Hamdan v. Rumsfeld* and *Boumediene v. Bush*, the Supreme Court refused to concede on the jurisdictional question, finding that detainees at Guantánamo Bay had the right to petition for writs of habeas corpus.[163] What this history indicates is that, had the Supreme Court not been willing to at least preserve its jurisdiction to hear such cases, Congress would have willingly given the executive branch free rein to indefinitely detain individuals it believed to be dangerous, and to subject them, if and when it wished, to military tribunals without the most fundamental rights of due process.

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157. *See* Ved Nanda, *Introductory Essay: International Law Implications of the United States' "War on Terror*," 37 DENV. J. INT'L L. & POL'Y 513, 515–33 (2009).

158. *See supra* notes 68, 109 and accompanying text.

159. *See* CHANG, *supra* note 27, at 43; COLE & DEMPSEY, *supra* note 95, at 151 ("It is virtually certain that not a single member of the House read the bill for which he or she voted."); *see also* Alexandria R. Harrington, *Presidential Powers Revisited: An Analysis of the Constitutional Powers of the Executive and Legislative Branches Over the Reorganization and Conduct of the Executive Branch*, 44 WILLAMETTE L. REV. 63, 81 (2007). *See generally* Beryl A. Howell, *Seven Weeks: The Making of the USA PATRIOT Act,* 72 GEO. WASH. L. REV. 1145 (2004).

160. *See* Detainee Treatment Act of 2005, Pub. L. No. 109–48, 119 Stat. 2739, 2741–43 (2005).

161. Military Commissions Act of 2006, Pub. L. No. 109–366, 120 Stat. 2600 (2006).

162. *See* Vladeck, *The Long War, supra* note 19, at 911–12.

163. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008); *see also* Vladeck, *The Long War, supra* note 19, at 912. *See generally* Marcia Pereia, *The "War on Terror" Slippery Slope Policy: Guantánamo Bay and the Abuse of Executive Power*, 15 U. MIAMI INT'L & COMP. L. REV. 389 (2008).

In the rare instances where Congress did seek to impose certain limitations on executive power, a common response of the Bush administration was to use the president's signing statements to narrow the reach of such legislation.[164] For example, the 2006 Defense Appropriations Bill, introduced by Senator John McCain, was amended to include a ban on torture. In response, the president's signing statement declared that the executive branch would construe the provision relating to the treatment of detainees "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch as Commander-in-Chief and consistent with the constitutional limitations on the judicial power." The goal of this statement was to "preclude the Federal courts from exercising subject matter jurisdiction" over judicial challenges to detention by those designated enemy combatants.[165]

3. Judicial Responses

The Supreme Court's responses to recent detentions have not differed significantly from those of the *Korematsu* Court. As the *Rasul*, *Hamdi*, *Hamdan* and *Boumediene* cases illustrate, the Supreme Court limited the Bush administration's assertion of an unconstrained prerogative to detain persons by insisting that the detainees had a right to habeas corpus.[166] However, it is not clear that the Court took any steps to narrow the precedent set by the Japanese American internment cases, for in those cases the right to petition for writs of habeas corpus was not at issue.[167] The most problematic aspect of the World War II internment decisions was the Court's refusal to review "the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."[168] Instead, as Rostow observed, "the Supreme Court undertook a review of its own intuitions. . . . There was no testimony or other evidence in the record as to the

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164. *See* Manheim & Ides, *supra* note 144, at 28 (noting that in his first six years in office George W. Bush only vetoed one bill, but attached signing statements to 130 others). *See also* Paust, *Above the Law*, *supra* note 145, at 381 (quoting signing statement accompanying 2005 Defense Appropriations Act). *See generally* Malinda Lee, *Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President's Constitutional Objections, Reservations, and Assertions of Power*, 55 UCLA L. REV. 705 (2008).

165. President's Statement on Signing of Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Hurricane Recovery, 2006 (Jun. 15, 2006). *See generally* Sofía E. Biller, *Flooded by the Lowest Ebb: Congressional Responses to Presidential Signing Statements and Executive Hostility to the Operation of Checks and Balances*, 93 IOWA L. REV. 1067 (2008); Michael T. Crabb, *"The Executive Branch Shall Construe": The Canon of Constitutional Avoidance and the Presidential Signing Statement*, 56 U. KAN. L. REV. 711 (2008).

166. *Boumediene,* 128 S.Ct. 2229; *Hamdan*, 546 U.S. 1002; Rasul v. Bush, 542 U.S. 466, (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004). *See generally* Jordan J. Paust, *Boumediene and Fundamental Principles of Constitutional Power*, 21 REG. U. L. REV. 351 (2009) (finding the Court's insistence that detainees retained a right to writs of habeas corpus as a rejection of uncontrolled executive power); *but see* Mark C. Rahdert, *Double-Checking Executive Emergency Power: Lessons From Hamdi and Hamdan*, 80 TEMP. L. REV. 451, 455 (2007) (arguing that the *Hamdi, Rasul*, and *Hamdan* cases "left the executive power baseline intact").

167. The *Hirabayashi*, *Yasui*, and *Korematsu* cases were appeals of criminal convictions and *Ex parte* Endo, 323 U.S. 283 (1944), was heard on a writ of habeas corpus. *See* IRONS, *supra* note 109, at 81–103, 135–51, 220–50, 319–41.

168. Korematsu v. United States, 323 U.S. 214, 218 (1944).

facts which governed the judgment of the military in entering the orders in question."[169]

In contemporary terms, this is referred to as "factual deference," and usually involves assertions that because the executive has access to the facts "on the ground" it is best situated to make decisions concerning issues of military necessity. Thus, White House attorneys like John Yoo "based their case for an unconstrained executive on a set of fact-intensive policy arguments about the nature of the security threats today's world presents," arguing that contemporary threats are "qualitatively different from past security threats."[170] Despite this purported reliance on the facts, concrete evidence concerning the detainees in the War on Terror has consistently been withheld on the basis of a claimed "state secrets" privilege,[171] and although President Obama has acknowledged problems with the use of the privilege, his administration has continued to invoke it.[172] Federal courts have not been any less deferential to claims of military necessity than was the *Korematsu* court.[173] In the *Hamdi* case, the government's primary claim was that the courts had no jurisdiction over Hamdi's habeas petition because he was being held by the military, but it also argued that the judiciary should simply accept the government's assertion that Hamdi was an enemy combatant.[174] The Fourth Circuit Court of Appeals deferred unquestioningly to the government, holding that "[t]he executive is best prepared to exercise the military judgment attending the capture of alleged combatants," and that judicial review of detention decisions "must not present a risk of saddling military decision-making with the panoply of encumbrances associated with civil litigation."[175] The Supreme Court's plurality opinion, written by Justice O'Connor, seemed to modify this position somewhat, rejecting the government's claim that the facts related to Hamdi's capture were undisputed, and noting "that an unchecked system of detention carries the potential to become a means for oppression and abuse."[176] Nonetheless, as Eric Yamamoto observes, "in stark contrast to the tone of most of O'Connor's

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169. Rostow, *supra* note 1, at 506–07.

170. Pearlstein, *supra* note 148, at 548.

171. *See, e.g.,* El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007) (dismissing claims for rendition and torture based upon government's assertion of state secrets privilege). *See generally* Stephanie A. Fichera, Note, *Compromising Liberty for National Security: The Need to Rein in the Executive's Use of the State-Secrets Privilege in Post-September 11 Litigation,* 62 U. MIAMI L. REV. 625 (2008); Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War on Terror*, 25 B.C. THIRD WORLD L.J. 35 (2005).

172. *See* Michael O'Connor & Celia M. Rumann, *Fanning the Flames of Hatred: Torture, Targeting, and Support for Terrorism*, 48 WASHBURN L.J. 633, 635 n.11 (2009) (noting assertion of privilege in the an extraordinary rendition case in February 2009); *see also Transcript of Obama's remarks on security,* May 21, 2009, *available at* www.upi.com/Top_News/2009/05/21/Transcript-of-Obamas-remarks-on-security/UPI-12271242924426/(noting that the privilege has been "overused" but not rejecting it).

173. *See supra* notes 166-169 and accompanying text; *see generally* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441 (2005) (critiquing the judiciary's "overwrought factual deference" in cases involving claims of military necessity).

174. *See* Robert M. Chesney, *National Security Fact Deference*, 95 VA. L. REV. 1361, 1367 (2009).

175. Hamdi v. Rumsfeld, 296 F.3d 278, 283–84 (4th Cir. 2002). Subsequently, it rejected the district court's finding that the government's declaration of facts was insufficient and refused to order an evidentiary hearing. *See* Hamdi v. Rumsfeld, 316 F.3d 450, 473 (4th Cir. 2003).

176. Hamdi v. Rumsfeld, 542 U.S. 507, 530 (2004).

opinion, the Court backed down . . . announc[ing] that 'enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict.'"[177]

In the civil suit brought by Maher Arar, who was "rendered" to Syria by U.S. officials,[178] the courts deferred to the executive branch before any facts had even been presented. The district court dismissed Arar's complaint, saying that the "task of balancing individual rights against national-security concerns is one that courts should not undertake without the guidance or the authority of the coordinate branches. . . . Those branches have the responsibility to determine whether judicial oversight is appropriate."[179] On appeal, the Second Circuit treated the case as an immigration matter, precluding any remedy[180] and prompting Owen Fiss to conclude that the judiciary thus "became complicit in the Administration's assault on the Constitution."[181]

IV. CONSTITUTIONAL ACCOUNTABILITY: THE MISSING PIECE

The dangers illustrated by the internment of Japanese Americans during World War II appear to be alive and well in post-9/11 America. If we wish to transform that reality, we cannot limit ourselves to resisting each new iteration of this pattern in a piecemeal fashion. Appealing to Congress, the executive, or even the courts to curb particular "excesses" or to enforce specific constitutional guarantees in a more effective manner still leaves Justice Jackson's "loaded weapon" available to those who would utilize it in the future. This brings us to what I believe may be the most dangerous legacy of the Japanese American internment—the failure of all branches of government to acknowledge what actually happened, to take effective remedial measures, or to hold to account those responsible for acknowledged injustices.

As Jerry Kang has documented, the Supreme Court did a remarkable job in the internment cases of "[letting] the military do what it will, keep[ing] its own hands clean, and forg[ing] plausible deniability for others."[182] Although the cases were self-evidently about the constitutionality of the detentions, the Court limited its holding in the *Yasui* and *Hirabayashi* cases to the legality of the

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177. Eric Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 LAW & CONTEMP. PROBS. 285, 325 (2005) (quoting *Hamdi*, 542 U.S. at 533). Similarly, in *United States v. Lindh*, the district court found that John Walker Lindh's claim to prisoner of war status was reviewable, but noted that the president's factual decision should be given great deference and rejected the claim. 212 F. Supp. 2d 541 (E.D. Va. 2002); *see also* Chesney, *supra* note 174, at 1373–76.

178. *See* Arar v. Ashcroft, 532 F.3d 157 (2d Cir. 2008); Arar v. Ashcroft, 414 F.Supp. 2d 250 (E.D.N.Y. 2006); Nanda, *supra* note 154, at 530–31. *See generally* COMMISSION OF INQUIRY, *supra* note 89.

179. *Arar*, 414 F. Supp. 2d. at 283.

180. *See* Nanda, *supra* note 157, at 531; *see also Arar v. Ashcroft*, 532 F.3d at 163.

181. Fiss, *Example of America*, *supra* note 145. On the Supreme Court's abdication of responsibility by virtue of refusing to hear critical cases, *see* Vladeck, *Long War*, *supra* note 19, at 913–17. *See generally* Linda Greenhouse, *The Mystery of Guantánamo Bay*, 27 BERKELEY J. INT'L L. 1 (2009) (summarizing this history of executive actions and judicial responses).

182. Kang, *Denying Prejudice, supra* note 12, at 965.

curfew,[183] and in *Korematsu* it bypassed the question of internment, approving the exclusion order as an extension of the curfew upheld in *Hirabayashi*.[184] "This segmentation technique allowed the Court to obscure its own agency and thereby minimize responsibility for its choice."[185]

In ex parte *Endo*,[186] decided at the same time as *Korematsu*, the issue of internment could no longer be avoided, for the only question was whether the government could continue to detain a U.S. citizen whom it conceded was "loyal." The Court, which waited to issue its decision until President Franklin Roosevelt had been safely re-elected,[187] found Mitsuye Endo's continued detention unlawful, but managed to absolve both Congress and the president by claiming that the War Relocation Authority ("WRA") had not been authorized to detain Endo.[188] In turn, the lower federal court decisions vacating the convictions of Gordon Hirabayashi and Fred Korematsu held that the Supreme Court would have ruled differently in the 1940s, had the justices been aware that they were being misled by the government's lawyers.[189]

More than forty years after the fact, the Civil Liberties Act attributed the internment to a combination of wartime hysteria, racial prejudice, and a failure of political leadership. This legislation also provided an apology and $20,000 in compensation to each surviving internee.[190] Despite the historic significance of this Act, and the enormous importance of the redress process to individual survivors and to the Japanese American community as a whole,[191] the fact that the legislative debate and the apology it produced were couched in terms of the wholesale loyalty of Japanese Americans is problematic.[192] Chris Iijima observed that, "[w]hile there was general agreement, at least rhetorically, on the injustice of the internment . . . [t]hose who, at the time of internment, saw it for the injustice and outrage that it was and chose to dissent continue to be silenced and unheralded even during the process of acknowledging their prescience."[193] As I

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183. *See* Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S. 80 (1943).

184. *See* Korematsu v. United States, 323 U.S. 214, 247 (1944).

185. Kang, *Denying Prejudice, supra* note 12, at 955.

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

187. *See* IRONS, *supra* note 109, at 344–45.

188. Kang, *Watching the Watchers*, *supra* note 14, at 260.

189. *See id.* at 263; Kang, *Denying Prejudice*, *supra* note 12, at 986; *see also* Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985); Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

190. Civil Liberties Act of 1988, *supra* note 13 ("As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."). On the fallacy of the "wartime hysteria" argument, *see* SAITO, CHINESE EXCLUSION, *supra* note 5, at 68–78.

191. *See generally* Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations,* 20 DENV. J. INT'L L. & POL'Y 223 (1992).

192. *See generally* Chris K. Iijima, *Reparations and the Model Minority Ideology of Acquiescence: The Necessity to Refuse to Return to the Original Humiliation*, 19 B.C. THIRD WORLD L.J. 385 (1998); Natsu Taylor Saito, *Beyond Reparations: Accommodating Wrongs or Honoring Resistance?*, 1 HASTINGS RACE & POV. L.J. 27 (2003).

193. Iijima, *Reparations*, *supra* note 192, at 394.

have argued elsewhere, the larger message that Congress seemingly intended to convey was that Japanese Americans should be rewarded for cooperating in our own incarceration, *not* that a wrong which should have been more widely resisted had occurred.[194]

This Article began with Eugene Rostow's question: "What are we to think of our own part in a program which violates every democratic social value, yet has been approved by the Congress, the President and the Supreme Court?"[195] Answering this question requires us to look not only at whether the institutions of government fulfilled their responsibilities under the Constitution, but whether the individual actors involved have been held accountable.

In the case of the Japanese American internment, it seems quite clear that those most responsible were well-rewarded. Lieutenant General John L. DeWitt, who falsely claimed that evacuation of Japanese Americans from the West Coast was necessary despite the fact that the War Department had determined that there was "no threat of imminent attack," and whose *Final Report* stated plainly that time was *not* an issue in assessing the loyalty of Japanese Americans,[196] was subsequently appointed Commandant of the Army and Navy Staff College and, after his retirement, promoted to full general by a special act of Congress.[197] Karl Bendetsen, the primary architect of the internment and author of DeWitt's *Final Report*, was appointed Assistant Secretary of the Army in 1950 and Undersecretary in 1952, before leaving government to become a corporate executive.[198]

Attorney General Francis Biddle, who was well aware of the problems with DeWitt's report, went on to represent the United States at the Nuremberg Tribunal and later became a member of the Permanent Court of Arbitration at the Hague.[199] Because DeWitt's arguments contradicted the government's position that evacuation was necessary as there was insufficient time to conduct loyalty hearings, Assistant Secretary of War John J. McCloy ensured that the version of the *Final Report* made available to the Supreme Court was revised to eliminate the problematic language.[200] He went on to become the founding president of the International Bank for Reconstruction and Development ("The

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194. *See* Saito, *Beyond Reparations*, *supra* note 192, at 39.

195. *See* Rostow, *supra* note 1 and accompanying text.

196. *See* IRONS, *supra* note 109, at 208; CWRIC, *supra* note 8, at 66.

197. *See* John Lesesne DeWitt, Arlington National Cemetery Website, *available at* www.arlingtoncemetery.net/jldewitt.htm.

198. *See generally* KLANCY CLARK DE NEVERS, THE COLONEL AND THE PACIFIST: KARL BENDETSEN, PERRY SAITO, AND THE INCARCERATION OF JAPANESE AMERICANS DURING WORLD WAR II 103–09, 204–16, 266–68 (2004).

199. *See* IRONS, *supra* note 109, at 280–84; *Francis Beverly Biddle*, in BIOGRAPHICAL DIRECTORY OF THE UNITED STATES EXECUTIVE BRANCH, 1774–1989 28 (Robert Sobel, ed., 1990); *see also* FRANCIS BIDDLE, IN BRIEF AUTHORITY: FROM THE YEARS WITH ROOSEVELT TO THE NÜRNBERG TRIAL 369–74 (1962).

200. *See* CWRIC, *supra* note 8, at 83 (quoting memorandum of February 12, 1942 from Attorney General Francis Biddle to Secretary of War Henry Stimson); IRONS, *supra* note 109, at 207–12; *see also* J.L. DEWITT, FINAL REPORT: JAPANESE EVACUATION FROM THE WEST COAST 1942 (1943); Gott, *supra* note 112, at 234.

World Bank") and, later, a senior advisor to President Reagan.[201] The Justice Department's liaison to the WRA, Tom C. Clark, was first appointed Attorney General and eventually became a justice on the Supreme Court.[202]

Part of the government's legal strategy was to avoid disputes about the accuracy of the military's assessments by having the courts take judicial notice of "facts" that were based upon unfounded presumptions about race and culture.[203] In turn, many of these "facts" had been generated by the media, most notably the press controlled by William Randolph Hearst,[204] and groups such as the Native Sons of the Golden West, an organization dedicated to preserving California "as it has always been and as God himself intended it shall always be—the White Man's Paradise."[205] In 1942, Earl Warren, then-Attorney General of California and a member of the Native Sons, coached the California Joint Immigration Committee—formerly known as the Asiatic Exclusion League—on how "to persuade the federal government that all ethnic Japanese should be excluded from the West Coast."[206] According to the CWRIC, "In DeWitt's *Final Report,* much of Warren's presentation to the [congressional committee preparing legislation to criminalize non-compliance with the military orders] was repeated virtually verbatim, without attribution. Warren's arguments, presented after the signing of the Executive Order, became the central justifications presented by DeWitt for the evacuation."[207] Subsequently Warren was elected Governor of California in November 1942, twice reelected, and appointed Chief Justice of the Supreme Court in 1953.[208]

Even government attorneys who opposed the internment acquiesced in its implementation and participated in its defense. Edward Ennis, Director of the Alien Enemy Unit of the Justice Department, and Assistant Attorney General James R. Rowe Jr. both recognized the factual inaccuracies and constitutional problems inherent to the government's arguments of "military necessity." Nonetheless, as Rowe later stated, he managed to "convince Ennis that it was not important enough to make him quit his job."[209]

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201. *See* Obituary, *John J. McCloy, Lawyer and Diplomat, Is Dead at 93,* N.Y. TIMES, Mar. 12, 1989, *available at* www.nytimes.com/1989/03/12/obituaries/john-j-mccloy-lawyer-and-diplomat-is-dead-at-93.html; *see generally* KAI BIRD, THE CHAIRMAN: JOHN J. MCCLOY AND THE MAKING OF THE AMERICAN ESTABLISHMENT (1992).

202. *See Tom Campbell Clark*, *in* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 112–19 (Melvin I. Urofsky, ed., 1994).

203. *See* IRONS, *supra* note 109, at 137–40.

204. ROGER DANIELS, CONCENTRATION CAMPS, U.S.A.: JAPANESE AMERICANS AND WORLD WAR II 32–33 (1980).

205. *See* CWRIC, *supra* note 8, at 364 n.41.

206. *See* MORTON GRODZINS, AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION 44–47 (1949); *see also* ROGER DANIELS, THE POLITICS OF PREJUDICE: THE ANTI-JAPANESE MOVEMENT IN CALIFORNIA AND THE STRUGGLE FOR JAPANESE EXCLUSION 24–29 (1968); CWRIC, *supra* note 8, at 33.

207. *See* CWRIC, *supra* note 8, at 98. On Warren's role, see also Boris I. Bittker, *Eugene V. Rostow*, 94 YALE L.J. 1315, 1319–20 (1985).

208. *See* Sumi K. Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption,* 40 B.C. L. REV. 73, 19 B.C. THIRD WORLD L.J. 73 (joint issue, 1998).

209. Quoted in IRONS, *supra* note 109, at 62. Asked in 1981 about Stimson's and McCloy's defense of the internment, Ennis responded, "These guys just acted as attorneys for the military authorities

With this sort of record, why would any public official, military leader, or government employee be deterred from engaging in comparable behavior? It remains unclear whether any officials will be held responsible for the detentions, abuse, and torture associated with the War on Terror that has been waged by the United States since 2001, but the signs are not propitious.

The American-Arab Anti-Discrimination Committee called for the removal of Civil Rights Commissioner Kirsanow following his defense of internment in 2002.[210] He was not removed, although apparently he did apologize, insisting that his remarks had been taken out of context.[211] In January 2006, while Congress was in recess, President Bush appointed Kirsanow to the National Labor Relations Board.[212] Congressman Coble expressed his "regret" that "many Japanese and Arab Americans found my choice of words offensive," but ignored calls for his resignation as chair of the subcommittee on terrorism.[213]

CIA Director "Leon Panetta announced at his confirmation hearing that CIA agents that engaged in torture, including waterboarding, in the early phases of the war against terrorism, would not be criminally prosecuted."[214] In fact, attorneys in the Obama administration have continued to rely "on the state secret doctrine and thus seem prepared to confer de facto immunity on the CIA for constitutional wrongs as gross as those entailed in extraordinary rendition."[215] According to Attorney General Eric Holder, "It would be unfair to prosecute dedicated men and women working to protect America for conduct that was sanctioned in advance by the Justice Department."[216]

It appears unlikely that those who sanctioned the illegal or unconstitutional programs will be prosecuted. As Jordon Paust observed in 2007, the administration of George W. Bush had "furthered a general policy of impunity by refusing to prosecute any person of any nationality under the War Crimes Act or alternative legislation, the torture statute, genocide legislation, and legislation permitting prosecution of certain civilians employed by or accompanying U.S. military forces abroad."[217] Shortly after Jay Bybee issued his torture memorandum in August 2002, President Bush appointed him to the Ninth Circuit Court of Appeals, and he was confirmed in March 2003.[218] John Yoo, who

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and gave them whatever they asked for without any independent determination of its propriety . . . ." *Id.* at 350.

210. *See* Press Release, Press Release, Am.-Arab Anti-Discrimination Comm., *supra* note 29.

211. *See* Guillermo, *supra* note 29.

212. *See* U.S. Comm'n on Civil Rights, Comm'r Kirsanow, http://www.usccr.gov/cos/bio/kirsanow.htm. *See also* Michael T. Kirkpatrick and Margaret B. Kwoka, *Title VI Disparate Impact Claims Would Not Harm National Security – A Response to Paul Taylor*, 46 HARV. J. LEGIS. 503, 531 (2009).

213. *See California Legislature Rebukes, supra* note 30. In 2008 he was reelected to a thirteenth term in the House of Representatives. *See* Official Biography of Congressman Howard Coble, http://coble.house.gov/Biography (last visited May 5, 2010).

214. Fiss, *supra* note 145, at 18.

215. *Id.* (citing Audio Recording: Oral Argument, Mohamed v. Jeppesen Dataplan, Inc., No. 08-15693 (9th Cir. 2009).

216. Quoted in Jennifer Loven & Devlin Barrett, *No charges for CIA torture*, DESERET MORNING NEWS, April 17, 2009, at A01.

217. Paust, *Above the Law*, *supra* note 145, at 367–68 (citations omitted).

218. *See* Manheim & Ides, *supra* note 144, at 31 n.69.

drafted the torture memos, has returned to his law professorship at Boalt Hall.[219] The Obama Justice Department has rejected recommendations of ethics investigators concerning violations of professional standards by Bybee and Yoo.[220] Although President Obama's January 22 Executive Order "prohibits reliance on any Department of Justice or other legal advice concerning interrogation that was issued between September 11, 2001 and January 20, 2009,"[221] when questioned about possible prosecutions for torture, he has only emphasized the importance of looking forward, not backward.[222] As things stand, then, there is no reasonable prospect of legal remedies for any of the wrongs associated with the so-called War on Terror.

I believe we, as lawyers and legal scholars, have responsibilities distinct from those of documentary historians or moral theorists. It is a central tenet of the rule of law that legal rights without remedies are meaningless.[223] If the legal system has permitted or facilitated legal wrongs, we have an obligation to ensure that effective remedies are implemented. In other words, it is necessary to address the question of accountability for injustice and, where there are consistent patterns replicating injustices, we must acknowledge that the remedies thus far employed have been inadequate. Otherwise, we are engaging not in legal analysis but alchemy.

The injustices of the Japanese American internment were belatedly acknowledged and partial redress provided to some of its victims, but even these measures were couched in terms which exonerated the institutional and individual actors responsible for the wrongs at issue. This left the door open for the dangers posed by the internment to be replicated in the current War on Terror, and our failure to hold those accountable for contemporaneous wrongs will ensure that they, too, will be repeated in the future.

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219. *See* Irene Baghoomians, Book Review, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning by Frederick Schauer*, 31 SYDNEY L. REV. 499, 500 (2009); *Groups Seek Bush Lawyers' Disbarment*, RECORDER (SAN FRANCISCO), May 19, 2009, at 11.

220. *See* Carrie Johnson, *Justice Department Decision on Terror Memos Sparks Legal Debate*, WASH. POST, February 21, 2010.

221. Exec. Order, *supra* note 154.

222. *See* Editorial, Paul Krugman, *Reclaiming America's Soul*, N.Y. TIMES, April 24, 2009, at A27 (quoting Obama, "Nothing will be gained by spending our time and energy laying blame for the past.").

223. *See generally* Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights in the Federal Courts*, 38 HASTINGS L.J. 665 (1987).