INTERNING THE "NON-ALIEN" OTHER: THE ILLUSORY PROTECTIONS OF CITIZENSHIP

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I

INTRODUCTION

> *Korematsu* remains on the pages of our legal and political history. As a legal precedent is it now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to protect all citizens from the petty fears and prejudices that are so easily aroused.
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> Judge Marilyn Hall Patel, *Korematsu v. United States* (1984)[1]

With these words, Federal District Judge Marilyn Patel granted Fred Korematsu's petition for a writ of *coram nobis* and, forty years after the fact, vacated his conviction for refusing to comply with the evacuation order under which all persons of Japanese descent on the West Coast, two-thirds of them U.S.-born citizens, were interned during World War II. Neither Judge Patel nor the Ninth Circuit Court of Appeals that subsequently vacated Gordon Hirabayashi's conviction for violating the curfew and evacuation orders[2] had the power to overturn the precedents set by the Supreme Court in 1943 and 1944, when it affirmed the convictions and thus legitimated the mass incarceration of a people

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1. Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). On the *coram nobis* cases, see generally JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter Irons ed., 1989).

2. Hirabayashi v. United States, 828 F. 2d 591 (9th Cir. 1987).

based on national origin.[3] However, as Judge Patel noted, by the mid-1980s legal scholars and even Supreme Court justices had described the original *Korematsu* decision as "an anachronism,"[4] and U.S. government lawyers in the *coram nobis* case had agreed with the findings of the Commission on Wartime Relocation and Internment of Civilians (CWRIC), established by Congress in 1980, that "the decision in *Korematsu* lies overruled in the court of history."[5]

Nonetheless, as law professor Fred Yen warned in 1998, "[u]nfortunately, proclamations of *Korematsu*'s permanent discrediting are premature."[6] As we have seen since the September 11 attacks on the Pentagon and World Trade Center, Muslims and those of Arab or Middle Eastern descent have been detained and deported by the thousands[7] and the mass internment of civilians in the United States has resurfaced as a viable option in the "war on terror."[8] In addition, at least two U.S.-born citizens, Yaser Esam Hamdi and Jose Padilla, also known as Abdullah al-Muhajir, have been held without charge for nearly three years on the government's unsupported assertion that they are "enemy combatants."[9] While the U.S. government has been understandably reluctant to invoke the Supreme Court's holdings in the Japanese American internment cases, these are the precedents on which it must ultimately rely to justify holding Hamdi and Padilla indefinitely in what are essentially one-person internment camps.[10]

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3. Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943); and Korematsu v. United States, 323 U.S. 214 (1944). For an excellent analysis and critique of these cases, see Eugene V. Rostow, *The Japanese American Cases: A Disaster,* 54 YALE L. J. 489 (1945); for their history, see generally PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES (1993). Minoru Yasui's petition for a writ of *coram nobis* was dismissed by Federal District Judge Belloni in Portland; Yasui died before his appeal could be heard by the Ninth Circuit, and the Supreme Court refused to review the case. *See* IRONS, JUSTICE DELAYED, *supra* note 1, at 27-30.

4. Korematsu v. United States, 584 F. Supp. at 1420.

5. *Id*.

6. Alfred C. Yen, *Praising with Faint Damnation—The Troubling Rehabilitation of* Korematsu*,* 40 B.C. L. REV. / 19 B.C. THIRD WORLD L.J. (joint issue) 1, 2 (1998). On the "dark side" of the *coram nobis* opinions, particularly how they serve to absolve the judiciary of any responsibility for the internment, see generally Jerry Kang, *Denying Prejudice: Internment, Redress and Denial*, 51 UCLA L. REV. 933 (2004).

7. *See generally* DAVID COLE, ENEMY ALIENS: DOUBLE STANDARDS AND CONSTITUTIONAL FREEDOMS IN THE WAR ON TERRORISM (2003); NANCY CHANG, SILENCING POLITICAL DISSENT: HOW POST-SEPTEMBER 11 ANTI-TERRORISM MEASURES THREATEN OUR CIVIL LIBERTIES (2002).

8. For example, Representative Howard Coble, R-N.C., chair of the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security, said, in response to a radio program caller's suggestion that Arabs be interned, that the World War II camps were established to "protect" Japanese Americans, adding that some Japanese Americans were "probably intent on doing harm to us just as some of these Arab-Americans are probably intent on doing harm to us." Associated Press, *N.C. Rep.: WWII Internment Camps Were Meant to Help*, (Feb. 5, 2003), *available at* http://www.foxnews.com/story/0,2933,77677,00.html. *See also* Jonathan Turley, *Camp for Citizens: Ashcroft's Hellish Vision; Attorney general shows himself as a menace to liberty*, LOS ANGELES TIMES, Aug. 14, 2002, at B11.

9. *See infra* notes 188-205, 2232-28 and accompanying text.

10. *See* 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, 119, n.50 (2004) (noting that in dismissing Hamdi's appeal, "the Fourth Circuit failed to cite *Korematsu*, a clearly analo-

As Judge Patel's opinion illustrates, in recent decades the Japanese American internment has been widely viewed as an unfortunate—if understandable—"mistake" made in times of war, an aberration from the norm of constitutional protection that has been acknowledged as unjust and that was remedied by the official apology and compensation provided survivors under the Civil Liberties Act of 1988.[11] However, if recent actions taken in the name of fighting terrorism are considered within the broader context of the United States' history of interning those deemed "Other," we must recognize that this "mistake" has not been remedied in any structural sense. Instead, it takes its place in a long and on-going history of the use of internment as a tool for controlling the Other.

The Japanese American experience is but one example of how those deemed Other by virtue of race, ethnicity, national origin or political ideology have been and continue to be conflated with those who are Other by virtue of alienage. This is not surprising, given that until the passage of the Fourteenth Amendment in 1868, U.S. citizenship was restricted to those of exclusively European descent. After that, citizenship was extended to most persons born in the territory regardless of race,[12] but racial restrictions on naturalized citizenship were not entirely eliminated until 1952.[13] As a result, we live with the contradiction between the presumption that *real* Americans are "white" and the fact that many people of color are U.S. citizens.

Discussions of both the World War II internment and the post-September 11 detentions often focus on the citizen-alien distinction, implying, at least implicitly, that the *real* danger in allowing aliens to be denied due process of law is the likelihood that citizens, too, will be similarly mistreated.[14] While this argument may have its tactical uses—it is, after all, an appeal to the immediate self-interest of those presumed to have the most influence over government policy—it reinforces the notion that the citizenry as a whole is generally protected

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gous case, perhaps because of *Korematsu*'s troubled legacy and reputation. . . . Completely undiscussed was the fact that Hamdi's constitutional protections were suspended on the very grounds that the internment had been justified: military security."(citations omitted)).

11. Civil Liberties Act of 1988, Pub. L. No. 100-383, 102 Stat. 903, codified at 50 U.S.C. § 1989 (2000). *See generally* LESLIE T. HATAMIYA, RIGHTING A WRONG: JAPANESE AMERICANS AND THE PASSAGE OF THE CIVIL LIBERTIES ACT OF 1988 (1993).

12. U.S. CONST., amend. XIV, § 1. In *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), the Supreme Court held that a child born to Chinese parents was a citizen, confirming that citizenship resulting from birth in the territory was not restricted by race. However, in *Elk v. Wilkins*, the Court held that American Indians did not acquire birthright citizenship because they were not "subject to the jurisdiction" of the United States. 112 U.S. 94, 95 (1884).

13. The Naturalization Act of 1790, 1 Stat. 103 (repealed by the Act of January 19, 1795, which reenacted most of its provisions, including its racial restrictions), limited naturalized citizenship to "free white persons." In 1870 this was amended to include persons of "African nativity or descent," Act of July 14, 1870, ch. 255, § 7, 16 Stat. 254, but most Asians remained barred from naturalized citizenship until the 1930s. Japanese could not naturalize until passage of the Immigration and Nationality (McCarran-Walter) Act, ch. 477, 66 Stat. 163 (1952). On the history of these racial prerequisites to citizenship, see generally IAN F. HANEY LOPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE (1996).

14. *See* COLE, ENEMY ALIENS, *supra* note 7 (making this point as well as a broader argument based on law and morality for respecting the fundamental rights of all persons).

by governmental action taken in the name of national security. In other words, it encourages us to believe that when the U.S. government takes action to protect "us," the "we" at issue is comprised of all Americans. This, in turn, makes it easier to disregard the extent to which the government exercises jurisdiction over large groups of people deemed Other, both citizens and noncitizens, without extending to them the protections guaranteed by law.

The fundamental human rights embodied in both the Constitution and in international law apply to *all* persons; by framing the discussion in terms of distinctions between the rights of citizens and aliens, we lose sight of the reality that, throughout U.S. history, those who have been deemed Other, regardless of citizenship, have routinely been denied due process of law and have frequently been subjected to mass internment. During World War II the evacuation orders were directed at all persons of Japanese ancestry, "alien and non-alien."[15] The latter term, of course, referred to the Nisei, or second generation, U.S. citizens by birth. The history of internments in the United States sheds light on the reality that many who hold U.S. citizenship are best described as "non-aliens," unprotected by any other sovereign yet still considered foreign" and easily transformed into "the enemy."[16]

II

ALL PERSONS OF JAPANESE ANCESTRY, ALIEN AND NON-ALIEN

> It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty. . . . 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.
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> *United States v. Korematsu* (1944)[17]

By the time Pearl Harbor was attacked on December 7, 1941, Japanese American communities both on the mainland and in Hawai`i had long been under surveillance by the Federal Bureau of Investigation (FBI) and the Office of Naval Intelligence (ONI). Together with the State Department, these agencies concluded that the Japanese government was much more likely to use "Occidentals" than "its own people" as operatives.[18] Indeed, according to a report

15. *See, e.g.*, Civilian Exclusion Order No. 57, 7 Fed. Reg. 3725 (May 19, 1942). This concept is also illustrated by Lt. Gen. John L. DeWitt's Public Proclamation No. 3 of March 24, 1942, which imposed a curfew on "all enemy aliens and all persons of Japanese ancestry" within designated military areas. 7 Fed. Reg. 2543 (1942).

16. On "foreign-ness" as integral to the racial identity of Asian Americans, see generally Neil Gotanda, *Asian American Rights and the "Miss Saigon Syndrome," in* ASIAN AMERICANS AND THE SUPREME COURT 1087 (Hyung-chan Kim ed., 1992); Keith Aoki, *"Foreign-ness" and Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes,* 4 UCLA ASIAN AM. PAC. ISLANDS L.J. 1 (1996); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreign-ness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

17. United States v. Korematsu, 323 U.S. 214, 223 (1944).

18. The terminology is from a memo from FBI Director J. Edgar Hoover to Attorney General Francis Biddle on Feb. 2, 1942. As was explained in a Nov. 1941 report prepared by Curtis B. Munson,

prepared for the White House by Curtis B. Munson, an intelligence analyst who claimed to be working for the State Department, the Nisei displayed "an almost pathetic eagerness to be Americans."[19] Many volunteered for military service, only to be turned away, classified by the War Department as "enemy aliens" ineligible to service, and many who were in the military were discharged.[20]

Despite their conclusion that the Japanese American community posed no threat to the national security, the FBI and ONI had compiled a list of approximately 1350 persons to be detained in the event of war with Japan, of whom fewer than 200 were considered to be of any actual danger. Most were community leaders, business owners, or teachers, and within three days of the attack on Pearl Harbor, virtually everyone on the list was in custody. Eventually they were given individualized hearings and either released or detained for the duration of the war. Having thus dealt with any actual security issues, the FBI, ONI, Attorney General Francis Biddle, and Curtis Munson had all concluded that there was "no Japanese 'problem' on the West Coast" and advised against mass internment.[21]

There was considerable evidence of German sabotage but no mass internment of German Americans.[22] The difference, according to Lieutenant General John L. DeWitt, in charge of the U.S. Western Defense Command, was that "[t]he Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted."[23] Testifying before a Congressional committee, DeWitt was asked about the contrasting treatment afforded Germans and Italians. He responded, "You needn't worry about the Italians at all except in certain cases. Also, the same for Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map."[24]

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a State Department specialist commissioned by President Roosevelt to assess the loyalty of the Japanese American community on the West Coast, "The Japanese are hampered as saboteurs because of their easily recognized physical appearance. It will be hard for them to get near anything to blow it up [because they have] no entrée to plants or intricate machinery. . . . There is far more danger from [whites] than from Japanese." A copy of "The Munson Report" is included in U.S. Congress, *Hearings Before the Joint Committee on the Investigation of the Pearl Harbor Attack*, 79th Cong., 1st Sess. (1946).

19. MICHI NISHIMURA WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS 41 (1976).

20. *See* U.S. CONGRESS, COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 186-88 (1982) [hereinafter CWRIC, PERSONAL JUSTICE DENIED]; ERIC K. YAMAMOTO, MARGARET CHON, CAROL L. IZUMI, JERRY KANG & FRANK H. WU, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 224 (2001).

21. *See* CWRIC, PERSONAL JUSTICE DENIED, *supra* note 20, at 54-55. A similar conclusion was reached by General Delos Emmons, U.S. military governor of Hawai`i, who subsequently blocked the mass incarceration of persons of Japanese descent in Hawai`i, in large part because they were vital to the economy. *See* WEGLYN, *supra* note 19, at 46-50, 86-89.

22. CWRIC, PERSONAL JUSTICE DENIED, *supra* note 20, at 283-93.

23. *Id.* at 66.

24. *Id.*

Despite the fact that the military and civilian intelligence services had concluded that the Japanese American community posed no threat to the national security—indeed, even by war's end there was not a single confirmed incident of espionage or sabotage involving Japanese Americans[25] on February 19, 1942 President Franklin Delano Roosevelt signed Executive Order (EO) 9066, authorizing the immediate evacuation of Japanese Americans from the "militarily sensitive" coastal areas of California, Oregon and Washington states and rendering the remainder of their rights "subject to military edict."[26] Shortly thereafter, DeWitt imposed a curfew and travel restrictions on German and Italian aliens and *all* Japanese Americans. He then ordered the evacuation of "all persons of Japanese descent, alien and non-alien" on the West Coast. Under this order, even babies in orphanages were deemed threats to national security.[27]

Nearly 120,000 men and women, children, and old people were thus forced to abandon their homes, farms and businesses; store or sell their possessions on a few days' notice; and report for removal with only what they could carry. They were tagged with numbers and taken under armed guard to "assembly centers," hastily converted holding facilities such as the racetracks at Tanforan and Santa Anita, California, where they were housed in horse stalls or makeshift barracks.[28] From there they were shipped off through the desert, many on trains with darkened windows, to ten concentration camps, euphemistically designated "relocation centers," in the interior,[29] where they were held for the du-

25. *See* TETSUDEN KASHIMA, JUDGMENT WITHOUT TRIAL: JAPANESE AMERICAN IMPRISONMENT DURING WORLD WAR II 39 (1992); ROGER DANIELS, THE DECISION TO RELOCATE THE JAPANESE AMERICANS 6 (1975).

26. *See* IRONS, JUSTICE AT WAR, *supra* note 3, at 63.

27. In early April 1942 a priest running an orphanage in Los Angeles inquired of Lt. Col. Karl Bendetsen, the officer in charge of rounding up Japanese Americans, whether it was necessary to turn over children of less than one-quarter Japanese "blood" for internment. Bendetsen replied that he was "determined that if they have one drop of Japanese blood in them, they must go to a camp." *See* WEGLYN, *supra* note 19, at 77, 291 n.1. Ironically, Bendetsen, who would be promoted to Under Secretary of the Army, had gone to great lengths to conceal that he was Jewish. *See* KLANCY CLARK DE NEVERS, THE COLONEL AND THE PACIFIST: KARL BENDETSEN, PERRY SAITO, AND THE INCARCERATION OF JAPANESE AMERICANS DURING WORLD WAR II 53, 206-07, 268, 286, 304-06 (2004).

28. For a vivid description of life in the "assembly centers," see Violet de Christoforo's *Tule Lake, in* JOHN TATEISHI, AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS 125-26 (1984) (noting the unbearable smell of manure in the summer heat and the food poisoning suffered by internees).

29. Although the Congressional Commission on Wartime Relocation and Internment of Civilians (CWRIC) preferred the term "relocation center" because "concentration camp" was considered "controversial," *see* CWRIC, PERSONAL JUSTICE DENIED, *supra* note 20, at 27*n,* those implementing the internment were clear that these were concentration camps—a term not to be confused with extermination camps. Dillon S. Myer, director of the War Relocation Authority (WRA) and thus directly responsible for the camps, stated that the Moab, Utah facility was "nothing more than a concentration camp." RICHARD DRINNON, KEEPER OF CONCENTRATION CAMPS: DILLON S. MYER AND AMERICAN RACISM 62 (1987). Tom Clark, who served as the Justice Department's liaison to the WRA during the war, said upon his retirement from the Supreme Court in 1967, "We picked the [Japanese Americans] up and put them in concentration camps. That's the truth of it." WEGLYN, *supra* note

ration of the war. Many were separated from their families and all subjected to constant uncertainty about their future. Life was harsh as internees endured the desert heat, cold, and dust storms in hastily constructed wooden barracks with no privacy, poor food, inadequate health care, and very little in the way of meaningful activity, surrounded by barbed wire and armed guards.[30]

By the end of 1942, Secretary of War Henry Stimson had decided, over DeWitt's objection, to establish a segregated all-Nisei combat unit composed of volunteers determined to be loyal.[31] This led to the development of a "loyalty review program" to which all internees over the age of seventeen, men and women, U.S. and Japanese citizens, were subjected.[32] Thus, after having been arbitrarily incarcerated for eighteen months or two years on the basis of General DeWitt's assertion that it was impossible to tell the "loyal" from the "disloyal,"[33] the determination was made based on a questionnaire about internees' families, language usage, education, organizational affiliations, "American habits," dress, and customs.[34]

Questions 27 and 28 asked,

> Are you willing to serve in the armed forces of the United States on combat duty whenever ordered?
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> Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, to any other foreign government, power or organization?[35]

19, at 214. And on November 21, 1944, President Roosevelt openly stated that American citizens of Japanese descent were being "kept locked up in concentration camps." *Id*. at 217.

30. *See generally*, TATEISHI, AND JUSTICE FOR ALL, *supra* note 28. After visiting the camps in which Japanese Latin Americans were being held, Albert Clattenberg of the State Department warned that the conditions were far worse than those in which U.S. prisoners in European P.O.W. camps were being held and worried that they would subject U.S. citizens to "ruthless retaliation." *See* Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians—A Case Study*, 40 B.C. L. REV 9 /19 B.C. THIRD WORLD L.J. 275, 291 (joint issue 1998).

31. CWRIC, PERSONAL JUSTICE DENIED, *supra* note 20, at 13. This led to the formation of the 442nd Regimental Combat Team, per capita the most decorated American unit in World War II. It was awarded seven Presidential Unit Citations in barely three years. Its men garnered more than 18,000 decorations during the same period and recorded 9,486 causalities, including more than 600 killed in action. The official unit history, entitled *The Story of the 442nd Regimental Combat Team*, was prepared under Army auspices immediately after the war but never published. It is lodged in the National Archives in Washington, D.C. (Record Group 407, Stack Area 207). *See generally* CHESTER TANAKA, GO FOR BROKE: A PICTORIAL HISTORY OF THE JAPANESE AMERICAN 100TH INFANTRY BATTALION AND THE 442ND REGIMENTAL COMBAT TEAM (1982). On its less celebrated Hawaiian predecessor unit, see THOMAS D. MURPHY, AMBASSADORS IN ARMS: THE STORY OF THE 100TH BATTALION (1954).

32. CWRIC, PERSONAL JUSTICE DENIED, *supra* note 20, at 190-91.

33. *Id.* at 8. This position received widespread support, as reflected in the report prepared for Attorney General Biddle by three lawyers which stated, "Since the Occidental eye cannot readily distinguish one Japanese resident from another, effective surveillance of the movements of particular Japanese residents suspected of disloyalty is extremely difficult if not practically impossible," *quoted in* IRONS, JUSTICE AT WAR, *supra* note 3 at 54.

34. *See* WEGLYN, *supra* note 19, at 196-99.

35. *Id.* at 199.

These questions, which could only be answered "yes" or "no," caused tremendous confusion and conflict in the camps. Many Nisei who had tried to volunteer for the military were now unwilling to serve unless their constitutional rights were restored.[36] The issei, or first generation immigrants, were prohibited by the racial restriction from becoming naturalized citizens and, therefore, would be effectively rendered stateless by a "yes" answer to Question 28. Their children, in turn, were reluctant to risk family separation by answering differently from their parents.[37] Nonetheless, government authorities separated the "loyal" from the "disloyal" on the basis of this questionnaire. The "disloyal" were segregated and sent to the Tule Lake camp; some of those the government deemed loyal were given "temporary leave" clearance to take jobs or attend schools in the east or Midwest, but only if they could find sponsors and the authorities determined that there would not be "backlash" in those communities.[38] Many were detained until 1945, some longer still.[39]

Conditions were especially harsh at Tule Lake, where the 18,000 Japanese Americans who had been deemed disloyal or denied leave clearance, as well as accompanying family members, were concentrated in facilities built for 15,000. When protests—labeled "riots"—erupted over conditions in the camp, its administration was turned over to the Army, which declared martial law, engaging in midnight raids and imprisoning "troublemakers" in an isolated stockade within the camp where "human rights were all but stamped out in order that the community might be kept in ignorance of what was occurring within."[40] In response Congress amended the Nationality Act of 1940, providing for the first time a legal mechanism to renounce one's citizenship during wartime.[41] Over 5,700 Nisei renounced their citizenship, 95 percent of them from Tule Lake.[42] After the war, about 5,400 asked for restoration of U.S. citizenship on the ground that their renunciations had been obtained under duress. In a process that took years, federal courts eventually agreed and most regained their citizenship.[43]

Four Nisei brought legal challenges to the internment. Minoru ("Min") Yasui had been a second lieutenant in the U.S. Army Reserve, rejected when he

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36. *See generally* ERIC L. MULLER, FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II (2001).

37. *See* WEGLYN, *supra* note 19, at 136-40; YAMAMOTO ET AL., *supra* note 20, at 197-98.

38. *See* CWRIC, PERSONAL JUSTICE DENIED, *supra* note 20, at 202-06; WEGLYN, *supra* note 19, at 134-73.

39. Most Japanese Americans were allowed to return to the West Coast after January 1945; some continued to be held at Tule Lake until March of 1946; and some who the U.S. claimed had renounced their U.S. citizenship were held until mid-1947. *See* WEGLYN, *supra* note 19, at 260-65.

40. WEGLYN, *supra* note 19, at 166, 156-73.

41. Renunciation Act of 1944, Pub. L. No. 405 (1944), amending the Nationality Act of 1940, 54 Stat. 1137 (1941); *see generally* Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among "We the People,"* 76 OR. L. REV. 233 (1997).

42. YAMAMOTO ET AL., *supra* note 20, at 227.

43. *See, eg.,* Acheson v. Murakami, 176 F.2d 953 (9th Cir. 1949) (holding renunciations void as a result of fear, intimidation and coercion); McGrath v. Abo, 186 F.2d 766 (9th Cir. 1951) (finding a rebuttable presumption that the renunciations were involuntary).

volunteered for active duty immediately after Pearl Harbor. Yasui turned himself in to the police in Portland, Oregon, as soon as criminal penalties for violation of the Army's curfew order targeting Japanese Americans took effect on March 28, 1942. An attorney as well as an army officer, Yasui took this action to test the order's constitutionality.[44] Convicted of violating the curfew, he was sentenced to a year in prison. The district court also held that Yasui had forfeited his U.S. citizenship because of a prewar position he held at the Japanese consulate in Chicago. "Although [Judge] Fee acknowledged that Japanese law conferred on Yasui the right of election of citizenship at the age of majority, and that the record disclosed no such election of Japanese citizenship, he found more persuasive 'the nativity of his parents and the subtle nuances of traditional mores engrained in his race by centuries of social discipline.'"[45]

On May 16, 1942, rather than reporting for relocation, Gordon Hirabayashi, a Quaker and pacifist, turned himself in to the FBI in Seattle[46] and was subsequently found guilty of violating both the evacuation order and an order imposing a curfew on Japanese Americans.[47] He appealed, challenging the constitutionality of both orders. On June 21, 1943, the Supreme Court unanimously upheld Hirabayashi's conviction for violating the curfew, ruling that the curfew was a reasonable exercise of Congress' and the Executive's power to wage war, and that its imposition against only persons of Japanese ancestry did not violate the Fifth Amendment's guarantee of due process. The Court carefully avoided addressing the evacuation, stating that it was unnecessary because Hirabayashi had received concurrent sentences on the two convictions.[48] Relying on its opinion in *Hirabayashi,* the Supreme Court simultaneously upheld Min Yasui's conviction, opining that during times of war the judiciary was ill-advised to question actions borne of military necessity. However, after the Solicitor General conceded that the trial court was mistaken on the issue, the Court concluded that Yasui had not, in fact, renounced his citizenship.[49]

In the meantime, Fred Korematsu attempted to avoid evacuation but was soon apprehended by the FBI in Oakland, California. He was convicted in September 1942, sentenced to five years probation and ordered released on appeal bond.[50] Then, in "what may be one of the few instances in the history of the

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44. *See* IRONS, JUSTICE AT WAR, *supra* note 3, at 81-87.

45. *Id.* at 161 (quoting United States v. Yasui, 48 F. Supp. 40, 54 (D. Or. 1942)). On Yasui's trial, see *id.* at 136-43, 159-62.

46. *Id.* at 87-93; 154-59.

47. United States v. Hirabayashi, 46 F. Supp. 657 (W.D. Wash. 1942).

48. Hirabayashi v. United States, 320 U.S. 81 (1943). Justice Murphy's concurrence had originally been drafted as a dissent, arguing that judicial acquiescence to the military orders was tantamount to sanctioning discrimination on the basis of ancestry. However, he was convinced by Justice Frankfurter that any dissent would amount to "playing into the hands of the enemy." IRONS, JUSTICE DELAYED, *supra* note 1, at 49.

49. Yasui v. United States, 320 U.S. 115 (1943); *see also* IRONS, JUSTICE AT WAR, *supra* note 3, at 222-27.

50. Korematsu v. United States, 323 U.S. 214 (1944); *see also* IRONS, JUSTICE AT WAR, *supra* note 3, at 93-99, 153-54.

United States of armed revolt by the military against duly constituted judicial authority," he was immediately [re]arrested by military policemen with drawn guns and taken first to the Presidio stockade in San Francisco, then to the Tanforan assembly center.[51]

Korematsu's appeal, like those of Hirabayashi and Yasui, was certified directly to the Supreme Court. Unlike the earlier cases, however, Korematsu's did not involve a curfew violation and directly raised the issue of the constitutionality of the evacuation and the internment. The Court delayed its decision by remanding to the Court of Appeals for a decision on the constitutionality of the exclusion order, allowing it to avoid ruling on the merits for more than a year.[52] In December 1944, with President Roosevelt safely reelected, the justices upheld Korematsu's conviction for violating the evacuation order by a vote of six to three, again avoiding the question of internment.[53] The majority addressed the charge of racial discrimination with the following mind-boggling conflation of race and citizenship:

> It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty. . . . 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.[54]

As Lorraine Bannai and Dale Minami point out, "[t]he Supreme Court first denied that there was any connection between race and the exclusion, and then accepted the argument that exclusion and, implicitly, incarceration, was necessitated by a race-based affinity Japanese Americans were presumed to have for Japan."[55]

Mitsuye Endo's case was decided at the same time as Korematsu's. A twenty-two-year-old clerical worker, Endo had filed a habeas corpus petition from Tule Lake, where she was incarcerated, straightforwardly challenging the government's authority to incarcerate *any* citizen absent so much as an explicit showing of cause.[56] Again, the Supreme Court "avoid[ed] constitutional issues which [were] necessarily involved," to quote the concurrence written by Justice Roberts, this time by ordering Endo's release, not on the merits of her legal argument, but because the government had conceded the fact of her loyalty.[57]

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51. IRONS, JUSTICE AT WAR, *supra* note 3, at 153-54.

52. *See* YAMAMOTO ET AL, *supra* note 20, at 139.

53. Korematsu v. United States, 323 U.S. 214 (1944); *see also* IRONS, JUSTICE AT WAR, *supra* note 3 at 325-41.

54. 323 U.S. at 223. As Eugene Rostow noted, the majority merely "applie[d] the two findings [of *Hirabayashi*]—that the Japanese are a dangerous lot, and that there was no time to screen them individually. . . . There [was] no attempt in the *Korematsu* case to show a reasonable connection between the factual situation and the program adopted to deal with it." Rostow, *supra* note 3, at 508-09.

55. Lorraine K. Bannai & Dale Minami, *Internment During World War II and Litigations, in* ASIAN AMERICANS AND THE SUPREME COURT, *supra* note 16, at 755, 774; *see also* Iijima, *Shooting, supra* note 10, at 123-25.

56. *See* IRONS, JUSTICE AT WAR, *supra* note 3, at 99-103, 143-51.

57. *Ex parte* Endo, 323 U.S. 283, 308 (1944) (Roberts, J., concurring); *see also* IRONS, JUSTICE AT WAR, *supra* note 3, at 307-10, 317-19, 323-25, 341-45.

While *Endo* is often portrayed as a "very substantial and important victory" for the internees—to quote the CWRIC—the Court actually avoided addressing, and thereby implicitly sanctioned, the notion that the government could arbitrarily and unilaterally determine loyalty and take punitive measure against those it deemed disloyal.[58]

Thus, without ever directly addressing the question of indefinitely imprisoning U.S. citizens without due process, the Supreme Court allowed the internment to stand, abdicating its duty to enforce the Constitution[59] and perpetuating the notion that "disloyalty" can be legitimately incorporated into the racialized identity of a particular ethnic group. As Neil Gotanda summarizes,

> [T]he separability of the juridical categories of "citizen" and "alien" is clear, as is the parallel social distinction between "American" and "foreign." But when the individuals concerned are other non-Whites, the racial considerations render the "natural" coincidence of citizen and American much less certain. A Japanese-American citizen in 1942 was easily considered "foreign," thus making possible the judgment that likelihood of disloyalty was high enough to justify wholesale internment.[60]

III

AMERICAN INDIANS: A LONG HISTORY OF INTERNMENTS

> It may well be doubted whether those [American Indian] tribes which reside within the acknowledged boundaries of the United States can with strict accuracy be denominated foreign nations. They may more correctly perhaps be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases—meanwhile they are in a state of pupilage.
>
> *Cherokee Nation v. Georgia* (1831)[61]

The internment of Japanese Americans during World War II has been generally understood to be an aberration; an exception, as it were, that proves the rule of the United States' fundamental commitment to constitutionally protected rights of due process and equal protection. However, we need only engage in only the most cursory review of the historical interactions between the

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58. CWRIC, PERSONAL JUSTICE DENIED, *supra* note 20, at 239.

59. Immediately after these cases were decided, Yale law professor Eugene Rostow summarized their import, noting that the Supreme Court had sanctioned

> five propositions of the utmost potential menace: (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 . . . 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.

Rostow, *supra* note 3, at 532.

60. Neil Gotanda, *"Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1191 (1985).

61. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

United States and American Indian peoples, on whose land it has established itself, to discover that the mass internment of civilians has been undertaken as a normal, rather than exceptional, prerogative by the federal government.[62]

The native peoples of this land are in many respects the quintessential American "Other." It was by contrasting their "savagery" against the "civilization" of the settlers that the latter both legitimated their appropriation of the land and forged their identity as "Americans," a perspective most clearly articulated in the notion of American Manifest Destiny.[63] Although the United States had entered into numerous treaties with American Indian nations, thereby acknowledging them to be independent sovereignties,[64] and, indeed, depended upon those treaties to justify its claims to much of its territory, by the 1830s the Supreme Court declared that the United States would no longer regard them as either independent or fully sovereign.[65] As Chief Justice John Marshall declared in *Cherokee Nation v. Georgia,* "[t]hey may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will. . . . Their relation to the United States resembles that of a ward to his guardian."[66] This declaration that all American Indian nations—even those the U.S. had not encountered as of the 1830s—

62. The mass internment of civilians in wartime has also been common, as illustrated by the United States' internment of much of the Filipino population in its war of "pacification" which began in 1898 and its policy of forcing Vietnamese villagers into "strategic hamlets" during the war in Indochina. On the Philippines, see THE PHILIPPINES READER: A HISTORY OF COLONIALISM, NEOCOLONIALISM, DICTATORSHIP, AND RESISTANCE 15-19 (1987) (Daniel B. Schirmer & Stephen Rosskamm Shalom eds.); Stuart Creighton Miller, "BENEVOLENT ASSIMILATION": THE AMERICAN CONQUEST OF THE PHILIPPINES, 1899-1903 163-64 (1982). On Vietnam, see DOUGLAS BLAUFARD, THE COUNTERINSURGENCY ERA: U.S. DOCTRINE AND PERFORMANCE 114-15, 120 (1977); D. MICHAEL SHAFER, DEADLY PARADIGMS: THE FAILURE OF U.S. COUNTERINSURGENCY POLICY 268 (1988); NEIL SHEEHAN, A BRIGHT SHINING LIE: JOHN PAUL VANN AND AMERICA IN VIETNAM 308-312 (1988).

63. *See generally* REGINALD HORSMAN, RACE AND MANIFEST DESTINY: THE ORIGINS OF AMERICAN RACIAL ANGLO-SAXONISM (1981); RICHARD DRINNON, FACING WEST: THE METAPHYSICS OF INDIAN-HATING AND EMPIRE-BUILDING (1980). For an overview that does not address race, see generally FREDERICK MERK, MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY: A REINTERPRETATION (1963).

64. *See* Siegfried Wiessner, *American Indian Treaties and Modern International Law,* 7 ST. THOMAS L. REV. 567, 591 (1995) (noting that the U.S. entered into such treaties "on a perfectly level playing field . . . extending to [the Indian nations] the same courtesies as to other nations of the then overwhelmingly European international legal order"). For a compilation of ratified treaties, see generally CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES (1940-41). For documents omitted by Kappler, see generally VINE DELORIA, JR. & RAYMOND J. DEMALLIE, DOCUMENTS OF AMERICAN INDIAN DIPLOMACY; TREATIES, AGREEMENTS, AND CONVENTIONS, 1775-1979 (1999).

65. *See* Johnson v. McIntosh, 21 U.S. (8 Wheat.) 543, 587 (1823); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831), and Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832). On this trilogy authored by Justice Marshall, see Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 HARV. L. REV. 381, 382, 406-18 (1993); Helen W. Winston, *"An Anomaly Unknown": Supreme Court Application of International Law Norms on Indigenous Rights in the Cherokee Cases (1831-32)*, 1 TULSA J. COMP. & INT'L L. 339, 349-58 (1994).

66. 30 U.S. (5 Pet.) at 17. As Ward Churchill concludes, "[i]n practical effect, Marshall cast indigenous nations as entities inherently imbued with a sufficient measure of sovereignty to alienate their territory by treaty when and wherever the U.S. desired they do so, but never with enough to refuse." Ward Churchill, *The Law Stood Squarely on Its Head: U.S. Legal Doctrine, Indigenous Self-Determination and the Question of World Order*, 81 OR. L. REV. 663, 677-78 (2002).

would henceforth be considered as internal colonies[67] laid the groundwork for the U.S. government's subsequent assertion of full and complete—"plenary"—power over Indian affairs.[68]

Indigenous peoples, while thus subjected to federal control, were not, however, considered "Americans." Somewhat ironically, while the U.S. government was asserting complete power over them, the Supreme Court held in the 1884 case of *Elk v. Wilkins* that the Fourteenth Amendment's birthright citizenship did not extend to American Indians:

> Indians born within the territorial limits of the United States, members of, and owing immediate allegiance to, one of the Indian tribes, (an alien though dependent power,) although in a geographical sense born in the Unites States, are no more "born in the United States and subject to the jurisdiction thereof," . . . than the children of subjects of any foreign government . . . .[69]

With some exceptions, this was the case until 1924 when Congress unilaterally declared all American Indians to be U.S. citizens, whether they wanted to be or not.[70]

In the meantime, every native people consigned to a reservation in the U.S.—effectively all 400-plus of them—was subjected to internment.[71] While not generally phrased in those terms, the reality is evident in that until well into the twentieth century, American Indians were generally required to obtain a permit from a federal Indian agent—or in some cases the military—in order to leave their assigned agencies. This was the issue in the 1879 *Standing Bear* case, which arose when a group of Poncas sent to a reservation in the "Indian Territory" of Oklahoma attempted to return to their traditional lands in eastern South Dakota without permission and were arrested by the army.[72] Similarly, in the 1896 case of *Ward v. Race Horse* the Supreme Court ruled that the Lakotas were not free to exercise their treaty-guaranteed right to hunt in customary lo-

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67. On internal and settler-state colonialism, see Ward Churchill, *The Indigenous Peoples of North America: A Struggle Against Internal Colonialism*, *in* STRUGGLE FOR THE LAND: NATIVE NORTH AMERICAN RESISTANCE TO GENOCIDE, ECOCIDE AND COLONIZATION 15, 24-26 (2002).

68. *See generally* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope, and Limitations*, 132 U. PA. L. REV. 195; Robert A. Williams, Jr., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT (1990).

69. Elk v. Wilkins, 112 U.S. 94, 102 (1884); *see also supra* note 12 and accompanying text.

70. The General Allotment Act, sec. 6, 24 Stat. 388 (1887), declared all Indians born within the territorial limits of the United States who accepted individual land allotment to be citizens. Citizenship was imposed on all American Indians pursuant to acts passed in 1924 (43 Stat. 253, 2 June 1924) and 1940 (Nationality Act of 1940, Pub. L. No. 76-853, 54 Stat. 1172, (1940)). *See generally* Robert B. Porter, *The Demise of the Ongwehoweh and the Rise of the Native American: Redressing the Genocidal Act of Forcing American Citizenship upon Indigenous Peoples*, 15 HARV. BLACKLETTER L.J. 107 (1999).

71. *See, e.g.*, "The Reservation as Prison: Forced Confinement of Indians on Reservations" *in* SIDNEY L. HARRING, CROW DOG'S CASE: AMERICAN INDIAN SOVEREIGNTY, TRIBAL LAW, AND UNITED STATES LAW IN THE NINETEENTH CENTURY 204-06 (1994). In fact, Indian reservations served as prototypes for the camps in which Japanese Americans were interned. *See* RICHARD DRINNON, KEEPER OF CONCENTRATION CAMPS, *supra* note 29; DILLON S. MYER AND AMERICAN RACISM xxiv, 265 (1987).

72. U.S. ex rel. Standing Bear v. Crook, 25 Fed. Cas. 695 (C.C.D. Neb., 1879). *See generally* THOMAS HENRY TIBBLES, THE PONCA CHIEFS: AN ACCOUNT OF THE TRIAL OF STANDING BEAR (1972).

cales beyond the boundaries of their reservations.[73] It was not until the *By-a-lil-le* case in 1909 that a formal opinion was rendered holding that American Indians could not be classified or treated as "prisoners of war" merely because they were Indians.[74]

Although "military necessity" and "national security" were frequently invoked to justify the mass internment of American Indians, war was rarely a determining factor.[75] No hostilities were occurring during the 1830s, when, for example, the army was employed to round up the Cherokees, holding them in stockades until they were sent onto the "Trail of Tears," a 1,200 mile forced march from their Georgia/North Carolina homeland to Oklahoma during which about half of them died. This is also true with respect to the other four "Civilized Tribes"—Choctaws, Chickasaws, Creeks, and Seminoles—all of whom had shared the Cherokees' fate by 1840.[76] Although they occurred during peacetime, President Andrew Jackson claimed, just as officials did with respect to Japanese Americans a century later, that the forced evacuations were motivated, at least in part, by a need to "protect" the Indians from the racial antipathy of their white neighbors.[77]

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73. Ward v. Race Horse, 163 U.S. 504 (1896).

74. *U.S. v. By-a-lil-le*, 12 Ariz. 150 (1909); *see also* HARRING, *supra* note 71, at 198-203. The government's contention in *By-a-lil-le* that Indians comprised a peculiar category of prisoners of war and that no law governed when such prisoners should be released is remarkably similar to its current position with respect to "enemy combatants" such as Hamdi, Padilla, and those held at Guantánamo Bay. *See infra* notes 184-205, 224-28 and accompanying text.

75. It is difficult to assess exactly what constituted an "Indian war," since Congress never declared one. A peculiar ambiguity attends the term, similar to that attending the present "war on terror," which was perhaps best summed up by the Supreme Court's observation in *Marks v. United States* that, notwithstanding the war-making requirements posited in the Constitution, "to constitute an Indian war, it is sufficient that hostilities exist and that military operations are carried on." 161 U.S. 297, 302-03 (1895). On its face, this would mean that the U.S. was continuously engaged in one or more Indian wars from its first moment until some point in the early twentieth century. This, however, has been officially and repeatedly denied, as illustrated by the conclusion of the 1890 census that Indian wars were only "about 40 in number." *See* U.S. DEPT. OF LABOR, BUREAU OF THE CENSUS, REPORT ON INDIANS TAXED AND NOT TAXED IN THE UNITED STATES (EXCEPT ALASKA) AT THE ELEVENTH U.S. CENSUS: 1890 637 (1894).

76. *See* RUSSELL THORNTON, THE CHEROKEES: A POPULATION HISTORY 75-77 (1990). According to Thornton, "The Choctaws are said to have lost 15 percent of their population, 6,000 out of 40,000; and the Chickasaw . . . surely suffered severe losses as well. By contrast, the Creeks and Seminoles are said to have suffered about 50 percent mortality." Russell Thornton, *Cherokee Population Losses During the Trail of Tears: A New Perspective and a New Estimate,* 31 ETHNOHISTORY 293 (1984). *See generally* GRANT FOREMAN, INDIAN REMOVAL: THE IMMIGRATION OF THE FIVE CIVILIZED TRIBES (1953); GLORIA JAHODA, THE TRAIL OF TEARS: THE STORY OF THE INDIAN REMOVALS (1975). For an interesting overview framed in juxtaposition to the Japanese American internment, see EDWARD H. SPICER, ASAEL I. HANSEN, KATHERINE LUOMALA & MARVIN K. OPLER, THE IMPOUNDED PEOPLE: JAPANESE AMERICANS IN THE RELOCATION CENTERS 46 (1969).

77. According to Jackson, the purpose of Indian Removal was humanitarian, that is, to "separate the Indians from immediate contact with settlements of whites; free them from the power of the States; enable them to pursue happiness [and] retard the progress of decay, which is lessening their numbers." "Message of the President to Congress on Indian Removal," Dec. 6, 1830. For this and numerous comparable statements, see U.S. Congress Staff, *Speeches on the Passage of the Bill for the Removal of the Indians: Proceedings of the U.S. Congress, 21st, 1st Session, 1829-1830* (1988). Regarding the Japanese American internment, see, e.g., the expressions of concern quoted in ROGER DANIELS, CONCENTRATION CAMPS USA: JAPANESE AMERICANS AND WORLD WAR II 47, 156 (1972) (quoting

Even when warfare was involved, the mass internment of civilians most often occurred after the fighting was over and typically lasted for years, even generations. In the aftermath of the 1862 "Little Crow's War" in Minnesota, for instance, virtually the entire Santee Sioux population was interned at Fort Snelling, where conditions were so miserable that one-quarter of them died within several months, and a $200 scalp bounty was proclaimed on all Santees found outside the concentration camp.[78] Similarly, following the army's so-called Kit Carson Campaign in 1863, the Navajos were first concentrated at Fort Defiance, Arizona, and then force-marched approximately 300 miles to the Bosque Redondo, adjoining Fort Sumner, New Mexico, where they were interned for four years. Lodged in crude shelters (sometimes literally holes in the ground), restricted to subsistence rations at best, and wracked by disease, half of the internees perished before they were moved to another reservation in 1868.[79]

The harsh conditions at the San Carlos Reservation in southeastern Arizona, where the far-flung western Apache peoples were increasingly concentrated, precipitated the escape and protracted military resistance mounted by a band of Chiricahua Apaches led by Geronimo during the 1870s and 1880s.[80] In retaliation, after Geronimo's surrender in 1886, the government shipped the entire Chiricahua population, including not only children, elders, and women, but also those men who had fought *for* the U.S. against their "renegade" relatives, to military barracks in Florida and Alabama. There they were confined in an utterly alien climate, with a resulting death toll of some forty percent, until the winter of 1913-14.[81] By that point, with even U.S. officials acknowledging that it was "too much to keep people more than 26 years in confinement for crimes

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expressions of concern by Sec. of Agriculture Claude Wickard and Gen. George C. Marshall); DRINNON, KEEPER OF CONCENTRATION CAMPS, *supra* note 29, at 30, 36 (quoting Gen. DeWitt and Asst. Sec. of War John J. McCloy).

78. They were then relocated to an even harsher facility at Crow Creek, in the Dakota Territory, where another quarter died within the first year. *See* DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST 60, 63-64 (1970); DUANE SCHULTZ, OVER THE EARTH I COME: THE GREAT SIOUX UPRISING OF 1862, 279-83 (1992).

79. *See generally* CLIFFORD E. TRAFZER, THE KIT CARSON CAMPAIGN: THE LAST GREAT NAVAJO WAR (1982); LYNN R. BAILEY, THE LONG WALK: A HISTORY OF THE NAVAJO WARS, 1846-68 (1988); LYNN R. BAILEY, BOSQUE REDONDO: THE NAVAJO INTERNMENT AT FORT SUMNER, NEW MEXICO, 1863-1868 (1998); GERALD THOMPSON, THE ARMY AND THE NAVAJO: THE BOSQUE REDONDO RESERVATION EXPERIMENT, 1863-1868 (1982).

80. *See* MICHAEL LIEDER & JAKE PAGE, WILD JUSTICE: THE PEOPLE OF GERONIMO VS. THE UNITED STATES 19-20 (1997); OBIE B. FAULK, THE GERONIMO CAMPAIGN 16 (1969); RICHARD J. PERRY, APACHE RESERVATION: INDIGENOUS PEOPLES AND THE AMERICAN STATE 129-36 (1993).

81. The attritional warfare waged against them by the U.S. reduced the Chiricahuas from an estimated 3,000 in 1855 to barely 500 in 1885. Their first eight years of internment in the east brought the number down to roughly 300, an overall population decline of 90 percent in a single generation. LIEDER & PAGE, *supra* note 80, at 28-38. *See generally* W. SKINNER, THE APACHE ROCK CRUMBLES (1987); DAVID ROBERTS, ONCE THEY MOVED LIKE THE WIND: COCHISE, GERONIMO AND THE APACHE WARS (1984).

they never committed," the survivors were transferred to a reservation in Oklahoma.[82]

In the winter of 1878-79, 15,000 U.S. troops were sent in pursuit of small group of several hundred Northern Cheyenne, primarily noncombatant women and children, who fled the desperate conditions of their internment near Fort Sill, Oklahoma.[83] General Philip Sheridan, commander of U.S. forces in the region, ordered his men to "spare no measure . . . to kill or capture" the fugitives as rapidly as possible and thus deter other peoples from following the Cheyennes' example.[84] Captured and informed they would be returned to Oklahoma, the Cheyenne fled again. This time they were quickly tracked down and about half of them, children included, simply butchered.[85] An even more egregious instance occurred on December 29, 1890—nearly thirteen years after the last of the "Sioux Wars"—when the U.S. Seventh Cavalry Regiment, using Hotchkiss guns, massacred more than 300 unarmed Minneconjou Lakotas captured on the Wounded Knee Creek in western South Dakota. Their sole "offense" was to have fled their assigned agency near Fort Yates during a period of starvation and severe repression, seeking refuge among their Oglalla relatives at the Pine Ridge Agency, about 150 miles away.[86]

The long term internment of numerous indigenous peoples—men and women, children and elders—under extremely harsh conditions, was thus an integral part—along with broken treaties, aggressive warfare and explicitly genocidal policies[87] of the United States' strategy for occupying all of the land within its claimed territorial boundaries. By early 1942, when the internment of Japanese Americans was undertaken, the terms under which their Indian coun-

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82. LEIDER & PAGE, *supra* note 80, at 48, *citing* CONGRESSIONAL RECORD, 48 Cong. Rec. S11336-7 (daily ed. Aug. 19, 1912).

83. For background on the extended warfare precipitated by U.S. invasions of Cheyenne territory beginning in the 1840s, see generally GEORGE BIRD GRINNELL, THE FIGHTING CHEYENNES (1955 reprint of 1915 original). For more detail on particular phases, see generally STAN HOIG, THE SAND CREEK MASSACRE (1961) and THE BATTLE OF THE WASHITA (1976).

84. DONALD J. BERTHRONG, THE CHEYENNE AND ARAPAHO ORDEAL: RESERVATION AND AGENCY LIFE IN THE INDIAN TERRITORY, 1875-1907 34 (1976). General Sheridan is famous for his 1869 observation that the only good Indians he had ever seen were dead ones (popularized as "the only good Indian is a dead Indian"). *See* PAUL ANDREW HUTTON, PHIL SHERIDAN AND HIS ARMY 180 (1985).

85. *See* MARI SANDOZ, CHEYENNE AUTUMN 245-90 (1964 reprint of 1953 original); RALPH K. ANDRIST, THE LONG DEATH: THE LAST DAYS OF THE PLAINS INDIAN 321-29 (1964).

86. On the last of the wars, see generally JOHN E. GRAY, THE CENTENNIAL CAMPAIGN: THE SIOUX WAR OF 1876 (1988). On the Lakotas' confinement during the intervening period, see generally GEORGE HYDE, RED CLOUD'S FOLK: A HISTORY OF THE OGLALLA SIOUX INDIANS (1937) and SPOTTED TAIL'S FOLK: A HISTORY OF THE BRULE SIOUX (1961). On the massacre, see ANDRIST, *supra* note 85, at 350-52; BROWN, *supra* note 78, at 401-02. Since both agencies were situated within the "Great Sioux Reservation," the Indians had never ventured beyond the boundaries of what was acknowledged by the U.S. as being their own territory. See the map entitled "Sioux Cessions and Land Claims" in IRREDEEMABLE AMERICA: THE INDIANS' ESTATE AND LAND CLAIMS 122-23 (IMRE SUTTON ED., 1985).

87. *See generally* WARD CHURCHILL, A LITTLE MATTER OF GENOCIDE: HOLOCAUST AND DENIAL IN THE AMERICAS, 1492 TO THE PRESENT (1997); WARD CHURCHILL, PERVERSIONS OF JUSTICE: INDIGENOUS PEOPLES AND ANGLOAMERICAN LAW (2003) [hereinafter PERVERSIONS OF JUSTICE].

terparts were confined had improved to a certain extent.[88] For all intents and purposes, however, the American Indian internment would continue until the mid-1950s, long after the Japanese Americans had been released, when the U.S. government finally decided that its interests were better served by "terminating" its relationship with the American Indians, abruptly pushing them off the reservations and dispersing them in cities.[89] Interestingly, Dillon S. Myer, who as director of the War Relocation Authority had managed the Japanese American internment, was designated to oversee this attempted "final solution of the Indian problem" in the U.S.[90]

Unlike Japanese Americans, American Indians have never received individual or collective compensation of any sort for the far more protracted periods of internment they suffered at the hands of the United States. In 1947 the Chiricahuas filed a claim with the Indian Claims Commission (ICC)[91] for damages accruing both from the expropriation of their lands and from their lengthy imprisonment in Florida and Alabama. In 1971 the ICC finally awarded them token payment for their lost lands, but asserted it had no jurisdiction over the imprisonment claim on the grounds that the incarceration did not violate any treaty.[92] The Commission's ruling was appealed, but in 1973, the Court of Claims, while acknowledging "with studied understatement that 'the Apache Tribe did not prosper' from twenty-seven years of imprisonment,"[93] held that the U.S. was not liable. The Supreme Court subsequently denied certiorari,[94] thus casting an aura of legitimacy over the "principle" that the U.S. government holds the prerogative to intern entire populations at will.

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88. It must be pointed out, however, that some of the Japanese American internment camps were actually built on American Indian reservations, and that the barracks hastily constructed for them, crude as they were, were still better than much of the reservation housing. Apparently at Poston, when the war was over, instead of turning over the barracks and leaving the trees and crops, the government plowed everything under and prevented the reservation residents from even salvaging any of the building materials. *See* Chris K. Iijima, *Reparations and the "Model Minority" Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV 9 /19 B.C. THIRD WORLD L.J. 385 (joint issue) (1998).

89. *See generally* GARY ORFIELD, A STUDY OF TERMINATION POLICY (1966); DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 (1986).

90. Richard Drinnon notes, "An accident of chronology has masked the underlying meaning of Myer's termination policy. Had he been commissioner of the [Bureau of Indian Affairs] *before* he became director of the [War Relocation Authority], then the continuities stretching from the reservations to the camps could hardly have been missed and the fundamental sameness of his treatment of Native Americans and Japanese Americans would have elicited close analysis long ago." DRINNON, KEEPER OF CONCENTRATION CAMPS, *supra* note 29, at 265. In an unpublished paper written during the mid-1950s, former Indian Commissioner John Collier described his successor's termination policy as amounting to a program of deliberate "social genocide" against Native Americans. In a paper of his own, written at about the same time, Myer concurred. *Id*. at 242-43.

91. On the ICC *see generally* Ward Churchill, *Charades Anyone? The Indian Claims Commission in Context in* PERVERSIONS OF JUSTICE, *supra* note 87, at 125-52 (noting that the ICC was established in 1946 in an attempt to distinguish U.S. land appropriations from those of the Third Reich); HARVEY D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION (1990).

92. Fort Sill Apache Tribe of Oklahoma v. United States, 26 Ind. Cl. Comm. 281 (1971).

93. LIEDER & PAGE, *supra* note 80, at 222.

94. Fort Sill Apache Tribe of Oklahoma v. United States, 477 F.2d 1360 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 993 (1974).

American Indians are, in many respects, prototypical "non-aliens": their nations were first acknowledged as independent sovereigns, then were deemed to be "domestic dependent nations." This appellation continues to be accurate in light of their still-colonized status under which the federal government exercises plenary power over them, but recognizes their "quasi-sovereign" status when convenient.[95] That many became U.S. citizens pursuant to the 1887 Allotment Act did not affect the government's ability to collectively treat them as prisoners of war, and internment has been a routine part of the U.S. government's attempts to control indigenous peoples and their lands and resources.[96]

IV

INTERNMENT AS A DOMESTIC POLITICAL OPTION

> [Under the Internal Security Act of 1950] the President was authorized to declare an "internal security emergency" during which the Attorney General was empowered to detain all persons for whom there was "reasonable ground" for believing [they] "probably will engage in, or probably will conspire with others to engage in, acts of espionage or sabotage" . . . .
>
> Robert Justin Goldstein, Political Repression in Modern America[97]

Mass internment has thus been used throughout American history to control civilian populations considered Other by virtue of race or national origin and deemed a threat to national security. Internment has also been considered a viable option for dealing with those who threaten the political status quo, and political dissidents have often been characterized as aliens or under the influence of foreign powers or ideologies. A brief overview of this history illustrates that much of what is now happening in the "war on terror" is simply an extension of this long-standing practice.

Even before the formal existence of the republic, Thomas Jefferson participated in drafting Virginia laws that allowed the government to remove citizens beyond "military zones" and "to restrain all persons who refused to take the oath of loyalty to the American cause or who were merely suspected of disaffec-

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95. *See* Natsu Taylor Saito, *Asserting Plenary Power Over the "Other": Indians, Immigrants, Colonial Subjects, and Why U.S. Jurisprudence Needs to Incorporate International Law,* 20 YALE L. & POL. REV. 429, 451-55 (2002).

96. *See supra* notes 75-90 and accompanying text.

97. ROBERT JUSTIN GOLDSTEIN, POLITICAL REPRESSION IN MODERN AMERICA: FROM 1870 TO 1976, 322 (2001) (referencing the Internal Security Act of 1950, Pub. L. No. 81-831, ch. 1024, 64 Stat. 987 (1950)). These provisions were in Title II, known as the Emergency Detention Act of 1950. *See* Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptation of 9/11*, 6 U. PA. J. CONST. L. 1001, 1018 (noting that at least 26,000 individuals were at one point catalogued on an FBI list of persons to be rounded up in the event of a "national emergency"); Arthur E. Sutherland, Jr., *Freedom and Internal Security*, 64 HARV. L. REV. 383, 396 (1951) (noting that Truman vetoed the bill, which passed, nonetheless, because the detention provisions failed to provide for suspension of the writ of habeas corpus and because other persons might be more important to detain).

tion."[98] As Governor of Virginia, Jefferson did not order mass evacuations, but he "did exercise his power to imprison the disaffected or politically suspect, and many languished in jail without a hearing or even a court-martial."[99]

In 1798, the first Alien and Sedition Acts[100] were passed on the Federalists' claim that the Jeffersonians were agents of France attempting to bring the French Revolution's "Reign of Terror" to the United States.[101] The institution of slavery can also be viewed, of course, as an officially protected and supported form of mass internment, economically motivated but sanctioned on the basis of race.[102] It was an essential aspect of the initial American status quo, well protected by the Constitution,[103] and those who spoke out against slavery's cruelties and advocated abolition were frequently charged with sedition.[104]

Union organizers in the late nineteenth and early twentieth century were labeled "communists" and "anarchists," and working class unrest was blamed on immigrants. The labor disputes which accompanied the depression of 1873-1877, particularly the fiercely contested strikes of railroad workers and miners, were consistently depicted as the work of outside agitators.[105] During the 1880s and 1890s immigrants continued to be conflated with anarchists and were "variously referred to as 'the very scum and offal of Europe,' 'venomous reptiles,' . . . and 'that class of heartless and revolutionary agitators' who had come 'to terrorize the community and to exalt the red flag of the commune above the stars and stripes.'"[106]

Congress, which had not regulated immigration at all until 1875, passed a series of acts in the 1880s and 1890s excluding Chinese workers, portrayed as the "yellow peril,"[107] and soon began debating proposals to exclude and deport

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98. LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 31-32 (1989). Jefferson was also instrumental in the drafting of a statute which gave Virginia authorities immunity from suits brought by evacuated or interned persons. *Id.* at 32.

99. *Id.* at 33.

100. Alien Act, ch. 58, 1 Stat. 570 (1798) *amended at* 41 Stat. 1008 (1920); Sedition Act, ch. 74, 1 Stat. 596 (1798) (expired 1801).

101. Richard O. Curry, *Introduction, in* FREEDOM AT RISK: SECRECY, CENSORSHIP, AND REPRESSION IN THE 1980S 3, 5 (Richard O. Curry ed., 1988); WILLIAM PRESTON, JR., ALIENS & DISSENTERS: FEDERAL SUPPRESSION OF RADICALS 1903-1933 21-22 (2d ed. 1994).

102. *See generally* IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA (1998).

103. U.S. CONST. art. II, § 8, cl. 15; art. II, § 9, cl. 1; art. IV, § 2, cl. 3; *see also* PAUL FINKELMAN, SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON 1-33 (1996); Staughton Lynd, *Slavery and the Founding Fathers, in* BLACK HISTORY: A REAPPRAISAL 115 (Melvin Drimmer ed., 1968).

104. On this basis the postmaster refused to allow abolitionist literature to be sent through the mail, and the House of Representatives employed a "gag" rule to prevent discussion of the subject. *See* Michael Kent Curtis, *The Crisis Over the Impending Crisis: Free Speech, Slavery, and the Fourteenth Amendment, in* SLAVERY AND THE LAW 161-205 (PAUL FINKELMAN ED., 1987); *see also* WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812, 329-30 (1968).

105. PRESTON, *supra* note 101, at 24-25; *see also* GOLDSTEIN, *supra* note 97, at 3-101.

106. GOLDSTEIN, *supra* note 97, at 41.

107. *See* Act of May 6, 1882, ch. 126, 22 Stat. 58 (suspending the immigration of all Chinese laborers for ten years); additional Chinese exclusion laws were passed in 1884, 1888, and 1892. *See generally*

"alien anarchists." In 1903 Congress prohibited the immigration of anarchists—those who believed in or advocated the overthrow of government by force and violence, and anyone "who disbelieve[d] in" organized government or was "affiliated with any organization entertaining and teaching such disbelief"[108]—the first federal legislation to ban immigrants on the basis of their beliefs or associations. Although the 1903 Act was portrayed as a response to the 1901 assassination of President McKinley by Leon Czolgosz, Czolgosz was a U.S.-born citizen with only vague anarchist connections.[109]

During World War I the Justice Department tried to convince President Woodrow Wilson to try civilians accused of interfering with the war effort before military courts martial.[110] That effort failed, but Wilson did sign the Espionage Act, which made it a crime to "willfully utter, print, write, or publish any disloyal, profane, scurrilous, or abusive language" about the United States, and which allowed the post office to exclude from the mails any material advocating "treason, insurrection or resistance to any law of the U.S."[111] The following year the Sedition Act[112] was passed, prohibiting essentially all criticism of the war or the government. Robert Justin Goldstein reports:

> Altogether, over twenty-one hundred [persons] were indicted under the Espionage and Sedition laws, invariably for statements of opposition to the war rather than for any overt acts, and over one thousand persons were convicted. Over one hundred persons were sentenced to jail terms of ten years or more. Not a single person was ever convicted for actual spy activities."[113]

As Japanese Americans would be in World War II, African Americans were particularly targeted in the hunt for subversives and draft evaders, due to "the widespread suspicion among whites that . . . enemy agents were actively subverting the loyalties of African Americans, who were believed to be uniquely susceptible to those who would manipulate them for sinister purposes."[114]

In the meantime, the Justice Department's Bureau of Investigation (the precursor to the FBI) collaborated with the American Protective League (APL), a group of some 350,000 private citizens, infiltrating organizations they considered detrimental to U.S. interests and making illegal arrests and deten-

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ENTRY DENIED: EXCLUSION AND THE CHINESE COMMUNITY IN AMERICA, 1882-1943 (Sucheng Chan ed., 1991); LUCY SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995).

108. Act of March 3, 1903, ch. 1012, § 2, 32 Stat. 1219. *See* Turner v. Williams, 194 U.S. 279 (1904) (holding that the Act did not violate the First Amendment).

109. *See* PRESTON, *supra* note 101, at 27-33.

110. SANFORD J. UNGER, FBI 41-42 (1976).

111. Espionage Act of 1917, ch. 30, 40 Stat. 217 (1918).

112. Sedition Act, ch. 75, 40 Stat. 553 (1918).

113. GOLDSTEIN, *supra* note 97, at 113; *see also* MICHAEL LINFIELD, FREEDOM UNDER FIRE: U.S. CIVIL LIBERTIES IN TIMES OF WAR 33-67(1990).

114. THEODORE KORNWEIBEL, JR., "INVESTIGATE EVERYTHING": FEDERAL EFFORTS TO COMPEL BLACK LOYALTY DURING WORLD WAR I 3 (2002).

tions of activists.[115] In a highly effective effort to subvert organized labor, they conducted large scale raids and vigilante actions against members of the Industrial Workers of the World. The raids, acknowledged to have been carried out "largely as a preventative matter to prevent possible violence,"[116] were followed by pre-indictment detentions of up to two years, mass trials in which the defendants were sometimes not even identified by name, and the imposition of lengthy prison sentences.[117]

In 1919, following a series of bombings around the country, Attorney General A. Mitchell Palmer declared war on radicals and subversives. When he failed to convince Congress to enact peacetime sedition legislation, he relied on the 1918 Alien Act to conduct raids, known as "Red raids" and later as the "Palmer raids," in thirty-three cities, arresting and holding 10,000 people, both citizens and noncitizens, as "criminal anarchists."[118] Using tactics similar to those we have seen with respect to the post-September 11 detainees, hundreds of people were held for months in harsh and squalid conditions, denied contact with their families, friends, and lawyers, and many were subsequently deported.[119]

By the 1930s the FBI "had launched significant and tacitly illegal . . . investigations of supposed subversion in [numerous] industries, as well as various educational institutions, organized labor, assorted youth groups, black organizations, governmental affairs and the armed forces,"[120] and was creating files on millions of Americans. The "Cold War" that followed World War II illustrated that the pursuit of those considered disloyal was not to be limited to periods of actual warfare, but extended indefinitely. In 1947 President Truman authorized the Justice Department to seek out "infiltration of disloyal persons" within the government and to create a list of "subversive" organizations. By 1954 the Justice department had listed hundreds of organizations and "sympathetic association" as well as membership was considered evidence of disloyalty.[121] "Communism," like anarchism, became a catch-all, a vaguely defined "enemy" against

115. GOLDSTEIN, *supra* note 97, at 111; *see also* WARD CHURCHILL & JIM VANDER WALL, AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT 18 (2d ed. 2002).

116. GOLDSTEIN, *supra* note 97, at 117 (quoting statement of the U.S. attorney for Kansas to a Justice Department official); *see also* CHURCHILL & VANDER WALL, AGENTS, *supra* note 115, at 19.

117. At the same time, Justice Department and APL "volunteers" were conducting "slacker raids" in which an estimated 400,000 men were seized and detained for not carrying draft cards. GOLDSTEIN, *supra* note 97, at 111-12. Less than one-half of one percent of those arrested were actually draft resisters. UNGER, *supra* note 110, at 42.

118. *See* CHURCHILL & VANDER WALL, AGENTS, *supra* note 115 at 20-23; UNGER, *supra* note 110 at 43-44.

119. On the post September 11 detentions, *see supra* note 7 and accompanying text.

120. CHURCHILL & VANDER WALL, AGENTS, *supra* note 115, at 29; *see also id.* at 26-28.

121. *Id.* at 32. Truman's directive was contained in Executive Order 9835, 12 Fed. Reg. 1935 (Mar. 21, 1947).

whom an undeclared "war" could be fought and increasingly restrictive measures imposed on the U.S. population.[122]

The Internal Security Act of 1950, also known as the McCarran Act, required all members of "Communist-front" organizations to register with the federal government and adopted a proposal, not rescinded until 1971, that special "detention centers" be established for incarcerating those so registered, without trial, any time the president chose to declare an "internal security emergency."[123] In 1952 Congress allocated funds for the establishment of six detention centers, including one at Tule Lake, where the "disloyal" had been segregated during the Japanese American internment.[124]

These provisions, like those supported by Jefferson, for the mass incarceration of civilians suspected of disloyalty to the prevailing order have not been utilized, perhaps because other equally effective ways of destroying mass movements for social change were employed in the meantime.[125] Nonetheless, the government has consistently associated political disloyalty with foreignness, and has maintained large-scale internment as an option for responding to internal political dissent. In the meantime, it has embarked on a remarkably successful program to incarcerate a large proportion of the civilian population that it acknowledges is composed primarily of citizens but that it nonetheless sees as "Other" and, therefore, threatening to the status quo—poor people and people of color.

V

INTERNING THE POOR AND PEOPLE OF COLOR: THE "WARS" ON CRIME AND DRUGS

> Discrimination and segregation have long permeated much of American life; they now threaten the future of every American. . . . To pursue our present course will involve

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122. *See generally* ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998). Her title is taken from Supreme Court Justice and Nuremberg Prosecutor Robert Jackson's statement, "Security is like liberty in that many are the crimes committed in its name." United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J. dissenting). For an analysis of parallels between the Cold War and the war on terrorism, *see generally* David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1 (2003).

123. 66 Stat. 163 (1950); *see* CHURCHILL & VANDER WALL, AGENTS, *supra* note 115, at 33; HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 423-24 (1980). *See generally* Mari Matsuda, *McCarthyism, The Internment and the Contradictions of Power*, 40 B.C. L. REV./19 B.C. THIRD WORLD L.J. (joint issue) 9 (1998).

124. GOLDSTEIN, *supra* note 97, at 324.

125. The most obvious were the FBI's Counterintelligence Programs (COINTELPROs) and similar programs of other intelligence and law enforcement agencies which began in the mid-1950s and, although officially terminated in the 1970s, continue to this day. *See generally* U.S. Senate, Select Committee to Study Government Operations with Respect to Intelligence Activities, *Final Report: Intelligence Activities and the Rights of Americans* (S. Rep. No. 755, Bk. III) (Washington, D.C.: 94th Cong., 2d Sess., 1976); WARD CHURCHILL & JIM VANDER WALL, THE COINTELPRO PAPERS: DOCUMENTS FROM THE FBI'S SECRET WAR AGAINST DISSENT IN THE UNITED STATES (2d ed. 2002); CHURCHILL & VANDER WALL, AGENTS, *supra* note 115; 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 (2002).

> the continuing polarization of the American community and, ultimately, the destruction of basic democratic values. The alternative is not blind repression or capitulation to lawlessness. It is the realization of common opportunities for all within a single society. . . . It is time to make good the promises of American democracy to all citizens.
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> Report of the National Advisory Commission on Civil Disorders (1968)[126]

Slavery was in many respects a government-sponsored, privately-run form of mass internment. As Justice Taney articulated so clearly in the 1857 Dred Scott case, prior to the passage of the Thirteenth and Fourteenth Amendments, persons of African descent were not even considered "persons" under the law, much less citizens.[127] Although their formal legal status changed dramatically as a result of the post-Civil War amendments, African Americans continued to be subjected to differential treatment as a result of "Jim Crow" laws[128] and the disparate treatment accorded them under the criminal justice system.[129] As Justice Miller declared in the *Slaughter-House Cases*, the "black codes" passed by southern states after abolition "imposed upon the colored race onerous disabilities and burdens and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value."[130] African Americans and other people of color in the United States today are recognized as U.S. citizens, but nonetheless continue to be regarded as Other in ways that subject them to much the same kinds of treatment as that accorded those considered "non-aliens." Among other things, this involves the ongoing reality of large-scale incarceration.

During the 1960s the United States faced massive challenges to the status quo, not only from organized social and political forces, such as the Civil Rights Movement, the women's movement, massive anti-war mobilizations, and the resurgence of organized labor,[131] but also from the hundreds of urban rebellions that rocked every major U.S. city. In 1967, following "riots" in Newark, Detroit, Cleveland, and nearly 150 other cities, President Lyndon Johnson convened a National Advisory Commission on Civil Disorders (commonly called

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126. Report of the National Advisory Commission on Civil Disorders 1-2 (1968) [hereinafter Kerner Commission Report].

127. Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 407 (1857) (describing the initial status of African Americans as "beings of an inferior order").

128. The U.S. system of legalized segregation was given the Supreme Court's approval in *Plessy v. Ferguson*, 163 U.S. 537 (1896), and not formally abolished until its decision in *Brown v. Board of Education*, 349 U.S. 294 (1954).

129. The Thirteenth Amendment abolished slavery and involuntary servitude *except* as punishment for those convicted of crimes, U.S. CONST. amend. XIII (ratified 1865), and many southern legislatures responded by passing "black codes" that criminalized a wide range of behavior. Combined with the convict lease system, this resulted in many African Americans, now convicts rather than slaves, being leased to their former masters. *See generally* MATTHEW J. MANCINI, ONE DIES, GET ANOTHER; CONVICT LEASING IN THE AMERICAN SOUTH 1866-1928 (1996); DAVID M. OSHINSKY, "WORSE THAN SLAVERY": PARCHMAN FARM AND THE ORDEAL OF JIM CROW JUSTICE (1996).

130. Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872); *see also* A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS 75 (1996).

131. *See* ZINN, *supra* note 123, at 435-528; GOLDSTEIN, *supra* note 97, at 429-545; CHRISTIAN PARENTI, LOCKDOWN AMERICA: POLICE AND PRISONS IN THE AGE OF CRISIS 3-4, 33-35 (1999).

the "Kerner Commission" after its chair, Illinois governor Otto Kerner),[132] which concluded that the primary cause of the rebellions was "pervasive discrimination and segregation in employment, education and housing" and the resulting "frustrations of powerlessness" that permeated the "ghettos."[133] Despite its stated awareness of the underlying causes of and solutions for "social disorder," the government's primary response since the late 1960s has been to wage an ever-intensifying "war on crime."[134]

Nixon had assumed office on a "law and order" platform and, perhaps because he soon discovered that there was little federal jurisdiction over most criminal activity, he rapidly declared war on drugs, announcing to Congress in June 1971 that "[t]he problem has assumed the dimensions of a national emergency."[135] In the meantime, the 1968 Omnibus Crime Control and Safe Streets Act had weakened constitutional protections and expanded surveillance options;[136] the Comprehensive Drug Abuse Prevention and Control Act of 1970 had dramatically expanded drug and law enforcement agency budgets;[137] and the 1970 Organized Crime Control Act, which included the Racketeer Influenced and Corrupt Organizations (RICO) Act, loosened evidentiary rules, allowed for seizures of the assets of any organization deemed a criminal conspiracy, created twenty-five-year sentences for "dangerous adult offenders," and empowered secret "special grand juries" with broad subpoena authority.[138] The RICO Act, a chapter of the Federal Criminal Code created under Title IX, was purportedly aimed at organized crime, but immediately used against political activists such as the Black Panther Party and the Puerto Rican independence movement.[139] With massive federal subsidies available for weapons, training, prison construction, and automated information systems, many states followed the federal lead,[140] the most dramatic example being New York Governor Nelson Rockefel-

132. Kerner Commission Report, *supra* note 126, at 32. The Commission was established pursuant to Executive Order 11365, 29 July 1967.

133. *Id.* at 10-11.

134. Lyndon Johnson announced to Congress in March 1965, "We must arrest and reverse the trend toward lawlessness," despite the fact that his Crime Commission reported shortly thereafter that there was no significant increase in crime, and that "[v]irtually every generation since the founding of the Nation . . . has felt itself threatened by the specter of rising crime and violence." ROBERT M. CIPES, THE CRIME WAR: THE MANUFACTURED CRUSADE 3, 8 (1968).

135. EDWARD JAY EPSTEIN, AGENCY OF FEAR 173 (2d ed. 1999). Nixon had claimed a ten-fold increase in the number of addict/users, an figure derived "not from any flood of new addicts reported to federal authorities in 1970 or 1971 but from a statistical reworking of the 1969 data." *Id.* at 174. As the 1972 election approached, this number was arbitrarily reduced as evidence of success in the drug war. *Id.* at 177.

136. Pub. L. No. 90-351, 82 Stat. 197 (1968).

137. Pub. L. No. 91-513, 84 Stat. 1242 (1970).

138. Pub. L. No. 91-452, 84 Stat. 922 (1970).

139. *See* R. Stephen Stigall, *Preventing Absurd Application of RICO: A Proposed Amendment to Congress' Definition of "Racketeering Activity" in the Wake of* National Organization for Women, Inc. v. Scheidler, 68 TEMPLE L.REV. 223, 243 (1995).

140. These funds were distributed through the Law Enforcement Assistance Administration (LEAA), created by the 1968 Omnibus Crime Act. *See Comment, Federal Interference with Checks and Balances in State Government: A Constitutional Limit on the Spending Power,* 128 U. PENN. L. REV. 402 (1979) (noting that by 1976, 20 percent of most state budgets came from such federal funding).

ler's implementation of draconian drug laws with mandatory life sentences, even for sixteen-year-olds, and his request that President Nixon and New York City Mayor John Lindsay set up "emergency camps" for detaining drug addicts.[141]

Under the Reagan administration, the drug war's focus on "foreign" enemies was intensified, with large scale operations targeting Mexico and Turkey and an increased focus on immigrants as drug traffickers. This set the stage for heightened military involvement, facilitated by amending the Posse Comitatus Act[142] and welcomed as a way of maintaining military budgets in a time of apparent peace.[143] Federal police powers continued to be strengthened, as the 1984 Comprehensive Crime Control Act allowed federal preventive detention, established mandatory minimum sentences, eliminated federal parole, scaled back the insanity defense, increased penalties for acts of "terrorism," and greatly expanded asset forfeiture provisions.[144] The Bail Reform Act,[145] also passed in 1984, greatly expanded the use of preventive detention. Despite Justice Thurgood Marshall's argument that "[s]uch statutes, consistent with the usages of tyranny and what bitter experience teaches us to call the police state, have long been thought incompatible with the fundamental human rights protected by the Constitution," the Supreme Court upheld the practice in *United States v. Salerno* on the ground that preventive detention is regulatory, not punitive.[146] While purportedly designed to keep "drug kingpins, violent offenders and other obvious threats to the community" incarcerated while awaiting trial, it was immediately used to keep political resisters incarcerated, "provid[ing] the FBI with a weapon far superior to the strategy of pretext arrests" in detaining, among others, the Puerto Rican *independentistas*, Resistance Conspiracy defendants, and Irish Republican Army asylum seekers.[147]

The 1986 Anti-Drug Abuse Act provided new mandatory minimum sentences without possibility of parole, including the requirement of a five-year minimum for possession of 500 grams of powdered cocaine but only five grams of crack cocaine, a notorious disparity in light of the fact that powdered cocaine

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141. EPSTEIN, *supra* note 135, at 43.

142. *See* Kevin Fisher, *Trends in Extraterritorial Narcotics Control: Slamming the Stable Door After the Horse Has Bolted*, 16 NYU J. INT'L L. & POL. 353, 391(1984); *see also* EVA BERTRAM, MORRIS BLACHMAN, KENNETH SHARPE, & PETER ANDREAS, DRUG WAR POLITICS: THE PRICE OF DENIAL 112 (1996).

143. For an update on the heightened role of the military in the domestic "war on terror," see generally Ann Scales & Laura Spitz, *The Jurisprudence of the Military-Industrial Complex*, 1 SEATTLE J. SOC. JUST. 541 (2003).

144. Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1989 (1984); *see* PARENTI, *supra* note 131, at 50-51 (maintaining that nationally gross receipts from seizures went from approximately $100 million in 1981 to over $1 billion in 1987).

145. Bail Reform Act of 1984, 18 U.S.C. 3141-3150, 3156 (1994).

146. United States v. Salerno, 481 U.S. 739 (1987).

147. CHURCHILL & VANDER WALL, COINTELPRO PAPERS, *supra* note 125, at il; *see also* Laura Whitehorn, "Preventive Detention," in CAGES OF STEEL (Ward Churchill & J. J. Vander Wall eds., 1992) at 365-77. The "Resistance Conspiracy" cases involved charges of seditious conspiracy against seven white activists protesting U.S. war crimes.

is used much more frequently by white Americans and crack by African Americans.[148] The 1988 Anti-Drug Abuse Act expanded use of the federal death penalty; created a "drug czar" to coordinate between law enforcement, military, and intelligence agencies; allocated funds to the Department of Defense to train law enforcement officers; and further increased the severity of mandatory minimum sentences.[149]

Notwithstanding the emphasis given the war on drugs during the 1980s, national surveys indicated that, as of July 1989, only twenty percent of the American people considered drugs their most pressing national problem.[150] Nonetheless, in September, in his first televised speech as president, George Bush "declared a national consensus on the primacy of this issue 'All of us agree that the gravest domestic threat facing our nation today is drugs'—and then declared war, calling for 'an assault on every front.' Urging Americans to 'face this evil as a nation united,' Bush proclaimed that 'victory over drugs is our cause, a just cause.'"[151] Shortly after this speech, sixty-four percent of those polled had decided that it was, after all, the nation's most pressing problem and sixty-two percent were willing to give up "a few of the freedoms we have in this country" to the war on drugs.[152]

There is no evidence that these "wars" have reduced drug use or crime rates.[153] Despite the public perception of increasing crime, the overall crime rate has remained stable since the early 1970s.[154] Nonetheless, in 1972 there were just under 200,000 people in U.S. prisons; by 1985 there were 500,000; and by 1997 1.2 million, plus another 500,000 in local jails.[155] The United States now has one of the world's highest per capita incarceration rates, and imprisons more

148. Pub. L. No. 99-570, 100 Stat. 3207 (1986). *See generally* Jason A. Gillmer, United States v. Clary: *Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497 (1995); William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233 (1996).

149. Pub. L. No. 100-690, 102 Stat. 4184 (1988). *See generally* Christopher D. Sullivan, *User-Accountability Provisions in the Anti-Drug Abuse At of 1988: Assaulting Civil Liberties in the War on Drugs*, 40 HASTINGS L.J. 1223 (1989).

150. BERTRAM, ET AL., *supra* note 142, at 116.

151. *Id.* at 114.

152. *Id.* at 116.

153. PARENTI, *supra* note 131, at 59.

154. According to the FBI's Uniform Crime Rate (based on reported crimes), the rate per 100,000 population was at about 6,000 in 1980, dropped somewhat in the mid-80s, and was again at about 6,000 in 1991. The National Crime Survey (based on surveys to assess victimization, and generally assumed to be more accurate) reported a drop from nearly 12,000 in the early 1980s to about 9,000 in 1991. JEROME G. MILLER, SEARCH AND DESTROY: AFRICAN-AMERICAN MALES IN THE CRIMINAL JUSTICE SYSTEM 26-30 (1996).

155. MARC MAUER, RACE TO INCARCERATE 9 (1999); *see also* JOEL DYER, THE PERPETUAL PRISONER MACHINE: HOW AMERICA PROFITS FROM CRIME 1-2 (2000). According to a December 1999 report of the General Accounting Office, the number of women in prison increased fivefold from 13,400 in 1980 to 84,400 in 1998, with 72 percent of all women in federal prison serving time for drug offenses. Nell Bernstein, *Swept Away, in* PRISON NATION: THE WAREHOUSING OF AMERICA'S POOR 66, 67 (Tara Herivel & Paul Wright eds., 2003).

people than any other country.[156] Those targeted are predominantly poor people and people of color. Nationally, eighty percent of all persons facing felony charges are indigent, too poor to afford a lawyer even by the stringent standards courts apply.[157] Recent studies report that African Americans are being incarcerated at nine times the rate of white Americans, and Latinos at four times that rate. At current rates, nearly one in three black men and one in six Latinos will find themselves in state or federal prison.[158] The use of the criminal justice system to control the poor and people of color is not new, but it appears to be intensifying. While many factors such as the soaring profitability of the prison-industrial complex and the political capital gained by appearing "tough on crime" contribute to the spiraling incarceration rate, it is also a very effective mechanism for maintaining the economic and racial status quo,[159] one made more socially palatable by the portrayal of its primary targets as Other by virtue of race, and as the "enemy" by the declaration of war on crime and drugs. If we step back and look at this reality not as a "crime problem" but in terms of the communities it affects, we see broad patterns of mass incarceration that dramatically disrupt family relations, social institutions, and economic prospects and make the ever-present threat of imprisonment a dominant consideration.[160]

VI

EXPANDED POLICE POWERS IN THE "WAR ON TERROR"

> Our forefathers would be proud, really proud of what they see in America today. . . . Americans are generous to our neighbors in need. Americans are tolerant toward our fellow citizens of every background. . . . And Americans are reaching out across the world to say: We wage a war on the guilty, not the innocent.

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156. As of 1997 the U.S. was incarcerating one of every 155 Americans, second only to Russia among the 59 nations in Europe, Asia, and North America for which data are available. MAUER, *supra* note 155, at 19-23.

157. Stephen B. Bright, *The Accused Get What the System Doesn't Pay For, in* PRISON NATION, *supra* note 155, at 6; *see also* Caroline Wolf Harlow, U.S. Dept. of Justice, Defense Counsel in Criminal Cases, Nov. 2000, NCJ 179023.

158. *See* Michael A. Fletcher, *"Crisis" of Black Males Gets High-Profile Look: Rights Panel Probes Crime, Joblessness, Other Ills*, WASH. POST, Apr. 17, 1999, A2 (noting that in some states one in two black men are "under the supervision of the criminal justice system"); BARRY HOLMAN, MASKING THE DIVIDE: HOW OFFICIALLY REPORTED PRISON STATISTICS DISTORT THE RACIAL AND ETHNIC REALITIES OF PRISON GROWTH (Nat'l Ctr. On Inst. & Alternatives, 2001) 17, *available at* http://www.ncianet.org/ncia/mask.pdf: U.S. Dep't of Just., Bureau of Justice Statistics, Criminal Offender Statistics (2001); *see generally* DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999); MAUER, *supra* note 155; MILLER, *supra* note 154.

159. *See generally* Noam Chomsky, *Drug Policy as Social Control in* PRISON NATION, *supra* note 155, at 57. On the profitability of prisons, see generally DYER, *supra* note 155.

160. For an overview of recent conditions in African American communities, see ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL (rev. ed.. 2003). For American Indian communities, see Rennard Strickland, *"You Can't Rollerskate in a Buffalo Herd Even if You Have all the Medicine": American Indian Law and Policy* in his TONTO'S REVENGE: REFLECTIONS ON AMERICAN INDIAN CULTURE AND POLICY 47-62 (1997); Ward Churchill, *Unraveling the Codes of Oppression, in* FANTASIES OF THE MASTER RACE: LITERATURE, CINEMA AND THE COLONIZATION OF AMERICAN INDIANS xiv-xix (2d ed. 1998).

George W. Bush (Oct. 17, 2001)[161]

With all of the police powers obtained in the war on drugs firmly entrenched, the 1990s saw a shift in emphasis from combating drugs to a "war on terrorism" in which the threat of an external Other has been used to dramatically expand governmental prerogatives with respect to internal Others both citizens and noncitizen residents, people of color and those who dissent politically. Much of the impetus for this new wave of legislation initially came from the bombings of the World Trade Center in 1993 and the Oklahoma City federal building in 1995.[162] In 1994 Congress passed the Violent Crime Control and Law Enforcement Act,[163] fulfilling President Clinton's election year promise to put an additional 100,000 police officers on the street, providing more funds for state prisons, adding a "three strikes" mandatory life sentence provision, enhancing sentences for "gang members," directing the sentencing commission to increase penalties for offenses committed in newly designated "drug free zones" and making those convicted of such offenses ineligible for parole, and authorizing the death penalty for numerous new categories of "terrorist activity."[164]

Despite the fact that the FBI had reported only two incidents of international terrorism on U.S. soil between 1985 and 1996, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), whose "sweeping provisions served to license almost the full range of repressive techniques that had been quietly continued after COINTELPRO was supposedly terminated."[165] The Act defines "national security" as encompassing the "national defense, foreign relations, or economic interests of the United States" and gives the Secretary of State broad authority to designate groups as "engaging in terrorist activity" if they threaten "the security of United States nationals or the national security of the United States"[166]—a provision similar to that authorized by President Truman's 1947 executive order.[167] Under this Act it is a felony to provide any form of material support to designated organizations even if the

161. *Excerpted Remarks by the President from Speech to the California Business Association* in "WE WILL PREVAIL": PRESIDENT GEORGE W. BUSH ON WAR, TERRORISM, AND FREEDOM 42, 45 (National Review ed., 2003).

162. *See* Jennifer A. Beall, *Are We Burning Only Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism,* 73 IND. L.J. 693, 694-95 (1998).

163. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. 103-322, 108 Stat. 1796 (1994) (amending the Omnibus Crime Control and Safe Streets Act of 1968, and therefore also referred to as the 1994 Omnibus Crime Control Act).

164. *Id.*; *see also* PARENTI, *supra* note 131, at 63.

165. CHURCHILL & VANDER WALL, COINTELPRO PAPERS, *supra* note 125, at li; *see also*, David B. Kopel & Joseph Olson, *Preventing a Reign of Terror: Civil Liberties Implications of Terrorism Legislation*, 21 OKLA. CITY U. L. REV. 247 (1996) (noting the dangers of the anti-terrorism bills subsequently enacted as AEDPA); Michael J. Whidden, *Note*, *Unequal Justice: Arabs in America and United States Antiterrorism Legislation*, 69 FORDHAM L. REV. 2825 (2001) (noting the discriminatory application of AEDPA).

166. DAVID COLE & JAMES X. DEMPSEY, TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY 119 (2d ed. 2002).

167. *See supra* note 121 and accompanying text.

support goes directly to an entirely lawful activity of the group,[168] and noncitizens can be deported on the basis of secret evidence for belonging to organizations deemed "terrorist," without any showing of personal involvement in terrorist or criminal activity—in other words, for engaging in what would otherwise be associations protected by the First Amendment.[169]

At the same time Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), which made it easier to deport immigrants not only for their political associations, but also for minor criminal convictions.[170] Noncitizens, who were already excludable or deportable for serious criminal offenses and for virtually any drug offense, no matter how minor,[171] are now retroactively deportable for a wide range of minor crimes that have been redefined as "aggravated felonies." As a result, numerous long-time permanent residents have been deported for misdemeanor pleas or convictions several decades old.[172]

With the September 11 attacks on the Pentagon and the World Trade Center, the stage was set for the swift passage of the next level of police and intelligence powers on the executive branch's wish list,[173] as U.S. citizens and permanent residents were informed once again that they would have to "sacrifice some liberties" for their security.[174] With Attorney General John Ashcroft's dire warning that the "blood of the victims" of the next terrorist attack would be on Congress' hands if they did not act quickly,[175] the so-called USA PATRIOT (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) Act[176] was rushed through

168. COLE & DEMPSEY, *supra* note 166, at 121-23.

169. William C. Banks & M.E. Bowman, *Executive Authority for National Security Surveillance*, 50 Am. U. L. Rev. 1, 267 (2000).

170. Illegal Immigration Reform and Immigration Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

171. *See* Immigration Act of 1990, Pub.L. 101-649, 104 Stat. 4978 (rewriting exclusion and deportation grounds and adopting provisions to ensure removal of criminal aliens).

172. *See* COLE & DEMPSEY, *supra* note 166, at 117-26. *See generally* David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203 (1999); Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY'S L.J. 833 (1997).

173. *See* CHANG, *supra* note 7, at 48; *see also* Sharon H. Rackow, *Comment, How the USA PATRIOT Act Will Permit Governmental Infringement Upon the Privacy of Americans in the Name of "Intelligence" Investigations*, 150 U. PA. L. REV. 1651 (2002) (noting that the new powers are unnecessary, violate civil liberties, and go beyond the stated goal of fighting terrorism).

174. As in the war on drugs, apparently the public has once again agreed, with a 2002 survey indicating that "49 percent of the public now thinks that the First Amendment 'goes too far,' up from . . . 22 percent in 2000." Diane P. Wood, *The Rule of Law in Times of Stress*, 70 U. CHI. L. REV. 455, n.1 (2003) (citing Richard Morin & Claudia Deane, *The Ideas Industry*, WASH. POST, Sept. 3, 2002 at A15).

175. *See* COLE & DEMPSEY, *supra* note 166, at 151. Shortly thereafter Ashcroft testified to Congress that the Justice Department's mission had been redefined to focus on detecting and preventing terrorism rather than on prosecuting criminal activity. *See* 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, 1086-87 (2002).

176. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. 107-56, 115 Stat. 272 (2001).

the legislature and hurriedly signed into law.[177] A lengthy and complicated piece of legislation containing 158 separate provisions, the Act dramatically expands the government's law enforcement and intelligence gathering powers, blurs the line between criminal and intelligence investigations, criminalizes political protest, and further curtails immigrants' rights.[178]

In the *Yasui* case, the federal district court attempted to skirt the issue of the internment of U.S. citizens by declaring that Min Yasui had "forfeited" his citizenship by working for the Japanese consulate.[179] Apparently the government is now attempting to institutionalize this practice, for in January 2003 a draft of the Justice Department's proposed Domestic Security Enhancement Act of 2003,"[180] more commonly known as "PATRIOT II," was leaked to the public. If passed, it would expand the already impressive list of powers given law enforcement and intelligence agencies by the USA PATRIOT Act, by, among other things, allowing for the "expatriation" of U.S. citizens for becoming members of, or providing material support to, a group that is deemed a "terrorist organization . . . engaged in hostilities against the United States."[181] The terms "material support" and "terrorist organization" are defined very broadly, and "hostilities" is left undefined.[182]

VII

"FOREIGN . . . IN A DOMESTIC SENSE": U.S. CITIZENS AS ENEMY COMBATANTS

> While in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession.

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177. The history of the bill is available at http://thomas.loc.gov/cgi-bin/bdquery/z?d107:HR03162:@@@L&summ2=m&.

178. *See generally* CHANG, *supra* note 7; Whitehead & Aden, *supra* note 175; Jennifer C. Evans, Comment, *Hijacking Civil Liberties: The USA PATRIOT Act of 2001*, 33 LOY. U. CHI. L.J. 933 (2002); Michael T. McCarthy, *USA PATRIOT Act*, 39 HARV. J. ON LEGIS. 435 (2002).

179. *See supra* note 45 and accompanying text.

180. Domestic Security Enhancement Act of 2003, *at* http://www.publicintegrity.org/dtaweb/downloads/Story_01_020703_Doc_1.pdf (draft of Jan. 9, 2003). The draft includes the proposed text of the legislation as well as a section-by-section analysis.

181. Domestic Security Enhancement Act of 2003, *supra* note 180, § 501.

182. The definition of "material support" for both "international terrorism" and "domestic terrorism" would also be expanded. "Training" would extend to "instruction or teaching designed to impart a specific skill" and "providing personnel" would include providing an organization with "one or more individuals (including himself) to work in concert with it or under its direction or control." Domestic Security Enhancement Act of 2003, *supra* note 180, §402; Analysis p. 21. Under the USA PATRIOT Act, "Engaging in terrorist activity" encompasses soliciting members or funds, and providing material support or "encouragement" to a "terrorist" organization, even if the activity is undertaken solely to support the lawful, humanitarian activities of the organization, and even if the associational activities would otherwise be protected by the First Amendment. USA PATRIOT Act, *supra* note 176, §411(a); *see also* Whitehead & Aden, *supra* note 175, at 1098-99. These organizations need not be on any official list, but can simply be groups which are comprised of "two or more individuals, whether organized or not" engaging in certain activities, including the use or threat of violence. USA PATRIOT Act, §411(a). The activities are listed at 8 U.S.C. §1182(a)(3)(B)(vi)(III) (2003).

Downes v. Bidwell (J. White, concurring) (1901)[183]

In the fall of 2001 the United States waged war on Afghanistan, claiming that its ruling Taliban government was harboring Osama bin Laden and the al Qaeda network, believed to be responsible for the September 11 attacks.[184] After a massive bombing campaign, the Taliban was replaced with a government friendlier to U.S. interests.[185] In the meantime, U.S. forces captured over 600 men and boys of several dozen nationalities and transported them to the U.S. naval base at Guantánamo Bay, Cuba, where most continue to be detained and interrogated more than three years later.[186]

Two of those captured, John Walker Lindh and Yaser Esam Hamdi, turned out to be U.S. citizens. Lindh was immediately taken to Alexandria, Virginia, and charged with conspiring to kill Americans. White House spokesman Ari Fleischer announced that "the great strength of America is [that] he will now have his day in court"[187] and, in fact, Lindh soon appeared in a civilian criminal court. Represented by counsel and supported by his family, he pled guilty to reduced charges of supplying services to the Taliban and carrying an explosive during the commission of a felony and received a twenty-year prison sentence.[188]

Hamdi, on the other hand, was first taken to Guantánamo Bay where it was established that he was a U.S. citizen, born in Louisiana. Rather than being transferred to a U.S. civilian court, as Lindh was, Hamdi was placed in a naval brig in Norfolk, Virginia, and held incommunicado for nearly three years.[189] Despite the breadth of the government's "anti-terrorist" powers, including the ex-

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183. Downes v. Bidwell, 182 U.S. 244, 341-42 (1901).

184. *See* John Quigley, *The Afghanistan War and Self-Defense*, 37 VAL. U. L. REV. 541 (2003); Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INT'L L.J. 533 (2002).

185. *See* Matthew Lippman, *Aerial Attacks on Civilians and the Humanitarian Law of War: Technology and Terror from World War I to Afghanistan*, 33 CAL. W. INT'L L.J. 1, 56-65 (2002); Michael P. Scharf & Paul R. Williams, *Report of the Committee of Experts on Nation Building in Afghanistan*, 36 NEW ENG. L. REV. 709 (2002); Laura A. Dickinson, *Reluctant Nation Building: Promoting the Rule of Law in Post-Taliban Afghanistan*, 17 CONN. J. INT'L L. 429 (2002).

186. *See generally* MICHAEL RATNER & ELLEN RAY, GUANTÁNAMO: WHAT THE WORLD SHOULD KNOW (2004); Richard J. Wilson, *United States Detainees at Guantanamo Bay: The Inter-American Commission on Human Rights Responds to a "Legal Black Hole,"* 10 HUM. RTS. BR. 2 (Spring 2003); Erin Chlopak, *Dealing With the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions*, 9 HUM. RTS. BR. 6 (Spring 2002).

187. Katherine Q. Seelye, *Walker is Returned to U.S. and Will Be in Court Today*, N.Y. TIMES, Jan. 24, 2002, at A15. *See generally* David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953 (2002).

188. *See* United States v. Lindh, 227 F. Supp. 2d 565 (E.D. Va. 2002); Melysa H. Sperber, *John Walker Lindh and Yaser Esam Hamdi: Closing the Loophole in International Humanitarian Law for American Nationals Captured Abroad While Fighting with Enemy Forces*, 40 AM. CRIM. L. REV. 159, 160-61 (2003); *see generally* Suzanne Kelly Babb, *Fear and Loathing in America: Application of Treason Law in Times of National Crisis and the Case of John Walker Lindh*, 54 HASTINGS L.J. 1271 (2003); James P. Fantetti, *John Walker Lindh, Terrorist? Or Merely A Citizen Exercising His Constitutional Freedom: The Limits of the Freedom of Association in the Aftermath of September Eleventh*, 71 U. CIN. L. REV. 1373 (2003).

189. *See* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004); Donna R. Newman, *The Jose Padilla Story,* 48 N.Y.L. SCH. L. REV. 39 (2003/2004); Alejandra Rodriguez, *Is The War on Terrorism Compromising Civil Liberties? A Discussion of Hamdi and Padilla*, 30 CAL. W. L. REV. 379, 381 (2003); Sperber, *supra* note 188, at 162. *See generally* Iijima, *Shooting, supra* note 10.

panded use of preventive detention and the death penalty,[190] the government chose to label Hamdi an "enemy combatant," denying him access to counsel and to the courts.[191] A petition for habeas corpus was filed on his behalf by his father alleging, among other things, that he was being held in violation of the Fifth and Fourteenth Amendments.[192] In response, the government filed a declaration by Michael Mobbs, Special Advisor to the Under Secretary of Defense, (the "Mobbs Declaration"), which asserted that Hamdi "traveled to Afghanistan" in July or August 2001, was "affiliated with a Taliban military unit and received weapons training," remained with the unit after September 11, and was captured by Northern Alliance forces to whom he surrendered a Kalashnikov assault rifle.[193] According to the Mobbs Declaration, "individuals associated with" al Qaeda and the Taliban "were and continue to be enemy combatants."[194]

The District Court criticized the Mobbs Declaration for its "generic and hearsay nature," calling it "little more than the government's 'say-so,'" found that the affidavit fell "far short" of supporting Hamdi's detention, and ordered the government to turn over numerous documents for *in camera* review.[195] The Fourth Circuit reversed, stating that the government was entitled to "great deference" in matters of "foreign policy, national security, or military affairs."[196] In what Iijima describes as "a stunning exercise of circular reasoning,"[197] the court concluded that no further investigation of the accuracy of the Mobbs Declaration was required, as the "factual averments in the affidavit, if accurate, are sufficient to confirm that Hamdi's detention conforms with a legitimate exercise of the war powers given the executive by [the Constitution]."[198]

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190. *See supra* note 164 and accompanying text.

191. U.S. officials have used this undefined term to take advantage of the Geneva Conventions' provision distinguishing between the treatment of enemy soldiers, who cannot be punished simply for engaging in combat, and "unlawful" combatants. At the same time, however, they have failed to acknowledge as binding the Conventions' requirements that all detainees be presumed prisoners of war until an individual hearing has determined otherwise and that all detainees, regardless of status, be afforded minimal protections. *See* COLE, ENEMY ALIENS: DOUBLE STANDARDS, *supra* note 7, 39-46; *see generally* Nickolas A. Kacprowski, *Stacking the Deck Against Suspected Terrorists: The Dwindling Procedural Limits on the Government's Power to Indefinitely Detain United States Citizens as Enemy Combatants*, 26 SEATTLE U. L. REV. 651 (2003); Susan M. Burns, *Access to Counsel for "Enemy Combatant" Citizens in Military Detention: A Statutory or Constitutional Right?* Padilla v. Bush, 233 F. Supp. 2d 564 (2002), 28 S. ILL. U. L.J. 599 (2004); Charles I. Lugosi, *Rule of Law or Rule by Law; The Detention of Yaser Hamdi*, 30 AM. J. CRIM. L. 225 (2003); Amanda Schaffer, *Life, Liberty, and the Pursuit of Terrorists: An In-Depth Analysis of the Government's Right to Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try Those Enemy Combatants by Military Commission*, 30 FORDHAM URB. L.J. 1465 (2003).

192. Hamdi v. Rumsfeld, 124 S. Ct. at 2636.

193. *Id*. at 2637 (quoting the Mobbs Declaration).

194. *Id.*

195. *Id., citing* Hamdi v. Rumsfeld, 243 F. Supp. 2d 527 (E.D. Va. 2002).

196. Hamdi v. Rumsfeld, 316 F.3d 450, 463 (4th Cir. 2003).

197. Iijima, *Shooting, supra* note 10 at 122.

198. Hamdi v. Rumsfeld, 316 F.3d at 473. For an in-depth analysis of this case and of Padilla's, *see generally* Jason Collins Weida, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 CONN. L. REV. 1397 (2004).

In June 2004 the Supreme Court reversed the Fourth Circuit.[199] In an opinion written by Justice O'Connor for a four-justice plurality, the Court concluded that under the "all necessary and appropriate force" clause of Congress' Authorization for Use of Military Force,[200] Hamdi *could* be detained as an "enemy combatant," thus avoiding Hamdi's contention that his detention was forbidden by Congress' 1971 repeal of the Emergency Detention Act of 1950, a repeal explicitly based on concerns about internments such as that of the Japanese Americans.[201] It held, however, that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[202] The Court did not require that the "neutral decisionmaker" be a federal court, or that constitutional protections normally pertaining to criminal proceedings be extended to such "citizen-detainees":

> Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided.[203]

Rather than provide Hamdi with this very minimal due process, the government chose to release him. As reported by the *New York Times* "Yaser E. Hamdi, an American citizen captured in Afghanistan and once deemed so dangerous that the American military held him incommunicado for more than two years as an enemy combatant, will be freed and allowed to return to Saudi Arabia in the next few days, officials said."[204] On its face a surprising move or, as the *Times* put it, a "striking reversal in a hotly debated test case,"[205] it is in many respects quite consistent with the government's decision to arbitrarily declare certain Japanese Americans "loyal" and release them on the basis of a questionnaire after it had interned them, without a hearing, on the theory that their ancestry rendered them inherently "disloyal."[206] The decision to release Hamdi is also less than surprising when considered in the context of cases in which, well

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199. 124 S. Ct. at 2649.

200. 115 Stat. 224 (Sept. 2001) (authorizing the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks [of September 11]" or "harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons").

201. 124 S. Ct. at 2639, citing 18 U.S.C. § 4001(a), passed as part of a bill to repeal the Emergency Detention Act of 1950, 50 U.S.C. § 811 *et seq.*, and related congressional testimony found at H.R. Rep. No. 92-116 (1971); 1971 U.S.C.C.A.N 1435, 1438.

202. 124 S. Ct. at 2648.

203. *Id.*

204. Eric Lichtblau, *U.S. to Free "Enemy Combatant," Bowing to Supreme Court Ruling*, N.Y. TIMES, Sept. 23, 2004, A1. Contrary to the implications of the headline the Court did not order Hamdi freed.

205. *Id.*

206. *See supra* notes 31-39 and accompanying text.

before September 11, the government attempted to deport politically "undesirable" Muslims and Arabs on the basis of secret evidence.

Georgetown law professor David Cole and James Dempsey, former assistant counsel to the House Judiciary Subcommittee on Civil and Constitution Rights, report that in November 1986

> the Justice Department was considering internally a document entitled "Alien Terrorists and Undesirables: A Contingency Plan." The document was circulated by the Alien Border Control Committee, a secret inter-agency task force organized in 1986 to develop, among other things, plans for the "expulsion from the United States of alien activists who are not in conformity with their immigration status." The "contingency plan" proposed building a detention camp in a remote area of Louisiana to hold "alien undesirables" pending deportation. It . . . identified certain countries, all Arab, as being likely origins of terrorist aliens. . . . The Committee was specifically looking for ways to use secret evidence [when criminal prosecution was not practicable].[207]

In the late 1980s and 1990s the Immigration and Naturalization Service (INS) began attempting, on the basis of secret evidence, to deport Arab immigrants who had been targeted for their lawful political activities. Until the Supreme Court's 1999 holding in *Reno v. American-Arab Anti-Discrimination Committee*[208] that the 1996 Illegal Immigration Reform and Immigrant Responsibility Act[209] stripped the courts of much of their power to review deportation cases, lower federal courts found this practice to be unconstitutional in a number of cases.[210] Thus, for example, in *Rafeedie v. INS*[211] the government had claimed that revealing its reasons for deporting Fouad Rafeedie would be "prejudicial to the public interest, safety, or security of the United States."[212] The D.C. Circuit Court responded: "Rafeedie—just like Joseph K. in The Trial—can prevail . . . only if he can rebut the undisclosed evidence against him, i.e., prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden."[213] It rejected the INS's use of secret evidence and on remand the District Court, weighing Rafeedie's due process rights against the government's national security concerns, ordered him released.[214]

Nasser Ahmed, an Egyptian father of four U.S. citizen children, spent more than three and a half years in prison, most of it in solitary confinement as the

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207. COLE & DEMPSEY, *supra* note 166, at 39.

208. Reno v. American-Arab Anti-Discrimination Comm., 525 U.S. 471 (1999); *see also* Maryam Kamali Miyamoto, *The First Amendment after* Reno v. American-Arab Anti-Discrimination Committee*: A Different Bill of Rights for Aliens?*, 35 HARV. C.R.-C.L. L. REV. 183 (2000).

209. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). *See generally* Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution,* 25 N.Y.U. REV. L. & SOC. CHANGE 213 (1999); Clarence E. Zachery, Jr., *The Alien Terrorist Removal Procedures: Removing the Enemy Among Us or Becoming the Enemy from Within?*, 9 GEO. IMMIG. L. J. 291 (1995); Johnson, *supra* note 172.

210. *See generally* Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion,* 14 GEO. IMMIG. L.J. 51(1999).

211. Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989); remanded to 795 F. Supp. 13 (D. D.C. 1992).

212. Rafeedie v. INS, 688 F. Supp. 729, 734-35 (D. D.C. 1992).

213. 880 F.2d at 516.

214. 795 F. Supp. at 13.

INS attempted to deport him on the basis of secret evidence. For the first year, the government would not even provide Ahmed's lawyer with a summary of the evidence against him; eventually they provided a one-line summary baldly asserting that it had evidence "concerning respondent's association with a known terrorist organization," but refused to identify the organization. As it turned out, Ahmed had come to the FBI's attention when he worked as a court-appointed paralegal and translator for the defense team of Sheik Abdel Rahman, who was charged with seditious conspiracy. The FBI and INS tried to get Ahmed to inform on the cleric and threatened to deport him and his family if he did not cooperate. Ahmed refused and the INS made good on its threat. Even though the immigration judge had "no doubt" that Ahmed would be imprisoned and likely tortured if he returned to Egypt and that he was thus eligible for political asylum, Ahmed was released only after the government was eventually forced to reveal its evidence, which consisted only of his "associations."[215]

According to Cole and Dempsey, from 1996 through 2000 the government "sought to use secret evidence to detain and deport about two dozen immigrants, almost all of them Muslims accused of vague associations with terrorist groups. Over time, case by case, the government's evidence was revealed to be worthless, its legal theories were largely rejected, and virtually all of the accused aliens were released."[216] Cole, who represented thirteen individuals in secret evidence deportation cases, testified before a subcommittee of the House Judiciary Committee in February 2000 that "[at] one time, the INS claimed that all 13 posed a direct threat to the security of the nation, and that the evidence to support that assertion could not be revealed—in many instances could not even be summarized—without jeopardizing national security. Yet in none of these cases did the INS's secret evidence [once revealed] even allege, much less prove, that the aliens had engaged in or supported any criminal, much less terrorist, activity."[217]

In light of this consistent history of attempts to deport politically undesirable aliens on the basis of secret evidence, the government's desire to deport

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215. COLE & DEMPSEY, *supra* note 166, at 129-31; *see also* Akram, *supra* note 210, at 76.

216. COLE & DEMPSEY, *supra* note 166, at 127. In one particularly strange case, six Iraqi Kurds who participated in a failed CIA-backed attempt to overthrow Saddam Hussein were brought to the U.S. in 1997 by government officials. When they arrived, the INS tried to exclude them on the basis of secret evidence that, initially, it would not reveal even to their lawyer, former CIA director James Woolsey. After several years in detention, five of them entered into a settlement agreement under which they are living in Nebraska under conditions resembling house arrest while they look for third countries which will accept them. *See* Andrew Cockburn, *The Radicalization of James Woolsey,* N.Y. TIMES MAG., July 23, 2000, 26, 29 (quoting Woolsey's characterization of the evidence, when he was finally allowed to see it, as "a joke"); *see also* COLE & DEMPSEY, *supra* note 166, at 137-39; Akram, *supra* note 210, at 78.

217. Statement of Professor David Cole, Georgetown University Law Center, On the Use of Secret Evidence in Immigration Proceedings and H.R. 2121, Before the House Judiciary Committee, Subcommittee on Immigration and Claims, 10 February 2000, *available at* http://www.house.gov/judiciary/cole0210.htm; *see also* Dave Martella, *Defending the Land of the Free and the Home of the Fearful: The Use of Classified Information to Deport Suspected Terrorists*, 7 AM. UNIV. J. INT'L L. & POL. 951 (1992).

Hamdi, rather than participate in even a pro forma hearing, is not particularly surprising. However, in Hamdi's case, there was a complication, for, although perceived as a "politically undesirable alien," he is—or was—a U.S. citizen. Professor Leti Volpp describes the process at work in this and similar situations:

> In the American imagination, those who appear "Middle Eastern, Arab, or Muslim" may be theoretically entitled to formal rights, but they do not stand in for or represent the nation. Instead, they are interpellated as antithetical to the citizen's sense of identity. Citizenship in the form of legal status does not guarantee that they will be constitutive of the American body politic. In fact, quite the opposite: The consolidation of American identity takes place against them.[218]

In Hamdi's case his formal rights as a citizen were superseded by his identity as "antithetical" to that of a *real* American and the constitutional rights to which he should have been entitled voided by requiring, in return for his release, that he not only agree to deportation to Saudi Arabia, where he had grown up, but that he renounce his U.S. citizenship.[219]

On its face, there is little to distinguish John Walker Lindh's case from that of Yaser Hamdi. Both were U.S.-born citizens, allegedly captured fighting with the Taliban. Yet Lindh, a European American, received an open trial in a civilian criminal court, with no diminishment of his constitutional rights, and Hamdi, of Middle Eastern descent, was denied all rights. One imagines that, much like the Tule Lake renunciants, his only choice appeared to be indefinite arbitrary detention or the renunciation of his U.S. citizenship. Using the framework articulated by Neil Gotanda,[220] when the "citizen/alien" distinction was directly confronted with the "American/'foreign'" dichotomy, perceived foreignness trumped citizenship.[221]

The question now becomes, what will happen to Jose Padilla? Padilla, who is of Puerto Rican descent, was born in Brooklyn and thus, like Lindh and Hamdi, a U.S. citizen by birth. But, unlike either Lindh or Hamdi, he was not captured in Afghanistan or any other arena of combat, but was arrested in May 2002 at Chicago's O'Hare Airport on a material witness warrant.[222] Two days before a scheduled court hearing, he was declared an enemy combatant and ordered into military custody, where he remains.[223]

Accompanying the order classifying Padilla as an "enemy combatant" was a declaration by Michael Mobbs stating that Padilla had contacted al Qaeda officials and proposed stealing radioactive material and detonating a "radiological

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218. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575, 1594 (2002).

219. Lichtblau, *supra* note 204 (noting that "the agreement also bars him from leaving Saudi Arabia for a time and requires him to report possible terrorist activity").

220. *See supra* note 60 and accompanying text.

221. For discussions of citizenship in this context, *see generally* Volpp, *supra* note 218; Karen Engle, *Constructing Good Aliens and Good Citizens: Legitimizing the War on Terror(ism)*, 75 COLO. L. REV. 59 (2004); Jaykant M. Patidar, *Citizenship and the Treatment of American Citizen Terrorists in the United States*, 42 BRANDEIS L.J. 805 (2004).

222. *See* Iijima, *Shooting, supra* note 10, at 134-38.

223. *See* Newman, *supra* note 189, at 40.

dispersal device" in the U.S.[224] Padilla's lawyer, who had not been allowed to meet with him, filed a petition for habeas corpus on his behalf in the Southern District of New York, which held that the President did have the authority to designate an American citizen captured on American soil as an enemy combatant, but also that Padilla had to be able to consult with counsel and challenge the facts upon which the government based its designation.[225] On appeal the Second Circuit held that "while Congress—otherwise acting consistently with the Constitution—may have the power to authorize the detention of United States citizens under the circumstances of Padilla's case," the President acting alone does not have the power "to detain as an enemy combatant an American citizen seized on American soil outside a zone of combat."[226]

In the spring of 2004 the Supreme Court heard Padilla's case but failed to reach the merits, holding that the case had been filed in the wrong jurisdiction, thereby delaying its final resolution.[227] However, since the Court has held that not only Yaser Hamdi but also the noncitizen detainees at Guantánamo Bay have a right to some kind of hearing,[228] it is likely to hold that Padilla, as a U.S. citizen arrested on U.S. soil, has at least as much right to due process as a person captured in combat. Perhaps it will agree with the Second Circuit and hold that Padilla cannot be held as an enemy combatant in the absence of specific congressional authorization. It could even overturn the purportedly discredited precedent of *Korematsu* by holding that U.S. citizens cannot be detained indefinitely on vague claims of "military necessity," but must be charged and tried in accordance with the Constitution.

Regardless of the position ultimately taken by the Court, the executive branch's treatment of Padilla to date raises significant issues about the nature of citizenship and its relationship to the Constitution. Born in Brooklyn, Padilla is a U.S. citizen by virtue of the Fourteenth Amendment, just as Hamdi and all of the Nisei interned in World War II were. Yet Padilla is both an internal Other by virtue of his race and ethnicity, and perceived as an external Other as a result of his conversion to Islam and the political associations attributed to him. As such, he is perhaps best described, as the Nisei were, as a "non-alien"—a citizen without the protections that status is thought to entail.

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224. Padilla ex rel Newman v. Rumsfeld, 233 F. Supp. 2d 565, 572 (S.D.N.Y. 2002). It has become increasingly clear that Padilla's connection to al Qaeda was tenuous at best and that, according to U.S. intelligence officials, the plot was "blown out of proportion." *See* Christopher Newton, *Officials Downplay Terror Suspect,* AP Online, Aug. 13, 2002, *available at* 2002 WL 25139054; Michael Isikoff, *And Justice for All: John Ashcroft Crowed at the Arrest of Alleged "Dirty Bomber" Jose Padilla. But Do the Feds Have a Case?* NEWSWEEK, Aug. 19, 2002, 32; Iijima, *Shooting, supra* note 10, at 135.

225. 233 F. Supp. 2d at 572, 600. The proposed standard of review, however, was only whether there was "some evidence to support [the President's] conclusion that Padilla was . . . engaged in a mission against the United States on behalf of an enemy with whom the United States is at war, and . . . whether that evidence has not been entirely mooted by subsequent events." *Id*. at 601.

226. Padilla v. Rumsfeld, 352 F.3d 695 at 715, 698 (2003).

227. Padilla v. Rumsfeld, 124 S. Ct. 2711 (2004). The Court held that the New York federal courts lacked jurisdiction since Padilla is being held in South Carolina.

228. Rasul v. Bush, 124 S. Ct. 2686 (2004).

One presumes that the government might wish to treat Padilla as it did Hamdi, stripping him of his citizenship and avoiding constitutional complications by deporting him. However, in this case there is an added complication created by Puerto Rico's status. In 1898 the United States "acquired" Puerto Rico from Spain and has exercised jurisdiction over the island nation since then.[229] Between 1901 and 1922 the Supreme Court addressed the question of Puerto Rico's relationship to the U.S. in a series of cases known as the *Insular Cases*, beginning with *Downes v. Bidwell*.[230] The central question was whether Puerto Rico should be treated as a foreign nation or as part of the U.S. for purposes of the Constitution, a question sometimes phrased in terms of whether the Constitution "follows the flag."[231]

Justice Brown, writing for the Court, held that Congress had complete discretion over whether to extend the Constitution to the territories and was bound only to recognize the "natural" rights of the inhabitants.[232] Justice White's concurrence distinguished between "incorporated" and "unincorporated" territories, a distinction that the Court would later adopt[233] and that, in Second Circuit Judge Cabranes' words, "was devised in order to make colonialism possible."[234] Echoing Justice Marshall's characterization of American Indian nations as "domestic dependent nations,"[235] Justice White said that "while in an international sense Porto Rico was not a foreign country, since it was . . . owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely appurtenant thereto as a possession."[236]

In 1922, in *Balzac v. Porto Rico*, the Court held that the Jones Act of 1917, which conferred U.S. citizenship but not representation on Puerto Ricans, did not "incorporate" Puerto Rico into the United States.[237] More than a century later, Puerto Rico—along with the Northern Mariana Islands, the "U.S." Virgin

229. I address the context of this "acquisition" in more detail in Saito, *Asserting Plenary Power, supra* note 95 at 443-47. On the status of Puerto Rico, see generally FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION (Christina Duffy Burnett & Burke Marshall eds., 2001); JOSÉ TRÍAS MONGÉ, PUERTO RICO: THE TRIALS OF THE OLDEST COLONY IN THE WORLD (1997); EFREN RIVERA RAMOS, THE LEGAL CONSTRUCTION OF IDENTITY: THE JUDICIAL AND SOCIAL LEGACY OF AMERICAN COLONIALISM IN PUERTO RICO (2001).

230. Downes v. Bidwell, 182 U.S. 244 (1901). The "Insular Cases" are generally thought to start with *Downes* and go through *Balzac v. People of Porto Rico*, 258 U.S. 298 (1922).

231. For critiques of this phrasing, see Christina Duffy Burnett & Burke Marshall, *Between the Foreign and the Domestic: The Doctrine of Territorial Incorporation, Invented and Reinvented in* FOREIGN IN A DOMESTIC SENSE, *supra* note 229, at 1, 32 n.44.

232. 182 U.S. at 280; *see also* Rivera Ramos,048 .8(l)1. 0 r 1 Tf7.098627 TD-0.0061 Tc03(:)-10.1(L))02.3(nt)-10g1(ri)-10.31(

Islands, and "American" Samoa[238]—remains an "unincorporated territory" or, more accurately, a U.S. colony.[239] In 1898 Puerto Ricans had their own parliament, full Spanish citizenship, and political representation in the Spanish parliament; today they have no representation in Congress and only qualified U.S. citizenship[240]—unless they are born in the U.S. proper, in which case they have birthright citizenship under the Fourteenth Amendment. As recently as 1996 the House Committee on Resources noted that the "compact" currently governing U.S.-Puerto Rico relations does not meet the United Nations' standards for self-government, that Puerto Rico is still an unincorporated U.S. territory, and that Congress can unilaterally revoke local self-government and U.S. citizenship as long as it meets the "fundamental rights test" of the *Insular Cases.*[241]

Dissenting in *Downes*, Justice Harlan warned, "It will be an evil day for American liberty if the theory of a government outside of the supreme law of the land finds lodgment in our constitutional jurisprudence."[242] In a separate dissent, Chief Justice Fuller characterized the majority's position as establishing that "if an organized and settled province of another sovereignty is acquired by the United States, Congress has the power to keep it, like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period."[243]

Like his Puerto Rican homeland, Jose Padilla is being kept "like a disembodied shade, in an intermediate state of ambiguous existence for an indefinite period." As with the Nisei in World War II, he is a U.S.-born citizen but, in fact, his status is that of a "non-alien." Unprotected by a separate sovereign, but denied the constitutional rights of a U.S. citizen, he is at the mercy of the U.S. government's unrestrained and arbitrary exercise of power.

VIII

CONCLUSION

> [W]hen one is born in America and learning to love it more and more every day without thinking it, it is not an easy thing to discover suddenly that being American is a terribly incomplete thing if one's face is not white and one's parents are Japanese of the country Japan which attacked America.

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238. *See* Burnett & Marshall, *supra* note 229 at 1, 30 n.1; *see generally* STANLEY K. LAUGHLIN, THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTION (1995); Marie Rios-Martinez, *Congressional Colonialism in the Pacific: The Case of the Northern Mariana Islands and Its Covenant with the United States,* 3 SCHOLAR 41 (2000).

239. On the colonial status of Puerto Rico, see generally TRÍAS MONGÉ, *supra* note 230; Ramos, *Insular Cases*, *supra* note 232.

240. *See* TRÍAS MONGÉ, *supra* note 229, at 6-7. On the complications of citizenship imposed in this colonial context, see generally José Julian Alvarez Gonzalez, *The Empire Strikes Out: Congressional Ruminations on the Citizenship Status of Puerto Ricans*, 27 HARV. J. ON LEGIS. 309 (1990).

241. TRÍAS MONGÉ, *supra* note 229, at 16 (citing House Comm. on Resources, Report 104-713, part I, United States-Puerto Rico Political Status Act, to Accompany H.R. 3024, 104th Cong. 2d Sess. 14 (1996)).

242. 182 U.S. at 382.

243. *Id.* at 372.

John Okada, No-No Boy[244]

The World War II internment of Japanese Americans is generally considered an aberration, an unusual situation in which the United States strayed from its basic commitment to the fundamental principles of the Constitution. It has been officially recognized as a "grave injustice"[245] and the Supreme Court's decision in *Korematsu* is frequently dismissed as an "anachronism."[246] Yet we see, in fact, that it was not a "mistake" but a policy deliberately implemented in the face of evidence that it was *not* necessary or reasonable and subsequently sanctioned by the Supreme Court in cases that remain viable precedents.[247]

Even a cursory look at U.S. history illustrates that the indefinite internment of civilians has been a routine practice, at least with respect to internally colonized Others. In many jurisdictions persons of African descent were presumed to be slaves and held in bondage from the founding of the Republic until 1865;[248] for most of the nineteenth century American Indians were routinely incarcerated en masse as "prisoners of war," almost always during periods of peace;[249] during World War II Japanese Americans were presumed "disloyal" on the basis of ancestry and interned;[250] and now large numbers of people are being detained on the basis of their race, gender and/or national origin.[251] Just as the United States has kept American Indian nations and external colonies like Puerto Rico in a state of limbo, exercising plenary power over them and denying them the protections of either the Constitution or international law, it has treated large groups of people as "non-aliens," arbitrarily denying them the protections of law.

Justice Jackson, dissenting in *Korematsu*, noted that the Court "for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens" and warned that this principle now "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."[252] We have seen its repetition in the anti-Communist crusades of the Cold War[253] and the "wars" on crime and drugs,[254] and we now see it being further embedded and expanded to new purposes in the current "war on terror."[255] In each of these

244. JOHN OKADA, NO-NO BOY 54 (1976).
245. *See* Civil Liberties Act of 1988, *supra* note 11.
246. *See supra* notes 4-5 and accompanying text.
247. *See generally* Kang, *Denying Prejudice, supra* note 6.
248. *See supra* notes 127-130 and accompanying text.
249. *See supra* notes 71-86, 91-96 and accompanying text.
250. *See supra* notes 17-39 and accompanying text.
251. *See supra* note 7 and accompanying text.
252. 323 U.S. at 246; *see generally* Iijima, *Shooting, supra* note 10 ; Eric K. Yamamoto & Susan Kiyomi Serrano, *The Loaded Weapon*, 27/28 AMERASIA J. 51 (2001-2002).
253. *See supra* notes 121-125 and accompanying text.
254. *See supra* notes 126-160 and accompanying text.
255. *See supra* notes 161-182 and accompanying text.

cases the threat has been labeled "foreign," and measures initially sanctioned only with respect to noncitizens, often enemy aliens, have been used against those considered "Other," regardless of their citizenship.

What is being sacrificed is not merely "some liberties"—or the liberties of some—but the rule of law itself, because in each of these situations the U.S. government is claiming a right to exercise unconstrained power over those under its jurisdiction. When challenged, the government explains away each instance as "aberrational"—an exception necessitated by an imminent threat to the national security. Yet when such assertions of raw power are viewed collectively, it is clear that they *are* the norm with respect to those deemed "Other."

This reality cannot be remedied effectively by focusing on the dangers posed to citizens, for the protections thought to accompany citizenship have proven illusory time and again. Neither can it be remedied by urging the government to act with more "restraint" in particular cases. Instead, we must address the underlying structures of American law and policy that sanction the relegation of both the internal Others, and those held in external territories under U.S. jurisdiction to the status of "non-aliens" who can be—and are, in fact—held in "an intermediate state of ambiguous existence for an indefinite period."[256] Simply put, if we are to ever move past *Korematsu* and its justification of the Japanese American internment, we must insist that the U.S. government comply with the rule of law, as articulated in both the Constitution and in international law, in *all* of its actions and with respect to *all* territories and peoples over whom it exercises jurisdiction.

256. *Downes,* 182 U.S. at 372.