RACE, RIGHTS AND REPARATION
Law and the Japanese American Internment

Chapter 8

RESURRECTING KOREMATSU: POST-SEPTEMBER 11th NATIONAL SECURITY CURTAILMENT OF CIVIL LIBERTIES

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A. OVERVIEW

In his ringing dissent in *Korematsu v. U.S.*, Justice Robert Jackson warned that the majority's decision upholding the constitutionality of the Japanese American internment would create a legal principle that sanctioned racial discrimination under the guise of national security – a principle that "lies about like a loaded weapon ready for the hand of any authority that can bring forward a claim of urgent need."[*] To what extent, if at all, is a U.S. government "hand of authority" now bringing forward a plausible, yet ultimately falsified, "claim of urgent need," in order to avoid judicial and public scrutiny of harsh political (rather than security) maneuvers? This question lies at the heart of this new post-September 11th Chapter 8 to RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT.

After the September 11, 2001 attacks on the World Trade Center and Pentagon, the Bush Administration's Justice Department took bold steps to prevent future attacks and to seek out those responsible for the deaths of over 2,000 people. Congress quickly passed the USA PATRIOT Act[*] to assist the Administration in its "war on terror." And the American public offered broad

[*] See Chapters 3 and 5, Eric Yamamoto, Margaret Chon, Carol Izumi, Jerry Kang and Frank Wu, Race, Rights and Reparation: Law and The Japanese American Internment (2001) (exploring the Japanese American internment cases from World War II that were reopened in the 1980s).

[*] *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT), Pub. L. No. 107-56,115 Stat. 272 (2001).

support as President Bush declared that "we would go forward to defend freedom and all that is good and just in our world."

Nearly all Americans found many government security measures to be not only appropriate but essential to ensuring the nation's safety. Those measures included heightened airport and public transportation security, increased police presence at major public events, improved security training for government personnel and closer security checks for foreigner visa entries. Some observers called for more aggressive measures.[*] When viewed separately, many of the government's actions seemed needed or at least acceptable.

Yet, when viewed as whole, especially in light of new proposals to further expand executive powers that restrict civil liberties, a deeply troubling picture emerged.[†] Consider the following Executive Branch actions and their likely collective impact on citizens and non-citizens:

- the designation of certain American citizens as "enemy combatants" and their indefinite detention without charges, trial, access to counsel or meaningful judicial review;
- the sweeping surveillance based on a broadly defined "terrorist activity" (including the unknowing contribution money for charitable purposes to an organization labeled "terrorist" by the government) as authorized under the PATRIOT Act;
- the broad scale questioning and indefinite detention of Arabs and Muslims on ostensible national security grounds and later deportation of many of these detainees for reasons unconnected to terrorist activity;
- the designation of citizens and immigrants as "material witnesses" not to secure their testimony in on-going criminal proceedings as required by statute, but to detain them in solitary confinement for extended periods and "break them," pending further general investigation;
- the blanket public closing of deportation hearings labeled "special interest" in apparent transgression of the first amendment rights of immigrants and the press;
- the use of new immigration "security" powers to target and harass Arabs, Muslims, South Asians and other persons of color for activities unconnected to terrorism;
- and the Administration-supported secret proposal to enact a Patriot Act II during the build-up to the Iraq war, further expanding Executive pow-

[*] Jan C. Ting, *Unobjectionable But Insufficient – Federal Initiatives in Response to the September 11th Attacks*, 34 Conn. L. Rev. 1145 (2002).

[†] *See generally*, Nancy Chang, Silencing Political Dissent: How Post-September 11 Anti-Terrorism Measures Threaten Our Civil Liberties (2002)

ers, including the authority to deport and denaturalize American citizens it declares to be terrorists.[*]

These government actions seem reasonable to many Americans who believe that they are aimed solely at likely terrorists. Yet, of the over one thousand men secretly detained and deported after September 11th, none was directly linked to terror. Indeed, the Executive Branch appeared to employ its new anti-terrorism powers and the public mandate in ways that target certain minority groups.

Early critics of apparent government civil liberties abuses were quickly dismissed as unpatriotic radicals. In late 2002, however, civil rights groups, backed by media investigative reporting, began to challenge specific Executive Branch actions.[†] In a series of nationwide lawsuits, both citizens and non-citizens demanded that the government establish that its sharp curtailment of constitutional liberties is necessary for combating domestic and global terrorism. The Executive Branch's response was in essence "just trust us" – that is, the Executive Branch need not justify itself to the courts and that its mere assertion of a national security justification for its actions should suffice.

Against the backdrop of recent government national security restrictions of civil liberties, the following study modules examine the relationship of the Japanese American internment experience to the experiences of Arabs and Muslims in America today. Module B.1 first addresses the effect of government actions on the rights of American *citizens*, focusing on the on-going *Hamdi* and *Padilla* "enemy combatant" cases. In B.2, we then address the rights of *non-citizens*, or immigrants to the U.S., looking first at legal history and government power over "aliens" and later at several government "national security" actions that harshly target non-citizens apparently for non-security reasons in what some call a "war against immigrants". Our third study module, B.3, deepens the analysis of the government's national security treatment of citizens and non-citizens by examining the process of *racial formation* of certain groups, particularly Arab Americans and Muslims, as presumptively terrorist in the public's and, equally important, the govern-

[*] See Charles Lane, *U.S. May Seek Wider Anti-Terror Powers*, Washington Post (Feb. 8, 2003) at A1; for full text of the proposed act, entitled the Domestic Security Enhancement Act, see the Center for Public Integrity website *http://www.publicintegrity.org*.

[†] *See, e.g., Detroit Free Press v. Ashcroft*, 303 F. 3d 691, 681 (6th Cir. 2002) (finding that there is a first amendment presumption of openness in deportation proceedings including those deemed "special interest"). *But see North Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002). *See also Center for National Security Studies v. U.S. Department of Justice*, 215 F. Supp. 2d. 94 (D.D.C. 2002) (case brought under the Freedom of Information Act to request information about detainees); *U.S. v. Osama Awadallah*, 202 F. Supp.2d 55 (S.D.N.Y. 2002) (challenging the executive's use of material witness statute to detain non-citizens indefinitely); *In Re the Application of the United States for a Material Witness*, 2002 U.S. Dist. LEXIS 13234 (S.D.N.Y. July 11, 2002); *Turkmen v. Ashcroft, No. 02-CV-2307(E.D.N.Y.)* (class action alleging unconstitutional imprisonment and harsh treatment of the non-citizens after the Sept. 11 attacks, as well as violations of international human rights and treaty law because of ethnic and religious profiling.), available at: *http://www.ccr-ny.org/v2/home.asp*. See also American Bar Association Task Force on Treatment of Enemy Combatants, Preliminary Report, August 8, 2002 (challenging the Executive's authority to label American citizens enemy combatants absent clear guiding precedent, standards and judicial review).

ment's eye. It then explores the extent to which government policies towards these particular minority groups constitute a form of *racial profiling*.

The final study module, B.4, coalesces the inquiries and insights of the previous modules. It does so first by looking at "Burgeoning Executive Power" under the mantle of national security and then at the deeply troubling attempts by government officials to resurrect *Korematsu* as authority for a possible present-day racial internment in the war on terror. The Executive Branch's contention that its sweeping and often secret actions under the mantle of national security should be immune from judicial oversight has led critics to charge that the administration is developing an "imperial presidency" –one with expansive powers and minimal accountability."[*]

Finally, in light of Justice Jackson's "loaded weapon" warning and the insights of the *Korematsu*, *Hirabayashi* and *Yasui coram nobis* cases, the study module concludes this new chapter with an in-depth examination of the appropriate judicial role in overseeing Executive Branch and Congressional national security actions that sharply curtail civil liberties.

In light of the injustice legitimized by the Japanese American internment, two key questions emerge about contemporary government national security restrictions of civil liberties:

Will today's judiciary draw upon yesterday's Korematsu lessons to demand that the government prove its national security claim as justification for curtailing fundamental liberties?

Or will the courts again abdicate their role of "watchful care"[†] over civil liberties of citizens and non-citizens during times of public fear?

As you analyze critically the following materials, please consider the consequences of the possible answers to these questions.

B. STUDY MODULES

1. RIGHTS OF CITIZENS

In this initial study module, we describe some of the post-9/11 civil liberties and civil rights issues affecting citizens. Because citizens presumably are entitled to the full panoply of rights under the Constitution, it is important to understand how some of these rights have been abrogated by the war on ter-

[*] *See* Melissa K. Mathews, *Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers*, 23 Hamline J. Pub. L. & Pol'y 455, 459-60 (2002) (discussed in more detail in study module B.4); *see also* Harold Hongju Koh, *Civil Rights: Six Experts Weigh In*, TIME (December 7, 2001); available at: <http://www.time.com/time/nation/article/0,8599,186581,00.html> ("[W]e have acknowledged the executive branch's lead on national security matters, while insisting that its actions be subject to congressional oversight and judicial review. In a constitutional democracy, we reason, our President is not our king. When he takes drastic action that affects all of our lives, as he must in crises, our system of checks and balances requires him to consult and persuade elected and appointed officials who do not work for him.").

[†] Ex Parte Milligan, 4 Wall 2, 124 (1866).

ror. Our fourth and final study module (B.4) revisits many of these issues in greater detail, in the context of analyzing the impact of national security concerns on the appropriate balance of power among the various branches of government.

a. Treatment of Citizens Deemed to be Enemy Combatants

Although the government's security actions in the war on terror have been directed primarily towards non-citizens, it has also pursued American citizens who theoretically are protected fully by the Constitution. Two citizens have been detained indefinitely without charges, access to counsel or trial, all on the government's unilateral declaration that they are "enemy combatants." Others have been detained as material witnesses.[*] The Executive Branch has asserted that it can hold these citizens indefinitely without basic procedural protections that would be available had they been charged as criminals. For example, the Sixth Amendment right to be notified of charges or to have a speedy trial by jury or right to counsel, as well as the Fifth Amendment right to due process of law, are rights that the government now argues are unavailable to those designated as enemy combatants. These actions call into serious question the Executive Branch's power to deprive American citizens of fundamental liberties.

b. Possible Procedural Protections Available to Enemy Combatants Under the Laws of War or Domestic Criminal Courts

The government has relied on *Ex Parte Quirin*,[†] a World War II German saboteur case, as its primary source of authority for indefinitely detaining American citizens designated as "enemy combatants." In *Quirin*, which we discussed briefly in Chapter 5, the U.S. Supreme Court allowed the government to try and punish a U.S. citizen and eight German nationals in a military tribunal, notwithstanding that non-military courts were available for criminal prosecutions. As opposed to lawful combatants fighting for an enemy army who are subject to the laws of war, the Court defined enemy combatants as individuals who are not subject to the status of prisoners of war. The Court thus determined that under the Articles of War, enemy combatants are not entitled to be tried in non-military proceedings or by jury. The Court also determined that trying enemy combatants before a military tribunal did not violate the fifth and sixth amendments because they were not charged with "crimes" or involved in "criminal prosecutions."

An enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are fa-

[*] 18 U.S.C. § 3144 (explored more in the next study module).

[†] 317 U.S. 1 (1942).

miliar examples of belligerents who are generally deemed not to be entitled to the status of prisoners, but to be *offenders against the law of war subject to trial and punishment by military tribunals*.[*]

c. Procedural Protections Available to the *Quirin* Defendants

The Supreme Court in *Quirin* held that the government can deem a U.S. citizen an enemy combatant, and then try and punish him in a military tribunal. Significantly, however, the *Quirin* defendants were represented by counsel. Moreover, the Court made clear that the government's enemy combatant designation was subject to judicial review and that enemy combatants have standing to contest convictions for war crimes by *habeas corpus* proceedings. As the Court recognized, the courts' duty "in time of war as well as in time of peace, [is] to preserve unimpaired the constitutional safeguards of civil liberty."[†] *Quirin* arose in the context of World War II; the defendants were trained in Germany as saboteurs and were captured in the U.S. with weapons and sabotage plans. Thus there was little question regarding who the enemy was and whether the petitioners were in fact enemy combatants.[‡] The decision in *Quirin* therefore turned not on whether the men being detained were in fact enemy combatants but whether they could be tried by a military tribunal, even if the civil courts were open.

d. Comparing *Quirin* to *Hamdi* and *Padilla*

Now consider the first two enemy combatant cases, *Hamdi v. Rumsfeld*[§] and *Padilla v. Bush*,[**] in which the Executive Branch has sought to detain indefinitely two non-White U.S. citizens it has labeled enemy combatants.[††]

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[*] *Quirin*, 317 U.S. at 14 (emphasis added).

[†] *Id. at* 6.

[‡] *See generally* Gary Cohen, *The Keystone Kommandos*, The Atlantic Monthly (February 2002), <http://www.theatlantic.com/issues/2002/02/cohen.htm>.

[§] *Hamdi v. Rumsfeld*, 243 F.Supp.2d 527 (E.D.Va. 2002) ("*Hamdi*"), *Hamdi v. Rumsfeld, 294 F.3d 598 (4th Cir.2002)* ("*Hamdi I* "), *Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir.2002)* ("*Hamdi II* "), *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003) ("*Hamdi III*").

[**] Padilla v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

[††] Other non-White citizens have been charged with conspiring to provide material support to Al-Qaeda. James Ujaama, an African American who converted to Islam, was indicted on August 28, 2002. Josh Feit, A.K.A. Bilal Ahmed: U.S. Charges Seattle Man with Ties to al Quaeda, <www.thestranger.com/2002-09-05/city.html>. On April 28, 2003, Maher Hawah, a naturalized citizen of Palestinian descent who resided in Portland, Oregon, was also charged with conspiring to provide material support to Al-Quaeda. Rachel L. Swarns, Suspect Charged With Plotting To Fight U.S. in Afghanistan, New York Times (April 29, 2003) at A13. Both Ujaama and Hawah were detained as material witnesses before being indicted.

Hamdi v. Rumsfeld

Yaser Esam Hamdi, an American citizen, was born in St. Louis and raised in Saudi Arabia. Northern Alliance forces in Afghanistan captured him, transporting him to Guantanamo Bay for detention.* Upon discovering he was an American citizen, U.S. forces transferred him to Norfolk Naval Station Brig where he has remained since April 2002. Although Hamdi acknowledged that the Northern Alliance seized him in Afghanistan during a time of active military conflict, his *habeas* petition asserted that "as an American citizen . . . Hamdi enjoys the full protections of the Constitution," and that the government's current detention of him in this country without charges, access to a judiciary trial, or the right to counsel "violates the Fifth and Fourteenth Amendments of the U.S. Constitution."†

On June 6, 2002, the U.S. District Court for the Eastern District of Virginia appointed Hamdi a public defender and ordered the government to allow Hamdi unmonitored access to counsel.‡ On July 12, 2002, at the government's request, the Fourth Circuit Court of Appeals reversed the district court's order allowing Hamdi access to counsel and criticized the lower court for not giving the government proper deference in national security matters.§

In the appeal, the government also asked the court to dismiss Hamdi's petition on the merits based on its claimed power to declare unilaterally any U.S. citizen an enemy combatant without judicial oversight.** The Fourth Circuit, however, denied the government's motion, stating its reluctance to "embrace [the] sweeping proposition . . . that with no meaningful review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so."††

The Fourth Circuit then remanded the case to the district court to determine Hamdi's status. In doing so, however, the court presaged the outcome on remand by noting "that if Hamdi is indeed an 'enemy combatant' who was captured during hostilities in Afghanistan, the government's present detention of him is a lawful one."‡‡

On remand,§§ the government then offered a two-page declaration by Michael H. Mobbs, Special Adviser to the Undersecretary of Defense for Policy

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* *Hamdi III*, supra, 316 F.3d at 460.

† *Id.*

‡ The U.S. District Court appointed Public Defender Frank Dunham as Hamdi's counsel. *Id.*

§ *Id.* 279. In its brief to the Fourth Circuit Court of Appeals, the government asserted that "given the constitutionally limited role of the courts in reviewing military decisions, courts may not second-guess the military's determination that an individual is an enemy combatant and should be detained as such. *Id.* at 283.

** *Id.* Even though *Quirin* allowed enemy combatants access to counsel, the Fourth Circuit did not address this issue, observing simply that the government is due deference when making decisions in its war making capacity. *Id.*

†† *Hamdi II, supra* 296 F.3d at 283 (4th Cir.2002).

‡‡ Hamdi II, 296 F.3d 278, at 283 (4th Cir. 2002).

§§ *Hamdi,* 243 F. Supp. 2d at 530.

(the "Mobbs Declaration"), in support of its position that Hamdi is an enemy combatant. District Judge Doumar then focused on the central issue of "whether the Mobbs Declaration, standing alone, was sufficient justification for a person born in the U.S. to be held without charges, incommunicado, in solitary confinement, without access to counsel on U.S. soil."

Most importantly, Judge Doumar carefully defined the judicial role: "a meaningful judicial review must at the minimum"* determine if the government's classification was determined pursuant to appropriate authority; the screening criteria used to make and maintain that classification is consistent with due process; and the basis of the continued detention serves national security.† Based on its preliminary review, the district court found that the Mobbs Declaration fell "far short of even these minimum criteria for judicial review."‡

The court then ordered the government to produce complete copies of any other statements made by Hamdi in order to conduct a proper judicial review of his classification, noting that the Mobbs Declaration was "little more than the government's 'say so' regarding the validity of Hamdi's classification as an enemy combatant" and that by accepting it at face value the court would be "abdicating any semblance of the most minimal level of judicial review . . . acting, as little more than a rubber stamp."§

Back on appeal, Judge Wilkinson, writing for the Fourth Circuit, chastised the district court for not showing the government the proper level of deference. Judge Wilkinson criticized District Judge Doumar for "challenging everything in the Mobbs Declaration" and claimed that the district court "intended to 'pick it apart' 'piece by piece'."** And although the Fourth Circuit maintained that "the detention of U.S. citizens must be subject to judicial review,"†† the court seemed to defer completely to the government's determination that Hamdi was in fact an enemy combatant, by requiring no more proof than the government's "say-so."‡‡ Judge Wilkinson explained: "Hamdi is not 'any American citizen alleged to be an enemy combatant' by the government; he is an American citizen captured and detained by Allied forces in a foreign theater of war during active hostilities and determined by the U.S. military to have been indeed allied with enemy forces."§§

The Fourth Circuit did not ascertain how the U.S. military determined that Hamdi was allied with enemy forces. Nor did it evaluate the sufficiency of the Mobbs Declaration standing alone, although it had instructed the district court previously to do so. Instead, the court boldly concluded that "the

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* *Id.* at 532.

† *Id.* at 532-533. The district court also considered whether the Geneva Treaty of the Joint Services Regulations required a different process.

‡ *Id.*

§ *Id.* at 535.

** *Hamd III, supra*, 316 F.3d at 11-12.

†† *Hamdi II,* 296 F.3d at 283.

‡‡ *Id.*

§§ *Hamdi III*, 316 F.3d at 476.

factual averments in the affidavits, if accurate, are sufficient to confirm Hamdi's detention,"[*] without considering whether the factual averments were indeed accurate. In fact, the court declined to evaluate the accuracy of the factual averments at all.

The court considered the "some evidence" standard advocated by the government for evaluating the Mobbs Declaration – a standard of review that is extremely deferential to the government's claim of military necessity and was apparently developed in the context of judicial review of deportation orders in immigration proceedings.[†] However, the court ultimately did not apply the some evidence standard. It declined to conduct any factual inquiry since Hamdi was captured within the theater of war. Thus, the court did not determine whether it was the appropriate standard for other enemy combatant cases.[‡]

In denying Hamdi the right to counsel and his request for *habeas* relief, the Fourth Circuit asserted that its holding was limited to Hamdi's situation because he was captured in the theater of war. Replete with deferential language, its opinion cited numerous times to the government's war-making powers, explaining that it would "stand the war-making powers of Articles I and II on their heads"[§] to make military officials defend military actions in court. Referring to the then-pending *Padilla* case, the court asserted that it would not proclaim "any broad or categorical holdings on enemy combatant designation"[**] and would not "address the designation as an enemy combatant of an American citizen captured on American soil or the role counsel might play in such a proceeding."[††]

Padilla v. Bush

As in the original *Hirabayashi decision*, where the Supreme Court claimed that its holding was narrowly limited to the curfew issue presented in that case,[‡‡] the Fourth Circuit claimed its Hamdi holding was narrow and lim-

[*] *Id.* at 473.

[†] Id. at 474 ("In support of its contention that no further factual inquiry is appropriate, the government has argued that a "some evidence" standard should govern the adjudication of claims brought by habeas petitioners in areas where the executive has primary responsibility. That standard has been employed in contexts less constitutionally sensitive than the present one, albeit in a procedural posture that renders those cases distinguishable. See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 306 (2001) (describing historical practice under which, so long as "there was some evidence to support" a deportation order, habeas courts would not "review factual determinations made by the Executive")").

[‡] *Id.* ("It is not necessary for us to decide whether the "some evidence" standard is the correct one to be applied in this case because we are persuaded for other reasons that a factual inquiry into the circumstances of Hamdi's capture would be inappropriate.")

[§] Hamdi II, 296 F3d at 284.

[**] *Hamdi III*,316 F.3d at 476.

[††] *Id.* at 465. For development of the civil liberties stakes for American citizens in *Hamdi*, see the amicus brief filed in the Fourth Circuit by the Center for Constitutional Rights, available at: <*http://www.ccr-ny.org/v2/reports/report.asp?ObjID=Vl89I1ioTY&Content=121*>.

[‡‡] 320 U.S. at 101-02.

ited to a citizen picked up within an active combat zone.[*] Yet, just as the *Hirabayashi* "narrow" curfew holding was later used to justify more broadly the exclusion order in *Korematsu*, the *Hamdi* decision was later relied upon as precedent by a federal district court in the Southern District of New York for allowing the indefinite detention of Jose Padilla, an American citizen arrested in the United States (not in Afghanistan), as an enemy combatant.[†]

Padilla, a U.S. born Puerto Rican American who converted to Islam, was arrested in Chicago in May, 2002, as a "material witness" in a September 11 investigation. Following his removal on May 15, 2002, from Chicago to New York, he appeared before the district court, which appointed him counsel. Following a conference on May 22, 2002, with his attorney, Donna Newman, Padilla moved to vacate his material witness warrant. On June 9, 2002, the government notified the court *ex parte* that it was withdrawing the subpoena and the court vacated the warrant. The government then immediately designated Padilla an "enemy combatant," took custody of him and transferred him to a South Carolina prison where he was no longer permitted to speak to his counsel.

Even though the government informed his counsel that she could write to Padilla, it indicated that he might not receive the correspondence. As a result of the government's interrogation of Padilla, the Justice Department claimed publicly that Padilla had plans to steal radioactive material within the U.S. and to build and detonate a radiological dispersal devise, or "dirty bomb," within the U.S. In support, the government once again submitted a conclusory seven paragraph declaration by the same Mr. Mobbs, contending that Padilla is "closely associated with Al Qaeda" engaged in "hostile and warlike acts" including "preparing for acts of international terror"[‡] directed at this country.

Although the district court did ultimately allow Padilla access to counsel, its ruling was not based on Padilla's Sixth Amendment right to counsel. Instead, Judge Mukasey granted access to counsel based on 18 U.S.C. §3006A(2)(B), which "permits a court to which a §2241 [habeas] petition is addressed to appoint counsel for petitioner if the court determines that 'interests of justice so require'."[§] This statutory rather than constitutional ruling appears to prevent full adversarial testing of the facts because the court limited the role of counsel to "presenting facts in connection with this petition [rather than the full scope of government] questioning."[**] Thus the

[*] *Hamdi III*, 316 F.3d at 465.

[†] *Padilla v. Bush*, 233 F.Supp.2d 564 (S.D.N.Y. 2003).

[‡] *Id.* at 572.

[§] *Id.* at 600.

[**] Id. at 603 ("However, access to counsel need by granted only for purposes of presenting facts in connection with this petition if Padilla wishes to do so; no general right to counsel in connec-

court appears to be contemplating very limited and minimally effective access to counsel. Coupled with the new evidentiary standard for establishing the government's enemy combatant designation, it assured that the *habeas* proceedings would be little more than a show.

Padilla argued for a "'searching inquiry' into the factual basis for the President's enemy combatant determination."[*] The government argued that courts should review its enemy combatant designation under "some evidence" evidentiary standard earlier considered by the Fourth Circuit in *Hamdi*. The district court adopted this standard without describing how it relates to other possible standards of review applicable to constitutional claims, such as strict scrutiny, intermediate scrutiny, or even standards of review of administrative agency action, such as substantial evidence.[†]

The following notes and questions focus on how differential standards of constitutional protections for citizens deemed to be enemy combatants can make vulnerable a targeted minority group after the 9/11 attacks – those of Middle Eastern descent and/or of Muslim faith -- in a manner analogous to the Japanese American community during World War II.

Notes and Questions

1. Enemy Combatant Designations: According to *Quirin*, what is an enemy combatant and how does the designation differ from that of a lawful combatant? How does one go about determining whether someone is an enemy combatant?

Note that the *Padilla* court stated that enemy combatants will not be charged or tried because they are not criminals. Rather, the purpose of their enemy combatant designation is to prevent them from rejoining the enemy, pending investigation:

> Padilla is not being detained by the military in order to execute a civilian law, notwithstanding that his alleged conduct may in fact violate one or more such laws. He is being detained in order to interrogate him about the unlawful organization with which he is said to be affiliated and with which the military is in active conduct, and to prevent him from becoming reaffiliated with that organization.[‡]

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tion with questioning has been hypothesized here and thus the interference with interrogation would be minimal or nonexistent.")

[*] *Id.* at 606.

[†] Id. at 608 ("The first determination -- that there is some evidence of Padilla's hostile status -- would support the President's assertion in the June 9 Order that he was exercising the power referred to above. That is the "some evidence" test suggested in the government's papers (Respondents' Resp. to and Mot. to Dismiss Am. Pet. at 17), and it will be applied once Padilla presents any facts he may wish to present to the court.")

[‡] *Padilla,* 233 F.Supp.2d at 589.

***2. Constitutional Protections for Enemy Combatants?*:** If *Quirin* preserved the enemy combatant's right to counsel, to contest his detention through *habeas corpus* proceedings and to judicial review, does it provide the proper precedent for the Executive Branch's current contention that it can unilaterally declare U.S. citizens as enemy combatants and detain them indefinitely without charges, access to counsel or trial?

3. Deprivation of Fundamental Liberties?: When the government labels a U.S citizen an enemy combatant, it is in essence depriving the individual of constitutional liberties. If the government charged Hamdi or Padilla as criminals, certain fundamental liberties would be implicated. For example, the individuals would have a Sixth Amendment right to confer with counsel in an unmonitored setting. Access to counsel includes presenting facts to the court, conducting discovery, knowing the evidence, the ability to rebut the evidence and cross-examining witnesses. The Fifth Amendment self-incrimination clause would also apply, requiring adequate protection to ensure government interrogation conforms to the dictates of the privilege. Most important, the due process clause of the Fifth Amendment would apply, forbidding the government from depriving any American of life, liberty or property "without due process of law".*

But what happens to an American citizen's rights when the government labels him an enemy combatant? Will the individual receive a scaled down version of guaranteed fundamental liberties as *Quirin* suggests, or will the individual be deprived of those liberties altogether? How does the government's use of enemy combatant designations compare to the curfew and exclusion orders that led to the Japanese American internment? What are the similarities and what are the differences? If the process is different, then are the consequences nonetheless similar?

4. ***A Prelude to Racial Incarceration?***: Do *Hamdi* and *Padilla* suggest a strategy if the government wanted to target individuals on account of race, ethnicity or nationality, as it did in *Korematsu*? Could the government simply designate them enemy combatants by offering only a conclusory declaration in support of the detention and then survive a constitutional challenge because the designation would not be subject to careful judicial scrutiny?

What then would stop the government from designating, for example, all Arab Americans in an area as enemy combatants, thereby stripping them of civil liberties? If as the Executive Branch contends, fundamental liberties are not implicated by virtue of the fact that it has designated someone an enemy combatant rather than charging him as a criminal, what protection do Americans have from arbitrary government actions? What if the government wanted to target individuals on account of religion or political opinion – could *Hamdi* and *Padilla* be extended to justify those actions? By using the enemy combatant designation, could the

* *Id.*

government de facto create a new internment, once again shielded from judicial review?*

5. Levels of Judicial Scrutiny: According to *Hamdi* and *Padilla*, who makes the determination that an American citizen is an enemy combatant and based on what evidence? Is the government's designation of someone as an enemy combatant subject to meaningful judicial review? Briefly review Chapter 3, which discusses constitutional standards of review in the context of suspect racial classifications. If a fundamental liberty is at stake or a suspect racial classification at issue, what level of judicial review typically applies?

According to the government, what standard of review is applicable in reviewing the government's enemy combatant designation? Is being incarcerated indefinitely in solitary confinement, without access to counsel and without being charged with wrongdoing a deprivation of fundamental liberties? If so, what level of judicial review should apply?

6. Checking Government Claims of National Security: Given the government's history of using false evidence to mislead the U.S. Supreme Court in *Korematsu* to justify the internment, how should we view the likely veracity of the Mobbs Declaration alone, a document that the federal district court found highly questionable? Should this declaration be sufficient evidence to justify the classification of an American citizen as an enemy combatant and his indefinite detention without charges, trial or full access to counsel?

In *Hamdi*, Judge Doumar carefully scrutinized the government's proof for indefinitely detaining Hamdi as an enemy combatant and found it severely inadequate in crucial respects.

> Paragraph 1 of the Mobbs Declaration states that Mobbs is a Special Adviser to the Undersecretary of Defense for Policy. The declaration does not indicate what authority a "Special Adviser" has regarding classification decisions of enemy combatants. Indeed, the declaration does not indicate whether Mr. Mobbs was appointed by the President, is an officer of the United States, is a member of the military, or even a paid employee of the government. During the August 13, 2002 hearing, when asked to explain the Mr. Mobbs authority and role in Hamdi's classification as an enemy combatant, the Respondent's counsel was unable to do so. In a general way, the declaration never refers to Hamdi as an "illegal" enemy combatant. The term is used constantly in Respondent's Memorandum. Nor is there anything in the declaration about intelligence or the gathering of intelligence from Hamdi...There is no reason given for Hamdi to be in solitary con-

* On this point, consider the discussion in the last study module in this Chapter (B.4) of Professor Anita Ramasastry's essay on reports of initial government plans to create detention camps for U.S. citizens unilaterally deemed enemy combatants by the Executive. Anita Ramasastry, Do Hamdi and Padilla Need Company: Why Attorney General Ashcroft's Plan to Create Internment Camps for Supposed Citizen Combatants is Shocking and Wrong (Aug. 21, 2002) *at* <http://writ.corporate.findlaw.com/ramasastry/20020821.html>.

> finement, incommunicado for over four months and being held for some eight-to-ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges. So obviously criminal charges are not contemplated.*

Compare the government's current use of the Mobbs Declaration to justify indefinitely detaining Hamdi and Padilla to the government's use of the deliberately falsified DeWitt Report discussed in chapter 5 to justify the Japanese American internment.

***7. The Legal Basis for the Some Evidence Standard*:** The government has argued that courts should employ the "some evidence" standard in the adjudication of claims brought by *habeas* petitioners in areas where the executive has primary responsibility. The some evidence standard is apparently an administrative agency standard used in the context of immigration proceedings. The *Hamdi* court cited to *INS v. St. Cyr* for the existence of the standard; *St. Cyr* is a recent immigration case. Courts typically apply the much higher "substantial evidence" standard for judicial review of factual determinations in formal agency action. As the Fourth Circuit in *Hamdi* conceded, "[the some evidence] standard has been employed in contexts less constitutionally sensitive than the present one, albeit in a procedural posture that renders those cases distinguishable."† Nevertheless, both the Fourth Circuit in *Hamdi* considered seriously and the district court in *Padilla* embraced the new standard.

Is the "some evidence" standard the appropriate standard of review? There are several reasons why the government's advocacy of this standard does not make sense at first blush. One is that immigration proceedings are procedurally and substantively different from proceedings to designate someone an enemy combatant. Although arguably both proceedings are imbued with the federal government's plenary power (discussed more fully in the next study module), decisions to deport non-citizens follow full-fledged hearings whereas enemy combatant designations are unilateral and ex parte actions by the government. Moreover, as the *Hamdi III* court itself conceded, the rights of non-citizens in the immigration context are perhaps "less constitutionally sensitive" than rights of citizens, as will be explored in the next study module. Finally, if the government is going to "borrow" a standard of review from administrative proceedings such as the "some evidence" standard of review of deportation orders, there are a myriad of other possible standards of review available in administrative law, ranging from the "hard look" doctrine of *Citizens to Preserve Overton Park, Inc. v. Volpe*,‡ to the arbitrary and capricious

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* *Hamdi,* 243 F. Supp. 2d at 533.

† *Hamdi III*, 316 F.3d at 476.

‡ *Citizens of Overton Park v. Volpe*, 401 U.S. 402 (1971).

standard of section 706 of the Administrative Procedure Act.* The Defense Department's designation of a citizen as an "enemy combatant" is a type of agency action that could be subject to any number of existing possible standards of review more stringent than the "some evidence" standard.

***8. Implications of the Some Evidence Standard*:** What is the practical effect of the federal judiciary's decision to embrace the some evidence standard? Because the government is offering a declaration that an American citizen is an enemy combatant, is that declaration standing alone "some evidence" and sufficient to pass judicial review under the new standard? If so, although District Court Judge Mukasey ruled that Padilla could present facts to the court to challenge his detention, could Padilla ever effectively refute the government's evidence against him if the court employed the some evidence standard?

9. *Different Racial Treatment of Enemy Combatant Designations?*: As *Hamdi* and *Padilla* demonstrate, the U.S. government is not only targeting non-citizens in its war on terror. In addition to targeting Arab and Muslim non-citizens who have already been racialized as foreign "others," the government is increasingly using its expansive powers to target other U.S. citizens of color by designating them as terrorists.

Compare, for example, the government's treatment of Hamdi (Arab American) and Padilla (Puerto Rican American) to that of John Walker Lindh (White American). U.S. forces picked up John Walker Lindh in an active combat zone in Afghanistan.† Although the government had substantial proof that Lindh fought with the Taliban against the U.S.,‡ the government charged Lindh in a criminal court, gave him full access to counsel, afforded him due process protections and opened his case to the American public – all subject to judicial scrutiny. Despite video footage of Lindh fighting with opposing Taliban forces, once in the U.S., the government afforded him the full gamut of constitutional rights. Thus, although the court found Lindh to be an unlawful combatant like Hamdi and Padilla, Lindh was criminally charged and the court determined that

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* 5 U.S.C. § 706/

† *United States v. Lindh*, 212 F. Supp.2d 541 (2002). In November 2001, Lindh and other Taliban surrendered to Northern Alliance forces and were transported to a prison compound. The following day, two Americans -- Johnny Michael Spann from the Central Intelligence Agency and another government employee – interviewed Lindh. Later that day, it is alleged that Taliban forces in the compound "attacked Spann and the other employee, overpowered the guards, and armed themselves. Spann was shot and killed in the course of the uprising and Lindh, after being wounded, retreated with the other detainees to a basement area of the QLJ compound." *Id.* at 546.

‡ Following capture and interrogation by U.S. forces, the government charged Lindh in a ten count indictment alleging, inter alia, (1) conspiracy to murder nationals of the U.S., including American military personnel and other governmental employees serving in Afghanistan following the September 11, 2001 attacks; (2) conspiracy to provide material support to a foreign terrorist organization; (3) conspiracy to provide material support and resources to Al Qaeda; (4) contributing service to Al Qaeda. *Id.* at 546-547.

Lindh had a sixth amendment right to counsel and to a fair and impartial jury.

By contrast, Hamdi and Padilla, also American citizens by birth, are being held indefinitely in solitary confinement without being charged with any crime, and are prohibited from even speaking with counsel. Why would the government treat Hamdi and Padilla differently from Lindh?

2. RIGHTS OF NON-CITIZENS*

a. Overview of the Rights of Non-Citizens

1) The Application of the Equal Protection Clause to Non-Citizens

As we saw in Chapter 1, the Fourteenth Amendment's protection of equal protection of the laws is applicable to all "persons," not just American citizens. A significant aspect of *Yick Wo v. Hopkins*† discussed in Chapter 2, is the clear statement by the Supreme Court that "[t]he Fourteenth Amendment to the Constitution is not confined to the protection of citizens . . . These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality . . . ." With these words, the Court interpreted the equal protection clause to apply to everyone, citizen or non-citizen, within the United States. This was not an inevitable result, but it was an early encouraging sign that the Supreme Court could be committed to an equality principle in American constitutional law that transcended racial and alienage classifications.

2) The Application of Substantive Due Process to Non-Citizens

Similarly, although the Chinese Exclusion case and *Fong Yue Ting v. United States,*‡ also discussed in Chapter 2, are typically cited for the genesis of the plenary power doctrine, these cases also illustrate that the due process clause of the fourteenth amendment applies to non-citizens. For example, the *Fong Yue Ting* court concluded that because the petitioner was present in

* We deliberately try to use the term "non-citizen" as opposed to "alien" throughout this Chapter. As has been pointed out, "the very word, "alien," calls to mind someone strange and out of place, and it has been used in a distinctly pejorative way." Gerald M. Rosberg, *The Protection of Aliens From Discriminatory Treatment by the National Government*, 1977 Sup. Ct. Rev. 275, 303. However, many judicial decisions refer to non-citizens as "aliens."

† 118 U.S. 356 (1886)

‡ 149 U.S. 698 (1893)

the U.S. conditionally, he had "not, therefore, been deprived of life, liberty or property, without due process of law" by the requirement that he present a certificate of residence in order to remain in the U.S. Thus the Court recognized that there was a possible *substantive* due process right to remain in the U.S. (that is, a "property" right or a "liberty" right), even while it declined to find a violation under those facts. The Court recently reiterated the existence of a substantive due process right of non-citizens in 2001 in *Zadvydas v. David*, in which Justice Breyer opined that "once an alien enters this country, . . . the Due Process Clause applies to all "persons" within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[*]

Analyzing the requirement of substantive due process involves a number of steps. First, the right involved in the substantive due process analysis must be fundamental.[†] A person's right to liberty is considered a fundamental right. It has been established that "freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause."[‡] A person who is detained pending trial or deportation proceedings has a fundamental liberty interest in freedom from restraint.[§] If a person's right, such as a person's liberty interest, is fundamental, then the government may not infringe upon it.[**] Because the Fifth Amendment does not have an equal protection clause, it has been interpreted in such a way as to apply equal protection-type protections through its due process clause, with respect to federal government action.[††]

In the case of non-citizens, government detention violates the Due Process Clause unless the detention is ordered in a criminal proceeding with adequate procedural protections, or in "certain special and narrow non-punitive circumstances…where a special justification… outweighs the individual's constitutionally protected interest in avoiding physical restraint."[‡‡] Therefore, in order to be constitutional, the government's detention provision must first be non-punitive. Second, the court must determine whether the purposes for the detention provision constitute special justifications that outweigh the individual's constitutionally protected interest in avoiding physical restraint.[§§] In order to determine this issue, the court must decide whether the government's interest is compelling and whether the provision is narrowly tailored such that the government's interest outweighs that of the individual.[***]

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[*] *Zadvydas v. David*, 533 U.S. 678, 693 (2001). Note that this case was decided in June 2001, several months before the 9/11 attacks.

[†] *Reno v. Flores*, 507 U.S. 292, 302 (1993).

[‡] *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

[§] *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1387 (10th Cir. 1981).

[**] *Reno*, at 302.

[††] Rosberg, supra, 1977 Sup. Ct. Rev. at 288 (describing possible difference between the fourteenth amendment equal protection analysis and fifth amendment substantive due process analysis of federal alienage classifications).

[‡‡] *Zadvydas v. Davis*, 533 U.S. 678, 693 (2001).

[§§] *Zadvydas*, at 677.

[***] *Demore v. Kim*, 123 S. Ct. 1708, 1716-1717 (2003).

3) The Application of Procedural Due Process to Non-Citizens

The *Fong Yue Ting* decision also implicitly endorsed a *procedural* due process right, through its judicial review of the legality of the Geary Act passed by Congress. This procedural due process requirement was more explicitly set forth in *Yamataya v. Fisher*[*] in 1903, in which the Court held that a non-citizen must be subject to certain procedural protections prior to being deported. This application of the due process protections to non-citizens has been endorsed since then by a long line of Supreme Court decisions. Procedural due process means essentially that the government may not deprive an individual of life, liberty, or property without a fair procedure. The touchstone of procedural due process is the opportunity to be heard "at a meaningful time and in meaningful manner."[†]

The Due Process Clause requires that non-citizens threatened with deportation have the right to a "full and fair hearing"[‡] and a "reasonable opportunity to present evidence on [his or her] behalf."[§] In determining whether detention under a provision of the Immigration and Naturalization Act is constitutional, the courts have considered three distinct factors first outlined in a non-immigration case, *Matthews v. Eldridge*: (1) the private interest that will be affected by the official action; (2) the probability of error and the effect of additional safeguards on that rate of error; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[**]

4) Justifying Equality: The Personhood Paradigm

Thus, non-citizens are protected by the Fourteenth Amendment, as well as many of the other amendments to the U.S. Constitution. In the context of criminal proceedings or issues involving economic parity, the rights accorded to citizens and non-citizens can and often do converge.[††] Leading scholars in the area, such as Professors Linda Bosniak and Michael Scaperlanda, have described a "personhood" paradigm[‡‡] in which courts accord non-citizens the same rights as other persons – that is, citizens – under the Constitution. Thus, for example, the Supreme Court in its 1971 *Graham v. Richardson* decision suggested that state laws differentiating between citizens and non-

[*] *Yamataya v. Fisher*, 189 U.S. 86 (1903).

[†] *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965).

[‡] *Getachew v. INS*, 25 F.3d 841, 845 (9th Cir. 1994).

[§] *Colmenar v. INS*, 210 F.3d 967, 971 (9th Cir. 2000).

[**] *Mathews v. Eldridge*, 424 U.S. 319, 335, 350 (1976).

[††] David A. Martin, *Graduated Application of Constitutional Protections for Aliens: The Real Meaning of Zadvydas v. David*, 2001 Sup. Ct. Rev. 47, 85.

[‡‡] *See generally* Liliana M. Garces, *Evolving Notions of Membership: The Significance of Communal Ties in Alienage Jurisprudence*, 71 S. Cal. L. Rev. 1037 (1998).

citizens in an economic context (to wit, whether states may condition welfare benefits on U.S. citizenship or years of residence in the U.S.) might even be subject to strict scrutiny.* Full procedural protections during criminal proceedings are also typically accorded to non-citizens.

5) Justifying Exclusion: the Membership Paradigm

However, the legal protection accorded to non-citizens is relatively limited compared to the full panoply of rights that attach to a U.S. citizen. Under the plenary power doctrine, the political branches of government have the power to define who can become a member of the relevant protected community in the first instance, under the justification that self-definition is one of the core attributes of sovereignty. In the political context (such as voting rights) and, most importantly for our purposes, the immigration context, one observes a sharp discrepancy in the applicability of due process rights to citizens vis-à-vis non-citizens. The plenary power doctrine has conditioned the due process right of non-citizens under immigration law and related areas such as alienage classifications in federal laws.†

Thus, for example, in the 1976 *Matthews v. Diaz* decision, the Supreme Court found it constitutionally permissible for Congress to predicate welfare benefits on citizenship status, relying on the plenary power of the federal government to regulate the area of immigration.‡ While the *Matthews* decision might seem at odds with the *Graham* decision, the difference can be explained by the plenary power of *federal* government in the area of immigration. Leading scholars have contrasted the "personhood" paradigm with this "membership" paradigm, in which the critical question is communal formation and in which the political branches of our federal government have greater power vis-à-vis the judicial branch than in many other areas of law.

6) The Role of the Plenary Power in the Due Process Rights of Non-Citizens

Article I of the Constitution grants Congress the power to "establish a uniform Rule of Naturalization."§ Congress' power, combined with the Necessary and Proper Clause, is the source of its constitutional authority over the regulation of non-citizens.** Recall from Chapter 2 that the courts have adopted the doctrine of plenary power doctrine to justify the disparate consti-

* 403 U.S. 365 (1971). *See generally* Rosberg, *supra*; Martin *supra* at 86-88; especially note 118, which cites to the work of immigration scholars Hiroshi Motomura, Linda Bosniak, Alex Aleinikoff and Michael Scaperlanda on the rights of non-citizens in a non-immigration context.

† Garces, *supra* at 1047 ("'inside' immigration matters [] can permeate the area 'outside' immigration as well.")

‡ 426 U.S. 67 (1976).

§ U.S. Const. Art. I, § 8.

** *INS v. Chadha*, 462 U.S. 919, 940 (1983).

tutional treatment of non-citizens by Congress. As summarized by Professor Natsu Saito:

> 'Plenary' means full, or complete, and application of the doctrine means that U.S. courts, rather than assessing the constitutionality of governmental action, defer to the 'political' branches of government, Congress and the executive. The plenary power doctrine is used primarily with respect to those groups recognized in international law to be most vulnerable: those over whom the government exercises complete power, but who are deemed by that same government to be 'outsiders.' Thus, the plenary power doctrine, though rarely discussed in general constitutional jurisprudence, is core U.S. law relating to American Indian nations, immigrants, and colonized territories such as Puerto Rico and Guam. [*]

Here we focus on how plenary power, resulting in differential standards of constitutional protections, can make vulnerable a targeted minority group after the 9/11 attacks – those of Mideastern descent and/or of Muslim faith -- in a manner analogous to the Japanese American community during World War II.

* * *

Notes and Questions

1. Citizen v. Non-citizen: Why should constitutional rights depend on the citizenship status of a person within the territorial boundaries of the U.S.? Make the strongest argument for and against differential standards of constitutional protection.

In an article pre-dating the war on terror, Gerald Rosberg argued that if Congress were "to order exclusion from the United States of any alien of that race or national origin[,] . . . such a classification would require strict scrutiny, not because of the injury to the aliens denied admission, but rather because of the injury to American citizens of the same race or national origin who are stigmatized by the classification."[†] Does or should the blurring of lines between citizen and non-citizen of minority groups make a difference in your analysis of what rights non-citizens should expect? Does it make a difference in the analysis if that national origin is Denmark as opposed to Iran?

2. Plenary Power and International Human Rights Norms: Professor Taylor Natsu Saito has argued that international human rights norms mandate that all persons within the U.S. be treated equally, without regard to differences based on citizenship status or national origin. Saito states that the plenary power doctrine is often invoked to justify vio-

[*] 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'y Rev. 427, 429 (2002).

[†] Rosberg, supra at 327.

lations or non-ratification of international human rights treaties.[*] Moreover, delineating rights based on citizenship has resulted in the systematic subordination of people of color such as African Americans (pursuant to the *Dred Scott v. Sanford* decision), American Indians and those located in territorial possessions of the U.S. Try to weigh the benefits of plenary power against its costs.

3. The Bill of Rights as Human Rights: Professor David Cole mentions the fact that at the time they were ratified, the rights enumerated in the Bill of Rights were considered inalienable natural rights.[†] Furthermore, precisely because immigrants often lack political rights, he asserts, their civil rights should be guarded more carefully since non-citizens are disenfranchised from the very legal system that defines the basic set of rights. Similarly, Rosberg argues that aliens should be treated as a suspect classification subject to strict scrutiny because of their political disenfranchisement.[‡] Are these arguments convincing from a social justice standpoint? Are they politically viable in a post 9/11 climate of fear?

4. ABC's and Alien Enemy Control Act: Recall from Chapter 3 that before the large-scale internment of Japanese American citizens and legal permanent residents, various non-citizens were listed on the Justice Department's so-called "ABC" list. These were Issei leaders in the Japanese American community. On the very day of the Pearl Harbor attacks, many of these non-citizens were rounded up by the FBI. The legal basis for this round-up was a long-standing statute that has been in existence since 1798: the Alien Enemy Control Act. This authorizes the President in a declared war to detain, deport or otherwise restrict the freedom of any citizen 14 years of age or older of the country with which are at war.[§] As Professor David Cole has written: "It requires no proceeding to determine whether the individual is in fact suspicious, disloyal, or dangerous; the act creates an irrebuttable presumption that an enemy alien is dangerous."[**] Does the existence of war justify the differential treatment of non-citizens, as set forth in this statute?

5. Fifth Columns and Sleeper Cells: Consider the fact that the government today is suspicious of law-abiding people of Middle Eastern origin because such seeming quiescence indicates the existence of persons in sleeper cells who will strike out as terrorists when told.[††] Recall that, analogously, in World War II, the government argued that the lack of evidence of espionage and sabotage by the Japanese American community was proof of fifth column activity. Does the existence of racism

[*] Saito, *supra* at 468.

[†] David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 979-81 (2002).

[‡] Rosberg, *supra* at 314.

[§] 50 U.S.C. §§ 21-24.

[**] Cole, *supra* at 990.

[††] Cole, *supra* at 963.

make the Alien Enemy Control Act prone to evidentiary short-cuts and selective enforcement problems?

b. Detention and Deportation

1) The Constitutional Framework for Evaluating Indefinite Detention in the Immigration Context

The government's power to detain non-citizens indefinitely pending deportation is not without constitutional constraints. A substantive liberty interest was recently endorsed by the Court in *Zadvydas v. David*, in which the Court wrote: "Freedom from imprisonment --from government custody, detention, or other forms of physical restraint -- lies at the heart of the liberty that [the due process c]lause protects."* Although the case was resolved on statutory grounds, the majority opinion implied that there would be grave constitutional concerns with the indefinite detention of a lawful permanent resident subject to a final removal order. The Court set a presumptively reasonable period of detention at six months. However, Justice Breyer did note in dicta: "Neither do we consider terrorism or other special circumstances where special arguments might be made for forms of preventive detention and for heightened deference to the judgments of the political branches with respect to matters of national security."†

In contrast to *Zadvydas*, the Supreme Court most recently upheld by a 5-4 decision the constitutionality of a no-bail provision of the INA.‡ This provision allowed the detention pending removal of a legal permanent resident being removed on the basis of a criminal conviction. The Court speaking through Chief Justice Rehnquist distinguished the facts in *Kim* from those in *Zadvydas* in two ways: (1) *Zadvydas* involved detainees who had no realistic chance of being accepted by their countries of origin following a final removal order, compared to the respondent in *Kim*, who was being detained pending removal proceedings; and (2) the detentions in *Zadvydas* were potentially permanent whereas the detention at issue in *Kim* was one that was typically terminated within a 90 day period through removal.§ However, Justice Souter's dissent pointed out that the statutory basis for Kim's detention did not provide for a hearing, for representation, and for consideration of facts bearing on risk of flight – in short, that while Zadvydas had individualized review, Kim did not. According to his dissent, this lack of individualized review violated procedural due process.**

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* *Zadvydas v. David,* 533 U.S. 678, 690 (2001).

† *Id.* at 696

‡ *Demore v. Kim*, 123 S.Ct. 1708 (2003) (upholding constitutionality of 8 U.S.C. §1226(c)).

§ *Id.* at 1719-20.

** *Id.* at 1735.

2) A Sliding Scale of Due Process Rights?

Both *Zadvydas* and *Kim* involved non-citizens who are legal permanent residents. Although the relationship is not absolutely linear, there is generally a direct relation between the citizenship or immigration status of an individual and the amount of due process protection to which that individual is entitled in immigration proceedings. Non-citizens who were never lawfully admitted because they have not technically set foot in the U.S. (or, in the jargon of immigration law, non-citizens who are "excludable aliens") or those who may have initially entered lawfully but have overstayed a visa or otherwise failed to maintain their lawful immigration status (so-called "removable aliens")[*] have fewer due process protections than non-citizens who have the status of legal permanent residents entitled to work and live anywhere in the country and eligible for naturalization after five years of residence.[†] Those in the latter category presumably have established a legal entitlement, whether based on formal legal status, ties to the community or demonstrated lack of risk to the community, to greater protection under the Constitution. Most of the leading commentators in this area agree that the deeper the roots and the longer the ties to the U.S., the greater the constitutional protections that ought to be accorded a non-citizen.[‡] The Supreme Court has not directly spoken to this issue but has implied a sliding scale of protection in many of its decisions, including its most recent immigration decisions, *Zadvydas* and *Kim*.

While these recent cases involved legal permanent residents, the Supreme Court established in 1950 in *Shaughnessy v. United States ex rel Mezei* that indefinite detention of so-called "excludable aliens" is constitutionally permissible, even when the exclusion order rested on secret procedures.[§] During the 1980's, the *Mezei* approach was endorsed by various courts with respect to the so-called Marielitos from Cuba. The Tenth Circuit was a lone exception to this trend, by ordering the release of a Mariel Cuban who was clearly excludable under U.S. law but without an alternative place to go.[**]

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[*] "Included in [this] category are officials of foreign governments, temporary visitors for business or pleasure, foreign students, temporary workers and trainees, foreign journalists, an d others who are not authorized to remain in the country indefinitely. No amount of residence will make a nonimmigrant eligible for naturalization." Rosberg, supra at 277.

[†] U.S. Department of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (April 2003; embargoed until June 2, 2003) [hereinafter Office of Inspector General] 72-74 (providing brief overview of immigration law).

[‡] See generally Martin ("Territoriality cannot tell the whole story of immigration law. Differences in status: parolee (excludable aliens) v. deportee (deportable alien) are also important. An alien who has entered and remained in the country for any significant period of time may have developed ties to the community through education, employment, friendships or other engagements during his stay.") *Martin, supra* at 81. This view is shared by Bosniak and Garces.

[§] Shaughnessy v. United States ex rel Mezei, 345 U.S. 206, 214 (1953).

[**] *Fernandez v. Wilkinson*, 654 F.2d 1382 (10th Cir. 1981).

3) Detention as Punishment?

The Supreme Court has repeatedly stated that detention is not considered punishment in the immigration context as it is in the criminal context; rather, it is considered a civil or regulatory act. Detention is thus judged in light of its non-punitive purpose, and justified only where "the government has provided a special justification outweighing the individual's liberty interest."[*] Until recently, the Court did not need often to balance the government's interest against the individual non-citizens' interest in most cases, because from 1950-96, Congress did not mandate indefinite detention of deportable aliens, but instead specified a six month maximum. In addition, the Immigration and Naturalization Service did not favor detention as an administrative matter because it is such a drain on resources.[†] Like pre-trial detention in the area of criminal law, detention pending removal has been justified in the immigration context only with a showing of danger to the community and/or flight risk. However, two major amendments to the INA in 1996, augmented by the 2001 provisions of the USA PATRIOT Act, changed the statutory landscape significantly – and allowed for the indefinite detention of many different non-citizens.

4) Effects of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) and the Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996

In 1996, Congress passed sweeping changes to the immigration code. The AEDPA provided no time limit to detention and made detention mandatory for all deportable non-citizens with criminal offenses.[‡] It also allowed secret evidence to be used in connection with deportation proceedings against lawful permanent residents.[§] Additionally in 1996, the IIRIRA made clear that the government can use secret evidence in deportation proceedings involving non-citizens who have been deemed not lawfully admitted to the U.S. (or "excludable aliens").[**] It also mandated a 90 day detention period beginning when the removal order becomes final, after which the Attorney General can order indefinite detention.[††] This mandatory detention covers both inadmissible ('excludable aliens') as well as some removable non-citizens. Finally, it stripped immigration agency decisions of review by federal courts for selec-

[*] *Zadvydas* 533 U.S. 678, 679 (2001).

[†] *Demore,* 123 S.Ct. 1708, 1715 (2001). ("[I]n practice, the INS faced severe limitations on funding and detention space, which considerations affected its release determinations.")

[‡] 8 U.S.C. § 1252(a)(2).

[§] 8 U.S.C. §§ 1531-37.

[**] 8 U.S.C. § 1225(c)(1).

[††] 8 U.S.C. § 1231(a)(6).

tive enforcement claims, essentially depriving non-citizens of the ability to challenge immigration decisions on equal protection grounds.[*]

5) USA PATRIOT Act Amendments Expanding the Grounds for Removal and Detention

In October 2001, Congress enacted a far-reaching statute that amended the federal criminal and immigration codes. Entitled Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism, this post 9/11 statute is known as the USA PATRIOT Act.[†] Among other things, section 411 of the Act expands the grounds for removal, allowing the Attorney General or the Immigration and Naturalization Service Commissioner to remove non-citizens based if the individual is or has engaged in "terrorist activities."[‡] And it allows the Attorney General to detain non-citizens without a hearing, by certifying reasonable grounds to believe that the non-citizen supported "terrorist activities."[§] (This is described in more detail in the following section.)

The description of "terrorist activity" is very broad: An individual or member of an organization is "engaging in terrorist activities" if he or she prepares or plans, gathers information, or solicits funds or other things of value, for a terrorist activity or organization,[**] even without knowledge. The

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[*] *See generally* Martin, *supra*.

[†] 107 P. L. 56, 115 Stat. 272 (2001).

[‡] USA PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(bb) and (cc), (V)(bb) and (cc), and (VI)(cc) and (dd).

[§] USA PATRIOT Act, section 412(a)(3) (amending 8 U.S.C. 1226(A)(a).

[**] Id. "(iv) ENGAGE IN TERRORIST ACTIVITY DEFINED- As used in this Chapter, the term 'engage in terrorist activity' means, in an individual capacity or as a member of an organization –

(I) to commit or to incite to commit, under circumstances indicating an intention to cause death or serious bodily injury, a terrorist activity;

(II) to prepare or plan a terrorist activity;

(III) to gather information on potential targets for terrorist activity;

(IV) to solicit funds or other things of value for – (aa) a terrorist activity; (bb) a terrorist organization described in clause (vi)(I) or (vi)(II); or (cc) a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity;

(V) to solicit any individual – (aa) to engage in conduct otherwise described in this clause; (bb) for membership in a terrorist organization described in clause (vi)(I) or (vi)(II); or (cc) for membership in a terrorist organization described in clause (vi)(III), unless the solicitor can demonstrate that he did not know, and should not reasonably have known, that the solicitation would further the organization's terrorist activity; or

(VI) to commit an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives, or training – (aa) for the commission of a terrorist activity; (bb) to any individual who the actor knows, or reasonably should know, has committed or plans to commit a terrorist activity; (cc) to a terrorist organization described in clause (vi)(I) or (vi)(II); or (dd) to a terrorist organization described in clause (vi)(III), unless the actor can demonstrate that he did not know, or should not reasonably have known, that the act would further the organization's terrorist activity."

term "terrorist activity" seemingly includes any crime involving virtually any use or threat to use a "weapon or dangerous device" against a person or property, besides that used for monetary gain.* A group may be identified as a "terrorist organization" in a number of ways. First, the Attorney General may formally designate a group as a "terrorist organization."† However, if "two or more individuals, whether organized or not" engage in terrorist activities, those individuals may be also be deemed a "terrorist organization."‡

Section 412 of the USA PATRIOT Act governs the Attorney General's power to detain non-citizens who are "suspected terrorists" under Section 411's definitions. Section 412 adds a provision, INA 236A, that authorizes the Attorney General's to detain suspected terrorists for seven days without being charged for any offense.§ If the person is not charged with a criminal offense or immigration violation during this period, he or she must be released.** However, if a non-citizen is deemed to be a "suspected terrorist," he or she may be removed as long as the Attorney General certifies them to be a "suspected terrorist." Therefore detention pending removal could be for an indefinite length of time.†† Even if a non-citizen prevails in a removal proceeding, the non-citizen can be detained indefinitely "until the Attorney General determines that the alien is no longer an alien who may be certified."‡‡ Although a non-citizen's certification must reviewed by the Attorney General every six months, the non-citizen does not have a right to know what kind of evidence is being used to determine his or her certification.§§ There are no procedures available for a non-citizen to obtain, amend or contest such evidence.*** In addition, the standard for certification is whether the Attorney General has "reasonable grounds to believe" that an alien falls within one of the specified grounds of deportation or inadmissibility.

Perhaps because of the intense criticism of these two provisions of the Patriot Act, the Justice Department reported to Congress recently that neither provision has been invoked prior to the transfer of immigration regulation to the Department of Homeland Security.††† With respect to section 412, it stated: "Numerous aliens who could have been considered for section 236A certifications have been detained since September 11 . . . [but] it has not been necessary . . . to use the new certification procedure in these particular cases

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* USA PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(iii)(V)(b).

† USA PATRIOT Act § 411(a), amending 8 U.S.C. § 1182(a)(3)(B)(iv)(IV)(bb) and (cc), (V)(bb) and (cc), and (VI)(cc) and (dd).

‡ Id.

§ USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a)(3) and (5).

** Id.

†† USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(a)(2).

‡‡ 8 U.S.C. § 1226(A)(a)(2).

§§ USA PATRIOT Act § 412.

*** Id.

††† Letter from Jamie E. Brown, Acting Assistant Attorney General to The Honorable F. James Sensenbrenner, Jr., Chairman, Committee on the Judiciary, U.S. House of Representatives (May 13, 2003) [hereinafter Brown Letter] at at 32-35.

because traditional administrative bond proceedings have been sufficient to detain these individuals without bond."[*]

6) Judicial Review of Preventive Detention

The USA PATRIOT Act does allow for judicial review of any decision relating to certification.[†] Applications for *habeas corpus* proceedings may be filed with the Supreme Court, the U.S. Court of Appeals for the District of Columbia, or any "district court otherwise having jurisdiction to entertain it."[‡] Even if a non-citizen is able to seek such a review, however, the U.S. government does not provide legal counsel, and the person is obligated to locate, contact and pay for his or her own attorney.[§]

Even where the INA does not expressly confer the power of judicial review, the Court has nonetheless refused to recognize a Congressional intent to preclude *habeas* review.[**] For example, the Court recently found that it had jurisdiction to review a habeas petition brought by a legal permanent resident being deported by reason of having pleaded guilty to aggravated felony, pursuant to provisions of the 1996 AEDPA and IIRIRA.[††] And in *McNary v. Haitian Refugee Center, Inc.*, the Court has allowed judicial review of claims of selective enforcement to INS procedures on due process grounds despite an INA provision expressly limiting judicial review of individual amnesty determinations to deportation or exclusion proceedings.[‡‡] The *McNary* Court held that the statutory language did not evidence a Congressional intent to preclude broad "pattern and practice" challenges to the program[§§], and acknowledged that if construed otherwise, "respondents would not as a practical matter be able to obtain meaningful judicial review."[***]

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[*] Id. at 35.

[†] USA PATRIOT Act § 412(a), adding 8 U.S.C. § 1226A(b)(1) and (2)(A)(iii) and (iv). It provides: "Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision."

[‡] Id.

[§] *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

[**] *Demore,* 123 S.Ct. 1708, 1713-14 (2003).

[††] *INS v. St. Cyr*, 533 U.S. 289, 298-99 (2001) ("For the INS to prevail it must overcome both the strong presumption in favor of judicial review of administrative action and the longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction. Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect a repeal.") (footnotes omitted).

[‡‡] *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991).

[§§] *Id.* at 494, 497.

[***] *Id.* at 496. But see *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471, 491 (1999) (holding that the IIRIRA amendment to 8 U.S.C. § 1252(g) deprived the federal courts of jurisdiction to review a selective enforcement claim prior to a final order of removal).

7) Administrative Regulations and Practice Affecting Detention of Non-Citizens

The Immigration and Naturalization Service promulgated regulations independently of the enactment of the USA PATRIOT Act. On September 20, 2001, the INS amended one of its regulations to permit detention without charges for 48 hours, and for a "reasonable period of time" thereafter in times of emergency.[*] Finally, also in October 2001, a new regulation was promulgated under which the INS district director, by filing an appeal, can stay the order of an immigration judge who has ordered the release of a non-citizen.[†]

A recently released report by the Justice Department's Office of Inspector General details and critiques some of the administrative practices developed in the aftermath of September 11.[‡] These include: the failure to charge detainees within the 48 hours of arrest, as provided by INS regulations;[§] more significantly, the failure to serve promptly detainees with the so-called Notice to Appear (NTA), once issued;[**] and the failure to keep records of when charges were made. For the 119 detainees surveyed in this report, there was an average of 15 days between the arrest and the service of the NTA.[††]

Moreover the Justice Department had an unwritten but widely understood "hold until cleared" policy, which meant that each detainee had to be cleared by the FBI and CIA prior to being released.[‡‡] Because of organizational delays, overwork and the disorganization of the agencies in coordinating with each other, the average time for clearance among the 119 detainees surveyed was 80 days;[§§] the median time was 69 days.[***] The Justice Department's own conclusion was this:

> The untimely clearance process had enormous ramifications for September 11 detainees, who were denied bond and also were denied the opportunity to leave the country until the FBI completed its clearance investigation. For many detainees, this resulted in continued detention in harsh conditions of confinement . . ..[†††]

Finally, the Office of Inspector General faulted the agency for not addressing the legal issue of whether detainees could be held for more than 90

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[*] 8 C.F.R. section 287.3(d).

[†] 66 Fed. Reg. 54,909 (October 31, 2001).

[‡] U.S. Department of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (April 2003; embargoed until June 2, 2003) [hereinafter Office of Inspector General].

[§] Id.

[**] Id. (The Report points out that the time of service is not governed by regulation and recommended that this omission be rectified.)

[††] Id.

[‡‡] Id. at 37.

[§§] Id. at 46.

[***] Id. at 51.

[†††] Id. at 71.

day maximum after the final removal order, as mandated by the immigration statute, in order to be investigated for possible links to terrorism.[*]

8) Non-Immigration-Based Detentions

Some non-citizens as well as citizens have also been detained based on criminal charges or because they are considered to be material witnesses to an on-going criminal investigation or trial. These latter so-called investigatory detentions under 18 U.S.C. § 3144 permit the government to detain people who may not be charged with a crime or an immigration violation.[†] However, the law permits detention of a material witness only to guarantee his testimony in a criminal proceeding, and only if the government can show he is a flight risk or that his or her testimony can be obtained only through detention. Material witnesses are not criminal suspects and, therefore, their detention should not exceed the time necessary to secure their depositions.

Since September 11, the administration is using the material witness statute for purposes other than holding witnesses to testify in on-going criminal proceedings, as statutorily required. Rather, the statute has been the basis for detaining citizens and non-citizens without evidence of wrongdoing while investigating those particular individuals for possible links to terrorism.[‡] Moreover, the government argues that its actions are shielded from judicial scrutiny.[§]

This expanded use of material witness detentions after September 11 may violate various provisions of the Bill of Rights, including the Fifth and Fourteenth Amendment's due process and equal protection clauses.[**] Until recently, the administration has neither disclosed the number of people held pursuant to this statute, nor their identities. However, on May 20, 2003, the Associated Press reported that as of January 2003, the number of people detained as material witnesses was fewer than 50, with 90 percent of those detained for 90 days or less and half held for 30 days or less.[††]

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[*] Id. at 108.

[†] *See generally* Stacey M. Studnicki & John P. Apol, *Witness Detention and Intimidation: The History and Future of Material Witness Law*, 76 St. John's L. Rev. 483 (Summer 2002).

[‡] Lawyers Committee for Human Rights Report, *A Year of Loss: Reexamining Civil Liberties since September 11*, (2002).

[§] *See Center for National Security Studies v. U.S. Department of Justice*, 215 F. Supp.2d. 94, 106 (D.D.C. August 2002). [FINDLAW – FREE LINK]

[**] Stacey M. Studnicki and John P. Apol, *supra* at 521-523 (describing how detention based on the material witness laws may violate the fourth amendment's requirement of probable cause, the fifth amendment's right to remain silent, the sixth amendment's right to be notified of charges and the right to a speedy trial).

[††] *In the Aftermath of Sept. 11*, N.Y. Times A24 (May 23, 2003).

9) Registration of Non-Citizens

In August 2002, the Justice Department implemented the National Special Entry and Exit Registration System (NSEERS). This requires individuals from twenty five primarily Arab and Muslim countries to register periodically with the INS, treating them presumptively as terrorist threats.[*]

As sociologist Louise Cainkar describes it:

> "THIS NOTICE IS FOR YOU"
>
> Special registration requires that visitors from countries designated by Ashcroft be fingerprinted, photographed and "provide information required" by the INS at their US port of entry. . ..

Ashcroft's program also includes special "call-in" registration. Although call-in registration was included in his final rule of August 12, 2002, where he amended the Code of Federal Regulations to lay out his special registration program, this aspect of the program was not implemented until November 6. On that day, the attorney general published a call-in notice in the Federal Register for "certain visiting citizens and nationals" of Iran, Iraq, Libya, Syria and the Sudan who had entered the US and been inspected by the INS prior to September 11, 2002. These persons were ordered to report to specified INS offices between November 15 and December 16, unless they were leaving the US prior to the latter date. At this time, the call-in program was limited to males 16 years of age and older (based on "intelligence information" and "administrative feasibility") and excluded applicants for asylum. While US permanent residents and citizens are excluded from special registration, applicants for adjustment of status (to permanent resident) are required to register. . ..

The words "This Notice Is for You" are emblazoned in capital letters across the top of INS flyers produced to advertise the call-in program. With call-in registration, the abuses of the NSEERS system, and its narrow targeting at Muslims and Arabs, became evident.[†]

In implementing NSEERS, the Immigration and Naturalization Service arrested without warrants and detained numerous Arabs and Muslims who voluntarily complied with the registration program. For example, in December 2002, between 400 and 900 registrants were arrested and detained in Southern California. Many of these detainees have since deported for minor immigration violations that, prior to September 11th, 2001, would have been easily remedied. A number of those deported had permanent resident applications properly pending, had lived legally in the U.S. for years and were forced to leave American spouses and children behind. As Caincar asserts:

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[*] Lawyers Committee for Human Rights, A Year of Loss, *supra* at 22-23.

[†] Louise Cainkar, Targeting Muslims, at Ashcroft's Discretion, Middle East Report On-line (March 14, 2003), available at: <http://www.merip.org/mero/mero031403.html>.

> Of the estimated 3.2 to 3.6 million persons in the US who are "out of status," and the 8 million undocumented, Arabs and Muslims constitute a very small proportion, yet they are the target of this initiative. The number of persons who will be "removed" from the US as a result of this program is unknown, but Ashcroft has already removed more Arabs and Muslims (who were neither terrorists nor criminals) from the US in the past year than the total number of foreign nationals deported in the infamous Palmer raids of 1919.[*]

The Department of Homeland Security later extended its national security dragnet to arrest and deport Mexicans in America with no connections to terrorist activity, while harassing and sometimes groundlessly detaining legally resident Latinos/as and American citizens.[†]

10) Estimated Numbers of Detainees Post 9/11

After the 9/11 attacks, the Justice Department made public a running tally the number of detainees in federal custody. As of November 2001, this number was over 1100.[‡] After November 2001, the government has refused to provide numbers, and estimates at the time of this writing (May 2003) vary. In a recent Freedom of Information Act case,[§] the government disclosed the following:

> The Government asserts that those it has arrested and detained fall into one of three categories: (1) persons held on immigration-related charges by INS; (2) persons charged with federal crimes; and (3) persons held on material witness warrants. DOJ has released the following information about each of the three categories of detainees.
>
> **1. Immigration Detainees**
>
> The Government has detained a total of 751 individuals[**] on immigration violations over the course of its investigation. *See* Def.'s Re-

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[*] Louise Cainkar, Targeting Muslims, at Ashcroft's Discretion, Middle East Report On-line (March 14, 2003), available at: <http://www.merip.org/mero/mero031403.html>.

[†] Marisa Taylor, Immigration Sweep Targets 80 people, Signon San Diego.com (Jan. 22, 2003), available at <*http://www.signonsandiego.com/news/uniontrib/wed/news/news_1n22ins.html*>. For example, INS officials rounded up over 80 foreign-born security guards and transportation workers in San Diego County as part of its on-going security investigations for Super Bowl Sunday. Some were in the U.S. illegally, while other legal permanent residents were targeted for deportation because of criminal records. None, however, was suspected of terrorism. Latinos/as in particular were targeted. *See also* Geoffrey Fattah, Provo INS Raid Sparks Fire, Desertnews.com (Feb. 20, 2003), available at <*http://desertnews.com/dn/print/1,1442,460030017,00,html*>. (INS raid in Utah arresting 120 primarily Latino/a workers, many of whom were U.S. citizens and legal resident aliens who were handcuffed and temporarily incarcerated without opportunity to prove their status).

[‡] Office of Inspector General, *supra* at 1.

[§] *Center for National Security Studies,* 215 F. Supp.2d. 94 D.C. Cir. (2002).

[**] Eds note: The Office of Inspector General Report released on June 2, 2003 puts this number at 762.

> sponse to the Court's Order of May 31, 2002. As of June 13, 2002, the number of people still being held in INS custody was 74.
>
> For 718 of the 751 individuals detained, DOJ has revealed their place of birth and citizenship status, as well as the dates any immigration charges were filed, and the nature of those charges. The Government has withheld the names of those detained, the dates and locations of their arrest and detention, the dates of release for those 677 who were released, and the identities of their lawyers.
>
> **2. Federally Charged Detainees**
>
> A total of 129 people have been detained on federal criminal charges since September 11, 2001. As of June 11, 2002, 73 individuals remained in detention on criminal charges. Only one of these has been charged in connection with the September 11 attacks. [The court notes in a footnote here that this individual is Zaccharias Moussaui, who was apprehended prior to September 11, 2001. No individual arrested after the attacks on September 11, 2001, has been charged in connection with those attacks.]
>
> DOJ has released the names of all individuals federally charged, with the exception of one defendant whose case is sealed by court order. Defendant also released the dates charges were filed; the nature of the charges filed; the dates any detainees were released; and their lawyers' identities. The Government continues to withhold information concerning dates or locations of arrest as well as the dates and locations of detention.
>
> **3. Material Witness Detainees**
>
> With respect to those held on material witness warrants, DOJ has withheld all information, including the number of individuals detained on material witness warrants, their names, citizenship status and place of birth, dates and location of their arrest and detention, and their lawyers' identities.[*]

As of October 2002, the INS had deported 431 detainees, according to Attorney General Ashcroft.[†]

The following notes and questions compare the internment of Japanese Americans to the current detention of people of Middle Eastern descent and/or Muslim faith, based on immigration, criminal or material witness statutes.

* * *

Notes and Questions

1. Comparing Injustice: Most people would agree that the greatest injustice of Japanese American internment was the massive preventive

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[*] *Center for National Security Studies*, 215 F. Supp.2d at 98-99.

[†]. Lawyers Committee for Human Rights Report, *A Year of Loss: Reexamining Civil Liberties since September 11*, (2002), at 27 n. 72.

detention of a specific ethnic group without individual charges or hearings. No exact analogy in the post-9/11 situation exists. Instead, the government has engaged in individual detentions of non-citizens pursuant to either technical immigration violations (such as over-staying a visa) or alleged criminal acts, either of which may provide the basis for deportation. Are these current detentions more or less justified than the preventive detentions during World War II? Why or why not?

2. Treatment of Citizens Then and Now: Relatively few *citizens* have been detained indefinitely; those individuals (such as Padilla and Hamdi) were discussed in the previous study module. Contrast the current situation to the fact that approximately 80,000 *citizens* of Japanese ancestry were incarcerated during World War II. Do these differences make a difference in the way we view the detentions? Should they? Why or why not?

3. Treatment of Aliens Then and Now: Professor Eric Mueller argues that the measures taken now are justified, in part because they are not as draconian and unilateral as those taken against non-citizens during World War II.[*] Do you agree with his analysis? Why or why not?

4. Definite or Indefinite Detention?: Professor Sameer Ashar, who has represented one of the post 9/11 detainees charges that "[s]ome Arab American and South Asian Muslim detainees are being held without charge for a period of time that is more than double the time allowed [7 days] for the detention of certified terrorist suspects [under the USA PATRIOT Act] and nine times longer than the [48 hour] period set forth by the Supreme Court under the Fourth Amendment."[†] In his client's case, "the INS held my client for over two weeks in a county jail without issuing a Notice to Appear or a Warrant for Arrest," pursuant to the INS regulations authorizing detention without charges for 48 hours, and for a "reasonable period of time" beyond if necessary.[‡] Does this suggest that the discretion inherent in administrative or judicial proceedings will operate against detainees?

5. A Substantive Due Process Analysis of INA 236A: Recall from the previous overview of the rights of non-citizens that both procedural and substantive due process rights attach to an individual once he or she is deemed to be physically within the United States. Now consider the effect of INA 236A, which authorizes the Attorney General's to detain suspected terrorists for seven days without being charged for any offense. INA § 236A's mandatory detention provision is arguably not narrowly tailored because of its lack of individual determination of each detainee's

[*] Eric L. Muller, *12/7 and 9/11: War, Liberties, and the Lessons of History*, 104 W. Va. L. Rev. 571, 574 (Spring 2002) ("Unlike today's detainees, nearly all of whom we believe are being held on the basis of at least some sort of violation of the criminal or immigration laws, none of these post-Pearl Harbor arrestees of Japanese ancestry had violated any law.")

[†] Sameer M. Ashar, *Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11*, 34 Conn. L. Rev. 1185, 1197 (2002).

[‡] *Id.* at 1189.

threat to national security. Because the provision is not narrowly tailored, there are no special justifications for the mandatory detention provision in INA § 236A that are sufficient to outweigh non-citizens' constitutionally protected liberty interest in not being detained. Do you agree or disagree with this conclusion? Why or why not?

6. A Procedural Due Process Analysis of INA 236A: Recall from the previous overview of the rights of non-citizens that procedural due process rights are determined by the three-part *Matthews v. Eldridge* analysis. Arguably, the process of detaining suspected terrorists under INA § 236A does not satisfy the *Matthews* test of procedural due process because: (1) a non-citizen's right to liberty is substantial, (2) the probability of error is too great, and (3) the effect of safeguards on the rate of error is minimal. For example, one student commentator has written that:

> the probability of the government mistakenly detaining innocent non-citizens is great, considering the vague, ambiguous definitions used to identify those involved in terrorism. INA § 236A provides no safeguard to prevent this rate of error from increasing. Although the provision mandates judicial review and release after a period of time if the detainee is not charged, there are no safeguards to prevent the detention of innocent non-citizens. Non-citizens are not afforded the right to any kind of hearing or proceeding explaining the reasons for detention.[*]

Do you agree or disagree with this analysis? Why or why not?

7. Racial Redemption?: Public education around the Japanese American internment has centered around the widespread belief that the federal government learned from its mistakes during World War II, as demonstrated by its very public and official acts of redress and reparation. However, there is another, more cautionary view shared by many legal scholars of the internment. In articles written before the 9/11 attacks, various Asian American law professors such as Professors Eric Yamamoto, Chris Iijima, Mari Matsuda and Natsu Saito questioned the "feel-good story" of the internment and warned that the longterm legacy of the Japanese American redress movement is whether and how it affects the social justice movements of other groups.

For example, Professor Natsu Saito argues that Japanese Americans must make the connection between their internment experience and the animus expressed against Arab Americans, particularly immigrants, since the Person Gulf War. She writes that the

> Antiterrorism and Effective Death Penalty Act of 1996 . . . resurrected guilt by association as a principle of criminal and immigration law. It created a special court to use secret evidence to

[*] Kelsie K.Y. Sanchez, Addressing the USA PATRIOT Act and the Military Order of November 13, 2001 in the Light of the Constitution and the Immigration and Nationality Act (unpublished paper on file with the authors).

> deport foreigners labeled as 'terrorists.' It made support for the peaceful humanitarian and political activities of selected foreign groups a crime. And it repealed a short-lived law forbidding the FBI from investigating First Amendment activities, opening the door once again to politically focused FBI investigations.[*]

Without challenging these repressive measures, she argues, there is no meaningful legacy of the Japanese American internment and redress chapter. Which narrative better represents the legacy of this chapter of our history? Why?

***8. Detention and International Law**:* Professor Saito also argues that the "IIRIRA abrogates U.S. obligations under various treaties, including those contained in the 1967 Protocol Relating to the Status of Refugees, the 1985 Convention Against Torture, and the International Covenant on Civil and Political Rights."[†] Assuming that the current U.S. domestic law pertaining to detentions violates international norms, what consequences might that have for the rule of law generally? Is this more or less important after 9/11 or after our invasions of Afghanistan and Iraq?

9. Impact of the War Against "Immigrants":

As reported by Tram Nguyen,

> In the U.S. today, a working person can report for duty in the morning and never return home at night. Simply being an immigrant, in many cases, is a federally punishable offense. Last August, Juana Jimenez, a food-service worker at LAX, was seized from her home by federal agents for using false documents to obtain her job two decades ago. Jimenez, who is a legal resident, was charged with a felony. The penalty would be deportation back to Mexico for, in effect, trying to work. More than 1,000 airport workers like Jimenez, mostly Asian Americans and Latinos, have been arrested and detained under the Department of Justice's Operation Tarmac. Not a single one was charged with anything remotely related to terrorism.[‡]

Chances are that Ms. Jiminez would have continued living and working peacefully in the U.S. were it not for the "war against terrorism." Why should she be arrested and detained if she is admittedly not a terrorist? If an immigrant is deportable because he or she has over-stayed a visitor's visa or is taking one credit too few under a student visa (as opposed to having committed a felony), does that make a difference in the way they should be treated in the "war against terrorism"? Note that none of the

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[*] Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the 'Racing' of Arab Americans as 'Terrorists*,' 8 Asian L.J. 1, 16 (2001).

[†] 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'y Rev. 427, 470 (2002).

[‡] Tram Nguyen, *Refugees from the Red, White, & Blue*, ColorLines RaceWire (March 22, 2003).

hundreds of people deported for visa violations since 9/11 have been deemed to be terrorists.

Should we just view these immigration sweeps, impacting mostly people of color, as inevitable "collateral damage" of the war against terrorism? Or should this cause us to take another hard look at the way people of color, and especially immigrants, are marginalized within the economic and political framework of the U.S.? Does your answer depend on whether an immigrant is present in the U.S. legally? Should it? Why or why not? For more examples of how the war against terrorism is affecting all immigrants, click on this link.

10. Magic Mirrors and Hitting Citizens: Professor Kevin Johnson has argued that "the differential treatment of citizens and noncitizens serves as a 'magic mirror' revealing how dominant society might treat domestic minorities if legal constraints were abrogated. Indeed, the harsh treatment of noncitizens of color reveals terrifying lessons about how society views citizens of color."* Similarly, Professor David Cole describes a phenomenon of "[t]argeting [i]mmigrants, [h]itting [c]itizens."† His argument is that "law enforcement measures initially targeted at aliens paved the way for measures later extended to citizens."‡ He links the criminalization of material support of terrorist activity under the 1996 AEDPA to an earlier and on-going prosecution and attempted removal of Palestinian non-citizens for associating with a terrorist organization.§ If Professors Johnson and Cole are correct, then this suggests we should be more vigilant about the rights of non-citizens. What are the practical and political obstacles to an enhanced vigilance?

The next study module will examine racial formation and racial profiling in more detail.

c. Secret Evidence and Secret Hearings

1) The Use of Secret Evidence In Immigration Proceedings

Recall that secret evidence in deportation proceedings was approved by the Supreme Court in 1950, in the *Mezei* decision.** However, that decision could be limited to its facts which involved the designation of Mezei as an "excludable alien." Thus it is an open question whether secret evidence is constitutionally permissible with respect to non-citizens who are within the

* Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A Magic Mirror into the Heart of Darkness*, 73 Ind. L. J. 1111, 1114 (1998).

† Cole, *supra* at 988.

‡ *Id.* at 997.

§ *Id.* at 999.

** Shaughnessy v. United States ex rel Mezei, 345 U.S. 206, 214 (1953).

United States after entry, legal or illegal. And most questionable is the use of secret evidence against legal permanent residents.

2) Current Statutory Bases for Secret Evidence in Immigration Proceedings

As described in the previous section, Congress passed sweeping changes to the immigration code in 1996. The AEDPA allowed secret evidence to be used in connection with deportation proceedings against lawful permanent residents.[*] Additionally in 1996, the IIRIRA made clear that the government can use secret evidence in deportation proceedings involving non-citizens who have been deemed not admitted to the U.S. (or "excludable aliens").[†]

3) Constitutional Problems with the Use of Secret Evidence

What are the arguments against secret evidence generally? It is inconsistent with our adversarial system of justice. At bottom, the use of secret evidence violates due process, especially when it is used as a basis for detention – which is a deprivation of a person's liberty interest. As Professor David Cole puts it, "[d]eclassified evidence of secret evidence that has been presented behind closed doors will rarely suffice to afford an alien a fair opportunity to defend himself, because one cannot cross-examine a summary."[‡] And as Cole further points out, "[t]here is a troubling congruence between the procedural tactic of relying on secret evidence and the substantive theory of guilt by association."[§]

4) Out of Sight and Out of Mind: Secret Hearings

As we detailed above, the government deported over 400 non-citizens ostensibly because they were threats to national security. Neither the families or supporters of those deported nor the press or public knew of the actual supporting evidence or the reasons for the deportations, however, because the Justice Department closed the hearings process.[**] The across-the-board secret hearings resulted from a blanket administrative order authorizing the

[*] 8 U.S.C. §§ 1531-37.

[†] 8 U.S.C. § 1225(c)(1).

[‡] David Cole, *Secrecy, Guilt by Association, and the Terrorist Profile*, 15 J.L. & Religion 267, 277 (2000-01).

[§] *Id.* at 286.

[**] *See Recent Case: First Amendment – Public Access to Deportation Hearings – The Third Circuit Holds That the Government Can Close "Special Interest" Deportation Hearings*, 116 Harv. L. Rev. 1193 (Feb. 2003) (hereinafter "Recent Case").

Justice Department to broadly designate "special interest" cases and close all hearing doors to enhance the nation's security.[*]

Ten days after the September 11th attacks, Chief Immigration Judge Michael Creppy issued a security directive covering potentially sensitive immigration cases.[†] The so-called Creppy Directive required all U.S. immigration judges to close "special interest" deportation proceedings to the public, media and even family members.[‡] The Department of Justice then quickly designated large numbers of non-citizens (mostly persons of Arab ancestry and Muslims) as special interest cases, broadly defining "special interest" to encompass not only those who had suspected connections with terrorist organizations but also those whose hearings might include information gleaned from DOJ investigations.[§]

The stated purpose of the Creppy Directive was to prevent disclosure of sensitive security information to those who pose a threat to the nation.[**] Dale L. Watson, the FBI's Executive Assistance Director for Counterterrorism and Counterintelligence, argued a "mosaic theory" in support of closure. Open hearings, he declared, would potentially jeopardize national security and thwart investigations[††] because "bits and pieces of information that may appear innocuous in isolation" released as a result of open hearings can be pieced together by terrorist groups like a jigsaw puzzle to help form a "bigger picture of the government's investigation of terrorism."[‡‡]

Critics argued that that the secret special interest hearings were a likely cover for discriminatory racial and religious profiling – beyond what security needs dictated – and offended the First Amendment's guarantee of public access to government proceedings, a fundamental tenet of democratic governance.[§§] By closing the hearings the government was able to play fast and loose with the Constitution, critics said, while remaining "in the shadows" and out of the public eye.

5) Case Studies

In *Detroit Free Media v. Ashcroft*, and *North Jersey Media v. Ashcroft*, media groups seeking access to "special interest" deportation hearings challenged the government's blanket closure. They asserted that the Creppy Di-

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[*] *Id.*

[†] *Id.* at 684. The Creppy Directive can be found at:
http://news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf

[‡] *See* N. Jersey Media Group, Inc. v. Ashcroft, 308 F. 3d 198, 202 (3d Cir. 2002) (North Jersey Media).

[§] *See* Detroit Free Press v. Ashcroft, 303 F. 3d 691, 683 (6th Cir. 2002) (Detroit Free Press).

[**] *Id.* at 203.

[††] *Id.*

[‡‡] *Id.* (quoting the Watson Declaration); *See* J. Roderick MacArthur Found. v. FBI., 102 F. 3d 600, 604 (D.C.Cir.1996); *see also* Halperin v. CIA, 629 F. 2d 144, 150 (D.C.Cir. 1980); *see also* Detroit Free Press, 303 F. 3d at 706.

[§§] *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press . . . . "); *See* Detroit Free Press, 303 F. 3d at 683.

rective's categorical closing of all government designated special interest cases precluded the individualized assessment of the necessity for closure required by the First Amendment.* The two cases, raising the same constitutional challenge, emerged with conflicting rulings.

(i) Detroit Free Press v. Ashcroft

On December 19, 2002, the Justice Department designated Rabih Haddad a "special interest" case. The government suspected that the Islamic Charity he operated was channeling funds to terrorist organizations. His family, members of the public and media sought access to his deportation hearings. Without prior notice, however, the government closed his hearings. Haddad was thereafter denied bail and detained, and all of his hearings were conducted in secret.

The Sixth Circuit Court of Appeals ruled that the Creppy Directive's blanket closure violated the press' First Amendment's right to access the deportation hearings.† The court refused to defer to the government's broad claim of national security in support of the Creppy Directive. The court first observed that non-citizens on U.S. soil are afforded the same due process protections as citizens.‡ The court then noted that although the federal government has expansive power over substantive immigration decisions (for example, whether to admit or deport), non-substantive aspects of immigration law, such as the deportation hearing process, are subject to constitutional limitations and government action in that realm is deserving of no special judicial deference.§

The court began its analysis by applying the two-pronged "experience and logic" test from *Richmond Newspapers*.** First, the process at issue must have an enduring tradition ("experience") of public access. Second, the beneficial effects of access must be overwhelming and uncontradicted ("logic").†† The court concluded that deportation hearings met both prongs of the test, holding that the proceedings presumptively should be open because of the traditional openness of deportation hearings and the substantive similarities between deportation proceedings and open judicial proceedings‡‡ (and particularly criminal trials).§§

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* *See Recent Case, supra*, at 1193.

† *See* Detroit Free Press, 303 F. 3d at 682.

‡ Such rights include those protected by the First, Fifth and the Due Process Clause of the 14th Amendment. *See id.* at 691 (quoting Justice Murphy's concurrence in Bridges v. Wixon, 326 U.S. 135, 161 (1945)). Interestingly, even illegal aliens are entitiled to the Fifth Amendment right of due process in deportation proceedings. *See* Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

§ *Id.* at 691.

** *See* Richmond Newspapers Inc., v. Virginia, 448 U.S. 555 (1980); *see also* Detroit Free Press, 303 F.3d at 700-701.

†† *See* Detroit Free Press, 303 F.3d at 700-701.

‡‡ *Id.* at 700-705.

§§ *Id.* at 703. The court emphasized that public access plays a significant role in deportation hearings. First, it enhances the quality of hearings by acting as a check on the actions of the Executive Branch. Second, it ensures that the government does its job properly, and without mistakes. Third, it

The court concluded that the government's arguments for closure could not survive strict scrutiny analysis. To trump a First Amendment right of access, the government was required to show that closure served a compelling government interest and was narrowly tailored to serving that interest.* The court found that the national security interest advanced by the government was compelling. In so doing, the court considered an affidavit submitted by James S. Reynolds, Chief of the Terrorism and Violent Crimes Section of the Justice Department's Criminal Division, and quoted extensively from the government's brief, which outlined its mosaic theory.† The court found, however, that the government failed to show that the Creppy Directive was narrowly tailored to furthering the government's interest in preventing terrorism. Indeed the government had failed to explore other less drastic options.‡ Moreover, the evidence offered by the government in support of the dangers of open proceedings was entirely speculative; it was unsupported by concrete evidence.§ Indeed, as the court noted, the government admitted that no information produced at any of Haddad's hearings in any way threatened national security.**

In concluding, the Sixth Circuit criticized the government for advancing a mosaic theory that appeared to be little more than national security subterfuge for depriving non-citizens of fundamental liberties.

> [T]here seems to be no limit to the Government's argument. The Government could use its "mosaic intelligence" argument as a justification to close any public hearing completely and categorically, including criminal proceedings. The Government could operate in virtual secrecy in all matters dealing, even remotely with "national security," resulting in a wholesale suspension of First Amendment rights. By the simple assertion of "national security," the Government seeks a process where it may, without review, designate certain classes of cases as "special interest" cases and, behind closed doors, adjudicate the merits of these cases to deprive non-citizens of their fundamental liberty interests. This, we simply cannot countenance.††

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serves as an emotional outlet for both individuals who feel they are being targeted, and assures that justice is being done and individual rights are being respected. Fourth, openness perpetuates notions of fairness and legitimacy. Fifth, it increases public participation and increases awareness. *Id.* at 703-705.

* *See* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606-607 (1982).

† Detroit Free Press, 303 F.3d at 705-07.

‡ *See* Detroit Free Press, 303 F.3d at 707. The court stated that the government offered no persuasive evidence as to why the Government's concerns cannot be addressed on a case-by-case basis. *Id.*

§ *Id.* at 709.

** *Id.* at 711.

†† Id. at 709-10.

(ii) North Jersey Media v. Ashcroft

In *North Jersey Media*, the U.S. Court of Appeals for the Third Circuit came to the opposite conclusion from the *Detroit Free Press* court.[*] In *North Jersey Media*, news reporters were abruptly barred from the "special interest" deportation hearings of Ahmed Raza and Malek Zeindan.[†] The Third Circuit employed the same *Richmond Newspaper* "experience and logic" test as did the Sixth Circuit, but found that deportation proceedings failed the first prong of the test. The court found that open deportation hearings were far too recent and inconsistently allowed to support a first amendment right of access.[‡] Compared to criminal trials that have been open to the public since before "the Norman Conquest,"[§] or civil trials, where access is "beyond dispute,"[**] the court found that the 100-year history of open deportation proceeding failed the experience prong.

In addressing in the "logic" prong of the test, the court found that the danger to the nation far out-weighed the benefits of access.[††] Relying on the same mosaic theory presented to the Sixth Circuit, the Third Circuit rejected case-by-case closure determinations because of the possibility that some piece of information released could have harmful effects when gathered by terrorist organizations.[‡‡] Although the court conceded that the Watson Declaration was speculative and provided "no concrete evidence that closed proceedings have prevented, or will prevent, terrorist attacks,"[§§] it still was hesitant to conduct a judicial inquiry into the government's security concerns, observing that judges lacked the expertise to do so.[***] Finally, the court broadly cited to the long tradition of judicial deference to the Executive Branch's assessments about national security.[†††]

In concluding, the court noted that during times of national crisis some infringements of constitutional rights should be expected. "But these [infringements] do not in themselves represent any real threat to democracy. A real threat could rise, however, should the government fail in its mission to prevent another September 11th."[‡‡‡] In his strong dissent, Judge Scirica mirrored the majority opinion in *Detroit Free Press*.

The following notes and questions explore the consequences of these rulings on the civil liberties associated with non-citizens, as well as their historical antecedents in the Japanese American internment experience.

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[*] *See* N. Jersey Media, 308 F.3d at 201.

[†] For facts on case, *see* North Jersey Media Group, Inc.; New Jersey Law Journal v. Ashcroft, 205 F. Supp. 2d 288, 4,5 (D.N.J. 2002).

[‡] *See* N. Jersey Media, 308 F.3d at 211.

[§] *Id.*

[**] *Id.*

[††] *Id.*

[‡‡] *Id.* at 219.

[§§] *Id.*

[***] *Id.*

[†††] *Id.*

[‡‡‡] *Id.*

Notes and Questions

1. Mosaic Theory In Support of Secret Hearings: Does the "mosaic" theory justify the blanket closure of a wide range of deportation cases deemed "special interest" by the Justice Department? Is the *Detroit Free Press*' majority's observation accurate that the mosaic theory would justify closing on national security grounds almost *all* judicial and administrative proceedings that involve the government since those proceedings might encompass at least one bit of government investigative information? Does it matter if most of the deportation decisions in the "special interest/secret hearings" cases are for grounds unrelated to terrorist activity?

2. Reconciling the Two Rulings?: Compare the Sixth Circuit's ruling in *Detroit Free Press* with the Third Circuit's decision in *North Jersey Media*. Although the facts of each case differed, both challenged on First Amendment grounds the Creppy Directives' blanket closure of all cases designated "special interest" by the Justice Department. What differing judicial perspectives and value judgments about national security and civil liberties appear to inform the different rulings? Which ruling is correct? As a matter of politics? As a matter of law?

3. Open vs. Closed Hearings: *North Jersey Media* intimated that public access to deportation hearings to "monitor" government actions is unnecessary because even in closed proceedings, non-citizens would still be afforded some due process protections (for example, to present evidence). Why is public access important? What is the significance to non-citizens of government transparency in the war on terror?

In *Detroit Free Press*, Judge Keith observed that "democracies die behind closed doors…When the government begins closing its doors, it selectively controls information rightly belonging to the people. Selective information is misinformation."[*] On the other hand, Judge Becker in *North Jersey Media* stated that "it is interesting to note that our democracy was *created* behind closed doors as the delegates at the Constitutional Convention in Philadelphia in 1787 excluded the public from their proceedings."[†] Is the legitimacy of American democracy itself at stake in the "special interest/secret hearings" cases?

4. "Special Interest" and "Enemy Combatant" Designations: In the first study module, you read about the *Hamdi* and *Padilla* cases and the government's unilateral designation of these two citizens as enemy combatants. Compare the government's unilateral "special interest" designation in *Detroit Free Press* and *North Jersey Media* (and the denial of media access) with the government's "enemy combatant" designation in *Padilla* and *Hamdi*. How do these designations further national security? How do they negatively affect civil liberties? Why might the

[*] Detroit Free Press, 303 F. 3d at 683.

[†] N. Jersey Media Group, Inc., 308 F. 3d at 210.

government be asserting that these designations should not be subject to review by the courts?

See the final study module for in-depth analysis on the significance of judicial review.

5. Racial and Religious Discrimination: The Sixth Circuit in *Detroit Free Press* critically observed that "the political branches have held nearly unrestrained ability to control our borders . . . Since the end of the 19th century, our government has enacted immigration laws banishing, or deporting, non-citizens because of their race and beliefs." Has *North Jersey Media* opened the way for overt government racial and religious discrimination against non-citizens? Does the *Detroit Free Press* case-by-case approach to hearing closures minimize the potential for invidious government racial or religious discrimination?

See the next study module for more exploration of racial formation and racial profiling.

6. Korematsu Revisited?:

Professor Natsu Taylor Saito observes that "history repeats itself as we watch."[*] Instead of Japanese Americans in World War II, this time persons of Arab descent and Muslims are being singled out, branded as disloyal and excluded from the country through secret hearings. Professor Thomas J. Joo notes that in July 2002 Peter Kirsanow, a President Bush appointee to the U.S. Civil Rights Commission, told Arab Americans to "accept America's new anti-terrorism laws . . . and that enhanced national security is in the interest of Arab American civil rights, because, he warned ominously, if another terrorist attack occurs on U.S. soil, public sentiment will support the internment of Arab Americans."[†] Are the parallels aptly drawn between the treatment of Japanese Americans during World War II and Arabs in America during the war on terror? Or, are they over-stated? How, if at all, is the incarceration of innocent Japanese American without charges or trial relevant to the government's attempts to deport non-citizens through secret hearings?

d. Final Thoughts on the Rights of Non-Citizens: Access to Counsel

While there are many other issues affecting non-citizens' rights that we could discuss in the context of the September 11 investigation, we end with a short discussion of the right to counsel. This right has been interpreted by the Supreme Court to extend to criminal proceedings, as guaranteed by the Sixth Amendment. Not surprisingly, it does not extend to immigration pro-

[*] *See* Natsu Taylor Saito, *Symbolism Under Seige: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists*," 8 Asian L.J 1, 11 (May 2001) [hereinafter Saito].

[†] Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 Colum. Human Rights L. Rev. 1, 33 (Fall 2002) [hereinafter Joo].

ceedings. Thus many of the detainees and deportees in federal custody since 9/11 have had very limited access to counsel. Professor Sameer Ashar has described the practical difficulty of even finding, much less representing a client under these circumstances:

> Arab and South Asian Muslim detainees are deprived of access to counsel because of the secretive manner in which they are arrested and detained at prisons far from their homes. It took a persistent community-based group with the aid of a small cadre of civil rights attorneys to even unearth my client's case and then to cast about for pro bono counsel. . . .
>
> In preparation for another hearing, we embarked on the drive to Passaic County Jail to see our client. En route, we found out that he had been removed from jail by the INS the day before. We spent a frantic day trying to locate our client . . .. We finally found our client at the Metropolitan Correctional Center (MCC) in Manhattan, where we visited the next day. . . . After another four days of investigative work, my colleague learned from an Assistant U.S. Attorney that he had been brought into the Southern District of New York on a writ of habeas corpus ad testificandum (to produce the prisoner for purposes of testimony) in another case. No attempt was made by the A.U.S.A. in charge of the case to contact the attorneys of record . . . [W]hile at the MCC he was interrogated by government officers in plain clothes . . . [who] told him that if he fired his attorneys and told us he had hired a White attorney that he might be released and given a green card.[*]

Ashar's client was one of the luckier detainees: he was able to find and keep a lawyer. According to the Lawyers Committee for Human Rights, many of the detainees have been restricted in their ability to contact anyone outside of prison.[†] This has been confirmed by the Justice Department itself, which reported that in certain detention centers, such as the Metropolitan Detention Center in Brooklyn, access to counsel was very problematic.[‡]

In response to questions from the House of Representatives Committee Judiciary Committee, the Department of Justice asserted that "Every single person detained as a material witness as part of the September 11 investigation has been represented by counsel."[§] It did not respond to questions regarding access to counsel of those detained under the NSEERS program described in the next study module.[**]

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[*] Sameer M Ashar, "Immigration Enforcement and Subordination: The Consequences of Racial Profiling After September 11," 34 Conn. L. Rev. 1185, 1197, 1191 (2002).

[†] Lawyers Committee for Human Rights, A Year of Loss, *supra*, at 19.

[‡] Office of Inspector General, *supra* at 130-40; 160-61; 184-85.

[§] Brown Letter, *supra* at 48.

[**] Id. at 36.

Notes and Questions

1. Deprivation of More Than Just One Right: Recall from the first study module that Jose Padilla and Yaser Hamdi are citizens who are being deprived of their Sixth Amendment right to counsel, under the logic that they are not being held as criminals but rather as enemy combatants. Compare how citizens and non-citizens are being deprived of access to counsel. The right to counsel is only triggered when formal criminal charges are filed. Consider how this right, integral to the assertion of other legal rights, is being used in the war against terrorism.

2. American Bar Association Task Force Recommendation: According to the American Bar Association Task Force on the Treatment of Enemy Combatants, the Executive needs to explain its basis for detaining someone as an enemy combatant. It should explain what procedures it will employ to ensure that these detentions are consistent with "Due Process, American tradition and international law." In particular, it should ensure that detainees have access to counsel and that whatever actions it takes when the civil courts are open are subject to judicial review.[*]

Should these principles extend to non-citizens who are effectively deprived of access to counsel during deportation proceedings initiated as a result of the war against terrorism?

3. RACIAL FORMATION AND RACIAL PROFILING

a. Racial Formation

1) Racial Formation Theory: A Quick Synopsis

Recall from Chapter 1 that critical race theorists consider race to be socially constructed. We took our definition of race from critical sociologists Michael Omi and Howard Winant: "Rather than being a thing, race is a process: an 'unstable and []decentered[] complex of social meanings constantly being transformed by political struggle.'" Chapter 1 *supra* (quoting Michael Omi and Howard, Racial Formation in the United States). In Chapters 1 and 2, we described how Omi and Winant's racial formation theory could be used to explain the formation of the "Oriental" or an Asian "race" within the America. We summarized in Chapter 2 some of the major social phenomena that constituted and still construct Asian American racial difference, including: (1) immigration and naturalization; (2) citizenship; (3) economic discrimination;

[*] AMERICAN BAR ASSOCIATION TASK FORCE ON THE TREATMENT OF ENEMY COMBATANTS, PRELIMINARY REPORT, August 8, 2002, at 20 <http://news.findlaw.com/hdocs/docs/aba/abarpt80802cmbtnts.pdf.>

and (4) the internment of Japanese Americans during World War II. Note that these categories are not about skin color or epicanthic folds – they are about how social meanings are organized around certain morphological differences. In other words, it is not physical difference per se that is important – it is the social significance that we attribute to certain physical differences that leads to racial difference.

2) Formation of the Terrorist as a Racialized Other

The above definition of race suggests that the meanings about race change in response to social and political forces, including law. And indeed, new racial categories can develop and existing racial classifications can shift over time. For example, Arabs in America have been classified by the U.S. Census Bureau as Black, Asian and (currently) White. In addition to the official government racial classifications, other understandings circulate of the racial identity of Arab Americans.

Several legal commentators have noted the emerging formation of the category of an Arab-Muslim terrorist into a racially different "other" (that is, other than the dominant racial group, White). As Professor Natsu Saito wrote prior to 9/11:

> Arab Americans and Muslims have been 'raced' as 'terrorists': foreign, disloyal, and imminently threatening. Although Arabs trace their roots to the Middle East and claim many religious backgrounds, and Muslims come from all over the world and adhere to Islam, these distinctions are blurred and negative images about either Arabs or Muslims are often attributed to both. As Ibrahim Hooper of the Council on American-Islamic Relations notes, 'The common stereotypes are that we're all Arabs, we're all violent and we're all conducting a holy war.'[*]

Indeed, as Professors Susan Akram and Kevin Johnson have documented, this new category of terrorist is not just a racial category, but a "complex matrix of 'otherness' based on race, national origin, religion, culture, and political ideology[, which] may contribute to the ferocity of the U.S. government's attacks on the civil rights of Arabs and Muslims."[†]

Akram and Johnson carefully document the emergence of this new racial formation in the U.S. at least since the 1970's, based on the following social phenomena: (1) the ripple effect of conflicts among people in the Middle East on race relations in the United States; (2) the intimidation of Arab and other Middle Eastern voices in the United States by extremist and even mainstream

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[*] Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the 'Racing' of Arab Americans as "Terrorists*," 8 Asian L. J. 1, 12 (2001).

[†] Susan Akram and Kevin Johnson, *Race, Civil Rights, and Immigration Law After September 11, 2001: The Targeting of Arabs and Muslims*, 58 N.Y.U. Ann. Surv. Of Am. L. 295, 299 (2002); *see generally* Nabeel Abraham, *Anti-Arab Racism and Violence in the United States*, in The Development of Arab-American Identity 155-214 (Ernest McCarus, ed. 1994).

Jewish groups; (3) the Hollywood movie industry, which has continuously depicted Arabs or Muslims as terrorists or as inhuman; (4) speeches and acts of publicly elected officials (such as returning campaign money donated by Arab Americans) that cast aspersions on Arabs or Muslims; and (5) most relevant for our purposes, U.S. foreign policy that recently has involved wars against Middle Eastern countries.[*]

Indeed, because of the foreignness imputed to Arab and Muslims in the U.S., there is a strong analogy between the racial formation of Asian Americans and that of Arab and Muslim Americans. The similarity is so apparent that more than a few Asian American scholars have explored it. As Professor Leti Volpp writes in reference to Edward Said's seminal work: "We are witnessing the redeployment of old Orientalist tropes. . . [where] the West is defined as modern, democratic, and progressive, through the East being defined as primitive, barbaric, and despotic."[†]

Of course, Arab-American identity is formed not only in response to external pressures, but also from within the group, as a matter of internal self-identification. Yvonne Yazbeck Haddad writes that:

> It is clear that the word Arab has meant different things to different Arab groups in this country. Earlier generations and their descendants have understood it as a means of national and ethnic identification, functioning in the same way that relationships with countries of origin have functioned for other immigrants. The term Arab connoted something more to recent arrivals, suggesting the common heritage of a powerful community with a common language and experience, and of a great civilization that had once ruled the world. By the 1960s a number of things were taking place in the U.S. context that encouraged the rethinking of ethnic identity. . . . The realities of prejudice [after the 1967 Arab-Israeli war] were confronted directly, and Arabs were forced both to articulate and to defend their right to be considered full U.S. citizens.
>
> As their self-definition became clearer and Arab-Americans consciously chose to affirm their common identity, several things happened. On the one hand, as this identification was forged it took on a visibility that made it more easily the target of prejudice and hatred. On the other hand, Arab-Americans found securtiy in being able to confront other Americans' anti-Arab feelings through belonging to a group and having an identity in which they could feel a common sense of pride. The very designation Arab-American provided common ground as well as a common bond that made their national, religious, and cultural differences seem anachronistic in the modern world. Together they affirmed their allegiance to this country and to

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[*] Akram and Johnson, *supra* at 303-13.

[†] Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. Rev. 1575, 1586 (June 2002); *see also* Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 Col. Human Rts. L. Rev. 1, 32-46 (Fall 2002) (comparing the prosecution of Wen Ho Lee to the racial formation of Arabs and Muslims). *See generally After Words: Who Speaks on War, Justice and Peace?*, Amerasia Journal 27-28 (2001/2002) (special issue of Asian American studies journal devoted to post 9/11 impact on communities of color).

> its ideals, and pressed for constitutional guarantees of freedom of speech and assembly and for more equitable U.S. foreign policies in regard to the Palestinian issue.[*]

3) Differences Between Racial Formation of Japanese Americans and that of Arab and/or Muslim Americans

There are some important differences between the Japanese American (as opposed to Asian American) experience during World War II and today's events. First, during World War II, Japanese Americans were not conflated with other Asians in the same way that Arab Americans are being conflated with others of Middle Eastern descent or even generally with other people of color.

As Professor Joo points out:

> The 'Arab' is racialized as a terrorist, but the 'Arab' racial category is sometimes conflated with the 'Muslim' religious category, even though most Arabs in America are not Muslim and most of the world's Muslims are not Arabs. Further complicating matters is the fact that racialized suspicion and even violence extends to persons who are neither Muslim nor Arab but are believed to 'look' like Arabs.[†]

And people who "look" Arab or Muslim include a large number of other minorities, including South Asian Sikhs or Hindus – who have reported being harassed by both government and private actors based on turbans and skin color. Much animus has been directed against Sikh men, who are often mistaken for Arabs because of their traditional cultural practice of wearing turbans.[‡]

The targeted group also includes Latina/os, African Americans,[§] Filipino Americans and even American Indians. Even European Americans who hap-

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[*] Yvonne Yazbeck Haddad, *Maintaining the Faith of the Fathers: Dilemmas of Religious Identity in Christian and Muslim Arab-American Communities*, in The Development of Arab-American Identity 79-80 (Ernest McCarus, ed. 1994); *see also* Peter Monoghan, *Defining the 'Arab American': Critics say a new survey blocks community input*, The Chronicle of Higher Education A14 (May 30, 2003).

[†] Joo, *supra* at 33-34.

[‡] *See, e.g.,* Indian American Center for Political Awareness, *www.iacfpa.org*.

[§] Ishmael Reed, *Civil Rights: Six Experts Weigh In*, Time (December 7, 2001) , <*http://www.time.com/time/nation/article/0,8599,186589,00.html*> ("Within two weeks after the WTC and Pentagon bombings, my youngest daughter, Tennessee, was called a dirty Arab, twice. An elderly white woman made such a scene on a San Francisco bus that my daughter got off. She was wearing a scarf that I bought her in Egypt last year, but on the other occasion there was nothing distinctive about her clothing. Some of the post-9-11 profiling would be comic and ironic if the circumstances weren't so tragic. Marvin X, an African-American playwright, has been criticizing some Arab-American owners of ghetto stores for selling pork, alcohol, drugs and extending credit to poor women in exchange for sexual favors. A few days after the terrorist attack, he was surrounded by men with guns at Newark airport. They mistook him for an Arab terrorist.")

pen to be in the "wrong" place – such as eating in an Indian restaurant being raided by FBI agents – can be caught up in racial sweeps.[*]

The target group today is much more disaggregated across different national origins, dispersed across the geographic U.S. and diverse generally than the Japanese Americans were prior to World War II.

Second, although two thirds of the Japanese Americans interned were citizens, it is fair to say that most of the Arabs and/or Muslims being targeted by government action so far are non-citizens pulled into the registration, detention and deportation procedures described in the previous study module. While it is difficult to get exact numbers (because the Constitution forbids the U.S. Census Bureau from collecting data on religion),[†] at least one estimate is that 36% of Muslims in the U.S. are citizens by birth.[‡] However, this number is from a study that weighted the percentage of survey respondents to include 20% African American and thus may over-estimate birthright citizenship of those from the Middle East.[§] This contrasts sharply with the 82% citizenship figure suggested for Arab Americans, based on the 1990 census.[**] (Figures based on the 2000 census will not be available until late 2003.[††]) Another study estimated that 73% of Middle Eastern immigrants to the U.S. are Muslim,[‡‡] suggesting a national origin-religion nexus; perhaps the most recent Arab immigrants (who are more likely to be Muslim than the earlier arrivals) are being targeted by government action.

4) Private v. Public Acts of Racial Formation

While the majority of the materials in the rest of this study module focus on official government action in the legal realm, it is important to keep in mind the nexus between public (or government) and private (or non-state-sponsored) action. Some have argued that the federal government sets the tone for acts of violence by individuals. As Professor Leti Volpp has written that

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[*] See Jason Halperin, *Feeling the Boot Heel of the Patriot Act*, Los Angeles Times B19 (May 2, 2003).

[†] Specifically, PL 94-521, section 214(c) adds a subsection to 13 USC § 221 that reads "notwithstanding any other provision of this title, no person shall be compelled to disclose information relative to his religious beliefs or to membership in a religious body." See <http://www.census.gov/prod/www/religion.htm>

[‡] Zogby International, "The American Muslim Poll" (December 2001), conducted for Project Maps, available at <http://www.projectmaps.com/PMReport.htm>.

[§] Id.

[**] Helen Hatab Samhan,"Who are Arab Americans," the Arab American Institute Foundation, available at <http://www.aaiusa.org/PDF/Grolier'sEncyc.pdf>.

[††] E-mail from Karim Shaaban, Program Coordinator, Arab American Institute to Kerry Fitz-Gerald (May 21, 2003).

[‡‡] Steven A. Camarota, "Immigrants from the Middle East: A Profile of the Foreign-Born Population from Pakistan to Morocco," Center for Immigration Studies Backgrounder (August 2002), available at
<http://www.cis.org/articles/2002/back902.html>

> since September 11, the general public has engaged in extralegal racial profiling in the form of over one thousand incidents of violence – homes, businesses, mosques, temples, and gurdwaras firebombed; individuals attacked with guns, knives, fists, and words; women with headscarves being beaten, pushed off buses, spat upon; children in school harassed by parents of other children, by classmates, and by teachers. . . These myriad attacks have occurred, despite Bush meeting with Muslim leaders, taking his shoes off before he visited the Islamic Center in Washington, D.C., and stating that we must not target people because they belong to specific groups. His statements have done little to disabuse people of their 'common sense' understanding as to who is the terrorist and who is the citizen. This is connected to the fact that the government has explicitly engaged in racial profiling in terms of its targets of our 'war on terrorism.'[*]

Others have noted the mixed messages emanating from the government. For example, at the same time that President Bush has spoken out against anti-Muslim prejudice, he has nominated an arguably anti-Muslim academic, Daniel Pipes, to a government institute, the United States Institute of Peace.[†] Mr. Pipes is on record as suggesting that "mosques are breeding grounds for militants and that Muslims in government and military positions should be given special attention as security risks."[‡]

Consider also the impact of the media, which is supposedly protected from government pressure by the First Amendment's free press clause. Professor Leonard Baynes has analyzed media coverage of the different post-September 11 terror prosecutions.[§] For example, Baynes compared media coverage of John Walker Lindh and Charles Bishop (a teenager who flew a small plane into a building in Tampa, Florida and left a note expressing support for Osama Bin Laden), concluding that "the coverage changed once their apparent racialized identities (and Walker Lindh's physical appearance) changed." Initially, Professor Baynes observed, Charles Bishop's coverage focused on a "what went wrong" with his upbringing approach until it was discovered that Bishop was one-half Syrian. Then, the media's coverage of Bishop became less favorable and "his ethnicity became sufficient explanation for his crime." To the contrary, John Walker Lindh was initially pictured with unkempt dark hair and beard, and a face darkened by dirt, making him look something other than a White American. Yet, once he changed his appearance by cutting his hair and beard, media coverage became more favorable. At that point, news stories began comparing him to the children of average Americans. Baynes concludes that race played a significant factor in how specific factual incidents and defendants were portrayed.

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[*] Volpp, *supra* at 1581.

[†] Richard W. Stevenson, *For Muslims, A Mixture of White House Signals*, N.Y. Times A15 (April 28, 2003).

[‡] Id.

[§] Leonard M. Baynes, *Racial Profiling, September 11 and the Media: A Critical Race Theory Analysis*, 2 Va. Sports & Ent. L.J. 1 (Winter 2002).

5) Hate Crimes Against Arabs and Muslims

A November 25, 2002 Hate Crimes Statistics report released by the FBI reveals 481 hate crimes against Arabs and Muslims in the year 2001.[*] This represents an increase of 1600% over the previous year.

The following notes and questions explore the similarities and differences between the racial formation of Japanese Americans prior to and during World War II, and the racial formation of the Arab-Muslim terrorist prior and during the so-called war against terrorism.

* * *

Notes and Questions

1. Common Sense of Race: What are the stereotypes of Arabs and/or Muslims circulating in American popular culture? Test your understanding of this complex group. True or false?

- Most Arabs in America are Muslim.
- Most Muslims worldwide live in the Middle East.
- Most Arabs in America are less educated than other Americans.
- Most Muslims worldwide do not believe that Jesus was a messenger from God.

In fact, each of these statements is false. Two thirds of the Arabs in America are Christian. The country with the largest absolute number of Muslims is Indonesia. Based on the 1990 census, Arab Americans on the average have more years of education than non-Arab Americans. And many Muslims believe that Jesus, like Mohammed, was a prophet of God or Allah, but they do not believe that he was a son of God.[†]

Why do certain misconceptions of this group abound? What are some of the mechanisms by which these misconceptions continue?

2. Racial Formation of a Terrorist: Before 9/11, what were some of the world events that contributed to the sense of Arabs and/or Muslims as terrorists?

3. Compared to European Americans: After the bombing of the federal building in Oklahoma City by Timothy McVeigh, federal law enforcement officers concentrated their search on Arabs and Muslims. Besides the Oklahoma City bombing, what are some other examples of terrorist acts perpetrated by European Americans? Why don't we infer from these acts that all European American men are potential terrorists?

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[*] Lawyers Committee for Human Rights, Imbalance of Powers: How Changes to U.S. Law and Policy Since 9/11 Erode Human Rights and Civil Liberties (September 2002-March 2003) 42.

[†] Detroit Free Press, 100 Questions and Answers About Arab Americans: A Journalist's Guide (2001), available at: < http://www.freep.com/jobspage/arabs.htm>.

Did cultural portrayals of dark-skinned individuals as foreign "others" likely influence government officials when they designated Hamdi (an Arab American) and Padilla (a Puerto Rican American) as enemy combatants and presumptively disloyal to the U.S.? Could one conclude from the disparity of treatment between Hamdi and Padilla, on the one hand, and White American John Walker Lindh, on the other, that the former were "raced" as foreigners as well as terrorists?*

4. Compared to Asian Americans: Do you agree with scholars who argue that there is a strong parallel between the racial formation of the Japanese Americans prior and during World War II and the current formation of the Arab or Muslim terrorist? Why or why not? What are the key similarities and differences?

5. Turning Ethnicity into Race: In many ways, the racial formation of the Arab or Muslim terrorist is an erasure of specific ethnicities, religions and nationalities – specific social locations that are then blended into an undifferentiated racial group. In fact, many critical race scholars view ethnic conglomeration as one defining aspect of racial formation. Asian Americans often experience being mistaken for someone of a different ethnicity – Chinese instead of Korean, for example.

A group known as the Committee of 100 conducted a poll in early 2001 through Yankelvich and Co. on attitudes towards Chinese Americans. In addition to a finding that 68% of the respondents had negative attitudes towards Chinese Americans and Asian Americans, the poll found that there were no statistical differences between two groups when asked about Chinese Americans as opposed to Asian Americans. As journalist and activist Helen Zia concluded: "So here was hard evidence of the 'racial lumping' that is so well-known to every Asian American kid who was ever called the slur of another Asian ethnicity."†

Do you see parallels between the ethnic mishmashing of the Asian American and that of the Arab or Muslim American? Why or why not? Note that the Supreme Court has recognized Arab ethnicity to be a racial classification, at least for purposes of a federal civil rights statute, 42 U.S.C. § 1981.‡

6. National Origin and Race: The difference between national origin and race may have legal consequences, at least with respect to the application of the Equal Protection Clause of the Fourteenth Amendment to noncitizens. Professor Gerald Neuman has argued: "Distinctions in federal law among aliens based on their country of current nationality are not constitutionally suspect. Bilateral and multilateral treaties frequently

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* Although initial reports linked Padilla to terror, according to U.S. intelligence reports, it appears the allegations were blown out of proportion. Associated Press, Officials Downplay Terror Suspect, N.Y. Times, (August 13, 2002) at *http://www.nytimes.com/aponline/National/AP-Attacks-Dirty-Bomb-html*.

† Helen Zia, *Oh, Say, Can You See? Post September 11*, in 27 Amerasia Journal 3, 6 (2001).

‡ Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987).

create reciprocal privileges for U.S. citizens and citizens of selected foreign countries, and some federal legislation extends specific favored treatment to particular nationalities independent of treaties. If these distinctions are not defined in terms of race and are not motivated by racial prejudice . . . then they would not elicit heightened scrutiny under ordinary equal protection analysis."[*] Neuman's assertion, based on an uncritical acceptance of the plenary power doctrine, makes clear why bringing selective enforcement claims against the government in the context of immigration is so difficult.

7. Racial Violence and Racial Formation: In what ways do private acts of racial violence such as the killing of Balbir Singh Sodhi, a Sikh American gas station owner, in Mesa, Arizona just after 9/11 by a man shouting "I stand for America all the way!" contribute to the racial formation of an Arab or Muslim terrorist? Can this be explained away as simply an act of individual bigotry and ignorance? Does it make any difference that the alleged murderer was himself a member of a subordinated minority group? Does this suggest (as many critical race theorists claim) that part of being American is the willingness to degrade individuals who are members of groups that are considered un-American? Consider Malcolm X's observation that the first word of English a European immigrant learns when s/he steps off a plane is the N-word.[†]

8. Harmful Rather Than Helpful Media Portrayals: Professor Natsu Taylor Saito suggests that during times of national distress the media often feeds public fears about specific groups with sensational stories and over-blown cultural images. In this way the mainstream media tends to support the public's need for scapegoats.[‡] How do you respond to Saito's observation that an uncritical mainstream media, worried about appearing patriotic to assure ratings, has fueled the perception of all Arabs and Muslims as disloyal foreigners and potential "terrorists," just as the newspapers unfairly tarred Japanese Americans with the brush of disloyalty during World War II?[§] Do most of us assume that the press with open access to government proceedings will inevitably play a watchdog role and work to protect even unpopular groups from government malfeasance? To what extent is this assumption about the press' role accurate? To what extent is it mistaken? And what are the consequences?

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[*] Gerald Neuman, *Terrorism, Selective Deportation and the First Amendment after Reno v. AADC*, 14 Geo. Immigr. L.J. 313, 339-40 (2000).

[†] David Roediger, Early Twentieth Century European Immigration and the First Word in 'Whiteness'.

[‡] *See* Saito, Symbolism Under Seige, *supra* at 12.

[§] *See* Saito *supra* note 46, at 12.

b. Racial Profiling

1) Definitions

Recently, the National Asian Pacific American Bar Association (NAPABA) defined racial profiling as:

> law enforcement initiated action that relies on the *race, ethnicity or national origin* of an individual rather than the *behavior* of the individual or information that leads the agency to a particular individual who has been identified as being, or having been, engaged in criminal activity.[*]

This definition is based on the work of Professor Deborah Ramirez and others,[†] prepared for the Department of Justice, which emphasizes the difference between police profiling based on a suspect's appearance as opposed to the suspect's actions.

Professor Ramirez herself more recently defines racial profiling as:

> the inappropriate[‡] use of race, ethnicity, or national origin, rather than behavior or individualized suspicion, to focus on an individual for additional investigation.[§]

Mixed Motives versus Sole Reason. Most commentators in this area acknowledge that police usually have mixed reasons for stopping a suspect, and therefore have rejected the narrowest definition of racial profiling as one in which the *sole* criterion for a police investigation is race. However, the Supreme Court has suggested that it does not violate the Fourth Amendment for police to use race as one factor among several for a decision to stop a person, unless race is the sole basis for the stop.[**] It apparently endorses the narrow definition, which then restricts the legal definition of discrimination in law enforcement to a very small number of cases.

But as Professor Randall Kennedy has argued:

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[*] NAPABA Position Paper: Recommendations for Oversight of the USA PATRIOT Act and for Federal Racial Profiling Legislation <http://www.napaba.org/napaba/showpage.asp?code=news> (emphasis added)

[†] Deborah Ramirez, Jack McDevitt, Amy Farrell, "A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned" (November 2000). This paper is available on the Department of Justice website: *http://www.ojp.gov/lawenforcement/policeintegrity/append2.htm*.

[‡] It is particularly important to distinguish between the "inappropriate" use of race and the "illegal" use of race. Circumstances under which we argue the use of race is inappropriate and therefore constitutes racial profiling may very well be "legal" according to the courts. *See* Brown v. City of Oneonta, 221 F.3d 329, 339 (2d Cir. 2000) ("Yet our role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the Equal Protection Clause."), *amending and superseding* 195 F.3d 111 (2d Cir. 1999), *reh'g en banc denied*, 235 F.3d 769 (2d Cir. 2000), *cert. denied*, 534 U.S. 816 (2001). [Ed'footnote in original article by Ramirez, et. al.]

[§] Deborah Ramirez, Jennifer Hoopes and Tara Lai Quinlan, "Defining Racial Profiling in a Post-September 11 World" Forthcoming ___ American Criminal Law Review ___ (2003) (on file with authors).

[**] U.S. v. Martinez-Fuerte, 428 U.S. 543 (1976).

> Even if race is only one of several facts behind a decision, tolerating it at all means tolerating it as potentially the *decisive* factor. In a close case, it is a person's race that might make the difference between being stopped by the police or being permitted to go on about one's business free from governmental intrusion. In a case involving two people engaged in ambiguous behavior, the white person may be left alone while the black person may be intruded upon because her race, perceived as a signal of heightened risk, tipped the balance against her. Few racially discriminatory decisions are animated by only one motivation; they typically stem from mixed motives. [*]
>
> His view is in accord with Professors Samuel Gross and Debra Livingston, who would tolerate racial profiling under certain circumstances. Gross and Livingston say that
>
> 'racial profiling' occurs whenever a law enforcement officer questions, stops, arrests, searches, or otherwise investigates a person because the officer believes that members of that person's racial or ethnic group are more likely than the population at large to commit the sort of crime the officer is investigating. The essence of racial profiling is a global judgment that the targeted group -- before September 11, usually African Americans or Hispanics -- is more prone to commit crime in general, or to commit a particular type of crime, than other racial groups. If the officer's conduct is based *at least in part* on such a general racial or ethnic judgment, it does not matter if she uses other criteria as well in deciding on her own course of action. It is racial profiling to target young black men on the basis of a belief that they are more likely than others to commit crimes, even though black women and older black men are not directly affected. [†]

Professors Gross and Livingston state that their definition is based on Professor Ramirez's work, and that they reject the "narrow definition [of racial profiling as based exclusively or solely on race] because other factors are inevitably considered by the police."[‡]

However, Professor Devon Carbado, in the context of discussing traffic stops, recently stated "that, but for . . . race, the officer's suspicions would not have been aroused, and they would not have stopped the vehicle." In his view, presumably racial profiling is *any* use of race as an indicator that would cause otherwise suspicious but tolerated behavior to become the object of police scrutiny.[§]

Individualized Suspicion Based on Race. Several commentators believe that certain police actions based on race nonetheless fall outside what they would proscribe as inappropriate racial profiling. For example, Ramirez, Hoopes and Quinlan state that "the use of race is not inappropriate if law en-

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[*] Randall Kennedy, Race, Crime, and the Law 148-49 (1st ed, Vintage Books 1997).

[†] Samuel R. Gross and Debra Livingston, "Racial Profiling After the Attack," 102 Colum. L. Rev. 1413, 1415 (June 2002) (emphasis added).

[‡] Id. at n. 5.

[§] Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 1040 (March 2002).

forcement has specific, concrete evidence linking race to a particular person or particular criminal incident."[*] Similarly, Gross and Livingston state: "It is *not* racial profiling for an officer to question, stop, search, arrest, or otherwise investigate a person because his race or ethnicity matches information about a perpetrator of a specific crime that the officer is investigating."[†]

2) Arguments Against Racial Profiling

- Is racial profiling consistent with the way we allow race to be used in other areas of government action? Professor Randall Kennedy argues that the same judicial skepticism that is brought to bear on racial classifications outside of the policing context should be applied in the context of police action. He assumes that any "rational" use of race in order to identify potential criminal activity will inevitably be used irrationally and systematically against racial minorities. Thus, the strict scrutiny standard of review under the Equal Protection Clause of the Fourteenth Amendment should apply here, just as it does in other areas of law where race has been found to be constitutionally suspect.
- Is racial profiling effective? Kennedy's view is buttressed by the many empirical studies that show that law enforcement focus on race (to the exclusion of other indicia of suspicious-ness such as anxiety) can result in inefficient police investigations. In the context of drug interdiction and traffic stops, Professor Deborah Ramirez summarizes eight studies that demonstrate that racial profiling detracts from the ability of police to find perpetrators. (She has found no studies that conflict with these general results.) In other words, despite the fact that the use of race is irrational (because it was inefficient), police stops based on race nonetheless continued. Arguing from these studies, Ramirez argues that dragnets and sweeps are typically not effective compared to investigative work based on specific facts.
- Is racial profiling fair? Moreover, several commentators have forcefully argued that the unfairness of racial profiling (in addition to its ineffectiveness) will further deter law enforcement from being able to identify criminals, because it will alienate the very communities whose cooperation is needed in order to perform effective police work. African American communities are more heavily victimized by crime than White communities, and yet they are also more suspicious of police than white communities, in part due to racial profiling. Thus they are less likely to cooperate with police, even to capture suspects who are affecting the community negatively.
- Is the racial profiling justified by compelling government need? It is very difficult to assess the government justification in any given case of racial

[*] Ramirez, Hoopes and Quinlan, *supra* at 9.

[†] Gross and Livingston, *supra* at 1415.

profiling. For one thing, the government could be lying about its need to rely on race or whether it in fact did rely on race. Moreover, claims of national security by the government (e.g., the Dewitt report in the *Korematsu* case; the Mobbs declaration in the *Hamdi* case), are difficult if not impossible to evaluate because such data is typically classified or secret. As a result, we may be susceptible to making poor judgments about whether racial profiling is justified.

- Will the racial profiling lead consistently to errors? Professor Jerry Kang states that the important lesson of the internment "is not that wartime creates mistakes; instead that wartime coupled with racism and intolerance create particular types of mistakes. Specifically, we over-estimate the threat posed by racial 'others' . . .. Simultaneously, we underestimate how our response to those threats burden those 'others. . .."[*] As a result, he argues that: "First, we should demand good data . . .. Second, we should strive to parse the data correctly . . .. Third, we should not overestimate the benefit . . .. Fourth, do not underestimate the harm . . .. Fifth, understand context and consequence . . .. Sixth and finally, we must consider morality."[†]

3) Arguments Supporting Racial Profiling

- Are we actually profiling on the basis of race? The government has argued that its current actions are not profiling based on race, but rather based on "country of issuance of passport."[‡] In addition, if the government has specific, credible evidence that a specific individual of a particular race or national origin has committed or about to commit a crime, then almost all the commentators would agree that an action based on this information is not racial profiling (or that it is an exception to what should be a general proscription on racial profiling).
- Is race or ethnicity a strong predictor of criminal behavior? While the existing empirical studies described indicate that there is weak if any correlation between one's race and one's status as a drug courier, arguably the situation may be different with respect to the ethnic identity of possible terrorists belonging to Al-Qaeda. Nonetheless, the fact that the fifteen perpetrators of the 9/11 massacre were young Middle Eastern immigrants belies the fact that the vast majority of the 1-3 million Arabs (or 1-7 million Muslims) in America are not terrorists. That is, even if all the perpetrators are from a certain "racial" group, not all (and not even a significant number) of people in that racial group are future perpetrators.
- Is the government action draconian? Some have argued after September 11 that racial profiling is an overly-general term that covers many differ-

[*] Jerry Kang, *Thinking Through Internment: 12/7 and 9/11*, 9 Asian L.J. 195, 197 (May 2002).

[†] Id. at 199-200.

[‡] Gross and Livingston at 1419.

ent kinds of possible government activity. For example, Professors Gross and Livingston claim that mass detention clearly represents one end of the spectrum, but that the "FBI paying more attention to reports of suspicious behavior by Saudi men than to similar reports about Hungarian women" (Gross and Livingston at 1425) is at the other – and acceptable – end of the spectrum. Thus, in order to decide whether racial profiling is "unacceptable," one has to define the government action at issue.

- Are there benefits of racial profiling that out-weigh the costs? The threat due to terrorism (mass murder and injury) is greater than the threat to civil society in typical drug cases. Thus "one could plausibly conclude that the efficiency gains from profiling outweigh the harm from the ethnic tax that post-September 11 policing is imposing on young men of Middle Eastern origin."[*]
- What is the role of pragmatism? It may be impossible to eliminate the use of race in police profiling practices, and it would be admittedly difficult for courts to determine when race is being used improperly as part of a profile. Thus some level of racial profiling is inevitable. A pragmatic approach would be to accept racial profiling but regulate more rigorously the manners in which it is used. For example, "place legal limits on the coercion – and rudeness – police inflict on suspects during the course of street stops."[†]

c. Racial Profiling of Arabs and Muslims After September 11

Without question, Arabs and Muslims in the U.S. have been selectively targeted by immigration officials and FBI agents after September 11, 2001. In November 2001, Attorney General Ashcroft issued a directive to local federal law enforcement officers to interview over five thousand young Arab and Muslim non-citizens. In February 2002, Ashcroft announced the Absconder Initiative Program, under which deportees from Arab and Muslim countries would be tracked down and deported. In April 2002, Ashcroft announced new regulations that would give local police the authority to enforce immigration laws.

In June 2002, the Attorney General proposed the "National Security Entry-Exit Registration System" to track the entry and exit of visitors from Iraq, Iran, Libya, Sudan and Syria. The final regulation, issued in August 2002 is known as the NSEERS program,[‡] described in the previous study module. All male non-citizens over the age of sixteen from twenty five specific countries were required to report to the local INS office for questioning, registration and fingerprinting. Of the over 1200 men detained on immigration viola-

[*] William J. Stuntz, *Local Policing After the Terror*, 111 Yale L.J. 2137, 2178 (2002).

[†] Stuntz at 2180.

[‡] Lawyers Committee for Human Rights, A Year of Loss: Reexamining Civil Liberties since September 11 (September 2002) 22-23.

tions, many had pending applications for permanent resident status that were not processed due to INS backlog.[*]

The previous study module also detailed that over one thousand Arabs and Muslims have been detained, some indefinitely, just after 9/11, based on immigration, criminal violations or material witness grounds. In response to a Congressional inquiry regarding "the percentage breakdown for the [material witness] detainees in terms of national origin, race, and ethnicity,"[†] the Justice Department recently stated that it does "not maintain data on these characteristics of detained material witnesses."

Seven hundred sixty two of those detained of those detained after 9/11 were detained on the basis of immigration violations. In a study released recently by the Office of Inspector General of the Justice Department,[‡] the demographics of these immigration detainees were detailed as follows: most are men; 63% are between the ages of 26 and 40 years old although a significant number were older; 254 (or 33%) came from Pakistan; 111 came from Egypt; 9 from Iran; 6 from Afghanistan; with a sprinkling from other countries in the Mideast.[§]

Many of these detainees have since been deported. As the Lawyers Committee for Human Rights describes these deportees and detainees: "Many were deported on non-criminal charges of overstaying a visa or working more hours than is permitted on a student visa. The majority of non-citizens detained by the government were long-term residents, business owners and taxpayers."[**]

In addition, the government has reportedly started a new intelligence program under which Iraqi-Americans and Iraq citizens in the U.S. will be subject to increased monitoring and possible detention without charge if they are believed to be part of a terrorism operation.[††]

Although the government action has most directly affected men, it has also impacted families. For example, the Hamoui family of the Seattle area was taken from their home on the basis of immigration violations: the mother, father and eldest daughter were detained for nearly a year.[‡‡] Moreover, many of the men being detained are married to U.S. citizens and have U.S. citizen children."[§§]

In addition, non-government actors have engaged in what could be characterized as private racial profiling. On April 25, 2003, the U.S. Department

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[*] Lawyers Committee for Human Rights, Imbalance of Powers: How Changes to U.S. Law and Policy Since 9/11 Erode Human Rights and Civil Liberties (September 2002-March 2003) 43.

[†] Brown Letter, *supra* at 50.

[‡] U.S. Department of Justice, Office of the Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks (April 2003; embargoed until June 2, 2003).

[§] Id. at 20-21.

[**] Lawyers Committee for Human Rights, A Year of Loss, *supra* at 14.

Lawyers Committee for Human Rights, Imbalance of Powers: How Changes to U.S. Law and Policy Since 9/11 Erode Human Rights and Civil Liberties, (September 2002-March 2003). at 52.

[‡‡] Dangerous Precedent: the Korematsu Case, Denshō: The Japanese American Legacy Project (Spring 2003).

[§§] Lawyers Committee for Human Rights, A Year of Loss, *supra* at 14.

of Transportation filed a lawsuit against American Airlines, accusing it of discriminating against Middle Eastern people as well as those who resemble them, by removing them as passengers on flights.[*]

The following notes and questions explore the similarities and differences between the racial profiling of Japanese Americans prior to and during World War II, and the racial profiling of the Arab-Muslim terrorist prior and during the so-called war against terrorism.

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Notes and Questions

1. Use of Secret Evidence Against Arabs and/or Muslims in Deportation Hearings Prior to September 11: "In 1998, the Justice Department said that of 24 pending secret evidence cases at that time, all but one or two were against Arabs or Muslims."[†] Do these government decisions to file deportation proceedings based on secret evidence fit within the definitions of racial profiling set forth in the discussion? Recall the materials from Chapter 3, where we discussed the evidence linking the Japanese American community to espionage and sabotage. Is there an analogy between the use of secret evidence in immigration proceedings and the suppressed evidence that never made it to the *Korematsu* courts?

2. Extreme Example?: Virtually all the commentators, whether for or against racial profiling, raise the Japanese American internment as an example of unacceptable racial profiling, but very few of them analyze why in any amount of detail. Spell out why the internment could be considered racial profiling and what makes it unacceptable. Refer to the definitions of racial profiling offered above.

3. Ethnic Profiling With a Light Touch"? Professor Eric Muller favorably compares the government's questioning of 5,000 young men in late 2001 to the questioning and searches of Japanese American homes in 1941. He says that former "program of interrogation, if it was ethnic profiling at all, was ethnic profiling with a decidedly light touch."[‡] Do you agree with this statement? Why or why not?

Similarly, Professor Jan Ting has written:

> And the current practice of detaining foreign terrorist suspects as material witnesses? Critics point to the Japanese internment during World War II and warn of a slippery slope. But the Japanese internment was outrageous because two-thirds of those interned were innocent American citizens. No one is considering anything like that today. . ..

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[*] Edward Wong, 11-Hour Union Vote Keeps American Afloat -- Bankruptcy Avoided; U.S. Files Complaint, N.Y. Times B1 (April 26, 2003).

[†] Cole, Secrecy, Guilt by Association, and the Terrorist Profile, *supra* at 286.

[‡] Muller at 577.

> The Attorney General has also initiated the questioning of 5,000 young men who recently entered the United States as visitors from countries of origin of known terrorists. Anything wrong with that? The interviews are voluntary. Yes, these young men are being singled out for questioning—profiled, if you will—and we have recently become sensitive about such practices. But our sensitivities have developed against the profiling of our fellow citizens. Especially in time of war, foreign visitors are simply not automatically entitled to the same presumption of loyalty to the United States of America as U.S. citizens."[*]

Professor Ting's analysis suggests that profiling is less problematic if its weight falls most heavily on non-citizens. Do you agree? Why or why not?

4. Emergency exception?: Even those who argue vehemently against any use of race in law enforcement profiling admit that there should be certain exceptions. For example, Professor Randall Kennedy states: "The law should authorize police to engage in racially discriminatory investigative conduct only on atypical, indeed extraordinary, occasions in which the social need is absolutely compelling: weighty, immediate, and incapable of being addressed sensibly by any other means. I have in mind a real emergency, a situation . . . in which there is clear reason to believe that a violent crime has been or is about to be committed and that the reported characteristics of the perpetrator are such that using racial criteria to narrow the pool of potential suspects clearly increases the ability of the police to apprehend the criminal quickly."[†]

Is the post 9/11 war against terrorism a type of "extraordinary occasion . . in which the social need is absolutely compelling" for profiling based on race? If it is, then what lessons from the internment (where there was an actual declared war) should we keep in the foreground of the analysis?

5. Cost-benefit analysis?: Professor Ramirez suggests some factors to consider: "[i]n evaluating whether or not to use race as part of a profile . . .: (a) how effective is such a strategy?; (b) what effect will this strategy have on community relations?; (c) will this strategy be perceived as violating basic civil rights?; (d) how many innocent people will be stopped as a result of this investigative strategy?; and (e) could an alternative race-neutral strategy be crafted to accomplish the law enforcement goal?" Apply these criteria to the interrogation, registration, detention or deportation of Arab and/or Muslim non-citizens. Compare Professor Ramirez's balancing test to Professor Jerry Kang's guidelines excerpted in the text above. Do these help us to avoid the "false positives" that are inherent in any group-based system of investigation?

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[*] Jan Ting, Civil Rights: Six Experts Weigh In, Time (December 7, 2001) <*http://www.time.com/time/nation/article/0,8599,186589,00.html*>

[†] Kennedy, *supra* at 161.

6. Efficiency or Equality?: According to government officials, eleven suspected terrorists have been caught and detained under the NSEERS program in the first few months of 2003.[*] During the same time, over 130,000 male immigrants and temporary visitors have been questioned. That means approximately .008% of those questioned are eventually deemed to be terrorism suspects. Consider the downsides to this sweep: mistaken arrests and detentions, deprivation of access to lawyers, political and social alienation within the Muslim community, pressure on illegal immigrants to go even further into hiding, and mistrust of law enforcement. How do Professor Ramirez's criteria help you to analyze whether this is an effective use of racial profiling? Does your calculus change if you add the over 800 criminal suspects and over 9000 allegedly illegal aliens to those apprehended pursuant to this government program?

7. Inconsistent, Inappropriate or Unconstitutional?: At a minimum, racial profiling is inconsistent with prevailing Equal Protection doctrine that would apply "strict scrutiny" to any government action based on race. Recall that the strict scrutiny standard was first enunciated in *Korematsu*. However, the legal landscape in this area is not well-settled, in part because challenges to racial profiling have been based on the Fourth Amendment rather than the Fourteenth Amendment. As a result, Professor Ramirez defines racial profiling as the "inappropriate" as opposed to "illegal" or "unconstitutional" use of race. The current use of profiling in the context of the war against terrorism is certain to have a significant impact on these important constitutional questions.

8. Effect on Other Groups: Prior to 9/11, racial profiling was mostly discussed in the context of DWB – Driving While Black (or Brown). The focus on Arab and Muslim detainees in this chapter should not distract us from the fact that racial profiling is practiced against virtually all racial minority groups. Indeed, the war of terrorism has had a very direct impact on a group that has had little to do with Al Qaeda, that is, Haitians trying to immigrate to the United States. Attorney General Ashcroft recently issued an opinion in which he stated:

> "Encouraging such unlawful mass migrations is inconsistent with . . . important national security interests. . . . There is a substantial risk that granting release on bond to such large groups of undocumented aliens may include persons who present a threat to the national security . . .."[†] In doing so, Ashcroft relied upon a State Department declaration that "asserts that it has 'noticed an increase in third country nations (Pakistanis, Palestinians, etc.)

[*] Rachel L. Swarns with Christopher Drew, Fearful, Angry or Confused, Muslim Immigrants Register, N.Y. Times A1 (April 25, 2003).

[†] *In re: D.J.*, 23 I & N. Dec. 572, 579, 580-81 (2003).

> using Haiti as a staging point for attempted migration to the United States."[*]

Recall the study module in Chapter 7 on the Interdiction of Haitians in the 1990's (pp. 456-60). Note how the social justice struggles of one group (Arabs or Muslims in the United States) affect the social justice struggles of another (Haitians).

9. Racial Profiling in Wartime: The National Asian Pacific American Bar Association argues that the egregious racial profiling during the Japanese American internment was due to the lack of public oversight over and scrutiny of the orders for the internment, coupled with judicial deference to the other branches of government.[†] The next and last study module explores the extent to which public oversight and strong judicial review has in fact taken place post September 11. To the extent that it has not, arguably we are likely to be repeating mistakes of the past.

4. GOVERNMENT ACCOUNTABILITY FOR NATIONAL SECURITY RESTRICTIONS OF CIVIL LIBERTIES

a. Introduction

In his dissent in the 1944 *Korematsu* case, Justice Robert Jackson starkly critiqued the Court majority's near-absolute deference to the government's unsubstantiated, and ultimately uncovered as false, assertion that military necessity justified the internment:

> No evidence has been taken on [the] subject [of military necessity] by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable.[‡]

He then warned of grave consequences:

> The [majority of the] Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. *The principle lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need."* [§]

Justice Jackson's "loaded weapon" warning reverberates through the government's national security restrictions of civil liberties in post-9/11

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[*] *Id.* at 579.

[†] NAPABA, *supra* at 1.

[‡] *Korematsu v. U.S.*, 323 U.S. 214, 245 (1944).

[§] *Id.*

America. Are these restrictions of fundamental liberties, described earlier study modules, supported by genuine necessity? According to what evidence? And in whose judgment? Is the government in some instances asserting "national security" in order to avoid judicial and public scrutiny of harsh political (rather than security) maneuvers? What then are the roles of courts and public in holding the government accountable for its abuses of power -- its national security excesses?

This study module explores the extent to which a government "hand of authority" is now bringing forward a plausible, yet ultimately falsified, "claim of urgent need" to justify firing the "loaded weapon" – that is, to legitimate racial and religious discrimination, the stripping of citizen and non-citizen civil liberties and the suppression of political dissent.

b. Burgeoning Executive Power

Consider the claim that the administration's post-September 11th new emergency powers are "restoring the imperial presidency". Melissa Mathews casts expanding executive powers in just those terms and warns of a "hidden agenda behind patriotic anti-terrorism policies."

> In response to the nation's outcry, the Bush Administration aggressively acted to prevent any further attacks on the U.S. by declaring a war on terrorism…President Bush invoked new emergency powers, claiming necessity due to the "extraordinary times." The new emergency powers have become the source of heated debate. Commentators are highly critical that President Bush has a hidden agenda behind his patriotic anti-terrorism policies….
>
> The Attorney General defends President Bush's [new claimed authority] because of the `extraordinary and sole authority as Commander-in-Chief"….[Also] the USA Patriot Act [discussed in Section IIB] gave the President new tools to assist in the war on terrorism. [It] allows the executive branch to exercise powers with minimal judicial and Congressional oversight….
>
> Only recently has Congress reacted to the power grab by the Bush Administration with outrage…Specifically, Congress became concerned with two issues: "whether the tactics used by the Justice Department are too draconian – and whether Ashcroft's team has done too little consulting with Congress….
>
> [T]his article analyzes how President George W. Bush exceeded his executive powers through his adoption of new emergency powers used to counter terrorism. Specifically, it identifies how the Bush Administration used the USA Patriot Act and executive orders to expand the scope of executive authority beyond what is set forth within the Constitution and without an act of Congress…[and] how the USA Patriot Act erodes the separation of powers and threatens civil liberties…[The] article proposes that the Bush Administration plans to bring back the imperial presidency. Consequently, the constitutional

balance is upset in favor of presidential power at the expense of presidential accountability.[*]

Notes and Questions

1. An "Imperial Presidency"?: Consider the USA PATRIOT Act's impact on the civil liberties of citizens and non-citizens described in the earlier study modules, including the Executive's "enemy combatant" and "material witness" designations to detain citizens without charges or trial or access to counsel.

Also consider the administration's contention, as explored in the first study module, that its anti-terrorism national security actions are effectively exempt from judicial review. In this light, how do you assess Mathew's claims that the Bush Administration is attempting to create an "imperial presidency"?

Note that the U.S. Government Accounting Office found that the Executive Branch "[has significantly] overstated by three hundred percent the number of federal convictions related to "international terrorism, [that is, immigration cases resolved on "national security" grounds.]"[†]

2. Executive Accountability: With your answers to question #1 in mind, how do you assess the Executive Branch's claim that its actions labeled "anti-terrorist" national security measures should be exempt from judicial review? If the Judiciary defers to the Executive on these measures, who will hold the Executive Branch accountable for possible abuses of government power and particularly constitutional violations? To what extent, if at all, is the Bush Administration effectively seeking to create an "imperial presidency?"

Recall how the Japanese American internment was justified legally by the War and Justice Department's deliberate falsification of key evidence on military necessity, as discussed in Chapter 5. Also consider the Supreme Court's hands-off judicial approach deferring to the government's claim of necessity, as explored in Chapters 3 and 5. What lessons about from the Japanese American internment cases are relevant to present-day accountability for national security restrictions of civil liberties?

3. Conspiracy Theory? Mathews' charge of a developing "imperial presidency" – that is, one with expansive powers and minimal accountability – is significant, particularly in light of her identification of a possible "hidden agenda behind" the President's "patriotic anti-terrorism policies." The "hidden government agenda" Mathews alluded to shortly after September 11 encompassed the exclusion of certain non-citizen

[*] Melissa K. Mathews, *Restoring the Imperial Presidency: An Examination of President Bush's New Emergency Powers,* 23 Hamline J. Pub. L. & Pol'y 455, 459-60 (2002).

[†] U.S. Government Accounting Office, Better Management and Oversight and Internal Controls Needed to Ensure Accuracy of Terrorism-Related Statistics (Jan. 2003); see also Laurie Kellman, GAO: Justice Dept. Inflated Terror Cases, Associated Press (Feb. 21, 2003).

groups and invasion of privacy for political rather than security reasons. Journalist Jay Bookman later identified a larger and even more significant apparent hidden government agenda. For Bookman, troubled by the Administration's stated national security justifications for the Iraq war, missing pieces fell into place upon discovery of the report on the "Project for the New American Century", generated by conservatives now in the Bush Administration, including Vice President Cheney and Deputy Defense Secretary Paul Wolfowitz. According to Bookman, the government's Iraq war "is intended to mark the official emergence of the U.S. as a full-fledged global empire, seizing sole responsibility and authority as global policeman...the culmination of a plan of 10 years...[to] seize the oportunity for global domination, even if it means becoming the "American imperialists" that our enemies always claimed we were."[*]

4. Domestic Policy and Foreign Policy: Assess Mathews and Bookman's statements in light of the recent commentary by John Dean, the former counsel to President Richard Nixon, who testified truthfully to Congress about the Watergate presidential cover-up that led to Nixon's unprecedented resignation in 1974. In June 2003, after analyzing the government's failure to legitimate its unequivocal claim that "weapons of mass destruction" justified the "pre-emptive self-defensive" war against Iraq, Dean surmised that either "something is seriously wrong within the Bush White House's national security operations(...[t]hat seems hard to believe, or) that the President has deliberately misled the nation, and the world." He then quoted Paul Wolfowitz as saying that "The truth is...we settled on the one issue that everyone could agree on which was weapons of mass destruction as the core reason" and later that the reason that the U.S. targeted Iraq is the "[t]he country swims on a sea of oil." Dean concluded that "[i]f the Bush Adminstration intentionally manipulated or misrepresented intelligence to get Congress to authorize, and the public to support, military action to take control of Iraq, that would be monstrous a misdeed."

The "kind of thinking that might lead a President to manipulate and misuse national security agencies or their intelligence to create a phony reason to lead the nation into a politically desirable war" would potentially be an impeachable offense. What light, if any, does the Korematsu, Hirabayashi and Yasui coram nobis litigation (chapter 5) shed on the possibility that government leaders would "manipulate and misuse national security agencies or their intelligence to create a phony reason to lead the nation" to suppress civil liberties or human rights to further a "politically desirable war"?

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[*] Jay Bookman, The President's Real Goal in Iraq, Atlanta Journal-Constitution, March 7, 2003, *http://www.accessatlanta.com/ajc/opinion/0902/29bookman.html*.

c. The Current Targets of the Loaded Weapon

Consider the following contemporary "Loaded Weapon" statement issued in 2002 by the Korematsu *coram nobis* legal team. Then assess the significance of Attorney General Ashcroft's proposal for detention centers for American citizens suspected of terrorism and recent statements by two high level government officials – a President Bush appointee to the U.S. Commission on Civil Rights and a Congressman heading the subcommittee on homeland security – suggesting popular and possibly legal support for a present-day internment of Arab Americans. Finally, add to the mix the documented history of the FBI and Justice Department's deliberate falsification of facts ostensibly validating the government's claim of national security.

1) Loaded Weapon Statement

The "*Loaded Weapon*": Are we replaying in post-modern form the injustice of the Japanese American internment?

NINE TALKING POINTS

Korematsu Coram Nobis Legal Team November 2002

- In 1944, Supreme Court Justice Jackson issued a grave warning: "[T]he [Korematsu] Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. *The principle lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."*
- Today, in response to the horrific killing of thousands of Americans and people from countries around the world, the Bush administration has unleashed an expansive new regime of national security measures. Some of these measures are needed and only reasonably burdensome. But others -- like secret incarcerations and detention camps for citizens -- are immensely troubling.
- People tend to believe that during times of national stress our powerful institutions will stand strong under the Constitution as the bulwark against these ill-conceived, harshly discriminatory government actions. *Korematsu I* teaches that they generally have not done so.
- In fact, court rulings, such as *Korematsu I*, have legitimized extreme, albeit popular, governmental actions -- in the 1940s, the internment; today, potentially, groundless detentions, secret trials and deportations and government racial profiling and harassment. It is the law's stamp of approval on wartime exigencies plus racism that transforms mistakes of the moment into enduring social injustice.
- Forty years passed before the 1984 *Korematsu II* decision repudiated the government's justification for the internment and the resulting "manifest injustice" for all interned Japanese Americans. The court

found that: (1) governmental officials lied to the Supreme Court about the national security risks requiring imprisonment, (2) no military necessity existed to justify the mass incarceration of an entire ethnic populace; and (3) racial animosity fueled the military orders to imprison Japanese Americans.

- The lesson of the *Korematsu* cases taken together is *not* that the government may target an entire ethnic group in the name of national security; the cases teach us that civil rights and liberties are best protected by strongly affirming their essential place in our national character, especially in times of crisis.
- In today's climate of fear and anger, the Bush administration *must prevent, not endorse, post-modern forms of internment*. The administration's national security regime must not overwhelm the civil liberties of vulnerable groups and move the country toward a police state. Our powerful institutions, particularly the courts, must be accountable to principles of equality and due process, and preserve our constitutional democracy. Our institutions must "protect all."
- Institutions will exercise such vigilance only when pushed to do so by the coordinated efforts of community and political organizations, scholars, lawyers, journalists, politicians and the public. The real bulwark against governmental excess and lax judicial scrutiny is political education and mobilization.
- It's up to us to call out injustice when it occurs, to spell out the damage it does to real people and to our constitutional democracy, and to demand accountability to principles of equality and due process for all.

The time is now to unload the weapon. *********[*]

The Korematsu coram nobis legal team's worry about the present-day use of the original *Korematsu* decision to justify racial restrictions of civil liberties emerged in part from Attorney General Ashcroft's post-9/11 proposal for detention center for American citizens and gained credence after two public statements by high level government officials.

2) Proposal for Detention Centers for American Citizens

After September 11th, reports surfaced that "Attorney General Ashcroft and the White House are considering creating military detention camps for all U.S. citizens deemed by the administration to be enemy combatants."[†] Critics of the reported plan pointed to a 1971 federal law that provided that

[*] *Korematsu coram nobis* team, Talking Points (on file with authors).

[†] Anita Ramasastry, Do Hamdi and Padilla Need Company: Why Attorney General Ashcroft's Plan to Create Internment Camps for Supposed Citizen Combatants Is Shocking and Wrong, Aug. 21, 2002 *at http://writ.corporate.findlaw.com/ramasastry/20020821.html.*

"no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."* The Bush Administration maintained that the 1971 Act did not apply to "enemy combatants" and, moreover, that the Executive Branch alone had to the power to designate American citizens "enemy combatants" and to detain them indefinitely. To date, two citizens have been designated enemy combatants and detained indefinitely without charges, trial and open access to counsel (Yaser Hamdi and Jose Padilla, discussed in the first study module *supra*).

3) Kirsanow and Coble Post-9/11 Support for Internment

In July 2002, Peter Kirsanow, a controversial President Bush appointee to the U.S. Civil Rights Commission, predicted that the public would demand an Arab American internment if terrorists again struck in America. Kirsanow spoke at a meeting of the Civil Rights Commission in which the Commission heard strong testimony by Arab Americans about government civil liberties violations after September 11th. Kirsanow reportedly said that in the event of such an attack Arab Americans can forget about civil liberties. The "public would be less concerned about any perceived erosion of civil liberties than they are about protecting their own lives." Although he did not personally favor an internment, the "groundswell of opinion" would be so strong that a racial internment would be difficult to prevent. Kirsanow concluded that Arab and Muslim Americans should accept government anti-terrorism measures and not complain about civil rights violations, noting that "not too many people will be crying in their beer if there are more detentions, more stops, more profiling."†

The Korematsu coram nobis team responded to Civil Rights Commissioner Kirsanow's statement with an open letter to President Bush, who had earlier appointed Kirsanow to the Commission over the strong objection of many civil rights organizations. That letter read in part:

July 25, 2002

> Dear President Bush,
>
> We are members of the [Korematsu Coram Nobis] legal team….We are deeply trouble by the recent comments made by Peter N. Kirsanow, your appointee…, raising the possibility of internment camps for Arab Americans and citing the original *Korematsu* case as supporting such drastic civil rights restrictions.
>
> In 1983, we helped overturn Mr. Korematsu's original conviction, which had been upheld by the U.S. Supreme Court in 1944, by prov-

* 18 U.S.C. Sec. 4001(a) (repealing the Emergency Detention Act of 1950 which authorized detention camps).

† Naraj Warikoo, Arabs in U.S. Could Be Held, Official Warns, Detroit Free Press, July 20, 2002, <*http://www.freep.com/news/metro/civil20* 20020720.htm>.

> ing that his conviction was obtained by the government through the deliberate suppression, alteration and destruction of evidence favorable to Mr. Koreamtsu and to all Japanese Americans. In 1983 the U.S. District Court for the Northern District of California further found that the Supreme Court was intentionally misled by government authorities and that there was no evidence of any "military necessity" to imprison 120,000 Americans of Japanese ancestry, two-thirds of whom were American citizens....
>
> By only citing the original, now-discredited, *Korematsu* decision, Mr. Kirsanow has ignored the later Court's findings and thus, is suggesting that there is legal justification for the mass imprisonment of an ethnic group in this country. This is precisely why Mr. Korematsu reopened his case in 1984, so that such travesties would never occur again. Mr. Kirsanow's inflammatory rhetoric, from a position of authority is the type of agitation which caused the immense civil rights deprivations Japanese Americans suffered during World War II and now threatens to victimize innocent Arab Americans.
>
> For a member of the U.S. Commission on civil Rights to make such irresponsible statements and to cite the discredited original *Korematsu* decision is antithetical to the mission of this Commission. The lesson of the *Korematsu* cases taken together is NOT that the government may incarcerate an entire ethnic group without notice, without attorneys and without trial; it teaches us that civil rights and liberties are best protected by strongly affirming their essential place in our national character especially in time of crisis, not by tolerating or condoning their abuse in the name of national security....
>
> As a member of the U.S. Civil Rights Commission, Mr. Kirsanow should be an advocate for our civil rights but his hostility to the protection of the civil rights of Arab Americans disqualifies him from membership on the Commission. We call on you to remove him from his position as a Commissioner.
>
> Very truly yours,
>
> The Korematsu Legal Team[*]

Six months after the Kirsanow controversy Republican Congressman Howard Coble from North Carolina expressed support for the World War II internment of Japanese Americans. Coble's comments carried special weight because he chaired the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security. Coble reportedly said that most Japanese Americans were not enemies of the U.S., but, reflecting the now discredited findings of the DeWitt Report, that some were probably "intent on doing harm to us...just as these Arab Americans are probably intent of doing us harm," and President Roosevelt had to consider national security.[†]

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[*] *Korematsu coram nobis* legal team, open letter (July 25, 2002) (on file with authors).

[†] NC Congressman Says Internment of Japanese Americans During WWII Was Appropriate, Associated Press (February 5, 2003).

The Kirsanow and Coble attempts effectively to resurrect the Supreme Court's decision in the original *Korematsu* case can be viewed in several ways. One view is that their statements were unplanned and reflected bad judgment by individuals and were not indicative of government policy. Another and contrary view is that their statements actually revealed government thinking about intoning "national security" to shield misdirected or even abusive government actions from public and judicial scrutiny.

4) Government Falsification of "National Security"

The latter view is starkly documented by a history of deliberate government falsification of (some say "lies" about) the national security basis for severe restrictions on civil liberties. Recall from Chapter 5 the deliberate fabrications and falsehoods set forth in the DeWitt Report, which justified to the Supreme Court the military necessity basis for the Japanese American internment. Similarly, recall from Chapter 7 how the Cox Report that justified holding Chinese American citizen Dr. Wen Ho Lee as a "nuclear secrets spy" was based on false "findings" Chinese American espionage. Note that the Foreign Information Surveillance Act (FISA) Court has recently criticized the FBI and the Justice Department for providing false information in more than 75 cases where the agencies were seeking authorization for surveillance of foreign nationals.[*]

Now re-consider the description of the Mobbs Declaration, used to justify indefinitely detaining American citizens as "enemy combatants," as discussed in the first study module to this chapter, *supra*. As well, re-consider the Creppy Directive, which authorizes the closing of deportation hearings en masse by labeling them special interest, as discussed in the second study module of this chapter, discussed in the second study module to this chapter, *supra*.

The following notes and questions explore the significance of the government's apparent attempts to resurrect the original *Korematsu* case and replay in modern form the near-absolute judicial deference the Supreme Court afforded then to the government's falsified assertions of necessity.

Notes and Questions

***1. The Loaded Weapon*:** Does Justice Jackson's loaded weapon warning "reverberate through the government's national security restrictions of civil liberties in post-9/11 America?" What civil liberties are at stake when the government unilaterally designates citizens "enemy combatants" and then detains them indefinitely without charges, trial or access to counsel? To what

[*] Philip Shenon, Secret Court Says F.B.I. Aides Misled Judges in 75 Cases, New York Times (Friday, August 23) at A1. Many of these abuses occurred even before September 11, 2001.

extent are these actions important to the nation's security? To what extent might the government be engaging in harmful ethnic or religious profiling?

Does "national security" justify the civil liberties restrictions? If so, should the Executive Branch alone determine whether security needs justify the restrictions? What if, as in the cases of *Korematsu*, *Hirabayashi* and Wen Ho Lee, the government fabricates key evidence and deliberately misleads the public about the necessity for the restrictions? What if, as the special FISA court found prior to September 11, that the FBI regularly and deliberately misrepresents facts about national security in order to obtain secret warrants to gather otherwise private information from non-citizens and now possibly citizens? At bottom, what is the role of the courts in holding the government accountable to the Constitution's equal protection and due process guarantees?

2. "Talking Points": In light of government restrictions of civil liberties described in the opening section of Chapter 8 and the Kirsanow, Coble and Ashcroft statements after September 11th about the potential for race-based detentions, what is the relevance of the "Talking Points" articulated by the Korematsu Coram Nobis Legal Team? To what extent, if at all, is the U.S. likely to "replay in post-modern form the injustice of the internment?"

3. Kirsanow and Coble: In light of your responses to the previous question, how do you interpret Kirsanow's dual statements that if there were to be another attack in the U.S. the public would demand an Arab-American internment and that a government sponsored internment, however distasteful, would be legally permissible?

First, coming from a member of the U.S. Commission on Civil Rights, what tacit message is Kirsanow sending to the public and to government officials handling national security matters? Second, did his later disavowal of support for an internment appropriately address the kind of criticisms voiced in the *Korematsu* legal team's letter to President Bush? Does it matter that Bush appointed Kirsanow over the strong objection of many civil rights organizations that argued that his record on civil rights reflected an extreme right perspective? Third, given the *coram nobis* cases, how can Kirsanow cite *Korematsu* as legal justification for a present day internment?

And how do you understand Congressman Coble's statement that the Japanese American internment was justified by necessity? Does it matter that Coble is the Chair of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security? Speculate why Coble, like Kirsanow, appears to be unaware of the *coram nobis* cases and their impact on the original *Korematsu* and *Hirabayshi* decisions? Note that he was one of the Members of Congress who voted against the Civil Liberties Act of 1988.

d. The Judicial Role

Review the Japanese American internment cases *Korematsu*, *Hirabayashi* and *Yasui*, excerpted and discussed in Chapter 3. Recall that in these cases the Supreme Court upheld the government's blanket racial curfew and exclusion orders on national security grounds. Chapter 3 discussed those

cases in the context of the tension between national security and civil liberties -- "when fears and petty prejudices aroused" during World War II led to the popular scapegoating of a socially and politically vulnerable group. As described in the preceding section, that same national security and civil liberties tension pervades many current government actions in its post-September 11th war on terror. Often overlooked yet central to the on-going debate about the propriety of sweeping government actions is this question: What role, if any, should the federal judiciary play in reviewing Executive Branch and Congressional actions that restrict civil liberties for asserted national security reasons?

At least two contrasting views respond to this critical question in the broader context of the proper role of the federal courts in assuring government accountability to constitutional standards:

The non-interventionist view holds that decisions that affect the liberties of individuals should be left to the majoritarian and politically accountable Executive and Congressional branches.[*] Implicit in this view is the notion that the judiciary should pay substantial deference to the political branches – particularly when their actions arise in the context of national security threats.[†] Under this rationale, if the executive or legislative branches overstep the bounds of their power, an informed electorate is later capable of checking government excesses through the political process.

The contrasting interventionist view contends that in a constitutional democracy the judiciary is best positioned to safeguard constitutionally protected liberties from the "tyranny of the majority" because it is insulated from the pressure of political constituencies. Appointed for life, federal judges do not have to worry about re-election and can therefore decide cases according to constitutional standards rather than bending to strong popular public sentiments. According to this view, the judiciary provides "watchful care" over the rights of individuals,[‡] including the rights of politically unpopular groups, particularly during times of national threat or crisis when "fears and prejudices"[§] are aroused and the nation's system of democracy itself is most vulnerable.

In *Korematsu*, the Supreme Court asserted that it would strictly scrutinize the government's Japanese American exclusion orders because racial classifications are inherently suspect. In making its pronouncement of strict scrutiny review, the Court embraced the interventionist view -- that it would be closely reviewing the claimed basis for the Executive And Legislative

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[*] Korematsu, supra, 323 U.S. at 224-25 (Frankfurter, J., concurring) (noting the adage that the war power of the government 'is the power to age war successfully' suggesting that courts should refrain from scrutinizing government exercises of its war powers); *Rostker v. Goldberg,* 453 U.S. 57, 64-65 (1981 ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other areas has the Court accorded Congress greater deference').

[†] *Id.*

[‡] *Ex Parte Milligan,* 71 U.S. (4 Wall.) at 124 (1867). During times of commotion, when "the passions of men are aroused and the restraints of law weakened," constitutional liberties "need and should receive, the watchful care of those instrusted [sic] with the guardianship of the Constitution and laws" – the courts.

[§] *See Korematsu v. U.S.*, 584 F. Supp. 1406 (N.D. Cal. 1984).

Branches' decision to exclude an entire racial group. In practice, however, the Court rejected the interventionist judicial role and instead adopted a fully non-interventionist posture. Recall that despite pronouncement of strict scrutiny, the Court reviewed the government's exclusion orders under less than the rational basis standard of review. (Refer to Chapter 3's discussion of differing levels of judicial review).

Using a double negative, the Court declared that it "could not reject as unfounded" the government's contention that military necessity justified the racial incarceration of innocent Americans. The Court's near absolute deference to the government coupled with the government's falsification and suppression of key evidence on "national security" legally sanctioned and continued the wrongful internment of over 100,000 Japanese Americans.

The legally-approved injustice of the internment resulted in part from the Court's extreme deference to falsified government claims of national security. Recognizing the significance of this problem for the future, while also acknowledging the need for strong government national security measures under appropriate circumstances, in 1986 Professor Yamamoto proposed a framework of judicial review for national security civil liberty restrictions. (See Chapter 3 for an extended treatment).

Yamamoto's proposal suggested that courts embrace the role of assuring both that the government has power to protect its institutions and people *and* that the constitutional liberties most fundamental to a functioning democracy are preserved. This approach to judicial review endeavors to accommodate both the interests of security and civil liberties. More specifically, the proposal seeks to have courts focus first on the right restricted and then apply the appropriate standard of review to government actions as determined by ordinary constitutional doctrine: "Except as to actions under civilly-declared martial law, the standard of review of government restrictions of civil liberties of Americans is not altered or attenuated by the government's contention that 'military necessity' or 'national security' justifies the challenged restrictions."[*]

This proposal means that if the liberty restricted ordinarily would receive heightened judicial solicitude, then that is how the courts should scrutinize those kinds of government restrictions, even during times of national fear (and especially when a distressed public is likely to search for scapegoats). On the other hand, if the restrictions do not implicate fundamental constitutional liberties, then a highly deferential judicial posture is appropriate, affording the political branches wide latitude in their national security actions. Although the government's assertions that self-protective powers are implicated would not itself attenuate the standard of judicial review, those assertions, when supported, would be significant if not compelling "ingredients in the fixed constitutional calculus."[†]

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[*] *Id.*

[†] Eric K. Yamamoto, *Korematsu Revisited – Correcting The Injustice of Extraordinary Government Excess and Lax Judicial Review: Time For A Better Accomodation of National Security Concerns And Civil Liberties*, 26 Santa Clara L. Rev. 1, 42 (1986) (hereinafter Yamamoto, *Korematsu Revisited*).

One way to look at this proposed framework of judicial review is that it offers an important balance, lacking in *Korematsu*, between national security and civil liberties – not an "either/or" approach.[*] Another viewpoint may question whether the proposal is workable – it raises serious questions about whether the judiciary is competent to assess sensitive questions of national security that are rooted in confidential intelligence information.[†]

Yet still another view is that the framework is an apt starting point for defining the judicial role, but that it needs further development and refinement in light of the current Executive Branch's sophisticated legal maneuvers apparently to avoid judicial review of civil liberty restrictions while simultaneously avoiding criticism about lack of constitutional accountability. This latter view is reflected in the following extended excerpt from a forthcoming article by Tania Cruz, who critiques and expands the proposed framework of judicial review to better account for what the author contends is the government's new "threshold designation" method of undertaking national security measures that deprive individuals of fundamental liberties while avoiding close judicial scrutiny.

TANIA CRUZ, JUDICIAL SCRUTINY OF NATIONAL SECURITY: GOVERNMENT RESTRICTIONS OF CIVIL LIBERTIES WHEN 'FEARS AND PREJUDICES ARE AROUSED'

forthcoming 2 SEATTLE J. FOR SOCIAL JUSTICE (Fall/Winter 2003)

> Given the ambiguity that exists as to how much deference the Judiciary should give government actions restricting civil liberties and the number of cases challenging government actions arising out of America's "war on terror," a workable standard is needed. By expanding [Professor Yamamoto's] proposed standard, courts can safeguard liberty while simultaneously giving deference to the government in its national security capacity. If a fundamental liberty is not implicated, then the court can give the government due deference and review self-protective measures under rational basis, as always. When a fundamental liberty is at stake, however, the government cannot use mere conjecture or stereotype to justify its actions as it did in *Korematsu*.
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> Currently, courts are in conflict as to whether they should review government national security restrictions of fundamental liberties under strict scrutiny or rational basis. In *Korematsu*, the Court gave near absolute deference to the government's military necessity claims despite the Court's pronouncement that it would apply strict scrutiny. Because scholars and historians have harshly criticized the Court's duplicity in *Korematsu,* the government now has created a new method for achieving the same results. It has created new threshold designations that precede

[*] STEPHEN DYCUS, et al, NATIONAL SECURITY LAW 805 (3rd ed. 2002) (discussing the proposed framework for judicial review of national security restrictions of civil liberties).

[†] *See generally* Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation Over National Security Information Under the Freedom of Information Act*, 37 Vill. L. Rev. 67 (1992).

the substantive designations – like "enemy combatant," "material witness," and "special interest" – that when unilaterally applied by the executive branch for asserted national security reasons are immune from heightened judicial scrutiny.

The "Threshold Designation" Method for Avoiding Heightened Judicial Scrutiny

A threshold designation appears to differ from an explicit racial directive like, for example, the military internment orders. The designation also appears to serve process goals in the interest of national security, such as holding potential terrorists pending investigation or shielding sensitive national security information from public eyes. The government, therefore, contends that courts should not scrutinize a preliminary and discretionary designation because the government has not yet made the substantive determination as to whether the person is actually dangerous – for example, whether an "enemy combatant" is actually engaged in terrorist activity. Yet, by making the threshold designation, the Executive Branch is in fact depriving the designated individual of fundamental liberties and is treating him as "guilty" of disloyalty.

For example, the government contends that by designating American citizens enemy combatants, fundamental liberties are not implicated. The government, thus, suggests that courts should avoid reviewing its threshold determinations completely, or at most, should review the designation and its supporting evidence[*] under less than rational basis. Were the government to charge those citizens as criminals, they would be entitled to a full range of procedural protections. People preliminarily designated enemy combatants, however, are detained indefinitely and deprived of fundamental liberties such as access to counsel, habeas proceedings and trial. By employing this threshold designation method to shift the framework of review, the government is assured that its national security civil liberty restrictions will always be upheld because they will never be subjected to heightened judicial scrutiny.

Delegitimizing the Threshold Designation Method to Assure Heightened Scrutiny

In order to better account for the government's new emphasis on threshold designations to avoid heightened scrutiny, the proposed framework of judicial review needs to be expanded and refined. Under the expanded framework, judicial review must focus on the government's preliminary threshold designation itself to determine its implications. For example, when the Executive designates an American an enemy combatant, if it appears that the designation's effect is to deprive the individ-

[*] *Hamdi*, 316 F.3d at 474 ("In support of its contention that no further factual inquiry is appropriate, the government has argued that a "some evidence" standard should govern the ajudication of claims brought by habeas petitioners in areas where the executive has primary responsibility. That standard has been employed in contexts less constitutionally sensitive than the present one, albeit in a procedural posture that renders those cases distinguishable." *INS v. St. Cyr*, 533 U.S. 289, 306 (2001)).

ual of fundamental liberties, such as indefinite incarceration without a hearing or access to counsel, courts should first review the designation itself under heightened scrutiny. In doing so the courts should closely scrutinize, rather than deferentially accept, the government's assertion that preliminarily labeling the individual an enemy combatant instead of a criminal does not implicate fundamental rights. Then, if courts determine that the effect of the government's threshold national security designation is to strip the individual of fundamental liberties, courts should strictly scrutinize the government's supporting evidence and rationale to assure that genuine and compelling security interests are at stake.

This expanded framework is significant because the threshold designation method employed by the government is not limited to enemy combatants. This method appears in other national security situations, such as the "material witness" and "special interest" cases, to avoid or severely limit judicial review of what appear to be substantial transgressions of constitutional liberties.

Meaningful review when a fundamental liberty is at stake will at a minimum not only prevent the politically powerless from being swept up in the tide of public opinion, but it will also assure that the Judiciary is not rubber-stamping government actions. It will guarantee that the system of checks and balances functions properly and that any one branch is not gaining excessive power. The courts' role would not be expanded because heightened scrutiny would only be applied in the same situations that it is applied when judicial review principles would ordinarily require "watchful care" and the most fundamental liberties of a constitutional democracy are at stake. If the situation in the country becomes so ominous that the government must initiate blanket restrictions of civil liberties in the name of national security, then it can declare martial law. * * *[*]

Notes and Questions

1. ***Judicial Review Generally*****:** Describe two contrasting views of the judicial role in reviewing government national security civil liberty restrictions? What differing philosophical underpinnings about judicial review are reflected in the contrasting views? Should a court's embrace of one view over the other depend on the context of the case? If so, what are the arguments for situationally applying either a deferential or heightened scrutiny approach to national security restrictions of civil liberties?

2. ***Government Openness and Electorate Oversight*****:** One argument supporting minimal judicial intervention in reviewing government actions that restrict civil liberties is that the framers devised an electoral process for correcting most political mistakes. For the political

[*] Tania Cruz, "Judicial Scrutiny of National Security: Government Restrictions of Civil Liberties When 'Fears and Prejudices Are Aroused'," 2 Seattle Journal for Social Justice (forthcoming Fall/Winter 2003).

process to work, however, government actions must be open to the American people. What if the American people do not know what their government is doing? Arvin S. Quist observes that "one of the nation's fundamental principles is the right of citizens to be informed....Therefore when the U.S. Government keeps secrets from its citizens, that action conflicts with a basic right of citizens to be informed of their government's actions so that they can intelligently participate in governmental processes."* If the government attempts to shroud in secrecy national security actions that appear to restrict civil liberties, how can the electorate provide an effective check against arbitrary or discriminatory government actions?

3. *"Discrete and Insular Minorities"*: Professor John Hart Ely observes that the judiciary must ensure that the voices of those members of society who do not have effective access to the political process are heard.† If the judicial branch does not assure constitutional protection for "discrete and insular minorities"‡ during times of fear and stress, he asserts, government violations of their civil rights likely will go unchecked because they are politically powerless and the tide of political opinion is against them. Moreover, when the courts are excessively deferential to the political branches, new legal precedent will emerge that can later be used and perhaps even expanded to justify additional civil rights violations.§

In the war on terror, many government national security actions have been directed primarily towards Arab and Muslim non-citizens. In the enemy combatant cases the two U.S. citizens targeted also have been racial minorities. Given the emotionally charged war on terror and the American public's renewed support for racial profiling, discussed in Section C, what effect, if any, might highly deferential judicial review have on the rights of racial, ethnic and religious minorities in the U.S.? Since the executive and legislative branches are popularly elected and are designed to respond to political constituencies, what government branch other than the judiciary will protect "discrete and insular minorities" from the "tyranny of the majority"?

4. *Proposed Framework of Judicial Review*: Professor Yamamoto contends that in the absence of martial law courts should review government restrictions of civil liberties under the ordinarily appropriate

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* Arvin S. Quist, Security Classification of Information 6-1 to 6-3 (Oak Ridge National Laboratory 1989), (cited in STEPHEN DYCUS et al., NATIONAL SECURITY LAW 912 (2002).

† *See* ELY, *supra*.

‡ *United States v. Carolene Products Co.,* 304 U.S. 144, 153 n.4 (1938) (calling for a "more searching judicial inquiry" former Chief Justice Stone cited the precarious position of "discrete and insular minorities" in a democratic society as distinguished from those with access to the political process).

§ Korematsu, supra, 323 U.S. at 246 (Jackson, J. dissenting) (warning that the majority's ruling upholding Fred Korematsu's conviction would lie "about like a loaded weapon ready for the hands of any authority tat can bring forward a plausible claim of an urgent need.").

standard of judicial review – that is, under the rational basis standard if no fundamental liberties are implicated, and heightened scrutiny (intermediate level or strict scrutiny) if fundamental liberties or suspect classifications (such as race or gender) are involved. The government, however, has traditionally argued that the forced relinquishment of security information to the courts will compromise its investigations.

Does the proposed standard appear workable in light of the government's expressed need for confidentiality? Can courts employ judicially accepted methods to minimize the risks of disclosure -- like reviewing government evidence "in camera" (privately by the judge in chambers) to assure that the government's evidence remains confidential?* Might some evidence be so sensitive that even federal judges should be prohibited from viewing it in camera? How likely is this possibility? Finally, can for courts effectively balance national security interests and civil liberties in applying the appropriate standard of review to civil liberty restrictions – that is, by assuring that the government's claim of security or necessity, when substantiated, is a key "ingredient in the fixed constitutional calculus?"

5. Contemporary Refinement of Proposed Framework of Judicial Review: Tania Cruz maintains that the proposed framework of judicial review needs to be expanded to account for current government restrictions of civil liberties in the war on terror. Stung by charges of duplicity in *Korematsu* (announcing strict scrutiny and then applying something less than rational basis), the federal courts appear to be reluctant to pronounce a standard of review without applying it.

In this light, Cruz describes the Executive Branch's employment of a new method for averting heightened judicial scrutiny of its restrictions of civil liberties -- a "threshold designation method." By creating new preliminary status designations such as "enemy combatant" that precede the substantive determination of whether the individual is in fact a terrorist or otherwise guilty of disloyalty, the government contends it can detain designated individuals incommunicado without careful judicial oversight because no criminal charges have been lodged and no fundamental liberties have yet been implicated. Those citizens, however, thus far all persons of color, have been detained indefinitely in solitary confinement without full access to counsel, charges, trial or findings of disloyalty.

To more clearly account for the government's apparent attempt to avoid heightened judicial scrutiny of its actions, Cruz maintains that the proposed framework of judicial review should be refined: Courts should first carefully review the threshold designation itself, even if substantive charges and determinations of disloyalty are yet to come; and if designation's effect is to deprive individuals of fundamental liberties, courts should strictly scrutinize the government's supporting evidence and ra-

* See *Ray v. Turner*, 587 F.2d 1187 (D.C. Cir. 1978) (describing the process of in camera judicial inspection of potentially sensitive national security information).

tionale to assure that genuine and compelling security interests are at stake.

How, if at all, does this refinement of the proposed framework of judicial review deepen inquiry into the government's new national security rationale for certain restrictions of civil liberties? How effectively does it address the threshold designation method the government appears to be advocating in arguing against heightened judicial scrutiny. Or, is the Executive Branch correct in arguing that fundamental liberties are not implicated in its enemy combatant, material witness or special interest designations and that careful judicial scrutiny of those designations and their effects is therefore inappropriate?

6. Application to Hamdi and Padilla: Now recall the *Hamdi* and *Padilla* enemy combatant cases described in detail in the first study module. In light of the government's contention that American citizens Hamdi and Padilla can be indefinitely detained without access to counsel, charges or trial based on the government's unilateral enemy combatant designation, does the government's designation in fact operate to deprive Hamdi and Padilla of fundamental liberties? If not, does it then make sense for the courts to avoid reviewing the government's designation entirely? At what costs in terms of public accountability? If so, what would be the effect of courts carefully scrutinizing the government's enemy combatant designation and its supporting evidence? Would this automatically invalidate the government's designation, or would it principally require the Executive Branch to produce credible evidence of a real risk to national security?

***7. Dueling Judges: Trial Judge Doumar and Appellate Judge Wilkinson*:** In *Hamdi*, District Judge Doumar maintained that when reviewing the designation of a particular individual as "enemy combatant," courts must scrutinize such factors as the government's evidentiary basis, the screening criteria used and the national security interest served by the individual's continued detention.[*] In contrast, on appeal, Fourth Circuit Judge Wilkinson criticized Judge Doumar's heightened judicial scrutiny approach. Wilkinson instead advocated a significantly a more deferential approach to scrutinizing government restrictions of civil liberties.

> The deference that flows from the explicit enumeration of powers protects liberty as much as the explicit enumeration of rights. The Supreme Court has underscored this founding principle: "The ultimate purpose of this separation of powers is to protect the liberty and security interests of the governed." Thus, the textual allocation of responsibilities and the textual enumeration of rights are not dichotomous, because the textual separation of powers promotes a more profound understanding of our rights. For the judicial branch to trespass upon the exercise of the war-

[*] See the first study module for detailed discussion.

> making powers would be an infringement of the right to self-determination and self-governance at a time when the care of the common defense is most critical. This right of the people is no less a right because it is possessed collectively.

In Judge Doumar's trial court the government offered only the conclusory Mobbs Declaration as evidentiary support for its position that Hamdi should be indefinitely detained as an enemy combatant. Would careful judicial scrutiny of the government's enemy combatant designation, as Judge Doumar advocated, better accommodate both national security interests and civil liberties; or, as Judge Wilkinson believes, would it likely embroil courts in decisionmaking on matters over which they lack both authority and competence? With these considerations in mind, reflect again on what the courts' role should be?

***8. "Meaningful" Judicial Review*:** If the ultimate goal of the war on terror is to protect the nation's institutions and democratic liberties, what would be the likely symbolic and practical effects of subverting these very liberties in the process? Reflect on the symbolic and practical effects of the Supreme Court's ruling in *Korematsu* upholding the constitutionality of the internment. Could near absolute judicial deference to the government's national security claims encourage the government to broadly assert national security whenever it deprives individuals of fundamental liberties? Is the Executive Branch already doing this? On this point, consider Judge Doumar's words about the significance of meaningful judicial review.

> While it is clear that the Executive is entitled to deference regarding military designations of individuals, it is equally clear that the judiciary is entitled to a meaningful judicial review of those designations when they substantially infringe on the individual liberties, guaranteed by the United States Constitution, of American citizens…The standard of judicial inquiry must also recognize that the "concept of `national defense' cannot be deemed an end in itself, justifying any exercise of [executive] power designed to promote such a goal. Implicit in the term `national defense' is the notion of defending those values and ideals which sets this Nation apart….It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties…which makes the defense of the nation worthwhile."[*]

9. *No Access to Counsel*: In *Padilla*, the government argued that granting Padilla even limited access to counsel would jeopardize the government's ability to prevent future attacks because Al Qaeda operatives

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[*] *Hamdi,* 243 F.Supp. 2d at 532 (*quoting United States v. Robel*, 389 U.S. 258, 264 (1967). *See also* Detroit Free Press v. Ashcroft, *supra*, 303 F.3d at 709–710.("there seems to e no limit to the Government's argument. . . . The Government could operate in virtual secrecy in all matters dealing, even remotely, with "national security," resulting in a wholesale suspension of [fundamental] rights. By the simple assertion of "national security," the Government seeks a process where it may, without review. . . . deprive [Americans] of their fundamental liberties.").

are trained to use third parties as intermediaries to pass messages to fellow terrorists, even if "the intermediaries may be unaware that they are being so used." The government's contention was too speculative even for District Judge Mukasey, who in other respects deferred to the government's national security claims and declined to adopt a heightened security standard of review of the government's enemy combatant designation of Padilla. In rejecting the government's argument, Judge Mukasey explained that the government's argument was based on "gossamer speculation" and that attorneys were competent to serve the interests of their clients while not comprising the nation's security.

> First, accepting that conjecture at face value and across the board proves far too much; by the government's logic, no indicted member of Al Qaeda facing trial in an Article III court should be allowed to consult with counsel – a result barred by the Sixth Amendment. Second, I have read both the Mobbs Declaration. . . . the government's conjecture is, on the facts presented to me in those documents, gossamer speculation. . . . Finally, Padilla's lawyers themselves are members of this court's Criminal Justice Act panel who have appeared before this court in numerous cases. In addition to being able advocates, they have conducted themselves at all times in a fashion consistent with their status as – to use the antique phrase – officers of the court. There is nothing in their past conduct to suggest that they would be inclined to act as conduits for their client, even if he wanted them to do so.[*]

How feasible is the government's asserted justification for denying Padilla even limited access to counsel because he would use his counsel as an intermediary to transmit messages to Al Qaeda operatives? Judge Mukasey explained that by the government's logic anyone indicted as an even distant Al Qaeda associate should be denied access to counsel – a result inconsistent with the Sixth Amendment. Does it appear that the government's goal is to deprive anyone held under suspicion of disloyalty (recall the government's later concession that Padilla was not connected to Al Qaeda) even limited access to counsel? What if the person under suspicion admitted a direct association with a terrorist group (one of over forty such groups designated by the government)? Should the government be able to deprive that person of access to counsel while it detains him indefinitely? If so, does limiting the individual access to counsel in effect render the individual guilty of disloyalty since he likely will be unable to properly defend himself or legally assert his right to freedom?

If the individual is not given the opportunity to properly defend himself, what guarantee does the American public have that the government is not arbitrarily targeting individuals and wrongfully labeling them enemy combatants? What is the significance of Judge Doumar's statement about the need for meaningful judicial review and Judge Mukasey's rejec-

[*] *Padilla*, 233 F. Supp. 2d at 603.

tion of the government's no-access-to-counsel argument as a likely transgression of the Sixth Amendment?

11. *American Bar Association Task Force Recommendations*: The American Bar Association is a respected mainstream legal organization comprised of most of the practicing attorneys in the U.S. Its Task Force on Enemy Combatants formally recommended that the government change its current practices and provide clear and consistent standards with respect to enemy combatant designations.* What does this say about the propriety of the government's threshold designation practices, including its "material witness" and "special interest" designations?

12. *Korematsu Revisited*: In light of Justice Jackson's "loaded weapon" warning in his *Korematsu* dissent (challenging the Supreme Court's deference to the government's false claims that Japanese Americans posed a threat to the nation's security) and in light of the revelations in the *coram nobis* cases, what are the dangers of near absolute judicial deference to the government's current national security arguments? Conversely, what are the risks in requiring the government to substantiate its national security claims when it declares individuals enemy combatants, material witnesses or special interest cases and deprives them of fundamental liberties? How might requiring the government to "prove its case" compromise national security? On the other hand, how might it ensure that the government is not arbitrarily targeting individuals on the basis of race or religion while escaping constitutional accountability? What framework of judicial review best enables the courts to accommodate both national security interests and civil liberties?

13. *Fabricated Evidence Compared*: Recall from your study of Chapter 5 that General DeWitt's Report submitted to the Supreme Court under the doctrine of judicial notice contained deliberate falsehoods, omitted key facts and altered material information. In light of DeWitt's actions in *Korematsu*, how should we evaluate the risks of accepting at face value the government's designation of American citizens as enemy combatants based solely on a Mobbs Declaration untested for veracity according to traditional evidentiary standards?

In *Hamdi*, Judge Doumar declined to accept the hearsay-laden Mobbs Declaration as bona fide proof of enemy combatant status, demanding that the government provide further evidence of necessity to justify its indefinite detention of Hamdi without charges, trial and access to counsel. Judge Doumar observed that he did not know Mobbs nor could he confirm the veracity of the statements in Mobbs Declaration, which were untested by cross-examination.

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* American Bar Association Task Force On The Treatment Of Enemy Combatants, Preliminary Report, August 8, 2002, at 20 *http://news.findlaw.com/hdocs/docs/aba/abarpt80802cmbtnts.pdf*.

> Paragraph 1 of the Mobbs Declaration states that Mobbs is a Special Adviser to the Undersecretary of Defense for Policy. The declaration does not indicate what authority a "special Adviser" has regarding classification decisions of enemy combatants. Indeed, the declaration does not indicate whether Mr. Mobbs was appointed by the President, is an officer of the United States, is a member of the military, or even a paid employee of the government. During the August 13, 2002 hearing, when asked to explain the Mr. Mobb's authority and role in Hamdi's classification as an enemy combatant, the Respondent's counsel was unable to do so. In a general way, the declaration never refers to Hamdi as an "illegal" enemy combatant. The term is used constantly in Respondent's Memorandum. Nor is there anything in the declaration about intelligence or the gathering of intelligence from Hamdi...There is no reason given for Hamdi to be in solitary confinement, incommunicado for over four months and being held for some eight-to-ten months without any charges of any kind. This is clearly an unreasonable length of time to be held in order to bring criminal charges. So obviously criminal charges are not contemplated.[*]

Recall Justice Jackson's parallel observation in *Korematsu* :

> So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable.[†]

Compare this to the near-absolute deference of Judge Wilkinson in *Hamdi* and Judge Mukasey's views in Padilla.

***14. Judicial Deference or Heightened Scrutiny?*:** If the court had employed a strict scrutiny standard of review of the Mobbs Declaration in the *Hamdi* and *Padilla* cases, what would have been the result?

Is our nation's security really at risk when the court strictly scrutinizes government restrictions of civil liberties in the name of national security? In *Padilla*, the government claimed that Padilla should be denied access to counsel because his attorney may act as an Al-Qaeda operative. Is this feasible? In light of what the *coram nobis* cases demonstrated, isn't a bigger threat to our nation when the courts abdicate their role of watchful care and provide no meaningful review of government civil liberties restrictions when there is the possibility that the government's justifications are false or unwarranted?

15. *Hidden Agendas Revisted*: Finally, re-consider journalist Jay Bookman's "The President's Real Goal in Iraq," described at the beginning of this study module. For Bookman the official story on America's invasion of Iraq "never made sense...Something else had to be going on;

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[*] *Hamdi,* 243 F. Supp. 2d at 533.

[†] *Korematsu v. U.S.*, supra, 323 U.S. at 245.

something was missing." The "missing pieces" fell into place when Bookman learned of the Project for a New American Century – or PNAC -- a blueprint for global U.S. military and political domination generated by key officials in the Bush Administration before September 11, 2001.

> As it turns out, this [war] is not really about Iraq. It is not about weapons of mass destruction, or terrorism, or Saddam, or U.N. resolutions.
>
> This war…is intended to mark the official emergence of the U.S. as a full-fledged global empire, seizing sole responsibility and authority as planetary policeman. It would be the culmination of a plan 10 years in the making, carried out by those who believe the U.S. must seize the opportunity for global domination, even if it means becoming the "American Imperialists" that our enemies always claimed we were . . ..
>
> The 2000 [PNAC] report directly acknowledges its debt to a still earlier document, drafted in 1992 by the Defense Department. That document also envisioned the U.S. as a colossus astride the world, imposing its will and keeping world peace through military and economic power. When leaked in final draft form, however, the proposal [then] drew so much criticism that it was hastily withdrawn and repudiated by the first President Bush….The defense secretary in 1992 was Richard Cheney; the document was draft by Paul Wolfowitz, who at the time was the undersecretary of defense.[*]

As Bookman describes, PNAC was developed by conservatives now serving in the Bush Administration, including Vice President Cheney and Paul Wolfowitz. It provided the blueprint for the government's National Security Strategy. Although formally presented as an "anti-terrorism" policy, might the PNAC plan more accurately be characterized as one aimed at military and economic "global domination"? To what extent, if at all, is the war on terror being used as a "front" to achieve larger political objectives?

C. CONCLUSION

As we asked at the beginning of this post-9/11 postscript to our book:

Will today's judiciary draw upon yesterday's Korematsu *lessons to demand that the government prove its national security claim as justification for curtailing fundamental liberties?*

Or will the courts again abdicate their role of "watchful care" over civil liberties of citizens and non-citizens during times of public fear?

The war on terror has yielded partial answers to these questions but we as American citizens have yet to experience and shape the full story.

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[*] Jay Bookman, The President's Real Goal in Iraq, Atlanta Journal-Constitution, March 7, 2003, *http://www.accessatlanta.com/ajc/opinion/0902/29bookman.html*.

ADDITIONAL RESOURCES

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APPENDIX I: TABLE OF CASES

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APPENDIX II: TIMELINE OF EVENTS

1790 - Naturalization Act prevents non-whites from being citizens; first federal naturalization statute

1830 - Chinese "sugar masters" working in Hawaii. Chinese sailors and peddlers in New York

1848 - Gold discovered in California. Chinese begin to arrive

1848 - Treaty of Guadalupe Hildalgo concludes U.S.-Mexican War; Mexicans residing on territory ceded to
U.S. can elect U.S. citizenship

1850 - California's Foreign Miner's Tax. Enforced against Chinese miners, who often had to pay twice. Before law voided ½ of State's income was derived from this source

1852 - 20,000 Chinese pass through San Francisco to gold fields of Sierra Nevada foothills, one year later, only 5,000 due to Foreign Miner's Law

1853 -Territorial law passed, banning Chinese from voting in Washington

1854 - **People v. Hall:** California court upholds ban testimony of Chinese person against white person in criminal trial

1855 - "An Act to Discourage the Immigration to this State of Persons Who Cannot Become Citizens" required master of ship owner to pay $50 for each passenger ineligible to naturalized citizenship

1857 - **Dred Scott v. Sanford**

1858 - California passes law to bar entry to Chinese and Mongolians

1860 - Japan sends diplomatic mission to U.S.

1861 - Civil War begins

1862 - Law passed "to protect Free White Labor against competition with Chinese Coolie Labor, and to discourage the immigration of the Chinese into the State of California"

1862 - California imposes a "police tax" of $2.50 a month on every Chinese

1863 - Territorial law banning Chinese from testifying in court cases involving whites in Washington

1864 - Territorial law enacting poll tax on Chinese in Washington

1865 - Civil War ends

1865 - Central Pacific Railroad recruits Chinese workers for the transcontinental railroad

1865 - Thirteenth amendment adopted, ending slavery

1866 - Civil Rights Act of 1866

1866 - **Ex Parte Milligan**

1867 - Two thousand Chinese railroad workers strike for one week

1868 - Fourteenth amendment ratified with its due process and equal protection clauses

1868 - Burlingame Treaty: The Chinese government sought, and obtained, treaty protection for the civil rights of Chinese persons in US

1870 - Civil Rights Act of 1870: Section 16 to protect Chinese aliens

1870 - Chinese railroad workers in Texas sue company for failing to pay wages

1870 - Fifteenth amendment adopted, formally extending the vote to African American males

1870 - 1790 Naturalization Act amended to include persons of African descent

1871 - **People v. Brady**

1872 - Repealed the ban on Chinese testimony in both criminal and civil cases

1873 - **The Slaughter-House Cases**, U.S. Supreme Ct. rejects challenge to a Louisiana statute creating a slaughter-house monopoly, narrowly construing 14th Amendment requiring the states to respect the "privileges and immunities" of citizens of the United States

1874 - **In re Ah Fong**

1875 - Page Law bars entry of Chinese, Japanese, and Mongolian prostitutes, felons, and contract laborers

1876 - **Chy Lung v. Freeman,** U.S. Supreme Ct. strikes down California immigration statute on federal supremacy grounds

1879 - California constitutional amendments include explicit provision forbidding corporations to employ Chinese immigrants

1880 - Burlingame Treaty renogotiated to allow U.S. to restrict, but not completely ban, immigration of laborers

1882 - Chinese Exclusion Act passed by Congress to bar immigration of Chinese laborers for 10 years

1883 - **The Civil Rights Cases,** Court holds the Civil Rights Act of 1875 can only proscribe government acts (public conduct); it cannot under the authority of the 14th Amendment regulate actions of individuals or businesses (private conduct) even if those actions occurred in public places

1884 - **Chew Heong v. United States**

1885 - Three Chinese killed outside of Issaquah

1885 - Anti-Chinese demonstrations in Tacoma

1886 - Anti-Chinese demonstrations in Seattle

1886 - First alien land law in Washington

1886 - Residents in Tacoma and Seattle forcibly expel the Chinese

1886 - Chinese laundrymen win case in **Yick Wo v. Hopkins**, which declares that a law with unequal impact on different groups is discriminatory

1888 - Scott Act makes exclusion of Chinese permanent and old certificates null and void

1889 - **Chae Chan Ping v. United States** (The Chinese Exclusion Case)

1892 - Chinese Exclusion Act (Geary Law) extended another 10 years

1892 - **Nishimura Ekiu v. United States**

1893 - San Francisco school board claims Japanese children posed a threat of contaminating white children

1893 - **Fong Yue Ting v. United States**

1895 - Japan defeats China in war

1896 - Bubonic plague scare in Honolulu, Chinatown burned

1896 - **Plessy v. Ferguson**, upholds constitutionality of segregated train cars

1898 - **United States v. Wong Kim Ark**, decides that Chinese born in US cannot be stripped of their citizenship

1898 - Spanish-American war ends; U.S. takes jurisdiction over Philippines and annexes Hawai'i as a territory

1900 - 25% of all employed Chinese males in the U.S. are launderers, with 18% in agriculture and 14% working as household servants

1900 - Organic Act ends contract labor

1902 - Chinese exclusion extended for another 10 years. Immigration officials and the police raid Boston's Chinatown and, without search warrants, arrest almost 250 Chinese who allegedly had no registration certificates on their persons

1903 - **Yamataya v. Fisher** (The Japanese Immigrant Case)

1905 - Japan defeats Russia

1906 - US Attorney General orders federal courts to stop issuing naturalization papers to Japanese

1907 - Gentlemen's Agreement reached between Americans and Japanese diplomats; Japan stops issuing passports to laborers bound for United States

1907 - Executive Order 589 (President Theodore Roosevelt) makes it illegal for Japanese with visas to Hawaii, Canada, or Mexico to re-migrate to the continental United States

1909 - 7,000 Japanese plantation workers strike major plantations on Oahu for 4 months

1910 - All major political parties have anti-Japanese planks by this time

1912 - President Woodrow Wilson says about the Japanese: "We cannot make a homogenous population out of a people who do not blend with the Caucasian race."

1913 - First Alien Land Act passed in California, prohibiting "aliens ineligible to citizenship" from owning land or leasing land for longer than 3 years

1915 - Passage of state law barring Asian immigrants from taking "for sale or profit any salmon or other food or shellfish"

1917 - Immigration Act of 1917 passed, Congress creates Asiatic Barred Zone; all Asian immigrants except Japanese and Filipinos banned by order of Congress

1920 - Japan stops issuing passports to female emigrants whose marriage arrangements were facilitated by an exchange of photographs ("picture brides")

1920 - Alien land law in CA amended by initiative to close loopholes

1921 - Alien Land restrictions passed in Washington state against Asians

1922 - **Takao Ozawa v. United States**, declares Japanese not eligible for naturalized citizenship.

1922 - Cable Act declares any American female citizen who marries "an alien ineligible to citizenship" would lose her citizenship

1923 - **Terrace v. Thompson**, U.S. Supreme Court upholds constitutionality of alien land laws

1923 - In **United States v. Bhagat Singh Thind,** the Supreme Court rules that racial exclusion is based on the "understanding of the common man."

1924 - Immigration Act (National Origins Act) prohibits "aliens ineligible to citizenship" from immigrating, virtually ends Japanese immigration

1928 - Filipino farm workers are driven out of Yakima Valley.

1930s - Supreme Court introduces "nondelegation doctrine"

1934 - Tydings-McDuffie Act makes the Philippines a commonwealth and promises full independence in 10 years. Filipino immigration to the U.S. limited to 50 per year

1937 - Washington state legislature attempts to pass an anti-miscegenation law

1937 - Alien land restrictions in Washington extended to Filipinos

1939 - Canada, as part of British Commonwealth, enters World War II against Germany

Late 1930s - Justice Department compiles list of Japanese resident aliens who were potentially "subversive" and "dangerous"

1941 - March: Justice Dept. and War Dept. reach secret agreement to coordinate an internment of "enemy aliens"

1941 - December 7: Pearl Harbor, Hawai'i bombed by Japan; Justice Dept. immediately arrests enemy aliens, most of whom are Japanese (some American citizens included)

December 8: Declaration of war against Japan

December 9: Nationally syndicated newspaper columnist, Westbrook Pegler, suggests concentration camps for "alien Japanese," and disloyal Italian and German Americans

December 12: Territory of Alaska placed under Western Defense Command

December 13: Guam taken

December 17-23: Submarine attacks off West Coast

December 19: General DeWitt advocates "collect[ing] all alien subjects fourteen years of age and over, of enemy nations and remov[ing] them to the Zone of the Interior"

December 24: Wake Island taken; Hong Kong invaded

1942 – January 2: Manila falls

January 26: Ringle memo identifying that only a small identifiable portion of the Japanese American people were potentially disloyal.

January: Supreme Court Justice Roberts, Roberts Commission report "Japanese living in America had committed espionage"

February 10: Singapore falls

February 13: DeWitt makes final recommendation on the evacuation of Japanese from Pacific Coast

February 19: Franklin Roosevelt signs Executive Order 9066, calling for evacuation of all Japanese and Japanese Americans living on the Pacific Coast inland to internment camps

February 20: Sec. Of War designates DeWitt Commander, West Def. Command

February 27: Battle of Java Sea

February: Walter Lippman advocates internment

Early March: DeWitt issues public proclamations, designating Military Areas #1 and #2, warning future evacuation, and encourages voluntary resettlement outside of Military Area #1

March 9: Indonesia & Burma taken

March 18: War Relocation Authority (WRA) created by executive order; a civilian agency designed to run the relocation centers

March 21: Congress passes Public Law 503, which criminalized violations of duly authorized military orders

March 21: Act authorizing exclusion at direction of Pres., Sec. Of War or designee

March 24: DeWitt begins issuing series of 108 Civilian Exclusion Orders, including Public Proclamation No.3, which imposed a curfew on all enemy aliens as well as citizens of only Japanese descent

March 27: Public Proclamation No.4 issued, known as the "freeze order," which prohibited enemy aliens from voluntarily leaving the designated military areas

March 28: Minoru Yasui walks into Portland, OR police station and demands to be arrested for curfew violation (first legal test of DeWitt's orders)

May 9: Effective date of Exclusion Order

May 16: Gordon Hirabayashi turns himself into FBI headquarters to challenge the exclusion order, a calculated act of civil disobedience; Hirabayashi charged with two counts of failing to obey exclusion order and disobeying curfew, even though intended to challenge only the exclusion order

May 28: Hirabayashi indicted

May 30: Fred Korematsu picked up by police while walking down the street in San Leandro, CA

June 12: Korematsu charged

June: Yasui's lawyer, Earl Bernhard, chooses to waive Yasui's right to jury trial, opts for bench trial

July 20: First official policy statement regarding resettlement of evacuees issued

September: Civil court jurisdiction extended to jury trials;

only about 250 internees leave camps under student leave policy

September 8: Korematsu convicted

October: Government prosecutors call Hirabayashi's father as their first witness;

Dillon Myer, new WRA director, initiates new liberalized leave regulations

October: Harper's article was published anonymously, but Edward Ennis, a lawyer at the Justice Department, figured out that it was probably based on the Ringle memo.

November 1: An evacuee who had cooperated with WRA and was suspected of being an "informer" was beaten by group of unidentified men

December 31: Evacuation complete – 10 camps/120K people

1943 - January: Secretary of War announces creation of all-Nisei combat unit, and registration efforts ensue

- **Regan v. King**: Citizenship by birth upheld by 9th Circuit

1943 - Justice Department presents extraordinarily selective evidentiary record in support of the constitutionality of the internment

1943 - Congress repeals the Chinese Exclusion Act, but allows only 105 immigrants annually, Chinese Repealer signed by President Frankilin Roosevelt

1943 - **Hirabayashi v. United States** decided by trial court

Yasui v. United States decided by trial court

1943- April 14, DeWitt testimony before Congress (SF) quoted in Murphy dissent. 323 U.S. at 236, fn.2.

April 15, DeWitt – Final Report transmittal to War Department released later

April 23, Justice Department got copies of pages

April 30, Director, Alien Enemy Control Unit – Ennis memo sent to Sol. Gen re: Ringle memo

1943 - May 10-11: Supreme Court hears oral arguments in **Hirabayashi, Yasui** and **Korematsu** cases

June 1: First **Korematsu** opinion issued by Supreme Court

June 5: Revised version of DeWitt Report issued

June 21: Supreme Court issues **Hirabayashi** ruling, 320 U.S. 81, **Yasui** decided, 320 U.S. 115

June 29: Smith memo re: Witnessing burning of original reports of galleys, etc.

1944 - January: DeWitt Final Report was made public

February 7: Hoover Memo was given to the Attorney General

April 4: FCC sends a letter to the Attorney General which undercuts the factual statements in the DeWitt Final Report

July 1: President Roosevelt signs Amendment to the Nationality Act of 1940 into law, which allowed the disaffected Japaense Americans to renounce their U.S. citizenship

September 11: Assistant Attorney General Burling writes War Division Memo re footnote

September 30: Ennis sends a memo to Asst. AG Wechsler arguing against the proposed alteration of the Burling footnote in the government's **Korematsu** brief.

October 2: Fisher sends a memo to McCloy, Assistant Secretary of War giving choice of footnotes

October 11-12: **Korematsu** argued

October 12: **Endo** argued

December: Supreme Court issues second **Korematsu** ruling

1944 - **Ex Parte Endo** decided by U.S. Supreme Court

United States v. Fujii

December 18: Korematsu decided, 323 U.S. 214 (1944).

December 18: Endo decided, 323 U.S. 283 (1944).

1945 - War Relocation Authority notes that 120 Japanese and 313 Japanese Americans lived in the internment camps from 1942-1945

1945 - Congress passes War Brides Act

1945 - **United States v. Okamoto**

1946 - Last of those detained in internment camps are released

1946 - Naturalization rights granted to Asian Indians and Filipinos, quotas set for each

1947 - War Brides Act amended to admit Chinese wives of citizens without regard to the quota limit and allow citizens to petition for their spouses to join them

1948 - Japanese American Claims Act (Evacuation Claims Act) passed, allowing limited redress for those dispossessed of their property during internment

1948 - **Oyama v. California**, U.S. Supreme Court denounced land ownership laws based on alienage status as an illegimate form of racial prejudice

Takahashi v. Fish and Game Commission

Shelley v. Kraemer

1949 – 5,000 highly educated Chinese in the U.S. granted refugee status after China institutes a Communist government

1949 - **Acheson v. Murakami**

1952 - Immigration and Nationality Act (McCarran-Walter Act), Congress abolishes last racial limitations on immigration and naturalization. Token quotas still remain.

1954 - **Brown v. Board of Education**, ended segregated education

Bolling v. Sharpe

1956 - California repeals alien land laws

1959 - U.S. Attorney General Roberts states that 5,409 of the over 5,700 Nisei who had renounced their citizenship had asked that it be returned; almost 5,000 had already recovered their citizenship by this time

1959 - Hawai'i becomes fiftieth state of the union

1965 - Immigration and Naturalization Act gives equal quota to all countries and favors immigration of professional classes

1965 - Amendments made to McCarran-Walter Immigration and Nationality Act

1965 - Asian Americans number 1 million

1965 - **Hitai v. Immigration and Naturalization Service**

1966 - Washington voters on fourth try repeal Alien Land Law

1969 - Students at the University of California, Berkeley, go on strike for establishment of ethnic studies program

1971 - **Pentagon Papers** case

1973 - Supreme Court grants aliens right to practice law

1974 - **Lau v. Nichols** rules that school districts with children who speak little English must provide them with bilingual education

1976 - President Gerald Ford rescinds Executive Order 9066, issues proclamation and apologizes

1978 - National convention of the Japanese American Citizen League adopts resolution calling for redress and reparations for the internment of Japanese Americans

1980 - Commission on Wartime Relocation and Internment of Civilians (CWRIC) created

1982 - CWRIC concludes that the "broad historical causes which shaped these decisions were race prejudice, war hysteria and failure of political leadership"

1982 - Justice Arthur Goldberg sends letter to Judge William Marutani, criticizing the coram nobis effort as unnecessary and potentially damaging

1983 - **Hirabayashi, Korematsu**, and **Yasui** file writ of coram nobis

February: CWRIC releases report of its internment investigation, entitiled "Personal Justice Denied"

June: CWRIC gives recommendations on Wartime Relocation

October: Government files response to **Korematsu** petition

November: Hearing on **Korematsu** petition held

1984 - January: Judge grants government's motion to vacate **Yasui**'s conviction and dismiss his petition

April: Judge issues written opinion on **Korematsu** petition

May: Government's motion to dismiss **Hirabayashi**'s petition denied

1985 - **Hirabayashi** puts his former prosecutors on trial on misconduct charges

1986 - Immigration Reform and Control Act imposes civil and criminal penalties on employers who knowingly hire undocumented aliens

1986 - February: Judge issues written **Hirabayashi** opinion, requiring vacation of Hirabayashi's conviction on evacuation charge, but declined to vacate the curfew conviction

1986 - **Hohri v. United States (Hohri I)**

1987 - On appeal, unanimous **Hirabayashi** opinion issued agreeing the U.S. government doctored the documentary record, reversing curfew conviction adn remanding case with orders to vacate both convictions

1988 - **Hohri v. United States (Hohri II)**

1988- Passage of reparation legislation by US Congress for Japanese Americans interned during WW II; Civil Liberties Act of 1988

1989 - President Bush signs into law an entitlement program to pay each surviving Japanese American internee $20,000

1990 - Asian Americans number 7 million, 2.9% of the national population

1993 - Congress adopts and President Clinton signs into law Public Law 103-150, the "Apology Resolution," to acknowledge the overthrow of the Kingdom of Hawai'i and offer apology to Native Hawaiians on behalf of the U.S. for the overthrow

1995 - **Adarand Constructors v. Pena**, 515 U.S. 200 (1995), Ct. held that strict scrutiny is to be applied to evaluate federal affirmative action programs

1996 - Gary Locke elected governor of Washington state, first Asian American governor on the US mainland

1996 - Proposition 187, which restricts social services for immigrants passed by nearly 60% in California

1999 - December: Dr. **Wen Ho Lee** sues FBI and the Justice and Energy Departments, alleging that they engaged in racial profiling, violated his privacy and wrongly portrayed him as a Chinese spy

2000 - July: Government's prosecution of Dr. Lee begins to collapse on multiple fronts

September: Dr. Lee set free after nine months in solitary confinement and villification as a spy

6/28/01: **Zadvydas v. Davis,** 533 U.S. 678 (2001) decided: USSC holds that if six months after the court has issued a final order of deportation, an immigrant still has not been deported and it does not appear that he or she will be deportable in the "reasonably foreseeable future," except in certain circumstances, he or she must be released.

9/11/01: Attacks on World Trade Center, Pentagon, and Pennsylvania

9/14/01: Bush's Proclamation-Declaration of National Emergency

9/20/01: Bush delivers Response to the Terrorist Attacks

9/23/01: Bush issues Executive Order 13224: Blocking Property and Prohibiting Transactions With Person Who Commit, Threaten To commit, or Support Terrorism

9/28/02: UN Security Council declares that "All nations should cease active or passive support for terrorist groups, suppress terrorist recruitment and access to weapons, outlaw financing of terrorist groups, and deny safe haven to those who finance, plan, support, or commit terrorist acts."

10/8/01: Bush issues Executive Order 13228: Establishing the office of Homeland Security and the Homeland Security Council

10/26/01: USA PATRIOT ACT passed

11/13/01: Bush's Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism [Established the Military tribunals]

12/25/01: Arab-American Secret Service Agent, Walid Shatter, is removed from a plane [Alleges racial profiling/ discrimination]

7/11/02 – Motion to dismiss indictment was denied. **U.S. v. Lindh,** 212 F. Supp. 2d 541 (E.D. Va. 2002).

7/12/02: 4th Circuit Court reverses and order which gave the American Taliban Fighter, Yaser Hamdi, Access to a Defense Lawyer

7/18/02: Jude Doumar of the Federal District Court ordered today that Prosecutors have a week to explain why American Taliban fighter, Yaser Hamdi, is being held without any charges filed against him.

7/22/02: Activist, James Ujaama arrested as a material witness to terrorist activity and is being held without a formal charge.

7/23/02: House approves 28.5 billion emergency spending bill [to pay for military operations, domestic security and New York's recovery effort from the Sept. 11 attacks].

7/26/02: House approves Homeland Security Bill [Approving the Largest Re-organization of the Federal Government in more than ½ a Century]

8/1/02: Federal Judge dismisses lawsuits brought by detainees at Guantanamo, Cuba. [First definitive ruling on the legal rights of the Guantanamo prisoners.]

8/6/02: **Hamdi v. Rumsfeld**, 316 F.3d 450 (4th Cir. 2003). Lawyers for the Justice Dept. reject a federal judge's order and fail to meet a deadline imposed by the order to produce documents to support its contention that Mr. Hamdi is an "enemy combatant."

8/7/02: **Hamdi v. Rumsfeld**, 316 F.3d 450 (4th Cir. 2003). Federal Judge in Virginia suspended all proceedings

10/12/02: Terrorists attack in Bali.

11/02: A federal court in San Francisco rejected a challenge to the detention of about 600 war prisoners being held in Guantanamo Bay, Cuba, ruling that a group of clergy and professors have no legal standing to intervene.

11/02: A special federal appeals court rules that the Justice Department has broad powers under the Patriot Act enacted in 2002 to use wiretaps, read e-mails and conduct searches of suspected terrorists.

11/02: The Pentagon confirmed the existence of the Total Information Awareness program, which will monitor passports, visas, work permits, airline tickets, rental cars, gun purchases, chemical purchases and other activities in search of potential terrorists.

11/25/02: President Bush signed the bill to create the Department of Homeland Security, a Cabinet-level super-agency that will combine 22 separate federal agencies to protect the United States from terrorism, and nominated former Pennsylvania governor Tom Ridge as its secretary.

1/24/03: Tom Ridge will take office as the Secretary for the Department of Homeland Security.

3/11/03: Developments in the cases of security detainees Held by the U.S. government

3/18/03: Operation Liberty Shield begins

3/26/03: Torture of Anti-War Demonstrator continues

4/24/03: Attorney General Ashcroft rules that illegal immigrants could be held indefinitely without bond if their cases present national security concerns.

4/25/03: Attorney General Ashcroft calls for blanket detention of Haitian asylum seekers.

5/23/03: Military Commission Rules fail to include fair trial guarantees.