

**OVERREACTION THEN (*KOREMATSU*) AND  
NOW (THE DETAINEE CASES)**

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Overreacting to tragic events leads to even more tragedy. When it is the government which overreacts, individual constitutional rights can vanish. The fear, anger, and patriotism engendered during a war or by a terrorist attack can “undermine the capacity of individuals and institutions to make clearheaded judgments about risk, fairness, and danger.”<sup>1</sup> Reason and logic vanish. “It is difficult to make calm, balanced decisions in a state of personal anxiety, outrage, or passion.”<sup>2</sup> Overreaction occurs, and individual rights disappear. Even the United States Supreme Court can get swept away. This article uses the *Korematsu* case<sup>3</sup> as a case study in how things can go grievously wrong. In this time of responding to terrorism, we need to be reminded that good people can do bad things. The Supreme Court, in its darkest moments, has rejected the idea of our political system governing “its citizens as individuals rather than as groups.”<sup>4</sup> During World War II, the United States, with no regard to the Constitution, imprisoned 120,313 people of Japanese ancestry; 70 percent of whom were American citizens.<sup>5</sup> We need to be reminded of this and some of its ugly details.

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<sup>1</sup> GEOFFREY R. STONE, *WAR AND LIBERTY: AN AMERICAN DILEMMA: 1790 TO THE PRESENT* 167 (2007).

<sup>2</sup> *Id.*

<sup>3</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>4</sup> *Arakaki v. Hawaii*, No. 00-00514, 2000 U.S. Dist. LEXIS 22394, at \*3-4 (D. Haw. Sept. 19, 2000). *See, e.g. Korematsu*, 323 U.S. 214 (upholding the internment of persons of Japanese ancestry during World War II); *Plessy v. Ferguson*, 163 U.S. 537 (1896) (permitting separate train cars for blacks and whites); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (upholding state law that barred women from practicing law); *Dred Scott v. Sandford*, 60 U.S. 393 (1856) (denying citizenship to blacks).

<sup>5</sup> WENDY NG, *JAPANESE AMERICAN INTERNMENT DURING WORLD WAR II: A HISTORY AND REFERENCE GUIDE* 32, 39 (2002).

In recent years, we have also seen the corrosive effects of overreaction. After 9/11, lawyers in the White House and the Department of Justice came up with dubious “legal justifications for a vast expansion of the government’s power in waging war on terror.”<sup>6</sup> “As part of that process . . . the United States sanctioned government officials to physically and psychologically torment U.S.-held captives, making torture the official law of the land in all but name.”<sup>7</sup> Arthur Schlesinger, Jr. called the Bush administration’s extralegal counterterrorism program “the most dramatic, sustained, and radical challenge to the rule of law in American history.”<sup>8</sup> The executive branch, under the authority of its own rules, created an alternative legal system.<sup>9</sup> Despite the United States signing and ratifying The Convention Against Torture,<sup>10</sup> which prohibits “cruel, inhuman and degrading” treatment, the Bush legal team, particularly under the direction of David Addington (Vice President Cheney’s legal counsel) and John Yoo (Deputy Chief in the Justice Department’s Office of Legal Counsel), concluded that these categories did not apply to the Central Intelligence Agency.<sup>11</sup> In 2003 Alberto Mora, then General Counsel of the Navy, thought that John Yoo’s legal opinion justifying acts amounting to torture displayed “catastrophically poor legal reasoning [which] approached the level of the notorious Supreme Court decision in *Korematsu*.”<sup>12</sup> “[T]orture, which was reviled as a depraved vestige of primitive cultures before September 11, seemed in danger of becoming normalized.”<sup>13</sup> By 2008, Germany and the European Union had accused the United States of violating internationally accepted standards for humane treatment and due process.<sup>14</sup> The four detainee cases, discussed *infra*,<sup>15</sup> dealt with aspects of this policy.

### **Background to *Korematsu***

After first arriving in Hawaii in the 1860s, many Japanese workers immigrated to the United States. However, after Hawaii

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<sup>6</sup> JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 7 (2008).

<sup>7</sup> *Id.* at 7-8.

<sup>8</sup> *Id.* at 8.

<sup>9</sup> *Id.* at 80.

<sup>10</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984. S. Treaty Doc. No. 100.20, 1465 U.N.T.S. 85.

<sup>11</sup> MAYER, *supra* note 6, at 296.

<sup>12</sup> *Id.* at 229.

<sup>13</sup> *Id.* at 329.

<sup>14</sup> *Id.* 332.

<sup>15</sup> See *infra* pp. 23-28.

became an American possession in 1898, the number of Japanese who reached the West Coast increased significantly.<sup>16</sup> In 1899, 2,844 Japanese arrived, and in 1900, 12,635 more arrived.<sup>17</sup> Many Americans on the West Coast viewed the influx of Japanese as an economic and cultural threat, and racial tensions grew.<sup>18</sup> The Gentlemen's Agreement with Japan in 1908 prohibited the further immigration of Japanese men.<sup>19</sup> Japanese men, however, immediately sent for their wives or for "picture brides," so immigration actually increased.<sup>20</sup> But, the Immigration Exclusion Act of 1924 virtually barred any further Japanese immigration.<sup>21</sup> Furthermore, the Japanese were not permitted to become naturalized citizens until 1952.<sup>22</sup> However, their sons and daughters born in the United States (second generation in the United States, called *Nisei* in Japanese) were American citizens by virtue of their birth place.<sup>23</sup>

In the months following the Japanese attack on Pearl Harbor on December 7, 1941, no high government official suggested that persons of Japanese ancestry should be moved away from the West Coast. Military estimates were that "there was no real threat of a Japanese invasion" of the area.<sup>24</sup> However, by March the program was fully underway to remove 120,000 persons of Japanese ancestry from the West Coast.<sup>25</sup> According to the 1982 Commission on Wartime Relocation and Internment of Civilians, "racial prejudice, war hysteria, and a failure of political leadership" brought this about.<sup>26</sup> Under Executive Order 9066,<sup>27</sup> President Franklin Roosevelt authorized military commanders to prescribe military areas from which people could be excluded. General John DeWitt, the West Coast military commander, then issued a series of exclusion orders under which people of Japanese ancestry were required to report to civilian control centers, from which they were removed to

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<sup>16</sup> 2 U.S. SUPREME COURT 613 (Thomas Tandy Lewis ed., 2007).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 614.

<sup>22</sup> *Id.* at 617.

<sup>23</sup> NG, *supra* note 5, at 5.

<sup>24</sup> 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1415 (Leonard W. Levy & Kenneth L. Karst eds., 2d ed. 2000).

<sup>25</sup> *Id.*

<sup>26</sup> NG, *supra* note 5, at 12.

<sup>27</sup> Exec. Order No. 9066, 7 Fed. Reg. 1,407 (Feb. 19, 1942).

relocation camps.<sup>28</sup> Fred Korematsu was convicted of failing to report to one of these civilian control centers.<sup>29</sup> The Supreme Court deferred to DeWitt's military judgment, but his report was based on lies and incomplete information.<sup>30</sup> Peter Irons, a noted authority on the internment fiasco, explained that government officials edited DeWitt's original report to eliminate DeWitt's admission that inadequate time to conduct loyalty hearings was not a factor in the government's evacuation program; also they substituted DeWitt's racist claim that it was "impossible" to determine the loyalty of those to be evacuated with the explanation that the Army had no "ready means" by which to perform this task.<sup>31</sup>

The FBI, in fact, opposed the internment because it believed the Japanese Americans were "fundamentally loyal and as a group, posed no threat to the nation."<sup>32</sup> In a striking parallel, the FBI has also opposed policies and methods amounting to torture by the American military and by the CIA.<sup>33</sup> The 14<sup>th</sup> Amendment of the Constitution states that "no person shall be deprived of liberty without due process of law and that every person is entitled to equal protection before the law."<sup>34</sup> Nevertheless, although never formally charged on an individual basis with any criminal offense, 120,000 people were forced to leave their homes, business, jobs, and communities. Particularly egregious, though, was the fact that some 70,000 of these individuals were *Nisei*; i.e., American citizens. *Nisei* then appeared to spend much of their time "trying to convince . . . the American public that despite [their] looks and [their] parents, [they were] really American."<sup>35</sup> *Nisei* almost totally lacked a knowledge of Japanese culture and would not have "found a place . . . in Japan" had they gone there.<sup>36</sup>

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<sup>28</sup> 2 HISTORIC U.S. COURT CASES: AN ENCYCLOPEDIA 724 (John W. Johnson ed., 2d ed. 2001) [hereinafter HISTORIC U.S. COURT CASES].

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 730.

<sup>31</sup> PETER IRONS, JUSTICE AT WAR 210 (1983).

<sup>32</sup> 2 HISTORIC U.S. COURT CASES, *supra* note 28, at 730 ("Hoover . . . concluded that the demand for mass evacuation was based on 'public hysteria' and that the FBI had already taken into custody all suspected Japanese agents."); STONE, *supra* note 1, at 71.

<sup>33</sup> MAYER, *supra* note 6, at 203-205.

<sup>34</sup> See U.S. CONST. amend. XIV, § 1.

<sup>35</sup> DAISUKE KITAGAWA, ISSEI AND NISEI: THE INTERNMENT YEARS 25 (1967).

<sup>36</sup> *Id.* at 35.

## Hysteria

The background that led to the relocation and internment was one of hysteria. James Michener noted: “One way to save face was to explain the disaster at Pearl Harbor as the result of espionage by Japanese living in Hawaii and along our West Coast.”<sup>37</sup> Accusations against Japanese Hawaiians for espionage and aiding the attack were never proved, but the accusations “inflamed the mainland press and contributed to . . . an intense campaign to evacuate Japanese Americans from the West Coast.”<sup>38</sup> In Hawaii itself, no evacuation was proposed because persons of Japanese ancestry constituted about 37 percent of the population, and it was impossible to evacuate that many people without causing incalculable financial and political harm.<sup>39</sup> In addition, General Delos Emmons, the commanding general in Hawaii, shortly after Pearl Harbor, provided positive leadership: “[W]e must do things the American Way. We must distinguish between loyalty and disloyalty among our people.”<sup>40</sup>

Mainland papers fed the hysteria. On January 28, 1942, a *Los Angeles Times* editorial argued that “the rigors of war demand proper detention of Japanese and their immediate removal from the most acute dangerous spots” on the West Coast.<sup>41</sup> On January 29<sup>th</sup> a *San Francisco Chronicle* columnist wrote: “I am for immediate removal of every Japanese . . . to a point deep in the interior. I don’t mean a nice part of the interior either . . . Let ‘em be pinched, hurt, hungry and dead up against it . . . .”<sup>42</sup> This columnist pretty much got his wish.

General DeWitt, in his official report, referred to “all individuals of Japanese descent as ‘subversive,’ as belonging to ‘an enemy race’ whose ‘racial strains are undiluted,’ and as constituting over ‘112,000 potential enemies.’”<sup>43</sup> In addition, “[h]e added to a growing hysteria by constantly – and always erroneously – reporting acts of Japanese-instigated sabotage and military actions off the coast . . . .”<sup>44</sup> The government attorneys intentionally exaggerated

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<sup>37</sup> James A. Michener, *Introduction* to MICHU NISHIURA WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA’S CONCENTRATION CAMPS* 27 (1976).

<sup>38</sup> 6 WEST’S ENCYCLOPEDIA OF AMERICAN LAW 1 (2d ed. 2005).

<sup>39</sup> NG, *supra* note 5, at 24-25.

<sup>40</sup> *Id.* at 25.

<sup>41</sup> 6 WEST’S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 38, at 1.

<sup>42</sup> *Id.* at 1-2.

<sup>43</sup> 2 ENCYCLOPEDIA OF AMERICAN CIVIL RIGHTS AND LIBERTIES 584 (Otis H. Stephens Jr. et al. eds., 2006).

<sup>44</sup> 2 HISTORIC U.S. COURT CASES, *supra* note 28, at 722.

the risk posed by the people of Japanese ancestry: “Even though winning the war undoubtedly was a compelling purpose, the means was not necessary to attaining that end.”<sup>45</sup> Actual incidents of espionage among people of Japanese descent on the West Coast were non-existent after Pearl Harbor.<sup>46</sup>

### **President Franklin Roosevelt**

Men thought of as liberal icons – Franklin D. Roosevelt, Hugo Black, Earl Warren – had feet of clay. Roosevelt’s “signing of Executive Order 9066 was probably one of the few shortcomings of his presidency that overlooked and abrogated the civil rights of minorities.”<sup>47</sup> He ignored FBI and naval intelligence reports suggesting that people of Japanese descent could be trusted.<sup>48</sup> Roosevelt’s ostensible motive was military necessity: “The army might be wrong, but Roosevelt considered it best equipped to decide what was needed to win the war.”<sup>49</sup> Moreover, “he failed to provide political or moral leadership on how evacuee property should be protected.”<sup>50</sup> Also, “a speech . . . reminding Americans that the internees had not been convicted of any crime would not have seriously embarrassed the administration or interfered with the evacuation.”<sup>51</sup> In 1944, Roosevelt was still referring to the *Nisei* (actually born in the U.S.) as “Japanese people from Japan who are citizens.”<sup>52</sup> Roosevelt was “unwilling to recognize that they had the same inalienable rights to due process and equal protection of the laws as other citizens.”<sup>53</sup> Nor did he want to release the internees until after the 1944 election because “such a decision might upset voters on the West Coast.”<sup>54</sup>

### **Earl Warren**

During Earl Warren’s tenure as Chief Justice of the United States Supreme Court, 1953-1969, “the court set standards of liberal judicial activism on race issues by which future courts would be

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<sup>45</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 698 (3d ed. 2006).

<sup>46</sup> IRONS, *supra* note 31, at 21-24.

<sup>47</sup> NG, *supra* note 5, at 147-148.

<sup>48</sup> *Id.* at 28.

<sup>49</sup> GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* 109 (2001).

<sup>50</sup> *Id.* at 144.

<sup>51</sup> *Id.* at 174.

<sup>52</sup> *Id.* at 243.

<sup>53</sup> *Id.*

<sup>54</sup> STONE, *supra* note 1, at 79.

judged.”<sup>55</sup> However, scholars have identified Warren, then Attorney General of California, as the “single most powerful voice for the [internment] decision” and “one of the individuals most responsible for bringing the relocation program into being.”<sup>56</sup> “Earl Warren . . . acted in an unconscionable manner, apparently foreseeing that if he gained local popularity by inflammatory acts against the Japanese he stood a good chance of being elected governor later on.”<sup>57</sup> That there had been no sabotage or espionage committed by persons of Japanese ancestry at the time of the attack on Pearl Harbor or shortly thereafter was to him the most dangerous sign in the whole situation. He said: “It convinces me . . . that the [acts of] sabotage we are to get . . . are timed just like Pearl Harbor was timed . . . .”<sup>58</sup> He even suggested that Japanese Californians conspired to live near designated strategic locations, such as power lines, which ignored their history of land use and development.<sup>59</sup> In April 1969, Chief Justice Warren returned to his law school, Boalt Hall, to give a speech titled, “Observations on Human Rights and Racial Discrimination.” Seated at the front of the auditorium were 25 Japanese-American students who sat during the standing ovation and Warren, noting the unfriendly faces, declined to take questions after his speech.<sup>60</sup> “Throughout his life Warren maintained that at the time [the evacuation] seemed the right and necessary thing to do . . . .”<sup>61</sup> In his posthumously published memoirs Warren finally conceded:

I have since deeply regretted the removal order and my own testimony advocating it, because it was not in keeping with our American concept of freedom and the rights of citizens . . . . It was wrong to react so impulsively, without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state.<sup>62</sup>

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<sup>55</sup> Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and a Theory of Racial Redemption*, 40 B.C. L. REV. 73, 73 (1998).

<sup>56</sup> *Id.* at 89-90.

<sup>57</sup> Michener, *supra* note 37, at 30.

<sup>58</sup> 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 24, at 1417.

<sup>59</sup> Cho, *supra* note 55, at 96.

<sup>60</sup> JIM NEWTON, *JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE* 139 (2006).

<sup>61</sup> THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1068 (Kermit L. Hall ed., 2d ed. 2005).

<sup>62</sup> EARL WARREN, *THE MEMOIRS OF EARL WARREN* 149 (1977).

People of Japanese ancestry were removed from the West Coast because the military thought it would take too long to conduct individual loyalty investigations.<sup>63</sup> “[T]he standard of judicial review of the exercise of war powers appears to be reasonableness.”<sup>64</sup> The *Korematsu*<sup>65</sup> and the *Endo*<sup>66</sup> cases essentially said: “subject only to explicit congressional approval . . . military officials faced no constitutional barriers to the wartime detention of American citizens singled out on a racial basis.”<sup>67</sup> The great anomaly of these cases is that they abandoned the requirement of a judicial inquiry into the factual justification for General DeWitt’s decision: “These cases treat[ed] the decisions of military officials, unlike those of other government officers, as almost immune from ordinary rules of public responsibility.”<sup>68</sup> The decisions of the military could be carried out without trials, without the confrontation of witnesses, without counsel for the defense, without the privilege against self-incrimination, and without any of the other safeguards of the Bill of Rights.<sup>69</sup> Curiously, during that same period the Supreme Court was capable of much better work. In 1943 it held that the government could not constitutionally compel children to pledge allegiance to the flag,<sup>70</sup> and in 1946 it held that military tribunals could not try civilians in Hawaii.<sup>71</sup>

### **Uprooting and Evacuation**

The decision to evacuate people of Japanese ancestry was both underinclusive and overinclusive. Interning only people of Japanese ancestry was underinclusive because it did not identify those of other races (e.g., people of German and Italian ancestry) who might be a danger. At the same time, the action was overinclusive because few, if any, of those rounded up posed any danger.<sup>72</sup> The evacuees did not know where they were going or how long they would be detained or what conditions they would face or what fate awaited them.<sup>73</sup>

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<sup>63</sup> Eugene V. Rostow, *The Japanese American Cases – A Disaster*, 54 *YALE L.J.* 489, 490 (1945).

<sup>64</sup> Neil Gotanda, *The Story of Korematsu: The Japanese-American Cases*, in *CONSTITUTIONAL LAW STORIES* 262 (Michael C. Dorf ed., 2004).

<sup>65</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

<sup>66</sup> *Ex parte Endo*, 323 U.S. 283 (1944).

<sup>67</sup> IRONS, *supra* note 31, at 346.

<sup>68</sup> Rostow, *supra* note 63, at 531.

<sup>69</sup> *Id.* at 532.

<sup>70</sup> *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

<sup>71</sup> *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

<sup>72</sup> CHERMERINSKY, *supra* note 45, at 674.

<sup>73</sup> STONE, *supra* note 1, at 67.

Citizens (i.e., *Nisei*) were designated as “non-alien.”<sup>74</sup> Farmers “were required to vacate within weeks and even days of the spring harvest, reaping none of the profits and incurring all of the debts.”<sup>75</sup> The majority of the evacuees lost everything they had at the time they were forced to leave. Two thousand people in Los Angeles were given 24 hours to sell their homes and businesses.<sup>76</sup> Families were numbered. Family Number 13453 said: “How can we clear out in ten days a house we’ve lived in for fifteen years?”<sup>77</sup> Mary Tsukamoto heard the authorities say “camp,” so she thought they were going up in the mountains somewhere: “We sold our car for \$800, which was just about giving it away.”<sup>78</sup> “I remember my daughter was five, and she cried for a whole week – she cried and cried and cried.”<sup>79</sup> Another evacuee noted: “Neat and conscientious to the end, my mother wanted to leave our house in perfect condition. That last morning she swept the entire place, her footsteps echoing sadly throughout the vacant house.”<sup>80</sup> By June 1942 the Japanese fleet had been destroyed at the Battle of Midway, completely obviating any threat of a West Coast invasion. By that time only 17,000 people had been evacuated to the internment camps.<sup>81</sup>

### **Relocation or Internment Camps**

“No one of Japanese ancestry living in California, Oregon, and Washington, whether citizen or alien, enjoyed freedom in America by June 1942.”<sup>82</sup> The 120,000 evacuees were moved to one of ten internment camps<sup>83</sup> which “were surrounded by barbed wire, guarded by armed soldiers, and located in isolated parts of the country.”<sup>84</sup> One observer commented, “As we visited one center after another, we became more and more impressed with the ingenuity of the government in finding such uniformly God-forsaken places for

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<sup>74</sup> JOHN TATEISHI, AND JUSTICE FOR ALL: AN ORAL HISTORY OF THE JAPANESE AMERICAN DETENTION CAMPS xix (Univ. of Wash. Press 1999) (1984).

<sup>75</sup> *Id.*

<sup>76</sup> 6 WEST’S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 38, at 2.

<sup>77</sup> YOSHIKO UCHIDA, DESERT EXILE: THE UPROOTING OF A JAPANESE AMERICAN FAMILY 59 (1982).

<sup>78</sup> TATEISHI, *supra* note 74, at 9.

<sup>79</sup> *Id.* at 15.

<sup>80</sup> UCHIDA, *supra* note 77, at 64.

<sup>81</sup> TATEISHI, *supra* note 74, at xx.

<sup>82</sup> *Id.*

<sup>83</sup> One in Utah, two in Arizona, one in Colorado, one in Wyoming, two in Arkansas, two in California, one in Idaho. The population varied from a low of 7,318 in Granada (Colorado) to a high of 17,814 in Poston (Arizona). NG, *supra* note 5, at 38.

<sup>84</sup> 2 HISTORIC U.S. COURT CASES, *supra* note 28, at 724.

relocation [camps].”<sup>85</sup> James Omura, testifying before a congressional committee in 1942, said: “Has the Gestapo come to America? Have we not risen in righteous anger at Hitler’s mistreatment of the Jews? Then, is it not incongruous that citizen Americans of Japanese descent should be similarly mistreated and persecuted?”<sup>86</sup> Nine hundred days behind barbed wire: lack of privacy, soul-deadening boredom, flimsy barracks subject to temperatures which soared and plummeted, sand and cactus outside, dust everywhere.<sup>87</sup> Families were separated by only thin partitions, and the communal toilets had no partitions at all. In other words, people were treated like cattle.<sup>88</sup> Forty percent of the people sent to the camps were under the age 15 or over the age of 50.<sup>89</sup> Although the culture was formerly family-centered, in the camps, family culture broke down. Given the communal camp mess halls, children didn’t eat with their parents and mothers did not prepare meals. Many children lost confidence in, and respect for, their parents.<sup>90</sup> There was a demonstration at Manzanar, one of the camps in the bleak high desert country of California, over work conditions among other things. Military Police tear-gassed demonstrators and then fired into the crowd, killing two and wounding ten others.<sup>91</sup> A six-year-old said to his mother: “Mommy, let’s go back to America.”<sup>92</sup> One inmate at the Topaz Relocation Camp in the Utah desert said it was “bleak as a bleached bone.”<sup>93</sup> And a bit of an inmate’s poignant poetry:

Someone named it  
 Topaz . . .  
 This land  
 Where neither grass  
 Nor trees  
 Nor wild flowers grow.<sup>94</sup>

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<sup>85</sup> KITAGAWA, *supra* note 35, at 154.

<sup>86</sup> MICHIE WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA’S CONCENTRATION CAMPS* 67 (1976) (quoting *Tolan Committee Hearings: Hearing Before the H. Select Comm. Investigating National Defense Migration*, 77th Cong. (1942) (statement of James M. Omura).

<sup>87</sup> RICHARD DRINNON, *KEEPER OF CONCENTRATION CAMPS: DILLON S. MYER AND AMERICAN RACISM* 43-44 (1987).

<sup>88</sup> 6 WEST’S *ENCYCLOPEDIA OF AMERICAN LAW*, *supra* note 38, at 3.

<sup>89</sup> 3 *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION*, *supra* note 24, at 1415.

<sup>90</sup> KITAGAWA, *supra* note 35, at 87-88.

<sup>91</sup> NG, *supra* note 5, at 47.

<sup>92</sup> KITAGAWA, *supra* note 35, at 94.

<sup>93</sup> UCHIDA, *supra* note 77, at 106.

<sup>94</sup> *Id.* at 121.

The War Relocation Authority managed the relocation centers (their formal name) or “camps.”<sup>95</sup> The words “imprisonment” and “deportation” were buried in the euphemism “evacuation” and its accomplishment by compulsory confinement. WRA officials said the centers or camps were not concentration camps and that the inmates were not prisoners.<sup>96</sup> “But the sense of being debased human beings was inescapable for a people being guarded night and day by soldiers up in guard towers.”<sup>97</sup> One writer has argued that these relocation centers or internment camps should be called concentration camps: “enclosures, where most people, most of them citizens, have been penned without being charged with crimes and without being sentenced by ordinary process of law, and then shot if they try to leave.”<sup>98</sup> An authoritative dictionary defines “concentration camp” as “a camp where persons (as prisoners of war, political prisoners, or refugees) are detained or confined . . . .”<sup>99</sup>

### **The *Korematsu* Case**

In 1941, Fred Korematsu lived in California. He volunteered for military service but was rejected for health reasons. He then became a welder in a defense industry. He had no reason to leave his home, and he was not a threat to the nation, so he stayed at his home in Alameda County, a proscribed area.<sup>100</sup> He was convicted of remaining in a military area contrary to General DeWitt’s Exclusion Order which said that all persons of Japanese ancestry were to be excluded, essentially, from the West Coast. In *Korematsu*,<sup>101</sup> the Supreme Court upheld the order excluding all persons of Japanese ancestry from the West Coast and the requirement that they report to assembly centers, which almost always resulted in assignment to internment camps. Justice Hugo Black wrote the opinion for the 6-3 majority. In a famous paragraph, he said:

[A]ll legal restrictions which curtail the civil right of a single racial group are immediately suspect . . .  
[C]ourts must subject them to the most rigid scrutiny.  
Pressing public necessity may sometimes justify the

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<sup>95</sup> NG, *supra* note 5, at 37.

<sup>96</sup> WEGLYN, *supra* note 86, at 79.

<sup>97</sup> *Id.*

<sup>98</sup> DRINNON, *supra* note 87, at 6.

<sup>99</sup> WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 469 (2002).

<sup>100</sup> 2 HISTORIC U.S. COURT CASES, *supra* note 28, at 726-727.

<sup>101</sup> *Korematsu v. United States*, 323 U.S. 214 (1944).

existence of such restrictions; racial antagonism never can.<sup>102</sup>

This was the first time the Supreme Court announced that “rigid [or strict] scrutiny” would be applied when the civil rights of a specific racial group were infringed. It is also the only time that the Supreme Court found a compelling state interest necessary to justify the infringement of the civil rights of a specific racial group.<sup>103</sup> Following that pronouncement, though, Justice Black abandoned all judicial scrutiny of the racial discrimination at hand.<sup>104</sup> Obliquely noting that Korematsu (and, by implication, about 70,000 other Japanese-Americans) had been placed in an internment camp for well over two years without charges and without even a hearing, Black said that “war is an aggregation of hardships” and that “citizenship has its responsibilities as well as its privileges.”<sup>105</sup> One is absolutely stunned by the insensitivity at the very least, or racism at the worst, of Black’s language. Justice Black never explained why segregating only people of Japanese ancestry was not racist. He even said that “no question was raised as to [Korematsu’s] loyalty to the United States.”<sup>106</sup>

In February 1943 the War Relocation Authority, the governmental agency which administered the internment camps, began its “loyalty” registration of all internees, for the combined purpose of serving the Army recruitment program<sup>107</sup> and the clearance of leaves in the hope of phasing out the camps as “anachronisms born of baseless fears and hysteria.”<sup>108</sup> Each adult internee, whether a citizen or not, was required to answer the 28 questions on the “Statement of United States Citizen of Japanese Ancestry” form. Question 27 asked:

Are you willing to serve in the armed forces of the United States on combat duty, wherever ordered?<sup>109</sup>

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<sup>102</sup> *Id.* at 216.

<sup>103</sup> 2 HISTORIC U.S. COURT CASES, *supra* note 28, at 727.

<sup>104</sup> 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 24, at 1417.

<sup>105</sup> *Korematsu*, 323 U.S. at 219.

<sup>106</sup> *Id.* at 216.

<sup>107</sup> About 500 inductees out of the internment camps died serving in the U.S. Army. PAUL BAILEY, *CITY IN THE SUN: THE JAPANESE CONCENTRATION CAMP AT POSTON, ARIZONA 195* (1971).

<sup>108</sup> *Id.* at 147.

<sup>109</sup> Document 4, Selective Service System, Statement of United States Citizen of Japanese Ancestry in NG, *supra* note 5, at 161. Question 27 “was modified . . . for *Nisei* women and for all the *Issei* [first-generation]: ‘If the opportunity presents itself and you are found qualified, would you be willing to volunteer for the Army Nurse Corps or the WAAC [Women’s Auxiliary Army Corps]?’ – a

Question 28 asked:

Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attack by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government power, or organization?<sup>110</sup>

“Conceived and executed without thought to the consequences, the questions generated enormous resentment.”<sup>111</sup> Those who answered the two questions improperly (i.e., with “no”) were labeled “disloyal” and were generally transferred to the Tule Lake Internment Camp in northern California where “discontent was much higher and the officials were much harsher in their administration than the other nine camps.”<sup>112</sup> This was true although no statute makes “disloyalty” a crime.<sup>113</sup>

The two questions threw thousands of internees into a quandary. Question 27 seemed to be implying that only a “yes” was satisfactory even though the internees, without any shred of due process, had been improperly put in what was essentially a prison. For the non-citizen *Issei*, Question 28 was impossible to answer because they had been denied American citizenship and if they answered “no,” not only would they be “disloyal” but in addition they would in fact be stateless. “WRA officials themselves considered this questionnaire drafted by the War Department misleading and coercive.”<sup>114</sup>

Because of the volatile situation, Congress passed a bill that would allow for the voluntary renunciation of U.S. citizenship.<sup>115</sup> *Issei* could apply for repatriation to Japan. By 1943, there were more than 9,000 applications on file for repatriation or expatriation

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prospect that must have seemed odd to elderly farmers and fishermen.”  
DRINNON, *supra* note 87, at 78.

<sup>110</sup> Document 4, Selective Service System, Statement of United States Citizen of Japanese Ancestry *in* NG, *supra* note 5, at 78.

<sup>111</sup> Neil Gotanda, *Race, Citizenship, and the Search for Political Community Among “We the People”*: A Review Essay on Citizenship without Consent, 76 OR. L. REV. 233, 243 (1997).

<sup>112</sup> *Id.*

<sup>113</sup> DRINNON, *supra* note 87, at 73.

<sup>114</sup> IRONS, *supra* note 31, at 337.

<sup>115</sup> NG, *supra* note 5, at 60.

(second-generation citizens) on file.<sup>116</sup> “The increase in applications was probably a result of the pressure from the loyalty questionnaire, which caused many to question whether they should stay in the United States . . . .”<sup>117</sup> By 1944 the WRA has recorded more than 19,000 applications, 75 percent of which came from Tule Lake.<sup>118</sup> A common theme for giving up American citizenship “was the feeling that America had . . . betrayed them through the forced internship.”<sup>119</sup>

With respect to this confusing situation caused by the two questions, Justice Black wrote:

That there were members of this group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.<sup>120</sup>

Given the context noted above, Justice Black was clearly wide of the mark in making the doubtful allegiance to the U.S. a rationale for the original internment. In fact, it was quite the other way round. The doubtful allegiance was *because of* the unlawful and unjust internment.

The majority opinion never questioned the assertion of the military that the Japanese on the West Coast posed a special problem for the nation. Justice Black remarked: “We cannot – by availing ourselves of the calm perspective of hindsight – now say that at that time [30 months before] these actions were unjustified.”<sup>121</sup> Here, one yearns to ask: “Why not?” When the Court heard oral argument in October 1944, “the outcome of the war [in the Pacific] was no longer in doubt, and the continued detention of Japanese Americans seemed increasingly unnecessary.”<sup>122</sup> “Invalidation of the exclusion and confinement program [by the Supreme Court would have done]

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 60-61

<sup>118</sup> *Id.* at 61.

<sup>119</sup> *Id.*

<sup>120</sup> *Korematsu v. United States*, 323 U.S. 214, 219 (1944).

<sup>121</sup> *Id.* at 224.

<sup>122</sup> *Id.* at 224.

no possible harm to the prosecution of the war.”<sup>123</sup> Justice Black’s response was one of simple deference to the military. “Congress, reposing its confidence in this time of war in our military leaders . . . determined that they should have the power to do . . . this.”<sup>124</sup> This amounted to a kind of rational basis test, really a “minimum rationality test.”<sup>125</sup> The rational basis test, however, is “utterly inappropriate to test the justification for selectively imposing restrictions on a racial minority.”<sup>126</sup> Justice Black was essentially saying that if there was any reasonable basis for the military decision, the Constitutional rights of due process must give way. Thus, “*Korematsu* was a war powers decision, not an equal protection holding.”<sup>127</sup> The Court accepted the argument based on military necessity and, without closely scrutinizing the evidence, decided that the forced exclusion and detention of American citizens based solely on ancestry was constitutional.<sup>128</sup>

Justice Roberts, in dissent, was outraged: “[I]t is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp . . . solely because of his ancestry . . . .”<sup>129</sup> Note Justice Roberts’ use of the term “concentration camp”: Justice Black used the term “assembly and relocation centers.”

Also dissenting, Justice Murphy said about the internment and imprisonment:

[O]ne of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law . . . [T]he exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage . . . .<sup>130</sup>

“[Justice] Murphy reject[ed] the Army’s racially-based presumptions of blood lines and instead demanded proof of disloyalty.”<sup>131</sup> “He

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<sup>123</sup> Rostow, *supra* note 63, at 503.

<sup>124</sup> *Korematsu*, 323 U.S. at 223.

<sup>125</sup> 6 WEST’S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 38, at 4.

<sup>126</sup> 3 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION, *supra* note 24, at 1417.

<sup>127</sup> Gotanda, *supra* note 64, at 270.

<sup>128</sup> TATEISHI, *supra* note 74, at xxi.

<sup>129</sup> *Korematsu*, 323 U.S. at 226 (Roberts, J., dissenting).

<sup>130</sup> *Id.* at 235 (Murphy, J., dissenting).

<sup>131</sup> Gotanda, *supra* note 64, at 286.

[demanded] evidence, [of which there was none], to support a conclusion that would be applicable to the entire racial category of Japanese American citizens and [would] justify their wholesale incarceration.”<sup>132</sup> Justice Murphy noted the exclusion was justified on “questionable racial and sociological grounds not ordinarily within the realm of expert military judgment . . . .”<sup>133</sup> He argued that the internment was based on “the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices – the same people who have been among the foremost advocates of the evacuation.”<sup>134</sup> He also argued that the Japanese Americans should have been treated “on an individual basis” through “investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry.”<sup>135</sup> He noted that the first exclusion order was not issued until “nearly four months elapsed after Pearl Harbor” and that “nearly eight months went by until the last order was issued; and the last of these ‘subversive’ persons was not actually removed until almost eleven months [had] elapsed.”<sup>136</sup> This undermined the claim of military necessity: “Leisure and deliberation seem to have been more of the essence than speed.”<sup>137</sup>

Justice Jackson, also dissenting, said: “[G]uilt is personal and not inheritable.”<sup>138</sup> Jackson also noted that Korematsu was “convicted of an act not commonly a crime. It consists merely of being present whereof he is a citizen, near the place where he was born, and where all his life he has lived.”<sup>139</sup>

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<sup>132</sup> *Id.*

<sup>133</sup> *Korematsu*, 323 U.S. at 236 (Murphy, J., dissenting).

<sup>134</sup> *Id.* at 239.

<sup>135</sup> *Id.* at 241.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 243 (Jackson, J., dissenting).

<sup>139</sup> *Id.*

Many<sup>140</sup> have considered the *Korematsu* decision one of the Supreme Court's biggest mistakes, alongside *Plessy v. Ferguson*<sup>141</sup> and *Dred Scott v. Sandford*.<sup>142</sup> "A striking feature of these cases, however, is that the language and analysis often do not appear racist . . . . Racism . . . is relatively easy to disguise in the work the Supreme Court justices do."<sup>143</sup> In *Korematsu*, the Supreme Court majority opinion evaded issues and refused to examine the factual assumptions underlying the military necessity of evacuation. Professors Antieau and Rich have commented: "No citizen should be stripped of home, business, or livelihood solely because of ancestry, and without a fair opportunity to prove personal loyalty to the country."<sup>144</sup> The Court "upheld an act of military power without a

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<sup>140</sup> E.g., Paul Butler, *Rehnquist, Racism, and Race Jurisprudence*, 74 GEO. WASH. L. REV. 1019, 1039 (2006) ("historical race cases . . . now universally reviled"); Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275, 280 (2003/2004) ("[T]he Supreme Court's decision in *Korematsu* stands alongside decisions such as *Dred Scott*, *Plessy v. Ferguson* . . . in the High Court's Hall of Infamy."); Frank W. Dunham, Jr., *The Thirty-Second Kenneth J. Hodson Lecture on Criminal Law: Where Moussaoui Meets Hamdi*, 183 MIL. L. REV. 151, 161-162 (2005) ("*Korematsu* is roundly considered one of the worst decisions of all time, in a league with *Dred Scott*"); Eugene Gressman, *Korematsu: A Melange of Military Imperatives*, LAW & CONTEMP. PROBS., Spring 2005, at 15, 26 ("one of the 'worst' opinions in the Court's history"); Devika Hovell & George Williams, *A Tale of Two Systems: The Use of International Law in Constitutional Interpretation in Australia and South Africa*, 29 MELB. U. L. REV. 95, 96 (2005) ("*Dred Scott* [and] *Korematsu* . . . now viewed: with a mixture of curiosity and embarrassment"); Samuel Issacharoff & Richard H. Pildes, *Emergency Contexts Without Emergency Powers: The United States' Constitutional Approach to Rights During Wartime*, 2 INT'L J. CONST. L. 296, 311 (2004) ("*Korematsu* is excoriated as one of the two or three worst moments in American constitutional history."); Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1001 (2003) ("The U.S. Supreme Court has committed more than its fair share of judicial atrocities over the past 210 years: *Dred Scott v. Sandford*, *Plessy v. Ferguson*, *Korematsu v. United States* . . . .") Timothy Sandefur, *Mine and Thine Distinct: What Kelo Says About Our Path*, 10 CHAP. L. REV. 1, 47 (2006) ("atrocities as *Dred Scott*, *Korematsu*"); Jonathan Turley, *Art and the Constitution: The Supreme Court and the Rise of the Impressionist School of Constitutional Interpretation*, 2004 CATO SUP. CT. REV. 69, 75 (2004) ("In the worst of times, the Court has even used its respected position to give prejudice and ignorance a patina of legitimacy, as in *Korematsu v. United States*.").

<sup>141</sup> 163 U.S. 537 (1896).

<sup>142</sup> 60 U.S. 393 (1856).

<sup>143</sup> Butler, *supra* note 140, at 1039.

<sup>144</sup> CHESTER JAMES ANTIEAU & WILLIAM J. RICH, 3 MODERN CONSTITUTIONAL LAW § 44.104, at 328-329 (2d. 1997).

factual record in which the justification for the act was analyzed.”<sup>145</sup> However, “because of the *Korematsu* decision, the courts must now look carefully at laws that restrict a certain group by racial characteristics.”<sup>146</sup>

There were efforts to redress the grievances and wrongs done. However, “[t]he total amount in claims paid [for lost property] was estimated at less than ten cents per dollar lost.”<sup>147</sup> During the war itself, only Colorado Governor Ralph Lawrence Carr apologized for the internment of American citizens.<sup>148</sup> “The act cost his reelection, but gained him the gratitude of the Japanese American community,” which erected a statue of him in downtown Denver.<sup>149</sup> In 1976, President Gerald Ford signed a proclamation regarding Executive Order 9066 that said: “Not only was that evacuation wrong, but Japanese Americans were and are loyal Americans . . . . [W]e . . . resolve that this kind of action shall never again be repeated.”<sup>150</sup> In response to the later discovered evidence that government officials “had deliberately misled the Court about the military need for the evacuations,”<sup>151</sup> in 1984 a federal district court set aside the conviction of Fred Korematsu in a *coram nobis* action.<sup>152</sup> A *coram nobis* vacation of sentence is granted if there is evidence of prosecutorial impropriety or if there are special circumstances or errors that resulted in a miscarriage of justice.<sup>153</sup> In 1988, Congress issued an apology and established a trust fund to pay \$20,000 in reparations to each survivor of the internment.<sup>154</sup> “The subsequent clearing of Fred Korematsu’s criminal record and the payment of reparations . . . stand as evidence that the [United States] government acknowledges the terrible injustice it inflicted on Japanese Americans.”<sup>155</sup> However, the legal conclusion in *Korematsu*, specifically its expansive interpretation of government powers in wartime, has not been overturned.

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<sup>145</sup> Rostow, *supra* note 63, at 491.

<sup>146</sup> NG, *supra* note 5, at 90.

<sup>147</sup> *Id.* at xxiii.

<sup>148</sup> Nationmaster.com, Encyclopedia: Japanese American Internment, <http://www.nationmaster.com/encyclopedia/Japanese-American-internment> (last visited Feb. 24, 2009).

<sup>149</sup> *Id.*

<sup>150</sup> Proclamation No. 4417, 41 Fed. Reg. 7,741 (Feb. 19, 1976).

<sup>151</sup> J. KENNETH JOST, *THE SUPREME COURT A TO Z* 244 (4th ed. 2007).

<sup>152</sup> *Korematsu v. United States*, 584 F. Supp. 1406 (D. Cal. 1984).

<sup>153</sup> 6 WEST’S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 38, at 5.

<sup>154</sup> Civil Liberties Act of 1988, 50 U.S.C. App. § 1989 et. seq.

<sup>155</sup> Alfred C. Yen, *Introduction: Praising with Faint Damnation – The Troubling Rehabilitation of Korematsu*, 40 B.C. L. REV 1, 2 (1998).

About Justice Black, one reference book notes: “He championed literal readings of the Constitution’s text, and he generally employed this literalism to secure individual liberty from the encroachments of government power . . . . [He also] champion[ed] constitutional principles of fairness in the treatment of those accused of crimes.”<sup>156</sup> This book notes also his “concern for the weak, the helpless, and the outnumbered,”<sup>157</sup> but makes no mention of his *Korematsu* opinion. “Black was proud of his [World War I] military record and became a lifelong member of the American Legion.”<sup>158</sup> He was also an ardent New Dealer and was devoted to FDR who had appointed him to the Supreme Court.<sup>159</sup> Given his deference to the military and to President Roosevelt, he had no stomach for opposing either one despite his understanding that there should be punishment for individual behavior only.

### **Resettlement and Dispersal**

In 1942 there were three ways to get out of the internment camps: join the military;<sup>160</sup> attend a university or college outside of California, Oregon, and Washington;<sup>161</sup> or permanently resettle outside of those three states. To permanently resettle, an internee first had to fill out an Indefinite Leave Application and answer questions such as the following:

Will you assist in the general resettlement program by staying away from large groups of Japanese?

Will you try to develop such American habits which will cause you to be accepted readily into American social groups?

Are you willing to give information to the proper authorities regarding any subversive activity?

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<sup>156</sup> TIMOTHY L. HALL, *SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY* 303, 305 (2001).

<sup>157</sup> *Id.* at 306.

<sup>158</sup> IRONS, *supra* note 31, at 230-231.

<sup>159</sup> *Id.*

<sup>160</sup> “By the end of the war in 1945, almost 40,000 Japanese Americans served in the U.S. armed services, several thousands of them coming from the detention camps.” 2 U.S. SUPREME COURT, *supra* note 16, at 615.

<sup>161</sup> About 5,500 Japanese American students were enrolled at more than 500 colleges and universities away from the West Coast. Peter Monaghan, *A Ceremony to Help Heal ‘the Tragic Legacy of 1942’*, CHRON. HIGHER EDUC., April 18, 2008, at A8.

Will you conform to the customs and dress of your new home?<sup>162</sup>

“Loyal citizens were required to have official approval of their homes, jobs and friends before they were allowed to move.”<sup>163</sup> Thus, citizens were told “where they might live, what to do . . . for a living, how to dress, how to behave, how to talk, and with whom to associate.”<sup>164</sup> In addition to one-way railway fare, the WRA provided a meager adjustment allowance after arrival at the point of destination - \$50 for an individual, \$75 for an individual with one dependent, \$100 for an individual with more than one dependent.<sup>165</sup> Chicago was a favorite site of “resettlers.” One resettler noted that his first residence was a hostel with 19 other resettlers with whom he was not supposed to fraternize – all under the observation of the FBI.<sup>166</sup> “By . . . May 1944, 22,000 Japanese Americans had left the ten . . . camps.”<sup>167</sup> Illinois had absorbed 5,000, Colorado 2,500, Utah 1,700, [and] Ohio 1,700.<sup>168</sup> But for many, “California was home and there could be no other place.”<sup>169</sup> The internees and former internees knew that Japanese were not welcome in other parts of the country and those who tried to resettle were frequently the targets of violence.<sup>170</sup>

In 1943 a fourth way to get out of the camps was repatriation to Japan for the first-generation, non-citizen *Issei* and the renunciation of citizenship and the expatriation to Japan for the second-generation American *Nisei*.<sup>171</sup> Many of those who had formally renounced their American citizenship “sought to rescind their renunciations by pleading duress, hysteria, and temporary insanity.”<sup>172</sup> The Justice Department rejected these pleas and, for good measure, secured the issuance of a Presidential proclamation that the renunciants were enemy aliens and were to be deported.<sup>173</sup> After a huge, time-consuming effort, Wayne Collins, a San Francisco attorney, managed to legally block the deportation of these renunciants who had changed their minds, just days before they were

<sup>162</sup> DRINNON, *supra* note 87, at 53.

<sup>163</sup> Rostow, *supra* note 63, at 500.

<sup>164</sup> DRINNON, *supra* note, 87 at 60.

<sup>165</sup> WAR RELOCATION AUTHORITY, THE RELOCATION PROGRAM: A GUIDEBOOK FOR THE RESIDENTS OF RELOCATION CENTERS 3 (1943) (Note the term “Residents”).

<sup>166</sup> DRINNON, *supra* note 87, at 53.

<sup>167</sup> BAILEY, *supra* note 107, at 200.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> 6 WEST’S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 38, at 2.

<sup>171</sup> See *supra* pp. 13-14.

<sup>172</sup> Gotanda, *supra* note 64, at 245.

<sup>173</sup> Proclamation No. 2662, 10 Fed. Reg. 11, 635 (Sept. 12, 1945).

to be shipped out.<sup>174</sup> Collins pointed out that renunciation was not a criminal act and was not punishable.<sup>175</sup> “Eventually 5,589 renunciants . . . [successfully] challenged the U.S. government decisions on their repatriation.”<sup>176</sup> Federal District Court Judge Louis Goodman ruled that native-born Americans could not be converted into enemy aliens by renunciation of their citizenship.<sup>177</sup> Nor could they be forcibly removed to Japan.<sup>178</sup> “Nor did Congress in any way, authorize detention or banishment in passing the denaturalization law.”<sup>179</sup> However, “[t]hrough . . . intimidation, racism, duplicity, and duress, some [8,000 internees, both] repatriates and expatriates . . . left for Japan between V-J Day and mid-1946.”<sup>180</sup> “[These] 8,000 [could not thereafter] claim indemnification for wrongful imprisonment, and destruction of health, sanity, livelihood, property, and lifelong savings . . . .”<sup>181</sup>

On December 17, 1944, the Army’s Western Defense Command issued a press release: “Those persons of Japanese ancestry whose records have stood the test of Army scrutiny during the past two years” would be released from internment after January 2, 1945 and would be “permitted the same freedom of movement throughout the United States as other loyal citizens and law-abiding aliens.”<sup>182</sup> Thus, some 50,000 Japanese American internees were cleared and were able to return to their homes.<sup>183</sup> Twenty thousand others remained behind barbed wire because of presumed disloyalty.<sup>184</sup> On December 18<sup>th</sup>, in *Ex Parte Endo* the Supreme Court said: “[W]hatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are conceded loyal to its leave procedure.”<sup>185</sup> Despite some continued animosity towards people of Japanese ancestry on the West Coast (e.g., bumper stickers saying “NO JAPS IN

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<sup>174</sup> WEGLYN, *supra* note 86, at 64-66. Weglyn dedicated her book to Collins: “Dedicated to Wayne M. Collins Who Did More to Correct a Democracy’s Mistake Than Any Other One Person.”

<sup>175</sup> WEGLYN, *supra* note 86, at 256.

<sup>176</sup> Gotanda, *supra* note 64, at 245.

<sup>177</sup> *Id.* at 260.

<sup>178</sup> *Id.*

<sup>179</sup> WEGLYN, *supra* note 86, at 256

<sup>180</sup> *Id.* at 260.

<sup>181</sup> *Id.*

<sup>182</sup> IRONS, *supra* note 31, at 345.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> 323 U.S. 283, 297 (1944).

CALIFORNIA”),<sup>186</sup> about 57,000 former internees eventually returned to the West Coast.<sup>187</sup>

## Racism

What happened to people of Japanese ancestry in the aftermath of Roosevelt’s Executive Order 9066 was the conclusion of almost 75 years of anti-Asian racism on the West Coast, particularly in California.<sup>188</sup> The exclusion and incarceration of these people accomplished what local pressure groups had been unable to do for half a century: “the complete removal of the entire ethnic Japanese population from the coastal states. It was an act of racism and had nothing to do with establishing security measures . . . .”<sup>189</sup> “Race alone was used to determine who would be uprooted and who would remain free.”<sup>190</sup> The West Coast anti-Japanese program had four phases: “(1) a discriminatory curfew against Japanese persons; (2) their exclusion from the West Coast; (3) their confinement pending investigation of their loyalty; and (4) the indefinite confinement of those persons found to be disloyal.”<sup>191</sup> “The official argument to justify the mass evacuation . . . was the theory of protective custody.”<sup>192</sup> This was all at the very time the U.S. was fighting Hitler’s racism in Europe. Basically, the notion was that “reinforcing racial stereotyping was legitimate in the interest of national security.”<sup>193</sup> It was as if the war was not directed at the Japanese state, but at the Japanese race. Thus, all people of Japanese ancestry were enemies.<sup>194</sup> Justice Murphy in his *Korematsu* dissent noted that the exclusion of “all persons of Japanese ancestry . . . falls into the ugly abyss of racism.”<sup>195</sup> And he added: “I dissent . . . from this legalization of racism.”<sup>196</sup> We need to remember that during World War II people of German and Italian ancestry who were considered suspect were given individual hearings before being interned.<sup>197</sup> Moreover, “the exclusion program was undertaken not because the Japanese were too numerous to be examined individually, but

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<sup>186</sup> BAILEY, *supra* note 107, at 199.

<sup>187</sup> DRINNON, *supra* note 87, at 60.

<sup>188</sup> Roger Daniels, *Foreword* to TATEISHI, *supra* note 65, at vii.

<sup>189</sup> *Id.* at xiv.

<sup>190</sup> CHEMERINSKY, *supra* note 45, at 697.

<sup>191</sup> Rostow, *supra* note 63, at 513.

<sup>192</sup> KITAGAWA, *supra* note 35, at 77.

<sup>193</sup> NG, *supra* note 5, at 90.

<sup>194</sup> Rostow, *supra* note 63, at 531.

<sup>195</sup> *Korematsu v. United States*, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting).

<sup>196</sup> *Id.* at 242.

<sup>197</sup> 6 WEST’S ENCYCLOPEDIA OF AMERICAN LAW, *supra* note 38, at 2.

because they were a small enough group to be punished by confinement.”<sup>198</sup>

Our war-time treatment of Japanese aliens and citizens of Japanese descent on the West Coast [was] hasty, unnecessary and mistaken. The course of action which we took was in no way required or justified by the circumstances of war. It was calculated to produce both individual injustice and deep-seated maladjustments of a cumulative and sinister kind.<sup>199</sup>

### Overreaction

Today it is no longer the “yellow people” and the “Japs” that we fear and presume guilty. In fact, the Japanese Americans have become one of the best educated and most industrious ethnic groups in our country. Now, it is the Arabs and Muslims that many Americans label.<sup>200</sup> Similar to the anti-Japanese hysteria after Pearl Harbor, “after 9/11 there arose a national feeling of animosity directed overtly toward Arab and South-Asian ethnic minorities . . . .”<sup>201</sup> “The United States has a long and unfortunate history of overreacting to the dangers of wartime . . . [in going] too far in restricting our liberties.”<sup>202</sup> With respect to legislation passed in the heat of wartime or terrorism, we should build in sunset provisions.<sup>203</sup> The 131-page USA PATRIOT Act<sup>204</sup> with its politically-unopposable name, “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism,” was passed into law 45 days after 9/11. However, to its credit, it included a four-year sunset requirement for some of its provisions.<sup>205</sup> Arguably, however, four years is too long.<sup>206</sup>

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<sup>198</sup> Rostow, *supra* note 63, at 508.

<sup>199</sup> *Id.* at 489.

<sup>200</sup> Ty S. Wahab Twibell, *The Road to Internment: Special Registration and Other Human Rights Violations of Arabs and Muslims in the United States*, 29 VT. L. REV. 407, 412 (2005).

<sup>201</sup> Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. KAN. L. REV. 307, 310 (2006).

<sup>202</sup> STONE, *supra* note 1, at 166.

<sup>203</sup> *Id.* at 176.

<sup>204</sup> USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

<sup>205</sup> *Id.* § 224(a) which said: “Except as provided in subsection (b), this title and the amendments made by this title (other than sections 203(a), 2039(c), 205, 208, 212, 213, 216, 219, 221, and 222, and the amendments made by those sections) shall cease to have effect on December 31, 2005.”

<sup>206</sup> STONE, *supra* note 1, at 176.

Overreaction is based on exaggerated and ill-informed fear and hysteria. “On the basis of the 9/11 attacks, the Bush administration initiated two [preemptive] regime-changing wars, detained tens of thousands of people, and even took U.S. citizens into military custody.”<sup>207</sup> Neither the war in Afghanistan nor the war in Iraq would have been politically possible without 9/11.<sup>208</sup> There is little question that the invasion of Iraq has “developed into a debacle vastly more costly than [9/11].”<sup>209</sup> “[T]he truly notable innovation for terrorists over the past few decades has not been in qualitative improvements in ordinance . . . but . . . in a more effective method for delivering it: the suicide bomber.”<sup>210</sup>

In the last four years, we have also now had four United States Supreme Court cases, which have rejected by the thinnest of margins some of the more extreme positions of the Bush administration, which has tried for years to come up with ways to keep terrorism suspects out of civilian courtrooms.<sup>211</sup>

In *Rasul v. Bush*, the Court held by a 6-3 vote that the federal habeas corpus statute<sup>212</sup> conferred jurisdiction on federal district courts to hear challenges of aliens held at Guantanamo. The administration had argued that the detainees had no constitutional rights and courts had no jurisdiction over their cases. Fred Korematsu filed an amicus brief in this case, noting that “history teaches that we tend to sacrifice civil liberties too quickly based on claims of military necessity and national security . . . .”<sup>213</sup>

In *Hamdi v. Rumsfeld*, the Court held by a 5-4 vote that due process required that a “citizen held in the United States as an enemy combatant be given meaningful opportunity to contest the factual basis for his detention before a neutral decisionmaker.”<sup>214</sup> “Like hundreds of detainees later freed from Guantanamo without a court hearing, Hamdi spent years in prison without ever having the

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<sup>207</sup> Gruber, *supra* note 201, at 310

<sup>208</sup> JOHN MUELLER, *OVERBLOWN: HOW POLITICIANS AND THE TERRORISM INDUSTRY INFLATE NATIONAL SECURITY THREATS, AND WHY WE BELIEVE THEM* 30 (2006).

<sup>209</sup> *Id.* at 59.

<sup>210</sup> *Id.* at 25.

<sup>211</sup> ABC News, *Timeline of Supreme Court Rulings on Guantanamo*, June 12, 2008, <http://abcnews.go.com/Politics/wireStory?id=505611> [hereinafter *Timeline*].

<sup>212</sup> 28 U.S.C. § 2241(a), (c)(3) (2006).

<sup>213</sup> Brief for Rasul as Amici Curiae Supporting Petitioner, *Rasul v. Bush*, 542 U.S. 466 (2004) (Nos. 03-334, 03-343), 2004 WL 103832, at \*3.

<sup>214</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 508 (2004).

opportunity to contest his status as an enemy combatant before an impartial judge.”<sup>215</sup> Justice O’Connor, who wrote the majority opinion, noted that “a state of war is not a blank check for the President.”<sup>216</sup> Even in dissent, Justice Scalia noted that indefinite imprisonment at the will of the Executive strikes at “the very core of liberty.”<sup>217</sup> However, Justice Thomas, also in dissent, wrote: “This detention falls squarely within the Federal Government’s war powers, and we lack the expertise and capacity to second-guess that decision.”<sup>218</sup> This was very similar to the reasoning of Justice Black’s majority opinion in the *Korematsu* case. Justice Thomas added: “The Founders intended that the President have primary responsibility – along with the necessary power – to protect the national security . . . .”<sup>219</sup>

In response to these two decisions, the Bush administration “set up secret military review panels, known as combatant status review tribunals [CSRTs], to review detainee cases and decide whether they really were enemy combatants.”<sup>220</sup> Congress then passed the Detainee Treatment Act,<sup>221</sup> which stripped federal district courts of the authority to hear new detainee cases.

In *Hamdan v. Rumsfeld*, the Court, by a 5-4 vote, ruled that the planned military commission at Guantanamo Bay convened to try Hamdan lacked power to proceed “because its structure and procedures violate[d] the [Uniform Code of Military Justice] and the Geneva Conventions.”<sup>222</sup> Hamdan was a former driver for Osama bin Laden. The Republican-controlled Congress then passed the Military Commissions Act of 2006,<sup>223</sup> which stripped federal district courts of their authority to hear any detainee challenges, including those already filed. This Act also set up a process in which detainees would be tried before commissions that could consider hearsay evidence<sup>224</sup> and evidence obtained through coercion.<sup>225</sup>

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<sup>215</sup> MAYER, *supra* note 6, at 303.

<sup>216</sup> *Hamdi*, 542 U.S. at 536.

<sup>217</sup> *Id.* at 554-555 (Scalia, J., dissenting).

<sup>218</sup> *Id.* at 579 (Thomas, J., dissenting).

<sup>219</sup> *Id.* at 580.

<sup>220</sup> Timeline, *supra* note 211.

<sup>221</sup> 42 U.S.C. §2000dd (2006).

<sup>222</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 567 (2006).

<sup>223</sup> Pub. L. 109-366, 120 Stat. 2600 (2006).

<sup>224</sup> *Id.* § 3 (a)(1)(IV)(949a)(b)(E)(ii) ([H]earsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the

In *Boumediene v. Bush*, the Court ruled by a 5-4 vote that foreign Guantanamo Bay detainees have rights under the Constitution to challenge their detention in civilian courts under the writ of habeas corpus.<sup>226</sup> In that connection, the Court held that § 7 of the Military Commissions Act of 2006 was unconstitutional.<sup>227</sup> Justice Kennedy, who wrote the majority opinion, noted: “The laws and Constitution are designed to survive, and remain in force, in extraordinary times. Liberty and security can be reconciled; and in our system they are reconciled within the framework of the law.”<sup>228</sup> Justice Scalia, in dissent, in rather apocalyptic terms responded that “the enemy brought the battle to American soil, killing 2,749 at the Twin Towers . . . . [O]ur Armed Forces are now in the field against the enemy, in Afghanistan and Iraq. Last week, 13 of our countrymen in arms were killed.<sup>229</sup>” His extrapolation of the “enemy” to Iraq is particularly troubling since the overwhelming consensus is that Iraq had nothing to do with the attack on the Twin Towers. Moreover, the United States has paid a fearful price for its venture into Iraq.<sup>230</sup> Scalia added: “[Today’s opinion] will almost certainly cause more Americans to be killed.”<sup>231</sup> In addition, he said: “At least 30 of those prisoners hitherto released from Guantanamo Bay have

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intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained)).

<sup>225</sup> *Id.* § 3(a)(1)(III)(948r)(d) “A statement obtained on or after December 30, 2005 . . . in which the degree of coercion is disputed may be admitted only if the military judge finds that—

(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value;

(2) the interests of justice would best be served by admission of the statement into evidence; and

(3) the interrogation methods used to obtain the statement do not amount to cruel, inhuman, or degrading treatment prohibited by section 1003 of the Detainee Treatment Act of 2005.” *Id.*

<sup>226</sup> *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

<sup>227</sup> *Boumediene*, 128 S. Ct. at 2241; Military Commissions Act of 2006, § 7(a) (“No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.”)

<sup>228</sup> *Boumediene*, 128 S.Ct. at 2277.

<sup>229</sup> *Id.* at 2294 (Scalia, J., dissenting).

<sup>230</sup> 4,109 American soldiers had died in Iraq as of June 25, 2008. Associated Press, *Three U.S. Soldiers Die in Iraq Fighting*, U.S.A TODAY, June 25, 2008, [http://www.usatoday.com/news/world/iraq/2008-06-25-three-dead\\_N.htm](http://www.usatoday.com/news/world/iraq/2008-06-25-three-dead_N.htm).

<sup>231</sup> *Boumediene*, 128 S. Ct. at 2294-2295 (Scalia, J., dissenting).

returned to the battlefield,”<sup>232</sup> which according to one report is simply false.<sup>233</sup> And finally: “The Nation will live to regret what the Court has done today.”<sup>234</sup> The *Boumediene* decision “resurrected nearly 200 detainee cases that had been on hold.”<sup>235</sup>

It is noteworthy that the Supreme Court, even if by very narrow margins, has not automatically deferred to the Bush administration and its supposed wisdom on how to keep the country secure. It is particularly noteworthy that of the eleven justices who voted on the four decisions noted above, nine of them were appointed by Republican Presidents.<sup>236</sup> In this time of terrorism,

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<sup>232</sup> *Id.*

<sup>233</sup> MARK DENBEAUX ET AL., JUSTICE SCALIA, THE DEPARTMENT OF DEFENSE, AND THE PERPETUATION OF AN URBAN LEGEND: THE TRUTH ABOUT RECIDIVISM OF RELEASED GUANTANAMO DETAINEES 2-3 (2008). The Executive Summary of this paper says:

[J]ustice Antonin Scalia, in his dissent in *Boumediene v. Bush*, repeated the false accusation that “[a]t least 30 of those prisoners hitherto released from Guantanamo Bay have returned to the battlefield.” His source was a year-old Senate Minority Report, which in turn was based on misinformation provided by the department of defense.

Denbeaux et al.’s paper goes on to discuss a report, *The Meaning of ‘Battlefield’: An Analysis of the Government’s Representations of ‘Battlefield’ Capture and ‘Recidivism’ of the Guantanamo Detainees* which, among other things, concludes:

- At most 12, not 30, detainees “returned to the fight”;
- [N]ot a single one of the 30 detainees was ever released by a court;
- [N]ot a single released Guantanamo detainee has ever attacked any Americans;
- The only indisputable detainee who took up arms against the United States or its allies was ISN 220 . . . who was not released through a CSRT or a federal habeas proceeding;
- The decision to release ISN 220 was made by Department of Defense political officers;
- The Department of Defense has never explained why ISN 220 was released.

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<sup>234</sup> *Boumediene*, 128 S. Ct. at 2307.

<sup>235</sup> Timeline, *supra* note 211.

<sup>236</sup> President Nixon appointed Justice Rehnquist; President Ford appointed Justice Stevens; President Reagan appointed Justices O’Connor, Scalia, and Kennedy; President George H.W. Bush appointed Justices Souter and Thomas; and President George W. Bush appointed Justices Roberts and Alito. Democratic President Bill Clinton appointed Justices Ginsberg and Breyer.

with respect to detainees, a fair and reasonable system should do as much adjudication as possible in public, “creating for each detainee a rigorous set of factual findings and a record evaluating the decision to detain.”<sup>237</sup> “[D]etainees should have real rights, starting with representation by competent counsel, cleared to see all evidence – even classified evidence – against their clients.”<sup>238</sup> The words, “military necessity,” when uttered by the President, are no longer the magical words that they were during World War II. “As the administration sees it, every action it has taken since Sept. 11 isn’t only justified by national security concerns in an age of terrorism, but consistent with the president’s historically expanded powers during wartime.”<sup>239</sup>

Justices on the Supreme Court are well aware of the *Korematsu* decision. “Since *Korematsu*, there has been little support for [the notion] that the courts should not attempt to stop reasonable military actions but apply constitutional standards after the crisis has passed.”<sup>240</sup> “The only jurisprudential effect of *Korematsu* has . . . been to encourage more aggressive . . . judicial review of executive and legislative actions during times when national security was implicated.”<sup>241</sup>

## Conclusion

The Supreme Court in the last few years has shown, in large part because it is immune from political pressures, an admirable respect for civil liberties which the nervous Bush administration has sought to curtail. The incarceration of 120,000 people of Japanese ancestry under President Roosevelt’s authority “set the stage for other presidential power grabs, culminating in President George W. Bush’s unprecedented claims of executive authority in the war on terror.”<sup>242</sup> Thus, we have a President wielding an extraordinary amount of power because of a perhaps excessive concern with terrorism contrasted with the Supreme Court trying to retain basic

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<sup>237</sup> Benjamin Wittes, *Congress’s Guantanamo Burden*, WASH. POST, June 13, 2008, at A23.

<sup>238</sup> *Id.*

<sup>239</sup> Jonathan Mahler, *Why This Court Keeps Rebuking This President*, N.Y. TIMES, June 15, 2008, at WK3.

<sup>240</sup> Gotanda, *supra* note 64, at 294.

<sup>241</sup> THE CONSTITUTION IN WARTIME: BEYOND ALARMISM AND COMPLACENCY 176-177 (Mark Tushnet ed., 2005).

<sup>242</sup> ROBERT A. LEVY & WILLIAM MELLOR, THE DIRTY DOZEN: HOW TWELVE SUPREME COURT CASES RADICALLY EXPANDED GOVERNMENT AND ERODED FREEDOM 131 (2008).

civil liberties – and both stemming from *Korematsu*. America, like any other country, meets fearful times with fearful actions. Brutality justifies brutality; an external threat trumps internal freedom. American politicians have too often allowed “fear and hysteria rather than sober-minded judgment . . . rule their decision-making processes.”<sup>243</sup>

The mindset and the culture of the country as they relate to terrorism and threats of terrorism are crucial. Paranoia leads to cloudy thinking. “Which is the greater threat: terrorism, or our reaction against it?”<sup>244</sup> The continued internment of Arabs and Muslims, without the rights of due process, can “only take place if the culture, the press, and the political climate” allow it.<sup>245</sup> Such was the case with people of Japanese ancestry. The internment took place because decent, intelligent people did nothing or did little. Courage to resist was called for, but such courage was lacking. “[T]he President, the Congress, and the Supreme Court all failed in their responsibility to preserve and protect the Constitution, and the public sat by silently, or worse, cheered them on.”<sup>246</sup> Now it is the President and the executive branch who have lost perspective and have set aside fundamental liberties. “In the name of protecting national security, the executive branch sanctioned coerced confessions, extrajudicial detention, and other violations of individuals’ liberties that have been prohibited since the country’s founding.”<sup>247</sup> Fortunately, though, the Supreme Court has maintained perspective. Citizens, too, according to the polls have turned against the President.<sup>248</sup> To fight a war successfully, even sometimes a war against terrorism, it is necessary for soldiers to risk their lives. “But it is not necessarily ‘necessary’ for others to surrender their freedoms.”<sup>249</sup>

Before the present time, the federal government twice suspended civil liberties to permit detention without trial or charges for thousands. President Lincoln suspended habeas corpus during the Civil War, allowing military authorities to detain civilians

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<sup>243</sup> Avi Klein, *But Fear Itself: Are We Overreacting to the Terrorist Threat?*, WASH. MONTHLY, April 1, 2007, at 49.

<sup>244</sup> MUELLER, *supra* note 208, at 1.

<sup>245</sup> Twibell, *supra* note 200, at 549.

<sup>246</sup> STONE, *supra* note 1, at 84.

<sup>247</sup> MAYER, *supra* note 6, at 328.

<sup>248</sup> Real Clear Politics, *President Bush Job Approval*, [http://www.realclearpolitics.com/polls/archive/?poll\\_id=19](http://www.realclearpolitics.com/polls/archive/?poll_id=19) (last visited Feb. 24, 2009). Average job approval rating for President Bush: 29%.

<sup>249</sup> STONE, *supra* note 1, at 169.

suspected of disloyalty.<sup>250</sup> Unlike the *Korematsu* court, however, the Supreme Court in *Ex Parte Milligan* declared unanimously that Lincoln's actions were unlawful.<sup>251</sup> An essential principle of democracy is that "all citizens are entitled to the same rights and legal protections."<sup>252</sup> Interning 120,000 people without any rights of due process was a horrendous mistake. Wayne Collins, the admirable attorney who was a profile in courage in helping the "renunciants" remain in this country, said 30 years after the evacuation: "I still feel bitter about the evacuation. It was the foulest goddam crime the United States has ever committed against a wonderful people."<sup>253</sup> The internment saga should serve, and has served, "as a reminder to all who cherish their liberties of the very fragility of their rights against the exploding passions of the more numerous fellow citizens . . ."<sup>254</sup> We cannot have people in power saying, as Assistant Secretary of War John McCloy said in 1942: "[I]f it is a question of the safety of the country [and] the Constitution . . . why the Constitution is just a scrap of paper to me."<sup>255</sup> The Court then condoned the unconstitutional internment and passed up its opportunity to establish legal precedent that might have dissuaded future executive misbehavior.<sup>256</sup> The Court now is doing better. "In time . . . the Bush Administration's descent into torture [will] be seen as akin to Roosevelt's internment of Japanese Americans during World War II. It happened . . . in much the same way, for many of the same reasons. 'Fear and anxiety were exploited by zealots and fools.'<sup>257</sup> Our Constitution is the bedrock of our country. Without it, we are ruled by whim and caprice. We must never lose sight of the 5<sup>th</sup> Amendment: "No person shall be . . . deprived of life, liberty, or property without due process of law." Finally, we must not overreact.

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<sup>250</sup> JOST, *supra* note 151, at 242.

<sup>251</sup> 71 U.S. 2 (1866).

<sup>252</sup> ROBINSON, *supra* note 49, at 6.

<sup>253</sup> WEGLYN, *supra* note 86, at 255.

<sup>254</sup> *Id.* at 22.

<sup>255</sup> 2 HISTORIC U.S. COURT CASES, *supra* note 28, at 723 (quoting Assistant Secretary of War McCloy).

<sup>256</sup> LEVY & MELLOR, *supra* note 242, at 140.

<sup>257</sup> MAYER, *supra* note 6, at 335.