

## Symbolism Under Siege: Japanese American Redress and the “Racing” of Arab Americans as “Terrorists”

Natsu Taylor Saito†

Warren, Roosevelt, DeWitt, and others were the architects of the internment, but we are its authors. We write of it and hope to find meaning in it, honoring those who lived it. . . . We honor the quiet dignity of those who left on the trains for the desert. We honor the maverick rebellion of those who refused to go. We honor the Issei . . . whose survival was their response to those who would deny their humanity. Here we are, writing as their heirs, writing the meaning of the internment.  
Mari J. Matsuda<sup>1</sup>

### I. INTRODUCTION

Reparations to Japanese Americans interned by the United States government during World War II seem nearly completed. The Civil Liberties Act of 1988<sup>2</sup> provided for an official apology, payments of \$20,000 to each surviving internee, and the establishment of a public education fund. Distribution of the funds was, for the most part, completed in 1998. To be sure, there are a few loose ends – redress for the railroad workers, for those born in the camps after the “cut-off” date, and for the Japanese Latin American internees,<sup>3</sup> but by and large we seem ready to

---

© 2001 Asian Law Journal, Inc.; Natsu Taylor Saito

† Professor, Georgia State University College of Law. I am grateful to Eric Yamamoto and the editors of the *Asian Law Journal* for envisioning and organizing this symposium, *Reconstructing Legal Paradigms: Synthesizing the New Racial Theories and Legal Strategies for Social Justice*; to Chris Iijima and Mari Matsuda for their insights into the meaning of the internment; to Andi Curcio for her thoughtful comments; to my research assistant Kate Santelli; and to the Georgia State University College of Law for its support of this work. Special thanks go to my father, Morse Saito, for conveying to me both his reality of internment and his passion for civil rights and social justice.

1. Mari J. Matsuda, *Foreword: McCarthyism, The Internment and the Contradictions of Power*, 40 B.C. L. REV. 9, 36; 19 B.C. THIRD WORLD L.J. 9 (1998).

2. Civil Liberties Act of 1980, 50 U.S.C. § 1989, *et seq.* (1988).

3. In May 2000, Representative Xavier Becerra introduced the Wartime Parity and Justice Act of 2000, a bill which would provide compensation for these groups, but Congress has not acted on it. See Sandy Fernandez, *Forgotten by History, Japanese-Peruvians Interned in the U.S. Still Struggle for Recognition and Compensation*, TIME INTERNATIONAL, June 26, 2000, available at 2000 WL

relegate the internment to history. The internment was a wrong, it was acknowledged, and a remedy was provided.

However, the most important question remains unanswered: the question of the long-term significance that will be attributed to this redress. Japanese Americans are one of the few groups to have received an official apology and reparations for a race-based wrong perpetrated by the United States government. As such, the redress received has implications that reach beyond the internees and their families.

Clearly, the redress is symbolic – a statement of regret and a token payment 50 years after the fact hardly constitute compensation – but *what* does it symbolize? Does it symbolize genuine recognition of the harm that was done to both Japanese Americans and the nation as a whole? Has the wrong at issue really been corrected, thereby diminishing the likelihood that others will be harmed in similar ways? Or does this “redress” actually reinforce acquiescence to, and accommodation of, race-based wrongs? Will it be used to further divide Japanese Americans from other people of color in this country? As we decide the meaning of redress, we must contest the generally accepted internment narrative or we will have struggled long and hard to expose a wrong, only to have its “remedy” reinforce the very tendencies that created the wrong.

I write here as a third generation<sup>4</sup> Japanese American; the daughter and granddaughter of internees; and as a beneficiary of the reparations provided by the Civil Liberties Act of 1988.<sup>5</sup> I also write as a legal scholar committed to a vision of law as an instrument of justice rather than a means for reinforcing structures of exploitation.

We have at this time a unique opportunity and, I would argue, Japanese American legal scholars and activists have a responsibility to ensure that the redress provided furthers the struggle for equality and justice in this country. How it is cast will affect reparations for other groups,<sup>6</sup> and will influence whether Asian Americans reinforce or challenge racial hierarchy in this country.<sup>7</sup> This is the period in which we can contest the symbolism of the internment; if we are to be its authors, let

---

22697931; see also Natsu Taylor Saito, *Justice Held Hostage: U.S. Disregard for International Law in the World War II Internment of Japanese Peruvians: A Case Study*, 40 B.C. L. REV. 275, 19 B.C. THIRD WORLD L.J. 275, 322-26 (1998) (discussing the U.S. failure to appropriately compensate Japanese Latin American internees).

4. Because immigration from Japan was terminated in the early 1910s, the Japanese American community has been composed of clearly defined generations: the *issei* (first generation) who immigrated but were not allowed to become citizens until 1952, the *nisei* (second generation) who were U.S. citizens by birth, and the *sansei* (third generation) who were born and raised in the post-war years.

5. My father received a check for \$20,000 (which he promptly gave away because he considered it “blood money”) and I received a grant from the public education fund to research and write about the internment of Japanese Latin Americans. See Saito, *Justice Held Hostage*, *supra* note 3.

6. For an account of how African Americans are affected by the Japanese American redress, see Eric K. Yamamoto, *Racial Reparations: Japanese American Redress and African American Claims*, 40 B.C. L. REV. 477, 19 B.C. THIRD WORLD L.J. 477 (1998).

7. See Mari J. Matsuda, *We Will Not Be Used*, 1 ASIAN PAC. AM. L.J. 79 (1993); Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, “Foreignness,” and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997).

us be sure it tells the story we want it to tell.<sup>8</sup>

Part II of this essay describes the widely-accepted narrative of the Japanese American internment. Part III identifies what I consider to be the major flaws in this interpretation – its portrayal of the internment as an aberration and the accompanying implication that the problem has been corrected. Part IV draws a parallel between the treatment of Japanese Americans during World War II and Arab Americans in the United States today, focusing on the “racing”<sup>9</sup> of Arab Americans as “terrorists” and the use of secret evidence and indefinite detention to deport non-citizens with political views or associations the government dislikes. Part V concludes that the real meaning of Japanese American redress is being shaped by our responses to such violations of rights guaranteed by the Constitution.

## II. THE INTERNMENT NARRATIVE

In the 1960s, the Japanese American internment appeared to be an aspect of history on the verge of being erased. Most surviving internees were adamant in their silence, and only the informed knew where to find those histories that had been written.<sup>10</sup> Thanks in large measure to a community-based redress movement and its emphasis on public education, the story of the Japanese American internment has moved into popular culture since the late 1980s. It is referred to, at least in passing, in most American history survey courses, and accounts of those interned as children are available for both children and adults.<sup>11</sup> With the popularity of *Snow Falling on Cedars*,<sup>12</sup> one can now find the story, albeit told from the perspective of a young white man, on fiction’s “top ten list” and available in video stores everywhere.

In short form, the redress narrative goes something like this: Japanese immigrants came to the United States in the late 1800s and early 1900s, settling primarily on the west coast, working as maids and gardeners until they could start a small business or slowly turn barren lands into profitable farms. Although the first generation immigrants, the *issei*, were forbidden by law from becoming U.S. citizens<sup>13</sup> and always faced discrimination and

8. On creating the meaning of redress, see Eric K. Yamamoto, *Friend, Foe or Something Else: Social Meanings of Redress and Reparations*, 20 DENV. J. INT’L L. & POL’Y 223 (1992).

9. See, generally, John Powell, *The Racing Of American Society: Race Functioning as a Verb Before Signifying as a Noun*, 15 LAW & INEQ. 99 (1997).

10. See, e.g., Lawson Inada’s description of how John Okada’s searing novel, *No-No Boy*, first published in 1957, almost disappeared from history and how Okada’s discouraged widow burned the manuscript of his only other novel. See Lawson Fusao Inada, *Introduction to JOHN OKADA, NO-NO BOY* (1976). This problem began to be addressed in the 1970s with the publication of critical histories such as MICHU NISHIURA WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA’S CONCENTRATION CAMPS* (1976) and ROGER DANIELS, *CONCENTRATION CAMPS, U.S.A.: JAPANESE AMERICANS AND WORLD WAR II* (1972).

11. See, e.g., JEANNE WAKATSUKI HOUSTON, *FAREWELL TO MANZANAR: A TRUE STORY OF JAPANESE AMERICAN EXPERIENCE DURING AND AFTER THE WORLD WAR II INTERNMENT* (1983); MICHAEL O. TUNNELL, *THE CHILDREN OF TOPAZ: THE STORY OF A JAPANESE-AMERICAN INTERNMENT CAMP BASED ON A CLASSROOM DIARY* (1996); DAVID K. FREMON, *JAPANESE-AMERICAN INTERNMENT IN AMERICAN HISTORY* (1996).

12. DAVID GUTERSON, *SNOW FALLING ON CEDARS* (1994).

13. The Naturalization Act of 1790, 1 Stat. 103 (repealed by the Act of January 19, 1795, which re-enacted most of its provisions, including its racial restrictions), provided that only “free white

hardship, their children, the *nisei*, were U.S. citizens by birth.<sup>14</sup> For the most part, the *nisei* were second-generation immigrants who knew little of Japanese language or culture and wanted to be “100% American.”<sup>15</sup>

Anti-Asian sentiment, present on the west coast since the arrival of the Chinese in the 1840s, was fueled by both the economic success of the Japanese Americans and the Japanese military expansion of the 1930s and was actively promoted by groups such as the Native Sons of the Golden West, led by California governor Earl Warren.<sup>16</sup> After the bombing of Pearl Harbor on December 7, 1941, anti-Japanese politics prevailed, resulting in the internment of all Japanese Americans on the west coast. In the words of the official apology, it was an unfortunate by-product of “racial prejudice and wartime hysteria.”<sup>17</sup> This version usually skips over several key facts: that within a few days of December 7, the FBI had already rounded up everyone they thought might possibly be subversive; that the remaining members of the community were not evacuated and imprisoned until late March or early April of 1942; and that there was no wholesale internment of those of Japanese descent in Hawai’i.<sup>18</sup>

The narrative does, however, go on to relate how nearly 120,000 Japanese Americans,<sup>19</sup> men and women, children and old people, were forced to abandon their homes, farms and businesses, having to store or sell off all of their possessions with just a few days’ notice. It relates how they were tagged with numbers and taken under armed guard to “assembly centers” – the most familiar being the converted racetracks at Tanforan and Santa Anita, California – and from there shipped off, many on trains with their windows covered, through the desert to ten concentration camps in the interior of the country euphemistically designated as “relocation centers.”<sup>20</sup>

persons” could become naturalized citizens. After passage of the 14<sup>th</sup> Amendment, this statement was amended to include persons of “African nativity and descent,” Act of July 14, 1870, ch. 255, s 7, 16 Stat. 254. The racial restriction on naturalized citizenship was not eliminated with respect to persons of Japanese ancestry until the McCarran-Walter Act of 1952, Immigration and Nationality Act, ch. 477, 66 Stat. 163 (1952). For a history of the cases addressing this racial prerequisite for citizenship, see IAN F. HANEY LOPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996).

14. This is based on the holding of the Supreme Court in *United States v. Wong Kim Ark*, 169 U.S. 649 (1898), that a child born in the United States to Chinese parents was an American citizen.

15. There were, in addition, the *kibei* (born in the U.S., but sent back to Japan for education) but their experiences are not part of the mainstream narrative. See RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE: A HISTORY OF ASIAN AMERICANS* 216-17 (1989).

16. On Earl Warren’s nativist leadership in California, see Sumi Cho, *Redeeming Whiteness in the Shadow of Internment: Earl Warren, Brown, and A Theory of Racial Redemption*, 40 B.C. L. REV. 73, 86-119, 19 B.C. THIRD WORLD L.J. 73 (1998).

17. See Dori Meinert, *Congress OKs Internee Redress, Reagan Favors Reparations for WWII Japanese-Americans*, SAN DIEGO UNION TRIBUNE, August 5, 1988, available at 1988 WL 5941128.

18. See WEGLYN, *supra* note 10, at 46-50.

19. I use this term to refer to those who were both U.S. and Japanese citizens because nearly all of the *issei* had committed themselves to living permanently in the United States, but were prevented by the racial restriction in the naturalization law from becoming citizens. See *supra* note 13.

20. That they were concentration camps has been acknowledged by many who were responsible for them. President Roosevelt said in 1944 that “it is felt by a great many lawyers that under the Constitution [the *nisei*] can’t be kept locked up in concentration camps.” WEGLYN, *supra* note 10, at 217. After retiring from the Supreme Court, Associate Justice Tom Clark said, “We picked the [Japanese Americans] up and put them in concentration camps. That’s the truth of the matter.” *Id.* at 114.

Life in the camps was harsh, with internees enduring the desert heat, cold, and dust storms in hastily constructed wooden barracks with no privacy, poor food, and very little in the way of meaningful activity. Sometimes the narrative touches on the intra-community and intra-family turmoil created by the internment, the eventual recruitment of soldiers from the camps, and the “loyalty” questionnaire.<sup>21</sup> A critical part of the story is the heroism of the all-*nisei* military units, the 442<sup>nd</sup> Regimental Combat Team and its predecessor, the 100<sup>th</sup> Infantry Battalion from Hawai’i. These were, per capita, the most decorated units in World War II,<sup>22</sup> distinguishing themselves by, among other acts, saving the “lost battalion” of Texas Rangers,<sup>23</sup> and being the first to reach the Nazi concentration camp at Dachau.<sup>24</sup>

Also critical to the story are the challenges to the constitutionality of the evacuation and internment brought by Gordon Hirabayashi, Minoru Yasui, Fred Korematsu and Mitsuye Endo. In May 1942, instead of reporting for evacuation, Gordon Hirabayashi turned himself in to the local police and was convicted for violating the evacuation orders and the order imposing a curfew on Japanese Americans. In 1943, the Supreme Court unanimously upheld Hirabayashi’s conviction for violating the curfew, avoiding the issue of the evacuation on the grounds that he had received concurrent sentences.<sup>25</sup> Similarly, the Court avoided addressing the internment issue and upheld the curfew in Min Yasui’s case.<sup>26</sup> In late 1944, after Roosevelt had been re-elected, the Court upheld Fred Korematsu’s conviction for violating the evacuation order by a vote of six to three.<sup>27</sup> By the time the Court decided Mitsuye Endo’s case, she had been certified “loyal” by the War Relocation Authority and the Court held that the government, after making such a determination, could not continue to detain her.<sup>28</sup>

In this way, without ever directly addressing the indefinite imprisonment of U.S. citizens without due process, the Supreme Court upheld the internment. Yale Law School Professor Eugene Rostow, one of the earliest critics of these decisions, noted that the Court simply found “that the Japanese are a dangerous lot, and that there was no time to screen

---

21. Everyone over age 17, men and women, citizens and non-citizens, had to complete a questionnaire which asked if they were willing to serve in the armed forces of the United States, and if they would swear unqualified allegiance to the United States and foreswear any allegiance to the Japanese emperor or any other foreign government, power or organization. Those who answered “yes” to both questions were considered loyal; those who answered “no” to either question were disloyal, regardless of their reasons. See WEGLYN, *supra* note 10, at 136-40; Chris K. Iijima, *Reparations and the Model Minority Ideology of Acquiescence: The Necessity to Refuse the Return to Original Humiliation*, 40 B.C. L. REV. 385, 19 B.C. THIRD WORLD L.J. 385, 403 (1998).

22. See Iijima, *supra* note 21 at 397, n. 35.

23. See Andrew Hiroshi Aoki, *American Democracy in Hawaii: Finding A Place for Local Culture*, 17 U. HAW. L. REV. 605, 617 (1995).

24. See Iijima, *supra* note 21, at 397, n. 35; see also ROGER DANIELS, *PRISONERS WITHOUT TRIAL, JAPANESE AMERICANS IN WORLD WAR II* 64 (1993).

25. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

26. *Yasui v. United States*, 320 U.S. 115 (1943).

27. *Korematsu v. United States*, 323 U.S. 214 (1944).

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

them individually. . . . There [was] no attempt . . . to show a reasonable connection between the factual situation and the program adopted to deal with it."<sup>29</sup>

Sometimes the narrative of the internment covers the conditions under which Japanese Americans were released from the camps – the government's deference to hostile public reaction; the scattering of communities because people were not initially allowed to return to the west coast; and the minimal compensation provided years later under the Evacuation Claims Act of 1948.<sup>30</sup> More often, it skips to statistical evidence of how "successful" Japanese Americans have become in the intervening years.

The narrative then moves to the "righting" of the wrong. This includes the public education and mobilization that went on through the latter part of the 1970s and the 1980s and the lawsuit brought by William Hohri<sup>31</sup> which created the possibility that the government could be held liable for billions of dollars in compensation. It proceeds to the appointment of the Commission on Wartime Relocation and Internment of Civilians, which held hearings across the country and, in 1982, issued a report which recognized that a "grave injustice" had been suffered by Japanese Americans as a result of "race prejudice, war hysteria, and a failure of political leadership."<sup>32</sup> This was the heart of the struggle for reparations, the time when the government sought and recorded the truth, and people finally came forward to tell their stories, many of them for the first time ever.

In the meantime, *coram nobis* petitions were brought to vacate the convictions of Yasui, Hirabayashi, and Korematsu, based on newly-discovered evidence that government officials had deliberately altered, destroyed and suppressed evidence that the military's allegations of disloyalty and espionage on the part of Japanese Americans were false.<sup>33</sup> Min Yasui died before the cases could be heard, but Fred Korematsu and Gordon Hirabayashi's convictions were vacated, providing some vindication of the positions they had taken without actually overturning the precedent set by the Supreme Court.<sup>34</sup>

In 1988, Congress finally passed remedial legislation. The Civil Liberties Act of 1988, based on the recommendations of the Commission, provided \$20,000 for each surviving internee, an official apology, and a

29. Eugene V. Rostow, *The Japanese American Cases: A Disaster*, 54 YALE L. J. 489, 508-09 (1945).

30. See WEGLYN, *supra* note 10, at 274.

31. Hohri v. United States, 586 F. Supp. 769 (D.D.C. 1984); *aff'd in part rev'd in part* by 782 F.2d 227 (D.C. Cir. 1986); *vacated* by 482 U.S. 64 (1987); *remanded* by 847 F.2d 779 (Fed. Cir. 1988); *cert. denied* by 488 U.S. 925 (1988).

32. REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982); *see also* PETER IRONS, A PEOPLE'S HISTORY OF THE SUPREME COURT 361 (1999).

33. IRONS, *supra* note 32, at 361-64.

34. *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal 1984); Hirabayashi v. United States, 828 F.2d 591 (9<sup>th</sup> Cir. 1987). For documents related to these cases, see JUSTICE DELAYED 125-224 (Peter Irons, ed., 1989).

public education fund.<sup>35</sup> The latter is a particularly significant but often over-looked part of the redress received. It was envisioned that the fund would have \$50 million with which to support educational projects over a ten-year period. As it turned out, the \$1.65 billion allocated by Congress was not invested as it should have been, and the Fund's board of directors was not appointed until 1996, so it had only 2 years and \$5 million to work with.<sup>36</sup> Nonetheless, the Fund acted as a catalyst for a great deal of creative work in the fields of elementary and secondary education and legal analysis, as well as financed the production of documentary films, art programs, and various memorials.<sup>37</sup>

This is a story of real accomplishment. Like many other *sansei*, I was initially critical of the entire redress effort. It seemed evident that nothing the government could do would really compensate those who had been interned. However, I have come to appreciate the importance of the reparations. They have brought healing to the individuals involved and to the community as a whole, effected a shift in public opinion about both the internment and the concept of reparations, and prevented the story from being erased from American history altogether. It is the redress movement and the obtaining of reparations, however limited, that brought the story of the internment into the public domain and made it a "legitimate" part of our history.

Thus far, it has the makings of a feel-good story: a terrible thing happened, but the nation recognized its wrong and stepped forward to provide some redress. The story confirms what so many want to believe, that despite occasional aberrations this is a nation committed to democracy and the equality of peoples. Most people I encounter are open to this story. Like many Japanese Americans, I am invited to tell it at high schools and churches, even military bases. However, if we really care about achieving democracy and equality, we need to look beyond this level of the narrative.

### III. FUNDAMENTAL FLAWS IN THE NARRATIVE

There are at least two major flaws with the internment narrative. First, it accepts the notion that the internment was an aberration rather than a

---

35. See 50 U.S.C. sec. 1989 et seq.

36. See National Coalition for Redress/Reparations et al. v. United States (9<sup>th</sup> Cir.), unpublished opinion, available at 2001 WL 133143, D.C. No. CV-98-03932-CAL (mem. opinion issued Feb. 15, 2001) (holding that the NCRR's claims for losses suffered due to the government's alleged failure to invest funds allocated to the Civil Liberties Public Education Fund were not redressable because the fund had been terminated and its administering board no longer existed). See also Jason Ma, *Redress-Fund Suit Thrown Out; Restoring Lost Interest Is Up To Lawmakers, Not Courts, Judge Rules*, ASIAN WEEK, Nov. 25, 1999 (reporting on the district court's dismissal of the case, and reporting that only \$5 million of the \$50 million authorized for educational programs was spent before the fund ran out); Cassandra Stern, *War Internees Sue U.S. on Settlement; Delay in Investing Allegedly Cut Payout*, WASH. POST, Oct. 14, 1998, available at 1998 WL 16562129 (noting that a class action suit had been filed to prevent hundreds of people from being denied reparations because the U.S. Treasury Department failed to properly invest the trust fund).

37. The Hirasaki National Resource Center of the Japanese American National Museum, through its Civil Liberties Archives and Study Center, is attempting to collect the products of the research and educational projects sponsored by the Civil Liberties Public Education Fund as well as other materials documenting the internment. See The National Resource Center <<http://www.janm.org/clasc/>>.

logical extension of the treatment of Asians in America. Second, it implies that the wrong has actually been righted.

*A. The Internment Was Not an Aberration in the Context of  
Asian American History*

Implicit in the terms of the apology, which attributed the problem to wartime hysteria and racial prejudice, is the notion that the internment was an aberration, an instance in which our nation temporarily strayed from its basic commitment to due process and equal protection.

But the internment was not an aberration. One need only look at the social, political, economic, and legal history of Asian Americans in the United States, from the enforcement of the 1790 Naturalization Act's limitation of citizenship to "free white persons,"<sup>38</sup> to the exploitation of Chinese labor in the mines and building of the railroads,<sup>39</sup> to lynchings and Jim Crow laws,<sup>40</sup> to Chinese exclusion in the 1880s and the exclusion of the Japanese in the early 1900s,<sup>41</sup> to the alien land laws,<sup>42</sup> and to the National Origins Act of 1924,<sup>43</sup> to see that the military orders to exclude and then imprison "all persons of Japanese ancestry, both alien and non-alien"<sup>44</sup> were really a logical extension of all that had come before.

Between the time of the Chinese Exclusion Act of 1882<sup>45</sup> and the National Origins Act of 1924,<sup>46</sup> immigration laws were modified to prevent

38. See *supra* note 13.

39. Takaki, *supra* note 15, at 79-131.

40. See *People v. Hall*, 4 Cal. 399 (1854) (interpreting California law precluding testimony by Ablack, mulatto person or Indian to extend to Chinese), SUCHENG CHAN, *ASIAN AMERICANS: AN INTERPRETIVE HISTORY* 45-61 (1991) (describing mob violence and lynchings); Robert S. Chang, *Toward An Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 *ASIAN L.J.* 1241, 1254-55 (1994) (describing the 1877 and 1885 massacres of Chinese in California and Wyoming); TAKAKI, *supra* note 16, at 201 (describing school segregation in San Francisco); see generally, Charles J. McClain, Jr., *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 *CAL. L. REV.* 529 (1984).

41. See ALEINIKOFF, MARTIN AND MOTOMURA, *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY*, 4<sup>TH</sup> ED. 179-182 (1998) (describing federal restrictions on Chinese immigration); TAKAKI, *supra* note 15, at 46-50 (describing restrictions on Japanese immigration, including the Gentlemen's Agreement of 1908).

42. For an excellent summary of the alien land laws and how they laid the groundwork for the internment, see Keith Aoki, *No Right to Own?: The Early Twentieth-Century "Alien Land Laws" as a Prelude to Internment*, 40 *B.C. L. REV.* 37, 19 *B.C. THIRD WORLD L.J.* 37 (1998).

43. National Origins Act of 1924, ch. 190, 43 Stat. 153 (1942) (restricting immigration in a manner designed to maintain the racial and ethnic status quo of the United States as of 1890 and completely banning Japanese immigration). See ALEINIKOFF, et al., *supra* note 41, at 164-65.

44. The Civilian Exclusion Orders issued by General DeWitt applied to "all persons of Japanese ancestry, both alien and non-alien." See, e.g., Civilian Exclusion Order No. 34, quoted in *Korematsu v. United States*, 323 U.S. 214, 229 n.6 (1944) ("providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and non-alien, were to be excluded from a described portion of Military Area No. 1"). The curious term "non-alien" referred, of course, to citizens and exemplifies how "foreignness" has been imposed on U.S.-born citizens of Asian descent.

45. Act of May 4, 1882, ch. 126, 22 Stat. 58 (suspending the immigration of Chinese laborers for 10 years). This was followed by a series of acts eliminating Chinese immigration altogether.

46. See *supra* note 43. National origin quotas, while modified, were not eliminated until the Immigration and Nationality Act Amendments of 1965. See ALEINIKOFF, et al., *supra* note 41, at 168. See generally Jan C. Ting, "Other Than a Chinaman": How U.S. Immigration Law Resulted From and Still Reflects a Policy of Excluding and Restricting Asian Immigration, 4 *TEMP. POL. & CIV. RTS. L. REV.* 301 (1995).

nearly all Asian migration to the United States. The 1790 Naturalization Act limited citizenship to “free white persons” and Asians were held in a series of cases to be non-white.<sup>47</sup> Thus, as Asians were incorporated into the U.S. racial hierarchy, “foreignness” became part of their racialized identity.<sup>48</sup> Some forms of discrimination, such as segregation and lynchings, were blatantly race-based, but much of it was structured, legally and socially, on the presumption that Asian Americans were not or could not become citizens. State and local laws were enacted which levied special taxes on Asian Americans; others prevented those aliens “ineligible to citizenship” from obtaining employment, possessing various kinds of licenses, or owning land.<sup>49</sup>

Legalized discrimination was compounded by the perpetual “enemy” status afforded Asians in popular American culture. Starting with depictions of the “yellow peril” hordes waiting to take over the country in the 1880s, Asians were routinely portrayed as sneaky, inscrutable, fanatical, unassimilable and, on top of that, fungible.<sup>50</sup> They were foreign, disloyal and therefore an enemy, just as portrayed in the rhetoric of the internment. In this context, the anti-Japanese sentiment and actions taken in the 1940s were unusual only in scope, not in nature.

Thus, as we look briefly at the history of Asians in America, we see the internment emerging as a somewhat extreme, but not aberrant, manifestation of a well-entrenched pattern of discrimination rooted in a racialized identification of Asian Americans as perpetually “foreign.”<sup>51</sup>

### B. Flaw #2: The Real Wrong Has Not Been Righted

The second major problem with the standard internment narrative is that it implies that the wrong has been recognized and corrected, or at least that it could not happen again. One of the stated purposes of the Civil Liberties Act was to “discourage the occurrence of similar injustices and violations of civil liberties in the future.”<sup>52</sup> To understand whether the wrong has been corrected, we must first see if it has been correctly identified. The way the story is usually told, the wrong is one of racial

47. See HANEY LOPEZ, *supra* note 13.

48. As Neil Gotanda says:

[T]he separability of the juridical categories of “citizen” and “alien” is clear, as is the parallel social distinction between “American” and “foreign.” But when the individuals concerned are Other non-Whites, the racial considerations render the “natural coincidence” of citizen and American much less certain.

Neil Gotanda, “*Other Non-Whites*” in *American Legal History: A Review of Justice at War*, 85 COLUM. L. REV. 1186, 1191 (1985). See also, Saito, *Alien and Non-Alien Alike*, *supra* note 7, at 268-81 (discussing the conflation of race, alienage, and loyalty).

49. See, e.g., *Ex parte Ah Pong*, 19 Cal. 106 (1861) (ordering a Chinese man to work on the county roads for not paying the Foreign Miners License Tax, despite the fact that he was a laundryman, not a miner); see generally McClain, *supra* note 40.

50. See Keith Aoki, “*Foreign-ness*” & *Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 ASIAN PAC. AM. L.J. 1 (1996).

51. See Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71 (1997); see also Saito, *Alien and Non-Alien Alike*, *supra* note 7.

52. 50 U.S.C. § 1989 (1988)

prejudice playing out against a group of people in ways we now recognize to have been excessive.

The history of racial discrimination against Asian Americans certainly did not end with the internment. The Chinese, who were “our friends” in World War II,<sup>53</sup> rapidly became the enemy as China “went communist.” The wars in Korea and Vietnam reinforced this image, despite the fact that Asians were allies as often as they were enemies.<sup>54</sup> The refusal to distinguish among individuals and ethnic groups has persisted from General DeWitt’s famous pronouncement that “a Jap’s a Jap”<sup>55</sup> through the beating death of Vincent Chin, a fifth generation Chinese American killed by unemployed auto workers in Detroit who were angry at the Japanese automobile industry,<sup>56</sup> to the stories of hate crimes against “gooks” and “chinks” still recorded every month.<sup>57</sup>

It was this history that made Asian Americans so suspicious of the allegations against and treatment of Wen Ho Lee, a nuclear physicist accused but never actually charged with espionage.<sup>58</sup> According to Neil Gotanda, “The federal government, after years of investigation, has been unable to produce any evidence of espionage. The spy charges have been maintained, not by evidence, but by constant allegations linking Wen Ho Lee to China.”<sup>59</sup> He continues:

The assignment to Wen Ho Lee of a presumption of disloyalty is a well-established marker of foreignness. And foreignness is a crucial dimension of the American racialization of persons of Asian ancestry. It is at the heart of the racial profile of Chinese and other Asian Americans.<sup>60</sup>

But while racism is inextricable from the story of the internment, the primary “wrong” that should be addressed by reparations is more complex. In what is still probably the best analysis of the Supreme Court’s decisions in the internment cases, Yale Law School professor Eugene Rostow, in 1945, summarized the wrong as follows:

The Japanese exclusion program thus rests on five propositions of the

53. Shortly after the war broke out, *Time Magazine* printed pictures of a smiling Chinese man and a stern-looking Japanese man, captioned, “How to Tell Your Friends From the Japs.” See TAKAKI, *supra* note 15, at 370, quoting TIME, Dec. 22, 1941, at 33.

54. See Saito, *Alien and Non-Alien Alike*, *supra* note 7, at 301-06.

55. See Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179, 228, 19 B.C. THIRD WORLD L.J. 179 (1998).

56. See Chan, *supra* note 40, at 176-78; Chang, *supra* note 40, at 1252-53. The perpetrators pled guilty and were given probation and a fine. See U.S. COMM’N ON CIVIL RIGHTS, CIVIL RIGHTS ISSUES FACING ASIAN AMERICANS IN THE 1990S (1992) (“A CIVIL RIGHTS COMM’N REPORT”) at 25-26.

57. See Comment, *Racial Violence Against Asian Americans*, 106 HARV. L. REV. 1926 (1993); A CIVIL RIGHTS COMM’N REPORT, *supra* note 56; National Asian Pacific American Legal Consortium, 1999 Audit of Violence Against Asian Pacific Americans: The Consequences of Intolerance in America (7<sup>th</sup> Ann. Rpt., 1999) (reporting three hate crime murders of Asian Americans in 1999).

58. Efforts by Asian Americans to highlight the problems in this case included the formation of the Coalition Against Racial and Ethnic Scapegoating, composed of at least six national and over twenty local legal or civil rights organizations (see <<http://www.asianlawcaucus.org/Cares>>), and the organization of a National Day of Action for Wen Ho Lee, which included a teach-in by the Asian American Legal Defense and Education Fund (see <<http://www.aaldef.org>>).

59. Neil Gotanda, *Comparative Racialization: Racial Profiling and the Case of Wen Ho Lee*, 47 UCLA L. REV. 1689, 1690 (2000).

60. *Id.* at 1694.

utmost potential menace: (1) protective custody, extending over three or four years, is a permitted form of imprisonment in the United States; (2) political opinions, not criminal acts, may contain enough clear and present danger to justify such imprisonment; (3) men, women and children of a given ethnic group, both Americans and resident aliens can be presumed to possess the kind of dangerous ideas which require their imprisonment; (4) in time of war or emergency the military, perhaps without even the concurrence of the legislature, can decide what political opinions require imprisonment, and which ethnic groups are infected with them; and (5) the decision of the military can be carried out without indictment, trial, examination, jury, the confrontation of witnesses, counsel for the defense, the privilege against self-incrimination, or any of the other safeguards of the Bill of Rights.<sup>61</sup>

Rostow's summary describes a wrong much larger than the "relocation" of 120,000 people on the basis of their race or national origin for three or four years. It goes beyond the denial of Japanese Americans' civil rights and liberties to a dismantling of protections that are supposed to extend to everyone within this system.

Have these problems been corrected? The 1943 and 1944 Supreme Court opinions in the *Korematsu* and *Hirabayashi* cases have never been overturned. The *coram nobis* cases decided in the 1980s vacated the convictions but, as Fred Yen says, "Unfortunately, proclamations of *Korematsu*'s permanent discrediting are premature. The Supreme Court has never overruled the case. It stands as valid precedent, an authoritative interpretation of our Constitution and the 'supreme Law of the Land.'"<sup>62</sup> Could it happen again? Would it? Given the publicity and the reparations, it is unlikely that it will happen again to Japanese Americans, but that does not mean it could not happen to other groups. The following section explores parallels I have observed between the Asian American experience described above and the contemporary social, political, and legal treatment of Arab Americans and Muslims in the United States.

#### IV. HISTORY REPEATS AS WE WATCH: THE TREATMENT OF ARAB AMERICANS TODAY

##### A. *The "Racing" of Arab Americans as "Terrorists"*

One way to examine whether the wrong done to Japanese Americans during World War II has been righted is to look at how the media and our

61. Rostow, *supra* note 29 at 532.

62. Alfred C. Yen, *Introduction: Praising with Faint Damnation B The Troubling Rehabilitation of Korematsu*, 40 B.C. L. REV. 1, 2, 19 B.C. THIRD WORLD L.J. 1 (1998); *see also* Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72 (1996); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 184-211 (1998) (in which the Chief Justice is, in Yen's words, "curiously muted in his criticism of the interment" (Yen, at 3)).

In vacating *Korematsu*'s conviction in 1984, the court noted that in issuing a writ of *coram nobis* it could only correct errors of fact and not law, and "[t]hus, the Supreme Court's decision stands as the law of this case and for whatever precedential value it may still have." *See Korematsu v. United States*, 584 F. Supp. 1406, 1420 (1984).

political and judicial systems are responding to discrimination against Arab Americans and Muslims<sup>63</sup> in the United States today. The possibility that Arab Americans could be interned just as Japanese Americans were lies just below the surface of popular consciousness, occasionally emerging as it did in the movie *The Seige*.<sup>64</sup> We have no more legal protections against such a scenario than we did in 1942. However, we need not postulate the wholesale internment of Arab Americans to see how many of the issues faced today by Arab Americans parallel those Asian Americans have encountered.<sup>65</sup>

Just as Asian Americans have been “raced” as foreign, and from there as presumptively disloyal,<sup>66</sup> 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 different 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.”<sup>67</sup>

Recent Hollywood movies both reflect and perpetuate these stereotypes.<sup>68</sup> *The Seige*, which depicts the U.S. military declaring martial

63. The United States is home to about 6.5 million Muslims and about 3 million persons of Arab descent, some of whom are Muslim but most of whom are Christian. *Muslims Move Into Political Arena in U.S.*, FLORIDA TIMES-UNION, October 22, 1999, available at 1999 WL 29069360. While Arabs and Muslims are thus distinct but overlapping groups, they are often conflated in the media and in popular U.S. culture. I use “Arab American” to include all persons of Arab ancestry who are living in the United States for the long term, regardless of citizenship, just as I included *issei* in the term “Japanese American,” because they have a long-term commitment to this society.

64. See Matthew Sweet, *Movie Targets—Arabs are the latest people to suffer the racial stereotyping of Hollywood*, THE INDEPENDENT (London) July 30, 2000, at 1.

65. James Dempsey and David Cole report:

In November 1986 . . . the Justice Department was considering internally a document entitled “Alien Terrorists and Undesirables: A Contingency Plan.” The document was circulated by the Alien Border Control Committee, a secret inter-agency task force organized in 1986 to develop, among other things, plans for the “expulsion from the United States of alien activists who are not in conformity with their immigration status.” The “contingency plan” proposed building a detention camp in a remote area of Louisiana to hold “alien undesirables” pending deportation. It listed the estimated number of students from Arab countries staying in the U.S. with expired visas, and identified certain countries, all Arab, as being likely origins of terrorist aliens.

JAMES X. DEMPSEY and DAVID COLE, *TERRORISM AND THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 37 (1999).

66. See generally Saito, *Alien and Non-Alien*, *supra* note 7. Neil Gotanda has noted how the attribution of racialized identity to Asian Americans is based not so much on purportedly biological characteristics, but on racial profiling, the linking of “a particular characterization or social stereotype . . . to the raced individual’s racial category.” Gotanda, *Comparative Racialization*, *supra* note 59, at 1691.

67. Twila Decker, *Muslims Fight Unfairness, the American Way*, ST. PETERSBURG TIMES, October 17, 1999, available at 1999 WL 27322848. One highly criticized example of this was the July 26, 1993 cover of the *New Yorker* magazine, which portrayed “several All-American children playing at the beach with one lone crazed-looking Arab child about to demolish a sand-castle replica of the World Trade Center.” Binny Miller, *Give them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 562 (1994).

68. On the racialized stereotyping of Arab Americans as terrorists in popular culture, especially movies, see Seth Hilton, *American Conceptions of the Middle East and Islam*, 1 U.C. DAVIS J. INT’L L.

law and imprisoning American Muslims and Arab Americans *en masse* following a series of terrorist bombings, “graphically connects Islamic religious practices like prayer, ritual cleansing, . . . Islamic dress and beards, and even the emblematic color green with terrorism.”<sup>69</sup> *Rules of Engagement*, in which a mob of Yemenis, including women and children, attack a U.S. embassy, has been described as uniformly negative in its depictions of Arabs in Yemen. Speaking for the American-Arab Anti-Discrimination Committee, Hussein Ibish said, “It can only be compared to films like the *Birth of a Nation* and *The Eternal Jew* insofar as the principled [sic] purpose seems to be the demonization and vilification of an entire people.”<sup>70</sup>

Such portrayals, combined with the perpetuation of these stereotypes in news reporting, feed the public perception that Arab or Muslim terrorists must be responsible for events such as the bombing of the federal building in Oklahoma City in 1995 and the 1996 midair explosion of TWA Flight 800 off the coast of Long Island. Even though white American terrorists were quickly identified as prime suspects in the Oklahoma City bombing, Arab Americans across the United States reported a surge of harassment and intimidation in the following weeks. In Oklahoma City a mosque was fired upon and a young Iraqi woman had a miscarriage after men shouting anti-Muslim epithets shattered the windows in her home.<sup>71</sup> As far away as northern Virginia, a U.S.-born Muslim woman reported that cars blew their horns at her, people avoided her in stores, and she was accosted with the line, all too familiar to Asian Americans,<sup>72</sup> “Why don’t you go back where you came from?”<sup>73</sup>

The stereotypes of Muslims and Arab Americans as “terrorists” affect law enforcement as well. In Detroit, attorney David Steingold represented an Arab American client accused of organizing a credit card fraud ring. After meeting with FBI officials on the case, he reported that “it was the stated opinion of the FBI that every single Arab in Dearborn is either in member of Hezbollah or a sympathizer.”<sup>74</sup> More significant than the prejudices of individual law enforcement officers, however, are the systematic plans being considered to give governmental agencies even more sweeping powers in the “war on terrorism.”

Immediately following the crash of TWA Flight 800, President

& POL’Y 355 (1995). See also Sweet, *supra* note 64.

69. Moin “Moon” Khan, *Film’s Bias Ought to Mobilize Muslims*, CHICAGO TRIBUNE, November 12, 1998, available at 1998 WL 2918786.

70. John Donnelly, *Again, Film Sparks Arab Fury*, PORTLAND OREGONIAN, April 17, 2000, available at 2000 WL 5394289 (noting that the American-Arab Anti-Discrimination Committee had also criticized *The Seige* and *True Lies*).

71. *House Kills a Resolution Decrying Anti-Muslim Bias; Arab-Americans protested the Move by Two GOP Legislators to Rewrite the Condemnation of Intolerance*, STAR TRIBUNE, November 26, 1999, available at 1999 WL 7519361.

72. See, e.g., Gish Jen, *An Ethnic Trump*, N.Y. TIMES MAG., July 7, 1996, at 50 (describing her 4-year-old son’s encounter with children who insisted he was Chinese).

73. Glenn Frankel, *A Fragile Peace; For Northern Virginia’s Palestinians, Life in America is a String of Perils*, WASHINGTON POST, March 1, 1997, available at 1997 WL 9337329.

74. Gordon Trowbridge and Lama Bakri, *Local Arabs Fear Fed Scrutiny; Terrorist Crackdown May Spur Privacy Violations Some Say*, DETROIT NEWS, July 25, 2000, available at 2000 WL 3485702.

Clinton appointed a White House Commission on Aviation Safety and Security, headed by Vice President Gore.<sup>75</sup> Among other things, the Commission recommended systems for bomb detection and automated passenger profiling which have been criticized by civil liberties groups.<sup>76</sup> Although the National Transportation Safety Board and the FBI have since concluded that the TWA crash was most likely caused by mechanical failure,<sup>77</sup> the selective targeting of Muslims and Arab Americans is an ongoing problem as airlines continue to profile people based on criteria such as "Arab sounding names" or passport stamps from Arab countries.<sup>78</sup>

Following bombings at the U.S. embassies in Tanzania and Kenya and a U.S. barracks in Saudi Arabia, Congress established a National Commission on Terrorism, which released its report in June 2000.<sup>79</sup> Although the attacks took place overseas, the Commission report focuses almost exclusively on increasing domestic security measures. FBI Director Louis Freeh testified that "since the World Trade Center bombing of 1993, no single act of foreign-directed terrorism has occurred on American soil," and that in 1998 the FBI had foiled ten planned terrorist attacks, *all* linked to domestic white supremacist and militia groups. Nonetheless, the first page of the Commission's report warns ominously, "Today international terrorists attack us on our own soil."<sup>80</sup>

The racialized identification of Muslims and Arab Americans as "terrorists" has not gone unnoticed. In a 1997 report, Maurice Glele-Ahazano, the United Nations' special rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related phenomena, noted racism and discrimination against Arabs in the U.S. and highlighted the media's tendency to identify Arabs and Muslims with terrorists.<sup>81</sup> In 1999 a bipartisan coalition in Congress sponsored a resolution condemning "anti-Muslim intolerance and discrimination," urging recognition that "organizations that foster such intolerance create an atmosphere of hatred" and noting that law enforcement agencies should avoid the "rush to judgment" that followed the Oklahoma City bombing.<sup>82</sup> However, just before Congress adjourned, the bill was effectively gutted and pulled off the calendar. Discouraged, James Zogby, president of the Arab American Institute, noted, "Instead of becoming a salve to heal the wounds of the Muslim community, this has become evidence of the problems that created

75. Michael J. AuBuchon, *Choosing How Safe Is Enough: Increased Antiterrorist Federal Activity and Its Effect on the General Public and the Airport/Airline Industry*, 64 J. AIR L. & COMM. 891 (1999).

76. *Id.*

77. *Id.*

78. *Id.*

79. Hussein Ibish, *A Return to Reckless CIA Activities? Terrorism Report Threatens Constitutional Protections*, CHARLESTON GAZETTE, June 25, 2000 at IC, available at 2000 WL 2614670.

80. *Id.*

81. Gustavo Capdevila, *Human Rights: Alarm at Spread of Racism Worldwide*, INTER PRESS SERVICE, Mar. 18, 1997, available at 1997 WL 7074280. The report recommended that the U.N. call an international conference on racism, a conference which is scheduled to be held in Durban, South Africa in August 2001.

82. *House, supra* note 71, at 32A.

the wounds in the first place.”<sup>83</sup>

B. “Anti-Terrorist” Legislation, Indefinite Detention and the Use of Secret Evidence

The “racing” of a group identified by religion and/or national origin has once again been combined with the portrayal of the group as a threat to national security. The government’s association of Arab Americans and Muslims, however loosely, with “terrorism,” has much in common with both the treatment of Japanese Americans on the basis of their presumed disloyalty and the anti-communism that followed closely on the heels of World War II.<sup>84</sup> With the “fall” of communism one would think there would no longer be a perceived need for the repressive measures of the Cold War, but many of these continue under the rubric of fighting “terrorism.” In this new war, Arab Americans and Muslims have quickly become the most visible “enemy.” As Edward Said has noted, “As a word and concept, ‘terrorism’ has acquired an extraordinary status in American public discourse. It has displaced Communism as public enemy number one, although there are frequent efforts to tie the two together.”<sup>85</sup> This McCarthyist response to the perceived dangers of “terrorism” has resulted in legislation and executive action which, when combined with the racialization of Arab American and Muslims as “terrorists,” looks quite similar to the conditions which led to the internment of Japanese Americans.

Even though it was almost immediately known that the Oklahoma City bombing was the work of “home-grown” terrorists<sup>86</sup>, the incident spurred the passage of bills purporting to clamp down on foreign terrorism in both criminal and immigration law.<sup>87</sup> The Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”)<sup>88</sup> made it a crime to contribute to any group deemed a “foreign terrorist organization,”<sup>89</sup> and created special

83. *Id.*

84. Mari Matsuda has pointed out numerous connections between the Japanese American internment and the McCarthyism of the 1950s. See Matsuda, *supra* note 1, at 9 (describing how “[t]he internment story both presages and diverges from the Cold war story, making way for our contemporary map of power”).

85. John A. Scanlan, *American-Arab—Getting the Balance Wrong—Again!*, 52 ADMIN L. REV. 347, 362 (2000), quoting Edward Said, *The Essential Terrorist*, BLAMING THE VICTIMS: SPURIOUS SCHOLARSHIP AND THE PALESTINIAN QUESTION 149 (Edward Said and Christopher Hitchens, eds. 1988). Scanlan goes on to note that the American and Canadian publics consider terrorism a bigger threat to their personal safety than driving on the freeways, even though the number of U.S. citizens killed in terrorist incidents around the world in 1985 was only one quarter the number killed that year by lightning.

86. Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L. J. 51, 70 (1999).

87. See also Ella Dlin, *The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments?*, 38 CATH. LAWYER 49 (1998) (noting problems with the popular correlation of immigration and terrorism). It is interesting to note the parallels to the passage of restrictive immigration laws in the wake of President McKinley’s assassination, an assassination conducted by a U.S.-born citizen, but popularly attributed to foreign anarchists. See Aleinikoff et al., *supra* note 41, at 160.

88. Pub. L. No. 104-132, 110 Stat.1214 (1996).

89. 18 U.S.C. § 2339B(a). See generally, Jacqueline Benson, *Send Me Your Money: Controlling*

deportation procedures for aliens accused of being terrorists. Calling it “one of the worse assaults on the Constitution in decades,” David Cole and James Dempsey summarize the AEDPA as follows:

It resurrected guilt by association as a principle of criminal and immigration law. It created a special court to use secret evidence to 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.<sup>90</sup>

The ban on fundraising has had a particularly chilling effect in Arab American communities, as Islamic social groups and mosques have come under scrutiny across the country. Federal grand juries in New York, Chicago and Tampa have investigated as many as twenty organizations with suspected links to terrorism.<sup>91</sup> As reported by the Detroit News,

The law explicitly puts support for social or charitable programs affiliated with terrorist groups in the same class as providing money for guns or bombs. That complicates matters in areas such as the West Bank and Gaza Strip, or in southern Lebanon, where many of the schools, orphanages and charity programs Arab Americans want to support are linked to groups such as Hamas and Hezbollah.<sup>92</sup>

The AEDPA and the Illegal Immigration and Immigrant Responsibility Act of 1996 (“IIRIRA”),<sup>93</sup> which followed on its heels, also codified special “alien terrorist removal procedures,” including a special court and provisions for the use of secret evidence. While U.S. citizens who are identified as Muslim or Arab have also been harassed or discriminated against in many ways, the problems have recently become most visible in the immigration context; a context where, as Asian Americans know all too well, those deemed “other” are particularly

*International Terrorism By Restricting Fundraising in the United States*, 21 HOUS. J. INT’L L. 321 (1999).

90. Dempsey and Cole, *supra* note 65, at 2-3. See generally, David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 S.C.T. REV. 203 (1999); Jennifer A. Beall, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996’s Answer to Terrorism*, 73 IND. L.J. 693 (1998); Andy Pearson, *The Anti-Terrorism and Effective Death Penalty Act of 1996: A Return to Guilt by Association*, 24 WM. MITCHELL L. REV. 1185 (1998).

91. See Trowbridge and Bakri, *supra* note 74. See also Steve McGonigle, *Mosques, Islamic Groups Under Scrutiny in Terrorism Probes*, THE RECORD, Northern New Jersey, Oct. 10, 1999 at A19, available at 1999 WL 7125342 (noting that in New York judges jailed a Palestinian-American and a Palestinian student on civil contempt charges for refusing to answer grand jury questions).

92. See Trowbridge and Bakri, *supra* note 74; McGonigle, *supra* note 91. McGonigle notes that the investigations had not yet produced any indictments but had provoked outrage among civil rights advocates, some of whom likened the tactics to the FBI’s COINTELPRO operations of the 1960s.

93. Pub. L. No. 104-208, 110 Stat. 3009-546 (1996). IIRIRA also made it easier for the INS to employ “expedited removal” procedures through which border inspectors make admissions decisions which are not subject to judicial review. See Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 NYU REV. L. & SOC. CHANGE 213 (1999); Clarence E. Zachery, Jr., *The Alien Terrorist Removal Procedures: Removing the Enemy Among Us or Becoming the Enemy from Within?*, 9 Geo. IMMIGR. L.J. 291 (1995); see also Kevin R. Johnson, *The Antiterrorism Act, the Immigration Reform Act, and Ideological Regulation in the Immigration Laws: Important Lessons for Citizens and Noncitizens*, 28 ST. MARY’S L.J. 833 (1997).

vulnerable.<sup>94</sup> Susan Akram notes:

Since the early 1990s, FBI and INS agents have launched widespread investigations of Arab and Arab-American communities in major cities all over the United States. Seeking information that would allegedly inform the government about “terrorist” activities, agents . . . have threatened individuals . . . that they would initiate deportation proceedings against them or their relatives if they did not “inform” on friends, relatives, or neighbors.<sup>95</sup>

It is much easier to deport non-citizens on “national security” grounds than it is to convict them on criminal charges associated with terrorism, and deportation has become one of the government’s primary weapons in its war against those with political associations it deems undesirable. In recent years, the Immigration and Naturalization Service (“INS”) has attempted to deport at least two dozen people on the basis of secret evidence, almost all of them Muslim, most of them Arab Americans.<sup>96</sup> Some of these cases are described in the following sections.

94. In analyzing prosecutions for “seditious conspiracy,” Bradley Winter concludes that: such prosecutions operate invidiously in inviting the jury to assess the defendant’s identity as an American. . . [asking] the jury to decide whether the defendant is one of “us” engaging in protected speech, or one of “them” conspiring . . . against our government.

Xenophobia operates to make those defendants who are ethnic minorities seem more threatening and thus more likely to be guilty of seditious conspiracy. When the defendants are actually foreigners, such as the immigrants in the New York City terrorism trial, their identities cast even a longer shadow.

Bradley T. Winter, *Invidious Prosecution: The History of Seditious Conspiracy—Foresadowing the Recent Convictions of Sheik Omar Abdel-Rahman and His Immigrant Followers*, 10 GEO. IMMIGR. L. J. 185, 212-13 (1996).

95. Akram, *supra* note 86 at 70. The “Ramparts” scandal has produced evidence that INS used similar tactics in conjunction with the Los Angeles Police Department and its war on “gangs.” See Matt Lait and Jim Newton, *The “Rampart Way”: Macho, Insubordinate and Cliquish Misconduct: Report Describes an “Us versus Them” Mind-set in which Superiors were Frequently Ignored*, L.A. TIMES, Mar. 1, 2000 at A16, available at 2000 WL 2215743.

96. See Akram, *supra* note 86 at 51-52; Statement of Professor David Cole, Georgetown University Law Center, On the Use of Secret Evidence in Immigration Proceedings and H.R. 2121, Before the House Judiciary Committee, Subcommittee on Immigration and Claims, Feb. 10, 2000 (avail. at <<http://www.house.gov/judiciary/cole0210.htm>>; (“Cole Statement”); Jim Lobe, Opponents of Secret Evidence Make Headway, Inter Press Service, June 8, 2000 (no page no. avail.), available at 2000 WL 4091546; see also, Dave Martella, *Defending the Land of the Free and the Home of the Fearful: The Use of Classified Information to Deport Suspected Terrorists*, 7 Am. U. J. INT’L L. & POL’Y 951 (1992). The strangest case may be that of six Iraqi Kurds who participated in a failed CIA-backed attempt to overthrow Saddam Hussein and were brought to the U.S. in 1997 by the U.S. government. When they arrived, the INS tried to exclude them on the basis of secret evidence that, initially, it would not even reveal to their lawyer, former CIA director James Woolsey. After several years in detention, five of them entered into a settlement agreement under which they are living in Nebraska under conditions resembling house arrest while they look for third countries which will accept them. One refused to accept the settlement and remains incarcerated. See Andrew Cockburn, *The Radicalization of James Woolsey*, N.Y. TIMES MAG., July 23, 2000 at 26, 29 (quoting Woolsey’s characterization of the evidence, when he was finally allowed to see it as “a joke”); see also Dempsey and Cole, *supra* note 65, at 136-137; Akram, *supra* note 86 at 78. These cases, while illustrating the dangers of secret evidence, appear to be more reflective of bureaucratic bungling than systematic harassment of the Arab American community.

1. *The Background: Rafeedie v. INS and American-Arab Anti-Discrimination Committee v. Reno.*

The precursors to current secret evidence cases are *Rafeedie v. INS*<sup>97</sup> and the 9<sup>th</sup> Circuit's decision in *American-Arab Anti-Discrimination Committee v. Reno* ("AADC").<sup>98</sup> The *Rafeedie* case involved three individuals of Palestinian descent, arrested upon their return from a two-week trip abroad. The INS tried to exclude them for attending a conference in Syria sponsored by a youth organization affiliated with the Popular Front for the Liberation of Palestine ("PFLP"). One was forced to leave and a second, a U.S. citizen, although detained by the INS, was not charged with any criminal violations. The third, 22-year-old Fouad Rafeedie, fought deportation.

Although Rafeedie was a permanent resident, the INS treated the case as a summary exclusion proceeding. Thus, no hearing was held and no evidence was provided, in open court or on the record. The INS claimed that revealing its evidence would be "prejudicial to the public interest, safety, or security of the United States."<sup>99</sup> The D.C. Circuit rejected the INS' use of secret evidence and refused to hear it *in camera*. On remand, the District Court held for Rafeedie using the *Mathews v. Eldridge*<sup>100</sup> test to weigh his due process rights against the government's national security concerns.<sup>101</sup> The D.C. Circuit Court summarized the INS' approach as follows:

Rafeedie – like Joseph K. in *The Trial* – can prevail . . . only if he can rebut the undisclosed evidence against him, *i.e.*, prove that he is not a terrorist regardless of what might be implied by the Government's confidential information. It is difficult to imagine how even someone innocent of all wrongdoing could meet such a burden.<sup>102</sup>

This description aptly conveys the Kafkaesque nature of the procedures being used. It also illustrates how the notion that such proceedings comport with any kind of due process undermines the due process guarantees any of us have under the Fifth or Fourteenth Amendments.

In the on-going saga of the "LA 8," the INS tried to deport seven Palestinians and one Kenyan in 1987 by charging them "under various provisions of the McCarran-Walter Act of 1952 for membership in an organization . . . that allegedly advocates the doctrines of world communism."<sup>103</sup> In 1990, while the case was pending, these provisions of

97. 880 F.2d 506 (D.C. Cir. 1989); *remanded to* 795 F. Supp. 13 (D. D.C. 1992).

98. 70 F.3d 1045 (9<sup>th</sup> Cir. 1995). Following changes in the law resulting from IIRIRA and the AEDPA, the 9<sup>th</sup> Circuit later addressed jurisdictional and selective prosecution claims in *American-Arab Anti-Discrimination Committee v. Reno*, 119 F. 3d 1367 (9<sup>th</sup> Cir. 1997). This holding was overturned by the Supreme Court in *Reno v. American-Arab Anti-Discrimination Committee*, 525 U.S. 471 (1999), but neither of these two decisions addressed the secret evidence issue.

99. 688 F. Supp. 729, 734-35.

100. 424 U.S. 319 (1976).

101. 795 F. Supp. 13 (D. D.C. 1992).

102. 880 F.2d at 516.

103. *American-Arab Anti-Discrimination Comm. v. Reno*, 70 F.3d 1045, 1052-53 (9<sup>th</sup> Cir. 1995).

For a thorough examination of the development of this case from 1987 to 2000, see John A. Scanlan,

the McCarran-Walter Act were repealed,<sup>104</sup> and Congress replaced them with provisions to exclude individuals who “engage in terrorist activity.”<sup>105</sup> The INS then moved to deport the eight under these provisions. According to Susan Akram, “Stripped to their essence, the government’s charges amounted to a claim that the aliens read or distributed pro-Palestinian literature linked to the Popular Front for the Liberation of Palestine (“PFLP”). All eight denied membership in the PFLP.”<sup>106</sup> Through thirteen years of litigation, the government never alleged that the LA 8 were engaged in any terrorist activity, supported any unlawful activities of the PFLP, or committed any crime.<sup>107</sup> In addressing the INS’ use of secret evidence in these cases, the 9<sup>th</sup> Circuit concluded,

Because of the danger of injustice when decisions lack the procedural safeguards that form the core of constitutional due process, the *Mathews* balancing suggests that use of undisclosed information in adjudications should be presumptively unconstitutional. Only the most extraordinary circumstances could support one-sided process.<sup>108</sup>

*Rafeedie* and *AADC* are important cases because they illustrate that the federal courts, when given the opportunity, have recognized that the government’s procedures undermine the functioning of the adversarial system. However, before we breathe a sigh of relief, we must note that their impact has been significantly limited by the Supreme Court’s recent decision in *Reno v. American-Arab Anti-Discrimination Committee*,<sup>109</sup> which interpreted provisions of the 1996 Act (IIRIRA) to dramatically limit judicial review. This is problematic because the INS continues to use secret evidence in deportation cases, as illustrated by the cases below.

## 2. *The INS’ Continuing Use of Secret Evidence.*

Nasser Ahmed, an Egyptian father of four U.S. citizen children, spent more than three and a half years in prison, most of it in solitary confinement, until the Board of Immigration Appeals (“BIA”) decided in November 1999 that he posed no threat to national security.<sup>110</sup> He was not charged with a crime, but with routine charges of overstaying his visa. Nonetheless, the INS detained him and attempted to deport him on the basis of secret evidence. For the first year, the government would not even provide Ahmed’s lawyer with a summary of the evidence; eventually they

*supra* note 85.

104. See Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(3) (1990).

105. 8 U.S.C. sec 1182(a)(3)(B)(iii) defined this to mean committing, either as an individual or as a member of an organization, an act of terrorist activity or an act which the person knows or should know provides material support to any individual, organization, or government conducting a terrorist activity at any time. It thus reaches anyone who solicits funds for any organization thus defined.

106. Akram, *supra* note 86, at 73.

107. See Dempsey and Cole, *supra* note 65, at 34.

108. 70 F.3d 1045, 1070 (9<sup>th</sup> Cir. 1995).

109. 525 U.S. 471 (1999); see also Maryam Kamali Miyamoto, *The First Amendment after Reno v. American-Arab Anti-Discrimination Committee: A Different Bill of Rights for Aliens?*, 35 HARV. C. R.-C.L. L. REV. 183 (2000).

110. Cole Statement, *supra* note 96; see also Akram, *supra* note 86, at 76; Douglas Montero, *U.S. Secret Evidence Law Terrorizes Innocent Arabs*, N.Y. POST, Jan. 9, 2000 at 22, available at 2000 WL 3899244.

provided a one-line summary which baldly asserted that it had evidence “concerning respondent’s association with a known terrorist organization,” but would not identify the organization.<sup>111</sup>

It turns out that Ahmed came to the FBI’s attention when he worked as a court-appointed paralegal and translator for the defense team of Sheik Abdel Rahman, who was charged with seditious conspiracy. The FBI and INS tried to get Ahmed to inform on the cleric and threatened to deport him and his family if he did not cooperate. Ahmed refused and the INS made good on its threat. Despite the fact that the immigration judge had “no doubt” that Ahmed would be imprisoned and likely tortured if he returned to Egypt, and was thus eligible for political asylum, he was released by the BIA only after the government was eventually forced to reveal its evidence, which consisted only of his “associations.”<sup>112</sup>

Mazen al-Najjar also spent the last three and a half years in custody on the basis of secret evidence. Al-Najjar is the father of three U.S.-born children and the son of U.S. citizen parents. He is a Florida resident of 19 years and an editor of a research journal affiliated with the University of South Florida. Like Ahmed, he was not charged with any criminal activity, and the only evidence against him appeared to be his otherwise constitutionally protected political associations.

According to Dempsey and Cole, shortly after al-Najjar’s arrest, “federal officials approached two people who knew al-Najjar and said they would release him in exchange for information about others in the community, suggesting that the government did not really believe that al-Najjar posed a threat to national security.”<sup>113</sup> The immigration judge initially ordered al-Najjar deported to the United Arab Emirates and his wife to Saudi Arabia, even though neither country had agreed to accept them. Al-Najjar eventually despaired of obtaining justice and told the INS he would agree to be deported to Guyana, which had agreed to accept him. “However, the INS opposed the request, and the U.S. government reportedly pressured Guyana to revoke the visa, suggesting that the government’s goal [was] in fact to keep al-Najjar in jail without the inconvenience of pressing criminal charges.”<sup>114</sup> Finally, in October 2000, an immigration judge ordered an “open evidence” hearing and found that al-Najjar was not, in fact, a threat to national security and he was released in December.<sup>115</sup>

Georgetown law professor David Cole has represented thirteen individuals in secret evidence deportation cases. In February 2000 he testified before a subcommittee of the House Judiciary Committee that:

---

111. Dempsey and Cole, *supra* note 65, at 129.

112. *Id.* at 129-30.

113. *Id.* at 132.

114. *Id.*

115. *Secret Evidence Fails Again*, WASH. POST, Dec. 16, 2000 at A26. See also Susan Aschoff, *Testimony Describes Scrutiny of Al-Najjar*, ST. PETERSBURG TIMES, Feb. 21, 2001, at 3B, available at 2001 WL 6964082. As of this writing, Al-Najjar and his wife are before the Eleventh Circuit Court of Appeals, appealing deportation. See Susan Aschoff, *Reporting Terrorism Is A Duty, Says Long-Jailed Former Teacher*, ST. PETERSBURG TIMES, Mar. 1, 2001, at 4B, available at 2001 WL 6965542.

At one time, the INS claimed that all 13 posed a direct threat to the security of the nation, and that the evidence to support that assertion could not be revealed – in many instances could not even be summarized – without jeopardizing national security. Yet in none of these cases did the INS's secret evidence even *allege*, much less prove, that the aliens had engaged in or supported any criminal, much less terrorist, activity.<sup>116</sup>

These cases, which illustrate some of the problems associated with the identification of Arab Americans as “terrorists,” are reminiscent of the treatment of Asian Americans as the perpetual foreigners. Some of the parallels between the treatment of Arab Americans and Asian Americans can be seen if we look more closely at one of these secret evidence cases, *Kiareldeen v. Reno*.<sup>117</sup>

### 3. A Case Study: *Kiareldeen v. Reno*.

Hany Kiareldeen, a Palestinian, has lived in the United States continuously since 1990 when he entered from Israel on a student visa. His first marriage ended in a bitter divorce and an on-going custody dispute. Kiareldeen re-married in 1997 and his wife, a U.S. citizen, submitted a petition to adjust his status to that of legal permanent resident. In March 1998, without warning, he was arrested by INS and FBI officials and detained without bond while the government tried to deport him for overstaying his student visa. Kiareldeen conceded the overstay but sought both discretionary relief, based on his marriage, and mandatory relief, based on the political asylum provisions of the Immigration and Naturalization Act and the Convention Against Torture.<sup>118</sup>

The INS claimed that Kiareldeen should be imprisoned and deported because he was a “suspected member of a terrorist organization and a threat to national security.”<sup>119</sup> No evidence was ever presented in open court; any evidence the INS had was presented *ex parte* and *in camera* to the immigration judge. After more than a year, the judge granted Kiareldeen's petition for adjustment of status and allowed his release on bond. However, the INS appealed to the Board of Immigration Appeals which stayed his release. In October 1999 the BIA affirmed the decision to grant Kiareldeen permanent resident status and the INS again obtained a stay. Kiareldeen was never charged with violating any criminal laws; the INS did not call any witnesses from the FBI's Joint Terrorism Task Force which had allegedly provided the classified evidence; and he was not allowed to cross-examine his ex-wife, even though she appeared to be the only source of evidence against him.<sup>120</sup> Finally, after a year and a half in custody, the

---

116. Cole Statement, *supra* note 96. Summaries of various secret evidence cases can be found in Akram, *supra* note 87, at 73-81; Cole Statement, *supra* note 96; Dempsey and Cole, *supra* note 65, at 128-137; Lobe, *supra* note 96; Montero, *supra* note 110.

117. 71 F. Supp. 2d 402 (D. N.J. 1999) (granting writ of habeas corpus); 92 F. Supp. 2d 403 (D. N.J. 2000) (granting attorney's fees).

118. 71 F. Supp. 2d. at 404.

119. *Id.*

120. *Id.* at 416-17. Kiareldeen testified that in the course of bitterly contested custody proceedings with his ex-wife, she had him arrested six times on domestic violence charges, all of which were

New Jersey District Court ordered his release, holding that the INS' procedures violated Kiareldeen's constitutional right to due process.<sup>121</sup>

The district court's opinion illustrates how the current secret evidence deportation cases are, in many ways, an extension of the Asian American struggle for racial justice in this country, particularly the struggle against the racialized attribution of "disloyalty." First, the court noted that the INS, in seeking to establish that the use of secret evidence was constitutionally acceptable, relied on Congress' "plenary power" to exclude nonresident aliens from the United States. The INS invoked not only the landmark Cold War cases of immigration law — *Knauff v. Shaughnessy*<sup>122</sup> and *Shaughnessy v. Mezei*,<sup>123</sup> both of which involved secret evidence—but also the Chinese exclusion cases of the 1880s.<sup>124</sup> The District Court characterized the government's reliance on these exclusion cases as "somewhat disingenuous," finding them limited to initial entry and holding that resident aliens, like Kiareldeen, have greater due process rights. In support of this proposition, the court cited *Kwong Hai Chew v. Colding*,<sup>125</sup> in which the Supreme Court held that a resident seaman returning to the United States retained the due process protections guaranteed by the Fifth Amendment.

The INS then argued that even if Kiareldeen had due process rights, he had "forfeited" them by conceding that he had overstayed his visa. The court dismissed this by noting that the government's argument "ignores the axiomatic, constitutional premise that aliens, once legally admitted into the United States, are entitled to the shelter of the Constitution."<sup>126</sup> In support it relied on *Yick Wo v. Hopkins*,<sup>127</sup> an 1886 case that extended the protections of the Fourteenth Amendment to resident alien Chinese laundry owners.

We see from these aspects of the *Kiareldeen* case that the struggle over deportations in the Arab American community is being waged on turf that is very familiar to Asian Americans. Our history is one of fighting to remain in this country and to obtain the protections the Constitution purports to provide. We lost the battle against the Chinese Exclusion Act, and we see the government is still using those cases to exclude Arab Americans.<sup>128</sup> We also see some protection being gained from the

dropped for lack of evidence, and she had made allegations, none substantiated, that he had ties to Islamic groups and had threatened to bomb her car. *Id.* at 417.

121. *Id.* at 419.

122. 338 U.S. 537 (1950); see also Akram, *supra* note 86, at 62-63.

123. 345 U.S. 206 (1953); see also Akram, *supra* note 86, at 63-64.

124. See *Chae Chan Ping v. United States (Chinese Exclusion Case)*, 130 U.S. 581 (1889) (upholding the Chinese Exclusion Act). This case is the touchstone for the proposition that Congress' power to exclude aliens is virtually unlimited.

125. 344 U.S. 590 (1953).

126. 71 F. Supp. 2d. at 409.

127. 118 U.S. 356 (1886) (holding a San Francisco city ordinance which allowed brick laundries but prohibited wooden ones to discriminate against the Chinese in violation of the 14<sup>th</sup> Amendment).

128. While the district court is certainly right in its holding that Kiareldeen, as a long-term resident, has due process rights not accorded those initially seeking entry, we need to remember that the petitioners in the Chinese exclusion cases were permanent residents as well. See *Chae Chan Ping v. United States*, 130 U.S. 581 (1889) ("Chinese Exclusion Case") (upholding the exclusion of a Chinese laborer who lived in San Francisco for 12 years, obtained a certificate required by law as evidence of

precedents such as *Kwong Hai Chew* and *Yick Wo* that were established by our hard-fought struggles for due process and equal protection.

Having refused to allow the INS to treat Kiaraldeen as if he were simply showing up on our shores for the first time, the district court proceeded to address the INS' reliance on secret evidence. It looked at both the D.C. Circuit's decision in *Rafeedie*<sup>129</sup> and the 9<sup>th</sup> Circuit's decision in *AADC*,<sup>130</sup> discussed above, and concluded that the lesson to be drawn from these cases was that "the INS' reliance on secret evidence raises serious issues about the integrity of the adversarial process, the impossibility of defense against undisclosed charges, and the reliability of government processes initiated and prosecuted in darkness."<sup>131</sup> It held the use of secret evidence impermissible in Kiaraldeen's case and, refusing to presume that the BIA's decision would have been the same without the secret evidence, ordered Kiaraldeen released.<sup>132</sup>

The district court then granted Kiaraldeen attorneys' fees, primarily because of what it termed a "pattern of concealment and legal misdirection"<sup>133</sup> by the government. This is very similar to the district court's finding, in the 1984 case which vacated Fred Korematsu's conviction, that in the Japanese American internment cases "the government deliberately omitted relevant information and provided misleading information" to the Supreme Court.<sup>134</sup>

Throughout the proceedings in *Kiaraldeen*, the INS did not produce original source material or live witnesses to support its allegations of terrorism, despite repeated requests from the immigration judge.<sup>135</sup> The District Court agreed with Hany Kiaraldeen that the failure of the INS and the FBI to provide any detailed information to the Board of Immigration Appeals "disabled the Board from meaningfully exercising its discretion,"<sup>136</sup> asking it instead to "accept the allegations as proven, based solely upon the FBI's statement regarding the credibility of the source of the classified information."<sup>137</sup>

The parallels to the Japanese American internment cases are striking.

his right to re-entry, went to China for a visit, and returned shortly after the enactment of a new law prohibiting all re-entry); *Fong Yue Ting v. United States*, 149 U.S. 698 (1893) (allowing the deportation of a permanent resident for failure to produce a certificate of residence as required by an 1892 law, even though his failure to obtain the certificate was due to his inability to obtain the testimony of a "credible white witness").

129. 880 F.2d 506 (D.C. Cir. 1989); *remanded to* 795 F. Supp. 13 (D.D.C. 1992).

130. 70 F.3d 1045 (9<sup>th</sup> Cir. 1995). See *supra* note 98.

131. 71 F. Supp. 2d at 413.

132. *Id.* at 414.

133. *Kiaraldeen v. Reno*, 92 F. Supp. 2d 403, 409 (2000).

134. *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (1984). The court also noted that Justice Department officials knew at the time that the military's report contained "willful historical inaccuracies and intentional falsehoods." See also *Hirabayashi v. United States*, 828 F.2d 591, 603-604 (1987) (noting the suppression of evidence which would probably have "profoundly and materially affected" the Supreme Court's 1943 decision); *Hohri v. United States*, 782 F.2d 227, 246 (D.C. Cir. 1986), *vacated on jurisdictional grounds*, 482 U.S. 64 (1987) (holding that the government's fraudulent concealment tolled the statute of limitations with respect to Hohri's takings clause claims).

135. 1 F. Supp. 2d at 417-18.

136. *Id.* at 418.

137. *Id.*

There, as Rostow noted, the Court simply accepted at face value the government's declaration of "military necessity," engaging in no meaningful judicial review.<sup>138</sup> Here, the same process is at work, albeit on a more individualized scale. Executive agencies of the government (in this case the INS and the FBI, rather than the military) are asserting their right to decide unilaterally that certain persons, identified initially by national origin, ethnicity or religious affiliation, but often singled out due to their otherwise lawful political or social affiliations, are a danger to "national security." These persons are targeted for deportation and detained indefinitely on the basis of evidence, if it can be called such, that the government is not willing to disclose to the courts. Yet the courts are asked to uphold these measures as constitutional without being able to conduct any meaningful review.

The district court in *Kiareldeen* and other courts have acted to curb some of these problems, but the INS continues to use secret evidence. Indeed, the government contended that Kiareldeen should not be granted attorneys' fees because he had not "achieved the benefits sought," *i.e.*, because the INS had not changed its legal position as a result of the lawsuit and continues to detain people on the basis of secret evidence.<sup>139</sup>

Further, as Akram notes, "While the lower courts and circuit courts in the LA 8 and Rafeedie cases substantially curbed the INS' ability to use various [Immigration and Nationality Act] provisions to deport or exclude on ideological grounds, the passage of AEDPA and IIRIRA has seriously eroded the courts' power to provide such checks in the future."<sup>140</sup> In its recent decision in the LA 8 case, *Reno v. American-Arab Anti-Discrimination Committee*,<sup>141</sup> the Supreme Court, while not addressing the issue of secret evidence, dramatically limited the jurisdiction of the courts to review deportation decisions at all. Dempsey and Cole explain:

The Court ruled both that Congress had cut off all access to courts for such [selective deportation] claims in a 1996 immigration law [IIRIRA], and that in any event aliens have no constitutional right to object to being targeted for deportation based on activities that would clearly be protected by the First Amendment if engaged in by United States citizens.<sup>142</sup>

This means that the practices of the INS in cases like *Kiareldeen*, *Rafeedie*, and *AADC* will continue unless checked in some other way.<sup>143</sup>

### C. Internment Logic

Each of these secret evidence deportation cases is a human tragedy. Families are torn apart, careers ruined, years lost. A number of individuals are still in custody and no one knows who will be next. Hany Kiareldeen

---

138. Rostow, *supra* note 29, at 491 (noting that the Supreme Court "has upheld an act of military power without a factual record in which the justification for the act was analyzed.").

139. *Kiareldeen v. Reno*, 92 F. Supp. 2d 403, 407.

140. Akram, *supra* note 86, at 75-76.

141. 525 U.S. 471 (1999).

142. Dempsey and Cole, *supra* note 65, at 3.

143. Congress did hold hearings on a secret evidence bill this year, but no action was taken. *See infra* note 157 and accompanying text.

was finally released this year, but he still suffers from flashbacks and depression. His ex-wife, apparently the source of the “secret evidence” did not let him see his daughter the entire time he was imprisoned, and he is now unable to find her at all.<sup>144</sup>

These cases pose larger problems as well. In them we see the dangers Eugene Rostow perceived in the *Korematsu* and *Hirabayashi* cases being played out, again, right before our eyes. Let us apply Rostow’s distillation of the propositions endorsed by the Supreme Court in the Japanese American internment cases,<sup>145</sup> his analysis of the “wrong,” to the Arab American deportation cases:

(1) *protective custody, extending over three or four years, is a permitted form of imprisonment in the United States:* while not labeled “protective custody,” the government maintains that detention pending deportation is not “punishment”<sup>146</sup> and it regularly keeps “detainees” imprisoned for at least that long;<sup>147</sup>

(2) *political opinions, not criminal acts, may contain enough clear and present danger to justify such imprisonment:* petitioners in these cases have almost all been targeted based on their association, however tenuous, with political organizations; they have not even been charged with crimes;<sup>148</sup>

(3) *men, women and children of a given ethnic group, both Americans and resident aliens can be presumed to possess the kind of dangerous ideas which require their imprisonment:* the widespread association of Muslims and those of Arab ancestry, whether U.S. citizens or not, with “terrorism” is just the sort of presumption Rostow was describing;<sup>149</sup>

(4) *in time of war or emergency the military, perhaps without even the concurrence of the legislature, can decide what political opinions require imprisonment, and which ethnic groups are infected with them:* rather than the military, in this case we have the INS, in conjunction with the FBI, deciding which expressions of speech or association deserve imprisonment and who is “infected” with them, and this is being done not even in time of war or declared national emergency, but by exploiting the fear created by relatively random, unrelated acts of violence;<sup>150</sup> and

(5) *the decision of the military can be carried out without indictment, trial, examination, jury, the confrontation of witnesses, counsel for the defense, the privilege against self-incrimination, or any of the other*

144. Montero, *supra* note 110.

145. See Rostow, *supra* note 29, at 532.

146. The majority in *Fong Yue Ting* held that an “order of deportation is not punishment for crime.” 149 U.S. 698, 730 (1893). In *Wong Wing v. United States*, the Court said, “We think it clear that detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid,” but struck down a provision of the 1892 exclusion statute that provided for “imprisonment at hard labor” without trial by jury for those found to be in the country illegally. 163 U.S. 228, 235 (1896).

147. Kiareldeen was held for over 3 years; the LA 8 have been held for over 13 years. See *supra* notes 110-121 and accompanying text.

148. See Cole Statement, *supra* note 96.

149. See *supra* notes 63-83 and accompanying text.

150. See Scanlan, *supra* note 85, at 363.

*safeguards of the Bill of Rights*: this is exactly what is happening in summary exclusion proceedings and even those petitioners who manage to obtain hearings cannot meaningfully exercise any of these rights when the government's case is based on secret evidence.

Viewed in this light, it appears that Rostow's "five propositions of the utmost potential menace" are a frighteningly accurate description of the current situation, and a disturbing reminder that the wrongs of the Japanese American internment really have not been righted. The government is still subverting our civil rights and undermining the safeguards of judicial review by tapping into race-based fears and playing the "national security" trump card. Susan Akram says:

The use of secret evidence in deportation proceedings is the most powerful tool in an apparently systematic attack by U.S. governmental agencies on the speech, association and religious activities of a very defined group of people: Muslims, Arabs, and U.S. lawful permanent residents of Arab origin residing in this country. Evidence emerging from these cases indicates that the government is spending thousands of U.S. taxpayer dollars on prosecuting and attempting to deport Arabs and Muslims under the rubric of "terrorism," when the "classified evidence" used to charge them is apparently nothing more than hearsay, innuendo, and, at most, guilt by association. Using secret evidence to deport Arabs and Muslims appears to be the latest manifestation of a war waged by various government agencies against these ethnic and religious groups; a war waged ostensibly to combat "terrorism" but which raises the disturbing specter of ideological bias.<sup>151</sup>

Can we let this happen and still believe that redress for the Japanese American internment has any real meaning?

#### V. CONCLUSION: CONTESTING THE SYMBOLISM OF REDRESS

After a thoughtful study of the legislative intent underlying the Civil Liberties Act of 1988, University of Hawai'i law professor Chris Iijima cautions us that the ultimate effect of Japanese American redress may not be to repair the harm caused by the internment. Instead, he warns that it may become "a return to original humiliation" if we allow it to reinforce the "ideology of acquiescence"<sup>152</sup> rather than resistance to injustice. Reparations for the Japanese American internment accomplished much that was important to the individuals involved, to the community, and to a broadening of "official history." And yet, as we have seen in the discussion above, it has not thus far created institutional change that will prevent such abuses from happening again. The redress received was clearly symbolic. No governmental proclamation fifty years after the fact or token payment of money can compensate for the families torn apart, property confiscated, communities scattered, psyches scarred, lives lost. But just what does it symbolize? This is what we are in the process of contesting and as we contest it we become, in Mari Matsuda's words, the

---

151. Akram, *supra* note 86, at 52-53 (citation omitted).

152. Iijima, *supra* note 21, at 385.

“authors” of the internment.<sup>153</sup>

Iijima makes a convincing case that it was Congress’ intent in passing the Civil Liberties Act to reward the “superpatriotism” of the Japanese Americans, illustrated by their co-operation with the internment and the extraordinary accomplishments of the all-*nisei* combat units. He quotes as typical the statement of Congressman Yates who noted the difficulties of the internment and concluded that:

[T]his should have been enough to kill the spirit of a less responsible group of people. But the reply from the Japanese parents was to [send] their children out from behind the wire fences . . . to fight the Nazis and the armed forces of their ancient homeland.<sup>154</sup>

From this perspective, redress was “deserved” because Japanese Americans were both heroic and stoic, because they went along with the program and proved their loyalty. In other words, we have been rewarded for accommodating the wrong. If this is not what Congress was doing, why haven’t those who recognized the wrong at the time, who spoke the truth and stood up for it at great personal cost, been honored? The resisters, and there were many,<sup>155</sup> still have not been properly recognized. Iijima notes,

There is a particular irony about the debate on the redress bill. While there was general agreement, at least rhetorically, on the injustice of the internment, . . . [t]hose who, at the time of internment, saw it for the injustice and outrage that it was and chose to dissent continue to be silenced and unheralded even during the process of acknowledging their prescience.<sup>156</sup>

This interpretation of Japanese American reparations – the rewarding of acquiescence rather than the righting of wrongs – seems to accurately capture not only Congress’ intent in passing the Civil Liberties Act, but also the reason why the mainstream narrative is so readily accepted. Rather than alarming people about the dangers lurking in our political and judicial structures, it comforts them with the notion that oppressed minorities can accommodate injustice.

If this is the symbolism that ultimately attaches to Japanese American redress, it will serve to divide Japanese Americans (and by extension other Asian Americans) from other communities of color, reinforcing the “model minority” myth that says to African Americans and Latinos, “look, they made it against all odds and were even polite in the process; why can’t you?” It will also mask the on-going abuses of power perpetrated by the government against racially identified groups in the name of “national security.” If we allow virtually the same wrong to be committed with impunity against Arab Americans today, we will have lost the Japanese American reparations battle altogether. A check and a letter fifty years after the fact mean nothing if they are not symbolic of changes in the

153. See Matsuda, *Foreword*, *supra* note 1.

154. Iijima, *supra* note 21, at 397, citing 13 CONG. REC. H7582 (Daily Ed. Sept. 17, 1987) (note the “model minority” imagery evoked by his reference to “a less responsible group of people”). See also generally, Saito, *Model Minority, Yellow Peril*, *supra* note 51.

155. See Iijima, *supra* note 21, at 402-404.

156. *Id.* at 394.

system which created the wrong in the first place.

We began with the commonly held belief that redress for the internment of Japanese Americans has almost been completed. We see, instead, that much remains to be done. First, we must take it upon ourselves to learn what is really happening, even if it appears to be happening to “someone else.” We must name the wrongs we see by their proper and truthful names; we must insist on meaningful redress. Those of us who grew up hearing about the internment remember stories of the white neighbor families who stood by, many sympathetic, even sad, watching silently as our families were herded onto trucks by soldiers with bayonets. We must not become those silent observers.

In addition to speaking out about the continuing abuses of civil liberties, we need to analyze and articulate meaningful avenues of recourse which would institutionalize the changes implicit in the granting of reparations. Where do we start with this process? First, we can actively push for passage of the proposed legislation banning the use of secret evidence.<sup>157</sup> In addition, we can also look to the three suggestions with which Eugene Rostow ended his 1945 critique of the internment cases. First, he said that we should ensure that the federal government protect the civil rights of Japanese Americans against organized and unorganized hooliganism. Second, he proposed generous financial indemnity. And finally, he advocated presenting the basic issues to the Supreme Court again in an effort to obtain a reversal of the internment cases.<sup>158</sup>

An aggressive campaign by the federal government to protect the civil rights of Arab Americans and Muslims would make a world of difference. If it were followed by “generous financial indemnity” for the losses suffered by INS detainees and others harmed by anti-Arab sentiment, and then by cases declaring the underlying propositions identified by Rostow unconstitutional, we would be well on the way to lasting structural change. That would give real meaning to our redress; not just for Japanese Americans or for those who are the current targets of similar governmental abuse, but for everyone who looks to the Constitution for protection.

The current abuses of the civil and political rights of Muslims and Arab Americans must be addressed *now* by all who value the protections the Constitution purports to provide; for by definition, those who are the targets of the abuse are the least likely to be heard. Asian Americans are particularly well-situated to recognize and identify discrimination based on race, national origin, ethnicity and religion, for we have lived a parallel history. Further, Japanese Americans have a particular responsibility, I believe, to name these on-going wrongs and to oppose them, for not only are we the beneficiaries of a redress movement which claims to have stopped such abuses, but we are the ones best situated to make that redress

---

157. On Oct. 17, 2000 the House Judiciary Committee reported favorably on H.R. 2121, entitled Secret Evidence Act of 2000, a bill “to ensure that no alien is removed, denied a benefit under the Immigration and Nationality Act, or otherwise deprived of liberty, based on evidence that is kept secret from the alien.” [H.R. Report 106-981].

158. Rostow, *supra* note 29, at 533.

live up to its potential. We are now, by our action or inaction, the authors of the internment.

