Alienable Citizenship: Race, Loyalty and the Law in the Age of 'American Concentration Camps,' 1941—1971

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I. INTRODUCTION: CONCENTRATION CAMPS AS A LEGAL BORDERLAND

> [No person shall] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> Constitution of the United States, Amendment V

> Whenever there shall be in existence ... an [internal security] emergency, the President, acting through the Attorney General, is hereby authorized to apprehend and by order detain ... each person as to whom there is reasonable ground to believe that such person probably will engage in, or probably will conspire with others to engage in, acts of espionage and sabotage.
>
> *Emergency Detention Act* § 103(a) (1950)

For two decades during the early Cold War period, the U.S. government had legal authority to detain citizens without due process. On September 23, 1950, Congress passed the Emergency Detention Act (Title II of the Internal Security Act of 1950).[1] The Emergency Detention Act (or "Title II") authorized the President to proclaim the existence of an "internal security emergency" in the event of war, invasion, or insurrection in aid of

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1. Internal Security Act of 1950, ch. 1024, 64 Stat. 987 (codified as amended in scattered sections of 50 U.S.C.); Emergency Detention Act of 1950, ch. 1024, § 102, 64 Stat. 1019, *repealed by* Non-Detention Act, Pub. L. No. 92-128, §2(a), 85 Stat. 348 (1971) (codified as amended at 18 U.S.C. § 4001 (2000)).

a foreign enemy.[2] Upon such a declaration, the Attorney General was authorized to apprehend and detain any person who the government believed probably would engage in espionage or sabotage.[3] Pursuant to Title II, the Department of Justice constructed six detention camps in 1952.[4] The law was officially repealed in 1971.[5]

Title II was one of numerous laws reflecting the federal government's attempts to control national and internal security threats at the expense of civil liberties.[6] The statute, however, had a characteristic that distinguished it from other pieces of legislation that restricted citizens' liberty for the nation's security: Title II embodied the idea of preventive detention.

Preventive detention logically contradicts the Fifth Amendment, which prohibits the deprivation of individual liberties without due process.[7] It restricts individual freedom based on future actions such persons might take that would threaten national security. It differs from criminal punishment, which is based on criminal activity that has already taken place. In preventive detention, an individual is not tried beyond a

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2. Emergency Detention Act § 102.

3. *Id.* § 103(a).

4. CHARLES R. ALLEN, CONCENTRATION CAMPS, USA 7 (1966), *reprinted in Hearings Relating to Various Bills to Repeal the Emergency Detention Act Before the H. Comm. on Internal Security*, 91st Cong. 3369 (1970) [hereinafter *Hearings*].

5. *See generally* William R. Tanner & Robert Griffith, *Legislative Politics of 'McCarthyism': The Internal Security Act of 1950*, *in* THE SPECTER: ORIGINAL ESSAYS ON THE COLD WAR AND THE ORIGIN OF MCCARTHYISM 172-89 (Robert Griffith & Alan Theoharis eds., 1974) (summary of the Internal Security Act legislative process); Masumi Izumi, Japanese American Internment and the Emergency Detention Act (Title II of the Internal Security Act of 1950), 1941—1971: Balancing Internal Security and Civil Liberties in the United States (2004) (unpublished Ph.D. dissertation, Doshisha University) (on file with author) (detailed history of the passage and repeal of the Emergency Detention Act).

6. The question of how to balance individual freedom and internal security has been discussed in the United States since its birth. The U.S. Constitution Article III, Section 3 defines treason as "levying war" against the United States or "in adhering to their enemies, giving them aid and comfort," making such acts punishable. In 1798, Congress passed the Alien and Sedition Acts, which made it illegal for any person to write, print or publish "any false, scandalous and malicious writing . . . against the government of the United States, or either house of the Congress . . . or the President." Alien Act of July 6, 1798, ch. 58, 1 Stat. 570 (current version at 50 U.S.C. §§ 21-24 (2000)); Sedition Act of July 14, 1798, ch. 74, § 2, 1 Stat. 596, 596-97 (expired 1801). During the Civil War, President Lincoln suspended the privilege of habeas corpus and ordered that those citizens engaging in or contemplating "treasonable practices" should be arrested and detained. In 1917, Congress passed the Espionage Act, which banned statements impeding the draft, promoting military insubordination, or conveying false statements with the intention to interfere with military operations. Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217 (repealed 1948). In 1918, the Sedition Act made it unlawful to "incite mutiny or insubordination in the ranks of the armed forces," to use "disloyal, profane, scurrilous, or abusive" language to describe the government, the Constitution, the flag, and the military uniform, or "by word or act oppose the cause of the United States." Sedition Act of 1918, ch. 75, 40 Stat. § 553 (repealed 1948). The 1940 Smith Act made it a crime to teach or advocate the overthrow of the government by force or violence. Alien Registration Act of 1940, 18 U.S.C. § 2385 (2000).

7. *See* BERNARD SCHWARTZ, A COMMENTARY ON THE CONSTITUTION OF THE UNITED STATES: PART I, THE POWERS OF GOVERNMENT 117 (1963).

reasonable doubt, the principal guideline for due process in criminal trials. It also differs from military tribunals or enemy combatant cases because the apprehension involves civilians who are not necessarily involved in military or pseudo-military actions. Finally, preventive detention requires special detention facilities, or concentration camps, to house those who are apprehended, instead of prisons that jail people found guilty and sentenced in criminal trials.

In the legal landscape, preventive detention lies at the outer edge of constitutional protection of civil liberties. The legitimacy of detention depends heavily on the government's discretion, and is acceptable, if ever, only when there is grave danger to national or internal security. Political scientist David Campbell points out that "for the state, identity can be understood as the outcome of exclusionary practices in which resistant elements to a secure identity on the 'inside' are linked through a discourse of 'danger' with threats identified and located on the 'outside.'"[8] In preventive detention, a discourse of danger places the detainees outside the constitutional realm, and thus justifies their detention before they conduct any illegal actions, notwithstanding Fifth Amendment protection. Thus, preventive detention is a useful site to examine American identity, which Campbell argues is "performatively constituted" through the inscription of boundaries that "demarcate an 'inside' from an 'outside,' a 'self' from an 'other,' a 'domestic' from a 'foreign.'"[9]

To see how the concept of citizenship can be manipulated through the construction of physical or potential concentration camps, this paper looks at the connections between three historical moments of national crisis: the internment of Japanese Americans during World War II, the passage of Title II in 1950, and the repeal of Title II in 1971. The construction of concentration camps for Japanese Americans not only deprived the inmates of their civil liberties, but also became an entrée for the creation of a concentration camp law, authorizing the government to detain any person it thought might be disloyal to the nation. A careful analysis of rhetorical connections between internment and Title II reveals that the former shifted America's discursive national border, from nationality to race, and then to loyalty.[10] Preventive detention and its physical embodiment—concentration

8. DAVID CAMPBELL, WRITING SECURITY: UNITED STATES FOREIGN POLICY AND THE POLITICS OF IDENTITY 68 (1998).

9. *Id.* at 69.

10. This article adopts a constructionist view of history, and thus focuses on how a particular set of language produces knowledge, shapes meaning, and influences social practice. Constructionism frees us from being concerned with the intentionality of historical actors and helps us focus on the relationship between one action and another by looking at power and practice of representation. Michel Foucault once said, "People know what they do; they frequently know why they do what they do; but what they don't know is what what they do does." HUBERT L. DREYFUS & PAUL RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 187 (2d. ed. 1983). Adopting the

camps—constitute a legal borderland in which certain individuals are marked as insiders, or true citizens who deserve constitutional protection, while others are branded as outsiders whose citizenship rights can be voided despite their American nationality. This study also demonstrates that the boundary is murky and fluid, shifting between different categories depending on the political context of the time.

A genealogy of Title II reveals that lawmakers modeled this legislation after laws promulgating Japanese American internment. An analysis of the connection between these two initiatives elucidates the complex ways in which the legacy of internment shaped Americans' perception of Title II.[11] Internment was an unprecedented military measure as it rounded up potentially disloyal civilians and put them in camps without trials. The military's internment of all persons of Japanese ancestry on the West Coast indicated that race marked the border between enemies and citizens. By detaining American citizen Nisei (second generation Japanese Americans born in the United States) along with alien Issei (first generation Japanese American immigrants), internment posed a peculiar problem regarding the national boundary vis-à-vis the question of whose constitutional rights were sacrosanct and whose were violable. Internment made it clear that legal nationality did not guarantee constitutional protection of civil liberties. When the policy was legally challenged, however, the Court, in the process of upholding the government's argument on military necessity, shifted the rationale for internment from racial discourse to the discourse of loyalty.[12] This loyalty rationale, in turn, opened the door to another type of human rights violation based on the category of loyalty and again excluded citizens from constitutional protection.

In 1950, when Congress passed Title II, lawmakers were aware of the injustice involved in mass incarceration based on race or ancestry.

Foucaultian method of discourse analysis, this article analyzes what the usage of such terms as "loyalty," "American," and "un-American" does within specific political and historical contexts, rather than trying to fix the definitions of these terms.

11. A few works in the past have assessed the connection between internment and McCarthyism, but no work so far has analyzed in detail the direct rhetorical linkage between internment and Title II. *See generally* Allan Wesley Austin, *Loyalty and Concentration Camps in America: The Japanese American Precedent and the Internal Security Act of 1950*, *in* LAST WITNESSES: REFLECTIONS ON THE WARTIME INTERNMENT OF JAPANESE AMERICANS 264 (Erica Harth ed., 2001); Mari J. Matsuda, *McCarthyism, the Internment, and the Contradictions of Power*, 19 B.C. THIRD WORLD L.J. 9, 9-36 (1998). Austin rightfully explains how Title II was modeled after the internment, but his assessment of the connection between Title II and internment is simplistic: "Ideology simply replaced 'race' as the basis for determining group disloyalty." Austin, *supra*, at 264. Matsuda points out the similarities between rhetorical maneuvering of the labels used to describe the "enemies" in the internment and McCarthyism. Matsuda's article, however, does not touch upon the direct connection between the internment and Title II.

12. Three cases went to the Supreme Court regarding the constitutionality of Japanese American internment. *See infra* note 50 and accompanying text.

Detaching the concept of loyalty from that of race and nationality, Congress legalized the construction of concentration camps in which citizens could be detained on the basis of the federal government's suspicion about their future involvement in subversive activities. During the late 1960s, Americans again debated Title II and collectively decided that concentration camps did not comport with American legal norms. Japanese Americans led the campaign to repeal Title II, which was crucial for the passage by Congress in 1971 of the "Non-Detention Act" that prohibited preventive detention of citizens.[13]

This history needs to be told particularly at the present moment, when the United States is again experiencing serious anxiety about national security because of the "war on terrorism." The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (hereinafter "USA PATRIOT ACT")[14] grants the government a broad set of emergency powers that could restrict citizens' and aliens' civil liberties. These powers include: detention of aliens for an indefinite length of time;[15] investigation of banking, library, and merchandise purchase records;[16] and interception of personal communications.[17] Moreover, security tensions in the post-September 11th era resurrected the term "enemy combatant" as a category that allowed the government to detain people without due process.[18] Racial profiling, detention and deportation of unaccounted numbers of Middle Eastern immigrants, and the government's increasing appeal to patriotism reveal the fragility of civil liberties in times of crisis. The distinction between "us" and "them" is still based on race, nationality and loyalty.

II. DRAFTING THE EMERGENCY DETENTION ACT: WRITING A CONCENTRATION CAMP LAW

The Emergency Detention Act constituted Title II of the Internal Security Act of 1950, popularly known as the McCarran Act for its sponsor, Democratic Senator Patrick McCarran from Nevada. Title I of the McCarran Act, the Subversive Activities Control Act, required communist

13. Non-Detention Act of 1971, Pub. L. No. 92-128, 85 Stat. 347 (codified at 18 U.S.C. § 4001(a) (2000)). For more details about the repeal of Title II, *see generally* Masumi Izumi, *Prohibiting 'American Concentration Camps': Repeal of the Emergency Detention Act and the Public Historical Memory of the Japanese American Internment*, 74 PAC. HIST. REV. 165 (2005).

14. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8 U.S.C.).

15. *Id.* § 412 (describing the conditions of mandatory detention of suspected terrorists, while listing some limitations on indefinite detention in § 412(a)(6)).

16. *See id.* §§ 210, 215.

17. *Id.* § 214.

18. The current "enemy combatant" cases will be discussed in the conclusion of this paper. See discussion *infra* Part VI.

organizations to register with the Attorney General and tightened existing immigration and naturalization laws.[19] Title II, the Emergency Detention Act, allowed the government to detain those who it suspected might engage in espionage or sabotage, and authorized the government to build concentration camps on American soil. Congress passed the Internal Security Act by an overwhelming majority, overriding President Truman's veto.

Notwithstanding the statute's restrictions on individual freedom, Title II contained procedural safeguards that protected individuals from wrongful detention. For example, the Attorney General had to issue a warrant for apprehension before arrests were made.[20] Only officers of the Department of Justice could conduct the arrests.[21] Furthermore, persons apprehended would be confined in places of detention prescribed by the Attorney General, which assured control of the detention procedure by the Justice Department rather than the military.[22] After arrest, each apprehended person would be brought before a preliminary hearing officer, who would hear evidence and decide whether there was a probable cause for his or her detention pursuant to Title II.[23] The person would be detained only if the hearing officer decided there was probable cause.[24] Title II also established the Detention Review Board,[25] which was empowered to review a detention order upon a detainee's petition.[26] The board was authorized to revoke the detention order if it found no reasonable ground for detention.[27] It was also authorized to hear the claim for loss of income resulting from groundless detention and, if necessary, order compensation.[28] Finally, Title II provided judicial review for a detainee whose petition for release was

19. Title I of the Internal Security Act substantially widened the classes of aliens to be excluded from admission to the United States. Excluded classes were aliens who sought entry to engage in activities which would be prejudicial to the public interest or would endanger the welfare or safety of the United States; anarchists; members of a Communist organization or any totalitarian party; aliens who advocated world communism or totalitarianism; aliens who advocated, taught, wrote or published material advocating unconstitutional overthrow of the government of the United States; aliens who were affiliated with any organization that wrote or distributed material advocating unconstitutional overthrow of the government; or aliens who would likely engage in espionage and sabotage. Internal Security Act of 1950, ch. 1024, § 22, 64 Stat. 987, 1006-10 (1950).

20. Emergency Detention Act of 1950, ch. 1024, § 104(a), 64 Stat. 1019, 1022 (1950) (repealed 1971).

21. *Id.* § 104(b).

22. *Id.* § 104(c).

23. *Id.* § 104(d).

24. *Id.*

25. *Id.* § 105(a).

26. Emergency Detention Act of 1950, ch. 1024, § 109, 64 Stat. 1019, 1022 (1950) (repealed 1971).

27. *Id.* § 110(a).

28. *Id.* § 110(b).

rejected by the Detention Review Board.[29]

To understand the equivocal content of Title II, one needs to understand the context in which the law was passed as well as the political positions of its drafters. The drafters of Title II shared two traits: they were pro-administration liberals, and they were directly or indirectly involved in forming or administering Japanese American internment. The drafters of the Emergency Detention Act insisted that the legislation was an improvement over Japanese American internment.[30]

It should be noted that Congress passed Title II when a war with communist countries seemed imminent. Title II passed only a few months after the outbreak of the Korean War and the arrests of Julius and Ethel Rosenberg on atomic espionage charges. In 1948, nationalistic Republicans such as Richard Nixon and Karl Mundt, proposed a communist registration bill, but their effort did not get much support. By the summer of 1950, however, anti-immigration Western Democrats such as Senator Patrick McCarran, and anti-civil rights Southern Democrats such as Congressman John Rankin, had formed a conservative anti-administration coalition with Republicans like Nixon.[31] This conservative block in Congress proposed Title I, a stronger communist registration bill combined with restrictive immigration regulations.

Pro-administration liberals, along with President Truman, faced difficulty fending criticism that they were soft on communism. At the same time, they were concerned that conservatives were pushing forward restrictive anti-communist laws, which liberals thought would violate freedom of speech and thought. To counter the strong congressional demand for communist registration bills, the White House and pro-administration Senators proposed the emergency detention bill as an alternative to the conservative-backed measures.

It is also important to note that the drafters of Title II had been involved in creating or administering Japanese American internment. Multiple accounts suggest that the staff of Democratic Senator Paul H. Douglas of Illinois initiated the emergency detention concept.[32]

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29. *Id.* § 111.

30. *See* 96 CONG. REC. 11, 14,401, 14,419 (1950) [hereinafter *Senate Debate on Internal Security Act*].

31. Benjamin Fordham analyzed the voting patterns of senators for and against the Truman administration's policies. He divided the senators into five groups: (1) Liberal Democrats, (2) Western Democrats, (3) Southern Democrats, (4) Internationalist Republicans, and (5) Nationalist Republicans. Among these groups, Western Democrats, Southern Democrats and Nationalist Republicans tended to vote against the administration's domestic policies on civil liberties and civil rights, while Internationalist Republicans generally supported the administration's foreign policy. BENJAMIN O. FORDHAM, BUILDING THE COLD WAR CONSENSUS: THE POLITICAL ECONOMY OF U.S. NATIONAL SECURITY POLICY, 1949-1951 78-85 (1998).

32. Senator Herbert H. Lehman recalled two years after the passage of Title II that Senator Douglas's staff prepared the preliminary draft of the proposal, although it might "have come to Senator

Professors Cornelius Cotter and Malcolm Smith explained the origin of the detention bill as follows:

> The detention provisions which were embodied in the second part of S.4130 [emergency detention bill] reflected a week-end effort to produce an American counterpart to Defense Regulation 18B, under which the British, during the Second World War, arrested and preventively detained persons whose freedom was deemed by a high officer of state to endanger the national security. The bill's framers had a copy of the Regulation before them, and also drew upon the advice of Justice Department officials "who had something to do with the detention of Japanese-Americans" in the last war.[33]

Unfortunately, Cotter and Smith did not reveal the source of this information, so the identities of these Justice Department officials remain unknown.

On the other hand, Senator Douglas's memoirs mention two individuals whose involvement in the drafting of the Emergency Detention Act suggests a direct connection between the design of both Japanese American internment and Title II.

> Our progressive group immediately asked Joe Rauh and Frank McCulloch to draft an alternative [to the communist registration bill]. We did not want to take a purely negative position when some real danger to the nation was involved. The alternative we devised was a compulsory-detention law based on the system adopted by Great Britain in World War II....[34]

Frank McCulloch was a Chicago lawyer who, between 1949 and 1961, served as an administrative assistant to Senator Douglas. Joseph L. Rauh, Jr. was a civil liberties lawyer in Washington, D.C., and one of the founders of Americans for Democratic Action.[35] In February 1942, Rauh had advised Attorney General Francis Biddle concerning the constitutionality of Japanese American internment, along with two other prominent lawyers in the administration, Benjamin V. Cohen and Oscar Cox.[36] Shortly before President Roosevelt issued Executive Order 9066,[37]

Douglas from an outside source." Letter from Herbert H. Lehman to Ralph Barton Perry (Nov. 1, 1952) ("Internal Security Act" C79-44, Senate Legislative Files, Papers of Herbert H. Lehman) (on file with the Herbert H. Lehman Suite & Papers, Columbia University). *New Republic* reported that Senator Douglas "spent a weekend studying the problem and decided that the emergency-detention system by the British during the last war might be the answer." *Unwise, Unworkable,* NEW REPUBLIC, Sept. 25, 1950 at 7.

33. Cornelius P. Cotter & J. Malcolm Smith, *An American Paradox: The Emergency Detention Act of 1950*, 19 J. POL. 20, 21-22 (1957).

34. PAUL H. DOUGLAS, IN THE FULLNESS OF TIME: THE MEMOIRS OF PAUL H. DOUGLAS 306 (1972).

35. Interview by Niel M. Johnson with Joseph L. Rauh Jr., in Washington, D.C. (June 21, 1989) (Harry S. Truman Library), *available at* http://www.trumanlibrary.org/oralhist/rauh.htm.

36. Benjamin V. Cohen was one of the most influential policymakers in the Roosevelt administration during the New Deal. Oscar Cox was Assistant Solicitor General in 1942 and worked

Rauh, Cohen and Cox collectively reported to the Attorney General that military necessity might uphold the constitutionality of a mass exclusion of an ethnic group.[38] According to Rauh's account, months after they drafted the memorandum, Benjamin Cohen was in tears after seeing a newspaper picture of a Japanese American boy being relocated, suggesting that internment seriously distressed the lawyers.[39]

Senator Hubert H. Humphrey, another pro-administration Democrat, co-sponsored the Emergency Detention Act along with Democratic Senators Harley M. Kilgore (the bill's main sponsor), Paul Douglas, Herbert H. Lehman, William Benton, Frank P. Graham, and C. Estes Kefauver. Humphrey had firsthand experience dealing with the aftermath of internment. He was the mayor of Minneapolis during the war, and as such had helped the relocated Japanese Americans settle in the city. In early 1947, then-Mayor Humphrey welcomed Japanese Americans to Minneapolis and urged full Nisei participation in the city's civic activities.[40]

Given the fact that the drafters and sponsors of the emergency detention bill included people who had dealt with internment and were distressed by the incident, it is not surprising that the bill contained clauses designed to prevent a recurrence of such injustice. The text of Title II shows traces of ambiguity and dilemma liberals shared. Liberals were wary of the encroachment of governmental powers into individual liberties. Yet they needed to devise tough measures against domestic and international communism. Thus, liberals authored a concentration camp law, even though they detested the idea of preventive detention.[41] And they adopted the idea of preventive detention because of Japanese American internment. It was the very ambiguity about the constitutionality of internment that gave rhetorical justification for legalizing preventive detention of citizens in the postwar United States.

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closely with Cohen. Although Cohen was the principal author of the memorandum on the constitutionality of the internment, the document was signed by all three of them, reflecting Rauh's agreement with its content. WILLIAM LASSER, BENJAMIN V. COHEN, ARCHITECT OF THE NEW DEAL 261-65 (2002).

37. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942) (presidential order granting the military the authority to designate military zones from which any citizens and aliens could be excluded).

38. *See* PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 54 (1983); LASSER, *supra* note 36, at 261-65.

39. *See* IRONS, *supra* note 38, at 54-55; LASSER, *supra* note 36, at 262.

40. WAR AGENCY LIQUIDATION UNIT (formerly WAR RELOCATION AUTHORITY), U.S. DEP'T OF THE INTERIOR, PEOPLE IN MOTION: THE POSTWAR ADJUSTMENT OF THE EVACUATED JAPANESE AMERICANS 21 (1947).

41. *See* DOUGLAS, *supra* note 34, at 307.

III. THE LEGAL LEGACY OF JAPANESE AMERICAN INTERNMENT: INVENTION OF ENEMY NON-ALIENS AND A SHIFT IN THE DISCURSIVE NATIONAL BORDER

Liberal politicians designed Title II to provide legal protection of civil liberties when the government resorted to preventive detention of potential subversives during a national security emergency. While trying to look tough, liberals tried to minimize the encroachment of governmental powers into individual liberties. The drafters of Title II, therefore, looked into wartime incarceration of enemy aliens as they wrote the Emergency Detention Act, modeling the legislation after Japanese American internment.

In contrast to the wartime Congress in which there was virtually no opposition to internment, Congress in 1950 underwent heated discussions when Democratic senators introduced the emergency detention bill.[42] As Senator Douglas introduced the emergency detention bill to Congress, he compared it with both the conservative-backed communist registration bill and security measures taken during World War II:

> [T]he Kilgore [emergency detention] bill gives the President and Attorney General the positive assistance of statutory authority for our essential job with procedures clearly understood and to a lesser degree previously employed, in alien enemy internment and war relocation cases.[43]

Senator Douglas criticized the communist registration bill saying that it resembled "the blunderbuss" while the Emergency Detention Act was "more like that of a rifle" that accurately hit those who really threatened national security.[44] In Senator Douglas's view, the problem of the Japanese American internment lay precisely in the broad category of those who were detained:

> [I]f it is asserted that the Executive may be empowered under the Constitution to institute a detention program anyway, I can only repeat that it is far better to give it explicit authority to act, so that we know what it can do—and enact along with that authority the essential safeguards for individual freedom which are in the due-process provisions of this bill.[45]

Senator Douglas's comments reflect how liberals in 1950 viewed Japanese American internment as a problematic constitutional precedent. Internment was conducted by the military, which was delegated the power by Executive Order 9066.[46] Congress then granted the Executive "positive

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42. *See* MORTON GRODZINS, AMERICANS BETRAYED: POLITICS OF THE JAPANESE EVACUATION 325-48 (1949) (analysis of the congressional debate on the internment (or lack of it)).

43. *Senate Debate on Internal Security Act*, *supra* note 30, at 14, 419.

44. *Id.*

45. *Id.*

46. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

assistance of statutory authority"[47] for the order after its issuance via Public Law 503.[48] However, neither Executive Order 9066 nor Public Law 503 indicated specific procedures or limitations of military conduct. In fact, Executive Order 9066 authorized the Department of War to exclude people from designated military areas but did not mention detention.[49] One constitutional question was whether the military exceeded its authority by detaining Japanese Americans.

The Supreme Court cases on internment had to judge whether the military had legal authority to impose a curfew on and exclude all persons of Japanese ancestry from the West Coast, let alone detain them.[50] In *Hirabayashi v. United States*, Chief Justice Harlan F. Stone contended that the government's war power was "the power to wage war successfully," which extended to "every matter and activity so related to war as substantially to affect its conduct and progress."[51] In *Korematsu v. United States*, Justice Hugo L. Black used the same principle to justify the exclusion of Japanese Americans from the West Coast area.[52] In both cases the Court adopted a broad definition of the government's war power and upheld the convictions of Japanese American violators of curfew and exclusion orders. Seeing a problem in this precedent, supporters of the Emergency Detention Act emphasized the necessity of explicitly granting the statutory authority to the Executive to conduct preventive detention and clearly define its executive procedures. Even though the process would be different from normal due process in criminal cases, these procedures would have provided individuals with some safeguard from arbitrary detention.

Senator Douglas further compared the situation in internment with provisions of Title II. In response to his congressional opponent Homer Ferguson, a Republican Senator and one of the major sponsors of the communist registration bill, Senator Douglas opined:

What would the Senator [Ferguson] say of the detention of Japanese-Americans during the war, 70,000 of whom were American citizens? That detention was carried out merely on the basis of race and nationality, whereas the detention provided for in the Kilgore bill would be carried out, not on the basis of race or nationality but on the basis of demonstrated

47. *Senate Debate on Internal Security Act*, *supra* note 30, at 14,419.

48. Act of Mar. 21, 1942, ch. 191, Pub. L. No. 77-503, 56 Stat. 173.

49. *See* Exec. Order No. 9066, 7 Fed Reg. 1407.

50. Three Japanese Americans violated military orders and were arrested: Minoru Yasui from Portland, Oregon; Gordon Kiyoshi Hirabayashi from Seattle, Washington; and Fred Toyosaburo Korematsu from San Leandro, California. Their cases went to the Supreme Court. The Supreme Court affirmed the convictions of all three of them. Korematsu v. United States, 323 U.S. 214 (1944); Yasui v. United States, 320 U.S. 81 (1943); Hirabayashi v. United States, 320 U.S. 81 (1943).

51. *Hirabayashi*, 320 U.S. at 93.

52. *Korematsu*, 323 U.S. at 217-18.

actions likely to lead to acts of espionage or sabotage.[53]

As Senator Douglas pointed out, the most serious problem of World War II internment was that detention was based on racial lines. Nisei were excluded from military service, government jobs, and later expelled from their homes without charge. Furthermore, they were incarcerated in inland concentration camps, euphemistically called the War Relocation Centers, for a substantial duration of time. The incarceration of Nisei demonstrated that one's possession of legal citizenship/nationality did not guarantee the rights of citizenship. By excluding and interning Nisei American citizens along with Issei Japanese nationals, the government in effect created a new category of citizens, "enemy non-aliens," who held American nationality but whose citizenship rights could be annihilated.[54]

Legal scholar Linda Bosniak identifies four distinct discourses implicated in citizenship: citizenship as legal status, citizenship as rights, citizenship as political activities, and citizenship as identity/solidarity.[55] Applying these distinctions, it can be said that the Nisei's citizenship as legal status (i.e. American nationality) entitled them neither to their citizenship as rights nor full membership in imagined American identity/solidarity. Not regarding Nisei as one of "us," mainstream Americans during World War II adopted a looser standard of scrutiny for civil liberties restrictions applied to Nisei and did not assume that this would affect American citizenship in general. They were proved wrong in 1950, when Title II legalized detention of any persons, American citizens or aliens.

Senator Ferguson, on the other hand, initially opposed the emergency detention legislation. As one of the sponsors of the communist registration bill, Ferguson criticized liberals for drafting a concentration camp law, while liberals reiterated that it was better than enforcing thought control, which they thought communist registration would do.[56] Ferguson's interpretation of internment, however, was an ambiguous one as well.

> Does the Senator [Douglas] realize that one of the Japanese-Americans in the so-called relocation center who made application for a writ of habeas corpus had her writ granted, and the Supreme Court ruled

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53. *Senate Debate on Internal Security Act*, *supra* note 30, at 14, 424.

54. After Pearl Harbor, the military classified Americans of Japanese ancestry as 4-C (enemy non-alien) and prohibited them from military service. Military orders on Japanese Americans also used the term. *See, e.g.*, Public Proclamation No. 3, 7 Fed. Reg. 2543 (Apr. 2, 1942) (curfew order issued by General John L. DeWitt for all enemy aliens and enemy non-aliens (meaning Japanese Americans citizens)), *cited in* Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 LAW & CONTEMP. PROBS. 255, 257 (2005).

55. Linda Bosniak, *Citizenship Denationalized*, 7 IND. J. GLOBAL LEGAL STUD. 447, 452 (2000).

56. *Compare Senate Debate on Internal Security Act*, *supra* note 30, at 14, 424 (comments of Senator Ferguson), *with* 96 CONG. REC. 13,721, 13,722-24 (1950) (debate in the House of Representatives on Subversive Activities Control and Communist Registration Act).

she could not be kept in camp? In setting up the relocation centers an attempt was made to follow a legally fictitious procedure of barring people from certain areas but allowing them to go up into camps voluntarily.[57]

The habeas corpus case *Ex parte Endo*, which Senator Ferguson mentioned, freed plaintiff Mitsuye Endo and consequently all Japanese Americans from internment camps.[58] Ferguson's statement can be interpreted as a criticism of internment, as he acknowledged that the government not only excluded Japanese Americans from the West Coast but forced them into camps "voluntarily." Neither Ferguson nor Douglas openly criticized internment as a mistake, let alone an injustice, but their ambiguity about the measures was apparent in the ways they described the incident. The ambiguity was not due to the Senators' ignorance about internment. It rather reflected the problematic administrative procedure through which internment was conducted and the perplexing rhetoric by which the Supreme Court justified the policy. Internment generated ambivalent historical memories, because it was a historical incident in which the rules for enemy aliens were applied to a class of American citizens. The loophole internment created in the constitutional protection of civil liberties opened an avenue for postwar Congress to pass a law that allowed detention of citizens by discretion of the government.

In response to Ferguson's reference to *Ex parte Endo*, Senator Douglas stated:

> Is the Senator [Ferguson] aware of the fact that in the case to which he refers, involving a Japanese woman, she was freed because it was found that she was loyal? Because it was found that she was loyal a writ of habeas corpus was granted. If there had been a finding that she was not loyal, the writ would not have been granted. I believe such an inference may well be drawn from the opinion of Justice [William] Douglas in that case.[59]

Senator Douglas's statement elucidates how the constitutional legacy of internment provided the lawmakers in 1950 with ideas concerning the category of citizens who could or should be detained. To justify the emergency detention bill, Douglas emphasized that loyalty, not race or nationality, should be the factor that determined whether or not a person could be detained. Loyalty, rather than individual actions, became the test to determine the extent of limitations on citizens' individual freedom. To see how this discursive shift happened, we need to further analyze the U.S. Supreme Court's justification for internment and examine the process by which Nisei were constructed as "enemy non-aliens"—citizens who were

57. *Senate Debate on Internal Security Act*, *supra* note 30, at 14, 424.

58. *See Ex parte* Endo, 323 U.S. 283 (1944) (writ of habeas corpus filed from inside an internment camp).

59. *Senate Debate on Internal Security Act*, *supra* note 30, at 14, 424.

potential enemies of the state.

Unlike the military, the Court was constrained by the Fourteenth Amendment's guarantee of equal protection from branding Japanese Americans as enemy aliens on the basis of race.[60] In *Hirabayashi*, the majority held that "distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality."[61] Likewise, in *Korematsu*, Justice Black stated that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect."[62] A close reading of *Hirabayashi* and *Korematsu* reveals that, at first, the Court translated racial discourse into cultural discourse to avoid a finding that the policy was unconstitutional by virtue of its discrimination based on race. In *Hirabayashi*, the Supreme Court listed numerous cultural traits of Japanese Americans that marked their foreignness in the United States, such as the prevalence of Japanese language schools, a common custom of sending children to Japan for education, and their retention of close-knit communities supported by religious and social activities.[63] Applying Bosniak's distinct discourses of citizenship, legal scholar Leti Volpp argues that Japanese Americans were extraterritorialized in citizenship of identity regardless of their legal citizenship status.[64] The classification of Japanese Americans as a "transnational extension of Japan into the United States" discursively established the Nisei's foreignness.[65]

Citizens' foreignness in cultural identity, however, could not justify their involuntary exclusion and relocation from their legally owned habitats. Thus, to simultaneously deny the racist nature of internment and justify disparate treatment of Japanese Americans, the Court translated a cultural discourse into a discourse of loyalty. In *Hirabayashi*, Chief Justice Stone held that "we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly

60. *See generally* U.S. CONST. amend. XIV, § 1 (no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"). Notwithstanding this amendment, the military did not conceal the fact that the exclusion order was based on racial motives. General John L. DeWitt of the Western Defense Command reported that "The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted." U.S. DEPARTMENT OF WAR, FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST, 1942 (reprinted by Arno Press, 1978) (U.S. Gov't Printing Office 1943).

61. *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

62. *Korematsu v. United States*, 323 U.S 214, 216 (1944).

63. *Hirabayashi*, 320 U.S. at 96-98.

64. *See* Leti Volpp, *The Citizen and the Terrorist*, *in* SEPTEMBER 11 IN HISTORY: A WATERSHED MOMENT? 147, 159 (Mary L. Dudziak ed., 2003).

65. *Id.*

ascertained."[66] In *Korematsu*, Justice Black reiterated *Hirabayashi* and added as evidence of disloyalty that "[a]pproximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan."[67] The internment cases established a constitutional precedent justifying curfew and exclusion over a broad group when the government found it impossible to segregate the disloyal from the loyal within the group. In short, the Supreme Court constructed Japanese Americans as the cultural "other" and translated this "otherness" into "danger," thereby legitimating their exclusion. This is an example of what David Campbell would describe as a historically common pattern of performative identity constitution.[68]

In *Endo*, the Court again invoked the discourse of loyalty. By contending that Executive Order 9066 and Public Law 503 only allowed the military to make orders to protect the West Coast from espionage and sabotage, the Court was able to hold that the War Relocation Authority was not allowed to detain persons whose loyalty had been cleared, because "a citizen... concededly loyal presents no problem of espionage or sabotage."[69] The Court unanimously ordered that Mitsuye Endo be freed because she had proven to be a loyal citizen.[70] By shifting the discourse from race to loyalty, the Supreme Court avoided rendering an opinion on the constitutionality of internment. This move, however, opened up a different avenue for restricting freedom of citizens. By discussing loyalty in assessing the constitutionality of citizens' detention, the Court brought the matter of loyalty into the analysis of the reasonableness of restrictions on civil liberties.

Although Senator Ferguson agreed that Endo's loyalty was the basis upon which the Court ordered her freedom, he refuted Senator Douglas's claim that the court sanctioned detention of disloyal citizens.[71] Ferguson correctly pointed out that the Supreme Court decisions on the Japanese American cases were limited to narrow grounds. The Court only upheld Korematsu's conviction for his violation of the exclusion order but refused to discuss constitutionality of the detention order. In *Endo*, the Court ordered Endo to be freed, but did not address the cases of disloyal citizens

66. *Hirabayashi*, 320 U.S. at 99.

67. *Korematsu*, 323 U.S. at 219. These findings on the Japanese Americans' loyalty were the results of internment and thus can not justify the military's assumption that the Japanese American community contained some disloyal members.

68. CAMPBELL, *supra* note 8, at 68.

69. *Ex parte* Endo, 323 U.S. 283, 302 (1944).

70. *See id.* at 294.

71. *See Senate Debate on Internal Security Act*, *supra* note 30, at 14, 424.

or aliens. As Ferguson argued, the Supreme Court did not sanction imprisonment or detention of aliens or citizens on the basis of disloyalty, let alone suspected disloyalty.[72] However, the fact that the Supreme Court neither addressed nor resolved the tension between civil liberties and internal security left room for the future legalization of preventive detention based on disloyalty.

Japanese American internment played a dual role in creating Title II: highlighting constitutional concerns of internment and providing a precedent and a method to circumvent those constitutional limitations. Internment involved constitutional problems because Japanese aliens were detained merely on the basis of nationality and Japanese American citizens merely on the basis of race. The identification of these problems led the drafters of Title II to design the law in a way that prevented mass exclusion and internment based on race or nationality. At the same time, congressional liberals' logic clearly indicated that internment was a precedent that justified a formal detention law. In fact, it was the liberals' very effort to avoid detention based on race or nationality that gave birth to a formal preventive detention law. The eventual passage of Title II meant that the American legal system sanctioned the detention of citizens on the basis of suspected disloyalty. Citizenship rights were no longer based on people's nationality. Loyalty, rather than nationality, became the basis for civil liberties.

In addition to the problem of determining who should be detained, another problem concerning the internment came up in the Title II debate: under what security conditions should the law grant the government emergency powers? Senator Ferguson, in his criticism of the Emergency Detention Act, emphasized that internment was a special wartime measure and was not equivalent to the peacetime detention of enemy aliens.

> Does [Senator Douglas] appreciate that what was done there was an entirely different matter? We had a territory which was declared to be a military area. Those Japanese-Americans were excluded from that military zone and relocated in special centers.[73]

In the above statement, Ferguson is criticizing the emergency detention legislation on the grounds that the bill applied to the entire United States rather than confined to a designated military area. On this point, Ferguson was only half-right. While the Western Defense Command did designate specific military areas encompassing coastal regions up to 100 miles from the Pacific Coast (plus in a later period the entire state of California), Executive Order 9066 also authorized the Secretary of War to designate military zones and exclude citizens anywhere within the United

72. *See id.*
73. *Id.* at 14, 424.

States and its territories.[74] Thus in principle, Executive Order 9066 was not as limited as Ferguson implied in his statement.

Douglas's counterargument was that the security emergency in the struggle with communism made virtually the entire territory of the United States a military area and he insisted that the nation might be "faced with a period of seriously threatened espionage and sabotage prior to a formal declaration of war."[75] Given that an actual (though undeclared) war was going on in Korea, Senator Douglas even went as far as to suggest the declaration of the internal security emergency as soon as Congress passed Title II.[76] This particular exchange of opinions reveals the differences between the situation concerning national security during World War II and the Cold War. Even though World War II was a total war, for Americans there remained a distinction between the battlefield and the home front. There was also a distinction between wartime and peacetime, the former starting with a declaration of war and the latter with the signing of a declaration of surrender. The Cold War erased those distinctions. By applying the precedent of Japanese American internment to the Cold War, wartime preventive detention of "potentially disloyal" people legitimized the detention at any time of "potentially disloyal" citizens and aliens on the home front.

The Douglas-Ferguson debate on Title II indicates that two interpretations of internment—incarceration of citizens based on race/nationality and wartime exclusion of enemy aliens for national security—coexisted, demonstrating the murky legal boundary between citizens and aliens. Liberals contended that internment virtually authorized the government to detain citizens if they posed a threat to national security. They insisted that, rather than leaving the power to an executive order or to the military, Congress should legalize the procedure for preventive detention and provide avenues for appealing detention, thus preventing arbitrary detention of innocent citizens. Conservatives regarded the internment as a wartime exclusion of enemy aliens. In their criticism of the Emergency Detention Act, they insisted that emergency detention was much broader compared to internment, because it would detain American citizens in concentration camps intended for the enemies.

To see the influence of Title II on postwar civil liberties, it is important to note that domestic enemies in the Cold War could not be identified as easily as before. Although there was an identifiable primary enemy state in the U.S.S.R, the Cold War was in fact an ideological conflict between communism and capitalism, rather than a military conflict

74. *See* Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

75. *Senate Debate on Internal Security Act*, *supra* note 30, at 14, 424.

76. *Id.* at 14, 430.

between two nation-states. Unlike the First and Second World Wars, enemies of the state could not be linked to a particular ethnicity. Hunting for ideological traitors was a far more complicated task than singling out a visible ethnic group. During World War II, the government failed to distinguish between the loyal and the disloyal among the Japanese American population. Clearly, distinguishing between the loyal and the disloyal among the general population would be a far more difficult task. By applying preventive detention on the basis of individual action rather than racial or ideological affiliation, Title II was designed to provide a safeguard for individual freedom while still granting the government strong power to minimize threats to national and internal security. Ironically, making disloyalty the standard for protection or deprivation of civil liberties in the Cold War context made all Americans vulnerable to various sorts of political and ideological repression.

In the end, both Title I and Title II were passed as parts of the Internal Security Act of 1950. On September 12, Senate Majority Leader Scott Lucas proposed to add the emergency detention provision to the communist registration bill, an amendment that shocked fellow liberals and received enthusiastic support from conservatives such as McCarran and Ferguson. After reviewing the bill in the Senate Internal Security Subcommittee (SISS) and a joint conference with the representatives from the House, McCarran, who chaired the SISS, introduced the final version of the Internal Security Act.[77] It was passed in the Senate 51 to 7,[78] and the House 313 to 20, on September 20.[79] President Truman sent a veto message two days later, only to be overridden.[80] The House voted immediately after the veto message was read,[81] and the Senate voted the next day.[82] On September 23, the Internal Security Act became a law with overwhelming support in Congress. In the end, liberals lost the battle. They not only failed to stop the communist registration bill from passing, but they could not claim to be tough against communism, because they were forced to vote against their own bill when it was added to the communist registration bill.

The Conference Report that submitted the final version of the Internal Security Act explained the process by which the Senate and House managers agreed upon the validity of Title II.

The managers on the part of the House were fully cognizant of the need for provisions of this character, but gave serious consideration to the constitutional questions involved in any such legislation. They concluded

77. H.R. CONF. REP. NO. 81-3112, at 63 (1950).
78. 96 CONG. REC. 15, 260 (1950) (Senate vote).
79. 96 CONG. REC. 15, 297-98 (1950) (House vote).
80. Veto of the Internal Security Bill, PUB. PAPERS 645 (Sept. 22, 1950).
81. 96 CONG. REC. 15, 632-33 (1950) (House vote to overturn veto).
82. 96 CONG. REC. 15, 726 (1950) (Senate vote to overturn veto).

that the precedents afforded by court decisions sustaining the validity of the Japanese relocation program in effect during World War II provide ample authority for the enactment of legislation to attain this objective. After the adoption of perfecting amendments designed more fully to protect the interests of the individuals who would be affected thereby and to insure the observance of procedural due process of law in the administration of such program, agreement was reached on this title.[83]

At the final stage of the legislative process, the legal legacy of Japanese American internment gave official sanction to the concentration camp law.

IV. SIGNIFICANCE OF THE EMERGENCY DETENTION ACT IN POSTWAR CIVIL LIBERTIES: PREVENTIVE DETENTION UNDER MCCARTHYISM

Following the passage of the Internal Security Act, the American Civil Liberties Union (ACLU), after careful study, came out in opposition to Title I and supported court cases challenging the communist registration clause.[84] The organization appointed a special committee to study Title II.[85] A month later, the committee recommended that the ACLU should not oppose Title II.[86] The Committee on Emergency Detention Provision of McCarran [Internal Security] Act explained their decision as follows:

> At the present time, the persons who may be dangerous to our security . . . are not necessarily aliens, but are likely to be citizens. The Act merely declares that such persons are virtually alien enemies. (They do, indeed, owe a superior allegiance to a foreign power.) There is no reason why an alien who is a threat to our national security at such times should be discriminated against by being interned while a citizen who poses a similar threat should be allowed to go free.[87]

Written by the most influential civil liberties organization, the ACLU's statement declares that disloyal citizens are virtually enemy aliens. Edward J. Ennis, a prominent ACLU lawyer who specialized in cases concerning civil rights and immigration, was one of the committee report's three authors. It is important to note that Ennis was another liberal

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83. H.R. REP. NO. 81-3112, at 63 (1950) (Conf. Rep.).

84. *See* Letter from Earnest Angell, Chairman, Patrick Malin, Executive Director, and Arthur Garfield Hays, General Counsel, ACLU, to United States Senate (July 26, 1950) (Box 865, Folder 1, "Internal Security Act—Correspondence with Congress," Papers of the American Civil Liberties Union) (on file with the Seeley G. Mudd Manuscript Library, Princeton University).

85. *See* Meeting Minutes, Board of Directors, ACLU, (November 13, 1950) (Box 13, Folder 11, "Board of Directors—Minutes," Papers of the American Civil Liberties Union) (on file with the Seeley G. Mudd Manuscript Library, Princeton University).

86. *See* Jonathan Bingham, Edward J. Ennis, Morris L. Ernst, Majority Statement for Committee on Emergency Detention Provisions of McCarran Act, Sec. 1(b) (December 18, 1950) (Box 4, Folder 4, "Mailing–1951," Papers of the American Civil Liberties Union) (on file with the Seeley G. Mudd Manuscript Library, Princeton University).

87. *Id.*

involved in Japanese American internment. As director of the Alien Enemy Control Unit in 1942, he was directly in charge of both controlling and securing the safety and welfare of Japanese Americans in the wake of the Pacific War. Working under Attorney General Francis Biddle, Ennis opposed the mass evacuation of Japanese Americans so strongly that he considered resigning from the job when the government proceeded with internment.[88] Eight years later, in the wake of the McCarthyist fervor, even staunch liberals such as Ennis equated disloyal citizens with enemy aliens. It shows that in the postwar United States, the border between citizens and aliens ceased to exist in terms of civil liberties. Freedom became a privilege that only those whom the government considered loyal enjoyed. At the same time, the definition of "loyalty" was defined by the government, influential members of Congress, investigative officers, or, in times of war, by the military.

Internment provided not only a historical legacy and a legal precedent, but also a physical model for the detention of American citizens in early Cold War America. In 1952, the Department of Justice completed six detention facilities for those arrested pursuant to Title II: Florence and Wickenburg, Arizona; Avon Park, Florida; Allenwood, Pennsylvania; El Reno, Oklahoma; and Tule Lake, California.[89] Tule Lake had originally been built as a camp to house relocated Japanese Americans but was later turned into a segregation camp that incarcerated those internees categorized as "disloyal."[90] It was the largest of the War Relocation Authority internment camps, housing over 18,000 people at its peak.

In June 1952, James V. Bennett, Director of the Federal Bureau of Prisons, testified during hearings before the Senate Appropriations Subcommittee that the Department of Justice was spending $750,000 a year to prepare and maintain wartime internment camps for the purpose of housing up to 15,000 subversives.[92] The camps were maintained in "stand-by" status until 1957 under the Bureau's supervision.[93] Title II, however, was never actually invoked before it was officially repealed in 1971. The law was to be activated only when the President declared an "internal

88. *See* IRONS, *supra* note 38, at 62.

89. ALLEN, *supra* note 4, at 7.

90. COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 208-09 (1997).

92. *Internment Camps Bared: Senate Group Discloses 5 Sites for Housing War Subversives*, N.Y. TIMES, June 26, 1952, at 3.

93. *6 M'Carran Act Camps 'Phased Out' But Usable*, TIMES-UNION (Albany, N.Y.), February 25, 1968.

security emergency,"[94] and this never happened between 1950 and 1971. In fact, Title II was effectively inactive long before the law's repeal, for the budget allocation for the camps was terminated five years after the government announced the designation of detention camps.[95] As the McCarthyite fervor subsided, the camps and the camp law were forgotten until the law once more attracted public attention in the late 1960s.

Nonetheless, Title II had a substantially negative impact on postwar civil liberties. The blurring of the already nebulous national border was a serious blow to civil liberties, notwithstanding the actual number of people, or the lack thereof, who were detained in concentration camps. The term "disloyalty" was particularly versatile in the political context in which Title II was passed. The Internal Security Act was a legal embodiment of McCarthyism, used by conservative politicians as the equivalent of the all-encompassing term "communist" to persecute those engaged in social reforms to improve race relations, labor relations, and social welfare. Politicians such as Richard Nixon and Patrick McCarran exercised strong influence, particularly in the House Un-American Activities Committee (HUAC) and the Senate Internal Security Subcommittee (SISS), respectively, purging people by branding them "communists" and/or "un-American."[96] Southern Democrats such as Congressman John Rankin and Senator James Eastland utilized the Cold War discourse of loyalty to empower their pro-segregationist, anti-civil rights political stance. They branded efforts to alleviate racial inequality in the South as "communist" and successfully blocked civil rights legislations promoted by the Truman Administration.[97]

The discursive power of the term "un-American" lay in the fact that those labeled as such were deemed to be outside the national border, regardless of their citizenship status. Hence, the government was not obligated to respect their constitutional rights. The irony of liberals regarding their failure to prevent conservative attack on civil liberties lay precisely on this point. In order to counter arbitrary congressional control

94. Emergency Detention Act of 1950, ch. 1024, § 102, 64 Stat. 1019, 1021 (1950) (repealed 1971).

95. *6 Camps for Reds Set Up, Then Closed*, N.Y. TIMES, May 5, 1962, at 10.

96. *See generally* THE SPECTER: ORIGINAL ESSAYS ON THE COLD WAR AND THE ORIGIN OF MCCARTHYISM (Robert Griffith & Athan Theoharis eds., 1974).

97. *See generally* POLITICS AND POLICIES OF THE TRUMAN ADMINISTRATION (Barton J. Bernstein ed., 1974); ATHAN THEOHARIS, SEEDS OF REPRESSION: HARRY S. TRUMAN AND THE ORIGINS OF MCCARTHYISM (1971). Legal scholar Mary Dudziak points out that the Cold War created a need for the American government to promote a positive image of American democracy in the world, and this contributed to the advancement of civil rights reforms in the United States. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000). At the same time, the Cold War was detrimental to the civil rights movement as the anti-communist discourse prevented civil rights activists from forming coalitions with leftist activists abroad. PENNY M. VON ESCHEN, RACE AGAINST EMPIRE: BLACK AMERICANS AND ANTICOLONIALISM, 1937-1957 (1997).

of internal security issues, liberals schemed to empower the executive branch so that it had adequate means to prevent subversive activities and still preserve freedom of thought.[98] The measure liberals adopted was Title II, which authorized the internal security agencies, such as the FBI, to arrest people before potential saboteurs had a chance to commit espionage and sabotage. In justifying the preventive detention of citizens, however, liberals discursively constructed their own version of alienable citizens.

Title II legalized emergency detention as a legitimate governmental measure to prevent subversive activities. The safeguard on civil liberties, which the liberal drafters of Title II included in the law, did not function because the FBI ignored the statutory procedures through which the agency conducted the detention policy.[99] In fact, the FBI had been creating a list of potentially subversive persons since the end of the 1930s, and the list grew during the 1940s and 1950s.[100] William Keller argues that the liberal strategy to counter McCarthyism by strengthening the government control on internal security areas led to the growth and transformation of the FBI in the following two decades "from a bureau of internal security with delimited functions into an agency resembling more a political police and an independent security state within a state."[101] Title II only authorized detention in time of war, invasion, and insurrection. However, preparing for emergency detention required constant surveillance of citizens and aliens during peacetime in order to detain suspects immediately once an emergency occurs.[102] Even though Keller's attribution of this development to liberals has to be discounted by the fact that the Truman administration did not give its full support to Title II, there is little doubt that the law's passage contributed to the development of a formidable domestic surveillance agency completely unaccountable to democratic sanctions.[103]

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98. MARY SPERLING MCAULIFFE, CRISIS ON THE LEFT: COLD WAR POLITICS AND AMERICAN LIBERALS, 1947-1954, at 79 (1978).

99. For details about the development of the FBI's list of subversive persons, see S. SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES [CHURCH COMM.], 2 FINAL REPORT, S. REP. NO. 94-755 (1976).

100. WILLIAM W. KELLER, THE LIBERAL AND J. EDGAR HOOVER, RISE AND FALL OF A DOMESTIC INTELLIGENCE STATE 59-64 (1989).

101. *Id.* at 6.

102. *Id.* at 56.

103. Keller argues that Title II "opened the door to ongoing investigation of a substantial and ill-defined group of individuals at the discretion of the administrator in charge." *Id* at 57. Keller further suggests that liberals contributed substantially to this development of the FBI into an independent, unaccountable political police. Without disagreeing with the idea that liberals in the administration and Congress sacrificed civil liberties issues for their political agenda, the author of this paper does not think it is correct to attribute the growth of the FBI during the 1950s and 1960s to the liberals' veneration of the FBI. FBI director J. Edgar Hoover's policy of secrecy prevented Congress members and the administration from learning about the FBI's activities and the information it gathered. Hoover utilized such information for his own political gain, and he kept a much better relationship with congressional conservatives than with liberals. The FBI conducted its own internal security program

V. REPEAL OF THE EMERGENCY DETENTION ACT: PROHIBITING PREVENTIVE DETENTION

In the late 1960s, American society undertook another major change in its identity, particularly surrounding the issue of loyalty. As the Civil Rights movement radicalized and anti-war demonstrations spread on college campuses and streets, the conformist notion of loyalty was replaced by a more critical concept of citizenship as political activities, as in Bosniak's definition.[104] A greater number of people started to think that citizens who love their country should oppose unjust government policies. Strong public opposition to the government's foreign policies and widespread demand for a more egalitarian relationship between different groups encouraged the nation as a whole to imagine a more inclusive society, accepting people from diverse races, genders, cultures, sexual orientations, and political ideologies. In the midst of this overall societal change, the concentration camp law once again came to attract the public's attention.

The public anxiety about concentration camps started as a rumor circulated in African American and radical activist student communities that the government was planning to round up African Americans and radical students to detain them in camps.[105] The source of this rumor was a sixty-page booklet titled, *Concentration Camps, U.S.A.*, published in 1966 by a freelance journalist, Charles R. Allen, Jr.[106] Allen toured the former detention camp sites and found that three of them were in the state of immediate stand-by, while others had changed ownership but were still maintained as potential detention camps.[107] He reported that the total known estimated capacity of detention centers in the United States was 26,500.[108]

Interest in Title II, however, did not spread beyond African American and radical student communities until an "unexpected non-left source" started an organized campaign to repeal the law.[109] Japanese Americans, especially radical Sansei (third generation), took up the issue of the concentration camp law as their political agenda. The Asian American

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regardless of the intentions of Congress.

104. Bosniak states that the notion of citizenship as political activities is one of the most common usage of the term, which denotes "active engagement in the life of political community." Bosniak, *supra* note 55, at 470.

105. For details about the concentration camp rumor, *see generally* Masumi Izumi, *Rumors of "American Concentration Camps": The Emergency Detention Act and the Public Fear of Political Repression, 1966-1971*, 4 DOSHISHA STUD. IN LANGUAGE AND CULTURE, 737 (2002).

106. *See generally* ALLEN, *supra* note 4, at 59.

107. *Id.* at 52.

108. *Id.*

109. I. F. Stone, *The Political Miracle in That Detention Camp Repealer*, I. F. STONE'S WKLY., Jan. 12, 1970, at 3.

Political Alliance (AAPA), a student activist group comprised of Chinese and Japanese American students at San Francisco State University and the University of California, Berkeley, organized rallies on concentration camps along with African American and other minority students. They were involved in the campaign to free Huey P. Newton, co-founder of the Black Panther Party, who had been arrested of manslaughter, and felt +the impact of the government's stricter enforcement of law and order through violent and repressive measures.[110] A few progressive Nisei also took interest in Title II. In July 1967, Raymond Okamura wrote to the Japanese American Citizens League (JACL), suggesting that Japanese Americans should publicly oppose Title II; San Francisco-based college professor Edison Uno supported radical Asian American student activists on the concentration camp issue.[111] Discussing Title II encouraged Sansei to inquire about their parents' wartime incarceration—a secret veiled in silence until then. It also encouraged Nisei to publicly narrate their experiences, which they had considered too shameful to talk about even within their families.

In 1968, activists within the Japanese American community, such as Okamura, Uno, and the AAPA members, succeeded in persuading the JACL to organize a public campaign to repeal Title II. At the grassroots level, the JACL National Ad Hoc Committee for Repeal of the Emergency Detention Act (hereinafter "Ad Hoc Committee") conducted an educational campaign about Japanese American internment and Title II.[112] Representatives from the Japanese American community organized meetings and also appeared in the media to talk about their experiences, warning the public of the possibility of concentration camps detaining innocent people.[113] At the congressional level, Senator Daniel Inouye and Congressman Spark Matsunaga introduced Title II repeal bills.[114] To coordinate community efforts towards the repeal campaign, the Ad Hoc Committee conducted a letter-writing campaign to urge members of Congress to support the repeal.

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110. WILLIAM WEI, THE ASIAN AMERICAN MOVEMENT 31 (1993).

111. Letter from Raymond Okamura to JACL Headquarters (July 20, 1967), *reprinted in The Concentration Camp Rumor*, PAC. CITIZEN, Sept. 8, 1967, at 1. Also *see* Raymond Okamura, *Background and History of the Repeal Campaign*, 2 AMERASIA J. 73 (1974) (Okamura's own account on the repeal of Title II).

112. The process of Title II's repeal is documented in detail in Masumi Izumi, *Prohibiting "American Concentration Camps": Repeal of the Emergency Detention Act and the Public Historical Memory of the Japanese American Internment*, 74 PAC. HIST. REV. 165 (2005).

113. *See, e.g., All-Nisei Panel Appears at S.F. Unitarian Event*, PAC. CITIZEN, Nov. 29, 1968, at 1; *Emergency Detention Act: Half for, Half Against Law*, PAC. CITIZEN, Jan. 17, 1969, p.1; Dorothy Kawachi, *Public Interest Still High on WRA Camps*, PAC. CITIZEN, Dec. 6, 1968, at 1; *Title II Repeal Move Being Aired, CRCSC Help Sought*, PAC. CITIZEN, Nov. 29, 1968, at 1.

114. *See* H.R. 11829, 91st Cong. (1969) (Matsunaga's bill, introduced June 3, 1969); S. 1872, 91st Cong. (1969) (Inouye's bill, introduced Apr. 18, 1969).

The Ad Hoc Committee's successful efforts became apparent during an eleven-day congressional public hearing by the House Internal Security Committee, held between March and September 1970.[115] The hearing called for the repeal of Title II, supported by the testimony of not only members of Congress but also prominent political figures and representatives from various ethnic, political, and religious organizations.[116] Delegates of the JACL testified on Japanese American internment, and so did some non-Japanese Americans who were involved in internment.[117] Even the Justice Department suggested repeal.[118]

With only limited support for the retention or amendment of Title II, mostly coming from former internal security officers, the overwhelming majority of witnesses supported the unconditional repeal of Title II. The vast racial and political diversity of witnesses demonstrated a successful campaign by the JACL Ad Hoc Committee. Almost no support for repealing a detention law that troubled political and African American radicals existed before Japanese Americans became involved in the campaign. After extensive hearings and congressional maneuvering, Congress, in September 1971, passed a law that not only repealed Title II but also prohibited "the establishment of emergency detention camps" and provided that "no citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[119] The concentration camp law ended its twenty-one-year life without ever being invoked.

The campaign to repeal Title II elucidated some important changes to the discursive American legal borderland. First of all, by representing themselves and being represented by others as "loyal American citizens"

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115. *Hearings*, *supra* note 4.

116. *See generally id.* (Former Supreme Court Justice Arthur J. Goldberg testified, while California Governor Ronald Reagan former Supreme Court Chief Justice Earl Warren, and Milton Eisenhower, the first director of the WRA, sent a letter supporting Title II repeal. The NAACP, the CCCL, the ACLU, and American Friends Service Committee were among the organizations that sent delegates to support the repeal.).

117. The JACL delegates were Jerry Enomoto, Mike Masaoka, Raymond Okamura, Edison Uno, Ross Harano, and Robert Takasugi. Patsy Mink, a Japanese American Democratic Representative from Hawaii, also testified. Philip M. Glick, a former General Counsel for the War Relocation Authority, and Dorothy Swaine Thomas, a sociologist who took charge of the Japanese American Evacuation and Resettlement Study, were also invited to make statements about internment. *See id.*

118. *See* Letter from Richard G. Kleindienst, Deputy Attorney General, to Richard H. Ichord (Dec. 2, 1969), *reprinted in id.* at 3595.

119. Non-Detention Act, Pub. L. No. 92-128, 85 Stat. 348 (1971) (codified as amended at 18 U.S.C.§ 4001 (2000)). *See also* Richard Longaker, *Emergency Detention: The Generation Gap, 1950-1971*, 27 W. POL. Q. 396 (1974). During the 91st Congress, the House Committee on Internal Security voted down the repeal bill by 4-4 tight vote. In the following year, Congressmen Spark Matsunaga and Chet Holifield, along with Abnar Mikva and Robert W. Kastenmeier introduced another repeal bill in the House of Representatives. This new bill eventually became the "Non-Detention Act" of 1971. The "non-detention" clause is being cited in the current "enemy combatant" cases to support the detainees' rights to appeal their detention. *See Padilla v. Rumsfeld*, 352 F.3d 695, 699 (2nd Cir. 2003).

who had been wrongfully held in concentration camps, Japanese Americans tried to secure their position as first-class citizens of the United States both in terms of legal status and national identity.[120] The campaign also provided an opportunity for other minority groups to address their own historical plights vis-à-vis the internment. In demanding for the removal of the concentration camp law, minorities and political dissenters could legitimately express concerns about the government's political repression. Concentration camps, symbolized as images of barbed-wire and watchtowers, became an icon of totalitarian society, an "un-American" regime. The Title II repeal campaign was a rare occasion when Americans from different racial, ethnic, religious, political, and historical backgrounds gathered and built a consensus that preventive detention was an unacceptable means to control internal security. Unlike the early 1950s, political dissenters could not be simply branded as "enemies of the state" and treated like aliens. It marked the end of the age of concentration camps, which started with the incarceration of Japanese Americans and concluded with the repeal of the concentration camp law. The intervention of former internees and their children was indispensable and appropriate for its ending.

VI. CONCLUSION: POST-9.11 AMERICA, A NEW AGE OF CONCENTRATION CAMPS?

The repeal of Title II did not completely cease the incarceration or surveillance of aliens, nor of American citizens. Two years before the Department of Justice announced its support to repeal Title II, the Nixon administration rearranged the internal security institutions to reinforce domestic surveillance capability. In 1967, Attorney General Ramsey Clark established the Interdivision Information Unit within the Department of Justice to monitor protest groups throughout the United States.[121] The unit collected information on campus and community protest activities throughout the country, generating detailed weekly reports from the FBI. Since the mid-1950s, the FBI has expanded its activities from purely investigatory operations to more aggressive counterintelligence programs (COINTELPROs) to disrupt and neutralize any activities that the Bureau

120. At the congressional hearings, mainstream Japanese Americans such as Mike Masaoka and Patsy Mink emphasized the loyalty demonstrated by Japanese Americans during the war. This strategy continued into the Redress Movement, when Japanese Americans demanded the government official apology and monetary compensation for their wartime incarceration.

121. Dep't of Justice memorandum from John W. Cameron, Deputy Chief, Interdivision Information Unit, to Lawrence S. Hoffheimer, Community Relations Service (Nov. 4, 1970), (Department of Justice File, "Interdivisional Information Unit, 1968-1976") (on file with National Archives, College Park, Md.).

considered possible threats to internal security.[122] Even after the radical social movements of the late 1960s and early 1970s subsided, criminalization of young black men continued. Indeed, the age of concentration camps was followed by the development of what Angela Davis calls the "prison industrial complex."[123]

Today, we might be facing another age of concentration camps. Forty-five days after the terrorist attacks of September 11, 2001, the federal government passed the first USA PATRIOT ACT, which granted the government sweeping powers to conduct surveillance, wiretaps, and secret searches on people, as well as authorizing indefinite detention all in the name of fighting the "war on terrorism."[124] The newly-created Department of Homeland Security strengthened the government's power to control immigration and national borders, resulting in the detention and deportation of an unknown but substantial number of immigrants.[125] Furthermore, military detention facilities hold some American citizens, and at the Naval Base at Guantanamo Bay, civilians captured from foreign countries are incarcerated.[126] The government claims that those who are held are "enemy combatants." Court cases are proceeding to determine whether the government has the authority to indefinitely detain citizens and aliens by merely designating them as "enemy combatants."

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122. For more on the FBI's COINTELPRO operations against the African American and Native American radicals, *see generally* WARD CHURCHILL & JIM VANDER WALL, AGENTS OF REPRESSION: THE FBI'S SECRET WARS AGAINST THE BLACK PANTHER PARTY AND THE AMERICAN INDIAN MOVEMENT (1990); Ward Churchill, *"To Disrupt, Discredit and Destroy": The FBI's Secret War Against the Black Panther Party*, in LIBERATION, IMAGINATION, AND THE BLACK PANTHER PARTY: A NEW LOOK AT THE PANTHERS AND THEIR LEGACY 78 (Kathleen Cleaver & George Katsiaficas eds., 2001).

123. Angela Davis points out that the U.S. penal system, which incarcerates over two million individuals, is not only biased unfavorably against people of color and the poor, but generating great wealth for corporations that provide services for the incarcerated population and exploit the prison labor. Angela Y. Davis, *Masked Racism: Reflections on the Prison Industrial Complex*, COLORLINES, Oct. 31, 1998, at 11.

124. USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of 8 U.S.C.). *See* ACLU, USA PATRIOT ACT AND GOVERNMENT ACTIONS THAT THREATEN OUR CIVIL LIBERTIES, http://www.aclu.org/FilesPDFs/patriot%20act%20flyer.pdf.

125. *See generally* ACLU, AMERICA'S DISAPPEARED: SEEKING INTERNATIONAL JUSTICE FOR IMMIGRANTS DETAINED AFTER SEPTEMBER 11 (2004), http://www.aclu.org/FilesPDFs/un%20report.pdf.

126. U.S. citizen Jose Padilla and Qatari citizen Ali Saleh Kahlah al-Marri are currently held as enemy combatants in military facilities in the United States. Al-Marri v. Bush, 274 F. Supp. 2d 1003 (C.D. Ill. 2003) (dismissing habeas petition for improper venue), *aff'd*, 360 F.3d 707 (7th Cir. 2004), *cert. denied*, 125 S. Ct. 34 (2004); Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564, 572-73 (S.D.N.Y. 2002), *rev'd*, 542 U.S. 426 (2004). The U.S. government has captured over 800 persons from more than 40 countries since the 9.11 incident and held them at the U.S. Naval Base at Guantanamo Bay, Cuba. Some 600 are still in military custody at Guantanamo. The government claim those detainees at Guantanamo are enemy combatants. The court, however, has not accepted this label for every detainee. *See* Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002), *rev'd*, 542 U.S. 466 (2004).

The term "enemy combatant" originated in *Ex Parte Quirin*.[127] The case involved the habeas corpus petitions of German and American citizens who received military training in Germany and landed on American soil from German submarines carrying explosives. The Supreme Court ruled that the petitioners could be categorized as unlawful belligerents, or "an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property" and as such they were "offenders against the law of war subject to trial and punishment by military tribunals."[128] This is important because the Court opined that even civilians with American citizenship could be tried and punished in military tribunals if they were found to be "enemy combatants."[129] However, the evidence in this case left no doubt that the petitioners were engaged in the military operations of an enemy state.[130] In contrast, in contemporary "enemy combatant" cases the government has refused to present indubitable evidence that detainees were actually "enemy combatants."[131]

The term "enemy combatant" is an ambiguous term that gives the government virtually blanket power to arrest and detain anybody in its discretion.[132] While the label "enemy alien" presumes citizenship of an enemy state, "enemy combatant" could be applied to both citizens and aliens. Although most of the people who have been detained since September 11 under the war on terrorism are aliens, the government has tried to retain the power to detain any citizens it considers as threats to national security.[133]

It is telling that the terms "enemy aliens" and "enemy combatants," used during World War II to allow the internment of Japanese Americans, have been revived in the war on terrorism. It is an interesting academic question to consider which term is more restrictive than the other. From the Japanese American point of view, "enemy combatant" may be fairer, allowing the executive branch stronger control in dealing with domestic espionage or sabotage on the basis of individual behavior rather than a

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127. *Ex Parte* Quirin, 317 U.S. 1, 31 (1942).

128. *Id.*

129. *Id.*

130. *Id. at* 21.

131. For detailed comparison between *Ex Parte Quirin* and the *Hamdi* and *Padilla* cases, *see* MARGARET CHON & ERIC K. YAMAMOTO, RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 9-14 (rev. ch. 8 Supp. 2003), *available at* http://www.law.ucla.edu/kang/racerightsreparation/Update__Ch__8/chon_yamamoto_race_rights_ch8.pdf.

132. The Department of Justice has also arrested and detained an unknown number of individuals on "material witness" warrants "for possible links to terrorism." *Id.* at 32.

133. For example, the Bush administration maintains that citizens designated as "enemy combatants" are neither protected under the Geneva Convention, nor protected under the 1971 Non-Detention Act.

group affiliation such as ancestry. On the other hand, "enemy combatant" is a highly problematic term because the federal government's policy of secrecy in terms of revealing how and why particular citizens or aliens are designated as "enemy combatants" leaves it unaccountable.[134] In reality, the detention and interrogation of enemy combatants are conducted less as a result of investigations on individual behavior than racial profiling.[135] The ambiguity of these terms demonstrates the government's power to detain people around the discursive national border by manipulating the murky boundaries between "citizens" and "aliens."

The internment of Japanese Americans, the McCarthyite prosecution of so-called communists, and anxiety about the USA PATRIOT ACT, are all well known and significant in and of themselves. However, when we see the connections between these separate incidents, we start to notice how American borders of citizenship are manipulated through legal and extra-legal violence. The genealogy of the Emergency Detention Act demonstrates that exclusion and incarceration based on one category of citizenship can transform into another. In 1942, the government allowed the detention of American citizens in concentration camps by branding Japanese American Nisei as "enemy non-aliens" and placing them outside the discursive national boundary on the basis of race. The Court, in order to uphold the government's wartime policy, applied the discourse of loyalty, instead of race, to justify the separate treatment of Japanese Americans from other American citizens. Ironically, this rhetorical manipulation opened an avenue for the government to use disloyalty as a legitimate reason to incarcerate any citizen in detention camps during the Cold War period. The passage of the Emergency Detention Act confirmed this Executive power.

The making and unmaking of the Emergency Detention Act, particularly in relation to Japanese American internment, illustrate that assuming a clear line between citizens and aliens is not necessarily helpful in assessing whether or not restricting the civil liberties of an individual or group is justifiable. Japanese American internment was unjust not only because the majority of the internees were U.S. citizens. It was unjust not only because most—some might say all—Japanese Americans were loyal. It is the very fluidity of these terms—citizenship and loyalty—that gives the government or the dominant segment in society the power to draw a line and determine whose constitutional rights should be respected while others would be excluded from such protection. Without an insight about the performative function of these fluid terms that mark the discursive national borderlands, we would only be able to see in hindsight the

134. CHON & YAMAMOTO, *supra* note 131, at 39-48.
135. *Id.* at 48-67.

injustice that happened to one group or another, but fail to recognize the exclusion, incarceration and detention happening to "other" people now, even as we speak about the history of American concentration camps.