

**“Military Necessity” and Suspending the Constitutional Rights of “Non-Aliens”:
A Closer Look at *Korematsu v. United States***

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I. Introduction

The rights and privileges commonly associated with American citizenship are numerous, ranging from recognized membership in a community to legal recourse against state oppression. In spite of the promises of the Constitution, history demonstrates that citizenship alone is not a sufficient guarantee of basic constitutional rights. When there is an intersection of state claims of “military necessity” or “national security” with the violation of the rights of citizens who are of a racial minority, the Court typically sides with the government, leaving the individual with no legal recourse.

This paper will explore the notion that constitutional rights are not always accessible to every American citizen. While the U.S. Constitution instructs equal protection for all (or at least all citizens), the government has frequently infringed upon the rights of minority citizens, often in the name of “military necessity” or “national security,” and the Courts have largely refused to intervene. The Court has a history of deflecting constitutional questions and deferring to federal and military authority on the necessity and justifiability of government action—thus allowing constitutional violations to continue. While invocations of “military necessity” and “national security” play an important role in politically and/or legally justifying the Court’s deferral to governmental authority, the element of race is crucial to the historical pattern of suspending citizens’ constitutional rights. The danger of this deference to governmental authority is particularly evident today in light of violations of the constitution and international law occurring at Guantanamo Bay and Abu Ghraib. This paper will explore the issues of citizenship, rights, race and “military necessity” through the lens of *Korematsu v. United States*.

II. Background

Fred Korematsu was born in 1919 to Japanese immigrants.¹ When Japan struck Pearl Harbor in December 1941, 22-year old Korematsu was living in Oakland, California and working as a welder at Bay Area shipyards.² About two months later, President Franklin Roosevelt signed Executive Order 9066, pronouncing all Japanese—including American citizens—“alien enemies.” Korematsu’s parents, along with over 100,000 other Japanese and Japanese-Americans reported to concentration camps as ordered by the federal government.³ Korematsu, however refused. He stayed behind with his Italian-American fiancée, undertook plastic surgery on his eyelids, and started to claim Hawaiian-Hispanic descent. Despite these actions, he was caught in May 1942. The next day newspapers crowed “Jap Spy Arrested in San Leandro”⁴

In court, Korematsu was convicted for violating Civilian Exclusion Order No. 32, ordering all civilians of Japanese ancestry to evacuate designated “Military Areas,” and report to “detention” (concentration) camps for “processing” (imprisonment). Though the basis of the order, as affirmed by the Court, was to combat espionage and sabotage, the Court found no question of Korematsu’s loyalty to the United States.⁵ Supporting the lower court’s conviction, the Court cited a separate Japanese internment case:

[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that [Japanese] population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.⁶

¹ Matt Bai, *He Said No to Internment*, N.Y. Times, December 25, 2005 at 38.

² Video Interview by PBS/Point of View with Eric Paul Fornier, documentary filmmaker, *Of Civil Rights and Wrongs*, <http://www.pbs.org/pov/pov2001/ofcivilwrongsandrights/thefilm.html> (accessed Sep. 2006).

³ Bai, *supra* note 1.

⁴ Marc Sandolow, *A Defiant Stand for Freedom: Japanese American Honored Years After Arrest, Internment*, S.F. Chron., January 16, 1998, at A1.

⁵ *Korematsu v. U.S.*, 323 U.S. 214, 217 (1944)

⁶ *Id.* at 218

III. Discussion

A. Citizens' Rights and the Fourteenth Amendment

The United States Constitution was intended by its drafters not only to framework to its signatories for governing, but also to prevent the tyrannical use of governmental power against the civilian population. The drafters of the Constitution made a distinct effort to outline the basic fundamental rights of each citizen and to caution against governmental behavior that violates these rights. Many of these rights, such as the Fourteenth Amendment's due process of law, function as distinct limitations upon state power.⁷ These individual rights and entitlements inevitably create economic and political burdens on the government to develop and maintain the structures and institutions necessary to prevent government from descending into oppressive tyranny. Legislative history strongly suggests that the drafters of the Fourteenth Amendment wrote it while fully cognizant of this burden.⁸

These burdens are heaviest when the threat of tyranny is greatest: during times of crisis. Safeguards against tyranny can only be effective if they can endure in the face of powerful resistance. The value of the Constitution and the rights it guarantees is measured not by the symbolism it offers on paper, but by its effectiveness when put to the test.

So to whom do Fourteenth Amendment rights extend? Sections of the amendment encompass all "persons" while others only privilege "citizens." The Fourteenth Amendment prohibits states from "making or enforcing any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State 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."⁹ Irrespective of the debate about whether the protections of the entire amendment extend to non-citizens, the amendment is clear that at the very least, all citizens are entitled to all the rights and protections it sets forth.

⁷ See also Earl M. Maltz *Civil Rights, the Constitution, and Congress 1863-1969*, 102-106 (U. Press of Kan. 1990) for discussion on the intention of drafters' of the Fourteenth Amendment to address the "Problem of State Action."

⁸ Maltz, *supra* note 7.

⁹ U.S. Const. amend. XIV, § 1. See also Maltz *supra* n. 7 at ch. 7 for discussion of the intentional choice—and thus implications—of the terms "citizen" vs. "persons" by the drafters of the Fourteenth Amendment.

B. Understandings of Citizenship, Eligibility for Citizenship

Citizenship is a legal classification of status, the bearers of which are distinguished from their non-citizen peers by an entitlement within their nation-state¹⁰ to a set of negotiated rights, privileges and protections. When questioned, American citizens most commonly associate the notion of citizenship with rights¹¹ and individual entitlement.¹² The U.S. Supreme Court echoed this view of citizenship in *Trop v. Dulles*, saying that “[citizenship is] the right to have rights.”¹³ When an individual or group of citizens is deprived of the full enjoyment of the rights guaranteed by the Constitution, his status can be described as “second-class citizenship.”¹⁴ This second-class status breaks the promise of equal protection guaranteed by the Fourteenth Amendment and is thus constitutionally prohibited.¹⁵ When the constitutional rights of individuals are breached under color of state law, the Court is one of the only institutions that may hold those government agencies accountable.

At the time of *Korematsu*, there were two ways to become an American citizen: either through birth, as guaranteed by the Fourteenth Amendment from 1868 onwards, or by naturalization. Naturalization rights were restricted to “free white persons” until 1870, when the 1790 naturalization statute was amended to include persons of African descent. Asians could not naturalize until well into the 20th century: Chinese as of 1943, Indians and Filipinos as of 1946 and all other Asians, including Japanese, not until 1952.¹⁶ So while at the time of World War II, no Japanese immigrant could become a naturalized American citizen, their children born in the U.S. were guaranteed American citizenship by the Fourteenth Amendment. Fred Korematsu was one of those natural-born American citizens.

Although as an ethnically Japanese person on the West Coast, Korematsu undoubtedly experienced the pains of racial discrimination, he nevertheless self-identified as an American and

¹⁰ While recognizing that people may have multiple identities and territorial affiliations (e.g., to city, state or region), Linda Bosniak also notes Gertrude Himmelfarb who argues that, the term citizenship has “little meaning except in the context of a state.” Linda Bosniak, *Citizenship Denationalized*, 7 Ind. J. Global Legal Stud. 447, 448 (2000). Bosniak continues on the role of the state in guarding citizenship rights, “rights-based traditions routinely assume that the site of citizenship is the national society, and that the national state is both the source and guarantor of rights.” *Id.* at 465-466.

¹¹ Will Klymicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 Ethics 352, 355 (1994)

¹² *Id.* at 352.

¹³ *Trop v. Dulles*, 356 U.S. 86, 102 (1958)

¹⁴ Leti Volpp, *Obnoxious To Their Very Nature”: Asian Americans and Constitutional Citizenship* 8 Asian L.J. 71, 72 (2001); See also *White v. Clements*, 39 Ga. 232 (1869) about the prohibition of second-class citizenship.

¹⁵ Volpp, *supra* note 14 at 75.

¹⁶ Eric K. Yamamoto et al. *Race, Rights and Reparation: Law and the Japanese American Internment*, 36 (2001).

considered himself to be a full member of American society. As a product of the American public education system, he believed deeply in the promises of the Constitution. “I learned in high school that I was an American, and I felt like an American,” he said.¹⁷

Korematsu did not consult a lawyer before defying the internment orders. Instead he acted on what he had learned in public school, that as an American, he possessed certain inalienable rights.¹⁸ “I didn't feel guilty because I didn't do anything wrong,” Korematsu said. “Every day in school we said the pledge to the flag, ‘with liberty and justice for all,’ and I believed all that. I was an American citizen and I had as many rights as anyone else.”¹⁹

C. Rescinding Constitutional Rights for “Military Necessity” / “National Security”

For Korematsu and all other Japanese-Americans who were forced into internment camps, their American citizenship was of no impediment to the wholesale abatement of their most fundamental rights. While certain conditions exist where the state may deprive citizens of their basic freedoms, the question remains whether government invocations of “military necessity” or “national security” are sufficient to justify the deprivations of citizens’ constitutional rights, and in particular, the right to due process.

Disloyalty is *not* a punishable crime, nor did the Court ever dispute Korematsu’s loyalty. Although the supposed disloyalty of Japanese-Americans in general was the rationale behind the internments, even a finding of Korematsu’s own disloyalty would not justify his internment or suspension of his constitutional rights. Only under formal martial law—the legality of which is hotly contested—can the government legitimately argue that it is constitutionally permissible to infringe on due process or other individual rights. “Military necessity” and “national security” are not valid justifications for the suspension of the Constitution, and the standard judicial review²⁰ of civil rights violations in these cases should remain the same.²¹

¹⁷ Thomas Y. Fujita-Rony, *Korematsu’s Civil Rights Challenges: Plaintiffs’ Personal Understandings of Constitutionally Guaranteed Freedoms, the Defense of Civil Liberties, and Historical Context*, 13 Temp. Pol. & Civ. Rts. L. Rev. 51, 56 (2003).

¹⁸ Rony, *supra* note 17 at 52.

¹⁹ David Margolick, *Legal Legend Urges Victims to Speak Out*, N.Y. Times, Nov. 24, 1984.

²⁰ Yamamoto describes judicial “standard of review” as follows: “It refers to the level of deference accorded by an appellate court to a lower court’s determinations. It also refers to the standards by which a court evaluates the constitutionality of executive and legislative branches. The latter meaning is used here.” Eric K. Yamamoto, *Korematsu Revisited—Correcting the Injustice of Extraordinary Government Excess and Lax Judicial Review: Time for a Better Accommodation of National Security Concerns and Civil Liberties*, 26 Santa Clara L. Rev. 1, 7 n.20 (1986).

At no point during the Japanese internment was the West Coast of the United States under martial law. Yet citing government claims of “military necessity” and “national security,” the Court’s majority abstains from judging the constitutionality of the internment program, and does not question the very claims of necessity and security which had triggered the decision to defer constitutional judgment in the first place.²² The majority argued that the military should be allowed its discretion to decide strategies and necessities for fighting a war, and thus refused to exercise its own judicial discretion in assessing military decisions. There simply was no time, the majority argued, for a more judicious process:

[M]ilitary authorities decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily...the military authorities considered that the need for action was great, and time was short.²³

The three dissenters in the six-three Korematsu decision were highly critical of the majority’s reasoning. Justice Murphy protested the majority’s decision to refrain from judging the military’s actions, insisting that “it is essential that there be definite limits to military discretion, especially where martial law has not been declared.”²⁴ The fact that the West Coast was not under martial law serves as evidence that the situation had not yet escalated to a military emergency. Justice Murphy also questioned whether the government’s claim of military necessity was substantiated, and asserted what Professor Eugene Rostow would later argue,²⁵ that the reasonableness of military claims must themselves be subject to judicial review.²⁶ Quoting the Court in *Sterling v. Constantin*, Justice Murphy wrote, “What are allowable limits of military

²¹ Yamamoto, *supra* note 16 at 7.

²² Eugene V. Rostow, *The Japanese American Cases—A Disaster*, 54 Yale L. Rev. 489, 509 (1945).

²³ *Korematsu*, 323 U.S. at 223-224.

²⁴ *Korematsu*, 323 U.S. at 234.

²⁵ Several decades after the publication of the Korematsu decision and Eugene Rostow’s widely read law review article on the Japanese internment cases (*supra* note 21), in his book “All the Laws But One: Civil Liberties in Wartime,” Chief Justice William Rehnquist ridicules Rostow’s assertion:

Eugene Rostow suggests the possibility of a judicial inquiry into the entire question of military necessity, but this seems an extraordinarily dubious proposition. Judicial inquiry, with its restrictive rules of evidence, orientation towards resolution of factual disputes in individual cases, and long delays, is ill-suited to determine an issue such as “military necessity.” William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime*, 205 (1998).

²⁶ *Korematsu*, 323 U.S. at 234.

discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”²⁷

Justice Murphy was also critical that the military gave “no adequate reason” for its inability to hold hearings and investigations for individual Japanese Americans—as had been done for German and Italian Americans—to separate the loyal from the disloyal. While sufficient for the majority, Justice Murphy dismissed the argument that “time was of the essence” as sufficient reason for the mass internments. He argued that to the contrary, time was not of the essence:

Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.²⁸

Furthermore, since heavy deployment had already taken place, the Court’s invalidation of the internment program had no potential detriment to the American war effort.²⁹ Finally, he noted that not a single American of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor, before the internments. This fact alone, he argued, should demonstrate to the Court that a “vast majority” of the Japanese American community was in fact loyal and posed no threat.³⁰ Professor Joel Grossman notes that in Hawai’i, where Japanese and Japanese-Americans composed a substantial proportion of the population, there was no internment program. Not only did the military governor in Hawai’i lobby vigorously to refute allegations of Japanese-American disloyalty, but Grossman argues that what “ultimately saved Hawai’i’s Japanese American population from mass internment was their key economic role. Removing the Japanese population would have left a dangerous void in the labor pool.”³¹ It seems that even in the throes of World War II, on the very island that was bombed by Japanese

²⁷ *Id.*, citing the opinion in *Sterling v. Constantin*, 287 U.S. 378, 401 (1932).

²⁸ *Korematsu* 323 U.S. at 241.

²⁹ Rostow, *supra* note 22 at 503.

³⁰ *Korematsu* 323 U.S. at 241.

³¹ Joel B. Grossman, *the Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 *Hawaii L. Rev.* 649, 654 (1997).

planes, there was disagreement with the mainland military and with the Korematsu majority, on whether the Japanese and Japanese American communities posed serious threats to national security.

Justice Jackson wrote his own dissent, arguing that the Court must exercise its power and cannot simply deflect its judicial inquiry for the sake of military authority. The courts are civil courts, and their failure to abide by the Constitution, even in the face of “a reasonable exercise of military authority,” will cause them to become instruments of military policy.³² Furthering this discussion, Rostow points out that the Constitution deliberately structured the federal government so that civilian authority would supersede military authority. It was no accident that a civilian president sits at the head of government, “[thus] the subordination of the military to the civil power is primarily assured.”³³ Although Justice Jackson’s dissent did not go so far as to question the reasonableness of the military’s assessments, he was no less concerned than the other dissenters about the implications of the majority’s decision:

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.³⁴

Even when a military invocation of “necessity” or “national security” is determined to be reasonable, however, the Court maintains that the state’s power remains limited. Even the direst emergencies will not grant the state permission to usurp more power than the Constitution granted to it, nor will emergency immunize state actions from constitutional inquiry. In *Home Bldg. & Loan Assn. v. Blaisdell* the Court writes:

³² *Korematsu* 323 U.S. at 247.

³³ Rostow, *supra* note 22 at 513-514.

³⁴ *Korematsu* 323 U.S. at 246.

Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved. The Constitution was adopted in a period of grave emergency. Its grants of power to the Federal Government and its limitations of the power of the States were determined in the light of emergency and they are not altered by emergency. What power was thus granted and what limitations were thus imposed are questions, which have always been, and always will be, the subject of close examination under our constitutional system.

In spite of constitutional prohibitions and the Court's warnings, there are historical precedents to the U.S. government's invocation of "military necessity" and "national security" to justify mass internments. Professor Natsu Saito explores some of the precedents related to various Native American tribes, and notes that in spite of the urgency and threat of violence implied by "military necessity," war has not been a determining factor in the past. There were no hostilities when the "Trail of Tears" took place in the 1830s, resulting in the death of about half of the Cherokee population. There were also no hostilities when the Choctaws, Chickasaws, Creeks and Seminoles met the same fate.³⁵ In all of these occasions, the government invoked "military necessity." In the few incidents when there were hostilities, Saito indicates that mass internments took place after the fighting had ceased.³⁶

D. Americanness vs. Citizenship

While there are historical precedents to the government violation of constitutional rights in the name of "military necessity" or "national security," patterns show that those invocations alone are insufficient to provide the political capital required to sustain the kinds of constitutional violations that occurred during the Japanese Internment. Most often claims of "military

³⁵ Natsu Taylor Saito, *Beyond the Citizen/Alien Dichotomy: Liberty, Security, and the Exercise of Plenary Power*, 14 Temp. Pol. & Civ. Rts. L. Rev. 389, 398 (2005).

³⁶ As an example Saito cites the war between the U.S. government and the Chiricahua Apaches which took place during the 1870s-1880s. After the cessation of hostilities,

[T]he government shipped the entire Chiricahua population, including not only children, elders, and women, but those men who had fought for the U.S. against their "renegade" relatives, to the Forts Marion and Pickens military prisons in Florida and later to the Mt. Vernon Barracks in Alabama." Over 40% of the interned population died, and the remaining prisoners were confined for over 26 years before U.S. officials finally transferred them to a reservation in Oklahoma.

Id. at 398.

necessity” and “national security” can be used as shields to protect unconstitutional government action when the victims are of a racial minority.

Korematsu was by law an American citizen. He identified personally as an American. As his internment punch card read, he also never visited Japan, did not have any Japanese schooling and did not speak Japanese.³⁷ Yet this was not enough to demonstrate how thoroughly “American” he was. As General DeWitt, who proposed and lead the Japanese internment project insisted:

In the war in which we are now engaged racial affinities are not severed by migration. 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 still undiluted.³⁸

In fact, of the nearly 120,000 Japanese and Japanese Americans interned, two-thirds of them were American citizens.³⁹ So the U.S. military, with the support of the Supreme Court, implemented Japanese internment on the assumption that international conflicts are at their root racial and a result of a biological predisposition for mutual hostility, rather than a result of fluid—often nation-state based—economic, political and social interests. The Court’s majority vigorously denied that the Korematsu case bore any relation to race:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire.⁴⁰

As Professor Neil Gotanda points out, Justice Black never explains how he makes the distinction between hostility against Korematsu's race and war with the Japanese Empire. Nevertheless, the difference is clear enough to the Court’s majority to eliminate the need for

³⁷ U.S. War Relocation Authority, *Japanese American Internee File: Korematsu, Fred* (Department of Justice, Civil Rights Division 1957). The War Relocation Authority (WRA) collected information on WRA Form 26 for each individual evacuee and created a punch card for each of them with this information. The WRA used the data to help manage the relocation centers and the individuals within them, as well as to serve as a locator index to the separate series of individual evacuee case files created and maintained by WRA. (NARA, *FAQ* Record Group 210).

³⁸ General DeWitt, *Final Report, Japanese Evacuation from the West Coast 1942* 34 (U.S. Army, Western Defense Command 1943, released 1944).

³⁹ Saito, *supra* note 35 at 402.

⁴⁰ *Korematsu* 323 U.S. at 223.

Equal Protection racial discrimination review.⁴¹ Ironically, the Korematsu majority establishes the basis for strict scrutiny of race-based decisions.⁴² The Court here argued that race-based violations of civil rights are immediately suspect, and the deciding court “must subject them to the most rigid scrutiny.”⁴³ In Korematsu’s case, however, the Court decided that racial prejudice was not at issue.

Many commentators disagree, and trace a much longer history of race discrimination against Asian and Asian-Americans that fostered conditions which ultimately permitted their mass incarceration in concentration camps. Racial discrimination in naturalization laws and other federal legislation (against Asians in particular) had wide repercussions for the Asian and Asian-American communities. Saito argues that discriminatory federal legislation “legitimized discrimination and violence against Asian Americans both directly and by reinforcing the idea that Asians were inassimilable. The notion that Asians could never be real Americans came to head in the internment of Japanese Americans during World War II.”⁴⁴ Several commentators note that the internment orders were directed at “all persons of Japanese ancestry, both alien and non-alien,”⁴⁵ General DeWitt’s careful choice to use the term “non-alien” in describing American citizens of Asian ancestry further supports the notion of the Asian as inassimilable and permanently foreign. Saito continues:

[A]s ‘non-alien’ rather than ‘citizens,’ they could be presumed disloyal on the basis of race and national origin and incarcerated indefinitely without trial, indeed without any of the protections guaranteed by the Bill of Rights. Like the American Indian nations unilaterally declared to be ‘domestic dependent nations’ and external colonies such as Puerto Rico deemed ‘foreign in a domestic sense,’ Japanese Americans could by executive fiat be turned into the colonized Other, subject to the unrestrained exercise of political power.⁴⁶

There is a long-standing notion of the permanent “foreignness” of “the Asian” or “the Oriental” in Court opinions and the political mainstream. In 1898, the Supreme Court decided in

⁴¹ Symposium, *Vision and Revision: Exploring the History, Evolution and Future of the Fourteenth Amendment: Reflections on Korematsu, Brown and White Innocence*, 13 Temp. Pol. & Civ. Rts. L. Rev. 663 (2004).

⁴² Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 Colum. Human Rights L. Rev. 1, 22-23 (2002).

⁴³ *Korematsu* 323 U.S. at 216.

⁴⁴ Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 Or. L. Rev. 261, 275 (1997).

⁴⁵ Civilian Exclusion Order No. 57 of May 10, 1942, 7 Fed. Reg. 3725.

⁴⁶ Saito, *supra* note 35 at 402-403.

*U.S. v. Wong Kim Ark*⁴⁷ that a child born on American soil to two Chinese nationals was an American citizen under the Fourteenth Amendment. Chief Justice Fuller, joined by Justice Harlan published a scathing dissent citing the “foreignness” and inassimilability of Chinese into American society. Reading the majority and dissenting opinions together demonstrates what Gotanda calls the paradoxical aspect of Chinese-American identity: the dual status as both an American citizen, and a permanent inassimilable foreigner. Gotanda calls this an “inclusion of foreignness into racial identity.” The Japanese internment was an extension of this racialized notion of citizenship where most Americans believed that Japanese and Japanese American loyalty to Japan during the war was innate to their genetic makeup.⁴⁸ “The foreignness of the Oriental has not simply been an issue of national citizen or place of birth,” says Professor Thomas Joo. “It has been treated as a permanent, inheritable characteristic. That is, it has been racialized.”⁴⁹

“In fact, ‘citizen’ and ‘Asian’ could be said to function as antonyms in the United States context,” says Professor Leti Volpp.⁵⁰ A white European immigrant is not racialized to the same degree, argues Joo. An immigrant may be racialized as “Italian,” but they are ultimately accepted as White Americans, and White is not considered foreign, and thus, incompatible with Americanness.⁵¹ The same ultimate acceptance is not true for non-white ethnic identities, which are always—with some exception for black identities—cast as foreign and thus inherently incompatible with Americanness.⁵² There were supposedly too many Japanese for the military to be able to distinguish the “good ones” from the “bad ones,” and so Japanese parentage stood in as the indicator of loyalty to a former sovereign, and thus, disloyalty to the United States. “Here,” says Volpp, “race fundamentally contradicted the purported promise of citizenship as rights, in the form of racial ancestry trumping the fact of U.S. citizenship.”⁵³ Chief Justice Warren protested the idea of interning Germans and Italians because “they are no different from anybody

⁴⁷ *U.S. v. Wong Kim Ark*, 169 U.S. 649 (1898).

⁴⁸ Neil Gotanda, “*Other Non-Whites*” in *American Legal History: a Review of Justice at War*, 85 Colum. L. Rev. 1186, 1190 (1985).

⁴⁹ Joo, *supra* note 42 at 17.

⁵⁰ Volpp, *supra* note 14 at 82; Volpp illustrates the point that “‘American’ is equated with white” and that Asian Americans are racialized as foreign with an incident from the 1998 Winter Olympics where MSNBC ran the headline “American beats out Kwan,” implying that the White American skater, Tara Lipinski, defeated the ostensibly non-American (Asian American) Michelle Kwan. *Id.* at 82.

⁵¹ Joo, *supra* note 42 at 17.

⁵² *Id.* at 19.

⁵³ Volpp, *supra* note 14 at 79.

else.” He was, however, a vocal advocate of Japanese internment.⁵⁴ General DeWitt followed the same line of reasoning in his testimony at a House hearing:

I don't want any [Japanese and Japanese Americans back on the West Coast]. They are a dangerous element. There is no way to determine their loyalty The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty.

. . . .

[On potential disloyalty among Germans and Italians in America]: You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map.⁵⁵

Professor Keith Aoki addresses the problematic accommodation of Asian Americans into the traditionally bipolar white-black construction of race relations in the United States. While white immigrants may maintain their prior nationalities and identifications, the American racialization process seeks to erase the former nationalities and identities of non-whites. Thus, African immigrants from different regions and nationalities become “black” or “African American,” Spanish-speaking immigrants from across South and Latin America become “Latino” or “Hispanic,” members of indigenous American tribes become “Indian” and people from across the sprawling continent of Asia become “Asian American.” But the same erasure and racialization does not apply to European immigrants, as Aoki argues:

[W]hite European immigrants retain to varying—but largely unproblematic—degrees, identification as German, English, French, Irish, Italian, Norwegian, etc. To the extent that “non-whites” retain a palimpsest of their ancestral nationality, it is suffused with racial content⁵⁶ While there might be a “good” nationality such as China and a “bad” nationality like “Japan,” there was no finer unit of characterization. The pejorative terms “Jap” or “Nip” had both a racial and national dimension, whereas the term “Nazi” was equivalent to “bad” German, and seemingly contemplated the existence of “good” (presumably white) Germans (many of whom may have immigrated to the United States). All Germans and

⁵⁴ Joo, *supra* note 42 at 19.

⁵⁵ *Hearings before Subcommittee of House Committee on Naval Affairs on H.R. 30, 78th Cong., 1st Sess. (1943) 739-40.*

⁵⁶ Keith Aoki, “*Foreign-ness*” & *Asian American Identities: Yellowface, World War II Propaganda, and Bifurcated Racial Stereotypes*, 4 *UCLA Asian Pac. Am. L.J.* 1, 10-11 (1996).

German Americans (or Italians and Italian Americans) were not “race-ed” in the way that Japanese and Japanese Americans were “race-ed.”⁵⁷

IV. Conclusion

Forty years after *Korematsu*, Fred Korematsu’s conviction was reversed by a district court which found that the government had intentionally falsified and withheld important information in the original case. While the conviction was vacated, the legal rationale of *Korematsu* was not—and has not been—struck down. Professor Eric Yamamoto writes:

Korematsu has never been explicitly overruled by the Court and, although its factual underpinnings have been undercut by Judge Patel’s ruling,⁵⁸ its legal legacy of diminished government accountability lingers.⁵⁹

Decades after the Japanese internment, when mainstream America largely agreed that the internment was a horrible mistake, the government offered Korematsu a pardon, but he refused, “I don’t want a pardon. If anything, I should be pardoning the government,”⁶⁰ he said. Then during his case in 1984, he stood and addressed the court:

As an American citizen being put through this shame and embarrassment and also all Japanese American citizens who were escorted to concentration camps, suffered the same embarrassment, we can never forget this incident as long as we

⁵⁷ *Id.* at 39.

⁵⁸ See generally *Korematsu v. U.S.*, 584 F. Supp. 1406 (N.D. Cal. 1984) in which Korematsu filed a Petition for Writ of Error Coram Nobis seeking to vacate his 1944 conviction. United States District Judge Marilyn Patel found “manifest injustice” and granted the Petition on the merits. Judge Patel wrote:

[T]here is substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court. The information was critical to the court’s determination [of military necessity] Because the information was of the kind peculiarly within the government’s knowledge, the court was dependent upon the government to provide a full and accurate account. Failure to do so presents the “compelling circumstance” contemplated by *Morgan*. The judicial process is seriously impaired when the government’s law enforcement officers violate their ethical obligations to the court.

Id. at 1420.

The writ of error coram nobis requests a review of fact due to some irregularity or invalidity of court proceedings. At the time of *Korematsu* (1984), the Supreme Court had warned that coram nobis should be used “only under certain circumstances compelling such action to achieve justice” and to correct “errors of fundamental character.” *U.S. v. Morgan*, 346 U.S. 502, 511, 509 n. 15 (1954).

⁵⁹ Yamamoto, *supra* note 20 at 3-4.

⁶⁰ Eric K. Yamamoto & May Lee, *A Brief Biography: Fred Korematsu*, Asian American Bar Association, <http://www.aaba-bay.com/aaba/showpage.asp?code=yamamotoarticle> (accessed September 17, 2006).

live As long as my record stands in federal court, any American citizen can be held in prison or concentration camps without a trial or a hearing Therefore, I would like to see the government admit that they were wrong and do something about it so this will never happen again to any American citizen of any race, creed or color.⁶¹

Cases involving American citizen labeled “enemy combatants” such as Jose Padilla, Yaser Hamdi and John Walker Lindh serve as stark reminders that the questions raised by the Japanese internment cases remain unanswered and as relevant as ever: to what extent will citizenship rights protect the individual from constitutional violations perpetrated by government? John Walker Lindh, the only white American among these three men, was indicted by a federal grand jury two months after his capture in Afghanistan, and within seven months of his capture Lindh was offered and accepted a plea bargain on two of the ten original charges.⁶² Yaser Hamdi was imprisoned and never charged, but after the second year of his detention incommunicado, the Supreme Court ruled that Hamdi was entitled to his day in court, and the U.S. government released him to Saudi Arabia.⁶³ Jose Padilla, arrested in Chicago’s O’Hara airport in 2004, was also imprisoned without charges for over two years, and continues to languish in prison as of the time of this writing.⁶⁴ Although history may have judged the Japanese internment cases harshly, Professor Alfred Yen warns notes that

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." While modern courts continue to cite Korematsu, critical references to it are noticeably rare.⁶⁵

In his *Korematsu* dissent, Justice Roberts’ challenges the majority’s position that the case is not about race. Tracing the role of Korematsu’s Japanese ancestry to his forced internment,

⁶¹ *Id.*

⁶² *U.S. v. Lindh*, 227 F. Supp. 2d 565 (D. Va. 2002).

⁶³ *From Afghanistan to Saudi Arabia, via Guantanamo*, N.Y. Times, Oct. 16, 2004; *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

⁶⁴ *See Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

⁶⁵ Symposium, *Introduction: Praising With Faint Damnation -- The Troubling Rehabilitation of Korematsu*, 19 B.C. Third World L.J. 1, 2 (1998).

Roberts' concludes, "I need hardly labor the conclusion that Constitutional rights have been violated."⁶⁶

In spite of the unequivocal language of the Constitution, there is no guarantee that anyone, least of all the courts, will step between the Executive branch and the individual to insist that basic constitutional rights are upheld. Thus when put to the test, the guarantees of the Third Article of the Constitution, and the Fifth, Sixth and Fourteenth Amendments have disintegrated upon state attacks immunized by claims of "national security" and "military necessity": powerful wildcards that are yet to stand under the scrutiny of constitutional judgment. As Chief Justice Rehnquist wryly points out in a chapter on the Japanese internment, "the traditional unwillingness of courts to decide constitutional questions ... illustrates in a rough way the Latin maxim '*Inter arma silent leges*': In time of war, the laws are silent."⁶⁷

⁶⁶ *Korematsu* 323 U.S. at 226.

⁶⁷ Rehnquist, *supra* note 25 at 202.