

US AGAINST THEM: THE PATH TO NATIONAL SECURITY IS PAVED BY RACISM

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I. INTRODUCTION

'[W]ithin the United States, if a person is racially identified as African American or white, that person is presumed to be legally a U.S. citizen and socially an American . . . [but] these presumptions are not present for Asian Americans, Latinos, Arab Americans, and other non-Black racial minorities. Rather, there is the opposite presumption that these people are foreigners; or, if they are U.S. citizens, then their racial identity includes a foreign component.'¹

1. Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 262-63 (1997) [hereinafter Saito, *Alien and Non-Alien Alike*] (quoting Neil Gotanda, *Asian American Rights and the "Miss Saigon*

National security has always been an important issue to the United States. Its military is one of the largest and most powerful in the world so that the country will be prepared for any type of hostile attack. In the 2000 presidential race, the two candidates debated whether or not the military was prepared to defend the country if attacked.² Since the terrorist attacks that occurred on September 11, 2001, one cannot watch the news without hearing mention of national security.

Since the United States of America became a country, it has tried to keep non-whites out of the country for fear that they would commit terrorist acts.³ "Throughout history, national security fears have driven our nation's leaders to take extreme action. . . . [In these cases,] instead of using the deprivation of rights to punish wrongful acts, the government deprived rights based solely on race and suspected political affiliations."⁴ After the Oklahoma City bombing, the government enacted legislation such as the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)⁵ and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA),⁶ presumably to ensure national security. Less than two months after September 11, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA Patriot Act) of 2001⁷ became law. These acts have been touted as the key to preventing terrorism, but instead have targeted innocent people because of their race or ethnicity.⁸ However, the government and the general public view national security policy as necessary to protect the country and believe that such policies are valid as long as they prevent terrorism.⁹

Syndrome," in ASIAN AMERICANS AND THE SUPREME COURT 1087, 1096 (Hyung-chan Kim ed. 1992)).

2. Steven Mufson, *In Round Two, Foreign Policy May Dominate; Mideast, Balkans Likely Topics*, WASH. POST, Oct. 11, 2000, at A14.

3. See Saito, *Alien and Non-Alien Alike*, *supra* note 1, at 275-80 (discussing early American immigration policy and its emphasis on excluding non-whites and stating that "[m]uch of the discrimination encountered by Asian Americans has been framed in terms of political loyalty and national security"); see also Alien Enemies Act, ch. 66, § 1, 1 Stat. 577 (1798); Sedition Act, ch. 74, 1 Stat. 596 (1798); Immigration Act of 1924, ch. 190, 43 Stat. 153 (1924) *repealed by* Immigration and Nationality (McCarran-Walter) Act of 1952, ch. 477, 66 Stat. 208 (1952).

4. Melissa A. O'Loughlin, Note, *Terrorism: The Problem and the Solution—The Comprehensive Terrorism Prevention Act of 1995*, 22 J. LEGIS. 103, 103 (1996).

5. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 214 (codified at 8 U.S.C. § 1182).

6. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-546 (codified at 8 U.S.C. § 1101).

7. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272.

8. See 8 U.S.C. §§ 1101, 1182.

9. See Michael Higgins, *Looking the Part: With Criminal Profiles Being Used More Widely to Spot Possible Terrorists and Drug Couriers, Claims of Bias Are Also on the Rise*, 83

However, the national security policy of the United States has been criticized for promoting racism against its own citizens.¹⁰ Non-white United States citizens and legal residents have been singled out as possible threats to national security because of their race or ethnicity.¹¹ In attempting to deal with possible national security threats, the government has taken away many innocent people's rights.¹² These persons have been detained and questioned about their loyalty to the United States, and harassed and discriminated against because of their race or ethnicity.¹³ In the several months preceding this publication, five thousand people, mostly of Arab descent, have been questioned and hundreds have been detained.¹⁴ Acts like the AEDPA do not explicitly link disloyalty to race; nonetheless, the Acts "associate foreignness with disloyalty."¹⁵ "[T]he ill-treatment of racial and ethnic minorities within our borders" is accepted in the name of national security.¹⁶ For instance, on May 24, 1997, Hassan and Julia Abbass, both United States citizens, were singled out from a line of two hundred people waiting for a U.S. Airways flight to St. Martin.¹⁷ Their bags were searched and fluorescent green tags stating, "Positive I.D." were placed on the bags.¹⁸ The Abbasses eventually made it onto their flight, but they left the airport feeling like accused terrorists, and several of the other travelers changed seats to avoid sitting near them.¹⁹ On February 18, 1998, Gregorio Diaz, a United States citizen of Mexican descent, was detained by the Immigration and Naturalization Service (INS) when he went through customs at O'Hare International Airport.²⁰ Even though Diaz proved his citizenship, he was "summarily removed" and deported to Mexico.²¹ On September 30, 2001, Northwest Airlines would not

A.B.A. J. 48 (1997); Lisa J. Laplante, *Expedited Removal at U.S. Borders: A World Without a Constitution*, 25 N.Y.U. REV. L. & SOC. CHANGE 213, 244 (1999); Robert Plotkin, *First Amendment Challenges to the Membership and Advocacy Provisions of the Antiterrorism and Effective Death Penalty Act of 1996*, 10 GEO. IMMIGR. L.J. 623, 623-24 (1996).

10. Natsu Taylor Saito, *Crossing the Border: The Interdependence of Foreign Policy and Racial Justice in the United States*, 1 YALE HUM. RTS. & DEV. L.J. 53, 53 (1998) [hereinafter Saito, *Crossing the Border*].

11. Higgins, *supra* note 9, at 48; Laplante, *supra* note 9, at 237-38.

12. O'Loughlin, *supra* note 4, at 104.

13. Higgins, *supra* note 9, at 48; see, e.g., Laplante, *supra* note 9, at 213-15 (discussing the Immigration and Naturalization Service's "expedited removal" procedure).

14. James Rosen, *Reality Meets Rhetoric over Race Profiling*, SACRAMENTO BEE, Dec. 30, 2001, at A9.

15. Saito, *Alien and Non-Alien Alike*, *supra* note 1, at 280.

16. Saito, *Crossing the Border*, *supra* note 10, at 53-54.

17. Higgins, *supra* note 9, at 48.

18. *Id.*

19. *Id.*

20. Laplante, *supra* note 9, at 213.

21. *Id.*

allow three men of Middle Eastern descent to board a flight.²² The men were told that the crew and passengers were scared to have them on the flight.²³ These incidents demonstrate the prevailing notion that non-whites, whether they are United States citizens or not, are a threat to the United States, and that the mentality of "us against them"²⁴ persists in the national security policy of the United States.

In this Note, I argue that the national security policy of the United States promotes racism in governmental actions and investigations, the media, and citizens. Part I examines Executive Order 9066²⁵ and *Korematsu v. United States*.²⁶ Part II addresses the effect the United States' "war on terrorism" has on Arab Americans. It further addresses the Oklahoma City bombing, and the AEDPA and other antiterrorism Acts. Part III discusses the investigation and trial of Wen Ho Lee, the Chinese American scientist accused of stealing nuclear secrets. These incidents demonstrate the racism that persists in the United States national security policy.

II. THE UNSUBSTANTIATED THREAT TO NATIONAL SECURITY DURING WORLD WAR II

A. Executive Order No. 9066

On December 7, 1941, the United States entered into World War II when the Japanese bombed Pearl Harbor.²⁷ Ten weeks later, on February 19, 1942, President Franklin D. Roosevelt signed Executive Order No. 9066.²⁸ This Executive Order created "military areas" where "any or all persons may be excluded" and called for these persons to be provided with "transportation, food, shelter, and other accommodations as may be necessary."²⁹ President Roosevelt justified the internment camps as a military necessity,³⁰ stating that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense

22. *Northwest Apologizes for Refusing to Seat 3*, DES MOINES REG., Sept. 30, 2001, at A2.

23. *Id.*

24. Saito, *Crossing the Border*, *supra* note 10, at 57-59.

25. Exec. Order No. 9066, 3 C.F.R. 1092 (1938-1943).

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

27. ROGER DANIELS, *CONCENTRATION CAMP U.S.A.: JAPANESE AMERICANS AND WORLD WAR II* 32 (1971).

28. 3 C.F.R. 1092.

29. *Id.*

30. DANIELS, *supra* note 27, at 70.

premises, and national-defense utilities."³¹ Japanese Americans were not specifically mentioned in Executive Order 9066, but they were the only ones placed in the camps.³²

Within eleven months after Pearl Harbor, 119,803 men, women, and children were forced to leave their homes and businesses, and "confined behind barbed wire" with armed men surrounding them in desolate areas.³³ The majority of the camp personnel—armed men—saw the interned Japanese Americans as the enemy and as an inferior race.³⁴ Two-thirds of those in the camps had been born in the United States and 77.4% of them were under the age of twenty-five.³⁵ More than half of the population in the camps was over the age of fifty.³⁶

B. Korematsu v. United States

In *Korematsu v. United States*,³⁷ Fred Korematsu, a United States citizen of Japanese descent, was convicted of violating Civilian Exclusion Order No. 34.³⁸

31. 3 C.F.R. 1092.

32. DANIELS, *supra* note 27, at 70-71.

33. *Id.* at 104-05; see CIVIL LIBERTIES PUBLIC EDUCATION FUND, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 49 (1982) [hereinafter CIVIL LIBERTIES FUND].

34. DANIELS, *supra* note 27, at 105.

35. *Id.* at 104.

36. *Id.*

37. *Korematsu v. United States*, 323 U.S. 214 (1944). Three other cases challenged the constitutionality of the curfew and exclusion orders during World War II, and like *Korematsu*, the Supreme Court upheld the orders. *Korematsu v. United States*, 323 U.S. 214, 219 (1944). In *Hirabayashi v. United States*, 320 U.S. 81 (1943), the Court unanimously upheld a curfew ordered by the military requiring all persons of Japanese descent to be in their home during 8:00 p.m. to 6:00 a.m. *Id.* at 83, 105. Gordon Hirabayashi was convicted of failing to report to the Civil Control Station to register for evacuation and of staying out past 8:00 p.m. *Id.* at 83-84. Hirabayashi claimed he was an American-born citizen who had never sworn allegiance to Japan, or even been to Japan, and that the curfew violated the Constitution by discriminating against Japanese Americans. *Id.* at 84, 100. However, the Court did not agree with Hirabayashi, finding that "the constitutional power of Congress and the executive arm of the government to prescribe [the] curfew order . . . involved no unlawful delegation of legislative power." *Id.* at 92. According to the Court, the government and military acted reasonably and the Court could not second-guess their decision. *Id.* at 94-95. "The challenged orders were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage." *Id.* Using evidence of large numbers of Japanese Americans living, working, and going to school together in metropolitan cities on the West Coast, children being taught Japanese, Japanese parents of American-born children keeping their Japanese citizenship, and a large number of elderly resident aliens who held influential positions in the Japanese communities, the Court justified the curfew by stating that "the war-making branches of the government" could have reasonably questioned the loyalty of those of Japanese descent. *Id.* at 96-99. According to the Court, racism was not absolutely prohibited by the Constitution. *Id.* at 100. The Court further held:

The Order, based on Executive Order No. 9066, excluded all persons of Japanese descent from designated military areas.³⁹ Korematsu challenged the constitutionality of the Exclusion Order.⁴⁰ However, the Court declared:

[W]e are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area. . . . [E]xclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. . . . [W]e could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group rested by the military on the same ground.⁴¹

The Court then cited several government hearings which stated that five thousand Japanese Americans "refused to swear unqualified allegiance" to America and

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.

Id. at 99. While holding that distinctions between citizens based on their ethnicity violated equal protection, the Court held such racial discriminations are constitutionally permissible in wartime if "in the crisis of war and of threatened invasion, . . . [there are] facts and circumstances which indicate that a group of one national extraction may menace that safety more than others . . ." *Id.* at 101. In *Yasui v. United States*, a companion case to *Hirabayashi*, the Court again unanimously affirmed the curfew order issued by the military. *Yasui v. United States*, 320 U.S. 115, 117 (1943). Yasui purposely defied the curfew in order to challenge its constitutionality. *Id.*; LARRY DANE BRIMNER, VOICES FROM THE CAMPS: INTERNMENT OF JAPANESE AMERICANS DURING WORLD WAR II 39 (1994). Even though Yasui was born in the United States and educated in America, and a former second lieutenant in the Army who offered to serve when the United States became involved in World War II, the Court held Yasui was properly convicted of violating the curfew and that the curfew was constitutional. *Yasui v. United States*, 320 U.S. at 117. In *Ex parte Mitsuye Endo*, Endo challenged the War Relocation Authority's power to keep her, a loyal American citizen, in an internment camp. *Ex parte Mitsuye Endo*, 323 U.S. 283 (1944). While holding Endo, a loyal citizen, should be released from the internment camp and that the War Relocation Authority had no right to hold loyal citizens, the Court continued to uphold the constitutionality of the internment camps and of the military decisions to restrict and detain persons of Japanese descent. *Id.* at 297, 302-04. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. *Id.* at 302.

- 38. *Korematsu v. United States*, 323 U.S. at 215.
- 39. *Id.* at 216-17.
- 40. *Id.* at 218.
- 41. *Id.* at 217-19.

renounce allegiance to Japan.⁴² The Court claimed that Korematsu was not excluded from the military area because of his race, but

because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot . . . now say that at that time these actions were unjustified.⁴³

However, in his dissent, Justice Roberts concluded that this case involved a citizen punished “for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry.”⁴⁴ No evidence existed to prove that Korematsu was not a loyal citizen.⁴⁵ Furthermore, the internment camps were merely “a euphemism for concentration camps.”⁴⁶

Also dissenting, Justice Murphy declared, “[N]o reasonable relation to an ‘immediate, imminent, and impending’ public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.”⁴⁷ “This exclusion of ‘all persons of Japanese ancestry, both alien and non-alien,’ . . . ought not to be approved. Such exclusion goes over ‘the very brink of

42. *Id.* at 219. Within some of the internment camps, resistance movements took place. See Gil Gott, *A Tale of New Precedents: Japanese American Internment as Foreign Affairs Law*, 40 B.C. L. REV. 179, 243 (1998) (citing ROGER DANIELS, *CONCENTRATION CAMPS: NORTH AMERICA: JAPANESE IN THE UNITED STATES AND CANADA DURING WORLD WAR II* 112-14 (1989) [hereinafter DANIELS, *CONCENTRATION CAMPS*]); see also BRIMNER, *supra* note 37, at 59-60. The “no-no” movement occurred when approximately nine thousand Japanese American internees refused to give affirmative answers to questions about their willingness to serve in the United States military and swear allegiance to the United States. Gott, *supra*, at 243-44 (citing DANIELS, *CONCENTRATION CAMPS*, *supra*, at 113). Those who resisted did not do so because of any loyalty to Japan but to protest the unfair treatment by the United States government. *Id.* (citing DANIELS, *CONCENTRATION CAMPS*, *supra*, at 114, 116-17); see CIVIL LIBERTIES FUND, *supra* note 33, at 195-96. Several hundred Japanese American males also refused to serve in the military to protest the internment of Japanese Americans. CIVIL LIBERTIES FUND, *supra* note 33, at 246-47.

43. *Korematsu v. United States*, 323 U.S. at 223-24.

44. *Id.* at 226 (Roberts, J., dissenting).

45. *Id.* (Roberts, J., dissenting).

46. *Id.* at 230 (Roberts, J., dissenting).

47. *Id.* at 235 (Murphy, J., dissenting).

constitutional power' and falls into the ugly abyss of racism."⁴⁸ Civilian Exclusion Order No. 34 discriminated against those of Japanese descent because of race and deprived them "of their constitutional rights to live and work" wherever they chose.⁴⁹ No reliable evidence could demonstrate that all persons of Japanese ancestry were disloyal to the United States or were threats to national security.⁵⁰ Most of the evidence cited appeared to be based on "misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation."⁵¹ Persons of German and Italian descent committed disloyal activities in the United States, but

48. *Id.* at 233 (Murphy, J., dissenting).

49. *Id.* at 234-35 (Murphy, J., dissenting).

50. *Id.* at 236 (Murphy, J., dissenting).

51. *Id.* at 239 (Murphy, J., dissenting); see Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 655-56 (1997) (detailing instances of anti-Japanese prejudices before World War II). White farmers, who competed with Japanese American farmers on the West Coast, advocated for the internment. Gott, *supra* note 42, at 229. A farmers' association member acknowledged, "We're charged with wanting to get rid of the Japs for selfish reasons. We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. . . . And we don't want them back when the war ends, either." *Korematsu v. United States*, 323 U.S. at 239 n.12 (Murphy, J., dissenting) (quoting Frank J. Taylor, *The People Nobody Wants*, SATURDAY EVENING POST, May 9, 1942, at 66). The media also pushed for the placement of all Japanese Americans into concentration camps. CIVIL LIBERTIES FUND, *supra* note 33, at 71-72, 80-81. *San Francisco Examiner* columnist Henry Lomore stated: "I am for immediate removal of every Japanese on the West Coast to a point deep in the interior. . . . Herd'em up, pack'em off and give'em the inside room in the badlands. Let'em be pinched, hurt, hungry, and dead up against it. . . . Let us have no patience with the enemy or with anyone whose veins carry his blood. Personally, I hate the Japanese. And that goes for all of them." BRIMNER, *supra* note 37, at 25 (citing DANIEL S. DAVIS, *BEHIND BARBED WIRE* 33 (1982)). Another columnist wrote, "The Japanese in California should be under armed guard to the last man and woman right now and to hell with *habeas corpus* until the danger is over." CIVIL LIBERTIES FUND, *supra* note 33, at 80 (quoting Westbrook Pegler, *Fifth Column Problem on Pacific Coast Very Serious—Japs Should Be Under Guard*, Feb. 16, 1942, DOJ 146-13-7-2-0 (CWRIC 13333)). Newspapers continuously reported the unfounded fears of military officers by placing much attention on alleged fifth column activities—a "secret, subversive army of residents who act in sympathy with the enemy." BRIMNER, *supra* note 37, at 24, 102. The media also sought to turn people of different ethnicities against those of Japanese descent. In 1941, *Time Magazine* wrote:

HOW TO TELL YOUR FRIENDS FROM THE JAPS: Virtually all Japanese are short. Japanese are likely to be stockier and broader-hipped than short Chinese. Japanese are seldom fat; they often dry up and grow lean as they age. Although both have the typical epicanthic fold of the upper eyelid, Japanese eyes are usually set closer together. The Chinese expression is likely to be more placid, kindly, open; the Japanese more positive, dogmatic, arrogant. Japanese are hesitant, nervous in conversation, laugh loudly at the wrong time. Japanese walk stiffly erect, hard heeled. Chinese, more relaxed, have an easy gait, sometimes shuffle.

Saito, *Alien and Non-Alien Alike*, *supra* note 1, at 304 (quoting TIME, Dec. 22, 1941, at 33).

they were not subjected to the same treatment as those of Japanese descent.⁵² Ultimately, Justice Murphy dissented because of the racism present in the evacuation orders, writing:

[T]o infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference . . . is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.⁵³

Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.⁵⁴

C. *The Aftermath of Executive Order No. 9066 and Korematsu*

On January 2, 1945, the internment ended.⁵⁵ They were given \$25.00 each⁵⁶ and their freedom. However, many did not want to leave due to the fear of what they would find outside the camps.⁵⁷ The return home for most Japanese

52. *Korematsu v. United States*, 323 U.S. at 240 (Murphy, J., dissenting).

53. *Id.* at 240 (Murphy, J., dissenting).

54. *Id.* at 242 (Murphy, J., dissenting). Justice Jackson also dissented in *Korematsu*. *Id.* at 242-48 (Jackson, J., dissenting). Justice Jackson stated that if *Korematsu* had been of any other ethnicity, including German or Italian, he would not have been in violation of any military orders. *Id.* at 243. (Jackson, J., dissenting). In addition, Justice Jackson argued the Court's decision validated discrimination and that the Court could not enforce an unconstitutional military order even if there was a reasonable necessity for that order. *Id.* at 247 (Jackson, J., dissenting).

55. DANIELS, *supra* note 27, at 157. Executive Order 9066, however, remained in effect until February 9, 1976, when President Gerald Ford rescinded it. BRIMNER, *supra* note 37, at 85 (citing Proclamation No. 4417, 41 Fed. Reg. 7714 (Feb. 20, 1976)). President Ford called the evacuation and internment "national mistakes" and a "setback to fundamental American principles." *Id.* (quoting Proclamation No. 4417, 41 Fed. Reg. 7714 (Feb. 20, 1976)).

56. CIVIL LIBERTIES FUND, *supra* note 33, at 241.

57. *See id.* at 240-41 (stating that "[h]owever unpleasant their lives in camp, it was preferable to an unknown, possibly hostile, reception in the West coast").

Americans proved to be very difficult.⁵⁸ Internees returned home to find their household belongings gone.⁵⁹ Some had trouble getting their property back, and others found their property or businesses run by former associates or strangers.⁶⁰ Many were not able to secure decent housing because of shortages, inflated prices, or bigoted landlords.⁶¹ Even restrictive covenants barred Japanese Americans from some communities.⁶² Additionally, employment mainly consisted of low skilled and low paying jobs.⁶³ Persons of Japanese descent faced the strenuous task of trying to regain their property, homes, jobs, and dignity with very little assistance from the government, the entity that took away their freedom in the name of national security.⁶⁴ In fact, the "government's forced segregation of Japanese Americans branded [them] unfit for society."⁶⁵

In addition to financial difficulties, the emotional toll caused by the internment proved to be overwhelming.⁶⁶ Having been forced into a prison-like environment even though they had done nothing wrong, many of those interned could not tell others, even their children, about their experiences.⁶⁷ They felt ashamed and unwanted.⁶⁸ The Nisei, those of Japanese descent born in the United States, experienced denial, a distrust and hatred towards those who had supported the internment, a sense of inferiority and self-blame, or renunciation of their heritage.⁶⁹ Children of those interned also suffered because their parents refused to teach them about Japanese culture.⁷⁰ They were told, "Don't make waves. Don't stand out. You are different enough anyway."⁷¹

58. See DANIELS, *supra* note 27, at 158-59 (describing the negative reaction of Californians to the return of Japanese Americans). Those interned suffered great economic losses during the exclusion. See CIVIL LIBERTIES FUND, *supra* note 33, at 117-33.

59. BRIMNER, *supra* note 37, at 72.

60. *Id.*

61. *Id.* at 75-76.

62. *Id.* at 77.

63. *Id.* at 76; see Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative*, 4 ASIAN PAC. AM. L.J. 72, 126-27 (1996).

64. BRIMNER, *supra* note 37, at 72-76.

65. Hashimoto, *supra* note 63, at 126.

66. CIVIL LIBERTIES FUND, *supra* note 33, at 297.

67. *Id.*

68. *Id.* at 298.

69. *Id.* at 299-300. The government actually encouraged the renunciation of their heritage by stating they should not walk together in public in groups larger than three, eat together if more than five persons of Japanese descent were present, or live next door to each other. *Id.* at 300. "This denial of who one was and how one looked bred ethnic hate and, ultimately, self-loathing." *Id.*

70. *Id.*

71. *Id.*

Furthermore, the public did not support the end of the internment camps, particularly in California.⁷² Ninety percent of Californians surveyed did not want internees from California to return.⁷³ Fred Howser, the Los Angeles District Attorney, proclaimed that the return of Japanese Americans signified "a second attack on Pearl Harbor."⁷⁴ The *Los Angeles Times* wrote that it was a serious mistake for the internees to return and that they should not be allowed to live on the West Coast.⁷⁵

While some political leaders in California tried to urge a peaceful acceptance of the returning Japanese Americans, harassment directed toward persons of Japanese descent occurred frequently.⁷⁶ Japanese Americans living throughout California experienced many hostile acts.⁷⁷ In Placer County, for example, a jury refused to find arsonists guilty of trying to burn down a shed on a Japanese American family's ranch and considered the culprits heroes.⁷⁸ Anti-Japanese protesters also fired gunshots into the homes of Japanese Americans and telephoned death threats; about thirty of these incidents occurred during the month of January 1945.⁷⁹ Those who were caught generally received light punishment if they were punished at all.⁸⁰

Businesses placed anti-Japanese signs in their windows displaying statements such as "Japs Keep Out You Rats" or "We Don't Want Any Japs Back Here—EVER!"⁸¹ Community meetings took place to protest the return of internees and to organize boycotts.⁸² In Vacaville, for example, approximately 1500 people signed petitions to boycott all Japanese Americans who might return to the city.⁸³ In Stockton, warehouse workers, backed by their union, shared the same sentiment and walked off the job when some internees were hired.⁸⁴ Unfortunately, these protests also worked to pit other minority groups against the Japanese Americans.⁸⁵ Persons of Chinese, Filipino, and Mexican descent were

72. DANIELS, *supra* note 27, at 158.

73. Hashimoto, *supra* note 63, at 126 (citing a poll of California residents soon after the war).

74. DANIELS, *supra* note 27, at 158.

75. *Id.*

76. BRIMNER, *supra* note 37, at 77.

77. *Id.*

78. DANIELS, *supra* note 27, at 159.

79. BRIMNER, *supra* note 37, at 77.

80. DANIELS, *supra* note 27, at 159-60.

81. BRIMNER, *supra* note 37, at 77; MAISIE CONRAT & RICHARD CONRAT, EXECUTIVE ORDER 9066: THE INTERNMENT OF 110,000 JAPANESE AMERICANS 93, 98 (1972).

82. DANIELS, *supra* note 27, at 160-61.

83. *Id.* at 161.

84. *Id.*

85. *Id.*

told they would lose their jobs if the internees returned.⁸⁶ Consequently, these other minority groups were also hostile to the Japanese Americans.⁸⁷

The harassment did not only take place in California but also in other areas of the West Coast.⁸⁸ The American Legion Post in Hood River, Oregon deleted the names of sixteen local Japanese American servicemen from the public honor roll, while the organization in Seattle refused membership to veterans of Japanese descent.⁸⁹ In the Pacific Northwest, white business owners successfully organized a boycott of products from Japanese growers.⁹⁰

Fortunately, in spite of the harassment, most internees eventually made a success of their return.⁹¹ Not all caucasians discriminated against Japanese Americans.⁹² A minority of whites proved to be helpful in establishing groups to help internees and impede the racism.⁹³ Through the changing economy, some local government support, and evidence of the next generation being less prejudiced than their parents, Japanese Americans were slowly accepted back into society, but it took several decades, and complete acceptance is still somewhat elusive.⁹⁴

D. *The True Reasons Behind Executive Order No. 9066 and Korematsu*

Japanese Americans were forced into internment camps because of their race.⁹⁵ "The myth of military necessity was used as a fig leaf for a particular variant of American racism."⁹⁶ Before President Roosevelt signed Executive Order 9066, the push for internment became fierce due to anti-Japanese sentiment.⁹⁷ Many government officials believed that Japanese Americans were loyal to Japan and not the United States.⁹⁸ President Roosevelt, holding deep

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.* at 162.

92. *Id.*

93. *Id.*

94. *Id.*; see Hashimoto, *supra* note 63, at 127.

95. CIVIL LIBERTIES FUND, *supra* note 33, at 9. In support of the internment camps, some have argued that the Japanese army's mistreatment of United States soldiers or the vigilante violence against Japanese Americans justified the exclusion. *Id.* at 48, 88. However, neither argument is sufficient to explain why a large group of innocent people were forced from their homes into "Spartan, barrack-like camps in the inhospitable deserts and mountains of the interior." *Id.* at 27.

96. DANIELS, *supra* note 27, at 71.

97. CIVIL LIBERTIES FUND, *supra* note 33, at 28-42, 67-82.

98. *Id.* at 81-82; see Gott, *supra* note 42, at 229-31.

anti-Japanese feelings himself, believed every Japanese American posed a threat to national security.⁹⁹ In hearings for the Tolan Committee,¹⁰⁰ future Chief Justice Earl Warren stated that Japanese American organizations were heavily involved in seditious activities even though no solid evidence existed to prove these activities.¹⁰¹ The report of the House Committee on Un-American Activities stated that "no Japanese can ever be loyal to any other nation than Japan."¹⁰² Both the Secretary of the Navy, Frank Knox, and a government investigative body led by Supreme Court Justice Owen Roberts, reported unsubstantiated claims of Japanese Hawaiians committing espionage in support of the attack on Pearl Harbor.¹⁰³

Lieutenant General John L. DeWitt, the head of the Western Defense Command, aggressively recommended internment of Japanese Americans because he believed they had a genetic predisposition that made them a threat to national security.¹⁰⁴ His report stated: "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 undiluted."¹⁰⁵ In newspaper interviews, DeWitt declared that "a Jap's a Jap."¹⁰⁶ DeWitt claimed Japanese Americans signaled Japanese ships on the Pacific Coast, that a significant amount of weapons and other contraband had been seized by the FBI from homes and businesses of Japanese Americans, and that those of Japanese descent could never assimilate and had strong ethnic allegiance to Japan.¹⁰⁷ However, because little evidence existed to prove DeWitt's claims that all people of Japanese descent were threats to national security, DeWitt also argued that it would be impossible to determine which Japanese American was loyal and which was not.¹⁰⁸ According to DeWitt, "there isn't such a thing as a loyal Japanese and it is impossible to determine

99. Grossman, *supra* note 51, at 658.

100. The Tolan Committee was comprised of members of Congress investigating the exclusion of Japanese Americans. CIVIL LIBERTIES FUND, *supra* note 33, at 86.

101. Gott, *supra* note 42, at 230 (quoting PETER IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 213 (1983)). Chief Justice Warren admitted that California had not investigated or found any evidence of espionage or sabotage. CIVIL LIBERTIES FUND, *supra* note 33, at 96 (citing *Hearings Before the Select Committee Investigating National Defense Migration*, 77th Cong. 11011-12 (1942) (statement of Earl Warren)).

102. Gott, *supra* note 42, at 230 (quoting IRONS, *supra* note 101, at 213-16).

103. *Id.* at 231.

104. *Id.* at 228; Grossman, *supra* note 51, at 656.

105. Gott, *supra* note 42, at 228 (citing IRONS, *supra* note 101, at 58-59).

106. CIVIL LIBERTIES FUND, *supra* note 33, at 222 (quoting Lieutenant General John L. DeWitt).

107. Grossman, *supra* note 51, at 656.

108. *Id.* at 657.

their loyalty by investigation."¹⁰⁹ "[W]e must worry about the Japanese all the time until [the Japanese are] wiped off the map."¹¹⁰ Army intelligence, on the other hand, officially reported that the internment camps were not needed.¹¹¹

While the United States also fought against Germany and Italy, neither German Americans nor Italian Americans were forced into internment camps as a whole.¹¹² While a few government officials pushed for evacuation and internment of persons of German and Italian descent and even with the strong pro-Nazi organizations and activities before the war, mass evacuation and internment of these groups was never seriously considered.¹¹³ In fact, President Roosevelt stated that persons of German and Italian descent should not be interned.¹¹⁴ A small number of German Americans and Italian Americans were interned.¹¹⁵ However, for all those interned, their internment was based on a review of their personal records and loyalty.¹¹⁶

The government has admitted there was never any evidence that any persons of Japanese descent had committed or were planning to commit crimes against the United States.¹¹⁷ Several sources of intelligence reported to President Roosevelt that the Japanese Americans were not the danger that some politicians and military officials made them out to be.¹¹⁸ Nonetheless, "[s]tronger political forces outside intelligence services wanted evacuation. Intelligence opinions were disregarded or drowned out."¹¹⁹ "Common sense [was] thrown to the winds and any absurdity [was] believed."¹²⁰ The internment occurred "without any thoughtful, thorough analysis of the problems, if any, of sabotage and

109. *Id.* (citing IRONS, *supra* note 101, at 269).

110. CIVIL LIBERTIES FUND, *supra* note 33, at 66.

111. DANIELS, *supra* note 27, at 71.

112. CIVIL LIBERTIES FUND, *supra* note 33, at 3; Saito, *Alien and Non-Alien Alike*, *supra* note 1, at 321. Curfew restrictions during World War II applied to United States citizens and aliens of Japanese ancestry, but not to United States citizens of German and Italian ancestry, only to German and Italian aliens. *Id.* (citing *Hirabayashi v. United States*, 320 U.S. 81, 88 (1943)). In the Trading with the Enemy Act, "evacuee national" meant "any Japanese, German, or Italian alien, or any person of Japanese ancestry, resident on or since Dec. 7, 1941 For the purpose of this regulation all evacuee nationals are nationals of a foreign country." *Id.* at 321 n.305 (quoting Special Regulation No. 1, 7 Fed. Reg. 2184 (1942)).

113. CIVIL LIBERTIES FUND, *supra* note 33, at 286, 288.

114. DANIELS, *supra* note 27, at 82 (citing Memorandum from Franklin D. Roosevelt to Henry L. Stimson (Apr. 14, 1942) (on file with national archives); Memorandum from Franklin D. Roosevelt to Henry L. Stimson (May 5, 1942) (on file with national archives)).

115. CIVIL LIBERTIES FUND, *supra* note 33, at 284, 288.

116. *Id.* at 285.

117. *Id.* at 50.

118. *Id.* at 51-55.

119. *Id.* at 60.

120. *Id.* at 64 (quoting Major General Joseph W. Stilwell).

espionage on the West Coast or of realistic solutions to those problems."¹²¹ Not one of those interned was ever charged with any crimes against the United States.¹²²

E. Korematsu's Conviction Vacated

On April 19, 1984, Fred Korematsu's 1942 conviction was vacated.¹²³ The district court in *Korematsu v. United States*¹²⁴ discussed the report by the Commission on Wartime Relocation and Internment of Civilians,¹²⁵ which concluded that there was a significant amount of credible evidence that disproved General DeWitt's report that justified the exclusion and internment of all persons of Japanese descent.¹²⁶ The report found that the exclusion and internment was not a military necessity, concluding

broad historical causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria, and a failure of political leadership. [Consequently,] a grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed and detained.¹²⁷

Evidence showed that during the original case, the government, relying on General DeWitt's report, failed to point to known contrary reports that were considered reliable by other government and military officials.¹²⁸ "Moreover, there [was] substantial support in the record that the government deliberately omitted relevant information and provided misleading information in papers before the court."¹²⁹ In vacating Korematsu's thirty-two year old conviction, the district court stated:

121. *Id.* at 67.

122. *Id.* at 185.

123. *Korematsu v. United States*, 323 U.S. 214 (1944), *conviction vacated by* 584 F. Supp. 1406, 1420 (N.D. Cal. 1984). Gordon Hirabayashi's conviction was also vacated. *Hirabayashi v. United States*, 320 U.S. 81 (1943), *conviction vacated by* 828 F.2d 591, 608 (9th Cir. 1987).

124. *Korematsu v. United States*, 584 F. Supp. at 1406.

125. The Commission on Wartime Relocation and Internment of Civilians published a report after studying the facts and circumstances surrounding the internment of persons of Japanese ancestry and recommended remedies. See CIVIL LIBERTIES FUND, *supra* note 33; see also Commission on Wartime Relocation and Internment of Civilians Act § 2, Pub. L. No. 96-317, 94 Stat. 964 (1980).

126. *Korematsu v. United States*, 584 F. Supp. at 1416.

127. *Id.* (quoting CIVIL LIBERTIES FUND, *supra* note 33, at 18).

128. *Id.* at 1418.

129. *Id.* at 1420.

As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.¹³⁰

III. THE UNJUSTIFIED MEANS USED TO FIGHT THE WAR ON TERRORISM

A. The Rush to Judgment: The Face of Terrorism Can Only Be a Brown-Skinned Man with Black Hair, a Cloth Wrapped Around His Head, and a Strange Name

The continuous media and government attention on terrorist acts may contribute to the hate and anger directed toward Arab Americans.¹³¹ Depictions of Arab Americans as Islamic fanatics¹³² also promote the stereotype that all Arabs are terrorists—"foreign, disloyal, and imminently threatening."¹³³ Even though those of Arab descent practice many different religions, including Christianity, it is a common belief that they are "all violent and . . . all conducting a holy war."¹³⁴ It can be argued that those who influence and determine national security policy view those of Arab descent as the problem and set out to make them the scapegoats.

After the first World Trade Center bombing, the Clinton Administration proposed the Omnibus Counterterrorism Act of 1995.¹³⁵ This Act proposed changes in the procedure for deportation hearings against aliens suspected of being linked to terrorists and allowed the government to use evidence

130. *Id.*

131. ALIXA NAFF, *THE ARAB AMERICANS* 103 (1999).

132. *See id.* at 104 (discussing popular media depictions of Arabs as "treacherous and fanatical").

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

134. *Id.* (quoting Twila Decker, *Muslims Fight Unfairness, the American Way*, ST. PETERSBURG TIMES, Oct. 17, 1999 (quoting Ibrahim Hooper from the Council on American-Islamic Relations, available at 1999 WL 27322848)).

135. *See* Richard Lacayo, *Rushing to Bash Outsiders*, TIME, May 1, 1995, at 70; *see also* Press Release, Office of the Press Secretary, Fact Sheet on Omnibus Counterterrorism Act of 1995, Feb. 10, 1995, available at 1995 WL 129954, at *1 [hereinafter Press Release].

undisclosed to the accused.¹³⁶ Introduced in February 1995, the Act did not attract much attention, but the day after the Oklahoma City bombing, it became a top priority for Congress.¹³⁷

1. *The Oklahoma City Bombing*

On April 19, 1995, a bomb exploded outside the Alfred P. Murrah Federal Building, killing 168 people and leaving the entire nation in shock.¹³⁸ Within hours of the bombing, the media reported that the suspects were from the Middle East.¹³⁹ Analysts and commentators speculated that the bomb had to be the work of Arab terrorists.¹⁴⁰ "While the violence in Oklahoma City cannot be conclusively attributed to Middle Eastern sources at this juncture, the available evidence certainly bears some of their trademarks," stated Frank J. Gaffney, Jr., Center for Security Policy Director.¹⁴¹ The *Wall Street Journal* called the bombing a "Beirut-style car bombing" while terrorism experts in the *New York Post* stated it "mimicked three recent attacks on targets abroad."¹⁴² CNN reported the names of four innocent Arab Americans whom it believed were involved with the bombing.¹⁴³ The bombers had to be Middle Eastern because "no white man, certainly no American, could have perpetrated such a deed."¹⁴⁴

Law enforcement officials also believed the bombing to be the work of Middle Eastern terrorists—even going so far as to issue an all-points bulletin depicting the suspects as two men of "Middle Eastern appearance" with "dark hair and beards."¹⁴⁵

These unjustified claims by the media, law enforcement, and politicians created an atmosphere of hate against Arab Americans and legal aliens of Arab

136. Press Release, *supra* note 135, at *8.

137. Lacayo, *supra* note 135, at 70.

138. Harry Levins, *The Pieces of the Puzzle; Bent Truck Axle Spotted by Alert Detective Provided Key Clue in Finding Oklahoma Bombing Suspect*, ST. LOUIS POST-DISPATCH, May 28, 1995, at B1.

139. Fred Bruning, *The Desperate Search for Elusive Answers*, MACLEAN'S, May 15, 1995, at 11.

140. Penny Bender, *Jumping to Conclusions in Oklahoma City?*, AM. JOURNALISM REV., June 1995, at 11; David C. Morrison, *Oklahoma's Troubling Aftershocks*, THE NAT'L J., May 6, 1995, at 1109; Charles M. Sennott, *After Bombings, America Faces Up to Prejudice*, BOSTON GLOBE, June 21, 1995, at 1.

141. Morrison, *supra* note 140, at 1109 (quoting fax from Frank J. Gaffney, Jr., Director of Center for Security Policy dated Apr. 19, 1995).

142. Bender, *supra* note 140, at 11.

143. *Id.*

144. Alexander Cockburn, *Journies Amid Paranoia*, THE NATION, May 15, 1995, at 659.

145. Bender, *supra* note 140, at 11.

descent.¹⁴⁶ Due to the constant barrage of reports that the bombing perpetrators were Middle Eastern, the number of hate crimes against those of Arab descent increased drastically.¹⁴⁷ Within one month of the bombing, 227 hate crimes against Arab Americans and Muslims were reported, up from 119 during the entire year of 1991.¹⁴⁸ Obscene and hateful phone calls accounted for most of the hate crimes.¹⁴⁹ Other crimes included bomb threats, physical assaults, shootings, false arrests, and police harassment.¹⁵⁰

An Arab American teacher had a sack of cans thrown at her by a man shouting, "Here's a bomb for you lady."¹⁵¹ Arab American merchants in Brooklyn received death threats.¹⁵² Mosques all around the United States were vandalized and even shot at.¹⁵³ An Arab American woman, seven months pregnant and living in Oklahoma City, miscarried her baby after bricks were hurled through her window.¹⁵⁴ Thinking they were gunshots, she and her two-year-old daughter hid in the bathroom waiting several hours before going to the hospital.¹⁵⁵

FBI agents detained and questioned Ibrahim Ahmad, an American citizen originally from Jordan, for six hours in Chicago because he was suspected of being the culprit after leaving Oklahoma City for Jordan less than two hours after the bombing.¹⁵⁶ His detainment was leaked to the media, who then announced on television and radio stations that an Arab suspect was being questioned about the bombing.¹⁵⁷ Ahmad was released but when he arrived at Heathrow Airport in London, he was strip searched, handcuffed, and his requests for food and access to a United States official were denied.¹⁵⁸ After being arrested for the bombing and questioned by British officials, he was sent to Washington D.C. accompanied by federal agents.¹⁵⁹ Again in Washington, he was handcuffed, strip searched,

146. Chris Casteel, *Muslims Cite Hostility After Bombing*, THE SATURDAY OKLAHOMAN, May 20, 1995, at 13.

147. *Id.*; see Kevin R. Johnson, *Race and Immigration Law and Enforcement: A Response to Is There a Plenary Power Doctrine?*, 14 GEO. IMMIGR. L.J. 289, 300 (2000).

148. Marc Selinger, *Oklahoma City Bombing Fuels Anti-Arab Crimes*, STATES NEWS SERVICE, May 19, 1995.

149. *Id.*

150. *Id.*

151. Bender, *supra* note 140, at 11.

152. *Id.*

153. *Id.*; Casteel, *supra* note 146, at 13.

154. Sennott, *supra* note 140, at 1.

155. *Id.*

156. Barbara G.B. Ferguson, *Arab-American Denies Role in Oklahoma City Bombing*, SAUDI GAZETTE, Apr. 28, 1995, LEXIS, Moneyclips.

157. *Id.*

158. *Id.*

159. *Id.*

fingerprinted, and questioned.¹⁶⁰ An FBI agent brought him back to Oklahoma City, but by then the investigation began to point to American antigovernment suspects.¹⁶¹ However, even though the real perpetrators turned out to be two white American men who had ties to antigovernment groups,¹⁶² Arab Americans continued to be the target when Congress and President Clinton vowed to stop terrorism.¹⁶³

2. *Antiterrorism Legislation*

Within days of the Oklahoma City bombing, Senators Bob Dole and Orrin Hatch introduced their own bill, the Comprehensive Terrorism Prevention Act of 1995.¹⁶⁴ Establishing a special court to expeditiously remove legal aliens from the United States, legal aliens who were determined to be terrorists by the Secretary of State could be deported without knowing what evidence the government had against them.¹⁶⁵ The government had only a clear and convincing burden and was permitted to withhold evidence deemed classified information.¹⁶⁶ Within two months of the Oklahoma City bombing, the Senate passed the bill by a vote of ninety-one to eight.¹⁶⁷ Claiming that such legislation had to be enacted immediately because of the Oklahoma City bombing,¹⁶⁸ supporters touted this bill as an effective method of preventing and punishing acts of terrorism.¹⁶⁹ However, this bill did not address domestic antigovernment groups such as the group of which the Oklahoma City bombers were members, but instead targeted legal aliens who had nothing to do with the Oklahoma City bombing.¹⁷⁰

160. *Id.*

161. *Id.*

162. Casteel, *supra* note 146, at 13.

163. *See* Lacayo, *supra* note 135, at 70 (discussing legislation that received the support of President Clinton and Congress, which made it easier to deport aliens suspected of being involved in terrorist activities).

164. Comprehensive Terrorism Prevention Act of 1995, S. 735, 104th Cong. (1995); Major Garrett, *Military Role Erased in GOP Terrorism Bill*, WASH. TIMES, Apr. 28, 1995, at A1.

165. O'Loughlin, *supra* note 4, at 106-07; Comprehensive Terrorism Prevention Act of 1995, S. 735 § 301 (amending the Immigration Nationality Act, 8 U.S.C. § 1101 (1984)). The Act broadened the definition the Secretary of State uses to designate an organization as a terrorist group. *Id.* § 303(a) (amending 8 U.S.C. § 1182 (a)(3)(B) (1996)).

166. Comprehensive Terrorism Prevention Act of 1995, S. 735 § 301(f)-(g).

167. O'Loughlin, *supra* note 4, at 106.

168. *Id.* at 105 n.21.

169. *Id.* at 106.

170. *See* Comprehensive Terrorism Prevention Act of 1995, S. 735.

B. Antiterrorism and Effective Death Penalty Act of 1996

The Comprehensive Terrorism Prevention Act was signed into law as the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),¹⁷¹ one year after the Oklahoma City bombing.¹⁷² President Clinton claimed that this law would stop terrorism and punish terrorists.¹⁷³ During two Senate debates, Senators in support of AEDPA all mentioned the Oklahoma City bombing as the reason to pass the act.¹⁷⁴ In support of the alien terrorist removal procedures, Senator Orrin Hatch stated: "[The bill is necessary] to give our law enforcement and courts the tools they need to quickly remove alien terrorists from within our midst without jeopardizing . . . national security."¹⁷⁵ Many mentioned the need to keep alien terrorists out of the country, yet none mentioned domestic antigovernment groups.¹⁷⁶ Similarly, in House reports, the attention was focused on legal and illegal aliens.¹⁷⁷ According to a House report:

The increasing public attention paid to our nation's immigration policies has brought to light the high number of aliens, both legal and illegal, who commit crimes while enjoying the benefits of this country. The significant cost that incarcerating those criminals place on our society has also come to the forefront of the national debate on this subject. In the past, many aliens who committed serious crimes were released into American society after they were released from incarceration, where they then continue to pose a threat to those around them.¹⁷⁸

A Conference report also comments:

The removal of alien terrorists from the United States, and the prevention of alien terrorists from entering the U.S. in the first place, present among the most intractable problems of immigration enforcement. The stakes in such cases are compelling: protecting the very lives and safety of U.S. residents and preserving the national security. Yet, alien terrorists, while deportable under section 241(a)(4)(D) of the INA [Immigration and Nationality Act], are able to exploit many of the substantive and procedural provisions available to all deportable aliens to delay their removal from the U.S. . . . The need for special procedures to adjudicate

171. Antiterrorism and Effective Death Penalty Act of 1996, 8 U.S.C. § 1182 (1996).

172. Ella Dlin, Note, *The Antiterrorism and Effective Death Penalty Act of 1996: An Attempt to Quench Anti-Immigration Sentiments?*, 38 CATH. LAW. 49, 50-51 (1998).

173. Statement by President William J. Clinton upon Signing S. 1965, 1996 U.S.C.C.A.N. 961-1 (Apr. 29, 1996).

174. O'Loughlin, *supra* note 4, at 105 n.21 (citing 141 CONG. REC. S7585, S7596, S7599, S7608 (daily ed. May 26, 1995) (statement of Sens. Hatch, Dole, Specter, Lieberman, & Daschle)). Much of the debates revolved around habeas corpus, on which the AEDPA put extensive time limits. 142 CONG. REC. S7479 (1996).

175. 141 CONG. REC. S7480 (1995) (statement of Sen. Hatch).

176. 141 CONG. REC. S7585, S7596, S7599 (1995).

177. H.R. REP. NO. 104-22 (1995); H.R. CONF. REP. NO. 104-518 (1996).

178. H.R. REP. NO. 104-22.

deportation charges against alien terrorists is manifest. Terrorist organizations have developed sophisticated international networks that allow their members great freedom of movement and opportunity to strike, including within the United States. . . . Several terrorist groups have established footholds within immigrant communities in the U.S.¹⁷⁹

179. H.R. CONF. REP. NO. 104-518. The anti-immigration sentiment is strong in the United States. *See generally* Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996); *see generally also* Am.-Arab Anti-Discrimination Comm. v. Reno, 119 F.3d 1367 (9th Cir. 1995), *vacated by* 525 U.S. 471 (1999) (petitioners claiming they were targeted for deportation for their affiliation with politically unpopular group); Harisiades v. Shaughnessy, 342 U.S. 580 (1952) (proceeding by Greek national against district director of INS involving validity of deportation proceeding); Bridges v. Wixon, 326 U.S. 135 (1945) (proceeding to deport petitioner because he was allegedly a member of the Communist Party); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (stating that aliens, who have taken no steps to become citizens and are incapable of becoming such under naturalization laws, are subject to the absolute and unqualified right of Congress to deport them); Chae Chan Ping v. United States, 130 U.S. 581 (1889) (stating that even in times of peace Congress may exclude aliens from the United States for any reason it deems sufficient); Rafeedie v. INS, 880 F.2d 506 (D.C. Cir. 1989) (noting resident alien was sought to be deported after re-entering country on parole, after having left to engage in alleged "nefarious" activities); Am.-Arab Anti-Discrimination Comm. v. Meese, 714 F. Supp. 1060 (C.D. Cal. 1989) (stating that provisions of immigration law pursuant to which aliens could be deported based solely on affiliation with certain international political groups were substantially overbroad in violation of the First Amendment); T. Alexander Aleinikoff, *Federal Regulation of Aliens and the Constitution*, 83 AM. J. INT'L L. 862 (1989) (noting, under current doctrine, aliens seeking to enter the United States for the first time are entitled only to those procedures Congress decides to provide); Kevin R. Johnson, *The Case Against Race Profiling in Immigration Enforcement*, 78 WASH. U. L.Q. 675 (2000) (discussing how the use of racial profiling in immigration, specifically the consideration of race by the border patrol, reveals the diluted civil rights protections afforded Latinos in comparison to other United States citizens); Johnson, *supra* note 147, at 292-96 (noting Congress' use of the plenary power recognized by the Supreme Court to enact racial classification in the immigration laws); Hiroshi Motomura, *Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 YALE L.J. 545 (1990) (examining the use of racial classifications in immigration laws to analyze and compare statutory interpretation and constitutional law); Saito, *Symbolism Under Siege*, *supra* note 133, at 15-24 (identifying parallels between the Japanese internment during the 1940s and the stereotyping of Arab Americans as "terrorists" today, and noting that both are instances in which "Executive agencies of the government . . . are asserting their right to decide unilaterally that certain persons, identified initially by [race], but often singled out due to otherwise lawful political or social affiliations are a danger to 'national security'"); Charles D. Weisselberg, *The Exclusion and Detention of Aliens: Lessons from the Lives of Ellen Knauff and Ignatz Mezei*, 143 U. PENN. L. REV. 933 (1995) (discussing the judiciary's deference to the executive in immigration matters, and therefore the courts continued acceptance of the proposition that aliens' civil rights are determined by territorial standing); George C. Beck, Note, *Deportation on Security Grounds and the First Amendment: Closing the Gap Between Resident Aliens and Citizens*, 6 GEO. IMMIGR. L.J. 803 (1992) (elucidating the disparity, recognized by immigration legislation, between United States citizens and permanent resident aliens in the extent to which they can exercise their First Amendment rights); Terri Yuh-lin Chen, Paper, *Hate Violence as Border Patrol: An Asian American Theory of Hate Violence*, 7 ASIAN L.J. 69 (2000)

The AEDPA banned monetary contributions and fundraising in the United States for any organization designated as a terrorist organization by the Secretary of State.¹⁸⁰ The AEDPA further strengthened the government's ability to remove and exclude legal aliens from the country.¹⁸¹ As with the first version of the law, the AEDPA created a special court to hear deportation cases concerning alien terrorists to ensure that the United States could remove a legal or illegal alien without disclosing what evidence the government has by claiming the evidence involves national security secrets.¹⁸²

However, "[t]he circumstances surrounding the creation and passage of the Antiterrorism and Effective Death Penalty Act provide ample evidence that in times of national crisis people may turn to scapegoating minorities in order to alleviate their fears."¹⁸³ While there was no actual evidence connecting the Oklahoma City bombing to Middle Eastern terrorists, they were the first suspects.¹⁸⁴ Even though the purpose of the AEDPA was to avert terrorism in America, it could not have prevented the Oklahoma City bombing.¹⁸⁵ Though some provisions in the AEDPA may combat terrorism, other provisions unjustly

(asserting the proposition that hate violence has become a way to patrol the borders of the United States and preserve a white national identity); Philip Monrad, Comment, *Ideological Exclusion, Plenary Power, and the PLO*, 77 CAL. L. REV. 831 (1989) (arguing that a swing of Supreme Court cases provides support for an exception to the plenary power doctrine, and in the alternative that an exception be carved out for First Amendment challenges to the government's treatment of aliens).

180. Antiterrorism and Effective Death Penalty Act of 1996 § 303, Pub. L. No. 104-132, 110 Stat. 1214 (codified at 8 U.S.C. § 1182 (1996)). In *Humanitarian Law Project v. Reno*, the court upheld the constitutionality of the AEDPA and the right of the government to prohibit its citizens from associating with foreign entities. *Humanitarian Law Project v. Reno*, 9 F. Supp. 2d 1176, 1189-97 (C.D. Cal. 1998).

181. See Antiterrorism and Effective Death Penalty Act of 1996 §§ 401-443.

182. *Id.*

183. Plotkin, *supra* note 9, at 654; see Lawrence E. Harkenrider, *Due Process or "Summary" Justice: The Alien Terrorist Removal Provisions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 4 TULSA J. COMP. & INT'L L. 143, 164-65 (1996). There is a good deal of discussion on the constitutionality of the AEDPA in regards to the First Amendment. See, e.g., Plotkin, *supra* note 9, at 623; Jennifer A. Beall, Note, *Are We Only Burning Witches? The Antiterrorism and Effective Death Penalty Act of 1996's Answer to Terrorism*, 73 IND. L.J. 693 (1998); Joseph Furst, III, Notes & Comments, *Guilt by Association and the AEDPA's Fund Raising Ban*, 16 N.Y.L. SCH. J. HUM. RTS. 475 (1999); Jason Binimow & Amy Bunk, Annotation, *Validity, Construction, and Operation of "Foreign Terrorist Organization" Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA)*, 8 U.S.C.A. § 1189, 2001 A.L.R. FED. 9, available at 2001 WL 1078382; Rhonda McMillion, *Restoring Balance: ABA Presses for Congressional Action to Reinforce Immigrants' Rights*, A.B.A. J., Sept. 2001, at 82; Margaret Graham Tebo, *Rewriting the Rules: Government Seeks Authority to Hold Suspected Terrorist Supporters, Curtail Their Court Appeals, and Quickly Deport Them*, A.B.A. J., Nov. 2001, at 36.

184. Plotkin, *supra* note 9, at 654.

185. See Dlin, *supra* note 172, at 61 (noting few provisions could have prevented the Oklahoma City bombing).

discriminate against specific groups of people.¹⁸⁶ In fact, the AEPDA is "susceptible to being used in a discriminatory and political fashion by applying its sweeping terms to those who are out of favor with the government and least likely to garner public support."¹⁸⁷

Some Arab American organizations have argued that the AEDPA will have a large disproportionate effect on Arab Americans and other minorities.¹⁸⁸ For example, many Arab Americans give funds to humanitarian and charitable nongovernmental organizations (NGOs) in the Middle East; however, some of these NGOs are associated with several political groups that are considered to be terrorist organizations.¹⁸⁹ The AEDPA's ban on fundraising greatly affects the ability of Arab Americans to help their country of origin because, if they do, they could face prosecution.¹⁹⁰ This particular provision makes giving money to help children in the Middle East the same as giving money for weapons.¹⁹¹ Moreover, because Arab Americans are often targeted and blamed after a terrorist act, they will suffer the most from the provisions in the AEDPA.¹⁹² One-third of the organizations designated as terrorist groups are from the Middle East, North Africa, or are Muslim organizations.¹⁹³ Federal grand juries have investigated as many as twenty Islamic groups because of suspicions that they associate with terrorists.¹⁹⁴

Since the Oklahoma City bombing, the INS has attempted to deport lawful permanent residents of Arab origin from the United States.¹⁹⁵ Evidence shows

186. See *id.* at 61-62 (highlighting changes in habeas corpus that affect prisons and having no connection to terrorism).

187. Plotkin, *supra* note 9, at 655.

188. *Id.* at 654.

189. Prepared Statement of Khalil E. Jahshan, Executive Director of the National Association of Arab Americans (NAAA), Before the Terrorism, Technology and Government Information Subcommittee of the Senate Judiciary Committee, FED. NEWS SERV., May 4, 1995 [hereinafter Jahshan]; see Bryan Sierra, *Senate Considers Foreign Terrorist Law*, UNITED PRESS INT'L, May 4, 1995 (discussing Jahshan's statement and concerns that legitimate nonterrorist activities would be hindered if fundraising is barred for groups affiliated with terrorist organizations).

190. Jahshan, *supra* note 189.

191. Saito, *Symbolism Under Siege*, *supra* note 133, at 16 (citing Gordon Trowbridge & Lama Bakri, *Local Arabs Fear Fed Scrutiny; Terrorist Crackdown May Spur Privacy Violations Some Say*, DETROIT NEWS, July 25, 2000, available at 2000 WL 3485702).

192. Jahshan, *supra* note 189.

193. Susan M. Akram, *Scheherezade Meets Kafka: Two Dozen Sordid Tales of Ideological Exclusion*, 14 GEO. IMMIGR. L.J. 51, 71 (1999) (citing Designation of Foreign Terrorist Organizations, 64 Fed. Reg. 55,112 (1999)).

194. Saito, *Symbolism Under Siege*, *supra* note 133, at 16.

195. Akram, *supra* note 193, at 51-52. Even before the Oklahoma City bombing, the FBI and INS initiated widespread investigations of Arab and Arab American communities. *Id.* at 70. Government agents threatened to deport them if they did not tell on their relatives, friends, and

that the INS is prosecuting and attempting to deport Arabs and Muslims—even those who are lawful, permanent aliens—under the guise of terrorism using secret evidence which is “apparently nothing more than hearsay, innuendo, and at most, guilt by association.”¹⁹⁶ Anti-Muslim and anti-Arab prejudice is a factor in the deportation cases: much of the evidence appears to be based on biased or unreliable sources, deliberately or mistakenly falsified translations, and foreign government pressure.¹⁹⁷ The AEDPA and IIRIRA have “given [the use of secret evidence] . . . new force [and are] clearly the linchpin[s] in the government’s strategy to exclude and deport based on its dislike of the political disposition of Muslim and Arab groups.”¹⁹⁸ This situation means that those detained cannot properly defend themselves and are held in prison cells for an indefinite amount of time, sometimes for years.¹⁹⁹ “More than ninety percent of all immigrants detained through use of secret evidence have been Muslims of Arab descent.”²⁰⁰ Through these actions and laws, the government is depriving lawful citizens and residents of their rights by using racial ignorance and national security as an excuse.²⁰¹

IV. THE CASE OF WEN HO LEE

On March 8, 1999, the Energy Department fired Wen Ho Lee, a naturalized United States citizen and scientist, from his job at the Los Alamos National Laboratory.²⁰² After a three-year investigation, the government claimed Lee was guilty of espionage because he had given nuclear secrets to the Chinese in the 1980s.²⁰³ Nine months later, Lee was indicted on fifty-nine counts, none of

neighbors. *Id.* (citing JAMES DEMPSEY & DAVID COLE, *TERRORISM & THE CONSTITUTION: SACRIFICING CIVIL LIBERTIES IN THE NAME OF NATIONAL SECURITY* 42-43 (1999)).

196. *Id.* at 53.

197. *Id.* at 81.

198. *Id.* at 113. Since 1996, at least twenty secret evidence cases have been brought, almost all against persons of Arab descent. Andrew Goldstein, *Could It Happen to You?*, *TIME* (Sept. 25, 2000), available at <http://www.time.com/time/magazine/articles/0,3266,55081,00.html>. For example, the government held Nasser Ahmed for three and one-half years without charging him with any crime. *Id.* Ahmed was accused of taking a message from the man who was convicted for conspiring to bomb the United Nations building based on the fact that Ahmed was the man’s translator. *Id.* After three and one-half years, the government had no proof and conceded that Ahmed was not a terrorist. *Id.*

199. Margaret Graham Tebo, *Locked Up Tight*, *A.B.A. J.*, Nov. 2000, at 44, 48.

200. *Id.*

201. Saito, *Symbolism Under Siege*, *supra* note 133, at 26.

202. Michael Isikoff, *Into the Sunshine*, *NEWSWEEK*, Sept. 25, 2000, at 38 [hereinafter Isikoff, *Into the Sunshine*]; Amanda Onion, *Fear of Persecution*, *ABCNEWS.com* (Sept. 15, 2000), at <http://more.abcnews.go.com/sections/science/DailyNews/Lee-scientist000914.html>.

203. *Key Dates in Lee Case*, *ALBUQUERQUE J.* (Sept. 10, 2000), available at <http://www.abqjournal.com/news/leechron09-10-00.htm>.

which included espionage.²⁰⁴ Fervently branded as a spy by politicians, commentators, and the media,²⁰⁵ Lee was held without bail in solitary confinement because the district court determined Lee was a danger to the community and nation.²⁰⁶ Lee's family was allowed to visit for one hour a week.²⁰⁷ During each visit, a glass partition separated Lee and his family, and FBI agents listened to every word and took notes.²⁰⁸ Lee always had his legs shackled, with his hands handcuffed and chained to his waist.²⁰⁹

The government contended that it had a strong case against Lee based on the fact that he went to China in 1988 and that he downloaded sensitive computer codes from a classified computer onto seven portable tapes.²¹⁰ FBI Agent Robert Messemer stated that during Lee's visit to China, he met with two senior Chinese weapons scientists and was asked about a math problem related to nuclear weapons.²¹¹ Messemer also testified at a hearing that Lee had been uncooperative during questioning and was deceptive.²¹² The government also claimed that Lee should not be granted bail because "[h]undreds of millions of

204. Isikoff, *Into the Sunshine*, *supra* note 202, at 39. A grand jury charged Lee "with violations of the Atomic Energy Act, 42 U.S.C. § 2275, Pub. L. No. 106-65, § 3148(b), 113 Stat. 938 (1999) (Receipt of Restricted Data), and 42 U.S.C. § 2276 (Tampering with Restricted Data), and the Espionage Act, 18 U.S.C. § 793 (Gathering, transmitting or losing defense information)." *United States v. Lee*, 79 F. Supp. 2d 1280, 1282 (D.N.M. 1999).

205. See Bill Mesler, *The Spy Who Wasn't*, THE NATION (Aug. 9, 1999), available at <http://www.thenation.com/issue/990809/0809mesler.shtml> (noting Senator Don Nickles labelled the Wen Ho Lee controversy the "most serious case of espionage" in United States history); see also Molly Irvis, *Media Bought into Los Alamos Spy Case*, SANTA FE NEW MEXICAN, Mar. 31, 1999, at A7; Isikoff, *supra* note 202, at 38 (noting United States District Judge James A. Parker was infuriated he had been misled into treating Wen Ho Lee as a spy). James Risen wrote a series of *New York Times* articles making broad accusations against Lee. See, e.g., *F.B.I. Interview Chinese Man in Spy Case*, N.Y. TIMES, Mar. 27, 1999, at A3.

206. *United States v. Lee*, 79 F. Supp. 2d 1280, 1289 (D.N.M. 1999). The Tenth Circuit Court of Appeals agreed and affirmed in *United States v. Lee*, 208 F.3d 228 (10th Cir. 2000) (unpublished opinion). Moreover, in *United States v. Lee*, 90 F. Supp. 2d 1324, 1329 (D.N.M. 2000), the district court upheld the constitutionality of the Classified Information Procedures Act.

207. Isikoff, *Into the Sunshine*, *supra* note 202, at 38.

208. *Id.*

209. *Id.*

210. *U.S. Cites Scientist's Meeting in China as Proof of His Spying*, STAR TRIB., Aug. 19, 2000, at 11A [hereinafter *Scientist's Meeting*]; see Dan Stober, *FBI Agent Admits "Mistake" in Lee Case Bail Hearing: Lead Official in Probe Says He Gave "Incorrect" Testimony in December*, SAN JOSE MERCURY NEWS, Aug. 18, 2000, at A4.

211. *Scientist's Meeting*, *supra* note 210 at 11A.

212. Stober, *supra* note 210, at A4.

people could be killed, . . . [t]he breadth of the potential harm [was] so great that . . . even a reduced risk [was] too great to take that gamble."²¹³

However, problems began to develop in the government's case.²¹⁴ During a bail hearing in August 2000, Messemer admitted that he had provided false testimony in depicting Lee as more deceptive than in actuality and some of the evidence supporting the government's case did not exist.²¹⁵ Then other nuclear scientists and weapons experts testified that the secrets Lee downloaded were not really secrets and publicly available.²¹⁶ The information did not become classified as secret until after his arrest.²¹⁷ Furthermore, the government has never been able to prove Lee was ever guilty of espionage²¹⁸ and never presented any direct evidence to District Court Judge James A. Parker that "Lee intended to harm the United States or to secure an advantage for a foreign nation."²¹⁹

Following nine months in solitary confinement, Lee was released after pleading guilty to one charge of mishandling classified information.²²⁰ During the plea hearing, Judge Parker stated:

Dr. Lee, I tell you with great sadness that I feel I was led astray last December by the Executive Branch of our government through its Department of Justice, by its Federal Bureau of Investigation and by its United States Attorney for the District of New Mexico, who held the office at that time. I am sad for you and your family because of the way in which you were kept in custody while you were presumed under the law to be innocent of the charges the Executive Branch brought against you. I am sad

213. *U.S. Argues Against Lee's Release: Defense Disputes Contention of Risks to Nuclear Secrets*, WASH. POST, Aug. 19, 2000, at A4 (quoting Assistant United States Attorney General George Stanboulidis after Lee hearing).

214. Isikoff, *Into the Sunshine*, *supra* note 202, at 40.

215. *Id.*; see Bob Drogin, *Defense Shows Holes in Case Against Scientist Security: In a Third Attempt to Win Bail for Wen Ho Lee, It's Revealed that an FBI Investigator Mislead the Judge and that Lee Passed a Polygraph Test*, L.A. TIMES, Aug. 19, 2000, at A12.

216. Isikoff, *Into the Sunshine*, *supra* note 202, at 40; see *The Faltering Case Against Wen Ho Lee*, NEWSWEEK, Sept. 11, 2000, at 62.

217. Brief of Amici Curiae in Support of Def.'s Motion for Discovery of Materials Related to Selective Prosecution, *United States v. Lee*, 90 F. Supp. 2d 1324 (D.N.M. 2000) (No. 99-1417), reprinted in 7 *ASIAN PAC. AM. L.J.* 57, 66-67 (2001) (citing Report: Files Weren't Secret, Data in Lee Case Was Under Low Security, Apr. 15, 2000, available at http://www.abcnews.go.com/sections/us/DailyNews/lee_000415.html) [hereinafter Brief in Support of Def.'s Motion].

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

219. Brendan Smith, *Defense Lawyers Call for Fairness in Lee Appeal*, ALBUQUERQUE J., Sept. 6, 2000, at A1 (quoting Memorandum from Judge James A. Parker to Tenth Circuit Court of Appeals).

220. Isikoff, *Into the Sunshine*, *supra* note 202, at 38.

that I was induced in December to order your detention, since by the terms of the plea agreement that frees you today without conditions, it becomes clear that the Executive Branch now concedes, or should concede, that it was not necessary to confine you last December or at any time before your trial. . . . [The Executive Branch has] embarrassed our entire nation and each of us who is a citizen of it. . . . I sincerely apologize to you, Dr. Lee, for the unfair manner you were held in custody by the Executive Branch.²²¹

A. *The Racing of Lee as a Spy*

While the government claimed that Lee was a spy for China, many believed that Lee was prosecuted only because of his ethnicity.²²² The government's entire case was based on Lee's two visits to China to attend approved conferences and that he hired a Chinese research assistant.²²³ In reality, the government had no case.²²⁴ Prosecutors could not prove that Lee had ever contacted anyone from China about nuclear secrets or that he did not initially cooperate with investigators.²²⁵ This entire episode would not have occurred except for the fact that Lee is of Chinese descent.²²⁶ The investigation and prosecution of Lee were tainted by "the racialized stereotypes of Asian Pacific Americans as suspect and perpetual foreigners."²²⁷ The spy charges remained only "by constant allegations linking Wen Ho Lee to China."²²⁸

221. United States v. Lee, Transcript of Proceedings, Sept. 13, 2000, at 55, 58 (D.N.M. 2000), available at <http://www.abqjournal.com/news/wenhotxt09-13-00.htm>.

222. Vernon Loeb, *Affidavits Cite Race in Probe of Lee*, WASH. POST, Sept. 1, 2000, at A16. A former FBI chief analyst for Chinese intelligence stated the FBI used racial profiling in its investigation of Lee. *Talk of the Nation: Whether Racial Profiling Played Some Role in the Case of Wen Ho Lee and Other Chinese-Americans Suspected of Espionage* (NPR Radio Broadcast, Sept. 5, 2000) (statement of Paul Moore, Director of Analysis at the Centre for Counterintelligence and Security Studies). Two former counterintelligence agents declared in sworn affidavits that Lee was targeted because of his ethnicity. Chitra Ragavan, *The Curious Lee Case*, U.S. NEWS & WORLD REP., Sept. 11, 2000, at 48. A Department of Energy nuclear-proliferation expert of Chinese descent lost his security clearance even though he twice passed a polygraph examination when he was questioned about being a spy. Michael Isikoff, *A Question of Profiling: Charges of "Systematic" Discrimination at Energy*, NEWSWEEK, Sept. 18, 2000, at 68.

223. Mesler, *supra* note 205, at 3; see Irvis, *supra* note 205, at A7; James Risen, *Though Suspected as China Spy, Scientist Got Sensitive Job at Lab*, N.Y. TIMES, Mar. 24, 1999, at A1.

224. *Wen Ho Lee: The Spy Who Never Was*, STAR TRIB., Sept. 12, 2000, at 12A.

225. *Id.*

226. Brief in Support of Def.'s Motion, *supra* note 217, at 63.

227. *Id.*

228. Gotanda, *Comparative Racialization*, *supra* note 218, at 1690.

Robert S. Vrooman, the former director of counterintelligence at Los Alamos, stated in an affidavit that Lee had never committed espionage.²²⁹ In a statement during a Senate hearing, Vrooman opined that Lee's ethnicity played a large role in the reason why the FBI focused on him.²³⁰ The Kindred Spirit²³¹ investigators had a preconceived notion that the person who gave the Chinese the nuclear information had to be of Chinese descent.²³² They made comments about the number of Chinese restaurants in the area and the number of Chinese Americans working at the lab who held doctorate degrees.²³³ Investigators also mentioned that these persons should not be permitted to work with classified information.²³⁴ The Department of Energy (DOE) wanted a list of all lab employees who were ethnic Chinese and what programs they were working on.²³⁵

The investigation targeted Lee and disregarded white employees with similar backgrounds and foreign contacts.²³⁶ After a request for a warrant was denied, the investigation of Lee became inactive until December 1998.²³⁷ At this time, Representative Christopher Cox issued a report stating that the Chinese government stole United States nuclear secrets and the espionage was ongoing.²³⁸ Lee was then subjected to a polygraph test.²³⁹ After passing the test, he received an apology, was given back his security privileges, and the FBI declared that Lee was not a spy.²⁴⁰ Nevertheless, a few weeks later, the DOE claimed that the test was "incomplete" and Lee was requested.²⁴¹ Yet again, FBI agents concluded

229. Vernon Loeb, *Affidavits Cite Race in Probe of Lee*, WASH. POST ONLINE, (Sept. 1, 2000), at <http://www.washingtonpost.com/wp-dyn/articles/A59464-2000Aug31.html>; William Wong, *Wen Ho Lee and the "China Card,"* S.F. EXAM'R, May 9, 2000, at A-19.

230. See *Continuation of Oversight of the Wen Ho Lee Case: Hearing Before the Subcomm. on Admin. Oversight and the Ct. of the Comm. on the Judiciary U.S.S., 106th Cong.* 49 (2000) (statement of Robert S. Vrooman) [hereinafter *Hearing*], available at 2000 WL 1578016.

231. Notra Trulock, former director of counterintelligence for the Department of Energy, led this investigation after it was discovered that China had obtained information about several United States nuclear warheads in 1996. Brief in Support of Def.'s Motion, *supra* note 217, at 63. This investigation has been severely criticized, and Trulock has also been investigated for mishandling classified information. *Id.* Trulock has maintained that the investigation of Lee was not biased or conducted improperly. *Hearing, supra* note 230, at 52-53 (statement of Notra Trulock, III), available at 2000 WL 1533397.

232. *Hearing, supra* note 230, at 49-51 (statement of Robert S. Vrooman), available at 2000 WL 1578016.

233. *Id.*

234. *Id.*

235. *Id.*

236. Brief in Support of Def.'s Motion, *supra* note 217, at 67.

237. *Id.* at 64.

238. *Id.*

239. *Id.* at 64-65.

240. *Id.* at 65 (citing Sharyl Attkisson, *Wen Ho Lee's Problematic Polygraph*, (Feb. 4, 2000), at cbsnews.com/now/story/0,1597,157220-412,00.shtml).

241. *Id.*

Lee was not a spy.²⁴² Then Lee was questioned for a third time in March 1999 with the same results.²⁴³ Even when the FBI agents stated that Lee should not be further investigated, he was still fired and subsequently prosecuted.²⁴⁴

Former FBI Director Louis Freeh testified that the FBI investigated Lee because a DOE administrative inquiry concluded that "Wen Ho Lee appears to have the opportunity, means, and motivation" to pass nuclear information to China.²⁴⁵ However, Lee never had access to all the specific nuclear information that was obtained by China and all discussions about Lee's motive revolved around his ethnicity.²⁴⁶ No other motive was suggested.²⁴⁷

In addition, the Justice Department usually does not prosecute civilian employees of federal agencies who are accused of mishandling classified information as long as there is no evidence of criminal intent, the information has not been disclosed to another party, and the employees are disciplined administratively.²⁴⁸ Lee is the first Los Alamos Lab employee to be criminally prosecuted, whereas other employees have only been disciplined or fired for similar conduct.²⁴⁹ Previously, a non-Chinese scientist who had transferred classified information to a foreign country received immunity after agreeing to a full debriefing.²⁵⁰

Moreover, former CIA Director, John Deutch, also had classified information on his home computer, but has not been charged with anything.²⁵¹ Unlike Lee, who downloaded information that at the time was not classified as secret, Deutch had the most restrictive type of data on an unsecured computer at his home.²⁵² There were 17,000 pages of top secret files on the computer.²⁵³

242. *Id.*

243. *Id.*

244. *Id.*

245. *Hearing, supra* note 230, at 49-51 (statement of Robert S. Vrooman), available at 2000 WL 1578016.

246. *Id.*

247. *Id.*; see Gotanda, *Comparative Racialization, supra* note 218, at 1693 (stating that racialization of Asians was the basis for the investigation of Wen Ho Lee).

248. Walter Pincus & Vernon Loeb, *U.S. Inconsistent When Secrets Are Loose*, WASH. POST, Mar. 18, 2000, at A01, available at <http://www.washingtonpost.com/wp-srv/Wplate/2000-03/18/1661-031800-idx.html>.

249. *Id.*; see Brief in Support of Def.'s Motion, *supra* note 217, at 66 (citing Brendan Smith, *Criminal Charges 1st in Lab History*, ALBUQUERQUE J., Dec. 11, 1999, at A1).

250. Loeb, *supra* note 222, at A16.

251. John Solomon, Assoc. Press, *Deutch Disks Disappeared* (Oct. 10, 2000), available at <http://more.abcnews.go.com/sections/us/dailynews/deutchdisk001010.html>.

252. THE CASE OF WEN HO LEE: ALBERTA LEE (C-SPAN television broadcast, Dec. 4, 2000); see Gotanda, *Comparative Racialization, supra* note 218, at 1692-94.

253. Shirley A. Kan, *China: Suspected Acquisition of U.S. Nuclear Weapon Secrets*, CRS REPORT FOR CONGRESS, Dec. 20, 2000, at CRS-39, available at

Deutch's family members and house staff also had access to the computer.²⁵⁴ During the first inquiry into this possible security breach, Deutch refused to cooperate with investigators²⁵⁵ while Lee cooperated until he was threatened with death.²⁵⁶ Charges of mishandling secret information were never filed against Deutch because, according to the government, Deutch's actions were harmless while Lee's were not.²⁵⁷ The government repeatedly contended that Lee spied for China even though no evidence of this charge existed.²⁵⁸ The real difference was "Deutch is white [and] Lee is ethnic Chinese."²⁵⁹ Deutch was reprimanded and Lee was placed into solitary confinement.²⁶⁰

The government focused on Lee because of his ethnicity and the prevailing stereotype that Asian Americans are more likely to be "spies for some 'ancestral homeland.'"²⁶¹ "The perpetual foreigner assumption—that Asians are sojourners, visitors, and/or guests who cannot overcome an inherent alien status—makes it easy to deprive Asian Americans of civil rights."²⁶² This assumption led to the belief that China sent thousands of Chinese abroad to uncover secrets and give the information to China²⁶³ and gave the United States the excuse to arbitrarily target scientists of Chinese descent.²⁶⁴ FBI agents clearly knew that only these scientists were under investigation.²⁶⁵ Then-Attorney General Janet Reno admitted that the FBI did not make inquiries about other non-Chinese lab employees who had the same access and opportunity as Lee.²⁶⁶

Arguably, the treatment of Lee in this case can be seen as "allowing a foreign government . . . to divest United States citizens of their rights."²⁶⁷ This is the same belief that forced Japanese Americans into internment camps during

<http://www.fas.org/spp/starwars/crs/RL30143.pdf>; George Koo, *Deutch Is Sorry; Lee Is in Jail*, S.F. EXAM'R, Feb. 8, 2000, available at <http://examiner.com/000208/0208op-koo.html>.

254. Niles Lathem, *Too Big for His Breaches; CIA Ex-Chief Free as Scientist Is Jailed for Same Offense*, N.Y. POST, Mar. 8, 2000, available at <http://pqasb.pqarchiver.com/nypost>.

255. *Id.*; Solomon, *supra* note 251.

256. *U.S. Argues Against Lee's Release*, *supra* note 213, at A4.

257. Gotanda, *Comparative Racialization*, *supra* note 218, at 1692-94.

258. *Id.* at 1694.

259. Koo, *supra* note 253.

260. *Id.*

261. Brief in Support of Def.'s Motion, *supra* note 217, at 68.

262. Frank H. Wu, *Profiling Principle: The Prosecution of Wen Ho Lee and the Defense of Asian Americans*, 7 ASIAN PAC. AM. L.J. 52, 53 (2001).

263. *See id.* at 54.

264. Brief in Support of Def.'s Motion, *supra* note 217, at 68-69.

265. *Id.* at 69.

266. *Id.* at 67. Apparently, it is not very difficult to obtain nuclear information. Bob Drogin, *FBI to Open New, Expanded Probe of China Spy Case Inquiry: Officials to Examine More than 500 Possible Suspects with Access to Nuclear Secrets*, L.A. TIMES, Sept. 23, 1999, at A1. Thousands of people reportedly had access to the information in question in the Lee case. *Id.*

267. Wu, *supra* note 262, at 54.

World War II.²⁶⁸ Similarly, no evidence exists that Chinese Americans are more inclined to be disloyal to the United States than any other citizen.²⁶⁹

B. *The Effects of the Wen Ho Lee Case*

Other scientists of Asian descent have been fearful that what happened to Wen Ho Lee will also happen to them.²⁷⁰ Some scientists have even chosen early retirement because of pressures they felt from the Lee incident.²⁷¹ Many Asian American scientists felt the pressure increase with the report by Representative Christopher Cox, which stated that China had been spying on the United States for at least twenty years.²⁷² This misapprehension of Asian American scientists, along with a feeling of not being respected, will undoubtedly hurt the country's scientific community because of the major contributions they have made.²⁷³

On a larger scale, the Lee case evidences the racial stereotype that Asian Americans are "the historic and perpetual foreigner, being disloyal to [the United States], really evoking the historical images of Asians as the yellow peril."²⁷⁴ It appears that those of Asian descent have yet to become full citizens in the eyes of the government, media, or general public. When it comes to national security, we are not all treated equally; those who fall in the "them" category bear the harsh burden.

V. CONCLUSION

These three incidents in American history demonstrate a willingness on the part of the United States government, media, and public to scapegoat those people who are of a different race. The internment of Japanese Americans, the allegations and harassment against Arab Americans, and the case of Wen Ho Lee show that many believe the race or ethnicity of a person determines their loyalty to the United States. In all three incidents discussed above, those affected by government actions, the media, and the general public were discriminated against

268. *Id.*; see Brief in Support of Def.'s Motion, *supra* note 217, at 68-69.

269. Brief in Support of Def.'s Motion, *supra* note 217, at 69. Most Chinese Americans refuse when asked to help Chinese intelligence agents. *Id.* (citing Vernon Loeb & Walter Pincus, *China Prefers the Sand to the Moles*, WASH. POST, Dec. 12, 1999, at A2).

270. *Id.*, *supra* note 202.

271. *Id.*

272. *Id.*

273. *Id.*

274. *Nightline: The Strange Case of the U.S. v. Wen Ho Lee* (ABC television broadcast, Sept. 19, 2000) (statement by Kathay Feng, Asian Pacific American Legal Center). See Brief in Support of Def.'s Motion, *supra* note 217, at 60-62 and Gotanda, *Comparative Racialization*, *supra* note 218, at 1689, 1694-1702 for examples of the treatment of Asian Americans as perpetual foreigners.

because of their race. During times of war and unrest, national security is used as an excuse to take away the rights of others.

The aftermath of September 11 clearly demonstrates the government's, the media's, and the public's willingness to discriminate against its own citizens in the name of national security. Immediately following the terrorist attacks, American citizens began attacking innocent civilians themselves. People of Arab descent became the target of hate and violence.²⁷⁵ School children in New York were threatened when a man claimed he would "paint the streets with [their] blood."²⁷⁶ Mosques were vandalized and bombed.²⁷⁷ Many Arab Americans have been told to go back to their country even though they are United States citizens.²⁷⁸ Others have been chased by cars and beaten.²⁷⁹ Some have even been killed.²⁸⁰ They are afraid to leave their homes because of the hundreds of hate crimes that have been perpetrated against them.²⁸¹ Politicians have also participated in the hate crimes.²⁸² Congressman John Cooskey stated, "If I see someone that comes in that's got a diaper on his head and a fan belt wrapped around the diaper on his head, that guy needs to be pulled over and checked."²⁸³

In response to the terrorist attacks, the government enacted rules and laws to try to prevent terrorism, but innocent persons of Arab descent will be the ones most greatly affected. With calls for tighter airport security, Arab Americans are the ones being singled out. For example, a secret service agent was removed from an airplane flight allegedly because he was of Arab descent.²⁸⁴ An Arab American woman sued the Illinois National Guard and an airport security company after she was allegedly strip searched even though the metal detector and hand wand found nothing suspicious.²⁸⁵ The USA Patriot Act sets out new

275. Derek Thompson, *Arab-Americans Feel Backlash*, ABCNEWS.com (Sept. 14, 2001), at http://www.abcnews.go.com/sections/us/Dailynews/wtc_backlash_010914.html.

276. *Id.*

277. *Id.*

278. *Id.*

279. Assoc. Press, *Arab, Muslim Students Feel Heat* (Sept. 20, 2001), at <http://www.msnbc.com/news/627565.asp>.

280. *Bush Criticizes Attacks on Arab-Americans, Muslims*, ABCNEWS.com, Sept. 17, 2001, at http://www.abcnews.go.com/sections/us/Dailynews/wtc_backlash_sikh_010917.html.

281. Jim Avila, *Muslim Backlash Continues* (Sept. 20, 2001), at <http://stacks.msnbc.com/news/631801.asp?cp1=1>.

282. *Id.*

283. *Id.*

284. Rosen, *supra* note 14, at A9.

285. Amy E. Nevada, *Woman Suing over O'Hare Search*, CHI. TRIB., Jan. 17, 2002, available at 2002 WL 2613252.

provisions for electronic surveillance and also focuses on money laundering.²⁸⁶ However, organizations that help Arab Americans send money to their families in the Middle East seem to be the only ones suspected of providing funds to terrorists and are being shut down by the government. The questioning of 5000 men of Arab descent is justified as a tool to help investigate terrorism,²⁸⁷ but why were white, Christian men not questioned after the Oklahoma City bombing in order to stop the antigovernment terrorist movement?

While national security is a priority, the government must change the way it attempts to protect its citizens without using some as scapegoats. Instead of automatically trying to find a group of easily identifiable persons to blame, the government must look at each national security problem individually. The government must focus on the true threats to national security like domestic antigovernment groups or those who are members of foreign terrorists groups. National security cannot be used as an excuse to discriminate. When the government is allowed to place persons into solitary confinement for no justified reason, force an entire group of people from their homes, or use secret evidence to deport innocent, legal residents, then we all lose our rights as American citizens and human beings.

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286. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) of 2001, Pub. L. No. 107-56 §§ 201-377 (2001).

287. Norihiko Shirouzu & Robert Tomsho, *Plan to Interview Arabic Men Worries Michigan Groups*, WALL ST. J., Nov. 28, 2001, at B4.

