FORSAKEN AND FORGOTTEN: THE U.S. INTERNMENT OF JAPANESE PERUVIANS DURING WORLD WAR II

Lika C. Miyake [FNd1]

The internment of Japanese Americans during World War II has been well discussed by scholars, but few remember or even know about the internment of Japanese Peruvians in the U.S. This note examines the history of the Japanese Peruvian internment, focusing on the U.S. government's legal justification for the program and the unjust treatment of the Japanese Peruvians under the U.S. immigration system after the conclusion of the war. The author considers U.S. legal and constitutional theories and cases relevant to the Japanese Peruvian internment and highlights the vulnerability of non-citizens in the U.S. during wartime. In conclusion, the author argues that the U.S. government should grant Japanese Latin Americans reparations equal to that awarded to Japanese Americans. Furthermore, the U.S. government should acknowledge the responsibility to avoid race or nationality-based bias, whether in crafting domestic policy or acting in foreign affairs.

INTRODUCTION

In no other wartime instance in United States (U.S.) history has the abrogation of individual liberties been more glaring than in the incarceration of ethnic Japanese during World War II. Under the guise of "military necessity," [FN1] racist politicians and opportunistic businessmen succeeded in pressuring the U.S. government to remove the Japanese population from the U.S.'s west coast. The government herded some *164 120,000 Japanese Americans, [FN2] two-thirds of whom were U.S. citizens, to camps in barren, unwanted lands to the east. [FN3] Few Americans knew then, or know now, that U.S. internment policies stretched past its own borders. As a part of a program to ensure the security of the Western Hemisphere, U.S. leaders coordinated a deportation program to remove dangerous enemy aliens from Latin American nations and place them in U.S. custody.

An appreciable majority of the Latin Americans interned in the U.S. were ethnic Japanese. [FN4] Among these internees, the Japanese Peruvians [FN5] merit special attention. Leaders in the highest offices of the Peruvian government cooperated with
Westlaw Download Summary Report for ELSEA,JENNIFER 3568535

Your Search: PERU /5 (INTERNMENT INTERNEE INTERN) & "WORLD WAR II"
Date/Time of Request: Wednesday, November 02, 2005 08:00:00 Central
Client Identifier: INTERNEES
Database: JLR
Lines: 8765
Documents: 4
Images: 0

The material accompanying this summary is subject to copyright. Usage is governed by contract with Thomson, West and their affiliates.
U.S. internment policies more than any other Latin American officials. As a result, the Japanese Peruvians were the largest group of Latin American internees, comprising over half of the entire Latin American internee population. Though only one of fourteen Latin American countries that deported its residents to the United States for internment, [FN6] Peru produced 1,771 of the 2,118 Japanese Latin American internees by the war's end. [FN7]

This paper will examine the history of the Japanese Peruvian internment, focusing on the U.S. government's role in their deportation and its legal justification of the program. Part I outlines the history of the Japanese Peruvian experience, concentrating on their wartime deportation and internment. It will examine the causes of the internment, the U.S. government's part in encouraging Peruvian persecution of its Japanese population, and the after effects of this program. Part II considers U.S. *165 legal and constitutional theories and case law relevant to the Japanese Peruvian internment. This section focuses on the treatment of enemy aliens under U.S. law and the development of anti-Japanese jurisprudence before and during World War II. A study of the Japanese Peruvian internment exposes the racist sentiments embedded in U.S. law at the time and highlights the vulnerability of non-citizens in the U.S. during wartime. The plight of the Japanese Peruvians shows the great damage that can be done when racism and fear collide.

I. THE JAPANESE EXPERIENCE IN PERU

A. Pre-War Struggles in Peru

The story of the Japanese in Peru begins in the late 19th century. Peru established diplomatic relations with Japan in 1873, recognizing the great potential for commercial and economic cooperation with the emerging Asian power. [FN8] Japanese immigration to Peru began in 1898, sparked by domestic unrest and economic troubles in Japan and the needs of the Peruvian rubber and sugar industries. [FN9] Immigration gained momentum as immigrants began to send for relatives and friends and established thriving communities in the large port cities of Lima and Callao. [FN10] Those who arrived in the late 1920s were not laborers, like their predecessors, but artisans and craftsmen, in many cases with ties to established and successful Japanese Peruvians. [FN11] Native Peruvians had begun nurturing anti-Asian sentiments during the Chinese immigration boom twenty-five years before. [FN12] The existing anti-Asian feeling transferred to Japanese laborers when the Japanese began to threaten Peruvian jobs. The Japanese laborer was better paid and "his work habits stamped the average Peruvian as a second-class worker." [FN13] Peruvians became more anxious as they saw the industrious immigrants succeed as small businessmen and independent farmers.

The insularity of the Japanese Peruvian community aroused Peruvian suspicions about the immigrants' loyalty to their native country. Some Japanese did attempt to assimilate, converting to Catholicism and marrying Peruvian natives. [FN14] In general, however, Japanese workers were unlikely to intermarry with native Peruvians, opting instead to bring wives from Japan or send for brides. [FN15] As the Japanese community grew, the immigrants established Japanese language school systems and civic organizations. [FN16] For the native Peruvians, the social development of the Japanese communities was a threat, a dangerous sign of separation from the rest of the society. The new associations and schools provided forums where the Japanese could retain their language and belief systems, making them less likely to integrate with the rest of the Peruvian population.
The isolation of the Japanese Peruvians was not entirely self-imposed. Poor relations between the Japanese laborers and their Peruvian employers, exacerbated by the language barrier and the Peruvians' general anti-Asian prejudice, had set the tone for mutual distrust and dislike. [FN17] Peruvians turned to race and culture to assert their blood superiority. Intermingling and intermarrying was frowned upon; Peruvians believed that “miscegenation involving the Japanese would inevitably lead to the deterioration of the Peruvian nation." [FN18]

The Peruvian press voiced Peruvian misgivings about the Japanese immigrant community. In 1937, La Prensa, a Lima newspaper, announced, "It is the government of Japan that organizes Japanese activity in Peru." [FN19] This suspicion dovetailed with anxiety over Japan's aggressive military imperialism in the 1930s: "If, as a growing number of Peruvians concluded, expanding Japanese economic desires had prompted invasion and military conquest in East Asia, would not this pattern repeat itself in Japanese Peruvian relations?" [FN20] Rumors flew about secret military drills and stockades of weapons and their connection to the Japanese civic and educational associations. [FN21] False reports that arms had been found in Japanese-owned haciendas near Lima triggered anti-Japanese riots on May 13, 1940; ten Japanese Peruvians lost their lives. [FN22] In the conclusion to their 1943 study of the Japanese Peruvian community, João Frederico Normano and Antonello Gerbi, presented what they believed to be the average Peruvian's view of the Japanese:

The ordinary Peruvian knows that most Japanese are ready to sacrifice themselves for the fatherland. He knows that they are all imbued with the traditional ideals of fanatical patriotism and devotion to the Emperor. And, therefore, while he respects and even admires the individual *167 Japanese ... he regards with misgivings such a standoffish and organized foreign group--people who do not speak Castilian, do not profess the Catholic faith, do not attempt to participate in the social and intellectual life of the country, and send their money away. To many Peruvians, Japanese tenacity and diligence seem doubly dangerous. [FN23]

Such prejudice led to the passage of anti-Japanese laws. In the late 1930s, Peru enacted legislation establishing immigration quotas to counter the "Japanese invasion." [FN24] In July 1936, the Peruvian government suspended naturalization proceedings for Japanese immigrants. [FN25] Second-generation Japanese Peruvians became the next target. A 1937 law annulled alien birth registrations and banned the Japanese from claiming jus soli nationality, citizenship based on nation of birth. A 1940 decree, which clearly targeted the Japanese, stripped citizenship from Peruvian-born children of parents from jus sanguinis nations who traveled to live or study in their parents' native countries. [FN26] These legal restrictions put official imprimatur on anti-Japanese sentiments and set firmly in place the Peruvian prejudices that motivated the Japanese Peruvian internment.

B. The Latin American Internment Program

The United States government had taken notice of the Japanese Latin American communities well before the Pearl Harbor attack. Soon after the European War began in 1939, the United States and the other North and South American countries turned their attention to the potential threat of Axis nationals in the Western Hemisphere. A meeting of foreign ministers of the American nations on September 23, 1939, called for proposals "to suppress violations of neutrality and subversive activities by nationals of belligerent countries or others seeking to promote the interest of belligerent powers in the territory and jurisdiction of any or all of the American Republics." [FN27] By order of President Franklin D. Roosevelt, undercover FBI...
agents spread out across South America in June 1940. [FN28] Originally, their mandate was to investigate and disable German intelligence and covert operations. However, the large Japanese populations in Brazil and Peru soon attracted their attention, [FN29] and along with Army and Navy intelligence agents, the FBI began extensive investigations of the Japanese Latin American communities. [FN30]

The first detention of Japanese Latin Americans took place in Panama within days of the Pearl Harbor attack. Because of its crucial canal, Panama was a central concern of the American military. [FN31] In October 1941, U.S. Ambassador to Panama Edwin C. Wilson began discussing an internment program with Panamanian Foreign Minister Octavio Fabrega. By the end of the month, the Panamanian Cabinet had agreed to administer an American-funded internment program in Panama. [FN32] Five days after Pearl Harbor, Wilson notified Undersecretary of State Sumner Welles that Panamanian authorities had rounded up all Japanese men, women and children. [FN33] The imprisonment of Japanese Panamanians became a model for the internment of all suspicious Latin Americans.

From the early stages of the Pacific War, the U.S. encouraged the other Western hemispheric countries to consider detaining their enemy aliens. In January 1942, the third meeting of the foreign ministers of these countries formed the Emergency Advisory Committee for Political Defense, which in the ensuing months recommended a "comprehensive and vigorous program of detention of Axis nationals." [FN34] The committee recommended that countries unable to handle their own internment programs deport their enemy aliens to other American republics, with the unspoken understanding that "the most obvious 'other' republic was the United States." [FN35] Many American officials believed that it was in the best interest of the United States "to remove all the Japanese from these American Republic countries for internment in the United States." [FN36]

Undersecretary of State Sumner Welles prodded other State Department officials to act quickly. He worried that the other Latin American countries could not be trusted to monitor and detain dangerous Axis nationals. [FN37] Assistant Secretary of State Breckenridge Long concurred, "[If these persons are not taken now the South American governments may neither surrender nor detain them at all." [FN38] Such a wide-scale and complex undertaking was sure to give rise to nightmarish logistical problems: America lacked the spare boats and men to implement such a program; and the Justice Department worried that this program could be challenged under international law if non-enemy nationals were interned. [FN39] However, the preoccupation with speed superseded the objections to a deportation and internment program.

The deportation was so hurried that the first shipload of Latin American "alien enemies" set sail for the U.S. before the different U.S. departments had settled which one would take custody of the deportees once they arrived on U.S. soil. The Justice Department finally agreed to take responsibility for the Latin Americans, but only as a two to six week temporary measure pending their repatriation to Japan. [FN40] This would not only solve the problem of resources but would provide the Justice Department officials with a way to circumvent the international law issue, as it was considered legitimate to assist in repatriating a non-belligerent nation's enemy aliens to their home country.

C. Internment of Japanese Peruvians
The U.S. was particularly anxious to assist Peru with the handling of its Japanese population because of the community's size and strategic location. Within days of the attack on Pearl Harbor, U.S. Ambassador to Peru Henry Norweb consulted with Peruvian Foreign Minister Alfredo Solf y Muro about what was to be done with Peru's Japanese population. In a December 11, 1941, telegram to Secretary of State Hull, Norweb reported that he had informed Solf y Muro of America's plan to intern its West Coast Japanese. Norweb explained that the Peruvian government "would sever diplomatic relations with Japan immediately if it knew what to do with the large Japanese population." Hull replied two days later that America would happily agree to assist with an internment program. Peru broke relations with Japan on January 24, 1942. American officials rejected the idea of interning suspicious individuals in Peru because Peruvian officials were known for their "indifference, laxity, and corruption in their administration of regulations and in their cooperation with American authorities."  

The Peruvian government quickly instituted policies in accordance with the U.S. program for hemispheric security. Soon after Pearl Harbor, the Peruvian government pledged to allow the construction of U.S. military installations in Peru. Peruvian officials shut down Japanese schools, community organizations, and newspapers; imposed travel restrictions; and, at the suggestion of the U.S. government, confiscated phones from homes of Japanese Peruvians. Economic restrictions inflicted more damage on the Japanese Peruvian community. Japanese land leases were canceled and assets frozen. Two days after Pearl Harbor, the Peruvian government placed hundreds of Japanese and their businesses on a "blacklist" which originated in the U.S. under Presidential Proclamation No. 2497. In the spring of 1943, Peruvian laws gave the government the authority to take over Japanese farms and confiscate the property of Axis nationals. Peruvian police arrested "suspicious" Japanese, sometimes in brutal nighttime raids, and detained inmates in Peruvian jails. The Japanese Peruvian community was cowed and economically powerless.

For both the Peruvian and the American governments, hemispheric security and anti-Japanese prejudice were initially the main motivations for the Japanese Peruvian deportation program. As the war progressed, other reasons for the deportations emerged. Some U.S. citizens had been caught in Japanese territory when the war began, and the U.S. had from the beginning conducted civilian exchange negotiations with Japan. Japan's conquests covered a large part of East Asia, and as the war persisted, it became apparent to U.S. officials that Japan held a larger than expected number of Americans in its prisoner camps. The government feared that it would not have enough Japanese in custody in the U.S. to exchange for American civilian prisoners. Deporting unconsenting Japanese Americans was out of the question. As a remedy to this problem, Cordell Hull urged the President to continue "our efforts to remove all the Japanese from these American Republic countries." The importation of internees from Peru and other South American nations gave the U.S. valuable bartering currency.  

Economic motives also came into play. A State Department Special Division meeting recognized that "certain economic advantages would accrue to individual Peruvians" because of the removal of the Japanese community. For Norweb, ridding Peru of the Japanese meant relieving the country of a group that threatened Peru's post-war progress towards an American-style democracy:

[B]conomic-social changes [in post-war Peru] will stand a far better prospect of
satisfactory outcome if they are not complicated by the existence of what is now Peru's largest alien group, industrious and thrifty but with a low standard of living, separatist, inassimilable, always disliked, non-democratic, and permanently loyal to an anti-democratic state. [FN54]

Peruvian officials saw the war as a serendipitous opportunity to rid Peru of its Japanese population altogether. In a July 20, 1942, memorandum, Norweb reported to Welles that the goal of Peruvian President Manuel Prado "apparently is the substantial elimination of the Japanese colony in Peru." [FN55] President Prado asked about U.S. shipping capability and indicated that Peru would not readmit interned Japanese Peruvians. [FN56] In stark contrast, Prado and other Peruvian officials took almost no action against the large, well-established German population and the smaller Italian community. [FN57]

Norweb recommended that Peru deport all persons of Japanese descent, regardless of their citizenship status. His memo revealed his own anti-Japanese bias. Here, as in the discussions leading to the Japanese American internment program, the close-knit nature of the community and, paradoxically, the lack of evidence of sabotage or subversion worked against the Japanese people:

*172 The Japanese problem is ... of immediate importance. Up to the present the Japanese have been grimly quiet. We know that they hold the firm conviction that their Emperor's forces will finally triumph .... We know that they are prepared to do their part when called upon by Japan and that their organization is thorough, centralized, and efficient .... Should Japan's war strategy dictate an attack on the west coast of South America, then the Japanese here, in their present status, would constitute an active danger of the gravest character. [FN58]

A lack of ships, personnel, resources, and space prevented the kind of wholesale deportation Prado and Norweb desired. However, partial deportation was accomplished through the cooperation of the American and Peruvian governments. In February 1942, the State Department dispatched Far Eastern specialists Lawrence Salisbury and John K. Emmerson to Lima to help the Peruvian government investigate the Japanese communities and select deportees. [FN59] Only one of several U.S. government agencies to send officials to Latin America, the State Department used local informants to investigate the Japanese and German communities in Peru. [FN60] Emmerson and a Chinese embassy staff officer named George Woo received warm welcomes and investigative assistance from Chinese Peruvians eager to show their allegiance to the Allied cause. [FN61] Emmerson also worked with Peruvian police officials, who regularly confiscated Japanese Peruvian mail to show to him. [FN62]

Deportation of Japanese Peruvians to the U.S. began soon after the January 1942 foreign ministers' conference. On April 4, 1942, the S.S. Etolin stopped at Callao on its way to San Francisco to pick up a cargo of male Japanese, German, and Italian Latin Americans. [FN63] The S.S. Acadia followed eight days later. [FN64] Deportations continued steadily through the middle of 1943. Passengers protested that the treatment was inhumane. They reported sleeping on cement floors in Peruvian prisons, and being held under strict guard in crowded, unventilated quarters below deck for the journey. [FN65] U.S. officials held some internees in a temporary camp in Panama before sending them to the United States. Camp guards forced the inmates to salute the American flag and recite the Pledge of Allegiance before sending them to labor in the rain forest. [FN66]
U.S. officials confiscated passports and other paperwork en route and ordered the consulates not to issue visas to the internees. [FN67] Upon the deportees' arrival on U.S. soil, the Immigration and Naturalization Service held hearings to establish that the internees entered illegally because they lacked the proper paperwork. [FN68] The Latin American internees joined those classified as "alien enemies" and were assigned to the jurisdiction of the Department of Justice. [FN69] The Justice Department housed most of the Latin American internees in three camps in Texas: Kennedy, for men; Seagoville and Crystal City for families. [FN70] Some would only spend a few months at the camps before boarding boats for Japan, [FN71] while others remained in the camps for the duration of the war and beyond.

Initially, the targets of the deportation program were consular and diplomatic officials, as well as some prominent businessmen. [FN72] These men would be included in the American civilian exchange program. Their deportation opened the way for other non-officials, including those considered suspicious or those who volunteered for repatriation, to leave Peru. Unable to find any real evidence of subversion amongst the Japanese Peruvians, Emmerson established the "criteria of leadership and influence in the community" to select deportees. [FN73] He reasoned that singling out journalists, Japanese language teachers, civic organization presidents, and other leaders of the community would be the most effective way to catch "potential subversives" amongst the Japanese Peruvians. [FN74] Emmerson applied this criterion not only to the large urban Japanese Peruvian populations in Lima and Callao, but also to the small communities that inhabited coastal villages and towns.

Despite Emmerson's efforts, those deported to the U.S. were a random lot. The Peruvian officials had never established a procedure for selecting its deportees, and "the whim of enforcing officials played a major part in the designation of the undesirables." [FN75] Some were not Japanese citizens, but naturalized Peruvian citizens or Peruvian-born Nisei. [FN76] The State Department suspected that the Peruvian government did not bother to distinguish between dangerous and non-dangerous Japanese Peruvians because the haste to get rid of as many Japanese as possible eclipsed concerns of getting rid of the "right" Japanese. The U.S. embassy at Lima reported the willingness of the Peruvians to send Japanese to the U.S. as repatriates "regardless of whether or not there was any possibility of their repatriation [to Japan]." [FN77]

Edward J. Ennis, chief of the Department of Justice's Alien Enemy Control Unit, acknowledged that the U.S. officials operating in Lima did not follow the same standards as those used in selecting alien enemies detained on U.S. soil. [FN78] U.S. officials acted in great haste and accepted the possibility that there would be errors. A few Peruvian officials tried to maintain some kind effective screening method. However, when Peruvian officials argued that evidence should be presented to justify deportation on an individual basis, they were told that the Americans were "unprepared to investigate each individual but that the Peruvians should see the program as preventing fifth-column activities." [FN79] The Americans were most concerned with taking preventative measures in Peru, regardless of whether or not those measures resulted in fair treatment for the Japanese Peruvians involved. Attorney General Francis Biddle determined that errors and potential for errors "did not warrant the restriction of internment." [FN80] U.S. officials disregarded evidence of Peru's indiscretions in selecting deportees and did little to ensure that the Japanese Peruvians received just treatment.

The anti-Japanese environment in Peru, exacerbated by the wartime economic and legal restrictions, drove some Japanese Peruvians to want to leave Peru. The blacklists and the general prejudice made it difficult for a Japanese Peruvian to earn a living and lead a normal life. [FN81] For those who wished to go to Japan, the path led through the U.S. Towards the middle of the war, even those who did not want repatriation began to offer themselves for deportation with the expectation of better lives in the U.S., even though that meant confinement in camps. George H. Butler, First Secretary of the Embassy at Lima, reported to the Secretary of State that "at first the Japanese did not wish to leave Peru but that now 'all of them' want to go to the United States." [FN82]

*175 The inconsistencies in selecting deportees became a problem that demanded immediate attention when the civilian exchanges with Japan fell through. Now the Justice Department needed to prepare for indefinite internment instead of temporary detention. [FN83] The Justice Department wanted to make their acceptance of more deportees contingent on their ability to hold hearings once the internees were on U.S. soil. The State Department rejected this proposal. Ironically, their concern was that the Peruvian government would interpret a hearings policy as an insult to their competency and integrity, and would therefore refuse to cooperate with future U.S. programs. [FN84] As a compromise, both departments agreed that a Justice Department official would be sent to Lima to determine the acceptability of internees before they boarded vessels bound for the U.S. Subsequently, Raymond Ickes, head of the Central and South American Division of the Department of Justice's Alien Enemy Control Unit, visited Lima to help select internees. [FN85] Ickes and Emmerson discovered that many of the Japanese named on the Peruvian government's expulsion list did not meet Emmerson's criteria for potential dangerousness, and rejected many of the Japanese Peruvians rounded up by the Peruvian government for internment. [FN86]

Several other factors contributed to the gradual slowing of the Peruvian deportation program. By fall 1942, American victories at Midway and Coral Sea had crippled the Japanese fleet, turned back the Japanese advance in the Pacific, and assuaged fears of a Japanese threat to the Western Hemisphere. [FN87] As the hysteria that followed the Pearl Harbor attack died down, so too did the perceived threat of the Japanese Peruvian communities to the security of the Americas. [FN88] The effects of the persecution of Japanese Peruvians also calmed Peru's fears. Some Japanese went into hiding to avoid unpredictable arrest raids, and Japanese Peruvian landowners and businesspeople were hamstrung by the economic restrictions. [FN89] In addition, there were questions as to the availability of resources to continue the program; the Justice Department foresaw overcrowding problems in the camps.

Because of these factors, the deportation of internees on the basis of their threat to hemispheric security grounded to a halt in 1943. From June 1943 to the end of the war, a vast majority of the passengers on ships *176 headed for the U.S. were women and children joining their husband/father internees in Texas. These dependents had suffered the pain of separation from husbands and fathers and also found themselves deprived of their means of support in Peru. [FN90] These last ships also continued to carry passengers who had volunteered for deportation, were found to be community leaders, or were arbitrarily arrested by the Peruvian police. [FN91]

D. "Repatriation" [FN92]
As it became apparent that the Allied forces would triumph in the Pacific,
questions began to arise about what to do with the Latin American internees. In the rush to deal with the Japanese Peruvian problem, U.S. and Peruvian officials had not decided what the deportees' ultimate fate would be. [FN93] Peruvian officials had mentioned to Norweb and others that they did not want to readmit deported Japanese Peruvians, but there had never been an official agreement. [FN94] In February and March of 1945, the foreign ministers gathered in Mexico City for another inter-American conference. In Resolution VII, they recommended that anyone whose "residence would be prejudicial to the future security or welfare of the Americas" be deported from the hemisphere. [FN95] On September 8, 1945, the U.S. government implemented Resolution VII through Presidential Proclamation No. 2662, which ordered the deportation of the Latin American internees. [FN96] In addition to the perceived security threat, U.S. officials worried: "Not only does their continued stay in the United States constitute a burden for the American taxpayer, but as a group they are not desirable additions to our own population." [FN97]

U.S. officials had "no information which would enable [them] to make a case-by-case review" of the Japanese Peruvian internees, but had plenty of evidence showing that the Germans Peruvians were "clearly dangerous." [FN98] In light of this fact, the U.S. asked Peru to take back all of *177 the Japanese Peruvian internees. [FN99] However, while defending the German Peruvians' rights to not be "repatriated" to Germany without their consent, the Peruvian government urged the U.S. to repatriate all of the Japanese Peruvians. [FN100] The Peruvian government refused readmission to all but about 100 Japanese Peruvians. [FN101] Most of these people were allowed to return to Peru only because they were Peruvian-born Nisei or were married to Peruvian wives and had Peruvian-born children. Peruvian officials pointed to Resolution VII, which urged the prevention of "the reestablishment of any Axis influences in the New World" to justify this position. [FN102] William D. Pawley, the new U.S. Ambassador to Peru, supported the Peruvian government's stance. Pawley recommended that the U.S. government concede to all of the Peruvian demands for the handling of the internees. He strongly agreed with Peruvian officials that the return of the Japanese to Peru would be "politically disastrous." [FN103]

Soon after the war's end, German Latin American internees brought legal proceedings against the U.S. government, filing habeas corpus petitions to forestall their repatriation to Germany. [FN104] A January 10, 1946, decision determined that the internees were indeed "alien enemies" within the definition of the Alien Enemy Act of 1798, and could legally be deported under the Act. [FN105] Other cases affirmed this decision. [FN106] These legal rulings left the Japanese Peruvians in a terrible predicament. Most of the internees wanted to return to Peru, where many had been born and had spent years building lives and raising families. [FN107] Some believed that their best option would be to start anew in the U.S., especially those with children who were born during the internment and who qualified as U.S. citizens. [FN108] Japan was a country so war-torn that its own population faced mass starvation. Yet some believed that repatriation was the only possible way to reunite with families who had been left in Peru. [FN109] In the end, convinced that neither Peru nor America would allow them to stay, most of the internees "elected" to accept repatriation to Japan. [FN110]

*178 Some continued to reject repatriation, and about 300 Japanese Peruvians were left in the United States when the Department of State declassified them as "alien enemies" on April 6, 1946. [FN111] Yet this nominal change in status did not lessen the possibility that they could be deported. By transferring authority over the

deportations from the State to the Justice Department, the government turned the
Japanese Peruvian cases into immigration cases. By the strict letter of the law, the
internees were non-residents who "were not admitted to this country under the
immigration laws" and had "no recognized interest or right to remain in this
country." [FN112] As U.S. officials had not issued visas and had confiscated
Japanese Peruvian documents before they set foot on U.S. soil, the Japanese
Peruvians were still technically "non-resident aliens" who could be deported to
Japan under the Immigration Act of 1924. [FN113]

The government continued its efforts to deport the internees as illegal
immigrants. The Department of Justice issued warrants and arrested some of the
internees at the camps. [FN114] However, before the deportations could be carried
out, attorney Wayne M. Collins filed two habeas corpus test cases in the Northern
District Court of California to stall the deportations. [FN115] The U.S. government
continued to petition Peru to readmit more internees through the early 1950s.
However, with a few exceptions, Peru continued to rebuff the U.S. government’s
requests. [FN116]

*179 Three years passed before Public Law 863, passed on March 4, 1949, allowed
Japanese Peruvians to apply to have their deportation suspended if it was found that
"deportation would result in serious economic damages to citizen-spouse or children
and if the alien had resided continuously in the United States for seven or more
years." [FN117] In 1952, Japanese nationals finally won the right to become U.S.
citizens under an amendment of the Immigration and Naturalization Act. [FN118]
Another two years would pass before Public Law 751, passed on August 31, 1954, gave
Latin American internees the right to apply for the status of a permanent resident
legally admitted into the U.S. This also qualified them for citizenship. [FN119]
Collins’ cases were dismissed so that the internees could apply for residency.
[FN120] After over a decade of persecution and confinement, the 300-some Japanese
Peruvians who had eluded deportation to Japan finally found a home in the U.S.

Despite these victories, those who settled in the U.S. after the war continued to
receive disparate treatment because of their non-citizenship status during the war.
The Civil Liberties Act of 1988 [FN121] was a great triumph for Japanese American
internees. It entitled each surviving internee to an official letter of apology and a
compensation award of $20,000. The Act excluded Japanese Peruvians and other
Japanese Latin Americans, declaring that only those people who were U.S. citizens or
permanent residents during the War were entitled to apologies and reparation monies.
In response, the surviving Japanese Peruvians filed a class action suit for redress
in the Court of Federal Claims. Under the settlement reached in Mochizuki v. U.S.,
the court ordered the U.S. government to make reparations to the Japanese Peruvians
in the form of an apology and payment of $5,000 each. [FN122] The Japanese Peruvian
former internees and their descendants continue to fight today, working for the *180
passage of bills that would grant them inclusion under the Civil Rights Act of 1988
and thus compensation in the same amount as the redress monies received by Japanese
Americans. [FN123]

II. THE JAPANESE PERUVIANS AND AMERICAN LAW

The participation of the U.S. in the internment of Japanese Peruvians violated
principles of international law. [FN124] U.S. officials collaborated with Peruvian
officials to deport civilians from a nonbelligerent to a belligerent country,
detaining those civilians indefinitely, and then forcing "repatriation" of those
civilians to their nation of ethnic origin. While international legal principles and the customary law of war of the time protected human rights, the codification of many of these protections did not occur until 1949. [FN125] International law, though established before the onset of World War II, had little effect on U.S. decision-making.

While lack of codification and spotty enforcement allowed the U.S. government to sidestep applicable international law, U.S. law was a greater obstacle. Because the development of civil and individual liberties has been a central part of U.S. history, there were decades of precedents, theories, and protections relevant to the U.S. involvement in the Japanese Peruvian internment. U.S. officials made efforts to find laws to validate the Japanese Peruvian internment. Their efforts to justify their actions provide a lens through which to examine the treatment of "aliens," "enemies," and Asians in U.S. legal history.

The Japanese Peruvian internment program was also at odds with America's goals in participating in World War II. World War II was perceived as the ultimate struggle between freedom, embodied by liberal Enlightenment notions of human liberty, and oppression, Hitler's Fascism. [FN126] The U.S. fought in part, rhetorically, to ensure that basic freedoms would extend to all. [FN127] After the war, Americans took the lead in establishing international conventions and organizations which would protect those inherent and natural individual rights so crucial to America's understanding of its own history and legacy. How then was the government able to justify its racially discriminatory program of internment and the stripping of individual rights of thousands of ethnic Japanese throughout the Western Hemisphere?

1. Sovereignty and the Individual Rights of Non-Citizens

   The notion of sovereignty provides the most basic justification for the treatment of Japanese Peruvians and all alien enemies during the war. Sovereign powers are at the core of any country's existence and are essential for a nation to maintain its independent status. [FN128] In U.S. v. Curtiss-Wright Export Corp., the Court concluded that sovereign powers essential for participation in the global community are "vested in the federal government as necessary concomitants of nationality." [FN129] Accordingly, sovereign powers are by origin natural and aconstitutional, and are not bounded by the restrictions of the Constitution and its Amendments, including the protections of individual rights. [FN130]

   In the arena of alien rights, America's social contract tradition supports the sovereignty argument's denial of constitutional protections. During the nation's founding, many believed that the conscious decision to be American was of core importance: "Voluntary adherence rather than a passive, imputed allegiance was the connective tissue that would bind together the new polity." [FN131] This means that only those who participate in the mutual consent pact that forms the nation should benefit from the protections offered by that pact. This "membership" notion of the Constitution lends ideological credence to the exclusion of aliens from the protections of the Bill of Rights. [FN132] Those who support this idea cite the very first line of the Constitution: "'We, the people of the United States,' were the only people concerned in making that instrument. [I find] nothing in it which [binds] us to fraternize with the whole world." [FN133]
Sovereignty and social contract authority are checked by notions of limited
government and inherent individual rights. Under the limited government argument,
the American government derives all of its powers from the Constitution and thus is
always bound by its limiting provisions. In Curtiss-Wright, the Court defined
sovereign powers as inherent but insisted that the government's action in foreign
affairs, "like every other governmental power, must be exercised in subordination to
the applicable provisions of the Constitution." [FN134] Since individual rights
inherently and naturally belong to all humans, not just American citizens, the Bill
of Rights protects all individuals and applies to treaties and international
agreements as well as other U.S. foreign affairs policies. [FN135] All persons also have rights to equal protection, and discrimination based on nationality is allowable only if dictated by legitimate government policy; discrimination by race is illegal. [FN136]

The friction between those theories which give broad authority to the government
and those that restrict that authority is featured in the debate over alien rights
and wartime policy. The Constitution not only defines the government's powers but
acts as a body of law. Its integrity is ensured by applying it consistently to all
who fall under its jurisdiction. In 1800, James Madison wrote, "Aliens are not more
to the laws, than they are parties to the Constitution; yet, it will not be
disputed, that as they owe, on one hand, a temporary obedience, they are entitled,
in return to their protection and advantage." [FN137] The arbitrary denial of rights
to any group of people, who naturally have the same inherent rights as Americans,
degrades the integrity of the principles embodied in the Constitution. By doing so,
such a denial threatens the rights of American citizens themselves. [FN138] Protesters of the Alien and Sedition Acts grieved, "the barrier of the Constitution thus [has been] swept away from us all ... the friendless alien has indeed been selected as the safest subject of a first experiment: but the citizen soon will follow." [FN139] This 200-year old prophecy was borne out with the imprisonment of innocent Japanese American citizens. If authority over non-citizen residents could be stretched to cover Japanese American citizens, it was even easier for the
government to extend its power over the Japanese Peruvians, either as alien enemies
or as illegal immigrants.

2. Judicial Deference to International Policy: Asian Immigration and Deportation

Despite the theoretical problems and potential hazards of permitting virtually
limitless government power, courts have rarely restricted the government's sovereign
powers, especially in the realm of foreign affairs. The Supreme Court has found the
government's sovereign authority in foreign affairs to be totally different from its
internal powers, which are imminently more limitable. [FN140] Restricting the
government's powers in the international sphere has the unacceptable consequence of
weakening the nation in relation to other countries and "to that extent [making it]
subject to the control of another power." [FN141]

Sovereign authority over aliens is so broad that the Supreme Court has generally
denied itself judicial review in such cases. In the Chinese Exclusion Case, [FN142] the Court established government plenary powers in immigration cases and
held that the judiciary had no power to contravene the sovereign right of Congress
to exclude aliens from the U.S. [FN143] In Ekiu v. U.S., [FN144] the Court declared
that the government, under its powers as a sovereign nation, had the right to
appoint officers to decide immigration cases. Once an appointed official passed

judgment on the facts of a case, "no other tribunal ... is at liberty to reexamine or controvert the sufficiency of evidence on which he acted." [FN145] Drawing on Chinese Exclusion and Ekiu, Fong Yue Ting v. U.S. extended these plenary powers to deportation cases by declaring that banishment from the United States was a preventative and non-punitive measure. [FN146] These precedents affirming Congress' plenary power over aliens are "legion," [FN147] one of the Supreme Court's strongest jurisprudential traditions. [FN148]

The use of sovereign powers in immigration matters expanded in response to the influx of Asian immigrants in the late nineteenth and early twentieth centuries. In 1882, anti-Chinese sentiment led to the first large-scale federal immigration restrictions based on nationality or race. [FN149] The government put an indefinite halt to Chinese immigration in 1902. [FN150] In 1922, the Court ruled that the Naturalization Act of 1790 precluded Japanese immigrants from becoming naturalized citizens. [FN151] The Court denied that this discrimination was malicious and invalid, reasoning that the legislators who wrote the original Act did not intend to exclude Asians but simply could not "foresee precisely who would be excluded by that term in the subsequent administration of the statute." [FN152] The 1924 National *184 Origins Act, also known as the Japanese Exclusion Act, surreptitiously but pointedly shut off Japanese immigration by banning the entry of "aliens ineligible for citizenship." [FN153]

Originally, the power to exclude certain groups of immigrants came from a constitutionally enumerated power, the commerce clause. [FN154] In the Chinese Exclusion Case, the Supreme Court made sovereignty a dominating feature of alien rights law by justifying the power to exclude Chinese immigrants as an element of the sovereign right of war. [FN155] The Court pointed to the fierce labor competition that Chinese immigration had engendered in California and accused the Chinese American community of refusing to assimilate, causing economic hardship, and bringing their inferior morality to America. [FN156] The Court cited to a California convention's plea to Congress that the large numbers of Chinese immigrants amounted to an "Oriental invasion, ... a menace to our civilization. [They] in fact constitut[e] a Chinese Settlement within the state." [FN157] The Court asserted that legislative action against the Chinese immigrants was really a move of sovereign self-defense:

"To preserve its independence, and give security against foreign aggression and encroachment, is the highest duty of every nation ... It matters not in what form such aggression and encroachment come, whether from the foreign nation acting in its national character or from vast hordes of its people crowding in upon us." [FN158]

Four years later, in Fong Yue Ting v. U.S., [FN159] the Court expanded the use of sovereignty to support the deportation of aliens. Writing for the majority, Justice Gray asserted that the right to expel aliens was part of the "inherent and inalienable right of [a] sovereign and independent nation." [FN160] This decision has been described as recognizing authority over immigrants to be a "congressional power without constitutional limits." [FN161] The Fong Yue Ting opinion was doubly effective because of Justice Gray's reliance on a membership notion of rights to support the use of sovereign powers over aliens. Justice Gray quoted Ortolan: "[T]he foreigner, not making part of the nation, his individual reception into the territory is [a] matter of pure permission, of simple tolerance, and creates no obligation." [FN162] Even in *185 cases where the rights of Asian immigrants seemed to be upheld, the rhetoric of these decisions betrayed the courts' disinterest in
the just treatment of Asian aliens. The extension of due process rights to Kaoru Yamataya, a deportable Japanese woman, in The Japanese Immigrant Case is often cited as a victory for alien rights. [FN163] The Court declared that aliens had the right to hearings before deportation and protection under the Fifth Amendment. [FN164] However, the Court wrote that it was not necessary for the defendant to understand what was happening at the hearing. [FN165] The Court stated that it was the defendant's "misfortune" that she did not understand English, and that the hearing was valid and binding even if it was merely a "pretended" hearing. [FN166]

Notably, there are no major immigration cases involving the exclusion of any other racial group, although sovereign powers were cited to extend restrictive and exclusive policies to idiots, lunatics, polygamists, anarchists, contract laborers, prostitutes and others whose moral or ideological failings made them unfit for U.S. citizenship. [FN167] The ethnic background of Asian aliens rendered them undesirable additions to American society. Significantly, some of the most aggressive assertions of sovereignty on U.S. soil, during peace and war, have supported repressive actions against people of Asian descent. This legacy of racism provided the foundation for America's treatment of the Japanese Peruvian internees.

B. In the Case of Japanese Peruvians

1. Alien Enemies and U.S. Law

   The war power is perhaps the most crucial of sovereign powers. During wartime, courts have paid special deference to the President in his role as military commander, tying it to his general authority in the realm of foreign affairs. [FN168] The primary duty of a sovereign nation is to preserve itself, and thus it has a natural and undeniable right to anything necessary for its self-protection. The sovereign power of war is "the power to wage war successfully," and the Court has given wide latitude to the President to *186 exercise his military powers. [FN169] Internment must be understood in light of the special powers given to the President and military during wartime.

   The piece of legislation at the heart of the Japanese Peruvian internment in the U.S., and all such internment programs, was the Alien Enemy Act of 1798. [FN170] This statute granted the President wide-ranging and virtually unlimited authority:

   [W]herever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States, ... all natives, citizens, denizens, or subjects of the hostile nation or government, ... who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured and removed, as alien enemies. [FN171]

   At the time of its passage, the Alien Enemy Act was described as a "permanent wartime statute" with "bipartisan support" that "raised no controversial constitutional questions." [FN172] Its authority came from multiple sources: unspecified sovereignty powers, enumerated war powers, [FN173] and common law. [FN174] It has remained basically the same since its writing, with only one minor amendment in two centuries of existence. [FN175]

   Many agree with the necessity and legitimacy of government authority over alien enemies. However, the dangers of granting this nearly unlimited power to the government was recognized even by its supporters. Even as he advocated for the Act,
John Quincy Adams cautioned: "This power is tremendous; it is strictly constitutional; ... but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." [FN176]

President Roosevelt's use of the Alien Enemy Act in World War II was not unprecedented. The Act had been the basis of internment of suspected saboteurs and spies during the First World War. [FN177] During that war, President Woodrow Wilson issued Presidential Proclamations to establish protected zones from which to exclude German and Austro-Hungarian citizens. [FN178] President Roosevelt's December 1941 Proclamations drew heavily from Wilson's Proclamations; Roosevelt sometimes quoted Wilson word-for-word. Roosevelt's *187Executive Order 9066 [FN179] was based on Wilson's April 5, 1917, Proclamation, which declared that:

An alien enemy shall not reside in or continue to reside in, to remain in, or enter any locality which the President may from time to time designate by Executive Order as a prohibited area in which residence by an alien enemy shall be found by him to constitute a danger to the public peace and safety .... [FN180]

Presidential authority over alien enemy nationals was upheld by Wilson-era courts. In cases arising from World War I internment, courts held that alien enemies were not entitled to writs of habeas corpus, [FN181] nor to bring action against the government on grounds of due process. [FN182] In Ex parte Graber, the court held that the President was the "exclusive judge" of whether a citizen could be detained as an enemy alien, and that courts would not review the executive's decision by entertaining habeas corpus petitions. [FN183] Similarly, in Minotto v. Bradley, [FN184] the Court rejected procedural rights for aliens because "determination by the President whether the facts justify the internment of the petitioner, provided he is an alien enemy, is not to be investigated by the courts." [FN185] The only question for the courts was whether or not the defendant was actually an alien enemy; once that was established, there was "no question here of violating the provisions of our Constitution." [FN186] Ex parte Gilroy confirmed the legitimacy of the Alien Enemy Act, and agreed that alien enemies were not entitled to hearings. To grant them hearings would "defeat[ ] the protective and safeguarding objects of the enactment at the threshold." [FN187] Thus, decades before World War II broke out, summary seizure and detention of alien enemies without hearings were determined to be legitimately "preventive, protective, and precautionary in character." [FN188]

Cases arising out of World War II also supported the constitutionality of the Alien Enemy Act. [FN189] The court in Citizens Protective League v. Clark asserted that no court had ever held the Act to be unconstitutional. [FN190] The court referred to the authority granted to the executive by the Act not only as a power, but a "right" and a part of his "solemn responsibility" to forestall threats to America's war efforts. [FN191] The Supreme Court echoed the holdings of the World War I-era judges by emphasizing that the powers *188 granted under the Act were not to be reviewed by courts. [FN192]

2. The Alien Enemy Act and World War II

As legitimate as the Alien Enemy Act may be in expressing the President's war powers, the U.S. government's application of it in the case of the Japanese Peruvians was suspect. "Alien enemies" were arrested under actual suspicion of subversion and placed under the jurisdiction of the Department of Justice. [FN193] The Department of Justice internment camps held "dangerous" Japanese Americans, as
well as German and Italian enemy aliens. [FN194] Because the Japanese Peruvians and all other Latin American internees had supposedly been detained selectively in their home countries, they were labeled "alien enemies" under U.S. law, and the courts confirmed this classification. [FN195] In contrast, the Japanese Americans, both citizen and non-citizen, who were not specifically charged with sedition, were labeled "evacuees" and "relocated" by the War Relocation Authority. [FN196] The detention of the Japanese Peruvians was not selective, nor based on evidence of actual subversion. More, the Japanese Peruvians were not "alien" to the U.S., since they were not on U.S. soil at the time of their detention. Nor were many of the Japanese Peruvians "enemies;" while some of the internees were Japanese citizens, some were Peruvian citizens.

The Alien Enemy Act targeted those "who shall be within the United States" at the time of a declared war. [FN197] U.S. officials had no authority under the Act to help apprehend alien nationals who were not on U.S. soil. In the habeas cases filed by the Latin American internees, the government and courts simply disregarded the U.S.'s involvement in the internees' capture and deportation. In U.S. ex rel. Von Heymann v. Watkins, [FN198] the U.S. Circuit Court of Appeals for the Second Circuit declared that it had to be assumed that Costa Rican officials acted properly in apprehending the internees. [FN199] The District Court of the District of Columbia stated, "The facts as to how the [petitioners] came here are neither important nor controlling—the important and conclusive factor is their presence in and their status as 'within the United States.'" [FN200] Under these cases, the various Latin American governments were responsible for apprehending the internees, and actions by foreign governments on their own territories were *189 not reviewable in U.S. courts. [FN201]

Even if courts had recognized that the U.S. government had assisted with the capture of the Latin American internees, the question remains whether government officials acted within the constraints of the Constitution. It has never been conclusively shown that the constitutional protections of individual liberties apply to U.S. action abroad. In fact, the prevailing view originated from an 1891 case, In re Ross, [FN202] in which the Court stated, "[t]he constitution can have no operation in another country." [FN203] In the early 1900s, the American acquisition of territory through victory in the Spanish-American War and other means raised the legal question of whether the Constitution's protections apply in U.S. colonies as in U.S. proper. In the Insular Cases, [FN204] the Court refused to extend fundamental constitutional protections to the territories, asserting that the Constitution does not "follow the flag." [FN205] Sovereign powers are so crucial to a nation's ability to function in foreign affairs that courts have been hesitant to restrict them, even to protect individual rights.

The government did acknowledge in an internal memoranda that the arrest and detention of the Japanese Peruvian internees were accomplished illegally in their home countries. [FN206] Ennis relied on cases that had come before the United States Supreme Court to assert that jurisdiction over a defendant is not affected by the "illegality of the arrest." [FN207] Among the cases to which he referred was Ker v. Illinois. [FN208] Ker was wanted for larceny in Illinois, but escaped to Lima, Peru. The messenger carrying the Secretary of State's request for extradition found Ker, apprehended him, and brought him back to the U.S. Ker was subsequently brought to trial. The Court ruled that though Ker had been a victim of an "unlawful and unauthorized kidnapping" in Peru, "for mere irregularities in the manner in which he
may be brought into the custody of the law, we do not think he is *190 entitled to say that he should not be tried at all for the crime with which he is charged in a regular indictment." [FN209] Ennis also cited cases that involved the unlawful arrest of a fugitive in one state prior to extradition to another. [FN210]

Ennis' use of precedent was flawed. While the cases he cited did support the contention that the "forcible seizure" of a defendant, and/or "his conveyance by violence, force or fraud" are not controlling factors, [FN211] the defendant in Ker had committed a crime on U.S. soil and was to stand trial for that crime. Neither the U.S. nor the Peruvian governments found any evidence suggesting that the Japanese Peruvians threatened the security of the Western Hemisphere. Neither had the Japanese Peruvians committed any crimes in the U.S. in participating in the overseas capture and transport of innocent civilians, the U.S. government overstepped its authority over alien enemies.

Once the internees were in U.S. territory, however, it was relatively simple to assert authority over them. As soon as the alien nationals set foot on U.S. soil, they fell under the purview of the Alien Enemy Act and the Presidential Proclamations which enforced it. As Edward Ennis, chief of the Alien Enemy Control Unit, stated in a March 1942 memo, "[O]ur legal authority to intern alien enemies summarily is [no] less over those brought here involuntarily from another country than over residents. Their presence here supports our jurisdiction." [FN212] The courts affirmed this reasoning. [FN213] The courts also consistently ruled that action taken under the Alien Enemy Act was unreviewable. [FN214]

The government decided to provide hearings for suspected alien enemies who were in the U.S. during the outbreak of the hostilities. [FN215] By Presidential order, the Attorney General established hearing boards in January 1942. If a hearing board determined the internees to be dangerous, the Justice Department interned them in camps separate from those established for the relocated Japanese Americans by the War Relocation Authority. There was no requirement for fair and consistent legal procedure. Defendants were denied legal counsel and the right to object to the government's line of questioning or presentation of evidence. [FN216] Still, many internees found that the hearings were "held promptly, and release was very likely despite the government's great advantages in the hearing process." [FN217] The Department of Justice was careful to announce that the *191 "hearing has been provided, not as a matter of right, but in order to permit them to present facts in their behalf." [FN218] Courts could not review the hearings. [FN219] The inadequate legal process allowed alien enemies, at that time, a privilege, not a right. It was a privilege, however, that the American government ostensibly intended to provide to all alien enemies who were arrested under suspicion of subversive activity by the FBI and Department of Justice. [FN220] The Department of Justice had held hearings for German, Italian, and Japanese American aliens.

The arbitrary and hurried detention of the Japanese Peruvians precluded the later possibility of their receiving the process that other alien enemies were granted. In the Japanese Peruvian cases, the government found that preliminary reviews and hearings could not be held because of the "complete lack of information on [the Japanese Peruvians]." [FN221] In contrast, U.S. officials performed a preliminary review of two-thirds of the German Latin American cases and began hearings for all of the German internees in February 1946. [FN222]

3. Internees as Illegal Immigrants

Beginning in 1946, internees of German descent brought habeas corpus cases to avoid deportation under the immigration laws. The courts agreed that because the German Latin Americans had been arrested and brought to the U.S. against their will, they had never truly "entered" the country as immigrants. Therefore, they could not be deported as illegal immigrants until they were given the opportunity to depart voluntarily. [FN223] Despite these victories, the government retained the prerogative to deport Latin American internees who chose not to leave. Some remained in the United States because their Latin American home countries refused to readmit them and return to their country of ethnic origin was unthinkable. [FN224] In the court’s eyes, internees who refused to voluntarily leave the U.S. were distinguishable from those who had not yet been given the opportunity. In U.S. ex rel. Paetau v. Watkins, the court ruled that an alien who entered the U.S. involuntarily would eventually become subject to deportation because his entry became "clearly voluntary by his continued unforced stay." [FN225] In U.S. ex rel. Schirrmeister v. Watkins, the court ordered a former internee to be deported: "[H]e is not entitled to depart when he pleases, or to remain here indefinitely, simply because he did not choose to come here in the first place." [FN226]

Ethnic Japanese internees faced an extra handicap. The government claimed further authority to deport them because those with Japanese citizenship were still ineligible to apply for U.S. citizenship. [FN227] This restriction prevented the Japanese Peruvians from appealing under a law that suspended the deportation of "Caucasians and such aliens ... [in like hardship cases who are] racially admissible or eligible to naturalization." [FN228] Thus, the Japanese Peruvians were to suffer doubly from the U.S.'s legacy of racism: under particularly harsh wartime policies as alien enemies, and under the institutionalized discrimination against the Japanese immigrants and residents in U.S. law.

CONCLUSION

Although the U.S. government clearly wronged the Japanese Peruvians, the Japanese Peruvians could not rely on U.S. constitutional and legal protections, even when on U.S. soil. Because of their status as aliens, their classification as enemy aliens, and the obscurity of U.S. law regarding their peculiar situation, the Japanese Peruvians had no certain claims to the civil rights guaranteed U.S. citizens and residents and no clear recourse under the law.

Even if the Japanese Peruvians had been protected by our Constitution and laws, those legal protections would most likely have fallen to claims of military necessity, as they did in the case of the Japanese Americans. The arguments that trump individual rights protections find justification in legitimate law and reasonable powers; the sovereign authority to make war is a power we would never want our government to forfeit completely. However, while the ideas of sovereignty and social contract are legitimate and important aspects of our political tradition, they must be put in their proper places within that tradition. The "more perfect union" that the U.S. strives to be is not one in which personal rights are swept aside when pressing national matters arise.

The U.S. government should grant the Japanese Latin Americans reparations equal to that awarded the Japanese Americans. Though classed as enemy aliens and illegal immigrants, the Japanese Peruvians were forced to reside indefinitely in the U.S. They became Japanese Americans, albeit against their will, and should be compensated...
as such. [FN229] In granting a *193 lesser reparations award to the Japanese Latin Americans than that given to Japanese Americans, the U.S. government makes an expressive statement about the value of the former internees as individuals. By refusing to so acknowledge Japanese Peruvian sufferings, the U.S. government worsens its misdeeds by trivializing the Japanese Peruvian experience.

More, the government cheapens its own wartime efforts. The Allied powers assailed the Axis governments for crimes committed in China and against the Jewish population in Europe. The U.S. purported to fight World War II to defend the freedoms enjoyed in the U.S. and help freedom-loving nations prevail over oppressive regimes. [FN230] By falsely detaining the Japanese Peruvians and then refusing to fully concede its responsibility for their mistreatment, the government exposes its hypocrisy. Its refusal to pay equal reparations to the surviving Japanese Peruvian internees suggests that the goals and values for which World War II was fought only applies selectively to U.S. action, and that the lessons the U.S. hoped to teach to the world fell on deaf ears at home.

The Japanese Peruvian experience was not simply part of a wartime program, unconnected to the rest of U.S. history. The Japanese Peruvians, like the Japanese Americans, were victims of long-standing racism and intolerance in the U.S. It is inadequate to condemn this inglorious incident as simply the actualization of military-driven wartime hysteria and move on, hiding it and other unjust government actions behind the veil of our prouder traditions. From falsely detaining the Japanese Peruvians and then refusing to fully concede its responsibility for their mistreatment, the government exposes its hypocrisy. Its refusal to pay equal compensation to the surviving Japanese Peruvian internees suggests that the goals and values for which World War II was fought only applies selectively to U.S. action, and that the lessons the U.S. hoped to teach to the world fell on deaf ears at home.

Today, U.S. leaders are struggling to deal with new kinds of global threats and are now, as in the past, characterizing this fight as a fight for freedom. [FN231] Redressing the World War II-era wrongs committed against Japanese Latin Americans would help to remind U.S. leaders to be heedful of the fundamental principles that America champions, and that give credence to America's leadership as a nation of liberty and justice for all.

[FN11]. J.D. expected 2003, Yale Law School; B.A. Yale University. I am indebted to Christiana Norgren, Grace Meng, and Sharon Lin for their careful reading and editorial suggestions. I also would like to thank Paul Claussen, Librarian at the Department of State, and the staff at the National Archives branch at College Park for their invaluable assistance. Special thanks go to Rogers Smith and Brian Hayashi for their insight and encouragement through many drafts, and to Robin Toma, plaintiffs' attorney in Mochizuki v. U.S., for his cooperation and helpful comments. Thanks and affection to Morris Cohen, Philippa Strum and especially Deborah Martinson for their mentorship and constant support.


[FN2]. The term "Japanese Americans" refers to people of Japanese ethnicity living
in the United States. The Issei, or first generation Japanese Americans, all retained their Japanese citizenship, as the U.S. government banned them from naturalization. The American-born Nisei, or second generation, held American citizenship and during the war were euphemistically called "non-aliens" in order to make the incarceration more palatable. See GLEN KITAYAMA, "non-alien," JAPANESE AMERICAN HISTORY: AN A-TO-Z REFERENCE FROM 1868 TO THE PRESENT 270 (Brian Niiya ed. 1993).

[FN3]. See infra notes 190-199 and accompanying text.

[FN4]. In all, about 3,000 Latin Americans, including people of German, Italian, and Japanese descent, were deported to the United States. This figure was approximated from the ship totals given in C. HARVEY GARDINER, PAWNS IN A TRIANGLE OF HATE: THE PERUVIAN JAPANESE AND THE UNITED STATES (1987) 25-111 [hereinafter GARDINER I].

[FN5]. The term "Japanese Peruvians" refers to people of Japanese ethnicity who lived in Peru at the beginning of World War II. Included in this group are the first-generation immigrants, who generally possessed Japanese citizenship, and second-generation Peruvian nationals. Later, Peruvian law stripped some of these Peruvian-born Japanese of their Peruvian citizenship. See infra note 26 and accompanying text.

[FN6]. The other Latin American countries involved in the U.S. internment program were Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, and Venezuela. Panama was the only country other than Peru to contribute a significant number of Japanese to the internment program. Other countries chose to intern or otherwise deal with their alien enemies without U.S. aid, including Brazil, which had Latin America's largest Japanese population. See C. HARVEY GARDINER, THE JAPANESE AND PERU: 1873-1973 87-88 (1975) [hereinafter GARDINER II]; MICHI WEGLYN, YEARS OF INFAMY 59 (1996); UNITED STATES COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 307 (1982) [hereinafter CWRIC].


[FN8]. See JOAO FREDERICO NORMANO & ANTONELLO GERBI, THE JAPANESE IN SOUTH AMERICA: AN INTRODUCTORY SURVEY WITH SPECIAL REFERENCE TO PERU 66 (1943).


[FN10]. At the end of 1909, 5,158 Japanese lived in Peru. The vast majority who emigrated (96 percent) were male and had been contracted to come by various emigration companies. GARDINER II, supra note 6, at 29-30. By 1927, the Japanese Peruvian population had jumped to 15,207, of whom 4,966 were female. Id. at 37. The 1940 Peruvian census counted 17,598 Japanese citizens in residence: 11,745 male and 5,853 female. Id. at 41. The same census reported that the Japanese community included 8,790 Peruvian-born Nisei. EMMERSON, supra note 7, at 131.
According to Normano and Gerbi, Peru had allowed almost 100,000 Chinese immigrants into the country between 1849 and 1874, flooding the country with cheap labor and sparking riots and massacres. Id.

Normano and Gerbi assert that this behavior contrasted with that of Chinese laborers, who tended to come without wives and thus intermarried more than the Japanese immigrants. Id.

Normano and Gerbi, supra note 8, at 76.

See NORMANO & GERBI, supra note 8, at 76.

According to Normano and Gerbi, Peru had allowed almost 100,000 Chinese immigrants into the country between 1849 and 1874, flooding the country with cheap labor and sparking riots and massacres. Id.

See NORMANO & GERBI, supra note 8, at 68.

See NORMANO & GERBI, supra note 8, at 68.

Normano and Gerbi assert that this behavior contrasted with that of Chinese laborers, who tended to come without wives and thus intermarried more than the Japanese immigrants. Id.

See NORMANO & GERBI, supra note 8, at 83-84.

See NORMANO & GERBI, supra note 8, at 83.

See NORMANO & GERBI, supra note 8, at 83.

See GARDINER I, supra note 4, at 6-7; NORMANO & GERBI, supra note 8, at 83.

See GARDINER I, supra note 4, at 6-7; NORMANO & GERBI, supra note 8, at 83.

See GARDINER I, supra note 4, at 6-7; NORMANO & GERBI, supra note 8, at 83.

The meeting in Panama was the first in a series of meetings of the Western Hemisphere's foreign ministers to discuss security and economic issues arising out of the European and then the Pacific War. U.S. DEPARTMENT OF STATE, 5 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 17 (1957).

The Japanese Brazilian population in the early 1940s was estimated at about 300,000. The 1940 Peruvian census indicated that there were a total of 25,888...

[FN30]. See EMMERSON, supra note 7, at 127; BARNHART, supra note 26, at 170; CWRIC, supra note 6, at 305.

[FN31]. P. SCOTT CORBETT, QUIET PASSAGES: THE EXCHANGE OF CIVILIANS BETWEEN THE UNITED STATES AND JAPAN DURING THE SECOND WORLD WAR 140 (1987). The major shipyards were all on the East Coast. Without access to the Panama Canal, the U.S. had no hope of winning the Pacific War. Interview with Brian Hayashi, Professor (Dec. 1, 1998) (on file with the author).

[FN32]. See Memorandum from Edwin C. Wilson, U.S. Ambassador to Panama, to Cordell Hull, Secretary of State (Oct. 20, 1941) (on file with the author).

[FN33]. Only male German and Italian Panamanians were rounded up in this sweep. See Letter from Edwin C. Wilson, U.S. Ambassador to Panama, to Sumner Welles, Undersecretary of State (Dec. 12, 1941) (on file with the author). Later, the Panamanian officials would abandon plans for internment on Panamanian soil, instead turning their internees over to the United States. See Letter from Edwin C. Wilson, U.S. Ambassador to Panama, to Cordell Hull, Secretary of State (Jan. 14, 1942) (on file with the author).

[FN34]. BARNHART, supra note 26, at 171.

[FN35]. CORBETT, supra note 31, at 142.

[FN36]. Corbett cites an August 27, 1942 letter from Hull to President Roosevelt, requesting that more ships be made available to handle Japanese Peruvian deportees. Id. at 146.

[FN37]. Memorandum from Lawrence M.C. Smith, Chief of Special Defense Unit, to Francis Biddle, U.S. Attorney General (Mar. 19, 1942) (on file with the author) [hereinafter Memorandum from Lawrence M.C. Smith, Mar. 19, 1942].

[FN38]. Memorandum from Edward J. Ennis, Chief of Alien Enemy Control Unit to Francis Biddle, U.S. Attorney General (Mar. 15, 1942) (on file with the author) [hereinafter Memorandum from Edward J. Ennis, Mar. 15, 1942].


[FN40]. See Memorandum from Lawrence M.C. Smith, Mar. 19, 1942, supra note 37.

[FN41]. The shock and surprise of the Pearl Harbor attack had U.S. government agencies frantically seeking ways to make up for the failure of U.S. intelligence

and diplomacy. John Emmerson recalled the frustration and panic in the State Department: "someone's eyes wandered down the map of the Pacific coast, fixing on the startling fact that thirty thousand Japanese were living quietly in the coastal regions of Peru, a vital, strategic area where enemy infiltration, clandestine communication, and all manner of spying could be perpetrated with impunity. Something had to be done about Peru!" EMMERSON, supra note 7, at 126.


[FN43]. CORBETT, supra note 31, at 143.

[FN44]. GARDINER I, supra note 4, at 54. A March 19, 1942 memorandum to the Attorney General stated, "Mr. Welles pointed out ... that if they were kept in the countries they would not be adequately guarded and would probably be released and continue to do damage in South America to our interests." Memorandum from Lawrence M.C. Smith, Mar. 19, 1942, supra note 37.

[FN45]. See CWRIC, supra note 6, at 307.

[FN46]. See EMMERSON, supra note 7, at 137.

[FN47]. See GARDINER II, supra note 6, at 89.


[FN50]. See GARDINER II, supra note 6, at 90.

[FN51]. The Peruvians had no real evidence against any of the Japanese Peruvians, but targeted teachers, clergymen, organization leaders, and other high-profile members of the community.

[FN52]. CORBETT, supra note 31, at 56.

[FN53]. In a December 11, 1942 letter, General George C. Marshall wrote, "These interned nationals are to be used in exchange for American civilian nationals now interned." BARNHART, supra note 26, at 171, quoting Letter from General George C. Marshall to CG Caribbean Defense Command (Dec. 11, 1942) (on file with the author). The government may have also interned the Japanese Latin Americans as hostages. Kidnapping these Japanese provided a guarantee against Japanese abuse of American civilian and soldier prisoners in Japanese camps. Interview with Brian Hayashi, Professor (August 4, 2000) (on file with author).

[FN54]. Japanese activities, supra note 39, at 6-7.


[FN56]. Id.
In Peru, as in other American republics (and the United States, for that matter), the German population was bigger and better established, with strong ties to the elites in business and government. In addition, there was a significant enough number of Peruvians, "among them prominent individuals," in Germany to make the Peruvians think twice before enthusiastically backing the deportation of masses of Germans. These tempering influences on wartime fear did not exist for the Japanese Peruvians, whose deportation the Peruvian government supported with "near abandon." See GARDINER I, supra note 4, at 20. Peru did send Germans and some Italians to the United States; the government sought to deport sailors who were in Peru basically by accident when their boats were sunk off the Peruvian coast. Id. at 25. According to Emmerson, there was no real investigation into the Italian community because "the Italians hardly counted." EMMERSON, supra note 7, at 127.

Japanese activities, supra note 39, at 7 (emphasis added).

See EMMERSON, supra note 7, at 127.

See id.

See id. at 142-43.

See id. at 139.


The Acadia eventually carried 654 internees: 491 Germans, 94 Japanese, and 69 Italians. GARDINER I, supra note 4, at 35.

See Letter from Victor K. Tateishi, detainee of alien detention center, to the Ambassador of Spain, (June 30, 1944) (on file with the author).

See HIGASHIDE, supra note 7, at 145.

CWRIC, supra note 6, at 308.

BARNHART, supra note 26, at 173.

CORBETT, supra note 31, at 147. "Alien enemies" consisted mostly of citizens of enemy countries who were on American soil at the time of Pearl Harbor. They were given hearings and held in Department of Justice internment camps. They were distinguished from the Japanese Americans, who were not "interned" but euphemistically "relocated" under the jurisdiction of the War Relocation Authority. See infra note 196 and accompanying text.

See CORBETT, supra note 31, at 147.

See CWRIC, supra note 6, at 308. There was also evidence that some Japanese Peruvians were able to bribe their way out of deportation. See Japanese activities, supra note 39, at 4; EMMERSON, supra note 7, at 143-44.

EMMERSON, supra note 7, at 143.

Id. at 139.

GARDINER II, supra note 6, at 85. American officials discovered the haphazard nature of Peru's deportation procedures through individual investigations and interviews conducted with internees in U.S. camps. See BARNHART, supra note 26, at 173.

GARDINER II, supra note 6, at 86.

Department of State Special Division, Meeting concerning disposition of dangerous Axis nationals in Peru (on file with the author). Though the U.S. government used the word "repatriation" in referring to sending the Japanese Peruvians to Japan, the term does not fit. Some of the Japanese Peruvians did not hold Japanese citizenship, and "repatriation" should have meant their return to Peru. Moreover, for many Japanese Peruvians and internee family members who had never been in Japan, the voyage was not a return at all but a frightening first-time visit. For the sake of consistency, I will use "repatriation" to mean travelling to the enemy nation of ethnic origin.

See Memorandum of Conversation, Edward J. Ennis, Chief of Alien Enemy Control Unit, and James Keeley, Special Division (January 7, 1943) (on file with the author). See also GARDINER I, supra note 4, at 41. "Fifth-column activities" refers to sabotage or spying by enemy agents on American soil.

Letter from Francis Biddle, U.S. Attorney General, to Cordell Hull, Secretary of State (January 11, 1943) (on file with the author).

Japanese activities, supra note 39, at 5 ("They sense a growing suspiciousness and hostility directed toward them; they are apprehensive of worsening future conditions.").

Letter from George H. Butler, First Secretary of the Lima Embassy, to Cordell Hull, Secretary of State (July 10, 1943) (on file with the author). Butler explained, "This is logical, considering the constantly increasing force of economic restrictions in Peru and the news of good treatment in American internment camps." EMMERSON, supra note 7, at 145. Those still in Peru heard good things about the camps from those already interned: "The letters said, in effect, 'Come on up and join us! It's not so bad here. We see movies twice a week and eat chicken on Sundays.'"

Memorandum of Conversation, Ennis and Keeley, January 7, 1943, supra note 78 ("The whole matter had taken on a different aspect.").
[FN84]. GARDINER I, supra note 4, at 70.

[FN85]. Id.

[FN86]. Id. at 71; EMMERSON, supra note 7, at 145.

[FN87]. WEGLYN, supra note 6, at 62.

[FN88]. See EMMERSON, supra note 7, at 147.

[FN89]. See generally HIGASHIDE, supra note 7. See Donna Kato, The Exiles, SAN JOSE MERCURY NEWS 1L (Mar. 21, 1993); EMMERSON, supra note 7, at 138.

[FN90]. The following ships carried mostly women and children: Aconcagua, June 29, 1943, carrying 86 Japanese; Imperial, July 1943; Madison, January 18, 1944; Cuba, March 1, 1944, carrying 339 Japanese, over half of whom were children; Cuba, June 17, 1944, with only 9 men of the 377 Japanese. See CORBETT, supra note 31, at 157, 162; GARDINER I, supra note 4, at 90.

[FN91]. See CORBETT, supra note 31, at 157.

[FN92]. "Repatriation" was the deportation of Japanese, German, and Italian Latin Americans to their nations of ethnic origin.

[FN93]. See GARDINER II, supra note 6, at 91.

[FN94]. "In any arrangement that might be made for the internment of Japanese in the States, Peru would like to be sure that these Japanese would not be returned to Peru later on." Letter from R. Henry Norweb, July 20, 1942, supra note 55.

[FN95]. BARNHART, supra note 26, at 173.

[FN96]. See 3 C.F.R. 1938-1943 Comp, 64-65; Removal of Alien Enemies, President's Proclamation No. 2662 of September 8, 1945 (10 F.R. 11635 -- Sept. 12, 1945) (on file with the author). This Proclamation was issued to deal specifically with the Latin American internees; Presidential Proclamation No. 2655 ordered the deportation of "dangerous" alien enemies apprehended in the U.S. 3 C.F.R. 1938-1943 Comp, 57-58 (Issued July 14, 1945).


[FN98]. Memorandum from Jonathan B. Bingham, Assistant to Assistant Secretary of State, to Spruille Braden, Assistant Secretary of State, and Dean Acheson, Undersecretary of State (Dec. 13, 1945) FRUS 1945, supra note 97, at 299.

[FN99]. See id.

[FN100]. See Memorandum from Wells, Assistant Chief of the Division of North and West Coast Affairs to White, Acting Chief of the Division of North and West Coast Affairs (Aug. 14, 1945), FRUS 1945, supra note 97, at 273.
[FN101]. See GARDINER II, supra note 6, at 92 (finding that Peru only admitted 79 internees in 1946). CORBETT, supra note 31, at 153 (approximately 26 internees were readmitted in 1945, 81 in 1946).

[FN102]. See CORBETT, supra note 31, at 165.

[FN103]. GARDINER I, supra note 4, at 135. Pawley wrote, "'[T]his alien population in Peru has reverted to its non-moral Asiatic cunning, unchecked by self-respect.'" Id.

[FN104]. See CWRIC, supra note 6, at 312.

[FN105]. See GARDINER I, supra note 4, at 133. For the text of the Alien Enemy Act, see text accompanying note 164, infra 174.


[FN107]. GARDINER I, supra note 4, at 119.

[FN108]. Id. at 120.

[FN109]. See WEGLYN, supra note 6, at 64.


[FN111]. See BARNHART, supra note 26, at 175. See also, GARDINER I, supra note 4, at 160, stating that 298 Japanese Peruvians were in the United States in early 1947: 178 at Seabrook Farms, in Connecticut; 91 at Crystal City Internment Camp; 26 paroled elsewhere; 3 in hospitalization.

[FN112]. Letter from Dean Acheson, Acting Secretary of State, to Tom C. Clark, Attorney General (July 8, 1946) (on file with the author).

[FN113]. See WEGLYN, supra note 6, at 64. German Latin Americans deported to the United States were also ordered to be deported under this Act and later filed petitions for writs of habeas corpus to escape deportation. See, e.g., U.S. ex rel. Schirrmieister v. Watkins, 171 F.2d 858 (2d Cir. 1949); U.S. ex rel. Sommerkamp v. Zimmerman, 178 F.2d 645 (3d Cir. 1949); U.S. ex rel Bradley v. Watkins, 163 F.2d 328 (2d Cir. 1947).
The internees turned illegal immigrants faced deportation under several immigration laws. See, e.g., Bradley, 163 F.2d at 329, citing the Immigration Act of 1924 §13(a)(1) (making illegal entry without an unexpired immigration visa); Act of May 22, 1918 (22 U.S.C.A. 223) (making illegal entry without an unexpired passport).

See generally In re Yamasaki, Docket No. (26139) (N.D.Ca. 1946); In re Sakasegawa, Docket No. (26140) (N.D.Ca. 1946) (Folders 26139-26140, Box 520, Series Civ. Cs. Fls., 1938-1953, Subgroup No. Dist. of Calif., RG21 NA, San Francisco, National Archives Pacific Sierra Region Branch, San Bruno, CA). While these cases, and the fate of the remaining 365 Japanese Peruvians, were pending, Collins arranged for the internees to be paroled and employed at Seabrook Farms, a New Jersey vegetable and fruit canning company. See Letter from Wayne M. Collins to Ugo Carusi, INS Commissioner (May 15, 1946) (on file with the author); Letter from James P. McGranery, Assistant to the Attorney General, to Ugo Carusi, INS Commissioner (October 4, 1946) (on file with the author).

A trickle of internees was allowed to return to Peru, including Iwamori (a.k.a. Francisco de) Sakasegawa, for whom Collins had filed a petition for a writ of habeas corpus. See, Sakasegawa, supra note 115.

This provision amended section 19 of the Immigration Act of Feb. 5, 1917, to read: "In the case of any alien ... who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may ... (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds ... (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act." See 8 U.S.C. §155(c); See also, 62 Stat. 1206 (emphasis added).

Japanese immigrants were banned from applying for naturalization by the 1924 Natural Origins Act. See infra notes 145-147 and accompanying text.

amending the Refugee Relief Act of 1953; 67 Stat. 403; GARDINER I, supra note 4, at 170-71.

Chika Yamasaki, one of the internees for whom Collins filed a test case, had his case dismissed in order to apply for suspension of deportation under this provision. See, In re Yamasaki.

Compared with the $20,000 received by Japanese American ex-internees, this was a paltry sum that led many to consider the Mochizuki settlement a bitter triumph. Worse yet, the Department of Justice fund which was to provide the reparations monies for all eligible ex-internees dried up after only 145 Japanese Latin
Americans were paid. It was not until the summer of 1999 that the 44 remaining eligible Japanese Latin American internees received compensation. "Campaign for Justice," at <http://rice-rockets.com/jaredress/campaignforjustice.html> (2000).


[FN124]. See SAITO, supra note 39, at 304-305.

[FN125]. World leaders, realizing that those principles had done nothing to prevent World War II's horrific crimes, passed the 1949 Geneva Convention to establish binding international protections for human rights, including the prohibition of the deportation of civilians. Id.


[FN127]. Id. at 237.


[FN130]. Corwin, supra note 128, at 1, 19.


[FN133]. Id. at 54.


[FN135]. Id. at 254.

[FN136]. Id. at 258. See also Yick Wo. v. Hopkins, 118 U.S. 356, 372 (1886). "No reason for [this discrimination] exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified. The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution."

[FN137]. NEUMAN, supra note 132, at 58.

[FN138]. Id. at 60.


[FN140]. See Curtiss-Wright, supra note 128.

[FN142]. Chae Chan Ping, 130 U.S. 581.

[FN143]. Id. at 602-603. "This court is not a censor of the morals of other departments of the government; it is not invested with any authority to pass judgment upon the motives of their conduct. When once it is established that Congress possesses the power to pass an act, our province ends with its construction, and its application to cases as they are presented for determination."

[FN144]. 142 U.S. 651 (1892).

[FN145]. Id. at 660-62. In this case, a Japanese woman was to be deported on grounds that she was a pauper and would be a burden to the state.


[FN147]. Kleindienst v. Mandel, 408 U.S. 753, 766 (1972) (involving a Belgian journalist denied a visa by the INS because he did not follow his speaking itinerary during a previous visit).

[FN148]. "'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens." Id., quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909) (regarding fines assessed to a navigation company for failing to perform the requisite medical examinations on alien passengers). See also Ekiu v. U.S., 142 U.S. 651, 659 (1892) (refusing to review the decision of an immigration inspector to deny a Japanese alien entrance into the U.S.); Galvan v. Press, 347 U.S. 522, 530-32 (1954) (refusing to overturn decision to deport member of Communist party). For other decisions dealing with the exclusion of aliens, see infra note 167.

[FN149]. In a separate category altogether, but worthy of note, was the restriction of movement and transportation of Africans in America from pre-Revolutionary times. See generally DAVID JACOBSON, RIGHTS ACROSS BORDERS: IMMIGRATION AND THE DECLINE OF CITIZENSHIP 47 (1996).


[FN151]. Ozawa v. U.S., 260 U.S. 178 (1922). The 1790 Act, which set up a uniform law of naturalization for all "free white aliens" was amended in 1870 to grant naturalization rights to African-Americans. 1 Stat. 103 (1790); 16 Stat. 256 (1870); KONVITZ, supra note 150, at 80.

[FN152]. Id. at 196. Justice Sutherland's opinion is careful to close with a paragraph assuring the Japanese that this case did not indicate any prejudice against them: "The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree ... Of course there is not implied--either in the legislation or in our interpretation of it--any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved." The brief filed for the appellant asserted, "The Japanese are 'free.' They, or at least the dominant strains, are 'white persons,' speaking an Aryan tongue and having
Caucasian root stocks; a superior class, fit for citizenship. The Japanese are assimilable."

[FN153]. LAFEBER, supra note 9, at 144-45.

[FN154]. See U.S. Const. art. I, § 8, cl. 3; KONVITZ, supra note 150, at 3; Edye v. Robertson, 112 U.S. 580 (1884).

[FN155]. Chae Chan Ping, 130 U.S. 581, 609 (1889).

[FN156]. Id. at 595.

[FN157]. Id. at 595-96.

[FN158]. Id. at 606.

[FN159]. 149 U.S. 698 (1893).

[FN160]. Id. at 711.


[FN162]. Fong Yue Ting, 149 U.S. at 708, quoting Ortolan, Diplomatie de la Mer, lib. 2, c. 14, 4th ed., 297. Gerald Neuman notes that Field's argument in the Chinese Exclusion Case was based on a more narrow version of this "guest theory," that "an admitted alien is a guest of the nation" and the admission is a "retractable privilege." See NEUMAN, supra note 132, at 121.


[FN164]. Yamataya v. Fisher, 189 U.S. 86, 100 (1903).

[FN165]. Id. at 101-02.

[FN166]. Id. 2


[FN170]. Act of July 6, 1798, ch. 66, §1, 1 Stat. 577.


[FN173]. U.S. Const. art. I, § 8, cl. 11.

[FN174]. "At common law 'alien enemies have no rights, no privileges, unless by the king's special favor, during the time of war.'" (Clark, 155 F.2d at 294, quoting 1 William Blackstone, Commentaries 372-3).

[FN175]. The Act originally only applied to men. It was amended by Congress on April 16, 1918, to include women. Presidential Proclamation of April 19, 1918, 40 Stat. 1772.

[FN176]. Byrnes, 64 F. Supp. at 234.

[FN177]. See Letter from Francis Biddle, U.S. Attorney General, to Cordell Hull, U.S. Secretary of State (Dec. 11, 1941) (on file with the author).


[FN181]. Ex parte Graber, 247 F. 882 (Ala. 1918).


[FN183]. Graber, 247 F. at 886.

[FN184]. 252 F. at 603.

[FN185]. Id. at 603.

[FN186]. Id. at 604.


[FN190]. 155 F.2d at 294.

[FN191]. Id.

[FN192]. Ludecke, 335 U.S. at 163-65. "[E]very judge before whom the question has since come has held that the statute barred judicial review."

[FN193]. KITAYAMA, supra note 2, "internment camps," at 175-76.

[FN194]. Id.

[FN195]. Von Heymann, 159 F.2d at 653.

[FN196]. As part of its campaign of euphemism surrounding the Japanese Americans internment, the government referred to the internment as an "evacuation" or "relocation" and the Japanese Americans as "evacuees." See KITAYAMA, supra note 2, "relocation centers," at 292. "War Relocation Authority," at 347-48.

[FN197]. Act of July 6, 1798, ch. 66, §1, 1 Stat. 577.

[FN198]. 159 F.2d 650 (2d Cir. 1947).

[FN199]. Id. at 652.

[FN200]. Byrnes, 64 F. Supp at 234.

[FN201]. See 159 F.2d at 652.


[FN203]. Id. at 464. Though the Court in Ross determined that the Bill of Rights protections need not be applied abroad, they strongly upheld the right of the U.S. government to try U.S. citizens abroad in U.S. consular tribunals. This is a clear example of the courts' racial bias against Japanese. The Justices' decision rested on the belief that Japan was uncivilized, and thus that their tribunals could not be trusted to give fair hearings and punishments. See also Reid v. Covert, 354 U.S. 1, 57-58 (1957). U.S. consular tribunals were needed as Japan "progresse[d] in civilization and in the assimilation of its system of judicial procedure to that of Christian countries ...."

[FN204]. The Insular Cases were a serious of decisions in which the Court discussed the application of Constitutional rights to non-state territories. These decisions included Balzac v. Porto Roco, 250 U.S. 298 (1922) (right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (grand jury provision in Fifth Amendment inapplicable in Philippines); Dorr v. United States, 195 U.S. 138 (1904) (right to jury trial inapplicable in Philippines); Hawaii v. Mankichi, 190 U.S. (1903) (right to indictment by grand jury and right to jury trial inapplicable in Hawaii).

[FN205]. See NEUMAN, supra note 132, at 5. In Balzac v. Porto Rico, the Court stated, "The citizen of the United States living in Porto Rico can not there enjoy a right of trial by jury under the Federal Constitution, any more than the Porto Rican. It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it." 258 U.S. 298, 309 (1922).

[FN207]. Id.


[FN209]. Id. at 440-41.


[FN211]. Mahon, 127 U.S. at 715.


[FN213]. Byrne, 64 F. Supp. at 234. The courts eventually acknowledged America's responsibility for the forced deportation of internees to the United States. However, this admission did not bar the government from deporting the internees through other means. See infra notes 104-09 and accompanying text.

[FN214]. See Clark, 155 F.2d at 294; Ludecke, 335 U.S. at 164-65.


[FN216]. See CWRIC, supra note 6, at 55.


[FN219]. In Ludecke, Justice Frankfurter, on behalf of the Court, wrote, "A war power of the President not subject to judicial review is not transmuted into a judicially reviewable action because the President chooses to have that power exercised within narrower limits than Congress authorized .... The fact that hearings are utilized by the Executive to secure an informed basis for the exercise of summary power does not argue the right of courts to retry such hearings, nor bespeak denial of due process to withhold such power from the courts." 335 U.S. at 166, 171-72.

[FN220]. GARDINER I, supra note 4, at 133.

[FN221]. Id.

[FN222]. See id.


[FN224]. In Paetau, the court submitted former internee's testimony at his original
hearing in New Orleans: "I very fervently apply to give me the chance [to stay in
the U.S.], as they don't accept me in Guatemala. Even if I should stay in a camp
here I could work to let me stay in the United States and not send me to Germany,
because it is a hell from which we have come." 164 F.2d at 460.

[FN225]. 164 F. 2d at 458.

[FN226]. Shirrmeister, 171 F. 2d at 860.

[FN227]. See In re Sakasegawa, Application and Petition for Writ of Habeas Corpus,
June 24, 1946, 7; In re Yamasaki, Application and Petition for Writ of Habeas
Corpus, June 24, 1946, 7.

Children born in the camps were considered American citizens.

[FN228]. Sakasegawa, Application and Petition for Writ of Habeas Corpus, June 24,
1946, 8-9.

[FN229]. This was a major argument in the Mochizuki case. See Saito, supra note 39,
at 277-78 (citing Plaintiffs' Memorandum in Opposition to Defendant's Motion to
Dismiss at 9-12, Mochizuki v. U.S., 41 Fed. Cl. 54 (1998) (No. 97-924C)).

[FN230]. Saito, supra note 126, at 221-23.

[FN231]. President George W. Bush, State of the Union Address (Jan. 29, 2002),

END OF DOCUMENT
Introduction: Mochizuki v. United States

The federal government will pay $5,000 settlements and issue an apology to Japanese who were taken from their homes in Latin America and held in U.S. internment camps during World War II, a Justice Department official said Thursday. More than 2,200 Latin Americans, most of them of Japanese ancestry and a majority from Peru, forcibly were brought to the United States during the war. After Pearl Harbor was bombed, the U.S. government, hoping to use Japanese Latin Americans as exchange prisoners for U.S. POWs, collaborated with the Peruvian government and other Central and South American countries to round them up and ship them to the United States .... During the war, an estimated 550 Latin American Japanese were sent to Japan in exchange for U.S. POWs. When the war was over, 900 more were deported to Japan, even though they didn't want to go.

Neither the administration of President Franklin D. Roosevelt nor later administrations gave an official explanation for the removals and internments. The suit, filed in a Los Angeles federal court in 1996, sought equal treatment with Japanese American internees. The 1988 *276 federal reparations law covered only Japanese who were either U.S. citizens or legal U.S. residents at the time of their detention.

--San Francisco Examiner, June 12, 1998 [FN1]

With a weakly worded statement of regret [FN2] and some redistribution of funds already allocated to interned Japanese Americans, [FN3] these egregious violations of human rights and international law committed by the United States during World War II may pass into history without redress of the injuries, recognition of the costs or acknowledgment of the illegality of kidnapping civilians from a nonbelligerent third country and holding them as hostages for exchange. The
settlement [FN4] in Mochizuki v. United States, [FN5], a class action brought on behalf of interned *277 Japanese Latin Americans, [FN6] is most notable for what it does not offer. The plaintiffs lost homes and possessions; some were forced to clear jungle in the Canal Zone; and men, women and children were transported under armed guard to prison camps in the Texas desert where they were incarcerated indefinitely without charge or hearing. Families were torn apart and scattered across the globe. [FN7] Held as hostages, some Japanese Latin Americans were exchanged for U.S. citizens, and others were imprisoned past the end of the war, when the U.S. Immigration and Naturalization Service ("INS") declared them to be "illegal aliens" and deported them, against their will, to Japan. [FN8] There has been no calculation of what would constitute actual redress for the damages incurred.

Whether the settlement provides even symbolic redress is questionable. The $20,000 offered to each Japanese American [FN9] internee under the Civil Liberties Act of 1988 ("CLA") [FN10] does not compensate for the property lost, rights denied or injuries suffered as a result of the internment. [FN11] The payment, instead, symbolizes this country's recognition of the injustices inflicted upon Japanese Americans during World War II. The CLA restricts compensation to those who were U.S. citizens or permanent residents at the time of the internment, thus excluding interned Japanese Latin Americans. The Mochizuki settlement neither expands the terms of the CLA to incorporate the Japanese *278 Latin Americans, [FN12] nor provides for compensation comparable to that received by Japanese Americans. Instead, under the settlement, payments of $5000 will be made from monies remaining after all of the claims of Japanese Americans have been paid. Thus, even this reduced amount is not guaranteed to every internee. [FN13] Under such terms, it is hard to say whether the settlement constitutes acknowledgment and apology or symbolizes disrespect for the harm suffered by the Japanese Latin American claimants.

Most importantly, the settlement does not acknowledge that the United States violated any domestic or international law by interning Japanese Latin Americans. [FN14] While the precedent set by Korematsu v. United States [FN15] has never been overturned, [FN16] it is widely accepted that the incarceration of Japanese Americans from the West Coast violated the constitutional rights of U.S. citizens and permanent residents. The terms of the Mochizuki settlement imply that the harm inflicted on Japanese Latin Americans, because they were nonresident aliens, was less significant than that inflicted upon Japanese Americans. Unacknowledged are the gross violations of international law committed in their kidnapping and deportation, imprisonment without hearing or charge, use as hostages for exchange and subsequent forced "repatriation." [FN17] If the Mochizuki settlement is the only U.S. acknowledgment of these actions, its central message may be that the U.S. government can disregard international law and violate human rights with impunity.

This Article examines the abduction and incarceration of the Japanese Peruvians by the U.S. government from the perspective of international law—the provisions of international law that were violated during the war, and those that apply to the government's continuing refusal to compensate the victims. This case illustrates the importance of insisting that our government's foreign policy and wartime conduct comply with international law and the costs of failing to incorporate international law into U.S. litigation strategies and legal structures. The story of the U.S. collaboration with the Peruvian government to kidnap and hold hostage their citizens and residents of Japanese descent comprises Part I. This story is presented in some
detail, and relies heavily on contemporaneous accounts from within the State Department, because it is important to understand how international law is, in fact, implemented-- or ignored-- in specific situations. Part II reviews the provisions of international law violated by these actions and concludes that they were, indeed, war crimes. Part III considers the redress currently available in U.S. courts for these violations of human rights. Given that neither Congress nor the Supreme Court has declared the Japanese American internment illegal or unconstitutional, the Japanese Latin Americans have few legal remedies available to them unless international law is applied. This is why the government could insist on such a meager settlement in the Mochizuki case. Part IV reviews the limited options available for bringing these international law claims in domestic and/or international tribunals. Part V considers the harm done by allowing the U.S. government to ignore international law in this situation, and suggests ways to better incorporate international law into our legal system and governmental institutions. The final part concludes that the internment of the Japanese Latin Americans and the inadequacies of the settlement in Mochizuki illustrate the importance of insisting that our government and our courts comply with international law.

*280 I. CIVILIANS HELD HOSTAGE: 1941-47

I cannot begin ... even to call the role of our maimed, mutilated, and missing civil liberties, but the United States, more than two years after the war, is holding in internment some 293 naturalized Peruvians of Japanese descent, who were taken by force by our State and Justice Departments from their homes in Peru.

--Secretary of the Interior Harold Ickes, December 1947 [FN18]

A. The Japanese in Peru

Shortly after the restoration of the Meiji emperor in 1868, Japan began a rapid industrialization. [FN19] One result was that the population "doubled to 60 million within a little over a half century ... and rural Japan, already saturated with people ..., became a seemingly inexhaustible reservoir for cheap urban labor." [FN20] With farms too small to divide among children, there was considerable pressure on second and third sons to migrate to the cities or overseas. [FN21] This, combined with "unsettling economic prospects in the wake of the Sino-Japanese War [and] the desire of certain shipping companies and emigration agents to make a profit," [FN22] resulted in significant Japanese emigration to the Americas.

In 1899 the Sakura Maru brought the first 790 Japanese immigrants to Peru, landing in the port of Callao, just outside Lima. [FN23] Peru welcomed Japanese labor, especially to its expanding cotton and sugar plantations. [FN24] Rural contract laborers eventually leased land for themselves *281 or moved to the cities, where they became household servants, accumulated some capital and eventually opened barber shops, grocery stores, restaurants and other commercial ventures. According to Harvey Gardiner, by 1938, "organizations of merchants, café owners, barbers, bazaar owners, charcoal dealers, chauffeurs, importers, jewelers, hotel owners, restaura[n]teurs, peddlers, bakery owners, and building contractors ... boasted 967 members." [FN25]

The success of the Japanese immigrants generated resentment that, intensified by the depression of the 1930s, led to an "official government program to 'Peruvianize' economic activity aimed principally at eliminating Japanese interests and
enterprises." [FN26] This was followed by the denunciation of Peru's treaty of friendship, commerce and navigation with Japan; the establishment of quotas requiring that eighty percent of any work force be native Peruvian; the suspension of naturalizations and the annulment of late birth registrations of Japanese Peruvians. [FN27] Fueled by these trends, in May 1940 about 600 Japanese homes and businesses in Lima and Callao were attacked and looted. [FN28] Despite such tensions most Japanese Peruvians were, by this time, deeply rooted in Peru, and the 1940 census reported 17,598 Japanese immigrants and 8790 Peruvians citizens of Japanese descent, [FN29] at least forty percent of whom were women and children. [FN30]

B. Abduction and Deportation

A Conference of Foreign Ministers of the American Republics convened in Rio de Janeiro in January 1942. At the urging of the United States, its Final Act included detailed recommendations concerning subversive activities and the "control of dangerous aliens." [FN31] *282 The Conference established an Emergency Committee for Political Defense to "coordinate hemispheric security." [FN32] One of the Committee's resolutions, entitled Detention and Expulsion of Dangerous Axis Nationals, advocated the "[i]nternment of dangerous Axis agents and nationals for the duration of the emergency." [FN33] While supporting repatriation of such persons, it advocated internment and suggested a program of local detention within each republic, supplemented by expulsion to other American republics for the duration of the war. [FN34] The United States agreed to pay for transportation and detention and promised to include nationals of the participating countries in any exchanges made with Axis governments. [FN35] Over a dozen Latin American countries sent internees to the United States and three countries set up their own detention programs. [FN36]

Meanwhile, the U.S. State Department had been pressuring the American republics to send "potentially dangerous" persons, especially Japanese, to the United States. An October 1941 memorandum from the U.S. Ambassador to Panama to the Secretary of State described Panama's willingness to cooperate with the following plan:

Immediately following action by the United States to intern Japanese in the United States, Panama would arrest Japanese on Panamanian territory and intern them on Taboga Island .... All expenses and costs of internment and guarding to be paid by the United States. The United States Government would agree to hold Panama harmless against any claims which might arise as a result of internment. [FN37]

Similar proposals were enthusiastically received by the Peruvian government which was, by then, eager to deport its residents and even citizens of Japanese ancestry. On December 8, 1941 Peru froze all *283 Japanese funds [FN38] and on December 9 the United States added Japanese to its Proclaimed List of Certain Blocked Nationals, [FN39] an economic blacklist which soon included 566 Japanese Peruvian businesses. [FN40] The Peruvian government severed diplomatic relations with Japan in January 1942, [FN41] but did not declare war until 1945 when Allied victory was imminent. [FN42] John Emmerson was assigned to the U.S. Embassy in Lima from April 1942 until July 1943, where, as the Embassy's only Japanese speaker, he studied the Japanese community and oversaw the detention and transport of Japanese Peruvians to the United States. [FN43] He summarized the situation:

To the Peruvians, the war was a faraway fire. Not directly involved, although pro-Allies in sentiment, they set about to enjoy the advantages, and these included war on the Axis economic stake. The measures taken against Axis nationals ... were welcomed for their destruction of unwanted competition ....
Pressured by American authorities, the Peruvians zealously imposed controls on the movements and activities of Germans and Japanese .... All Japanese schools, organizations, and newspapers were closed, and Japanese were frequently arrested for illegal assembly ... [and] were prohibited from traveling .... [FN44]

In early 1942, the United States proposed repatriating all Axis government officials from the Latin American republics through the United States, ignoring Peru's request to take in addition "Axis nonofficial women and children and men not of military age or known to have engaged in subversive activities." [FN45] When the Japanese government insisted that ten Japanese trading company representatives be repatriated as well, Peru began a list of nonofficial Axis nationals it wished to expel, a list that quickly grew to several hundred. [FN46]

Aware of Peruvian President Prado's desire to expel all the Japanese from Peru, the United States, in March 1942, agreed to take some "nonofficial Axis nationals." [FN47] In July of 1942, Ambassador Norweb wrote, "[i]n any arrangement that might be made for internment of Japanese in the States, Peru would like to be sure that these Japanese would not be returned to Peru later on. The President's goal apparently is the substantial elimination of the Japanese colony in Peru." [FN48] The State Department was willing to help: "The suggestion that Japanese be removed from strategic areas should be followed .... The suggestion that Japanese be expelled whether they are naturalized Peruvians or not might be met by a denaturalization law." [FN49]

The first ship of civilian deportees left Callao in April 1942, carrying Germans, Japanese and Italians. Most of the Japanese had "volunteered" by notifying the Spanish embassy in Lima that they were willing to repatriate to Japan. [FN50] Even so, the process was a haphazard one. Peruvian authorities gave the U.S. embassy a "final and definitive" list, yet thirty-two men failed to appear and twelve who were not listed showed up. [FN51] Almost none of these men had been blacklisted or identified as "dangerous." According to one commentator,

*285 In addition to the sloppy, incomplete lists, spur-of-the-moment additions and subtractions, quixotic and erratic inspections, and the lack of coordination between the Peruvian and American authorities, this first deportation operation exhibited no recognizable criteria for deportation. Almost all the men lacked social, economic, and community significance. [FN52]

U.S. embassy official Emmeron states that "[o]n subsequent sailings, no volunteers were accepted. The object of the program was to expel those enemy aliens whose continued presence in the country presented a danger to the hemisphere's security." [FN53] While that may have been the objective, that was not the criterion used. Emmeron admits:

In selecting the deportees, since no proof of guilt existed, it seemed logical to mark for detention those individuals who by their influence or position in the community, their known or suspected connections in Japan, or by their manifest loyalty to Japan could be considered potential subversives.... Since no one in the Peruvian government or in the embassy, except myself, spoke or read Japanese, [researching the activities of the Japanese Peruvians] fell largely to me. [FN54]

Emmeron, just transferred to Peru, thus became the only representative of the U.S. government with any specific information about the Japanese Peruvians who were to be interned. Struggling to read letters brought to him by the Peruvian police, he
"failed to find a single missive which divulged bomb plots, secret trysts, contemplated assassinations, codes, or even plans to signal a Japanese ship from a lonely beach. Nothing emerged to confirm the rumors constantly whispered to our legal, army, and naval attaches by their conscientious paid informants." [FN55] Traveling throughout the country and gathering information about the various Japanese communities likewise revealed "nothing reliable or convincing about subversion." [FN56] It is hard to escape Harvey Gardiner's conclusion: "The Americans, ignoring both law and legal formality, simply wanted to weaken the Japanese community by seizing and expelling its leaders." [FN57]

*286 The lack of evidence regarding subversive activity did not slow down the expulsion and internment of Japanese Peruvians. The State Department knew that those on U.S. lists had not been identified as dangerous and that most of the Japanese arrested by Peruvian authorities had no connection to either the war effort or the lists prepared by the United States. As Emmerson notes:

Lacking incriminating evidence, we established the criteria of leadership and influence in the community to determine those Japanese to be expelled. We prepared lists, which we presented to the Peruvian authorities. These authorities, committed at least personally if not officially, to the expulsion of all Japanese, treated our proposed lists rather lightly. As the second and third ships departed, it became clear that the passengers who actually embarked were not the ones so carefully identified by us. [FN58]

The Peruvian police arrested Japanese men without warning, often in pre-dawn raids on their homes. In many cases the men were given no time to gather personal items or notify their families. They were generally held in local jails, then turned over to U.S. authorities. No charges were filed; no hearings held. To avoid arrest, some men went into hiding; others found that well-placed bribes could buy them time. [FN59] Most of the men were Japanese nationals, but citizenship made little, if any, difference. Naturalized and native-born Peruvian citizens of Japanese descent were arrested and deported as well. Many who were Japanese citizens had lived in Peru for decades, some for over forty years, [FN60] and a number had wives and children who were Peruvian citizens. For "humanitarian reasons" and, one might note, to maximize the number of internees, U.S. officials included wives and children as "voluntary deportees." [FN61] For many women, joining their husbands in the United States was preferable to trying to raise children alone in a hostile environment, with the wage earners gone, businesses closed and assets frozen. Even in this sense, some departures could not be termed voluntary. A "strictly confidential" memorandum from the First Secretary of the Embassy in Lima to the Secretary of State notes that Chieko Nishino was deported upon the order of the Peruvian Minister of Government despite her insistence that she did not wish to join her estranged husband (indeed, despite her threats to commit suicide *287 should she be deported) because the embassy feared that refusal to take her "might jeopardize future deportations of Axis nationals." [FN62]

In February 1943 168 Japanese and 5 Germans were driven 600 miles north in army trucks without provisions for food to the port of Talara. [FN63] From Talara the men were sent to the Panama Canal Zone, where they lived under armed guard for several weeks, forced to clear jungle and construct living quarters. [FN64] They were then put on a U.S. army transport, where they were again required to work without pay. [FN65] When the ship docked at San Pedro, California, INS officials asked each man if he had a passport. None did, as all passports--Japanese and Peruvian--had been

taken by U.S. authorities as soon as the ship left Peruvian waters. [FN66] Ironically, the Japanese Peruvians who had just been abducted at the behest of the State Department were informed by INS officials that their entry into the United States was "illegal." [FN67] This Kafkaesque sleight of hand foreshadowed the problems that Japanese Latin American internees would face both at the end of the war and when applying for reparations under the Civil Liberties Act of 1988.

Meanwhile, Peruvian President Prado sought U.S. help in permanently removing all Peruvians of Japanese descent. [FN68] Countering legal *288 concerns about shipping the Japanese Peruvians from a nonbelligerent state to a belligerent one, Prado argued that such action was permissible for purposes of repatriation. [FN69] This, of course, would only have been true for those Japanese citizens who requested repatriation. [FN70] U.S. Ambassador Norweb initially recommended that only "dangerous" Japanese leaders be expelled, but he wanted to maintain good relations with the Peruvian government and eventually advocated the removal of all Japanese Peruvians to the United States, regardless of their citizenship. "While approving Norweb's ... proposals, the [State] department did view the deportation of Nisei [second generation] and naturalized Japanese as a knotty problem and suggested that the latter be 'denaturalized.'" [FN71]

In August 1942 Secretary of State Hull proposed to President Roosevelt that the State Department "[c]ontinue our efforts to remove all the Japanese from these American Republics for internment in the United States [[[[and continue our efforts to remove from South and Central America all the dangerous Germans and Italians still there ...." [FN72] In other words, the State Department intended to individually screen Germans and Italians to see if they were dangerous, while simply kidnapping the Japanese wholesale. This created tension between the Departments of State and Justice, as the Justice Department knew that the only plausible justification for deporting and interning Japanese Peruvians was their identification as enemy aliens who posed a significant danger to hemispheric security. In June 1942 Attorney General Francis Biddle took the position that:

[i]f [the Latin American internees] are not to be repatriated ..., the Department of State should arrange for them to be returned to Central or South America or the same procedure should be adopted with respect to them as now applies to other Axis aliens apprehended in this country on Presidential warrants, and [] each case should be decided on its merits to determine, after proper hearing, whether the individual alien should be released, paroled, or interned for the duration. [FN73]

*289 The State Department favored repatriation or deportation to Japan, [FN74] but the Attorney General hesitated, noting that "[a]ny involuntary repatriation appears to raise serious questions of law as well as of policy." [FN75]

By January 1943 the Justice Department could no longer ignore the fact that the United States was interning people who neither posed a security threat nor, as Peruvian citizens, were even enemy aliens. Although not insisting on individual hearings before alien enemy review boards, Biddle declared that "[s]ome of the cases seem to be mistakes," [FN76] and sent Raymond Ickes of the Justice Department's Alien Enemy Control Unit to Lima to review the information available on each detainee to determine if he was actually or potentially "dangerous." Ickes's review slowed the process, but failed to ensure that only "dangerous enemy aliens" were deported. [FN77] He, too, discovered that there was no evidence that anyone
was, in fact, "dangerous." Thus, "[i]n an effort to establish parameters warranting
internment, Ickes accepted the following: service as an officer of a Japanese
society, residence in Callao and other (unidentified) strategic areas, attendance at
Japanese meetings ..., visits at embassies and legations of other enemy countries."

[FN78] The "screening" done by Emmerson for the State Department and Ickes for the
Justice Department had little effect. Of the 119 men interned by the U.S. government
in February 1943, only 15 had been on the U.S. list. [FN79] The rest were selected
independently, and apparently quite randomly, by Peruvian authorities.

*290 The last ship transporting Japanese Peruvians landed in New Orleans on
October 21, 1944. By that time well over 2000 people [FN80] had been taken from
their homes and their homelands and interned in U.S. prison camps--many of them
snatched from their beds or arrested without warning at work or in meetings; others
"volunteering" to be repatriated to Japan because conditions had become so harsh in
Peru; some "volunteering" in order to reunite their families.

C. Internment in the United States

The Japanese Latin American internees were held by the INS, under Justice
Department jurisdiction, rather than by the War Relocation Authority ("WRA") that
had been established to oversee the incarceration of Japanese Americans. [FN81] The
first INS internment center--concentration camp, to be more accurate [FN82]--was in
an abandoned federal Civilian Conservation Corps camp in the southern Texas town of
Kenedy. [FN83] There was no doubt that this was a prison camp--the administrators
were instructed to comply with the Geneva Convention of 1929, which specifies
minimum requirements for the treatment of prisoners of war. [FN84] A censor division
scrutinized all mail and a surveillance department trained civilian guards to work
with INS agents. [FN85] There were two daily line-ups and up to four checks each
night. The entire camp was surrounded by a barbed-wire fence which, if touched,
activated an electric alarm. [FN86] Some Japanese Latin American men were sent to an
abandoned army post at Fort Missoula, Montana, where "hundreds of Italian seamen, a
few Germans, and an unknown number of Japanese Americans" were already being held.

[FN87] From these camps, *291 some "volunteers" went to Kooskia, Idaho to work on
road projects while those men who remained at Kenedy were transferred to a barbed
wire stockade, formerly a prison, in Santa Fe, New Mexico. [FN88]

As more internees, particularly women and children, were brought in, the INS
created two additional camps in Texas. One was at Seagoville, a former federal
women's prison, where internees were initially housed with prison inmates under the
immediate supervision of a Bureau of Prisons warden. [FN89] The Seagoville prison
was soon filled, and the INS expanded a migrant labor facility in Crystal City,
Texas to become the third prison camp. [FN90] Some Japanese Latin Americans were
also held by the military at Camp Livingston, Louisiana and Fort Sill, Oklahoma.

[FN91]

Living conditions in these camps were abhorrent. In July 1943 Albert Clattenberg
of the State Department, after visiting the camps at Kenedy, Crystal City and
Seagoville, noted that the physical facilities, except the permanent buildings at
Seagoville, were significantly worse than those at a U.S. prisoner of war camp he
had visited in Europe:

The climate of Texas ... cannot be considered mild in summer and the shadeless
detention areas in which there are primarily temporary structures do not measure up
against the Texas heat in the same way that the permanent structures in the
detention camps in Europe, even with the scarcity of fuel, measure up against the European winter. [FN92]

Clattenberg worried that the poor conditions in the camps endangered the well-being of Americans that were being held by Axis governments and warned that "our Americans in Europe stand in momentary danger of ruthless retaliation." [FN93]

In addition to the physical difficulties discussed above, the Japanese Peruvians were subject to social, economic, cultural and psychological hardships as well. Families were literally scattered around the world, and those who managed to reunite in camp faced years in cramped quarters with little privacy. Property, personal belongings and *292 cash were lost. Parents worried about their children being accepted in Japan and tried to retain some semblance of Japanese culture and language in their lives, while the children who had grown up speaking Spanish were now constantly exposed to English. Children born in the camps added to already confused questions of identity. "The Hikozo Izumi family," Gardiner states, "represented graphically the kinds of tangled citizenship to which internment was contributing. Hikozo held Japanese citizenship, his wife Masako was a Peruvian Nisei, one child was Peruvian-born, and now their second child was American." [FN94]

D. Hostages for Exchange

Why did the United States go to so much trouble and expense to detain, transport and incarcerate nearly 2000 Japanese Peruvians who were known to be of no danger to hemispheric security?

U.S. officials may have thought that catering to anti-Japanese sentiment was an easy way to obtain Peru's cooperation in the war effort. Although the U.S. government placed a military force near the northern oilfields of Talara, signed a lend-lease agreement promising Peru approximately $29 million of arms and munitions and negotiated for Peruvian rubber, cinchona bark and other perceived strategic materials, [FN95] such factors do not adequately explain the U.S. motivation in this massive effort to intern civilians. The U.S. authorities wanted to have Japanese Latin American civilians in their possession and control not because these civilians posed any threat but because the United States wanted hostages to barter for American citizens held in Japanese-occupied territories.

The idea of taking hostages was not a new one. As early as 1936, George S. Patton, then Chief of Military Intelligence in Hawaii, drafted a plan "[t]o arrest and intern certain persons of the Orange race [i.e., Japanese] who [were] considered most inimical to American interests, or those whom, due to their position and influence in the Orange community, it was desirable to retain as hostages." [FN96] In August 1941, months before the U.S. Navy was attacked at Pearl Harbor, Congressman John Dingell of Michigan wrote President Roosevelt:

I want to suggest ... that we remind Nippon that unless assurances are received that Japan will facilitate and permit the voluntary departure of [a group of one hundred American citizens] within forty-eight hours, the Government of the United States will cause the forceful detention or imprisonment in a concentration camp of ten thousand alien Japanese in Hawaii; the ratio of Japanese hostages held by America being one hundred for every American detained by the Mikado's Government.

It would be well to further remind Japan that there are perhaps one hundred fifty thousand additional alien Japanese in the United States who will be held in a reprisal reserve .... [FN97]
In January 1942 Major Karl Bendetson, architect of the Japanese American internment, said that "the 'hostage idea' has not been sufficiently explored .... The question should be ... whether the individual has any close relatives in the armed forces ... in [a] hostile [nation]." [FN98] Weglyn says 

[i]f a reprisal reserve urgency had indeed precipitated the sudden decision for internment, the emphasis, as the tide of the war reversed itself, switched to the buildup of a "barter reserve": one sizable enough to allow for the earliest possible repatriation of American detainees, even at the price of a disproportionate number of Japanese nationals in exchange. [FN99]

All of this could have been avoided had the United States accepted a Japanese proposal in the early days of the war to exchange nonofficials "without limit as to their number and without question of their usefulness for the prosecution of the war." [FN100] Instead, the United States pursued a policy of creating reserves of hostages for exchange. As a result, according to Gardiner, by mid-1942 the United States, aware of the entrapment of additional thousands of Americans by Japanese military successes, could only hope to regain those nonofficial Americans by giving up an equal number of nonofficial Japanese. Battlefield casualties did not then constitute the sole body count. *294 Very carefully one counted and matched the number of persons promised in any exchange with the enemy. [FN101]

Two such exchanges of civilians took place. [FN102] In an Outline of Negotiations for Exchange of American Civilians in Japanese Hands, Clattenberg states that from December 7, 1941 to April 15, 1942 the United States "assembled from various points on this continent Japanese nationals who were to be repatriated" and from April 15 to July 25, 1942 "carried on the activities necessary to accumulate a ship-load of Japanese nationals from this hemisphere." [FN103] In June 1942 the Gripsholm left New York carrying 1065 Japanese nationals, including 35 Japanese Peruvians. [FN104] The second exchange was delayed until September 1943 by communication problems, the difficulties of working through both Spanish and Swiss intermediaries, discrepancies between the individuals requested by the Japanese government and those produced by the United States and the refusal of many Japanese Latin Americans to repatriate. This time the Gripsholm carried 1340 Japanese, of whom 484 were from Peru. [FN105]

The United States was anxious to arrange a third exchange of 1500 prisoners, but the Japanese government's interest seems to have waned as it learned of the U.S. treatment of both Japanese Americans and Latin Americans. In October 1942 the Spanish embassy transmitted a protest from the Japanese government denouncing the "inhuman treatment given the Japanese in Panama." [FN106] A Memorandum of May 29, 1944 protested the transfer of both Bolivian and Peruvian Japanese:

*295 The fact of the American Government having whimsically transferred the custody of Japanese residents of a third country, namely Bolivia, to the United States, is as unjust a measure as the one taken by the American Government with the Japanese residents of Peru, a measure that the Japanese Government is still at a loss to understand. [FN107]

In addition to protesting the abduction of Japanese from Central and South America, the Japanese government paid close attention to the U.S. treatment of Japanese Americans. In late 1942 Dillon Myer, National Director of the War Relocation Authority, notified the directors of the ten U.S. "relocation centers" that the Spanish Consul, on behalf of the Japanese government, was conducting
inspection tours of all civilian detention camps. He warned: "Please bear in mind that the Japanese Government has recently evidenced a substantial amount of interest in the West Coast evacuation through diplomatic channels and has lodged some rather vigorous protests concerning various phases of the treatment of Japanese generally in the United States." [FN108]

In December 1942 dissent and turmoil at the camp holding Japanese Americans in Manzanar, California culminated in troops throwing tear gas grenades and firing into a crowd, killing two internees and injuring dozens. [FN109] The WRA reported, "The incident, which might well have been represented to Japanese governmental authorities as an attempt at mass murder, could easily have touched off a wave of unrestrained brutality at prisoner of war camps and detention stations throughout the Far East." [FN110] There was no immediate response, but "[a]fter the docking of the first detainee exchange ship, the Japanese Government sharply protested 'these outrages on the part of the United States Authorities' in which 'unarmed civilian internees who offered no resistance were mercilessly killed and wounded.'" [FN111]

Shortly after the second Gripsholm exchange, the U.S. government sent all the Japanese Americans deemed "disloyal" to the Tule Lake camp. There, 18,000 Japanese Americans were crowded into a camp complete with barbed wire, tanks patrolling its perimeter and a full battalion of guard troops. [FN112] Outrage over their treatment escalated into a demonstration of over 5000 men, women and children when WRA Director Myer visited in November 1943. Three days later, the Army invaded and martial law was declared within the camp, triggering new rounds of arrests, protests and hunger strikes. [FN113] The Japanese government protested and Secretary of State Hull immediately warned Secretary of War Stimson of the "vital nature of this problem arising from the desire of this government to keep open negotiations with the Japanese Government, looking toward future exchange operations through which Americans in Japanese hands may be repatriated ...." [FN114] Nonetheless, the U.S. government persisted in its hard line response. Weglyn concludes:

The Tule Lake "riot" had exploded into headlines at the very moment when the lives and safety of over 6,000 American detainees in Japanese prison camps hung precariously in the balance as they awaited exchange ships. In two years of war, fewer than 3,000 persons had been exchanged ....

With the follow-up report from the Spanish Embassy concerning the stockade, the 200 men being held therein, and the extraordinary Army seizure of a camp full of civilian detainees, Tokyo called an abrupt halt to prisoner-exchange negotiations. The cutoff proved permanent. [FN115]

Thus, it seems that the U.S. kidnapping of civilians from third-party countries and the mistreatment in the camps of both Latin American and U.S. citizens or residents of Japanese descent made the Japanese government unwilling to participate in further exchanges. Although ships continued to bring deportees from Peru through the middle of 1944, only about 500 Japanese Peruvians, in total, were exchanged for Japanese-held American citizens. As of July 1945, over 1300 Japanese Latin Americans, mostly Peruvians, remained interned in the United States, along with 815 Germans and 53 Italians who had been brought to the United States from Latin America. [FN116]

E. Forced Deportations

The internment of Japanese Latin Americans, much like the internment of Japanese Americans, has been portrayed as an aberration based on wartime hysteria, confusion
or haste. [FN117] The implication is that the actions taken, while regrettable, were justifiable because they occurred under extraordinary circumstances. It is, however, precisely during times of war or other perceived crisis--times that our civil liberties are most easily lost--that we must most diligently guard our rights and insist on lawful conduct by the government. [FN118] That these violations of human rights were not just a product of wartime hysteria, but were deeply rooted in our political and legal structures is illustrated by the treatment of the Japanese Latin Americans after the war ended.

In December 1945 Jonathan Bingham, Chief of the State Department's Alien Enemy Control Section, stated, "[t]here was never any clear understanding as to the eventual disposition of the aliens after the war, primarily because at the time they were deported from Peru no one was thinking about the postwar period." [FN119] A full year before Japan's surrender, realizing that further civilian exchanges were unlikely, the State Department anticipated "difficulties in disposing of the *298 enemy nationals brought here from the other American republics for internment." [FN120] The repatriation of those who wanted to return to Germany or Japan was not an issue, but the internees who wanted to return to Latin America or remain in the United States posed a problem for the government.

U.S. officials faced a dilemma. On the one hand, they wanted the other American republics to agree to "the return of all internees to the enemy state of which they were nationals," [FN121] in part because the State Department had a grand vision of banishing all "subversive" elements from the hemisphere, and perhaps also because the "more complete the harassment and removal of late enemy nationals and their operations, the more complete the economic void to be filled by Americans, their products and capital." [FN122] On the other hand, the Justice Department was clear that U.S. law and policy prohibited forced repatriations.

At a meeting held on August 31, 1944, State Department officials recognized that "some individuals sent here for internment were undoubtedly relatively harmless and probably were selected for expulsion through error." [FN123] Thus, they agreed to divide the internees into three classifications: (A) dangerous, (B) probably dangerous and (C) probably harmless. Persons in categories B and C might be allowed to return to the Latin American countries from which they came, but "[a]ll persons in category A would be sent to their homeland and efforts would be made ... to prevent them from returning to the Western Hemisphere." [FN124] The new classification system afforded no relief to Japanese Latin Americans because it was further agreed that "category [A] would include all Japanese received from the other American republics" whether considered dangerous or not. [FN125]

In March 1945 the Inter-American Conference on Problems of War and Peace at Mexico City passed Resolution VII of its Final Act, recommending that all American republics adopt measures to prevent any person whose deportation was deemed necessary for reasons of security from further residing in the Western Hemisphere. [FN126] The United *299 States invoked Resolution VII to pressure Latin American governments into repatriating all interned Axis nationals. Nonetheless, Peru insisted that the U.S. return certain German internees to Peru, regardless of their security classification, and refused to take back any of the Japanese, even those who were Peruvian citizens. After initial resistance, U.S. authorities agreed that Peru would have the final word on German deportations, despite the fact that this "would result in the return to Peru of some of the worst offenders ...." [FN127]
Regarding the Japanese, Gardiner explains,

Peru, regretting that it had not rid itself of all its Japanese, insistently refused to readmit most of those who had been shipped to the United States. Secure in the knowledge that the interned Peruvian Japanese had constituted no security risk to either country at any time, the United States had hoped that Peru would relent and readmit the several hundred who desired to return there. \[FN128\]

Ultimately, Peru agreed only to the return of those who were born in Peru (the Nisei), naturalized citizens and those who were married to Peruvians. \[FN129\]

U.S. authorities insisted that all remaining Japanese Peruvians would be deported to Japan, even though it was unclear that the government had the power to send them involuntarily. The Alien Enemy Act of 1798 \[FN130\] provided that in the event of war all enemy aliens over fourteen years of age within the United States could be "apprehended, restrained, secured, and removed" according to presidential proclamation. The government had relied on this authority in holding Japanese Latin Americans, although its application to those brought here by the government is questionable.

On July 14, 1945 President Truman issued a proclamation authorizing the Attorney General to order the removal of alien enemies interned within the United States who were deemed "dangerous to the public peace and safety of the United States because they have adhered to ... enemy governments or to the principles of government thereof *300 ...." \[FN131\] Because the Justice Department interpreted this to extend only to the removal of aliens who were U.S. residents, the State Department requested and obtained the Presidential Proclamation of September 8, 1945, which specifically authorized the Secretary of State to remove to destinations outside the Western Hemisphere:

All alien enemies now within the continental limits of the United States (1) who were sent here from other American republics for restraint and repatriation pursuant to international commitments of the United States Government and for the security of the United States and its associated powers and (2) who are within the territory of the United States without admission under the immigration laws ... if their continued residence in the Western Hemisphere is deemed by the Secretary of State prejudicial to the future security or welfare of the Americas as prescribed in Resolution VII of the Inter-American Conference on Problems of War and Peace .... \[FN132\]

Implementing this proclamation created problems, as noted by J.E. Doyle in a State Department memorandum of September 29, 1945. First, he said, the powers granted under the Alien Enemy Act were so sweeping that the Supreme Court might suspend its application upon the unconditional surrender of the enemy. \[FN133\] In other words, because Japan had surrendered, the war was over and such measures were no longer needed. Second, some of the internees were not "alien enemies," but were Peruvian citizens or U.S. citizens by virtue of their birth in the camps. Third, the continued residence of Japanese Peruvians in the Western Hemisphere could hardly be considered a threat to the security or welfare of the Americas. \[FN134\] Doyle concluded:

[I]t remains far too clear that the initial apprehension of these persons, their removal to the United States, and their internment here has been accomplished in disregard of the very fundamentals of just and orderly procedure. From first to last ... these aliens have been denied a clear statement of *301 the charges against them

or an opportunity to deny or to disprove the charges ....

It is now suggested that ... all but about 50 will be deported to Germany, Italy or Japan. It is not too much to say that this crowning disregard of basic notions of fairness and decency would earn for this program an equal place with the Mitchell Palmer raids and the anti-alien crusade that followed the first World War. [FN135]

Nonetheless, the deportations proceeded. Between November 1945 and February 1946, the United States sent between 1400 and 1700 Japanese Peruvians to a war-devastated, U.S.-occupied Japan. [FN136] Many of the deportees had no ties to Japan, some had never even been there and a number of the men had wives and children still living in Peru. [FN137] Deemed "voluntary" by the State Department, many internees only acquiesced when Peru prohibited their return and the U.S. government insisted that they would not be allowed to stay in the country. [FN138] In March 1946 Acting Secretary of State Dean Acheson informed Attorney General Tom Clark, formerly the Coordinator of Alien Enemy Control and later a Supreme Court Justice:

[i]n no case is there clear evidence that the individual's continued residence in this hemisphere would be prejudicial to the security and welfare of the Americas. I am therefore requesting you to inform [the approximately 425 remaining Japanese Peruvians] that they are no longer subject to restraint as dangerous alien enemies. [FN139]

*Acheson added, "[Y]ou will presumably wish to take steps looking toward their departure from the United States within a reasonable time." [FN140] In other words, rather than deport them as "enemy aliens," the State Department turned responsibility for the expulsions over to the Justice Department who, through the INS, would deport the Japanese Peruvians as "illegal aliens." [FN141]

In the spring of 1946, the 365 Japanese Peruvians still fighting deportation came to the attention of Wayne Collins, a remarkable attorney who represented Fred Korematsu in his challenge to the Japanese American internment as well as hundreds of Japanese Americans in deportation proceedings where the government claimed they had "renounced" their U.S. citizenship. [FN142] Collins, with the support of the ACLU of Northern California, filed two test cases challenging the Japanese Peruvian deportations, thereby delaying the process. He also arranged for about 200 Japanese Peruvians to be "paroled" (i.e., released from detention) for the purpose of working at Seabrook Farms, a frozen food processing plant in New Jersey which had been using civilian internee as well as German prisoner of war labor. [FN143]

The plight of the Japanese Peruvians dragged on; their lives put on hold while Wayne Collins furiously pursued legal, political and diplomatic solutions. In the spring of 1949, seven years after the first Japanese Peruvians were seized, the State Department finally decided that "the obvious solution [was] to regularize their status in the United States as permanent immigrants legally admitted." [FN144] Over the next few years, individual families managed to have their orders of deportation suspended, a process that required petitioning the Board of Immigration Appeals and getting a resolution passed by Congress. In 1954 the *303 Refugee Relief Act of 1953 was amended to provide that "[a]ny alien who establishes that prior to July 1, 1953, he ... was brought to the United States from other American republics for internment, may, not later than June 30, 1955, apply to the Attorney General of the United States for an adjustment of his immigration status." [FN145] Thus, some of the interned Japanese Latin Americans were able to remain in the United States after years of uncertainty, during which time they had effectively been rendered
II. VIOLATIONS OF INTERNATIONAL LAW

The forcible detention of Japanese from Peru, arising out of a wartime collaboration among the governments of Peru, the United States, and the American republics, was clearly a violation of human rights and was not justified by any plausible threat to the security of the Western Hemisphere.

--John Emmerson, Second Secretary of the U.S. Embassy in Lima, Peru, 1942-43

The U.S. kidnapping, deportation, internment, holding hostage and forced repatriation of Japanese Peruvians constituted a series of war crimes. These crimes did not result from the actions of a few individuals, but from a callous and widespread disregard for the rights of the people involved and the applicable international law. Those responsible for making and carrying out U.S. policy willingly violated the law for perceived strategic and/or political advantage. Much of what we now call human rights law, particularly that which protects individuals against the actions of their own governments, emerged out of World War II, but during the war there was already in place a large body of well-established international humanitarian law that covered the treatment of civilians during war.

To establish the principles of international law that were in effect at the time of the Japanese Peruvian internment, we look to both conventions and customary international law. By World War II, there was generally recognized international law applicable to many areas implicated by the U.S. internment of Japanese Latin Americans: mutual self-defense treaties and the extent of permissible involvement of nonbelligerents in hostilities; the treatment of "enemy aliens" and prisoners of war; the treatment of civilians in occupied territories and in nonbelligerent countries; the transfer and deportation of civilian populations; the granting, withholding and revoking of citizenship; governmental responsibility for citizens, including a prohibition on rendering people stateless; and forced repatriation. This Section examines the specific provisions of international law that were violated by the U.S. government's actions and its ongoing refusal to compensate the victims.

A. Kidnapping and Deportation

The United States violated well-established principles of international law by collaborating with the Peruvian government --and other Latin American governments--to kidnap and deport civilian noncombatants from a nonbelligerent to a belligerent country on the basis of their racial or ethnic identification, without charge, hearing or determination that they posed a serious threat to U.S., Peruvian or "hemispheric" security. Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 states: "Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying power or to that of any other country, occupied or not, are prohibited, regardless of their motive." Article 146 provides that the parties will "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches ... defined in the following Article." That Article defines grave breaches to include "unlawful deportation or transfer or unlawful confinement of a protected person ...." While the drafting of this treaty was not completed until a few years after World War II,
"[t]hese articles of the Geneva Convention of 1949 merely codify the prohibition of deportations of civilians from occupied territories which in fact already existed in the laws and customs of war." [FN155] A proposal to prohibit deportations had been included in the Tokyo Draft of Geneva IV adopted at the International Red Cross Conference of 1934, [FN156] and some of this customary law had been codified in the 1907 Hague Regulations. [FN157] According to the Commentary to the 1949 Geneva Convention, the 1907 Hague Regulations probably did not explicitly prohibit deportations "because the *306 practice of deporting persons was regarded ... as having fallen into abeyance." [FN158]

In 1863, well before the Hague Conventions, the United States had condemned the deportation of civilians in Lieber's Code, "the first instance in western history in which the government of a sovereign nation established formal guidelines for its army's conduct toward its enemies." [FN159] Also known as U.S. Army General Order 100, the Code stated, "[p]rivate citizens are no longer murdered, enslaved, or carried off to distant parts, and the inoffensive individual is as little disturbed in his private relations as the commander of the hostile troops can afford ...." [FN160]

Deportations had also been condemned by international judicial practice. In 1924, in Moriaux v. Germany, the Belgo-German Mixed Arbitral Tribunal considered the legality of the deportation of Belgian civilians to Germany during World War I and concluded that deportations were a "most flagrant and atrocious breach of international law." [FN161] In the Chevreau case, discussed below in the context of internment, [FN162] the arbitrator took into consideration the claimant's deportation from Persia to Mesopotamia, India and Egypt in awarding him damages against the British government. [FN163]

Throughout the Second World War, the Allies made it clear that they considered the mass expulsion of civilians to be criminal. [FN164] The war crimes for which German and Japanese defendants were convicted by the Nuremberg and Tokyo Tribunals included the deportation of *307 civilians. [FN165] Schwarzenberger states, "In the Charter of Nuremberg Tribunal, deportation of civilians from occupied territories to slave labour or for any other purpose is enumerated, under the heading of war crimes in the strict sense, that is, breaches of the laws or customs of war, and that of crimes against humanity." [FN166]

The Nuremberg and Tokyo Tribunals focused especially on the use of deported civilians as slave labor. [FN167] "Forced labour in tropical heat without protection from the sun, complete lack of housing and medical supplies and insistence on work directly related to military operations were some of the features of forced labour castigated in the Tokyo Judgment (1948)." [FN168] This description fits quite closely the actions of the United States in forcing the two shiploads of Japanese Latin Americans to clear jungles and build barracks in the Canal Zone without remuneration. [FN169]

If the Germans and Japanese were responsible for knowing that the deportation of civilians was a war crime, surely the United States, which prosecuted them for these acts, was similarly charged with the *308 knowledge that taking civilians from their homes in a nonbelligerent third country to concentration camps in a belligerent country, and forcibly deporting them to the occupied territory of another belligerent country after the war, likewise violated the same well-established
principles of international law. [FN170]

B. Indefinite Internment of Civilians

The Hague Peace Conferences of 1899 and 1907 considered the internment of civilians by belligerents and decided that an express prohibition was not required as the practice fell below the minimum standard of civilization. [FN171]

In 1930 the Greco-German Mixed Arbitral Tribunal held in Nacio v. Germany that a neutral national unjustifiably detained by an occupying power is entitled to compensation. [FN172] The same Tribunal held in Palios v. Germany that any arrest or internment of a neutral national, not followed by criminal proceedings and condemnation, was contrary to international law. As neutral nationals are not entitled to any privileged treatment, in comparison with the rest of the population of the occupied country, this finding applies also to the population at large of the occupied territory. [FN173]

*309 In the Chevreau case the Sole Arbitrator, considering the legality of Chevreau’s arrest and prolonged detention in a camp for Turkish prisoners of war, articulated three rules:

1. The arbitrary arrest, detention or deportation of a foreign national may give rise to an international claim. If, however, the measures are taken in good faith and upon reasonable suspicion, in particular in a zone of military operations, they do not involve any international liability.

2. In the case of an arrest, suspicions have to be verified by a serious inquiry, offering the legal safeguards customary among civilized nations. Moreover, the arrested person must be given an opportunity to defend himself .... If there is no inquiry, this is unduly delayed or the detention unnecessarily prolonged, an international claim is justified.

3. A detainee is to be treated in a manner befitting his station, and according to the standards habitually practiced by civilized nations. [FN174]

According to Schwarzenberger, it was "the German and Japanese practices ... of wholesale internment of civilians in concentration camps, irrespective of security requirements in individual cases or for entirely different purposes" [FN175] that led to the much more precise codification of minimum standards concerning internment found in the 1949 Geneva Convention. [FN176] Article 42 of the Convention states that the “internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary,” [FN177] and Article 43 provides that any person so interned “shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board ... [which, if the internment is maintained] shall periodically, and at least twice yearly, give consideration to his or her case, with a view to the favorable amendment of the initial decision ...." [FN178]

U.S. legal scholars and courts also recognize that arbitrary or prolonged detention is a violation of international law. According to the notes to Section 702 of the Restatement of the Foreign Relations *310 Law of the United States, "[a]rbitrary detention is cited as a violation of international law in all comprehensive international human rights instruments .... It is included also in United States legislation and national policy statements citing violations of fundamental human rights ...." [FN179] The United States District Court for the District of Kansas said in Rodriguez-Fernandez v. Wilkinson:
Our review of the sources from which customary international law is derived clearly demonstrates that arbitrary detention is prohibited by customary international law. Therefore, even though the indeterminate detention of an excluded alien cannot be said to violate the United States Constitution or our statutory laws, it is judicially remediable as a violation of international law. [FN180]

The Alien Enemies Act authorized the presidential proclamations allowing the Attorney General to subject enemy aliens to "summary apprehension" during World War II. [FN181] This Act did not necessarily violate international law for it is recognized that enemy aliens in the territory of a belligerent can be detained, at least for as long as is necessary to determine if they pose a danger to the security of the country. [FN182] The Act and the related presidential proclamations, however, cannot justify the indefinite detention of civilians who were brought into the territory against their will, were given no hearings and were known to pose no danger to U.S. or hemispheric security. [FN183]

C. The Holding of Hostages

A hostage is "a person detained for reasons unconnected with his own acts or omissions." [FN184] As early as 1863, Lieber's Code stated that "hostages are rare in the present age." [FN185] Although hostages are not specifically referred to in the Hague Regulations of 1899 and 1907, [FN186] Article 50, by prohibiting the infliction of penalty upon the population of occupied territories for acts for which they cannot be held responsible, effectively bans the taking of hostages. [FN187] The prosecution of the Nuremberg Tribunals, led by U.S. Supreme Court Justice Jackson, argued that "irrespective of the illegality of the shooting of hostages, under Article 50 of the Hague Regulations, the taking of hostages was illegal." [FN188]

The 1934 Tokyo Draft of the International Red Cross Convention on the Protection of Civilian Alien Enemies forbade reprisals against civilians and the taking of hostages. [FN189] The Nuremberg Tribunal referred on several occasions to the taking and killing of hostages, condemning, for example, under the heading of Murder and Ill-Treatment of Civilian Population, the German practice of "keeping hostages to prevent and to punish any form of civil disorder." [FN190]

Article 3 of the 1949 Geneva Convention says that in the case of armed conflict within the territory of a Party, the taking of hostages is prohibited at any time and in any place with respect to persons taking no active part in the hostilities. [FN191] With respect to persons in occupied territories, Article 34 of the 1949 Geneva Convention simply states, "the taking of hostages is prohibited." [FN192] While the Geneva Convention had not been drafted at the time the United States was holding Japanese Latin Americans as hostages for exchange, it illustrates what was commonly accepted in international law at the time. Under this law, the Japanese Peruvians were hostages, held not because of any acts or omissions of their own, but because the U.S. government thought it could use them, either as "bait" for an exchange or as a "reprisal reserve" to gain better treatment for U.S. citizens held by the Japanese government.

D. Refusal to Compensate

"The right to redress an international wrong is recognized by scholars as a fundamental principle of customary law. Recognition of this right clearly pre-dates World War II, and it has been incorporated into both treaties and international
legal opinions.* [FN193] In 1928, the Permanent Court of International Justice stated in the Chorzow Factory case that "reparation must, as far as possible, wipe out all consequences of the illegal act and re-establish the situation which would ... have existed if the act had not been committed." [FN194] According to the settled practice of arbitration tribunals, a belligerent country is not responsible for accidental injury to a neutral national or damage to neutral property in a theater of war. If, however, the action taken by the belligerent state is contrary to the laws of war, the belligerent country is liable under international law for paying compensation. [FN195] The Hague Convention of 1907 defines "neutrals" as nationals of a state not taking part in war. [FN196] Accordingly, all of the Japanese Peruvians holding Peruvian citizenship were neutral nationals. Those holding Japanese citizenship, however, should have been entitled to the same general protections because "[t]he basic rule is that, compared with other inhabitants of occupied territories, neutral nationals resident there are not entitled to any privileged treatment." [FN197] If those holding Peruvian citizenship are entitled to compensation, the others should be as well.

In Nacio v. Germany, the Greco-German Mixed Arbitral Tribunal considered the case of a Greek national who was arrested and held by *313 German occupation forces in Rumania. Suspected of concealing weapons, he was released after eight days. The Tribunal held that the occupation authorities could arrest persons in the territory, including neutral nationals, suspected of acts which constituted a security threat. It added, however, that "if, in fact, the detention was unjustified, a detainee was entitled to compensation for any actual damage suffered, and that the non-payment of such compensation constituted an illegal act under Section 4 of the Annex to Articles 297 and 298 of the Peace Treaty of Versailles of 1919." [FN198] In Palios v. Germany, the same Tribunal considered a claim by a Greek restaurant owner who was detained for three months in Bucharest. It held that any arrest and detention of a neutral national, if not followed by a judgment involving conviction or the payment of compensation, constitutes an "act contrary to international law." [FN199]

Applying these principles, the U.S. failure to compensate the Japanese Latin American victims of these war crimes is itself a violation of international law. That these crimes were committed over fifty years ago does not reduce the government's responsibility. Although the United States is not a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, which entered into force in 1970, the Convention reflects customary international law on this principle. The Convention notes, for example, that none of the declarations, instruments or conventions that relate to the prosecution of war crimes and crimes against humanity, as defined by the London Charter, have provided for a period of limitation. [FN200] Furthermore, because it has an ongoing responsibility to compensate the victims, the United States is engaging in an ongoing violation by failing to do so and in that respect, even if a statute of limitations did apply, it would not have begun to toll.

The United States' ongoing refusal to adequately compensate the Japanese Latin Americans also raises questions of racial and national origin discrimination. U.S. officials were clearly cognizant of the racism behind the Peruvian government's efforts to rid the country of its Japanese population. They supported this attitude and collaborated with the Peruvian authorities in this matter, taking only those German and Italian Peruvians who were individually deemed to be dangerous, *314 while kidnapping and deporting Japanese Peruvians solely on the basis of their
At the time of the internment, there were no international agreements prohibiting racial discrimination. Due in large measure to the horrors of World War II, however, such prohibitions have become well-established in international law. The Universal Declaration of Human Rights, adopted in 1948, states: "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." [FN202] This is also the language prohibiting discrimination in Article 2 of both the International Covenant on Civil and Political Rights, [FN203] to which the United States is a party, and the International Covenant on Economic, Social and Cultural Rights, which the United States has signed but not ratified. [FN204] The International Convention on the Elimination of All Forms of Racial Discrimination defines "racial discrimination" to mean:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life. [FN205]

The American Convention on Human Rights obligates the parties *315 to undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. [FN206]

These standards are now almost universally acknowledged. The racial discrimination manifest in the wholesale internment of Japanese Americans and Japanese Latin Americans should encourage the United States to comply with its international obligation to compensate the Japanese Latin American internees for the losses inflicted upon them. [FN207]

III. EXAMINING CURRENT DOMESTIC REMEDIES

A military order, however unconstitutional, is not apt to last longer than the military emergency.... But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of urgent need.

--Justice Jackson, dissenting in Korematsu v. United States, December 1944 [FN208]

A basic principle of our legal system is that there should be a remedy for every wrong. As the U.S. Supreme Court said in Marbury v. Madison, "the very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford *316 that protection." [FN209] This Section looks at the remedies available to the Japanese Peruvians under U.S. law and concludes that they
are inadequate--perhaps nonexistent--because of the failure of U.S. courts to enforce international law.

The Japanese Latin Americans interned by the United States were innocent victims of U.S. policy gone astray. John Emmerson, who coordinated the removals for the U.S. embassy in Lima, says:

As I look back on the Peruvian experience I am not proud to have been part of the Japanese operation. One steeled oneself against the heartbreak being inflicted on hundreds of innocent Japanese .... It is hard to justify our pulling them from their homes of years and herding them, whether born in Japan or in Peru, onto ships bound for a strange land, where they would live in concentration camps under conditions which at best were difficult .... [FN210]

The United States has never explained these actions, although the President's letter to the internees states that they were treated "unjustly" by government actions "rooted in racial prejudice and wartime hysteria." [FN211] The claim of hysteria is itself dubious since, even at the time of their abduction, Justice and State Department officials recognized that these individuals were not dangerous to U.S. or hemispheric security. [FN212]

Japanese Latin American internees were subjected to conditions similar to those inflicted upon the Japanese American internees and, in addition, suffered the trauma of being uprooted from their countries and effectively rendered stateless. Why, then, would the U.S. government offer them only a fraction of the compensation given Japanese Americans? The answer lies in (1) the precedent established *317 by the Supreme Court in the Japanese American internment cases, (2) the narrowly tailored terms of the law providing redress to Japanese Americans and (3) the U.S. legal system's disregard for international law.

A. The Internment of Japanese Americans and the Supreme Court

In the spring of 1942, all Japanese Americans living on the West Coast of the United States were rounded up and taken to concentration camps in desolate parts of the country. Nearly 120,000 people were imprisoned for several years without charge, hearing or conviction--two-thirds of them American citizens by birth; more than half either over fifty or under fifteen years of age. [FN213] Despite the fact that nearly one-third of Hawaii's population was Japanese American and Hawaii was under martial law, no mass incarcerations materialized there. Instead, individual hearings resulted in about 2000 of the 160,000 Japanese Hawaiians being sent to mainland internment camps. [FN214] On the mainland, some German and Italian aliens--not U.S. citizens--were subjected to restrictions, but only those deemed dangerous after individual hearings were interned. [FN215]

The legal basis for the Japanese American internment was Executive Order No. 9066 ("EO 9066"), issued by President Roosevelt on February 19, 1942. EO 9066 authorized the Secretary of War, and commanders he designated, to prescribe "military areas" from which they could exclude "any or all persons." [FN216] It made no explicit reference to Japanese Americans. In order to enforce military exclusion orders against civilians, the War Department quickly persuaded Congress to *318 enact Public Law 503, which made it a misdemeanor to "enter, remain in, leave, or commit any act in any military area ... contrary to the restrictions applicable to such area ...." [FN217] Three days after Roosevelt signed this into law, Lt. Gen. DeWitt issued curfew orders directed to all alien enemies and all U.S. citizens of Japanese
descent on the West Coast. DeWitt also issued the first of 108 exclusion orders which forced "all persons of Japanese ancestry, both alien and non-alien" to evacuate their homes on a few days notice and report to "assembly centers" with only such personal belongings as they could carry. [FN218]

As Nanette Dembitz pointed out in 1945, the internment of Japanese Americans was "the first instance in which the applicability of a deprivation or restraint imposed by the Federal Government [upon a citizen] depended solely upon the citizen's race or ancestry." [FN219] Four U.S. citizens--Min Yasui, Gordon Hirabayashi, Fred Korematsu and Mitsuye Endo--brought legal challenges to the internment.

The first case the Supreme Court ruled on was Hirabayashi v. United States. [FN220] When the United States entered World War II, Gordon Hirabayashi was a senior at the University of Washington, a YMCA officer, a Quaker and a pacifist. Instead of obeying the evacuation order, in May 1942 he turned himself in to the FBI and was convicted of failing to report for evacuation and violating curfew. [FN221] The Supreme Court addressed only the curfew, not the evacuation, unanimously holding that it was a reasonable exercise of Congress's and the Executive's power to wage war, and that its imposition against only those persons of Japanese ancestry did not violate the Fifth Amendment's guarantee of due process. [FN222] Similarly, the Court sustained the curfew and avoided ruling on the internment in Yasui v. United States. [FN223]

Korematsu and Endo were not decided until December 1944, after President Roosevelt had been successfully re-elected. Fred Korematsu was a shipyard welder, born and raised in Oakland, turned down when he volunteered for the Navy and fired when his union expelled all persons of Japanese ancestry. He refused to report for evacuation and was arrested by the local police. The Supreme Court upheld his conviction for violating the evacuation order by a vote of six to three, but avoided addressing the detention. The Court addressed the charge of racial discrimination with the following mind-boggling logic:

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty .... To cast this case into outlines of racial prejudice ... merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire .... [FN224]

According to Yale Law School Professor Eugene Rostow, one of the earliest critics of these decisions, Justice Black's majority found that "the exclusion orders merely apply[ed] the two findings [of Hirabayashi]--that the Japanese are a dangerous lot, and that there was no time to screen them individually .... There [was] no attempt *319 in the Korematsu case to show a reasonable connection between the factual situation and the program adopted to deal with it." [FN225]

Rostow concluded, "[T]he Court, after timid and evasive delays, has now upheld the main features of the program. That step converts a piece of war-time folly into political doctrine, and a permanent part of the law." [FN226] Forty years later, Min Yasui, Gordon Hirabayashi and Fred Korematsu petitioned for writs of coram nobis, asking that their convictions be overturned on the basis of newly discovered evidence--evidence that government officials had deliberately altered, destroyed and suppressed evidence concerning the loyalty of Japanese Americans; specifically,
knowledge that the allegations of disloyalty and espionage in General DeWitt's Final Report were false. Min Yasui died while the appeals were pending, but Korematsu's and Hirabayashi's convictions were vacated. [FN227] Unfortunately, however, this does not over-turn the precedent of the Supreme Court's 1943 and 1944 decisions.


Japanese Americans' first step toward redress was the Evacuation Claims Act passed in July 1948. [FN228] In Michi Weglyn's words, "though eminently successful in reaping media praise ... the post-war restitution program turned out to be uncharitable in the extreme." [FN229] Only "tangible" losses that could be proven were compensated, i.e., damage to real or personal property. No interest was paid and claims litigation stretched out over seventeen years. [FN230] In 1951 Congress authorized *321 "compromise" settlements of $2500 per family to speed up the process, and "at a time when families were reeling from destitution, going without medical attention, and the Issei [first generation] fast dying off," most chose to settle, regardless of the amount of their original claim. [FN231] Of the $400 million in material loss estimated by the Federal Reserve Bank of San Francisco, less than ten cents on the 1942 dollar was paid under the Claims Act. [FN232]

By the 1970s a movement for redress had begun to take root in the Japanese American community, and in 1980 activist groups formed the National Coalition for Redress/Reparation which organized support for redress through letter-writing campaigns and public education events. At the urging of Senator Daniel Inouye, Congress established the Commission on Wartime Relocation and Internment of Civilians. After hearings across the nation, the Commission issued its report, Personal Justice Denied, acknowledging the "grave injustices" suffered by the interned Japanese Americans. [FN233] In August 1988 Congress enacted the Civil Liberties Act, which provided $20,000 for each surviving internee, an apology signed by President Reagan and a public education fund. [FN234] The CLA, while providing symbolic redress, did not acknowledge that the Japanese American internment was either illegal or unconstitutional. [FN235]

With the Supreme Court decisions upholding internment and the courts' rejection of claims for reparations, Japanese Americans obtained redress through political action. The Japanese Latin Americans, *322 however, being few in number and scattered across the globe, had little political clout. Seiichi Higashide, a Japanese Latin American internee, testified before the congressional Commission on Wartime Relocation and Internment of Civilians and encouraged other Japanese Latin American internees to testify. [FN236] Although the Japanese Latin American internment was reported in Appendix D of the Commission's report, [FN237] redress under the Civil Liberties Act was nonetheless limited to internees of Japanese descent who were citizens or permanent residents at the time of the internment. [FN238] This set the stage for the Mochizuki litigation.

C. Mochizuki v. United States: The Limits of Domestic Options

It seems that the U.S. government would be estopped from denying Japanese Latin American internees constructive resident status for purposes of the Civil Liberties Act. [FN239] The Office of Redress Administration, however, declared most of the Japanese Latin Americans who applied under the CLA ineligible because they were not legal residents at the time of the internment. [FN240] In 1996, five of these rejected applicants brought the Mochizuki case as a class action requesting that all interned Japanese Latin Americans be covered by the Act. [FN241] This eminently
reasonable and minimal demand proved difficult to enforce under domestic law.

As discussed above, the precedents established by Hirabayashi, Yasui and Korematsu still stand, and there have been no federal cases holding such detention illegal. [FN242] At the time the CLA was passed, one *323 redress case, Hohri v. United States, was pending. [FN243] While Congress may have been influenced by the possibility of a judgment requiring billions of dollars in reparations, no law required Congress to enact the CLA or to include the Japanese Latin Americans in its terms. [FN244] Thus, the Mochizuki plaintiffs were limited to two rather narrow arguments for relief under the CLA: first, that they should be deemed constructive residents because they were forcibly brought here by the U.S. government; and second, that providing reparations to Japanese Americans but not Japanese Latin Americans violates the guarantee of equal protection under the Fifth Amendment. [FN245]

The constructive resident argument is a strong one from the perspective of morality and equity. Allowing the same government which forcibly removed and imprisoned these people to avoid responsibility on the ground that they were here "illegally" is grotesquely absurd. [FN246] There is precedent for deeming people "permanent residents under color of law" ("PRUCOL") even when they do not have resident status under the Immigration and Nationality Act. [FN247] Given *324 that the government was not only aware that the Japanese Latin Americans were in the country, but had forced them to come, it would seem that they should be granted a similar status. [FN248] As the United States Court of Appeals for the Second Circuit said in United States v. Toscanino, courts should "be guided by the underlying principle that the government should be denied the right to exploit its own illegal conduct." [FN249] There is no precedent, however, requiring the government to treat the Japanese Latin Americans as residents; that remains at the government's discretion.

The Fifth Amendment equal protection argument is even harder to make. Ironically, the standard for governmentally-imposed race-based classifications was first articulated in Korematsu, where the Supreme Court held that such classifications must be subjected to "the most rigid scrutiny." [FN250] There, of course, the Court decided that the internment of all persons of Japanese descent was not race-based. [FN251] In the Mochizuki case, the Japanese Latin Americans cannot say that a racial distinction is being made between them and the Japanese Americans who are receiving reparations; they must argue that the distinction constitutes national origin discrimination. [FN252] This is difficult for several reasons. Most obviously, both groups are of Japanese national origin--the very reason they were interned. [FN253] Likewise, challenging the Act as unlawful discrimination based on citizenship is futile because internees covered by the CLA include both U.S. and Japanese citizens, and those *325 denied coverage include citizens of Japan, the United States, Peru and other Latin American countries.

The Civil Liberties Act distinguishes between those who, at the time of internment, had been granted permanent resident status by the government, and those who, despite being in INS custody, did not have resident status. This distinction, while unjust, is probably lawful. Ever since the Supreme Court upheld the Chinese Exclusion Act of 1882 [FN254] in Chae Chan Ping v. United States, [FN255] the courts have ruled consistently that the government has plenary power over immigration, i.e., the right to exclude almost any individual or group from the country. [FN256]
With respect to restrictions on the entrance of non-citizens into the country and the subsequent determination of when they are "legally present," the courts have almost completely abdicated judicial review of legislation or administrative action. [FN257]

Congress provided compensation to Japanese Americans as a matter of discretion. Accordingly, there need only be a rational basis for the distinctions made in the legislation. In addition, considerable precedent authorizes distinguishing between people on the basis of citizenship or immigration status when the benefit at issue constitutes a privilege as opposed to a right. [FN258] As a result, it is extremely difficult to make a compelling legal argument that the failure to include Japanese Latin Americans under the Civil Liberties Act constitutes national origin discrimination in violation of the Fifth Amendment's guarantee of due process. [FN259] Domestic law, as currently enforced, thus provides no effective avenues for redress.

*326 IV. ENFORCEMENT OF INTERNATIONAL CLAIMS

International law has emerged from the agreements and practices of nation states, and claims under international law can be heard in the domestic courts of these states, or by transnational tribunals. This Section considers the options, and attendant difficulties, of pursuing international claims in U.S. courts as well as in regional and global institutions.

A. International Claims in U.S. Courts

Generally, international courts or commissions require claimants to exhaust domestic remedies. [FN260] This requires bringing the claim in the appropriate court of the nation with jurisdiction over the violation, and pursuing it until (a) there is a final judgment and all appeals have been exhausted, or (b) it is apparent that further pursuit of the claim is futile. [FN261] Therefore, claims against the U.S. government should first be litigated in U.S. federal courts.

Article VI of the Constitution provides that the Constitution, the laws made pursuant to it and "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." [FN262] As early as 1804, the Supreme Court held that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains." [FN263] In 1900, the Supreme Court stated in The Paquete Habana:

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, *327 where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. [FN264]

The Restatement (Third) of the Foreign Relations Law of the United States says that "[i]nternational law is law like other law, promoting order, guiding, restraining, regulating behavior .... It is part of the law of the United States, respected by Presidents and Congresses, and by the States, and given effect by the courts."
Nonetheless, our legal system allows international law to be superseded by domestic law. Some nations consider domestic law and international law to be part of a unified system which acknowledges international law as the highest law of the land. In such jurisdictions, if domestic laws or judicial decision run counter to international law, they will be "trumped" by the latter. Article 25 of the Constitution of the Federal Republic of Germany, for example, states that "[t]he general rules of public international law are an integral part of federal law. They shall take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory." In contrast, the U.S. judicial system regards domestic law and international law as independent. The courts attempt to enforce both, where possible, and seek to interpret domestic law in a manner compatible with international law. Where an irreconcilable conflict exists, and Congress has evinced an intent to supersede international law, the courts have adopted a "last in time" rule, enforcing later-enacted domestic legislation even if it violates international law. Unilateral abrogation of international agreements or customary international law is not, of course, recognized as legitimate under international law. The result is that our domestic rule allows the government to consciously violate international law without necessarily violating domestic law.

In Garcia-Mir v. Meese, the United States Court of Appeals for the Eleventh Circuit held that detained Cuban refugees from the Mariel boatlift who had not been "admitted" under immigration law but specially "paroled" into the country, did not have a right to parole revocation hearings. The court stated, "The public law of nations was long ago incorporated into the common law of the United States. To the extent possible, courts must construe American law so as to avoid violating principles of public international law." Acknowledging that the United States' indefinite detention of aliens in this case was a violation of international law, the court nonetheless allowed it to continue.

If international law is to have any meaning, there must be places where claims under such law will be adjudicated. As recognized in The Paquete Habana, international law is supposed to be enforced by domestic courts. U.S. courts comprise one of the most efficient and effective systems in the world. In addition, it is generally necessary to raise international law claims in U.S. courts because domestic remedies must be exhausted before going to an international forum. Federal courts, however, are often reluctant to enforce international law claims and sometimes threaten lawyers with sanctions for frivolous litigation, making litigators hesitant to raise such claims.

*329 A significant step toward the recognition of customary and conventional international law can be seen in cases recently litigated under the 1789 Alien Tort Claims Act. which confers federal jurisdiction over civil actions by aliens for torts committed "in violation of the law of nations." In Filartiga v. Pena-Irala, the United States Court of Appeals for the Second Circuit recognized customary international law as part of federal common law and reviewed a broad range of international law sources in determining that torture by governmental officials is now prohibited by the law of nations. Since then, a number of human rights violations have been successfully prosecuted under the Alien Tort Claims Act.
Claims Act. [FN276] U.S. courts are criticized, however, for enforcing these international standards against other governments, but not against the United States. According to Mark Gibney,

[In] suits by foreign plaintiffs against foreign state actors [...] U.S. domestic courts have provided a vital forum for individuals seeking some measure of justice against those responsible for committing heinous crimes. Yet these same courts have *330 given a much different reception to foreign plaintiffs who allege that the U.S. government itself is responsible for the commission of human rights abuses. In one suit after another, foreigners who have been harmed by the pursuit of U.S. foreign policy have had their claims dismissed by a panoply of revolving defenses. [FN277]

As a result, it is still an uphill battle to introduce international law into domestic litigation. [FN278] Paul Hoffman refers to the judicial skepticism encountered when trying to introduce customary international law as the "blank stare phenomenon," calling it the "threshold problem" of using international law in domestic litigation. As Naomi Roht-Arriaza states:

Although the application of international human rights law in U.S. courts remains far from commonplace, the exclusion of individual rights ... is definitively a relic of the past.... The challenge now is to educate both domestic advocates and judges as to the usefulness and applicability of [...] [international law] so that judges routinely consider international law-based arguments with the same ease they consider constitutional or statutory ones. [FN279]

*331 B. Through Regional and Global Organizations--O.A.S. and U.N.

Persons who have suffered violations of international law and who have exhausted available domestic remedies can bring their claims to regional or global organizations. The Japanese Latin Americans' claims would be most appropriately brought to the Organization of American States' ("OAS") Inter-American Commission on Human Rights or to the United Nations' Commission on Human Rights.

As a member of the OAS, the United States is bound by the OAS Charter. [FN280] The same 1948 diplomatic conference that adopted the Charter also proclaimed the American Declaration of the Rights and Duties of Man, which catalogues civil, political, economic, social and cultural rights and duties. [FN281] Although the Declaration was a non-binding resolution, [FN282] it has come to be regarded as the authoritative interpretation of the "fundamental rights" referred to in the Charter. [FN283] The OAS's Inter-American Commission on Human Rights performs country studies and on-site investigations, and receives and acts on individual petitions and inter-state communications. There is an American Convention on Human Rights and an Inter-American Court which hears cases brought under the Convention, [FN284] but the United States has not ratified the Convention. [FN285] Nonetheless, as an OAS member, the United States is bound by the Declaration, and the Inter-American Commission has jurisdiction to hear claims based on the Declaration. [FN286]

*332 Because the United States' internment of Japanese Peruvians predated the OAS Charter its actions cannot be said to have violated the Charter or the Declaration. The U.S. government's ongoing refusal to compensate the victims, however, may well violate the Declaration. [FN287] Thus, when domestic remedies for these claims have been exhausted, the Japanese Latin American internment cases could be brought before the Inter-American Commission with a request that the Commission find the United States responsible for full redress.

Options also exist within the United Nations structure. As a U.N. member, the United States is a party to the Statute of the International Court of Justice ("ICJ"). The ICJ hears cases arising under international law, but only has contentious jurisdiction over states which have accepted that jurisdiction. Dissatisfied with the ICJ's handling of a case brought by Nicaragua against the United States for mining its territorial waters, attacking ports and other facilities and financing and training the "Contra" forces to overthrow the Nicaraguan government, the United States withdrew its consent to compulsory ICJ jurisdiction in 1986. To the extent that it is a party to treaties that so provide, the U.S. is still subject to ICJ jurisdiction. Nonetheless, the United States continues to disregard unfavorable rulings. For example, in April 1998, ignoring a stay of execution requested by the ICJ, the United States allowed the execution of Angel Breard, a Paraguayan national who had been convicted of murder without having access to Paraguayan consular officials--a violation of the Vienna Convention on Consular Relations.

Because no treaties confer jurisdiction in the Japanese Peruvian case and the ICJ can only hear cases brought by states parties, the ICJ is not an option for the Japanese Latin Americans. Such situations, however, can be brought to the world's attention by presenting them to the United Nation's Commission on Human Rights and its Sub-Commission on Prevention of Discrimination and Protection of Minorities. In March 1998, Karen Parker of International Educational Development submitted a report concerning the Japanese Latin American internment to the 54th session of the Commission on Human Rights. It said, in part:

At the time this program was in operation, international humanitarian law clearly forbade war-time abduction, incarceration, and deportation of civilians from friendly countries. Exchange of civilians from a friendly country to an enemy third party was viewed as especially serious and in this case, met the criteria of hostage-taking. International law also forbade slavery and forced labour (the conditions of the Latin Americans held in the Panama camps clearly met the then-existing prohibitions against slavery and forced labour) whether in peacetime or in war. The Charter of the International Military Tribunal (Nuremberg charter), the Charter of the Military Tribunal for the Far East (Tokyo charter) and the earlier Control Council Law 10 set out these acts as war crimes and crimes against humanity at the time of World War II.

While the Commission lacks enforcement powers, it can bring considerable pressure to bear on states and can aid in raising public awareness of violations of international law. Whether it will be successful in this case remains to be seen.

To summarize, avenues are available for pursuing international claims such as those of the interned Japanese Peruvians, but each is accompanied by significant problems. Generally speaking, the U.S. judicial system is relatively effective and well-organized, but it is reluctant to enforce international law. International courts and commissions, specifically created to hear international claims, are difficult to access, slow to respond and lack enforcement power. Although such international bodies can be invaluable in bringing international attention to violations of law, domestic courts remain the best hope for effective remedies.

V. TOWARD COMPLIANCE WITH INTERNATIONAL LAW

Even as one reflects on certain events of the 1940s and 1950s and concludes that
they were unnecessary militarily, inept politically, and inhumane socially, it is no consolation that they are part of the dead past in which the Alien Act of 1798, President Roosevelt's Executive Order 9066, General DeWitt's orders on our West Coast, and Ambassador Norweb's program in Peru fostered gross abuse of elementary human rights. The uncertain future that precipitates other tense and fear-laden moments may unfortunately find American law, an American president, the American military, and American diplomats equally able and willing to violate the human rights of innocent men, women and children.

--Harvey Gardiner, Pawns in a Triangle of Hate [FN299]

While the Japanese Latin American internment may not involve large numbers of people, it is a case of significant import. A well-defined episode with relatively undisputed facts, it provides a clear example of how international law is incorporated into--or ignored by--our legal and governmental structures. It shows how considerations of human rights and international law can be lost in the foreign policy decisions of U.S. authorities and how the legal system fails to rectify such actions. It also illustrates the harm that can be done when international law is not taken seriously--harm to innocent individuals, to the national interest of the United States and to the rule of law globally. This Section considers the costs of ignoring international law in the Japanese Peruvian case, and makes two recommendations for addressing these problems: first, that remedies for such violations be made available by enforcing international law in domestic courts; and second, that the branches of government responsible for foreign policy make structural changes to institutionalize awareness of, and ensure compliance with, international law and human rights norms.

A. Repercussions of Ignoring International Law

The Japanese Peruvian internment resulted not so much from the malevolent designs of particular individuals, but from a convergence of perceived interests on the part of the Peruvian and U.S. governments. Within the executive branch of the U.S. government there were varying perceptions, motivations and expectations that this particular program would further U.S. interests. [FN300] U.S. authorities in the Departments of War, State and Justice were interested in promoting "hemispheric security" and in accommodating Peruvian anti-Japanese hostility in order to obtain the cooperation of the Peruvian government. The primary motivation for internning the Japanese Latin Americans, however, was to accumulate hostages to exchange for Americans held in Japanese-occupied territories.

The U.S. holding of hostages turned out to be not only unnecessary, but counterproductive in a number of ways. First, the U.S. reportedly rejected a proposal from the Japanese government to exchange all civilians without regard to numbers, and began negotiating one-for-one exchanges that stalled when the Japanese government insisted on the repatriation of designated individuals. Not only did the U.S. and Peruvian lists of proposed deportees not agree, but often neither list included the individuals requested by the Japanese government. [FN301] The program of forced deportation and incarceration thus not only failed to release American internees but may, in fact, have helped bring the larger exchange program to a halt. As noted above, the Japanese government withdrew from the negotiations for a third exchange after lodging protests about the kidnapping of Japanese Latin Americans and the treatment of Japanese Americans, particularly those interned at Tule Lake. [FN302] While the reasons for the Japanese withdrawal are not clearly
documented, it is reasonable to infer that the Japanese government would resist participating in exchanges which gave the United States further incentive to kidnap Japanese nationals from third countries. Thus, it appears that by engaging in these blatant violations of international law, the United States subverted the very ends it hoped to achieve.

Second, the holding of Japanese Latin American and Japanese American hostages in internment camps did not protect Americans held by the Japanese military. There are various references to a "reprisal reserve" designed to ensure humane treatment of American internees, [FN303] but in fact the poor physical conditions of the U.S. camps made State Department officials fear reprisals against the Americans held overseas. [FN304]

Third, if increased hemispheric security was an expected benefit of the internment program that, too, failed to materialize. As John Emmerson's memoirs [FN305] and the files combed by Harvey Gardiner [FN306] so clearly illustrate, embassy officials found no evidence of sabotage or subversive activity by the Japanese in Peru. Until Raymond Ickes was sent to Lima to participate in the selection process, those chosen by U.S. authorities were not even identified as "dangerous." [FN307] After Ickes insisted on this criterion, there was still no evidence of subversive activity by any Japanese Peruvians, so men were labeled "dangerous" simply by virtue of having been community leaders. [FN308] Moreover, even after screening procedures were implemented, only a small fraction of those actually deported were on the U.S. lists. U.S. officials were under no illusion, even as the process was taking place, that the deportations did anything to promote hemispheric security.

*337 There is thus no evidence that any of the anticipated benefits were achieved by the actions of the U.S. government. There were, however, numerous costs. Most obvious, of course, are the losses suffered by the Japanese Peruvians and other interned Japanese Latin Americans. As described in Section II, they lost homes, businesses, property and generations of personal belongings and connections. Most could not return to their homes in Peru and had to construct new lives in a war-devastated Japan where they had few ties and were often regarded as outsiders. [FN309] Those who were able to remain in the United States lived for years in uncertainty and fear. [FN310]

Significant costs were also incurred by the United States government. Some of these were fiscal. The United States assumed the entire cost of transporting over 2,000 people from Latin America, and then guarding, feeding, and housing them for years. Transport ships, military personnel and other precious resources were devoted to this entirely unproductive end. [FN311] The contemporaneous costs to the United States were not, however, limited to material costs. The international credibility of the country was harmed when, for example, the U.S. actions with respect to Japanese Americans were raised as a defense by German and Japanese being prosecuted at the Nuremberg and Tokyo tribunals. [FN312]

The United States has accrued ongoing costs as well. By refusing to compensate the victims, [FN313] the government has incurred the liability under international law to do so. The settlement in the Mochizuki case only requires the government to pay five million dollars or less in redress. [FN314] The plaintiffs sought compensation equivalent to that afforded interned Japanese Americans under the terms of the Civil Liberties Act, which would cost approximately twenty-four million dollars. In addition, the government owes the internees compensation for the property they lost.
for the lives disrupted, for the illnesses and deaths attributable to the
internment.  [FN315] It owes them this plus fifty years worth of interest. Taking
only inflation into account, the $5000 now being offered each internee is the
equivalent of about $550 in 1945. At an interest rate of 6%, it represents about
$242 in 1945.  [FN316] While one cannot begin to calculate the actual damages
incurred by the Japanese Latin Americans, it is clear that the amount required to
fully compensate them under international law is enormous.

The possibility of having to compensate the victims is probably the least
significant of the ongoing costs incurred by the United States in this case. The
plight of the Japanese Latin Americans has slowly been coming to the attention of
the American public and the international community. Testimony about the Japanese
Peruvian internment was presented to the Commission on Wartime Relocation and
Internment of Civilians and resulted in acknowledgment of the program in the
Commission’s final report.  [FN317] Testimony about the war crimes committed by the
United States, and the need for redress, has been presented to the United Nations' Commission on Human Rights.  [FN318] International attention has been paid to the
Mochizuki case and will be paid to the cases which are being filed by plaintiffs who
opted out of the settlement.  [FN319] In short, the matter is now before the court of
international opinion.

Compensation for the victims of World War II war crimes became a topic of
widespread interest in 1998. In August Swiss banks and Holocaust victims agreed to a
$1.25 billion settlement of a suit filed in U.S. district court charging the Swiss
banks with laundering gold looted by the Nazis  [FN320] and, under threat of suit,
Volkswagen agreed in July to compensate those who had been forced to perform slave
labor in its factories during World War II.  [FN321] Based on a 200-page report
issued by a U.S. commission headed by Under Secretary of State Stuart Eizenstat, an
eighteen billion dollar lawsuit has been filed against two German banks.  [FN322] In
April a Japanese court ordered the Japanese government to pay reparations to three
Korean women who had been used as sex slaves, and a group representing "comfort
women" got a bill introduced in the U.S. Congress calling for an apology and
reparations from Japan.  [FN323] This issue has also been presented to the United
Nations Commission on Human Rights  [FN324] and some propose that the newly formed
International Criminal Court should deal with the question of compensation for the
"comfort women."  [FN325]

The U.S. government has been a major player in recent reparations movements,
particularly those concerning compensation for gold and artwork taken by the Nazis.
[FN326] The United States' position, however, appears hypocritical in the face of
its refusal to compensate for the Japanese Latin American internment.  [FN327] It
diminishes U.S. credibility and devalues international law in ways we may not fully
recognize for years to come. The effectiveness of international law rests on the
recognition it receives from the governments of the world. When a nation as
powerful as the United States refuses to abide by its norms, the stage is set for
other governments and non-governmental groups--including the "terrorist"
organizations frequently denounced by the United States--to ignore international law
when it suits them.  [FN328]

Ironically, one of the stated purposes of the Civil Liberties Act is to "make more
credible and sincere any declaration of concern by the United States over violations
of human rights committed by other nations."  [FN329] The terms of the Mochizuki

settlement, however, suggest that the mistreatment of these plaintiffs was less significant than that of U.S. citizens and residents. Viewed only in quantitative terms, this could be dismissed as a small incident in recent history. But it is difficult to see how the U.S. government's resolution of the problem could be perceived by anyone, inside or outside of the United States, as reflecting anything but disdain for international law and human rights. As such, it sends a stark message, one that directly contradicts the purpose of the Civil Liberties Act and undermines the credibility of the United States in protesting violations of international law and human rights by other nations.

B. Proposals for Restructuring

We are beginning to recognize that the internment of Japanese Americans was not an aberration or a product of wartime hysteria, but quite consistent with the historical treatment of Asian Americans and other racial minorities under the law. [FN330] Similarly, we need to consider that the internment of Japanese Latin Americans was not an aberration, a mistake made in the turmoil of war, but instead quite consistent with the United States' treatment of minorities in the United States as well as our neighbors in Latin America. In 1823, in what came to be known as the Monroe Doctrine, the United States announced its intentions to be the primary power in the western hemisphere. [FN331] Woodrow Wilson's Secretary of State said bluntly, "[i]n its advocacy of the Monroe Doctrine, the United States considers its own interests. The integrity of the other American nations is an incident, not an end." [FN332]

United States has exhibited its disregard for Latin American nations' sovereignty on numerous occasions. Having failed in its attempts to buy Cuba in 1854, [FN333] the United States essentially took control of it in 1898, forcing the Cubans to incorporate an amendment into their Constitution which gave the United States military bases in Cuba and an unrestricted right to intervene in Cuban affairs. [FN334] The United States annexed Puerto Rico in 1898, [FN335] seized the Panama Canal in 1903, [FN336] and occupied Haiti and the Dominican Republic in 1915. [FN337] It subsequently installed governments, often run by dictators like Machado in Cuba and Trujillo in the Dominican Republic, to do the United States' bidding. [FN338] More recent violations of international law in Latin America include U.S. support of a 1954 military coup in Guatemala; [FN339] the CIA-backed overthrow of Salvador Allende in Chile in 1973; [FN340] and the mining of the waters and support of the Contras in Nicaragua. [FN341] *342 In December 1989 approximately 24,000 U.S. troops invaded Panama, inflicting significant civilian casualties and destroying entire neighborhoods. [FN342] This disregard for international law has, in turn, created tension with other nations. [FN343]

International law has been violated in these cases both in times of war and in times of peace. This means we must be cautious about accepting justifications based on "military necessity" and "national security." As Eugene Rostow notes, "[i]t is essential to every democratic value in society that official action taken in the name of the war power be held to standards of responsibility." [FN344] Especially in times of war, we need to protect our civil liberties as well as human rights under international law. As Nanette Dembitz said about the Korematsu and Endo cases, "periods of war and peace are not disconnected eras; the peace-time social scene emerges from the war-time, and that which might emerge as a result of ... such unrestrained military force is a subject for apprehension." [FN345] As we move into an era of military actions marked *343 by undeclared wars, [FN346] and of

declarations of open-ended "wars" on targets such as drugs, crime or terrorism, we must not lose sight of these principles. [FN347]

Accordingly, if the United States is to wage such "wars," we must insist that it comply with both domestic and international law. [FN348] Should the U.S. violate international law, we must take victims' claims seriously, and provide them with a forum for redress. If we fail to do so, we will be undermining the rule of law throughout the world. [FN349]

As a powerful industrialized nation heavily vested in global markets, the United States strongly desires other nations to comply with international law. Government officials have consistently made this point with respect to Iraq's invasion of Kuwait, its biological and chemical weapons, and its treatment of the Kurds; [FN350] China's use of prison labor and treatment of political dissent; [FN351] Pakistan's use of child labor; *344 [FN352] Taiwan's and China's respect for intellectual property rights [FN353] and the safety of U.S. embassies and diplomatic personnel. [FN354] The U.S. cannot assume to promote these interests while adhering to a policy of selective compliance with international law. To really participate in the development and promotion of the global rule of law we must take international law more seriously ourselves. [FN355] This requires scrupulous compliance in large and small matters alike as those governmental policies that allow for minor violations will invite major ones. Violations of international law, like landmines, may appear small and deeply buried, yet it is difficult to know when they will explode and how much damage they will do. [FN356] This problem must be tackled in at least two ways: first, by creating viable remedies within our domestic courts for violations of international law, and second, by insisting that the branches of the government charged with making and implementing U.S. foreign policy--Congress and the Executive--take international law seriously and create institutional mechanisms to that end.

According to Anthony D'Amato, "any international lawyer will estimate that over 99% of the cases that turn on rules of international law are filed in domestic courts." [FN357] As the recent move to organize an International Criminal Court demonstrates, [FN358] transnational courts are developing. This is a lengthy process, however, and justice will not be served by waiting for them to become effective. Furthermore, the hesitations that many in the United States have about submitting to the jurisdiction of international tribunals could be avoided if U.S. courts would enforce international law, for those tribunals always require domestic remedies to be exhausted first. By taking international law seriously, federal courts could begin to provide effective remedies for violations of international law. This would serve as a deterrent for future violations of international law and would greatly increase the credibility of the United States in the international legal community. [FN359]

Providing remedies after the fact, however, is not enough. Having litigated many human rights cases, Paul Hoffman laments, "I have learned [that] customary law ... really does not restrain executive action." [FN360] Improving compliance prospectively is greatly preferable to meting out punishment retroactively. There are many ways in which this could be done. Despite having been an active participant in their drafting, the United States has not ratified many human rights treaties. [FN361] Ratification of the major international treaties currently accepted by most other nations would be a meaningful step. [FN362] Payment of the over one billion
dollars owed to the United Nations would also *346 signal an increased respect for international institutions. [FN363] The United States could begin to comply with the judgments of international bodies such as the International Court of Justice and the Inter-American Commission on Human Rights. Congress could enact legislation that provides real compensation for Japanese Latin Americans and other victims of human rights abuses. Collectively, these acts would convey the message that the United States is taking international law seriously.

In and of themselves, these measures will not be enough to ensure that U.S. authorities actually comply with international law. That will require structural changes, including extensive education about evolving aspects of international law and the assignment of specific responsibility for compliance within the Departments of Defense, State and Justice. Internal systems need to be created which will identify international law issues when they arise, initiating a process that includes investigation of the relevant law, an assessment of the effects of compliance or noncompliance, and conscious decisionmaking based on that information. [FN364] At this point, there may not be a consensus on the extent to which the United States should participate in a world order defined by international agreements rather than the exertion of national power. Nonetheless, the presumption should be that the United States intends to comply with international law. To the extent that it does not do so, consensus surely exists that the United States government should not violate international law, either by accident or deliberately, without careful consideration of the costs involved, including the harm done to individuals and other countries, the immediate self-interest of the United States and damage to the United States' reputation and to the development of international law.

CONCLUSION

Our position in the post-war world is so vital to the future that our smallest actions have far-reaching effects .... We cannot *347 escape the fact that our civil rights record has been an issue in world politics. The world's press and radio are full of it .... Those with competing philosophies ... have tried to prove our democracy an empty fraud, and our nation a consistent oppressor of under-privileged people. This may seem ludicrous to Americans, but it is sufficiently important to worry our friends. The United States is not so strong, the final triumph of the democratic ideal is not so inevitable that we can ignore what the world thinks of us or our record.


This Article has used the Japanese Peruvian internment as a case study of the consideration given to international law in the making of U.S. foreign policy, and the costs and consequences of ignoring, or refusing to enforce, international law. The harm caused to the thousands of interned Japanese Latin Americans, their families and their communities was the result of the United States' willingness to disregard well-established international law prohibiting the kidnapping and forced deportation of civilians, the holding of hostages, their indefinite internment without charge or hearing and their forced repatriation and/or deportation at the end of the war. The internment of Japanese Latin Americans was allowed to happen, over some objections from the Justice Department, but with very little resistance from U.S. authorities, unreported to the general public, and without triggering any subsequent intra-governmental review revealing the flawed nature of the program as a
whole. This illustrates how important it is to create an oversight system designed to assure congruence between American foreign policy and international law.

Had the executive branch, through the President and the Cabinet officials, made international law a priority and then communicated this policy to each department and the agencies thereunder; had Congress enacted legislation to enforce international law; or had federal courts, particularly the Supreme Court, incorporated international law into their decisions, this situation could have been avoided altogether. What President Truman's Committee on Civil Rights said just after World War II is still true. We cannot afford to let incidents such as the Japanese Latin American internment go unremedied, for they communicate a disdain for international law that will have far-reaching effects on the protection of human rights and the furtherance of a world order that complies with international law.

[FN1] (c) 1998 by Natsu Taylor Saito, Associate Professor, Georgia State University College of Law. B.A. 1977, Swarthmore College; M.Ed. 1982, Georgia State University; J.D. 1987, Yale Law School. I am grateful to the Civil Liberties Public Education Fund and to the Georgia State University College of Law for support of this research, to Sumi Cho for organizing the Original Legal Scholarship Collaborative, and to Keith Aoki, Gil Gott, Dean Hashimoto, Chris Iijima, Mari Matsuda and Eric Yamamoto for providing a context for this work. I am also grateful for the cooperation of Grace Shimizu and Julie Small of the Japanese Peruvian Oral History Project and Robin Toma, plaintiffs' attorney in Mochizuki v. United States; to Karen Parker and Ralph Steinhardt for their insight into the applicable international law and to Cooper Knowles for exceptional research assistance. Special thanks to Kelly Jordan, whose interest, analysis and editing both sustained me and shaped the ideas presented here.


[FN3] Clinton's brief letter of apology acknowledges U.S. authorities "unjustly interned, evacuated, relocated or otherwise deprived you of liberty." The letter states:

We recognize the wrongs of the past and offer our profound regrets to those who endured such grave injustice. We understand that our nation's actions were rooted in racial prejudice and wartime hysteria, and we must learn from the past and dedicate ourselves ... to renewing and strengthening equality, justice and freedom.


[FN4] I use the term "Japanese American" to refer to all persons of Japanese descent who had made their homes in the United States. This includes the Issei (first generation immigrants) who were still Japanese citizens as well as the Nisei (second generation) who were U.S. citizens by birth in the United States. Although the Issei were for the most part permanent residents who had every intention of living here the rest of their lives and raising their children as Americans, they were prevented from becoming naturalized citizens by the racial restrictions dating back to the Naturalization Act of 1790, 1 Stat. 103 (limiting naturalized citizenship to "free white persons"). The racial restrictions were not removed until 1952 by the Immigration and Nationality Act, chapter 477, 66 Stat. 163 (1952). See

[FN4]. The case was transferred from the Central District of California to the
Federal Claims Court in Washington, D.C. The government and the plaintiffs have
entered into a Settlement Agreement, which was approved on January 25, 1999. See
Cl. Jan. 25, 1999); Notice of Proposed Settlement in Class Action Lawsuit Involving
Latin American Japanese <http://www.usoj.gov/crt/ora/news.html> (visited Mar. 8,
1999); see also K. Connie Kang, The Battle Rages on Rights: Activist Worked Hard to
Get Reparations for Japanese Latin American Internees, But Now Faults Notification
Effort and Government's Different Treatment of U.S. Residents, L.A. TIMES, Aug. 9,
1998, at B2; Dara Akiko Tom, Deadline for WWII Redress Money, AP, Aug. 10, 1998,
available in 1998 WL 6706271 (noting plaintiff Art Shibayama's intent to "reject the
payment out of principle"); Dara Akiko Tom, WWII Internees React to Settlement, AP,

Now that the Settlement Agreement has been approved, some of the plaintiffs have
opted out and brought separate lawsuits. See Paul Harrington, Japanese Latin
Peruvian of Japanese Origin Demands Compensation from US, AGENCE FR.-PRESSE, Mar. 3,


[FN6]. I use the term 'Japanese Latin Americans' to refer to all persons of Japanese
ancestry who are or were living in Mexico or Central or South America. Like the
Japanese Americans, many of the first generation were still Japanese citizens, but a
considerable number had become naturalized citizens, and a significant number were
citizens of their Latin American country by birth.

[FN7]. See generally JOHN EMMERSON, THE JAPANESE THREAD: A LIFE IN THE U.S. FOREIGN
SERVICE 125-49 (1978); C. HARVEY GARDINER, PAWNS IN A TRIANGLE OF HATE: THE PERUVIAN
JAPANESE AND THE UNITED STATES (1981); HIGASHIDE SEIICHI, ADIOS TO TEARS: MEMOIRS OF
A JAPANESE PERUVIAN INTERNEE IN U.S. CONCENTRATION CAMPS (1994); Ken Mochizuki,
Crystal City: Forgotten World War II Camp, NORTHWEST NIKKEI, Apr. 29, 1997, at 1,
available in 1997 WL 11711778; Corey Takahashi, The Other Japanese American
WL 11551858; Julie Tamaki, An Enduring Indignity; Japanese Latin Americans Interned

[FN8]. See infra notes 130-41 and accompanying text.

[FN9]. Japanese American, see supra note 3, not to be confused with Japanese Latin
American, see supra note 6.


[FN11]. This can be contrasted, for example, with indemnification from the Federal
Republic of Germany to Nazi victims which, according to Weglyn, included
calculations for loss of life, damage to health, incarceration in concentration
camps and ghettos, damage to property, damage to profession, repatriation and
interruption of education. See MICHI WEGLYN, YEARS OF INFAMY: THE UNTOLD STORY OF
AMERICA'S CONCENTRATION CAMPS 276-77 (1996). There has been no calculation of what would constitute actual redress for the damages incurred.

[FN12]. The plaintiffs have asserted that this should be done by declaring them "permanent residents under color of law." Plaintiffs' Memorandum in Opposition to Defendant's Motion to Dismiss at 9-12, Mochizuki v. United States, 41 Fed. Cl. 54 (1998) (No. 97-924C) (on file with author); see also infra notes 245-49 and accompanying text.

[FN13]. The Campaign for Justice, which has organized the redress campaign for Japanese Latin Americans, estimates that there may be as many as 1800 claimants but funding available for far fewer. President Clinton has stated that "[i]f the fund proves insufficient, I will work with the Congress to enact legislation appropriating the necessary resources to ensure that all eligible claimants can obtain the compensation provided by this settlement," but this is not part of the settlement itself. See Jerry Seper, Government to Settle with Interned Japanese, WASH. TIMES, June 13, 1998, at A3. An editorial in the Sacramento Bee referred to the settlement as "bargain basement redress." Editorial, Bargain Basement Redress; Cheers & Jeers, SACRAMENTO BEE, June 22, 1998, at B4.

[FN14]. According to the Settlement Agreement, the United States maintains that the claimants are not eligible for redress under the CLA and their Fifth Amendment equal protection claims are unfounded. The parties agree that the Settlement Agreement "shall not operate as an admission on the part of any party for any purpose" and that nothing introduced in connection with the Agreement shall be construed as "evidence of liability or as an admission or concession." Settlement Agreement, ¶ 21. Mochizuki v. United States, No. 97-924C, 1999 WL 72777 (Fed. Cl. Jan. 25, 1999). Further, acceptance of payment under the Agreement is agreed to be "in full satisfaction of any and all claims against the United States relating to the internment of the class member." Id. ¶ 23.


[FN16]. Fred Korematsu's conviction was vacated by the United States District Court for the Northern District of California, but this did not overturn the Supreme Court precedent. See Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); see also infra note 227 and accompanying text.

[FN17]. "Repatriation" is not a particularly appropriate term here, as some of the people sent to Japan were not Japanese citizens and others had left long ago with no intent of returning. In either case most did not want to go to Japan. See infra notes 142-45 and accompanying text.

[FN18]. WEGLYN, supra note 11, at 65 (quoting Town Meeting of the Air (broadcast, Dec. 2, 1947)). Many of these Japanese Peruvians were naturalized or native-born Peruvian citizens, but of course, many were also Japanese citizens. Harold Ickes was the father of Raymond Ickes, who had been sent to Lima by the Justice Department to participate in the creation of U.S. lists of proposed Japanese Peruvian internees, and he was also the only senior official in the Roosevelt administration to speak out against the post-war deportation of Japanese Latin Americans.


[FN20]. REISCHAUER, supra note 19, at 153.

[FN21]. According to Reischauer, "[s]ince there was little unused land ... and the average size of a farm ... was only 2 1/2 acres, the increased rural population had to drain off to the cities, but the new industries could not grow fast enough to absorb it all." Id.

[FN22]. GARDINER, supra note 7, at 3.

[FN23]. See id. According to Emmerson, they were "all destined for the coastal sugar plantations." EMMERSON, supra note 7, at 130.

[FN24]. By 1923, when labor contracts were abolished, emigration companies had brought 17,764 Japanese workers to Peru and in the following years Japanese workers continued to migrate independently. See GARDINER, supra note 7, at 4.

[FN25]. Id. at 6. John Emmerson, Second Secretary of the U.S. Embassy in Lima, reported that by the early 1940s Japanese entrepreneurs controlled large percentages of the barber shops, bakeries, poultry farms, machine shops and glass dealers. They made most of the buses in Lima; were "prominent" in the manufacture of rubber products, hosiery and hats; were known as the best plumbers, carpenters and florists; and produced 12.5% of Peru's cotton. See EMMERSON, supra note 7, at 133.

[FN26]. GARDINER, supra note 7, at 8.

[FN27]. See id.

[FN28]. See EMMERSON, supra note 7, at 134; see also GARDINER, supra note 7, at 9.

[FN29]. See EMMERSON, supra note 7, at 131. There had been, however, a net decrease in the Japanese Peruvian population through the 1930s. See id. at 130.

[FN30]. According to Gardiner, women and children composed 40% of the Japanese community. See GARDINER, supra note 7, at 10. Emmerson states that "more than half of the Japanese population was female." EMMERSON, supra note 7, at 136.


[FN32]. Id. at 17. Between April 1942 and July 1943 this Committee submitted 21 programs of action to the governments of the Western Hemisphere. See id.

[FN33]. Id. at 18.

[FN34]. See id. (citing the Emergency Committee's Annual Report (July 1943) and the Emergency Committee's Second Annual Report (1944)); see also WEGLYN, supra note 11, at 59.

[FN35]. See WEGLYN, supra note 11, at 59. The shipping was handled by the Special War Problems Division of the State Department, using U.S. Army transports.
[FN36]. See id.

[FN37]. Id. at 58 (quoting Letter from Edwin Wilson, to Sumner Welles (Oct. 20, 1941) (Dept. of State File 740.00115 Pacific War/11/3, RG 59, National Archives ("NA")) (on file with author)). As early as December 8, 1941, U.S. representatives in Costa Rica wired the State Department that "[o]rders for internment of all Japanese in Costa Rica have been issued." Id. at 58 (quoting Telegram #375 from Lane, to State Department (Dec. 8, 1941) (DS File 740.00115 Pacific War/9, RG 59, NA) (on file with author)).

[FN38]. See EMMERSON, supra note 7, at 138.


[FN40]. See EMMERSON, supra note 7, at 138.

[FN41]. See id. at 126.

[FN42]. See GARDINER, supra note 7, at 109.

[FN43]. See EMMERSON, supra note 7, at 139.

[FN44]. Id. at 137-38 (emphasis added). These and other measures are outlined in Emmerson’s Memorandum on the Control of Japanese in Peru. See Enclosure no. 1 to Dispatch no. 7288 from Henry R. Norweb, U.S. Ambassador to Peru, to Sumner Welles, U.S. Secretary of State (Mar. 24, 1942) (740.00115 Pacific War/1706, RG 59, NA) (on file with author) [hereinafter Memorandum from Henry R. Norweb, Mar. 24, 1942].

[FN45]. GARDINER, supra note 7, at 19 (quoting Memorandum from Henry R. Norweb, Mar. 24, 1942, supra note 44, on which Assistant Secretary of State Breckinridge Long penciled "ignore this ... in replying").

[FN46]. Id. at 19.

[FN47]. Id. at 23 (quoting Memorandum from Henry R. Norweb, Mar. 24, 1942, supra note 44).

[FN48]. WEGLYN, supra note 11, at 60 (quoting Letter from Henry R. Norweb, U.S. Ambassador to Peru, to Sumner Welles, U.S. Secretary of State (July 20, 1942) (DS File 740.00115 Pacific War/1002 2/6, RG 59, NA) (on file with author)).

[FN49]. Id. at 61 (quoting Memorandum from Philip W. Bonsal, to Selden Chapin (Sept. 26, 1942) (SD File 740.00115 Pacific War/1002 5/6, RG 59, NA) (on file with author)).

A December 1942 Intelligence Report from the Naval Attaché in Lima reflects this disregard for the law: "One of the most encouraging phases of this limited exodus of undesirable Axis nationals is that no attention was paid to the fact that one of the Germans was a naturalized Peruvian and two were married to Peruvian women." DEPT. OF THE NAVY, Intelligence Report, Dec. 20, 1942 (on file with author).

Denaturalization and even the stripping of citizenship of U.S.-born Americans was considered as well. In a memorandum to Secretary of State Cordell Hull dated December 17, 1943, Assistant Secretary Breckinridge Long stated, "the Attorney General is reported to have said recently to one of the [Senate] Committees that he
had a formula under one of our statutes by which a native-born Japanese or one naturalized could be divested of his American citizenship--thus making him eligible for deportation." WEGLYN, supra note 11, at 190.

[FN50]. GARDINER, supra note 7, at 25; see also EMMERSON, supra note 7, at 139. The Spanish embassy was used because Spain represented Japanese interests in Peru. It seems inappropriate to term this "voluntary" in light of the unremitting increase in governmental repression of the Japanese in Peru. It also should be noted that these men were volunteering for immediate repatriation, not indefinite incarceration in prison camps in the Texas desert. It is similarly inappropriate to term "voluntary" the departure of women and children who left to join husbands and fathers who had been abducted.

[FN51]. GARDINER, supra note 7, at 27.

[FN52]. Id. at 28.

[FN53]. EMMERSON, supra note 7, at 139.

[FN54]. Id.

[FN55]. Id. at 140.

[FN56]. Id. at 143.

[FN57]. GARDINER, supra note 7, at 41.

[FN58]. EMMERSON, supra note 7, at 143.

[FN59]. See id. at 143-44; GARDINER, supra note 7, at 65-67; WEGLYN, supra note 11, at 61.

[FN60]. See GARDINER, supra note 7, at 43.

[FN61]. Id.

[FN62]. Letter from George H. Butler, First Secretary of Embassy, to the Secretary of State (July 10, 1943) (DS File 740.00115 Pacific War/1729, RG 59) (on file with author). U.S. officials forced Mrs. Nishino onto an army transport and sent her to a prison camp in the United States while, at the same time, sending a memorandum to the Spanish Embassy, which represented Japanese interests, "disclaim[ing] all responsibility for any untoward incident which may occur during Mrs. Nishino's stay in the United States ... or during the voyage." Memorandum from Henry R. Norweb, U.S. Ambassador to Peru, to Pablo de Churruca y Dotes, Spanish Ambassador to Peru (July 17, 1943) (DS File 740.00115, Pacific War/1729, RG 59) (on file with author).

[FN63]. See GARDINER, supra note 7, at 67-69.

[FN64]. Before they got there, however, this group spent over three months clearing jungle in Panama: [A]s the rains beat down, the men were forced to work without renumeration. Denied communication with their families, unaccustomed to the hard labor, resenting the unsavory food and their inadequate shelter under intolerable weather conditions,
the men understandably put forth no special effort. In return guards occasionally kicked, beat, or nicked with their bayonets some passive worker. Id. at 76.

Gardiner reports that a thirty-one year-old merchant became so distraught that one day he began running for freedom, barefoot and in his pajamas. Miraculously he survived after guards in the towers felled him with their machine guns. See id. at 77.

[FN65]. See id. at 69. Gardiner reports that one man was incarcerated for insubordination when he refused to work and that all of the men were forced to sign papers stating that they had been well treated on board. See id.

[FN66]. See id. at 69-70. They did not have visas either, as U.S. consular officials had been instructed not to issue any. See id. at 29.

[FN67]. See GARDINER, supra note 7, at 70.

[FN68]. According to Gardiner, "[h]e and Pedro Beltran [later Peruvian ambassador to the United States] agreed that the removal of 30,000 Japanese they claimed were in the country would be the most welcome aid Washington could render Peru." Id. at 53.

[FN69]. See id. at 53.

[FN70]. See infra notes 73-75 and accompanying text.

[FN71]. GARDINER, supra note 7, at 55.

[FN72]. WEGLYN, supra note 11, at 63 (quoting letter from Cordell Hull, U.S. Secretary of State, to Franklin D. Roosevelt, U.S. President (Aug. 27, 1942) (OF 20, FDR Library) (on file with author) (emphasis added)).

[FN73]. GARDINER, supra note 7, at 56 (quoting Memorandum from Francis Biddle, U.S. Attorney General, to Cordell Hull, Secretary of State (June 25, 1942) (DS File 740.00115 EW1939/3610, RG59 NA) (on file with author)).

[FN74]. Apparently the State Department took this position because it was aware that the laws of most of the Latin American republics would not allow them to detain Axis nationals for the duration of the war. See id. at 57.

[FN75]. Id. (quoting Department of State Memorandum (Nov. 6, 1942) (DS File 311.9415/251) and Memorandum from Francis Biddle, U.S. Attorney General, to Secretary of State (Nov. 9, 1942) (DS File 740.00115 PW/1126, GR59, NA) (on file with author)).

[FN76]. WEGLYN, supra note 11, at 63 (quoting Letter from Francis Biddle, U.S. Attorney General, to the Secretary of State (Jan. 11, 1943) (DS 740.00115 Pacific War/1276, RG59, NA) (on file with author)).

[FN77]. People like Arturo Shinee Yakabi were still among those taken on the next ship. Yakabi, twenty-one years old, had been born in Peru. As the oldest child of poor farmworkers, he had been sent at age 15 to work in a bakery in Callao. In February 1943 he was awakened in his room behind the bakery, seized by the Peruvian police and held in a Lima jail for three weeks. Apparently his employer had avoided
deportation by paying a bribe and offering Yakabi as a substitute. Yakabi's mother
visited repeatedly and the police told the family that if they had money something
could be "worked out." They did not have any, so at 3:00 a.m. on February 24,
carrying all he owned in a flour sack, Yakabi was put on a truck and loaded onto the
Frederick C. Johnson. He joined 119 other Japanese Peruvians headed to concentration
camps in Missouri, Montana and later, the Texas desert. See GARDINER, supra note 7,
at 72, 77-78.

[FN78]. Id. at 73.

[FN79]. In addition to those men who were deemed "dangerous," the United States
wanted the families of the men who had already been interned, as the men were more
likely to agree to be repatriated to Japan if their families were with them. See id. at 73.

[FN80]. Weglyn says of the Japanese Latin Americans in Justice Department custody:
"A total of 1,094 of them, officially designated as 'voluntary detainees,' answered
the State Department's 'invitation' to place themselves in war-duration voluntary
incarceration with the 1,024 men who had been seized and spirited to the mainland by
the U.S. military." WEGLYN, supra note 11, at 62; see also EMMERSON, supra note 7,
at 139; GARDINER, supra note 7, at 95.

[FN81]. GARDINER, supra note 7, at 22.

[FN82]. That these, and the WRA camps, were in fact, concentration camps, has been
acknowledged by many who were responsible for them. President Roosevelt said in
1944, that "it is felt by a great many lawyers that under the Constitution [the
Nisei] can't be kept locked up in concentration camps." WEGLYN, supra note 11, at
217. Upon his retirement as Associate Justice of the Supreme Court, Tom Clark said,
"[w]e picked [the Japanese Americans] up and put them in concentration camps. That's
the truth of the matter." Id. at 114.

[FN83]. See GARDINER, supra note 7, at 29-30.

[FN84]. See id. at 30.

[FN85]. See id.

[FN86]. See id. at 32-33.

[FN87]. Id. at 83.

[FN88]. See GARDINER, supra note 7, at 97-98.

[FN89]. See id. at 37-38.

[FN90]. See id. at 36, 75, 98-103.

[FN91]. See id. at 49.

[FN92]. Albert E. Clattenberg, Brief Review of Impressions Obtained at Immigration
Detention Stations at Kennedy, Crystal City and Seagoville, Texas (July 9, 1943) (on
file with author).

[FN93]. Id. He blamed the conditions on the "apparent failure of the appropriate agencies of this Government to accord the Immigration Service the priority ratings necessary for provision of material articles requisite for the construction and operation of a camp according to a standard affording security against reprisals for our Americans detained abroad." Id.

[FN94]. GARDINER, supra note 7, at 110.

[FN95]. See id. at 20-21.

[FN96]. WEGLYN, supra note 11, at 182.

[FN97]. Id. at 55 (quoting Letter from John Dingell, U.S. Congressman from Michigan, to Franklin D. Roosevelt (Aug. 18, 1941) (on file with author)). As Weglyn points out, according to the 1940 census, there were approximately 127,000 Japanese Americans in the continental United States, less than 50,000 of whom were aliens. See id. at 285 n.1.

[FN98]. Id. at 182.

[FN99]. Id. at 56.

[FN100]. GARDINER, supra note 7, at 47 (citations omitted).

[FN101]. Id. at 50.

[FN102]. Within days of the U.S. declaration of war, the Japanese had accepted a U.S. proposal for an exchange of diplomatic personnel at the east African port of Lourenco Marques (now Maputo). A memorandum of June 15, 1942 outlines the agreement. See State Department Memorandum, Summary of American-Japanese Exchange Agreement (June 15, 1942) (on file with author); see also GARDINER, supra note 7, at 46-47.


[FN104]. GARDINER, supra note 7, at 48. Approximately 400 additional Japanese from the east coast of South America were picked up in Rio de Janeiro. See id.

[FN105]. Gardiner concludes:

When the United States put the women and children from Costa Rica and Panama, the men from Peru, and the occasional family from any of those countries aboard the Gripsholm, those Latin American Japanese, not one of whom had been charged, tried, or convicted of espionage, sabotage, or subversive activity, were pawns in a human traffic Washington hoped to continue. Id. at 50.

[FN106]. Memorandum from the Spanish Embassy, to the U.S. Department of State, (Oct. 1, 1942), reprinted in WEGLYN, supra note 11, at 183-84 app. 7A. According to the Spanish Embassy:

The Japanese diplomats and residents of Panama who recently arrived in Japan, denounce the inhuman treatment given the Japanese in Panama.

They advise that on December 7th, all Japanese residents in Panama were arrested without allowing them to take anything more with them than what they had on, and
were held up to 24 hours in the jail of Panama and by the Police of Colon without
any food or water.
On the 8th, they were turned over to the American Authorities and for one week
were put in very unsanitary concentration camps, forced to work and given extreme
punishment.
Immediately after their arrest, the homes and residences of these detainees were
looted.
Upon being transferred, the American Authorities of the Canal Zone, confiscated
all the money that they had ....
Among the Japanese detainees, there was one named Alejandro who fell ill, and
neither the American or Panamanian Authorities gave him medical attention until the
2nd of May, when he was placed in a hospital and where he died the same day.
Id.

[FN107]. Memorandum from the Spanish Embassy, to the U.S. Department of State (May
29, 1944), reprinted in WEGLYN, supra note 11, at 185.

[FN108]. WEGLYN, supra note 11, at 120 (quoting Memorandum from Myer to All Project
Directors (Dec. 9, 1942) (on file with author)).

[FN109]. See id. at 121-25.

[FN110]. Id. at 125 (quoting WAR RELOCATION AUTHORITY, WRA: A STORY OF HUMAN
CONSERVATION 50 (1946)).

[FN111]. Id. (quoting Memorandum from Spanish Embassy to State Department (Mar. 13,
1944) (on file with author)).

[FN112]. See id. at 156-57.

[FN113]. See WEGLYN, supra note 11, at 160-66.

[FN114]. Id. at 171 (quoting Secretary of State Hull, to Secretary of War Stimson
(Jan. 11, 1944) (WRA File 36.239, RG 210, NA) (on file with author)).

[FN115]. Id. at 173.

[FN116]. Even though they--unlike the Japanese--had been determined to be
"dangerous," over half the Italians and almost a third of the Germans were "interned
at large," having been released in a parole-type status after an investigation of
their cases. All of the Japanese were kept in camps. See Memorandum on the Removal
of Enemy Aliens Brought Here from the Other Americas, from J.E. Doyle, to the Acting
Secretary of State (Sept. 24, 1945) (on file with author).

[FN117]. See Sense, supra note 2 (quoting apology of President Clinton); see also
WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 205-06, 211
(1998) (noting that judicial review is ill-suited to determine "military necessity"
and that on the West Coast there was real fear of attack by Japanese forces).

[FN118]. See Eugene V. Rostow, The Japanese American Cases--A Disaster, 54 YALE L.J.
489 (1945).

[FN119]. GARDINER, supra note 7, at 129 (quoting Memorandum of Jonathan Bingham,
Chief of the State Department’s Alien Enemy Control Section (Dec. 13, 1945),
published in 9 FRUS 298 (1945)).

[FN120]. Memorandum of Meeting, Post-War Disposition of Interned Alien Enemies
Received from the Other American Republics 1 (Aug. 31, 1944) (on file with author)
[hereinafter Memorandum of Meeting].

[FN121]. See id. at 2.


[FN123]. Memorandum of Meeting, supra note 120, at 2.

[FN124]. See id. at 4.

[FN125]. See id. (emphasis added). By January 31, 1946, of the 513 Japanese from
Latin America still in U.S. custody, 495 were from Peru. See GARDINER, supra note 7,
at 134, tbl. 9.

[FN126]. See Proclamation No. 2662, reprinted in 50 U.S.C., Supp. IV, app. note
prec. § 1 (1945) and in 59 Stat. 880 (1945).

[FN127]. See Memorandum, Disposition of German Internees from Peru, from Joseph
Flack, to Mr. Dreier (Nov. 7, 1945) (on file with author) (with attachments giving
the history of the disagreement).

[FN128]. GARDINER, supra note 7, at 152.

[FN129]. Id. at 153.

(1998)); see also J. Gregory Sidak, War, Liberty and Enemy Aliens, 67 N.Y.U. L. REV.
1402, 1416-20 (1992) (discussing the use of the Alien Enemy Act during World War
II).

[FN131]. Proclamation No. 2662, reprinted in 50 U.S.C., Supp. IV, app. note prec. §
1 and in 59 Stat. 880; see also Memorandum from J.E. Doyle, Summary Statement on
Removal of Enemy Aliens Brought Here from the Other Americas, to Acting Secretary
(Sept. 29, 1945) 2-3, (711.62115 AR/9-2945, NA) (on file with author) [hereinafter
J.E. Doyle, Summary Statement].

1 and in 59 Stat. 880.

[FN133]. See J.E. Doyle, Summary Statement, supra note 131, at 3.

[FN134]. See GARDINER, supra note 7, at 132.


[FN136]. WEGLYN, supra note 11, at 64 & n.28 (stating that during this period 1700
Japanese Peruvians (700 men and their dependents) were sent to Japan, but noting
that the State Department reports 1440 people "voluntarily returned to Japan").

[FN137]. Id. at 64.

[FN138]. In Ex parte Kenzo Arakawa, a habeas corpus proceeding challenging the government's right to hold the plaintiff in custody at Seabrook Farms and to deport him to Japan, the district court held that the plaintiff was lawfully detained pursuant to the Alien Enemy Act and that the government could deport him to Japan without his consent despite the fact that the Axis nations had unconditionally surrendered and the President had proclaimed that hostilities had ceased. 79 F. Supp. 468, 470-71 (E.D. Pa. 1947). But see United States ex rel. Paetau v. Watkins, 164 F.2d 457 (2d Cir. 1947) (holding that an alien brought to the United States against his will for internment as an alien enemy could not be deported as an "immigrant" until he had been given the opportunity to depart voluntarily); United States ex rel. Von Heymann v. Watkins, 159 F.2d 650 (2d Cir. 1947) (holding that a German brought to the United States from Costa Rica and interned pursuant to the Alien Enemy Act could be ordered removed from the country, but could not be held in custody unless it was shown that he "refused or neglected" to depart voluntarily).

[FN139]. GARDINER, supra note 7, at 136.

[FN140]. Id. at 136 & n.7.

[FN141]. Thus, the arrest warrant of Iwamori Sakasegawa stated that he was to be deported because he did not have a valid visa, did not have an unexpired passport and was ineligible for citizenship at the time he entered the United States. See id. at 144-45.

At this time, the restrictions of the Naturalization Act of 1790 which originally limited citizenship to "free white persons" had been modified to allow the naturalization of persons of African descent and persons from certain Asian countries, but the racial restriction still applied to those of Japanese descent. See Natsu Taylor Saito, Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law, 76 OR. L. REV. 261, 271-72 (1997) [hereinafter Alien and Non-Alien Alike]. See generally HANEY LOPEZ, supra note 3; Charles J. McClain, Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship, 2 ASIAN L.J. 33 (1995).


[FN143]. See CRISTGAU, supra note 142, at 177-78; GARDINER, supra note 7, at 141-51; WEGLYN, supra note 11, at 64-65.

[FN144]. GARDINER, supra note 7, at 168 (citing Memorandum of B.C. Davis, to State Department (Apr. 15, 1949), (FW 711.94115 AR/4-1349, RG 59, NA) (on file with author)).

[FN145]. Id. at 171.

[FN146]. EMMERSON, supra note 7, at 149.

[FN147]. See generally Manjusha P. Kulkarni, Note, Application of the Civil


[FN150]. The Statute of International Court of Justice, established in June 1945, states in Article 38 that in making decisions "in accordance with international law," the ICJ shall apply:
(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of law recognized by civilized nations; [and]
(d) [as a subsidiary and non-binding means of determination,] judicial decisions and the teachings of the most highly qualified publicists of the various nations.
In May 1945, in drafting the Executive Agreement Relating to the Prosecution of European Axis War Criminals, the Allied Powers agreed that "'International law' shall be taken to include treaties between nations and the principles of the law of nations as they result from the usages established among civilized peoples from laws of humanity, and the dictates of the public conscience." Executive Agreement Relating to the Prosecution of European Axis War Criminals (drafts 3 & 4), ¶ 12 in THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 206 (Bradley F. Smith ed., 1982).


[FN152]. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3576, T.I.A.S. No. 3365, 75 U.N.T.S. 287 [hereinafter Geneva Convention], reprinted in DOCUMENTS ON THE LAWS OF WAR, 271, 288 (Adam Roberts & Richard Guelff eds., 1982) [hereinafter DOCUMENTS]. The United States signed the treaty in 1949 and ratified it in 1955. While Article 49 deals specifically with the treatment of civilians in territory which has been occupied, one could not expect there to be less protection of civilians in territory which has not been directly occupied, but has a government which collaborates with a belligerent state to the extent of deporting its civilians into the custody of that belligerent state. See id. See generally Civilian Protection in Modern Warfare: A Critical Analysis of the Geneva Civilian Convention of 1949, 14 VA. J. INT'L L. 123 (1973).

[FN153]. Geneva Convention, art. 146, supra note 152, reprinted in DOCUMENTS, supra note 152, at 323.

[FN154]. Id. Article 4 defines protected persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals." Id. art. 4, DOCUMENTS, supra note 152, at 273.


[FN156]. See DOCUMENTS, supra note 152, at 271 (quoting the Prefatory Note to the 1949 Geneva Convention).


[FN158]. Henckaerts, supra note 151, at 480 (quoting COMMENTARY TO THE IVTH GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 4-5, 279 (Jean Pictet ed., 1958)); see also Raymond T. Yingling & Robert W. Ginnane, The Geneva Conventions of 1949, 46 AM. J. INT'L L. 393, 411-24 (1952) (describing the provisions relating to civilians). De Zayas states, "Analogously, it would have seemed unnecessary to the delegates convened at The Hague in 1907 to draft special articles to prohibit cannibalism or human sacrifices." De Zayas, supra note 155, at 211.

[FN159]. RICHARD HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 1 (1983); see also Henckaerts, supra note 151, at 483.

[FN160]. HARTIGAN, supra note 159, at 45, 49; see also Henckaerts, supra note 151, at 483.


[FN162]. See France ex rel Madame Julien Chevreau, M.S. Dep't of State (file no. 500, AIA/1197) (on file with author); see also infra note 174 and accompanying text.

[FN163]. See SCHWARZENBERGER, supra note 161, at 229 (citations omitted).

[FN164]. De Zayas, supra note 155, at 213-14, (citing the Inter-Allied Meeting in St. James' Palace in London (Sept. 24, 1941) which endorsed the Principles of the Atlantic Charter; the Allied Declaration on German War Crimes (adopted Jan. 13, 1942); a Decree on the Punishment of German War Crimes Committed in Poland, adopted by the Polish Exile Cabinet (Oct. 17, 1942); and declarations at the Moscow Conference (Oct. 19-30, 1943)).
[FN165]. Article 6 of the Charter of London, which established the basis for the International Military Tribunal at Nuremberg, gave the Tribunal jurisdiction over three categories of crimes: (1) crimes against peace; (2) war crimes, "namely, violations of the laws or customs of war ... [which] shall include, but not be limited to ... ill-treatment or deportation to slave labor or for any other purpose of civilian population ..."; and (3) crimes against humanity, which included "deportation, and other inhumane acts committed against any civilian population ...; or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." Agreement and Charter of the International Military Tribunal, art. 6, 82 U.N.T.S. 279 (1945), reprinted in THE AMERICAN ROAD TO NUREMBERG, supra note 150, at 212, 215. See generally William J. Penrick, Attacking the Enemy Civilian as a Punishable Offense, 7 DUKE J. COMP. & INT'L L. 539, 541-49 (1997) (discussing, in the context of the International Criminal Tribunal for the former Yugoslavia, how the concepts of military objective and proportionality limit what can be done to civilians under the laws and customs of war).

[FN166]. See SCHWARZENBERGER, supra note 161, at 23. He continues:

In the Charter of the Tokyo Tribunal, the subject is specifically mentioned only under the latter heading .... [T]here is, however, no doubt about it that breaches of the law of belligerent occupation constitute breaches of the laws and customs of war, and therefore, amount to war crimes in the technical sense. Thus, under both Charters, deportation is a war crime in the technical sense and a crime against humanity.

Id.

[FN167]. See id. at 225-26, 230-32. Compulsory labor was also forbidden by Article 52 of the Hague Regulations of 1899 and 1907. See id. at 224-25.

[FN168]. See id. at 225-26.

[FN169]. See supra note 64 and accompanying text. Article 2 of the International Labour Organization Convention, No. 29, Concerning Forced or Compulsory Labour defines forced labor as "all work or service which is exacted from any person under the menace of a penalty and for which the person has not offered himself voluntarily." June 28, 1930, 39 U.N.T.S. 55, 58; see also Parker & Chew, supra note 149, at 524.

[FN170]. Henckaerts summarizes the state of the law regarding deportations at the time of the Japanese Peruvian internment:

When all the pieces of this international humanitarian law puzzle are put together, the picture becomes apparent. Deportations were prohibited under the Hague Regulations as falling below the standards of civilization. As such they have become part of customary international law merely clarified in Geneva IV. Being part of customary international law and prohibited by the Hague Regulations, the Charter of the International Military Tribunal did not run counter to the adage nullem crimen, nulla poena sine lege when it classified deportations as an international crime. Henckaerts, supra note 151, at 484.

Schwarzenberger notes that, ironically, the Japanese delegate to the 1907 conference proposed declaring such internment illegal, but the Belgian delegate rejected it as redundant because it was generally accepted that belligerents could only intern prisoners of war. See SCHWARZENBERGER, supra note 161, at 227 n.45.

See id. at 221.

See id.

Id. at 222.

Id. at 223.


Id. art. 41, reprinted in DOCUMENTS, supra note 152, at 286.

Id. art. 43, reprinted in DOCUMENTS, supra note 152, at 286-87.


Proclamation No. 2525, 6 Fed. Reg. 6321 (1941); Proclamation No. 2526, 6 Fed. Reg. 6323 (1941); Proclamation No. 2527, 6 Fed. Reg. 6324 (1941); reprinted in 36 AM. J. INT'L L. 236-243 (1942); see Sidak, supra note 130, at 1405-24 (summarizing the Alien Enemy Act and its application).

See supra notes 131-35 and accompanying text.

During World War II, Attorney General Biddle stated that although the Act did not entitle enemy aliens to hearings, he believed "each enemy alien who had been taken into custody should have an opportunity for a hearing on the question whether he should be interned" and more than 100 hearing boards were set up for this purpose. See Sidak, supra note 130, at 1416 (quoting 1942 ATT'Y GEN. ANN. REP. 9) (hearings not granted to the interned Japanese Latin Americans); see also Michael Brandon, Note, Legal Control Over Resident Enemy Aliens in Time of War in the United States and in the United Kingdom, 44 AM. J. INT'L L. 382 (1950).

SCHWARZENBERGER, supra note 161, at 240-41. He bases this on the Nuremberg Tribunal's reference to both prophylactic hostages and reprisal prisoners as hostages, noting that they "have in common that they are arrested on grounds not involving any personal responsibility of their own." Id. This definition clearly fits the interned Japanese Latin Americans.

HARTIGAN, supra note 159, at 56.

Apparently this was because of the bitterness still existing among some parties regarding the taking of hostages in the Franco-German War of 1870-71. See SCHWARZENBERGER, supra note 161, at 234.

[FN188]. Id. at 240 (citing IMT Proceedings (English ed.), Pt. 5, at 124 (1946)).


[FN190]. SCHWARZENBERGER, supra note 161, at 239-40. Although the Charter of the Tribunal listed the killing of hostages as an example of war crimes, the Tribunal did not rule specifically on the taking of hostages.

[FN191]. See Geneva Convention, supra note 152, art. 3(1)(b), reprinted in DOCUMENTS, supra note 152, at 273. Article 3 of the 1949 Geneva Convention states that in the case of armed conflict within the territory of a party, the taking of hostages is prohibited at any time and in any place with respect to persons taking no active part in the hostilities. See id.

[FN192]. See id. art. 34, reprinted in DOCUMENTS, supra note 152, at 284.

[FN193]. See Parker & Chew, supra note 149, at 524; see also Jimenez de Arechaga, International Law in the Past Third of a Century, 159 REC. DES COURS 285-87 (1978), reprinted in HENKIN ET AL., supra note 148, at 583 ("A State discharges the responsibility incumbent upon it for breach of an international obligation by making reparation for the injury caused."). This principle was also recognized by the district court in Rodriguez-Fernandez v. Wilkinson, 505 F. Supp. 787, 798 (D. Kan. 1980), aff'd, 654 F.2d 1382 (10th Cir. 1981).

The explanation that the violations of international law described above were a product of "wartime hysteria" is belied not only by the treatment of Japanese Peruvians immediately after the war, but also by the U.S. government's consistent refusal to compensate the victims in the intervening 50 years.

[FN194]. Chorzow Factory (Indemnity), 1928 P.C.I.J. (ser. A) No. 17, at 47; see Parker & Chew, supra note 149, at 524, n.159.

[FN195]. See SCHWARZENBERGER, supra note 161, at 583.

[FN196]. Hague Convention, supra note 157, art. 16, reprinted in DOCUMENTS, supra note 152.

[FN197]. SCHWARZENBERGER, supra note 161, at 584.

[FN198]. Id. at 221, 584.

[FN199]. Id.


[FN201]. See supra note 72 and accompanying text.


[FN206]. The American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (entered into force July 18, 1978). The United States has not signed this Convention. By virtue of its membership in the Organization of American States, however, it is bound by the American Declaration on the Rights and Duties of Man.

[FN207]. Referring to the Japanese American internment, Justice Murphy said in his dissent in Korematsu v. United States, "[n]o adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry." 323 U.S. 214, 241 (1944) (Murphy, J., dissenting).

[FN208]. Id. at 246 (Jackson, J., dissenting).

[FN209]. Marbury v. Madison, 5 U.S. 137, 163 (1803). Citing Blackstone, the Court continues, "it is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded." Id. (citations omitted).

[FN210]. EMMERSON, supra note 7, at 148.

[FN211]. See supra note 2 and accompanying text.

[FN212]. The excuse of "wartime hysteria" only illustrates why it is precisely during times of war or other national crisis that our civil liberties must be most vigilantly protected. Nonetheless, the history of Asian Americans illustrates that the internment of Japanese Americans during World War II was not an aberration attributable to wartime, but the logical extension of a long history of legalized racism. See Natsu Taylor Saito, Model Minority, Yellow Peril: Functions of "Foreigness" in the Construction of Asian American Legal Identity, 4 ASIAN L.J. 71, 77-89 (1997). Further, even if one were to accept "wartime hysteria" as part of the
motivation for the internment of Japanese Americans, it is difficult to conceive of any way in which the Japanese Latin Americans who were abducted from their countries and brought to the United States could have been seen as any kind of threat to the United States (at least until they were brought here!).


[FN214]. Rostow, supra note 118, at 494.

[FN215]. Yale Law School Professor Eugene Rostow saw clearly in 1945 that "[t]he dominant factor in the development of this policy was not a military estimate of a military problem, but familiar West Coast attitudes of race prejudice. The program of excluding all persons of Japanese ancestry from the coastal area was conceived and put through by the organized minority whose business it has been for forty-five years to increase and exploit racial tensions of the West Coast."

Id. at 496; see also id. at 492-93. See generally CRISTGAU, supra note 142 (detailing the stories of individual German and Japanese internees).


[FN217]. Exec. Order No. 9066, 7 Fed. Reg. at 1407, reprinted in 18 U.S.C. § 97a, and in 56 Stat. 173; see also IRONS, supra note 142, at 66-68; Rostow, supra note 118, at 498. Ohio Republican Senator Robert Taft raised the only objection to the bill, saying "I think this is probably the 'sloppiest' criminal law I have ever read or seen anywhere." IRONS, supra note 142, at 68.


[FN219]. Nanette Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 COLUM. L. REV. 175, 176 (1945). Slavery was, of course, imposed on African Americans by virtue of their race and protected by the Constitution and federal law. See U.S. CONST. art. I, § 2, art. II, § 9, art. IV, § 2; Paul Finkelman, A Covenant with Death: Slavery and the Constitution, AM. VISIONS, May--June 1968, at 21. However, as the Supreme Court made painfully clear in Dred Scott v. Sanford, 60 U.S. 393, 454 (1857), African Americans were not citizens under the law until the Fourteenth Amendment was enacted. See U.S. CONST. amend. XIV.

[FN221]. See id.

[FN222]. Id. Regarding the unanimity of the opinion, Irons reports that Justice Murphy's concurrence was originally written as a dissent, but Justice Frankfurter convinced him that any dissent was "playing into the hands of the enemy." JUSTICE DELAYED 49 (Peter Irons, ed.) (1989) [hereinafter JUSTICE DELAYED].

[FN223]. 320 U.S. 115 (1943). A graduate of the University of Oregon Law School and an Army Reserve officer, Min Yasui immediately reported for military service when war broke out, but was rejected because of his Japanese ancestry. In March 1942 he became the first to test the military orders by turning himself in to the Portland police. See IRONS, supra note 142, at 81-86. The district court held that the orders were unconstitutional as applied to American citizens, but that Yasui had renounced his American citizenship by working for the Japanese consulate. The Supreme Court reversed on both issues. It sustained the curfew conviction by referring to Hirabayshi and held that there was no evidence that Yasui had renounced his citizenship. See Yasui, 320 U.S. at 117.

[FN224]. Korematsu, 323 U.S. at 223. Ex parte Endo was a habeas corpus proceeding brought after Mitsuye Endo had been determined to be "loyal" by the War Relocation Authority, but was still being held pending arrangements to place her in an area of the country where her presence would not cause "disorder." See 323 U.S. 283 (1944). The Court held her continued detention invalid "although temporary detention for the purpose of investigating loyalty was assumed to be valid as an incident to the program of 'orderly' evacuation approved in the Korematsu case." Rostow, supra note 118, at 512.

[FN225]. Rostow, supra note 118, at 508-09.

[FN226]. Id. at 491. He cut through to the heart of the matter: The Japanese exclusion program thus rests on five propositions of the utmost potential menace: (1) protective custody, extending over three or four years, is a permitted form of imprisonment in the United States; (2) political opinions, not criminal acts, may contain enough clear and present danger to justify such imprisonment; (3) men, women and children of a given ethnic group, both Americans and resident aliens, can be presumed to possess the kind of dangerous ideas which require their imprisonment; (4) in time of war or emergency the military, perhaps without even the concurrence of the legislature, can decide what political opinions require imprisonment, and which ethnic groups are infected with them; and (5) the decision of the military can be carried out without indictment, trial, examination, jury, the confrontation of witnesses, counsel for the defense, the privilege against self-incrimination, or any of the other safeguards of the Bill of Rights. Id. at 532.

[FN227]. See Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987); IRONS, supra note 142, at 125, 128-30.

[FN228]. See WEGLYN, supra note 11, at 274.

[FN229]. Id.
[FN230]. See id. According to Edison Uno, "[t]here was a total disregard of prevailing market value or the irreplaceable nature of items lost .... Petitioners were totally at [the government arbiters'] mercy since the Justice Department attitude was 'take it or leave it.'" Id. at 275.

[FN231]. Id. at 275.

[FN232]. Id. at 276.

[FN233]. In March 1983, after the Commission's preliminary report had been released and the coram nobis petitions had been filed, William Hohri and the National Council for Japanese American Redress filed a class action redress suit on behalf of all surviving Japanese American internees. The injuries for which they requested $24 million included "summary removal from their homes, imprisonment in racially segregated prison camps, and mass deprivations of their constitutional rights." JUSTICE DELAYED, supra note 222, at 27, 46. The case was eventually dismissed. See Hohri v. United States, 482 U.S. 64 (1987).

[FN234]. The work of the Original Legal Scholarship Collaborative, of which this Article is a part, was supported by this fund, the Civil Liberties Public Education Fund.

It should be noted that the CLA did not provide payments for Hawaiian residents who were forcibly excluded from their homes, Nisei soldiers who were not allowed to visit their families in the camps or, of course the Japanese Latin Americans. See WEGLYN, supra note 11, at 282. In Ishida v. United States, 59 F.3d 1224 (Fed. Cir. 1995) and Consolo v. United States, 65 F.3d 186 (Fed. Cir. 1995), the United States Court of Appeals for the Federal Circuit made children of "voluntary evacuees," those who had moved inland before the forced internment, eligible.

[FN235]. Although it stated that one of its purposes was to "discourage the occurrence of similar injustices and violations of civil liberties in the future," it did little to ensure that. Civil Liberties Act of 1988, 50 U.S.C. § 1989 (1988).


[FN237]. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, supra note 213, App. D.

[FN238]. 50 U.S.C. § 1989(b-7)(2)(A) defines an "eligible individual" as one who was "a United States citizen or a permanent resident alien" during the period of internment.

[FN239]. See Kulkarni, supra note 147, at 335-37.

[FN240]. See Redress Provisions for Person of Japanese Ancestry, 28 C.F.R. § 74, 54 Fed. Reg. 34157, 34160 (1989) ("persons of Japanese ancestry who were sent to the United States from other American countries for restraint and repatriation pursuant to international commitments of the United States Government for the security of the United States and its associated powers ... were determined by the Department of Justice to be illegal aliens"). Some internees who remained in the United States were able to obtain retroactive permanent resident status and they were deemed eligible for redress. See id.


[FN243]. See supra note 233 and accompanying text.

[FN244]. That the reparations paid to Japanese Americans were not required by law, but provided at Congress's discretion is illustrated by the Ninth Circuit's holding in Cato v. United States, a case seeking more than $100 million in reparations for African Americans for damages that resulted from slavery and subsequent racial discrimination. The Ninth Circuit emphasized that the reparations paid Japanese Americans did not provide any precedent for the African American plaintiffs because "[t]hose reparations were not awarded as damages in court but rather were enacted into law in the Civil Liberties Act of 1988 .... The legislature, rather than the judiciary, is the appropriate forum for this relief." 70 F.3d 1103, 1110-11 (9th Cir. 1995).

[FN245]. See Kulkarni, supra note 147, at 327-38.

[FN246]. This is a classic "Catch-22." Support for the position that aliens forcibly brought to the United States against their will should not be deemed to be here "illegally" under the immigration laws is found in a series of postwar cases that, while acknowledging the right of the government to remove the aliens, found they had not "entered" as illegal immigrants because they had not "departed" from a foreign port as required by the Immigration and Nationality Act in its definition of "immigrant." In Bradley v. Watkins, the court stated, "[t]he immigration acts, we submit, deal with aliens who are voluntarily seeking to enter the United States." 163 F.2d 328, 330 (2d Cir. 1947); see also United States ex rel Pateau v. Watkins, 164 F.2d 457 (2d Cir. 1947) (alien seized and brought to the United States for internment as an enemy alien cannot be deported as an "immigrant" until he has been afforded an opportunity to depart voluntarily). Nonetheless, these cases also do not impose any requirement that the aliens be deemed to have "immigrant" status.

[FN247]. This status has been extended to refugees, asylees, conditional entrants, aliens paroled into the United States, aliens granted suspension of deportation, Cuban and Haitian entrants and applicants for registry to allow them to qualify for federal benefits. See Sharon Carton, The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits, 14 NOVA L. REV. 1033, 1051 (1990).

In Holley v. Lavine, the Second Circuit required New York state to provide aid to a woman who, though not a permanent resident, was living permanently in the United States with the knowledge and permission of the INS. 553 F.2d 845, 851 (2d Cir. 1977); see also Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985). But see Esperanza v. Valdez, 612 F. Supp. 241, 244-45 (D. Col. 1985) (requiring specific grant of status).

[FN248]. The possibility of extending PRUCOL status to the Japanese Peruvians is discussed by Kulkarni, supra note 147, at 332-35.

federal criminal jurisdiction over an Italian defendant who had been kidnapped in Uruguay, tortured in Brazil, drugged and brought to the United States for trial) (citing Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

([FN250] Korematsu, 323 U.S. at 216.)

([FN251] Id. at 223; see also supra note 224 and accompanying text. As Bannai and Minami point out, the Supreme Court denied the connection between race and exclusion, and then justified exclusion on the basis of a race-based affinity Japanese Americans were presumed to have. See Lorraine K. Bannai & Dale Minami, Internment During World War II and Litigations, in ASIAN AMERICANS AND THE SUPREME COURT 755, 774 (Hyung-Chan Kim ed., 1992).

([FN252] See Saito, Alien and Non-Alien Alike, supra note 141, at 326-30 (discussing the shortcomings of national origin discrimination law as a remedy for discrimination against those perceived as "foreign").

([FN253] In Jacobs v. Barr, 959 F.2d 313 (D.C. Cir. 1991), a German American internee brought a class action alleging that the Civil Liberties Act's restriction of redress to persons of Japanese and Aleutian ancestry was national origin discrimination in violation of the Fifth Amendment. The court held that he had standing to bring suit, but found that, even if subjected to strict scrutiny, the statute was constitutional because Congress had "concluded that Japanese Americans were detained en masse because of racial prejudice and demagoguery, while German Americans were detained in small numbers, and only after individual hearings about their loyalty." 959 F.2d at 314.


This plenary power was used to justify holding Ignatz Mezei indefinitely on Ellis Island when he, as a returning permanent resident, was excluded as a security risk. See Shaughnessy v. Mezei, 345 U.S. 206, 215 (1953) (continued detention did not violate any statutory or constitutional right). This power, said to be inherent in sovereignty, was also the basis on which the courts allowed for the indefinite offshore detention of Haitians and Cubans trying to gain political asylum in the United States. See Fernandez-Roque v. Smith, 734 F.2d 576, 582 (11th Cir. 1984) (upholding detention of Cubans; "[i]ke the court in Jean, we find [Mezei] to be controlling"); Jean v. Nelson, 727 F.2d at 969 (upholding the detention of Haitian asylum seekers).

([FN257] See generally Legomsky, supra note 256; Motomura, supra note 256.

([FN258] See, e.g., Mathews v. Diaz, 426 U.S. 67, 80 (1977) ("The fact that Congress has provided some welfare benefits for citizens does not require it to provide like benefits for all aliens."). Such distinctions are also found in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193,

[FN259]. For a discussion of the difficulties of applying theories of national origin discrimination to claims related to perceived "foreignness," see Saito, Alien and Non-Alien Alike, supra note 141, at 326-30.

[FN260]. The American Convention on Human Rights, Article 46(1)(a) states that a requirement of admission of a petition or communication is that "the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law." The American Convention on Human Rights, supra note 206; see also European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 312 U.N.T.S. 221, E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45, Protocol No. 5, E.T.S. 55 and Protocol No. 8, E.T.S. 118 ("The Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law ....").


[FN262]. U.S. CONST., art. VI, cl. 2.


[FN265]. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, supra note 179, Introduction; see also Filartiga v. Peña-Irala, 630 F.2d 871, 876 (1980) ("Upon ratification of the Constitution, the thirteen former colonies were fused into a single nation, one which, in its relations with foreign states, is bound both to observe and construe the accepted norms of international law, formerly known as the law of nations.").

[FN266]. See ANTHONY D'AMATO, INTERNATIONAL LAW COURSEBOOK 261-64 (1994) (discussing theories of "monism" and "dualism" in the application of international law in U.S. courts).

[FN267]. Id. at 263.

[FN268]. This means that if a domestic law is enacted which conflicts with pre-existing international law—a treaty the United States has ratified, perhaps—the courts presume that Congress intended that result, and will uphold the domestic law as long as it is within the limits of the Constitution. As the district court explained in United States v. Palestine Liberation Organization:

Under our constitutional system, statutes and treaties are both the supreme law of the land, and the Constitution sets forth no order of precedence .... Wherever possible, both are to be given effect .... Only where a treaty is irreconcilable with a later enacted statute and Congress has clearly evinced an intent to supersede a treaty by enacting a statute does the later enacted statute take precedence. 695 F. Supp. 1456, 1464 (S.D.N.Y. 1988) (holding that the United Nations Headquarters Agreement was not superseded by the Anti-Terrorism Act).
FFN269. 788 F.2d 1446, 1453 (11th Cir. 1986). The court noted, however, that "public international law is controlling only 'where there is no treaty and no controlling executive or legislative act or judicial decision.'" Id. (quoting The Paquete Habana, 175 U.S. at 700).

FFN270. Id. (citing RESTATEMENT OF FOREIGN RELATIONS LAW OF UNITED STATES, supra note 179, § 131 cmt. d, draft no. 6 (1985)).

FFN271. Attorney sanctions under Federal Rule of Civil Procedure 11 were imposed on plaintiffs' counsel for raising allegedly frivolous claims in Saltany v. Reagan, 886 F.2d 438 (D.C. Cir. 1989), a suit brought by and on behalf of wounded and deceased victims of the 1986 U.S. bombing of residential areas on Benghazi and Tripoli, Libya. See Anthony D'Amato, The Imposition of Attorney Sanctions for Claims Arising from the U.S. Air Raid on Libya, 84 AM. J. INT'L L. 705, 706 (1990) ("The imposition of sanctions casts a serious chilling effect upon all attorneys who engage in international human rights litigation."). Sanctions were also sought by the government in Haitian Centers Council, Inc. v. McNary, 789 F. Supp. 541 (E.D.N.Y. 1992), a case challenging the policy of detaining Haitian refugees and refusing to allow them access to legal council even after they had been found to have a credible fear of persecution. See Harold Hongju Koh, The Human Face of the Haitian Interdiction Program, 33 VA. J. INT'L L. 483, 485 (1993) ("[T]he government ... demanded that we post a $10,000,000 bond .... Rule 11 sanctions run against both the clients and the lawyers personally, which gave us considerable concern."); see also Rule 11 Report: Bush Administration Accused of Seeking Sanctions for Political Purposes, 6 INSIDE LITIG. 15 (1992).


FFN273. Id.

FFN274. 630 F.2d 876 (2d Cir. 1980).


[FN281]. American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, O.A.S. Off. Rec. OEA/Ser. L/V/I.4 Rev. (1965). Among other relevant provisions, Article I provides that "[e]very human being has the right to life, liberty and the security of his person;" Article V says that "[e]very person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life;" Article VIII says that "[e]very person has the right to fix his residence within the territory of the state of which he is a national, to move about freely within such territory, and not to leave it except by his own will;" and Article XXV provides that "[n]o person may be deprived of his liberty except in the cases and according to the procedures established by pre-existing law." Id.


[FN283]. See THOMAS BUERGENTHAL, INTERNATIONAL HUMAN RIGHTS, 180 (2d ed. 1995).

[FN284]. American Convention on Human Rights, supra note 206. The Inter-American Court of Human Rights is established by Chapter VII of the Convention. See id.

[FN285]. BUERGENTHAL, supra note 283, at 194-95.

[FN286]. See Richard J. Wilson, Researching the Jurisprudence of the Inter-American Commission on Human Rights: A Litigator's Perspective, 10 AM. U. J. INT'L L. & POL'Y 1 (1994); see also Kam Nakano, supra note 147, at 20-25 (arguing that U.S. refusal
to hear the claims of Japanese Latin Americans is an ongoing violation of the American Declaration of Rights and Duties of Man).

The Commission has heard claims brought by individuals against the United States. In 1998 it ruled that the United States had violated William Andrews' rights under the Declaration to life, to equality before the law without regard to race, to an impartial hearing and to be free from cruel, infamous or unusual punishment. See Organization of American States, Inter-American Commission on Human Rights, Report No. 57/96, Case 11.139, United States, OEA/ser/L./V./II.98, doc. 7.rev. (Feb. 19, 1998) (on file with author). Andrews had been executed by the state of Utah despite significant evidence of racism in the proceedings, including an incident in which a juror handed the bailiff at trial a napkin on which "hang the niggers" was written. Id. at 39-40; see Andrews v. Shulsen, 485 U.S. 919, 920 (1988) (Marshall, J. dissenting from denial of certiorari); Capital Punishment on the 25th Anniversary of Furman v. Georgia, A Report by the Southern Center for Human Rights 5 (1997) (reproducing the note). While such judgments are difficult to enforce against the United States, they have significant impact on how other nations perceive the United States and bring some pressure on the United States to comply with international law.

[FN287]. The U.S.'s actions in interning the Japanese Latin Americans would now be prohibited by Articles I (life, liberty and security), II (equality before the law without distinction as to race), V (protection of the law against abusive attacks upon his private and family life), VI (protection of the family), VIII (right to fix residence within the territory of the state of which he is a national, to move freely within the territory, and not to leave it except by his own will), IX (inviolability of his home), XIV (right to remuneration for work), XVII (basic civil rights), XVIII (courts to protect from acts of authority that violate fundamental constitutional rights), XIX (right to nationality), XXIII (right to own private property), XXV (no deprivation of liberty except through pre-existing legal procedures), and XXVI (right to an impartial and public hearing).

[FN288]. Statute of the International Court of Justice, supra note 150. All members of the United Nations are parties to the Statute by virtue of Article 93 of the U.N. Charter.

[FN289]. See id. art. 34(1).


[FN291]. See Statute of International Court of Justice, supra note 150, art. 36(1).


[FN293]. Statute of International Court of Justice, supra note 150, art. 34(1).

[FN294]. This body was created by the United Nations' Economic and Social Council in © 2005 Thomson/West. No Claim to Orig. U.S. Govt. Works.


[FN297]. See Strossen, supra note 279.


[FN299]. GARDINER, supra note 7, at 176. This is the conclusion reached by Gardiner, the only historian to thoroughly document the Japanese Peruvian internment.

[FN300]. See supra notes 95-99 and accompanying text.

[FN301]. See supra notes 76-79 and accompanying text.

[FN302]. See supra notes 112-16 and accompanying text.

[FN303]. See supra notes 97-99 and accompanying text.

[FN304]. See supra notes 92-93, 106-11 and accompanying text.

[FN305]. See generally EMMERSON, supra note 7.

[FN306]. See generally GARDINER, supra note 7.

[FN307]. See supra notes 52-58 and accompanying text.

[FN308]. See supra notes 76-78 and accompanying text.

[FN309]. See generally WEGLYN, supra note 11.

[FN310]. See generally GARDINER, supra note 7; HIGASHIDE, supra note 7.

[FN311]. See supra note 35 and accompanying text.
[FN312]. See supra notes 164-70 and accompanying text.

[FN313]. See supra notes 193-99 and accompanying text.

[FN314]. The Japanese Peruvian Oral History Project estimates that there may be 1200 JLA internees still living, but the current proposed settlement would only pay them $5000 apiece until the already-allocated funds under the CLA run out. While this amount is not certain, it will definitely be inadequate. Therefore, I have projected that 1000 internees might receive redress under the settlement.


[FN316]. This is the approximate interest rate of 10-year treasury bills for the period of 1945 to 1998. At 6% interest, $242 in 1945 would be $5,008 in 1998. AAA corporate bonds, all maturities, averaged 6.7% interest between 1945 and 1996. At this rate, $172 in 1945 would yield $5,001 in 1998. Using the very conservative measure of 3-month treasury bills, the average interest since 1945 is 4.8%, at which rate $437 in 1945 would yield $5,003 today. These figures are from the Economic Report of the President (1997), Council of Economic Advisors, Table D-71, Bond Yields and Interest Rates, 1929-1996 at 382 available at <http://www.gpo.ucop.edu/catalog/-erp97.html> (visited Mar. 26, 1999). I am grateful to Peter Philips, Professor of Economics, University of Utah, for obtaining this information and making these calculations.

[FN317]. See COMMISSION ON WARTIME RELOCATION, supra note 213, App. D (testimony of Seiichi Higashide); see also JUSTICE DELAYED, supra note 222, at 8.

[FN318]. See supra note 296 and accompanying text.

[FN319]. See supra notes 7, 13 and accompanying text.

[FN320]. See Michael Hirsch, After 50 Years, A Deal Swiss Banks Agree to Make Payments to Holocaust Victims, NEWSWEEK, Aug. 24, 1998, at 41; Switzerland Hopes Holocaust Settlement Clears Air, DALLAS MORNING NEWS, Aug. 14, 1998, at 11A. The Swiss banks are criticized for following an "ethic of the least effort" and neglecting to distinguish looted gold from other gold. Victim Gold, STAR-TRIBUNE (Minneapolis-St. Paul), May 26, 1998, at 03A.


In addition, a lawsuit filed in March accuses a German subsidiary of the Ford Motor Company with knowingly profiting from forced labor during World War II, and the United States is spearheading a drive to identify and ensure compensation for billions of dollars worth of art stolen by the Nazis. See Blaine Harden, Suit Alleges Ford Unit Used Forced Labor In WWII, WASH. POST, Mar. 5, 1998, at A04; Barry Schweid, 39 Nations Seek Art Looted by Nazis, AP, July 1, 1998, available in 1998 WL 6689782.


[FN326]. According to Stuart Eizenstat, "[t]his can be a healing process, which can strengthen each of our countries and bring this century to a close on a high note of justice." Schweid, supra note 321.

[FN327]. As an editorial in the St. Petersburg Times said about the Japanese Latin American internment, "[t]his outrageous episode weakens our moral authority to wag an accusatory finger at Switzerland for not accounting for Nazi gold, or at Japan for its failure to compensate the South Korean 'comfort women' it conscripted into sexual slavery." Editorial, ST. PETERSBURG TIMES, June 23, 1998, at 10A.

[FN328]. Harold Koh states: "A state's violation of international law creates inevitable frictions and contradictions that hinder its ongoing participation within the transnational legal process. When the United States denies the jurisdiction of the International Court of Justice in a suit in which it is a defendant, that decision impairs its ability to invoke the court's jurisdiction as a plaintiff." Harold Hongju Koh, Transnational Legal Process, 75 NEB. L. REV. 181, 203-04 (1996); see also Harold Hongju Koh, Review Essay: Why Do Nations Obey International Law?, 106 YALE L.J. 2599 (1997) (describing the process of interaction, interpretation, and internalization of international norms into domestic legal systems).


[FN331]. ERIC WILLIAMS, FROM COLUMBUS TO CASTRO: THE HISTORY OF THE CARIBBEAN, 1492-1969, at 411 (1984). This was characterized in 1895 as a violation of international law by the British Foreign Secretary: "[N]o statesman, however
eminent, and no nation, however powerful, are competent to insert into the code of
international law a novel principle which was never recognized [sic] before, and
which has not since been accepted by the Government of any other country." Id. at
416-17 (quoting a statement of Lord Salisbury, to U.S. Secretary of State Olney in
1895).

[FN332]. See generally Saito, Alien and Non-Alien Alike, supra note 141, at 268-315.

[FN333]. See WILLIAMS, supra note 331, at 413-14.

[FN334]. See id. at 420-21.

[FN335]. See id. at 420.

[FN336]. Eric Williams, former Prime Minister of Trinidad and Tobago, characterized
the U.S. attitude in the seizure of the Panama Canal: "As stated frankly by
[President Theodore] Roosevelt himself in 1908 with reference to Venezuela, America
had to 'show these Dagoes that they will have to behave decently.' So Roosevelt just
'took' the Panama Canal while Congress and the South Americans debated the issue." Id.
at 422; see also Construction of a Ship Canal to Connect the Waters of the

[FN337]. See WILLIAMS, supra note 331, at 424-25.

[FN338]. As President Franklin Roosevelt said of Trujillo, "He may be an S.O.B., but
he is our S.O.B." Id. at 465.


[FN340]. See id. at 189-90.

[FN341]. See supra note 290 and accompanying text.

[FN342]. General Manuel Noriega, head of the Panamanian state and reportedly on the
CIA payroll, was arrested by U.S. forces, brought to the United States and put on
trial for criminal conspiracy to violate U.S. law. See United States v. Noriega, 683
F. Supp. 1373 (S.D. Fla. 1988); see also Mark Andrew Sherman, An Inquiry Regarding
the International and Domestic Legal Problems Presented in United States v. Noriega,
20 U. MIAMI INTER-AM. L. REV. 393, 395 (1989) ("Noriega represents the ultimate
intersection of United States domestic law and foreign policy, and its precedential
value should not be understated."); John Embry Parkerson, Jr., United States
Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause,
133 MIL. L. REV. 31 (1991) (noting ambiguity in the justification for the invasion
of Panama and arguing that the U.S. should have complied fully with the humanitarian
law applicable to armed conflict); see also Louis Henkin, The Invasion of Panama
(1991) ("With regret, I conclude that the invasion of Panama by the United States
was a clear violation of international law as embodied in the principal norm of the
U.N. Charter on which the world, under the leadership of the United States, built
the new international order after World War II. The United States did not even have
a color of justification for this invasion."). For a justification of the invasion,
see Anthony D'Amato, The Invasion of Panama Was a Lawful Response to Tyranny, 84 AM.
Koh, Transnational Legal Process, supra note 328, at 195-96. Koh states: "The Supreme Court held that a Mexican accused's forced abduction by U.S. agents ... did not divest U.S. courts of criminal jurisdiction to try that defendant. Alvarez-Machain sparked intense media criticism and protests from political leaders in Mexico, Canada, Europe, and the Caribbean ... The Permanent Council of the Organization of American States requested a legal opinion regarding the inter-national legality of the Supreme Court's decision from the Inter-American Juridical Committee, which concluded that "the decision is contrary to the rules of international law.""

Id.

Rostow, supra note 118, at 515.

Dembitz, supra note 219, at 238.

The military conflict in the Gulf War or the recent bombings of Afghanistan and Sudan provide examples. See James Risen & David Johnston, Experts Find No Arms Chemicals at Bombed Sudan Plant, N.Y. TIMES, Feb. 9, 1999, at A12.


Regarding the importance of international human rights law to protecting the rights of minorities within the United States, see generally Berta Esperanza Hernandez-Truyol, Natives, Newcomers and Nativism: A Human Rights Model for the Twenty-First Century, 23 FORDHAM URBAN L.J. 1075 (1996) (discussing the human rights law applicable to alienage discrimination in the United States); Natsu Taylor Saito, Crossing the Border, supra note 278 (discussing the impact of U.S. human rights violations overseas on racial and ethnic minorities in the United States).


[FN354]. See, e.g., The Diplomatic and Consular Staff Case (U.S. v. Iran), 1980 I.C.J. 3 (1980) (holding that the Iranian government violated international law by allowing the takeover of the U.S. embassy and holding the U.S. diplomatic staff hostage).


[FN356]. See, e.g., Seymour M. Hersh, My Lai and Its Omens, N.Y. TIMES, Mar. 16, 1998, at A27 (discussing, 30 years after the fact, how the U.S. military's failure to train its personnel in international law contributed to widespread massacres in Vietnam).

[FN357]. ANTHONY D'AMATO, supra note 266, at 261.


See generally Detlev F. Vagts, Taking Treaties Less Seriously, 92 AM. J. INT'L L. 458 (1998) (noting the "alarming exacerbation" of the "tendency of the United States not to give its treaty obligations the weight they deserve[,]")


Harold Koh's evaluation of the Clinton Administration's human rights record provides a good model for this process by reviewing (1) the Administration's rhetoric; (2) appointments made to key policy-making positions; (3) interventions to prevent ongoing human rights abuses; (4) accountability in seeking remedies for past abuses; and (5) preventive measures taken, "for example, adopting international standards and treaties, promoting institutional change, and taking measures of deterrence." Harold Hongju Koh, Democracy and Human Rights, supra note 355, at 192-93.

CROSSING THE BORDER: THE INTERDEPENDENCE OF FOREIGN POLICY AND RACIAL JUSTICE IN THE UNITED STATES

By Natsu Taylor Saito [FNal]

Copyright © 1998 Yale Human Rights and Development Law Journal; By Natsu Taylor Saito

I. Introduction

I.1 Scholars, social activists, and policy makers often regard the United States' foreign policy as it relates to human rights and its domestic policy with respect to race as distinct areas, separated by the nation's border. Although this border exists geographically, through the assertion of jurisdiction, and in the recognition of citizenship, is there really a border between our foreign and domestic policy in these matters? The U.S. government is often criticized for failing to comply with international human rights law and for perpetuating economic and racial inequality in its foreign policy. Racism within the United States is recognized as pervasive and virulent, but generally considered unrelated to U.S. foreign policy. For the most part, scholars and activists concentrate on either the international or the domestic realm, reflecting a widely accepted assumption that the problems confronted in each are distinct. There is, however, evidence that this border between the two is much more permeable than contemporary legal analyses or social attitudes suggest.

I.2 In fact, because perceptions of and attitudes toward those who are regarded as racial or ethnic minorities flow quite readily across this border, racism towards those outside the United States makes discrimination within this country seem more acceptable; the ill-treatment of racial and ethnic minorities within our borders, in turn, makes it easier to disregard the rights and humanity of those outside the border. This attitude manifests itself in many ways, one of which is the United States' willingness to disregard international law, particularly human rights law.

I.3 It is a mistake to think that we can remedy discrimination against Americans while allowing our government to treat people who live in other countries or carry...
different passports as not deserving of full, or even basic, human rights. Taking such a position allows the basis of the discrimination to be constantly re-created at the same time that we deplore its consequences. It is like cutting off the head of a weed while fertilizing its roots. This cycle is especially problematic in the United States because our population has cultural and historic ties with so many parts of the world. We cannot expect a formal legal distinction between 'citizens' and 'non-citizens,' or 'Americans' and 'foreigners' to protect the rights of racial or ethnic minorities simply because we live inside the U.S. border, particularly when prejudice and disregard move so easily across its territorial boundaries.

P4 We have been conditioned to define ourselves in terms of citizenship, and to think of ourselves in relation to the border. With respect to human rights, we uncritically accept the distinction between 'Americans' and 'foreigners,' and frame the struggle for justice and human decency in terms of 'civil rights' for those at home and 'human rights' for those overseas. This is reinforced by the belief that the U.S. Constitution provides significantly more protection than is afforded by international law, and that we can only take advantage of this higher level of protection by maintaining the power of the border.

P5 Because these concepts are so deeply rooted in our thinking, it is easier to see the connections between foreign and domestic policy if we leave aside, for the moment, the concepts of race and citizenship, and think in terms of the identification of the 'other.' The distinction between 'us' and 'them' is, of course, one that affects all social interaction, creating complex layers of overlapping identities. Here, however, I am limiting the term to the kind of 'otherness' that is ascribed on the basis of what we commonly call racial or ethnic characteristics. It thus encompasses people of color, people who speak languages other than English, and people from significantly different cultural traditions. What makes this concept of 'otherness' more confusing-- and correspondingly, more useful--is that, unlike distinctions based on fixed characteristics such as 'race' or nationality, 'otherness' mutates in response to social and political change. Thus, for much of our history, African Americans have been defined as 'other,' based on the strict racial classifications that emerged in the seventeenth and eighteenth centuries to help create and maintain the institution of slavery. Nonetheless, we see current attempts to enlist African Americans, as U.S. citizens, in campaigns to restrict the rights of recent immigrants. While Cuban Americans have sometimes been identified as 'other' or 'foreign' based on their national origin, we have recently seen distinctions made on the basis of race, class, and political affiliation between the Cuban Americans who came to the United States in the 1960s, now portrayed as 'insiders,' and more recent Cuban immigrants, generally poorer and darker-skinned, who are portrayed as 'others.'

P6 Although who is 'other' can change over time, once people have been identified as outsiders, public perceptions of them often do not keep pace with advances in their legal status. This is illustrated by the legacy of slavery. The portrayal of Africans as less than human--and therefore not deserving of human rights--as a rationale for slavery created a basis for ongoing oppression of African Americans that did not end with the granting of citizenship or formal legal equality. As the Dred Scott decision made painfully clear, until the passage of the Fourteenth Amendment, persons of African descent were not considered citizens, or even 'persons,' under the law. From Jim Crow laws to the

Kerner Commission [FN10] to contemporary reports of racial violence and discrimination, [FN11] we see the lingering effects of the viewpoints that once rationalized slavery. [FN12] One result of this history is that we cannot understand racism today without reference to the continuing, often unconscious, portrayal of whiteness as the norm and African Americans as 'other.'

P7 This article explores some of the ways in which U.S. foreign policy affects the treatment of those peoples within the United States who are identified as 'other' based on socially constructed notions of race, ethnicity, or national origin and how, in turn, the treatment of such groups within the United States influences our foreign policy. In Section II, I consider how the portrayal of peoples outside the U.S. border as 'other' can both stem from and perpetuate the ill-treatment of racial and ethnic minorities within the United States. I describe some contemporary situations in *57 which the U.S. government has exhibited a flagrant disregard for human rights and international law in our foreign policy, and the adverse effect this disregard has on racial and ethnic minorities at home. In Section III, I present a case study, the currently pending legal action regarding the United States' kidnapping, holding hostage, and incarceration of Japanese Peruvians during World War II, and relate this policy to discrimination against Japanese Americans, discrimination which extended to the point of threatening large-scale deportations of U.S. citizens. Section IV focuses on the important role international law can play in developing governmental policies that promote human rights for racial and ethnic minority groups both at home and in other countries. I conclude in Section V that an integral part of the struggle for racial justice at home is the insistence that our government comply with international law and treat those who are identified as 'foreign' or 'other' with respect.

II. Foreign Policy and Domestic Discrimination: The 'Other' Inside and Outside the Border

P8 The identification of some peoples as 'other,' the distinguishing of 'them' from 'us,' is often used as an explanation of why some people control more resources, are regarded with more favor, or wield more power. In the 1980s and 1990s the distinction between 'Americans' and 'foreigners' seems to have taken on added significance, strengthening the notion that those who are foreign need not be treated as well as those who are American. [FN13] Sometimes this is seen in American attitudes towards other nations and their peoples. Because it affects them and not us, it has apparently been acceptable to most Americans to disregard slaughter in the Balkans, [FN15] to buy products made by child labor in Pakistan [FN16] or prison labor in China, and to allow our government to mine Nicaraguan waters and use drug money to fund the Contras. [FN17] There has been little public outcry over the government's kidnapping Mexican citizens in blatant disregard of international law, [FN18] or its refusal to ratify international conventions [FN19] or pay monies owed the United Nations. [FN20]

P9 Sometimes the distinction between them and us focuses on citizenship, blaming the cost of social programs on immigration, and cutting back the constitutional protections and social benefits available to those who, while they may be legal residents, are not U.S. citizens. [FN21] What *59 started as a movement to cut back on social services provided to those who entered this country without the government's approval has quickly expanded to cutbacks in the rights and privileges of those who are legal permanent residents, but who are also portrayed as 'other.' Even constitutional protections, such as the Fourth Amendment's prohibition of
unlawful searches and seizures, which have long been held to apply to all 'persons,' are being restricted on the basis of immigration status. \[FN22\]

\[P.10\] There is a spillover effect whereby these attitudes affect even those who, while they may be citizens of the United States, are still identified as 'foreign' or 'other.' Thus, civil rights groups have documented increased violence toward and discrimination against Mexican Americans in the wake of California's Proposition 187 and the recent changes in federal immigration and welfare laws. \[FN23\] To the extent that our government treats people poorly because they are not 'us' we must recognize that one day it will probably treat some of 'us' with the same disregard. The devaluing of human life overseas contributes to racism and nativism at home and, in turn, racism at home is exported in foreign policy that harms people, particularly people of color, in other countries.

\[P.11\] Numerous examples demonstrate the negative impact U.S. foreign policy has on racial and ethnic minorities in the United States today, regardless of the fact that the individuals affected live on this side of the border and may, in fact, be U.S. citizens. The United States' disregard for international law and human rights in Southeast Asia during the Vietnam War era is well documented. \[FN24\] One small but telling example of this has recently come to light in connection with the murder of hundreds of women, children and old men at My Lai in 1968. Six months before this massacre, the Pentagon had received a report entitled 'Alleged Atrocities by U.S. Military Forces in South Vietnam,' which showed that all but six of the 179 Marine second lieutenants interviewed would mistreat a prisoner to obtain desired information, most would kill a prisoner in the case of a *firefight*, and most lacked a ''clear understanding of their responsibility in regard to the Geneva Convention.' \[FN25\] Faced with this information, the U.S. military did not take it upon itself to teach its soldiers about their responsibilities under international law. Instead, the report was ordered rewritten and subsequently placed in ''review status,' effectively killing it.' \[FN26\] The atrocities at My Lai and numerous other villages were a predictable result of the government's disregard for human rights law. Our policies also resulted in the bombing of civilians, the widescale use of land mines, and the use of defoliants and other chemical weapons by the United States during the Vietnam War. \[FN27\] After the war, hundreds of thousands of Southeast Asian refugees came to the United States, many of them forced to leave their homelands because of their collaboration with the U.S. military. Despite the fact that the Southeast Asians who have come to the United States have been those who were on 'our' side, they have encountered widespread discrimination and violence. \[FN28\] Furthermore, because Southeast Asians in the United States are racially identified with those of Korean, Chinese, and Japanese descent, the discrimination has a compounding effect making, for example, Chinese Americans the targets of violence related to both the war in Vietnam and resentment of Japanese auto makers. \[FN29\] In working to ensure that Asian Americans are treated with respect, we cannot ignore the legacy of U.S. violations of human rights during the war in Vietnam, Laos and Cambodia, and the portrayal during that period of Southeast Asians as 'gooks.'

\[P.12\] The same is true for Haitian Americans. The recent history of what *has* been called 'the world's first black republic' \[FN30\] is one of massive violations of international human rights law. The United States occupied Haiti from 1915 to 1934, a period which was followed by two decades of political chaos and three decades of rule by the brutally repressive Duvaliers. \[FN31\] In 1990, a Catholic
priest and human rights activist, Jean-Bertrand Aristide, was the overwhelming winner of the country's first democratically held presidential elections. His government was ousted in a 1991 military coup, and thousands of Haitians took to the sea to escape a military regime that engaged in arbitrary detentions and disappearances, torture, and summary executions. Despite the fact that these human rights violations were widely known and many of the refugees would have qualified for political asylum in the United States, over 40,000 Haitian 'boat people' were stopped and turned back by the U.S. Coast Guard on the high seas, outside of U.S. jurisdiction. [FN32] The United States contended that such interdiction was allowed by a 1981 agreement between the Reagan administration and the regime of Jean-Claude ('Baby Doc') Duvalier in 1981, which provided that the Haitians interdicted on the high seas were to be interviewed, and those found to have a credible fear of political persecution were not to be returned to Haiti. [FN33] Questionable as this agreement was, at least it recognized the principle of nonrefoulement, a well-established tenet of international law that prohibits persons from being returned to a country in which they are likely to be subjected to persecution. [FN34] In 1992, however, President Bush issued an executive order which allowed the Coast Guard to interdict Haitians on the high seas and return them to Haiti without any screening of their claims for political refugee status. [FN35] Despite the clear violations of international law and the human rights of the Haitians involved, this practice was upheld by the U.S. Supreme Court in Sale v. Haitian Centers Council, [FN36] a case Thomas Jones has called the 'Dred Scott Case of Immigration Law.' [FN37] As noted by Judge *62 Hatchett, dissenting from the Eleventh Circuit's decision to uphold the interdictions, 'Under existing law, any refugee may reach the shores of the United States . . . except Haitian refugees . . . . The primary purpose of the program was . . . to keep Haitians out of the United States.' [FN38]

P13 Harold Koh summarizes the situation:

[When refugees started to arrive, we began to view the refugees, not the restoration of democracy, as the problem. We abandoned the safe-haven principle . . . We undercut international legal standards at home. We defended illegal violations of international treaties before our courts and violated the principle of non-neutrality. . . . The United States acted as a broker, not as an advocate of democracy, cutting a deal between the legitimately elected government and the coup leaders. . . . The United States insisted on amnesty for gross human rights abuses, effectively eliminating any incentive for the military officials to discontinue these abuses. . . . We ignored human rights abuses while the . . . negotiations continued. Then deaths occurred. . . . Supporters of the democratic government were shot in the street. . . .] Finally, as the deadline for returning the Aristide government approached, we sent two hundred American soldiers with sidearms to Haiti . . . When Haitians protested at the dock, we turned our boat around and departed. [FN39] It was the official policy of the U.S. government to countenance such human rights abuses. Widely disseminated newspaper and television accounts portrayed the turning back of boatloads of Haitians on the high seas, and the slaughter of civilians by members of the Haitian military whom we had trained and paid. [FN40] Such actions cannot be portrayed as *63 acceptable U.S. foreign policy without also conveying the notion that Haitian lives are worth less than American lives. While such policies were carried out by different branches of the federal government, extensive media coverage disseminated the message of the policies to the public. Consequently, it is not surprising to find that police officers and other government agents brutalize Haitian immigrants. The recent police torture in Brooklyn of a

Haitian security guard gave rise to well-justified public outrage and political organizing within Haitian American communities. [FN41] Effective prevention of such abuses, however, will require not only a focus on discrimination at home, but also on U.S. foreign policy. Just as discrimination against African Americans did not end when they were granted citizenship, we cannot expect discrimination to stop the moment a person crosses over the border.

P14 One can find examples of the transborder effects of discrimination with respect to almost any racial or ethnic minority group in the United States. Our government has been roundly criticized by the world community (as well as many Americans, including former attorney general Ramsey Clark) for the enormous numbers of civilian deaths resulting from the bombing of Iraq during the Gulf War. [FN42] It does not seem reasonable that we could deem the lives of Iraqis and citizens of other Middle Eastern countries to be worthless (at least in comparison to our desire for oil) [FN43] and constantly identify Arabs as 'terrorists,' [FN44] and yet expect that Arab-Americans will be treated with respect in this country. The 'war on drugs' also provides many examples of the conflation of the domestic and the international. [FN45] Swept up by rhetoric against drugs, we allowed our government to invade Panama and destroy entire neighborhoods in an effort to kidnap President Noriega, a former employee of the Central Intelligence Agency. [FN46] There is footage of entire city blocks being bombed and swallowed up by fires, reportedly set deliberately by the U.S. military. [FN47] It is difficult to see how such a policy could be acceptable without also condoning the Philadelphia city government's decision to 'fight crime,' in the form of the MOVE organization, by bombing and burning the entire block of the neighborhood in which they lived. [FN48]

P15 Although the previous cases focus on ways in which disregard for human rights in our foreign policy comes home to roost, domestic racism also infects our international policies. Beginning with early attempts to justify slavery in the United States, African peoples have often been portrayed as savage or uncivilized. This view can still be seen in news coverage which portrays African nations in a constant state of 'tribal' warfare, with governments run by corrupt strongmen who stand by as their people die of malnutrition and infectious diseases. The racism in this perspective allowed the United States to support white supremacist governments in southern Africa for years. It has allowed the United States to wait for many months before responding to widespread famine in Somalia [FN49] or to the genocide in Rwanda. [FN50] More devastating in the long run may be the discounting of African lives that can be seen today in our lack of action concerning AIDS in Africa. [FN51] It is my belief that these policies, which have been fueled by racism at home, come back to influence domestic policy toward African American teenagers in the inner cities and toward poor people who have AIDS. [FN52] Finally, as the border between governmental and corporate power becomes less fixed and the ability of national governments to regulate business declines, we need to consider not only the government's stated policy, but also its influence, and ours, on the actions of multinational corporations with large U.S. operations. [FN53] We see the same de-valuing of human life in the actions of Shell Oil in Ogoniland in Nigeria, [FN54] in the reaction to the Bhopal disaster, [FN55] and in U.S. attitudes toward tobacco companies that have targeted Asian markets. [FN56]

III. The Japanese Peruvian Internment: A Case Study

P16 In the previous part, I illustrate my proposition that our foreign and domestic policies with respect to the treatment of those identified as 'other' are
not demarcated by a distinct border but are, instead, interdependent phenomena. The attitudes and actions I have described go far beyond, and are much more complicated than, what is identified as unlawful under either domestic or international legal systems. Nonetheless, if we wish to reduce the impact of racism on our foreign policy, and the impact of our foreign policy on our treatment of domestic minorities, compliance with international law is a good place to begin.

P17 Respect for international law is important for at least two reasons. First, there is a large body of international law, both conventional and customary, that addresses human rights in a way that is far more complex and encompassing than our domestic law, which is generally limited to the civil and political rights of individuals. Second, this is a body of law that has been constructed by the representatives of many nations. Simply acknowledging its legitimacy is the beginning of a policy of respect for those who are, by definition, 'other.' This Part considers in some detail the World War II internment of Japanese Peruvians, a case in which the United States government disregarded international law and the human rights of the individuals involved.

P18 Representing the African captives in the Amistad case, John Quincy Adams argued to the Supreme Court that the United States could not concede to Spain's demand that the President 'first turn man-robber . . . next turn jailer . . . and lastly turn catchpoll and convey [the African defendants to] slave-traders despoiled of their prey and thirsting for blood.' A case currently pending in the federal courts illustrates what can happen when the U.S. government is allowed to violate international law with impunity. It is a case in which the United States turned 'man-robber' and 'jailer' of thousands of Japanese Latin-Americans during World War II and it illustrates the connection between foreign policy and domestic policy-- specifically, that disregard for human rights in our foreign policy both reflects and perpetuates discrimination inside the United States.

P19 The evacuation and imprisonment of approximately 120,000 Japanese Americans from the West Coast during World War II is a now-familiar story of racism against a domestic minority. But until 1996 when Mochizuki v. United States, a class action requesting redress for the incarceration of Japanese Latin Americans, was filed in federal district court, few people knew that the U.S. government, in collaboration with various Latin American governments, also kidnapped, transported, incarcerated, and held hostage over 2,000 Japanese Latin Americans. Because the bulk of these people were Japanese Peruvians, this section focuses on their story.

*68 P20 Japanese began emigrating to Peru in 1899 for the same reasons they came to the United States--land, jobs, and the opportunity to make a better life for their children. By the 1930s, many were economically successful and, like Japanese Americans on the West Coast, had become targets of local hostility and racism. Nonetheless, by 1940, there were at least 25,000 Peruvians of Japanese descent, some of whom were Peruvian citizens.

P21 Although Peru was a non-belligerent during World War II, it entered into an agreement to promote hemispheric unity and in 1942, acceded to U.S. pressure to break diplomatic ties with the Axis powers. Peru accepted a U.S. proposal that all Axis officials be repatriated through the United States, and then asked the United States to take non-officials as well. These were civilian men,
women, and children, both Japanese and Peruvian citizens. [FN70] Some 'volunteered' for repatriation, and many of the women and children left in order to be reunited with their husbands and fathers. Large numbers were simply kidnapped by the Peruvian police, however, and turned over to U.S. officials. [FN71] Very few of these individuals had been classified as 'dangerous' to either Peruvian or U.S. security. [FN72] 69 American consuls in Peru were instructed not to issue visas to Japanese Peruvians, and passports and other documents were illegally seized from those who had them. [FN73] One group of men was sent via Panama, where they spent several weeks at forced labor, clearing jungle in the Canal Zone. [FN74] Others were shipped directly to San Francisco or New Orleans. Upon arrival, all were turned over to I.N.S. officials who then declared them to be in the country illegally. [FN75] The Department of Justice, through the Immigration and Naturalization Service, held the Japanese Peruvians and other Japanese Latin Americans in concentration camps [FN76] in Texas for the duration of the war. [FN77]

P22 The United States' motivation for going to all of this trouble and expense, most of which violated both U.S. and international law, [FN78] appears *70 to have been a desire for hostages to be exchanged for Americans held in the Japanese-occupied territories. [FN79] Thus, even though concern about hemispheric security had diminished by October 1942, Secretary of State Hull, noting that there were 3300 American citizens still in China, 3000 in the Philippines, and 700 in Japan proper, recommended that there be no let-up in the hemispheric removals of 'all the dangerous Germans and Italians' and 'all the Japanese . . . for internment in the United States.' [FN80] This was not a new idea. In 1936, George Patton, then Chief of Military Intelligence, suggested a plan '[t]o arrest and intern certain persons of the Orange race [[[Japanese] who are considered most inimical to American interests, or those whom, due to their position and influence in the Orange community, it is desirable to retain as hostages.' [FN81] In January 1942, Major Karl Bendetson, the architect of the Japanese American internment, noted that 'the 'hostage idea' has not been sufficiently explored . . . .' [FN82]

P23 Over 500 Japanese Peruvians were in fact included in the two exchanges that took place in 1942 and 1943. [FN83] Evidence suggests that attempts to arrange a third exchange fell through at least in part because of the Japanese government's reaction to the hostage taking and to the harsh treatment of Japanese Americans held in the Tule Lake camp. [FN84] This left *71 over 1300 Japanese Peruvians imprisoned in the United States. [FN85] At the end of the war, Peru refused to allow these people to return. [FN86] Pressured by the United States, it eventually agreed to the return of those who were either Peruvian citizens or married to citizens. [FN87]

P24 In March 1946, a full seven months after Japan's surrender, Acting Secretary of State Dean Acheson asked Attorney General (later Supreme Court Justice) Tom Clark to inform the Japanese Peruvians that, because there was no 'clear evidence' that they posed a threat to 'the security and welfare of the Americas,' they were 'no longer subject to restraint.' [FN88] Although the U.S. Justice Department recognized that it was illegal to forcibly repatriate the Japanese Peruvians to Japan, [FN89] it refused them permission to stay in the United States. [FN90] Ironically, the arrest warrant of *72 one Iwamori Sakasegawa stated that he was to be deported because 'he was an immigrant not in possession of a valid immigration visa[,] . . . did not present an unexpired passport[,] was] an alien ineligible to citizenship and was not entitled to enter the United States.' [FN91] Some '700 men and their
dependents' had no choice but to allow themselves to be deported to Japan. [FN92] The plight of the remaining 365 Japanese Peruvians came to the attention of Wayne Collins, a remarkable attorney who was carrying on a one-man battle against the forced 'repatriation' of Japanese Americans. [FN93] Collins eventually got the remaining deportations halted and found employment for many of them at Seabrook Farms in New Jersey, a frozen food processing plant (now Birdseye) that had used German POW labor during the war. [FN94] Some in this final group were later able to legalize their immigration status and become U.S. citizens. [FN95] None of the abducted Japanese Peruvians, even those who became U.S. citizens, received the redress eventually provided to Japanese Americans under the Civil Liberties Act of 1988 because that Act limits redress to persons who, at the time of internment, were American citizens or permanent residents. [FN96] The class action brought in Mochizuki v. United States is challenging that limitation. [FN97]

P25 There is no doubt that the kidnapping, deportation, incarceration, holding hostage, and forced repatriation of the Japanese Peruvians violated international law. [FN98] Forcibly transporting civilians from a non-belligerent to a belligerent country and holding them as hostages for exchange was prohibited at that time by the laws and customs of war. [FN99] In fact, the drafters of the 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War noted that they were compelled by the events of World War II to articulate prohibitions on deportations that had previously been considered unnecessary because it was assumed that civilized nations no longer resorted to such practices. [FN100] John Emmerson, the State Department official who supervised the deportations for the U.S. Embassy in Lima, later acknowledged that the program 'was clearly a violation of human rights and was not justified by any plausible threat to the security of the Western Hemisphere.' [FN101] Interdepartmental correspondence makes it clear that the U.S. State Department was largely unconcerned about the legality of internment of individual Axis nationals who were identified as 'dangerous to hemispheric security' was even arguably legal, did little to enforce compliance with international law. [FN102]

P26 The U.S. government's disregard for international law was facilitated by the racism of American officials, both civilian and military, toward those identified as Japanese, regardless of their citizenship. [FN103] This attitude is reflected in a December 1943 memorandum to Secretary of State Hull from Assistant Secretary Long. [FN104] After noting that the U.S. had 'quite of number of these Japanese (of American nationality) serving in our Army whom we could not in justice kick out of the United States after they had fought with us,' Long said:

The Department has a responsibility . . . in connection with the internment camps, relocation centers and prisoners of war camps in this country where Japanese citizens and American citizens of Japanese race are confined. I have appeared before two committees of the Senate where the subject has been discussed and . . . a large-scale operation to get them out of the United States seems to be the hope of the members of those committees.

The problem has been complicated by our laws relating to citizenship and by the constitutional provision regarding the native born character of the citizenship of those born here. The Attorney General is reported to have said recently . . . that he had a formula under one of our statutes by which a native-born Japanese or one
naturalized could be divested of his American citizenship--thus making him eligible for deportation. . . . I think the far larger part of official sentiment is to do something so we can get rid of these people when the war is over . . . . But sentiment is liable to wane if the authorization measures are not adopted before the war ends. We have 110,000 of them in confinement here now - and that is a lot of *75 Japs to contend with in postwar days . . . . [FN105]

P27 This statement, which comes from within the State Department, illustrates how Japanese Americans were regarded as 'other' despite their citizenship and the close ties between their rights and U.S. foreign policy. Even President Roosevelt referred to the nisei, second generation Japanese Americans who were U.S. citizens by birth, as 'Japanese people from Japan who are citizens.' [FN106] As Justice Murphy, dissenting in the Korematsu case said, '[t]his exclusion of 'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area on a plea of military necessity . . . goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.' [FN107]

P28 Racism against those of Japanese descent allowed the U.S. government to imprison Japanese Americans during World War II and to contemplate expatriation or deportation plans such as that described by Long. The treatment of U.S. citizens and permanent residents in this manner is consistent with policies that endorse abducting Japanese Latin Americans, bringing them to the United States, and holding them in prison camps. In turn, the ease with which the Japanese Latin Americans could be kidnapped and held hostage made it easier for government officials to justify the internment of Japanese Americans in violation of both international and domestic law, and even to consider stripping them of all rights and deporting them after the war was over.

P29 It is interesting to contemplate how differently both Japanese Latin Americans and Japanese Americans would have been treated had the U.S. government adhered to international law. Although the main body of what is now identified as international human rights law was not explicitly articulated until after World War II, there were many provisions of humanitarian law that prohibited such treatment of civilians, even in times of war. Legal challenges to the Japanese American internment were framed in the context of domestic law, and U.S. courts, up to and including the Supreme Court, upheld the constitutionality of the internment. [FN108] In the 1980s, after discovering evidence that the War Department had deliberately misled the Court about the existence of a military threat posed by Japanese Americans, coram nobis petitions were brought by Gordon Hirabayashi and Fred Korematsu, challenging their convictions in the earlier cases. Even though their convictions were vacated, the precedent set by the earlier decisions was not overturned. [FN109]

P30 As a practical matter it is highly unlikely that a federal court during World War II would have stopped either internment just because it *76 violated international law. Nonetheless, had there been forces within the government, the courts, or the public which prevented the United States from interning all but those Japanese Latin Americans who had been individually identified as dangerous, it would have been much more difficult to justify interning all persons of Japanese ancestry from the West Coast. The fact that the United States could have complied with international law in both of these cases is illustrated by the procedures implemented in Hawaii. Although the Japanese had attacked Hawaii, only those
persons of Japanese descent who were individually considered dangerous were interned on the urging of the Military Governor. There were no security problems as a result of this policy and, in fact, a high proportion of Japanese Hawaiians volunteered for military service. [FN110]

IV. International Human Rights Law and Racial Justice

P31 Some of the greatest thinkers on the subject of racism in the United States have concluded that the struggle must be viewed in an international context. W.E.B. Du Bois spent much of his life opposing colonialism and participating in Pan-African movements. [FN111] As Henry Richardson says, Du Bois:

repeatedly pointed out regarding black America that 'the problem of the color line, is international and no matter how desperately and firmly we may be interested in the settlement of the race problem in Boston, in Kansas and in the United States, it cannot ultimately be settled without consultation and cooperation with the whole civilized world.' [FN112]

Malcolm X argued that African Americans should see themselves as part of the worldwide majority of peoples of color, forming the Organization of African American Unity (OAAU) with the express purpose of bringing the struggle of African Americans 'from the level of civil rights to the level of human rights.' [FN113] Martin Luther King, Jr. came to believe that speaking out against the war in Vietnam was a necessary part of the *77 struggle for justice at home. [FN114]

P32 These leaders recognized that, in many respects, international law provides more protection for racial and ethnic minorities than does domestic law, particularly regarding economic, social and cultural rights [FN115] and the rights of 'peoples' to self-determination. [FN116] Thus, Malcolm X proposed to have the General Assembly of the United Nations declare that the United States' treatment of African Americans violated the Universal Declaration of Human Rights, [FN117] and a major political objective of the Black Panther Party was 'a United Nations-supervised plebiscite . . . for the purpose of determining the will of Black people as to their national destiny.' [FN118]

P33 Du Bois, Malcolm X, and King, among others, understood that painting people who reside outside the borders of the United States as 'other' and the willful indifference to their ill-treatment on that basis, reinforces the oppression of those identified as 'other' within the United States. [FN119] One means of combating this form of racism is to insist on *78 compliance with international law, particularly the emerging international law of human rights. [FN120] Although international law is sometimes unclear and always difficult to enforce, it represents an emerging global consensus regarding the nature of human rights. In addition, because international law is premised on the notion of political equality among sovereigns and is negotiated between various nations, respect for and compliance with international law puts the principle of respect for those who are 'other' into practice. [FN121]

P34 The case of the Amistad [FN122] provides a good example of how compliance with international law can contribute to the fight against racism within the United States. Recently popularized by a spate of books and movies, [FN123] this case involved a mutiny by Africans aboard a Spanish ship, the Amistad. The Africans took control of the ship, killed the captain and tried to return to Africa. Tricked by
the crew into sailing north, the ship was seized by the U.S. Navy off the coast of Long Island. The Africans remained imprisoned for two years while the courts tried to resolve the claims brought on behalf of the Africans for their freedom, by two Americans for salvage, and by the Spanish owners of the ship.

P35 The U.S. government intervened on behalf of the Spanish government, which asserted that the Africans, as slaves, should be returned to their Spanish owners, pursuant to a treaty with Spain which provided for the return of property captured by pirates. [FN124] While it might appear that compliance with this treaty was mandated by international law, in fact the Africans had been captured in violation of an 1817 treaty between Great Britain and Spain which outlawed the slave trade throughout the dominions of Spain [FN125] and, thus could not be regarded as 'property' under international law. Recognized as human beings under international law, the Africans had the right to mutiny in self-defense. [FN126] It appears that the U.S. government was willing to disregard international law in order to maintain good relations with the Spanish government, and because the country was on the verge of splitting apart over the issue of slavery.

P36 Federal courts, including the Supreme Court, had the courage to insist that the government comply with international law, despite fears that a judgment for the Africans would touch off yet another controversy about slavery. Looking back, we can see that this was the right thing to do, legally and morally, and that it contributed to the demise of slavery in the United States by acknowledging publicly that the slave trade--though not slavery itself--was illegal and by treating the Africans as human beings, not property, in the highest courts of the land.

P37 A more recent example of the positive effect that compliance with international law can have in domestic matters is that of U.S. foreign policy regarding apartheid. Racial discrimination, particularly apartheid, was banned by the United Nations Charter, the United Nations Declaration of Human Rights, and numerous conventions that were drafted after World War II. [FN127] Nonetheless, the U.S. persisted in allowing racial segregation at home and, for decades afterward, supported white minority governments in South Africa that practiced apartheid. It was public insistence that the United States government comply with international law and popular pressure on multinational corporations to ban racial discrimination in their operations in southern Africa that resulted, finally, in the Comprehensive Anti-Apartheid Act of 1986, which Congress enacted over President Reagan's veto. [FN128] By forcing the U.S. government to catch up, in its policies and its actions, with the consensus of the international community, activists in the United States not only helped to end apartheid in South Africa and encourage a peaceful transition to a democratic state, but also assisted in reshaping the image of Africa in the eyes of the American public. Now, in addition to images of warfare, famine, and disease, Americans see African National Congress leader Nelson Mandela and other leaders of the struggle for liberation in South Africa treated with tremendous respect by the United States media. [FN129]

P38 A struggle is now being waged to bring the United States' domestic policy into compliance with emerging international law regarding the death penalty. International law clearly prohibits both the racially discriminatory use of the death penalty and the execution of juveniles. [FN130] There is, in addition, an emerging movement to prohibit capital punishment altogether. [FN131] Although the racially disparate imposition of the death penalty is well established, the U.S.
Supreme Court has refused to prohibit its use. [FN132]

P39 In February 1998, the Inter-American Commission on Human Rights, a body of the Organization of American States, found that the United States had violated the rights of William Andrews, an African American executed by the State of Utah, to life, to equality before the law without regard to race, to an impartial hearing, and to protection from cruel, infamous, or unusual punishment in violation of the American Declaration of the Rights and Duties of Man. [FN133] Andrews was executed despite the fact that, among other things, a juror handed a napkin to the bailiff at the trial on which was written 'hang the niggers.' [FN134] While the Inter-American Commission's decision does not affect this individual's fate, it illustrates that the arguments about racial disparity being advanced--and rebuffed--in domestic courts are in line with international law, and that those who are being adversely affected by this domestic policy can be aided by the insistence that the United States comply with international norms. [FN135]

V. Conclusion

P40 Activists and intellectuals have recognized the connections between U.S. foreign policy and domestic racism in some contexts--understanding, for example, that we could not allow the U.S. government to support apartheid in South Africa and still expect that African Americans would be respected at home. As long as the United States supported virulent racism in another country, no border could keep it from infecting public attitudes and domestic governmental policies. As the African American experience has so painfully demonstrated, citizenship--the nominal protection of the border--is not enough to protect human rights and human dignity.

P41 As with the anti-apartheid movement, we need to take on the responsibility of paying attention to, and holding the government accountable for, the effects of its actions on the rest of the world. Sometimes we feel that the problems of racism at home are so overwhelming that we cannot afford to pay attention to what happens overseas. But we need to understand that the two are inseparable, and that if we want our government to treat all Americans with respect, we have to insist that the government treat 'foreigners' with respect as well.

P42 A foreign policy that promotes human dignity is not limited to, but certainly requires respect for international law. The United States could be at the forefront of the movement to expand international human rights law. Until we get to that point, we can at least insist that our government comply with existing law and promulgate a foreign policy that does not discount the value of human life in any country.

P43 We are tempted sometimes to believe that gross violations of human rights and international law by the United States are a thing of the past. We cannot imagine that our government would support slave traders or hold hundreds of innocent civilians hostage simply because of their race or national origin. Nonetheless, a closer look at the recent actions and policies of the U.S. government reveals a disturbingly familiar disregard for the rights of people, particularly people of color, on the other side of the border. [FN136]

P44 In matters of both international and domestic concern, human rights violations are often rationalized as necessary to preserve 'national security.' In examining these situations, we must not accept assertions of military necessity or national
security interests uncritically. If there were ever a case where national security interests could override international law, it surely would have been the Amistad case, given the imminent threat of civil war. Yet it is clear in retrospect that the Supreme Court furthered the cause of justice both at home and internationally by ruling as it did. Conversely, the rationale of military necessity was accepted almost without question at the time of the internment of Japanese Americans and Japanese Peruvians during World War II. One of the few to challenge this justification was Professor Eugene Rostow, who noted that the rights and liberties of all Americans were endangered by the Supreme Court's willingness to allow the military to determine the extent to which constitutional protections would apply to an ethnic minority in times of war. \[FN137\] It has since come to light that the War Department deliberately had misled the courts about the nature of the military danger, \[FN138\] and that Justice Murphy correctly identified racism, rather than military necessity, as the true motivation for the internment. \[FN139\] As these cases illustrate, it is in times of war that the military is given the greatest latitude and therefore requires the most scrutiny. During the Cold War, the excesses of McCarthyism were said to be justified by concern for national security, but then, too, the human rights and dignity of American citizens suffered the most. \[FN140\] Today the United States is unquestionably the most powerful nation on earth. We need to be extremely cautious about accepting 'national security' or analogies to war as justifications for curtailing human rights at home or abroad, whether they are framed in terms of military warfare, economic threat, the invasion of our geographic borders, or the 'war on drugs.' During war, human rights should not be violated because these are precisely the situations in which we most need human rights to be protected. \[FN141\]

P45 Speaking about his experiences representing Haitian refugees interdicted at sea, Professor Harold Koh has said:

I heard our government assert claims of national security and national emergency in support of its demand for presidential power: the Korematsu argument being made against the Haitians. I heard the Chinese Exclusion arguments about sovereignty and inherent power to protect our borders invoked against the Haitians. The Government cited U.S. ex rel. Knauff v. Shaughnessy, an egregious case that had declared that '[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.'

... [I]t finally dawned on me that the Haitian saga is not someone else's saga. It is my story. \[FN142\]

We need to apply this analysis to all of our foreign policy. The Haitian story is certainly the story of Asian American immigrants, but it is more than that. As Koh says, 'I realized that the Haitian story reduces to a story about 'we' and 'they.' Our government was able to depersonalize the Haitians because Americans wanted to believe that the Haitians are not us.' \[FN143\] That depersonalization comes back to harm us.

P46 In the struggle for racial justice at home, it is sometimes tempting to believe that we will achieve more progress on domestic rights by avoiding criticism of U.S. foreign policy. There are several problems with this approach. One is that we all become part of the problem when our silence can be bought with the promise of

a higher standard of living or a little less discrimination. Another is that as we
struggle for domestic respect and recognition, we have to demonstrate that we are
part of this *84 polity. This is our government acting in the world and if it is not
representing us in those actions, we need to insist that it change. And finally, as
discussed above, disregard for the rights of those identified as 'other' does not
stop at the border. Discussing the reaction to his decision to speak out against
the war in Vietnam, Martin Luther King, Jr. said

[M]any persons have questioned me about the wisdom of my path. . . . Why are you
speaking about the war, Dr. King? . . . Peace and civil rights don't mix, they say.
Aren't you hurting the cause of your people? they ask. And when I hear them,
though I often understand the source of their concern, I am nevertheless greatly
saddened, for. . . .their questions suggest that they do not know the world in which
they live. [FN144]

[FN1]. Associate Professor, Georgia State University College of Law. This article
was initially presented as part of a panel on Critical Race Theory and International
Human Rights at the Critical Race Theory Conference held at Yale Law School in
November, 1997. I am grateful to Berta Esperanza Hernandez-Truyol for organizing
the panel, to C. Cooper Knowles for many hours of research, to the Japanese Peruvian
Oral History Project for generously sharing information on the internment of
Japanese Peruvians, to the members of the Original Legal Scholarship Collaborative
Project who encouraged my research in this area, and to the editorial staff of the
Yale Human Rights & Development Law Journal. This research has been supported by a
grant from the Civil Liberties Public Education Fund and by the Georgia State
University College of Law. Special thanks go to Kelly Jordan for thinking and
re-thinking these concepts with me through this article's many iterations.

[FN1]. On the relationship between citizenship and the perception of foreignness,
see generally Neil Gotanda, Asian American Rights and the 'Miss Saigon Syndrome,' in
Asian Americans and the Supreme Court 1087 (Hyung-chan Kim ed., 1992); Kevin R.
of Nonpersons, 28 U. Miami Inter-Am. L. Rev. 263 (1997) (examining the legal,
social, and political importance of the term, 'alien'); Kevin R. Johnson, Racial
Hierarchy, Asian Americans and Latinos as 'Foreigners,' and Social Change: Is Law
the Way to Go?, 76 Or. L. Rev. (1997) (noting the complexities of racial hierarchy);
Yxta Maya Murray, The Latino-American Crisis of Citizenship, 31 U.C. Davis L. Rev.
503, 506 (1998) (examining 'how the United States government prevents many
Latino-American citizens from 'belonging' to the United States collective by
stigmatizing aspects of Latino-American identity'); Juan F. Perea, Los Olvidados: On
'American culture, history, and laws make 'invisible people' out of American
Latinos....'); Natsu Taylor Saito, Alien and Non-Alien Alike: Citizenship,
'Foreignness,' and Racial Hierarchy in American Law, 76 Or. L. Rev. 261 (1997)
(explaining the role of 'foreignness' in the racialized identification of Asian
Americans); and Natsu Taylor Saito, Model Minority, Yellow Peril: Functions of
'Foreignness' in the Construction of Asian American Legal Identity, 4 Asian L.J. 71
(1997) (arguing that the depiction of Asian Americans as a model minority masks the
discrimination suffered by them).

[FN2]. See generally Robert S. Chang, A Meditation on Borders, in Immigrants Out!:
The New Nativism and the Anti-Immigrant Impulse in the United States 244- 245 (Juan
'Race' is increasingly being recognized as a social construct, rather than an immutable biological characteristic. Justice White, writing for the majority in St. Francis College v. Al-Khazraj, 481 U.S. 604 (1987), said, '[i]t has been found that differences between individuals of the same race are often greater than the differences between the 'average' individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological in nature.' Id. at 610 n.4. See generally Anthony Appiah, The Uncompleted Argument: Du Bois and the Illusion of Race, in 'Race,' Writing and Difference 21, 22 (Henry Louis Gates, Jr. ed., 1986) (discussing how Du Bois came to 'gradually, though never completely, assimilate the unbiological nature of races.'), Michael Omi & Howard Winant, Racial Formation in the United States: From the 1960s to the 1990s (2d ed. 1994) (discussing paradigms of race based on concepts of class, ethnicity, and nationality); Ian Haney-Lopez, The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice, 29 Harv. C.R.-C.L. L. Rev. 1 (1994) (critiquing existing theories of race and advancing a new one based on historical social relationships).

This recognition has, in turn, led to the use of 'race' as a verb meaning that racial identity is being ascribed. See, e.g., Lani Guinier, (E)Racing Democracy: The Voting Rights Cases, 108 Harv. L. Rev. 109 (1994) (using play-on-words in the title to criticize the refusal of the judiciary to take race into account when interpreting the Voting Rights Act); Barbara Phillips Sullivan, The Song That Never Ends: New Verses About Affirmative Action, 23 S.U. L. Rev. 157, 161 (1996) (stating that 'de-racing' is 'routinely done by whites and usually noticed by African-Americans').


[FN6]. Scott v. Sanford, 60 U.S. (19 How.) 393, 454 (1857) (holding that the Court did not have jurisdiction to hear Scott's challenge to his enslavement because, being of African descent, he could not be a citizen of Missouri). See generally Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics (1978) (discussing Scott).

[FN7]. U.S. Const. amend. XIV.

[FN8]. Justice Taney, writing for the majority found, not only that slaves were not citizens, but that all African Americans, even free blacks were not meant to be full-fledged citizens under the U.S. Constitution. See Scott, 60 U.S. at 403-4.

[FN9]. On laws mandating racial segregation, see Pauli Murray, States' Laws on Race and Color (1951) (describing segregation laws in each state of the U.S.); Woodward, supra note 5.

President Johnson in 1967 following massive civil uprisings, the Kerner Commission reported frankly that 'segregation and poverty have created in the racial ghetto a destructive environment totally unknown to most white Americans.' Id. at 2.


[FN12]. Martin Luther King, Jr. observed in 1964 the relationship between the continuing influence of slavery and involvement in international politics:

For those who ask the question, 'Aren't you a Civil Rights leader?' and thereby mean to exclude me from the movement for peace, I have this further answer. In 1957 when a group of us formed the Southern Christian Leadership Conference, we chose as our motto: 'To save the soul of America.' We were convinced that we could not limit our vision to certain rights for black people, but instead affirmed the conviction that America would never be free or saved from itself unless the descendants of its slaves were loosed completely from the shackles they still wear.


[FN14]. I use the term 'American' because we do not have another adjective meaning 'of the United States,' but note many Mexicans, Canadians, and Central and South Americans consider it chauvinistic to use the term 'American' to refer only to people from the United States.


[FN17]. See Military and Paramilitary Activities (Nicar. v. United States), 1984 I.C.J. 392, 442 (finding that the International Court of Justice had jurisdiction and that the application by Nicaragua was admissible). The United States refused to participate in the proceedings and announced its intent to terminate its acceptance of the Court's compulsory jurisdiction. See id. at 395. In 1986, the ICJ held that
the United States had violated customary international law and its Friendship, Commerce, and Navigation (FCN) treaty with Nicaragua by mining Nicaraguan territorial waters, attacking ports and other facilities, and financing and training the contra forces. See Military and Paramilitary Activities (Nicar. v. United States) 1986 I.C.J. 14, 538-42.

[FN18]. See United States v. Alvarez-Machain, 504 U.S. 655, 659-70 (1992) (allowing a criminal defendant to be tried in federal court despite his transborder abduction); William J. Aceves, The Legality of Transborder Abductions: A Study of United States v. Alvarez-Machain, 3 Sw. J.L. & Trade Am. 101, 102 (1996). Despite the holding in United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974), that courts were required to divest themselves of jurisdiction when a defendant had been abducted in violation of international treaties, federal courts have routinely found jurisdiction in cases of abduction by U.S. agents. See, e.g., United States v. Reed, 639 F.2d 896 (2d Cir. 1981) (holding that defendant's alleged abduction did not constitute a violation of due process); United States ex rel. Luian v. Gengler, 510 F.2d 62 (2d Cir. 1975) (same); United States v. Chapa-Garza, 62 F.3d 118 (5th Cir. 1995) (same); United States v. Herrera, 504 F.2d 859 (5th Cir. 1974) (holding that a defendant could be tried in federal court despite the alleged failure of the United States to follow orderly processes of extradition).


[FN26]. Id.

[FN27]. See, e.g., Noam Chomsky, After 'Pinkville', in The Chomsky Reader, supra, at 259 (describing the massacre of Vietnamese civilians by U.S. troops at Song My); Noam Chomsky, Cambodia, in The Chomsky Reader, supra, at 289 (relating the genocide committed by the Khmer Rouge to earlier United States actions in Cambodia); Noam Chomsky, Laos, in The Chomsky Reader, supra, at 265 (describing United States bombardment of Laos); Noam Chomsky, The Mentality of the Backroom Boys), in The Chomsky Reader, supra, at 269 (describing the 'pacification' program, including saturation bombing and the use of torture); Noam Chomsky, Vietnam and United States Global Strategy, in The Chomsky Reader 227 (James Peck, ed. 1987) (presenting an overview of U.S. policies in Indochina).


[FN29]. In 1982 Vincent Chin, a young Chinese American, was beaten to death by two laid-off auto workers in Detroit who blamed him for their loss of employment. See United States v. Ebens, 800 F.3d 1422 (6th Cir. 1986); Racial Violence Against Asian


[FN31]. See Jones, supra note 30, at 83-84; O'Neill, supra note 30, at 90-94.


[FN33]. See Jones, supra note 30, at 93.


[FN37]. Jones, supra note 30, at 102. Jones notes that by 'restricting the access to the high seas and interfering with the movement of refugees on the high seas, arguably, both Haiti and the United States are in violation of conventional and customary international law.' Id. at 111.


[FN40]. See Kathleen Marie Whitney, SIN, FRAPH, and the CIA: U.S. Covert Action in Haiti, 3 Sw. J. L. & Trade Am. 303, 304, 315-30 (1996) (documenting U.S. Central Intelligence Agency (CIA) involvement with leaders of the Haitian government, military, and police, and indicating that 'the CIA has provided training, funds, and equipment to the corrupt Haitian military). Whitney states that the activities of the CIA 'violate international laws that protect the rights of sovereignty and self-determination and prohibit intervention into the domestic affairs of other states'. Id. at 304.

[FN41]. See Timothy Williams, Point of View: In Wake of Attack; Haitian Immigrants Say Political Power Needed, L.A. Sentinel, Sept. 3, 1997, at A7; see also James Ridgeway & Jean Jean-Pierre, Louima Time: An Alienated and Angered Haitian American Community Fights Back, Village Voice, Sept. 2, 1997 (noting that in a fact-finding mission to Haiti in 1982, the Mayor of New York, Rudolf Giuliani, reported that there was no political repression but that people emigrated for economic reasons); Ron Daniels, Vantage Point: Racism, Anti-Immigrant Fever Fuel Police Brutality, L.A. Sentinel, Oct. 15, 1997, at A7 (arguing that the crisis surrounding the assault on Abner Louima is 'much deeper than just police brutality, it goes to the heart of the issue of social and economic injustice').


[FN44]. See generally Arab-American Anti-Discrimination Comm., 1991 Report on Anti-Arab Hate Crimes: Political and Hate Violence Against Arab-Americans (1992) (documenting political and hate violence against Arab-Americans, particularly showing the increase in such violence following the Gulf War); 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 A.B.A. J. 48, 50 (1997) (quoting Sam Husseini, media director of the American-Arab Anti-Discrimination Committee Director, who states that 'Arab-Americans get targeted more or less depending on world events.... The Gulf War, World Trade Center bombing and Oklahoma City bombing all led to more reports of disparate treatment').

[FN45]. See generally Mark Andrew Sherman, United States International Drug Control Policy, Extradition, and the Rule of Law in Colombia, 15 Nova L. Rev. 661 (1991) (describing how the United States' international drug policy often involves...
coercion, impeding its effectiveness); Peter S. McCarthy, Comment, United States v. Verdugo-Urquidez: Extending the Ker-Frisbie Doctrine to Meet the Modern Challenges Posed by the International Drug Trade, 27 New Eng. L. Rev. 1067 (1993) (examining the issue of government-sponsored kidnapping in light of the Verdugo-Urquidez decision).

[FN46]. In December, 1989, approximately 24,000 U.S. troops invaded Panama, inflicting significant casualties, both civilian and military, and destroying much property. General Manuel Noriega, head of the Panamanian state (and formerly on the CIA payroll), was arrested by U.S. forces, brought to the United States, and put on trial for criminal conspiracy to violate U.S. law. See United States v. Noriega, 683 F. Supp. 1373 (S.D. Fla. 1988); see also Mark Andrew Sherman, An Inquiry Regarding the International and Domestic Legal Problems Presented in United States v. Noriega, 20 U. Miami Inter-Am. L. Rev. 393, 395 (1989) ('Noriega represents the ultimate intersection of United States domestic law and foreign policy, and its precedential value should not be understated.'). Louis Henkin says,

With regret, I conclude that the invasion of Panama by the United States was a clear violation of international law as embodied in the principal norm of the U.N. Charter on which the world, under the leadership of the United States, built the new international order after World War II. The United States did not even have a color of justification for this invasion.


[FN47]. This can be seen in the documentary film Panama Deception (Empowerment Project 1992).


[FN49]. See Robert M. Cassidy, Sovereignty Versus the Chimera of Armed Humanitarian Intervention, 21 Fletcher F. World Aff., Fall, at 47, 59 (1997) ('The United States was very reluctant to commit forces in Somalia until it was impelled to do so by domestic political factors.').

[FN50]. See Dorinda Lea Peacock, 'It Happened and It Can Happen Again': The International Response to Genocide in Rwanda, 22 N.C. J. Int'l L. & Com. Reg. 900-01 (1997) (noting that the United States and the international community 'maintained a careful distance' for over two years of refugee crises, civil war, and genocide); see also Weekend Edition-Saturday, Mar. 28, 1998, available in 1998 WL 6284798 (discussing President Clinton's apology to genocide survivors in Rwanda for the slow response of the United States, and noting one estimate that the commitment of 2,000 troops could have prevented the slaughter of 500,000 people).

[FN51]. See UN: 'We cannot afford to fail' in AIDS fight, says Secretary-General, M2 Presswire, Dec. 9, 1997, available in 1997 WL 16294870 (noting the World Health
Organization's new estimate that over 20 million people in sub-Saharan Africa are infected with HIV or AIDS, two-thirds of the total number in the world; see also African Epidemic Reaches Unprecedented Levels, AIDS Alert SS4, Feb. 1, 1998. See generally Global AIDS Policy (Douglas A. Feldman, ed. 1994) (including essays examining the harm done by political agendas and biases against the poor and racial minorities to the development of effective remedies).

[FN52]. CBS News reported that 'President Clinton is under fire... from his own advisory panel on AIDS.... for not getting AIDS drugs to HIV patients on Medicaid and for not funding needle-exchange programs.' CBS Evening News (CBS television broadcast, Dec. 7, 1997), available in 1997 WL 16409290. In addition, the United States and three European countries have recently been accused of 'conducting unethical medical experiments on thousands of HIV-infected pregnant women in Africa, Asia and the Caribbean.' Martin Kettle, American AIDS Trials Run Into Ethics Fury, The Guardian, Sept. 19, 1997. In these experiments, only half of the HIV-positive women were treated with AZT. As the Guardian reports, '[t]he issue carries particular force... because it raises the spectre of the notorious Tuskegee research on untreated syphilis among poor blacks in Alabama, in which unknowing sufferers were denied penicillin during a 40-year study.' See id; accord Sheila Dennie, Against All Odds: Survivors of Tuskegee Syphilis Study (TSS) Receive Apology from President Clinton, Tenn. Trib., June 19, 1997, at 4 (noting that the 'TSS's lasting effect is especially evident' in African Americans' attitudes toward HIV/AIDS policies); Muriel Dobbin, Clinton Warns Against Prejudice in Science, Sacramento Bee, May 19, 1997, at A6.


[FN58]. See text accompanying notes 22-26 infra.


[FN60]. Two thirds of this number were second generation Japanese Americans who were American citizens by birth. See Ronald Takaki, Strangers From a Different Shore 15 (1989). Because the racial restrictions imposed by the Naturalization Act of 1790 (limiting naturalization to 'free white persons' and, after passage of the Fourteenth Amendment, adding persons of African descent) were not fully removed until the Naturalization Act of 1952, the first generation Japanese immigrants were not eligible to become U.S. citizens. See Ian F. Haney Lopez, White by Law: The Legal Construction of Race 1 (1996). Nonetheless, they were in the United States as permanent residents, committed to staying here and raising their children as Americans. Therefore, I use the term 'Japanese American' to encompass this entire community, regardless of citizenship.


[FN62]. Mochizuki v. United States, No. 96-5986 (C.D. Cal., filed Aug. 27, 1996). On July 12, 1998, the U.S. Justice Department announced that it had reached a settlement with the plaintiffs. The settlement consists of a brief letter of regret from President Clinton and an agreement to pay each surviving Japanese Latin American internee $5,000 out of funds allocated under the 1988 Civil Liberties Act after all Japanese American claimants have been paid. Not only is this amount significantly less than the $20,000 paid to each Japanese American internee, but the claims of Japanese Latin American internees are expected to exceed the available funds. A hearing to finalize the settlement is scheduled for November, 1998. See Aurelio Rojas, U.S. Offers Internees Apology, S.F. Chron., June 13, 1998, at Al; Lena H. Sun, U.S. Apologizes for Internment, Wash. Post, June 13, 1998, at A04.


There were Japanese Latin Americans taken from numerous other countries as well, but by far the largest number came from Peru. See Weglyn, supra note 61, at 60 (eighty percent of the Latin-American Japanese deportees were from Peru); see also Gardiner, supra note 63, at 134, tbl. 9 (showing that only 18 Bolivians and 495 Peruvians of Japanese descent remained in U.S. custody as of Jan. 31, 1946.)

[FN64]. See generally Emmerson, supra note 63, at 130-33 (describing Japanese migration to Peru); Gardiner, supra note 63, at 3-11 (same).

[FN65]. See Emmerson, supra note 63, at 132 ('[t]he patent success of the Japanese won them enmity'); Gardiner, supra note 63, at 8; Weglyn, supra note 61, at 60.

[FN66]. The Peruvian census of 1940 reported 17,598 Japanese citizens and 8,790 second generation Peruvians of Japanese descent, for a total 'Japanese' population of 25,888. See Emmerson, supra note 63, at 131; see also Memorandum (no. 7288) from R. Henry Norweb to Secretary of State, encl. No. 1 (July 7, 1943) (on file with author). The State Department files also contain a translation of an article entitled 'Japanese in Peru,' which states that in 1940 there were 50,000 Peruvians of Japanese descent. See Letter (May 27, 1943) (summarizing Japanese in Peru) (on file with author).

[FN67]. See Weglyn, supra note 61, at 58-59; see also Gardiner, supra note 63, at 16-17.

[FN68]. See Gardiner, supra note 63, at 18-19.

[FN69]. See Gardiner, supra note 63, at 19, 23 tbl. 4.

[FN70]. Emmerson says, 'From April 4, 1942 until July 9, 1943, during the period I was in Lima, the embassy participated actively in the expulsion from the country and transportation to the United States of 1,024 Japanese, of whom 399 were women and children.' Emmerson, supra note 63, at 139; accord Gardiner, supra note 63, at 41 (noting American authorities' insistence that 'citizenship should not stand in the way of their efforts to deport individuals from Peru.'). A Department of State, Special War Problems Division [hereinafter 'SWP.'] report, dated July 6, 1944, states: 'Following Peru's severance of diplomatic relations in April 1942 with the Axis nations, 569 Germans and 1,737 Japanese nationals have been removed from Peru for internment in the United States.' See U.S. Department of State, SWP, Report No. 6467 (July 6, 1944) (on file with author.)

[FN71]. See Gardiner, supra note 63, at 24, 27-29, 67-69; Weglyn, supra note 61, at 61. The SWP memorandum on the 'Control of Japanese in Peru,' supra note 70, states that 'through political influence and bribery,' a number of 'dangerous Japanese leaders' have avoided deportation. Letter No. 7314, dated July 10, 1943, from the embassy in Lima to the Secretary of State, states that a Mrs. Chieko Nishino had been arrested and sent to join her husband in a U.S. internment camp despite her insistence that she would kill herself if deported. See Letter (No. 7314) from George M. Butler, First Secretary of U.S. Embassy, to U.S. Secretary of State (July 10, 1993) (on file with author).
Emmerson says:

Lacking incriminating evidence, we established the criteria of leadership and influence in the community to determine those Japanese to be expelled. We prepared lists, which we presented to the Peruvian authorities. These authorities, committed at least personally if not officially, to the expulsion of all Japanese, treated our proposed lists rather lightly.

Emmerson, supra note 63, at 143; accord Gardiner, supra note 63, at 16-17, 27-28, 39-40, 44 tbl. 5, 67-68; Weglyn, supra note 61, at 63.

State Department Memorandum No. 6239 from Ambassador Norweb to the Secretary of State, dated March 3, 1943, indicates that of the 119 Japanese Peruvians who were evacuated on the S/S Frederick C. Johnson on February 24, 1943, 15 were recommended for expulsion by the Embassy. Memorandum from R. Henry Norweb to U.S. Secretary of State (Mar. 3, 1943) (on file with author). Another State Department letter entitled War Problems, dated August 24, 1944, notes that the new Peruvian ambassador had been sent to the United States to get rid of the Japanese in Peru and to buy matches and that he was not interested in any other matters....' Letter from A.B.C. to Keeley (Aug. 24, 1944) (on file with author).

[FN73]. See Gardiner, supra note 63, at 29, 41.

[FN74]. Cf. id. at 69 (describing their living conditions in Panama).

[FN75]. Cf. id. at 46, 70 (describing claims of their illegal entry); Weglyn, supra note 61, at 64 (same).

[FN76]. While some consider this term too harsh, Harold Ickes, Secretary of the Interior, called them 'fancy-named concentration camps.' Weglyn, supra note 61, at 18; accord Roger Daniels, Concentration Camps USA: Japanese Americans and World War II (1972).

While these camps were far from the death camps run by the Nazis, the parallel was not lost on the world. Michi Weglyn reports: 'In his article, 'The Man Behind a Famous Court Case,' (Pacific Citizen, February 13, 1970), Ray Okamura wrote: 'Gordon [Hirabayashi] had a grim and thought-provoking footnote: 'The Nazi defendants at the Nuremberg Tribunal cited the Hirabayashi and Korematsu decisions as a defense.' Weglyn, supra note 61, at 291 n.14.

[FN77]. These camps were located in the Texas towns of Kenedy, Seagoville and Crystal City. See Gardiner, supra note 63, at 29-31, 36-37, 58-61. [Weglyn: at this time, no evid. of mistreatment of Americans held by Japanese].

[FN78]. The Alien Enemies Act, 50 U.S.C. §§ 21-23 (1988), only allowed the executive to intern or deport enemy aliens. See id. §21. The United States was a party to hemispheric security arrangements, but they only allowed for the restraint or removal of 'certain dangerous alien enemies.' Proclamation No. 2685, 60 Stat. 1342 (1946) (citing adopted May 21, 1943, Emergency Advisory Committee for Political Defense Res. XX; adopted Jan. 28, 1942, Conference of Foreign Ministers Res. XVII); accord Emmerson, supra note 63, at 126. Weglyn states:

By early 1943, the Justice Department... had become greatly alarmed at the number of internees being sent up. Worse, it had come to its attention that many being held under the Alien Enemies Act were not enemy Japanese but Peruvian nationals, thus aliens of a friendly nation; and that little or no evidence supported the Peruvian Government's contention that their deportees were dangerous.
Weglyn, supra note 61, at 63.

[FN79]. Weglyn, supra note 61, at 54-56; see also State Department officer A.E. Clattenberg, Outline of Negotiations for Exchange of American Civilians in Japanese Hands (Oct. 12, 1943) (on file with author); Memorandum (June 15, 1942) (on file with author) (summarizing 'American-Japanese exchange agreement ') (on file with author); Letter from Francis Biddle, Attorney General to Secretary of State (June 28, 1943) (agreeing to withdraw the Justice Department's objections to the repatriation of 12 Japanese nationals to avoid endangering 'the entire Japanese repatriation negotiations,' in light of 'the primary objective of obtaining the return of American nationals.') (on file with author).

[FN80]. Weglyn, supra note 61, at 62-63 (emphasis added); accord supra note 78 (regarding the legal implications of imprisoning persons not found to be 'dangerous').

[FN81]. Weglyn, supra note 61, app. 7, at 182.

[FN82]. Id. In August 1941, months before the attack on Pearl Harbor, Congressman John Dingell of Michigan suggested to the President that:

we remind Nippon that unless [Japan allows the departure of one hundred U.S. citizens reportedly detained in Japan] within forty-eight hours, the Government of the United States will cause the forceful detention or imprisonment in a concentration camp of ten thousand alien Japanese in Hawai'i; the ratio of Japanese hostages held by America being one hundred for every American detained by the Mikado's Government.

It would be well to further remind Japan that there are perhaps one hundred fifty thousand additional alien Japanese in the United States who will be held in a reprisal reserve....
Id. at 55.

[FN83]. See Gardiner, supra note 63, at 48, 84-85.

[FN84]. In June 1944, Secretary of State Hull wrote President Roosevelt that 'the detention of [the Japanese Americans] and incidents that have occurred in our detention centers have resulted in protests from the Japanese Government and have supplied that Government with pretexts for refusing to negotiate for further repatriation of our nationals in Japanese custody or for their relief.' Weglyn, supra note 61, at 222. The Clattenberg 'Outline,' points out the 'tremendous resentment' and 'a lessening of Japanese interest in the exchange of nationals' due, in part, to reports from Japanese repatriated from the U.S. See Clattenburg, supra note 79 (manuscript at 3, on file with author). On the determination of 'loyalty' and the segregation at Tule Lake, see Weglyn, supra note 61, at 146-173; cf. Tokyo Makes Most of Tule Lake Riots, Chi. Sun, Nov. 15, 1943, reprinted in id. at 15 (describing reactions to the riots there).

Referring to the forced deportation of Chieko Nishino from Peru, see supra note 71, a State Department memorandum voices concern that the related 'unfavorable propaganda' could affect 'our exchange negotiations with Japan' should Mrs. Nishino commit suicide. Memorandum from J.K.W. to the Ambassador (July 9, 1943) (on file with author); see also Brief Review of Impressions Obtained at Immigration Detention Stations at Kenedy, Crystal City and Seagoville, Texas (July 9, 1943) (noting that the physical conditions in the camps were so poor as to 'most likely produce on the part of the enemy retaliation against our Americans') (on file with author);
Memorandum from Spanish Embassy (June 5, 1944), reprinted in Weglyn, supra note 61, at 185 (transmitting Japanese government's protest over the **internment** of Japanese residents of Peru and Bolivia).

[FN85]. See Gardiner, supra note 63, at 116 tbl. 8.

[FN86]. A State Department memorandum of Nov. 2, 1945 states that 'the Peruvian government has indicated on a number of occasions that it does not look with favor on the return to Peru of the Japanese... now interned in the United States.' Memorandum (Nov. 2, 1945) (on file with author).

[FN87]. See Gardiner, supra note 63, at 169-171; Weglyn, supra note 61, at 64. According to Gardiner, '[f]ewer than 5 percent of the deported Peruvian Japanese--considerably fewer than one hundred persons--were allowed to return to South America.' Gardiner, supra note 63, at 174.

[FN88]. Gardiner, supra note 63, at 136.

[FN89]. A 'War Problems' memorandum dated September 1, 1944 noted that the author 'was informed by Mr. Ennis [Department of Justice, Director of the Alien Enemy Control Unit] that the law precludes Justice [referring to the Department of Justice] from holding non-alien enemies in an interned status beyond a period of three months.' Memorandum (Sept. 1, 1944) (entitled 'War Problems ') (on file with author). According to Gardiner, the Justice Department 'insisted that it could justify the detention of the Latin American Japanese only if some satisfactory means were instituted to determine whether the enemy aliens were dangerous.' Gardiner, supra note 63, at 64; accord id. at 73-74.

On July 14, 1945 and April 10, 1946, Presidential Proclamations entitled 'Removal of Enemy Aliens' were issued, specifically allowing the deportation of interned Latin Americans pursuant to the Alien Enemy Act. See Proclamation No. 2685, 60 Stat. 1342 (1946); Proclamation No. 2655, 59 Stat. 370 (1945).

[FN90]. See Emmerson, supra note 63, at 148-149. A U.S. State Department Notice to the Internees from Latin America, dated Jan. 4, 1946, explained that the internees were being held pursuant to the Alien Enemy Act, and that they could not remain in the U.S. after release from custody because their 'entry into the United States was not made under the immigration laws.' U.S. Dept. of State, Notice to the Internees from Latin America (Jan. 4, 1946) (manuscript at 3, on file with author); accord Truman Acts on Axis Nationals, Baltimore Sun, Sept. 9, 1945 (from U.S. Dept. of State Alien Enemy Control Section file), noting that the President by proclamation gave the State Department 'the authority to get rid of 1,300 Japanese and 900 German aliens who were arrested in Latin America during the war and brought to this country for internment.' According to the article, the internees included 'spies, saboteurs, provocateurs and propagandists.' Id. See also State Department Memorandum of Meeting dated Aug. 31, 1944 on the subject of the 'Postwar disposition of interned alien enemies received from the other American republics,' anticipating 'difficulties in disposing of them but determining that none of the internees should be allowed to remain in the U.S., despite the fact that 'some individuals sent here for internment were undoubtedly relatively harmless.' Memorandum of Meeting (Aug. 31, 1944).

[FN91]. Gardiner, supra note 63, at 138.

See Weglyn, supra note 61, at 64. A letter from the Officer in Charge of the Santa Fe, New Mexico Department of Justice Internment Camp to the State Department, dated April 3, 1946, lists the 81 Japanese Peruvians held in the camp and notes that of that number, only 4 were willing to accept voluntary repatriation to Japan. See Letter from Ivan Williams, Officer in Charge, U.S. Dep't of Justice/I.N.S. Internment Camp, Santa Fe, New Mexico, to Dep't of State, Alien Control Section (Apr. 3, 1946) (on file with author).

Collins, who had represented Korematsu and Endo in their challenges to the internment, also represented hundreds of Japanese Americans whom the U.S. government was trying to deport. See Gardiner, supra note 63, at 141-42; Weglyn, supra note 61, at 253-65. Because the majority of the incarcerated Japanese Americans were U.S. citizens, the term 'repatriation' is inaccurate. Nevertheless, it is frequently used in this context, furthering the perception that these Americans were 'foreign.'

See Gardiner, supra note 63, at 142; Weglyn, supra note 61, at 64-65; see also Letter from Albert Clattenburg, State Department, to the Peruvian Embassy (Aug. 26, 1946) (identifying eight Japanese Peruvians employed at Seabrook Farms and noting that 355 Japanese from Peru remained in custody) (on file with author).


See The Civil Liberties Act of 1988, 50 U.S.C. § 1989b-7(2) (1990). Furthermore, the Act excludes persons who 'relocated' to a country between Dec. 7, 1941 and Sept. 2, 1945 while the United States was at war with that country. See id.


According to a March 1998 submission of International Educational Development to the 54th Session of the United Nations Commission on Human Rights:

At the time this program was in operation, international humanitarian law clearly forbade war-time abduction, incarceration, and deportation of civilians from friendly countries. Exchange of civilians from a friendly country to an enemy third party was viewed as especially serious and in this case, met the criteria of hostage-taking.... International law also forbade slavery and forced labour (the conditions of the Latin Americans held in the Panama camps clearly met the then-existing prohibition against slavery and forced labour) whether in peacetime or in war. The Charter of the International Military Tribunal (Nuremberg Charter), the Charter of the Military Tribunal for the Far East (Tokyo Charter) and the earlier Control Council Law 10 set out these acts as war crimes and crimes against humanity at the time of World War II.

Vand. J. Transnat'l L. 469 (1993) (arguing that states should be prohibited from deporting civilians during time of war).

[FN99]. This was recognized by the United States government as early as 1863, when it was stated in General Order No. 100 of the U.S. Army ('Lieber's Code') that 'private citizens are no longer murdered, enslaved, or carried off to distant parts....' Richard Shelly Hartigan, Lieber's Code and the Law of War 49 (1983). According to Georg Schwarzenberger, at the Hague Peace Conferences of 1899 and 1907, 'to raise the issue of the illegality of the deportation of the population of occupied territories was considered unnecessary; the illegality was taken for granted.' Georg Schwarzenberger, 2 International Law as Applied by International Courts and Tribunals 227 (1968). In 1924, the Belgo-German Mixed Arbitral Tribunal stated in Moriaux v. Germany that deportation of civilians was a 'most flagrant and atrocious breach of international law.' See Schwarzenberger, supra, at 228-29. Beginning in 1921, the International Red Cross began articulating prohibitions on the mass deportation of civilians and the taking of hostages, but these were not finalized before the outbreak of World War II. See Donald A. Wells, War Crimes and Laws of War 50-51 (2d. ed. 1991).

[FN100]. 'The 1907 Hague Regulations do not provide an explicit prohibition of deportations. The Commentary to Geneva IV explains that this was probably so because the practice of deporting persons was regarded at the beginning of this century as having fallen into abeyance.' Henckaerts, supra note 98, at 480; accord de Zayas, supra note 98, at 210-211 (noting that the 1907 Hague Regulations were silent on the issue of deportations because deportations were no longer practiced in 'so-called civilized warfare.') It is also interesting to note that one of the defenses raised at the Nuremberg trials was the United States' treatment of Japanese Americans. See Weglyn, supra note 61, at 75.

[FN101]. Emmerson, supra note 63, at 149.

[FN102]. See supra note 78; see also Memorandum (1943) (Enclosure No. 1 to despatch No. 6239 (Mar. 3, 1943) from the U.S. Embassy in Lima) (on file with author) (describing the deportation of Axis nationals, and outlining the review of State Department procedures by Raymond Ickes of the Alien Enemy Control Unit of the Department of Justice in which Ickes insisted that only 'dangerous' enemy aliens could be arrested, and that there was inadequate evidence for some of the proposed deportations).

[FN103]. The most famous of these are probably General DeWitt, head of the Western Defense Command, who said 'A Jap's a Jap. It makes no difference whether he is an American citizen or not,' Weglyn, supra note 61, at 201, and then-Governor of California Earl Warren, who had to be warned by the Army in December 1944 that people of Japanese ancestry had to be allowed safe return to the West Coast. See id. at 192-93 (reprinting of letter to Earl Warren from Robert Lewis).

[FN104]. See Weglyn, supra note 61, at 190-91.

[FN105]. Id. (emphasis added).

[FN106]. Id. at 217.

dissenting).

[FN108]. Various aspects of the internment were upheld in Ex parte Endo, 323 U.S. 283 (1944); Korematsu v. United States, 323 U.S. 214 (1944); Yasui v. United States, 320 U.S. 115 (1943); and Hirabayashi v. United States, 320 U.S. 81 (1943).


[FN110]. See Weglyn, supra note 61, at 144.

[FN111]. See W.E.B. Du Bois, The Autobiography of W.E.B. Du Bois: A Soliloquy on Viewing My Life From the Last Decade of Its First Century 239-40 (1st ed. 2d prtg. 1969) ('The most important work of the decade as I now look back upon it was my travel.... [It] gave me a depth of knowledge and a breadth of view which was of incalculable value for realizing and judging... the problem of race in America.').


[FN114]. A Time to Break Silence, reprinted in Eyes on the Prize Reader, supra note 12, at 387.

[FN115]. These are sometimes referred to as 'second generation' human rights, in contrast to civil and political rights, which are identified as 'first generation' rights. They are also considered 'positive' rights (e.g., the right to food, shelter, medical treatment or education) in contrast to 'negative' rights which protect people from interference by the government (e.g., the right to freedom of speech, the right to be free from arbitrary arrest and detention, or the right not to be discriminated against on the basis of race or gender). Both first and second generation rights are generally considered to be the rights of individuals. See Louis B. Sohn, The New International Law: Protection of the Rights of Individuals Rather than States, 32 Am. U. L. Rev. 1 (1982). These rights are articulated in many international agreements, including the International Covenant on Civil and Political Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; the International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 999 U.N.T.S. 3 [hereinafter ICESCR]; the International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Mar. 7, 1966, 600 U.N.T.S. 195 [hereinafter ICERD]; and the Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter UDHR].

[FN116]. The rights of groups or of peoples, sometimes referred to as 'third generation' human rights, are mentioned in the ICCPR, supra note 15, and the ICESCR, supra note 15, and more specifically articulated in the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, G.A.

[FN117]. See Carson, supra note 113, at 40 (citing December 14, 1964 report by John Lewis & Donald Harris, The Trip). Lewis and Harris were Student Nonviolent Coordinating Committee (SNCC) activists who met with Malcolm X (now El-Hajj Malik El-Shabazz) in Nairobi during his second trip to Africa. See id. at 39.


[FN119]. According to Lewis and Harris, Malcolm 'felt that the presence of SNCC in Africa was very important and that this was a significant and crucial aspect of the 'human rights struggle' that the American civil rights groups had too long neglected.' Carson, supra note 113, at 40 (citing December 16, 1964 report by John Lewis & Donald Harris, The Trip). King noted that, among other reasons, he was opposed to the war in Vietnam because it diverted resources from the domestic Poverty Program, it disproportionately sent the poor to fight and die, and it promoted violence at home. See A Time to Break Silence, reprinted in Eyes on the Prize Reader, supra note 12 at 388-389.

[FN120]. This point is made by Berta Esperanza Hernandez-Truyol, Building Bridges: Bringing International Human Rights Home, 9 La Raza L.J. 69, 72 (1996) ("Binding international human rights norms provide significant protections beyond our 'domestic' civil rights law."). See also Richardson, supra note 112 (discussing the importance of international law to African Americans).

[FN121]. I refer here to international law as it is found in each of the sources of international law identified in Article 38 of the Statute of the International Court of Justice: treaties, custom, general principles, and the writings of scholars and jurists. Statute of the I.C.J., signed June 26, 1945, art. 38, 59 Stat. 1055, 33 U.N.T.S. 993. See also Howard S. Schrader, Custom and General Principles as Sources of International Law in American Federal Courts, 82 Colum. L. Rev. 751 (1982) (discussing customs and general principles as sources of international law).


[FN123]. See, e.g., Amistad (Dreamworks 1997). Before its recent rediscovery, the case was discussed in other books, including Howard M. Jones, Mutiny on the Amistad: The Saga of a Slave Revolt and Its Impact on American Abolition, Law, and Diplomacy (1987).

[FN125]. 'Under this law, an African imported into any of the Spanish colonies contrary to the treaty would be declared free in the first port at which the African arrived.' Holden-Smith, supra note 124, at 1112.

[FN126]. See also Jackson, supra note 59, at 124.

[FN127]. See Art. 2 of the ICCPR, supra note 15; and the ICERD, supra note 15; Art. 2 of the UDHR, supra note 15; U.N. Charter art. 55.


[FN130]. See Hernandez-Truyol, supra note 120, at 73-76 (noting that the imposition of the death penalty in a discriminatory manner, or on juveniles, violates the International Covenant on Civil and Political Rights, and that U.S. practices have been questioned by the UN Human Rights Committee).

[FN131]. See generally Stephen B. Bright, Discrimination, Death and Denial: The Tolerance of Racial Discrimination in Inflation of the Death Penalty, 35 Santa Clara L. Rev. 433 (1995) (arguing that because discrimination and arbitrariness continue to play a role in the imposition of the death penalty, it should be declared unconstitutional); Ved P. Nanda, The United States Reservation to the Ban on the Death Penalty for Juvenile Offenders: An Appraisal Under the International Covenant on Civil and Political Rights, 42 DePaul L. Rev. 1311 (1993) (arguing that the United States should prohibit the imposition of the death penalty on persons under 18 years).

[FN132]. See International Comm'n of Jurists, Administration of the Death Penalty in the United States 54 (June 1996) (finding that in a majority of death penalty cases in the US, there is a class and racial disparity in charging, sentencing, and imposition of the death penalty); U.S. General Accounting Office, Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (1990) (rep. No. GGD-90-57); Bright, supra note 131, at 467-480 (discussing the failure of U.S. courts to deal with racial discrimination in capital sentencing). In McCleskey v.
Kemp, the Supreme Court allowed Georgia to continue to execute persons despite evidence that death sentences were four times more likely to be imposed in cases in which the victim was white than in cases with black victims. 481 U.S. 279, 287-291 (1987).


[FN136]. Particularly with respect to American Indians, this disregard also exists within the border. See Robert A. Williams, Jr., 'The People of the States Where They are Found are Often Their Deadliest Enemies: The Indian Side of the Story of Indian Rights and Federalism, 38 Ariz. L. Rev. 981, 982-84 (1996).

[FN137]. See Rostow, supra note 61, at 491-92.

[FN138]. See Hirabayashi v. United States, 828 F.2d 591, 597-99 (9th Cir. 1987) (vacating convictions on the basis of newly discovered evidence); Korematsu v. United States, 584 F. Supp. 1406, 1416-19 (N.D. Cal. 1984) (same); Justice at War, supra note 61, at 269-310 (discussing ways in which War Department misled courts); Justice Delayed, supra note 61, at 103-21 (same).

[FN139]. Korematsu v. United States, 323 U.S. 214, 233 (1944) (Murphy, J., dissenting); see also Ex parte Endo, 323 U.S. 283, 302-04 (1944); Hirabayashi v. United States, 320 U.S. 81, 111 (1943) (Murphy, J., concurring).

[FN140]. Senator McCarthy's skepticism about international human rights agreements was consistent with his domestic agenda. 'Senator Joseph McCarthy and his cohorts were deeply suspicious of internationalism.' Barbara Stark, Urban Despair and Nietzsche's 'Eternal Return': From the Municipal Rhetoric of Economic Justice to the

[FN141]. See Gibney, supra note 128, at 261-62 (noting that federal courts have been much more receptive to suits by foreign plaintiffs against foreign state actors than to suits alleging violations of human rights by the U.S. government).


[FN143]. Id. at 20.

[FN144]. A Time to Break Silence, reprinted in Eyes on the Prize Reader, supra note 12, at 388. King says further that after speaking with the 'desperate, rejected and angry young men' following the urban uprisings of the mid-1960s, 'I knew that I could never again raise my voice against the violence of the oppressed in the ghettos without having first spoken clearly to the greatest purveyor of violence in the world today--my own government.' Id. at 389.

END OF DOCUMENT
The evacuation and internment of Japanese Americans during World War II finally have made their way into our history books. The injustice of these events perpetrated by the United States government has awakened the conscience of Congress enough to induce it to appropriate redress to the victims. The Civil Liberties Act of 1988 began providing eligible Japanese Americans with an apology from the U.S. government and $20,000 in reparations for the loss of liberty and destruction of property suffered at the hands of U.S. officials. As it did with Japanese Americans, however, the American government also robbed Peruvians of Japanese descent of their freedom during World War II. The U.S. government abducted Japanese Peruvians from their homes in Peru, brought them to the United States, and interned them for the duration of the war. After the war, the U.S. government deported most of these eighteen hundred individuals to Japan. Approximately three hundred individuals remained in the United States, gained permanent residency, and eventually became American citizens. While Japanese Americans have attained redress for the injustice they experienced, the U.S. government has not recognized the similar evacuation and internment of two thousand Peruvians of Japanese descent. These victims have received neither an apology nor reparations.

This Note describes the wartime experiences of Japanese Peruvians and discusses possible avenues of redress. When discussing redress options, the Note focuses primarily on those Japanese Peruvians who remained in the United States after the war and became permanent residents or citizens. Part I examines the history of Japanese Peruvians, beginning with their immigration to Peru. It follows their experience from deportation to the United States through subsequent internment and settlement of some Japanese Peruvians in the United States.

Section II analyzes the Civil Liberties Act of 1988 ("the Act"), which authorized

reparations to Japanese American internment victims. The Act currently limits the reparations to individuals who were permanent residents or U.S. citizens at the time of their internment. This provision prevents most Japanese Peruvians from gaining redress because, as deportees kidnapped from Peru and brought to the United States by American officials, they were not permanent residents or citizens during their internment.

Legal action is necessary to enable Japanese Peruvians to attain the same modest reparations offered by the U.S. government to other World War II internment victims. Section III considers a number of potential redress options for Japanese Peruvians based on the Civil Liberties Act. One approach *310 involves an equal protection challenge to the Act resting on the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Another approach involves Japanese Peruvians claiming retroactive residency through the Immigration and Naturalization Service (INS) doctrine of permanent residency under color of law ("PRUCOL"). A third avenue involves application of the principle of implied waiver, which allows individuals to gain residency without the required documentation. A final option invokes equitable estoppel to prevent the government from claiming that the Japanese Peruvians entered the United States illegally and, therefore, fail to qualify for redress under the Civil Liberties Act.

I. HISTORICAL REVIEW OF THE JAPANESE PERUVIAN EXPERIENCE

A. The Emigration of Japanese to Peru

In 1899, the first Japanese immigrants arrived in Callao, Peru on board the ship the Sakura Maru. [FN1] This first wave of approximately eight hundred Japanese migrated to Peru for various reasons: unsettled economic times in Japan due to the Sino-Japanese war, a surplus of skilled farmers in Japan, the desire of Japanese emigration agents and shipping companies to make a profit by expanding business, and Peru's assurances that Japanese workers would be welcome. [FN2] The second wave of emigrants in 1903 included over one thousand Japanese, and the third wave in 1906 sent about eight hundred more emigrants to Peru. [FN3] During this time, the Peruvian willingness to accept the Japanese matched the Japanese willingness to emigrate to Peru. [FN4] These waves of emigration attracted fierce competition among Japanese shipping companies to contract with prospective emigrants. [FN5] By the early 1940s, close to 18,000 Japanese lived in Peru, representing twenty-eight percent of its population. [FN6] The Japanese population in Peru increased to approximately 30,000 by 1942. [FN7]

Japanese assimilation into Peruvian communities was relatively tranquil in the early part of the twentieth century. [FN8] By the 1930s, however, the newly-settled Japanese faced severe pressures in their new homeland due to mounting prejudice and increasingly hostile legislation. [FN9] Native Peruvian discrimination against Chinese Peruvians shifted to the Japanese, which resulted in a *311 number of clashes between native Peruvians and the Japanese in rural parts of the country. [FN10]

Tension arose as native farmers claimed that Japanese farmers were taking control of the most fertile agricultural areas of the country. [FN11] At the same time, urban Peruvians resented the Japanese for their resistance in adopting Peruvian culture. [FN12] Peruvian journalists exaggerated the threat that Japanese businesses
purportedly posed to the Peruvian economy, which spawned further resentment from native Peruvians. \[FN13\] In 1940, the hostility climaxed when riotous native Peruvians pillaged Japanese homes and businesses in Lima and Callao. \[FN14\] Out of fear of further violence, many Japanese men sent their wives and children back to Japan. \[FN15\]

B. Anti-Foreign Political Measures in Peru

As a reaction to anti-foreign public sentiment after World War I, the Peruvian government began a program to "Peruvianize" the economy and eliminate Japanese-held interests in Peru. \[FN16\] In order to decrease Japanese economic activities and enterprises in Peru, the Peruvian government passed legislation that required any work force to be at least eighty percent native Peruvian. \[FN17\] Additionally, racial prejudice among Peruvian officials resulted in policies that halted Japanese immigration to Peru, and led to the revocation of Peruvian citizenship held by many native-born Japanese Peruvians. \[FN18\]

*312 C. The Beginning of U.S. Cooperation to Rid Peru of its "Dangerous Aliens"

In December 1938, the Pan-American Conference took place in Lima, Peru. \[FN19\] The conference "stressed hemispheric unity in the face of the totalitarian aggression" consuming Europe. \[FN20\] A couple of years after the conference, Peruvian government officials met with U.S. naval representatives to discuss cooperative military endeavors. \[FN21\] At this meeting, Peru and the United States discussed Peru's concern about its "dangerous" Japanese population as well as possible measures to address this problem. \[FN22\]

Subsequent to the meeting between the United States and Peru, the U.S. Congress authorized the Federal Bureau of Investigation (FBI) to deploy nonmilitary intelligence agents throughout the Western Hemisphere. \[FN23\] Consequently, FBI Director J. Edgar Hoover posted agents in Peru. \[FN24\] Peruvian officials often fed lies and rumors to these agents about the Japanese. \[FN25\] The Peruvian officials claimed that all Japanese in the country had served in the Japanese army and therefore were allies with the Axis forces. \[FN26\] American diplomats and agents posted in Peru adopted these Peruvian rumors, which fueled fears in Washington. \[FN27\]

After World War II began, the legal positions of aliens made them vulnerable to expulsion from Peru. \[FN28\] The Peruvian government had the constitutional authority to expel any and all aliens in defense of national interests without any express statement of law. \[FN29\] In fact, the executive branch could even *313 arrange with other nations to deport and intern aliens without legislative consideration or public knowledge. \[FN30\]

Henry Norweb, The U.S. Ambassador to Peru, was eager to contribute to the war effort by strengthening U.S. relations with Peru. \[FN31\] Norweb wanted to persuade Peru to deport up to three hundred "undesirable Japanese." \[FN32\] At that time, the U.S. government, with Panamanian cooperation, already had implemented a plan that permitted both the transfer of Japanese Panamanians to the United States and their subsequent exchange for citizens of the western hemisphere held by Japan. \[FN33\] United States representatives in Peru wanted to undertake the same strategy to deal with Japanese. \[FN34\]
In an effort to gain greater cooperation among countries of the western hemisphere in their fight against the Axis nations, the United States arranged a conference of foreign ministers in Rio de Janeiro in January 1942. [FN35] The conference created the Emergency Advisory Committee for Political Defense, which adopted a U.S. government-prepared resolution for the detention and expulsion of dangerous Axis nationals from Latin American countries during the war. [FN36] In this resolution, the United States assured interested countries that it would provide both detention accommodations and shipping facilities "at its own expense." [FN37]

**314**

D. The First Deportation and Internment of Japanese Peruvians to the United States

While the plan to deport and intern Japanese Peruvians originated in the U.S. State Department, the Departments of War and Justice and the Navy shared responsibility for its implementation. [FN38] The Etolin carried the first boatload of 141 Japanese Peruvians from Callao, Peru on April 5, 1942. [FN39] When the deportees arrived in San Francisco, they met briefly with INS personnel. [FN40] These INS officials informed Japanese Peruvians that they had entered the United States without visas or passports, and consequently, were in the United States illegally. [FN41] INS then shipped the newly imported Japanese Peruvians to their U.S. residence in Texas. [FN42]

Kenedy Camp, Texas served as a makeshift internment camp. [FN43] The camp consisted of nine barracks with two hundred pre-fabricated one-room huts, warehouses, a hospital, an administrative building, watchtowers and barbed wire fences. [FN44] Camp authorities generally allowed the detainees free movement, but forced them to endure two daily line-ups and as many as four bed checks per night to ensure against escape. [FN45] To help combat boredom, the men could play sports or work in the camp's woodworking shop. [FN46] They watched movies regularly, and wrote and participated in plays. [FN47] Despite these provisions, a great deal of discontent existed among the men because the U.S. government had uprooted them from their homes, and left them unaware of what the future held. [FN48]

E. Subsequent Deportations of Japanese Peruvians to the United States

Only eight days after the Etolin departed from Callao, the Acadia, a smaller passenger ship from Boston, left the same Peruvian port with forty-six people on board, most of whom were diplomatic officials and their families. [FN49] The next ship, the Shawnee, carried 342 Japanese from Peru to the United States in June 1942. [FN50] Although two of these people were Peruvian nationals, the rest were still Japanese citizens even though they had lived in Peru for twenty to thirty years. [FN51] When the Acadia arrived in New Orleans, the U.S. government transported the single men to the Kenedy Internment Camp and the families to Seagoville Camp. [FN52] Upon arrival at the camps, the new internees found other deported Japanese Peruvians, and also discovered that the U.S. government already had sent some of their predecessors to Japan. [FN53]

F. The Proposal to Exchange Japanese Peruvians and Other Japanese Latin Americans for Prisoners of War from the Western Hemisphere Held by Japan

Soon after the attack on Pearl Harbor on December 7, 1941, Spanish and Swiss
intermediaries helped American and Japanese officials begin negotiating an exchange of diplomatic and consular personnel held by each country. [FN54] Japanese officials agreed to an American proposal to exchange diplomats. [FN55] As a result of their desire to unify the war effort in the Western Hemisphere, officials in Washington decided to expand the number of people that they would exchange with Japan to include Latin American and Canadian government personnel held by the Japanese. [FN56] The U.S. government imported many Japanese *316 from Latin America for the specific purpose of such an exchange with Japan. [FN57] Japan's surge into large parts of the southwest Pacific also produced many more individuals from Western Hemispheric nations that could be involved in the exchange. [FN58] Thus, in order to obtain as many Western Hemispheric nationals as possible from the Japanese, the U.S. government made sure to import non-officials as well as diplomats from Latin American countries. [FN59]

In June 1942, as many Japanese Peruvians entered the United States, several hundred prepared to leave for Japan. [FN60] These internees were eager to leave the camps, as Japan became their country of choice once Peru refused to accept them back into the country. [FN61] Moreover, the camp administrators were glad to see these Japanese Peruvians leave because they were concerned about camp overpopulation. [FN62] Those internees left behind from the Etoin group hoped to depart soon, while Japanese Peruvians who had just arrived on the Shawnee felt encouraged by the possibility of a short stay in the United States. [FN63] Unfortunately for these Japanese Peruvian internees, another exchange with the Japanese did not take place for fifteen months. [FN64] Questions began to arise about the legitimacy of the program to "repatriate" private citizens of foreign nations, causing the internees to remain at the American camps much longer than they had expected. [FN65]

G. Further Repatriations Encouraged by the United States

Due to the increasing internee population, the United States Department of Justice established the nation's largest detention facility in Crystal City, a small community 120 miles from San Antonio. [FN66] Its creation represented the United States' position that it would bring a growing number of Japanese families to the United States and place them in internment camps before repatriation *317 to Japan. [FN67] Peruvian officials were enthusiastic about further deportations. [FN68]

The joint American/Peruvian effort continued with the deportation of another 168 Japanese Peruvian men in January 1943 aboard the Frederick C. Johnson. [FN69] In June 1943, the Aconcagua transported twenty-eight women, fifty-five children and three men from Callao to New Orleans. [FN70] Most were taken to Crystal City to be reunited with their families. [FN71] More families were reunited at Crystal City that summer. [FN72] Almost thirty American citizens were born at Crystal City as a result of these family reunions. [FN73]

By the middle of 1942, the U.S. War Department informed Lima that it could no longer provide shipping for deportees. [FN74] In 1943, Chilean officials reported that they could not provide any more vessels to ship deportees either. [FN75] Thus, in 1943 no ships transported Japanese Peruvians from Latin America to the United States. [FN76] By this time, Second Secretary John K. Emmerson in Peru had decided that he had completed his job. [FN77] He had decided that the Japanese in Peru were no longer a threat to the American security, if they ever had posed a threat. [FN78]
An exchange of Japanese Peruvians for American prisoners of war had not taken place since the summer of 1942. \[FN79\] Finally, on September 2, 1943, in an exchange eagerly anticipated by American officials, the Gripsholm transported 1340 Japanese from New York to Japan. \[FN80\] Seven hundred thirty-seven of \(*318\) these individuals were from Latin America, whom the U.S. government chose to trade for 737 Americans held by Japan. \[FN81\] Once completed, this exchange gave American officials hope that another exchange for 1500 Americans would be possible in the future. \[FN82\]

H. Repatriations Come to a Grinding Halt

As the war progressed through 1944, the State Department continued to support the Peruvian government's desire to expel the Japanese from their country. \[FN83\] Pedro Beltran, Peruvian Ambassador to the United States, expressed hope that the government would send these deportees to Japan after the war, although President Roosevelt denied giving Beltran any such assurances. \[FN84\] Beltran anticipated the expulsion of all the Japanese from Peru by the end of the war, including those who possessed Peruvian citizenship. \[FN85\]

Despite the desires of Beltran and others in the Peruvian government, the last ship to transport Japanese Peruvians to the United States, the Frederick C. Johnson, left Callao, Peru on October 11, 1944 with twenty-two Japanese on board. \[FN86\] By this time, INS reported interning 1333 Japanese from Latin America in the United States, most of whom were housed at the Crystal City and Santa Fe camps. \[FN87\] Less than one month before the United States dropped the first atomic bomb on Japan, President Truman issued Proclamation 2655, \[FN88\] authorizing the removal of enemy aliens. \[FN89\] Even though the Department of Justice had played only a limited role in transporting the internees to the United States, the Proclamation determined that it was to have control over their departure. \[FN90\] An ongoing conflict, however, between the Justice Department and the State Department regarding which agency's viewpoint would guide the deportations came to a climax just before the Japanese surrender. \[FN91\] Consequently, immediately after the Japanese surrender, President \(*319\) Truman issued Proclamation 2662, \[FN92\] which gave the State Department the authority to deport Japanese Peruvians:

All enemy aliens now within the continental limits of the United States (1) who were sent from other American republics ... and (2) who are within the territory of the United States without admission under the immigration laws are, if their continued residence in the Western Hemisphere is deemed by the Secretary of State prejudicial to the future security or welfare of the Americas ... subject upon the order of the Secretary of State to removal to destinations outside the limits of the Western Hemisphere. \[FN93\]

Thus, although the Department of Justice and other agencies were to assist, the main responsibility for carrying out the deportations shifted from the Department of Justice to the State Department. \[FN94\]

On November 25, 1945, the U.S.A.T. General Randall left the United States for Japan with 138 Japanese Peruvian men. \[FN95\] In early December 1945, the S.S. Matsonia carried another 660 Japanese Peruvians from the Crystal City Internment Camp to Japan. \[FN96\] Many of these individuals had never lived in Japan, but now had no choice other than to start a new life there. \[FN97\]

During this time, the U.S. government drastically shifted its position concerning
the destination of the internees. [FN98] The government adopted the Peruvian foreign minister's policy that alien enemies were not to be repatriated to nations of the western hemisphere without full consent of those countries. [FN99] As such, the new plan called for a review of all evidence, and preparation of lists of individuals who would and would not meet the standards necessary for repatriation. [FN100] The State Department, while undertaking this enormous task, *320 had to come to some sort of agreement with Peru about the ultimate disposition of aliens imported to the United States from Peru. [FN101] The Peruvian government still resisted U.S. efforts to return any of the internees to Peru on the grounds that they were all indigent. [FN102] This meant that all Japanese Peruvians would be repatriated to Japan because the U.S. government had no information upon which to base any case-by-case analyses. [FN103]

Meanwhile, more ships carried both Japanese Peruvians and their Japanese American counterparts to Japan. Of the 626 people who left Los Angeles for Japan on board the U.S.A.T. General Ernst on February 23, 1946, approximately eighty were Japanese Peruvians. [FN104] Another fifty were taken to Japan on the U.S.A.T. General Meigs on June 13, 1946. [FN105] These deportees included families with children, many of whom were born in America during their internment. [FN106]

By this time, the State Department had established a hearing procedure for alien enemy cases. [FN107] If the U.S. government held individual internees for further proceedings about their cases, they had the right to request a hearing. [FN108] Once the three person review board scheduled a hearing, the procedure provided the internees with one week's notice, and allowed them to obtain counsel. [FN109] *321 The review board conducted the hearing at the internment camp, where it made its decision regarding repatriation immediately after the completion of the proceedings. [FN110]

After Japanese Peruvians received arrest warrants, the prospect of these hearings prompted them to seek legal representation. [FN111] Wayne Collins and Ernest Besig, both of the American Civil Liberties Union of Northern California were two of the more prominent attorneys. [FN112] To counter the government's move to deport the internees, these attorneys filed stays of deportation while they investigated the files and prepared the many new cases. [FN113]

Nine months after the war had ended, Japanese Peruvians, and some Japanese Americans, were given the opportunity to leave their internment camps and work at Seabrook Farms in New Jersey. [FN114] While these internees, now parolees, were still interested in returning to Peru, working at Seabrook allowed them not only to earn much needed money, but also to avoid deportation to Japan. [FN115] The work at Seabrook Farms included planting, cultivating, harvesting, processing and packing various crops. [FN116] Although the wages were extremely low and subject to income tax, the farm did give Japanese Peruvians greater privacy and more family unity than the internment camps. [FN117] Their experience at Seabrook also led to greater assimilation into American culture, which Japanese Peruvians actively resisted. [FN118] The children assimilated by attending American schools, and the adults through purchasing American foodstuffs and clothing. [FN119]

By mid-1946, the State Department announced that the FBI had cleared Japanese Peruvians individually, and thus, no longer classified them as enemy aliens. [FN120] The State Department subsequently encouraged the Peruvian government to accept the
internees. [FN121] The Peruvian government remained reluctant, however, and accepted only seventy-nine internees back into Peru. [FN122]

After years of legal maneuvering, Wayne Collins finally was able to suspend the deportation of Japanese Peruvians to Japan based on a showing that such deportation would result in serious economic hardship for the former internees. [FN123] *322 Japanese Peruvians also had to prove, however, that they had resided continuously in the United States for ten years, including the duration of their internment. [FN124] Of the 365 individuals that Collins saved from deportation, 300 chose to remain in the United States and seek permanent residency. [FN125] Most of them eventually became citizens. [FN126]

II. ELIGIBILITY REQUIREMENTS IN THE CIVIL LIBERTIES ACT OF 1988

A. Purposes and Provisions of the Civil Liberties Act

Congress appropriated restitution for the World War II internment of Japanese Americans in the Civil Liberties Act of 1988. [FN127] The Act established the following purposes:

[To] 1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II; 2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens; 3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event; 4) make restitution to those individuals of Japanese ancestry who were interned; 5) make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island, in settlement of United States obligations in equity and at law . . . ; 6) discourage the occurrence of similar injustices and violations of civil liberties in the future; and 7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations. [FN128]

Congress thus realized that the government was unable to justify its actions based on either adequate security reasons or any act of espionage, [FN129] and admitted that the United States committed a great injustice when it relocated and interned Japanese American citizens and permanent resident aliens. [FN130] Because the internment did not result from military necessity as previously believed, but primarily from racial hostility toward Japanese Americans, Congress allocated the sum of $20,000 to eligible individuals who suffered injustice at the hands of the U.S. government. [FN131]

Additionally, to help remedy the constitutional violations, Congress directed the Attorney General of the United States to: (1) pardon those Japanese Americans convicted of crimes related to internment; (2) establish a trust fund to pay victims of the internment restitution for some of their hardships; (3) create an educational fund; and (4) set aside funds for the preservation of documents relating to the internment in the National Archives. [FN132] The Attorney General also must evaluate eligible individuals' reparations applications for possible restitution of any position, status, or entitlement lost due to the U.S. government's discriminatory actions during the war. [FN133]
B. Application of the Civil Liberties Act Provisions to Japanese Peruvians

While the Civil Liberties Act only acknowledges the injustice of Japanese Americans' wartime experience, the evacuation, relocation, and internment of Japanese Peruvians is parallel. The lack of legitimate reasons for internment of Japanese Americans applies to Japanese Peruvians also as "[t]hese actions were carried out without adequate security reasons and without any acts of espionage or sabotage. . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership." [FN134] Moreover, because the U.S. government helped remove Japanese Peruvians from their homes in Peru, deported them to the United States, and interned them for an extended period of time, the Japanese Peruvian experience is more brutal and prejudicial than that of Japanese Americans. This makes their claim for restitution even more substantial. The Civil Liberties Act, however, fails even to acknowledge the deportation of over two thousand individuals of Japanese descent from Peru and other Latin American nations. The Act provides neither an apology nor compensation for the injustice experienced by the Japanese Peruvians.

Congress made distinctions between Japanese Americans and other victims of the World War II internment only in the Act's definition section, which describes an eligible individual as:

any individual of Japanese ancestry who is living on the date of the enactment of this Act [Aug. 10, 1988] and who, during the evacuation, relocation, and internment period-

(A) was a United States citizen or a permanent resident alien; and
(B)(i) was confined, held in custody, relocated, or otherwise deprived of liberty or property as a result of-
(I) Executive Order Numbered 9066, . . .
(II) the Act entitled "An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones" . . . or
(III) any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States, or other action taken by or on behalf of the United States or its agents, representatives, officers, or employees, respecting the evacuation, relocation, or internment of the individuals solely on the basis of Japanese ancestry. . . except that the term "eligible individual" does not include any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country;
(3) the term "permanent resident alien" means an alien lawfully admitted into the United States for permanent residence. [FN135]

Even though Japanese Peruvians were neither citizens nor permanent residents of the United States at the time of their internment, they otherwise meet the criteria that Congress established to become eligible for reparations. In response to orders made by U.S. agents in cooperation with Peruvian officials, the U.S. government held Japanese Peruvians in custody and prohibited their travel outside military zones. Thus, the Act distinguishes similarly situated Japanese Peruvians from Japanese Americans on citizenship grounds only, and provides no stated rationale.

While the Act neither expressly nor implicitly explains the rationale behind the redress limitations, [FN136] examination of the legislative records may provide some
insight into Congressional intent underlying the eligibility requirements. If the records indicate that Congress did not deliberately exclude Japanese Peruvians, and was not even aware of the deportation and internment carried out by government officials, then the likelihood of Japanese Peruvians obtaining redress may increase. [FN137]

*325 C. Legislative Intent in Construction of Eligibility Requirements

Congressional proposals to provide redress to individuals interned during World War II began in 1979 with the establishment of the Commission on Wartime Relocation and Internment of Civilians ("the Commission"). Congress directed the Commission to gather information to determine whether the U.S. government committed any human rights violations during World War II, and based on its findings, to submit a final report within eighteen months recommending possible remedies. [FN138] The Commission held public hearings in a number of cities including Washington, D.C., Los Angeles, San Francisco, New York, Seattle and Anchorage. [FN139] After it completed the hearings, the Commission recommended (1) compensatory payments of $20,000 to approximately 60,000 surviving internees; (2) a government apology; and (3) a presidential pardon for those Japanese Americans convicted of curfew violations. [FN140]

In response to the Commission's conclusions, many members of Congress introduced bills implementing these recommendations. Senator Cranston's bill made no mention of a specific dollar amount, but did recommend that the Commission's findings and conclusions generally be followed. [FN141] and Representative Wright's bill in the House of Representatives was similar, but specified a dollar amount. [FN142] A bill introduced by Representative Lowry that same year, provided that $20,000 be given to any World War II internee. [FN143] The importance of all three bills is that they possessed no citizenship or permanent residency requirements, but rather, defined an "eligible individual" as "any individual of Japanese and Alaskan Aleut ancestry . . . who was confined, held in custody, or otherwise deprived of liberty." [FN144] None of these bills, however, passed the subcommittee stage.

Representative Wright [FN145] and Senator Matsunaga introduced similar bills in 1985. [FN146] Like the earlier Senate bill, Senator Matsunaga's version did not contain any provision requiring citizenship. [FN147] The new House bill, 442, did not require that eligible individuals be U.S. citizens or permanent residents either. [FN148] These bills, however, also failed to advance past the subcommittee stage.

*326 In 1987, Representative Foley reintroduced House Bill 442, which specified $20,000 compensation for each former internee. [FN149] This time, the bill not only advanced through the House Subcommittee on Administrative Law and Governmental Relations, but also survived the House Judiciary Committee. [FN150] On September 17, 1987, the House passed the bill by a vote of 242 to 141. [FN151] Unlike the earlier House versions, however, this bill required recipients of compensation to be either citizens or permanent residents at the time of their evacuation, relocation and internment. [FN152]

That same year, Senator Matsunaga introduced a bill similar to the 1985 and 1983 Senate versions. [FN153] The Senate Governmental Affairs Committee unanimously approved the bill. [FN154] The Senate, however, put a floor vote on hold.

indefinitely in order to prevent an expected presidential veto. [FN155] Like the earlier versions, this bill originally did not include a citizenship or residency requirement. [FN156] Later amendments required that redress recipients either be citizens or permanent resident aliens of the United States on the date of enactment of the Civil Liberties Act. [FN157] At the conference stage, however, the House and Senate conferees agreed to follow the House bill, which included a requirement that eligible individuals were either U.S. citizens or permanent residents during their internment. [FN158]

Since the legislative records provide no information regarding Congressional rationale behind eligibility requirements, the distinctions between those who can receive redress and those who cannot are difficult to understand. While Congress possessed a great deal of factual information about the internment of Japanese Americans, as evidenced by the extensive Congressional hearings and the report promulgated by the Commission on Wartime Relocation and Internment of Civilians, it may not have had similar data regarding the internment of Japanese Peruvians. Congress' uncertainty and hesitation about appropriate eligibility requirements, as demonstrated by the qualification changes in various versions of the House and Senate Bills, may indicate such a lack of information.

III. REDRESS OPTIONS FOR JAPANESE PERUVIANS UNDER THE CIVIL LIBERTIES ACT OF 1988

A. Equal Protection Challenge of Alienage Classification Based on the Due Process Clause of the Fifth Amendment

Since the Civil Liberties Act excludes most Japanese Peruvians from eligibility, they must take legal action to challenge either the constitutionality of the statute or their illegal status during wartime. One avenue for redress is a facial challenge of the Civil Liberties Act on the grounds that it denies Japanese Peruvians equal treatment under the Fifth Amendment. [FN159] Although the Fifth Amendment does not contain an explicit equal protection clause, the Supreme Court has construed the Due Process Clause of the Fifth Amendment to include implicitly an equal protection guarantee. [FN160] When the federal government acts like a state, Fifth Amendment equal protection analysis resembles a Fourteenth Amendment equal protection analysis. [FN161] Also, similar to the Fourteenth Amendment, the Fifth Amendment does not confine its guarantees solely to the protection of U.S. citizens, but encompasses lawfully admitted resident aliens as well. This protection entitles both classes of individuals to equal protection under the law. [FN162]

1. Questionable Congruence Between the Fifth Amendment Due Process Clause and Fourteenth Amendment Equal Protection Clause

The equal protection guarantees under the Fifth Amendment may not be congruent with the guarantees under the Fourteenth Amendment when the federal government does not act like a state. [FN163] In Hampton v. Mow Sun Wong, [FN164] the U.S. Supreme Court reinforced the principle that while the federal government must govern impartially, "overriding national interests" may justify federal legislation otherwise unlawful for a state to enact. [FN165] The Court in Hampton made a crucial distinction between federal statutes reaching only a limited territory, where the Fifth and Fourteenth Amendments have comparable significance, and those having a nationwide impact, where the federal government has more leeway. [FN166]
Despite its differentiation between state and federal action, throughout the 1970s the Court assumed that Fourteenth Amendment precedent controlled claims under the Fifth Amendment. [FN167] For example, in Washington v. Davis, [FN168] the Court relied heavily on Fourteenth Amendment equal protection decisions to determine that a federal law with a discriminatory racial impact *329 denied equal protection to individuals in the District of Columbia. [FN169] Moreover, in Examining Board of Engineers, Architects & Surveyors v. Flores de Otero, [FN170] the Court expressly refused to specify whether they applied Fifth or Fourteenth Amendment protection to strike down a Puerto Rican statute that permitted only American citizens to practice privately as civil engineers. [FN171] These two cases suggest that claims under the two amendments were "precisely the same," as asserted by the Court only a year before Hampton. [FN172]

The issue of congruence is significant to the potential success of a Fifth Amendment challenge to the Civil Liberties Act. If the Court deems the equal protection guarantees under the Fifth and Fourteenth Amendments to be the same, then Fourteenth Amendment cases will possess a powerful stare decisis effect for Fifth Amendment challenges. Moreover, this impacts not only the relevance of suspect classification, but also the standard of review, which is likely to determine the outcome of the case. [FN173]

2. Deference to Congress Based on Federalism Concerns

Despite its earlier recognition of congruence between state and federal equal protection principles, the Court's more recent treatment of racial classifications in legislation implementing affirmative action programs has signaled a reemergence of the "overriding national interests" doctrine. This necessitates a distinction between equal protection guarantees under the Fifth and Fourteenth Amendments to be the same, then Fourteenth Amendment cases will possess a powerful stare decisis effect for Fifth Amendment challenges. Moreover, this impacts not only the relevance of suspect classification, but also the standard of review, which is likely to determine the outcome of the case. [FN173]

These cases stood in direct contrast to City of Richmond v. Croson, [FN178] in which the Court applied strict scrutiny and thereby struck down a local program that resembled the Fullilove federal "set-aside" plan. [FN179]

3. Deference to Congress Based on Separation of Powers and Congressional Authority and Expertise in Immigration

Traditionally, the U.S. Supreme Court has deferred to the judgment of the legislative and executive branches on issues relating to immigration and nationality. [FN180] As "political branches," the legislature and executive require flexibility in order to respond to changing global conditions. [FN181] The Court has held that these two branches of the federal government are better equipped to address areas that in some way implicate U.S. sovereignty and foreign policy. [FN182] Congressional authority and expertise in immigration and foreign policy signify that judicial review in these areas necessarily is limited. [FN183] In terms of congruence of the Fifth and Fourteenth Amendments, this implies that the Court may allow federally sanctioned discrimination against aliens in circumstances where it would condemn similar actions by states. [FN184]

In Mathews v. Diaz, [FN185] the U.S. Supreme Court held that Congress has the right to condition aliens' eligibility for federal medical benefits on continuous residency in the United States and admission for permanent residence, even though a similar provision for citizens would be unconstitutional. [FN186] The Court premised its decision on the fact that aliens are not entitled to enjoy all the benefits of citizenship. [FN187] While the Court in Hampton agreed that the power of Congress and the President over immigration and naturalization is broad, it also determined that their power over aliens is not so plenary as to "arbitrarily subject all resident aliens to different substantive rules from those applied to citizens." [FN188] This rationale took a step back from the Mathews decision. Moreover, the Hampton opinion suggested that some judicial review was necessary since the federal classification affected an already disadvantaged class of people. [FN189] In order to pass constitutional muster, "overriding national interests" must justify the use of such a classification. [FN190]

4. Alienage as Suspect Classification and Standard of Review

Classifications based on alienage, nationality, or race are inherently suspect and subject to close judicial scrutiny. [FN191] Yet, in cases involving federal restrictions on aliens, the Court has avoided discussion of suspect classifications altogether. [FN192] This necessarily means that alienage is not entitled to strict scrutiny where federal classifications are involved. Instead in these cases, the Court has required only that the restriction be rationally related to its stated purpose. In Mathews, the Court used the rational basis test to sustain the statute in question, whereas in Hampton, it used a rational basis test to invalidate the classification. Further, in Hampton, the Court was unwilling to accept a hypothetical justification for the classification, and instead looked for a legitimate basis for presuming that the rule was intended to serve the overriding national interest. [FN193]

5. Application of the Equal Protection Challenge to the Civil Liberties Act

Under this approach, Japanese Peruvians may challenge the alienage classification in the Civil Liberties Act on grounds that it violates the equal protection guarantee of the Fifth Amendment. Since alienage is not presumptively suspect in federal restrictions, the classification requiring eligible individuals to have been permanent residents or citizens at the time of their internment is likely to qualify only for rational basis, rather than strict, scrutiny. The considerations in determining whether the requirement passes constitutional muster include the national interests involved, Congress' role in issues involving immigration and foreign policy, and the deference given to Congress as a co-extensive branch.

In terms of the Civil Liberties Act, the Court is likely to give deference to Congress's decision to award redress based on alien status. Here, the issue revolves around immigration, a field in which the Supreme Court deems Congress to have considerable expertise and authority. Congress' expertise and authority, however, are limited very specifically to entry and deportation, neither of which are a direct factor in this situation. [FN194] Furthermore, because Congress (and the Commission on Wartime Relocation and Internment of Civilians) has reviewed the relevant concerns surrounding this issue, it is presumed to have sufficient knowledge to make informed policy choices. Unfortunately, Congress, unlike states, may consider tangential issues, such as administrative convenience and fiscal...
priorities, when denying benefits based on alienage. [FN195]

The rational basis test only requires that a classification is rationally related to its stated purpose. The alienage requirement in the Civil Liberties Act is not rationally related to its purpose of compensating internment victims, especially because Japanese Peruvians were interned for the same reason as Japanese Americans - racial hatred. The pertinent question is whether compensating some, but not all, former internees is rational and not based on a hypothetical justification. Considering that individuals who received retroactive residency escaped the restriction, the fact that some Japanese Peruvians have received redress and others have not makes the classification wholly irrational. Since some Japanese Peruvians have attained redress, providing the others with that opportunity is the only just move for Congress to make.

B. Assertion of Permanent Residency Under Color of Law (PRUCOL) to Gain Retroactive Residency and Attain Redress

Alternative to asserting an equal protection challenge, Japanese Peruvians could argue that they do qualify for the $20,000 in reparations under the doctrine of permanent residency under color of law ("PRUCOL") because they were legal aliens at the time of their internment. [FN196] In some instances, this *333 INS doctrine has recognized the uncertain status of individuals like Japanese Peruvians who resided in the United States like formally recognized permanent residents, but lacked documentation necessary to enable them to receive public benefits. Often, the courts have allowed similar aliens to assert PRUCOL status and, thereby, become eligible for government benefits. [FN197]

In Holley v. Lavine, [FN198] the United States Court of Appeals for the Second Circuit required the state of New York to provide Aid to Families with Dependent Children (AFDC) benefits to a woman and her children even though she was not a permanent legal resident of the United States. [FN199] The court found that the plaintiff was living permanently in the United States with the knowledge and permission of INS. [FN200] Moreover, INS, despite knowing of this illegal arrangement, never attempted deportation, but instead notified the New York State Department of Social Services that "deportation proceedings have not been instituted . . . for humanitarian reasons" and the "Service does not contemplate enforcing her departure from the United States at this time." [FN201] Consequently, INS' inaction entitled the plaintiff to PRUCOL status and qualified her to receive AFDC benefits.

Japanese Peruvians may be eligible for redress benefits based on the PRUCOL doctrine if they meet the threshold requirement of citizenship or permanent residency in the United States. In order to attain permanent residency under PRUCOL, Japanese Peruvians must be: (1) "permanently residing" in the United States; and (2) this residence must be "under color of law." [FN202] The first criterion requires that an individual's residency in the United States is "of continuing or lasting nature, as distinguished from temporary." [FN203] INS recognizes a "continuous and lasting" residency if it (1) has knowledge of the individuals' existence; [FN204] (2) permits the individuals to remain in the United States; [FN205] and (3) does not "contemplate enforcing" the deportation of these individuals. [FN206]

Many Japanese Peruvians are able to meet these criteria. First, many Japanese
Peruvians have lived continuously in the United States since their deportation and subsequent internment. Second, similar to the plaintiff in Holley, Japanese Peruvians resided in the United States with the full knowledge and permission of INS before they received formal permanent residency and subsequently, American citizenship. Furthermore, INS has never initiated deportation proceedings against any Japanese Peruvians currently residing in the United States. Thus, by fulfilling the conditions for PRUCOL status, many Japanese Peruvians satisfy the threshold qualifications required to receive benefits under the Civil Liberties Act.

Japanese Peruvians, however, face one potential problem. Unlike statutes in other PRUCOL public benefit cases such as the Social Security Act, the Civil Liberties Act makes no mention of individuals who are permanent residents under color of law. On the other hand, the statute and accompanying rules proposed by the Office of Redress Administration (ORA) do not disqualify such individuals from obtaining reparations under PRUCOL. The ORA rules specifically state that individuals who gained permanent residency before the internment period do qualify for benefits because they "meet the threshold requirement of being permanent resident aliens during the evacuation, relocation and internment period and, as such, are eligible for compensation." Consequently, Japanese Peruvians not currently eligible for reparations under the Civil Liberties Act can use the PRUCOL doctrine to obtain retroactive residency and thereby receive the reparations to which they are entitled.

C. Implied Waiver of Passport and Visa Requirements to Gain Lawful Entry Status

In order to qualify as permanent residents at the time of their internment, Japanese Peruvians may also argue that INS implicitly waived the normal passport and visa requirements by purposely bringing the Peruvian deportees into the United States. In some circumstances, INS has allowed "non-immigrants" or "in-transit" aliens to enter the country without the proper documentation. Under the waiver doctrine, such individuals may allege that their entry into the United States was lawful because INS officials either failed to require the proper documentation or specifically allowed entrance without a passport and visa.

In Choy Yuen Chan v. United States, the United States Court of Appeals for the Ninth Circuit held that INS cannot disregard lawful entry into the United States unless it was erroneous or fraudulent. The U.S. government allowed the defendant to enter the United States after a Board of Special Inquiry determined that he was Hawaiian-born. Four years later, INS attempted to deport Choy Yuen Chan because it contended that he was in the United States unlawfully. The court concluded that absent some affirmative proof of fraudulent acts by the defendant or others, the defendant's entry was lawful. The Department of Justice and INS similarly facilitated the entry of Japanese Peruvians into the United States without proper documentation. The U.S. government brought these individuals into the country with full knowledge that they did not have the documents necessary to enter legally. Japanese Peruvians acted neither erroneously nor fraudulently in entering the United States. Rather, the U.S. government intentionally brought Japanese Peruvians here, confiscated their...
passports, and denied them legal residency. [FN220] Moreover, although they lacked proper documentation, Japanese Peruvians continued to reside in the United States after their internment with governmental acquiescence. [FN221] These intentional actions by the U.S. government constitute an implied waiver of traditional visa requirements. Consequently, Japanese Peruvians' entrance into the United States was legal. Their internment, therefore, occurred while they were permanent residents, making them eligible for reparations under the Civil Liberties Act.

D. Equitable Estoppel to Prevent Government Denial of Legal Residency Status and Redress Benefits

The final potential avenue of redress for Japanese Peruvians invokes the doctrine of equitable estoppel. To make out a claim, Japanese Peruvians must first establish the traditional elements of estoppel, which require the following: (1) the party to be estopped knows the facts; (2) the party to be estopped intends for its conduct to be acted upon or acts so that the party asserting estoppel is ignorant of the facts; and (3) the party asserting estoppel relies on the conduct to his detriment. [FN222] Furthermore, any estoppel claim brought against the government must involve affirmative misconduct, rather than mere negligence. [FN223] Moreover, estoppel applies only if the government's wrongful conduct causes serious injustice, and the public's interests will not suffer undue damage by the imposition of government liability. [FN224]

In Corniel-Rodriguez v. I.N.S., [FN225] the Second Circuit estopped the government from denying the plaintiff a permanent resident visa because she violated INS provisions by getting married just before she entered the country. [FN226] The court held that the government's failure to warn the plaintiff about the provisions qualified as affirmative misconduct that delayed the plaintiff's arrival to the United States. In Galvez v. Howertown, [FN227] the court held that the government's improper rejection of the plaintiffs' immigration applications was affirmative misconduct resulting in the denial of fifth-preference immigrant visas. [FN228] The plaintiffs, therefore, suffered unreasonable delay in entering the United States. In both cases, the government was aware of the pertinent facts when it acted, while the plaintiffs were ignorant of these facts. Further, the government intended for the plaintiffs to act upon its conduct, which both defendants actually relied upon in securing immigration rights.

While the Japanese Peruvians' plight is not completely analogous to these cases, they can make similar arguments to estop the government from denying their lawful entrance into the United States. The U.S. government intended for Japanese Peruvians to act upon their conduct. When INS and Navy officials forcibly brought Japanese Peruvians to this country, they did so without allowing the deportees to retain proper documentation in their possession or to obtain the necessary visas beforehand. [FN229] Once the Japanese Peruvians were in the United States, however, these same officials claimed that the internees entered illegally. The Navy and INS subsequently denied Japanese Peruvians any opportunity to obtain legal immigrant status until several years later. The Japanese Peruvians did not understand why they were deported from Peru and interned in the United States, much less whether they resided here illegally. Their reasonable assumption was that because U.S. officials brought them to the United States, they had entered the country legally. Even if they had known, Japanese Peruvians were in no position, as wards of the state, to obtain proper documentation. Thus, Japanese Peruvians relied on the government's conduct regarding their immigration status.

While INS conduct constituted "affirmative misconduct," such misconduct may not meet the requirements of the equitable estoppel doctrine. Unlike the conduct in Corniel-Rodriguez and Galvez, the actions of INS in this instance did not specifically violate any statutes or administrative rules. Although the U.S. government abducted Japanese Peruvians, brought them to the United States, took possession of their Peruvian passports, denied them visas, and interned them here for the duration of the war, none of these activities violate INS regulations. Therefore, an argument for estoppel must contend that the deportation and internment of Japanese Peruvians, and subsequent INS action amounted to government misconduct that caused a serious injustice. The INS' denial of visas to Japanese Peruvians prevented them from attaining legal immigrant status until a number of years after their internment. The denial of legal immigrant status has resulted in a denial of reparations under the Civil Liberties Act. Consequently, a great injustice will occur if the U.S. government can deny redress to Japanese Peruvians due to their illegal immigrant status, given that it carried out the deportation and internment of these same people.

IV. CONCLUSION

The deportation and internment of Japanese Peruvians, like the internment of Japanese Americans, have left a blemish on American history. These acts of aggression resulted from racist wartime hysteria, rather than from an actual threat to national security. While Japanese Peruvians did not possess the same constitutional rights as American citizens of Japanese descent, they did not deserve to suffer what effectively was kidnapping and imprisonment. Now, as permanent residents and citizens of the United States, the U.S. government should enable Japanese Peruvians to obtain the same reparations that Japanese Americans receive, since little difference separates the motives behind the groups' internments and the conditions they faced.

The legislative history surrounding the enactment of the Civil Liberties Act does not explain the exclusion of Japanese Peruvians from obtaining redress. It is, therefore, difficult to understand the rationale behind the gap, especially considering the fact that many early House and Senate bills made no distinction between individuals of Japanese ancestry who were citizens or permanent residents at the time of their internment and those who were not. Since Japanese Peruvians do not qualify under the current requirements, they must take legal action to gain redress eligibility.

The most feasible of the four redress options available to Japanese Peruvians is gaining retroactive residency through PRUCOL. Utilizing PRUCOL enables them to become eligible for reparations without actually having to challenge the statute itself. As a group, Japanese Peruvians satisfy the qualifications for PRUCOL. They had resided in the United States for several years before receiving formal residency. INS knew and permitted Japanese Peruvians to reside in the United States without formal documentation, and did not contemplate enforcing their deportation (although INS did contemplate and force the deportation of other Japanese Peruvians from the United States). While the Civil Liberties Act does not mention individuals with PRUCOL status, it does not forbid this mode of eligibility. Moreover, the administrative rules surrounding the Act specifically mention individuals who obtained redress after attaining retroactive residency, suggesting that future applicants may attempt to gain eligibility through the same measures.

If PRUCOL fails to provide redress, the second most plausible means for Japanese
Peruvians to gain eligibility under the Civil Liberties Act involves the doctrine of implied waiver. Like the PROCOL approach, this avenue avoids a challenge to the statute. Here, Japanese Peruvians must assert that by taking their passports and denying them visas, INS officials implicitly waived the formal documentation requirements. Moreover, because INS, with the aid of other agencies, brought Japanese Peruvians to the United States, they necessarily facilitated the lack of passports and visas. Such action was intentional and deliberate and, therefore, should be treated as an implied waiver. If INS officials waived documentation requirements, then a Japanese\textsuperscript{*339} Peruvian's date of entry into the United States constitutes the beginning of permanent residency.

The estoppel option, while more feasible than an equal protection challenge to the Act, is more difficult to satisfy than the previous two. It requires a showing that government officials were aware of the facts regarding the deportation and internment, that they intended their conduct to be acted upon, and that Japanese Peruvians relied to their detriment. While these statements are generally true, proving them in specific instances may be quite difficult and tedious. Even more difficult is proving that these actions constituted affirmative misconduct. Unless INS provisions outlaw deporting and interning foreign nationals, this requirement may be insurmountable. It is likely that general misconduct would not suffice.

Finally, while applying equal protection principles to the Civil Liberties Act provides the most comprehensive approach to redress, it is also the least feasible alternative. Because federal restrictions on aliens do not merit suspect status, they also do not qualify for strict scrutiny, which would most likely invalidate the discriminatory classifications. Using the rational basis test, Japanese Peruvians may still be able to challenge the statute because the classification has no legitimate basis. However, Congress possesses a great deal of power and expertise in the area of immigration and the judiciary affords it great deference on such issues. This is due to Congress' status as a co-equal branch to the judiciary and the fairly intensive fact-finding process in which Congress engages before implementing a redress program. Therefore, the equal protection approach is unlikely to yield positive results. In fact, an equal protection challenge to the Civil Liberties Act may only cause Japanese Americans who currently can receive redress to become ineligible.

For Japanese Peruvians, gaining redress for the deportation and internment that they suffered is essential to help compensate them for the harsh experiences they faced at the hands of the American government. The reparations also provide validation of their experience, and discourage future occurrences of similar injustice and violations of civil liberties. [FN231] Japanese Peruvians should explore any or all of these redress options toward these ends.

[FN2] Id.
[FN3] Id.
[FN4] Id. at 4.
[FN5] Id.
[FN6] Id. at 5.


[FN8] Gardiner at 5-6.

[FN9] See id., at 7-8. These conditions resulted in a greater number of Japanese returning to Japan than arriving in Peru between 1931 and 1941. Emmerson, supra note 7, at 42.

[FN10] See Gardiner, supra note 1, at 7; see also Orazio Ciccarelli, Peru's Anti-Japanese Campaign in the 1930s: Economic Dependency and Abortive Nationalism, 5 Canadian Review of Studies in Nationalism 113, 114 (1981-1982). One reason for the native Peruvian shift in prejudice from the Chinese Peruvians to the Japanese Peruvians was the rapid integration of Chinese Peruvians into Peruvian society. Id. The Japanese Peruvians, by contrast, still held close ties to Japan. See id. Moreover, the Japanese in Peru opened their own schools, created Japanese language newspapers, and retained many indicia of Japanese culture. Gardiner, supra note 1, at 9.


[FN12] Id. at 8-9.

[FN13] Id. at 8. One newspaper in particular, Anti-Asia, stated that its purpose was to "awaken Peruvians to the grave danger the Asians posed to Peru and suggest ways to combat that peril." Ciccarelli, supra note 10, at 114.


[FN15] Id.

[FN16] Id. at 8.

[FN17] Id.

[FN18] Id. at 9. During this time, the Peruvian government, at the urging of United States officials, also placed a number of restrictions on the movement and association of the Japanese Peruvians. John K. Emmerson, The Japanese Thread: A Life in the U.S. Foreign Service 137 (1978) [hereinafter The Japanese Thread]. For example, Japanese Peruvian schools, organizations and newspapers were closed, phones were removed from the homes of 355 families, and some Japanese Peruvians were moved from certain strategic coastal cities to other interior areas. Id.


[FN20] Id.

[FN21] Id.

[FN22] Id. at 10.

FFN231 Id.

[FN24] See id.; see also Emmerson, supra note 7, at 40-41. At this time, the U.S. Army and Navy also had informants stationed in Peru seeking to discover information about Japanese and German activities there. Id. at 41.


[FN26] See id.; see generally Emmerson, supra note 7, at 41 (*[E]very Japanese barber was assumed to be an admiral in disguise and every Japanese tailor a constant recipient of secret orders from Tokyo.*).

[FN27] Gardiner, supra note 1, at 10-11. These lies caused American officials to speculate that Japanese Peruvians were in fact dangerous to hemispheric security and, therefore, needed to be deported. Emmerson, supra note 7, at 41.

[FN28] Gardiner, supra note 1, at 12.

[FN29] Id. According to Article 70 of the Peruvian Constitution, "when the security of the state requires it, the Executive can suspend totally or partially . . . the guarantees set down in articles 56, 61, 62, 67 and 68." La Constitucion del Peru arts. 56, 61, 62, 67, 68, 70. This meant that "[i]n the name of national security, Peruvian homes could be invaded and individuals detained without written authorizations, persons could neither congregate nor freely move about." Gardiner, supra note 1, at viii. Similar measures were available to the presidents of other Latin American countries. See id. at 12.


[FN31] Id. at 13. In a statement to Peruvian officials indicating his desire to help them get rid of the Japanese, Ambassador Norweb said, "[w]e may be able . . . to assist the Peruvian Government by making available information and suggestions based upon our handling of Japanese residents in the United States." Id. (quoting Letter from Norweb to SS (Apr. 21, 1942) (on file with National Archives 894.20223/124, RG59, NA)).

[FN32] Id. at 14.

[FN33] Id.

[FN34] Id. Likewise, the Peruvian government was eager to get rid of the Japanese in Peru for good. See Michi Weglyn, Years of Infamy 60 (1976). Ambassador Norweb informed the U.S. State Department of President Prado's interest:

[T]he President is very much interested in the possibility of getting rid of the Japanese in Peru. He would like to settle this problem permanently, which means that he is thinking in terms of repatriating thousands of Japanese . . . . In any arrangement that might be made for internment of Japanese in the States, Peru would like to be sure that these Japanese would not be returned to Peru later on.

Id. (quoting Letter from Norweb to Sumner Welles (July 20, 1942) (on file with National Archives, Department of State File 740.00115 Pacific War/10022/6, RG59)).


[FN37] Weglyn, supra note 34, at 59 (quoting Dep't St. Bull., Aug. 6, 1944, at 146). The U.S. State Department added that it would allow the participation of any officials or civilian nationals in whatever exchange arrangements the United States might make with Axis nations. Id.

[FN38] Id.

[FN39] Gardiner, supra note 1, at 25. See also Emmerson, supra note 7, at 44-45. Emmerson, as Third Secretary for the American Embassy in Peru, as the only Japanese speaking agent in the Embassy, directed the research regarding the backgrounds of Japanese Peruvians and established the criteria by which they were judged. See id. at 45-46. Emmerson selected individuals "who by their influence or position in the community, their known or suspected connections in Japan, or by their manifest loyalty could be considered potential subversives." Id. at 45. Despite the established criteria, this first round of Japanese Peruvian deportees volunteered for relocation to the United States. Id. at 44-45. They were among nearly 1000 Japanese who expressed a desire to leave Peru. Id. Subsequent voyages accepted no volunteers. Id.

[FN40] See Thomas K. Walls, The Japanese Texans 184-85 (1987). For many individuals, docking brought on the most frightening and humiliating moment of the journey. Donna Kato, The Exiles, San Jose Mercury News, Mar. 21, 1993, at 1L, 7L-8L. Fusi Sumimoto remembers "being stripped naked and sprayed with disinfectant in front of boys her age, then being taken to a mass stall for showers." Id. Sumimoto recalled that "[w]e didn't understand what was going on and thought we were going to die there." Id.


[FN45] See id. at 179.

[FN46] Id. at 180.

[FN47] Id.

[FN48] See Gardiner, supra note 1, at 34. Such anxiety led one Japanese Peruvian to attempt suicide a number of times. Id. at 31.

[FN49] Id. at 34.

[FN50] Id. at 42.

[FN51] Id. at 43. Many of the deported men were teachers, whom Peruvian officials considered "dangerous" because their "coveted and respected role within the community, their mental alertness and idle hours might be dedicated to intelligence gathering, and their comparative youth and relatively short stays in Peru ... meant that they were products of the increasingly nationalistic, militaristic Japan of the 1930s." Id. at 44-45.

[FN52] Id. at 46.

[FN53] Id.

[FN54] Id.

[FN55] Id. at 46-47.

[FN56] Id. at 47.

[FN57] Id. In December 1942, General Marshall first made the suggestion to exchange American prisoners of war held by Japan for Japanese Peruvians. Emmerson, supra note 7, at 45. Emmerson claims that the American Embassy in Lima was completely unaware of this proposal. Id.

[FN58] Gardiner, supra note 1, at 47.

[FN59] See id. at 47-48.

[FN60] See generally id. at 47-50.


[FN62] Gardiner, supra note 1, at 50.

[FN63] Id.

[FN64] Id.

[FN65] See id. The United States Department of Justice was concerned about the number of internees being sent to the United States and was alarmed that many of those held under the Alien Enemies Act were not enemy Japanese, but Peruvian nationals, and therefore were citizens of a friendly nation. Weglyn, supra note 34, at 63.

[FN66] Gardiner, supra note 1, at 59.

[FN67] See id. Despite concerns from the Department of Justice about the legality of continued importation of Japanese from Peru, the State Department wanted to bring another 1000 Japanese Peruvians to the United States. Id. at 62. This difference of opinion strained relations between the two departments for the duration of the importation of Japanese Peruvians. See id. at 115.

[FN68] Id.
Id. at 56.

Id. at 84. "Japanese demands for designated individuals, objections raised by American agencies, language problems, transmission by way of the Swiss and Spanish representatives, and the refusal of some who were expected to repatriate" all posed problems for further exchanges between the United States and Japan.

Id.

Id.

Id. at 85.

Id. at 106.

Id.

See id.

Id. at 106-07.

Id. at 112.


Gardiner, supra note 1, at 112. The Proclamation stated that all persons deemed by the Attorney General to be dangerous to the public peace and safety of the United States . . . shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance, with such regulations as he may prescribe.

Proclamation No. 2655, 10 Fed. Reg. 8947. See also The Japanese Thread, supra note ---.
18, at 148-49.

[FN90] Gardiner , supra note 1, at 112.

[FN91] See id. at 114-15. This was due, in part, to INS' reluctance to repatriate German internees from Latin American nations to Germany. Id . at 115. The State Department, on the other hand, was not interested in allowing such individuals to remain in the United States. Id.


[FN93] Id . (emphasis added).

[FN94] Gardiner , supra note 1, at 115.

[FN95] Id. at 124.

[FN96] Id.

[FN97] See Weglyn , supra note 34, at 64. Some were hoping that in Japan they could reunited with family members left behind in Peru. Id.

[FN98] Gardiner, supra note 1, at 128. President Roosevelt indicated to Ambassador Beltran that the U.S. government had no plans to return large numbers of Japanese to Japan after the war.

[FN99] Id. The reasons for this shift were two-fold:
   (1) unilateral action by the United States would damage relations "with the other American republics," and (2) "the Alien Enemy Act . . . seem [ed] clearly to require that the alien be given an opportunity to depart from the country before he can be removed , which would mean that if he were able to obtain a visa to the country from which he came . . . he would be able to escape removal to Germany [or any other country]."
   Id. (emphasis added).

[FN100] Id.

[FN101] Id. Jonathan Bingham of the State Department formulated a memorandum about the U.S.-Peruvian joint venture regarding the Japanese Peruvian deportation and internment. He reached four conclusions:

1) 'There was never any clear understanding as to the eventual disposition of the aliens after the war, primarily because at the time they were deported from Peru no one was thinking about the postwar period,'

2) 'The United States never made any commitments in writing or . . . orally that the aliens would be returned to Peru upon Peru's request after the war,'

3) 'At all times the Peruvians were obviously of the opinion that the aliens were theirs to control . . . The United States never contradicted this view, and on various occasions appeared to acquiesce in it,'

4) 'The Peruvians could properly assert that, from early 1944 on, it was their understanding that the aliens were being held in this country for the purpose of internment during the war, and that certain persons in whom Peru had a particular interest would not at any time be repatriated to Germany (or Japan) against their wishes.'
Id. at 129.

[FN102] Id.; see also C. Harvey Gardiner, The Japanese and Peru 1873-1973 at 92 (1975) [hereinafter The Japanese and Peru]. The Peruvians did allow 79 Japanese Peruvians to return, most of whom had Peruvian spouses. Id.

[FN103] Gardiner, supra note 1, at 129.

[FN104] Id. at 130.

[FN105] Id.

[FN106] Id.

[FN107] Id. at 133. This followed a U.S. District Court decision from the Southern District of New York that "internees from Latin America were 'alien enemies' within the meaning of the Alien Enemy Act of 1798." Id.

[FN108] Id.

[FN109] Id.

[FN110] Id.

[FN111] See id. at 136-38.

[FN112] Id. at 141-42; see also Yamamoto & Hiura, supra note 41, at 1.

[FN113] Gardiner, supra note 1, at 142.

[FN114] Id. at 148-49. The transfer to Seabrook Farms provided the internees' only means of escape from the camps. See id.

[FN115] Id. at 150.

[FN116] Id. at 157.

[FN117] Id.

[FN118] Id.

[FN119] Id.

[FN120] The Japanese and Peru, supra note 102, at 91.

[FN121] Id. at 91-92.

[FN122] Id. at 92.

[FN123] See Weglyn, supra note 34, at 65-66. Collins launched a multi-targeted approach, which included a letter-writing campaign to all of the top U.S. officials. Id.
[FN124] Id.

[FN125] Id.

[FN126] Id.

[FN127] 50 U.S.C. §1989 (1988). Congress also appropriated restitution for the destruction of personal and community property of the Aleut Alaskans, including community church property, destroyed by American forces during World War II. Id. §1989(c)(4)(d). The Civil Liberties Act would not have become law had it not been for the pain-staking efforts of Japanese American organizations.

[FN128] Id. §1989.

[FN129] Id.; see also Commission on Wartime Relocation and Internment of Civilians, Personal Justice Denied 8 (1982) ("In sum, the record does not permit the conclusion that military necessity warranted the exclusion of Ethnic Japanese.") .


[FN131] Id. §1989(b)(4).

[FN132] Id. §1989(b).

[FN133] Id. §1989(b)(2).

[FN134] Id. §1989(a).

[FN135] Id. §1989(b)(7) (emphasis added).

[FN136] See generally Civil Liberties Act Redress Provisions, 28 C.F.R. § 74 (1995). The administrative rule, promulgated by the Office of Redress Administration within the Department of Justice, also fails to discuss the rationale behind excluding Japanese Peruvians and other internees from Latin America. See id. This Note does not discuss administrative remedies, in part, because such discussion likely would not help Japanese Peruvians attain redress.

[FN137] See generally Commission on Wartime Relocation and Internment of Civilians, supra note 129, at 18-23. Although this report makes some mention of Japanese Peruvian deportation and internment, it is not clear from any of the legislative records how much information Congress possessed about the Japanese Peruvian experience, or if this information shaped their decision-making in any way. At least one Japanese Peruvian is known to have testified in front of the Commission. Id.


[FN139] Id. at 3.

[FN140] Id.


[FN144] Id. §3; H.R. 4110, supra note 142, §201; S. 1520, supra note 141, § 3.


[FN147] Id. §201.


[FN151] Id.


[FN155] Id.


[FN157] Id.


[FN159] See Jacobs v. Barr, 959 F.2d 313, 315 (D.C. Cir. 1992) (citing Allen v. Wright, 468 U.S. 737, 751 (1984)). In bringing a suit to challenge the constitutionality of the statute, Japanese Peruvians must first establish standing. Id. The constitutional requirement for standing mandates that (1) actual or threatened injury be alleged; (2) the injury be fairly traceable to challenged official conduct; and (3) there be substantial likelihood that alleged injuries will be redressed by the judicial decision in the plaintiffs' favor. Id. When the injury alleged is the denial of equal protection, the plaintiffs must contend that they were denied equal treatment solely as a result of the classification they are challenging. Id. at 316. The injury experienced by Japanese Peruvians qualifies them for standing. Although the U.S. government interned them in basically the same way as they interned Japanese Americans, the Civil Liberties Act denies Japanese Peruvians redress for the harm and losses they suffered because of their alien status. Moreover, their injuries are traceable to the unconstitutional classification in the Civil Liberties Act. Id.

liberty, or property, without due process of law." U.S. Const. amend. V. As a companion case to Brown v. Board of Education, 347 U.S. 483 (1954), Bolling rejected segregated schooling for students in the District of Columbia. Bolling, 347 U.S. at 498. The Court analyzed the equal protection claim in Bolling in the same manner that it analyzed the issue under the Fourteenth Amendment. Id. at 499. Chief Justice Warren commented that "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." Id. at 500.


[FN162] See Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary or transitory is entitled to [Fifth and Fourteenth Amendment] constitutional protection."); see also Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 (1976) (holding that "the federal power over aliens is [not] so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"). The Court in Hampton also stated that "[t]he concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." Id. at 100; see also Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that resident aliens are "persons" under the Fourteenth Amendment, and therefore, entitled to equal protection from state discrimination based on race or nationality).

[FN163] Carrasco, supra note 161, at 595 n.15.


[FN165] Id. at 100. The Court explained the incongruence between the equal protection guarantees under the Fifth and Fourteenth Amendments as follows:

Although both [the Fifth and Fourteenth] Amendments require the same type of analysis, . . . the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.

Id. (footnote omitted). What is interesting is that only a year before, the Court stated that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

[FN166] Hampton, 426 U.S. at 100. Here, the Court was referring to the statute in Bolling, which applied only to public schools in the District of Columbia. Id.


[FN169] Id. This case, decided only six days after Hampton, fits into the distinction between federal statutes governing a limited territory and those having
nationwide impact. Surprisingly enough, the Court did not even consider this distinction.


[FN171] Id. Again, the Court failed to consider the local/national distinction, suggesting that it was not at the forefront of the Court's equal protection consciousness. Karst, supra note 167, at 555.

[FN172] Id. at 557 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)). This is significant in determining the relevant standard of review. This will be further discussed in Sections III.A.2, 4.


[FN176] Fullilove, 448 U.S. at 472 (quoting U.S. Const. Art. I, §8, cl. 1); Metro Broadcasting, Inc., 497 U.S. at 547. But see id. at 604-05 (O'Connor, J., dissenting) (referring to a number of cases in which the Court has found the protections under the Fifth and Fourteenth Amendments to be the same); United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) (** The reach of the equal protection guarantee of the Fifth Amendment is co-extensive with that of the Fourteenth.**); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977) (stating that traditional equal protection standard applies despite deference to congressional benefits determination).


[FN179] Id. at 500.

[FN180] Carrasco, supra note 161, at 602.


[FN182] Carrasco, supra note 161, at 602; see Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952). The Court in Harisiades determined that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune to judicial inquiry or interference.

Id. at 588-89 (footnote omitted). This deference by the Court is based in part on "[c]ongressional authority over the admission, exclusion, and deportation of aliens primarily derive[d] from Congress' power to 'establish an [sic] uniform Rule of Naturalization.' " Carrasco, supra note 161, at 602, n.44 (quoting U.S. Const., art. I, §8, cl. 4). The Court in Fiallo v. Bell, 430 U.S. 787 (1977), extended this principle to include even those issues that do not involve sovereignty or foreign policy. Id. at 792.
Mathews, 426 U.S. at 81-82.

See Carrasco, supra note 161, at 602-03; see Mathews, 426 U.S. at 86-87 ("It is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration."); see also Graham v. Richardson, 403 U.S. 365, 376-80 (1971) (holding invalid an Arizona law limiting aliens' eligibility for benefits because it encroached upon exclusive federal power).


Id. at 79-80.

Id. at 78.


Id. at 102. See Note, The Equal Treatment of Aliens: Preemption or Equal Protection? , 31 Stan. L. Rev. 1069, 1086-87 (1979) [hereinafter Equal Treatment of Aliens].

Hampton , 426 U.S. at 101.


Equal Treatment of Aliens , supra note 189, at 1088.

Hampton , 426 U.S. at 103.

Tangentially, however, the issues in this case do involve entry and deportation because of their forced entry into the United States and the deportation of some Japanese Peruvians to Japan.


Sharon Carton, The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits , 14 Nova L. Rev. 1033, 1051 (1990). PRUCOL is not available to all "illegal aliens" seeking federal benefits. Id. Rather, federal agencies only accept seven categories of PRUCOL: refugees; asylees; conditional entrants; aliens paroled into the United States; aliens granted suspension of deportation; Cuban-Haitian entrants; and applicants for registry. Id. (citing C. Wheeler, Alien Eligibility for Public Benefits: Part I at 3 (Immigration Briefings No. 88-11, 1988)).

Holley v. Lavine, 553 F.2d 845, 847 (2d Cir. 1977); see also Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985).

Holley , 553 F.2d 845.

Id. at 848. The Social Security Act regulations require that a state plan include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent
residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provision of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act). 45 C.F.R. § 233.50 (1995).

[FN200] Holley, 553 F.2d at 849.

[FN201] Id. Holley 's expansive reading formed the basis of efforts by other federal and state courts to interpret the PRUCOL criteria consistently and meaningfully. Some courts, however, have chosen to follow the more narrow approach taken in Esperanza v. Valdez, 612 F. Supp. 241, 244-45 (D. Colo. 1985), which required a specific statutory or regulatory review and a grant of an immigration status that allowed the alien to remain indefinitely. Carton, supra note 196, at 1044.


[FN203] Holley, 553 P.2d at 848.

[FN204] Lewis v. Grinker, 794 F. Supp. 1193, 1204 (E.D.N.Y. 1991) ("Under a fair, broad, and reasonable interpretation of the term, knowledge includes that of which one is aware from personal observation.").

[FN205] Sudomir v. McMahon, 767 F.2d 1456, 1461 (9th Cir. 1985). It is not clear whether an official assurance is required, or whether mere inaction constitutes permission to stay. But see Velasquez v. Secretary of HHS, 581 F. Supp. 16, 18 (E.D.N.Y. 1984) (placing the burden on the Secretary to give proof of the agency’s intentions in the face of a record of inaction).

[FN206] Holley, 553 P.2d at 847-48; see also Lewis, 794 F. Supp. at 1204.

[FN207] Gardiner, supra note 1, at 29. See also Yamamoto & Hiura, supra note 41, at 1-2. More importantly, U.S. government officials forcefully brought Japanese Peruvians to the United States with the knowledge that they did not possess the necessary documentation to reside legally. Libia Yamamoto asks, "[H]ow could we be illegal aliens when the U.S. government was the one who forcibly took us from our homes, our country, took away our passports, and incarcerated us in concentration camps thousands of miles away to be used as hostages?" Id. at 1.

[FN208] See Yamamoto & Hiura, supra note 41, at 1-2. Not only were these individuals not deported, some were actually drafted a few years later to serve in the Korean War. Id.


[FN210] Id.

[FN211] Choy Yuen Chan v. United States, 30 F.2d 516, 517 (9th Cir. 1929).

[FN212] Id.

[FN213] 30 F.2d 516 (9th Cir. 1929).

The (original) Board of Special Inquiry official made his decision based on his discretionary power, as provided by the statute, to be exercised upon examination of certain facts, of which he is the sole and exclusive judge. Id.

Gardiner, supra note 1, at 29.

See Yamamoto & Hiura, supra note 41, at 1.

See supra text accompanying notes 114-28.

See Heckler v. Community Health Serv. of Crawford County, 467 U.S. 51, 59 (1984) (citing Wilber Nat'l Bank v. United States, 294 U.S. 120, 124-25 (1935)); see also United States ex rel. Shakopee Mdewakanton Sioux Community v. Pan Am. Management Co., 616 F. Supp. 1200, 1209 (D. Minn. 1985); Gestuvo v. District Director of INS, 337 F. Supp. 1093, 1101 (C.D. Cal. 1971). But see Talanoa v. INS, 397 F.2d 196, 201 (9th Cir. 1968) (requiring that the fact situation be "a glaring and obvious one, to-wit, that he who, by his language or conduct, leads another to do what he would not otherwise have done").

Morgan v. Heckler, 779 F.2d 544 (9th Cir. 1985); see also INS v. Miranda, 459 U.S. 14, 17 (1982); INS v. Hibi, 414 U.S. 5, 11 (1973); Carrillo v. United States, 5 F.3d 1302, 1306 (9th Cir. 1993); Vickars-Henry Corp. v. Board of Governors of Fed. Reserve Sys., 629 F. 2d 629, 635 (9th Cir. 1980).

See McCurty v. United States, 30 Fed. Cl. (CCH) 108, 112 (1993); see also Miranda, 459 U.S. at 16.

532 F.2d 301 (2d Cir. 1976).

Id. at 307.


Id. at 40.

See Yamamoto & Hiura, supra note 41, at 1.

See supra text accompanying notes 225-28.


END OF DOCUMENT