Stranded in Japan and the Civil Liberties Act of 1988 Recognition for an Excluded Group of Japanese Americans

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The United States government provided redress and reparations for many Japanese Americans injured by its constitutional violations during World War II. The United States has failed, however, to address the legitimate claims of Japanese Americans who traveled to Japan for temporary visits before the outbreak of World War II. These Japanese Americans were excluded from repatriation to America while their White American counterparts were welcomed home. The author examines the policies behind the Civil Liberties Act of 1988 and its mechanisms for providing relief to injured Japanese Americans. The author argues that the strandees qualify for redress and reparations under the Civil Liberties Act because they are eligible as individuals "deprived of liberty" and because this result is consistent with the underlying purpose of the Civil Liberties Act.

I. INTRODUCTION

The final chapters of the Japanese American Redress Movement have closed with the victories of those who were wrongly terminated from their jobs as railroad and mine workers.¹ These victims, as well as others, waited nearly fifty years for the U.S. government to provide redress and reparations for its unconstitutional actions against them during World War

¹ In 1941 and 1942, hundreds of Japanese American railroad and mine workers were dismissed by their companies and forced to relocate as a result of government action. According to Bill Lann Lee, Acting U.S. Department of Justice Assistant Attorney General for Civil Rights, recently-discovered documents "established that the railroad and mining companies, working closely with the federal government, terminated Japanese American workers because of an unjustified perception that these individuals posed a security risk solely because of their ancestry." Railroad and Mine Workers to Get Redress, PACIFIC CITIZEN, Mar. 6-19, 1998, at 1.
II. Redress and reparations finally came under the Civil Liberties Act of 1988, which reached over 81,000 eligible claimants. Those Americans of Japanese ancestry illegally imprisoned by the U.S. government, pursuant to Franklin D. Roosevelt's Executive Order 9066, brought the bulk of these claims.

With the Civil Liberties Act's sunset date in August of 1998, the U.S. government rushed to wash its hands of its wrongdoing during World War II. However, it has failed sufficiently to fulfill all worthy claims. Most recently, the government settled the class action suit brought by over 2,000 former Japanese Latin American internees who were not allowed to gain U.S. citizenship or permanent residency after the U.S. government kidnapped them from their home countries. The government provided these victims with a formal apology and a mere $5,000 each. Beyond these redress measures, the U.S. government deemed other deserving individuals ineligible for any reparations. Among such excluded individuals are the American citizens of Japanese ancestry that the U.S. government left stranded in Japan during World War II.

Along with a large number of white Americans, these Japanese Americans traveled to Japan shortly before the outbreak of World War II for various reasons. Some were sent back to Japan to care for aging relatives. Others went to learn the Japanese language. These Japanese Americans were to reside temporarily in Japan, as were the white Americans who went for business or diplomatic assignments. The bombing of Pearl Harbor and the U.S. government's declaration of war on Japan altered the travel plans of all Americans staying in Japan at the time. As citizens back home in the United States voiced concerns to bring back their family members and friends from Japan, the U.S. Department of State initiated operations to bring American citizens back from Japan. The State Department underwent negotiations with the government of Imperial Japan to exchange Japanese nationals who lived in the United States and wished to return to Japan for American citizens who were temporarily residing in Japan and wished to return to the United States. But these operations did not bring back all American citizens from Japan.

Unlike their white American counterparts, none of the Japanese Americans stranded in Japan during the war were selected for participation in the exchanges of civilians made between the United States and Japan. At the exchange point in Mormugão, India, one participant in the repatriation to Japan from America observed, "it dawned on the Nisei kids that [the ship from Japan]... was not [an] ordinary ship. The passengers from that Japanese ship were White Americans for whom the Nikkei were being exchanged." Reiko Rikimaru Nimura states, "It was racist. It got to me later. It would have been different if they let the Nisei come back. But only White Americans were allowed to come back." Not only did the U.S. government fail to bring Japanese Americans back, but as unpublished archival research indicates, it discriminated against them in the policy created for the exchanges.

This paper argues for redress and reparations for these Japanese American strandees based on the U.S. government's deprivation of their liberty by excluding them from repatriation to America. Section II of this paper explicates the Civil Liberties Act of 1988 and the government's finding the strandees ineligible under the Act. Section III provides the background of the exchange program during World War II, and characterizes its effects with the voices of the Japanese American strandees who were rejected in their attempts to repatriate through it. Section IV analyzes the legal argument recommending eligibility for the strandees based on the interpretation of the "eligible individual" provision under the Civil Liberties Act, as presented in Ishida v. United States. Section V presents further support for the claimants' eligibility based on archival evidence of the government's discrimination against the strandees and on the public's anti-Japanese influence on the government. Finally, Section VI examines the theoretical basis for including the strandees as eligible claimants for reparations.

II. THE CIVIL LIBERTIES ACT OF 1988 AND ITS APPLICATION TO THE STRANDEES

The passage of the Civil Liberties Act breathed new life into the U.S. Constitution.... The story of the redress bill's success serves as a reminder of the need for the people of this nation to fight for adherence to

7. Id. See also Sharon Yamato Danley, Some Japanese Americans Still in Reparations Battle, L.A. TIMES, June 15, 1995, at E3-E4 (reporting that one who sailed on a prisoner-of-war ship described the exchange as an attempt to "bring back American citizens of white ancestry").
8. See 59 F.3d 1224 (Fed. Cir. 1995).
constitutional principles in the coming decades of dramatic social change. As former Chief Justice Charles Evans Hughes once said: 'You may think that the Constitution is your security.... You may think that the statutes are your security.... [They are] nothing at all, unless you have sound and uncorrupted public opinion to give life to your Constitution, to give vitality to your statutes, to make efficient your government machinery.' The truth of this statement is uncanny. Just ask Japanese Americans.\(^9\)

Although the Civil Liberties Act of 1988 has served over 81,000 Japanese Americans, the U.S. government has failed to extend it to the claims of the Japanese Americans who were stranded in Japan during World War II. This rejection represents the government's inadequate attempt to rectify its wrongdoing against Americans of Japanese ancestry during World War II. This rejection contradicts the purpose of the Civil Liberties Act and the protections available to U.S. citizens by the Constitution. Finally, this rejection dishonors those who worked to enact the Civil Liberties Act.

The Civil Liberties Act of 1988 represents a major accomplishment of the 100th Congress. The Act stems from the U.S. government's wartime mass imprisonment of Japanese Americans in concentration camps.\(^10\) This deprivation of the right to life, liberty, and property without criminal charges or trials of any kind affected 120,000 persons of Japanese ancestry, including 77,000 U.S. citizens.\(^11\) On February 19, 1942, President Franklin D. Roosevelt issued Executive Order 9066, which authorized the U.S. military to establish prohibited zones in the United States and exclude therefrom all persons, citizens and aliens, as a security measure.\(^12\)

The mass exclusion, relocation and detention affected only persons of Japanese ancestry. American citizens and resident aliens of German or Italian descent did not suffer similar treatment. The U.S. government based its policy against Japanese Americans on an unwarranted presumption of inherent disloyalty of the Japanese people.\(^13\) The government found

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10. This paper will often make use of the term "concentration camp," and dispense with the euphemisms "assembly center" or "relocation center." According to Philip Tajitsu Nash, President Roosevelt and other government officials used the term "concentration camps." See Philip Tajitsu Nash, Moving for Redress, 94 YALE L.J. 743, 743 n.2 (1985) (book review) (suggesting also that the camps of Nazi Germany be called "death camps").
11. See HATAMIYA, supra note 9, at 6. See generally COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982) (representing the outcome of a historical inquiry into the causes and consequences of the internment program, based on the testimony of 750 witnesses and an examination of thousands of government documents).
13. See HATAMIYA, supra note 9, at 6. "The government's policy was based on the incredible notion that this group of people, solely on the basis of ancestry, had to be regarded as inherently disloyal to the United States. They were simply presumed to be a racial nest of spies and saboteurs, there
virtually no acts of espionage, sabotage or fifth column activity committed
by any identifiable United States citizen of Japanese ancestry or permanent
resident Japanese alien on the West Coast. Moreover, the government
even admitted many Japanese Americans to the armed forces during the
war. The government ignored the evidence of Japanese American loyalty
and continued the internment of Japanese Americans until the end of the
war.

The 1982 report of the Commission on Wartime Relocation and In-
termnet of Civilians (CWRIC) set the stage for the Civil Liberties Act by
initiating the government's redress measures. The Commission investi-
gated the internment experience to educate Congress and give credibility to
the pending bill for redress. From July to December 1981, for twenty-
three days, the Commission heard the testimony of 750 witnesses in nine
cities, ranging from former Japanese American and Aleutian internees to
former government officials, public figures, academics and other profes-
sionals, community leaders, and others. The Commission recommended
that: (1) Congress pass a joint resolution, to be signed by the President, ac-
knowledging that a grave injustice had been done and offering a national
apology; (2) the President pardon those convicted of violating the curfew or
exclusion orders; (3) Congress direct executive agencies to which Japanese
Americans may apply for restitution of position, status, or entitlements lost
during the war to review such applications with liberality; (4) Congress ap-
propriate money to create an educational and humanitarian foundation; and
(5) Congress make individual compensation payments of $20,000 to each
of the surviving evacuees and internees. The CWRIC grounded these
recommendations in the fact that "nations that forget or ignore injustices
are more likely to repeat them." Congress then referred to the CWRIC recommendations in its creation
of the Civil Liberties Act of 1988. Under the Act, the Attorney General

being no individual review whatever.” JOHN TATEISHI, AND JUSTICE FOR ALL: AN ORAL HISTORY OF

14. See PERSONAL JUSTICE DENIED PART 2: RECOMMENDATIONS: REPORT OF THE COMMISSION
ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 51 (1982). Historian Michi Weglyn
documents, "Mandated with pro forma investigative powers as a Special Representative of the State
Department was one Curtis B. Munson. His mission: to get as precise a picture as possible of the de-
gree of loyalty to be found among residents of Japanese descent, both on the West Coast of the United
States and in Hawaii. . . . Munson's investigation . . . certified a remarkable, even extraordinary degree
of loyalty among this generally suspect ethnic group." MICHI WEGLYN, YEARS OF INFAMY: THE
UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS 34 (1976) (citations omitted). See also
CORBETT, supra note 5, at 28-29 (describing the research on Japanese Americans regarding the degree
of threat they posed to national security by Curtis B. Munson, who concluded that "there is no Japanese
problem," and noting that the Justice and War Departments discounted the report).

15. See HATAMIYA, supra note 9, at 84.

16. See id. at 89 (noting that the Commission traveled from Washington, D.C., to Los Angeles,
San Francisco, Seattle, Anchorage, Alaska, Chicago, back to Washington, D.C., to New York, and then
to Boston).

17. See id. at 90.

18. HATAMIYA, supra note 9, at 90 (citation omitted).
was responsible for identifying, locating, and paying $20,000 as compensation to each "eligible individual." As defined by the Act, the term "eligible individual" means:

any individual of Japanese ancestry, or the spouse or a parent of an individual of Japanese ancestry, who is living on the date of the enactment of this Act [enacted August 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, dated February 19, 1942;

(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', approved March 21,1942 (56 Stat. 173); 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 individuals solely on the basis of Japanese ancestry . . .

To implement the Act's mandate, the Attorney General operated through the Office of Redress Administration (ORA), under the Civil Rights Division of the U.S. Department of Justice. ORA would notify individuals of their eligibility and verify their claims upon receipt of certain background information. Upon a determination of ineligibility by ORA, claimants could seek reconsideration from the Appellate Section of the Civil Rights Division under the authority of the Assistant Attorney General for Civil Rights. If a claimant exhausted her administrative appeal, she could file suit in the U.S. Court of Claims, which is under the jurisdiction of the U.S. Court of Appeals for the Federal Circuit.

This paper involves the particular class of Japanese Americans who were stranded in Japan during World War II and sought redress and reparations under the Civil Liberties Act. ORA and the Chief of the Appellate Section found members of this group ineligible for redress and reparations under the Act because these claimants were outside the United States when the war began. They remained unable to return to the United States throughout the duration of the war, despite repeated attempts. Since the claimants resided in Japan, ORA refused to consider them subject to any

governmental actions or prohibitions. Specifically, ORA determined that when an individual living in Japan was unable to return to his or her domicile in a prohibited zone during the war, such restriction was not the result of direct government action as set forth in Title 28 of the Code of Federal Regulations, section 74.3(a)(4).\(^{23}\) According to that section, eligibility requires that the person must have been evacuated, relocated, interned, held in custody, or otherwise deprived of liberty or property on the basis of Japanese ancestry as a result of U.S. government action.\(^{24}\)

ORA based its theory on a 1951 decision entitled the *Claim of Rikitaro Ushio*.\(^{25}\) This case did not directly concern the Japanese American strankees' claims for redress and reparations, nor was it considered under the Civil Liberties Act of 1988. Instead, *Ushio* involved a claim under the Japanese American Evacuation Claims Act.\(^{26}\) This Act allowed Japanese American evacuees to file claims against the government for damages to, or loss of, real or personal property that was "a reasonable and natural consequence of the evacuation or exclusion of such person by the appropriate military commander from a military area in Arizona, California, Oregon, or Washington ...."\(^{27}\)

In *Ushio*, the claimant sought to receive compensation for the loss of community property he shared with his wife as a result of the forced evacuation of Japanese Americans from California during the war. The issue presented in *Ushio* involved whether the claimant's wife was eligible under the Evacuation Claims Act, so that the claimant could then recover for the entire property, rather than merely his share. The claimant's wife had gone to Japan on a visit in 1940 and was not able to return to the United States during World War II. She was found ineligible under the Evacuation Claims Act because "she was never evacuated or excluded from a military area pursuant to orders issued by a military commander."\(^{28}\) Instead, her exclusion from the United States was deemed "due to the intervention of World War II which prevented her return and is not attributable to action taken"\(^{29}\) by the government as required by the Evacuation Claims Act.

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23. See 28 C.F.R. § 74.3(a)(4).
24. See id.
26. See The Japanese Evacuation Claims Act, Pub. L. No. 80-886, 62 Stat. 1231 (1948) (codified as amended at 50 U.S.C. app. §§ 1981-87 (1982)). Many have criticized the Evacuation Claims Program for its serious shortcomings, including the requirement of an elaborate proof of loss, which was impossible to meet given the frantic "evacuation sales" held in the few days between notice of the relocation and the relocation itself. See CHUMAN, supra note 4, at 243-45.
29. Id.
ORA applied *Ushio* and its interpretation of the Japanese American Evacuation Claims Act of 1948 to the Japanese American strandees' claims under the Civil Liberties Act of 1988. As a result, ORA rejected the claims of the strandees under the Civil Liberties Act of 1988. It found that the strandees' inability to return to the United States resulted from a natural consequence of the war rather than direct action by the U.S. government. ORA concluded that eligibility under the Civil Liberties Act required direct action by the government. In doing so, ORA ignored the claimants' attempts to return home and their struggle to survive in Japan during the war. Moreover, on administrative appeal, the Chief of the Appellate Section further ignored the U.S. government's decision to leave them in Japan during the war, as discussed later in this paper.

III. THE STRANDEES' EXPERIENCE IN JAPAN

For the better part of my seventy-nine years, I have suppressed my disappointment and frustrations of the events set forth above. I have had many struggles and hardship, but the period of detention and relocation in Japan during the period December 1941 and the subsequent years until our eventual return... was the greatest challenge and struggle.³⁰

A. Exchange Program of the Special War Problems Division of the State Department

Plans to exchange civilians from the Far East began immediately after the attack on Pearl Harbor. Many Americans became concerned for their families and colleagues in the Far East. During World War II, care of Americans in the Axis countries fell upon the Special War Problems Division of the U.S. Department of State (hereinafter "Special Division").³¹ In furtherance of its duties, the Special Division began plans for the repatriation of civilians from enemy nations. According to the State Department, repatriation or exchange is "a process by which Nationals (or persons having a claim to Nationality) of hostile countries are exchanged during the period of hostilities in accordance with agreements reached between the two governments through their respective Protecting Powers. . . . Repatriation procedures are reciprocal arrangements and must adhere fully to the agreements reached between the two hostile governments."³² Thus, the Special Division complied with the suggestion that "[t]he best hope of carrying on the exchange for one or more additional voyages would seem to

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³⁰ Letter from Appellant to Department of Justice, Civil Rights Division, Appellate Section (Aug. 7, 1993) [hereinafter Letter from Appellant (Aug. 7, 1993)].
³¹ See CORBETT, supra note 5, at 41.
³² Administrative Instruction No. 65, RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 84 Subject Files, 1939-54, National Archives II, College Park, MD.
be to adhere as closely as possible to the terms of the exchange agreement.\footnote{33}

In accordance with this suggestion, the Japanese and American governments agreed that the Portuguese port of Lourenco Marques in East Africa would serve as the place to conduct the first exchange.\footnote{34} The U.S. government obtained the \textit{M.S. Gripsholm}, a Swedish ship, to use in the two-month-long exchange process.\footnote{35} The terms were simple, as were preliminary decisions as to who would certainly participate in the exchange. Secretary of State Cordell Hull informed the Japanese government, through its Swiss representative, of the U.S. government's desire to repatriate "the personnel of the United States Court at Shanghai, the marine guards remaining in China, ... and all employees of the various branches of this government' in Japanese controlled areas."\footnote{36} With these preliminary decisions, Hull intended to "open the door to an exchange process that could be modified and expanded later to include more people and different categories of people."\footnote{37}

Difficulty still remained in determining how to decide which Americans to select for the first repatriation. Indeed, it seemed as if the U.S. government had little say on whom it could bring back.\footnote{38} However, Breckinridge Long, Assistant Secretary of State for the Special Division, declared an affirmative role for the U.S. government in selecting participants for the repatriation to America. Long refuted the proposition that the Japanese

\footnote{33. \textit{Fundamentals of Japanese-American Exchange}, RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 186 Subject Files, 1939-54, National Archives II, College Park, MD.}
\footnote{34. \textit{See Joseph C. Grew, Ten Years in Japan: A Contemporary Record Drawn From the Diaries and Private and Official Papers of Joseph C. Grew} 507 (1944).}
\footnote{35. \textit{See Corbett}, supra note 5, at 63-64. The ships used in the first exchange were the Japanese ship \textit{Asama Maru}, taking aboard American diplomatic personnel and civilians at Yokohama, Hong Kong, and Saigon, and the Italian liner, \textit{Conte Verde}, bringing Americans from Shanghai, China. On the second exchange, in mid-October of 1943, the \textit{Gripsholm} met the Japanese ship \textit{Teia Maru} at the Portuguese port of Mormugão, India. \textit{See E. Bartlett Kerr, Surrender and Survival: The Experience of American POWs in the Pacific 1941-1945} at 90, 158 (1945).}
\footnote{36. \textit{Corbett, supra} note 5, at 56 (citation omitted).}
\footnote{37. \textit{Id.}}
\footnote{38. To illustrate this point, Maury Maverick, member of the War Production Board, personally requested that Breckinridge Long make efforts to repatriate one of his schoolmates that was in Japan at the outbreak of the war. After initially receiving an unfavorable response from Long, in a letter, Maverick reacted:

\begin{quote}
You say you will get the list after the exchange takes place. Can this mean the Japanese have the decision, and make up the list? Can this mean that representations to our State Department by American citizens are of no avail? ... [I]s it wholly up to the Japanese? Expressing my own opinion as an American citizen, I think, first that if exchange is to be made our country should at least demand certain Americans ... [T]he State Department might well consider certain suggestions from practical public officials—such officials, by the way, being most friendly to the Honorable Cordell Hull, yourself, and the successful administration of your department.
\end{quote}

\textit{Letter from Maury Maverick, War Production Board, to Breckinridge Long, Assistant Secretary of State, U.S. Department of State (Sept. 15, 1943), RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 8 Policy Books 1939-45, National Archives II, College Park, MD.}
were entirely in control of the selection of repatriates to America by referring to the "broad directives issued by [the State] Department and not by the Japanese..." 39

On March 13, 1942, James H. Keeley, Jr., Long's subordinate in the Special Division, designed a policy creating categories of people for selection. 40 Keeley intended for this policy to prevent influential friends and relatives of Americans in Japan from tampering with the repatriation process. These directives helped guide the compilation of the passenger lists for the Gripsholm. According to the report of the Congressional Subcommittee of the Committee on Foreign Affairs, "[t]hese directives gave preference to (1) those under close arrest; (2) interned women and children; (3) the seriously ill; and (4) interned men with preference being given, other things being equal, to married men long separated from their families in the United States." 41

At least in the first exchange, Keeley's policy enabled the State Department to effect repatriation of a significant number of American citizens from the Far East. On August 26, 1942, the Gripsholm carried over 1,300 United States officials and non-officials to New York on its return from Lourenco Marques. 42 The first exchange thus proved successful. As a result, some members of the State Department expressed their desire to "have in view such subsequent voyages as future conditions may permit until all

39. Letter from Breckinridge Long, Assistant Secretary of State, U.S. Department of State, to Maury Maverick, War Production Board (Sept. 23, 1943), RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 8 Policy Books 1939-45, National Archives II, College Park, MD.
40. See CORBETT, supra note 5, at 60.
41. Exchange of American Citizens Interned or Held Prisoners of War by the Japanese, H.R.J. Res. 243, 244, 294, 78th Cong. 2d Sess. (1944), at 10 [hereinafter Exchange of American Citizens Interned]. Initially, the stranded Americans "were not subject to full-scale internment and those that were detained were experiencing rather light supervision..." However, with the fall of the Philippines came harsher treatment so that General MacArthur "argued that the only language the Japanese could understand was force 'and it should be applied mercilessly to its nationals if necessary.'" CORBETT, supra note 5, at 47-48. See also VAN WATERFORD, PRISONERS OF THE JAPANESE IN WORLD WAR II 45 (1994) ("Civilians were interned because the Japanese were determined to wipe out all Western colonial 'influences'; they felt threatened by 'enemy' Westeners walking about freely with antagonistic attitudes toward the occupying forces."). The Japanese government also did not permit these directives to be applied to Americans in the Philippines, among whom a number were returned on the second exchange. See id.
persons of the western hemisphere now in the Far East are evacuated who can be and who are willing to be evacuated." Indeed, they were "deeply hopeful that it may be possible to carry out plans for the second voyage of the M.S. Gripsholm and to make such further voyages as may be needed and prove feasible to give all Americans an opportunity to escape the serious hazards and harshness attending confinement in Japanese occupied territory." Accordingly, on its second exchange from Mormugão, India, the Gripsholm returned approximately 1,240 nationals of the United States.

B. The Stories of the Japanese Americans Left Behind

Numerically, the two exchanges appeared extremely successful. The State Department brought Americans home. P. Scott Corbett writes that the safety of the thousands of Americans accidentally caught up in Japanese-controlled territory depended on the "extent international understandings regarding the treatment of enemy nationals during war and the labors of the Special Division, the State Department, and the United States' protecting power." While Corbett's characterization of these Americans as "accidentally caught up" holds true, his praise of the U.S. government's effort in rescuing citizens provides a singular and limited view of the role that the U.S. government played during the exchanges with Japan.

While the U.S. government repatriated over 2,500 white Americans, it failed to repatriate a group of American citizens stranded in Japan at the outbreak of the war. This group consisted of Japanese Americans who fell in the categories of Keeley's policy and desired to return to the United States. The U.S. government forced all of these Japanese Americans to remain in Japan for the duration of the war, thus denying them equal access to transportation home.

Some of these Japanese Americans included tourists, men and women who went to take care of sick relatives, children taken by Issei parents to visit relatives in Japan, students sent to study the Japanese language, and workers and professionals who sought temporary employment in Japan. Some were passengers on the Tatsuta Maru, the last ship that left Yokohama.

43. Letter from Lawrence E. Salisbury, U.S. Department of State, to Breckinridge Long, Assistant Secretary of State, U.S. Department of State (June 25, 1942), RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 180 Subject Files, 1939-54, National Archives II, College Park, MD (emphasis added).
44. Id.
45. See Exchange of American Citizens Interned, supra note 41, at 10. See also Department of State Press Release No. 10, supra note 42.
46. CORBETT, supra note 5, at 24. On December 9, 1941, the Swiss minister in Tokyo informed Ambassador Grew, that Switzerland would take charge of American interests in Japan as its protecting power. See id. at 42; Exchange of American Citizens Interned, supra note 41, at 9. Switzerland was selected for the reason, among others, that it seemed capable of centralizing the protection of American interests in both Europe and Asia. See CORBETT, supra note 5, at 42. The Japanese government chose Spain as its protecting power. See id. at 44.
47. The term "Issei" refers to a first generation Japanese American.
hama bound for San Francisco on December 1, 1941. The U.S. government ordered this ship to turn back as a result of the bombing of Pearl Harbor. The incoming war caught all of the Japanese Americans unprepared. They were stranded in Japan and separated from their families, ostracized by Japanese citizens, and subjected to poverty and bombing raids.

The following narratives reveal the experiences of three Japanese Americans and their families who have made claims under the Civil Liberties Act as a result of their being stranded in Japan from 1941 through 1945 by the U.S. government. In March of 1998, the U.S. Department of Justice shattered their hopes for redress and reparations by denying their claims.

1. Mrs. Wakamatsu

Today, multiple strokes have confined Mrs. Wakamatsu to her bed and rendered her unable to speak, and left her in the permanent care of her daughter. Mrs. Wakamatsu's daughter declares, "The money means nothing to us. She has lived her life and has no use for money at this point. From all that my mother has told me, it is the apology that would help heal those wounds." 49

In October of 1941, Mr. and Mrs. Wakamatsu learned of a family emergency that arose in Terayama, Japan. A doctor had diagnosed Mrs. Wakamatsu's father as terminally ill. Without delay, Mr. and Mrs. Wakamatsu and their three children traveled from their homeland in Hawaii to Japan. Upon their arrival, they found that Mrs. Wakamatsu's father had died. Within weeks, they were surprised to learn of the bombing of Pearl Harbor. After the bombing, Mrs. Wakamatsu and her family sought immediate return to Hawaii. They traveled a great distance to reach the closest U.S. Consulate in Kobe, which was far from the countryside of Terayama where they were staying. Despite the distance, Mrs. Wakamatsu and her now deceased husband were determined to return to Hawaii to raise their children as Americans.

Unfortunately, the U.S. government treated them with apathy. Mrs. Wakamatsu remembers the agent who listened to their plight. That agent informed them that "there would be no ships to leave Japan carrying the Japanese [American] people because an order was issued in America for relocating people of Japanese descent to other areas, whether or not they were citizens of the United States, and that some were even being returned to Japan because of their ancestry." 50 The agent told them that returning to Hawaii would even "be difficult for non-Japanese but that because of [their] ancestry, it was impossible [for the Wakamatsus]." 51 The agent

48. The names used here are pseudonyms.
49. Telephone Interview with Mrs. Wakamatsu's daughter (Jan. 15, 1998) (notes on file with author).
50. Claimant's Supporting Statement and Documents to ORA (Jan. 18, 1993).
51. Id.
proved correct.

The U.S. government excluded Mr. Wakamatsu and her family, as well as other Japanese Americans, from participation in the exchange program. Commenting on her exclusion, Mrs. Wakamatsu expressed, "my fate and that of others of Japanese ancestry were determined by actions taken by our own government. It was our government who randomly classified us a threat to our country's national security. It was the direct act of the United States Government that caused the detention and relocation of persons of Japanese ancestry both within and outside the United States."\(^{52}\)

Over forty-five years later, Mrs. Wakamatsu and her children have each been denied redress and reparations from the U.S. government. They are all United States citizens. They each suffered by the hand of the U.S. government during World War II. In a letter supporting an administrative appeal of ORA's determination of her ineligibility under the Act, Mrs. Wakamatsu states:

> Some fifty-two years have lapsed, the stigma remains. Some fifty-two years lapsed and... such records... would undoubtedly reveal that while others suffered the same unfortunate situation of being in a country with which the United States had declared war, the citizens of non-Japanese ancestry were afforded the right to return. The records will show that we did make numerous efforts through the agents and representatives of the United States in Japan. The records will further reveal that as it relates to those persons of United States citizenship who were in Japan previous to the onset of World War II, of Japanese ancestry like myself, upon the directive of the United States Government or by actions taken on its behalf by its representatives, officers and employees failed to represent or assist those citizens of Japanese ancestry, in any measure, simply because of their ancestry. It was obvious that the fact that we were United States citizens was unimportant nor considered. The fact that we were of Japanese ancestry was the underlying factor for the unjust and biased treatment.\(^{53}\)

2. **Mrs. Tsunomori**

When she was fourteen years old, Mrs. Tsunomori traveled with her mother, younger sister and older brother to Japan in 1939. Mrs. Tsunomori went to Japan to take care of her dying older sister, who had been studying in Japan. The trip forced Mrs. Tsunomori to sacrifice her own studies and the free life she had enjoyed in America. Intent on helping her sister, Mrs. Tsunomori pushed aside her worries about delaying her own studies. However, the family discovered that Mrs. Tsunomori's older sister had died as they were en route to Japan.

52. Letter from Appellant (Aug. 7, 1933), supra note 30 (emphasis in original).
53. Id.
Upon their arrival in 1939, the Tsunomoris registered with the U.S. Consulate in Kobe. They documented their arrival and provided the Consulate with the address of where they would be staying in Japan. They had originally planned to stay for a mere six months and obtained a visa from the Consulate for that period. Yet, they again faced misfortune. Mrs. Tsunomori's younger sister, who traveled with them from America, had become gravely ill, eventually dying in 1942 from lack of proper medical care.

The most devastating change in the Tsunomoris' lives was the U.S. government's declaration of war with Japan. She and her family immediately knew that they must return to America. Mrs. Tsunomori recalls her attempt to return on the day after the declaration of war. She declares, "we contacted the American Consulate in Kobe, Japan. They told us that there would be a ship coming from the Philippines to Kobe and leaving for the United States. They told us to be prepared to go on board the ship when it arrives in Kobe. They told us that they will notify us as soon as the ship arrives. We waited in vain—we never did hear from the American Consulate."54

Not only did the U.S. government reject the Tsunomoris at the outbreak of the war, so did the people of Japan. Before the war, Japanese nationals perceived Japanese Americans in a negative light. Upon outbreak of the war, Japanese Americans in Japan were suspected traitors. Mrs. Tsunomori states:

On December 8, 1941, the day after war broke out, I recall three Japanese military personnel coming to our house—we were renting a house in Osaka until such time we were able to return to the United States. They confiscated all of our belongings and I clearly remember their remark at the time—since our mother was born in Japan, we were spared from being locked up. We did not know whether they meant by the Japanese military or by the Japanese police. All I remember is we were scared to say anything or ask any questions.55

This account is consistent with other documented stories of the strandees.56 They faced immense political pressures. At the outbreak of Pearl Harbor, the Japanese American strandees were urged by the kempeitai, or Special Security Police, to enter their names in the family register to establish their Japanese citizenship.57 This effort contributed to the Japanese government's scheme to conscript Japanese Americans into the army and to make them pledge their loyalty to Japan.58 Masayo Duus writes, "Those

54. Letter from Appellant to Department of Justice, Civil Rights Division, Appellate Section (Sept. 15, 1993) [hereinafter Letter from Appellant (Sept. 15, 1993)].
55. Id.
57. See id. at 55-56.
58. See id. *Some nisei had been forced to serve in the Imperial army and a few had inadver-
who refused were subjected to considerable economic and psychological pressure. As belligerent aliens they had trouble getting jobs or even rations." The suspicion placed on the Japanese Americans stranded in Japan intensified as they lost contact with their own government for the duration of the war.

Stranded, Mrs. Tsunomori and her family were forced to adapt to life in Japan. Military officers repeatedly visited the house where they were staying and on one occasion took Mrs. Tsunomori's older brother away. The officers coerced him to register as a Japanese citizen and join the Imperial Japanese Army. Mrs. Tsunomori was forced to quit school to support her family and its needs, as well as to pay for the medical expenses of her sick younger sister. With her English-speaking ability, she was able to gain employment at a Swedish business firm in Osaka. As a result, she escaped the Japanese military's attempt to coerce all English-speaking Japanese Americans to support the war effort against the Allies. Yet, she remained stranded in Japan until her return to California in 1949, where she found her family business ransacked and all of her belongings stolen.

3. Mrs. Fukuda

Mrs. Fukuda traveled to Japan in June of 1941 with her mother and younger sister. On the day after the U.S. government declared war on Japan, during a visit with relatives in Japan, Mrs. Fukuda's mother abandoned her and her sister. In 1942, her father could not send for Mrs. Fukuda and her sister because he had lost everything as a result of imprisonment in an internment camp in Poston, Arizona, by the U.S. government. Without parental support, Mrs. Fukuda remembers being "juggled from relative to relative" while taking responsibility for her new-born baby sister. Eventually, they ended up with their paternal grandparents in Hiroshima, but as outsiders, they struggled throughout their stay in Japan during the war.

In describing the hardship faced by Japanese Americans in Japan, Mrs. Fukuda recalls, "we attended school in Japan, but bitterness and resentment followed us. After all, we were not Japanese, we were Americans. . . . We were never accepted in school, and were treated like outsiders. Their icy resentment and disparaging remarks made us both aware of the pain and injustice of prejudice." Such hardship is consistent with the case of Iva Toguri, the Japanese American woman wrongly convicted of broadcasting wartime propaganda for the Japanese under the pseudonym "Tokyo Rose." Duus writes, "She . . . suffered the tragedy of being a nisei.

tently taken jobs that lost them their citizenship. But the majority of nisei who remained in Japan were forced to do so because they had been registered as Japanese citizens. Indeed, some had been children when their parents entered their names in the family register, and had lost their citizenship by no conscious act of their own." Id. at 108.
59. Id. at 55.
60. Letter from Appellant to Department of Justice, Civil Rights Division, Appellate Section (Mar. 20, 1993) [hereinafter Letter from Appellant (Mar. 20, 1993)].
During the war these Americans who looked like Japanese were treated as
foreigners by their own government, and those stranded in Japan met with
equal suspicion from the Japanese, who distrusted them as aliens, perhaps
even spies.\textsuperscript{61}

Further, Mrs. Fukuda's misery did not end with the war. Her misery
did not even end upon repatriating to America. Mrs. Fukuda's sentiments
reflect those of all the Japanese Americans left stranded in Japan, as she
explains:

I know that I was not physically interned during the war, but that is not to
say that I did not feel any pain. The emotional imprisonment of being
away from my home, watching the death and suffering of my family and
friends, being an outsider in both Japan and the United States, and empti-
ness and uncertainty that I felt when I returned home perhaps can be con-
sidered emotional trauma. I cannot recollect any feelings of security, so-
cial identity, or stability. All I remember is the feeling that I was trapped
in a foreign country, unable to return home to the love and emotional se-
curity I remembered as a child. I never recaptured those feelings in my
youth because my life had been dramatically altered during the war....
I feel that my rights as an American citizen were compromised....

IV. LEGAL ARGUMENT BASED ON \textit{ISHIDA V. UNITED STATES}

Although ORA found the Japanese American strandees ineligible for
redress, the testimonies given above reflect the strandees' suffering by di-
rect government action. The testimonies show that the U.S. government
caus ed the strandees' suffering, even though they were not evacuated, relo-
cated, or interned by the U.S. government during the war. ORA failed to
provide complete consideration to the strandees' eligibility for redress un-
der the Civil Liberties Act. ORA failed to consider the strandees as eligible
individuals specifically on the basis of their being "otherwise deprived of
liberty" as a result of a U.S. government decision.\textsuperscript{63} To remain consistent
with the \textit{Claim of Rikitaro Ushio}, as discussed above, ORA limited its con-
sideration by refusing to hold the U.S. government responsible for any ac-
tion beyond the evacuation, relocation, and internment of Japanese Ameri-
cans.

\textsuperscript{61.} \textit{Duus, supra} note 56, at 223. It has been argued that the criminal proceedings against Iva
Toguri, who had been stranded in Japan at the outbreak of the war, "in addition to reflecting racist and
wartime hatred, bearing false witness and creating a crime of innocent speech, thoroughly trashed the
Constitution of the United States." Ramsey Clark, \textit{Foreword} to \textit{RUSSELL WARREN HOWE, THE HUNT
FOR "TOKYO ROSE"} xvi-xvii (1990). \textit{See also D'Aquino v. United States, 192 F.2d 338 (9th Cir. 1951);
cial thanks to Dr. Clifford Uyeda of the National Japanese American Historical Society (NJAHS), who
led the movement to obtain Ms. d'Aquino's pardon from President Ford, for his insight on the strandees'
experience in Japan, particularly regarding Iva Toguri's experience.

\textsuperscript{62.} Letter from Appellant (Mar. 20, 1993), \textit{supra} note 60.

But no reason exists for the need to remain consistent with *Ushio*. That case was decided in 1951 and has nothing to do with the Civil Liberties Act. ORA should have broadened its interpretation of the Act when determining the strandees' eligibility. It should have considered the U.S. government's deprivation of the strandees' liberty, since the U.S. Court of Appeals for the Federal Circuit has deemed "liberty deprivation . . . an alternative or additional ground for compensation [under the Act]." This proposition originates from *Ishida v. United States*, a landmark case in Civil Liberties Act jurisprudence.

In *Ishida*, the claimant was an American citizen of Japanese ancestry born on November 23, 1942. Prior to his birth, on March 2, 1942, the U.S. military announced the imminent expulsion and exclusion of persons of Japanese ancestry from the West Coast. Moreover, on March 29, 1942, the military declared that the U.S. government would relocate and detain all Japanese Americans on the West Coast. The government allowed the Japanese Americans to evacuate "voluntarily" from the West Coast before March 29, 1942. Yet such evacuation was hardly "voluntary," since the evacuees did not have unconditionally free movement into the interior. Instead, the government required them to register their destinations with the government. The Ishidas relocated from California to Ohio between March 2, 1942, and March 29, 1942, and they thus avoided violating 56 Stat. 173, which penalized any "violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military zones or areas." ORA compensated Mr. Ishida's parents under the Civil Liberties Act, based on their "voluntary" relocation in avoidance of 56 Stat. 173. However, both ORA and the Assistant Attorney General for Civil Rights found Mr. Ishida ineligible for redress and reparations. ORA determined that he was not "an individual . . . confined, held in custody, [or] relocated" pursuant to 50 U.S.C. App. § 1989b-7(2)(B). ORA reasoned that the regulations were not interpreted to "include as eligible children born after their parents had voluntarily relocated from prohibited military zones or from assembly centers, relocation camps, or internment camps." Mr. Ishida's birth came after his parents "voluntarily" relocated from California to Ohio before March 29, 1942.

After Mr. Ishida exhausted his administrative appeal, he took his claim to the U.S. Court of Claims. That court upheld the Justice Department's interpretation that the phrase, "otherwise deprived of liberty," did not extend to individuals born after their parents had voluntarily relo-

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64. *Ishida v. United States*, 59 F.3d 1224, 1232 (Fed. Cir. 1995).
65. *Id.* at 1230 (citation omitted).
66. *See id.* at 1228.
67. *Id.* (citing 50 U.S.C. app. §1989b-7(2)(b) (1988)).
68. *Id.* at 1228-29 (citation omitted).
Before the U.S. Court of Appeals for the Federal Circuit, Mr. Ishida argued that he was "otherwise deprived of liberty," specifically in being denied his right to return to his family's home as a result of the statutorily specified laws and orders in effect during the relevant statutory period. While conceding that Mr. Ishida suffered a deprivation of liberty, the government contended that the suffering was not a "sufficiently direct deprivation of liberty as a result of government action to recover under the Act."\(^{70}\)

Upon review, the U.S. Court of Appeals for the Federal Circuit dismissed the government's narrow construction of the "otherwise deprived of liberty" provision.\(^{71}\) It held that Japanese Americans who were born after their parents had "voluntarily" relocated from the West Coast restricted areas to avoid imminent internment were entitled to redress and reparations under the Civil Liberties Act. As a result of government action, such children were found to have "suffered economic hardship, ostracism, and familial disruption . . . ."\(^{72}\) The Court declared that the U.S. government deprived such Japanese Americans of liberty by excluding them from their parents' original place of residence, since they were excluded and could not return to their homes without committing a crime under the criminal statute, 56 Stat. 173.\(^{73}\)

The Court reached its interpretation of the "otherwise deprived of liberty" provision based on three considerations. First, the Court reasoned that limiting eligibility to those directly deprived of liberty as a result of government action, those "'confined, held in custody, [or] relocated'" would "render superfluous the phrase 'or otherwise deprived of liberty.'"\(^{74}\) "[R]ules of statutory construction require a reading that avoids rendering superfluous any provision of a statute."\(^{75}\) Consequently, by including the phrase "otherwise deprived of liberty" as an independent basis for eligibility, Congress necessarily intended to compensate those Japanese Americans "deprived of liberty" as a result of enumerated government actions, even though they were not "'confined, held in custody, [or] relocated.'"\(^{76}\)

Second, the Court did not find anything in the plain language of the Civil Liberties Act to indicate Congress' intent to exclude individuals like

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69. See id. at 1229.
70. Id.
71. See id. at 1229-30. The court found the government's interpretation ineligible for deference under Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45, based on the fact it contravened Congress' intent to include anyone, even later-born children of Japanese ancestry, who has been "deprived of liberty" as a result of government action. See id.
72. Id. at 1230.
73. See id.
74. Id (citation omitted).
75. Id. (citing Ratzlaf v. United States, 510 U.S. 135, 135 (1994)).
76. Id.
Mr. Ishida from compensation. Specifically, the language does not express Congress' intent to exclude Japanese Americans who were born after their parents had relocated from the military areas on the West Coast.

Third, the Court rejected a reading of the "eligible individual" provision of the Act that would not include persons deprived of their rights as a result of their exclusion from their homes on the West Coast. The Court's interpretation followed the basic rule of statutory construction in reading each statutory provision with reference to the whole act. Section 1989a of the Act states, "[t]he excluded individuals of Japanese [America] ancestry suffered enormous damages .... For these fundamental violations of the basic civil liberties and constitutional rights of these individuals ... the Congress apologizes on behalf of the Nation." According to the Court, Section 1989a of the Act "speaks in terms of redressing the violations of 'basic civil liberties' of citizens ... who were 'excluded' from their places of residence ... ." The Court thus found eligible the Japanese Americans forced to relocate, since they were excluded from their places of residence. To find otherwise would have amounted to interpreting the "eligible individual" provision in a manner inconsistent with Congress' express acknowledgment in section 1989a.

Ishida's first consideration in rejecting a direct deprivation requirement supports the claims of the Japanese American strandees by recognizing the sufficiency of proximate causation in linking the U.S. government's action with the deprivation of liberty. The specific deprivation of liberty suffered by the strandees was the government's prevention of their return to their homes within the prohibited zones. Requiring proximate, rather than direct, causation allowed for extending the government's act of depriving the Ishida family of liberty to an act directed against their child. Even though the child was born after his parents relocated, he still suffered from the government's action, since he was prohibited from returning to his family's home.

Under the same theory, the government's act of incarcerating or forcing the relocation of Japanese Americans in the prohibited zones can be extended to a deprivation of liberty to the strandees. The government may

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77. See id. at 1231.
79. See Ishida, 59 F.3d at 1231 (citing United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988)).
80. See id (citing Massachusetts v. Morash, 490 U.S. 107, 114-15 (1989)).
82. Ishida, 59 F.3d at 1230.
83. Note, however, that this argument might be weaker as applied to Mrs. Wakamatsu and her family, whose domicile was in Hawaii. While not exactly similarly situated with the other claimants regarding the prohibited zones in California, the Wakamatsu's eligibility is nevertheless supported by the fact that the U.S. government discriminated against them and denied their movement, as discussed later in this paper.
not have forced both Mr. Ishida and the strandees to leave, but it did affect their right to return to their homes. Mr. Ishida could not return home because he would have been subject to imprisonment. Similarly, the strandees could not return home because they would also have been subject to imprisonment. This proximate cause theory thus holds the government responsible for the deprivation of the strandees' liberty so that it should not be cut off from liability despite the intervention of war, as was the case in Ushio.

The second consideration in Ishida equally applies in the strandees' claim since nothing in the plain language of the Act indicates that Congress intended to exclude them from eligibility. At most, section 1989b-7 excludes from eligibility "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." The existence of this express exclusion indicates that Congress could have similarly treated those who went to Japan before the war. However, Congress did not limit the scope of the Act in such a way. This point, which was raised by the Court in Ishida, has greater relevance as applied to the strandees, since the express exclusion deals with those Japanese Americans who traveled to Japan during the specified period. The strandees did not travel to Japan between December 2, 1941, and September 2, 1945. On the contrary, they attempted to leave Japan during that period.

Finally, the Ishida court's reading of the "eligible individual" provision as referring to the whole act supports including the strandees, since failing to deem them eligible would contravene Section 1989a. Recall that the Court in Ishida found Section 1989a relates to compensating those Japanese Americans who were excluded from their homes. Mr. Ishida had not yet been born and was being compensated for a life he was deprived of leading. While Mr. Ishida was deprived of liberty and his claim proved meritorious, considering this characterization of Mr. Ishida's deprivation leads to the conclusion that the deprivation suffered by the strandees was even more severe. The strandees had lived in the United States, while Mr. Ishida had never been to the home of his parents. They directly experienced the disruption in their lives by not being allowed to return. Thus, Section 1989a was meant to compensate the damages they suffered.

V. POLICY OF DISCRIMINATION AGAINST JAPANESE AMERICANS

Always,... the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.
—Robert Jackson, U.S. Supreme Court Justice

For a little while
Encountering a person
Who was anti-Japanese,
I rubbed against a spirit
Out of harmony with mine.

While the argument based on Ishida sufficiently establishes the strandees' claim, a policy of intentional discrimination implemented by the U.S. government against the strandees provides additional proof of its deprivation of their liberty "solely on the basis of Japanese ancestry." This policy of discrimination rests on the U.S. government's refusal to consider the strandees for participation in the exchange program that would have resulted in their repatriation. The policy arose in the context of American antipathy for persons of Japanese ancestry. Existing scholarship on the wartime treatment of Japanese Americans reveals that the U.S. government deliberately discriminated against Japanese Americans on the West Coast. This treatment, as well as the public sentiment against Japanese Americans in the United States during the war, supports the probability of the government's implementation of its policy regarding the strandees. This section first considers the U.S. government's policy of discrimination implemented in selecting participants for repatriation to the United States. Second, it explores the notion that the government acquiesced to the popular anti-Japanese sentiment by removing persons of Japanese ancestry from the United States and preventing Japanese American strandees from returning to the United States.

A. Calculation of Participants in the Exchange Program

During World War II, the U.S. government adopted an implied policy of discrimination regarding the exchange program with Japan. Initially, the U.S. government gave the appearance of intending to make a good faith ef-

88. See Korematsu v. United States, 584 F. Supp. 1406, 1416 (N.D. Cal. 1984) (taking judicial notice of the CWRIC finding that the government had knowingly withheld information from the courts that military necessity did not justify internment). See also JAPANESE AMERICANS: FROM RELOCATION TO REDRESS (Roger Daniels et al. eds., 1986).
fort to return all Americans to the United States. On April 3, 1942, Assistant Secretary of State Breckinridge Long sent a telegram to the American legation at Bern. Long stated, "In accordance with [the] original Japanese proposal regarding repatriation of non-officials Department expects repatriation of all civilians who are non-permanent residents of Japan." However, the government qualified this expectation. A document entitled "Administrative Instruction No. 65" states that "every effort is being made to work out as rapidly as possible the complicated problems involved in exchanging Americans in Japan who want to return... and are acceptable to the United States Government..." This document indicates that the government actually intended to repatriate only certain Americans stranded in Japan.

The U.S. government's policy regarding acceptable repatriates intended to include only white Americans in the exchange program. The government's refusal to consider Japanese Americans for the exchanges becomes evident from two documents found at the National Archives II in College Park, Maryland. The first document is a letter from Secretary of State Cordell Hull to President Roosevelt. This letter delivered a progress report on the first exchange. Hull states: "In exchange for [Americans in Japan] we will have to send out Japanese in the same quantity. If that agreement should be carried through, all the Americans except prisoners of war would be removed from the continent of Asia under control of the Japanese." This document manifests a general intention by the U.S. government to repatriate all Americans. On its face, the document shows no discriminatory intent.

The second document, a State Department, Far East Division memorandum to Breckinridge Long indicates the U.S. government's continued general support for repatriating Americans in the second exchange. It states, "Unless the Japanese agree to general repatriation of Americans from the Philippines, which is still very much of a question, there is no need to plan beyond the third exchange, as there will be insufficient repatriable Americans in the Far East for a fourth exchange." Readers of this memorandum would assume that the U.S. government had successfully re-

89. Telegram from Breckinridge Long, Assistant Secretary of State, U.S. Department of State, to American Legation, Bern (April 3, 1942), RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 121 Subject Files, 1939-54, National Archives II, College Park, MD.
90. Administrative Instruction No. 65, supra note 32 (emphasis added).
91. Letter from Cordell Hull, Secretary of State, to President Franklin D. Roosevelt (Aug. 27, 1942), RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 168 Subject Files, 1939-54, National Archives II, College Park, MD.
92. Memorandum to Breckinridge Long, Assistant Secretary of State, U.S. Department of State, Third American-Japanese Exchange Operation (Dec. 10, 1943), RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 185 Subject Files, 1939-54, National Archives II, College Park, MD.
patriated almost all of the Americans stranded in Japan. However, by the
time of this memorandum, the U.S. government had already repatriated
nearly all of the Americans it had intended to repatriate.

The letter from Cordell Hull and the State Department memorandum
together indicate that by the end of the second exchange, the U.S. government
had repatriated all Americans. However, a significant number of
Americans had not yet returned to the United States by this time. The im-
plification of these documents becomes clear when one makes the appro-
riate calculations. According to the only source exclusively dedicated to the
historic documentation of the strandees, there were approximately 20,000
Japanese Americans in Japan at the outbreak of World War II. The large
number of Japanese Americans stranded is not at all surprising when one
considers that approximately 50,000 American Nisei were working, study-
ing, or visiting Japan in 1938, although many managed to return home be-
fore Pearl Harbor. Many of the 20,000 were killed in the bombings of
Tokyo and the atomic bombing of Nagasaki and Hiroshima. Yet on behalf
of the Japanese American Citizens League (JACL), Roger Baldwin re-
ported that there were still 10,000 Japanese Americans living in Japan in
1946. The occupation authorities estimated the number to be around
15,000 in November 1948. The discrepancy between these two estimates
can be explained at least in part by the return of 8,000 Japanese Americans,
who were coerced to renounce their U.S. citizenship and expatriate to Japan
in 1946.

Given that the two voyages of the Gripsholm managed to return
slightly over 2,500 Americans to the United States, a third exchange would
return approximately 1,500 more repatriates. According to the statement in
the memorandum to Long quoted above, with a third exchange, there
would be "insufficient repatriable Americans in the Far East for a fourth
exchange." This statement completely discounts the 20,000 Japanese

93. See Mary Kimoto Tomita, Dear Miye: Letters Home from Japan, 1939-1946 18 (Rob-
ert G. Lee, ed., 1995) (providing background information about Japanese Americans stranded in Japan
as an introduction to a collection of letters by the author, a Japanese American strandee, to friends in
Japan and in the United States). Special thanks to Professor Roger Daniels for recommending this
source, the only one of which has been published solely regarding Japanese Americans stranded in Ja-
pan during World War II. See also Duus, supra note 56, at 55-56, 107 (stating that 10,000 Japanese
Americans were stranded in Japan at the outbreak of the war). An exhaustive search suggests that no
official documentation regarding the exact number of Japanese Americans in Japan at the time of the
war exists. Moreover, any such documentation by the kempeitai in Japan would likely have been de-
stroyed. See Telephone interview with Roger Daniels, Professor of History, University of Cincinnati
(Feb. 12, 1998) (notes on file with author). Even if the number of Japanese Americans in Japan totaled
10,000 rather than 20,000, a third or fourth exchange would not return all of the Japanese Americans
stranded in Japan, and thus all of the American citizens, so as to be consistent with Long's statement.

94. See TOMITA, supra note 93, at 18.
95. See id. at 18-19 (citation omitted).
96. See id. at 19 (citation omitted).
97. See id.
98. Memorandum to Breckinridge Long, supra note 92.
Americans awaiting repatriation to their homeland in the United States. The government actually meant that it had repatriated all Americans that it desired to repatriate. Such blatant disregard of the Japanese Americans stranded in Japan constitutes an outright denial of their identity as U.S. citizens by the government to which they had pledged their allegiance.


The U.S. government's policy of discrimination in selecting participants for repatriation appears more plausible when taken in conjunction with the anti-Japanese attitude pervading the United States before and during the war. Leslie Hatamiya writes, "The story of the Civil Liberties Act does not begin with President Franklin D. Roosevelt's 1942 order authorizing the evacuation and internment... Rather, the story reflects a long-standing history of anti-Asian sentiment in this country...." Before World War II, white supremacy groups in California sparked jingoism regarding the Yellow Peril issue in California, where over 80 percent of the Japanese population lived. Morton Grodzins posits that, before the war, these groups exerted pressure on officials to eliminate the population of the Japanese Americans for economic or other self-interested reasons. By 1941, fifty years of hatred toward Japanese Americans had resulted in a stereotyped attitude of distrust toward Asians and Asian Americans among the West Coast population. The attack on Pearl Harbor exacerbated those sentiments and infused the public opinion with heightened feelings of suspicion, fear, and anger. During the war, several organizations voiced

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99. Hatamiya, supra note 9, at 6.
100. These groups included the Native Sons of the Golden West, the California Grange Association, the American Legion, the Exclusion League, and the American Federation of Labor. See Audrie Girdner and Anne Loftis, The Great Betrayal: The Evacuation of the Japanese-Americans During World War II 357 (1969).
101. See Morton Grodzins, Americans Betrayed: Politics and the Japanese Evacuation 21 (1949) (noting, "The complete story of the attempts of various groups to foster the Japanese evacuation will probably never be told.... Nevertheless, enough data are available to supply an understanding of techniques and to afford an estimate of quantity.").
102. See TenBroek et al., Prejudice, War and the Constitution 68 (1954). TenBroek adds, "[T]he hostility reached maturity in the early twenties with the passage of the Alien Land Law and the Oriental Exclusion Act, and although thereafter it became relatively inactive it was kept alive during the thirties by the stimuli of Japanese aggression and economic depression." Id.
103. See Donald E. Collins, Native American Aliens: Disloyalty and the Renunciation of Citizenship by Japanese Americans During World War II 12 (1985) (citing U.S. Department of Interior, War Relocation Authority, Wartime Exile: The Exclusion of the Japanese American from the West Coast 92-96 (1946)). Such emotions, particularly fear, have been studied by sociologist Harry H.L. Kitano, who writes: "Perceived danger is the most common mechanism for triggering extreme acts. The danger may be real or unreal — it makes little difference because the target group has been so effectively insulated that the public is often ready to believe anything. In essence, the message is a clear one. One group does not want the other group to occupy the same system and is therefore opting..."
their urgent desire to remove Japanese and Japanese Americans from the United States. For instance, addressing Attorney General Francis Biddle about the necessity of evacuation, a Los Angeles resident wrote, "No Jap should be permitted to remain in America. Whether born here or not, they are Japs at heart and always will be. . . . [N]o such opportunity as now exists may ever again be presented to us, in all our future history, to ship them back to Japan."

Consequently, these pressure groups had crucial influence on the government in deciding the evacuation issue. Grodzins contends that the objectives of large organizations, including the government, may have been influenced and even thwarted by subtle and diverse forces that operate within them. According to Grodzins, policy decisions are made by people who "filter program objectives through their own values, their own aggressions, their own struggles for status and prestige." These personal emotions affected the objectives and the decision-making process of the U.S. government during World War II. For instance, in his recommendation to the Secretary of War regarding the mass evacuation, General DeWitt stated, "In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted." For those who agreed with DeWitt, citizenship and demonstrated patriotic loyalty also presented immaterial factors. Moreover, relocation from the coastal states and internment insufficiently dealt with the danger that Japanese Americans appeared to pose.

DeWitt's attitude stirred support among the political arena for the removal of all Japanese Americans from America. Members of Congressional delegations frequently imposed their views on the War and Justice Departments, where their actual influence "rested in this pressure they brought to bear, individually and collectively, against those departments." For instance, Congressman John Rankin of Mississippi supported "catching every Japanese in America . . . shipping them back to Asia as soon as possible." He stated, "This is a race war, as far as the Pacific

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104. See GIRDNER, supra note 100, at 357.
105. GRODZINS, supra note 101, at 21 (citation omitted).
106. See TENBROEK, supra note 102, at 186.
107. See GRODZINS, supra note 101, at viii.
108. Id.
109. See id.
110. Id. at 282 (citation omitted).
111. Id. at 90-91.
112. Id. at 86. At least two other members of Congress were vocal in their opinions regarding the evacuation of Japanese Americans. They were Congressman Martin Dies of Texas and Senator Tom Stewart of Tennessee. See id. at 86-87.
side of this conflict is concerned.... The white man's civilization has come into conflict with Japanese barbarism. Christianity has come in conflict with Shintoism, atheism, and infidelity.... Damn them! Let us get rid of them now!\textsuperscript{113} Jacobus tenBroek suggests that during the war era, the politicians' call for removing the offending minority constituted a "response to the growing apprehension of the public and its antagonism toward the Japanese Americans, and... [a way] of capitalizing on groundswells of opinion by acting with the appearance of leading them."\textsuperscript{114} As a result, their pressure forced the Army and the U.S. government to capitulate.\textsuperscript{115}

In addition to its influence on the internment of Japanese Americans, the American anti-Japanese sentiment during the war era eventually led to the forced removal of Japanese and Japanese American internees from the United States to Japan. Although the State Department initially intended not to remove persons against their will, its policy "became a difficult one to maintain, for the State Department became the object of various outside and internal political pressures supporting wholesale repatriation regardless of the wishes of the internees."\textsuperscript{116} A State Department memorandum noted that Breckinridge Long would remove 1,633 Japanese and Japanese American internees, despite their objections. Long believed that such a forced removal was necessary to proceed with another exchange.\textsuperscript{117}

The development of American anti-Japanese sentiment and the adoption of forced removal of persons of Japanese ancestry suggests that the exchange program with Japan involved more than an effort to bring back U.S. citizens from Japan. It appears that popular racist sentiment reinforced the U.S. government's decision to use the exchange to eliminate persons of

\textsuperscript{113} Id at 86. (citation omitted).
\textsuperscript{114} TENBROEK, supra note 102, at 198.
\textsuperscript{115} See id.
\textsuperscript{116} CORBETT, supra note 5, at 65.
\textsuperscript{117} See Memorandum of Conference between Breckinridge Long, Assistant Secretary of State, U.S. Department of State, George Brandt, Legal Adviser to Assistant Secretary of State, U.S. Department of State, and Mr. Years (Oct. 3; 1942), RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 188 Subject Files, 1939-54, National Archives II, College Park, MD. Corbett notes, "the Special Division realiz[ing] that... to assure the best possible treatment for Americans, they had to guard against the hasty actions of their own boss [Breckinridge Long]." CORBETT, supra note 5, at 53. In his opinion, Long was "caught up in the excitement and the responsibility of being in a policy-making position during a war, he persevered and increasingly saw himself engaged in battles for the protection of America against radical ideologies and foreign elements. In waging such battles, Long was particularly suspicious of the Justice Department, which was, to his mind, infused with the 'Frankfurter boys,' who tended to be 'bleeding-hearts' and proponents of probabor views with excessive humanitarianism." Id. See also Memorandum of Conversation between Mr. Huston and Lt. Weldon, Office of Naval Intelligence (Oct. 3, 1942), RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 188 Subject Files, 1939-54, National Archives II, College Park, MD (noting Weldon's suggestion not to press the matter at present but to clear them if participants were needed to save the exchange). But see Letter from Mr. Huston, Special Division, U.S. Department of State, to James H. Keeley, Special Division, U.S. Department of State (Sept. 10, 1942), RG 59, Stack Area 250, Row 49, Compartment 20, Shelf 03, Box 188 Subject Files, 1939-54, National Archives II, College Park, MD (mentioning the unlikelihood of forced repatriation).
Japanese ancestry from the American population. In this way, the exchange program drove out the existing Japanese and Japanese American population from America without bringing any of the Japanese American strandees back from Japan. The forced repatriation of persons of Japanese ancestry to Japan satisfied the anti-Japanese racists to resolve their hatred of Japanese.118 This exclusionist theory, combined with the government's failure to consider the 20,000 Japanese American strandees for repatriation to the United States, supports the probable existence of a discriminatory policy adopted by the U.S. government. In Corbett's words, "Under the pressure of the war and a resilient, rejuvenated racism towards the Japanese, policy makers in Washington toyed with plans and policies that...besmirched the nation's honor through the ill-conceived and often unnecessary manipulation of innocent people."119

VI. THEORETICAL CONSIDERATIONS OF REPARATIONS FOR STRANDEES

If a citizen believes that the sovereign state is committing an illegal act, it is incumbent upon that citizen to take measures to rectify such error, or so, at least, I believed. Finally, it seemed to me then and now that if the government unlawfully curtails the rights of any person, the damage is done not only to that individual person but to the whole society. If we believe in America, if we believe in equality and democracy, if we believe in law and justice, then each of us, when we see or believe errors are being made, has an obligation to make every effort to correct them.120

—Minoru Yasui

In the 1944 decision of Korematsu v. United States, the U.S. Supreme Court upheld as constitutional the incarceration and dispossession of all Japanese Americans on the West Coast based on military necessity.121 The 1944 Korematsu Court based its decision on "the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained."122 As a result, the Court affirmed Mr. Korematsu's conviction for remaining on the West Coast because of the war with Japan, because the military felt constrained to take security measures, and because Congress determined that the military should have the power to act as it did.123

118. See CORBETT, supra note 5, at 79.
119. Id.
120. TATEISHI, supra note 13, at 70-71.
121. See Korematsu v. United States, 323 U.S. 214 (1944). See also Hirabayashi v. United States, 320 U.S. 81 (1943) (affirming lower court's rejection of Hirabayashi's constitutional challenges to the curfew and exclusion orders that presumed the disloyalty of Japanese Americans and predicting that they would support any invading Japanese armed forces); Yasui v. United States, 320 U.S. 115 (1943) (affirming Yasui's conviction on similar grounds).
122. Korematsu, 323 U.S. at 218.
123. See Id at 223.
Forty years later, District Judge Marilyn Hall Patel granted Mr. Korematsu's petition for a writ of *coram nobis* to vacate his 1942 conviction that was the subject of the earlier Supreme Court case. The 1984 *Korematsu* case, along with the other *coram nobis* cases, *Yasui v. United States* and *Hirabayashi v. United States*, fueled the legislative effort for redress and reparations for all Japanese Americans who had been interned by the U.S. government during World War II. By finding that the government and military officials purposely suppressed information that proved the loyalty of Japanese Americans and rejected the need to evacuate them, the cases eradicated any remaining legal justification for the evacuation and internment. They legitimated the redress movement and prioritized the need to correct the government's wartime mistakes.

The *coram nobis* cases further support the need to compensate the Japanese American strandees for their suffering as a result of the U.S. government's discrimination. In the 1984 *Korematsu* opinion, Judge Patel discusses the significance of the 1944 decision. She writes:

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

Judge Patel's explication of the two roles of the 1944 *Korematsu* decision present two reasons that justify redress for the strandees that are discussed in the following two sections. The first section discusses the 1944 decision's limited role as legal precedent, which provides a basis for the strandees' claim against the government for violating their constitutional equal protection rights. The second section addresses the historical precedent of the 1944 opinion that suggests the appropriateness of the strandees'
place within the greater redress scheme. The case as written in 1944 stands as a reminder of the U.S. Supreme Court's irresponsible decision to succumb to governmental actions driven by wartime hysteria. The case represents the need for the U.S. government to apologize to all Japanese Americans affected by its discriminatory actions.

A. Classic Equal Protection Theory and the Japanese American Strandees

Legal scholars consider the 1944 Korematsu decision to be one of the U.S. Supreme Court's greatest mistakes.\(^\text{128}\) Ironically, the 1944 decision also stands as the first case where the Court explicitly declared race a "suspect" classification in constitutional analysis. The Court proclaimed that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect.... [C]ourts must subject them to the most rigid scrutiny."\(^\text{129}\) On the facts of the 1944 Korematsu decision, restriction based on military necessity withstood the strict scrutiny standard. This standard expressing immediate suspicion toward racially explicit classifications has survived the highly criticized outcome. The current Supreme Court continues to apply the same standard in its Equal Protection Clause jurisprudence.\(^\text{130}\)

The Supreme Court's intolerance of classifications that reflect stereotyped prejudice dates back to Strauder v. West Virginia.\(^\text{131}\) In that case, the Court reversed an African American defendant's conviction of murder in a state which barred African Americans from sitting on a jury. The state law provided that only "white male persons who are twenty-one years of age and who are citizens of this State" were eligible for jury duty.\(^\text{132}\) The Court viewed the Equal Protection Clause as declaring "that all persons, whether colored or white shall stand equal before the laws of the States, and in regard to the colored race [sic], for whose protection the amendment was intended must, in the absence of some overriding constitutional necessity, be accorded the same privileges and the same opportunities."\(^\text{133}\)

\(^\text{128}.\) See generally Eugene V. Rostow, The Japanese American Cases — A Disaster, 54 YALE L.J. 489 (June 1945) (subjecting the Supreme Court's decisions to an analysis that exposed the Justices' abdication of judicial responsibility and the racist underpinnings of the decisions); Nanette Dembitz, Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions, 45 COLUM. L. REV. 175 (June 1945) (attacking the factual premises of the "racial disloyalty" claims adopted in the Korematsu and Endo decisions by former Department of Justice attorney who helped prepare the government's briefs); Sandra Takahata, The Case of Korematsu v. United States: Could It Be Justified Today?, 6 U. HAW. L. REV. 109 (Spring 1984) (concluding that Korematsu could not meet the standards of judicial review of military power and racial discrimination that have evolved since World War II); Marc Hideo Iyeki, The Japanese American Coram Nobis Cases: Exposing the Myth of Disloyalty, 13 N.Y.U. REV. L. & SOC. CHANGE 199 (Winter 1984-85) (attacking the assumptions of "racial disloyalty" that underlay the Korematsu, Hiroabayashi, and Yasui decisions).


\(^\text{130}.\) See L.H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-22, at 1466 (2d ed. 1988) (stating that "every member of the Court seems to think that at least some form of heightened scrutiny is appropriate; no Justice has endorsed minimal scrutiny of race-based preferences").

\(^\text{131}.\) 100 U.S. 303 (1879).

\(^\text{132}.\) Id. at 305 (citation omitted).
primarily designed, that no discrimination shall be made against them by
law because of their color."

Although no member of the present Supreme Court supposes that ra-
cial preferences are always invalid, its recent cases express disfavor toward
classifications that depend on race.134 The present Court appears suspi-
cious of race-based classifications in a manner consistent with Justice Harlan's
declaration in Plessy v. Ferguson that "[o]ur constitution is color-blind . . . ."135 In his dissent, Justice Harlan deemed classifications as "fully 'sus-
pect' only when those classifications denigrate someone's equal worth on
racial grounds."136 This view exists irrespective of the classification re-lecting "any stigmatizing prejudice that has distorted the fairness of the
political process that produced the classifications," or reinforcing any "ra-
cial caste system in which some races permanently dominate others."137

The Supreme Court's present approach to equal protection analysis
recognizes the legitimacy of the Japanese American strandees' claim for re-

dress. Their claim poses no analytical difficulty. The U.S. government's

133. Id. at 307.
Kennedy, J. and White J., stating that "[t]he Richmond Plan denies certain citizens the opportunity to
compete for a fixed percentage of public contracts based solely upon their race. To whatever racial
group these citizens belong, their 'personal rights' to be treated with equal dignity and respect are impli-
cated by a rigid rule erecting race as the sole criterion in an aspect of public decisionmaking."). In a
concurring opinion, Justice Scalia states, "I share the view . . . that . . . discrimination on the basis of
race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society." Id.
at 521. Justice Kennedy also writes, "The moral imperative of racial neutrality is the driving force of
the Equal Protection Clause." Id. at 518. But see Owen M. Fiss, Groups and the Equal Protection
Clause, 5 PHIL. & PUB. AFF. 107 (1976) (arguing in favor of the group-disadvantaging principle, which
justifies invalidating legislation that subordinates perpetually disadvantaged groups). See generally
Paul Brest, In Defense of the Antidiscrimination Principle, 90 HARV. L. REV. 1 (1976) (promoting the
antidiscrimination principle, which disfavors states from identifying race-based classifications because
they attribute significance to race and group identification).

135. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting). While a thorough dis-
cussion of this topic is beyond the scope of this paper, I must mention that I do not subscribe to the
Court's color-blind approach and use of strict scrutiny in all race-based classifications. In my opinion,
courts should consider race to surmount the lingering effects of racial discrimination and to produce
racial diversity without racial domination.

136. Tribe, supra note 130, § 16-22, at 1525.
137. Id. Professor Tribe argues that the notion that all racial classifications are equally suspect and
invalid is not supported by constitutional text, principle, and history. He suggests that even Justice
Harlan limits the scope of his principle of color-blindness. Tribe, supra note 130, § 16-22, at 1524. In
Plessy, Justice Harlan states, "The white race deems itself to be the dominant race in this country.
And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will con-
tinue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitu-
tional liberty. But in the view of the Constitution, in the eye of the law, there is in this country no supe-
or, dominant class of citizens. There is no caste here. Our Constitution is color-blind." Plessy, 163
U.S. at 559. Tribe comments, "Even for this late nineteenth century proponent of white dominance, it
appears that the color-blind ideal was only shorthand for the concept that the fourteenth amendment
prevents our law from enshrining and perpetuating white supremacy." Tribe, supra note 130, § 16-22,
at 1525. Additionally, the Korematsu decision stated that strict scrutiny detects whether racial classifi-
cations reflect "pressing public necessity" or merely "racial antagonism," rather than treats all racial
classifications as equally suspect. See id.
differential treatment of white strandees and Japanese American strandees cannot withstand strict scrutiny analysis. The government could attempt to argue that it made its best effort but was unable to accommodate the Japanese Americans. However, this argument raises the question: why was the government able to transport only white Americans? The government's refusal to make room for the Japanese American strandees on the exchange ships represents its discriminatory intent in establishing the repatriation process. It created an explicit race-based classification that allowed only white Americans to return to the United States via the *M.S. Gripsholm*. Such a discriminatory action appears far from color-blind and would never survive current equal protection clause analysis.138

Race served as the only difference that existed between the Japanese American strandees and white strandees. The Japanese American strandees fell within the categories of individuals to be considered for repatriation to the United States, as established by the State Department.139 The Japanese American strandees were just as capable as white strandees to survive the journey back to the United States. And, the Japanese American strandees were just as eager, perhaps even more so than white strandees, to return to their homes in America. Many traveled great distances from the countryside to the U.S. consulates, located in the major cities. They were willing to return to the United States, if only to live in the internment camps. They knew that however uncertain the outcome of the war, they wanted to live and die as Americans in the United States. But the U.S. government's race-based policy denied them the opportunity.

**B. The Japanese American Strandees' Place in the Redress Movement**

The passage of the *coram nobis* cases established the 1944 *Korematsu* decision as an historical precedent. The 1944 decision memorializes the U.S. government's impulsive institutional breakdown in a time of distress and its failure to provide all citizens with their constitutional protections. These failures by the government inspired in the nation a need to apologize formally to the former internees and to cleanse the American conscience. Although the government has apologized to the former internees, shouldn't the apology be extended to the other groups of Japanese Americans that suffered at the hands of the U.S. government during the war? Can we

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138. While the original *Korematsu* Court found that the restriction at issue withstood strict scrutiny on ground of "pressing public need" and "racial antagonism," several cases since then have suggested that *Korematsu* and *Hirabayashi* are the only two modern cases upholding racial discrimination as constitutional. See *Fullilove v. Klutznick*, 448 U.S. 448, 507 (1980) (Powell, J., concurring). Justice Ginsburg has written that in *Korematsu* the "scrutiny the Court described as 'most rigid,' . . . nonetheless yielded a pass for an odious, gravely injurious racial classification. A *Korematsu*-type classification . . . will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 275 (1995) (Ginsburg, J., dissenting).

really consider the American conscience cleansed, knowing that justice for
these other groups remains denied?

1. Objection to Reparations for Strandees

The intuitive objection to compensating the Japanese American strandees consists of the idea that they did not suffer in the same manner as the
Japanese Americans incarcerated by the U.S. government in concentration
camps on the mainland. Many people know about the government's in-
ternment of Japanese Americans during World War II. Accordingly, when
asked about the Civil Liberties Act of 1988, such people typically respond
by saying that it serves to redress that internment. However, few are aware
of Section 1989b-7(2)(B)(i)'s purpose to redress those Japanese Americans
"otherwise deprived of liberty or property" by the U.S. government.

If actual incarceration makes the difference in deserving reparations,
concerns arise regarding the effect produced on the rest of the Japanese
American community by compensating the strandees. Specifically, would
the payment of a so-called "marginal group" detract from the center? This
objection consists of the possibility that reparations to one group may im-
pact negatively on other potential recipients. As a result, those potential
recipients might be prevented from obtaining reparations. In Mari J. Ma-
tsuda's words, the difficult problem that arises is "the effect of reparations
to one group upon other victim groups that remain uncompensated," re-
sulting in "a new group slipping to the bottom."¹⁴⁰

As posed, the objection to the strandees receiving reparations consists
of the notion that they are taking awards away from other groups. Under
this argument, there appears a spiraling need to save for other, "worthier"
groups, or a need to save for other expenditures. But exactly how much
needs to be saved? The Civil Liberties Act authorized the payment of up to
$500 million in each fiscal year until the total $1.65 billion was distributed.
The legislation also imposed a ten-year time limit for the payments. Under
the Act, "[I]f all of the amounts in the Fund have not been expended by the
end of [10 years after the enactment of this Act], investments of amounts in
the Fund shall be liquidated and receipts thereof deposited in the Fund and
all funds remaining in the Fund shall be deposited in the miscellaneous re-
cceipts account in the Treasury."¹⁴¹

¹⁴⁰ Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV.
internees and 586 Japanese Latin American former internees have not received redress because funds
were depleted. See Redress Delegates Seek Justice in Washington, D.C., PACIFIC CITIZEN, Apr. 16-
May 6, 1999, at 3. The National Coalition for Redress/Reparations (NCRR) has charged the govern-
ment with failing to invest the reparations fund in an interest-bearing account during the 1990's as man-
dated by the Civil Liberties Act. See 50 U.S.C. app. § 1989b-3(b). According to Richard Katsuda,
president of NCRR, if the government had done so, there would have been almost $200 million in inter-
est accrued, which would have been sufficient for all former internees, with $50 million available for
With limited appropriations, one might argue that the government should deny reparations to the strandees because the Japanese Latin Americans are more deserving. Another might contend that the government should deny reparations to the Japanese Latin Americans because if one group gets paid, the scope will widen to make all Japanese Americans eligible. Once the scope widens, Native Americans, African Americans, and virtually every ethnic minority group that has suffered by U.S. government action will be eligible under some reparations law.

2. Arguments in Favor of Reparations for Strandees

The problem with the "limited appropriations" objection arises partially from its definition of terms—particularly, in the determination that a certain group "marginally" deserves reparations. The danger appears in too quickly dismissing a group's claim as unworthy. Rejection may result from the government tightening the scope of eligibility under the Civil Liberties Act merely to save money. Or, it may result from the public narrowing its judgment on who deserves reparations. However, the determination of excluding a particular group's claim should instead focus on whether excluding that group from eligibility would render the policy of reparations ineffective. In addressing the objection posed at the beginning of this section, Professor Matsuda suggests that "[r]eparations will result in a new form of disadvantage only if they are made outside of a broader consciousness that always looks to the needs of the bottom."142 I would alter her statement by suggesting that such a disadvantage will occur if reparations are not made within a broader consciousness that always looks to the needs of the bottom. The difference suggested is that Professor Matsuda addresses the objection that paying those groups would "take a chunk" out of a limited fund,143 while I am more concerned with the exclusion of a group that would fall to the bottom if not recognized as harmed by the government.

This paper argues that excluding the Japanese American strandees from reparations risks hindering the Civil Liberties Act's contribution to the larger, on-going process of securing equal treatment by the U.S. government of its citizens. Along with the coram nobis cases, the Civil Liberties Act served to make the U.S. government accept responsibility for its wrongdoing, and to voice the rights of one minority group to empower future minority groups in their struggles against the dominant power. Exclusion of the Japanese American strandees from eligibility under the Civil Liberties Act would damage the developments of the Civil Liberties Act in

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142. Matsuda, supra note 140, at 397.
143. Professor Matsuda raises the example of progressive Hawaiians who view awards already made to Native Americans on the mainland "not as a chunk taken out of a limited fund, leaving less for Hawaiians, but as a symbol of the possibility of reparations for Hawaiians as well." Id.
two ways. First, exclusion would allow the U.S. government to deny the severity of its violation of the Japanese American strandees' constitutional rights. Second, it would condition a group's rights on the group's popularity, size, or worth.

The strandees' experience warrants them recognition as more than a "marginal" group based on the violation of their constitutional rights by the government in failing to consider them for repatriation. Some may argue that the strandees comprise a "marginal" group in terms of the government's passive role in violating their rights. This argument is based on the belief that the government could not violate any constitutional rights by failing to act. This argument presupposes that such a violation requires government action, such as the government's active incarceration of Japanese Americans on the mainland. The government's failure to consider Japanese American strandees for repatriation was actually just as harmful in constitutional terms as its "direct action" against the Japanese American internees, since its failure to consider the strandees amounted to an intentional discriminatory action. The government created a benefit and provided it on the basis of race by accommodating only its white citizens in the exchange program. That this denial was based on race makes it a severe infringement of the strandees' constitutional rights. Suffering such an infringement moves the strandees toward the "center" of the group worthy to receive redress and reparations, and away from the margin.

Regardless of whether the strandees occupy a position at the center or the margin, all groups whose rights the U.S. government has violated deserve vindication. This principle applies to even the most marginal of groups, as indicated in criminal procedure law, which states that commitment to justice is strengthened more at the margins than at the core. The measure of a nation's effectiveness in carrying out justice rests on the margins, for if justice is to exist for all persons, it must exist for even those perceived as unworthy.

The Japanese American strandees deserve the same degree of vindication as any other group whose rights the U.S. government has violated. Vindication in the strandees' case calls for memorializing the government's discriminatory treatment of them during the war. Redress and reparations for the strandees under the Civil Liberties Act constitute the most appropriate memorial for the U.S. government's wrongdoing. Such a memorial serves as the only way to remind the government of its violation of the

144. Stephen Bright, Director of the Southern Center for Human Rights states, "It is those who are the least among us—the poor, the members of minorities and the despised—that most need the protection of the Bill of Rights. They are the people who cannot afford to purchase the attention of a Congressman or a Senator with a huge campaign contribution." Stephen B. Bright, *The Politics of Crime and the Death Penalty: Not 'Soft on Crime,' But Hard on the Bill of Rights*, 39 St. Louis U. L.J. 479, 483 (1995) (discussing the denial of fundamental guarantees of fairness suffered by the indigent people facing the death penalty).
stranded constitutional rights during World War II. Moreover, it would allow the Civil Liberties Act to serve its fundamental purpose of protecting minority rights. By accepting responsibility for its violation against the strandees, the U.S. government can further pledge to safeguard the rights of other groups in similar situations that may arise in the future. Any failure by the U.S. government to recognize its violation during World War II and any rejection of its promise not to engage in similar violations in the future would mock the sacrifices made on behalf of the Civil Liberties Act, as well as on behalf of the war effort.

VII. CONCLUSION

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II. In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. You and your family have our best wishes for the future.

-Letter of Official National Apology to Redress Recipients

Over fifty years ago, the U.S. government excluded the Japanese American strandees from repatriation to the United States. Under equal protection analysis, the government violated the strandees' constitutional rights by excluding them through a race-based classification in the repatriation during the war. Based on reparations policy, inclusion of the strandees under the Civil Liberties Act would further the Act's contribution by challenging the government's future infringement of a group's rights. Beyond the theoretical soundness of providing reparations to the strandees stands the archival evidence of the government's policy of discrimination against them in determining participants for repatriation. Finally, under Civil Liberties Act jurisprudence, the strandees qualify for reparations under the Act as "eligible individuals deprived of liberty" by the U.S. gov-

145. See CWRIC, supra note 11, at 251, 257 (discussing the 100th Infantry Battalion, the Military Intelligence Service, and the 442nd Regimental Combat Team). See also TATEISHI, supra note 13, at 120-23, 157-67, 176-185, 250-59 (providing the oral histories of 442nd Regimental Combat Team veterans John Kanda, Shig Doi, Tom Kawaguchi, and Wilson Makabe). See generally CHESTER TANAKA, GO FOR BROKE: A PICTORIAL HISTORY OF THE JAPANESE AMERICAN 100TH INFANTRY BATTALION AND THE 442ND REGIMENTAL COMBAT TEAM (1982). It was the heroism of these Japanese American volunteers that persuaded certain members of Congress to vote in favor of redress. See HATAMIYA, supra note 9, at 82-83 (recounting how 442nd veteran Rudy Tokiwa persuaded Congressman Charles Bennett (D-Fla.), the second-ranking member of the House Armed Forces Services Committee, dean of the Florida congressional delegation, and disabled World War II veteran).

146. HATAMIYA, supra note 9, at 187 (quoting Letter of official national apology to redress recipients from President George Bush, 1990).
ernment. However, these considerations have failed to persuade the Department of Justice of the merit of the strandees' claims and subsequent administrative appeals.

As a result, the Japanese Americans stranded in Japan during World War II have yet to hear the words of the National Apology. The words have not come close to restoring the years they lost in Japan as a result of the U.S. government's abandonment of them. They have not yet erased the painful memories of waiting to hear from the U.S. Consulate about the ship that should have returned them to their homes in America. Finally, they have yet to receive redress and reparations under the Civil Liberties Act for any of these injustices. The strandees have looked to the Executive Branch in hopes that the Department of Justice would at least take a stand and recognize the injustice done to them during World War II. Yet, the Department of Justice has closed itself to their cause.

The strandees can approach the Legislative Branch and lobby Congress, although few are bound to listen to a group so small in number. Thus, they are left with the Judicial Branch, where they can plead their case in the U.S. Court of Claims. The courts remain the most accessible for the public. In the courts reside those, like Judge Patel, who will hear the voices of the excluded. Perhaps Loren A. Smith, Chief Judge of the U.S. Court of Claims, will refuse to leave the strandees out from the provision of redress. In his words, such a provision "would do great credit to the moral integrity of our nation." But until the Japanese American strandees receive redress and reparations, America fails in its "commitment to the ideals of freedom, equality, and justice."

147. *After 50 Years, Amends*, WASH. POST, Apr. 9, 1998, at A-24 (quoting Chief Judge Smith's comment in urging the government to settle the class action suit brought by the Japanese Latin Americans).

148. *Hatamiya*, supra note 9, at 187 (quoting Letter of official national apology to redress recipients from President George Bush).