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Learning From the Past: Using Korematsu and Other Japanese Internment Cases to Provide Protections Against Immigration Detentions

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LEARNING FROM THE PAST: USING *KOREMATSU* AND OTHER JAPANESE INTERNMENT CASES TO PROVIDE PROTECTIONS AGAINST IMMIGRATION DETENTIONS

Caleb Ward*

"Give me your tired, your poor, Your huddled masses yearning to breathe free, The wretched refuse of your teeming shore, Send these, the homeless, tempest-tost to me, I lift my lamp beside the golden door!" [1]

I. INTRODUCTION

One of the darkest periods in modern United States history is reoccurring with mixed public approval. During World War II, the United States government enacted executive orders creating a curfew, proscribing living areas, and forcing the exclusion and detention of all Japanese descendants from the West Coast.[2] The United States justified these grievous freedom and equality violations through an increased need for national security "because we [were] at war with [Japan]."[3] However, this perceived increased need for national security came from a fraudulent assessment showing any Japanese-American could be

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1. The Statue of Liberty. Emma Lazarus, *The New Colossus*, POETRY FOUND. (2002), [https://perma.cc/44AB-8WLT] (reciting a poem inscribed on a plaque at the Statue of Liberty).

2. *See* Korematsu v. United States, 323 U.S. 214, 215-16 (1944); Hirabayashi v. United States, 320 U.S. 81, 83, 85 (1943); *Ex parte* Endo, 323 U.S. 283, 288-89 (1944). Notably, in this paper, exclusion means restricting access to enter, be within, or leave an area proscribed by the Secretary of War. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942).

3. *Korematsu*, 323 U.S. at 223.

planning espionage or sabotage of the United States.[4] After the war, the case constitutionalizing these detentions, *Korematsu v. United States*, became a black mark in United States' jurisprudential history, yet it has still not been completely overturned.[5] Despite this black mark, the United States is again subjecting people to unwarranted detention based on alienage, race, and national origin.[6] By using only alienage, race, and national origin to detain individuals and families in camps and correctional facilities,[7] the modern immigration detention scheme mirrors that of Japanese internment. Despite *Korematsu*'s black mark, the United States is, again, detaining persons with no real detention time limit, but without a world war to provide a fragile excuse for the detentions.[8] Yet, the United States purportedly stands for liberty, justice, and equality.[9] However, immigration detention, much like the Japanese internment, inhibits liberty, justice, and equality for the immigrant populations and, in turn, the United States' ability to represent such ideals.[10]

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4. *See id.* at 216-17; Eric L. Muller, Opinion, *Op-Ed: The Supreme Court Was Right to Overturn Korematsu. Now it Needs to Overrule Hirabayashi*, L.A. TIMES , (July 3, 2018), [https://perma.cc/9UMB-ZMJN] (noting that the representation of the danger posed by the Japanese-Americans was later shown to be greatly exaggerated at the time).

5. *See* Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J. F. 629, 630 (2019); Carl Takei, *The Supreme Court's Disingenuous Funeral Ceremony for Korematsu*, ACLU (July 13, 2018), [https://perma.cc/LFX4-6CKF]. *But see* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) ("*Korematsu* was gravely wrong the day it was decided, [and] has been overruled in the court of history, ...").

6. *See Korematsu*, 323 U.S. at 229 (Roberts, J., dissenting) (quoting explicit "alien Japanese" from Federal Order for exclusion); *Hirabayashi*, 320 U.S. at 88 (discussing need to separate Germans and Italians based on alienage and Japanese based on national origin); Jennings v. Rodriguez, 138 S. Ct. 830, 838, 847-48 (2018) (allowing permanent detention of immigrants without bond hearing under current immigration law).

7. *See* Carrie Rosenbaum, *Immigration Law's Due Process Deficit and the Persistence of Plenary Power*, 28 BERKELEY LA RAZA L.J. 118, 119, 123-24 (2018); César Cuauhtémoc García Hernández, *Immigration Detention as Punishment*, 61 UCLA L. REV. 1346, 1390-91 (2014).

8. *See Release on bond or conditional parole—Criteria for detention or release—Release from Custody under IIRAIRA*, 1 IMMIGR. LAW & DEFENSE § 7:12 (2020) ; *Jennings*, 138 S. Ct. at 847-48 (declining to create a time-limit before giving bond hearing or rehearing); *see also* Denise Gilman, *Realizing Liberty: The Use of International Human Rights Law to Realign Immigration Detention in the United States*, 36 FORDHAM INT'L L.J. 243, 256-58 (2013) (discussing the average length of detention pre-*Jennings*).

9. *American Government: Democratic Values – Liberty, Equality, Justice*, USHISTORY.ORG, [https://perma.cc/EY2G-99TX] (last visited Sept. 30, 2020).

10. *See Ex parte* Endo, 323 U.S. 283, 297 (1944) (holding person could not be detained after pledging loyalty to United States or when granted leave).

As noted in *Trump v. Hawaii*, *Korematsu* is not morally good law.[11] However, it is likely still valid precedent and unlikely to be completely overturned.[12] Its law and precedential value, then, should be used to protect others from going through the same degradation and violated rights the Japanese dealt with seventy years ago.[13] Primarily, *Korematsu* and other Japanese internment cases created a standard for national origin and alienage-based detention not met by current immigration detention law.[14] Their standard requires an extreme-level State interest in national security akin to an imminent espionage threat by indiscernible enemy combatants during a world war.[15] This standard should protect noncitizens from detention by instituting a high standard to detain classes based on alienage, race, or national origin. Under this high standard, modern immigration detention becomes constitutionally impermissible.

Part II of this Article will focus on the history and precedent created by Japanese internment in the United States as well as modern immigration law allowing virtually indefinite immigrant detention including those seeking asylum and humanitarian protection.[16] Part III then analyzes the two sets of law to show how the Fourth Amendment issues under *Korematsu, Ex parte Endo,* and *Hirabayashi*, could be argued as establishing a protective, unmet standard for allowing the apprehension and detention of noncitizens.[17] This standard, then, reveals modern immigration law to be unconstitutional while establishing a standard to prevent future alienage-based detention.

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11. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

12. *See* Quinta Jurecic, *The Travel Ban Decision and Ghost of Korematsu*, LAWFARE (June 28, 2018), [https://perma.cc/BLA7-LRK6].

13. *See* Korematsu v. United States, 323 U.S. 214, 217-220, 223 (1944); Kaelyne Yumul Wietelman, *Disarming Jackson's (Re)Loaded Weapon: How* Trump v. Hawaii *Reincarnated* Korematsu *and How They Can Be Overruled*, 23 UCLA ASIAN PAC. AM. L.J. 43, 53-56 (2019).

14. *See, e.g.*, *Korematsu*, 323 U.S. at 217-20, 223 (describing the high standard); *see also* Wietelman, *supra* note 13 (explaining how modern war on terror concerns do not articulate a credible national security interest); Gilman, *supra* note 8, at 279-80 (highlighting the fact that immigration detention in the United States does not meet international norms).

15. *See Korematsu*, 323 U.S. at 217-20, 223.

16. *See infra* Part II.

17. *See infra* Part III.

II. BACKGROUND

Two sets of law in United States jurisprudence have allowed the detention of groups of people based on alienage, race, and national origin: law from Japanese internment and law for modern immigration detention.[18] Though having similar justifications and results, the Supreme Court has only recognized Japanese internment law as counter to United States' values.[19] Nonetheless, the cases retain their precedential value.[20] The second category, laws allowing near indefinite detention for immigrants entering the country without a visa, remains good and valid law despite its similarities to the previous category.[21] However, the law set by the Japanese internment cases, should, through its precedential value and societal backlash, prohibit the same internment from occurring again.[22] While the laws themselves are abhorrent to American and humanitarian ideology, they remain precedential law and should be used to correct the same wrongs they once enabled. Essentially, arguments should be made that the Japanese internment cases ensure detention based on xenophobia cannot happen in the United States again.

A. Japanese Internment Precedent

Following the attack on Pearl Harbor, the United States instigated two measures designed to protect the country from imminent espionage and sabotage: Executive Orders 9066 and

18. *See Korematsu*, 323 U.S. at 223 (1944) (acknowledging detention on basis of race, though stating not using animus); *Korematsu*, 323 U.S. at 228 (1944) (Roberts, J., dissenting) (quoting explicit "alien Japanese" from Federal Order for exclusion); Hirabayashi v. United States, 320 U.S. 81, 88 (1943) (discussing need to separate Germans and Italians based on alienage and Japanese based on national origin); Jennings v. Rodriguez, 138 S. Ct. 830, 847-48 (2018) (holding §§ 1225 and 1226 applies to the detention of virtually all illegal immigrants).

19. *See e.g.* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018).

20. *See* Muller, *supra* note 4 (concerning *Hirabayashi*); Jurecic, *supra* note 12.

21. *Jennings*, 138 S. Ct. at 837 (holding § 1225 applies to virtually all immigrants); *Release on bond or conditional parole—Criteria for detention or release—Release from Custody under IIRAIRA*, 1 IMMIGR. LAW & DEFENSE § 7:12 (2020) (explaining procedure to allow indefinite detention).

22. *See Korematsu*, 323 U.S. at 219; *Hirabayashi*, 320 U.S. at 83, 104; Jurecic, *supra* note 12.

9102.[23] Executive Order 9066 granted power to the Secretary of War and their delegees to proscribe areas as military zones within which certain groups were not allowed.[24] Executive Order 9066 also granted the Secretary the authority to provide transportation, food, and shelter to those ejected from these military exclusion zones.[25] Just a month after Executive Order 9066, President Roosevelt signed Executive Order 9102 into action.[26] Executive Order 9102 established the War Relocation Authority and granted it the power to enforce the exclusions from select areas which were determined under Executive Order 9066.[27] To secure the removed person's "relocation, maintenance and supervision," the order conferred various powers to authorities including the ability to evacuate and supervise areas, purchase land, secure loans, as well as make all regulations and delegations needed to enforce Executive Order 9066.[28]

Hirabayashi v. United States was the first case to substantively address these executive orders' constitutionality.[29] Just before *Hirabayashi*, Congress passed legislation making it a misdemeanor to knowingly violate any order given under the powers of Executive Orders 9066 or 9102.[30] General DeWitt, under Executive Orders 9066 and 9102, then ordered an exclusion zone of the "entire Pacific Coast" due to its particular vulnerability to espionage and sabotage.[31] The exclusion required all non-citizen Germans, Italians, Japanese, and all other persons of Japanese ancestry to remain in their homes between 8:00 p.m. and 6:00 a.m.[32] The exclusion also required all the affected persons to report to a Civil Control Center by May 11 or 12 to register for evacuation.[33] By ruling these acts constitutional, the Supreme Court allowed exclusion, curfew, and removal based on

23. *Hirabayashi*, 320 U.S. at 85, 87.
24. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).
25. *Id.*
26. Exec. Order No. 9102, 7 Fed. Reg. 2165 (Mar. 18, 1942).
27. *Id.*
28. *Id.*
29. *See* Takei, *supra* note 5.
30. Hirabayashi v. United States, 320 U.S. 81, 87-88 (1943).
31. *Id.* at 86.
32. *Id.* at 88.
33. *Id.* at 89.

alienage and national origin to prevent imminent sabotage and espionage from an indiscernible enemy combatant.[34] The Court allowed these actions as "an emergency war measure" because there was, allegedly, not enough time to decipher which Japanese-Americans were enemy combatants and which were normal citizens before the war effort was impacted.[35] Further, the Court's ruling should be argued as creating a standard with an extreme-level national security interest in order to detain based on alienage or national origin.[36]

In *Hirabayashi*, Gordon Hirabayashi was arrested for knowingly violating the imposed curfew and for failing to report to a Civilian Control Station.[37] To show the executive orders' unconstitutionality, Hirabayashi argued he was not an enemy combatant and therefore should not be subject to exclusion; he proved this by showing his United States citizenship without an allegiance to the Japanese Empire and his parents' immigration from Japan twenty-five years prior.[38] Hirabayashi also claimed he broke the curfew and failed to report to the Control Center to avoid waiving his rights as a United States citizen.[39] However, the Supreme Court ruled that because Congress had ratified order 9066 through their own punitive legislation and all actions were done to protect the United States from espionage and sabotage from an enemy during war, the laws and regulations were constitutional as "an emergency war measure."[40] Notably, *Hirabayashi*, unlike the subsequent cases, remains virtually uncontroverted precedent.[41] In ruling for the government, *Hirabayashi* creates a valid precedent allowing discrimination, arrest, and eventually, detention based on alienage, race, and nationality, but only as an emergency war measure to prevent imminent espionage or sabotage.[42]

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34. *Id*. at 88, 100-01.

35. *Hirabayashi*, 320 U.S. at 92, 99; Muller, *supra* note 4.

36. *See Hirabayashi*, 320 U.S. at 94-95 (discussing the unique circumstances and threat of imminent espionage allowing proscription).

37. *Id.* at 83-84.

38. *Id.* at 84.

39. *Id.*

40. *Id.* at 92.

41. Muller, *supra* note 4.

42. *See id.*

Shortly after *Hirabayashi*, the Supreme Court included the ability to detain under Executive Orders 9066 and 9102, but importantly, did not alter the extreme security interest necessary.[43] In *Korematsu*, the order at issue fully excluded all persons of Japanese origin, requiring them to leave the entire Pacific Coast exclusion zone.[44] Fred Toyosaburo Korematsu refused to be removed from the West Coast merely for being a Japanese-American.[45] The Court upheld the ability to exclude and detain based on national origin and alienage, but noted it required the "gravest imminent danger to the public safety[.]"[46] Further, the Court allowed a broad racial application due to the threat's apparent gravity.[47] Military authorities had falsely[48] shown it impossible to distinguish between the disloyal and the loyal Japanese-Americans in the timely manner required to protect national security.[49] The Court held "[t]he power to exclude include[d] the power to do [so] by force . . . ."[50] Thus, the detention in "relocation centers," or military detention centers, was constitutional despite a detainee's total compliance with the exclusion orders.[51] However, as the Court indicated, doing so still required an imminent and extreme threat to national security from an indiscernible enemy combatant.[52] When combined, *Korematsu* and *Hirabayashi*, establish precedent allowing discrimination, arrest, and detention based on alienage, race, and nationality, but only as an emergency war measure to prevent imminent espionage or sabotage.[53]

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43. Korematsu v. United States, 323 U.S. 214, 223 (1944).

44. *See id.* at 218 (discussing how the full exclusion is a graver constitutional threat than the curfew).

45. *Id.* at 215-16.

46. *Id*. at 218. *See also Korematsu*, 323 U.S. at 228 (Roberts, J., dissenting) (quoting explicit "alien Japanese" language from the Federal Order for exclusion).

47. *Korematsu*, 323 U.S. at 219.

48. Muller, *supra* note 4. Though the Court cited "intelligence" and reports as establishing the threat, in reality any such report was based not on actual intel but on an official's personal, racist ideas.

49. *Korematsu*, 323 U.S. at 219.

50. *Id*. at 223.

51. *Id*. at 221-22.

52. *Id.* at 223.

53. *See* Muller, *supra* note 4.

The last fundamental case constructing the Japanese internment law is *Ex parte Mitsuye Endo*. Mitsuye Endo, unlike Hirabayashi and Korematsu, had followed all evacuation orders but was still detained in Tule Lake War Relocation Center.[54] Prior to the case, the War Relocation Authority had determined it could grant leave from Relocation Centers to persons, pending a leave delegation decision.[55] To determine leave clearance, the delegation would investigate the effect of a petitioner's release on the war effort, public peace, and security of issuing indefinite leave.[56] However, leave clearance alone would not allow leaving a Relocation Center.[57] Instead, petitioners also had to apply for leave and meet at least one of fourteen conditions.[58] Even with the conditions met, petitioners could still have been denied leave if the delegation determines the leave community is improper for petitioners.[59] Endo applied and received leave clearance but never applied for indefinite leave.[60] Notably, Endo's loyalty to the United States went unchallenged, just as Endo did not challenge the validity of her detention under armed guard for her Japanese ancestry.[61] The Government's main argument for requiring continued detention, after showing loyalty, hinged on the belief "that the interior states would not accept an uncontrolled Japanese migration."[62] The Court held, since Endo had uncontested loyalty, it was unlawful for the War Relocation Authority to keep detaining her.[63] Because Endo no longer presented an espionage or sabotage threat, she could not be lawfully detained by the War Relocation Authority.[64] Thus, even in the Japanese internment cases, once the extreme threat to national security dissipated, a person could not be detained for their alienage, race, or national origin.[65]

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54. *See Ex parte* Endo, 323 U.S. 283, 284-85 (1944).
55. *Id.* at 290.
56. *Id.* at 292.
57. *Id.*
58. *Id.*
59. *Endo*, 323 U.S. at 293.
60. *Id.* at 293-94.
61. *Id*. at 294-95.
62. *Id.* at 295-96 (quoting General DeWitt's report to chief of staff).
63. *Id.* at 297.
64. *Endo*, 323 U.S. at 302-04.
65. *Id.*

Taken together, these three cases and the two executive orders, create a standard for detaining persons based on their alienage, race, or national origin.[66] Because the Fourth Amendment and *Endo* both apply to a *person,* as opposed to a citizen, the rights surrounding detention also apply to noncitizens.[67] According to the executive orders, *Hirabayashi*, and *Korematsu*, persons can be detained only to prevent an extreme threat to national security which must equal imminent espionage by an indiscernible enemy combatant, during wartime, when the danger to national security prevents any narrower acts.[68] However, as indicated in *Endo*, the person can no longer be detained once they no longer present a threat to the national security interest.[69]

Recently, *Trump v. Hawaii*, a case assessing the constitutionality of President Trump's "Travel Ban," stated *Korematsu* was "overruled in the court of history" and unconstitutional.[70] However, this overruling was most likely dicta as, just lines before, the court acknowledged *Korematsu* had nothing to do with the case.[71] Though contentious, *Korematsu* likely still retains precedential value.[72] Even if *Korematsu* was overruled though, *Hirabayashi* sets the same, high standard of an extreme-national security threat while the nation is at war for excluding based on alienage, race, and national origin.[73] Further, *Hirabayashi* has not had subsequent cases question its validity.[74] Following *Korematsu* and *Hirabayashi*, the government can create laws to detain individuals based on alienage, race, and national origin only to protect extreme national security

66. *See supra* notes 23-65 and accompanying text.

67. *Endo*, 323 U.S. at 287-88. *See generally* U.S. CONST. amend. IV ("The right of the *people* to be secure . . . against unreasonable searches and seizures . . . .") (emphasis added).

68. *See* Korematsu v. United States, 323 U.S. 214, 218-19 (1944); Hirabayashi v. United States, 320 U.S. 81, 99, 102-04 (1943).

69. *See Endo*, 323 U.S. at 302.

70. Trump v. Hawaii, 138 S. Ct. 2392, 2417, 2423 (2018).

71. Greene, *supra* note 5, at 629.

72. *Id.*

73. *See* Eric L. Muller, Korematsu, Hirabayashi, *and the Second Monster*, 98 TEX. L. REV. 735, 735-36, 754 (2020).

74. Amanda L. Tyler, *Courts and the Executive in Wartime: A Comparative Study of the American and British Approaches to the Internment of Citizens During World War II and Their Lessons for Today*, 107 CAL. L. REV. 789, 848 (2019).

interests.[75] Thus, the ability to detain a person based on alienage, race, or national origin occurs narrowly and only in light of an extreme national security interest where it is necessary to stop an enemy combatant from espionage during wartime.[76] Further, any proof the detained does not present such a threat to the interest requires release, or at least the potential for release.[77]

B. Immigration Detention Law

While immigration law has fluctuated throughout American history, since the late 1990s the government has increased the restrictions and penalties for those who enter the country prior to seeking visas or green cards.[78] To understand the current legal state, a synopsis of modern law followed by its history and evolution is given below.

1. Current Law and Plenary Power

Beginning in the 1980s with the war on drugs, and increasing especially with the events on September 11, 2001, immigration and detention policies intensified.[79] These increases culminated in the modern system where individuals without immigration authorization, including those who arrive at the border seeking protection, can be detained until a final removal hearing determination.[80] In other cases with civil detention, the government generally must show the person to be a danger to the community, a flight risk, or an enemy noncitizen.[81] To appeal an Immigration and Customs Enforcement (ICE) agent's decision to

75. *See* Korematsu v. United States, 323 U.S. 214, 218-19 (1944); Hirabayashi v. United States, 320 U.S. 81, 88, 103-04 (1943) (allowing the legislation and subsequent detentions based on race, alienage, and national origin due to the extreme threat of espionage and sabotage during war time).

76. *See Korematsu*, 323 U.S. at 218, 223; *Hirabayashi*, 320 U.S. at 88, 92, 95.

77. *See Ex parte* Endo, 323 U.S. 283, 302, 304 (1944).

78. *See* Sharon A. Healey, *The Trend Toward the Criminalization and Detention of Asylum Seekers*,
25 IMMIGR. & NAT'LITY L. REV. 181, 182 (2004).

79. García Hernández, *supra* note 7, at 1350, 1414.

80. *See* Fatma E. Marouf, *Alternatives to Immigration Detention,* 38 CARDOZO L. REV. 2141, 2147-48 (2017).

81. *See id.* at 2146.

detain, the burden on appeal rests with the noncitizen to show they are not a flight risk or a danger to the community.[82] Complicating this further is the detention scheme set in 8 U.S.C. section 1226 which mandates detention for any noncitizen that has committed any offense with a *possible* penalty of one-year or more in prison.[83]

Additionally, the plenary power doctrine underlies and complicates much of immigration law and the law's ability to change over time. The Supreme Court, in 1889, first declared that the government's legislative and executive branches had generally unreviewable control of the nation's immigration policies and laws.[84] The plenary power doctrine originally granted both branches and their administrative agencies the power to make laws and policies that were virtually unreviewable by the judiciary.[85] In practice, this doctrine gave incredibly high deference to the executive and legislative branch's immigration laws, especially when national security was at issue.[86] The doctrine peaked in the 1950s when *Knauff v. Shaughnessy* held that any procedure authorized by Congress met constitutional due process, including indefinite detention of some noncitizens post-removal proceedings.[87]

2. Doctrinal History and Evolution to Current State

Since the 1950s, the Court began to review, and even overrule, some of the laws made by Congress and the executive.[88] The plenary power doctrine's application, though, continues to be fairly nebulous.[89] The Court has shown itself willing to both

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82. *See id*. at 2146.

83. *Id.* at 2146-47; 8 U.S.C. § 1226.

84. *See* Chae Chan Ping v. United States, 130 U.S. 581, 606-07 (1889); Jennifer Gordon, *Immigration As Commerce: A New Look At The Federal Immigration Power and Constitution*, 93 IND. LAW J. 653, 661 (2018); Catherine Y. Kim, *Plenary Power in The Modern Administrative State*, 96 N.C. L. REV. 77, 79 (2017).

85. Gordon, *supra* note 84, at 654.

86. *See id.* at 654-55.

87. *Id.* at 664-665; United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950).

88. Kim, *supra* note 84, at 79.

89. *See id.* at 89-91 (discussing the decline of plenary power's use without a solid, predictable explanation).

review immigration laws and policies without mentioning plenary power, and uphold laws and executive orders under the doctrine.[90] For example, in 2003, *Zadvydas v. Davis* overturned *Shaughessy*'s ruling to disallow indefinite detainment for noncitizens with a final removal order.[91] Recently, the Supreme Court held noncitizens have a right to habeas corpus review for unlawful detention, but not to gain asylum, and only if the noncitizen was statutorily granted such due process right by Congress.[92] One main theme for when the Court grants deference to the government is when national sovereignty or national security requires a unified approach.[93] The core logic of plenary power, since its inception, was to allow the nation to "speak with one voice" on topics of national security and foreign affairs.[94] Despite the willingness to review, though, Congress and delegated agencies or positions, like the Attorney General, retain power and discretion to act within immigration law when national security and foreign affairs are at issue.[95]

Beginning in 1996, the Illegal Immigration Reformation and Immigrant Responsibility Act of 1996 (IIRIRA)[96] created a system for "expedited removal" in order to "put certain criminal aliens on a fast track for deportation."[97] IIRIRA required all immigrants who presented themselves at the border without documentation to be detained and assessed for expedited removal.[98] This requirement includes asylum seekers even

90. *See id.* at 87-88; Trump v. Hawaii, 138 S. Ct. 2392, 2424 (2018) (Thomas, C., concurring) (citing *Shaugnessey,* 338 U.S. 537) ("the President has *inherent* authority to exclude aliens from the country.").

91. Kim, *supra* note 84, at 87-88. *See* Zadvydas v. Davis, 533 U.S. 678, 682, 689 (2001) (distinguishing *Shaughnessey,* 338 U.S. 537 and discussing Congressional intent and meaning to create a presumptive time limit).

92. DHS v. Thuraissigiam, No. 19-161, slip op. at 1-2 (U.S. June 25, 2020) (slip opinion).

93. *See* David A. Martin, *Why Immigration's Plenary Power Doctrine Endures*, 68 OKLA. L. REV. 29, 38-41 (2015).

94. *Id*. at 40-41.

95. *See id.*; Kim, *supra* note 84, at 96.

96. Healey, *supra* note 78, at 182; Illegal Immigration Reformation and Immigrant Responsibility Act (IIRIRA) of 1996 , Pub. L. 104-208 110 Stat. 3009 (codified as amended in scattered sections of 8 U.S.C.).

97. Deborah Buckman, Annotation, *Validity, Construction, and Application of Mandatory Predeportation Detention Provision of Immigration and Nationality Act (8 U.S.C.A. § 1226(c)) As Amended,* 187 A.L.R. Fed. 325, 325 (2003).

98. *See* § 302 IIRIRA; Healey, *supra* note 78, at 182.

though these refugees are fleeing from countries refusing to give them the proper documentation.[99] Once detained, the asylum seekers can try to prove their need for an asylum hearing by proving a credible fear of returning to their country.[100] Even if the asylum seeker has a credible fear, they remain in detention unless they are eligible for parole.[101] Yet, the decision for parole is made by the Department of Homeland Security (DHS), the detaining entity, without many guiding regulations.[102]

Even if eligible for parole, DHS can set bond with supervision orders or release the noncitizen on the their own recognizance - which frequently requires some indication of financial stability, like being able to live with a family member or support themselves.[103] Officially, the practice is to release noncitizens after an immigration court denies removal orders [104] However, cases have shown that the immigrants and asylum seekers with favorable hearings have been detained throughout DHS's appeals.[105] Though civil immigration detention cannot be used as punishment, this practice is designed to deter immigrants and asylum seekers from coming to the United States.[106]

More broadly, IIRIRA altered the Immigration and Nationality Act to include sections demarcating noncitizens with certain criminal convictions for mandatory detention.[107] 8 U.S.C. sections 1225-27, codified the procedures for detention of noncitizens in removal.[108] The statutes also allow continued detention during the entirety of the removal process without bond or parole determination for mandatory detention.[109] This allows

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99. *See* Healey, *supra* note 78, at 182.

100. *Id.*

101. *Id.* at 182-83.

102. *Id.* at 183.

103. *Id*. at 188.

104. *See* Healey, *supra* note 78, at 183.

105. *See id.*

106. *See* Emily Ryo, *Detention as Deterrence*, 71 STAN. L. REV. 237, 237-39 (2019).

107. César Cuauhtémoc García Hernández, *The Perverse Logic of Immigration Detention:*
Unraveling the Rationality of Imprisoning Immigrants Based on Markers of Race and Class Otherness, 1 COLUM. J. RACE & L. 359, 360-61 (2012); Buckman, *supra* note 97, at 325.

108. *See* 8 U.S.C. §§ 1225-27.

109. Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018).

immigration judges to deny bond in non-mandatory cases.[110] In *Jennings v. Rodriguez*, the Supreme Court assessed the mandatory components of these statutes and determined the propriety of detention without bond or parole.[111] First, the Court examined section 1225 and its ability to detain without bond or parole.[112] It recognized section 1225(b)(1) as authorizing detention of immigrants entering by "fraud, misrepresentation, or lack of valid documentation."[113] The Court also recognized 1225(b)(2) "as a catchall provision that applies to all applicants. . . ."[114] Section 1225(b)(1) created the ability to remove noncitizens without a hearing; however it carves out an exception for asylum seekers, though requiring that they remain in detention.[115] Section 1225(b)(2), however, acts as a catchall requiring other noncitizens to be detained pending a complete removal hearing when an officer cannot immediately determine are "clearly and beyond a doubt entitled to be admitted into the country."[116]

The Court then went on to interpret sections 1226 and 1227. These sections deal with removal procedure for immigrants already in the country.[117] Section 1226(c) iterates the categories described in 1227 as well as provides the Attorney General power to issue warrants and arrest noncitizens with certain criminal convictions for a removal proceeding and detention.[118] The statutes also do not require the Attorney General to set bond or parole.[119] Like section 1225, section 1226 permits immigrant detention until their removal proceeding is fully completed.[120]

The *Jennings v. Rodriguez* decision affirmed this indefinite detention of noncitizens awaiting a removal hearing without a continuing chance for a bond hearing, by relying on the plenary

110. *Id.*
111. *Id.* at 836.
112. See *id*. at 836-37.
113. *Id.* at 837.
114. *Jennings*, 138 S. Ct. at 837.
115. *Id.*
116. *Id*.
117. 8 U.S.C. § 1227.
118. 8 U.S.C. § 1226(c).
119. 8 U.S.C. § 1226(b)-(c); *Jennings*, 138 S. Ct. at 837.
120. 8 U.S.C. § 1226(c)(2).

power doctrine.[121] However, section 1226(c), as used in *Jennings*, applies to noncitizens with criminal convictions or alleged criminal conduct already in the country, whereas section 1225 applies only to those seeking admittance.[122] Because *Jennings* concerned a lawful permanent resident going through the removal proceedings for committing a crime, pursuant to section1226(c), the Court elided the interpretation and detention abilities for sections 1225 and 1226.[123] *Jennings* also held that since parole and bond hearings were only narrowly applicable, sections 1225 and 1226 do not require a bond hearing nor a explicit time limit on mandatory detention.[124]

In *Jennings*, the Petitioners argued that the lack of a statutory time limit and precedential weight requires an individualized hearing to show the need to detain the immigrant, before prolonged detention.[125] The Court, however, distinguished detention under sections 1225 and 1226 from the existing immigration precedent, namely *Zadvydas v. Davis*, requiring a bond hearings after six months of detention.[126] The Court distinguished *Jennings* since it concerned ongoing proceedings under sections 1225 and 1226 instead of hearings requiring removal under section 1231—which concerned the detention and removal of immigrants who were ordered removed from the United States.[127] The Court found sections 1225 and 1226 do not allow indefinite detention since the statutes have a terminal event: final adjudication.[128] Again, though, detention can last months or years depending on the appellate process and immigration court backlog.[129] Under both statutes and *Jennings*, immigration authorities are free to detain immigrants and asylum seekers indefinitely based solely on their alienage.[130]

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121. *See Jennings*, 138 S. Ct. at 844 (using the Congress's differing statutory language to overturn the Court of Appeals application of *Zadvydas v. Davis* in this case).

122. *Id*. at 845.

123. *See id.* at 860 (Breyer, J., dissenting) (identifying three separate categories here and in analysis).

124. *Id*. at 842 (majority opinion).

125. *Id.* at 839.

126. *Jennings*, 138 S. Ct at 843.

127. *Id.*; 8 U.S.C. §§ 1225-27.

128. *Jennings,* 138 S. Ct. at 845-6.

129. *See* Healey, *supra* note 78, at 182-83.

130. *See supra* notes 95-128 and accompanying text.

The recent decision in *Matter of M-S-*, a case from the Board of Immigration Appeals, cites *Jennings* and various statutes to force detention on asylum seekers after establishing credible fear.[131] In the case, the respondent, an asylum seeker who was originally placed on expedited removal, was placed in a full removal proceeding after showing credible fear for asylum and granted bond through an immigration court.[132] Attorney General Barr, however, found the immigrant was not eligible for bond before completing his full removal and asylum proceeding.[133] This case, then, overturned Board precedent allowing asylum seekers who established credible fear to have a custody redetermination hearing before an immigration judge.[134] It also ignores an interpretation of the Immigration and Nationality Act requiring warrants to continue detaining immigrants transferred from expedited to full proceedings.[135] Instead, the opinion excludes bond and bond hearings for immigrants after transferring to the lengthier process unless they fit within the narrow, explicit exceptions for temporary parole: urgent humanitarian crises or significant public benefits.[136] The opinion only validates its interpretation by determining that the parole statute was exhaustive while the statute with categories requiring detention was non-exhaustive.[137] Thus, asylum seekers could be included implicitly in the required detention category and only paroled for two exceptions.[138] Although the Board treats all detentions equal, the Board chose to detain more immigrants for longer periods with no real justification other than its having the ability.[139]

Notably, noncitizens are deemed "detained" in the facilities, sometimes jails and prisons, instead of incarcerated, since

131. Matter of M-S-, 27 I. & N. Dec. 509, 509-10 (Att'y Gen. 2019). As of publication date, this is still valid law though distinguished in the 9th Circuit.

132. *Id.*at 510.

133. *Id.*

134. *Id* (calling prior case, Matter of X-K-, 23 I. & N. Dec. 731 (BIA 2005) "wrongly decided").

135. *See id.* at 515-16.

136. *M-S-*, 27 I. & N. Dec. at 516.

137. *Id.* at 515-16.

138. *Id.*

139. *See id.* at 509-10, 515-19.

immigration law is civil meaning it cannot use punitive measures.[140] The Supreme Court has even held that the label of civil immigration law does not allow Congress to make fundamentally punitive acts applicable to noncitizens.[141] Yet, the Court ruled deportation is akin to criminal punishment.[142] However, it refused to expand the law to include civil detention.[143] Additionally, *Matter of M-S-* expands the category of those immigrants who are ineligible for bond to include those apprehended within the United States borders.[144]

The modern state of immigration detention, then, permits detaining noncitizens and asylum seekers without proper documentation at the border and either putting them on an expedited removal track or continuing detention until removal and asylum hearings and their appeals end.[145] Once detained, immigrants and asylum seekers remain detained as deterrence for other immigrants.[146] This detention lasts throughout their proceedings without any time limit, opportunity for a bond hearing, or a realistic opportunity for parole.[147] The detention ends only after a final adjudication of their removal proceedings.[148] Further, the statutes' interpretation separated this detainment from prior immigration cases, which *required* bond hearings, allowing cases brought under section 1225 - 1227 to result in near indefinite detention.[149] As immigration laws, they are all also statutes granting permission to detain solely on the basis of alienage.[150] Because the mere label of civil deterrence cannot prevent constitutional protections, the same standard set

140. *See* García Hernández, *supra* note 7, at 1413 (discussing facilities used to detain).

141. *See* Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

142. *See* Padilla v. Kentucky, 559 U.S. 356, 365-66 (2010) ("Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . .").

143. *See id* (affirming proceedings were still civil).

144. *M-S-*, 27 I&N Dec. at 515-16.

145. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 837 (2018).

146. Ryo, *supra* note 106 at 237-39.

147. *See Jennings*, 138 S. Ct. at 837 (describing statutory procedures); Healey, *supra* note 78, at 188 (discussing difficulty posting bond even after qualifying).

148. Buckman, *supra* note 97, at § 5 (citing Kwon v. Comfort, 174 F. Supp. 2d 1141, 1144-45 (D. Colo. 2001)).

149. *See* Gilman, *supra* note 8, at 256-58 (explaining the procedure can last years and lasts longer when fought).

150. HILLEL R. SMITH, CONG. RESEARCH SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 2 (2019).

by the Japanese internment laws to allow detention for alienage, race, or national origin should govern the immigrants' detention for their alienage.[151]

III. APPLICATION

Immigration detention generally falls under civil law since "[u]nlawful presence in the United States does not itself constitute a federal crime. . . ."[152] Under civil law, the United States can only detain individuals when a legitimate, special interest outweighs the person's constitutional interest in remaining free.[153] However, the detention cannot constitute punishment.[154] In the past, the United States has traditionally recognized three situations that provide the ability to detain people through civil law.[155] These situations occur when the detainee is a danger to the community, a flight risk, or an extreme national security risk.[156] Notably, the second category can be considered largely inapplicable. Little to no evidence exists showing asylum seekers to be a flight risk; instead, when noncitizens were released on community-based detention alternatives, there was a ninety-six percent appearance rate.[157] For example, those released on their own recognizance maintained a seventy-eight percent compliance rate.[158] Thus, the ability to detain immigrants and asylum seekers until their removal proceedings are finalized likely only occurs pursuant to the first and third categories.[159] Similarly, national security was the justification for Japanese internment during

151. Matt Ford, *The Return of* Korematsu, THE ATLANTIC, (Nov. 19, 2015) [https://perma.cc/THL4-A349].

152. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 171 (D.D.C. 2015) (citing case law and statutes concerning Immigration and Nationality Act).

153. Zadvydas v. Davis, 533 U.S. 678, 690 (2001).

154. *See id.* (elaborating on when civil detention can occur).

155. *See id.* at 688-92 (discussing national security as well as two statutory reasons to civilly detain).

156. *See id; R.I.L-R*, 80 F. Supp. 3d at 175 (citing cases requiring consideration of national security and deterrence value in asylum seeker release hearings).

157. Marouf, *supra* note 80, at 2165.

158. *See generally id.* at 2155-70 (discussing alternatives and successes); *see also Zadvydas*, 533 U.S. at 690 (emphasizing low flight risks).

159. *See* HILLEL R. SMITH, CONG. RESEARCH SERV., R45915, IMMIGRATION DETENTION: A LEGAL OVERVIEW 17 (2019).

World War II.[160] In fact, to allow the Japanese interment, the Court elided the first and third categories so the perceived community danger both increased the national security risk and was amplified by the ongoing war.[161] Statutes and case law, like *Jennings*, have tried to separate immigration from the typical civil detention scheme.[162] However, the ability to detain, even by statute, must comport with the Supreme Court's standard for detaining based on alienage, race, or national origin: the standard set out by the Japanese internment cases.[163]

The first category, presenting a danger to the community, allows "preventive detention based on dangerousness only when limited to specially dangerous individuals and subject to strong procedural protections."[164] Moreover, for a potentially indefinite detention, like in immigration, the danger must be coupled with "some other special circumstance."[165] To detain under the third category, national security risk, the government must show a direct and actual national security risk.[166] Together, these categories created the justification for detention in the Japanese internment cases, which means their precedent creates the minimum standard for long-term civil detention under these interests.[167] Current immigration detention reasons, in turn, fall far short from meeting the Japanese internment cases' standard.[168] Simply, immigration detention fails to justify itself through an actual and acute threat or concerning especially dangerous individuals.[169] For instance, to allow the ability to detain all immigrants, judges had to interpret the immigration detention

160. Korematsu v. United States, 323 U.S. 214, 216-18 (1944).

161. *See id.* at 217-18.

162. *See generally* Jennings v. Rodriguez, 138 S. Ct. 830, 842-46 (2018).

163. *See Korematsu*, 323 U.S. at 217-18; Hirabayashi v. United States, 320 U.S. 81, 92 (1943).

164. Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001).

165. *Id.* at 691.

166. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 190 (D.D.C. 2015) ("Incantation of the magic words 'national security' without further substantiation is simply not enough to justify significant deprivations of liberty.").

167. *See Korematsu*, 323 U.S. at 217-18; *Hirabayashi*, 320 U.S. at 92.

168. *Compare Korematsu*, 323 U.S. at 217-18, and *Hirabayashi*, 320 U.S. at 92, *with* Jennings v. Rodriguez, 138 S. Ct. 830, 842-846.

169. Gilman, *supra* note 8, at 318, 321; *See also* Megan Shields Casturo, *Civil Immigration Detention: When Civil Detention Turns Carceral*, 122 PENN STATE L. REV. 825, 830, 840 (2018).

statutes as applying to criminal-immigrants, undocumented immigrants, and those seeking asylum equally despite different statutory sections for each.[170] Further, the national security issues center on resource allocation issues within ICE, and only a minority of immigrants present a community threat, despite even the slightest criminal charge being used to deny bond.[171] Thus, neither of the two state interests rise to the level of indiscernible enemy plotting imminent sabotage during war, which should be required to allow long-term detentions as it was with Japanese internment.

The Japanese internment cases allowed civil detention based on alienage, race, and national origin only for the heightened and specific national security and community danger interests.[172] The ability to detain came from statutes and executive orders granting the Secretary of War and their designees the ability to detain classes based on alienage, race, and national origin.[173] These statutes, as seen in the cases, were only constitutional due to the heightened national security at the time—acting as an "emergency war measure."[174] Notably, the Court did not elaborate or require a general timeframe for release. The Court was satisfied that at some point a resolution would occur releasing all detainees.[175] Thus, though there was no timeframe in months or years for the detention's end, making it for an indeterminate period, it was still constitutional.[176] The statutes were constitutional, though, only because of both the ongoing war with Japan and the plead threat about imminent espionage or sabotage from indiscernible enemy combatants within the country, which seemingly heightened the government's national security interests.[177] Together, the war and espionage threat heightened

170. *See Jennings*, 138 S. Ct. at 837-38 (finding the statute applies equally).

171. *See Korematsu*, 323 U.S. at 217-18; *Hirabayashi*, 320 U.S. at 85-88; *Korematsu*, 323 U.S. at 228-29 (Roberts, J., dissenting) (quoting explicit "alien Japanese" from Federal Order for exclusion); Marouf, *supra* note 80, at 2147-48 (discussing shoplifting and minimal marijuana charges as reasons for detention).

172. *See Hirabayashi*, 320 U.S at 92 (calling it an "emergency war measure").

173. *See Korematsu*, 323 U.S. at 216-18.

174. *Hirabayashi*, 320 U.S. at 92.

175. *See Korematsu,* 323 U.S. at 222 (acknowledging detention was for an indeterminate period).

176. *Id*. at 221-23.

177. *See Korematsu*, 323 U.S. at 217-18; *Hirabayashi*, 320 U.S. at 85-88.

national security by appearing to create a time pressure to prevent imminent espionage and sabotage from indiscernible combatants.[178] Because the cases allowed civil detention based on alienage and national origin, their precedent creates the standard for all similar detentions.

The law and reasoning behind immigration detention mirrors the Japanese internment cases.[179] However, it lacks the heightened interests required for continuous detention. Like the Japanese internment cases, the ability to detain immigrants and asylum seekers came from statutes, regulations, Executive Orders, and agencies guidance.[180] Underpinning these statutes, though ignored in *Jennings*, should be an extreme need to protect communities or national security.[181] However, the argument for both arises largely from economic concerns in dealing with mass migration not an actual threat to safety.[182] However the biggest national security risk, presented in *R.I.L.-R*, is a fear of resource allocation due to an influx of immigrants, not a direct and actual attack or threat to citizens' safety.[183] Similarly, though political speeches claim an increased immigrant crime rate which endangers communities, research from Texas showed immigrants, especially undocumented and asylees, have a lower crime rate than United States born persons.[184] Thus, even if both claimed interests were valid and combined, the threat to national

178. *See Hirabayashi*, 320 U.S. at 94-95 (emphasizing the urgency of the situation precipitated by the attack on Pearl Harbor).; *Korematsu*, 323 U.S. at 217-18.

179. *See* Rosenbaum, *supra* note 7.

180. *See* Zadvydas v. Davis, 533 U.S. 678, 695 (2001) (acknowledging the plenary power doctrine requires judicial deference).

181. *Zadvydas*, 533 U.S. at 688; *see generally* Jennings v. Rodriguez, 138 S. Ct. 830 (2018).

182. R.I.L-R v. Johnson, 80 F. Supp. 3d 164, 189 (D.D.C 2015).

183. *Id.*

184. *See* Horsley, *FACT CHECK: Trump, Illegal Immigration, and Crime*, NPR (June 22, 2018) [https://perma.cc/PP2Q-4H94] (discussing rhetoric like: "'They don't talk about the death and destruction caused by people who shouldn't be here,' the president said. 'People that will continuously get into trouble and do bad things'"); Alex Nowrasteh, *Criminal Immigrants in Texas: Illegal Immigrant Conviction and Arrest Rates for homicide, Sex Crimes, Larceny, and Other Crimes*, CATO INST.: IMMIGR. RES. AND POL'Y BRIEF NO. 4, [https://perma.cc/ZGF4-92S6].

security and communities fall far short of the Japanese internment standard.[185]

Similarly, the immigration statues, like those for Japanese internment, have been held to only allow definite detention since the detention is terminated upon final decision in a removal proceeding.[186] The final decision, and in turn detention, could potentially last months or years. Yet, the notion of an eventual final decision by a court, satisfied the Supreme Court that immigrant detainees were not detained indefinitely.[187] Because the national security and community danger concerns generally deal with relatively minor economic issues, they do not usurp the immigrants' constitutional interest in remaining free.[188]

The differences between state interests in each detention reveal the Japanese internment's standard for event-terminated detention based on alienage, race, and national origin set is unmet by current immigration law. For Japanese internment, the Court, though based on misrepresented intelligence data,[189] saw a dire situation where Japanese or Japanese-American hidden combatants planned to sabotage the United States during the ongoing war.[190] This inability to timely distinguish the loyal, non-combatant Japanese-Americans, from the potential, hidden agents to prevent espionage, combined with the already heightened security interests from the ongoing war, allowed their detentions.[191] Further, the language in *Hirabayashi* and *Korematsu*, stating the detention's validity as an "emergency war measure" indicate these threats are the minimum standard for

185. *See* Korematsu v. United States, 323 U.S. 214, 223 (1994); *see also R.I.L-R*, 80 F. Supp. 3d at 189.

186. *See* Jennings v. Rodriguez, 138 S. Ct. 830, 845 (2018). *But see Jennings*, 138 S. Ct. at 874 (Breyer concurrence) (pointing out the detentions are, effectually, indefinite).

187. *Jennings*, 138 S. Ct. at 846 (fining sections are not "'silent' as to the length of detention [since i]t mandates detention 'pending a decision on whether the alien is to be removed from the United States'").

188. *See R.I.L.-R*, 80 F. Supp. 3d at 189 (finding plead governmental interests in national security through resource use inadequate).

189. Muller, *supra* note 4.

190. *Korematsu*, 323 U.S. at 218 (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)).

191. *Id.* at 218-19.

detention.[192] Allowing detention as an emergency war measure indicates that, without a similar level of a national security interest, the detention could not be constitutional.[193] Thus, it should be argued the government, though based on misinformation, created a standard allowing civil detention due to a specific and extremely high national security concern. This standard requires a threat equal to the safety and integrity of the United States during an ongoing World War from indiscernible enemy combatants.[194]

As for the concerns allowing detention, modern political rhetoric attempts to increase community apprehension regarding the danger that immigration poses, but lacks evidence to verify the claims.[195] For instance, then-Presidential candidate Trump famously said Mexico was sending "people that have lots of problems, . . . [] [t]hey're bringing drugs[, t]hey're bringing crime[, and t]hey're rapists."[196] Since then, Trump and his supporters have continued an inaccurate crime-focused narrative of noncitizens to justify increasing immigration regulation.[197] At a rally in Wisconsin, then-Presidential candidate Trump stated that unauthorized migration massively strains "communities and schools and hospitals and public resources, like nobody's ever seen before."[198] This rhetoric attempts to increase community apprehension regarding the danger immigration poses to communities by hyperbolizing any potential danger to infrastructure and crime rates.

However, the studies comparing native born and immigrant crime rates negate this perception.[199] For instance, illegal immigrants are 16% less likely to commit homicide, about 7.9% less likely to commit sexual crimes, and 77% less likely to

192. *See* Hirabayashi v. United States, 320 U.S. 81, 92 (1943); *Korematsu*, 323 U.S. at 219-20.

193. *See id.* at 99-100.

194. *See id*. at 99.

195. *See* Michelle Ye Hee Lee, *Donald Trump's False Comments Connecting Immigrants and Crime*, WASH. POST (July 8, 2015, 2:00 AM), [https://perma.cc/SK4H-DHUW].

196. *Id.*

197. *See* Horsley, *supra* note 183.

198. Calvin Woodard & Hope Yen, *AP FACT CHECK: Trump's misleading rhetoric on immigrants*, ASSOCIATED PRESS (Apr. 29, 2019), [https://perma.cc/S3ZJ-WDSG].

199. Hee Lee, *supra* note 194; Horsley, *supra* note 183; Nowrasteh, *supra* note 183.

commit larceny than the native-born populations.[200] In drug crimes during 2013, four out of five smuggling arrests involved United States citizens.[201] Overall, male immigrants ages 18 to 59 have an internal incarceration rate of 1.6%, while native-born males have an incarceration rate of 3.3%.[202] Despite the political rhetoric, immigrants pose virtually no significant danger to their communities.

Additional political rhetoric implies that undocumented immigrants and asylum seekers must be detained in order to thwart terrorist attacks under the guise of immigration and asylum.[203] Even more than the increased crime rates, though, there is no evidence to support this. In fact, between 1975 and 2017, the chance of being killed by an asylee *or* undocumented noncitizen was 1 in 1.3 billion.[204] Further, when caught or applying for asylum, the noncitizens must still pass through the terrorist vetting procedures before they are permitted to stay.[205] Thus, immigrants and asylum seekers pose virtually no threat to the United States populace through increased crime or terroristic threats.[206]

Next, the arguments around national security in immigration fall drastically short of this standard. The national security concerns in immigration arise largely from an economic strain on ICE personnel and resources.[207] However, the supposed economic strain on ICE does not indicate an immigration influx would weaken ICE, "overwhelm[] the country's borders or wreak[] havoc in southwestern cities."[208] This threat to ICE's resource allocation[209] cannot be equivalent to espionage and sabotage by an indiscernible enemy combatant during wartime. Though increased immigration would likely increase the local

200. Nowrasteh, *supra* note 183.

201. Hee Lee, *supra* note 194 (citing a Center for Investigative Reporting study).

202. *Id.* (citing American Immigration Council report on 2010 Census data).

203. *See* Alex Nowrasteh, *Does The Migrant Caravan Pose A Serious Terrorism Risk?*, CATO INST., (Oct. 23, 2018, 5:19 PM), [https://perma.cc/SQ3X-CJF7].

204. *Id.*

205. *Id.*

206. *Id.*

207. R.I.L.-R v. Johnson, 80 F. Supp. 3d 164, 189 (D.D.C. 2015).

208. *Id.*

209. *Id.*

infrastructural costs, a purely economic threat to increased resource use does not necessarily rise to the level of a national security threat.[210] Current immigration national security interests only concern a minor, if existent, economic strain on a single administrative agency failing to meet the minimum standard to detain all immigrants.[211] Even the minimal threat immigrants do pose falls far short of the extreme national security threat standard created by the Japanese internment cases.[212] A slight increased strain on infrastructural budgets, watered-down crime rates, and the small chance of terrorism cannot equal the threat to national security that imminent espionage by indiscernible enemy combatants pose. Therefore, neither of the required underlying interests for constitutional civil detention are met concerning immigrant detention.[213]

Together, the Japanese internment cases create a high standard for detaining classes based on alienage, race, and national origin. To civilly detain based on alienage or national origin, the government must show an extreme interest in national security, akin to an imminent threat by an indiscernible enemy combatant during an ongoing war.[214] Then, if the detention is pending an event without a known timeframe, the government must also show that if released, the detainee would pose a threat to the public.[215] Importantly, even if this standard is met, the

210. *Id*.

211. *Id*.

212. *See* Donald Trump, *Remarks by President Trump on the Illegal Immigration Crisis and Border Security*, WHITE HOUSE (Nov. 1. 2018, 4:19 PM), [https://perma.cc/2NBM-7JB3] (pleading mostly economic harm from increased "illegal immigration"); *see also* Korematsu v. United States, 323 U.S. 214, 218-20 (1944) (explaining that the compulsory exclusion of citizens from their homes would be inconsistent with basic governmental institutions, unless doing so would prevent espionage and sabotage in dire circumstances).

213. *See Korematsu*, 323 U.S. at 217-18 (upholding the legality of the exclusion order of all persons of Japanese ancestry from threatened areas at certain times, so as to protect against espionage and sabotage).

214. *See* Zadvydas v. Davis, 533 U.S. 678, 690-91 (2001) (requiring special dangerousness and strong procedural protections to civilly detain based on future danger); *see also Korematsu*, 323 U.S. at 218 (quoting Hirabayashi v. United States, 320 U.S. 81, 99 (1943)) (using potential espionage by an indiscernible enemy combatant as standard for dangerous group).

215. *See Zadvydas,* 533 U.S. at 690-91.

government must release the detainee if the detainee proves not to be a threat to national security or the community.[216]

Current immigration detention, then, fails this standard and, therefore, should not be permitted. The alleged threat to national security comes not from a fear of imminent espionage or sabotage but from unsubstantiated claims of increased crime and speculated infrastructural strain on ICE.[217] Further, even this threat could be ameliorated through alternative, cost-effective, and more humane measures to ensure asylum seekers, refugees, and other immigrants appear in court.[218] For instance, parole programs or ankle monitors, though also problematic, drastically reduce costs while ensuring court appearances.[219] The saved money could be channeled back to ease the infrastructural burden.[220]

Further, to review detention, courts can overcome the plenary power doctrine by reviewing the standard set by the Japanese internment cases, an extreme national security interest, is met before granting any judicial deference to the statutes and administrative policies.[221] Because the plenary power doctrine must still comport with constitutional rights and interests and immigration detention is civil detention based on alienage and national origin, courts should ensure that the constitutional standard requiring an extreme security interest is met before granting the law's plenary power deference.[222]

The next argument for using *Korematsu* to prevent prolonged or nearly indefinite immigrant detentions pulls not from existing law, but from constitutional and cultural values. At the beginning, this Article quoted the inscription and description

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

217. *See Remarks by President Trump on the Illegal Immigration Crisis and Border Security*, WHITE HOUSE (Nov. 1. 2018, 4:19 PM), [https://perma.cc/74EW-24FT].

218. Healey, *supra* note 78, at 188-89 (noting a high success rate and halved cost for a parole or telephone surveillance system to ensure appearances in court).

219. Marouf, *supra* note 80, at 2161-62.

220. *Id*. at 2160, 2162, 2165; *see* ROBERT RECTOR & JASON RICHWINE, THE HERITAGE FOUND., FISCAL COST OF UNLAWFUL IMMIGRANTS AND AMNESTY TO THE U.S. TAXPAYER 15 (May 6th, 2013); *see* David Becerra et al., *Fear vs. Facts: Examining the Economic Impact of Undocumented Immigrants in the U.S.*, 39 W. MICH. U. J. SOC. & SOC. WELFARE 111, 128 (2012).

221. Korematsu v. United States, 323 U.S. 214, 218-20; Gordon, *supra* note 84. at 661.

222. *See Korematsu*, 323 U.S. at 218-20; Gordon, *supra* note 84, at 661.

for the Statue of Liberty.[223] Though definitionally changing through time, the United States always meant to stand for justice, liberty, and equality for all persons.[224] To stand for these values, these cruxes of the American way, they must be deeper than facial policy concerns or self-aggrandizing sentiment. Instead of learning from our mistakes in Japanese internment, the country is again detaining groups of people based on alienage and national origin.[225] This time on a people seeking hope, a new life, or refuge. The United States cannot say it stands for freedom, liberty, and justice while detaining those who seek protection and hope.

The United States was supposed to be a beacon of hope, the City on the Hill, to inspire the world to follow it in providing freedom and equality for all peoples.[226] Yet, laws allowing, proscribing, and requiring prolonged detention for immigrants, from those seeking asylum to those wanting a better life, violate these core tenets.[227] In this xenophobic mindset, the United States deprives itself of what was supposed to make it great. Worse, this exact situation has happened in the past: interning hundreds of thousands of Japanese and Japanese Americans based on a misrepresented notion they posed some threat to the United States during World War II. Since then, the United States claims to regret not standing for liberty and freedom for a group within its borders.[228]

And now, again, the United States is detaining a more vulnerable population who just seek protection and/or a better life for themselves and their family.[229] Instead of having open arms

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223. Lazarus, *supra* note 1.

224. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); U.S. CONST. pmbl.

225. *See* Jack Rockers & Elizabeth Troutman, *Dangerous Detention: Human Rights Standards and Enforcement in Immigration Detention*, UNIV. OF N.C. SCH. OF L. IMMIGR. & HUM. RTS. POL'Y CLINIC 1, 6, 9 (2009).

226. John F. Kennedy, *City Upon a Hill Speech* JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM (last visited Oct. 25, 2020) [https://perma.cc/U9KY-PFKR] (Transcript of President-elect John F. Kennedy, addressing a Joint Convention of the General Court of the Commonwealth of Massachusetts on Jan. 9, 1961),

227. Rockers & Troutman, *supra* note 225, at 22, 23.

228. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (stating *Korematsu* was wrong the day it was decided and has been overruled through cultural history).

229. . E.C. Gogolak, *Ankle Monitors Weigh in on Immigrant Mothers Released from Detention*, N.Y. TIMES (Nov. 15, 2015), [https://perma.cc/75E3-YFW7].

and doors for the tired and poor, these policies specifically aim to slam that door in their face and construct a wall in front of it. If the United States wants to truly stand for equality, liberty, and justice for *All* Persons, it cannot continue to detain immigrants seeking a better life nearly indefinitely. To learn from our past, we must argue the Japanese internment cases create a standard so high it prevents indefinite or event-based detention of any person based on their alienage, race, or national origin. Recently, the Fifth and Ninth Circuit Courts of Appeal and a Second Circuit District Court found that an immigrant cannot be detained indefinitely without serious constitutional concerns.[230] This finding came after finding a reasonable belief the petitioner could not be removed despite their final removal order and a conviction for engaging in terroristic activities.[231] So why, then, should the United States continue to allow the detention of people whose only crime or fault is entering the country seeking a better life?

Moving the United States toward the values it is supposed to protect in this situation merely requires learning from a past mistake. Despite *Korematsu*'s ill-repute, the other cases, setting the same standard, are still valid law.[232] Thus, this law should be used to ensure that similar liberty violations will cease and not reoccur. *Korematsu*, *Hirabayashi*, and *Ex parte Endo*, can and should be used to require an extreme level national security interest for prolonged civil detention based on race and national origin.[233] Then this standard, when applied to detained immigrants, reveals the necessary interests are not met and requires the release of immigrants.

Notably, the direct legal or policy driven argument against detaining noncitizens is not the same as stating noncitizens can never be detained or monitored. While the initial, and ideally brief, processing period could allow detention for administrative

230. Hassoun v. Searls, 427 F. Supp. 3d, 357, 366, 372 (W.D.N.Y 2019). (W.D.N.Y., 2019). Specifically, these Circuits found the regulation 8 C.F.R 241.14, "authorized" under 8 U.S.C. § 1231, to detain specific immigrants indefinitely was unconstitutional.

231. *See id.* at 362.

232. *See* Karen Korematsu, *How the Supreme Court Replaced One Injustice with Another*, N.Y. TIMES (June 27, 2018), [https://perma.cc/RA8F-B2NX].

233. Korematsu v. United States, 323 U.S. 214, 218-19 (1944); Hirabayashi v. United States, 320 U.S. 81, 99 (1943); *Ex Parte* Endo, 323 U.S. 283, 287 (1944).

relief, there is no reason the detention must continue throughout their hearing process.[234] Instead, another form of monitoring could be used to ensure the immigrants appear throughout their proceedings without posing a threat to citizens. For instance, the use of ankle monitors and required telephone check-ins or just community programs allow for immigrants to continue life and maintain their liberty.[235] Further, that type of surveillance has a 93% success rate and less than half the cost of detention.[236] However, for the asylum seeking population, and likely the majority of the detained noncitizen population, these measures are superfluous and only prolong the trauma they are fleeing, albeit less than detention.[237] For a population fleeing their homes for fear of violence, persecution, and torture, the need to appear in court for their hearings or notion of deportation is enough to ensure appearance.[238] The best solution, then, is to have a system where immigrants are detained for the minimum amount of time necessary to screen for health issues and begin asylum or visa cases. Once the appropriate proceeding has been filed and health screened, the immigrant should be released on bond, with a monitor, or , ideally, with only the looming threat of voiding their proceeding and deportation to ensure compliance. Ideally, the system would release the immigrants with the minimum amount of liberty impedance necessary. After all, the people currently detained or monitored are victims of violence or threats of violence to themselves and their families who do not need a reminder or elongation of their trauma or they are people who just want to a better life for themselves and their family.[239]

234. *See Seeking Release from Immigration Detention*, AM. IMMIGR. COUNCIL 3 (Sept. 13, 2019),[https://perma.cc/K4K6-9LUB].

235. *See* Marouf, *supra* note 80, at 2164-70 (discussing community based alternatives after electronic monitoring). Notably, while a more comprehensive discussion of more than adequate alternatives is out of the scope of this paper, the Fatma Marouf article just cited contains a fairly comprehensive discussion of the topic.

236. Healey, *supra* note 78, at 188.

237. Gogolak, *supra* note 229. Of note, though, the trauma from detention is substantially worse.

238. *Id*.

239. *See id.*

IV. CONCLUSION

The United States immigration detention system prevents the United States from truly standing for liberty, equality, and justice by detaining immigrants seeking a better, safer life. The United States has held people in detention, or internment camps, based on their alienage and national origin through executive orders solidified by case law pleading national security. However, these orders and court decisions are deemed a disgrace in the United States' history.[240] Now, the United States is again holding people based on their alienage and national origin through executive orders solidified by recent case law pleading national security. To learn from its past mistakes, though, the Japanese internment cases should be read to create a standard for all civil detentions based on alienage and national origin. This standard requires an extreme level of national security interest akin to an imminent threat by unknown and indistinguishable enemy combatants during wartime. This standard, when applied to immigrant and asylum detentions, whose main national security threat concerns resource allocation to a government agency, fails to meet this standard.

240. Victor M. Silva, *Readers React: Japanese internment is a disgrace now, and it was a disgrace during WWII*, LA TIMES (Dec. 2, 2018, 3:00 AM), [https://perma.cc/4A9M-C9YA]