APPLICATION OF THE CIVIL LIBERTIES ACT TO JAPANESE PERUVIANS: SEEKING REDRESS FOR DEPORTATION AND INTERNMENT CONDUCTED BY THE UNITED STATES GOVERNMENT DURING WORLD WAR II

The evacuation and internment of Japanese Americans during World War II finally have made their way into our history books. The injustice of these events perpetrated by the United States government has awakened the conscience of Congress enough to induce it to appropriate redress to the victims. The Civil Liberties Act of 1988 began providing eligible Japanese Americans with an apology from the U.S. government and $20,000 in reparations for the loss of liberty and destruction of property suffered at the hands of U.S. officials. As it did with Japanese Americans, however, the American government also robbed Peruvians of Japanese descent of their freedom during World War II. The U.S. government abducted Japanese Peruvians from their homes in Peru, brought them to the United States, and interned them for the duration of the war. After the war, the U.S. government deported most of these eighteen hundred individuals to Japan. Approximately three hundred individuals remained in the United States, gained permanent residency, and eventually became American citizens. While Japanese Americans have attained redress for the injustice they experienced, the U.S. government has not recognized the similar evacuation and internment of two thousand Peruvians of Japanese descent. These victims have received neither an apology nor reparations.

This Note describes the wartime experiences of Japanese Peruvians and discusses possible avenues of redress. When discussing redress options, the Note focuses primarily on those Japanese Peruvians who remained in the United States after the war and became permanent residents or citizens. Part I examines the history of Japanese Peruvians, beginning with their immigration to Peru. It follows their experience from deportation to the United States through subsequent internment and settlement of some Japanese Peruvians in the United States.

Section II analyzes the Civil Liberties Act of 1988 ("the Act"), which authorized reparations to Japanese American internment victims. The Act currently limits the reparations to individuals who were permanent residents or U.S. citizens at the time of their internment. This provision prevents most Japanese Peruvians from gaining redress because, as deportees kidnapped from Peru and brought to the United States by American officials, they were not permanent residents or citizens during their internment.

Legal action is necessary to enable Japanese Peruvians to attain the same modest reparations offered by the U.S. government to other World War II internment victims. Section III considers a number of potential redress options for Japanese Peruvians based on the Civil Liberties Act. One approach

involves an equal protection challenge to the Act resting on the Due Process Clause of the Fifth Amendment to the Constitution of the United States. Another approach involves Japanese Peruvians claiming retroactive residency through the Immigration and Naturalization Service (INS) doctrine of permanent residency under color of law ("PRUCOL"). A third avenue involves application of the principle of implied waiver, which allows individuals to gain residency without the required documentation. A final option invokes equitable estoppel to prevent the government from claiming that the Japanese Peruvians entered the United States illegally and, therefore, fail to qualify for redress under the Civil Liberties Act.

I. HISTORICAL REVIEW OF THE JAPANESE PERUVIAN EXPERIENCE

A. *The Emigration of Japanese to Peru*

In 1899, the first Japanese immigrants arrived in Callao, Peru on board the ship the *Sakura Maru*.[1] This first wave of approximately eight hundred Japanese migrated to Peru for various reasons: unsettled economic times in Japan due to the Sino-Japanese war, a surplus of skilled farmers in Japan, the desire of Japanese emigration agents and shipping companies to make a profit by expanding business, and Peru's assurances that Japanese workers would be welcome.[2] The second wave of emigrants in 1903 included over one thousand Japanese, and the third wave in 1906 sent about eight hundred more emigrants to Peru.[3] During this time, the Peruvian willingness to accept the Japanese matched the Japanese willingness to emigrate to Peru.[4] These waves of emigration attracted fierce competition among Japanese shipping companies to contract with prospective emigrants.[5] By the early 1940s, close to 18,000 Japanese lived in Peru, representing twenty-eight percent of its population.[6] The Japanese population in Peru increased to approximately 30,000 by 1942.[7]

Japanese assimilation into Peruvian communities was relatively tranquil in the early part of the twentieth century.[8] By the 1930s, however, the newly-settled Japanese faced severe pressures in their new homeland due to mounting prejudice and increasingly hostile legislation.[9] Native Peruvian discrimination against Chinese Peruvians shifted to the Japanese, which resulted in a

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[1] C. HARVEY GARDINER, PAWNS IN A TRIANGLE OF HATE 3 (1981).

[2] *Id.*

[3] *Id.*

[4] *Id.* at 4.

[5] *Id.*

[6] *Id.* at 5.

[7] John K. Emmerson, *Japanese and Americans in Peru, 1942-43*, FOREIGN SERV. J., May 1977, at 40, 42.

[8] GARDINER at 5-6.

[9] *See id.*, at 7-8. These conditions resulted in a greater number of Japanese returning to Japan than arriving in Peru between 1931 and 1941. Emmerson, *supra* note 7, at 42.

number of clashes between native Peruvians and the Japanese in rural parts of the country.[10]

Tension arose as native farmers claimed that Japanese farmers were taking control of the most fertile agricultural areas of the country.[11] At the same time, urban Peruvians resented the Japanese for their resistance in adopting Peruvian culture.[12] Peruvian journalists exaggerated the threat that Japanese businesses purportedly posed to the Peruvian economy, which spawned further resentment from native Peruvians.[13] In 1940, the hostility climaxed when riotous native Peruvians pillaged Japanese homes and businesses in Lima and Callao.[14] Out of fear of further violence, many Japanese men sent their wives and children back to Japan.[15]

B. *Anti-Foreign Political Measures in Peru*

As a reaction to anti-foreign public sentiment after World War I, the Peruvian government began a program to "Peruvianize" the economy and eliminate Japanese-held interests in Peru.[16] In order to decrease Japanese economic activities and enterprises in Peru, the Peruvian government passed legislation that required any work force to be at least eighty percent native Peruvian.[17] Additionally, racial prejudice among Peruvian officials resulted in policies that halted Japanese immigration to Peru, and led to the revocation of Peruvian citizenship held by many native-born Japanese Peruvians.[18]

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[10] *See* GARDINER, *supra* note 1, at 7; *see also* Orazio Ciccarelli, *Peru's Anti-Japanese Campaign in the 1930s: Economic Dependency and Abortive Nationalism*, 5 CANADIAN REVIEW OF STUDIES IN NATIONALISM 113, 114 (1981-1982). One reason for the native Peruvian shift in prejudice from the Chinese Peruvians to the Japanese Peruvians was the rapid integration of Chinese Peruvians into Peruvian society. *Id.* The Japanese Peruvians, by contrast, still held close ties to Japan. *See id.* Moreover, the Japanese in Peru opened their own schools, created Japanese language newspapers, and retained many indicia of Japanese culture. GARDINER, *supra* note 1, at 9.

[11] GARDINER, *supra* note 1, at 7.

[12] *Id.* at 8-9.

[13] *Id.* at 8. One newspaper in particular, *Anti-Asia*, stated that its purpose was to "awaken Peruvians to the grave danger the Asians posed to Peru and suggest ways to combat that peril." Ciccarelli, *supra* note 10, at 114.

[14] GARDINER, *supra* note 1, at 9.

[15] *Id.*

[16] *Id.* at 8.

[17] *Id.*

[18] *Id.* at 9. During this time, the Peruvian government, at the urging of United States officials, also placed a number of restrictions on the movement and association of the Japanese Peruvians. JOHN K. EMMERSON, THE JAPANESE THREAD: A LIFE IN THE U.S. FOREIGN SERVICE 137 (1978) [hereinafter THE JAPANESE THREAD]. For example, Japanese Peruvian schools, organizations and newspapers were closed, phones were removed from the homes of 355 families, and some Japanese Peruvians were moved from certain strategic coastal cities to other interior areas. *Id.*

C. *The Beginning of U.S. Cooperation to Rid Peru of its "Dangerous Aliens"*

In December 1938, the Pan-American Conference took place in Lima, Peru.[19] The conference "stressed hemispheric unity in the face of [the] totalitarian aggression" consuming Europe.[20] A couple of yeas after the conference, Peruvian government officials met with U.S. naval representatives to discuss cooperative military endeavors.[21] At this meeting, Peru and the United States discussed Peru's concern about its "dangerous" Japanese population as well as possible measures to address this problem.[22]

Subsequent to the meeting between the United States and Peru, the U.S. Congress authorized the Federal Bureau of Investigation (FBI) to deploy non-military intelligence agents throughout the Western Hemisphere.[23] Consequently, FBI Director J. Edgar Hoover posted agents in Peru.[24] Peruvian officials often fed lies and rumors to these agents about the Japanese.[25] The Peruvian officials claimed that all Japanese in the country had served in the Japanese army and therefore were allies with the Axis forces.[26] American diplomats and agents posted in Peru adopted these Peruvian rumors, which fueled fears in Washington.[27]

After World War II began, the legal positions of aliens made them vulnerable to expulsion from Peru.[28] The Peruvian government had the constitutional authority to expel any and all aliens in defense of national interests without any express statement of law.[29] In fact, the executive branch could even

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[19] GARDINER, *supra* note 1, at 9.

[20] *Id.*

[21] *Id.*

[22] *Id.* at 10.

[23] *Id.*

[24] *See id.; see also* Emmerson, *supra* note 7, at 40-41. At this time, the U.S. Army and Navy also had informants stationed in Peru seeking to discover information about Japanese and German activities there. *Id.* at 41.

[25] *See* GARDINER, *supra* note 1, at 10.

[26] *See id.; see generally* Emmerson, *supra* note 7, at 41 ("[E]very Japanese barber was assumed to be an admiral in disguise and every Japanese tailor a constant recipient of secret orders from Tokyo.").

[27] GARDINER, *supra* note 1, at 10-11. These lies caused American officials to speculate that Japanese Peruvians were in fact dangerous to hemispheric security and, therefore, needed to be deported. Emmerson, *supra* note 7, at 41.

[28] GARDINER, *supra* note 1, at 12.

[29] *Id.* According to Article 70 of the Peruvian Constitution, "when the security of the state requires it, the Executive can suspend totally or partially . . . the guarantees set down in articles 56, 61, 62, 67 and 68." LA CONSTITUCION DEL PERU arts. 56, 61, 62, 67, 68, 70. This meant that "[i]n the name of national security, Peruvian homes could be invaded and individuals detained without written authorizations, persons could neither congregate nor freely move about." GARDINER, *supra* note 1, at viii. Similar measures were available to the presidents of other Latin American countries. *See id.* at 12.

arrange with other nations to deport and intern aliens without legislative consideration or public knowledge.[30]

Henry Norweb, The U.S. Ambassador to Peru, was eager to contribute to the war effort by strengthening U.S. relations with Peru.[31] Norweb wanted to persuade Peru to deport up to three hundred "undesirable Japanese."[32] At that time, the U.S. government, with Panamanian cooperation, already had implemented a plan that permitted both the transfer of Japanese Panamanians to the United States and their subsequent exchange for citizens of the western hemisphere held by Japan.[33] United States representatives in Peru wanted to undertake the same strategy to deal with Japanese.[34]

In an effort to gain greater cooperation among countries of the western hemisphere in their fight against the Axis nations, the United States arranged a conference of foreign ministers in Rio de Janeiro in January 1942.[35] The conference created the Emergency Advisory Committee for Political Defense, which adopted a U.S. government-prepared resolution for the detention and expulsion of dangerous Axis nationals from Latin American countries during the war.[36] In this resolution, the United States assured interested countries that it would provide both detention accommodations and shipping facilities "at its own expense."[37]

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[30] GARDINER, *supra* note 1, at 12-13.

[31] *Id.* at 13. In a statement to Peruvian officials indicating his desire to help them get rid of the Japanese, Ambassador Norweb said, "[w]e may be able . . . to assist the Peruvian Government by making available information and suggestions based upon our handling of Japanese residents in the United States." *Id.* (quoting Letter from Norweb to SS (Apr. 21, 1942) (on file with National Archives 894.20223/124, RG59, NA)).

[32] *Id.* at 14.

[33] *Id.*

[34] *Id.* Likewise, the Peruvian government was eager to get rid of the Japanese in Peru for good. *See* MICHI WEGLYN, YEARS OF INFAMY 60 (1976). Ambassador Norweb informed the U.S. State Department of President Prado's interest:

> [T]he President is very much interested in the possibility of getting rid of the Japanese in Peru. He would like to settle this problem permanently, which means that he is thinking in terms of repatriating thousands of Japanese . . . . In any arrangement that might be made for internment of Japanese in the States, Peru would like to be sure that these Japanese would not be returned to Peru later on.

Id. (quoting Letter from Norweb to Sumner Welles (July 20, 1942) (on file with National Archives, Department of State File 740.00115 Pacific War/1002 2/6, RG59)).

[35] WEGLYN, *supra* note 34, at 58-59.

[36] GARDINER, *supra* note 1, at 17-18. A dozen nations agreed to cooperate with the U.S. plan. WEGLYN, *supra* note 34, at 59.

[37] WEGLYN, *supra* note 34, at 59 (quoting DEP'T ST. BULL., Aug. 6, 1944, at 146). The U.S. State Department added that it would allow the participation of any officials or civilian nationals in whatever exchange arrangements the United States might make with Axis nations. *Id.*

D. *The First Deportation and Internment of Japanese Peruvians to the United States*

While the plan to deport and intern Japanese Peruvians originated in the U.S. State Department, the Departments of War and Justice and the Navy shared responsibility for its implementation.[38] The *Etolin* carried the first boatload of 141 Japanese Peruvians from Callao, Peru on April 5, 1942.[39] When the deportees arrived in San Francisco, they met briefly with INS personnel.[40] These INS officials informed Japanese Peruvians that they had entered the United States without visas or passports, and consequently, were in the United States illegally.[41] INS then shipped the newly imported Japanese Peruvians to their U.S. residence in Texas.[42]

Kenedy Camp, Texas served as a makeshift internment camp.[43] The camp consisted of nine barracks with two hundred pre-fabricated one-room huts, warehouses, a hospital, an administrative building, watchtowers and barbed wire fences.[44] Camp authorities generally allowed the detainees free movement, but forced them to endure two daily line-ups and as many as four bed checks per night to ensure against escape.[45] To help combat boredom, the men could play sports or work in the camp's woodworking shop.[46] They watched

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[38] *Id.*

[39] GARDINER, *supra* note 1, at 25. *See also* Emmerson, *supra* note 7, at 44-45. Emmerson, as Third Secretary for the American Embassy in Peru, as the only Japanese speaking agent in the Embassy, directed the research regarding the backgrounds of Japanese Peruvians and established the criteria by which they were judged. *See id.* at 45-46. Emmerson selected individuals "who by their influence or position in the community, their known or suspected connections in Japan, or by their manifest loyalty could be considered *potential* subversives." *Id.* at 45. Despite the established criteria, this first round of Japanese Peruvian deportees volunteered for relocation to the United States. *Id.* at 44-45. They were among nearly 1000 Japanese who expressed a desire to leave Peru. Id. Subsequent voyages accepted no volunteers. *Id.*

[40] *See* THOMAS K. WALLS, THE JAPANESE TEXANS 184-85 (1987). For many individuals, docking brought on the most frightening and humiliating moment of the journey. Donna Kato, *The Exiles*, SAN JOSE MERCURY NEWS, Mar. 21, 1993, at 1L, 7L-8L. Fusi Sumimoto remembers "being stripped naked and sprayed with disinfectant in front of boys her age, then being taken to a mass stall for showers." *Id.* Sumimoto recalled that "[w]e didn't understand what was going on and thought we were going to die there." *Id.*

[41] WALLS, *supra* note 40, at 184-85. In fact, the U.S. government had taken at least some Japanese Peruvians' passports as soon as they entered the United States. *See generally* J.K. Yamamoto & Barbara Hiura, *Some Japanese Peruvian Internees Still Seeking Reparations*, HOKUBEI MAINICHI, Feb. 27, 1993, at 1.

[42] WALLS, *supra* note 40, at 184-85.

[43] GARDINER, *supra* note 1, at 30.

[44] WALLS, *supra* note 40, at 178.

[45] *See id.* at 179.

[46] *Id.* at 180.

movies regularly, and wrote and participated in plays.[47] Despite these provisions, a great deal of discontent existed among the men because the U.S. government had uprooted them from their homes, and left them unaware of what the future held.[48]

E. *Subsequent Deportations of Japanese Peruvians to the United States*

Only eight days after the *Etolin* departed from Callao, the *Acadia*, a smaller passenger ship from Boston, left the same Peruvian port with forty-six people on board, most of whom were diplomatic officials and their families.[49] The next ship, the *Shawnee*, carried 342 Japanese from Peru to the United States in June 1942.[50] Although two of these people were Peruvian nationals, the rest were still Japanese citizens even though they had lived in Peru for twenty to thirty years.[51] When the *Acadia* arrived in New Orleans, the U.S. government transported the single men to the Kenedy Internment Camp and the families to Seagoville Camp.[52] Upon arrival at the camps, the new internees found other deported Japanese Peruvians, and also discovered that the U.S. government already had sent some of their predecessors to Japan.[53]

F. *The Proposal to Exchange Japanese Peruvians and Other Japanese Latin Americans for Prisoners of War from the Western Hemisphere Held by Japan*

Soon after the attack on Pearl Harbor on December 7, 1941, Spanish and Swiss intermediaries helped American and Japanese officials begin negotiating an exchange of diplomatic and consular personnel held by each country.[54] Japanese officials agreed to an American proposal to exchange diplomats.[55] As a result of their desire to unify the war effort in the Western Hemisphere, officials in Washington decided to expand the number of people that they would exchange with Japan to include Latin American and Canadian government personnel held by the Japanese.[56] The U.S. government imported many Japa-

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[47] *Id.*

[48] *See* GARDINER, *supra* note 1, at 34. Such anxiety led one Japanese Peruvian to attempt suicide a number of times. *Id.* at 31.

[49] *Id.* at 34.

[50] *Id.* at 42.

[51] *Id.* at 43. Many of the deported men were teachers, whom Peruvian officials considered "dangerous" because their "coveted and respected role within the community, their mental alertness and idle hours might be dedicated to intelligence gathering, and their comparative youth and relatively short stays in Peru . . . meant that they were products of the increasingly nationalistic, militaristic Japan of the 1930s." *Id.* at 44-45.

[52] *Id.* at 46.

[53] *Id.*

[54] *Id.*

[55] *Id.* at 46-47.

[56] *Id.* at 47.

nese from Latin America for the specific purpose of such an exchange with Japan.[57] Japan's surge into large parts of the southwest Pacific also produced many more individuals from Western Hemispheric nations that could be involved in the exchange.[58] Thus, in order to obtain as many Western Hemispheric nationals as possible from the Japanese, the U.S. government made sure to import non-officials as well as diplomats from Latin American countries.[59]

In June 1942, as many Japanese Peruvians entered the United States, several hundred prepared to leave for Japan.[60] These internees were eager to leave the camps, as Japan became their country of choice once Peru refused to accept them back into the country.[61] Moreover, the camp administrators were glad to see these Japanese Peruvians leave because they were concerned about camp overpopulation.[62] Those internees left behind from the *Etolin* group hoped to depart soon, while Japanese Peruvians who had just arrived on the *Shawnee* felt encouraged by the possibility of a short stay in the United States.[63] Unfortunately for these Japanese Peruvian internees, another exchange with the Japanese did not take place for fifteen months.[64] Questions began to arise about the legitimacy of the program to "repatriate" private citizens of foreign nations, causing the internees to remain at the American camps much longer than they had expected.[65]

G. *Further Repatriations Encouraged by the United States*

Due to the increasing internee population, the United States Department of Justice established the nation's largest detention facility in Crystal City, a small community 120 miles from San Antonio.[66] Its creation represented the United States' position that it would bring a growing number of Japanese families to the United States and place them in internment camps before repa-

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[57] *Id.* In December 1942, General Marshall first made the suggestion to exchange American prisoners of war held by Japan for Japanese Peruvians. Emmerson, *supra* note 7, at 45. Emmerson claims that the American Embassy in Lima was completely unaware of this proposal. *Id.*

[58] GARDINER, *supra* note 1, at 47.

[59] *See id.* at 47-48.

[60] *See generally id.* at 47-50.

[61] ROGER DANIELS ET AL., JAPANESE AMERICANS: FROM RELOCATION TO REDRESS 145 (1991).

[62] GARDINER, *supra* note 1, at 50.

[63] *Id.*

[64] *Id.*

[65] *See id.* The United States Department of Justice was concerned about the number of internees being sent to the United States and was alarmed that many of those held under the Alien Enemies Act were not enemy Japanese, but Peruvian nationals, and therefore were citizens of a friendly nation. WEGLYN, *supra* note 34, at 63.

[66] GARDINER, *supra* note 1, at 59.

triation to Japan.[67] Peruvian officials were enthusiastic about further deportations.[68]

The joint American/Peruvian effort continued with the deportation of another 168 Japanese Peruvian men in January 1943 aboard the *Frederick C. Johnson*.[69] In June 1943, the *Aconcagua* transported twenty-eight women, fifty-five children and three men from Callao to New Orleans.[70] Most were taken to Crystal City to be reunited with their families.[71] More families were reunited at Crystal City that summer.[72] Almost thirty American citizens were born at Crystal City as a result of these family reunions.[73]

By the middle of 1942, the U.S. War Department informed Lima that it could no longer provide shipping for deportees.[74] In 1943, Chilean officials reported that they could not provide any more vessels to ship deportees either.[75] Thus, in 1943 no ships transported Japanese Peruvians from Latin America to the United States.[76] By this time, Second Secretary John K. Emmerson in Peru had decided that he had completed his job.[77] He had decided that the Japanese in Peru were no longer a threat to the American security, if they ever had posed a threat.[78]

An exchange of Japanese Peruvians for American prisoners of war had not taken place since the summer of 1942.[79] Finally, on September 2, 1943, in an exchange eagerly anticipated by American officials, the *Gripsholm* transported 1340 Japanese from New York to Japan.[80] Seven hundred thirty-seven of

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[67] *See id.* Despite concerns from the Department of Justice about the legality of continued importation of Japanese from Peru, the State Department wanted to bring another 1000 Japanese Peruvians to the United States. *Id.* at 62. This difference of opinion strained relations between the two departments for the duration of the importation of Japanese Peruvians. *See id.* at 115.

[68] *Id.*

[69] *Id.* at 67.

[70] *Id.* at 78-79.

[71] WEGLYN, *supra* note 34, at 61.

[72] GARDINER, *supra* note 1, at 79-80.

[73] *Id.*

[74] *Id.* at 80.

[75] *Id.*

[76] *Id.*

[77] Emmerson, *supra* note 7, at 48.

[78] *Id.* Emmerson stated, "During my period of service in the Embassy, we found not one iota of reliable evidence of planned or contemplated acts of sabotage, subversion, or espionage. Stories that many adult male Japanese in Peru held commissions in the imperial army and navy were never verified." *Id.* at 56.

[79] GARDINER, *supra* note 1, at 84. "Japanese demands for designated individuals, objections raised by American agencies, language problems, transmission by way of the Swiss and Spanish representatives, and the refusal of some who were expected to repatriate" all posed problems for further exchanges between the United States and Japan. *Id.*

[80] *Id.*

these individuals were from Latin America, whom the U.S. government chose to trade for 737 Americans held by Japan.[81] Once completed, this exchange gave American officials hope that another exchange for 1500 Americans would be possible in the future.[82]

H. *Repatriations Come to a Grinding Halt*

As the war progressed through 1944, the State Department continued to support the Peruvian government's desire to expel the Japanese from their country.[83] Pedro Beltrán, Peruvian Ambassador to the United States, expressed hope that the government would send these deportees to Japan after the war, although President Roosevelt denied giving Beltrán any such assurances.[84] Beltrán anticipated the expulsion of all the Japanese from Peru by the end of the war, including those who possessed Peruvian citizenship.[85]

Despite the desires of Beltrán and others in the Peruvian government, the last ship to transport Japanese Peruvians to the United States, the *Frederick C. Johnson*, left Callao, Peru on October 11, 1944 with twenty-two Japanese on board.[86] By this time, INS reported interning 1333 Japanese from Latin America in the United States, most of whom were housed at the Crystal City and Santa Fe camps.[87] Less than one month before the United States dropped the first atomic bomb on Japan, President Truman issued Proclamation 2655,[88] authorizing the removal of enemy aliens.[89] Even though the Department of Justice had played only a limited role in transporting the internees to the United States, the Proclamation determined that it was to have control over their departure.[90] An ongoing conflict, however, between the Justice Department and the State Department regarding which agency's viewpoint would guide the deoportations came to a climax just before the Japanese surrender.[91] Consequently, immediately after the Japanese surrender, President

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[81] *Id.*

[82] *Id.* at 85.

[83] *Id.* at 106.

[84] *Id.*

[85] *See id.*

[86] *Id.* at 106-07.

[87] *Id.* at 112.

[88] Proclamation No. 2655, 10 Fed. Reg. 8947 (1945).

[89] GARDINER, *supra* note 1, at 112. The Proclamation stated that all persons

> deemed by the Attorney General to be dangerous to the public peace and safety of the United States . . . shall be subject upon the order of the Attorney General to removal from the United States and may be required to depart therefrom in accordance, with such regulations as he may prescribe.

Proclamation No. 2655, 10 Fed. Reg. 8947. *See also* THE JAPANESE THREAD, *supra* note 18, at 148-49.

[90] GARDINER, *supra* note 1, at 112.

[91] *See id.* at 114-15. This was due, in part, to INS' reluctance to repatriate German internees from Latin American nations to Germany. *Id.* at 115. The State Department,

Truman issued Proclamation 2662,[92] which gave the State Department the authority to deport Japanese Peruvians:

> All enemy aliens now within the continental limits of the United States (1) who were sent from other American republics . . . and (2) who are within the territory of the United States without admission under the immigration laws are, if their continued residence in the Western Hemisphere is deemed by the *Secretary of State* prejudicial to the future security or welfare of the Americas . . . subject upon the order of the *Secretary of State* to removal to destinations outside the limits of the Western Hemisphere.[93]

Thus, although the Department of Justice and other agencies were to assist, the main responsibility for carrying out the deportations shifted from the Department of Justice to the State Department.[94]

On November 25, 1945, the U.S.A.T. *General Randall* left the United States for Japan with 138 Japanese Peruvian men.[95] In early December 1945, the *S.S. Matsonia* carried another 660 Japanese Peruvians from the Crystal City Internment Camp to Japan.[96] Many of these individuals had never lived in Japan, but now had no choice other than to start a new life there.[97]

During this time, the U.S. government drastically shifted its position concerning the destination of the internees.[98] The government adopted the Peruvian foreign minister's policy that alien enemies were not to be repatriated to nations of the western hemisphere without full consent of those countries.[99] As such, the new plan called for a review of all evidence, and preparation of lists of individuals who would and would not meet the standards necessary for repatriation.[100] The State Department, while undertaking this enormous task,

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on the other hand, was not interested in allowing such individuals to remain in the United States. *Id.*

[92] Proclamation No. 2662, 10 Fed. Reg. 11635 (1945).

[93] *Id.* (emphasis added).

[94] GARDINER, *supra* note 1, at 115.

[95] *Id.* at 124.

[96] *Id.*

[97] *See* WEGLYN, *supra* note 34, at 64. Some were hoping that in Japan they could reunited with family members left behind in Peru. *Id.*

[98] GARDINER, *supra* note 1, at 128. President Roosevelt indicated to Ambassador Beltrán that the U.S. government had no plans to return large numbers of Japanese to Japan after the war.

[99] *Id.* The reasons for this shift were two-fold:

> (1) unilateral action by the United States would damage relations "with the other American republics," and (2) "the Alien Enemy Act . . . seem[ed] clearly to require that the alien be given an opportunity to *depart* from the country before he can be *removed*, which would mean that if he were able to obtain a visa to the country from which he came . . . he would be able to escape removal to Germany [or any other country]."

Id. (emphasis added).

[100] *Id.*

had to come to some sort of agreement with Peru about the ultimate disposition of aliens imported to the United States from Peru.[101] The Peruvian government still resisted U.S. efforts to return any of the internees to Peru on the grounds that they were all indigent.[102] This meant that all Japanese Peruvians would be repatriated to Japan because the U.S. government had no information upon which to base any case-by-case analyses.[103]

Meanwhile, more ships carried both Japanese Peruvians and their Japanese American counterparts to Japan. Of the 626 people who left Los Angeles for Japan on board the U.S.A.T. *General Ernst* on February 23, 1946, approximately eighty were Japanese Peruvians.[104] Another fifty were taken to Japan on the U.S.A.T. *General Meigs* on June 13, 1946.[105] These deportees included families with children, many of whom were born in America during their internment.[106]

By this time, the State Department had established a hearing procedure for alien enemy cases.[107] If the U.S. government held individual internees for further proceedings about their cases, they had the right to request a hearing.[108] Once the three person review board scheduled a hearing, the procedure provided the internees with one week's notice, and allowed them to obtain coun-

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[101] *Id.* Jonathan Bingham of the State Department formulated a memorandum about the U.S.-Peruvian joint venture regarding the Japanese Peruvian deportation and internment. He reached four conclusions:

> 1) 'There was never any clear understanding as to the eventual disposition of the aliens after the war, primarily because at the time they were deported from Peru no one was thinking about the postwar period,'
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> 2) 'The United States never made any commitments in writing or . . . orally that the aliens would be returned to Peru upon Peru's request after the war,'
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> 3) 'At all times the Peruvians were obviously of the opinion that the aliens were theirs to control . . . The United States never contradicted this view, and on various occasions appeared to acquiesce in it,'
>
> 4) 'The Peruvians could properly assert that, from early 1944 on, it was their understanding that the aliens were being held in this country for the purpose of internment during the war, and that certain persons in whom Peru had a particular interest would not at any time be repatriated to Germany (or Japan) against their wishes.'

Id. at 129.

[102] *Id.*; *see also* C. HARVEY GARDINER, THE JAPANESE AND PERU 1873-1973 AT 92 (1975) [HEREINAFTER THE JAPANESE AND PERU]. The Peruvians did allow 79 Japanese Peruvians to return, most of whom had Peruvian spouses. *Id.*

[103] GARDINER, *supra* note 1, at 129.

[104] *Id.* at 130.

[105] *Id.*

[106] *Id.*

[107] *Id.* at 133. This followed a U.S. District Court decision from the Southern District of New York that "internees from Latin America were 'alien enemies' within the meaning of the Alien Enemy Act of 1798." *Id.*

[108] *Id.*

sel.[109] The review board conducted the hearing at the internment camp, where it made its decision regarding repatriation immediately after the completion of the proceedings.[110]

After Japanese Peruvians received arrest warrants, the prospect of these hearings prompted them to seek legal representation.[111] Wayne Collins and Ernest Besig, both of the American Civil Liberties Union of Northern California were two of the more prominent attorneys.[112] To counter the government's move to deport the internees, these attorneys filed stays of deportation while they investigated the files and prepared the many new cases.[113]

Nine months after the war had ended, Japanese Peruvians, and some Japanese Americans, were given the opportunity to leave their internment camps and work at Seabrook Farms in New Jersey.[114] While these internees, now parolees, were still interested in returning to Peru, working at Seabrook allowed them not only to earn much needed money, but also to avoid deportation to Japan.[115] The work at Seabrook Farms included planting, cultivating, harvesting, processing and packing various crops.[116] Although the wages were extremely low and subject to income tax, the farm did give Japanese Peruvians greater privacy and more family unity than the internment camps.[117] Their experience at Seabrook also led to greater assimilation into American culture, which Japanese Peruvians actively resisted.[118] The children assimilated by attending American schools, and the adults through purchasing American foodstuffs and clothing.[119]

By mid-1946, the State Department announced that the FBI had cleared Japanese Peruvians individually, and thus, no longer classified them as enemy aliens.[120] The State Department subsequently encouraged the Peruvian government to accept the internees.[121] The Peruvian government remained reluctant, however, and accepted only seventy-nine internees back into Peru.[122]

After years of legal maneuvering, Wayne Collins finally was able to suspend the deportation of Japanese Peruvians to Japan based on a showing that such deportation would result in serious economic hardship for the former intern-

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[109] *Id.*

[110] *Id.*

[111] *See id.* at 136-38.

[112] *Id.* at 141-42; *see also* Yamamoto & Hiura, *supra* note 41, at 1.

[113] GARDINER, *supra* note 1, at 142.

[114] *Id.* at 148-49. The transfer to Seabrook Farms provided the internees' only means of escape from the camps. *See id.*

[115] *Id.* at 150.

[116] *Id.* at 157.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] THE JAPANESE AND PERU, *supra* note 102, at 91.

[121] *Id.* at 91-92.

[122] *Id.* at 92.

ees.[123] Japanese Peruvians also had to prove, however, that they had resided continuously in the United States for ten years, including the duration of their internment.[124] Of the 365 individuals that Collins saved from deportation, 300 chose to remain in the United States and seek permanent residency.[125] Most of them eventually became citizens.[126]

II. ELIGIBILITY REQUIREMENTS IN THE CIVIL LIBERTIES ACT OF 1988

A. *Purposes and Provisions of the Civil Liberties Act*

Congress appropriated restitution for the World War II internment of Japanese Americans in the Civil Liberties Act of 1988.[127] The Act established the following purposes:

> [To] 1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II; 2) apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens and permanent resident aliens; 3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event; 4) make restitution to those individuals of Japanese ancestry who were interned; 5) make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island, in settlement of United States obligations in equity and at law . . . ; 6) discourage the occurrence of similar injustices and violations of civil liberties in the future; and 7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.[128]

Congress thus realized that the government was unable to justify its actions based on either adequate security reasons or any act of espionage,[129] and admitted that the United States committed a great injustice when it relocated

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[123] *See* WEGLYN, *supra* note 34, at 65-66. Collins launched a multi-targeted approach, which included a letter-writing campaign to all of the top U.S. officials. *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] 50 U.S.C. § 1989 (1988). Congress also appropriated restitution for the destruction of personal and community property of the Aleut Alaskans, including community church property, destroyed by American forces during World War II. *Id.* § 1989(c)(4)(d). The Civil Liberties Act would not have become law had it not been for the pain-staking efforts of Japanese American organizations.

[128] *Id.* § 1989.

[129] *Id.*; *see also* COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED 8 (1982) ("In sum, the record does not permit the conclusion that military necessity warranted the exclusion of Ethnic Japanese.").

and interned Japanese American citizens and permanent resident aliens.[130] Because the internment did not result from military necessity as previously believed, but primarily from racial hostility toward Japanese Americans, Congress allocated the sum of $20,000 to eligible individuals who suffered injustice at the hands of the U.S. government.[131]

Additionally, to help remedy the constitutional violations, Congress directed the Attorney General of the United States to: (1) pardon those Japanese Americans convicted of crimes related to internment; (2) establish a trust fund to pay victims of the internment restitution for some of their hardships; (3) create an educational fund; and (4) set aside funds for the preservation of documents relating to the internment in the National Archives.[132] The Attorney General also must evaluate eligible individuals' reparations applications for possible restitution of any position, status, or entitlement lost due to the U.S. government's discriminatory actions during the war.[133]

B. *Application of the Civil Liberties Act Provisions to Japanese Peruvians*

While the Civil Liberties Act only acknowledges the injustice of Japanese Americans' wartime experience, the evacuation, relocation, and internment of Japanese Peruvians is parallel. The lack of legitimate reasons for interning Japanese Americans applies to Japanese Peruvians also as "[t]hese actions were carried out without adequate security reasons and without any acts of espionage or sabotage . . . and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership."[134] Moreover, because the U.S. government helped remove Japanese Peruvians from their homes in Peru, deported them to the United States, and interned them for an extended period of time, the Japanese Peruvian experience is more brutal and prejudicial than that of Japanese Americans. This makes their claim for restitution even more substantial. The Civil Liberties Act, however, fails even to acknowledge the deportation of over two thousand individuals of Japanese descent from Peru and other Latin American nations. The Act provides neither an apology nor compensation for the injustice experienced by the Japanese Peruvians.

Congress made distinctions between Japanese Americans and other victims of the World War II internment only in the Act's definition section, which describes an eligible individual as:

> any individual of Japanese ancestry who is living on the date of the enactment of this Act [Aug. 10, 1988] and who, during the evacuation, relocation, and internment period-

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[130] 50 U.S.C. § 1989(a).
[131] *Id.* § 1989(b)(4).
[132] *Id.* § 1989(b).
[133] *Id.* § 1989(b)(2).
[134] *Id.* § 1989(a).

(A) was a United States citizen or a permanent resident alien; and
(B)(i) was confined, held in custody, relocated, or otherwise deprived of liberty or property as a result of-
(I) Executive Order Numbered 9066, . . .
(II) the Act entitled "An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones" . . . or
(III) any other Executive order, Presidential proclamation, law of the United States, directive of the Armed Forces of the United States, or other action taken by or on behalf of the United States or its agents, representatives, officers, or employees, respecting the evacuation, relocation, or internment of the individuals solely on the basis of Japanese ancestry. . . *except* that the term "eligible individual" *does not include* any individual who, during the period beginning on December 7, 1941, and ending on September 2, 1945, relocated to a country while the United States was at war with that country;
(3) the term "permanent resident alien" means an alien lawfully admitted into the United States for permanent residence.[135]

Even though Japanese Peruvians were neither citizens nor permanent residents of the United States at the time of their internment, they otherwise meet the criteria that Congress established to become eligible for reparations. In response to orders made by U.S. agents in cooperation with Peruvian officials, the U.S. government held Japanese Peruvians in custody and prohibited their travel outside military zones. Thus, the Act distinguishes similarly situated Japanese Peruvians from Japanese Americans on citizenship grounds only, and provides no stated rationale.

While the Act neither expressly nor implicitly explains the rationale behind the redress limitations,[136] examination of the legislative records may provide some insight into Congressional intent underlying the eligibility requirements. If the records indicate that Congress did not deliberately exclude Japanese Peruvians, and was not even aware of the deportation and internment carried out by government officials, then the likelihood of Japanese Peruvians obtaining redress may increase.[137]

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[135] *Id.* § 1989(b)(7) (emphasis added).

[136] *See generally* Civil Liberties Act Redress Provisions, 28 C.F.R. § 74 (1995). The administrative rule, promulgated by the Office of Redress Administration within the Department of Justice, also fails to discuss the rationale behind excluding Japanese Peruvians and other internees from Latin America. *See id.* This Note does not discuss administrative remedies, in part, because such discussion likely would not help Japanese Peruvians attain redress.

[137] *See generally* COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, *supra* note 129, at 18-23. Although this report makes some mention of Japanese Peruvian deportation and internment, it is not clear from any of the legislative records how much information Congress possessed about the Japanese Peruvian experi-

C. *Legislative Intent in Construction of Eligibility Requirements*

Congressional proposals to provide redress to individuals interned during World War II began in 1979 with the establishment of the Commission on Wartime Relocation and Internment of Civilians ("the Commission"). Congress directed the Commission to gather information to determine whether the U.S. government committed any human rights violations during World War II, and based on its findings, to submit a final report within eighteen months recommending possible remedies.[138] The Commission held public hearings in a number of cities including Washington, D.C., Los Angeles, San Francisco, New York, Seattle and Anchorage.[139] After it completed the hearings, the Commission recommended (1) compensatory payments of $20,000 to approximately 60,000 surviving internees; (2) a government apology; and (3) a presidential pardon for those Japanese Americans convicted of curfew violations.[140] In response to the Commission's conclusions, many members of Congress introduced bills implementing these recommendations. Senator Cranston's bill made no mention of a specific dollar amount, but did recommend that the Commission's findings and conclusions generally be followed,[141] and Representative Wright's bill in the House of Representatives was similar, but specified a dollar amount.[142] A bill introduced by Representative Lowry that same year, provided that $20,000 be given to any World War II internee.[143] The importance of all three bills is that they possessed no citizenship or permanent residency requirements, but rather, defined an "eligible individual" as "any individual of Japanese and Alaskan Aleut ancestry . . . who was confined, held in custody, or otherwise deprived of liberty."[144] None of these bills, however, passed the subcommittee stage.

Representative Wright[145] and Senator Matsunaga introduced similar bills in 1985.[146] Like the earlier Senate bill, Senator Matsunaga's version did not contain any provision requiring citizenship.[147] The new House bill, 442, did not require that eligible individuals be U.S. citizens or permanent residents either.[148] These bills, however, also failed to advance past the subcommittee stage.

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ence, or if this information shaped their decision-making in any way. At least one Japanese Peruvian is known to have testified in front of the Commission. *Id.*

[138] Robert S. Tokunaga, *A Chronology of the Redress Movement, Part I*, HOKUBEI MAINICHI, July 28, 1988, at 1.

[139] *Id.* at 3.

[140] *Id.*

[141] S. 1520, 98th Cong., 1st Sess. (1983).

[142] H.R. 4110, 98th Cong., 1st Sess. (1983).

[143] H.R. 3387, 98th Cong., 1st Sess. (1983).

[144] *Id.* § 3; H.R. 4110, *supra* note 142, § 201; S. 1520, *supra* note 141, § 3.

[145] H.R. 442, 99th Cong., 1st Sess. (1985).

[146] S. 1053, 99th Cong., 1st Sess. (1985).

[147] *Id.* § 201.

[148] H.R. 442, *supra* note 145, § 206.

In 1987, Representative Foley reintroduced House Bill 442, which specified $20,000 compensation for each former internee.[149] This time, the bill not only advanced through the House Subcommittee on Administrative Law and Governmental Relations, but also survived the House Judiciary Committee.[150] On September 17, 1987, the House passed the bill by a vote of 242 to 141.[151] Unlike the earlier House versions, however, this bill required recipients of compensation to be either citizens or permanent residents at the time of their evacuation, relocation and internment.[152]

That same year, Senator Matsunaga introduced a bill similar to the 1985 and 1983 Senate versions.[153] The Senate Governmental Affairs Committee unanimously approved the bill.[154] The Senate, however, put a floor vote on hold indefinitely in order to prevent an expected presidential veto.[155] Like the earlier versions, this bill originally did not include a citizenship or residency requirement.[156] Later amendments required that redress recipients either be citizens or permanent resident aliens of the United States on the date of enactment of the Civil Liberties Act.[157] At the conference stage, however, the House and Senate conferees agreed to follow the House bill, which included a requirement that eligible individuals were either U.S. citizens or permanent residents during their internment.[158]

Since the legislative records provide no information regarding Congressional rationale behind eligibility requirements, the distinctions between those who can receive redress and those who cannot are difficult to understand. While Congress possessed a great deal of factual information about the internment of Japanese Americans, as evidenced by the extensive Congressional hearings and the report promulgated by the Commission on Wartime Relocation and Internment of Civilians, it may not have had similar data regarding the internment of Japanese Peruvians. Congress' uncertainty and hesitation about appropriate eligibility requirements, as demonstrated by the qualification changes in various versions of the House and Senate Bills, may indicate such a lack of information.

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[149] H.R. 442, 100th Cong., 1st Sess. (1987).

[150] Robert S. Tokunaga, *A Chronology of the Redress Movement, Part II*, HOKUBEI MAINICHI, Aug. 11, 1988 at 2.

[151] *Id.*

[152] H.R. 442, *supra* note 149, § 10.

[153] S. 1009, 100th Cong., 1st Sess. (1987).

[154] Tokunaga, *supra* note 150, at 2.

[155] *Id.*

[156] S. 1009, *supra* note 153, § 201.

[157] *Id.*

[158] H.R. CONF. REP. NO. 100-785, 100th Cong., 2d Sess. 8-9 (1988).

III. Redress Options for Japanese Peruvians Under the Civil Liberties Act of 1988

A. *Equal Protection Challenge of Alienage Classification Based on the Due Process Clause of the Fifth Amendment*

Since the Civil Liberties Act excludes most Japanese Peruvians from eligibility, they must take legal action to challenge either the constitutionality of the statute or their illegal status during wartime. One avenue for redress is a facial challenge of the Civil Liberties Act on the grounds that it denies Japanese Peruvians equal treatment under the Fifth Amendment.[159] Although the Fifth Amendment does not contain an explicit equal protection clause, the Supreme Court has construed the Due Process Clause of the Fifth Amendment to include implicitly an equal protection guarantee.[160] When the federal government acts like a state, Fifth Amendment equal protection analysis resembles a Fourteenth Amendment equal protection analysis.[161] Also, similar to the Fourteenth Amendment, the Fifth Amendment does not confine its guarantees solely to the protection of U.S. citizens, but encompasses lawfully admitted resident aliens as well. This protection entitles both classes of individuals to equal protection under the law.[162]

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[159] *See* Jacobs v. Barr, 959 F.2d 313, 315 (D.C. Cir. 1992) (citing Allen v. Wright, 468 U.S. 737, 751 (1984)). In bringing a suit to challenge the constitutionality of the statute, Japanese Peruvians must first establish standing. *Id.* The constitutional requirement for standing mandates that (1) actual or threatened injury be alleged; (2) the injury be fairly traceable to challenged official conduct; and (3) there be substantial likelihood that alleged injuries will be redressed by the judicial decision in the plaintiffs' favor. *Id.* When the injury alleged is the denial of equal protection, the plaintiffs must contend that they were denied equal treatment solely as a result of the classification they are challenging. *Id.* at 316. The injury experienced by Japanese Peruvians qualifies them for standing. Although the U.S. government interned them in basically the same way as they interned Japanese Americans, the Civil Liberties Act denies Japanese Peruvians redress for the harm and losses they suffered because of their alien status. Moreover, their injuries are traceable to the unconstitutional classification in the Civil Liberties Act. *Id.*

[160] *See* Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954). The Due Process Clause of the Fifth Amendment provides that "[n]o persons shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. As a companion case to Brown v. Board of Education, 347 U.S. 483 (1954), *Bolling* rejected segregated schooling for students in the District of Columbia. *Bolling*, 347 U.S. at 498. The Court analyzed the equal protection claim in *Bolling* in the same manner that it analyzed the issue under the Fourteenth Amendment. *Id.* at 499. Chief Justice Warren commented that "[i]n view of our decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government." *Id.* at 500.

[161] Gilbert Paul Carrasco, *Congressional Arrogation of Power: Alien Constellation in the Galaxy of Equal Protection*, 74 B.U. L. Rev. 591, 595 n.15 (1994).

[162] *See* Mathews v. Diaz, 426 U.S. 67, 77 (1976) ("Even one whose presence in this country is unlawful, involuntary or transitory is entitled to [Fifth and Fourteenth

1. Questionable Congruence Between the Fifth Amendment Due Process Clause and Fourteenth Amendment Equal Protection Clause

The equal protection guarantees under the Fifth Amendment may not be congruent with the guarantees under the Fourteenth Amendment when the federal government does not act like a state.[163] In *Hampton v. Mow Sun Wong*,[164] the U.S. Supreme Court reinforced the principle that while the federal government must govern impartially, "overriding national interests" may justify federal legislation otherwise unlawful for a state to enact.[165] The Court in *Hampton* made a crucial distinction between federal statutes reaching only a limited territory, where the Fifth and Fourteenth Amendments have comparable significance, and those having a nationwide impact, where the federal government has more leeway.[166]

Despite its differentiation between state and federal action, throughout the 1970s the Court assumed that Fourteenth Amendment precedent controlled claims under the Fifth Amendment.[167] For example, in *Washington v. Davis*,[168] the Court relied heavily on Fourteenth Amendment equal protection decisions to determine that a federal law with a discriminatory racial impact

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Amendment] constitutional protection."); *see also* Hampton v. Mow Sun Wong, 426 U.S. 88, 101-02 (1976) (holding that "the federal power over aliens is [not] so plenary that any agent of the National Government may arbitrarily subject all resident aliens to different substantive rules from those applied to citizens"). The Court in *Hampton* also stated that "[t]he concept of equal justice under law is served by the Fifth Amendment's guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 100; *see also* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (holding that resident aliens are "persons" under the Fourteenth Amendment, and therefore, entitled to equal protection from state discrimination based on race or nationality).

[163] Carrasco, *supra* note 161, at 595 n.15.

[164] 426 U.S. 88 (1976).

[165] *Id.* at 100. The Court explained the incongruence between the equal protection guarantees under the Fifth and Fourteenth Amendments as follows:

> Although both [the Fifth and Fourteenth] Amendments require the same type of analysis, . . . the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State.

Id. (footnote omitted). What is interesting is that only a year before, the Court stated that "[t]his Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975).

[166] *Hampton*, 426 U.S. at 100. Here, the Court was referring to the statute in *Bolling*, which applied only to public schools in the District of Columbia. *Id.*

[167] Kenneth L. Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541, 554 (1977).

[168] 426 U.S. 229 (1976).

denied equal protection to individuals in the District of Columbia.[169] Moreover, in *Examining Board of Engineers, Architects & Surveyors v. Flores de Otero*,[170] the Court expressly refused to specify whether they applied Fifth or Fourteenth Amendment protection to strike down a Puerto Rican statute that permitted only American citizens to practice privately as civil engineers.[171] These two cases suggest that claims under the two amendments were "precisely the same," as asserted by the Court only a year before *Hampton*.[172]

The issue of congruence is significant to the potential success of a Fifth Amendment challenge to the Civil Liberties Act. If the Court deems the equal protection guarantees under the Fifth and Fourteenth Amendments to be the same, then Fourteenth Amendment cases will possess a powerful *stare decisis* effect for Fifth Amendment challenges. Moreover, this impacts not only the relevance of suspect classification, but also the standard of review, which is likely to determine the outcome of the case.[173]

2. Deference to Congress Based on Federalism Concerns

Despite its earlier recognition of congruence between state and federal equal protection principles, the Court's more recent treatment of racial classifications in legislation implementing affirmative action programs has signaled a reemergence of the "overriding national interests" doctrine. This necessitates a distinction between equal protection guarantees under the Fifth and Fourteenth Amendments. In both *Fullilove v. Klutznick*[174] and *Metro Broadcasting, Inc. v. FCC*,[175] the Court upheld a federal "minority set-aside" program and minority ownership enhancement program respectively, on the grounds that the national legislature was to be accorded more deference in "provid[ing] for the . . . general welfare of the United States" than state legislatures.[176] The Court applied intermediate rather than strict scrutiny to the

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[169] *Id.* This case, decided only six days after *Hampton*, fits into the distinction between federal statutes governing a limited territory and those having nationwide impact. Surprisingly enough, the Court did not even consider this distinction.

[170] 426 U.S. 572 (1976).

[171] *Id.* Again, the Court failed to consider the local/national distinction, suggesting that it was not at the forefront of the Court's equal protection consciousness. Karst, *supra* note 167, at 555.

[172] *Id.* at 557 (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)). This is significant in determining the relevant standard of review. This will be further discussed in Sections III.A.2, 4.

[173] *See supra* text accompanying notes 168-71.

[174] 448 U.S. 448 (1980).

[175] 497 U.S. 547 (1990).

[176] *Fullilove*, 448 U.S. at 472 (quoting U.S. CONST. Art. I, § 8, cl. 1); *Metro Broadcasting, Inc.*, 497 U.S. at 547. *But see id.* at 604-05 (O'Connor, J., dissenting) (referring to a number of cases in which the Court has found the protections under the Fifth and Fourteenth Amendments to be the same); United States v. Paradise, 480 U.S. 149, 166 n.16 (1987) ("[T]he reach of the equal protection guarantee of the Fifth Amend-

"benign race-conscious measures."[177] These cases stood in direct contrast to *City of Richmond v. Croson*,[178] in which the Court applied strict scrutiny and thereby struck down a local program that resembled the *Fullilove* federal "set-aside" plan.[179]

3. Deference to Congress Based on Separation of Powers and Congressional Authority and Expertise in Immigration

Traditionally, the U.S. Supreme Court has deferred to the judgment of the legislative and executive branches on issues relating to immigration and nationality.[180] As "political branches," the legislature and executive require flexibility in order to respond to changing global conditions.[181] The Court has held that these two branches of the federal government are better equipped to address areas that in some way implicate U.S. sovereignty and foreign policy.[182] Congressional authority and expertise in immigration and foreign policy signify that judicial review in these areas necessarily is limited.[183] In terms of congruence of the Fifth and Fourteenth Amendments, this implies that the Court may allow federally sanctioned discrimination against aliens in circumstances where it would condemn similar actions by states.[184]

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ment is co-extensive with that of the Fourteenth."); Califano v. Goldfarb, 430 U.S. 199, 210-11 (1977) (stating that traditional equal protection standard applies despite deference to congressional benefits determination).

[177] *Metro Broadcasting*, 497 U.S. at 563-65.

[178] 488 U.S. 469 (1989).

[179] *Id.* at 500.

[180] Carrasco, *supra* note 161, at 602.

[181] Mathews v. Diaz, 426 U.S. 67, 81 (1976).

[182] Carrasco, *supra* note 161, at 602; *see* Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952). The Court in *Harisiades* determined that

> any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune to judicial inquiry or interference.

Id. at 588-89 (footnote omitted). This deference by the Court is based in part on "[c]ongressional authority over the admission, exclusion, and deportation of aliens primarily derive[d] from Congress' power to 'establish an [sic] uniform Rule of Naturalization.'" Carrasco, *supra* note 161, at 602, n.44 (quoting U.S. CONST. art. I, § 8, cl. 4). The Court in Fiallo v. Bell, 430 U.S. 787 (1977), extended this principle to include even those issues that do not involve sovereignty or foreign policy. *Id.* at 792.

[183] *Mathews*, 426 U.S. at 81-82.

[184] *See* Carrasco, *supra* note 161, at 602-03; *see Mathews*, 426 U.S. at 86-87 ("[I]t is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration."); *see also* Graham v. Richardson, 403 U.S. 365, 376-80 (1971) (holding invalid an Arizona law limiting aliens' eligibility for benefits because it encroached upon exclusive federal power).

In *Mathews v. Diaz*,[185] the U.S. Supreme Court held that Congress has the right to condition aliens' eligibility for federal medical benefits on continuous residency in the United States and admission for permanent residence, even though a similar provision for citizens would be unconstitutional.[186] The Court premised its decision on the fact that aliens are not entitled to enjoy all the benefits of citizenship.[187] While the Court in *Hampton* agreed that the power of Congress and the President over immigration and naturalization is broad, it also determined that their power over aliens is not so plenary as to "arbitrarily subject all resident aliens to different substantive rules from those applied to citizens."[188] This rationale took a step back from the *Mathews* decision. Moreover, the *Hampton* opinion suggested that some judicial review was necessary since the federal classification affected an already disadvantaged class of people.[189] In order to pass constitutional muster, "overriding national interests" must justify the use of such a classification.[190]

4. Alienage as Suspect Classification and Standard of Review

Classifications based on alienage, nationality, or race are inherently suspect and subject to close judicial scrutiny.[191] Yet, in cases involving federal restrictions on aliens, the Court has avoided discussion of suspect classifications altogether.[192] This necessarily means that alienage is not entitled to strict scrutiny where federal classifications are involved. Instead in these cases, the Court has required only that the restriction be rationally related to its stated purpose. In *Mathews*, the Court used the rational basis test to sustain the statute in question, whereas in *Hampton*, it used a rational basis test to invalidate the classification. Further, in *Hampton*, the Court was unwilling to accept a hypothetical justification for the classification, and instead looked for a legitimate basis for presuming that the rule was intended to serve the overriding national interest.[193]

5. Application of the Equal Protection Challenge to the Civil Liberties Act

Under this approach, Japanese Peruvians may challenge the alienage classification in the Civil Liberties Act on grounds that it violates the equal protection guarantee of the Fifth Amendment. Since alienage is not presumptively

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[185] 426 U.S. 67 (1976).

[186] *Id.* at 79-80.

[187] *Id.* at 78.

[188] Hampton v. Mow Sun Wong, 426 U.S. 88, 101 (1976).

[189] *Id.* at 103. *See* Note, *The Equal Treatment of Aliens: Preemption or Equal Protection?*, 31 STAN. L. REV. 1069, 1086-87 (1979) [hereinafter *Equal Treatment of Aliens*].

[190] *Hampton*, 426 U.S. at 101.

[191] Graham v. Richardson, 403 U.S. 365, 372 (1971).

[192] *Equal Treatment of Aliens*, *supra* note 189, at 1088.

[193] *Hampton*, 426 U.S. at 103.

suspect in federal restrictions, the classification requiring eligible individuals to have been permanent residents or citizens at the time of their internment is likely to qualify only for rational basis, rather than strict, scrutiny. The considerations in determining whether the requirement passes constitutional muster include the national interests involved, Congress' role in issues involving immigration and foreign policy, and the deference given to Congress as a coextensive branch.

In terms of the Civil Liberties Act, the Court is likely to give deference to Congress's decision to award redress based on alien status. Here, the issue revolves around immigration, a field in which the Supreme Court deems Congress to have considerable expertise and authority. Congress' expertise and authority, however, are limited very specifically to entry and deportation, neither of which are a direct factor in this situation.[194] Furthermore, because Congress (and the Commission on Wartime Relocation and Internment of Civilians) has reviewed the relevant concerns surrounding this issue, it is presumed to have sufficient knowledge to make informed policy choices. Unfortunately, Congress, unlike states, may consider tangential issues, such as administrative convenience and fiscal priorities, when denying benefits based on alienage.[195]

The rational basis test only requires that a classification is rationally related to its stated purpose. The alienage requirement in the Civil Liberties Act is not rationally related to its purpose of compensating internment victims, especially because Japanese Peruvians were interned for the same reason as Japanese Americans — racial hatred. The pertinent question is whether compensating some, but not all, former internees is rational and not based on a hypothetical justification. Considering that individuals who received retroactive residency escaped the restriction, the fact that some Japanese Peruvians have received redress and others have not makes the classification wholly irrational. Since some Japanese Peruvians have attained redress, providing the others with that opportunity is the only just move for Congress to make.

B. *Assertion of Permanent Residency Under Color of Law (PRUCOL) to Gain Retroactive Residency and Attain Redress*

Alternative to asserting an equal protection challenge, Japanese Peruvians could argue that they do qualify for the $20,000 in reparations under the doctrine of permanent residency under color of law ("PRUCOL") because they were legal aliens at the time of their internment.[196] In some instances, this

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[194] Tangentially, however, the issues in this case do involve entry and deportation because of their forced entry into the United States and the deportation of some Japanese Peruvians to Japan.

[195] Hampton v. Mow Sun Wong, 426 U.S. 88 (1976).

[196] Sharon Carton, *The PRUCOL Proviso in Public Benefits Law: Alien Eligibility for Public Benefits*, 14 NOVA L. REV. 1033, 1051 (1990). PRUCOL is not available to all "illegal aliens" seeking federal benefits. *Id.* Rather, federal agencies only accept

INS doctrine has recognized the uncertain status of individuals like Japanese Peruvians who resided in the United States like formally recognized permanent residents, but lacked documentation necessary to enable them to receive public benefits. Often, the courts have allowed similar aliens to assert PRUCOL status and, thereby, become eligible for government benefits.[197]

In *Holley v. Lavine*,[198] the United States Court of Appeals for the Second Circuit required the state of New York to provide Aid to Families with Dependent Children (AFDC) benefits to a woman and her children even though she was not a permanent legal resident of the United States.[199] The court found that the plaintiff was living permanently in the United States with the knowledge and permission of INS.[200] Moreover, INS, despite knowing of this illegal arrangement, never attempted deportation, but instead notified the New York State Department of Social Services that "deportation proceedings have not been instituted . . . for humanitarian reasons" and the "Service does not contemplate enforcing her departure from the United States at this time."[201] Consequently, INS' inaction entitled the plaintiff to PRUCOL status and qualified her to receive AFDC benefits.

Japanese Peruvians may be eligible for redress benefits based on the PRUCOL doctrine if they meet the threshold requirement of citizenship or permanent residency in the United States. In order to attain permanent residency under PRUCOL, Japanese Peruvians must be: (1) "permanently residing" in the United States; and (2) this residence must be "under color of law."[202] The first criterion requires that an individual's residency in the United

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seven categories of PRUCOL: refugees; asylees; conditional entrants; aliens paroled into the United States; aliens granted suspension of deportation; Cuban-Haitian entrants; and applicants for registry. *Id.* (citing C. Wheeler, Alien Eligibility for Public Benefits: Part I at 3 (Immigration Briefings No. 88-11, 1988)).

[197] Holley v. Lavine, 553 F.2d 845, 847 (2d Cir. 1977); *see also* Berger v. Heckler, 771 F.2d 1556 (2d Cir. 1985).

[198] *Holley*, 553 F.2d 845.

[199] *Id.* at 848. The Social Security Act regulations require that a state plan include an otherwise eligible individual who is a resident of the United States but only if he is either (a) a citizen or (b) an alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law (including any alien who is lawfully present in the United States as a result of the application of the provision of section 203(a)(7) or section 212(d)(5) of the Immigration and Nationality Act). 45 C.F.R. § 233.50 (1995).

[200] *Holley*, 553 F.2d at 849.

[201] *Id. Holley*'s expansive reading formed the basis of efforts by other federal and state courts to interpret the PRUCOL criteria consistently and meaningfully. Some courts, however, have chosen to follow the more narrow approach taken in Esperanza v. Valdez, 612 F. Supp. 241, 244-45 (D. Colo. 1985), which required a specific statutory or regulatory review and a grant of an immigration status that allowed the alien to remain indefinitely. Carton, *supra* note 196, at 1044.

[202] Carton, *supra* note 196, at 1043.

States is "of continuing or lasting nature, as distinguished from temporary."[203] INS recognizes a "continuous and lasting" residency if it (1) has knowledge of the individuals' existence;[204] (2) permits the individuals to remain in the United States;[205] and (3) does not "contemplate enforcing" the deportation of these individuals.[206]

Many Japanese Peruvians are able to meet these criteria. First, many Japanese Peruvians have lived continuously in the United States since their deportation and subsequent internment. Second, similar to the plaintiff in *Holley*, Japanese Peruvians resided in the United States with the full knowledge and permission of INS before they received formal permanent residency and subsequently, American citizenship.[207] Furthermore, INS has never initiated deportation proceedings against any Japanese Peruvians currently residing in the United States.[208] Thus, by fulfilling the conditions for PRUCOL status, many Japanese Peruvians satisfy the threshold qualifications required to receive benefits under the Civil Liberties Act.

Japanese Peruvians, however, face one potential problem. Unlike statutes in other PRUCOL public benefit cases such as the Social Security Act, the Civil Liberties Act makes no mention of individuals who are permanent residents under color of law. On the other hand, the statute and accompanying rules proposed by the Office of Redress Administration (ORA) do not disqualify such individuals from obtaining reparations under PRUCOL.[209] The ORA rules specifically state that individuals who gained permanent residency before the internment period do qualify for benefits because they "meet the threshold

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[203] *Holley*, 553 F.2d at 848.

[204] Lewis v. Grinker, 794 F. Supp. 1193, 1204 (E.D.N.Y. 1991) ("Under a fair, broad, and reasonable interpretation of the term, knowledge includes that of which one is aware from personal observation.").

[205] Sudomir v. McMahon, 767 F.2d 1456, 1461 (9th Cir. 1985). It is not clear whether an official assurance is required, or whether mere inaction constitutes permission to stay. *But see* Velasquez v. Secretary of HHS, 581 F. Supp 16, 18 (E.D.N.Y. 1984) (placing the burden on the Secretary to give proof of the agency's intentions in the face of a record of inaction).

[206] *Holley*, 553 F.2d at 847-48; *see also Lewis*, 794 F. Supp. at 1204.

[207] GARDINER, *supra* note 1, at 29. *See also* Yamamoto & Hiura, *supra* note 41, at 1-2. More importantly, U.S. government officials forcefully brought Japanese Peruvians to the United States with the knowledge that they did not possess the necessary documentation to reside legally. Libia Yamamoto asks, "[H]ow could we be illegal aliens when the U.S. government was the one who forcibly took us from our homes, our country, took away our passports, and incarcerated us in concentration camps thousands of miles away to be used as hostages?" *Id.* at 1.

[208] *See* Yamamoto & Hiura, *supra* note 41, at 1-2. Not only were these individuals not deported, some were actually drafted a few years later to serve in the Korean War. *Id.*

[209] Civil Liberties Act Redress Provision, 28 C.F.R. § 74 (1995). None of the legislative history accompanying the Civil Liberties Act mentions permanent residents under color of law.

requirement of being permanent resident aliens during the evacuation, relocation and internment period and, as such, [are] eligible for compensation."[210] Consequently, Japanese Peruvians not currently eligible for reparations under the Civil Liberties Act can use the PRUCOL doctrine to obtain retroactive residency and thereby receive the reparations to which they are entitled.

C. *Implied Waiver of Passport and Visa Requirements to Gain Lawful Entry Status*

In order to qualify as permanent residents at the time of their internment, Japanese Peruvians may also argue that INS implicitly waived the normal passport and visa requirements by purposely bringing the Peruvian deportees into the United States. In some circumstances, INS has allowed "non-immigrants" or "in-transit" aliens to enter the country without the proper documentation.[211] Under the waiver doctrine, such individuals may allege that their entry into the United States was lawful because INS officials either failed to require the proper documentation or specifically allowed entrance without a passport and visa.[212]

In *Choy Yuen Chan v. United States*,[213] the United States Court of Appeals for the Ninth Circuit held that INS cannot disregard lawful entry into the United States unless it was erroneous or fraudulent.[214] The U.S. government allowed the defendant to enter the United States after a Board of Special Inquiry determined that he was Hawaiian-born.[215] Four years later, INS attempted to deport Choy Yuen Chan because it contended that he was in the United States unlawfully.[216] The court concluded that absent some affirmative proof of fraudulent acts by the defendant or others, the defendant's entry was lawful.[217] The court deemed inconsequential the fact that Mr. Chan lacked proper documents when he arrived in the United States.[218]

The Department of Justice and INS similarly facilitated the entry of Japanese Peruvians into the United States without proper documentation. The U.S. government brought these individuals into the country with full knowledge that they did not have the documents necessary to enter legally.[219] Japanese Peruvians acted neither erroneously nor fraudulently in entering the United States. Rather, the U.S. government intentionally brought Japanese Peruvians

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[210] *Id.*

[211] Choy Yuen Chan v. United States, 30 F.2d 516, 517 (9th Cir. 1929).

[212] *Id.*

[213] 30 F.2d 516 (9th Cir. 1929).

[214] *Id.* at 517.

[215] *Id.* at 516.

[216] *Id.*

[217] *Id.* at 517.

[218] *Id.* The (original) Board of Special Inquiry official made his decision based on his discretionary power, as provided by the statute, to be exercised upon examination of certain facts, of which he is the sole and exclusive judge. *Id.*

[219] GARDINER, *supra* note 1, at 29.

here, confiscated their passports, and denied them legal residency.[220] Moreover, although they lacked proper documentation, Japanese Peruvians continued to reside in the United States after their internment with governmental acquiescence.[221] These intentional actions by the U.S. government constitute an implied waiver of traditional visa requirements. Consequently, Japanese Peruvians' entrance into the United States was legal. Their internment, therefore, occurred while they were permanent residents, making them eligible for reparations under the Civil Liberties Act.

D. *Equitable Estoppel to Prevent Government Denial of Legal Residency Status and Redress Benefits*

The final potential avenue of redress for Japanese Peruvians invokes the doctrine of equitable estoppel. To make out a claim, Japanese Peruvians must first establish the traditional elements of estoppel, which require the following: (1) the party to be estopped knows the facts; (2) the party to be estopped intends for its conduct to be acted upon or acts so that the party asserting estoppel is ignorant of the facts; and (3) the party asserting estoppel relies on the conduct to his detriment.[222] Furthermore, any estoppel claim brought against the government must involve affirmative misconduct, rather than mere negligence.[223] Moreover, estoppel applies only if the government's wrongful conduct causes serious injustice, and the public's interests will not suffer undue damage by the imposition of government liability.[224]

In *Corniel-Rodriguez v. I.N.S.*,[225] the Second Circuit estopped the government from denying the plaintiff a permanent resident visa because she violated INS provisions by getting married just before she entered the country.[226] The court held that the government's failure to warn the plaintiff about the provisions qualified as affirmative misconduct that delayed the plaintiff's arrival to

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[220] *See* Yamamoto & Hiura, *supra* note 41, at 1.

[221] *See supra* text accompanying notes 114-28.

[222] *See* Heckler v. Community Health Serv. of Crawford County, 467 U.S. 51, 59 (1984) (citing Wilber Nat'l Bank v. United States, 294 U.S. 120, 124-25 (1935)); *see also* United States *ex rel.* Shakopee Mdewakanton Sioux Community v. Pan Am. Management Co., 616 F. Supp. 1200, 1209 (D. Minn. 1985); Gestuvo v. District Director of INS, 337 F. Supp. 1093, 1101 (C.D. Cal. 1971). *But see* Talanoa v. INS, 397 F.2d 196, 201 (9th Cir. 1968) (requiring that the fact situation be "a glaring and obvious one, to-wit, that he who, by his language or conduct, leads another to do what he would not otherwise have done").

[223] *See* Morgan v. Heckler, 779 F.2d 544 (9th Cir. 1985); *see also* INS v. Miranda, 459 U.S. 14, 17 (1982); INS v. Hibi, 414 U.S. 5, 11 (1973); Carrillo v. United States, 5 F.3d 1302, 1306 (9th Cir. 1993); Vickars-Henry Corp. v. Board of Governors of Fed. Reserve Sys., 629 F. 2d 629, 635 (9th Cir. 1980).

[224] McCurty v. United States, 30 Fed. Cl. (CCH) 108, 112 (1993); *see also Miranda*, 459 U.S. at 16.

[225] 532 F.2d 301 (2d Cir. 1976).

[226] *Id.* at 307.

the United States. In *Galvez v. Howertown*,[227] the court held that the government's improper rejection of the plaintiffs' immigration applications was affirmative misconduct resulting in the denial of fifth-preference immigrant visas.[228] The plaintiffs, therefore, suffered unreasonable delay in entering the United States. In both cases, the government was aware of the pertinent facts when it acted, while the plaintiffs were ignorant of these facts. Further, the government intended for the plaintiffs to act upon its conduct, which both defendants actually relied upon in securing immigration rights.

While the Japanese Peruvians' plight is not completely analogous to these cases, they can make similar arguments to estop the government from denying their lawful entrance into the United States. The U.S. government intended for Japanese Peruvians to act upon their conduct. When INS and Navy officials forcibly brought Japanese Peruvians to this country, they did so without allowing the deportees to retain proper documentation in their possession or to obtain the necessary visas beforehand.[229] Once the Japanese Peruvians were in the United States, however, these same officials claimed that the internees entered illegally. The Navy and INS subsequently denied Japanese Peruvians any opportunity to obtain legal immigrant status until several years later. The Japanese Peruvians did not understand why they were deported from Peru and interned in the United States, much less whether they resided here illegally. Their reasonable assumption was that because U.S. officials brought them to the United States, they had entered the country legally. Even if they had known, Japanese Peruvians were in no position, as wards of the state, to obtain proper documentation. Thus, Japanese Peruvians relied on the government's conduct regarding their immigration status.

While INS conduct constituted "affirmative misconduct," such misconduct may not meet the requirements of the equitable estoppel doctrine. Unlike the conduct in *Corniel-Rodriguez* and *Galvez*,[230] the actions of INS in this instance did not specifically violate any statutes or administrative rules. Although the U.S. government abducted Japanese Peruvians, brought them to the United States, took possession of their Peruvian passports, denied them visas, and interned them here for the duration of the war, none of these activities violate INS regulations. Therefore, an argument for estoppel must contend that the deportation and internment of Japanese Peruvians, and subsequent INS action amounted to government misconduct that caused a serious injustice. The INS' denial of visas to Japanese Peruvians prevented them from attaining legal immigrant status until a number of years after their internment. The denial of legal immigrant status has resulted in a denial of reparations under the Civil Liberties Act. Consequently, a great injustice will occur if the U.S. government can deny redress to Japanese Peruvians due to their *illegal immigrant* status, given that it carried out the deportation and intern-

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[227] 503 F. Supp. 35 (C.D. Cal. 1980).

[228] *Id.* at 40.

[229] *See* Yamamoto & Hiura, *supra* note 41, at 1.

[230] *See supra* text accompanying notes 225-28.

ment of these same people.

IV. CONCLUSION

The deportation and internment of Japanese Peruvians, like the internment of Japanese Americans, have left a blemish on American history. These acts of aggression resulted from racist wartime hysteria, rather than from an actual threat to national security. While Japanese Peruvians did not possess the same constitutional rights as American citizens of Japanese descent, they did not deserve to suffer what effectively was kidnapping and imprisonment. Now, as permanent residents and citizens of the United States, the U.S. government should enable Japanese Peruvians to obtain the same reparations that Japanese Americans receive, since little difference separates the motives behind the groups' internments and the conditions they faced.

The legislative history surrounding the enactment of the Civil Liberties Act does not explain the exclusion of Japanese Peruvians from obtaining redress. It is, therefore, difficult to understand the rationale behind the gap, especially considering the fact that many early House and Senate bills made no distinction between individuals of Japanese ancestry who were citizens or permanent residents at the time of their internment and those who were not. Since Japanese Peruvians do not qualify under the current requirements, they must take legal action to gain redress eligibility.

The most feasible of the four redress options available to Japanese Peruvians is gaining retroactive residency through PRUCOL. Utilizing PRUCOL enables them to become eligible for reparations without actually having to challenge the statute itself. As a group, Japanese Peruvians satisfy the qualifications for PRUCOL. They had resided in the United States for several years before receiving formal residency. INS knew and permitted Japanese Peruvians to reside in the United States without formal documentation, and did not contemplate enforcing their deportation (although INS did contemplate and force the deportation of other Japanese Peruvians from the United States). While the Civil Liberties Act does not mention individuals with PRUCOL status, it does not forbid this mode of eligibility. Moreover, the administrative rules surrounding the Act specifically mention individuals who obtained redress after attaining retroactive residency, suggesting that future applicants may attempt to gain eligibility through the same measures.

If PRUCOL fails to provide redress, the second most plausible means for Japanese Peruvians to gain eligibility under the Civil Liberties Act involves the doctrine of implied waiver. Like the PRUCOL approach, this avenue avoids a challenge to the statute. Here, Japanese Peruvians must assert that by taking their passports and denying them visas, INS officials implicitly waived the formal documentation requirements. Moreover, because INS, with the aid of other agencies, brought Japanese Peruvians to the United States, they necessarily facilitated the lack of passports and visas. Such action was intentional and deliberate and, therefore, should be treated as an implied waiver. If INS officials waived documentation requirements, then a Japanese

Peruvian's date of entry into the United States constitutes the beginning of permanent residency.

The estoppel option, while more feasible than an equal protection challenge to the Act, is more difficult to satisfy than the previous two. It requires a showing that government officials were aware of the facts regarding the deportation and internment, that they intended their conduct to be acted upon, and that Japanese Peruvians relied to their detriment. While these statements are generally true, proving them in specific instances may be quite difficult and tedious. Even more difficult is proving that these actions constituted affirmative misconduct. Unless INS provisions outlaw deporting and interning foreign nationals, this requirement may be insurmountable. It is likely that general misconduct would not suffice.

Finally, while applying equal protection principles to the Civil Liberties Act provides the most comprehensive approach to redress, it is also the least feasible alternative. Because federal restrictions on aliens do not merit suspect status, they also do not qualify for strict scrutiny, which would most likely invalidate the discriminatory classifications. Using the rational basis test, Japanese Peruvians may still be able to challenge the statute because the classification has no legitimate basis. However, Congress possesses a great deal of power and expertise in the area of immigration and the judiciary affords it great deference on such issues. This is due to Congress' status as a co-equal branch to the judiciary and the fairly intensive fact-finding process in which Congress engages before implementing a redress program. Therefore, the equal protection approach is unlikely to yield positive results. In fact, an equal protection challenge to the Civil Liberties Act may only cause Japanese Americans who currently can receive redress to become ineligible.

For Japanese Peruvians, gaining redress for the deportation and internment that they suffered is essential to help compensate them for the harsh experiences they faced at the hands of the American government. The reparations also provide validation of their experience, and discourage future occurrences of similar injustice and violations of civil liberties.[231] Japanese Peruvians should explore any or all of these redress options toward these ends.

Manjusha P. Kulkarni

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[231] 50 U.S.C. § 1989(a) (1988).