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Editor's Note

With great pride and pleasure, the Editors and I present Issue 2 of the Interdisciplinary Undergraduate Law Journal. I would like to thank everyone involved in the production of this issue, including the Editors, the Amherst College Department of Law, Jurisprudence, and Social Thought, the college, and particularly the authors. Without all of your contributions and support, this issue would not have been possible. We received a very favorable response to our first issue and we hope this issue is equally thought provoking. The Editors and I hope you will continue to support us on the road ahead, and we expect the journal will continue to prosper and set a standard of excellence in the field. We look forward to receiving your feedback, suggestions, requests for subscriptions, support, and of course your submission of new articles.

Sincerely,

Adam Shniderman

Editor-in-Chief/Founder

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With the saturation of everyday life by modern science and technology, the increasingly global and unequal flow of culture, capital, commodities and populations across nation-state boundaries, the transformation and even crisis of human rights and the dismaying consistency of human rights abuses, and the constant depiction of law in diverse traditions of popular culture, literature, and film, we are faced with a host of new, troubling, and intriguing questions about law that cannot be fully posed, much less answered, within the narrow horizons of conventional legal training and/or the traditional social sciences.

As students of law and the humanities, it is our responsibility to pose these questions and to strive to answer them with the nuance, clarity, probity, and rigor that are the marks of the very best of the liberal arts tradition.

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Prejudice and Ethnic Bias in Momentous Political Trials of the 20th Century

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Abstract:

This project examines trials at significant moments in 20th century United States history that have been influenced by external forces such as immigrant status and national security concerns. The purpose is to show a correlation between attacks perpetrated by foreign or immigrant groups and a failure in the legal system due to external forces. An interdisciplinary methodology encompassing both history and law is necessary because of the scope of the topic. By examining the cases of *Commonwealth v. Sacco*, *Korematsu v. United States* and *Hamdi v. Rumsfeld* and the historical settings in which they took place, it is evident that a correlation does indeed exist between attacks perpetrated by foreigners or immigrants and failures in the justice system. Through the examination of these cases, a continuum becomes apparent in which the influence of external forces builds in Sacco, peaks in Korematsu and then recedes post 9/11 in Hamdi. The study concludes that the presence of external forces at a trial, namely prejudice towards immigrants and national security fears, at times of high tension in American history, indicate a probability that a miscarriage of justice will occur if these factors unduly influence the trial.

Introduction:

One of the most recent and significant events in American history, the terrorist attack of September 11, 2001, affected every American from coast to coast. The arrests, detentions and trials conducted post-9/11, when the nation craved vengeance, caused many to wonder whether external forces, such as public paranoia and insecurity, could affect the very core of the American legal system. This question requires a much broader look at the past one hundred years of our history. Utilizing an interdisciplinary, chronological-compare and contrast method, it becomes clear that trials at significant moments in 20th century United States history that have been unduly influenced by external forces and circumstances predate the post-9/11 climate, with regard to prejudice against immigrants and concerns about national security.

There have been multiple attacks similar to 9/11 in the United States, generally perpetrated by foreigners. Through the exploration of these attacks and their effects on the American people, and subsequent examination of trials conducted in the aftermath of these attacks, it will be clear that outside forces have played a role in the courtroom. The trials of Nicola Sacco and Bartolomeo Vanzetti¹ in the 1920's and Fred Korematsu during the 1940's occurred in atmospheres very similar to that of the post-9/11 era. Sacco and Vanzetti, two Italian immigrants, were tried for murder and robbery just after the height of the Red Scare. The case, which took place over eighty years ago, is still highly debated subject. *Korematsu v. United States*, 323 U.S. 214 (1944) was another controversial case that was heard under the cloud of World War II and in the shadow of the attack on Pearl Harbor. Finally, the post 9/11 case *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)², will be analyzed in order gain a comprehensive understanding of how outside forces have affected issues inside the courtroom over the past 100 years.

The complexity of this issue requires the use of an interdisciplinary approach because no single academic discipline can adequately explain it. The three touchstone cases will be investigated first from a historical perspective, taking into account the background of the time period, the ethnic groups involved, their past treatment and society's feelings towards them at the time. Each case will be viewed in terms of its effect on confidence in national security. Then each case will be analyzed from a legal standpoint. The trials, appeals, and rulings in each case will be examined for inconsistencies and abnormalities, which will then be the correlated to

¹ *Commonwealth v. Sacco*, 158 N.E. 167 (Mass. 1927).

² *Hamdi* was a 2004 United States Supreme Court case that dealt with the indefinite detention of a American citizen captured in a military zone in Afghanistan.

external forces. All three cases will be compared and contrasted to illustrate that external forces can and have influenced the outcomes of trials in the past, as well as in the present.

Political Trials and the Touchstone Cases:

External forces, in particular, prejudice against immigrants and concerns about national security, can affect the atmosphere and outcome of legal proceedings which, arguably, should be immune from such pressures. The effects of external forces on the American legal system will be examined through the study of two cases: *Commonwealth v. Sacco*,³ *Korematsu v. United States*, and *Hamdi v. Rumsfeld*. These cases were selected for specific reasons. They all occurred during significant moments of 20th century United States history where national security was a major concern. Moreover, each case involved members of an ethnic immigrant group that, at the time, was disliked by the American public. Also, each cases had controversial outcomes.

Political Trials:

The *Sacco and Vanzetti*, *Korematsu* and *Hamdi* cases are classified as “political trials”, according to Ronald Christenson. Christenson, a Political Science professor at Gustavus Adolphus College, writes that political trials are hard to define but, “we can recognize political trials when we see them.”⁴ Political trials stand out because they simultaneously involve legal and political agendas ordinary criminal cases do not.⁵ In the average criminal case, the only issue at hand is legal *i.e.*, Did the defendant commit the crime? Was there intent? A political trial, on the other hand, also involves a political agenda, usually to punish or dominate the person or

³ *Commonwealth v. Sacco*, 158 N.E. 167 (Mass. 1927).

⁴ Ronald Christenson, “A Political Theory to Political Trials,” *The Journal of Criminal Law and Criminology* 74, no. 2 (1983): 548.

⁵ *Ibid.*, 554.

group on trial. Political trials “proceed according to a fully political agenda, with only a façade of legality.”⁶

Perhaps two of the most famous examples of political trials are those of Socrates and Jesus Christ. Socrates was put on trial and sentenced to death not because he had corrupted the youth of Athens, but because of his close association with the Thirty Tyrants and their leader Alcibiades. Similarly, Jesus was sentenced to be crucified because of the threat he posed to the religious establishment, not for blasphemy and sedition. In these cases and other political trials, the law is used by prosecutors and politicians as a tool to push political agendas.⁷

In addition to having dual agendas, political trials share a number of other common characteristics. They usually involve a threat to authority,⁸ either legitimate or fictional. Political trials also tend to involve some type of hysteria,⁹ usually a product of the exaggerated claims made by the media, politicians or both.¹⁰ In most instances, hysteria is used to make the defendant or a group that the defendant belongs to, often their ethnic or religious group, a scapegoat for the catastrophic event that prompted the trial.¹¹ Revenge is often the driving force behind many political trials,¹² punishing defendant for the catastrophic event, regardless of whether they are guilty or innocent. Another characteristic of most political trials is that powerful

⁶ Ronald Christenson. “What is a Political Trial?” *Society* (1986):28.

⁷ Ronald Christenson, “A Political Theory to Political Trials,” *The Journal of Criminal Law and Criminology* 74, no. 2 (1983): 575.

⁸ Christenson. “What is a Political Trial?” 26.

⁹ Christenson, 26.

¹⁰ Lawson Fusao Inada, ed. *Only What We Could Carry: The Japanese American Internment Experience*. (Berkeley: Heyday, 2000), 13, 570.

¹¹ Ronald Christenson. “What is a Political Trial?” 26.

¹² Christenson, 26.

figures will “weigh in” to lend support to the verdict, giving it more credibility.¹³ These figures can range from academics to judges,¹⁴ so long as they are influential and well respected.

Political trials can be classified into four categories based on the political questions they raise: trials of corruption, trials of dissenters, trials of nationalists and trials of regimes.¹⁵ Trials of dissenters and trials of nationalists are the two categories most relevant to this study. Trials of nationalists are cases in which, “the nature of representation is at stake.”¹⁶ In other words, does the government represent the ethnic group on trial or does it repress them? If the latter is the case, then it can be a step towards the domination or elimination of that particular ethnic group. The exploitation of ethnicity and immigration status to create public bias are two means of subjugating minority groups.¹⁷ Trials of dissenters involve challenges to the government, usually over controversial policies. Ironically, these cases the government’s policies are on trial just as much as the defendants.¹⁸ Frequently, the dissenters argue that the government’s policies are morally wrong, while the government, via the prosecution, attempt to justify themselves legally.¹⁹ Trials in this category are prosecuted with the purpose of eliminating opposition to the policy or policies in question.²⁰

These categories, along with the common characteristics of political trials create a guideline for analyzing, comparing and contrasting the trials involved in this inquiry. Categorizing each case as a trial of dissenters or trial of nationalists allows for a better

¹³ Christenson, 26.

¹⁴ Christenson, “A Political Theory,” 550.

¹⁵ Christenson, 554.

¹⁶ Christenson 564.

¹⁷ Felix Frankfurter, *The Case of Sacco and Vanzetti* (New York: Little, Brown and Co., 1927), 59.

¹⁸ Christenson, “A Political Theory,” 559.

¹⁹ *Ibid.*

²⁰ *Ibid.*

understanding of what role history and past treatment of minorities played in the courtroom. It also provides the second hidden agenda in each political trial, which were already established above.

The Sacco and Vanzetti Case:

The trial of Fernando “Nicola” Sacco and Bartolomeo Vanzetti was a notorious case, the facts of which are still debated today. During their trial and subsequent appeals in the 1920s, the case divided the nation, and even the world. Many believed they were innocent men on trial for their anarchist beliefs, while others believed the trial to be fair and just. Sacco and Vanzetti were found guilty of first degree murder on July 14, 1921²¹ and, after a lengthy appeals process, were executed by means of electrocution on August 23, 1927.²² The circumstances of the crime and evidence against them were vague at best. Many believe that the biggest pieces of evidence against them were their ethnicity and their political beliefs. The main legal issue in the case was that the conviction was based not on physical evidence linking Sacco and Vanzetti to the crime, but on circumstantial evidence and the unpersuasive, weak testimony of five eyewitnesses.²³

The period in history, following the First World War, was a time of fear and anxiety known as the Red Scare. Sparked after a number of bombings in 1919, the Red Scare was a national fear of Anarchists, Communists, Socialists or any other leftist groups.²⁴ People feared these groups would undermine American society by inciting riots and strikes, eventually causing a “Bolshevik-style revolution” in the United States.²⁵ A number of strikes did occur throughout

²¹Frankfurter, 8.

²² Famous Trials. “Chronology.” Ed. Douglas O. Linder. (Missouri: University of Missouri-Kansas City School of Law, 2007), <http://www.law.umkc.edu/faculty/projects/ftrials/SaccoV/chronology.html> (accessed December 1, 2007).

²³ Frankfurter, 11.

²⁴ Famous Trials. “The Red Scare.”

²⁵ Ibid.

the country in 1919, and while none were sparked by radical movements, the news media portrayed them as if they did. Newspapers created a frenzy about what the anarchists had done and what they were planning to do next,²⁶ which caused a public hysteria, and gave credibility to the fears that America was under siege. Anyone involved with the strikes or a leftist organization was automatically labelled a “Red” and “red hunting became a national obsession.”²⁷

At the behest of United States Attorney General A. Mitchell Palmer, a division of the Bureau of Investigation was founded to expose radical conspiracies and arresting the conspirators.²⁸ This group was responsible for the arrest and deportation of thousands of alleged radicals, based on little more than a suspicion. Many of these people were rounded up simply because of their ethnicity and associations, held in inhumane conditions, mistreated and denied their civil rights. “If the national press is any indicator of the predominant mood of the country, then the efforts of the Justice Department was [were] overwhelmingly supported by the masses because the raids, deportations, and arrests were all championed on the front page of most every paper.”²⁹

Both Sacco and Vanzetti would have been considered “Reds” because they were known anarchists. In general terms, anarchism is a “political theory holding all forms of governmental authority to be unnecessary and undesirable and advocating a society based on voluntary cooperation and free association of individuals and groups.”³⁰ Within these political groups there

²⁶ Frankfurter, 44.

²⁷ Famous Trials. “The Red Scare.”

²⁸ Ibid.

²⁹ Ibid.

³⁰ Merriam-Webster Online. “Anarchism,” <http://www.m-w.com/dictionary/anarchism> (Accessed November 29, 2007).

are many different sects, each of whom advocates the core ideals of anarchism in different ways. Some of these factions operated incognito, working within labor unions, while others were much more visible and radical. Sacco and Vanzetti were followers of Luigi Galleani, a radical Italian Anarcho-Communist who advocated terrorism and the violent overthrow of the government.³¹ An Italian immigrant, Galleani ran an anarchist newspaper, called *Cronoaca Sovversiva*, the *Subversive Chronicle*, and supported theft and robbery as long as it benefit the movement.³² Galleani also supported assassinations of government officials and distributed materials on bomb making.³³

The Galleanistas were primary targets of the government not only because of their radical views, but because of the violent and criminal means by which they hoped to achieve their goals. In all likelihood, Sacco and Vanzetti were on a list of dangerous enemies as well. Galleani was eventually arrested and deported in 1919, and the Galleanistas went underground.³⁴ It was in this volatile social and political climate that Sacco and Vanzetti were arrested and tried for the South Braintree robbery.

The case of Sacco and Vanzetti fits the description of a political trial on many different levels. The dual agendas involved are obvious. There was the legal agenda of whether or not Sacco and Vanzetti were guilty of the double murder and robbery in South Braintree, Massachusetts. The political agenda rested on the fact that Sacco and Vanzetti were Italian immigrants involved in an anarchist group. This agenda may have been informed by the fact that group may have been linked to an assassination attempt on the attorney general, made up the

³¹ Nunzio Pernicone, "Carlo Tresca and the Sacco-Vanzetti Case," *The Journal of American History* (1979): 536, 538.

³² *Ibid.*, 539.

³³ Famous Trials. "Chronology." Attorney General Palmer was actually the target of a botched assassination attempt, possibly by the Galleanistas, when an associate of Sacco and Vanzetti blew himself up outside of Palmer's home.

³⁴ Pernicone, 537.

political agenda of the case. Their involvement in a violent radical group also suffices as a threat to the government, and the hysteria requirement is more than met by the “Red Scare.” The idea of revenge as a motive is plausible considering the bombing and assassination attempts were all attributed to radical leftist movements. Finally, power figures did “weigh in” on the case late in the appeals process, offering their support for the guilty verdict.³⁵ In terms of Christenson’s four categories, the Sacco and Vanzetti case was a Trial of Nationalists because of the role the defendants’ ethnicity and political views played in the trial.

The Korematsu Case:

The United States Supreme Court heard *Korematsu* in October 1945, with the attack on Pearl Harbor and World War II still looming over the nation. The central legal issue before the Court was whether the President and Congress acted beyond their constitutional powers by restricting the rights of Americans of Japanese descent and forcing them into internment camps. The Petitioner in the case, Fred Korematsu, was originally convicted for his failure to evacuate San Leandro California, which was deemed as part of a “military area.”³⁶ This was a violation Civilian Exclusion Order No. 34, which declared all people of Japanese ancestry were to be excluded from that zone.³⁷ The also challenged the much broader Executive Order No. 9066, which ordered the internment of people of Japanese ancestry living on the west coast of the United States.³⁸ The court ruled six to three against Mr. Korematsu, despite the fact that he was a loyal American citizen. Justice Hugo Black, in the opinion of the court, wrote that the need to protect national security justified restricting the rights of Americans of Japanese descent.³⁹

³⁵ Christenson, “A Political Theory,” 550.

³⁶ *Ibid.*, 214.

³⁷ *Ibid.*

³⁸ As cited By Takahata, 119.

³⁹ *Ibid.*

However, many feel the real reasons behind Japanese-American internment were prejudice and fear.

Asians have been victims of racial prejudice since they first began immigrating to the United States in the 19th century. Chinese immigrants were the first Asian group to be legally discriminated against in America. For example, the Chinese Exclusion act of 1882 and the Geary Act of 1892 are two examples of discrimination against Asians by the Federal government.⁴⁰ These acts prohibited the immigration of Chinese laborers to the United States, and also restricted the rights of those already in the country.⁴¹ These acts marked the first time federal law limited immigration on the basis of ethnicity. The Japanese were the second target of legal discrimination among Asian groups. Like the Chinese Exclusion and Geary Acts, the Immigration Act of 1924 severely limited the number of Japanese immigrants that could enter the country.⁴²

After the Japanese attack on Pearl Harbor, on December 7, 1941, discrimination against Japanese-Americans reached a new level. Immediately after the attack, , national security was a primary concern. Many feared an invasion of the west coast inevitable and that the Empire of Japan already had spies and saboteurs planted in America, *all* “Japs” were seen at as spies and considered sneaky, treacherous, disloyal and untrustworthy.⁴³ This cause for alarm was elevated to the level of hysteria by an irresponsible news media. Two mainstream newspapers on the west coast, *The Sacramento Bee* and *The San Francisco Chronicle*, had taken anti-Japanese stances

⁴⁰ Ibid.

⁴¹ Ourdocuments.gov, 2006. <http://www.ourdocuments.gov/doc.php?flash=true&doc=47> (accessed November 29, 2007).

⁴² Hane, 569.

⁴³ Ibid, 570.

even before the war.⁴⁴ *The San Francisco Chronicle* printed an editorial on January 7, 1942 telling people not to call Japanese-Americans “yellow” because that would associate them with the honorable Chinese. The newspaper suggested calling them “Japanazis” instead.⁴⁵ Other editorials blamed Japanese-Americans for Pearl Harbor altogether, which only fanned the flames of prejudice and hate.⁴⁶

Newspapers were not the only source of anti Japanese-American sentiment. Many public figures, including Lieutenant General John L. DeWitt, Military Commander of the Western Defense Command, who was one of the most outspoken.⁴⁷ DeWitt was quoted as saying “A Jap is a Jap,” meaning there was no difference between the Japanese in Japan and Japanese immigrants in America.⁴⁸ He also said, “We will have to worry about the Japs until they are wiped off the face of the map.”⁴⁹ Dewitt’s plan of action against the Japanese in America was similar to Hitler’s “final solution” in Germany.⁵⁰ What is most troubling about the Lieutenant Generals statements is not their radical racist nature, but the fact that they came from a man whose proposals to the President became the basis for Executive Order No. 9066, and who was later put in charge of the evacuation and relocation of the Japanese on the west coast.⁵¹

President Franklin D. Roosevelt issued Executive Order No. 9066 on January 19, 1942, which authorized the interment of all people of Japanese descent on the west coast, including

⁴⁴Inada, 11.

⁴⁵ Ibid, 13.

⁴⁶ Ibid, 22.

⁴⁷ Sandra Takahata. “The Case of *Korematsu v. United States*: Could it be Justified Today?” *University of Hawaii Law Review* (1984): 119.

⁴⁸ Hane, 570.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Takahata, 119.

American citizens.⁵² Roosevelt wrote, “[t]he successful prosecution of the war requires every possible protection against espionage and against sabotage to nation-defense material, national-defense premises and national-defense utilities.”⁵³ However, the government had already taken measures to protect the west coast by detaining all enemy aliens considered dangerous by the nation’s intelligence services through the Alien Enemy Act.⁵⁴ For reasons that remain contested, the President, at the urging of DeWitt and the public, decided to go a step further and detain all people of Japanese ancestry.

The conditions in the internment camps were poor. The camps were located in deserts, and detainees had the bare minimum they needed to get by. United States Supreme Court Justice Frank Murphy, who was against the idea of internment, summed it up as having, “a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany.”⁵⁵

Internment came as a result of public hysteria and national security concerns. However, whether mass internment based on ethnicity was justified by the situation, as both the President and the Supreme Court claimed, remains open to debate. One thing that cannot be disputed, however, is that, of the 119,803 people who were interned, sixty-five percent of them were American citizens.⁵⁶ Fred Korematsu was one of those American citizens. He is a perfect example of an individual who posed no threat to national security, but was detained as a result of racism and fear. Born in California, Fred Korematsu had never even left the Continental United States.⁵⁷ Never, at anytime, had he renounced his citizenship or pledged allegiance to another

⁵² Hane, 571.

⁵³ Takahata, 119.

⁵⁴ *Ibid*, 117.

⁵⁵ Hane, 572.

⁵⁶ Inada, 191.

⁵⁷ Takahata, 121.

country.⁵⁸ In fact, Mr. Korematsu was actually a model citizen, a regular voter who was willing to serve his country in the war against Japan.⁵⁹ Despite all of the evidence in his favor, the Supreme Court ruled against him because he was a Japanese-American at a time when the country was at war with Japan. The court's decision to uphold such blatantly racist policies "remains as precedent for justifying restrictive government actions against an ethnic minority on the basis of military necessity."⁶⁰

Korematsu fits the criteria of a political trial in many of the ways same ways the Sacco and Vanzetti trial did, including a dual agenda. The legal agenda pertained to whether Civilian Exclusion Order No. 34 and Executive Order No. 9066 were beyond the scope of Presidential and Congressional powers, and therefore unconstitutional. Additionally, the agenda of the anti-Japanese sentiment and racism underscored not just this case, but this whole time period. Similar to the Sacco and Vanzetti case, there was a public hysteria caused by fear of a Japanese invasion of America that was only made more intense by newspapers like *The San Francisco Chronicle* and individuals like Lieutenant General DeWitt. Revenge was a very likely motive behind internment. The case also had many powerful figures involved, including the six Justices who upheld the ruling. *Korematsu* proceeded according to a fully political agenda of eliminating any opposition by Japanese-Americans to the policy of interment, while only maintaining a façade of legality. As Ronald Christenson described, this case should be considered a cross between Trials of Dissenters and Trials of Nationalists.⁶¹

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid, 115.

⁶¹ Christenson, "A Political Theory," 554.

The Hamdi Case:

Hamdi v. Rumsfeld, 542 U.S. 507 (2004), was born in the wake of the tragedies of September 11, 2001. Yaser Esam Hamdi, an American citizen, was being held at the Guantanamo Bay detention center indefinitely as an illegal enemy combatant. Through his father, Hamdi petitioned the United States Court of Appeals for the Fourth Circuit for a writ of habeas corpus.⁶² At issue in this case was whether the Executive Branch had the authority to hold American citizens indefinitely without granting them the protections guaranteed by U.S. Constitution. The Court ruled in a six to three decision that American citizens designated as enemy combatants have a right to contest their detainment before a neutral decision maker under the Due Process Clause.⁶³

Americans in the past have viewed certain minorities as “outside the traditional ‘American’ social circle.”⁶⁴ Once again this seemed to be the case after 9/11, a minority group labeled guilty by association and being persecuted for the crimes of others simply because they looked alike or shared the same religion. A foreign enemy had viciously executed a surprise attack on the United States and people all over the nation were gripped by fear and insecurity. These feelings were now directed at Arab-Americans who were in the public’s cross-hairs because of the nationality and religion of the 9/11 hijackers.

⁶² Ibid.

⁶³ Ibid., 509.

⁶⁴ Vijay Sekhon, *More Questions than Answers: The Indeterminacy Surrounding Enemy Combatants Following Hamdi v. Rumsfeld*, 9 Boalt J. Crim. L. (2005): 6.

The United States Congress acted quickly to pass the USA PATRIOT ACT on October 26, 2001, which was immediately signed into law by President George W. Bush.⁶⁵ This act limited certain civil rights in the name of national security. Not only did this act allow the government to hold people designated as “enemy combatants” indefinitely but it also lessened restrictions on authorizations for wiretaps and search warrants.⁶⁶

In the aftermath of 9/11, the American people heavily supported the USA PATRIOT Act and other similar government actions.⁶⁷ People wanted to feel safe and reassured, and they were willing to give up almost anything to do so. Of course Muslim-Americans would suffer the most from the expansion of executive power, because nationality and religion associated them with the 9/11 hijackers in the public’s eye.

As time progressed, the effects of limited civil rights became apparent in the media’s coverage of Guantanamo Bay and other terrorist cases. More and more citizens began to speak out against Constitutional abuses such as the USA PATRIOT Act and public support quickly dried up. With the help of mass media, people became more aware of the liberties that they had and when they were being infringed upon.⁶⁸ Americans began to realize that it was not necessary to trade civil liberties for security. It was in this setting that the Supreme Court heard *Hamdi*.

The petitioner in this case, Yasser Essam Hamdi, was born in Baton Rouge Louisiana in 1980 and moved to Saudi Arabia with his family as a child shortly thereafter.⁶⁹ In 2001, Hamdi

⁶⁵ Highlights of The USA PATRIOT Act. (Washington D.C.: Department of Justice, 2007) <http://www.lifeandliberty.gov/highlights.htm> (accessed April 17, 2008).

⁶⁶ Ibid.

⁶⁷ “U.S. Senate Roll Call Votes 107th Congress 1st Session.” United States Senate. October 25, 2001. http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=107&-session=1&vote=00313 (accessed May 1, 2008).

⁶⁸ Rebecca M. Kahan, *Constitutional Stretch, Snap-Back, and Sag: Why Blaisdell Was A Harder Blow to Liberty Than Korematsu*, 99 Nw. U. L. Rev. (2005): 1295.

⁶⁹ *Hamdi v. Rumsfeld*, 542 U.S. 510, (2004).

was apprehended in Afghanistan by the Northern Alliance and turned over to United States forces. Mr. Hamdi was then sent to Guantanamo Bay.⁷⁰ Mr. Hamdi was classified as an enemy combatant before authorities realized he was an American citizen. His classification remained unchanged even after it became clear that Hamdi was a U.S. citizen. In his petition to the court, Hamdi's father claimed that his son was in Afghanistan doing relief work and had only been in the country for two month prior to 9/11.⁷¹ Regardless of the parties positions the fact remained that as an enemy combatant Yaser Esam Hamdi was not allowed any opportunity to contest his detention despite being an American citizen.

In his petition, Hamdi asserted that as a U.S. citizen he was entitled to the full protection of the Constitution. He also argued that the detention violated his Fifth and Fourteenth Amendment rights.⁷² The Supreme Court agreed, holding while Congress had authorized Hamdi's detention through the PATRIOT Act, as a citizen he was still entitled to receive due process.⁷³ The court reversed and remanded the case and ordered the lower court to balance Hamdi's interest in liberty against the public's interest in security.⁷⁴

When deciding whether to characterize a case as a political trial, it is important to look at the elements of the proceedings and not simply the results. Looking at the outcome of *Hamdi* it is possible to be deceived and think it was not a political trial, when in fact it was. *Hamdi* meets several of Christenson's criteria for identifying political trials. The case involved a threat to authority and public hysteria that was exaggerated by the both the media and the government.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Jeffrey Rosen, *The Supreme Court: The personalities and Rivalries That Defined America* (New York: Times Books, 2006), 212.

⁷⁴ Ibid.

Repeatedly showing clips of the two airplanes slamming into the World Trade Center, the media heightened the public's outrage. The Department of Homeland Security also intensified fear across the nation with the use of their color-coded warning system, often raising and lowering the national threat level without explanation. High-ranking officials advocated the government's position, including Michael Mobs, a special advisor to the Undersecretary of Defense, who testified for the defense. Most importantly however, *Hamdi* contained dual agendas, which is a key characteristic of a political trial. Operating under a veil of legality the defense in *Hamdi* attempted to block those detained as enemy combatants from receiving a fair hearing to dispute their detention, by allowing detainees only a severely limited form of discovery on this basis that many of the necessary documents were classified.⁷⁵

This trial has elements of both a trial of ethnic nationals and a trial of dissent, much like *Korematsu*. *Hamdi* was a trial of ethnic nationalists because it involved an attempt by the government to dominate a particular ethnic group,⁷⁶ in this case through indefinite detention. *Hamdi* also had a second characteristic of trials of ethnic nationalists: a belief that the laws of the country failed to protect him, evident in his claim of a failure to receive the due process he was entitled. At the same time, it was also a trial of dissenters because *Hamdi* was as much about the petitioner's rights, as a United States citizen, as it was a trial of the Bush Administration's policy on indefinite detention of enemy combatants. Christenson notes that the examination of government policy is a critical characteristic of a trial of dissent.⁷⁷

Aside from being a political trial, *Hamdi* was also affected by external forces. When compared to another post 9/11 case of a United States citizen being detained as an enemy

⁷⁵ Sekhon, 7.

⁷⁶ Christenson., 555.

⁷⁷ Christenson, 559.

combatant, *United States v. Lindh*, 227 F. Supp. 2d 565, (E.D. Va. 2002), the influence of ethnic bias becomes apparent. *Lindh* was very similar to *Hamdi*, both cases involved United States citizens seized in Afghanistan during United States military operations against the Taliban. However, unlike in *Hamdi*, *Lindh* was informed of the charges against him and was tried in a civilian criminal court with all of his constitutional rights.⁷⁸ The major differences in these two cases were that *Lindh* lived his whole life in the United States, whereas *Hamdi* moved away as a child, and *Lindh* was a Caucasian who converted to Islam, while *Hamdi* was an Arab and born a Muslim. In the years, following these decisions, the government has offered no explanation for why *Hamdi*'s rights were different from *Lindh*'s.⁷⁹ The length of each man's residence within the United States is irrelevant considering that it is place of birth that makes a person a citizen. Furthermore there is no law, be it common law or statute that suggests that Constitutional rights somehow strengthen with the length of one's residency in the United States or its territories. Thus eliminating one similarity, the only true distinguishing fact between these cases is the ethnicity of the parties involved.⁸⁰

Commonwealth v. Sacco, *Korematsu v. United States* and *Hamdi v. Rumsfeld* have more in common than being political trials. They share the common denominator of an unstable time period where prejudice and insecurity form a hysteria that cause a wanton disregard for the laws and principles that should make up the American legal system. Further analysis of the cases discussed in this chapter, with the help of theories and concepts from both history and law, will prove that it was this commonality of crisis that allowed anti-immigrant sentiment and national security fears to affect each touchstone case.

⁷⁸ John Lichtenthal, *The Patriot Act and Bush's Military Tribunals: Effective Enforcement or Attacks on Civil Liberties?*, 10 *Buff. Hum. Rts. L. Rev.* (2004): 415.

⁷⁹ *Ibid.*

⁸⁰ *Ibid.*

Comparing, Contrasting and Common Ground:

In a legal system where Justice is thought of as blindfolded, the fact that citizens' rights can differ because of skin color or ethnicity demonstrate how external forces, namely public fear and anti-immigrant or minority sentiment, can affect a trial. Looking at the previously examined cases, *Commonwealth v. Sacco* and *Korematsu v. United States* together with *Hamdi v. Rumsfeld* a pattern begins to emerge. During times of crisis, "other" racial groups are considered less deserving of Constitutional protections than traditional American racial groups.⁸¹ The two academic disciplines involved in this study, history and law, each offer their own theories which attempt to explain why external forces can affect the legal system and how they do so. Each of these theories is covered at length below, however first it is important to understand the relevant similarities and differences between the three touchstone cases.

Comparing and Contrasting Cases:

Each of the three touchstone cases was selected because they occurred during a period marked by public hysteria as a result of an attack by a foreign or immigrant group. The Federal government, more precisely the Executive Branch, responded to each case by using the fear and hysteria to their advantage. National emergencies require action by the government which must be large enough to match the threat and swift enough to contain it.⁸² However, the government often exaggerates dangers in order to impose stronger restrictions of liberties than necessary.⁸³ The Executive errs naturally on the side of national security.⁸⁴ The habit of the executive branch

⁸¹ Sekhon, 6.

⁸² Kahan, 1291.

⁸³ *Ibid.*, 1312.

⁸⁴ Richard H. Fallon Jr., *Habeas Corpus Jurisdiction, Substantive Rights and The War on Terror*, 120 *Harv L. Rev.* (2007): 2068.

to err on the side of security rather than liberty is compounded because often the people who are being impacted are unable to speak out and gain public support due to their race or culture.⁸⁵

Examples of exaggeration by the government can be found in each case. During the Red Scare, the Justice Department had a strong belief that the rash of bombings were in retaliation for the government's policies regarding anarchism. However the Justice Department wanted to make the attacks look like the first step in a nationwide radical uprising.⁸⁶ This approach would allow them and other law enforcement agencies the public support necessary to crackdown harshly on anyone suspected of being a radical. Similar examples of exaggeration can be found during World War II in the statements of politicians and military personnel like General DeWitt.⁸⁷ The USA PATRIOT Act is also an example of both the executive and legislative branches capitalizing on public fear just after 9/11 and imposing harsher than necessary restrictions on liberties.

Another important similarity is the importance of race in each case. The ethnicity of the parties involved in all three touchstone cases seems to be the reason these individuals were denied basic Constitutional protections. Sacco and Vanzetti's status as Italian immigrants combined with their poor ability to speak English was used against them by the prosecution to transfer an ethnic bias that already existed in the public into the courtroom.⁸⁸ Evidence suggests that the trial of Sacco and Vanzetti was part of a collusive effort between the District Attorney of Massachusetts and the Department of Justice to rid the country of radical Italians.⁸⁹ The Internment of Japanese-Americans seems purely race based. There was no commonality between

⁸⁵ Ibid.

⁸⁶ Hagedorn, Ann, *Savage Peace: Hope and Fear in 1919* (New York: Simon & Schuster, 2007), 225.

⁸⁷ Mikiso Hane. "Wartime Internment." *Journal of American History* (1990): 570.

⁸⁸ Felix Frankfurter, *The Case of Sacco and Vanzetti* (New York: Little, Brown and Co., 1927), 59.

⁸⁹ Ibid., 68.

the detainees other than ethnicity. The fact that there was no mass removal of people in Hawaii, where the Japanese attack occurred suggests that the decision to intern Japanese-Americans on the west coast was based on racial and political reasons rather than safety or security.⁹⁰ In the same respect, the difference between the rights afforded John Walker Lindh and Yasser Essam Hamdi is an example of the role race has played in the post 9/11 era.⁹¹

These touchstone cases also have a number of important differences, one of which is the nature of the attack preceding each case. *Sacco and Vanzetti* and *Hamdi* both followed “terrorist” attacks. In both cases, individuals carried out violent attacks targeting civilians to make a political statement through violence. Publicity is the blood and oxygen of terrorists.⁹² The anarchists of the 1920s and the Islamic fundamentalists of the 21st century each used the media as a means to spread their message. In contrast, the event that led to *Korematsu* was Pearl Harbor, an actual attack by a foreign nation’s military against the United States’ Navy.

The difference between crime and an act of war seemed to matter little in both the eyes of the public, the courts and the government. The gravity of the threat and level of fear in the country was, in reality, proportional to the scale and violence of the attack. The more dramatic and bloody the event, the more likely it was be exaggerated in the media.⁹³ Since the average member of the public experiences an event through reporting,⁹⁴ and politicians use media as a tool to judge how to make or change policy,⁹⁵ the importance of the media’s role in each case

⁹⁰ Hane, 572.

⁹¹ Lichtenthal, 415.

⁹² Brigitte L. Nacos, *Mass-Mediated Terrorism: The Central Role of the Media in Terrorism and Counterterrorism The Case of Sacco and Vanzetti* (Oxford: Rowman & Littlefield Publishing, 2002), 39.

⁹³ Steven M. Chermak., and Jeffrey Gruenewald, "The Media’s Coverage of Domestic Terrorism." *JQ: Justice Quarterly* 23, no. 4 (2006): 454.

⁹⁴ *Ibid.*, 431

⁹⁵ *Ibid.*, 432.

cannot be understated. Mass media plays a pivotal role for the public, the government and the terrorist or foreign aggressors.

The second major difference between the touchstone cases is the immigration status of the defendants in each of the cases. While Sacco, Vanzetti and Korematsu were arrested in the United States, Hamdi was seized in Afghanistan and brought back to the United States for detention. Arguably, the fact that all of these men were American citizens or residents makes this difference irrelevant.

Historical Theories:

Another commonality of the three touchstone cases is their complexity. Each trial cannot be understood without first knowing the social mood of the period. It is this complexity that requires the use of an interdisciplinary methodology, because no single discipline encompasses all of the factors involved in each case. The need for the use of law as a discipline is obvious considering that this is an examination of trials. The “history” discipline is necessary because it looks at the totality of an issue, that is the circumstances and occurrences that lead up to and affect an important historical event. The theory of cause and effect is ideal for determining how and why external forces affect trials at significant moments in U.S. history. Also, the theory that there has been a history of discrimination against non-white minority groups other than African-Americans in the United States is useful in unraveling this issue because it helps identify and explain why racial or ethnic biased occurs and where it comes from.

A cause and effect relationship clearly exists in all three touchstone cases. Cause and effect as a historical method however, is much more than just the occurrence of one event leading to another. According to historian Louis Gottschalk, understanding a cause and effect relationship requires knowing both the immediate cause and the remote cause of an event, as

well as the difference between the two.⁹⁶ The immediate cause of an event is not the actual cause, but a breaking point in a chain of events.⁹⁷ In other words the origin of an event is the actual cause, something that is much less obvious than the immediate cause. Applying this to the touchstone cases it is easily seen that the immediate causes in *Commonwealth v. Sacco*, *Korematsu v. United States*, *Hamdi v. Rumsfeld*, were the South Braintree robbery, the attack on Pear Harbor, and the September 11th terrorist attacks respectively. However, each of these events was a mere breaking point in a longer chain of events leading up to each case.

The actual cause on the other hand is what initiated the chain of events to begin with.⁹⁸ Finding the remote cause is harder than the immediate cause. It requires one look back further into history to determine where a particular chain of events began. Looking at the background of *Commonwealth v. Sacco*, the beginnings of anti-immigrant sentiment can be seen well before the Red Scare in the late 19th century.⁹⁹ The real cause of the anti-immigrant sentiment and national security fear in *Sacco* was the anarchist bombings of 1919. These bombings, with the help of the media, turned the smouldering anti-immigrant sentiment into a wild fire so strong that it was able to affect the trial of Sacco and Vanzetti until their execution in 1927.

The real cause of the ethnic bias and security fears that affected *Korematsu* can also be traced to the late 19th century and the Chinese Exclusion act of 1888¹⁰⁰ and later the Immigration Act of 1924.¹⁰¹ The media and the government once again used anti-immigrant sentiment

⁹⁶ Louis Gottschalk, *Understanding History: A primer of Historical Method* (New York: Alfred A. Knopf Inc., 1950), 33.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, 34.

⁹⁹ Hane, 569.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

combined with national *insecurity* following Pear Harbor as justification for the internment of almost all individuals of Japanese descent on the west coast.

The real cause of *Hamdi* and the Bush Administration's policy of indefinite detention at Guantanamo Bay can be traced to the decision in *Korematsu*, as well the history of ethnic bias in America. The fact that *Korematsu* remains precedent for justifying restrictive government actions against an ethnic minority on the basis of national security substantiates the Bush administration's claim.¹⁰² Building on past Executive's actions, the Bush Administration has been able to institute policies similar to the Roosevelt Administration during World War II.

Applying the historical theory of cause and effect to the three touchstone cases yields an interesting conclusion. Looking past the more obvious immediate cause of each case, the remote cause becomes clear. The existence of a history of ethnic and racist bias, as seen in both law and media, combined with panic in the aftermath of an attack on the United States created a public outcry strong enough to influence the legal system at its highest levels. This caused waves of discrimination against the minorities blamed for each attack.

Another historical perspective on this issue focuses on the racial or ethnic aspect in each case. The theory, known as the "Other Non-White" theory, states that throughout American history "other non-whites" have been treated with a notion of foreignness when considering their racial identity and legal status.¹⁰³ It should be noted that "other non-whites" means a minority other than African-Americans. Italian-Americans, Japanese-Americans and Muslim-Americans all fit into the "other non-white" category. The theory goes on to suggest that the thought of

¹⁰² Sandra Takahata. "The Case of *Korematsu v. United States*: Could it be Justified Today?" *University of Hawaii Law Review* (1984): 115.

¹⁰³ Neil Gotanda. "Other Non-Whites in American Legal History: A Review of *Justice at War*" *Columbia Law Review* 85 (1985): 1188.

American born non-whites as foreign brought them an underserved stigma.¹⁰⁴ This supports the notion that ethnic biased played a role in the trials of Sacco and Vanzetti, Korematsu and Hamdi. These men were born in the United States or legal immigrants; yet they were still looked at by mainstream America as foreigners. After Pear Harbor, Japanese-Americans were seen as spies and saboteurs, likely to sympathize with Japan.¹⁰⁵ The idea that Fred Korematsu, an American citizen who had never left the continental United States¹⁰⁶ would side with a foreign nation simply because they looked like him is absurd. The “Other Non-White” theory explains that this illogical way of thinking occurs because of a racist tradition in America.¹⁰⁷ This custom of racial and ethnic prejudice led to the idea that a person of Japanese descent would side with Japan because it was a part of their human nature.¹⁰⁸ The same idea applies to Italian-Americans and Muslim-Americans in their respective cases. This theory demonstrates that the reason Sacco and Vanzetti, Korematsu and Hamdi were not granted their full Constitutional rights was because they belonged to minorities considered, outside the traditional American social circle. Ultimately it was this foreignness and not the facts in each case that lead to decisions in which two out of the three cases were decided against the minority party.

Legal Theories:

The “law” discipline has three theories that attempt to explain how and why ethnic bias and fear for national security affected the three touchstone cases. The first theory of political trials has been covered at length above. This theory views *Commonwealth v. Sacco, Korematsu v. United States, Hamdi v. Rumsfeld* as having dual agendas. The outer agenda provides a false

¹⁰⁴ Ibid.

¹⁰⁵ Hane, 570.

¹⁰⁶ Takahata, 121

¹⁰⁷ Gotanda, 1190

¹⁰⁸ Ibid.

legality and legitimacy, while a secondary motive to punish, dominate or eliminate the minority group involved underlies the superficial rationale.¹⁰⁹ All three cases were an attempt at domination of the individuals involved and the minority group they represent. The government succeeded in doing so in both *Commonwealth v. Sacco* and *Korematsu v. United States*.

The theory of Constitutional Stretch, Snap-Back and Sag is also useful for explaining the phenomenon in these touchstone cases. This theory states that in times of crisis the interpretation of what is constitutional is stretched to allow government to respond to the situation.¹¹⁰ After the stretch, the interpretation will either snap-back to its pre-crisis position or it will sag,¹¹¹ creating a metaphorical loose space in which the crisis powers can be made permanent. While the actions of the executive and the legislative branches are important in the theory of Constitutional Stretch, Snap-Back and Sag, the judiciary who plays the pivotal role. In times of emergency judicial affirmation is key because it defines what expanded crisis powers are constitutional.¹¹²

A constitutional stretch is visible in all three touchstone cases. In *Commonwealth v. Sacco*, the stretch exists in the addition of a branch to the Bureau of Investigation whose sole purpose was investigating radical activity.¹¹³ The Court upheld the decision in *Commonwealth v. Sacco* and the tactics used to obtain it when they refused to grant a *writ of certiorari*. In *Korematsu*, Executive Order No. 9066 was a constitutional stretch. The decision in *Korematsu*, because it up held the order, was the Court's affirmation of the constitutionality of the Japanese

¹⁰⁹ Christenson, 554.

¹¹⁰ Kahan, 1280.

¹¹¹ Ibid.

¹¹² Ibid., 1290

¹¹³ Famous Trials. "The Red Scare." Ed. Douglas O. Linder. (Missouri: University of Missouri-Kansas City School of Law, 2007), <http://www.law.umkc.edu/faculty/projects/ftrials/SaccoV/chronology.html> (accessed December 1, 2007).

internment. Lastly, in *Hamdi* the passages of the PATRIOT Act represented a constitutional stretch, which the Court has yet to be strike down.

The snap-back or sag that occurred in each of these cases varied. Following *Sacco* there was a sag. In the years after the trial and eventual execution of Sacco and Vanzetti, the Bureau of Investigation became the modern Federal Bureau of Investigation and was never condemned for their persecution of Italian-American radicals. However, there was a snap-back in constitutional interpretation following the decision in *Korematsu*. After the threat subsided, Americans realized that not even World War II justified detaining a whole class of people based on race.¹¹⁴ It is still too soon to tell whether the post 9/11 era will see a constitutional snap-back or sag. As of the time of this article, the War on Terror and the War in Iraq continue with no end in sight, as do terrorist threats to national security.

The third legal theory examines the three touchstone cases from the perspective of the Plenary Power Doctrine, which allows Congress and the Executive nearly complete control of immigration decisions and generally exempt from judicial review.¹¹⁵ The Plenary Power Doctrine was established in a Supreme Court ruling in the Chinese Exclusion Case, which states:

If...the government of the United States, through its legislation department, considers the presence of foreigners of a different race in this country who will not assimilate with us, to be dangerous to its peace and security, their exclusion is not to be stayed because at the time there are not actual hostilities with the nation of which the foreigners are subjects.¹¹⁶

This doctrine is considered constitutional because Congress' power over the nationalization of immigrants and the Executive's duty to enforce that power.¹¹⁷ This change to the law was abrupt,

¹¹⁴ Kahan, 1301.

¹¹⁵ Lichtenthal, 403.

¹¹⁶ Lichtenthal, 402, Citing: *Chae Chan Ping v. United States*, 130 U.S. 581 (1889).

¹¹⁷ *Ibid.*, 403.

as so often occurs in constitutional law. However it has gained strength over time.¹¹⁸ The Plenary Power Doctrine allows an issue involving immigrants or immigration law to be decided purely on race or ethnicity.¹¹⁹

This perspective helps explain how external forces like racial or ethnic bias affect a trial because it shows that in cases involving immigrants the Supreme Court has deferred to the executive branch and has often ignored the Fifth and Fourteenth amendments.¹²⁰

The Court has often been cautious when holding U.S. citizens responsible for the action of others, except when those individuals are immigrants,¹²¹ which is apparent in the three touchstone cases. The Plenary Power Doctrine provided legal justification at the highest levels of government for the indefinite holding of Americans strictly on the basis of ethnicity. The doctrine is worded so as to apply only to “foreigners of a different race,” which Sacco, Vanzetti, Korematsu and Hamdi were. Perhaps this is why the facts differed so much in the *United States v. Lindh* and *Hamdi v. Rumsfeld*, or why no other group but Japanese-Americans were interned in the United States during World War II.¹²²

Integration:

While each of these disciplinary theories is able to explain a part of how and why anti-immigrant sentiment and fear for national security affect trials at significant moments in history, no single theory or discipline can explain it completely. However, integrating the relevant parts of all the theories allows for a better understanding of the issue and provides an opportunity to

¹¹⁸ Kahan, 1291.

¹¹⁹ Lichtenthal, 399.

¹²⁰ Ibid., 408.

¹²¹ Ibid., 408.

¹²² Hane, 572.

find a solution. The five theories from the disciplines of both history and law covered above are arranged in chart form to elucidate the integration process. (See Appendix)

The historical theories of Cause and Effect and the “Other Non-White” Theory illustrate where ethnic bias and anti-immigrant sentiment originate and why it appears so fervently during the eras of the touchstone cases. However, these theories fail to explain how external forces are able to penetrate the courtroom. Similarly, the legal theories illuminate only how the government and the law work during times of crisis as well as the certain prejudice tendencies they possess at times. These theories are also limited because they cannot explain where anti-immigrant sentiment and national security fears originated, and why they were widespread at the time. Yet, by combing these five theories the seemingly unrelated aspects of each case become relevant to one and other and provide a clearer picture of this issue.

The “Other Non-White” Theory demonstrates there has been a history of anti-immigrant discrimination towards ethnic minorities such as Italian-Americans, Asian-Americans and Muslim-Americans, that first appeared in the law in the Chinese Exclusion Act of 1888.¹²³ This ethnic bias manifested itself in the legal system through the Constitutional Stretch Snap-Back and Sag theory. Cause and Effect caused the normal history of anti-immigrant discrimination to swell during times of crisis. It was during these times that the courts were most susceptible to being influenced by political issues and public opinion.¹²⁴ The Plenary Power Doctrine was used as a way for the Judiciary to uphold legislative and executive actions that bordered on being unconstitutional such as Executive Order No. 9066 and the PATRIOT Act.¹²⁵ All of this resulted

¹²³ *Ibid.*, 569.

¹²⁴ Kahan, 1294.

¹²⁵ Lichtenthal, 399.

in political trials in both *Commonwealth v. Sacco* and *Korematsu v. United States*, as well as a political trial in *Hamdi v. Rumsfeld*, which was decided in favor of the minority party, Hamdi.

From all of this, a continuum appears showing anti-immigrant sentiment and national security fears affecting a trial after a momentous event in history first appearing in *Commonwealth v. Sacco* in 1921, peaking in 1944 in *Korematsu v. United States* and receding in *Hamdi v. Rumsfeld* in 2004. The influence peaked in *Korematsu* as demonstrated by the fact that the sentiment was strong enough to cause an entire ethnic group, sixty-five percent of whom were American citizens,¹²⁶ to be interned for the duration World War II. Soon after both the nation and members of the Judiciary realized the decision was wrong.¹²⁷ The internment of a whole class of people based on ethnicity was found such violation of American Jurisprudence that a major Constitutional snap-back occurred.¹²⁸

In the forty years between *Korematsu* and *Hamdi*, minority rights improved tremendously through the Civil Rights Movement of the 1960s. During this time people became more aware of the rights they possessed. Mass media, and the way in which people received information also improved. These factors contributed to the recession of anti-immigrant sentiment and national security fears, because it is public awareness that affects how big or small limitations on liberties can be during times of crisis.¹²⁹

The public has vigorously fought against the constitutional stretch that occurred after September 11th via the PATRIOT Act. While anti-immigrant sentiment continues to exist toward Muslim-Americans to a certain degree, it is far from the intensity that existed following the Red

¹²⁶ Hane, 571.

¹²⁷ Rosen, 151.

¹²⁸ Kahan, 1301.

¹²⁹ *Ibid.*, 1295.

Scare or Pearl Harbor. Additionally, though insecurity about the nation's security persists, advances in information technology and media no longer allow a few politicians or media outlets to foster the panic as in the earlier two touchstone cases. That the Supreme Court was able to avoid these influences after 9/11, an attack larger than any America had experienced before, and make a just decision in *Hamdi* demonstrates that Americans may have begun to realize that it is not necessary to trade liberty for security.

Conclusion:

Through the use of interdisciplinary methodology, along with historical background and case analysis, external forces such as anti-immigrant sentiment and national security fear clearly can and have influenced trials at significant moments in history. Integrating the history and law proves that ethnic bias has a long history in the United States, and was only intensified by immigrant or foreigner attacks on America. The approach also demonstrates that these feelings were able to affect the legal system because the atmosphere in which each trial took place: a post-crisis period. The courts were at their weakest following these crises because of the public's pressure for action, which is felt by all branches of government.

In *Commonwealth v. Sacco* anti-immigrant sentiment was amplified by radical bombings during the Red Scare. These bombings were exaggerated by the press and government and caused a panic within the public. When Sacco and Vanzetti were brought to trial in 1921, fears of radical Italian immigrants and of a Bolshevik-style revolution in the United States were strong enough to influence the court. Ultimately, Sacco and Vanzetti were convicted and executed based on their ethnicity and political beliefs rather than the actual evidence against them.

Similarly, in *Korematsu* anti-foreign prejudice and security fears were cause by the Japanese attack on Pearl Harbor. The attack caused the existing anti-immigrant, especially anti-

Asian, sentiment to increase. This bias combined with fear of Japanese invasion of the West Coast led to the internment of almost 120,000 Japanese-Americans. These people, including Fred Korematsu, had their Constitutional rights violated. The Court's decision in *Korematsu* heightened the problem, upholding those violations as just and necessary.

Hamdi began in the same manner as the previous two cases. An individual of an unpopular minority group, following a tragic attack on the United States, was wrongly deprived of constitutional protections. It seemed as if anti-immigrant sentiment and public security fears would once again lead to a miscarriage of justice. Fortunately, this did not occur. Advances in minorities' rights, in addition to a better informed general public led to a decrease in anti-immigrant and national security fears in the years following the 9/11 attacks. This allowed the Court to make a just ruling in *Hamdi*, upholding the principles of the Constitution to protect citizens from unlawful arrest and imprisonment, and discrimination under the law.

Examinations and comparisons of the touchstone cases clearly indicate that the influence of external forces began in *Commonwealth v. Sacco* peaked in *Korematsu v. United States* and have receded in *Hamdi v. Rumsfeld*. Whether this change is permanent and will continue is impossible to tell. If another September 11th-like terrorist attack were to occur, it could produce a social and political atmosphere worse than any seen in history. This could nullify the positive advancements American society has made over the past sixty years and allow for an even more blatant disregard of the Constitution, as well as an even worse miscarriage of justice that was seen in any of the three touchstone cases. Whether external forces could again lead to injustices against minorities all depends on the future and the decisions made in the hearts and minds of the American people.

Appendix

Disciplinary Theories, Concepts and Perspectives

	<u>Law</u>	<u>History</u>
Anarchism (Sacco and Vanzetti Case)	Political Trials/ Constitutional Stretch Snap-Back and Sag/Plenary Power Doctrine	Cause and Effect/ “Other Non-Whites” Theory
Japanese Internment (Korematsu Case)	Political Trials/ Constitutional Stretch Snap-Back and Sag/ Plenary Power Doctrine	Cause and Effect/ “Other Non-Whites” Theory
Post 9/11 (Hamdi Case)	Political Trials/ Constitutional Stretch Snap-Back and Sag/ Plenary Power Doctrine	Cause and Effect/ “Other Non-Whites” Theory

Law:

Political Trials: This theory views the three touchstone cases as having dual agendas. The outer agenda provides a false cover of legality and legitimacy. Underneath that there is a secondary motive to punish, dominate of eliminate the minority group involved.

Constitutional Stretch, Snap-Back and Sag: This theory states that in the wake of all the crises involved in the three touchstone cases, the Constitution was stretched. After *Korematsu*, the Constitution snapped back tighter than before because of the dreadfulness of the decision. In the post 9/11 era this phenomenon has been realized and the stretch has been fought against inch by inch to prevent another discriminatory abuse of Constitutional power.

History:

Cause and effect: This theory proposes that waves of discrimination and prejudice against minorities were caused when members of these minorities caused, or were thought to have caused major attacks on the United States.

“Other Non-White” Theory: This theory suggests that “other non-white” minorities such as Asians, Muslims, and Italian/Hispanics have always been seen with a notion of foreignness. Therefore when a major attack or crime caused by the members of these minority groups occurs, they are not afforded the protection or rights guaranteed to “true” American citizens.

Plenary Power Doctrine: This doctrine provides legal for the indefinite holding of Americans on the basis of ethnicity. It allows an issue involving immigrants or immigration law to be decided purely on race or ethnicity. It has also allowed the United States

Supreme Court to ignore Fifth and Fourteenth Amendment rights in cases involving immigrants, and defer to the executive and legislative branches