RACE, COLOR, AND CITIZENSHIP: *OZAWA* AND *THIND*

ROLES (IN ORDER OF APPEARANCE)

NARRATOR 1
TAKAO OZAWA…… *A Japanese man who sought to be naturalized*
BHAGAT SINGH THIND……. *An Indian American man who sought to be naturalized*
NARRATOR 2
BUNTARO KUMAGAI……. *A Japanese man who sought to be naturalized*
WILLIAM KNIGHT…….. *A man of English, Japanese and Chinese descent who sought to be naturalized*
ALBERT HENRY YOUNG…….. *A Japanese-born man of German and Japanese who sought to be naturalized*
BENJAMIN CLARKE……... *Petitioner's witness in district court; testified regarding Ozawa's good moral character and U.S. residence*
JUDGE CHARLES CLEMONS…… *U.S. District Judge, District and Territory of Hawaii*
EDITH SACHIKO…….. *Daughter of Takao Ozawa*
OTOTAKA YAMAOKA……... *Head of a committee appointed by Japanese Association Deliberative Council to assist Ozawa*
AMBASSADOR VISCOUNT ISHII KIKUJIRO *Ambassador Extraordinary and Plenipotentiary from Japan*
GEORGE WICKERSHAM……*Counsel for Ozawa in the U.S. Supreme Court*
SECRETARY OF STATE ROBERT LANSING. *U.S. Secretary of State, 1915 to 1920*
SOLICITOR GENERAL JOHN W. DAVIS…… *U.S. Solicitor General, 1913 to 1918*
FRANK ENGLISH……..*Deputy Attorney General of the State of California*
JUSTICE GEORGE SUTHERLAND…….. *Associate Justice, U.S. Supreme Court*
MARSHAL OF THE COURT…….. *U.S. Supreme Court*
CHIEF JUSTICE WILLIAM H. TAFT…….. *Chief Justice, U.S. Supreme Court*
JUSTICES A, B, C, & D…… *Associate Justices, U.S. Supreme Court*
SOLICITOR GENERAL JAMES M. BECK…. *U.S. Solicitor General who argued* Ozawa *and* Thind *before the U.S. Supreme Court*
JUDGE CHARLES E. WOLVERTON…… *U.S. District Judge for the District of Oregon*

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* During the 2011 presentation of the Race, Color, and Citizenship: Ozawa and Thind, the presenters used a slideshow to accompany the re-enactment. The slideshow was prepared by Jury Group, http://www.jurygroup.com, which is on file with the authors and available at http://lawreview.aabany.org/.

V.W. TOMLINSON…… *A Naturalization Examiner in the Department of Labor who conducted the investigation of Thind's 1919 citizen petition*

WILL R. KING…….. *Counsel for Thind at in the U.S. Supreme Court*

VAISHNO DAS BAGAI……. *An Indian American man whose U.S. citizenship was revoked in the aftermath of the* Thind *case*

SENATOR DANIEL INOUYE……. *U.S. senator from Hawaii, 1964 to present*

TIMELINE OF EVENTS IN *OZAWA*

Jun. 15, 1875	Takao Ozawa is born in Sakureimura, Japan.
Jul. 29, 1894	Ozawa arrives at the port of San Francisco aboard the S.S. Galic as an immigrant from Yokohama, Japan. He is 19.
Aug. 1, 1902	Ozawa files a declaration of intention to apply for citizenship in the Superior Court of Alameda County, California.
Summer 1903	Ozawa graduates from Berkeley High School.
Fall 1903 - Apr. 1906	Ozawa attends the University of California until the university closes after the Great Earthquake of April 18, 1906.
May 1906	Ozawa leaves San Francisco to live in Honolulu.
1906-1912	In Hawaii, Ozawa marries Masako, who was born in Yamakuchi, Japan. They have two children, both born in Honolulu.
Oct. 16, 1914	Ozawa files a petition for naturalization in the U.S. District Court, Territory of Hawaii. Hearings take place throughout 1915.
Mar. 26, 1916	Ozawa's petition for naturalization is denied by Judge Clemons.
Aug. 17, 1916	Ozawa files a bill of exception.
Sept. 25, 1916	An order permitting the appeal to the Ninth Circuit is signed by Judge Horace W. Vaughan.
May 1917	Both parties file briefs for the appeal.
Jun. 4, 1917	A certificate of the Ninth Circuit certifying questions for the U.S. Supreme Court is granted.
Jun. 1918	Secretary of State Robert Lansing asks Solicitor General John W. Davis to delay proceedings in *Ozawa* until the end of World War I because Japan is an ally of the U.S.
Nov. 11, 1918	World War I ends. However, delays are occasioned by communications between the U.S. government and Ozawa's attorney, G. Wickersham, regarding postponements due to continuing foreign relations sensitivities with the Japanese government

Oct. 3-4, 1922	The court hears oral argument on the matter.
Nov. 13, 1922	The Supreme Court reaches a decision holding that a person born in Japan is not eligible for naturalization as a U.S. citizen.
Nov. 16, 1936	Takao Ozawa dies in Honolulu.

TIMELINE OF EVENTS IN *THIND*

Oct. 3, 1892	Thind is born in the Village of Taragarh, in Punjab, India.
Jul. 4, 1913	Thind arrives in Seattle, WA. He is 20 years old.
Jan. 17, 1917	Thind petitions for citizenship in the U.S. District Court of Oregon.
Jul. 22, 1918	Thind petitions for citizenship in U.S. District Court of Washington. He enlists in the U.S. Army on the same day.
Dec. 9, 1918	Thind is granted U.S. citizenship, but it is voided by the INS just four days later. Shortly after, he is honorably discharged from the U.S. Army.
May 6, 1919	Thind once again petitions for citizenship in the U.S. District Court of Oregon.
Oct. 19, 1919	The U.S. District Court in Oregon rules in favor of granting Thind citizenship
Nov. 18, 1920	Thind is granted citizenship by the U.S. District Court of Oregon.
Oct. 17, 1921	The Ninth Circuit sends the case to the U.S. Supreme Court.
Feb. 19, 1923	The Supreme Court rescinds Thind's citizenship on the grounds that Thind is not a white person within the meaning of Section 2169, Revised Statutes.
Jun. 24, 1935	Congress enacts a statute that allows U.S. citizenship for U.S. Veteran Aliens.
Sept. 27, 1935	Thind files again for citizenship.
Mar. 2, 1936	Thind is granted citizenship.

INTRODUCTION[1]

NARRATOR 1: What does it mean to be "white?" And what does it take to be an American?

These questions were presented to the United States Supreme Court in the 1920s, in a pair of cases brought by two Asian Americans seeking to be naturalized as United States citizens: Takao Ozawa[2] and Bhagat Singh Thind.[3] In their court papers, they argued:[4]

[OZAWA and THIND take center stage]

OZAWA: I, Takao Ozawa, may not be an American "in name," but in reality, I am a true American already. . . . I have always lived like an American, trying my best to qualify myself to become a good and useful citizen of the United States, to whom I am so attached that the desire to go back to Japan has entirely left from my head. So I sincerely hope that the United States will admit me.

THIND: I, Bhagat Singh Thind, am a high class man in every respect, a veteran of the late war and a volunteer, who received high commendation from my superior officers for my distinguished services. My personal desirability is therefore apparent, and as a general proposition a man who fights for the flag should be entitled to come under the flag. My love for America is evidenced by my conduct.

NARRATOR 2: Ozawa and Thind were qualified to be citizens; the only question was their race.

In 1790, when Congress enacted this country's first naturalization statute, it permitted only aliens who were "free white persons" to be naturalized as U.S. citizens.[5] After the Civil War, Congress extended the privilege of naturalization to persons of African descent, to recognize the efforts of the many slaves who had fought for the North.[6] Hence, by law only "free white persons" and persons of African descent could be naturalized.

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[1] The background information in this script is largely drawn from Yuji Ichioka, *The Early Japanese Immigrant Quest for Citizenship: The Background of the 1922 Ozawa Case*, 4 AMERASIA J. 1 (1977); Deveon W. Carbado, *Yellow by Law*, 97 CALIF. L. REV. 633 (2009); M. Browning Carrott, *Prejudice Goes to Court: The Japanese & the Supreme Court in the 1920s*, 62 CAL. HIST. 122 (1983); IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 56-61 (10th Ann. Ed. 2006) (1996).

[2] Ozawa v. United States, 260 U.S. 178 (1922).

[3] United States v. Thind, 261 U.S. 204 (1923).

[4] The following section is derived from Second Brief of Petitioner at 3, In the Matter of Takao Ozawa, No. 274 (D. Haw. 1915) and Brief of Respondent at 1-2, 4-5, In the Matter of the Petition of Bhagat Singh Thind, No. 998 (D. Or. Oct. 18, 1920).

[5] John Tehranian, *Performing Whiteness: Naturalization Litigation and the Construction of Racial Identity in America*, 109 YALE L.J. 817, 818 (2000) (citing to Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414).

[6] *Id.* (citing to Act of Mar. 26, 1790, ch. 3, 1 Stat. 103, *repealed by* Act of Jan. 29, 1795, ch. 20, 1 Stat. 414). In 1856, the U.S. Supreme Court held in *Dred Scott v. Sandford* that people of African descent brought into the United States and held as slaves or their descendants, whether or not they were slaves were not protected by the Constitution and were not U.S. citizens. *See* 60 U.S. 393 (1856). In response to the *Dred Scott* decision, Congress extended the right of naturalization to "aliens of African Nativity and to persons of African descent." Tehranian, *supra* note 5, at 818-19 (quoting Act of July 14, 1870, ch. 255, § 7, 16 Stat. 254).

NARRATOR 1:[7] Where did that leave Asians? The number of Chinese, Japanese, and other Asian immigrants in the United States had been growing steadily throughout the 1800s. Many wanted to become American citizens, and in fact a few were naturalized. But in time the immigration authorities stopped granting these applications.

The situation was quickly clarified with respect to the Chinese. As a result of growing hostility toward the Chinese, Congress passed the Chinese Exclusion Act of 1882, which barred the Chinese from entering the United States. It also declared the Chinese already in the country ineligible for naturalization.[8]

NARRATOR 2: As for the Japanese, clearly they were not of African descent. Nor were they Chinese. But were they "white?"

And what about South Asians? There was a wave of immigrants from India at the turn of the century, and by 1910 there were between 5,000 and 10,000 Asian Indians in the United States. At the time, anthropologists generally regarded Asian Indians not as Mongolian but as Caucasian. [9] Accordingly, were they "white" for purposes of the naturalization laws?

NARRATOR 1: In their quest to become citizens, scores of these Asian immigrants -- including some who had fought for their adopted country and some who were part white because they were of mixed blood -- argued in the courts that they were "white." More than 50 of these so-called racial prerequisite cases worked their way through the court system,[10] including cases brought by Buntaro Kumagai in 1908; William Knight in 1909; and Albert Henry Young in 1912.[11]

[KUMAGAI, KNIGHT, and YOUNG take center stage]

KUMAGAI: I'm Buntaro Kumagai. When I applied to be a U.S. citizen, the court described me as "an educated Japanese gentleman." I enlisted in the regular army of the United States, and I served honorably. The court found that there was no objection to my becoming a citizen on "personal grounds."

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[7] In the late eighteenth and early nineteenth centuries, the ethnic makeup of the United States was almost exclusively black and white; thus, no litigation resulted from the naturalization requirements. Tehranian, *supra* note 5, at 819. "However, in the latter part of the nineteenth century, as a new wave of immigrants began to enter the country, the law was forced to deal with the influx of individuals who did not fit so neatly into the constructed [black and white] racial categories of the time." *Id. See also* Ichioka, *supra* note 1, at 2; Carbado, *supra* note 1, at 656; Carrott, *supra* note 1, at 125.

[8] Chinese Exclusion Act of May 6, 1882, ch. 126, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, ch. 344, 57 Stat. 600.

[9] Jasmine K. Singh, *Everything I'm Not Made Me Everything I Am: The Racialization of Sikhs in the United States.* 14 ASIAN PAC. AM. L.J. 54 (2008-2009). *See also* Carbado, *supra* note 1, at 689 (discussing Justice Sutherland's analysis of the racial-classification "[b]ecause Asian Indians were formally categorized as Caucasian").

[10] Between 1878 and 1952, fifty-two cases were reportedly brought over the naturalization law's racial prerequisite. Tehranian, *supra* note 5, at 818-19.

[11] The following is derived from the Supreme Court opinions of their respective cases. *See In re* Kumagai, 163 F. 922 (W.D. Wash. 1908); *In re* Knight, 171 F. 299 (E.D.N.Y. 1909); *In re* Young, 198 F. 715 (W.D. Wash. 1912).

KNIGHT: My name is William Knight. I was born in 1866, on a schooner flying the British flag, in the Yellow Sea, off the Coast of China. My father was English, my mother half Chinese and half Japanese. I served honorably in the U.S. Navy for 27 years. I was even given a medal for my service. The court was entirely satisfied as to my intelligence and character.

YOUNG: And I'm Albert Henry Young. I was born in Yokohama, Japan. My father was German, and my mother Japanese. When I petitioned to be a citizen, the court noted that I had fully complied with all the requirements to be admitted as a citizen of the United States. The only question was whether I was a white person.

NARRATOR 2: All three petitions were denied, solely based on race. In *Kumagai*, the court held that by using the words "white persons" in the statute, Congress clearly intended to extend the privilege of naturalization only to those of the predominant race in this country. In *Knight*, the court held: "A person, one-half white and one-half of some other race, belongs to neither of these races, but is literally a half-breed." And in *Young*, the court ruled that "the Japanese . . . are not included in what are commonly understood as 'white persons.' . . . [I]t cannot be said that one who is half white and half brown is a white person, as commonly understood."

NARRATOR 1: These were among the early cases, decided by the lower courts. Eventually, two cases would reach the Supreme Court -- *Ozawa v. United States*[12] and *United States v. Thind*.[13]

NARRATOR 2: Today we will explore these two cases and their place in American legal history, using where possible excerpts from the briefs of the parties, contemporary correspondence, and excerpts from the decisions to tell the stories of Takao Ozawa and Bhagat Singh Thind.

OZAWA: BACKGROUND AND DISTRICT COURT PROCEEDINGS[14]

NARRATOR 1: Takao Ozawa was born in Japan on June 15, 1875. On July 17, 1894, at the age of 19, he relocated to San Francisco. He graduated from Berkeley High School, studied at the University of California and then moved to Hawaii. There he worked as a sales clerk at one of the Big Five sugar companies in Honolulu for 23 years.

At the time of Ozawa's birth, there were only 55 Japanese living in the United States. By 1900, the number of Japanese had risen to 25,000. By the time Ozawa moved to Hawaii, anti-Japanese sentiment was regularly featured in the press in California, with story after story claiming that the Japanese were trying to take over the United States. By 1913, the number of Japanese in the United States rose to over 70,000, with more than half living in California. Japanese land ownership also increased, leading the state legislature to pass the Alien Land Act in 1913 restricting land ownership by Japanese.

[12] 260 U.S. 178.
[13] 261 U.S. 204 (1923).
[14] The facts set forth below are drawn from the First Brief of Petitioner, In the Matter of Takao Ozawa, No. 274 (D. Haw. 1915); Second Brief of Petitioner, In the Matter of Takao Ozawa, No. 274 (D. Haw. 1915); and Third Brief of Petitioner, In the Matter of Takao Ozawa, No. 274 (D. Haw. 1916). *See also Ozawa*, 260 U.S. at 189; Carbado, *supra* note 1; Carrott, *supra* note 1; Ichioka, *supra* note 1; HANEY LÓPEZ, *supra* note 1, at 56-61.

NARRATOR 2: Ozawa filed his declaration of intent to naturalize in 1902 while still a resident of California, and filed his petition for naturalization on October 16, 1914, the day his American-born daughter, Edith Sachiko Ozawa, turned two. Commentators subsequently described Ozawa as "a paragon of an assimilated Japanese immigrant," noting that he was fully qualified for citizenship given his years of residency, his personal character, and his English fluency. [15] Ozawa presented his own petition to the United States District Court for the Territory of Hawaii, writing out in composition books his legal briefs for submission to the Court.[16]

OZAWA:[17] In name, General Benedict Arnold was an American, but at heart he was a traitor. In name, I am not an American, but at heart I am a true American. I did not report my name, my marriage, or the names of my children to the Japanese Consulate in Honolulu; notwithstanding all Japanese subjects are requested to do so. These matters were reported to the American government. I do not have any connection with any Japanese churches or schools, or any Japanese organizations here or elsewhere. I am sending my children to an American church and American school in place of a Japanese one. Most of the time I use the English language at home, so that my children cannot speak the Japanese language. I educated myself in American schools for nearly eleven years by supporting myself. I have lived continuously within the United States for over twenty-eight years. I chose as my wife one educated in American schools . . . instead of one educated in Japan. I have steadily prepared to return the kindness which our Uncle Sam has extended me . . . so it is my honest hope to do something good to the United States before I bid a farewell to this world.

NARRATOR 1:[18] In terms of actual skin color, Ozawa was as white as any Caucasian -- and whiter than most. Ozawa argued, however, that skin color was not the key. Rather, he contended that the intent of Congress in using the term "free white person" was to make a person's character, not a person's race, relevant for purposes of naturalization.

NARRATOR 2: On Saturday, January 30, 1915, Ozawa appeared before the Court with his two witnesses. Benjamin Hornblower Clarke, a salesman, and Louis Aloysius Perry, a clerk, both residents of Honolulu, had presented sworn statements in support of Ozawa's petition.[19] Here is Clarke:

CLARKE:[20] I am a citizen of the United States of America. I personally know Takao Ozawa to have resided in the United States continuously immediately preceding the date of filing his petition, since the 1st day of January, 1909. I have personal knowledge that the petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and in every way qualified, in my opinion, to be admitted a citizen of the United States.

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[15] Ichioka, *supra* note 1, at 11, 15.
[16] Copies of Ozawa's handwritten composition book petition were located by the research team.
[17] Second Brief of Petitioner at 3-4, In the Matter of Takao Ozawa, No. 274 (D. Haw. 1915).
[18] First Brief of Petitioner at 4-8, In the Matter of Takao Ozawa, No. 274 (D. Haw. 1915).
[19] Transcript of Record of Appeal at 10, Ozawa v. U.S., No. 2888 (9th Cir. 1915) (containing minutes of Court proceedings and hearing on January 30, 1915) [hereinafter Ozawa ROA].
[20] This section is derived from Ozawa ROA at 8 (containing Benjamin H. Clarke's affidavit in support of Ozawa's petition).

NARRATOR 1: More than a year went by. Finally, on March 25, 1916, Judge Charles Clemons denied the petition. He later summarized his decision as follows:[21]

CLEMONS:[22] The petition was opposed by the United States District Attorney for the District of Hawaii on the ground that the petitioner, being a person of the Japanese race and born in Japan, is not eligible for citizenship under Revised Statutes, Section 2169. The other qualifications were proved, including all the statements in that petition, and found to be fully established, and are so conceded by the government.

The applicant had for twenty years continuously resided in the United States, including the last nine years' residence in Hawaii. He presented two briefs of his own authorship, which are ample proof of his qualification, by education and character.

The court found that the contention of the United States District Attorney is correct and that, although the applicant was eligible for citizenship in every other respect, yet having been born in Japan and being of the Japanese race, as a matter of law he was not eligible to naturalization.

NARRATOR 2: The case moved on to the Ninth Circuit Court of Appeals.[23] Years later, when she was in her 90s, Ozawa's daughter Edith recalled her father's determination:[24]

EDITH: My father wrote his own brief and everything. And he was really devoted. He wanted to become an American citizen and nothing would stop him. He was determined.

The articles would come out in the paper. I thought, "Ooh. What did he do?" You know, I thought only bad things came out in the paper and I was kind of ashamed, you know? And I was a child. And it was just the way we were brought up. I didn't have any Oriental friends. My neighbors were all Caucasian. He was so determined to get us, when the time came, to be American citizens.

OZAWA: SUPREME COURT

NARRATOR 1:[25] Until the District Court decision was reached, Ozawa's quest for citizenship had been intensely personal, undertaken without assistance of any political group and indeed without the assistance of any attorney. All that now changed. Ozawa hired an attorney, David L. Withington of Honolulu, to represent him on appeal. The appeal captured the attention first of Pacific Coast immigrant newspapers and then of the Pacific Coast Japanese Association Deliberative Council.

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[21] Ozawa ROA at 38-40 (containing copy of Bill of Exceptions endorsed by Judge Clemons).
[22] Ozawa ROA at 18-38 (containing copy of Judge Clemons's decision denying Ozawa's petition).
[23] Ozawa v. U.S., No. 2888 (9th Cir. 1917).
[24] RACE: THE POWER OF AN ILLUSION, EPISODE THREE: THE HOUSE WE LIVE IN (California Newsreel 2003) (an online transcript is available at http://www.newsreel.org/transcripts/race3.htm) [hereinafter RACE].
[25] *See* Brief of Petitioner, Ozawa v. United States, 260 U.S. 178 (1922) (No. 1).

The right to naturalization had become an issue of paramount importance since the passage by California of the Alien Land Law of 1913.[26] That law, which prevented "aliens ineligible to citizenship" from purchasing land, was openly acknowledged to be aimed at Japanese immigrants. [27] Under its terms, real property acquired by aliens would escheat to the State upon a successful action by the State Attorney General. To save their land, the Japanese immigrants had to acquire the right to naturalize.

NARRATOR 2:[28] Determined to fight the Alien Land Law, the Japanese Association sought the assistance of the Japanese government and considered lobbying Congress. Neither option proved viable, and they began the search for a test case. When Ozawa's appeal to the Ninth Circuit ended not in a decision, but in a certification of questions to the Supreme Court, the Japanese Association Deliberative Council voted unanimously to assist Ozawa and appointed a committee to plan strategy.[29]

The head of the Committee, Ototaka Yamaoka of Seattle, conferred with Viscount Ishii Kikujiro, Ambassador Extraordinary and Plenipotentiary from Japan, in 1917. The Japanese diplomat asked the Committee, and later Ozawa himself, not to pursue the matter.[30]

YAMAOKA: Mr. Ambassador, this ineligibility for citizenship has been the root of harmful and discriminatory legislation and moreover is in itself insulting and degrading treatment. This case is heading for the highest tribunal in the land, and will affect every Japanese in the United States. We ask for the support of the Japanese government as we pursue this matter.

ISHII:[31] Mr. Yamaoka, I am sorry, but the Japanese government cannot help the Committee. All eminent persons in the executive branch of the American government and in every political party and faction believe that the Japanese should be allowed to naturalize as a matter of justice and humaneness. But public opinion at large is not ready so no one will come out and take a public stand on the question. Thus it is better to postpone the case until the right time comes. Indeed, I must ask you to suspend support of the Ozawa matter.

NARRATOR 1: Ambassador Ishii spoke directly with Ozawa on his way back to Japan.

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[26] *See* Edwin E. Ferguson,*The California Alien Land Law and the Fourteenth Amendment*, 35 CALIF. L. REV. 61 (1947).

[27] The California Attorney General even stated, "It is unimportant and foreign to the question, whether a particular race is inferior. The simple and single question is, is the race desirable. . . . It [the law] seeks to limit their presence by curtailing their privileges which they may enjoy here; for they will not come in large numbers and long abide with us if they may not acquire land." *See* Frank F. Chuman, THE BAMBOO PEOPLE: THE LAW AND JAPANESE AMERICANS 161–63 (1976) (quoting a speech made by the California attorney general about the Alien Land Law of 1913). For more on the passage of the Alien Land Laws, see Rose Cuison Villazor, *Rediscovering Oyama v. California: At the Intersection of Property, Race and Citizenship*, 87 WASH. UNIV. L. REV. 979 (2010).

[28] Carbado, *supra* note 1, at 676.

[29] The Pacific Coast Japanese Association Deliberative Council met for two days on July 26-27, 1917 in Los Angeles, carefully weighed the implications, and voted unanimously to support Ozawa. *See* Ichioka, *supra* note 1, at 11-13. The Council appointed four individuals to the committee. *Id.*

[30] *See* Ichioka, *supra* note 1, at 14.

[31] Conversation as recalled by Yamaoka. *See id.*

ISHII: Mr. Ozawa, I have conferred with officials of Japan and of the United States. The time is not right. You must discontinue this appeal.

OZAWA: Mr. Ambassador, I thank you for the visit. But I am an American, and I believe that the Supreme Court will recognize that fact. I will neither postpone nor withdraw my case under any circumstance, even in the face of death.

NARRATOR 2:[32] The Committee rejected the Ambassador's request and pushed forward. It augmented Ozawa's legal team by seeking out George W. Wickersham, a former U.S. Attorney General with significant Supreme Court experience who had served as the Chairman of the National Committee on American-Japanese relations. On April 22, 1918, Wickersham wrote to respond to the Committee's inquiry as follows:

WICKERSHAM:[33] My fee for services in this case would depend upon what is expected of me. You ask me if I will consent to act as associate counsel with Mr. Withington in representing Ozawa. If this means that Mr. Withington is to prepare the brief and participate with me in the argument at Washington, I should be willing to undertake to prepare and conduct the argument for a fee of $1,000. On the other hand, if Mr. Withington does not contemplate coming to Washington for the purpose, and I am to conduct the argument alone, which would involve the entire responsibility for preparation of the brief, my fee would be $2,500.

Very truly yours,

Geo W. Wickersham

NARRATOR 2: Wickersham, after speaking with Withington, revised the fee proposal to $2,500, whether Withington came to Washington or not. The Committee nevertheless considered the fee to be "so low" as not to be an issue. Wickersham was hired.

NARRATOR 1:[34] However, the delays continued. The U.S. government was as unwilling as the Japanese government for the matter to proceed. It valued Japan's assistance in the First World War, and feared the reaction from Japan if the Supreme Court ruled against Ozawa. The U.S. Secretary of State corresponded with the U.S. Solicitor General regarding his concern.

SECRETARY OF STATE LANSING: Japan and the United States are co-belligerents in the present war, in which, as you know, Japan has given and is giving consistent and essential assistance to the common cause. The Japanese land question in California, which aroused considerable feeling in Japan, has not been definitely settled and would, I fear, be opened, or at least a public discussion of it renewed, if the Takao Ozawa case were argued in the Supreme Court.

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[32] Ichioka, *supra* note 1, at 14. *See also* Brief of Petitioner, Ozawa v. United States, 260 U.S. 178 (1922) (No. 1).
[33] Carbado, *supra* note 1, at 674.
[34] *Id.* at 675 (summarizing the political friction between Japan and the United States at the time and the roles of Secretary of State Robert Lansing and Solicitor General James M. Beck in delaying Ozawa's case before the U.S. Supreme Court).

SOLICITOR GENERAL: I understand that it is not the desire of the State Department nor the Japanese Embassy to have the case argued during the approaching term of the Supreme Court. I also understand that the Embassy has endeavored to bring some pressure upon the applicant to delay or abandon the case but that this has been unsuccessful. I would be glad to be advised whether the State Department still thinks the argument of this to the Supreme Court and a decision from that tribunal undesirable under existing circumstances. I do not know that a postponement can be obtained, but it will be my desire to endeavor to carry out the wishes of your Department in this matter as far as I properly can.

NARRATOR 2: At the same time, a procedural issue arose in Ozawa's case. A case decided by the Supreme Court in 1918 suggested that Ozawa's case might be moot.[35] Over Ozawa and Withington's protests, Wickersham took the procedural issue seriously and suggested to the Japanese Association that Ozawa's case be delayed while a companion test case was sought. The Association found such a case in *Yamashita v. Hinkle*[36] and with Wickersham appearing as counsel in that matter as well, both cases were finally scheduled for oral argument in October 1922.

NARRATOR 1: Although Ozawa's opening brief was filed in December 1918, the Government's brief was not filed until September 1922. Wickersham submitted a single reply brief for both the *Ozawa* and *Yamashita* cases. A day later, an amicus brief was filed by the State of California. It was 125 pages long and it gives some idea of the public sentiment at the time.

MR. ENGLISH:[37] It is true that California in 1913 adopted an alien land law and amended that act in 1920. Justification for the adoption of that law is found in the fact that ineligible aliens, including Japanese in large numbers, have taken up their abode and residence in this state.

In an agricultural country such as our Western States there cannot continue to exist the American farm home life as America has known it if that life is to be placed in competition with the Oriental farmer. One or the other must survive and the inevitable result would be the survival of the Oriental farmer when his method of intensive agricultural development is opposed to that of the American farmer. The American family reared along the lines of American traditions with the father managing the farm, the mother presiding in the home and the children during their younger years attending school, cannot compete with the Oriental farm life wherein children and mother join with the father in the actual farm labor, and in addition do not enjoy conditions of life which are demanded by the American standard of living.

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[35] *Id.* at 676. A Supreme Court decision in *United States v. Morena*, 245 U.S. 392 (1918), handed down after the Council took over Ozawa's case, upheld the constitutionality of a procedural provision of the 1906 Act requiring that a petition of intent to naturalize be filed no less than two years, but no more than seven years, prior to the official petition to naturalize. Because Ozawa had waited twelve years, the Act presented a potential procedural obstacle to his cases. *See id.*

[36] *Yamashita v. Hinkle*, 260 U.S. 199 (1922), involved two previously naturalized Japanese men, Takuji Yamashita and Hyosaburo Kono, whose filing of articles of incorporation to form a real estate company was refused by the Secretary of State on the grounds that the two men had not been naturalized legally. The Washington Supreme Court declined to issue a writ of mandate to compel the acceptance of the articles of incorporation, and Yamashita and Kono appealed to the U.S. Supreme Court. *See* Ichioka, *supra* note 1, at 16.

[37] At the time, the Deputy Attorney General of the State of California was Frank English. *See* Brief for Attorney General of the State of California as Amicus Curiae Supporting Appellee, Ozawa v. United States, 260 U.S. 178 (1922) (No. 1); Carrott, *supra* note 1, at 127.

It is perfectly obvious that the average American man, woman or child if asked the question as to the race of the Japanese would without any hesitation answer that Japanese are yellow, brown, or possibly a mixture of those two races. Any one would be astounded on asking such a question to receive the answer that the Japanese are of the white race. They are popularly referred to over the world as the "little brown men" and such popular appellation bespeaks an understanding of our American people and of the civilized world that the Japanese are not of the white race.

ORAL ARGUMENTS IN *OZAWA* AND *YAMASHITA*

NARRATOR 2: Oral argument before the Supreme Court was held on October 3 and 4, 1922. William Howard Taft was Chief Justice, and the Court's newest member was George Sutherland, an immigrant from England who had won Utah's single congressional seat in 1900. He gave an interview shortly after this victory.[38]

JUSTICE SUTHERLAND: The Chinese laborers, who had naturally come to this country, will be brought into unhealthy competition with our own laborers. We already have one race problem in the South with the negroes, and to open our doors to the unrestricted immigration of Mongolians would be to invite another and more serious race problem into the West.

NARRATOR 1: After losing his seat in 1916, Sutherland maintained his ties with the conservative Republican majority, and was nominated to the Supreme Court by President Harding and confirmed by the Senate on the same day, September 5, 1922.[39] Less than a month later, he heard oral argument in the *Ozawa* case with the other members of the Court. No transcript of the argument exists, but based on the briefs and the Court's decision, we have created one possible version of what happened before the Court. [40]

[JUSTICE SUTHERLAND, FOUR OTHER ASSOCIATE JUSTICES, and CHIEF JUSTICE TAFT enter from stage right][41]

MARSHAL OF THE COURT: The Honorable, the Chief Justice, and the Associate Justices of the Supreme Court of the United States. Oyez, Oyez, Oyez. All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court.

CHIEF JUSTICE TAFT: We will hear argument this morning in *Ozawa v. United States.* Mr. Wickersham.

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[38] *See* Carbado, *supra* note 1, at 678.

[39] *Id.* at 679. *See also* JOEL FRANCIS PASCHAL, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE (1951).

[40] The following mock oral argument is derived from Brief of Petitioner, Ozawa v. United States, 260 U.S. 178 (1922) (No. 1); Brief of Respondent, Ozawa v. United States, 260 U.S. 178 (1922) (No. 1); Reply Brief of Petitioner, Ozawa v. United States, 260 U.S. 178 (1922) (No. 1); *Ozawa*, 260 U.S. 178.

[41] The script provides for four associate justices in addition to Associate Justice Sutherland (the author of the opinion) and Chief Justice Taft. The four additional justices are designated as Justices A, B, C, and D. Of course, the number could be reduced or increased. The sight of six (or more) justices entering wearing black robes is visually powerful.

WICKERSHAM: Mr. Chief Justice, and may it please the Court. The District Court of Hawaii found that Takao Ozawa meets all the qualifications for citizenship other than race. The government takes the position that all Africans and Europeans, white, black, brown or yellow in color, educated or not, may qualify as free white persons, but even the most loyal and cultured and white-skinned Japanese are categorically excluded from naturalization simply by virtue of their nation of origin. Mr. Ozawa has lived in this country for 20 years. He was educated here, went to high school and college here. He and his family go to church here. He has never attended a Japanese school or church. Petitioner is Japanese in origin only and otherwise is as American as anyone else to whom our country has extended the great right and privilege of naturalization.

NARRATOR 2:[42] One threshold issue that was surely discussed was a matter of statutory construction. The governing statute at the time was the Immigration Act of 1906. It did not contain a racial restriction on naturalization, and the question was whether it superseded section 2169 of Title XXX of the Revised Federal Statutes of 1875, which did limit naturalization to "free white persons" and aliens of African descent.

JUSTICE A: Counsel, I am highly sympathetic to your argument as a public policy matter, and were I a legislator with the unfettered power to act, I might have a different view. But is not the starting point of this Court's calculus the intendment of the statute, as expressed by its plain language and inescapable implication?

WICKERSHAM: No doubt, Your Honor. But the plain language of the Act of 1906 shows that it overrides Section 2169. The Act states explicitly that it is designed to "provide for an uniform rule for the naturalization of aliens throughout the United States." Every naturalization law that was previously enacted in the history of this Great Nation has contained similar language, which derives from our Constitution. Notably, the Act of 1906 does not purport to engraft or preserve any part of Section 2169 or any other prior law from our venerable past, but instead is complete and self-contained.

NARRATOR 1: The Court must also have explored the question of whether Ozawa was entitled to naturalization as a "free white person" in the event that Section 2169 was applicable. As Ozawa had argued in his hand-written briefs, Wickersham noted that Congress had barred the Chinese -- but not the Japanese -- from being naturalized. Because the Japanese were neither black nor Chinese, he argued, they had to be white -- and therefore eligible to be naturalized.

WICKERSHAM: Your Honors, petitioner is eligible for naturalization because he falls within the meaning of "free white persons." "Free white persons" means nothing more than one who is not black, not a Negro. It is the greatness of our nation that it has extended a welcoming hand to immigrants of all ethnicities and for this reason, we exclude only Chinese and also those morally, mentally and physically unfit for citizenship, but we have imposed no restrictions against the

[42] *See* Ichioka, *supra* note 1, at 2. Section 2169, Title XXX specified that racially, only two types of aliens -- persons of white or black descent -- were eligible to become American citizens. All Asian immigrants, being neither white nor black, were classified as "aliens ineligible to citizenship." *See* Sect. 141, 18 Stat. 477, 1873 (March 1875). The Immigration Act of 1906 framed the rules for naturalization, standardized naturalization forms, encouraged state and local courts to relinquish their naturalization jurisdiction to Federal courts, required immigrants to learn English in order to become naturalized, and expanded the Bureau of Immigration into the Bureau of Immigration and Naturalization. *See* Naturalization Act of 1906, ch. 3592, § 4, 34 Stat. 596 (repealed in part 1940).

Japanese race. Numerous Chinese Exclusion Acts have been passed; but there is no line in any statute before or since 1875 which indicates any intention to classify the Japanese with those excluded or to discriminate against them in any way. Indeed, if Section 2169 excludes the Chinese from naturalization, why did Congress believe there was a need to promulgate a Chinese Exclusion Act?

CHIEF JUSTICE TAFT: Counsel, is it not the case that we should depart from the words of the legislation if the literal meaning of those words leads to an unreasonable result plainly at variance with the policy of the legislation as a whole?

WICKERSHAM: Mr. Chief Justice, of course, this Court's construction of the legislation should avoid absurd results. But petitioner submits that the absurd result here would be to draw unyielding lines based upon place of origin, rather than upon factors relating to the individual in question, such as the extent to which that individual has assimilated into our great nation.

JUSTICE B: But in determining the policy underlying the legislation, abstractions do not matter as much as the antecedent legislative history. And isn't that history clear, right or wrong, in stating that "Asiatics" should not be naturalized?

WICKERSHAM: Section 2169 traces its origin back to 1790. There is no indication that the framers of our government in 1790 contemplated the immigration of Asians and thus there was at that momentous time in our nation's history no intention to exclude Asians. To the contrary, in 1790, the framers intended "white" to simply mean a person without negro blood.

JUSTICE C: But is that analysis misplaced? The question is not whom the framers intended to exclude. The question is whom the framers intended to *include*. And their intent to *include* only free whites is unmistakable, is it not?

WICKERSHAM: Where is the line drawn, Your Honor, as to who is white and who is not? Our courts have ruled that Parsees, Armenians, Syrians, and Hindoos have qualified for naturalization as "white." Our laws have demarcated Puerto Ricans, aliens in the military, and Filipinos as white. Judge Lowell in the *Halladjian* case stated that the term "white" is a broad term which he described as encompassing "substantially all of the people of Asia."[43] I would submit to you that there is no reason why Japanese fall on the other side of the line, particularly when the skin color of some Japanese is as white as yours or mine.

[43] *In re* Halladjian, 174 F. 834, 845 (D. Mass. 1909) ("We find, then, that there is no European or white race, as the United States contends, and no Asiatic or yellow race which includes substantially all the people of Asia; that the mixture of races in western Asia for the last 25 centuries raises doubt if its individual inhabitants can be classified by race; that, if the ordinary classification is nevertheless followed, Armenians have always been reckoned as Caucasians and white persons; that the outlook of their civilization has been toward Europe. We find, further, that the word 'white' has generally been used in the federal and in the state statutes, in the publications of the United States, and in its classification of its inhabitants, to include all persons not otherwise classified; that Armenians, as well as Syrians and Turks, have been freely naturalized in this court until now, although the statutes in this respect have stood substantially unchanged since the First Congress that the word 'white,' as used in the statutes, publications, and classification above referred to, though its meaning has been narrowed so as to exclude Chinese and Japanese in some instances, yet still includes Armenians.").

NARRATOR 2: When the government argued its case, it is likely that the Solicitor General spent little time on statutory construction but proceeded directly to the definition of "free white persons," believing that the decision would turn on that issue.

BECK: Since 1790, our laws have specifically limited naturalization to "free white persons." As Judge Sawyer explained in *In re Ah Yup* in 1878, the common meaning of white person is a person of the Caucasian race.[44] Indeed, even so basic a resource as the Webster Dictionary states that there are five racial classifications, of which Caucasians are one and of which the Mongol or yellow race is another. And never in the common parlance or in the science of ethnology do we find anyone who will aver that the white race encompasses the yellow one.

Now, my learned adversary tries to confuse the issue by stating that Syrians and others fall on the border line. Our courts of course draw lines all the time and it is well within their competence to do so. However, this is no such hard case. Mr. Ozawa is, by his own admission, of Japanese extraction and thus unassailably of the Asiatic race and not the white race.

JUSTICE D: If Chinese were already excluded from the naturalization statutes prior to passage of the first Chinese Exclusion Act, why were the Chinese Exclusion Acts necessary? And is it not a source of concern for you that the Chinese Exclusion Act makes no mention of excluding Japanese?

BECK: The court cases prior to the Chinese Exclusion Act clearly excluded Chinese from the purview of "free white persons." The Chinese Exclusion Act was enacted to recognize the growth of the Chinese population and the legislative need for targeted legislation dealing with that group. The Japanese were not included in the Exclusion Act because until recently the Japanese could boast no such numerosity and thus there was no perceived legislative exigency with respect to the Japanese race.

JUSTICE A: By not defining the words "white person," Congress left the subject in great uncertainty. What is our practical recourse? Can we draw any better line than simply visually inspecting the applicant and determining whether he is a "white person?"

BECK: Your Honor, it is precisely because an individual accounting is unworkable that the Congress, the President and our Courts have all urged a categorical definition of "white person," a definition applicable to entire races without regard to what may well be exemplary individual characteristics which arguably render some applicants assimilable into white society.

NARRATOR 1: A little more than a month after oral argument, Justice Sutherland delivered the opinion of the unanimous court. The Court rejected the statutory construction argued by Wickersham, refusing to hold that the Act of 1906 superseded Section 2169, and proceeded to the issue of whether Ozawa was white.

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[44] *In re* Ah Yup, 1 F. Cas. 223 (D. Cal. 1878) ("Whiteness has acquired a well-settled meaning in common parlance. Language, literature, and scientific nomenclature do not define Mongolians as white. Also, all classifications of races do not include Mongolians within the definition of the white race. It is clear from Congressional proceedings and recent legislation that naturalization laws exclude Chinese.").

SUTHERLAND:[45] The question then is: Who are comprehended within the phrase "free white persons?" We have been furnished with elaborate briefs in which the meaning of the words "white person" is discussed with ability and at length, both from the standpoint of judicial decision and from that of the science of ethnology. It does not seem to us necessary, however, to follow counsel in their extensive researches in these fields. It is sufficient to note the fact that these decisions are, in substance, to the effect that the words import a racial and not an individual test, and with this conclusion, fortified as it is by reason and authority, we entirely agree. Manifestly the test afforded by the mere color of the skin of each individual is impracticable, as that differs greatly among persons of the same race, even among Anglo-Saxons, ranging by imperceptible gradations from the fair blond to the swarthy brunette, the latter being darker than many of the lighter hued persons of the brown or yellow races.

The federal and state courts, in an almost unbroken line, have held that the words "white person" were meant to indicate only a person of what is popularly known as the Caucasian race. With the conclusion reached in these several decisions we see no reason to differ. . . .

The determination that the words "white person" are synonymous with the words "a person of the Caucasian race" simplifies the problem, although it does not entirely dispose of it. Controversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases. . . .

The appellant in this case, however, is clearly of a race which is not Caucasian. A large number of the federal and state courts have so decided. . . . These decisions are sustained by numerous scientific authorities, which we do not deem it necessary to review. We think these decisions are right and so hold. . . .

The briefs filed on behalf of appellant refer in complimentary terms to the culture and enlightenment of the Japanese people, and with this estimate we have no reason to disagree; but these are matters which cannot enter into our consideration of the questions here at issue. We have no function in the matter other than to ascertain the will of Congress and declare it. Of course there is not implied -- either in the legislation or in our interpretation of it -- any suggestion of individual unworthiness or racial inferiority. These considerations are in no manner involved.

NARRATOR 2: Only two months later, the reasoning of the *Ozawa* decision would be tested in the *Thind* case.

[45] *Ozawa*, 260 U.S. at 196-98.

THIND: BACKGROUND[46]

NARRATOR 1: Thind was born in 1892, in northern India in Amritsar, Punjab, "the holy city" of the Sikh religion. He attended Khalsa College, but moved to the United States at the age of 21 to pursue an education in an American university.

THIND: At Khalsa, I studied Emerson, Thoreau, and Whitman. From their writings I became fascinated with America and its people. I remember this about Thoreau: When Thoreau was dying, a priest asked him, "have you made your peace with the Lord?" Thoreau replied, "we are on the best of terms."[47] I dreamed of going to America, where I could study more, and become a spiritual leader.

NARRATOR 2: Thind followed his dream, arriving in the United States in Seattle, Washington in 1913, and worked in the lumber mills of Astoria, Oregon. On July 22, 1918, while still a citizen of India, he joined the U.S. Army to fight in World War I. A few months later, he was promoted to Acting Sergeant.

THIND: I was idealistic, but I always told my disciples that "it is the daring, vital, vigorous, high souled men and women with the courage to face and experience the world who become conquerors of their minds and of the world."[48] My father was a high ranking military official in the British Indian Army; actually my entire family was respected in Amritsar as a warrior family. So though I was in the United States, and not Amritsar, I felt the responsibility to fight for my country, the United States, as my father did for his.

NARRATOR 1: Thind filed a petition to be an American citizen, in part because he wanted to be a lawyer and could not become a lawyer unless he was a citizen. On December 9, 1918, in the district court in Washington, his petition was granted. He was sworn in as a U.S. citizen, while wearing his uniform as a soldier in the U.S. Army. But just four days later, his citizenship was revoked, as the Immigration and Naturalization Service disagreed with the court's decision.

Undeterred, Thind tried again. In May 1919, he petitioned for citizenship in Oregon District Court. In November 1920, Judge Wolverton ruled.[49]

JUDGE WOLVERTON: Since his entry into this country, Thind's deportment has been that of a good citizen, attached to the Constitution of the United States.

Bhagat Singh did not enter unlawfully. The Immigration Act does not require him to depart the country. I find nothing in the Act that evinces an intendment that it should render Thind's lawful entry presently unlawful. Shall such Hindus remain here as they please, without the privilege of

[46] The facts set forth below are drawn from Singh, *supra* note 9, at 66; Brief for Appellant, United States v. Thind, No. 3745 (9th Cir. Sept. 28, 1921); Brief for Respondent, United States v. Thind, No. 3745 (9th Cir. Oct. 6, 1921); *In re* Bhagat Singh Thind, 268 Fed. 683 (D. Or. 1920); Carbado, *supra* note 1, at 682-85; HANEY LÓPEZ, *supra* note 1, at 61-65, 84-88.

[47] *See* SIMON CRITCHLEY, THE BOOK OF DEAD PHILOSOPHERS 181 (2009) ("When asked if he had made his peace with God, [Thoreau] replied, 'I did not know we had ever quarreled.'").

[48] Bhagat Singh Thind, SANSAR ROGI NAM DARU OR THE LIVING WORD OF GOD 7-8 (2009).

[49] *In re* Bhagat Singh Thind, 268 Fed. 683 (D. Or. 1920).

becoming citizens or shall they be deported whence they came? As to these questions, the law is silent.

As the present act does not require such Hindus as are here to depart, and, there being no manifest repugnancy between this and the naturalization laws, it must be concluded that Bhagat Singh is entitled to his naturalization.

I am not disposed to discuss the question as one of first impression whether a high-class Hindu, coming from Punjab, is ethnologically a white person, within the meaning of Section 2169. I am content to rest my decision of the question upon a line of cases that have explored this issue and held that Hindus of India are members of the Aryan branch of the Caucasian race.

NARRATOR 1: Following Judge Wolverton's decision, Thind was naturalized. One month later, the U.S. government filed a bill in equity to cancel Thind's citizenship, supported by the affidavit of V.W. Tomlinson, a Naturalization Examiner in the Department of Labor.[50]

TOMLINSON: I am acquainted with Bhagat Singh Thind, who was admitted to citizenship as a citizen of the United States and I conducted an investigation and examination of his qualifications to become a citizen. He is a native of India and to the best of my information and belief he is not a free white person within the meaning of Section 2169 and is not thereby entitled to become a citizen of the United States by naturalization. In my opinion, there is good cause for cancelling the certificate of naturalization issued to Bhagat Singh Thind.

NARRATOR 2: The Oregon District Court disagreed with the government, once again affirming Thind's lawful entitlement to naturalization and dismissing the bill. The government appealed to the Ninth Circuit, which turned directly to the Supreme Court with the question whether a high caste Hindu of full Indian blood was a white person within the meaning of Section 2169.[51]

THIND IN THE SUPREME COURT[52]

NARRATOR 1: In January 1923, the U.S. Supreme Court heard oral argument. Again, we have imagined how the argument proceeded.

[JUSTICE SUTHERLAND, FOUR ANONYMOUS JUSTICES, And CHIEF JUSTICE TAFT enter from stage right]

CHIEF JUSTICE TAFT: We will hear argument this morning in *United States v. Thind*. Mr. King, on behalf of Mr. Thind?

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[50] Transcript of Record on Appeal at 7-8, United States v. Thind, No. 3745 (9th Cir. Aug. 5, 1921) (containing Tomlinson Affidavit as Exhibit A attached to the Bill of Complaint in Equity filed by the U.S. Attorney in the U.S. District Court for the District of Oregon) [hereinafter Thind ROA]. *See* Singh, *supra* note 9, at 66.

[51] *See* Carbado, *supra* note 1, at 682.

[52] No transcript of the argument exists, but based on the briefs and the Court's decision, the authors created one possible version of what happened before the Court. The following mock oral argument is derived from United States v. Thind, 261 U.S. 204 (1923) (No. 202); Brief for Respondent, United States v. Thind, 261 U.S. 204 (1923) (No. 202); United States v. Thind, 261 U.S. 204 (1923); Carbado, *supra* note 1, at 682.

KING: Mr. Chief Justice, and may it please the Court: Mr. Thind became a lawful citizen of the United States on November 18, 1920. From well before that date until the present, Mr. Thind has faithfully served our country. He spent many summers stacking lumber in the Oregon mills, and volunteered to protect America as a serviceman in our armed forces during the Great War. Mr. Thind was granted an honorable discharge from the U.S. military in December of 1918. He has remained a law-abiding citizen since that day.

Under this country's law, Mr. Thind meets all of the requirements of citizenship. The District Court decision should be upheld.

JUSTICE B: Counselor, the question before us, of course, is not whether your client faithfully served this country or whether he is a good person or whether he stacked lumber in Oregon. Rather, the question, as you well know, is whether Mr. Thind is a "white person" within the meaning of the statute.

KING: Your Honor, Mr. Thind is a "white person," for he is, unequivocally, Caucasian and therefore white.

JUSTICE C: Is he not "brown?"

KING: Respectfully, Your Honor, Mr. Thind was born a member of a high Hindu caste, a caste well known to be descendants of the Aryan race. Aryans, as your Honors are aware, are of the Caucasian -- the "white" -- race. Accordingly, the naturalization law permits Mr. Thind, a white person, to be a citizen, as held in *Ozawa*.

JUSTICE SUTHERLAND: Mr. King, I do have some familiarity with the *Ozawa* decision. Did I not write in *Ozawa* that the determination that the words "white person" means a Caucasian did not end the matter? Did this Court not conclude that there was not to be a sharp line of demarcation between those who are entitled to be naturalized and those who are not?

KING: Justice Sutherland, Mr. Thind falls well within the zone of those entitled to be naturalized. Various renowned scholars have proven to us that Hindus are Caucasians. Professor Blumenbach's research and studies compared many important racial factors such as skull shape and complexion which demonstrate that Hindus are Caucasian, the highest type of white race.

NARRATOR 2: King argued not only that Thind was white, but he went to great lengths to argue that Thind was of pure blood, and that there was no possibility that he was a person of mixed blood. While Ozawa had argued that being "white" for these purposes should turn more on a person's character and worthiness, Thind's lawyer emphasized blood and race.

JUSTICE D: You cannot be saying that a man with brown skin and black hair is the same race as a blond Scandinavian with fair skin.

KING: Your Honor, color alone cannot determine race. While color is some evidence of race, the *true* test of race is blood or descent. It is well-settled among scientists that Indians hail from

the Aryan race, specifically those in the north and northwest, including Punjab, where Mr. Thind was born.

JUSTICE A: Everyone knows -- even a child could recognize -- that the physical group characteristics of Hindus are readily distinguishable from the whites.

KING: The reason Aryans of India are darker than Aryans of Germany is due to environmental factors such as the sun. Natural selection has shown us that dark-skinned people have a better chance of survival in warmer climates. Thus, those Aryans in India have evolved to be more adapted for the climate of India, but they are still Caucasian.

JUSTICE B: Even so, we could not be sure of his origin. Mr. Thind's blood might not be pure. After hundreds of years, there is certain to be mixing of races.

KING: Your Honor, the caste system in India is strictly regimented. It is guaranteed that there is no intermixing of castes or races and thus the Aryan blood is pure. In the caste system, it is disgraceful for a high-class Hindu to marry someone of a lower caste. This would be like an American gentleman marrying a member of the Negro race -- the offspring is subject to the same social denigration.

NARRATOR 1: The argument would have included exploration of a second question certified to the Court: the effect of the Immigration Act of 1917. This statute, also known as the "Asiatic Barred Zone Act," created a zone across much of Asia, including India and the Pacific Islands, from which individuals were banned from entering the country. Hence, Hindus, other Asians, and Pacific Islanders joined a list that included the "feeble-minded," "idiots," "criminals," "epileptics," and "professional beggars."[53]

JUSTICE C: Isn't it the case that the 1917 Act disqualifies Hindus who lawfully entered before that date from being naturalized as citizens?

KING: No, Your Honor, it does not. The 1917 Act was meant to apply prospectively only -- from that point forward.

JUSTICE D: Doesn't the 1917 Act evidence an intent to exclude natives of Asian countries, including India?

KING: Your Honor, the 1917 Act does not amend the Naturalization Act by implication or otherwise. The 1917 Act only affects Hindus who attempt to come to the United States after that time.

Mr. Thind entered the country lawfully and was a lawful citizen before the enactment of the Immigration Act of 1917. The Act therefore cannot affect him.

We ask the Court to affirm the district court's decision.

[53] Immigration Act of 1917, H.R. 10384; Pub.L. 301, 39 Stat. 874 (Feb. 5, 1917).

CHIEF JUSTICE TAFT: We'll hear from the Government.

BECK: Honorable Justices, may it please the Court, quite simply, Mr. Thind is a Hindu. He is not a white person and, therefore, he is not eligible for naturalization.

JUSTICE A: Is Mr. Thind not Caucasian?

BECK: Apparently so, your Honor. We acknowledge the consensus amongst ethnologists that high-caste Hindus, such as Mr. Thind, would be considered a member of the Aryan family and therefore Caucasian.

JUSTICE B: That being the case, why is he not a white person for purposes of Section 2169?

BECK: In *Ozawa*, this Court noted that defining a "white person" as a Caucasian simplified but did not entirely dispose of the issue, because controversies would arise with respect to the proper classification of individuals in borderline cases, individuals falling within a zone of debatable ground. Here, we have such a borderline case, at least when considered ethnologically.

JUSTICE C: What about the cases holding that "white" means Caucasian? There is even language in *Ozawa* to that effect.

BECK: Your Honors, it's not that simple. As a matter of statutory construction, this Court must consider what the drafters intended, in 1790, when they first wrote the words "free white persons," and what they had in mind in 1870,when the naturalization laws were extended to aliens of African descent, and what they had in mind in 1875, when the words "free white persons" were restored after they had been inadvertently omitted. It is necessary to determine who the drafters intended to include, not who they intended to exclude. And they intended to include men of a combination of color, race, and social institutions, men like themselves, men who developed and maintained a civilization of which the drafters were a part – the civilization of white men.

JUSTICE D: Counsel, petitioner Thind is a Caucasian who has clearly adopted Western culture, habits and customs, is he not?

BECK: Perhaps so, Your Honor, but that is not the test here. Even though his Caucasian or Aryan stock in India may have kept their blood pure for centuries, even though Mr. Thind himself may strive to adopt Western ways, those eligible for naturalization must be representatives of a white civilization. The people of India are removed from political fellowship with the white men of the Western World. The term "white man" has never been used as appropriate to describe the Hindu, who are classified as the "brown" race. To call a Hindu a white man would be to give a judicial interpretation contrary to the universal acceptation of the term.

NARRATOR 1: Just over a month later, Justice George Sutherland delivered the opinion for what was again a unanimous court:

JUSTICE SUTHERLAND:[54] Mere ability on the part of an applicant for naturalization to establish a line of descent from a Caucasian ancestor will not necessarily conclude the inquiry. We must not fail to keep in mind that the statute does not employ the word "Caucasian" but the words "white persons," and these words are of common speech and not of scientific origin. The word Caucasian not only was not employed in the law but was probably wholly unfamiliar to the original framers of the statute in 1790.

The words of familiar speech, which were used by the original framers of the law, were intended to include only the type of man whom they knew as white, almost exclusively from the British Isles and Northwestern Europe. When they extended the privilege of American citizenship to 'any alien being a free white person' it was these immigrants – bone of their bone and flesh of their flesh – and their kind whom they must have had affirmatively in mind.

What we now hold is that the words "free white persons" are words of common speech, to be interpreted in accordance with the understanding of the common man, synonymous with the word "Caucasian" only as that word is popularly understood. As so understood, it does not include the body of people to whom the appellee belongs.

It is very far from our thought to suggest the slightest question of racial superiority or inferiority. What we suggest is merely racial difference, and it is of such character and extent that the great body of our people instinctively recognize it and reject the thought of assimilation.

AFTERMATH[55]

NARRATOR 1: What was the impact of the Supreme Court's decisions in *Ozawa* and *Thind*? As a result of *Ozawa*, Japanese immigrants gave up their dream of becoming U.S. citizens. Some called the decision a "national humiliation,"[56] as the message was sent that the Japanese were too different, too undesirable to become a part of American society. Without the rights of citizenship, the Japanese would never have the full protection of the law.

Nevertheless, immigrant leaders hoped that they could win their separate cases challenging the California and Washington alien land laws. But they suffered total defeat in these cases as well.[57] As a consequence, Japanese immigrants were unable to own or even lease land, and thousands of acres of land were seized from Japanese immigrants.

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[54] *Thind*, 261 U.S. at 208, 213-15 (1923).

[55] *See generally* HANEY LÓPEZ, *supra* note 1; Carbado, *supra* note 1; Carrott, *supra* note 1; Ichioka, *supra* note 1.

[56] Ichioka, *supra* note 1, at 17.

[57] In November 1923, the U.S. Supreme Court handed down four decisions on California and Washington's alien land laws, all detrimental to the Japanese. *See* Terrace v. Thompson, 263 U.S. 197 (1923) (involving a white American that sought to lease his agricultural property to a Japanese alien; the Supreme Court held that the state had the authority to forbid aliens from holding land and that Washington state had followed the federal policy of discriminating only against certain aliens); Porterfield v. Webb, 263 U.S. 225 (1924) (citing *Terrace v. Thompson* and finding that a Japanese alien was not permitted to rent farm land from American under the Alien Land Act of California); Webb v. O'Brien, 263 U.S. 313 (1923) (stating that sanctioning cropping arrangements between an Japanese alien and American would cause aliens ineligible for citizenship to threaten the security of the state by controlling much of the US's farm land); Frick v. Webb, 263 U.S. 326 (1923) (involving a white American selling stock in company that owned farm land to a Japanese alien; the Supreme Court refused to issue an restraining order on the basis that any ownership of stock in a farm was the same as holding an interest in the land).

In the longer term, the Supreme Court's ruling in *Ozawa* surely paved the way for the United States government's decision during World War II to intern people of Japanese ancestry and the Supreme Court's acquiescence in that internment.

NARRATOR 2: For Asian Indians, the Supreme Court decision in *Thind* was perhaps even more devastating: Asian Indians who had previously been naturalized, and had believed their status to be secure, were stripped of their citizenship. More than 65 Asian Indians were denaturalized between 1923 and 1927 in the wake of *Thind*. Among them was Vaishno Das Bagai, who had lived with his family in the United States since 1915, and had become a citizen. He committed suicide, and in his suicide note, he wrote as follows:

DAS BAGAI:[58] "But now they come to me and say, I am no longer an American citizen. . . . What have I made of myself and my children? We cannot exercise our rights, we cannot leave this country. Humility and insults, who are responsible for all of this? . . . Obstacles this way, stockades that way, and the bridges burnt behind."

NARRATOR 1:[59] As for Thind, his U.S. citizenship was revoked. In 1935, however, Congress passed a law allowing citizenship to U.S. veterans of World War I. Thind was eligible under the new law and he took the oath of citizenship in 1936 in New York. By that time, he had completed his PhD and was delivering lectures in Metaphysics.

Soon after, he was ordained a minister, then met and married Vivian (Davies) Thind, in Ohio in 1940. He went on to become a revered spiritual leader and wrote many religious books. He died on September 15, 1967.

NARRATOR 2: Judge Clemons, the judge who felt constrained by the law to rule against Ozawa, offered these views in an op-ed published in the *Honolulu Star-Bulletin*, some years later.[60] He wrote:

CLEMONS: It is absurd . . . that a man must be either 'white' or 'of African nativity' . . . to become a naturalized citizen . . . . The remedy for this anomaly lies with Congress, which should not further delay the radical cure for this international ill. How hypocritical so much prating about the 'international mind,' while retaining so much prejudice against mere radical 'color' as such!

NARRATOR 1: Congress, however, did not act to remove racial restrictions on naturalization generally until 1952.[61]

NARRATOR 2: We do not know how Takao Ozawa reacted to the Supreme Court decision. We do know that in 1926, he opened Kaimuki Dry Goods, a store that today is run by his grand-

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[58] *See* RACE at 1:19:15; HANEY LÓPEZ, *supra* note 1, at 64-65.

[59] *See* Amin Vafa, *The Fight To Be American: Military Naturalization And Asian Citizenship*, 17 ASIAN AM. L.J. 119, 145-46 (2010).

[60] *See* Carbado, *supra* note 1, at 671

[61] In 1952, Congress passed the McCarran-Walter Act eliminating race as a basis for naturalization. McCarran-Walter Act, 8 U.S.C. § 1422 (1952).

daughter, Dee Dee Miyashiro.[62] We do know that Ozawa lived out his days in Hawaii, raising four daughters and one son, and that he died in 1936. We also know that his son served in the U.S. military as a U.S. citizen in World War II and that George Yoshio Ozawa died near Leonardo, Italy, fighting for the country his father had so proudly adopted as his own. George is interred at the National Memorial Cemetery of the Pacific in Honolulu, known as Punchbowl. He was awarded the Purple Heart and many other medals for his service to his country.[63]

NARRATOR 1: On November 2, 2011, members of Congress gathered to award the Congressional Gold Medal, the highest civilian award given by Congress, to World War II Japanese-American veterans in the 442nd Regimental Combat Team, the Military Intelligence Service and George's unit, the 100th Infantry Battalion.[64] The members of Congress recognized that what separated these veterans from others was not only that many of them had family members in internment camps, but that they were exempt from the draft. They *chose* to serve. Senator Inouye, himself a member of the 442nd, stated as follows:[65]

SENATOR INOUYE: After Pearl Harbor, Japanese-Americans were declared by the government as being enemy agents. . . and, as such, unfit to put on the uniform of this land. But we didn't sit by and do nothing about it. We petitioned the government to give us an opportunity to demonstrate our love of country and our patriotism, which was granted to us.

NARRATOR 2: Takao Ozawa would have been proud of his son. And both Takao Ozawa and Bhagat Thind would have understood and applauded the spirit behind the petition described by Senator Inouye, for they shared that same spirit.

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[62] *See* KAIMUKI DRY GOODS, http://www.kaimukidrygoods.com/aboutus.shtml (last visited Aug. 29, 2012); Carbado, *supra* note 1, at 646 ("By the time Ozawa died in 1936, he had made Hawai'i his home.").

[63] *See* Obituary of George Yoshio Ozawa (October 24, 1917- October 21, 1943) (on file with authors).

[64] *See* C. Todd Lopez, *Japanese-American Vets Earn Nation's Highest Civilian Honor*, THE OFFICIAL HOMEPAGE OF THE UNITED STATES ARMY (Nov. 2, 2011), http://www.army.mil/article/68563.

[65] *Going for Broke: Japanese-American Veterans Honored with Congressional Gold Medal*, ABC NEWS (Nov. 2, 2011), http://abcnews.go.com/blogs/politics/2011/11/going-for-broke-japanese-american-veterans-honored-with-congressional-gold-medal.