# Patriotism, Rebuffed

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Abstract

During the three decades that Diamond Kimm spent in the United States, he confronted the most powerful judicial and legislative authorities in the country. As a leader in the Korean American community in Los Angeles, Kimm spoke publicly about his political beliefs and criticized U.S. policies overseas and military intervention on the Korean peninsula. Immigration officials sought to deport Kimm on the basis of his suspected communist affiliations and Kimm's subsequent fight to remain in the country illuminates a significant chapter in the development of constitutional protections for immigrants, as well as the history of Asian Americans in the United States.

About the Author

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## Introduction

Diamond Kimm, a Korean immigrant, appeared in front of the House of Representatives in 1955 after three decades of residence in the United States. Kimm faced deportation proceedings and a congressional investigation for suspected communist affiliations and activities. Representative Gordon Scherer questioned Kimm about his work with the Los Angeles–based newspaper, *Korean Independence*, and asked him to confirm the identity of the newspaper's treasurer. Kimm responded that Scherer's questions violated his First Amendment rights: "Since I live in this country, I want to uphold the Constitution and I refuse to answer." Scherer responded that it was "strange" that "this North Korean," a "noncitizen," would charge Congress with violating the Constitution. Kimm said that he would have applied for citizenship but the U.S. government's initiation of deportation proceedings prevented him from doing so. To this, Representative Clyde Doyle replied:

> I regret hearing you, a noncitizen of my country all these years saying that my Government is at fault . . . it is not very pleasant to hear a man that hasn't proved his right to citizenship . . . charge my Government being at fault . . . I direct you to answer the question. If you don't like our country, why don't you get out.[1]

Doyle's remark was met with applause from the audience. Kimm rejected Doyle's attack on his patriotism and cited his past military service as evidence of his dedication to the United States. Ultimately, the hearing ended with several congressmen wishing aloud that Kimm be immediately deported by the Department of Justice. Scherer said, "There is every reason why he should have been deported."[2]

This bitter exchange characterizes the political environment in which Kimm contested his deportation order. Catalyzed by the fall of Eastern European governments to communist forces and the discovery of Soviet espionage within the United States, anti-communist fear and stigma grew throughout the 1950s.[3] Kimm was one of many individuals who were called to appear in front of the House Un-American Activities Committee (HUAC), a congressional body charged with investigating domestic communist "infiltration" and eliminating the perceived threat of a rising communist influence from abroad.[4]

While Kimm faced this unique challenge, the perception of Asian Americans as a group of threatening foreigners predates Kimm's case. Since the passage of the Chinese Exclusion Act of 1882, Asian immigrants have been denied access to naturalization and citizenship.[5] While the earliest seminal

1. *Investigation of Communist Activities in the Los Angeles, Calif., Area—Part 1: Hearings Before the Comm. on Un-American Activities H.R.*, 84th Cong. 1550 (1955) [hereinafter *HUAC Hearing Diamond Kimm Testimony*] (Testimony of Diamond Kim [sic]).

2. *Id.* at 1572.

3. *See* Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 San Diego L. Rev. 1, 17–18 (1991).

4. See id. at 18.

5. Asian American immigrants litigated unsuccessfully for naturalization and

cases with Asian American litigants involved Chinese, Indian, and Japanese immigrants, the Korean American immigrant community began to grow in the midtwentieth century.[6] Kimm arrived at the tail end of the first wave of Korean immigration to the United States, making his first home in Los Angeles where he studied geology at the University of Southern California (USC) and assumed leadership positions within the Korean American Christian community and the movement for Korean independence from Japanese colonial rule.[7]

## I. Kimm's Beginnings in the United States

After finishing his undergraduate education at USC, Kimm attended a postgraduate program at the Colorado School of Mines until his student visa expired in 1938.[8] In 1941, the Immigration and Naturalization Service (INS) issued a warrant for his arrest for unlawfully remaining in the United States.[9] Kimm claimed he intended to return to Korea the year before his visa expired but could not do so because the Japanese colonial government in Korea would have required Kimm to contribute to "Japan's war machine" by working for the colonial government as a technician.[10] Eventually, the Board of Immigration of Appeals (BIA) found Kimm to be deportable based on his failure to maintain his student status. However, because Kimm was able to establish his "good moral character" for the preceding five years, he was given

citizenship rights throughout the late nineteenth and early twentieth centuries. *See, e.g.*, United States v. Thind, 261 U.S. 204 (1923) (finding that residents of Indian descent were ineligible for naturalization); Fong Yue Ting v. United States, 149 U.S. 698 (1893) (upholding the constitutionality of the Geary Act, which mandated that Chinese laborers would be deported if they failed to obtain a certificate of residence, unless they were excused by the testimony of a white witness); *In re* Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104) (finding that residents of Asian descent were ineligible for naturalization). *See also* Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting) ("There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race.").

6. There were three large waves of Korean immigration to the United States: 1) 1903–1924: labor migration to Hawaii; 2) 1950–1964: migration after the Korean War; and 3) 1965–present: migration after the Immigration and Nationality Act of 1965. *See* Kyeyoung Park, *Koreans in the United States*, *in* Encyclopedia of Diasporas 993, 994 (Melvin Ember et al. eds., 2005). When the United States went to war in Korea in 1950, Koreans could not immigrate to the United States due to racial quotas, and the 3000-odd Koreans that had arrived in the United States before 1924, including Kimm, were denied naturalization. *See* Bruce Cumings, Korea's Place in the Sun: A Modern History 455 (Updated ed. 2005) [hereinafter Cumings, Korea's Place].

7. *See* David K. Yoo, Contentious Spirits: Religion in Korean American History, 1903–1945 105 (2010).

8. *See* Brief for Petitioner at 4, Kimm v. Hoy, 263 F.2d 773 (9th Cir. 1959) (No. 15763); *see also* Cindy I-Fen Cheng, Citizens of Asian America: Democracy and Race During the Cold War 137 (2013).

9. The arrest warrant was served on Kimm on March 14, 1942. Kimm v. Rosenberg, 363 U.S. 405 (1960). *See* Kimm v. Hoy, 263 F.2d 773, 774 (9th Cir. 1959), *aff'd sub nom.*

10. *See* Brief for Petitioner, *supra* note 8, at 4; *see also* Cheng, *supra* note 8, at 137.

the option of making a voluntary departure within 60 days after the end of World War II.[11]

During World War II, the U.S. Military's Office of Strategic Services (OSS) solicited Kimm to carry out a covert mission against the Japanese government. In July 1945, he entered into the OSS's employ and trained for his mission on Catalina Island, located off the coast of Southern California. During the course of his training, the U.S. government allegedly offered Kimm the option of becoming a citizen. However, Kimm declined, stating that his covert mission could be more successful if he maintained Korean citizenship and avoided arousing suspicions.[12]

The Japanese surrendered before Kimm could carry out his mission, and in September 1945, Kimm left the OSS.[13] At the end of the war, Kimm submitted several applications to the State Department to receive an exit permit to return to Korea but never received a reply.[14] Kimm's immigration case again lapsed into dormancy until April 1949 when the INS ordered Kimm's case to be reopened to allow him to apply for suspension of his deportation order—a form of immigration relief established by Congress on July 1, 1948 through amendment of the Immigration Act of 1917. This 1948 amendment authorized the Attorney General to suspend deportation for aliens who (1) demonstrated good moral character for the preceding five years, (2) were eligible for naturalization or were ineligible solely because of race, (3) resided continuously in the United States for seven years, and (4) resided in the United States on July 1, 1948. This amendment included a notable exception for immigrants who could be found deportable based on their membership or past affiliations with the Communist Party; this exception had been implemented by the Internal Security Act of 1950, which was then commonly referred to as the "McCarran Act."[15]

Nine days before the Korean War began, and shortly before the enactment of the McCarran Act, Kimm appeared at a hearing in front of the INS, where he was advised that the hearing's purpose was to determine his right "to be and remain in the United States and to enable [Kimm] to show cause, if there be any, why he should not be deported from the United States" under the original warrant of arrest issued in 1941.[16] The INS argued that, in light of the recent Supreme Court decision, *Wong Yang Sung v. McGrath*, Kimm required a new hearing for full consideration of his case.[17] Kimm's counsel

11. *See* Brief for Petitioner, *supra* note 8, at 4.

12. *See HUAC Hearing Diamond Kimm Testimony*, *supra* note 1, at 1547.

13. *See id.* at 1546.

14. *See* Brief for Petitioner, *supra* note 8, at 5; Brief for the Respondent at 4, Kimm v. Rosenberg, 363 U.S. 405 (1960) (No. 139) ("Apparent attempts by the petitioner to obtain an exit permit in 1946 and again in 1957 . . . were unsuccessful.").

15. *See* Brief for Petitioner, *supra* note 8, at 5 ("This act was amended by section 22 of the Internal Security Act of 1950 to include aliens who had ever been members of the Communist Party.").

16. Kimm v. Hoy, 263 F.2d 773, 775 (9th Cir. 1959), *aff'd sub nom.*

17. Wong Yang Sung v. McGrath, 339 U.S. 33 (1950). *See* Kimm v. Hoy, 263 F.2d at

requested a continuance, which was granted, and the hearing resumed several months later on October 2, 1950.

At this continued hearing, Kimm's counsel argued that the scope should be limited to Kimm's application for suspension of deportation. However, the hearing examiner stated that the INS was permitted to inquire into any aspect of Kimm's residence in the United States because Kimm was applying for discretionary relief.[18] Kimm's counsel disagreed, but the hearing examiner continued his questioning and asked Kimm if he was a member of the Communist Party. Kimm's counsel objected, citing various grounds, including Kimm's First and Fifth Amendment rights, and Kimm did not answer. The hearing was continued again to January 8, 1951 when Kimm appeared with new counsel, William Samuels from Los Angeles. The INS inspector stated that the hearing was open "for all purposes" and Samuels did not object to the scope.[19] The inspector again asked Kimm if he would state whether he was a member of the Communist Party, and Kimm replied that he refused to answer on the ground of self-incrimination, invoking his Fifth Amendment right.

During the course of these hearings, Kimm presented affidavits in support of his good moral character, including statements from military officials regarding his training and service with the OSS.[20] The INS introduced evidence regarding Kimm's employment history, his lack of criminal record, and his FBI report, which included documentation detailing how Kimm had been cleared by the War and Navy Departments for employment on classified, confidential, and restricted War and Navy Department contracts.[21] The INS never introduced evidence substantiating any ties between Kimm and the Communist Party. However, by solely relying on Kimm's refusal to answer the question regarding Communist Party membership, the INS hearing officer concluded that Kimm had failed to meet his burden of proving good moral character for the preceding five years, and recommended denial of suspension of deportation and withdrawal of the privilege of voluntary departure. This decision was issued on January 15, 1951, one week after the final hearing.[22] In March, Kimm was arrested and served with a deportation order that overrode the 1943 order of voluntary departure.[23]

## II. Appeals Process

After the BIA affirmed this deportation order, Kimm filed an appeal in the District Court for the Southern District of California challenging the

775 ("In view of the decision of the Supreme Court in the (*Wong Yang*) *Sung v. McGrath* case, it will be necessary to *accord* you a new hearing under that warrant.").

18. Kimm v. Hoy, 263 F.2d at 776.

19. Brief for the Respondent, *supra* note 14, at 5.

20. *See* Brief for Petitioner, *supra* note 8, at 6.

21. *Id.*; Diamond Kimm's Federal Bureau of Investigation File, *microformed on* Korean American Digital Archive, File002/Item003 (Univ. S. Cal. Digital Archive), http://digitallibrary.usc.edu/cdm/ref/collection/p15799coll126/id/879.

22. *See* Kimm v. Hoy, 263 F.2d at 776.

23. *See* Cheng, *supra* note 8, at 137.

legality of the INS' denial of suspension of deportation. Judge William M. Byrne reviewed the administrative record and upheld the BIA's decision, holding that Kimm had failed to meet the good moral character requirement and that the INS' finding was "supported by reasonable, substantial and probative evidence."[24]

Kimm then appealed to the Ninth Circuit where he maintained his argument and claimed that he was eligible for suspension of deportation because the INS had failed to present sufficient evidence to negate his eligibility for relief. He argued that he had met the requisite burden of proof and his refusal to answer questions probing his Communist Party affiliations was insufficient to disprove good moral character. Kimm believed that the INS' decision unjustly shifted the burden of proof to the petitioner since the government attorneys should have been required to affirmatively prove the petitioner's Communist Party membership or affiliation, "[o]therwise the alien would have the burden of proving a negative."[25] Furthermore, Kimm argued, by penalizing Kimm for invoking his Fifth Amendment right, the INS officials "prefer[red] the policy of the anarchist deportation act over the policy of the Fifth Amendment," and, in doing so, they had "denigrate[d]" the Constitution.[26]

In turn, the INS attorneys argued that Kimm failed to prove good moral character in accordance with the statutory eligibility carve-out based on Communist Party membership or affiliation. Although Kimm's Fifth Amendment right against self-incrimination may have justified his refusal to answer the government's question, his silence cost him the "privilege" of immigration relief in the form of suspension of deportation.[27] The INS attorneys relied on the BIA's opinion, which concluded that "[Kimm] is asking a special favor" and therefore "must be willing to permit a thorough examination of his eligibility for that favor[.]"[28] They also dismissed Kimm's claim that he was being forced to prove a negative: "The petitioner was not asked to 'prove' his nonmembership in the Party. He was merely asked by the government to answer a question."[29]

## III. The Fifth Amendment and Communism

Although the INS attorneys reduced the question regarding Communist Party membership to a "mere" inquiry, the question carried significant weight at the time. Kimm's case began as the stigma against the Communist Party emerged in the United States. By the time Kimm appealed his case, anti-communist fear and hysteria were in full force.[30] The post–World War

24. Brief for Petitioner, *supra* note 8, at 7.
25. *Id.* at 8.
26. *Id.* at 10.
27. Brief for the Respondent, *supra* note 14, at 13.
28. *Id.* at 17.
29. *Id.* at 19–20.
30. *See* Rohr, *supra* note 3, at 15–17 (writing that the 1930s provided a hospitable

II concern with Soviet expansionism stirred a fear of the growing influence of the Communist Party of the United States (CPUSA) and individuals who sought to overthrow the U.S. government.[31] In fact, the McCarran Act, was the "most comprehensive and detailed piece of federal legislation directed against the CPUSA."[32] The McCarran Act explicitly required the deportation and barred naturalization of any "alien" who had been a member of any communist group, as well as advocates of "doctrines of world Communism."[33] Congress formed the HUAC in order to hold hearings to investigate domestic communist "infiltration" and pass legislation to target Communist Party members and affiliates.[34]

As the number of investigative bodies grew, constitutional protections for suspected Communist Party affiliates waned. The Fifth Amendment came to be seen as a tool for communists and communist sympathizers to circumvent congressional regulation, "permitting [communist] partisans to conceal their active membership and thereby infiltrate into strategic positions."[35] The widespread suspicion of communists was reflected in contemporary Supreme Court decisions. In *Dennis v. United States*, the Supreme Court sustained the constitutionality of the Smith Act, which was designed to criminalize the activities of "subversive" groups like the Communist Party.[36] Dissenting in *Dennis*, Justice Black lamented the powerful sway of public scare:

> Public opinion being what it now is, few will protest the conviction of these [c]ommunist petitioners. There is hope, however, that in calmer times, when present pressures, passions and fears subside, this or some later Court will restore the First Amendment liberties to the high preferred place where they belong in a free society.[37]

Despite Justice Black's cautionary message, the Supreme Court would issue a decision against Kimm nine years later. In a per curiam opinion, five justices largely adopted the INS' argument and found the suspension

decade for American Communists in terms of constitutional protections, but in the 1940s, Congress began to pass measures designed to combat the perceived threat of various subversive groups during the McCarthy era).

31. *See id.*; *see also* Jonathan Stewart, *Balancing the Scales of Due Process: Material Support of Terrorism and the Fifth Amendment*, 3 Geo. J.L. & Pub. Pol'y 311, 314 (2005) (explaining that the Smith Act, enacted on June 28, 1940, represented renewed congressional efforts to directly regulate political speech by criminalizing the speech and activities of those who knowingly or willingly advocated the overthrow of the U.S. government).

32. Rohr, *supra* note 3, at 13.

33. *Id.* at 14–15.

34. *Id.* at 18–19.

35. Case Comment, *Self-Incrimination and Federal Anti-Communist Measures*, 51 Colum. L. Rev. 206, 218 (1951).

36. Dennis v. United States, 341 U.S. 494 (1951). *See* Stewart, *supra* note 31, at 314; *see also* Scales v. United States, 367 U.S. 203 (1961) (finding a defendant guilty of complicity in the commission of criminal activity due to his membership in the Communist Party in the Supreme Court's first review of a criminal conviction under the Smith Act membership clause).

37. Dennis, 341 U.S. at 581 (Black, J., dissenting).

of deportation was a form of relief based on "discretion and of administrative grace."[38] Therefore, Kimm was required to supply any information that would have a direct bearing on his eligibility for relief, including any evidence of membership in the Communist Party.[39] The justices did not address Kimm's Fifth Amendment arguments and instead based their decision on Kimm's failure to meet his statutory burden.[40]

The dissenting justices criticized the per curiam opinion writers for inappropriately shifting the burden of proof to Kimm and for failing to address Kimm's constitutional arguments. Justice Brennan's dissenting opinion focused on the majority's statutory reading. He maintained that by reading the statutory exception to eligibility as an affirmative requirement, the Court adopted a reading of the statute that was not only irrational and punitive, but also in conflict with the First Amendment.[41] By relying on this "anomalous" statutory interpretation, Justice Brennan argued, the Court unduly shifted the burden to the petitioner to "prove a negative" in order to qualify for suspension of deportation.[42]

Justice Black also expressed his disagreement, as he did in Dennis, this time joining a dissenting opinion written by Justice Douglas who argued that the majority erroneously imputed wrongdoing and penalized Kimm for invoking his Fifth Amendment right: "What the case comes down to is simply this: invocation of the Fifth Amendment creates suspicions and doubts that cloud the alien's claim of good moral character."[43] Justice Douglas argued that the invocation of the Fifth Amendment privilege should be considered "a neutral act, as consistent with innocence as with guilt."[44] He rebuked the majority for sharply departing from the Court's precedent and historic recognition of the Fifth Amendment privilege.[45]

Justice Douglas also emphasized that no evidence was brought against Kimm, and that his character was reputable in every aspect on the record.[46]

38. Kimm v. Rosenberg, 363 U.S. 405, 408 (1960) (per curiam).
39. *See id.*
40. *See id.*
41. *See id.* at 415 (Brennan, J., dissenting).
42. *Id.* at 414.
43. *Id.* at 410 (Douglas, J., dissenting).
44. *Id.* at 411.
45. In support of his argument, Justice Douglas cited the following cases: Grunewald v. United States, 353 U.S. 391, 421 (1957) ("Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect innocent men."); Konigsberg v. State Bar of Cal., 353 U.S. 252, 267 (1957) (finding that past membership in the Communist Party was not by itself evidence that the person was of bad moral character); Schware v. Bd. of Bar Exam'rs. of the State of N.M., 353 U.S. 232, 246 (1957) (finding that past membership in the Communist Party was not by itself evidence that the person was of bad moral character); and Slochower v. Bd. of Higher Educ. of City of N.Y., 350 U.S. 551, 557–558 (1956) ("The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."). *See* Kimm v. Rosenberg, 363 U.S. 405, 411 (Douglas, J., dissenting).
46. Kimm v. Rosenberg, 363 U.S. 405, 409 (Douglas, J., dissenting) ("The import of what we do is underlined by the fact that there is not a shred of evidence of bad character

Kimm's only barrier to eligibility for suspension of deportation was his invocation of the Fifth Amendment, which would have been unnecessary had it not been for the INS officer's question about Communist Party membership—a question that was not statutorily mandated.[47] Ultimately, Justice Douglas concluded that the majority's decision reflected a troubling judicial trend of shirking constitutional protections because of the political climate: "It has become much the fashion to impute wrongdoing to or to impose punishment on a person for invoking his constitutional rights."[48] While the per curiam opinion writers justified their decision by focusing on the nature of the relief—namely, that it was a discretionary "favor" based on administrative grace—Justice Douglas argued that Fifth Amendment protections should be robust, regardless of the relief requested.

## IV. Perception of Korean Immigrants

While Justices Brennan and Douglas discussed the political climate, they made little reference to the Supreme Court's traditional deference to Congress in matters of immigration and avoided discussing Kimm's Korean background.[49] However, Kimm's identity as a Korean immigrant and, more specifically, a North Korean immigrant, bore some influence on others' perceptions of him throughout his court proceedings and congressional hearing.

By the time Kimm appeared in front of the Supreme Court in 1960, the United States had been entangled in Korean affairs for over a decade, but Korean history and politics were still opaque to many congressional leaders. Historian Bruce Cumings argues that many American leaders failed to understand that Korean communist interests were tied to Korean nationalism

in the record against this alien.").

47. *See id.* at 410.

48. *Id.* at 408. Despite Justice Douglas's defense of the invocation of the Fifth Amendment privilege, subsequent judicial interpretations of the Fifth Amendment privilege have not accorded strong protections to litigants in noncriminal proceedings. For example, Akhil Reed Amar and Renee B. Lettow argue that the "silence penalty" can pass constitutional muster in noncriminal proceedings. *See* Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 905 (1995). However, other practitioners maintain that it is constitutionally prohibited to penalize an individual solely on the basis of her invocation of the Fifth Amendment. *See* Richard L. Scheff, Scott A. Coffina & Jill Baisinger, *Taking the Fifth in Civil Litigation*, 29 Litig. 34, 36 (2002) ("While the use of the Fifth Amendment in a civil setting is not constitutionally required to be 'costless,' a party cannot be found liable solely because of reliance on the Fifth Amendment, as this would effectively constitute a penalty tied to the exercise of the privilege.").

49. *See* Rohr, *supra* note 3, at 27–28. Rohr points to *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952) and *Galvan v. Press*, 347 U.S. 522 (1954) as two examples of the Supreme Court's deference to congressional findings of deportability. In *Harisiades* and *Galvan*, both immigrant petitioners were past members of the CPUSA but they never shared the CPUSA's motive to overthrow the U.S. government. Justice Frankfurter wrote that the Court's decision in *Galvan* "[struck] one with a sense of harsh incongruity," but the Court would nonetheless defer to Congress in matters of entry and exclusion of immigrants. *Galvan*, 347 U.S. at 530.

rather than Soviet communism.[50] Similarly, historian Cindy I-Fen Cheng argues that, at the time of Kimm's HUAC hearing in 1955, American officials did not yet understand Korean American political affiliations and assumed that any individual from the northern half of the Korean peninsula was "subversive" and loyal to the Soviet Union.[51] This conflation of Korean and Soviet interests shaped U.S. officials' belief that American democracy was fundamentally at odds with North Korea due to North Korea's ties to the Soviet Union.[52]

This misunderstanding also helps explain the HUAC's fixation on letters written between North Korean nationalists who supported Korean independence. These letters named Kimm and some of his peers as North Korean nationalist leaders based in Los Angeles. The HUAC's chief counsel, Frank Tavenner, questioned Kimm about his activities based on this correspondence, but Kimm refused to answer his questions, pointing out that these letters focused solely on efforts for Korean independence and did not discuss the expansion of the Soviet empire nor the downfall of the U.S. government.[53]

However, Kimm was lumped in with the Soviet threat. Tavenner questioned Kimm about his work as a "mail drop for the Soviet Union" and later corrected himself, explaining that he meant to say "[mail drop] for North Korea."[54] When a congressman asked Tavenner what distinction existed between Soviet and North Korean mail drops, Tavenner replied, "There might be a technical distinction. Similarity caused me to make the mistake."[55] Kimm showed disdain for American ignorance of Korean history and culture. When Tavenner asked Kimm if he was born in North or South Korea, Kimm retorted, "extreme North," and when Tavenner asked him to spell out his hometown, Kimm replied, "You just write it out because it is not American language."[56]

Kimm was a political actor, and his actions were oftentimes controversial. His newspaper, Korean Independent, was known for its disapproval of the South Korean President, Syngman Rhee, due to Rhee's support of U.S. intervention on the Korean peninsula. The newspaper instead supported Ahn Chang-ho, a Korean independence activist who publicly criticized the U.S. military occupation.[57] The newspaper also supported protests against the U.S. military presence in Korea and therefore became the target of FBI and local police surveillance.[58] Despite the paper's left-leaning tendencies,

50. *See* Bruce Cumings, The Korean War: A History 49, 89–90 (2010) [hereinafter Cumings, The Korean War].

51. Cheng, *supra* note 8 at 145.

52. *See id.* at 146.

53. *See HUAC Hearing Diamond Kimm Testimony*, *supra* note 1, at 1559; *see also* Cheng, *supra* note 8, at 142–43.

54. *HUAC Hearing Diamond Kimm Testimony*, *supra* note 1, at 1571.

55. *Id.*

56. *Id.* at 1545.

57. Cumings, Korea's Place, *supra* note 6, at 455.

58. *See id.*

the paper's politics were tepid overall.[59] However, at that time, even Korean Americans with moderate political views came under government scrutiny and were often deported. The FBI regularly investigated and deported Korean immigrants who engaged in protest, expressed communist or pro–North Korean sentiments, or publicly spoke out against U.S. military presence in Korea.[60] Although there was no evidence to substantiate Kimm's connections to the CPUSA, as one of the more notable Korean American leftist activists, he stood little chance of avoiding FBI surveillance and deportation.[61]

Following the Supreme Court's ruling, Kimm requested permission from embassies in Czechoslovakia and the Soviet Union to immigrate to their countries. His original order of voluntary departure was reinstated in 1962 and at the age of sixty, he left the United States for Czechoslovkia en route to North Korea after thirty-four years of continued residence in the United States.[62]

## Conclusion

Kimm's immigration case might have fared differently today as courts have refrained from imposing a penalty based solely on a petitioner's silence in certain circumstances.[63] However, Justice Douglas's vision for the Fifth Amendment—as one "equally consistent with innocence as with guilt"[64]—is yet unrealized for all immigrants in deportation proceedings.[65] While Kimm's deportation proceedings were unique given his identity as a relatively notable political organizer whose case was heard before the highest judicial and legislative bodies in the United States, his deportation proceedings demonstrate the historic and present-day limitations of Fifth Amendment protections for immigrant petitionersespecially during periods of widespread scare and racialized misconceptions.

59. *See id.*

60. *See* Cumings, The Korean War, *supra* note 50, at 91 (explaining that the FBI records for many Korean deportees are still classified on this, but it is alleged that some who were deported were subsequently executed in South Korea and others went to North Korea).

61. *See* Cheng, *supra* note 8, at 127, 143.

62. *See id.* at 138.

63. In 2013, the Ninth Circuit held that the government fails to meet its burden of proof if its case is based solely on the petitioner's silence and refusal to answer the government's questions. *See* Urooj v. Holder, 734 F.3d 1075, 1079 (9th Cir. 2013) ("[The] Government should not be bailed out from the need to present an adequate prima facie case. . . . We should not encourage the cutting of corners by an agency having such significant responsibilities.") (citations omitted).

64. Kimm v. Rosenberg, 363 U.S. at 411 (Douglas, J., dissenting).

65. *See e.g.*, Guiterrez v. Holder, 662 F.3d 1083, 1091 (9th Cir. 2011) (immigration judge permitted to draw an adverse interest when petitioner invoked his Fifth Amendment right against self-incrimination).