

# LAW AND CONTEMPORARY PROBLEMS

---

---

Volume 68

Spring 2005

Number 2

---

---

## FOREWORD

ERIC L. MULLER\*

The year 2004 saw the anniversaries of one of the Supreme Court's most celebrated race decisions and one of its most notorious. The better-known anniversary was the fiftieth of *Brown v. Board of Education*,<sup>1</sup> on May 17. Its memory was appropriately feted at countless conferences and public events across the country. The lesser-known anniversary was that of *Korematsu v. United States*,<sup>2</sup> which turned sixty on December 18, 2004. A single conference, jointly convened in Los Angeles by the University of North Carolina School of Law, the UCLA Asian American Studies Center, and the Japanese American National Museum, commemorated the event.<sup>3</sup>

The conference, entitled "Judgments Judged and Wrongs Remembered: Examining the Japanese American Civil Liberties Cases of World War II on their Sixtieth Anniversary," took what might be termed a multi-modal approach to remembering *Korematsu*, *Ex parte Endo*,<sup>4</sup> *Hirabayashi v. United States*,<sup>5</sup> *Yasui v. United States*,<sup>6</sup> and other cases from World War II in which Japanese Americans used the courts to contest their eviction and confinement.<sup>7</sup> Surviving

---

Copyright © 2005 by Eric L. Muller

This Foreword is also available at <http://law.duke.edu/journals/lcp>.

\* George R. Ward Professor of Law, University of North Carolina School of Law.

I owe a special debt of gratitude to Professor Sara Sun Beale of Duke Law School, whose early and energetic assistance helped bring this symposium issue to life.

1. 347 U.S. 483 (1954).

2. 323 U.S. 214 (1944).

3. The conference was supported by generous grants from the United States-Japan Foundation, the California Civil Liberties Public Education Program, and Takata.

4. 323 U.S. 283 (1944).

5. 320 U.S. 81 (1943).

6. 320 U.S. 115 (1943).

7. Chief among these were *Fujii v. United States*, 148 F.2d 298 (10th Cir. 1945); *Takeguma v. United States*, 156 F.2d 437 (9th Cir. 1946); and *United States v. Kuwabara*, 56 F. Supp. 716 (N.D. Cal.

participants in the cases—law clerks, lawyers, and litigants—shared recollections and impressions. Chief among these was Supreme Court litigant and civil rights hero Fred Korematsu, to whose memory this symposium issue is devoted.<sup>8</sup> Children of men who contested the internment in court spoke about the personal legacy of their fathers' resistance. Conference attendees saw a dance piece,<sup>9</sup> a play,<sup>10</sup> and a film<sup>11</sup> interpreting the internment and the legal challenges to it. And an array of scholars in law and history presented papers examining both the historical setting of the World War II cases on Japanese American civil liberties and their significance for the law and politics of today.

This issue of *Law and Contemporary Problems* presents a number of these papers. It begins with the contributions of two men whose analysis of the wartime cases sits atop direct personal experience. Along with more than one hundred ten thousand other people of Japanese ancestry, Judge A. Wallace Tashima and his family were forced from their West Coast home in 1942 into a so-called "relocation center"—in the case of the Tashima family, the Poston Relocation Center in the scorching desert of southwestern Arizona. Now a senior judge of the United States Court of Appeals for the Ninth Circuit,<sup>12</sup> Judge Tashima sees the wartime Japanese American civil liberties cases as both lived history and legal precedent. The title of Judge Tashima's keynote address<sup>13</sup>—"Play It Again, Uncle Sam"—sums up his view that the executive overreaching and fear that led to his own childhood incarceration are not things of the past.

Eugene R. Gressman, now an emeritus professor at the University of North Carolina School of Law, was the law clerk to Associate Justice Frank Murphy in 1944, when the Court heard and decided *Korematsu*. Justice Murphy's dissent, accusing the Court's majority of plunging over the edge of constitutional power into the abyss of racism, powerfully refutes the often-heard claim that the racism of the government's policies is apparent only in retrospect. Some of the outrage over Justice Black's majority opinion lingers in Gressman's reflections,<sup>14</sup> which, in light of his important role in the drafting of Murphy's dissent, is hardly surprising.

---

1944). In these cases young internees attempted to challenge the lawfulness of their internment by resisting the military draft. For more on the Japanese American draft resistance cases, see ERIC L. MULLER, *FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II* (2001).

8. Fred Korematsu passed away on March 30, 2005. His speech at the "Judgments Judged and Wrongs Remembered" conference turned out to be his last major public appearance.

9. *The Believer*, by Kokoro Dance of Vancouver, Canada, choreographed by Jay Hirabayashi, son of Supreme Court litigant Gordon Hirabayashi.

10. *The Patriot*, by Holly Yasui, daughter of Supreme Court litigant Min Yasui.

11. *DAY OF INDEPENDENCE* (Cedar Grove Productions 2003).

12. Judge Tashima was appointed to the United States District Court for the Northern District of California in 1980 and served on that court until his elevation to the Ninth Circuit in 1996. See Federal Judicial Center, *Tashima, Atsushi Wallace*, at <http://air.fjc.gov/servlet/tGetInfo?jid=2339> (last visited March 24, 2005).

13. A. Wallace Tashima, *Play It Again, Uncle Sam*, 68 L. & CONTEMP. PROBS. 7 (Spring 2005).

14. See Eugene R. Gressman, *Korematsu: A Mélange of Military Imperatives*, 68 L. & CONTEMP. PROBS. 15 (Spring 2005).

One of the key aspirations of the conference was to show that the legal struggle over Japanese American civil liberties was both deeper and more far-reaching than the well-known *Korematsu* litigation. Several conference papers fulfilled this hope. Arguably the timeliest of these is *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*,<sup>15</sup> by Professor Greg Robinson and Toni Robinson, which usefully links the two anniversary cases of 2004—*Korematsu* and *Brown v. Board of Education*. The Robinsons carefully document the importance of cases challenging discrimination against Japanese and other Asian Americans in the broader mid-century litigation campaign for racial equality. Not only did the Court first articulate a language of strict scrutiny in *Korematsu*, but less well-known cases in the 1940s and early 1950s involving the rights of Japanese Americans to live and work without discrimination helped solidify the ground on which *Brown* would ultimately stand.

John Barrett also traces a broader reach for *Korematsu* than we customarily see. He focuses on another of the dissenters in that case, Associate Justice Robert H. Jackson.<sup>16</sup> Jackson's words in *Korematsu* are, of course, famous. By approving of the racial "transplanting" of American citizens on an unmeasurable claim of military necessity, the Court, he charged, was leaving a "loaded weapon . . . [y]ing] about" for misuse by later generations.<sup>17</sup> What is not generally known, however, is that Justice Jackson's experience with a wild exercise of absolute power by the general who oversaw the eviction and incarceration of Japanese Americans had a significant impact on Justice Jackson's own conduct of the prosecution of top Nazi leaders at the Nuremberg war crimes trial in 1945-46.

Two additional historically focused papers consider strategies of reaction and resistance to internment that were both more popular and more ambiguous than the head-on challenges brought by Fred Korematsu, Min Yasui, Gordon Hirabayashi, and Mitsuye Endo. Patrick Gudridge's *The Constitution Glimpsed from Tule Lake* examines the complex situation of several thousand American citizens of Japanese ancestry who, while under race-based detention, chose to renounce their U.S. citizenship and cast their lot with Japan.<sup>18</sup> Most of these renunciants soon thought better of their decision and sought to restore their citizenship through the federal courts. These internees have long been the blackest of the black sheep in the Japanese American family, scorned for their supposed disloyalty. Gudridge, however, carefully examines the political landscape at Tule Lake, the camp where these "disloyals" were housed, and concludes that these internees' efforts at reclaiming their citizenship were moments of deep, even unique American patriotism.

---

15. Greg Robinson and Toni Robinson, *Korematsu and Beyond: Japanese Americans and the Origins of Strict Scrutiny*, 68 L. & CONTEMP. PROBS. 29 (Spring 2005).

16. See John Q. Barrett, *A Commander's Power, A Civilian's Reason: Justice Jackson's Korematsu Dissent*, 68 L. & CONTEMP. PROBS. 57 (Spring 2005).

17. *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting).

18. Patrick O. Gudridge, *The Constitution Glimpsed from Tule Lake*, 68 L. & CONTEMP. PROBS. 81 (Spring 2005).

My own contribution to the symposium, *A Penny for their Thoughts: Draft Resistance at the Poston Relocation Center*, considers the cases of more than one hundred young men at Poston who refused to serve when they were drafted into the U.S. Army from behind barbed wire in 1944.<sup>19</sup> These men, like the more than two hundred others who resisted the draft at other camps,<sup>20</sup> are often viewed as indistinguishable from the thousands of “disloyals” at Tule Lake who renounced their citizenship. However, my careful review of the evidence about the motivations, thoughts, and feelings of this group of young men reveals a wide and complex array of motivations and causes for their resistance. It also illuminates and ultimately justifies the ostensible inconsistencies in the sentences that a single federal judge in Arizona meted out in their cases.

A paper by the influential historian Roger Daniels<sup>21</sup> nicely bridges the gap between the historical contributions of Robinson, Barrett, Gudridge, and Muller, and the more present- and future-focused pieces that follow. Daniels is concerned not so much with the details of the internment as with its position in legal and public discourse over the last sixty years. Daniels documents the slow and painstaking process by which scholars, lawyers, and politicians undermined and finally dislodged the false consensus that the internment was a product of strictest wartime military need. His paper is a useful reminder that the condemnation of the internment against which current revisionists<sup>22</sup> now rail is still a fragile achievement that the pressures of our current fight against terrorism could undermine.

Natsu Taylor Saito’s *Interning the Non-Alien “Other”: The Illusory Protections of Citizenship*<sup>23</sup> deepens our appreciation of this fragility. Her goal is to refute the prevailing view of the internment of Japanese Americans as aberrational—a momentary deviation from an otherwise unbroken story of inclusion and freedom. Saito argues that this view has things almost exactly backwards. Focusing on the treatment of various “others” in American society—especially American Indians, the poor, and people of color, and without regard to citizenship—Saito maintains that measures approximating internment have been deployed throughout American history, and have reappeared with renewed force since September 11, 2001.

Picking up on this theme of the marginalized “other” in American Society, Margaret Chon and Donna E. Arzt consider the practice of racial profiling in a

---

19. Eric L. Muller, *A Penny for their Thoughts: Draft Resistance at the Poston Relocation Center*, 68 L. & CONTEMP. PROBS. 119 (Spring 2005).

20. This article is an extension of my earlier study of the Japanese American draft resisters, about whose experiences at three other camps—Tule Lake, the Heart Mountain Relocation Center, and the Minidoka Relocation Center—I wrote in *FREE TO DIE FOR THEIR COUNTRY*, *supra* note 7.

21. Roger Daniels, *The Japanese American Cases, 1942-2004: A Social History*, 68 L. & CONTEMP. PROBS. 159 (Spring 2005).

22. I refer here primarily, although, I regret, not exclusively, to Michelle Malkin. See MICHELLE MALKIN, IN *DEFENSE OF INTERNMENT: THE CASE FOR “RACIAL PROFILING” IN WORLD WAR II AND THE WAR ON TERROR* (2004).

23. Natsu Taylor Saito, *Interning the Non-Alien “Other”: The Illusory Protections of Citizenship*, 68 L. & CONTEMP. PROBS. 173 (Spring 2005).

society coming to terms with September 11 in their article, *Walking While Muslim*.<sup>24</sup> They examine the role that perspectives of religious identity have on racial profiling, suggesting that such profiling, mixing together not only racial but also religious stereotypes, should more accurately be called “terror profiling.” Observing parallels between the current view of Muslims that propels contemporary profiling practices and wartime assumptions about the loyalty of Japanese Americans, Chon and Arzt draw startling insights, implying that the rationales for profiling depend less on rational political grounds than on misconceptions and misperceptions of Islam—both its faith practices and the identity of its adherents.

Jerry Kang is also interested in the connections between the World War II internment of Japanese Americans and current antiterrorism measures. In *Watching the Watchers: Enemy Combatants in the Internment’s Shadow*,<sup>25</sup> Jerry Kang brings to the Supreme Court’s recent enemy combatant cases<sup>26</sup> the critical method of scrutiny that he developed for the World War II internment cases in an earlier piece in the *UCLA Law Review*.<sup>27</sup> Kang concludes that the recent decisions show some, but not all, of the inclination to absolve the government of responsibility that marked the World War II cases. His discussion is especially notable for the attention he brings to the continued vitality of the Court’s overshadowed opinion approving a racial curfew in *Hirabayashi v. United States*<sup>28</sup> and for the richness of his response to Patrick Gudridge’s assessment<sup>29</sup> of the importance of the Court’s internment-ending opinion in *Ex parte Endo*.<sup>30</sup> Kang’s ultimate concern is accountability: the lasting tragedy of the internment is that the Supreme Court of the 1940s let the other branches off the hook, just as courts today let the Supreme Court of the 1940s off the hook. This is what he seeks to avoid in today’s judicial response to the enforcement and prevention strategies of the so-called “War on Terror.”

On this point, Kang’s piece dovetails nicely with the last article in the symposium, Eric Yamamoto’s *White (House) Lies: Why The Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*.<sup>31</sup> Yamamoto agrees with Kang that the federal courts of today must avoid the mistake of absolving the government of responsibility for the excesses and abuses in its national security policies. Whereas Kang is interested primarily in how courts can avoid this mistake from within, by rigorous and nuanced legal

---

24. Margaret Chon and Donna E. Arzt, *Walking While Muslim*, 68 L. & CONTEMP. PROBS. 215 (Spring 2005).

25. Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment’s Shadow*, 68 L. & CONTEMP. PROBS. 277 (Spring 2005).

26. *Rasul v. Bush*, 124 S. Ct. 2686 (2004), *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), and *Rumsfeld v. Padilla*, 124 S. Ct. 2711 (2004).

27. Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 *UCLA L. Rev.* 933 (2004).

28. 320 U.S. 81 (1943).

29. See Patrick O. Gudridge, *Remember Endo?*, 116 *HARV. L. REV.* 1933 (2003).

30. 323 U.S. 283, 297 (1944).

31. Eric K. Yamamoto, *White (House) Lies: Why the Public Must Compel the Courts to Hold the President Accountable for National Security Abuses*, 68 L. & CONTEMP. PROBS. 287 (Spring 2005).

analysis, Yamamoto is concerned primarily with how courts are led to demand accountability from *without*. Yamamoto maintains that it is only through sustained pressure and assistance from the public, the press, and critical advocacy that the courts of today will find the courage to insist on executive accountability. He offers a blueprint for grassroots organization and advocacy that will help assure that courts carefully scrutinize the justifications—and fabrications—that the executive might offer in support of its most extreme assertions of power.

On September 10, 2001, no one could have imagined that the sixtieth anniversary of the Japanese American civil liberties cases of World War II would be of anything more than historical interest. Instead, those cases today are intensely—and tragically—relevant to our most pressing national debates. By deepening our understanding both of what happened sixty years ago and of what is at stake today, the articles in this symposium contribute importantly to those debates.