

Northern California Time of Remembrance,
Sacramento, California,
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Keynote Address
by Eric L. Muller

How happy I am to be together with you for this Time of Remembrance.

This event is advertised as a community-wide remembrance of Executive Order 9066 and its aftermath. Community is important to an event of remembrance. We remember better together than we do alone, because remembering can be *hard work*.

Why is remembering difficult?

I am now in my mid-40s, and believe me, when I stand in the law school parking lot every afternoon and can't remember for the life of me where I left my car in the morning, I understand one reason why remembering is difficult.

But remembering, of the kind we're doing here today, is difficult because it is taxing and sad. We tend these days to speak of the 120,000 Issei and Nisei who were exiled and incarcerated under Executive Order 9066 as a group, a mass, a unit, the protagonist in a single story of injustice. But it was not a group. It was 120,000 individuals with 120,000 stories. And many of those stories are quite tragic—not the sorts of things people like to dwell upon.

I do a lot of research in the newspapers of this time period, and I come across these lost and tragic stories all the time. Let us remember a few of them together. Try, as I read them, to capture each scene in your mind's eye.

From the Denver Post, April 10, 1942.

The headline: "Army Evacuates Jap Who Served 30 Years in U.S. Navy."

Dateline: San Diego, California.

"A 67-year-old Japanese who served 30 years in the United States Navy and who protested vigorously, "I'm no Jap," departed for the Santa Anita reception center Friday under military escort.

The Japanese, Isakichi Kanasawa, remained in San Diego when 1,150 others left for Santa Anita Tuesday night. Found hoeing in his garden Thursday, Kanasawa said he assumed he was exempt from the evacuation order.

Ed Law, assistant United States attorney, found that Kanasawa not only had served thirty years in the navy, but had a letter of commendation from the secretary of the navy and was drawing a navy pension.

But the army makes no exception to the rule that all Japanese whose physical condition will permit must be evacuated from certain areas.

From the Seattle Times, March 27, 1942:

The headline: "Sister Gives First-Aid as Jap Collapses." Dateline: Seattle, Washington.

A young Japanese man collapsed today in the crowded evacuation offices at 808 Second Avenue, as hundreds of Seattle Japanese gathered there to make last-minute preparations for leaving Seattle. The man's sister said his collapse resulted from fatigue and worry.

The victim, Leonard Bitow, 25 years old, was taken to Harborview County Hospital in an ambulance.

Miss Ikuko Bitow, his sister, administered first aid until the ambulance arrived.

Miss Bitow broke into tears as she entered the ambulance.

"I don't know what's the matter," she said. "We have all been under great strain and Leonard has been awfully worried and tired."

And from the Seattle Times, March 30, 1942:

The headline: 237 Bainbridge Japs Leave, Head South; Evacuation Brings Sad Farewells. Dateline: Bainbridge Island, Washington.

Bainbridge Island Japanese, alien and American-born alike, were evacuated from the island this forenoon, some leaving in tears, some with smiles and others with traditional stoic faces.

... Only one incident marred an orderly evacuation. One elderly woman was stricken with a heart attack as she awaited the ferry ... which was to take her to her new surroundings in California.

... Arriving at Colman dock [by ferry] shortly after noon, the Japanese were immediately to a special train. ... The Japanese by this time were smiling, but there were many soldiers, even officers, who had tears streaming down their faces as they escorted the evacuees aboard the train.

... It was a pathetic exodus. There were mothers with babies in arms, aged patriarchs with faltering steps, high school boys and girls, and some children, too young to realize the full import of the occasion.

... There were many scenes of pathos yesterday. The Japanese can take only personal belongings with them. The Army made no arrangements for pets. This was a hard blow to many children who had to part with dogs and cats. The dog situation was eased by citizens who agreed to care for the animals until the Japanese return.

... There was no solution, however, as to what to do about little Kejo Nishimura's kitten. The little girl, scarcely 4 years old, said, with tears in her eyes: "I can't take my kitty."

Can't you still feel the confusion, the indignity, and the sorrow in these scenes?

So one of the reasons that remembering is difficult—one of the reasons that we come together to do it—is that remembering is sad.

But I'd like to argue to you this afternoon that there is another, more potent reason why remembering is difficult. It is difficult because there are powerful forces in our society that want us to forget.

Milan Kundera, the Czech novelist who in his own life experienced the excesses of both Nazism and Stalinism, put it this way: "**The struggle of man against power is the struggle of memory against forgetting.**" Notice the word "*struggle*." Memory is a *struggle*, and it's a struggle because powerful forces want us to forget. The power of government thrives in a culture of forgetting.

And what a moment this is for government power. We are living in a time when the executive branch of our government is claiming truly unlimited and unreviewable power. Unlimited and unreviewable power to run secret prisons in Eastern Europe.

Unlimited and unreviewable power to incarcerate people indefinitely in a gulag at Guantanamo. Unlimited and unreviewable power to use torture in interrogations. Unlimited and unreviewable power to eavesdrop on American citizens.

So on this Day of Remembrance, I want to challenge you to think about the words of Milan Kundera. If the struggle of man against power is the struggle of memory against forgetting, what does power want us to forget?

Being a legal historian, I want to challenge you to think about this question in a specific way: What part of the *legal* history of the internment does power want us to forget? What part of the *legal* history of the internment might stand in the way of these new claims of unlimited and unreviewable executive power?

A book published in 1998, a few years before the crisis of September 11, points us toward an answer to that question. I am referring to a book by a great friend of executive power, the late Chief Justice of the United States, William Rehnquist. In 1998 he took it upon himself to write a book called "All the Laws But One: Civil Liberties in Wartime." It became a bestseller at the time, and then again after September 11, as citizens looked for guidance from the highest judicial authority in the land.

Rehnquist's message was stark: Courts, he argued, have always been reluctant to decide a case against the government on an issue of national security during a war. And Rehnquist called this historical reluctance, this judicial timidity, a "desirable phenomenon." During a war, the Chief Justice said, the balance between freedom and order, between liberty and security, has to shift toward order and security. Courts have

always let the executive have its way in wartime, according to Rehnquist, and they always will.

What a dangerous message. And more to the point, on this Day of Remembrance, what a false and forgetful one.

In the next few minutes, I would like to help us remember the *real* and *full* story of the federal courts and Japanese Americans in World War II. That story is decidedly *not* a story of timid courts and a victorious executive. Something like the opposite is true: An astonishing number of the legal cases involving Japanese Americans in World War II ended in acquittals, dismissals, stern judicial rebukes, and other repudiations of the government's legal and factual positions.

Now, I know many of you must be thinking, "Hold on a second. I know about those cases. He is talking about the *Korematsu* case and the *Hirabayashi* case, and the government *won* both of those in the Supreme Court."

That is certainly true, and in the narrow class of cases in which Japanese Americans directly challenged the legality of curfew and of exclusion in the face of dire claims of strict military necessity, they tended to lose. But these two well-known cases were hardly representative of the larger government program of litigation. When the government moved beyond curfew and exclusion, trying to enlist federal judges and juries in an effort to affix enduring badges of disloyalty and subversion on Japanese Americans in other contexts, the government very often failed—sometimes spectacularly.

Consider these cases. (I have time only to give you the very briefest of summaries; I can share more during the Q and A if there are some that you are especially interested in):

United States versus Kenji Ito and United States v. Thomas Masuda.

For all of the recent ranting by certain revisionist historians about supposed "networks of Nisei spies" who were operating undercover for Japan before the outbreak of war, very few names have ever surfaced. In fact, the government brought criminal charges against only two Nisei for acting as Japanese agents in the United States. The two men were both struggling young lawyers in Seattle, Kenji Ito and Thomas Masuda. As was common for Nisei professionals in that day, both of them tried to build a client base by focusing on their own ethnic community, Japanese-owned businesses and cultural organizations. And in the late 1930s and early 1940s, both did legal work for the Japanese consulate in Seattle. They monitored bills affecting Japanese interests that were pending in the Washington legislature; they attended public meetings at which Japanese policy in the Pacific was debated and reported back to the consulate on those meetings; Kenji Ito, who was a very gifted public speaker, gave occasional speeches presenting the Japanese perspective on the conflict between China and Japan, usually in opposition to a Chinese-American speaker who would present the Chinese position.

This was an increasingly risky gamble for the two young lawyers as tensions between Japan and the United States heightened: on the one hand, their work for the consulate brought them much-needed business and helped them build their law practices;

on the other hand, they expected that in the event of war with Japan, they would be questioned about their contacts with the consulate.

What they did not expect, however, was that on December 8, 1941, they would be seen as Japanese spies, arrested in the middle of the night, and charged with the felony of acting as unregistered agents of the government of Japan.

Both men were tried by all-white juries in Seattle in the spring of 1942, Ito first, and then Masuda. It is hard to imagine a less auspicious time or place for a Japanese American to go on trial for acting disloyally to the United States. Nations along the Pacific Rim were falling like dominoes to the Japanese military and Americans feared an invasion of the West Coast. The Seattle newspapers were full of images of the entire Japanese American community being marched off to assembly centers. What's more, both men freely admitted that they had done work for the Japanese consulate. They were just young lawyers scrambling for business, they argued, and loyal Americans—not Japanese agents. And their all-white juries ... believed them. Both juries acquitted both men of all charges. These two acquittals were a stunning and embarrassing public rejection of the government's account of the criminal disloyalty of two prominent Japanese Americans.

United States versus Maasaki Kuwabara

Consider now the cases of the Nisei draft resisters. Many of you undoubtedly know that after Pearl Harbor, the U.S. military was closed to Japanese Americans, and that it came back in two stages: first the government sought volunteers out of the camps in the spring of 1943—and got very few—and then in January of 1944, as the internees

were nearing the end of their second full year behind barbed wire, the government announced that it would begin drafting young men out of the camps and into the army. the reopening of the draft plunged young men and their families into a great deal of anxiety and confusion. To greater and lesser extents, and for varying reasons, young men at all of the camps but Manzanar ended up resisting the draft. Around 300 Nisei made this choice. The two largest groups were at the Poston Relocation Center in Arizona, where more than 100 young men refused the draft, and the Heart Mountain Relocation Center in Wyoming, where around 85 young men made that choice. These two camps had the largest groups because each of these two camps had older Nisei leaders who lobbied and organized young men to refuse the draft until their civil rights were restored.

It is commonly thought that the government successfully prosecuted all of the draft resisters and sent them off to prison. But that is not at all so. Consider, for example, the 26 resisters from the Tule Lake Segregation Center. In the summer of 1944, Judge Louis E. Goodman of the United States District Court for the Northern District of California heard their cases. Judge Goodman's was simply outraged by the government's position. He held that the entire proceeding against the resisters violated their right to due process of law. He noted that while dangers to the West Coast following the Pearl Harbor attack might have supported the President's initial decision to place Japanese Americans under detention, there were no dangers that justified the Justice Department's decision to prosecute those who refused to be drafted into the military. Drafting people from behind barbed wire, and then prosecuting them when they refused, were, to Judge Goodman, nothing but "overzealousness in an attempt to reach, via the criminal process,

those whom we may regard as undesirable citizens." Judge Goodman concluded that it was "shocking to the conscience that an American citizen be confined on the ground of disloyalty, and then, while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion." He dismissed all twenty-six of the indictments, and the government did not appeal.

United States versus Hideichi Takeguma

The government did not fare much better in the cases of the more than 100 resisters from the Poston Relocation Center. There, an initial group of just a few resisters were convicted, but when they took their case up on appeal to the U.S. Court of Appeals for the Ninth Circuit, one of the three judges filed a separate opinion recommending that while the young men were technically guilty, the President should grant them executive clemency. The judge emphasized that the resisters were American citizens who had taken their fateful decision only "after a continued illegal imprisonment by the Federal Government in barbed wire enclosures, guarded by armed soldiers, under conditions of great oppression and humiliation." The judge saw the young men's resentment as justified, and said that "even if, in their justifiable resentment, they committed acts adverse to the continuance of the war ..., it is for the United States, the first and greater wrongdoer, to be merciful." These were stern words condemning the government: illegal imprisonment, conditions of oppression and humiliation, the United States as "the first and greater wrongdoer."

But the Justice Department could not take the hint. When the cases of around 100 more Poston resisters came back before the trial judge for sentencing, the prosecution

asked that they all be jailed. But the federal judge would have none of it. He let them all off with no jail time and a fine of one penny each. So on the whole, the government's prosecutions of the Nisei draft resisters were hardly a successful venture. Of the roughly 300 cases it brought, the government suffered some sort of setback—either an embarrassing one-penny fine, or a stinging and public judicial condemnation, or an outright dismissal of the charges—in over 130 of them.

United States versus George Fujii

You might expect, at least, that the government would have had more success going after the ringleaders of the draft resistance at Poston and Heart Mountain, the vocal older Nisei who so successfully encouraged young men to demand the restoration of their rights as citizens as a condition of serving in the military. But if you expected that, you'd be wrong. Those cases were also total failures for the government.

At Poston, the advocate was named George Fujii. Shortly after the government announced that it was going to draft the Nisei out of the camps, Fujii wrote and distributed around camp two posters that emphasized that while the Nisei were willing and ready to serve in the armed forces, it was wrong for the government to compel them to serve without first clarifying whether they were citizens and restoring their rights. He did not sign them with his own name, but signed them as the "Voice of the Nisei." They posters caught on, and soon another anonymous poster went up that pressed even further, calling on young men not to show up for their pre-induction physical examinations until their rights were restored. Fujii did not write this one, but the FBI thought he did, and agents swooped into camp and arrested him on felony charges of sedition.

But like so many of the others, this prosecution quickly fizzled. At his trial, George Fujii admitted writing the first two posters, but because they had not actually called for anybody to violate the law, the judge found that they were not legally seditious. As for the third poster, it did call for people to break the law, but the government couldn't come up with a shred of evidence linking Fujii to it. So the judge granted Fujii's motion for an acquittal, and Fujii returned to Poston as a David who had slain Goliath.

United States versus James Omura and Kiyoshi Okamoto et al.

At Heart Mountain, the group of anti-draft advocates was larger. It consisted of six or seven Nisei internees, the leadership of the so-called Heart Mountain Fair Play Committee, and the government also tried to rope into the conspiracy a Nisei journalist from Denver who had done nothing more than to write stories and editorials about the Fair Play Committee's efforts to fight the draft.

Their conspiracy case went to trial in Cheyenne, Wyoming, in October of 1944. Again, David slew Goliath, although it happened in two stages. First, the all-white jury acquitted the Nisei journalist outright, concluding that he had had no involvement with the internees at Heart Mountain at all. The leaders of the Fair Play Committee it convicted, but the conviction did not stand up on appeal. In December of 1945, an appellate court reversed the convictions, holding that the trial judge had misled the jury into thinking that the Fair Play Committee leaders' good-faith motive to create a legal test case of the legality of the draft was irrelevant to whether they were guilty of counseling draft evasion. The Justice Department then decided not to retry the Fair Play Committee

leaders. And so yet again—do you see a pattern here?—another government effort to use the criminal law to punish Japanese Americans came to nothing.

Acheson v. Murakami

The sternest judicial rebuke of the government's program of evacuation, exclusion and incarceration came a few years after the war was over, in a case called *Acheson v. Murakami*. In order to understand the issues in this case, you have to understand a little bit about how and why a significant number of Japanese Americans came to renounce their U.S. citizenship while behind barbed wire, and then changed their minds and sought to cancel those renunciations and hold onto their American citizenship.

Anger and resentment among Japanese Americans began building as soon as the government began singling them out for special burdens in the spring of 1942—curfew, travel restrictions, eviction from their homes and resulting loss of property, detention in "assembly centers," exclusion from the West Coast, and indefinite incarceration in the interior. But while a few of the camps saw flare-ups of conflict and resistance late in 1942, for the most part the internee community dealt privately and quietly with the anger, confusion, and resentment that were building within it. Those emotions broke through, however, in the late winter of 1943, when the government decided to administer a poorly conceived questionnaire to determine which internees were loyal and which disloyal. The questionnaire became a lightning rod for all of the anxiety, anger, insecurity, and confusion that the whole process of dislocation and imprisonment had engendered, and a far greater percentage of the Nisei refused to swear unqualified loyalty to the United States than anyone had expected. Of the 74,588 internees who filled out the

questionnaire, 8,816—nearly twelve percent—refused to swear allegiance without qualification.

With these results in hand, the government decided to warehouse as many of the self-reported "disloyal" and their families as possible at a single camp. The site that was chosen was the Tule Lake camp. In the late summer and early fall of 1943, the government orchestrated a tremendous reshuffling, shipping thousands of "loyal" Tule Lake residents off to other camps in order to make room for the trainloads of so-called "disloyals" who were arriving from the other nine. Tanks rolled in to patrol the camp's perimeter. The camp was surrounded by a six-foot chain-link fence topped with barbed wire. Additional guard towers were built.

As might have been expected, Tule Lake quickly became a deeply unhappy, even pathological, place. By November of 1943, the camp was in turmoil. Labor strife between Japanese American workers and the camp administrators was intense. Adding to the chaos were a number of fiercely pro-Japanese young men who vied with the administration for control of camp life, threatened those internees who sought accommodation with administrators, and sought to disrupt the camp's functioning at every opportunity. By mid-November 1943, anger and fear had led to a more-or-less complete stoppage of work at the camp and a breakdown in community life. The government responded by calling in the army and placing the camp under military control, which lasted until mid-January 1944. Even after civilian control of the camp was restored, however, tensions remained high.

One strategy that the camp's administrators used for keeping a lid on unrest at Tule Lake was to transfer its most difficult residents to enemy alien camps administered by the Justice Department. But this plan had a major defect: an increasing number of the most disaffected were not aliens but citizens, and while the law allowed the Justice Department to detain enemy aliens, it did not allow the detention of *citizens*. Pressure therefore began to build for a change in American citizenship law, to permit a citizen to renounce his U.S. citizenship on American soil, rather than just on foreign soil as the law then required. The government wanted this change, because once a Tule Lake resident renounced his citizenship, he could more easily be shunted to Justice Department control. Some of the most intensely pro-Japanese residents at Tule Lake supported it as well, both because it seemed a symbolic victory and because it would facilitate a hoped-for exodus to Japan. Congress enacted the change by mid-1944, and President Roosevelt signed it into law on July 1st of that year.

Not too many residents at Tule Lake filed renunciations of their citizenship until late December 1944 when the government announced that the Japanese American camps would be closing by mid-1945. This development triggered a new wave of anxiety at Tule Lake; rumors spread that the government would either deport alien parents and separate them from their citizen children or force entire families out to fend for themselves in hostile white communities. Pro-Japanese forces at the camp capitalized on these anxieties, ratcheting up the already considerable pressure they were bringing to bear on camp residents to renounce their citizenship. And the renunciations began to pour in: 2,000 in late December 1944, and another 3,400 in January of 1945. In all, nearly 6,000

U.S. citizens would renounce their citizenship at Tule Lake. Camp administrators reported to a Justice Department attorney that the atmosphere at Tule Lake was one of hysteria, and that the camp might more properly be run "as a species of mental institution."

The hysteria only mounted when the war with Japan ended in August of 1945. Residents who had effectively rendered themselves stateless by renouncing American citizenship without anything to replace it found themselves in a kind of limbo; to others the reality of deportation to Japan suddenly came home, leading them to question the wisdom of their renunciations. Many internees found themselves facing the very separation from family that they had been trying to avoid. Thus, a new wave of requests began to flood in--this time for *cancellation* of the renunciations. It was these requests that led to litigation in federal court.

Acheson v. Murakami was a lawsuit brought by three Tule Lake renunciants, each of whom alleged that she had renounced her citizenship in an atmosphere of pressure and hysteria and against a backdrop of threatened physical violence. A federal trial judge cancelled the renunciations on a finding that each had been coerced, and the government appealed the district court's judgment to the 9th Circuit court of appeals. The Ninth Circuit agreed with the trial judge that the evidence proved that the renunciations had been coerced and involuntary.

The appellate court might have stopped there, but instead it proceeded to lay out an indictment of the government's entire course of dealing with Japanese Americans from just after Pearl Harbor until war's end.

The court evaluated, and condemned, each step of a Tule Lake renunciant's path from the very first days after Pearl Harbor to segregation and renunciation. The court began with what it called "the racial deportations" of the spring of 1942, emphasizing not just the extraordinary property losses that the deportees suffered, but also the emotional scars that came along with being driven from one's home on account of race, permitted to take only what one could carry. "One has no difficulty," the court wrote, "imagining the thousands of families in which the mother must carry the babies, measuring the carrying capacity of each of the other children able to walk against the sacrifice of one or another household utensil, or book, or family treasure." Nor, the court wrote, would one have any difficulty "in realizing the repeated recitals of such wrongs in the crowded dust filled halls and cells of the Tule Lake Center and their effect upon the psychology of those there contemplating the value of an American citizenship."

The court next drew a grim picture of "[t]he incarceration at the Tule Lake stockade [and] [i]ts effect upon the minds of our fellow citizens as to the value of their citizenship." It stated that "[t]he barbed wire stockade surrounding the 18,000 people there was like that of the prison camps of the Germans," including its guard turrets and their machine guns. He described the camp's barracks and facilities in great detail, as well as the meager pay that those at Tule Lake received for their work, concluding that neither the living conditions nor the labor situation compared favorably with a penitentiary.

Finally, and most harshly, Denman reviled the military's "doctrine of enemy racism inherited by blood strain." He referred here to the justification that General John

DeWitt, the commander of the Western Defense Command at the Presidio, had offered for the entire program of excluding American citizens of Japanese ancestry from the West Coast: "his belief that these citizens, descended of an eastern Asiatic race, can never be determined to be loyal Americans." Denman quoted DeWitt's notorious assertions that "[a] Jap is a Jap," and that "[t]he Japanese race is an enemy race" whose foreign "racial strains" are "undiluted" in those born on American soil," and that it was necessary to "worry about the Japanese all the time until he is wiped off the map" of the West Coast. This was racist ideology worthy of the Nazis, said the court:

The identity of this doctrine with that of the Hitler generals towards those having blood strains of a western Asiatic race as justifying the gas chambers of Dachau must have been realized by the educated Tule Lake prisoners of Japanese blood strain. The German mob's cry of 'der Jude' and 'the Jap is a Jap' to be 'wiped off the map' have a not remote relationship in the minds of scores of thousands of Nisei, whose constant loyalty has at last been recognized.

It is very difficult to imagine a more complete and crushing denunciation of the federal government's wartime Japanese American program than the one written by the Ninth Circuit in *Acheson v. Murakami*.

Ex parte Endo

Last but not least, let me briefly mention a case that we hear very little about, even though it was decided by the US Supreme Court on the very same day as the notorious *Korematsu* decision. I am referring to *Ex parte Endo*, in which the Supreme Court held that the federal government had no legal authority to continue to confine loyal Japanese Americans and would have to release them from the camps. That is, the U.S. Supreme Court—on the same day as it decided *Korematsu*—held that the U.S.

government had been acting unlawfully by detaining loyal Japanese Americans. And it reached that conclusion *unanimously*.

We tend not to hear too much about the government's loss in *Ex parte Endo*; instead we mostly hear about the government's victory on the same day in *Korematsu*. Part of the reason for that, I think, is that *Korematsu* was a constitutional case, whereas the Court's basis for slapping down the government in the *Endo* case was not the Constitution.

But my whole point this afternoon is to suggest to you another reason why we tend to forget the victory of Japanese Americans in the *Endo* case, just as we tend to forget the many victories of Japanese Americans in the scores of other unsung and largely invisible Japanese American cases of World War II that I have told you about—these lower-court cases in which the government tried to punish supposed spies, draft resisters, subversive speakers, and citizenship renunciants, and failed, over and over again, in those efforts.

I want to suggest to you that we tend to forget them for the reason that the Czech author Milan Kundera stated: the struggle of man against power is the struggle of memory against forgetting. Power *wants* us to forget them. It wants us to remember a different story about World War II, a story in which the courts stepped aside and let the government have its way. But that is not the whole story; it is just one misleading part of the whole story.

In times like ours, with new suspicions falling on different racial and religious groups, we will do well to remember that federal judges and federal juries had the

capacity and the courage to reject important parts of an executive program of stigmatization and repression. We are often told that in times of crisis, the judiciary will defer to the executive on questions of liberty and security. This was the message of Chief Justice Rehnquist's book. But we must not let ourselves be fooled by that voice, because it is the voice of power telling tales of forgetting. At this Time of Remembrance, let us remember not just *Korematsu*, but **all** of the Japanese American legal cases of World War II, because they serve as an important, even inspiring, reminder of a different, bolder role for the federal judiciary in times of crisis.