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## **PATRIOTISM: DO WE KNOW IT WHEN WE SEE IT?**

*A. Wallace Tashima\**

FREE TO DIE FOR THEIR COUNTRY. By *Eric L. Muller*. Chicago: University of Chicago Press. 2001. Pp. xx, 229. \$27.50.

In a small, triangular plot, a short distance north of the Capitol in Washington, D.C., is the recently dedicated “National Japanese American Memorial to Patriotism.” One of the primary purposes of the memorial is to recall publicly the forced removal of Japanese Americans from the Pacific coast at the beginning of World War II and their imprisonment in government internment camps for the duration of the war.<sup>1</sup> The incident is worth recalling, of course, if for no other reason than as a constant reminder that we must not let a similar tragedy befall any other group of Americans. But one is at a loss to know why it is called a “Memorial to Patriotism.”<sup>2</sup> Is it patriotic to be stripped of all of one’s dignity and earthly possessions and forced into exile/imprisonment solely because of one’s race or ethnicity? Is it patriotic for a citizen of this country to be regarded as the enemy based on one’s race alone? Is it an act of patriotism to bow to the command of the President, literally enforced by the U.S. Army, when there is no apparent alternative? That many Japanese Americans evacuated by force from the West Coast choose to call their obedience to that unconstitutional act patriotic sixty years later highlights the schism within the Japanese-American community that Professor Eric Muller<sup>3</sup> explores in his book.

This modest volume that expands on a footnote to history can be read on several different levels. It tells the story of a small group of Japanese American men of draft age who, out of their understanding of patriotism, defied the draft and of the consequences they knowingly faced. The evacuation and internment of all persons of Japanese ancestry, citizens as well as aliens, from the Pacific coast at the start of

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1. Executive Order 9066, the legal authority for the internment, was issued by the President on February 19, 1942. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

2. The memorial also honors the 800 Nisei soldiers killed in action in World War II, pp. 197-98, and, certainly to that extent, it is a fitting memorial to patriotism.

3. Professor of Law, University of North Carolina, Chapel Hill.

World War II is a well-known episode of our recent past. Professor Muller does not go into detail, but he provides some of that background and the historical context of the evacuation and internment.<sup>4</sup> He then launches into his tale.

Shortly after World War II started, all draft-age Japanese-American men were reclassified into draft category 4-C, the category reserved for enemy aliens and other undesirables, with the consequence that, despite their American citizenship, these men became ineligible to be drafted into the armed forces. The leading “civil rights” organization for Japanese Americans was (and still is) the Japanese American Citizens League (“JACL”).<sup>5</sup> After it became inevitable that Japanese Americans would be removed from the Pacific Coast, the JACL, instead of protesting the evacuation as unconstitutional, urged full cooperation with the government.<sup>6</sup> It also lobbied the War Department to permit Japanese Americans to serve in the military, believing that such service was the best available vehicle for Japanese Americans to regain their rights as citizens (p. 42). As one Pentagon official put it, the JACL “has been a good influence. It has pursued a policy of full cooperation with the War Department and other federal agencies” (p. 63). Indeed, Professor Muller goes so far as to characterize Mike Masaoka, one of the wartime leaders of the JACL, as a “collaborator . . . with many of the wartime government’s anti-Nikkei policies. . . .” (p. 198).

The JACL was successful in these efforts and Japanese Americans were again reclassified, this time as draft-eligible. It was, however, unsuccessful in its efforts to have Nisei soldiers placed in “general assignments,” that is, assigned throughout the army, in the same manner as any other soldiers, as the need arose. After a long internal struggle within the War Department, the government determined that Nisei would serve in segregated combat units, rather than being integrated into existing units. One of the important considerations, of course, was the difficulty of explaining how the army could “possibly

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4. The historical background and legal basis of the evacuation are treated in some detail in the Supreme Court cases which considered the constitutionality of various aspects of the evacuation and internment, and the curfew that preceded it. See *Ex parte Endo*, 323 U.S. 283 (1944); *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). In coram nobis proceedings more than 40 years later, the factual basis of the order excluding all persons of Japanese ancestry from the Pacific Coast, as represented to the Supreme Court by the Solicitor General in the government’s brief, was called into serious question. See *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986), *aff’d in part, rev’d in part*, 828 F.2d 591 (9th Cir. 1987); *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

5. See <http://www.jacl.org> (JACL’s website).

6. To its credit, the JACL did support the legal challenges to the evacuation and internment in the form of amicus curiae briefs in both the *Korematsu* and *Hirabayashi* cases before the Supreme Court, as well as in *Yasui v. United States*, 320 U.S. 115 (1943).

integrate the Nisei while simultaneously segregating black soldiers” (p. 62). As one general observed, the “general assignment of the Nisei would inevitably draw attention to the continued segregation of blacks in the army” (pp. 60-62). Those young Japanese-American men who answered their country’s call by serving distinguished themselves on the field of battle. The segregated, all-Japanese 442nd Regimental Combat Team compiled a record of heroism unmatched in the annals of American military history by any unit of comparable size. As President Truman stated in his address to the returning soldiers of the 442nd:

You fought not only the enemy, but you fought prejudice — and you won. Keep up the fight, and we will continue to win — to make this great republic stand for just what the Constitution says it stands for: the welfare of all of the people all of the time. (p. 198)

A few young men, however, concluded that it was unjust for them to be drafted into the military to protect American democracy while they and their families were being held under armed guard, behind barbed wire, their status as prisoners resting on nothing less (and nothing more) than a purely racial classification (pp. 83-84). They either refused to report for their preinduction physical examinations or refused to step forward to take the oath when their names were called at the draft induction centers. Inevitably, these men were charged with refusing to report for induction into the armed forces of the United States, in violation of the Selective Service Act.<sup>7</sup>

After giving us an account of the turmoil within the internment camps on the issue of serving in the army,<sup>8</sup> Professor Muller takes us through several of those trials. His chronicle of those trials richly demonstrates the rampant racism that was the order of the day in America at that time, a much-lowered expectation of the meaning of “due process,” again consistent with the times, and the power that a United States district judge exercises over the case before him.

The Heart Mountain, Wyoming Relocation Center draft resisters were tried in the United States District Court for the District of Wyoming, in Cheyenne. After waivers of jury trials, all 63 draft resisters were tried en masse before Judge T. Blake Kennedy. On a well-documented basis (pp. 104-07), Professor Muller brands Judge Kennedy as an out-and-out racist (p. 104). On the first day of trial, Judge Kennedy referred to the defendants as “you Jap boys” (p. 104). Unsurprisingly, all 63 defendants were convicted and each was sentenced to a three-year term of imprisonment (p. 113). Judge

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7. Selective Training and Service Act of 1940, ch. 720, 54 Stat. 885 (1940) (expired 1947).

8. Pp. 41-99. The navy continued to refuse to accept Japanese Americans into its ranks. P. 47.

Kennedy's personal afterwords help explain his justification for those harsh sentences:

Personally this Court feels that the defendants have made a serious mistake in arriving at their conclusions which brought about these criminal prosecutions. If they are truly loyal American citizens they should, at least when they have become recognized as such, embrace the opportunity to discharge the duties of citizens by offering themselves in the cause of our National defense.<sup>9</sup>

The cases of the Minidoka, Idaho Relocation Center draft resisters were tried in the United States District Court for the District of Idaho, in Boise. If Judge Kennedy was an out-and-out racist, the xenophobia of the district judge who presided over the Minidoka cases was even more pronounced. Chase A. Clark had been the governor of Idaho before his appointment to the district court two years earlier. As governor, shortly after the outbreak of World War II, Clark's suggestion of what to do about the Japanese in America — what he called the "Jap problem" — was to "[s]end them all back to Japan, then sink the island" (p. 125; alteration in original). At a conference of western governors, called by the then-director of the War Relocation Authority, Milton Eisenhower, Governor Clark engaged in a vicious diatribe against Japanese Americans, admitting right from the start "that I am so prejudiced that my reasoning might be a little off..." He concluded his remarks by urging that any "Japanese who may be sent [to Idaho] be placed under guard and confined in concentration camps for the safety of our people, our State, and the Japanese themselves" (p. 33; alteration in original). No one fully realized then the accuracy of his foreboding prediction. It apparently never crossed Judge Clark's mind that he ought to recuse himself for bias and prejudice against the defendants, or even for the sake of the appearance of impartiality (pp. 126-27).

Other shortcomings pervaded the trial. The level of representation afforded the defendants by court-appointed counsel, as demonstrated by Muller, fell woefully short of even the most crabbed definition of the Sixth Amendment right to the effective representation of counsel. Some of the appointed defense counsel refused even to consult with their clients (pp. 125-26). Judge Clark also instituted his own version of a "rocket docket," in which justice itself was the victim of speed and efficiency. Judge Clark conducted 33 jury trials over an 11-day period. He was able to do so only by having the same 34 jurors serve in "slightly different configuration[s] of twelve" for all 33 cases. As Professor Muller states, "by the time all of the trials were completed, virtually all of the jurors had served on at least ten separate juries" (pp. 128-29). The longer jury "deliberations" lasted all of a few

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9. *United States v. Fujii*, 55 F. Supp. 928, 932 (D. Wyo. 1944).

minutes; some juries merely filed out, turned around, and returned with their guilty verdicts (p. 128). Any semblance of an impartial jury, open-mindedness, and lack of prejudice was abandoned. Challenges to the venire on account of possible prejudice fell on deaf ears (p. 129). All but one of the defendants were convicted.<sup>10</sup> Those that went to trial (a few others had entered pleas of guilty) were sentenced to three years and three months of imprisonment (p. 129).

Similar trials and ensuing convictions were repeated throughout the western states where the internment camps were located. Only the trial in the Northern District of California ended with unexpected results. The draft resisters from the Tule Lake, California Segregation Center were tried before Judge Louis E. Goodman, at the Eureka Division of the United States District Court for the Northern District of California. The defendants had moved to quash the indictment on the ground that they were deprived of their liberty without due process “by virtue of the circumstances” of their confinement at Tule Lake (p. 143). Concluding that “[i]t is 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,” Judge Goodman granted the motion to quash and dismissed the proceedings.<sup>11</sup> In further justification of his ruling, Judge Goodman observed:

The issue raised by this motion is without precedent. It must be resolved in the light of the traditional and historic Anglo-American approach to the time-honored doctrine of “due process.” It must not give way to overzealousness in an attempt to reach, via the criminal process, those whom we may regard as undesirable citizens.<sup>12</sup>

As Professor Muller rightly points out, although long on equity and fairness, Judge Goodman’s opinion is woefully short on citation to precedent or then-accepted norms of American constitutional doctrine (p. 151). The opinion rested uneasily on the then-untested, and even unrecognized, notion of substantive due process (pp. 146-48). It antedated the Supreme Court’s widespread introduction into constitutional law of the “shocks the conscience” doctrine by eight years.<sup>13</sup>

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10. The single acquittal was because the defendant had never received an induction notice. He also was later convicted, after having been given notice to report for induction. Pp. 129, 213 n.63.

11. *United States v. Kuwabara*, 56 F. Supp. 716, 719 (N.D. Cal. 1944).

12. *Id.*

13. Pp. 149-50; see *Rochin v. California*, 342 U.S. 165, 172 (1952).

For reasons lost in history, the Department of Justice did not appeal *Kuwabara*.<sup>14</sup> If it had been appealed, it surely would have been reversed. In *United States v. Takeguma*,<sup>15</sup> which involved an appeal from the draft-resisting convictions originating in the Poston, Arizona Relocation Center, the Ninth Circuit made short shrift of *Kuwabara*, noting tersely that “[w]herein the reasoning of the *Kuwabara* opinion differs with that of this opinion, it may be taken that we are not in accord therewith.”<sup>16</sup>

Professor Muller suggests that Judge Goodman’s free-lancing efforts to do justice are part of a long line of cases in which conscientious judges struggled with the tension between their sworn duty to uphold the law and the injustice of enforcing an unjust law.<sup>17</sup> In this country, that struggle goes back at least as far as the Fugitive Slave Act, which required northern judges to order the return of runaway slaves to their owners. The problem persists through the present day, however, with federal judges who oppose capital punishment wrestling with their own consciences as they enforce what they believe to be unjust laws that require the imposition of the death penalty (p. 153).

These young men were motivated by a somewhat-inchoate, but nonetheless deep-rooted, sense of injustice. The burden of their cases, and their cause, in their own words, as quoted by the Ninth Circuit, was simple: “Although American citizens by birth, the defendants [appellants] because of claimed war emergency have been treated as alien enemies, interned as prisoners of war, solely because *we* have been at war with the government where *their* ancestors were born.”<sup>18</sup> The Tenth Circuit’s summary of the defendant’s contention stated similarly:

Appellant’s entire appeal is predicated on the argument that his removal from his home and his confinement behind barbed wire in the relocation center without being charged with any crime deprived him of his liberty and property without due process of law, and that therefore he ought not be required to render military service until his rights were restored.<sup>19</sup>

We do not have to label these acts of resistance as “courageous” to recognize that they were acts of conscience, committed with the knowledge and acceptance of their harsh consequences. But these

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14. Professor Muller engages in some speculation regarding the reasons for the decision not to appeal *Kuwabara*, but grants that “it is impossible to know the full story” because the Department of Justice’s files of the case no longer exist. P. 157.

15. 156 F.2d 437 (9th Cir. 1946) (en banc).

16. *Takeguma*, 156 F.2d at 441.

17. See Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

18. *Takeguma*, 156 F.2d at 439 (alteration in original) (quoting appellants’ opening brief).

19. *Fujii v. United States*, 148 F.2d 298, 299 (10th Cir. 1945).

individual acts of conscience take on a dimension of courage when one pauses to reflect on the widespread approbation the draft resisters faced within the Japanese-American community. The culture of the Japanese-American community, instilled by the first-generation elders, was obedience and submission to and respect for authority. This culture of conformity was reinforced by the JACL's policy of cooperation with the government in carrying out the evacuation and internment and its express pro-draft stance. These acts of resistance also antedated the rise of the modern notion of passive resistance, popularized by Mahatma Gandhi a decade later. They also preceded the acceptance of civil disobedience that Dr. Martin Luther King Jr. impressed upon the American conscience a generation later. Nonetheless, these young men persisted.

Judge William Denman, of the Ninth Circuit Court of Appeals, confronted the morally-troubling dilemma that these convictions posed for some judges of conscience in his concurring opinion in *Takeguma*, which affirmed the Poston Relocation Center draft-resister convictions. Judge Denman's short, concurring opinion is worth quoting in full:

I concur in the opinion and its reasoning.

In addition, I feel that these young men should be considered by the executive as the subject of its clemency. They were United States citizens and only attempted to give up their citizenship after a continued illegal imprisonment by the Federal Government in barbed wire enclosures, guarded by armed soldiers, under conditions of great oppression and humiliation. *Ex parte Endo*, 323 U.S. 283, 65 S.Ct. 208, 89 L.Ed. 243.

Had any one of us been so wrongfully imprisoned in our youth because our parents had emigrated to this country from, say, Germany, England, or Ireland, with which there might be a war, it cannot be said that our exasperation and shame would not have caused us to prefer the citizenship of our parents' homeland. It was because the United States first cruelly wronged us by an illegal if not criminal imprisonment that our renunciation came. Even if, in our justifiable resentment, we committed acts adverse to the continuance of the war against our fatherland, it is for the United States, the first and greater wrongdoer, to be merciful.

Because our skins are white and our origin is European, is no ground for a distinction between our youth and that of these appellants.<sup>20</sup>

Apparently, none of the other judges of the Ninth Circuit, sitting en banc, felt a sufficient sense of moral outrage to join in Judge Denman's opinion.

The following year, a presidentially established amnesty board, headed by retired Supreme Court Justice Owen J. Roberts, recommended, inter alia, that the Japanese-American draft resisters be

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20. *Takeguma*, 156 F.2d at 442 (Denman, J., concurring).

granted pardons, including the full restoration of their civil rights. President Truman accepted that recommendation and, on December 24, 1947, granted the recommended pardons.<sup>21</sup>

Still, these men could not gain acceptance in their own community. For years running into decades, the JACL struggled with reconciling its own past of collaborating with the government's efforts and the antithetical acts of the draft resisters, which undermined the JACL's position. It repeatedly turned down efforts from its more progressive members, including a proposal from the 442nd Veterans Club of Oahu, Hawaii, that a formal apology be extended to the draft resisters. It was not until 2000, more than a half century later, that the JACL finally formally apologized to the draft resisters for the manner in which it had treated them (pp. 182-86). But the schism remains. As Professor Muller notes, "[s]adly, even as the Nisei generation that fought on the battlefields of Europe and in the courtrooms of the American West now dies out, the rancor and bitterness of their own internal disagreement live on" (p. 186).

Given this history, Senator Daniel K. Inouye's acknowledgment that "it took just as much courage and valor and patriotism to stand up to our government and say 'you are wrong,' " as it did to volunteer for military service, is an important step toward reconciliation (p. xi). Senator Inouye, himself a highly decorated veteran of the 442nd Regimental Combat Team,<sup>22</sup> is a revered figure among Nisei veterans of World War II, particularly those who served with him in the 442nd. Thus, his Foreword to Professor Muller's book is, itself, an important statement. Perhaps, reflection on Senator Inouye's Foreword, particularly his closing thought, will help bring closure to both sides of this debate: "I am glad that there were some who had the courage to express some of the feelings that we who volunteered harbored deep in our souls" (p. xi).

Professor Muller's book is not only a worthy record of these little-remembered events, but makes an important contribution towards reconciling the Japanese-American community, as well as the larger community, with its past.

This book is also worth reading on another level, in light of the legal problems that are likely to come to the forefront in this post-9/11, war-against-terrorism, world. Professor Muller's account reminds us of the crucial role that federal district judges play as the first line of defense of our Constitution. We see that the federal district court is the stage upon which both the majesty of the Constitution and the failures of the rule of law are vividly displayed.

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21. Pp. 181-82, 216 n.5 (citing, *inter alia*, Proclamation No. 2762, 12 Fed. Reg. 8731 (Dec. 23, 1947)).

22. Senator Inouye was awarded the Congressional Medal of Honor, the nation's highest military decoration, for his battlefield actions in Italy.

Federal trial judges exercise almost unchallenged power over the cases pending before them. In these draft-resister cases, the judgments ranged from acquittals to sentences of a few months to five years' imprisonment. In one case, the draft resisters, upon conviction, were sentenced to pay a fine of one cent (p. 192 n.14). As one of the leaders of the draft-resister movement commented, "Gee, what in the hell is the matter with this justice system? It doesn't make sense. The charge is the same, identical" (p. 192).

The federal judges who presided over these trials likely represented a fair cross-section of the federal judiciary of the day. Some were so biased and prejudiced that, by any objective measure, they should have recused themselves from participating in the cases. Others strove to conform their judgments to a higher ideal than that embodied in the positive law they were sworn to uphold. All surely saw themselves as fair-minded judges who applied the law fairly and even-handedly.

But all were the product of their time and place. And, at that time, overt racism was an accepted part of American life and law, and nativism and xenophobia played an important part in the politics of the American West. It is no wonder then that, for most of these draft resisters, their convictions and harsh sentences were a foregone conclusion. These "Jap boys" got exactly what they deserved, and what the public expected, under the standards of justice that then prevailed in the American West. It is to their credit that a few judges rose above their time and place to see the injustice of the strict and harsh application of the criminal sanctions of the Selective Service Act to these young men and recognized that, if not acquittal, mitigation and clemency were called for.

Today the cast in the federal courtroom has changed, but, like the stage itself, the scenarios remains familiar. In this post-9/11 world, many of the themes played out in this book will surely be played out again. The federal judiciary will again be called upon to protect the values embodied in our Constitution from overreaching government attempts to run roughshod over them.

Professor Muller's book is also worth reading in this light, as a thoughtful examination of one of those interstices where the rule of law struggles to coexist with morality and justice, and federal judges struggle to uphold their sworn duty *and* to do justice. It is a revisit worth making.