remained committed to ensuring justice. I believe LaShann DeArcy Hall has the right judicial temperament that will allow her to serve as a fair and honorable Eastern District Judge for New York." In addressing Congress, Senator Gillibrand stated that Judge Hall's "credentials are absolutely worthy of this position on the federal bench, and we would be a stronger nation with more women like Ms. Hall serving as judges in our federal court system.... She has devoted her entire career to various forms of public service. She is dedicated to her community, and she cares deeply about this country. LaShann DeArcy Hall would make an excellent federal judge, and she would add much needed diversity and another female voice to the federal bench."

In nominating Judge Hall to the federal bench, Senator Gillibrand stated that Judge Hall "is an accomplished attorney, who is extremely well qualified to serve as a federal court judge...."

When asked by Senator Grassley, as part of the judicial confirmation process, about the most important attribute of a judge and whether she possessed it, Judge Hall stated, "The most important attribute of a judge is the ability to fairly and impartially apply the rule of law. I am committed to strict adherence to the rule of law, and, if confirmed, I would base my rulings on applicable law without regard to my personal views."

Similarly, when asked about the appropriate temperament of a judge, she replied, "A judge should be deliberate, thoughtful, patient, and fair. A judge should serve with integrity and humility. I believe I have demonstrated each of these qualities through my service on the New York State Joint Commission on Public Ethics, the New York City Taxi and Limousine Commission, and in the United States Air Force. If I am confirmed, I will continue to exemplify these qualities."

Judge Hall was sworn in as the sixty-second judge of the Eastern District of New York by Chief Judge Carol Bagley Amon. At her investiture ceremony, Chief Judge Janet DiFiore of the New York State Court of Appeals stated, "This is a great day for Judge Hall, her family, and her friends and colleagues. Most of all, this is a great day for the public she serves so ably on the bench. Her years as a commercial litigator without a doubt prepare her to preside over the complex and varied cases." Judge Amon also stated, "LaShann DeArcy Hall brings to our bench her sharp inquisitive mind, her no-nonsense approach to conducting proceedings, her kindness and her ability to make all around her reach for higher heights. I feel very blessed to have her as my newest colleague."

Legal History

Yet Another *Awful* Decision by the U.S. Supreme Court

By C. Evan Stewart

In the last two issues of the *Federal Bar Council Quarterly*, we have explored the *worst* decision *ever* by the U.S. Supreme Court (*Dred Scott v. John F.A. Sanford*, 60 U.S. (19 How.) 393 (1856)), as well as the *second worst* (*Plessy v. Ferguson*, 163 U.S. 537 (1896)). Now let's add another decision to this un-august group: *Korematsu v. United States*, 323 U.S. 214 (1944). In *Korematsu*, the Court held that widespread racial discrimination aimed at one group of American citizens – Americans of Japanese descent – was justified by wartime necessity.

A Date Which Will Live in Infamy

At 7:48 a.m. (Hawaiian time) on December 7, 1941, forces from the Imperial Japanese Navy began their attack on the U.S. Pa-

cific Fleet headquartered at Pearl Harbor. All eight U.S. battleships were damaged (four were sunk); 188 planes were destroyed; 2,403 Americans were killed and 1,178 were wounded. That same day (although it was actually December 8 in Asia), Japan also attacked U.S. bases in the Philippines, Guam, and Wake Island, as well as attacking the British-held colonies of Hong Kong, Singapore, and Malaya.

Also taking place on December 7 was a meeting in Pittsburgh's Soldiers and Sailors Memorial Hall. With a seating capacity of 2,550, the arena was packed with supporters of the America First Committee ("AFC"), eager to hear Senator Gerald Nye (and others) speak against America getting involved in the armed conflicts raging in Europe and Asia. AFC had been started on September 4, 1940 by Yale Law students (among them, Gerald Ford, Sargent Shriver, Potter Stewart, and Kingman Brewster) and quickly grew into a national movement (800,000 paying members, with supporters such as Walt Disney, John F. Kennedy, Frank Lloyd Wright, e.e. cummings, and Alice Roosevelt Longworth).

The national spokesman for the group was the famed aviator, Charles Lindbergh. Lindbergh, who had publicly opposed the Roosevelt administration for years (and had also announced to the world how impressed he was with the growing might of Germany's air force), turned up the nature and heat of the isolation debate at an AFC rally in Des Moines, Iowa, on September 11, 1941. Blaming the British, Roosevelt's administration, and American Jews for leading America inexorably into the world's conflicts, Lindbergh went on:

> It is not difficult to understand why Jewish people desire the overthrow of Nazi Germany. The persecution they suffered in Germany would be sufficient to make bitter enemies of any race. No person with a sense of the dignity of mankind can condone the persecution the Jewish race suffered in Germany. But no person of honesty and vision can look on their pro-war policy here today without seeing the dangers involved in such a policy, both for us and for them.
>
> Instead of agitating for war the Jewish groups in this country should be opposing it in every possible way, for they will be among the first to feel its consequences. Tolerance is a virtue that depends upon peace and strength. History shows that it cannot survive war and devastation. A few farsighted Jewish people realize this and stand opposed to intervention. But the majority still do not. Their greatest danger to this country lies in their large ownership and influence in our motion pictures, our press, our radio, and our government.

It was in this type of environment that Senator Nye took the stage at 4:45 p.m. and proclaimed, "Never, never, never again must America let herself be made such a monkey of as she was 25 years ago." During his speech, Nye was handed a note that read, "The Japanese Imperial Government and Tokyo today at 4:00 p.m. announced a state of war with the U.S. and Great Britain." He told the crowd about the note, but added, "I can't somehow believe this. I can't come to any conclusions until I know what this is about."

It turned out that Nye had known of the attack on Pearl Harbor before he had gotten up to speak. The next day, the *Pittsburgh Press* denounced the meeting in an editorial: "Never has there been such a disgraceful meeting in all Pittsburgh's history. Those who participated in it should forever hang their heads in shame." More importantly, President Roosevelt addressed Congress that same day, proclaimed that December 7th was "a date which will live in infamy," and asked Congress to declare war against the Empire of Japan. Within 40 minutes, Congress did just that (the Senate: 82 to 0; the House 388 to 1 – Jeannette Rankin (R. Montana) was the one negative vote; she in fact had also voted against United States participation in World War I). Stung by the surprise and enormity of the Japanese attacks, the nation reflexively followed suit, pivoting from isolationism to full support for a vengeful war; not surprisingly, on December 11, the leaders of AFC disbanded the organization.

Panic on the West Coast (and Beyond)

In very short order the vengeful American public and their political representatives focused on the approximately 120,000 Japanese Americans who lived among them, almost all of whom were located on the West Coast. One who led the charge was Earl Warren, California's then Attorney General (and who later became a liberal icon as Chief Justice of the United States). Warren publicly proclaimed, "I have come to the conclusion that the Japanese situation, as it exists today, may well be the Achilles Heel of the entire civil defense effort. Unless something is done it may bring about a repetition of Pearl Harbor." And the Mayor of Los Angeles, Fletcher Bowron, invoked America's greatest president. "There isn't a shadow of a doubt but that Lincoln … would make short work of rounding up the Japanese and putting them where they could not do harm."

The reported sightings of purported enemy ships and imminent invasions threatening the West Coast exploded. But it was not all frantic fantasy. In late December, three ships were in fact torpedoed off the California coast by a Japanese submarine or submarines. And, on February 23, 1942, a Japanese submarine fired some shells at an oil refinery in Galeton, California, causing $500 of damage. The next night brought on "The Battle of Los Angeles," with hundreds of army anti-aircraft rounds fired at the off-shore enemy – a U.S. Navy weather balloon (five people died – two of heart attacks, three in car crashes of locals fleeing the City of Angels).

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The federal government's team charged with handling this existential threat to the homeland was led by Lieutenant General John DeWitt of the Western Defenses Command. DeWitt's basic, bottom line was as follows: "A Jap is a Jap! There is no way to determine their loyalty." DeWitt found an ally in Assistant Secretary of War John J. McCloy (*see, Federal Bar Council Quarterly* (September 2012)), who opined: "We can cover the legal situation … in spite of the Constitution. Why the Constitution is just a scrap of paper to me." Together, they pressed for an executive order to round up every person on American soil deemed to be of Japanese lineage. McCloy's boss, Secretary of War Henry L. Stimson (*see, Federal Law Council Quarterly* (May 2009)), was not comfortable with that approach; Attorney General Francis B. Biddle actually publicly opposed such an action on the ground that it was unconstitutional.

Nonetheless, on February 19, 1942, President Roosevelt signed Executive Order 9066. Roosevelt, however, did not want to publicly embrace this tar baby and issued the order without comment. The order read, in part:

> I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area herein above authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

Importantly, the order did not mention race or national origin. One reason for that was there was significant sentiment to round up on a whole-sale basis German-Americans and Italian-Americans as well. General DeWitt, in fact, wanted to intern Joe DiMaggio's parents, who were based in San Francisco and had never applied for American citizenship. (He did not get his wish; but they were barred from using their fishing boat and from visiting the restaurant they owned.)

To the "Camps"

Initially, Japanese-Americans were allowed to "voluntarily" leave the West Coast states – if they relocated east of the Sierra and Cascade mountain ranges. Very few availed themselves of this offer. On March 27, 1942, General DeWitt shut down that option.

Mass departures by bus and train then began in earnest. People were allowed to bring "only what you can carry." A number of "Assembly Centers" were established (mostly in California); these were created to process the deportees on their way to "Relocation Centers" – ultimately, there were 10 such "Centers" (two in

Roger Shimomura
American, born 1939
Desert City, 2010
Acrylic on canvas. This painting depicts the Minidoka Relocation Center, Idaho, where the artist spent his early childhood.
Collection of the Herbert F. Johnson Museum of Art
Acquired through the George and Mary Rockwell Fund; 2014.005
Courtesy of the artist

California, two in Arizona, two in Arkansas, and one each in Idaho, Utah, Wyoming, and Colorado). These "Centers" were, in fact, concentration camps, surrounded by barbed wired and guarded by armed troops. The government's official line was that the "Centers" had been set up to protect the Japanese Americans from violence by other Americans; but the people cluttered inside the "Centers" noticed that the armed troops, perched on the various guard towers (with search lights), were pointing their machine guns at them, rather than at access routes leading to the "Centers."

Fred Korematsu and Military Order No. 34

Fred Korematsu was an American citizen; his parents had emigrated from Japan. He worked in a shipyard in California, but was fired after Pearl Harbor. He twice tried to enlist, but was rejected. He then procured a forged draft card with the name of Clyde Sarah, claiming Spanish and Hawaiian lineage. Based on his new identity, he was hired at another shipyard in California; and "Clyde" did well there, being promoted to foreman.

During this same period, General DeWitt was busy issuing a whole series of orders, based upon the authority delegated to him by Executive Order 9066. On March 27, 1942, for example, he issued Proclamation No. 4, which forbade all persons of Japanese ancestry from leaving Military Area No. 1 "for any purpose." Then, on May 3, the general issued Order No. 34, which excluded all persons of Japanese ancestry from Military Area No. 1. Failure to obey any of the directives issued pursuant to Executive Order 9066 had explicitly been made a crime by a recent act of Congress.

On May 30, Korematsu was arrested on a street corner in San Leandro, California. He subsequently was convicted for violating Order No. 34 and the aforementioned Congressional statute. A local lawyer, Wayne Collins (at that point a lawyer for the American Civil Liberties Union), urged Korematsu to test the constitutionality of Executive Order 9066. Korematsu agreed, and the case ultimately made its way to the U.S. Supreme Court.

In the Supreme Court

Writing for a six Justice majority (Chief Justice Stone and Justices Black, Reed, Douglas, Rutledge, and Frankfurter), Justice Hugo Black ruled that Executive Order 9066 and the Congressional statute that made a violation thereof a crime were constitutional. Black, who as a young lawyer in Alabama had been a member of the Klu Klux Klan, began his opinion by laying out – for the first time in the Court's history – that "legal restrictions which curtail the civil rights of a single racial group are immediately suspect ... [and are subject] to the most rigid scrutiny."

Notwithstanding such strict scrutiny, Black believed he was controlled by the Court's prior decision – *Hirabayashi v. United States*, 320 U.S. 81 (1943) – in which the conviction of a Japanese-American for violating a DeWitt curfew order was upheld. Quoting from the earlier decision, Black wrote:

> We cannot reject as unfounded the judgment of military authorities and of Congress that there were disloyal members of that population.... We cannot say that the war-making branch of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

Writing for a six Justice majority, Justice Hugo Black ruled that Executive Order 9066 and the Congressional statute that made a violation thereof a crime were constitutional.

If that were not bad enough, incredibly, Black then wrote that, while it would be a different case if it involved imprisoning a loyal citizen in a concentration camp

because of racial prejudice ("our duty [would be] clear"), "we are dealing specifically with nothing but an exclusion order." Of course, that was simply not true; indeed, once Korematsu was arrested he was put into just such a camp (as were nearly 120,000 others). Compounding this strange analysis, Black then wrote that casting "the case into outlines of racial prejudice ... *merely confuses* the issue. Korematsu was *not* excluded from the Military Area because of hostility to him or his race." (Emphasis added.)

Black then concluded this train of thought as follows:

> There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot – by availing ourselves of the calm perspective of hindsight – now say that at that time these actions were unjustified.

Justice Felix Frankfurter, while he concurred with Black's opinion, felt compelled "to add a few words of [his] own." Opining that the Constitution is "an instrument for dialectic subtleties," Frankfurter could "find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts." And just to sharpen that point, he ended with this thought: When it comes to war, "[t]hat is their [the Executive's and Congress's] business, not ours."

There were three dissents, the first by Justice Owen Roberts. Roberts, as an initial matter, noted that the issue was not "keeping people off the streets at night" (*Hirabayashi*), but rather the conviction of someone who refused to submit to imprisonment in a concentration camp based upon his race or national origin. Laying out the history of Executive Order 9066 and General DeWitt's various directives pursuant thereto, Roberts laid bare the absurd dilemma Korematsu faced: "The earlier of [DeWitt's] orders made him a criminal if he left the zone in which he resided; the latter made him a criminal if he did not leave." The only escape from this trap was to voluntarily go to one of the concentration camps. Thus, the internment program itself was indeed at the heart of what was at issue and the whole shebang was clearly unconstitutional.

Justice Frank Murphy was up next, writing that constitutional power had been abused and the internment program fell "into the ugly abyss of racism." Murphy focused on deconstructing the case the government had put forward to justify the "military necessity" for excluding "'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area." That case was based exclusively on General DeWitt's *Final Report, Japanese Evacuation from the West Coast, 1942* (dated June 5, 1943; made public in January 1944). As Murphy made clear, there was "no reliable evidence" cited anywhere in DeWitt's report that the general population of individuals of Japanese descent were disloyal or had done anything wrong. Instead, the report just set forth a litany of racist suppositions, strung one-after-another ("an accumulation of ... misinformation, half-truths and insinuations"), without any factual basis for support. Murphy then observed that many of these same charges of treason, etc., had been lodged against German-Americans and Italian-Americans, without any wholesale evacuation of those very large groups of citizens to concentration camps. He also noted that not one person of Japanese ancestry had been accused or convicted of any activities relating to the attack on Pearl Harbor. Finally, he demonstrated the Alice-in-Wonderland logic of the DeWitt Report, citing its "amazing statement": "The very fact that *no sabotage* has taken place to date is a disturbing and confirming indication that such action *will be taken*." (Emphasis added.) He concluded by abhorring the Court's "legalization of racism," which should never have a place "in our democratic way of life."

Justice Robert Jackson then weighed in with a historic dissent. Initially, he noted that Korematsu's crime "consists merely of being present in the state whereof he is a citizen, near the place he was born, and where all his life he has lived." The legal dilemma he faced (which could only be solved by agreeing to placement

in a concentration camp) was due solely to the birth place of his parents, notwithstanding that the "fundamental assumption" of our system is that "guilt is personal and not inheritable."

Jackson next turned to the Court's role in passing on DeWitt's various orders. Given the "evidence" in the record, Jackson said he could not judge whether or not the orders were "reasonably expedient military precautions." But to Jackson that was not the issue; the issue was whether or not the orders were constitutional. Making this even more problematic was the DeWitt Report itself, over which there was "sharp controversy as to [its] credibility":

> So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And that it will always be when courts try to look into the reasonableness of military orders.

Jackson's real concern, however, was not with DeWitt's orders, per se, because a military commander's order can always be revoked after the military emergency. Rather, his concern was the majority's giving constitutional imprimatur to such orders; for now "the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens." In his dissent's most famous line Jackson then wrote: "The principle then lies about like a *loaded gun* ready for the hand of any authority that can bring forward a plausible claim of an urgent need." (Emphasis added.)

The Justice Department had done its best to time the case before the Supreme Court to ensure that it would have no impact on Roosevelt's campaign for a fourth term. And that effort worked: oral argument took place on October 11 and 12, 1944, and the decision was handed down on December 18, 1944. Not only had Roosevelt been re-elected by that time, but Korematsu had been released and was working as a welder in Salt Lake City.

The Aftermath of Korematsu

For many decades this shameful episode in our nation's history was not widely discussed or acknowledged. But by the 1970s, books began to be written, and President Ford issued Proclamation 4417 in 1976, which repudiated Executive Order 9066; in doing so he said, among other things: "We now know what we should have known then, not only that evacuation was wrong, but Japanese-Americans were and are loyal Americans." Congress thereafter published a report in 1982; it concluded that "Executive Order 9066 was not justified by military necessity" and that it and DeWitt's various orders were the result of "race prejudice, war hysteria, and a failure of political leadership." Six years later, Congress passed the Civil Liberties Act of 1988. That legislation not only included a formal apology for the evacuations and internments, it also provided payment of $20,000 to each of the approximately 80,000 citizens subject to such treatment who were still living.

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More important for Fred Korematsu was that Peter Irons, a professor at the University of Massachusetts at Amherst, and Aiko Yoshinaga-Herzig, a California housewife, independently discovered that Justice Department lawyers had withheld, altered, and/or destroyed evidence while Korematsu's case was winding its way to the Supreme Court. They pooled what they had learned, and a group of Japanese-American lawyers subsequently brought on a *coram nobis* petition to overturn Korematsu's conviction. In the course of that

litigation, Korematsu's legal team proved that:

(1) The government had withheld intelligence reports from 1942 documenting that Japanese-Americans, as a whole, were loyal;

(2) DeWitt's Final Report had been materially altered (and it was the altered version that had been submitted to the Supreme Court as "evidence"); and

(3) DeWitt's various suppositions of treasonous acts by Japanese-Americans were not only false, they were *known to be false* by government attorneys at the time the Court was rendering its decision.

Based upon that evidentiary record, Judge Marilyn Hall reversed Korematsu's conviction, finding that a "manifest injustice" had been done to him and to all who had been interned. *See*, *Korematsu v. United States*, 584 F. Supp. 1406, 1416-17 (N.D. Cal. 1984).

Congress thereafter published a report in 1982; it concluded that "Executive Order 9066 was not justified by military necessity."

Postscripts

- Apropos of Justice Jackson's "loaded gun" imagery, the Supreme Court's decision in *Korematsu* has never been expressly overturned. Governmental policy in the aftermath of 9/11 certainly has some antecedents from that precedent. And one of this year's presidential candidates cited *Korematsu* with approval vis-à-vis dealing with specific immigrant groups that may (or may not) pose terrorist threats to this country.
- Ironically, Senator Nye sponsored the Nye-Lea bill in 1935, which granted citizenship to American veterans of Asian ancestry.
- The famed Western photographer, Ansel Adams, was granted access to Manzanar. His photographs have all been digitalized and are available online at the Library of Congress' website.
- By 1943, the federal government had changed its tune, at least insofar as allowing Japanese-Americans to serve in the military. Segregated units were formed, bound for service in Europe; a number of Japanese-Americans also served in the Pacific, most often as translators/interrogators (Major General Charles Willoughby paid tribute to those men as follows: "Never before in history did an army know so much concerning its enemy.... Those translators saved over a million lives and two years."). The almost entirely Japanese-American 442nd Regimental Combat Team, which ferociously fought the Germans in Italy, became the most decorated combat unit (per capita) in American history. Yet when Daniel Inouye (who later represented Hawaii in the U.S. Senate for 50 years) returned from the war (minus his right arm), he went into a San Francisco barbershop in his full dress uniform (bedecked with medals – he won, *inter alia*, the Medal of Honor), Lieutenant Inouye was told: "You're a Jap and we don't cut Jap hair."
- The hysteria that gripped California in the aftermath of Pearl Harbor is captured well in Steven Spielberg's 1979 movie "1941." One of the high points of "1941" is the greatest jitterbug dance scene in movie history."
- The best, most comprehensive book on the treatment of Japanese-Americans in World War II is Richard Reeves' *Infamy: The Shocking Story of the Japanese-American Internment in World War II* (Picador 2015). An excellent review of the *coram nobis* petition can be found in S. K. Serrano & D. Minami's "*Korematsu v. United States*: A Constant Caution in a Time of Crisis," 10 *Asian American Law Journal* 37 (2003). For a contemporaneous critique of the Supreme Court's handling of *Korematsu*, *see*, E.V. Rostow's "The Japanese American Cases – A Disaster," 54 *Yale Law Journal* 489 (1945).