06-3745-cv(L), 06-3785-cv(CON), 06-3789-cv(CON), 06-3800-cv(CON), 06-4187-cv(XAP)

United States Court of Appeals

for the

Second Circuit

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, AKIL SACHVEDA, SHAKIR BALOCH, HANY IBRAHIM, YASSER EBRAHIM, ASHRAF IBRAHIM,

Plaintiffs-Appellees-Cross-Appellants,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF KAREN KOREMATSU-HAIGH, JAY HIRABAYASHI, AND HOLLY YASUI AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES/CROSS-APPELLANTS AND SUPPORTING REVERSAL OF PARTIAL DISMISSAL OF CLAIM FIVE OF THE THIRD AMENDED COMPLAINT

ERIC L. MULLER
GEORGE R. WARD PROFESSOR
UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW
CB #3380
Chapel Hill, North Carolina 27599
(919) 962-7067

STEVEN M. PESNER
ROBERT H. PEES
AKIN GUMP STRAUSS HAUER
& FELD LLP
590 Madison Avenue
New York, New York 10022
(212) 872-1000

Attorneys for Amici Curiae

– v. –

JOHN ASHCROFT, FORMER UNITED STATES ATTORNEY GENERAL, DENNIS HASTY, FORMER WARDEN OF MDC, JAMES W. ZIGLAR, COMMISSIONER, IMMIGRATION AND NATURALIZATION SERVICE, JAMES SHERMAN, ROBERT MUELLER,

Defendants-Appellants-Cross-Appellees,

UNITED STATES OF AMERICA,

Defendant-Cross-Appellee,

JOHN DOES 1-20, MDC CORRECTIONS OFFICERS, MICHAEL ZENK, WARDEN OF MDC, CHRISTOPHER WITSCHEL, CLEMETT SHACKS, BRIAN RODRIGUEZ, JON OSTEEN, RAYMOND COTTON, WILLIAM BECK, SALVATORE LOPRESTI, STEVEN BARRERE, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, STUART PRAY, ELIZABETH TORRES, PHILLIP BARNES, SYDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, SCOTT ROSEBERY,

Defendants.

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STATEMENT OF IDENTITY AND INTEREST OF AMICI

Amici are children of three Japanese Americans who challenged the government's racial curfew and detention programs in the United States Supreme Court during World War II. Karen Korematsu-Haigh is the daughter of Fred Korematsu (Korematsu v. United States, 323 U.S. 214 (1944)). Jay Hirabayashi is the son of Gordon Hirabayashi (Hirabayashi v. United States, 320 U.S. 81 (1943)). Holly Yasui is the daughter of Minoru Yasui (Yasui v. United States, 320 U.S. 115 (1943)).

Their interest is in avoiding the repetition of a tragic episode in American history that is also, for them, painful family history. That history is not the ordeal suffered by their famous fathers and other American citizens of Japanese ancestry, but rather that suffered by their *grandparents* – Japanese aliens in the United States at the outbreak of war in December 1941. Their grandparents were all aliens because American law forbade them, as Asians, from naturalizing as U.S. citizens. See Morrison v. California, 291 U.S. 82, 85-86 (1934). Like the Plaintiffs in the matter now before the Court, amici's grandparents were wrongfully subjected to prolonged and lawless detention during a national security crisis on account of their race and national origin. It took over forty years for the Congress and the President to acknowledge and apologize for this error and to offer them compensation. Amici file this amicus brief in the hope that the Plaintiffs will not

have to wait four decades for the justice that amici's grandparents' generation so belatedly received.

Karen Korematsu-Haigh's paternal grandmother, Kotsui Aoki, was born in Japan, and before emigrating to San Francisco in 1914, she married by proxy Korematsu-Haigh's paternal grandfather, Kakusaburo Korematsu, who had earlier come to the United States from his native Japan. Korematsu-Haigh's grandparents were living in East Oakland, California, on December 7, 1941, when the Japanese navy attacked Pearl Harbor. On May 4, 1942, they were forced into detention at the Wartime Civilian Control Administration's Tanforan Assembly Center just south of San Francisco. After nearly five months at Tanforan, the federal government transferred them to the Topaz Relocation Center in central Utah. They remained behind barbed wire at Topaz until the camp closed in 1945.

Holly Yasui's paternal grandparents were born in Japan in 1886. Her grandfather, Masuo Yasui, came to the United States shortly after the turn of the century in order to work on the railroads. Her grandmother, Shidzuyo Miyake Yasui, came to this country in 1912 in order to marry her grandfather. They were living in Hood River, Oregon, on December 7, 1941. On December 12, 1941, the FBI arrested Holly Yasui's grandfather and, after a hearing, held him in Justice Department captivity for the duration of the war. Yasui's grandmother was taken in the spring of 1942 to the Pinedale Assembly Center outside Fresno, California, and from there to the Tule Lake Relocation Center in northwestern California in

the fall of 1942. She remained incarcerated at Tule Lake until 1943, when the government allowed her to leave camp to work on a sugar-beet farm in Montana.

Jay Hirabayashi's paternal grandfather, Shungo Hirabayashi, was born in Japan and came to the United States in 1907. Seven years later, he married Mitsu Suzawa, a recent Japanese immigrant. Hirabayashi's grandparents were living in Auburn, Washington, at the time of the Pearl Harbor attack. In the spring of 1942, they were forced from their home and into the Pinedale Assembly Center. That fall, the government moved the couple to indefinite incarceration at the Tule Lake Relocation Center. They remained at Tule Lake until the spring of 1943, when they were permitted to leave camp to join one of their sons who was working on a farm in Idaho.

None of amici's grandparents lived long enough to accept either the apology for their wartime ordeal that the Congress and President of the United States offered in the late 1980s or the token redress payments of $20,000 that the government offered to surviving internees.

PRELIMINARY STATEMENT

In Claim 5 of the Third Amended Complaint, Plaintiff-Appellees/Cross-Appellants (hereinafter "Plaintiffs") alleged, in part, that the Defendant-Appellants/Cross-Appellees (hereinafter "Defendants") violated their right to equal protection under the Fifth Amendment by detaining them, solely on account of

their race, religion, and national origin, for longer than was necessary to secure their removal from the United States.

In its June 14, 2006, Memorandum and Order (the "Memorandum and Order"), the district court dismissed this part of Claim 5.[1] The court separately analyzed the allegation of national-origin discrimination and the allegation of racial and religious discrimination. Insofar as Count 5 alleged discriminatory detention based on national origin, the district court analogized it to a claim of discriminatory deportation on account of national origin, which is generally permissible under Reno v. American-Arab Anti-Discrimination Committee, 525 U.S. 471 (1999). (Special Appendix ("SA") 47-48.) The district court saw "nothing outrageous about [Plaintiffs'] claim of national-origin discrimination in this context; the executive is free to single out 'nationals of a particular country' and 'focus[ ]' enforcement efforts on them." (SA 48 (quoting Reno, 525 U.S. at 491.).)

The district court reasoned similarly in dismissing that part of the Plaintiffs' claim that alleged racial and religious discrimination. The court held that while the tool of singling out Arab Muslims for detention in order to investigate possible ties to terrorism was "crude," it was not "so irrational or outrageous as to warrant

[1] The district court did not dismiss Claim 5 insofar as that claim alleged harsh conditions of confinement. See Special Appendix ("SA") 47.

judicial intrusion into an area in which courts have little experience and less expertise." (SA 48.)

The district court's rationale for dismissing Claim 5 painfully resurrects the long-discredited legal theory that the federal government deployed to hold amici's grandparents and the rest of the West Coast's alien Japanese population behind barbed wire on account of their race and national origin during World War II. The district court's ruling also overlooks the nearly twenty-year-old declaration by the United States Congress and the President of the United States that the racially selective detention of Japanese aliens during World War II was a "fundamental injustice" warranting an apology and the payment of reparations. And the district court's posture of near-total deference to the political branches ignores the tragic consequences of such deference for amici's grandparents, parents, and 120,000 other people of Japanese ancestry in World War II. For these reasons, this Court should reverse the district court's Memorandum and Order insofar as it partially dismissed Claim 5 of the Third Amended Complaint.

ARGUMENT

I. The District Court's Rationale for Partially Dismissing Claim 5 Revives the Rationale that the Government Used to Detain the Japanese Alien Population of the West Coast in World War II.

The district court's Memorandum and Order is, for amici, an instance of both wrongful legal history and painful family history repeating itself. In partially

dismissing Claim 5, the district court invoked a broad theory of executive power to detain aliens on the basis of race, religion, and national origin that cannot meaningfully be distinguished from the federal government's theory for singling out Japanese aliens for wartime detention during World War II. Amici are saddened to witness the resurrection of a legal theory that brought their grandparents so much suffering six decades ago. Amici therefore urge this Court to reverse the district court's partial dismissal of Claim 5 and to return the theory on which it rests to the dustbin of legal history.

A. Japanese Aliens in the United States Before World War II

The stories of amici's grandparents are typical of the experiences of the generation of Japanese who left their native land for the United States at the end of the nineteenth and the beginning of the twentieth centuries. Most of these Japanese emigrants, called the "Issei," were farmers and laborers displaced by rapid economic and political change in Japan. See Yuji Ichioka, The Issei: The World of the First Generation Japanese Immigrants 42-56 (1988). By 1940, some 47,000 Issei lived in the continental United States, nearly ninety percent of them along the West Coast. See Roger Daniels, Asian America: Chinese and Japanese in the United States Since 1850 115, 156 (1989).

The Issei in the United States had no choice but to remain aliens. American law at the time forbade naturalization of any person of Asian ancestry. See In re Ah Yup, 1 F. Cas. 223 (C.C.D. Cal. 1878) (No. 104); Ozawa v. United States, 260

U.S. 178 (1922). Moreover, after 1924, American law also forbade all new Japanese immigration. See Immigration Act of 1924, ch. 190, § 13, 43 Stat. 153, 161-62 (1942). As a consequence, nearly all Japanese aliens in the United States on December 7, 1941, had called the United States home for at least seventeen years.

B. The Detentions of Japanese Aliens After Pearl Harbor

Japanese aliens' lengthy affiliation with the United States did not protect them from race and national-origin discrimination when the country went to war with Japan, Germany, and Italy between December 8 and December 11, 1941. An initial wave of FBI arrests of Japanese, German, and Italian aliens netted 3,849 people by February 16, 1942, nearly fifty-seven percent of whom were Japanese.[2] See United States Comm'n on Wartime Relocation and Internment of Civilians, Personal Justice Denied 284 (1997). These initial arrestees were apprehended under the Alien Enemies Act, 50 U.S.C. § 21 (2000), and under Justice Department policy were afforded hearings on whether they should be interned as enemy aliens. See Charles W. Harris, Note, The Alien Enemy Hearing Board as a Judicial Device in the United States During World War II, 14 Int'l & Comp. L.Q. 1360, 1362 (1965).

[2] Among the arrestees was *amica curiae* Holly Yasui's paternal grandfather, Masuo Yasui.

In the late winter and early spring of 1942, the net of alien detention closed around a much larger number of Japanese aliens on the West Coast. Acting pursuant to authority conferred on him by President Roosevelt in Executive Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942), and without holding individualized hearings of any sort, Lieutenant General John L. DeWitt of the Western Defense Command directed the mass exclusion and detention of all people of Japanese ancestry from military exclusion zones encompassing the entire West Coast of the continental United States. See United States Comm'n on Wartime Relocation and Internment of Civilians, supra, at 100-12. These orders drove all Japanese aliens and all American citizens of Japanese ancestry from their homes and into prolonged detention in so-called "assembly" and "relocation" centers. See id. at 135-84.

At no time did the United States government order the mass exclusion or mass detention of German or Italian aliens from or in any sizable region of the country. The government's orders singled out just the Japanese aliens (along with their citizen children) for mass exclusion and mass detention.

C. The Government Predicated Its Japanese Alien Detentions in World War II on an Unbridled Power to Detain Aliens on the Basis of Race.

The military's rationale for singling out Japanese aliens was unabashedly racial. In justifying the exclusion of all people of Japanese ancestry from the West Coast, but not the mass exclusion of German or Italian aliens, Western Defense

Commander John L. DeWitt argued that "[t]he Japanese race is an enemy race," Memorandum from Lt. Gen. John L. DeWitt to the Secretary of War (Feb. 13, 1942) reprinted at http://www.unc.edu/~emuller/isthatlegal/DeWitt2.jpg, and that "the continued presence of a large, unassimilated, tightly knit and racial group, bound to an enemy nation by strong ties of race, culture, custom and religion . . . constituted a menace which had to be dealt with." Letter from Lt. Gen. John L. DeWitt to the Chief of Staff, U.S. Army (June 5, 1943) reprinted in U.S. Army, Western Defense Command and Fourth Army, Final Report; Japanese Evacuation from the West Coast 1942 viii (1943).

Defending its exclusion and detention programs for American citizens of Japanese ancestry in the United States Supreme Court, the government noted that "[t]he detention of persons, whether citizens *or aliens*, in the interest of the public safety ... is a measure not infrequently adopted by the government." Brief for the United States at 56, Korematsu v. United States, 323 U.S. 214 (1944) (No. 22) (emphasis supplied). "The fact that the exclusion measure adopted [by the Western Defense Command] was directed only against persons of one race," the government argued, "d[id] not invalidate it." Id. at 26.

Thus, the prolonged detention of Japanese aliens in World War II came about as a consequence of a particular theory of government power. That theory arrogated to the executive an expansive power to respond to a national security

crisis by singling out aliens for prolonged detention on the basis of crude racial and national-origin distinctions.

D. The District Court's Partial Dismissal of Claim 5 Revives the Government's Theory of Alien Detention in World War II

In partially dismissing Claim 5, the district court endorsed the same theory of unbridled executive power to impose selective racial burdens that led to the prolonged detention of amici's grandparents. The court's partial dismissal of Claim 5 is therefore a chilling instance of a tragic legal history repeating itself.

The district court conceded for the purposes of the dismissal motion that the government had singled out the Plaintiffs for longer detention than other aliens because of their national origin. The district court noted that the September 11 attacks had been the work of members of "al Qaeda, a fundamentalist Islamist group," some of whom had overstayed their visas, and that the government had decided to subject to greater scrutiny those "aliens who shared characteristics with the hijackers." (SA 48.) But the court saw "nothing outrageous about [a] claim of national-origin discrimination in this context." (SA 48.) The court admitted that the government's theory of selective detention was "extraordinarily rough and overbroad," but held nonetheless that the government was "free to single out" the Plaintiffs for prolonged detention on the basis of their national origin. (SA 48.) Similarly, the district court endorsed a broad executive power to single out individuals for prolonged detention on the basis of their race and their religion.

"As a tool to ferret out information to prevent additional terrorist attacks," the district court admitted, prolonged detention on the basis of race and religion "may have been crude." (SA 48.) But it was not "so irrational or outrageous as to warrant judicial intrusion." (SA 48.)

The district court's reasoning depressingly parallels that of Hirabayashi v. United States, 320 U.S. 81 (1943), in which the Supreme Court validated a racially selective curfew that the military imposed on all people of Japanese ancestry along the West Coast in March of 1942. The Hirabayashi Court noted several aspects of Japanese immigrant life in the United States that purportedly sustained feelings of identification and attachment with Japan, id. at 96-98, and relied on those features to justify the confessed racial selectivity in the government's curfew: "We cannot say that these facts and circumstances, considered in the particular war setting, could afford no ground for differentiating citizens of Japanese ancestry from other groups in the United States." Id. at 101. It is true that the Hirabayashi case concerned citizens while the case now before this Court concerns aliens, but the theory of government power to draw crass and burdensome racial lines is the same.

Five decades after Hirabayashi, the Supreme Court condemned the "unfortunate results" of the Hirabayashi Court's miserly understanding of equal protection. Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 214 (1995). The district court's Memorandum and Order shares that cramped understanding of equal protection, with equally unfortunate results. By endorsing the government's

confessed selectivity in this case, the district court resurrected and reinforced the very theory of executive power that led amici's grandparents into years of detention behind barbed wire while German and Italian aliens all over the country remained free from mass detention. For this reason, amici urge this Court to reverse the district court's Memorandum and Order partly dismissing Claim 5 of the Third Amended Complaint and to make clear that the unjust theory of government power on which it rests no longer has a place in American jurisprudence.

II. The Congress and the President Invalidated the Rationale of the District Court's Partial Dismissal of Claim 5 by Apologizing and Providing Redress to the Japanese Alien Detainees of World War II

The district court's endorsement of the selective detention of aliens not only resurrects an obsolete and dangerous theory; it also resurrects a thoroughly *discredited* one. Both the Congress and the President have unambiguously repudiated it through legislation and other public pronouncements offering apologies and reparations for the harms suffered by amici's grandparents and other Japanese aliens. The district court's endorsement of unfettered selectivity in the detention of aliens ignores this milestone in the development of American equal protection law.

"Here we admit a wrong." So said President Ronald Reagan on August 10, 1988, as he signed into law the Civil Liberties Act of 1988, a bill that apologized and authorized redress payments for the government's wartime exclusion and

detention of the West Coast's population of Japanese ancestry. See Ronald Reagan, Remarks on Signing the Bill Providing Restitution for Wartime Relocation and Internment of Civilians (August 10, 1988), in 2 Public Papers of the Presidents of the United States: Ronald Reagan 1035 (1990). The wrong that President Reagan admitted was the wrong that the government had practiced on amici's grandparents in World War II. It is also the wrong that is at the core of Claim 5 of the Plaintiffs' Third Amended Complaint: prolonged detention of aliens on account of race, national origin, and religion.

The Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989-1989d (2000), was the capstone of years of effort by the Japanese American community, spurred at key moments by amici's fathers Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, to secure an apology and reparations for wartime exclusion and detention. Early in the 1980s, advocates succeeded in pressing Congress to create a blue-ribbon panel to investigate the circumstances of the wartime exclusions and detentions of Japanese aliens, Japanese Americans, and others. That panel, the United States Commission on Wartime Relocation and Internment of Civilians, issued its report late in 1982. It concluded that "the detentions that followed from [President Roosevelt's promulgation of Executive Order 9066] ... were not driven by analysis of military conditions," but instead flowed from "race prejudice, war hysteria, and a failure of political leadership." United States Comm'n on Wartime

Relocation and Internment of Civilians, supra, at 18. The Commission's study of the episode led it to conclude that "[a] grave injustice was done to American citizens *and resident aliens* of Japanese ancestry who ... were excluded, removed, and detained by the United States during World War II." Id. (emphasis supplied).

Congress implemented the Commission's findings in the Civil Liberties Act of 1988, 50 U.S.C. app. §§ 1989-1989d. The law's purposes were to "acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens *and permanent resident aliens* of Japanese ancestry during World War II;" to "apologize on behalf of the people of the United States for the evacuation, relocation, and internment of such citizens *and permanent resident aliens*;" to "make restitution to those individuals of Japanese ancestry who were interned;" and to "discourage the occurrence of similar injustices and violations of civil liberties in the future." Id. § 1989 (emphasis supplied). Congress clearly recognized that "[w]ith regard to individuals of Japanese ancestry, ... a grave injustice was done to both citizens *and permanent resident aliens* of Japanese ancestry by the evacuation, relocation, and *internment* of civilians during World War II," and, "on behalf of the Nation," "apologize[d]" "[f]or these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry." Id. § 1989a(a) (emphasis supplied).

Two things about this piece of legislation are especially noteworthy. First, Congress apologized for the racially selective detention not just of American citizens, *but also of aliens*. The Civil Liberties Act of 1988 therefore represents a clear condemnation of the legal theory that animated the district court's partial dismissal of Claim 5 in this case. The Act clearly recognizes that the race- and national-origin-based detention of aliens is a grave error.

Notably, amici's grandparents and the tens of thousands of other Issei to whom the government apologized and offered redress were not just aliens but *enemy* aliens. See Proclamation No. 2525 (Dec. 7, 1941), 3 C.F.R. ch. 1, 273-76 (Cum. Supp. 1943). As enemy aliens, amici's grandparents and the other Issei became subject to a degree of executive power that was nearly as complete as can be imagined. See Ludecke v. Watkins, 335 U.S. 160 (1948). They were subject to summary apprehension if deemed dangerous by the Attorney General or the Secretary of War, bans on moving from place to place except pursuant to regulation, and exclusion from all sites designated by government officials. See Proclamation No. 2525, supra, at 275-76. Notwithstanding this stifling degree of authorized executive control, the Congress still condemned the wartime government's racially selective detention of aliens as a "grave injustice" and a "fundamental violation" of the aliens' "basic civil liberties" in the Civil Liberties Act of 1988. Civil Liberties Act of 1988, 50 U.S.C. app. § 1989a(a).

The Plaintiffs in the case before this Court were not enemy aliens over whom the government had near-complete power. Rather, they were aliens who had allegedly overstayed their visas or committed other technical violations of the immigrations laws. Surely the government's power over the Plaintiffs did not approach the degree that the government may assert over enemy aliens. Thus, if it was a "grave injustice" for the government to subject the enemy alien Issei to prolonged detention on account of race and national origin in World War II, then it was at least as unjust to single out the Plaintiffs in the case before this Court for prolonged detention.

The second noteworthy feature of the Civil Liberties Act of 1988 was its explicit intent not just to right a past injustice, but to prevent a recurrence of such an injustice in the future. One need not rummage through ambiguous legislative history to infer that Congress was concerned about future episodes of alien detention like the one that forms the basis of Claim 5 of the Third Amended Complaint. That concern stands squarely in the statute's text: Congress passed the law apologizing for and redressing the racially selective detentions of World War II partly in order to "discourage the occurrence of similar injustices and violations of civil liberties in the future." Civil Liberties Act of 1988, 50 U.S.C. app. § 1989. From their unique vantage point, amici clearly perceive in this case an "occurrence of similar injustices" to those their grandparents endured. It would therefore be entirely consistent with the intent of the Civil Liberties Act of 1988 for this Court

to reverse the district court's partial dismissal of Claim 5 and allow it to proceed to trial on the merits.

III. The District Court's Posture of Nearly Complete Judicial Deference to the Executive Ignores the Lessons of History

The district court partially dismissed Claim 5 of the Third Amended Complaint because it saw the judiciary as having virtually no role in matters affecting immigration, especially during times of national crisis. "[R]egarding immigration matters such as this," the district court maintained, "the Constitution assigns to the political branches all but the most minimal authority in making the delicate balancing judgments that attend all difficult constitutional questions; 'nothing in the structure of our Government or the text of our Constitution would warrant judicial review by standards which would require [courts] to equate [their] political judgment with that of' the executive or the Congress." (SA 49 (quoting Harisiades v. Shaughnessy, 342 U.S. 580, 590 (1952).)

This Court has already had occasion to caution against such a dangerously deferential approach to racial line-drawing during times of peril. In a case that this Court decided shortly after the terror attacks of September 11, 2001, it cited Korematsu v. United States, 323 U.S. 214 (1944), to illustrate that "unconditional deference to a government agent's invocation of 'emergency' to justify a racial classification has a lamentable place in our history." Patrolmen's Benevolent Ass'n of City of New York v. City of New York, 310 F.3d 43, 53-54 (2d Cir.

2002). The Court, avowing that it was "not inclined to repeat the same mistakes today," id. at 54, refused to condone the City of New York's racial assignments of police officers in a time of emergency. Id.

The sad spirit of Korematsu hangs more heavily over the racial classifications in this case than it did over the ones in Patrolmen's Benevolent Association. This case, like Korematsu, concerns prolonged detention on the basis of race and ancestry; Patrolmen's Benevolent Association concerned the lesser (albeit serious) matter of racial job assignments. If the memory of Korematsu stood in the way of the racial job assignments in Patrolmen's Benevolent Association, that memory should serve as an even more powerful warning against prolonged racial detention in the case now before the Court.

Because the federal courts chose to cede the legal landscape to the executive branch in World War II, Fred Korematsu, Gordon Hirabayashi, Minoru Yasui, and tens of thousands of other people of Japanese ancestry spent years behind barbed wire in some of the nation's most desolate places. The federal judiciary failed these innocent victims of racial profiling, timidly refusing to call the executive to task in the Korematsu, Hirabayashi, and Yasui cases. This failure ranks among the federal judiciary's most tragic moments. As Justice Scalia noted in his recent dissenting opinion in Hamdi v. Rumsfeld, "[w]hatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war

and, in a manner that accords with democratic principles, to accommodate it." 542 U.S. 507, 579 (2004) (Scalia, J., dissenting).

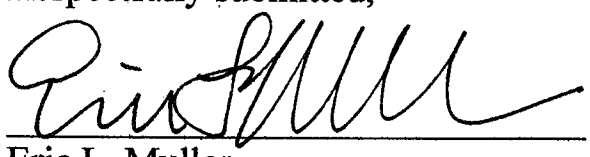
It took more than forty years for the federal government to apologize and pay reparations for the harsh and painful results of that earlier posture of judicial deference. For amici's grandparents, redress came too late. Amici fervently hope that a new generation of aliens in the United States will not have to wait forty years for justice.

CONCLUSION

For all of the aforementioned reasons, *amici curiae* respectfully request that the Court reverse the district court's partial dismissal of Claim 5 of the Third Amended Complaint.

Dated: April 2, 2007
Chapel Hill, NC

Respectfully submitted,



Eric L. Muller
George R. Ward Professor
University of North Carolina School of Law
CB #3380
Chapel Hill, NC 27599
(919) 962-7067

Steven M. Pesner
Robert H. Pees
AKIN GUMP STRAUSS HAUER
& FELD LLP
590 Madison Avenue
New York, NY 10022
(212) 872-1000

Attorneys for Amici Curiae