

## Case Comment

### ***Korematsu Continued . . .***

*Dasrath v. Continental Airlines, Inc.*, 228 F. Supp. 2d 531 (D.N.J. 2002).

How far have America and her courts come since World War II? Even in the wake of September 11th, it seemed they would not again endorse racial intolerance on the level of wholesale internments. This Comment argues, however, that *Dasrath v. Continental Airlines, Inc.*<sup>1</sup> indicates there has been limited progress since the internment camps and the Supreme Court's validation of those internments in *Korematsu v. United States*.<sup>2</sup>

In Part I, this Comment briefly discusses the months that followed 9/11, noting particularly this country's desire to avoid repeating history. In Part II, this Comment asserts that, notwithstanding the observations of Part I, *Korematsu* has been reborn. Part II finds *Dasrath* closely mirrors *Korematsu*'s powerful and peculiar rhetoric, and it concludes that *Dasrath* accordingly embodies *Korematsu*. Part III discusses *Dasrath*'s ramifications. It demonstrates that *Korematsu* was the Court's concession to America's existing anti-Asian and anti-asian American<sup>3</sup> racism. As a reincarnation of *Korematsu*, *Dasrath* is a tool for cloaking existing anti-Arab and anti-arab American sentiment in legal legitimacy. Finally, in Part IV, this Comment concludes that *Dasrath*'s insidious purpose indicates America and her courts remain willing to sanction some racist sentiment. While *Korematsu* has been long reviled, the tolerance for racism manifested in that case continues.

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1. 228 F. Supp. 2d 531 (D.N.J. 2002).

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

3. Both the noncapitalization of "asian" in "asian American" and the nonhyphenation of "asian American" are intentional. These decisions apply to other such phrases, like "arab American," and reflect the belief that the first word, e.g., "asian," should be an adjective no more important than other adjectives, such as "black," "white," or "yellow." See Elbert Lin, Book Note, *Yellow Is Yellow*, 20 YALE L. & POL'Y REV. 529, 543 (2002) (reviewing FRANK WU, *YELLOW: RACE IN AMERICA BEYOND BLACK AND WHITE* (2002)).

## I

September 11, 2001, was compared, almost immediately, to December 7, 1941.<sup>4</sup> The ensuing debate over the Bush Administration's domestic response to 9/11 similarly included comparisons to the Roosevelt Administration's response to Pearl Harbor.<sup>5</sup>

Caution against repeating World War II's race-based internments accompanied those comparisons.<sup>6</sup> Many also feared the courts would resurrect the sort of judicial deference that gave legal legitimacy to the internments—i.e., the courts would “repeat” *Korematsu v. United States*.<sup>7</sup>

These concerns were not overstated. After September 11th, some called for ethnic profiling, insisting that the Constitution permitted it.<sup>8</sup> Others cited *Korematsu* as favorable precedent.<sup>9</sup> Indeed, even before 9/11, a few commentators still argued that *Korematsu* had life,<sup>10</sup> though by the 1980s most scholars considered the case functionally dead letter,<sup>11</sup>

As the Administration and the courts acted, however, it seemed that, while possibly open to criticism, the response to 9/11 would not sink to race-based internments or *Korematsu*-like opinions. Following the attacks, our leaders were careful to “acknowledg[e] and celebrat[e] our racial and religious diversity.”<sup>12</sup> One year after 9/11, the courts appeared not to be deferring to the executive branch's wartime policies.<sup>13</sup> Scholars who warned of *Korematsu*-type deference conceded that, while judicial deference today might resemble the deference in *Korematsu*, the sort of outright racism seen in *Korematsu* would not withstand modern equal

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4. E.g., Richard Willing & Jim Drinkard, *America's Descent into Madness*, USA TODAY, Sept. 12, 2001, at 3A.

5. E.g., Dan Balz, *Bush Confronts a Nightmare Scenario*, WASH. POST, Sept. 12, 2001, at A2.

6. E.g., Terry Diggs, *Fighting the Enemy Within*, RECORDER (San Francisco), Dec. 5, 2001, at 5; Frank H. Wu, “*A Jap's a Jap*,” LEGAL TIMES, Oct. 1, 2001, at 51.

7. There was significant concern that the Supreme Court would again defer to government encroachments on civil liberties in the name of national security. E.g., William Glaberson, *War on Terrorism Stirs Memory of Internment*, N.Y. TIMES, Sept. 24, 2001, at A18; Tony Mauro, *The New Ground Zero*, N.J.L.J., Dec. 31, 2001, at 7.

8. E.g., Gail Heriot, Opinion, *Race, Ethnicity, Airport Security and the Constitution*, SAN DIEGO UNION-TRIB., Oct. 4, 2001, at B13.

9. William J. Hopwood, *Letter to the Editor*, WALL ST. J., Dec. 18, 2001, at A17.

10. E.g., Alfred C. Yen, *Introduction: Praising with Faint Damnation—the Troubling Rehabilitation of Korematsu*, 40 B.C. L. REV. 1 (1998).

11. Eugene Rostow, considered by many to be the leading scholar on *Korematsu*, stated in 1988, “I would submit that *Korematsu* has already been overruled in fact, although the Supreme Court has never explicitly overruled it. The case has been overruled in fact because of the criticism it has received . . . .” Charles J. Cooper et al., *What the Constitution Means by Executive Power*, 43 U. MIAMI L. REV. 165, 196-97 (1988).

12. Wu, *supra* note 6.

13. Tony Mauro, *Showing Little Deference: Courts No Longer Yielding to the Executive Branch During Wartime*, LEGAL INTELLIGENCER, Sept. 11, 2002, at 4.

protection review.<sup>14</sup> One commentator—a Columbia University professor—even referred to *Korematsu* as an “obscure” Supreme Court case.<sup>15</sup>

September 11th did not immediately result in the sort of publicly sanctioned racism that, after Pearl Harbor, had led to *Time* and *Life* “how-to” guides for distinguishing, on the basis of *physical characteristics alone*, between our “friends,” the Chinese, and our “enemies,” the “Japs.”<sup>16</sup> In his September 20, 2001, address to Congress, President Bush asserted several times that America would not profile, saying once, “The enemy of America is not our many Muslim friends; it is not our many Arab friends.”<sup>17</sup> America would not repeat the past.

## II

On October 17, 2002, however, a federal district court in New Jersey revived *Korematsu* in *Dasrath v. Continental Airlines, Inc.*<sup>18</sup> by using language remarkably similar to that used in *Korematsu*. *Dasrath* concerns two of five suits recently filed by the American Civil Liberties Union (ACLU), all of which allege a racially discriminatory removal of a passenger from a commercial flight.<sup>19</sup> In the opinion, the court construes 49 U.S.C. § 44,902, a statute permitting “an air carrier . . . [to] refuse to transport a passenger or property the carrier decides is, or might be, inimical to safety.”<sup>20</sup> Judge Debevoise’s explication of the broad discretion granted by § 44,902 and his justification for the “heavy” burden the statute imposes upon a plaintiff<sup>21</sup> echo Justice Black’s validation of Exclusion Order No. 34 in *Korematsu*.

*Dasrath* mimics *Korematsu* in several ways. Most significantly, both opinions use threats to national security to deflect attention from race-based actions. In *Dasrath*:

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14. E.g., Liam Braber, Comment, *Korematsu’s Ghost: A Post-September 11th Analysis of Race and National Security*, 47 VILL. L. REV. 451, 478-89 (2002).

15. Eric Foner, *Changing History*, NATION, Sept. 23, 2002, at 5.

16. *How To Tell Japs from the Chinese*, LIFE, Dec. 22, 1941, at 81; *How To Tell Your Friends from the Japs*, TIME, Dec. 22, 1941, at 33.

17. Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 37 WEEKLY COMP. PRES. DOC. 1347, 1348 (Sept. 20, 2001).

18. 228 F. Supp. 2d 531.

19. Susan Sachs, *5 Passengers Say Airlines Discriminated by Looks*, N.Y. TIMES, June 5, 2002, at B4.

20. 49 U.S.C. § 44,902(b) (2002) (detailing “permissive refusal” to transport passengers). The opinion denies motions to dismiss filed by Continental Airlines in two cases. In the cases, Michael Dasrath and Edgardo Cureg each alleged that Continental engaged in unlawful racial discrimination by removing him from Continental flight 1218 on December 31, 2001. Among other defenses, Continental relied on 49 U.S.C. § 44,902. The court finds the plaintiffs pled that “Continental’s conduct was arbitrary and therefore beyond the scope of conduct authorized by § 44902,” which is sufficient for “this stage of the proceedings.” *Dasrath*, 228 F. Supp. 2d at 539. In dicta, however, the court explains the burden the plaintiffs now face under § 44,902.

21. *Dasrath*, 228 F. Supp. 2d at 540.

[T]he objective assessment of a carrier's decision must take into account all the circumstances surrounding the decision, including . . . not least, *the general security climate in which events unfold*. . . . In the present case, *it should not be forgotten that the decisions at issue were made in an atmosphere pervaded by the fears and uncertainty's* [sic] *arising from the events of September 11, 2001*.<sup>22</sup>

The *Korematsu* Court asserted:

To cast this case into outlines of racial prejudice, *without reference to the real military dangers which were presented, merely confuses the issue*. *Korematsu* was not excluded from the Military Area because of hostility to him or his race. He was excluded because *we are at war with the Japanese Empire* [and] because *the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures* . . . .<sup>23</sup>

Both opinions also use the need for quick decisionmaking as an excuse for hasty or ill-considered decisions. They note the real consequences of inaction, as well as the constraints of time on information-gathering. According to Judge Debevoise:

The test . . . rests upon the facts and circumstances of the case *as known to the airline at the time it formed its opinion and made its decision* . . . .

. . . .

. . . [T]he objective assessment . . . must take into account . . . the (*perhaps limited*) facts *known at the time* [and] *the time constraints under which the decision is made* . . . .

. . . .

. . . In this case Plaintiff's burden will be a heavy one considering the heightened actual dangers arising from the increased risk of terrorist acts, *the catastrophic consequences in the case of air travel of the failure to detect such acts in advance, and the necessity that pilots make safety decisions on short notice without the opportunity to make extensive investigations*.<sup>24</sup>

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22. *Id.* at 539 (emphasis added).

23. *Korematsu v. United States*, 323 U.S. 214, 223 (1944) (emphasis altered).

24. *Dasrath*, 228 F. Supp. 2d at 538-40 (internal citation and quotation marks omitted, emphasis added).

2003]

Case Comment

1915

In *Korematsu*, Justice Black wrote:

[W]e cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal [japanese Americans], *whose number and strength could not be precisely and quickly ascertained*. We cannot say that the war-making branches 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 . . . demand[ing] that prompt and adequate measures be taken . . . .*

. . . .

. . . [T]he 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.<sup>25</sup>

And throughout the opinion, Justice Black noted “*the twin dangers of espionage and sabotage*,” “*the gravest imminent danger to the public safety*,” and “*circumstances of direst emergency and peril*.”<sup>26</sup>

Finally, *Dasrath* and *Korematsu* make hollow gestures toward both equal protection of racial minorities and (at least somewhat) rigorous judicial review. For example, Judge Debevoise observes that “a racially motivated removal would not be sheltered by § 44902.”<sup>27</sup> The *Korematsu* opinion similarly assured, “Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.”<sup>28</sup> Judge Debevoise also insists that “the standard for review[] . . . is not a subjective one,” noting that even the case that “offers one of the most emphatic endorsements of broad discretion under § 44902” recognized explicit limitations.<sup>29</sup> This, too, is in *Korematsu*: The Exclusion Order was to be subject to “the most rigid scrutiny.”<sup>30</sup>

But while their rhetoric may be uncannily alike, does *Dasrath* really “revive” *Korematsu*? After all, the two cases differ in many ways. Most obviously: Airline discretion to remove a passenger “inimical to safety” is far from blanket exclusion of all Americans of a particular ethnic ancestry, a federal district court’s denial of a motion to dismiss is not the same as a final decision by the United States Supreme Court, and an action by a

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25. 323 U.S. at 218, 223-24 (internal quotation marks omitted and emphasis added).

26. *Id.* at 217, 218, 220 (emphasis added).

27. *Dasrath*, 228 F. Supp. 2d at 540 n.12.

28. 323 U.S. at 216.

29. *Dasrath*, 228 F. Supp. 2d at 539.

30. 323 U.S. at 216.

private air carrier is wholly unlike a military decree given pursuant to a presidential executive order.

Is it truly legitimate to describe *Dasrath* as a revival of *Korematsu*? Yes—for two reasons. First, in *Dasrath*, Judge Debevoise reprised *Korematsu*'s rhetoric—possibly deliberately<sup>31</sup>—and it is *Korematsu*'s rhetoric, not its substance or procedural posture, that makes the case unique. This is not to say *Korematsu*'s facts and circumstances do not contribute to its notoriety. But there have been other reviled opinions. The use of “national security” and “imminent danger” rhetoric as a stand-in for logical and internally consistent legal reasoning, however, is peculiar to *Korematsu*. As one commentator has said, “The Court in *Korematsu* failed to provide a logical explanation for reaching its result and instead deceptively relied on persuasive rhetoric.”<sup>32</sup>

Second, a “revived” *Korematsu* need not resemble *Korematsu* in every way. To believe that it must would be foolish. A “new” *Korematsu* might simply embody a unique element of *Korematsu*. *Dasrath* is such a case. More compellingly, because *Korematsu* and the Japanese internment are widely despised, a “revived” *Korematsu* likely will not, and arguably cannot, resemble *Korematsu* in every way. It will not, because it is extremely unlikely that the public will allow the facts of the case—e.g., an internment pursuant to a presidential order followed by a Supreme Court validation—to replay.<sup>33</sup> It cannot, because a “new” *Korematsu* that sought to duplicate every circumstance of *Korematsu* could not repeat one notable circumstance: When it was decided, *Korematsu* was widely supported.<sup>34</sup>

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31. Judge Debevoise could have used other language. Deciding a motion in *Bayaa v. United Airlines, Inc.*, one of the other three ACLU-filed airline discrimination cases, a federal district court in California also addressed § 44,902. No. CV 02-4368 FMC (CTx) (C.D. Cal. Oct. 9, 2002) (unpublished order granting in part and denying in part defendants' motion to dismiss, on file with author). The language in *Bayaa*? Two sentences: “There is no merit to this argument. Defendants' duty under 49 U.S.C. § 44902 does not grant them a license to discriminate.” *Id.*

32. Dean Masaru Hashimoto, *The Legacy of Korematsu v. United States: A Dangerous Narrative Retold*, 4 ASIAN PAC. AM. L.J. 72, 96 (1996). Consider the following: Justice Black began, “It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject [such restrictions] to the most rigid scrutiny.” *Korematsu*, 323 U.S. at 216. But by *Korematsu*'s concluding sentence, “We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified,” Black's “most rigid scrutiny” had disappeared. *Id.* at 224.

33. For instance, U.S. Representative Howard Coble recently drew criticism for saying that he agreed with the Japanese internments. Brian Faler, *Lawmakers Under Fire for Comments Deemed Insensitive*, WASH. POST, Feb. 10, 2003, at A5. *But see* Lynette Clemetson, *Civil Rights Commissioner Under Fire for Comments on Arabs*, N.Y. TIMES, July 23, 2002, at A14 (reporting that a member of the President's Civil Rights Commission remarked that he believed after “another terrorist attack,” the public would allow a “return to *Korematsu*”).

34. *See* Joel B. Grossman, *The Japanese American Cases and the Vagaries of Constitutional Adjudication in Wartime: An Institutional Perspective*, 19 U. HAW. L. REV. 649, 651 (1997) (noting that *Korematsu* was “regarded by many as a successful example of the Court joining the political branches in support of a united war effort”); Lori Sachs, Comment, *September 11, 2001: The Constitution During Crisis: A New Perspective*, 29 FORDHAM URB. L.J. 1715, 1733 (2002) (noting that “the public supported the holding in *Korematsu*”).

## III

Understanding *Dasrath* as a reincarnation of *Korematsu* sheds light on an existing racist sentiment toward Arabs and Arab Americans. *Korematsu*'s return from the legal hinterlands might be interpreted as a sign that whatever it was about *Korematsu* that was reviled is once again in vogue. Most see *Korematsu* as a moment of gross indiscretion—"an aberration, an instance in which our nation temporarily strayed from its basic commitment to due process and equal protection."<sup>35</sup> Under this analysis, the worry about *Dasrath* would be that it heralds another such moment when the "burden" of citizenship on one ethnic group may once again be "heavier" than the burden on others.<sup>36</sup> But this perception fundamentally misunderstands *Korematsu*. *Korematsu* was not a single event, but "a logical extension" of all that had come before.<sup>37</sup> "The internment of the Japanese must be viewed within the context of the historical intolerance toward all Asians on the west coast"<sup>38</sup> and elsewhere in the country.

Asians faced prejudice and racial discrimination the moment they set foot in this country.<sup>39</sup> Over time, early intolerance manifested itself in law: Localities instituted anti-Asian ordinances,<sup>40</sup> the Supreme Court refused to allow Asians to naturalize,<sup>41</sup> and Congress passed one exclusionary immigration act after another.<sup>42</sup> While Japanese Americans were interned, prospective Asian immigrants were still subject to severe quotas—quotas that would not be lifted until 1965 and that were more restrictive on immigrants from Asia than on immigrants from Europe.<sup>43</sup> *Korematsu* simply took this existing anti-Asian sentiment another step. A proper understanding of *Korematsu*—which is to say, an understanding of why the Court used its now-reviled rhetoric—is that it was necessary to cloak the desired, but racist, conclusion in legal legitimacy.

A reincarnation of *Korematsu* therefore is an indication not of another isolated instance when the civil liberties of one ethnic group will be

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35. Natsu Taylor Saito, *Symbolism Under Siege: Japanese American Redress and the "Racing" of Arab Americans as "Terrorists,"* 8 ASIAN L.J. 1, 8 (2001).

36. *Korematsu*, 323 U.S. at 219.

37. Saito, *supra* note 35, at 8.

38. Grossman, *supra* note 34, at 654.

39. For one of many excellent histories of the discrimination faced by Asians in America, see RONALD TAKAKI, *STRANGERS FROM A DIFFERENT SHORE* (rev. ed. 1998).

40. See *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

41. *Ozawa v. United States*, 260 U.S. 178 (1927).

42. For example, the Chinese Exclusion Act of 1882 disallowed the entry of Chinese laborers, and the Immigration Act of 1917 "bar[red] virtually all Asians from entry." DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 3 (2002).

43. See, e.g., ANGELO N. ANCHETA, *RACE, RIGHTS, AND THE ASIAN AMERICAN EXPERIENCE* 19 (1998) ("After 1965, with the removal of a discriminatory system of quotas based on national origin, the immigration laws placed migration from Asia and the Pacific on equal footing with migration from other parts of the world.").

sacrificed for national security, but of existing racism and the cloaking of that racism in validating rhetoric. In particular, *Dasrath* is a natural progression, and shrouding, of previously existing anti-Arab and anti-arab American sentiment.

This notion of an abiding racist attitude toward Arabs and arab Americans is not pure speculation. In early 2001 (months before 9/11), Natsu Taylor Saito documented how Arabs and arab Americans have been “raced” as dangerously foreign—“terrorists.”<sup>44</sup> Thomas Joo has also noted this “racialization of terrorism,” citing an ABC News poll in which fifty-nine percent of the respondents “associated Arabs with terrorists.”<sup>45</sup> Perhaps the most publicized instance of this racism occurred in 1995, when America immediately sought men “of Middle Eastern origin” in connection with the Oklahoma City bombing, for which Timothy McVeigh, a white man, was actually responsible.<sup>46</sup> This finding should come as little surprise since other groups, such as Asians and asian Americans, have been “raced” unceasingly as perpetually foreign.<sup>47</sup> Saito, in fact, argues that Asians and asian Americans have made no progress since *Korematsu*. She believes that Arabs and arab Americans follow the same path. *Korematsu*’s return in *Dasrath* confirms the latter.

#### IV

How far have America and her courts come since World War II? Not as far as one might think, given the sixty years of civil rights history between Pearl Harbor and 9/11 during which the United States government delivered apologies and made reparations to the survivors of the Japanese internment camps. *Dasrath*—ironically, a *victory* for the ACLU—reveals not only existing racism toward Arabs and arab Americans, but also a willingness to conceal that racism beneath the rhetoric of national security.

This lack of progress suggests a troubling conclusion: While the racist sentiment toward Asians and asian Americans may have diminished since *Korematsu*, the tolerance for racism inherent in *Korematsu* may have persisted. In a sense, sixty years later, *Korematsu* continues.

—Elbert Lin

44. Saito, *supra* note 35, at 11.

45. Thomas W. Joo, *Presumed Disloyal: Executive Power, Judicial Deference, and the Construction of Race Before and After September 11*, 34 COLUM. HUM. RTS. L. REV. 1, 32 (2002).

46. Stewart M. Powell & Holly Yeager, *FBI Issues Bulletin for 3 Suspects*, SEATTLE POST-INTELLIGENCER, Apr. 20, 1995, at A4; *id.* (“[I]f it looks like a duck, talks like a duck, and walks like a duck, it’s probably a duck. . . . Car bombings are the tool of Islamic fundamentalists.” (quoting Robert Heibel, former FBI Deputy Director of Counterterrorism)); *see also* Don Lattin, *Muslims, Others Feel Scapegoated by Speculation*, S.F. CHRON., Apr. 20, 1995, at A11.

47. *See, e.g.*, WU, *supra* note 3, at 79-130.