

# Human Rights and Reparative Justice: The 2018 Reopening of the Jeju 4.3 Mass Convictions Through the Lens of the Coram Nobis Japanese American WWII Incarceration Cases

Eric K. Yamamoto, Katya Katano, Rachel Oyama and William N. K. Crowell

## PROLOGUE

During [the Jeju April 3rd Tragedy], two court-martials were called for civilians in 1948 and 1949. Most of the accused were innocent civilians, including villagers in the mountain areas that had escaped death during the police operations and those that had been hiding on Mt. Halla to survive who later believed the police propaganda saying the forces would 'spare their lives' if they would come down to lower-altitude areas. When examining the proceedings, no written records or protocols of the trials have been found that could prove that the martial courts followed legitimate procedures. The courts proceeded with hundreds of hearings every day, sentencing 345 persons to death in just three days. The survivors later universally stated that they had been jailed without due trial. Seo Jong-cheol, former Vice Commander of the 9th Regiment, and Kim Jeong-mu, former Chief of Staff for Logistics, also testified that no official trials had been proceeded by the court-martials. Many of those subject to trials at the martial courts were instead scattered to different prisons across the country, and were summarily executed after the outbreak of the Korean War.

Jeju 4.3 is Now Our History, 4.3 Peace Foundation<sup>1</sup>

[The United States coram nobis reopenings, invalidating Fred Korematsu's 40-year-old criminal conviction for resisting the WWII mass racial incarceration] stand as a caution that in times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

United States District Court Judge Marilyn Hall Patel<sup>2</sup>

1) 4.3 PEACE FOUNDATION, JEJU 4.3 IS NOW OUR HISTORY 108 (2018).

2) Korematsu v. United States, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).

## INTRODUCTION

J2018 marked the 70th anniversary of the Jeju April Third (or Jeju 4.3) Tragedy. Jeju is a small island in South Korea known today as a popular tourist destination and “Peace Island” and as a global model of environmental sustainability.<sup>3</sup> Seventy years ago, however, under the U.S. military’s command, and later operational control, Jeju witnessed “the mass killing of some 30,000 Jeju residents, the torture, rape and detention of many more, the destruction of 40,000 homes and the burning of numerous villages.”<sup>4</sup>

Amid the 4.3 “grand tragedy,” as it is sometimes called, over 2,500 Jeju residents were arrested and imprisoned broadly for “rebellion,” “aiding and contacting the enemy,” and “espionage.”<sup>5</sup> According to investigations and survivor testimony, these arrests were arbitrary, and the confessions were often coerced through torture. Furthermore, the military tribunals that convicted the prisoners were “carried out by brute force and with a disregard to legal protocol.”<sup>6</sup>

Many were wrongfully imprisoned or executed—and entire families were stigmatized for generations—for perceived disloyalty.

In 2017, nearly seventy years after the Jeju 4.3 events, eighteen survivors of wrongful imprisonment petitioned the Jeju District Court to reopen and set aside their decades-old convictions as part of a rejuvenated South Korea 4.3 reconciliation initiative. Now well into their eighties and nineties, these survivors asked the court to judicially right one of Jeju 4.3’s egregious wrongs and to help them, finally, heal.<sup>7</sup>

In this essay we only briefly describe the broad historical forces driving the Jeju 4.3 tragedy and the initial mid-2000s steps toward reconciliation. Others have explored these subjects in more detail.<sup>8</sup> Our focus is elsewhere. From the perspectives of many, despite significant initial steps toward social healing, 4.3 reconciliation remains incomplete—stalled for a variety of reasons, including resistance by politicians and private groups and the absence

of United States participation.<sup>9</sup> The “han”—“deepest pain”—persists through generations.<sup>10</sup> With this in mind, in the context of human rights and reparative justice, this essay addresses a potential next step toward comprehensive and enduring 4.3 social healing through justice<sup>11</sup>—clearing the names and judicial records of those wrongly convicted and harshly imprisoned en masse during the 4.3 events. And it does so by generally comparing the Jeju 4.3 conviction reopenings to the 1980s United States coram nobis reopening of the wrongful convictions of World War II Japanese American mass incarceration resisters.

## THE JEJU 4.3 GRAND TRAGEDY—A GLIMPSE

### A. The Backdrop<sup>12</sup>

At the end of World War II, South Korea entered a period of “peace” under American trusteeship—essentially occupation by the U.S. Military Government.<sup>13</sup> The emerging Cold War between the United States and the Soviet Union provided the setting for U.S. control over South Korea, including Jeju Island.<sup>14</sup> Cold War concerns gave rise to U.S. containment policies meant to prevent the spread of communism. Those policies also raised fears among Koreans of a possible continuation of oppressive

3) Anne Hilty, *Island of Peace?*, THE JEJU WEEKLY (April 10, 2011), <http://www.jejuweekly.com/news/articleView.html?idxno=1437> (describing Jeju’s reputation as a “peace island” and its history of violence).

4) Eric K. Yamamoto, Miyoko Pettit & Sara Lee, *Unfinished Business: A Joint South Korea and United States Jeju 4.3 Tragedy Task Force to Further Implement Recommendations and Foster Comprehensive and Enduring Social Healing Through Justice*, 15 *ASIAN-PAC. L. & POL’Y* 1, 3 (2014).

5) See Kim Min-kyung, *Former Prisoners Request Retrial in Jeju Uprising Cases*, HANKYOREH (Mar. 25, 2018) [http://english.hani.co.kr/arti/english\\_edition/e\\_national/837521.html](http://english.hani.co.kr/arti/english_edition/e_national/837521.html) [hereinafter Kim, *Former Prisoners Request Retrial*].

6) *Id.*

7) *Id.*

8) See 4.3 PEACE FOUNDATION, *supra* note 1; NAT’L COMM. FOR INVESTIGATION OF THE TRUTH ABOUT THE JEJU APR. 3 INCIDENT, THE JEJU APRIL 3 INCIDENT INVESTIGATION REPORT 363–64 (Jeju Apr. 3 Peace Found. Trans., 2013) [hereinafter TRANSLATED REPORT]; CHANG HOON KO ET AL., *JEJU 4.3 GRAND TRAGEDY DURING ‘PEACETIME’ KOREA: THE ASIA PACIFIC CONTEXT (1947–2016)* (2016).

9) Yamamoto, Pettit & Lee, *supra* note 4, at 34.

10) *Id.* at 37.

11) Our companion article published in this journal, *Reconciliation Revitalized: An Official Apology for the Wrongful Jeju 4.3 Mass Convictions as a Key Next Step Toward Comprehensively and Enduringly Healing Persisting Wounds of Injustice*, further addresses “social healing through justice.”

12) The account of the 4.3 events here is taken substantially verbatim from Eric K. Yamamoto, Miyoko Pettit-Toledo, Nathan Shimodoi, Katherine Vessels, Maria Amparo Vanaclocha & Janna Wehi Ahu, *A Crucial Next Step Toward April Third Reconciliation: UNITED STATES Responsibility for Social Healing Through Justice*, in CHANG HOON KO, ET AL., *JEJU 4.3 GRAND TRAGEDY DURING ‘PEACETIME’ KOREA: THE ASIA PACIFIC CONTEXT (1947–2016)* 221, 224–227 (2018) which itself is a general distillation of the cited materials.

13) After Japan surrendered, the United States occupied Korea south of the 38th parallel. It established the United States Army Military Government in Korea, which functioned as the sole legal authority and gave the United States more control than a simple trusteeship. See Bruce Cumings, *The Question of American Responsibility for the Suppression of the Chejudo Uprising*, *Korea International War Crimes Tribunal: Report and Final Judgment on US Crimes in Korea 1945–2001*, INT’L ACTION CTR. (June 23, 2001), <http://www.iacenter.org/Koreafiles/ktc-cummings.htm> (considering the role of the U.S. in Jeju 4.3 events); Bong-Jin Kim, *Paramilitary Politics Under the USAMGIK and the Establishment of the Republic of Korea*, 43 *KOREA J.* 289, 290 (2003) (exploring the political relationship between the U.S. and South Korea); William Stueck, *The Coming of the Cold War for Korea*, in *KOREA UNDER THE AMERICAN MILITARY GOVERNMENT, 1945–1948*, 41, 48 (2002) (observing the effects of the U.S. military presence in South Korea from 1945 to 1948).

14) According to the Translated Report, “the Cold War between the U.S. and the Soviet Union brought about the tragedy of the Jeju 4.3 Incident.” TRANSLATED REPORT, *supra* note 8, at 363–64 (citing Chosun Joongang Ilbo, Sept. 1, 1949). Some scholars observed that the United States used its extensive control to further its own goal of resisting Russian communism. As the United States negotiated as part of the Joint Soviet–U.S. Commission, a high-ranking U.S. official documented that in the “American view, freedom from Russian domination is more important than complete independence...it is not believed to be in the U.S. interest to form a Korean Government which could be granted complete independence in the next few years.” GEORGE KATSIAFICAS, *ASIA’S UNKNOWN UPRISINGS, VOL. 1: SOUTH KOREAN SOCIAL MOVEMENTS IN THE 20TH CENTURY* 66 (2012).

Japanese policies and diminished hopes for a future independent Korean peninsula.<sup>15</sup> Jeju residents, like many throughout South Korea, organized people's committees to promote stability and peace.<sup>16</sup> Several groups also resisted what they considered to be harsh national government food policies, unfair elections, corruption and violent police practices.<sup>17</sup> According to the 2003 investigative report on the Jeju 4.3 "incident," published by the legislatively-established 4.3 National Committee, among these diverse groups was a Worker's Party led by a very small number of mainland South Korea communist members.<sup>18</sup> Those members of the Worker's Party sought to eliminate oppressive policies. It also sought to gather support for communism in the South.<sup>19</sup> Both U.S. military leaders and South Korea officials later categorized the many diverse protesting groups, including the Worker's Party, as "organizations on the left."<sup>20</sup> According to the 4.3 National Committee's report, at a 1947 gathering organized in part by the Worker's Party and others, Jeju residents demonstrated against government policies and commemorated Independence Movement Day.<sup>21</sup> Police, "under control of the U.S. military, opened fire, killing six" and severely injuring others.<sup>22</sup> This led to general strikes by many Jeju groups.<sup>23</sup> Despite some military officials' assessment that the main cause of the strikes was opposition to police brutality and not an incitement to communism,<sup>24</sup> the U.S. military commander characterized the strikes and resistance as a broad scale communist uprising.<sup>25</sup> According to the 4.3 National Committee's report, the national police—the main security force along with the constabulary—began to characterize Jeju as an "island of Reds"

even though a U.S. investigation found relatively few communists among Jeju residents.<sup>26</sup> Those investigators also found many of the active resisters to be, at most, "moderate leftists."<sup>27</sup>

#### B. The Jeju 4.3 Events

According to the 4.3 National Committee's report, on April 3, 1948, two hundred residents armed with bamboo spears, farm tools and a few guns confronted police and government officials in an effort to stop police violence and to protest upcoming elections.<sup>28</sup> Other accounts indicate that the Worker's Party leaders trained a limited number of islanders and that the armed "rebel fighters" attacked police stations and later election officials and some uninvolved families.<sup>29</sup> According to the report, the U.S. Military Government sent in substantial additional national police and "right wing" paramilitary forces.<sup>30</sup> U.S. military officials also initially authorized the constabulary and police's forceful actions against the rebels and, later, oversaw operational orders to kill all villagers farther inland than 5km from the shore, which encompassed all mountain villages.<sup>31</sup>

After the establishment of the Republic of Korea in August 1948, the U.S. military exercised operational control over the South Korea military and national police.<sup>32</sup> Supported by the U.S. military, the Republic declared martial law in November 1948. According to the Report, the government indefinitely detained many and summarily tried and executed others presumed to be communists or communist supporters.<sup>33</sup> Others were tortured or killed without direct links to communism or resistance activities. Characterized as a "cycle of terror,"<sup>34</sup> by 1949 the violence left "one in every five or six islanders" dead. "More than half the villages

15) TRANSLATED REPORT, supra note 8, at 97–100.

16) In efforts to build political, education and cultural stability, Jeju islanders "systematized the building of the Autonomous People's Council." Ko Chang-Hoon, US Government Responsibility on the Jeju April Third Uprising and Grand Massacre: Islanders' Perspective, 8 LOCAL GOVT STUD. 123, 123–40 (2004).

17) See BRUCE CUMINGS, THE KOREAN WAR 123 (2010) (discussing the effect of increased unauthorized grain collection).

18) Id. at 126 ("Interrogators also found evidence that the SKWP [South Korean Worker's Party] had infiltrated not more than six trained agitators and organizers from the mainland, and none had come from North Korea.").

19) TRANSLATED REPORT, supra note 14, at 111–13 (describing the activities of the Worker's Party and certain attempts to gather new members to become a "mass party").

20) Despite characterizations as "leftist," the U.S. Military initially assessed the People's Committee of Jeju Island to be peaceful and moderate. U.S. Commander Hodge reiterated this assessment in 1947, stating that Jeju was a "truly communal area that is peacefully controlled by the People's Committee without much [communist] influence." KATSIAFICAS, supra note 14, at 91 (citing Chang-Hoon Ko, The International Context of the Jeju Sasam Uprising).

21) TRANSLATED REPORT, supra note 8, at 113, 126–130.

22) Hun Joon Kim, Seeking Truth After 50 Years: The National Committee for Investigation of the Truth About the Jeju 4.3 Events, 3 INT'L J. OF TRANSITIONAL JUST. 406, 410 (2009).

23) Id.

24) TRANSLATED REPORT, supra note 8, at 271–72.

25) Id. at 272 (citing "Letter from Brown to Ward," July 2, 1948, The Rothwell H. Brown Papers, Box 3, US Army Military History Institute, Pennsylvania, U.S.A.).

26) See id. at 150 (noting police references to Jeju as an "island of Reds").

27) CUMINGS, supra note 17, at 126 (referencing the actual findings of U.S. investigators that Jeju residents were not communists).

28) Tae-Ung Baik, Justice Incomplete: The Remedies for the Victims of the Jeju April Thirds Incidents, in RETHINKING HISTORICAL INJUSTICE AND RECONCILIATION IN NORTHEAST ASIA: THE KOREAN EXPERIENCE 96 (Gi-Wook Shin, Soon-Won Park & Daqing Yang eds., 2007).

29) See ASSOC. OF BEREAVED FAMILIES OF VICTIMS OF THE JEJU APR. 3RD UPRISING FOR HISTORICAL TRUTH, WHO ARE THE TRUE VICTIMS OF THE JEJU APRIL 3RD UPRISING? 79–80, 89 (2013) [hereinafter ASSOC. OF BEREAVED FAMILIES] (providing an account that the Worker's Party trained a modest number of islanders as armed "rebel fighters").

30) For example, the Northwest Youth Corps, later classified by the U.S. as a terror organization, was recruited as paramilitary to "control and reorient leftists." CUMINGS, supra note 17, at 123.

31) TRANSLATED REPORT, supra note 8, at 649 (citing the directive that stated "any pedestrian through the mountainous areas more than 5km inward from the coastal line would be assumed to be a mob and would be shot to death.").

32) In August 1948, the U.S. military "came to continuously hold operational control over the Korean [police] following the 'Executive Agreement on Interim Military and Security Matters during the Transitional Period'" signed between the South Korean president and the U.S. Military commander. Id. at 314–15 (citing Article 1 of the "Executive Agreement" setting forth this provision).

33) Baik, supra note 28, at 97.

34) Song Jung Hee, Islanders Still Mourn April 3 Massacre, JEJU WEEKLY (Mar. 31, 2010), <http://www.jejuweekly.cmo/news/articleView.html?idxno=657>.

were destroyed.”<sup>35</sup> In addition to the deaths of “rebel fighters” and a limited number of police and constabulary (estimated between 150 and 180), many thousands of ordinary villagers were killed or badly injured.<sup>36</sup>

### C. Partial United States Responsibility

Eventually, in the 1990s, based on limited U.S. military records and research by journalists and the newly established Jeju 4.3 Institute, two American scholars painted a picture of partial yet important United States responsibility. University of Chicago historian Bruce Cumings cited “formerly classified American materials” that documented a “wholesale assault on the Jeju people” to conclude that the American government actively participated in the 4.3 destruction.<sup>37</sup> According to George Katsiaficas of the Wentworth Institute of Technology, the Jeju 4.3 grand tragedy is “the worst single massacre [that occurred] under the post-war U.S. military government ... and [it] has yet to be acknowledged by the United States,” and “[u]ntil Americans acknowledge and accept responsibility for the tragic actions of our government” the U.S. will be viewed with suspicion.<sup>38</sup> More recently, retired U.S. Army Colonel Ann Wright expressed strong conviction that the United States played an integral role in Jeju 4.3 and now bears some responsibility for healing past and continuing wounds.<sup>39</sup> Similarly, after the 2013 publication of the English translation of the 4.3 National Committee’s report, Professor Yamamoto, along with Miyoko Pettit and Sara Lee, observed that the 4.3 National Committee’s translated report “indicates that U.S. and South Korean military leaders overreacted to Jeju residents’ understandable acts of dissatisfaction with and resistance to perceived unfair government practices and policies that led to widespread food shortages, police brutality and outside groups’ extortion of local residents.”<sup>40</sup>

South Korean scholars, too, pointed to the United States’ partial responsibility for Jeju 4.3 and its lack of participation in redress efforts. Professor Ko Chang Hoon of Jeju National University observed that,

[At a minimum, Jeju islanders] strongly desire help from the U.S. government to tell the truth about the U.S. government role in the Jeju Uprising and Grand Massacre. If [the U.S. helps uncover the truth], we will know whether the U.S. government has something to apologize for to Jeju islanders or not.<sup>41</sup>

According to Ko, many Jeju residents believe that the United States systematically violated the rights of Jeju people under the guise of anticommunist policies by “intentionally and illegally” labeling Jeju a “Red Island.” Ko suggested that Jeju residents were instead part of a “civil rights movement concerned with peace, individual rights and little people who went up against another big powerful country like the United States.”<sup>42</sup>

Professor Baik Tae-Ung of the University of Hawai‘i, a 1980s democracy advocate who was imprisoned and tortured, is now an expert in international human rights and Korean law. Professor Baik observed that the U.S. military government’s “accountability for [Jeju 4.3, which included crimes against humanity and war crimes,] requires further examination.”<sup>43</sup> Baik surmised that the United States “used its power to strengthen the rightist political factions while cracking down on leftist groups” in South Korea. In Jeju specifically the “United States declared the People’s Committee and other similar organizations to be illegal, while the rightist police and private military groups employed by the U.S. military government were granted the power to crack down on the activities of people.”<sup>44</sup>

In light of the 4.3 National Committee’s investigation and available research and commentaries in English about the extent of U.S. participation, it is fair to conclude that the United States bears an apparent degree of 4.3 responsibility (although not yet fully and precisely ascertained).

### D. Reconciliation Initiated and Stalled

In response to the 4.3 National Committee’s findings and reconciliation recommendations, the South Korea national government delivered a 2003 presidential apology<sup>45</sup> and constructed a memorial, gravesite and museum. It also created the Jeju 4.3 Peace Foundation, declared an annual national 4.3 day of remembrance and supported the further

36) ASSOC. OF BEREAVED FAMILIES, *supra* note 29, at 25.

37) CUMINGS, *supra* note 17, at 121, 127.

38) George Katsiaficas, *Why Many South Koreans Fear the U.S.*, EROSEFFECT (2003), <http://www.eroeffect.com/articles/Why%20South%20Koreans.pdf>.

39) Ann Wright, *Jeju Island—Tragic Destruction of Pristine Marine Area for Another Naval Base for the US Missile Defense System, WAR IS A CRIME*, <http://warisacrime.org/content/jeju-island-tragic-destruction-pristine-marine-area-another-naval-base-us-missile-defense-sy> (last visited Aug. 23, 2015).

40) Yamamoto, Pettit & Lee, *supra* note 4, at 57. “Major General Ward indirectly advised not to consider the Jeju 4.3 Incident a matter of incitement to communism. He also advised to settle the situation by stopping tyranny of the police to handle the public sentiment, pointing out that tyranny of the police is the main cause of the uprising.” TRANSLATED REPORT, *supra* note 8, at 271–72. Despite this advice and initial efforts to stop police brutality, the commanding officer initiated a strong violent repression operation on Jeju. *Id.* at 118, 171.

41) Chang Hoon Ko, *US Government Responsibility on the Jeju April Third Uprising and Grand Massacre: Islanders’ Perspective*, 8 LOCAL GOV’T STUD. 123, 123–40 (2004) (citing “the Island’s only newspaper at the time, Jejusinbo”).

42) *Id.*

43) Baik, *supra* note 28, at 99–100.

44) *Id.* at 100. See also TRANSLATED REPORT, *supra* note 8, at 654–55. According to the Translated Report, the U.S. Army “supplied weapons and observation aircrafts for Suppression Operations,” and U.S. military documents are cited in the Report to indicate “that the US Army executives agreed either with carrying out the massacre on Jeju or at least [in] overlooking it.” *Id.*

45) TRANSLATED REPORT, *supra* note 8, at 659–60 (citing President Roh Moo-hyun’s apology regarding Jeju 4.3).

excavation of mass graves and location of other important 4.3 sites.<sup>46</sup>

Yet after the 2007 inauguration of a conservative South Korea president, reconciliation efforts stalled and even regressed. Many apparently perceived political back-sliding in the social healing process.<sup>47</sup> Some government officials sweepingly re-mischaracterized the Jeju residents of 1948 as part of a pervasive communist insurgency, reviving the “it’s their own fault” narrative. The false sweeping linkage to widespread communism continues to harm many Jeju residents who suffered (and still suffer) from guilt by association and “political discrimination.”<sup>48</sup> The 2007–2015 government’s planning and construction of a major naval base on Jeju, apparently partly for United States use, also “opened unhealed decades-old wounds,” alarming Jeju residents and 4.3 survivors in particular. Under former President Lee Myung-bak’s administration, Jeju villagers living on the site of the future base were forcibly removed and their ancestral lands seized against “the villagers’ democratically expressed ... choice.”<sup>49</sup> Resident protestors viewed this government action, taken without resident participation, as a resurrection of the “undemocratic, militaristic practices of South Korea’s postwar dictatorship.”<sup>50</sup>

## NEXT STEPS IN SOCIAL HEALING THROUGH JUSTICE

### A. President Moon's 2018 Call for Next Steps for Jeju 4.3 Social Healing

After several years of stalled redress, the political landscape for Jeju 4.3 reconciliation changed.<sup>51</sup> Most significant, at the 70th Jeju 4.3 commemoration ceremony in 2018, South Korea President Moon Jae-in acknowledged the “painful history” of the “April Third Incident,” and extended his “deepest sympathy and gratitude to the surviving victims, bereaved families and the citizens of Jeju Province who have revealed their sense of resentment and pain ... and told the truth of the Jeju April 3 Incident.”<sup>52</sup> He also committed the national government to further revealing the facts behind the violence in order to “address grievances, restore honor, retrieve remains,

provide compensation” and deal with persisting effects of the 4.3 trauma. President Moon invoked the social goals of “reconciliation” and recognition of “human rights, which,” he said, “residents of Jeju Province and all Korean people hope for.”<sup>53</sup>

With this in mind, the president called more broadly for raising public consciousness about the 4.3 National Committee’s 2003 investigative report. He observed that there are “still people who turn away from the truth of the April 3 Incident,” viewing it “through the distorted lens of outdated ideology.” “Squarely facing a painful history,” he continued, is essential for “fair-minded conservatives and fair-minded progressives” as a step toward future “reconciliation and mutual prosperity, peace and human rights.”<sup>54</sup>

In essence, President Moon acknowledged what Jeju 4.3 justice advocates and Korean and American scholars and some officials have been saying: Even with important positive steps forward, there has been resistance and even backsliding.<sup>55</sup> And in the broader international arena, most still know nothing about the 4.3 tragedy. Comprehensive and enduring Jeju 4.3 social healing through justice remains, as Professor Yamamoto has characterized it, “unfinished business.” Additional “reparative justice” steps are needed.

### B. What’s Next

The question is this: What additional next steps are needed to promote comprehensive and enduring Jeju 4.3 social healing? Specifically for Jeju people? And more generally for South Korea’s government and people? In light of President Moon’s reference to human rights that “all Korean people hope for,” how might the promise and problems of international human rights affect the shaping of next steps forward?

In this essay, based on our collaborative October 2018 presentations at Chung Ang University (Seoul) and at Jeju National University (Jeju), we address that question—how human rights principles might be significant in supporting or shaping next steps toward reconciliation (or social healing through justice).<sup>56</sup> We do this with an eye on the 2017 petition of eighteen survivors of horrific Jeju 4.3 imprisonment to reopen and set aside their wrongful, en masse convictions. And we do this through the lens of the U.S. courts’ 1980s *coram nobis* reopenings of the convictions of

46) JEJU 4.3: FROM TRUTH TO PEACE, JEJU 4.3 PEACE FOUNDATION 6, 85, 129, (2018).

47) See Hahm Chaibong, *South Korea’s Miraculous Democracy*, 19 J. DEMOCRACY 128 (2008).

48) Baik, *supra* note 28, at 94, 106.

49) Ten Thousand Things, *4.3 Jeju Island: 1948 & Now*, *BLOGGER* (April 3, 2011), <http://tentousandthingsfromkyoto.blogspot.com/2011/04/43-jeju-island-1948-now.html>.

50) See *id.*

51) See Yamamoto, Pettit & Lee, *supra* note 4, at 33.

52) Cheong Wa Dae, *Remarks by President Moon Jae-in at a Memorial Ceremony in Honor of Victims of the Jeju April 3 Incident*, *KOREA.NET* (April 3, 2018), <http://www.korea.net/Government/Briefing-Room/Presidential-Speeches/view?articleId=156640&pageIndex=7>.

53) *Id.*

54) *Id.*

55) Despite initial steps toward reconciliation, progress stalled after 2007. Many victims of Jeju 4.3’s physical, psychological and financial harms have yet to receive reparations. And some government officials continue to characterize Jeju 4.3 as a communist insurrection. Yamamoto, Pettit & Lee, *supra* note 4, at 33.

56) Eric K. Yamamoto, Miyoko Pettit-Toledo & Sarah Sheffield, *Bridging the Chasm: Reconciliation’s Needed Implementation Fourth Step*, 15 *SEATTLE J. FOR SOC. JUST.* 109, 113 (2016) (describing a reconciliation framework characterized as “social healing through justice”).

the World War II Japanese American incarceration resisters.

## HUMAN RIGHTS PRINCIPLES OF REPARATIVE JUSTICE

Human rights are intended both to protect people and to limit government abuses of power. Those “rights” are shaped by conventions, covenants and treaties agreed upon by international bodies and by judicial declarations of customary international law. For example—and relevant to 4.3—the 1948 Universal Declaration of Human Rights codifies the rights to freedom from torture, from arbitrary killing, from arbitrary arrest and imprisonment and from inhumane or degrading treatment or punishment.<sup>57</sup> Additionally, the Declaration protects the freedom to peaceably assemble to associate with others (to protest). The 1966 International Covenant on Civil and Political Rights mandates that those whose human rights have been violated “shall have an effective remedy.”<sup>58</sup> It also authorizes general group-based remedies: “restitution, rehabilitation, and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition, and changes to relevant laws and practices.”<sup>59</sup>

### A. Reparative Justice

In 2005 the United Nations Human Rights Commission approved the “Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law.”<sup>60</sup> These Basic Principles and Guidelines generally codify principles and practices of “reparative justice.” “Reparative justice”—or “reparation,” as we use the term—means more than monetary payments to individuals. It encompasses physical

and emotional healing of people and communities. It covers economic capacity-building.<sup>61</sup> And it entails changes to laws and institutional practices. It thus speaks broadly to the foundational concept of “repair”—to fix all significant aspects of what was broken. “Reparative justice” or “reparation” therefore means comprehensively repairing the damage of the historic injustice.<sup>62</sup>

According to these human rights principles and guidelines, governments are called upon to, among other things, “make full reparation for the injury (whether material or moral) caused by the act.” Reparation “must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation that would, in all probability, have existed if that act had not been committed.”<sup>63</sup> Some scholars urge that these international human rights instruments legally mandate reparations for major wrongs, for instance, sexual enslavement during wartime and U.S. slavery.<sup>64</sup>

### B. Transformation of Public Consciousness About What Is Right and Just

But a major difficulty with asserting human rights claims in United States and other countries’ courts is that, with narrow exceptions, most nations’ courts refuse to systematically enforce international human rights dictates—whether because of broad reservations expressed in ratifying the international instruments or for political reasons.<sup>65</sup> And international tribunals render “binding” judgments only upon countries that ratify the treaties or sign the covenants establishing the tribunals. And even those judgments may not be practically enforceable against a resisting country.<sup>66</sup>

The reality is that human rights remain largely an aspiration<sup>67</sup>—not required, but highly desirable for a society both to protect vulnerable people and to

57) Universal Declaration of Human Rights, G.A. Res. 217A(III), at 71, U.N. GAOR, 3rd Sess., art. 4, U.N. Doc. A/810 (Dec. 10, 1948). See generally Eric K. Yamamoto, Sandra Kim & Abigail Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. WEST. L. REV. 1 (2007).

58) International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.

59) Thomas M. Antkowiak, *Remedial Approaches to Human Rights Violations: The Inter-American Court of Human Rights and Beyond*, 46 COLUM. J. TRANSNAT’L L. 351, 363 (2008). More specifically, as Antkowiak describes, [R]estitution comprehends restoring the victim to his or her original situation, such as a restoration of liberty, while rehabilitation includes “medical and psychological care as well as legal and social services.” Satisfaction ... [covers] apologies, “full public disclosure of the truth,” and victim memorials, to judicial and administrative [actions and clearing the court records on wrongful criminal convictions]. “Guarantees of non-repetition” are equally diverse, including, inter alia, the establishment of effective civilian control over state security forces and human rights educational training programs. *Id.* at 362 (emphasis added).

60) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc A/RES/60/147 (Mar. 21, 2006).

61) AMARTYA SEN, *DEVELOPMENT AS FREEDOM* (1999); Martha C. Nussbaum, *Human Rights and Human Capabilities*, 20 HARV. HUM. RTS. J. 21, 21 (2007); Eric K. Yamamoto & Brian MacKintosh, *Redress and the Salience of Economic Justice*, 10 J. PUB. POL. 1 (2010).

62) Yamamoto, Pettit-Toledo & Sheffield, *supra* note 56.

63) Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), available at [http://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

64) See Jon M. Van Dyke, *Reparations for the Descendants of American Slaves Under International Law*, in *SHOULD AMERICA PAY?: SLAVERY AND THE RAGING DEBATE ON REPARATIONS* 57, 58 (Raymond A. Winbush ed., 2003).

65) Yamamoto, Kim & Holden, *supra* note 57, at 54.

66) See Stanley A. Halpin, *Looking Over a Crowd and Picking Your Friends: Civil Rights and the Debate Over the Influence of Foreign and International Human Rights Law on the Interpretation of the U.S. Constitution*, 30 HASTINGS INT’L & COMP. L. REV. 1, 4 (2006) (arguing that direct enforcement of human rights by international tribunals has had little success in the United States due to the United States’ strong international influence).

67) Yamamoto, Kim & Holden, *supra* note 57, at 54.

bolster legitimacy on the international stage.

Yet despite the difficulty of achieving favorable court judgments, framing reparative justice claims in human rights terms has proven effective as part of a larger justice strategy. Almost every politically successful reparative justice movement has been energized and advanced by legal claims asking for the human rights remedies outlined above.<sup>68</sup> Even if the claims do not succeed in courts of law, the act of asserting reparative justice claims itself—in courts and legislatures and in the arenas of public opinion—sometimes produces new understandings of a past injustice and society's need to repair the persisting damage.<sup>69</sup> And at times those new public understandings compel courts, years later, to legally rectify the historic injustice.<sup>70</sup>

Empirical studies identify the reason. Legal claims rooted in civil and human rights provide the public with a common language, framework and visualization for grasping the depth of an injustice. And, at times, in combination with media attention and cultural depictions, this helps shape “what both government actors and larger populations view as ‘right,’ ‘natural,’ ‘just’ or ‘in [a country’s] interest.’”<sup>71</sup> Human rights claims—with journalist reporting, scholarly writing, community advocacy and social media—can help generate new domestic and international understandings of what happened, who was responsible, how people and communities were (and continue to be) harmed and, ultimately, what is needed now to repair the damage.<sup>72</sup>

Studies digested by legal scholar Paul Berman show that rights claims—even when not immediately successful in courts—operate in part by “influencing modes of thought” and are a creative “part of culture, shaping and determining social [and political] relations.” The shaping of what people come to believe is morally “right and just.”<sup>73</sup> According to Professor Berman, the studies show that, in the proper setting, internationally agreed upon human rights ideas of justice can “affect how both policymakers and ordinary citizens [come to] think about the state’s interest” in repairing the damage of government-backed injustice.<sup>74</sup>

Empirical studies also show that this international

framing of injustice and reparation at times influences the public policy debate among decisionmakers, “which are themselves influenced by outside pressure groups, [like] lobbyists,” non-governmental organizations and media.<sup>75</sup> Claims of harsh civil and human rights abuses at times pressure governments and political leaders to demonstrate that their country is actually committed to preventing future gross rights violations and to repairing the damage if violations have already occurred. This sometimes creates the public support foundation for courts, for example, to belatedly examine apparently abusive “trials and convictions”—all as a key part of a larger reconciliation (or reparative justice) initiative.<sup>76</sup>

The human rights edifice faces numerous criticisms. Some criticize international bodies for recognizing unenforceable rights. Others describe international human rights as little more than “victor’s law.” Still others say the international regime infringes on the sovereignty of nations.<sup>77</sup> These concerns warrant attention. They do not, though, detract from the points made earlier about the potential social and political impacts of human rights claims.

#### C. Korean WWII “Sex Slaves” (Comfort Women)

The redress movement of the World War II Korean sex slaves (also euphemistically referred to as “Comfort Women”) illustrates the impact of human rights claims on evolving global justice consciousness.<sup>78</sup> The former sex slaves’ reparations claims ultimately failed in Japanese and American courts.<sup>79</sup> But the Korean women told their searing stories of suffering. Their stories created a widely publicized official record. Much of the truth emerged. Through the courts and independent human rights tribunals in several countries, the women exposed official documents that directly refuted the Japanese government’s denial of involvement in the sex slave industry.<sup>80</sup> The filing of the widely-publicized lawsuits created political education forums that sparked worldwide awareness.<sup>81</sup> The filing of the widely-publicized lawsuits created political education forums that sparked worldwide awareness.<sup>82</sup>

75) Berman, *supra* note 69, at 1280.

76) Yamamoto & Obrey, *supra* note 72.

77) See generally Eric K. Yamamoto, Carrie-Anne Shirota & Jayna Kim, Indigenous Peoples’ Human Rights in United States Courts, in *MORAL IMPERIALISM 300* (B. Hernandez-Truyol ed., 2002) (describing critiques).

78) See Eric K. Yamamoto & Sara Lee, Korean “Comfort Women” Redress 2012 Through the Lens of U.S. Civil and Human Rights Reparatory Justice Experiences, 11 *KOREAN L. J.* 123 (2012).

79) *Id.*

80) Michele Park Sonen, Healing Multidimensional Wounds of Injustice Intersectionality and the Korean “Comfort Women,” 22 *BERKELEY LA RAZA L.J.* 269, 289 (2012).

81) *Id.* at 299.

82) ERIC K. YAMAMOTO, MARGARET CHON, CAROL IZUMI, JERRY KANG & FRANK WU, *RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT 374-76* (2d ed. 2013).

68) *Id.* at 56.

69) Paul Schiff Berman, Seeing Beyond the Limits of International Law, 84 *TEX. L. REV.* 1265, 1266 (2006).

70) See, e.g., *Korematsu v. United States*, 584 F. Supp. 1406, 1416 (N.D. Cal. 1984).

71) Berman, *supra* note 69, at 1269.

72) Eric K. Yamamoto & Ashley Kaiyo Obrey, Reframing Redress: A ‘Social Healing Through Justice’ Approach to United States–Native Hawaiian and Japan Ainu Reconciliation Initiatives, 16 *BERKELEY ASIAN AM. L. J.* 5, 28 (2009).

73) Berman, *supra* note 69, at 1281.

74) Yamamoto & Obrey, *supra* note 72, at 65; see Berman, *supra* note 69.

Even though the struggle for full justice continues for remaining survivors, they and their supporters have generated significant consequences. The women's suffering is now widely recognized as the result of widespread human rights violations. More broadly, sexual assault against women is no longer considered an "unfortunate incident of war"—a reward for soldiers. It is a crime against humanity.<sup>83</sup> Another consequence: the women's public assertion of human rights claims, with broad international support,<sup>84</sup> and at the Korea Constitutional Court's direction,<sup>85</sup> empowered the previous South Korea president to call for Japan's participation in an arbitration process for reparative justice.<sup>86</sup>

### THE 1980s CORAM NOBIS CRIMINAL CASE REOPENINGS AND THE U.S. WWII MASS INCARCERATION OF JAPANESE AMERICANS

During World War II, the United States incarcerated 120,000 Americans of Japanese ancestry<sup>87</sup> based on the U.S. government's deliberately falsified claims of disloyalty.<sup>88</sup> This mass racial imprisonment of mainly American citizens was popular among many other Americans due to racism and fear. Fred Korematsu, Gordon Hirabayashi and Minoru Yasui—all Americans—resisted the sweeping incarceration. Their own government prosecuted them for their protest and the trial court convicted them of a federal crime. The U.S. Supreme Court in 1943 and 1944 upheld their convictions, approving the racial

curfew and forced removal leading to the mass incarceration.<sup>89</sup> Japanese Americans as a group were falsely branded as dangerous and disloyal.<sup>90</sup> Korematsu, Hirabayashi and Yasui carried the heavy burden of their legal defeat for decades. But they did not give up.

Forty years later researchers found wartime documents showing that the highest World War II government officials knew there had been no security justification for the mass racial imprisonment and had lied to the courts and public.<sup>91</sup> Those documents also showed that the Supreme Court "turned a blind eye"—declined to recognize—the grievous government misconduct.<sup>92</sup> The wartime legal system had failed badly. It had wrongly upheld the criminal convictions of the internment resisters without carefully scrutinizing the government's manufactured contention of national security.

By the 1980s, American society's views about the importance of civil rights in America and about human rights internationally had evolved. This evolution helped change judges', legislators' and the public's view of the World War II imprisonment of innocent Japanese Americans.<sup>93</sup> In 1983, based mainly on the recently discovered World War II government documents, Fred Korematsu reopened his 1944 U.S. Supreme Court case.<sup>94</sup> He filed in the San Francisco trial court that originally convicted him a rare common law writ of coram nobis. A coram nobis writ seeks to rectify "manifest injustice" resulting from egregious government misconduct in the criminal prosecution—particularly

83) Yamamoto, Kim & Holden, *supra* note 57, at 61.

84) Canada, Taiwan, the United States, the U.N. Human Rights Council on behalf of France, the Netherlands, North and South Korea, China, the Philippines and the European Parliament all supported the women's efforts for justice. The Japanese city councils of Takarazuka, Kiyose and Sapporo also voiced support for the women. YAMAMOTO, CHON, IZUMI, KANG & WU, *supra* note 82, at 376.

85) Constitutional Court [Const. Ct.], 2006Hun-Ma788 (consol.), Aug. 30, 2011, (23-2(A) KCCR, 366, 385-86) (S. Kor.) (compelling South Korea's president to demand Japanese participation in a reparative justice process).

86) Martin Fackler, *South Korea Urges Japan to Compensate Former Sex Slaves*, N.Y. TIMES (Dec. 18, 2011), <https://www.nytimes.com/2011/12/19/world/asia/south-korea-urges-japan-to-compensate-former-sex-slaves.html>.

87) Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 25, 1942); Franklin Delano Roosevelt's Executive Order 9066 "enabled the now infamous wartime incarceration of 120,000 Japanese Americans, more than two-thirds of them American citizens." ROGER DANIELS, *THE JAPANESE AMERICAN CASES XV* (2013); see generally GREG ROBINSON, *BY ORDER OF THE PRESIDENT: FDR AND THE INTERNMENT OF JAPANESE AMERICANS* (2001).

88) When Executive Order 9066 was issued there was "substantial credible evidence from a number of federal civilian and military agencies contradicting the report of General DeWitt that military necessity justified exclusion and internment of all persons of Japanese ancestry." *Korematsu v. United States*, 584 F. Supp. 1406, 1416 (N.D. Cal. 1984); see also *Hirabayashi v. United States*, 828 F.2d 591, 601 (9th Cir. 1987) (finding that "General DeWitt acted on the basis of his own racist views").

89) See *Korematsu v. United States*, 323 U.S. 214, 65 S. Ct. 193, 223 (1944) (holding that Order No. 34, forcing removal or exclusion of Korematsu, was valid); *Hirabayashi v. United States*, 320 U.S. 81, 104, 63 S. Ct. 1375, 1387 (1943) (affirming that the "curfew order was an appropriate means of minimizing the danger"); *Yasui v. United States*, 320 U.S. 115, 63 S. Ct. 1392 (1943) (relying on the Hirabayashi decision, the court finding that the curfew order was not unconstitutional).

90) See *supra* text accompanying note 88.

91) PETER H. IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES*, at 206-11 (1983); see also PETER H. IRONS, *JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES* (1989).

92) In *Hassan v. City of New York*, the court acknowledged that, [T]he F.D.R. Administration and military authorities infringed the constitutional rights of Japanese-Americans during World War II by placing them under curfew and removing them from their West Coast homes and into internment camps. Yet when these citizens pleaded with the courts to uphold their constitutional rights, we passively accepted the Government's representations that the use of such classifications was necessary to the national interest. In doing so, we failed to recognize that the discriminatory treatment of approximately 120,000 persons of Japanese ancestry was fueled not by military necessity but unfounded fears.

804 F.3d 277, 307 (3d Cir. 2015) (internal citations omitted); see also ERIC K. YAMAMOTO, *IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY* (2018).

93) Eric K. Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. CIV. RTS-CIV. LIBS. L. REV. 341, 342 (1990).

94) LORRAINE BANNAI, *ENDURING CONVICTION* 186 (2015).

when the damage to the person convicted (and his broader community) continues long after he served the prison sentence.<sup>95</sup>

Korematsu's petition was a rare request to reopen a decades-old criminal conviction with continuing adverse consequences for Japanese Americans. Hirabayashi and Yasui filed similar *coram nobis* petitions in the Seattle and Portland federal courts. Legal scholars and former judges predicted failure.<sup>96</sup> But in 1983 and 1984, newspapers, television, journalists and scholars from all over the country covered the story of the *coram nobis* petitions. Teachers, religious leaders, government officials, civil rights groups and justice advocates voiced support.<sup>97</sup> Much of that support was cast in the language of civil and human rights about what is required for just civil societies—no arbitrary mass arrest and detention; no mass convictions without real evidence of individual wrongdoing; no inhumane treatment or degrading punishment; and affirmative remedies for the harms of past abuses. A wide range of people, including the Korematsu *coram nobis* trial judge, grasped the importance of those civil and human rights—rights the legal system had failed to enforce forty years earlier.

Public consciousness about the World War II mass incarceration began to change. The dominant narrative that framed the incarceration as “an unfortunate but acceptable security event” unraveled. People began to view the incarceration as a gross government injustice that required reparation. This change laid a foundation of public support for the U.S. trial courts to do something extraordinary.<sup>98</sup>

In 1984, after a hearing on the merits, Judge Marilyn Hall Patel of the San Francisco district court granted Korematsu's *coram nobis* petition and invalidated his criminal conviction.<sup>99</sup> Judge Patel affirmed a congressional investigative commission's finding<sup>100</sup> that the WWII mass incarceration was the result of “race prejudice, war hysteria and a failure of political leadership,” not a bona fide national security justification.<sup>101</sup> Finding “manifest injustice,” Judge Patel vacated Korematsu's decades-old

conviction to cleanse the judicial record infected by egregious government misconduct.<sup>102</sup> Other courts did the same for Hirabayashi and Yasui.<sup>103</sup> Those courts vacated these internment resisters' convictions, and, by extension, cleared the names of all who had been incarcerated en masse.

And vacating these wrongful convictions laid the legal cornerstone for the U.S. Congress to pass the Civil Liberties Act of 1988<sup>104</sup> and for Presidents Reagan, Bush and Clinton to apologize by individual letter to each Japanese American who had been incarcerated fifty years earlier and to award each \$20,000 in partial reparations.<sup>105</sup> It also led to the creation of a fund to broadly educate the public about the real history of the injustice. The goals: to finally heal the wounds of those who had suffered the injustice and to prevent the same kind of civil and human rights abuses from occurring to anyone again. All of this was a part of the larger U.S. commitment to reparative justice—to take the many steps needed to repair the damage to its people and communities and to America itself as a democracy.

This reparative justice commitment possessed a political dimension. It came in the late 1980s at a time when the United States sought to tear down the Soviet Union's “Iron Curtain.”<sup>106</sup> The U.S. sought to do so in part by showing that a legitimate democracy—and especially its courts—treats its people fairly, acknowledges its major mistakes and repairs the damage of its own civil and human rights injustices.<sup>107</sup> Human rights concepts and language provided the United States, as a democracy, the tools for “doing the right thing” for those harmed—even belatedly—while bolstering its own larger political interests.<sup>108</sup> This is not to say that the U.S. has repaired the damage of all its past injustices. Much more remains.<sup>109</sup> But it was an important start, a social justice precedent.

95) ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY 38 (2018).

96) YAMAMOTO, CHON, IZUMI, KANG & WU, *supra* note 82, at 249.

97) Eric K. Yamamoto, Racial Reparations: Japanese American Redress and African American Claims, 40 BOST. C. L. REV. 477, 477 (1998).

98) LORRAINE BANNAI, ENDURING CONVICTION 177–78 (2015).

99) *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting Korematsu's writ of *coram nobis* petition).

100) COMM'N ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS (1982–83).

101) *Korematsu*, 584 F. Supp. at 1417. See also Eric K. Yamamoto & Rachel Oyama, Masquerading Behind a Fa-ade of National Security, 128 YALE L.J.F. \_\_ (forthcoming 2019).

102) *Korematsu*, 584 F. Supp. at 1417.

103) *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985).

104) Civil Liberties Act of 1988, Pub. L. No. 100–383, 102 Stat. 903 (codified at 50 U.S.C. § 4211 (2012)).

105) ERIC K. YAMAMOTO, IN THE SHADOW OF KOREMATSU: DEMOCRATIC LIBERTIES AND NATIONAL SECURITY 49 (2018).

106) Eric K. Yamamoto, Friend, Foe or Something Else: Social Meanings of Reparations, 20 DEN. J. INT'L L. & POL. 223 (1992) [hereinafter Yamamoto, Friend, Foe or Something Else].

107) *Id.*

108) *Id.*

109) See Eric K. Yamamoto, Racial Reparations: Japanese American Redress and African American Claims, 40 BOST. C. L. REV. 477, 488–89 (1998) (explaining the difficulties African Americans face in getting reparations for past injustices); Spinner-Halev, Jeff, From Historical to Enduring Injustice 35 POL. THEORY 574, 575 (2007) (arguing that Native Americans and African Americans are “still victims of injustice”).

## NEXT STEPS IN SOCIAL HEALING THROUGH JUSTICE: REOPENING JEJU 4.3 CRIMINAL CONVICTIONS

The story of the coram nobis case reopenings brings us back to President Moon's words of acknowledgment and apology at the 2018 Jeju 4.3 commemoration ceremony.<sup>110</sup> It also brings us back to the significance of employing the language of international human rights as part of continuing initiatives aimed at comprehensive and enduring 4.3 reparative justice. Much has been accomplished since the publication of the 4.3 National Committee's 2003 investigative report by survivors, community advocates, policymakers, local officials, scholars, artists and journalists.<sup>111</sup> And teachers, students, religious leaders and the media have greatly expanded public understandings of the tragedy. Their collective accomplishments have been remarkable. Yet, by many accounts, including President Moon's, additional steps remain to achieve comprehensive and enduring 4.3 social healing for Jeju people and for South Korea's society.<sup>112</sup>

### A. Jeju 4.3 Survivors' 2017 Petition

One next step focuses on the eighteen 4.3 survivors who petitioned the Jeju District Court in 2017 to clear their records of severely unjust criminal convictions and harsh imprisonment.<sup>113</sup> These survivors lost their homes, family members and freedom in the "scorched earth" 4.3 operation.<sup>114</sup>

The survivors' petition asserted that they, along with over 2,500 others, were summarily and falsely convicted and imprisoned for being "reds," "guerilla fighters," participating in a "rebellion" and committing "espionage"—for being disloyal.<sup>115</sup> According to the survivors' accounts and the 4.3 National Committee's report, many Jeju prisoners were detained in crowded prison cells.<sup>116</sup> Many suffered repeated beatings and torture. At a 2015 event, one of the petitioners, Hyeon Chang-yong, recounted how the police arrested him when he was sixteen. He denied contacting the armed guerrillas, so the police "beat him tens of times" and threatened him at gunpoint. The police tortured Hyeon Chang-yong by tying him to a cot and pouring water into his nose and mouth. After days of torture, he finally confessed to false charges. He was convicted, he said, based on that torture-induced confession.<sup>117</sup> Another survivor, Yang Geun-bang, explained at the same 2015 event that he was imprisoned only because his brother had been previously killed by soldiers.<sup>118</sup>

The absence of records makes it difficult to know exactly what happened and the exact nature of the tribunals that convicted and sentenced the Jeju villagers. However, the 4.3 National Committee's report refers to these forums as "military tribunals," which differ from official government "courts."<sup>119</sup> The eighteen survivors had apparently been sentenced on charges of "rebellion," "aiding and contacting the enemy," and "espionage" by two different military tribunals in December 1948 and July 1949.<sup>120</sup> One news report described these military tribunals as being "carried out by brute force and with a disregard to legal protocol ... pinning responsibility for the uprising on civilian residents" following then-President Rhee Syng-man's declaration of martial law.<sup>121</sup> As mentioned in the prologue, it appears that these tribunals ordered harsh sentences that ranged from one year, to five years, to fifteen years, to life imprisonment, to execution.<sup>122</sup>

The survivors gave strikingly similar accounts of the particulars. According to translated news

110) Seong Yeon-cheol, President Moon Calls For National Reconciliation Over Apr. 3 Jeju Uprising, HANKYOREH (Apr. 4, 2018), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/839134.html](http://english.hani.co.kr/arti/english_edition/e_national/839134.html).

111) Special Features on the Anniversary of the Jeju April 3rd Incident, HANKYOREH (last visited Nov. 5, 2018), <http://english.hani.co.kr/arti/jeju43> (collecting Jeju 4.3 Incident 70th anniversary articles on the history of Jeju 4.3, remembrance ceremonies, activism, and the retrials of eighteen formerly imprisoned Jeju 4.3 survivors).

112) Ko Chang-hoon, USA Government Responsibility in the 'peacetime' Jeju 4.3 Grand Tragedy, in JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT (1947-2016) (2016); Tae-Ung Baik, Social Healing Through Justice—Jeju 4.3 Case, in JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT (1947-2016) (2016); Kunihiko Yoshida, Reparations and Reconciliation in East Asia: Some Comparison of Jeju 4.3 Tragedy with Other Related Asian Reparations Cases, in JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT (1947-2016) (2016); Yamamoto, Pettit & Lee, *supra* note 4; HUR SANG-SOO, THE NEXUS: U.S. RESPONSIBILITY FOR CHEJU MASSACRES 1947-1954 (2018).

113) The survivors, all of them in their 80s and 90s, are Jeong Gi-seong, Kim Gyeong-in, Kim Sun-hwa, Kim Pyeong-guk, Park Nae-eun, Park Dong-su, Park Sun-seok, Bu Won-hyu, Yang Il-hwa, Yang Geun-bang, Oh Gye-chun, Oh Yeong-jong, Oh Hui-chun, Lim Chang-ui, Cho Byeong-tae, Han Shin-hwa, Hyeon Woo-ryong, and Hyeon Chang-yong. Kim Min-kyung, [Interview] Retrials to Begin for 18 Former Inmates Incarcerated After Jeju Uprising in 1948, HANKYOREH (Oct. 29, 2018) [http://english.hani.co.kr/arti/english\\_edition/e\\_national/867861.html](http://english.hani.co.kr/arti/english_edition/e_national/867861.html) [hereinafter Kim, Retrials to Begin].

114) See Yang Dong-yun, Kang Mi-gyeong & Kim Yeong-ran, Testimonies of Jeju 4.3: Regaining Honor (May 30, 2015 in Seoul), in JEJU 4.3 GRAND TRAGEDY DURING 'PEACETIME' KOREA: THE ASIA PACIFIC CONTEXT (1947-2016) (2016) [hereinafter Yang, Kang & Kim, Testimonies of Jeju 4.3].

115) See Kim, Former Prisoners Request Retrial, *supra* note 5.

116) TRANSLATED REPORT, *supra* note 14, at 595.

117) Yang, Kang & Kim, Testimonies of Jeju 4.3, *supra* note 114, at 61-62.

118) *Id.* at 64.

119) TRANSLATED REPORT, *supra* note 14, at 554.

120) Kim, Former Prisoners Request Retrial, *supra* note 5; Kim Min-kyung, Retrials to Be Held for Victims of Illegal Detention and Torture During Jeju Uprising, HANKYOREH (Sept. 8, 2018), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/860653.html](http://english.hani.co.kr/arti/english_edition/e_national/860653.html) [hereinafter Kim, Retrials to Be Held for Victims]. Eight of the survivors had been incarcerated at prisons in Jeonju, seven in Incheon, two in Daegu, and one in Mapo. *Id.*

121) Kim, Former Prisoners Request Retrial, *supra* note 5.

122) See *id.*; TRANSLATED REPORT, *supra* note 8, at 554.

reports, the survivors say that they were not questioned by a judge to confirm their identities. They were not represented by attorneys. They were not read the charges against them.<sup>123</sup> Instead, the survivors assert that they were summarily convicted and shipped off to prisons.<sup>124</sup> The survivors' petition provided an account of the kind of broad-scale arbitrary arrest, conviction and imprisonment prohibited by human rights dictates described earlier.<sup>125</sup> In 2015, petitioner-survivor Kim Pyeong-guk described her illusory trial and mass automatic conviction.

The trial was held in an office room in the police station. More than 100 people were driven into the room ... A banner was hung on the wall. It read, "General Court-Martial Article 77 Rebellion." The trial began, but nobody asked me what my charge was. We were so scared at the thought of being tried. Before long, the judge said something and rapped the gavel. And then we were sent back to the holding cells. Next day, we were ... tied together in a row. We boarded a ship and headed for Jeonju [prison].<sup>126</sup>

In July 2017, these eighteen survivors turned to the Jeju District Court for "judicial ruling[s] on acts of human rights infringement," seeking the justice denied to them and approximately 2,500 others seventy years ago.<sup>127</sup>

#### B. Coram Nobis Connections

Judge Jegal Chang of the Jeju District Court was initially unsure if he would allow the petitioners' cases to continue on the merits.<sup>128</sup> The judge asked for any international precedent for reopening the Jeju 4.3 survivors' convictions decades after their sentences were served. Professor Ko Chang-hoon recognized broad but significant parallels between reopening the Jeju 4.3 convictions and the United States coram nobis cases. Professor Ko translated and submitted to the court two chapters of Professor Yamamoto's book on the 1983 coram nobis reopening of Korematsu, Hirabayashi, and Yasui's WWII-era convictions for resisting the Japanese American mass incarceration.<sup>129</sup> Although it is unknown how much Judge Chang relied on these two chapters, he thereafter ordered retrials of the eighteen survivors' convictions. In this way, the Jeju 4.3 retrials and the Japanese American coram nobis cases were officially connected in the Jeju

District Court.

#### C. The Survivors' Preliminary Testimony

Over the course of five hearings on the motion for retrial, seventeen of the survivors testified about their experiences of imprisonment, torture and infringements of their human rights.<sup>130</sup> From her wheelchair, survivor Kim Pyeong-guk described how she was "beaten like a dog by the police" for three days.<sup>131</sup> After she was falsely convicted for "rebellion" and imprisoned for a year, Kim "chose to marry far away out of 'shame over having been in prison'" despite her innocence.<sup>132</sup> Kim also expressed remorse for being unable to clear her name sooner.

Had I done this trial when I was 40, 50, 60, I would have had freedom in my heart ... But at that time, I couldn't go around with the word 'prisoner' attached to me. Now, no matter how good the trial outcome is, I wonder if I have anything left but to wait for death. It feels so unfair.<sup>133</sup>

The survivors' testimony powerfully influenced Judge Jegal Chang of the Jeju District Court, who in September 2018 ordered retrials, writing that the survivors' "testimony was candid and natural, with no sense of embellishment or exaggeration."<sup>134</sup>

The survivors' compelling stories also deeply affected the attorneys. In an interview, Im Jae-seong, an attorney representing the eighteen survivors, admitted that he had initially "figured a retrial of these former inmates would be impractical, given they're in their 80s and 90s."<sup>135</sup> However, the survivors' determination to clear their names before they die changed his mind. Im emphasized that the lawsuit was not about seeking money, but about "restoring reputations," and that the survivors speaking openly about the injustice they suffered to the court "was itself a kind of healing."<sup>136</sup>

#### D. Judge Chang's Ruling on the Motion for Retrial

As previously mentioned, in September 2018, Judge Chang made a groundbreaking ruling. He decided to hold retrials for the eighteen survivors. According to news reports, a South Korea criminal court had never before retried a case in connection with Jeju 4.3.<sup>137</sup> The judge first acknowledged that "illegal detention and acts of violence were in violation [of] the Founding Constitution and the former Criminal Procedure Act at the time."<sup>138</sup>

123) Kim, Former Prisoners Request Retrial, *supra* note 5.

124) *Id.*

125) See Part B.II.

126) Yang, Kang & Kim, Testimonies of Jeju 4.3, *supra* note 114, at 70–71.

127) Ko Chang-hoon & Cho Yun-yi, Some Insights on 18 Jeju 4.3 Survivors' Retrial Cases in 2018 From Consequences of 1984 Korematsu Coram Nobis Case Decisions and Civil Liberties Act of 1988, 8 WOLRD ENVY AND ISLAND STUD. 31, 32 (2018).

128) Interview with Ko Chang-hoon, Professor, Jeju National University (Feb. 7, 2018).

129) *Id.*; see YAMAMOTO, CHON, IZUMI, KANG & WU, *supra* note 82.

130) Kim, Retrials to Begin, *supra* note 112. The eighteenth survivor, Jeong Gi-seong, is in a nursing home and was apparently unable to testify. *Id.*

131) Kim, Former Prisoners Request Retrial, *supra* note 5.

132) *Id.*

133) *Id.*

134) Kim, Retrials to Begin, *supra* note 112.

135) *Id.*

136) *Id.*

137) Kim, Retrials to Be Held for Victims, *supra* note 120.

138) *Id.*

After hearing the petitioners' claims that their convictions and imprisonment were based on grossly improper (if not abusive) trials, the judge observed that "[a]lmost no evidence [had] been found of arrest warrants for the ... petitioners."<sup>139</sup> In order to review the eighteen survivors' convictions, the Jeju District Court needed the military tribunals' original decisions.<sup>140</sup> But the military tribunals had not followed legal protocol and had not issued written decisions.<sup>141</sup> Before the trial, the only known documentary evidence attesting to the trials was an inmate registry listing the names, places of origin, court rulings, sentencing dates, and places of incarceration of over 2,530 people.<sup>142</sup> Some denied the registry's authenticity. But the court appeared to disregard that argument. Instead, the court determined that the registry combined with the petitioners' specific allegations was a strong indication that the prisoners were wrongfully convicted.<sup>143</sup> Finally, the court acknowledged the survivors' suffering, recognizing that "some [of the petitioners] were incarcerated [and] suffered harsh treatment such as physical abuse and torture during their question[ing]."<sup>144</sup> The judge concluded that sufficient, possibly compelling, grounds for retrial existed.

## CONCLUSION

### A. The Coram Nobis Cases and Jeju 4.3 Retrials

Although different in many ways, there are some broad parallels between the 2018 Jeju retrials and the 1980s U.S. coram nobis cases mentioned earlier. Both began in the violence of the 1940s. Both involved apparently grave legal system injustices—with devastating damage to the survivors and their families. Followed by decades of silence. Both involved continuing demands for justice, decades later, to heal persisting wounds and restore dignity to individuals and communities. Both eventually turned to the courts and the rule of law in democratic societies, invoking the language of civil and human rights. Both involved extraordinary proceedings that were integrated with larger campaigns for reparative justice.

It is important to clarify that we are not saying that the U.S. coram nobis cases can, or should, serve

as formal legal precedent for overturning the Jeju 4.3 survivors' convictions. The decisions of United States courts are not binding on the decisions of South Korea courts. And the legal systems differ in many ways, as do the historical circumstances.

Nevertheless, the U.S. coram nobis cases serve as one international example of courts recognizing a serious past injustice rooted in sweeping wrongful criminal convictions. They are an example of courts now—long after the fact—employing the concepts and language of civil and human rights to reexamine those convictions as part of a larger reparative justice initiative to foster comprehensive social healing. Extraordinary measures that are now broadly judged to be courts in a democracy doing the "right thing."<sup>145</sup>

### B. Civil and Human Rights and Reparative Justice

With all this in mind, we conclude by returning to our original focus—the significance of human rights claims for reparative justice—about the human right to freedom from torture, from arbitrary killing, from false arrest, conviction and imprisonment and from inhumane or degrading treatment or punishment. And, especially significant, the human right to an "effective remedy" for human rights abuses and to "full reparation for the injury (whether material or moral)." Recall that reparative justice entails words and actions which, "as far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would, in all probability, have existed if that act had not been committed."

Reparative justice speaks to the Jeju District Court's initial decision to order retrials, and it would likely encompass its ultimate invalidation of the wrongful 4.3 convictions. This, of course, is for Judge Chang to decide based on the law and compelling evidence. But the retrials appear to be a critical opportunity to take "next steps" toward the comprehensive and enduring 4.3 social healing through justice that President Moon called for in his 2018 commemorative speech.<sup>146</sup>

Regardless of the Jeju court's formal ruling on the merits of the 2018 retrials, next steps in the social healing process might include a presidential apology to each of the eighteen survivor-petitioners acknowledging the extent of the 4.3 injustice and their suffering—an apology similar to the 1990s U.S. presidential apology to each surviving Japanese American World War II

139) Id.

140) Kim Min-Kyung, Court Weighs Question of Granting Retrials for Those Imprisoned During 1948 Jeju Uprising, HANKYOREH (Mar. 25, 2018), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/837522.html](http://english.hani.co.kr/arti/english_edition/e_national/837522.html).

141) Id.

142) Kim, Retrials to Be Held for Victims, supra note 120.

143) Id.

144) Id.

145) Yamamoto, Friend, Foe or Something Else, supra note 106, at 227.

146) See Seong Yeon-cheol, President Moon Calls for National Reconciliation Over Apr. 3 Jeju Uprising, HANKYOREH (Apr. 4, 2018), <http://english.hani.co.kr/arti/englishedition/enational/839134.html>.

internee. That apology might reach out directly to the survivors and also extend to the 2,500 others summarily convicted and imprisoned (and executed) during the 4.3 tragedy. And it may well serve as the foundation for appropriate legislative action, including monetary redress, support for community economic capacity-building and for measures to prevent future mass convictions during times of distress. The significance of these kinds of apologies for survivors, communities and larger society is addressed in our companion essay in this journal publication, "Reconciliation Revisited Through An Official Apology for the Wrongful Jeju 4.3 Mass Convictions: A Key Next Step Toward Comprehensively and Enduringly Healing Persisting Wounds of Injustice."

Whatever the Jeju court ultimately decides, the survivor-petitioners' claims, voiced in the language and principles of human rights, may expand knowledge of the 4.3 injustice to broader international audiences-governments, scholars, journalists and human rights organizations in the United States and other democracies worldwide. These international audiences, in turn, may assist Jeju social healing proponents in broadly shaping what political and legal next steps are needed and politically possible. For the benefit of Jeju 4.3 survivors and their families, for all Jeju people, for South Korea society itself as a democracy. And for all international communities committed to justice.

## EPILOGUE

As this essay was going to press in December 2018, the Jeju District Court concluded the retrials of the eighteen Jeju 4.3 survivors. Over the course of four hearings, Judge Chang heard the survivors' further testimony and allowed the prosecution the opportunity to support renewed charges. On December 17, 2018, Judge Chang heard the defense and prosecution's closing arguments.

In his closing argument, prosecutor Jeong Gwang-byeong made an unusual request-rather than request a guilty verdict, he asked the court to dismiss the indictments against all eighteen defendants.<sup>147</sup>

The stories of the eighteen survivors seemed to have moved the prosecutor to confront the history and injustices of Jeju 4.3. It seemed that, over the

year Jeong had worked on the case, he had come to realize the personal and national importance of continued Jeju 4.3 social healing through justice. Jeong used his closing argument to deliver powerful words to the court, reflecting on how the retrials had changed his own views of the Jeju 4.3 tragedy and the need to rectify the legally-inflicted injustice.

As a trial prosecutor, I have heard about the defendants' experience throughout the trial and examined records and literature from the time, and this has forced me personally to give deep consideration to the historical significance of the April 3 incidents and its effects on all Jeju residents, of which I was previously unaware ... What I realized in that process was a different version of the truth from what I had known and learned before. I learned that this place Jeju is mixed with the tears and spirits of countless family members who have wept in unspeakable pain for decades since losing their parents and children[.]<sup>148</sup>

Jeong acknowledged the government's role in the retrials, explaining that the prosecutors had "determined that it was not right for the state to shift responsibility for the lack of remaining records onto the defendants." Jeong also spoke of how the retrials had taken on a layer of meaning beyond procedure, becoming a "process of preserving [the survivors'] experience and memories for history while duly guaranteeing them their right to a trial according to the Constitution."<sup>149</sup>

Jeong concluded by voicing his wish that the retrials would help heal the survivors' persisting wounds and lend to the broader effort of Jeju 4.3 justice:

For the past year, I have approached this trial in the sincere hope in sharing in some small way in the bitter suffering of these people, and in the suffering of history and the Korean nation, and to bring the truth of what happened then to light as much as possible.<sup>150</sup> In his closing argument, the survivors' attorney, Im Jae-song, asked for the defendants to "have their indictments dismissed or be found not guilty." Im emphasized that the survivors' sentences had been executed "in violation of the law, based on torture and illegal detention without any evidence whatsoever." Furthermore, the sentences had damagingly framed the survivors as "the enemy," adding to the survivors' persisting trauma and shame.<sup>151</sup>

In her final statement to the court, petitioner-

147) Kim Min-Kyong, Prosecutors Request Dismissal of Indictments Against Defendants Connected With Jeju Uprising, HANKYOREH (Dec. 18, 2018), [http://english.hani.co.kr/arti/english\\_edition/e\\_national/874894.html](http://english.hani.co.kr/arti/english_edition/e_national/874894.html).

148) Id.

149) Id.

150) Id.

151) Id.

survivor Kim Pyeong-guk asked Judge Chang to “help ensure for my grandchildren that there is no record stating that their grandmother has a criminal history and spent time in prison.” “The path we have traveled to this point has been a tremendously perilous and difficult [one],” petitioner-survivor Yang Geun-bang added. “What the 18 of us want is to be acquitted.”<sup>152</sup>

In a rare moment of history and law, the prosecution, defense, and victims of past injustice were united in their desire to see the court right a historic wrong on behalf of both individuals and society at large. This mutual recognition of past and continuing harms, their sources, and the shared goal of justice for Jeju and its people can serve as a solid foundation for future social healing.<sup>153</sup> Additionally, the prosecution’s acceptance of responsibility to act—to repair damage done to individuals and communities—committed all parties to a collective process of reconstruction and reparation.<sup>154</sup>

Judge Chang’s ultimate decision now has the potential to do for Jeju 4.3 survivors and Jeju residents what Judge Marilyn Hall Patel’s 1984 *Korematsu coram nobis* ruling did for the Japanese Americans incarcerated en masse during WWII.<sup>155</sup> Judge Patel’s ruling affirmed findings that the mass incarceration was the result of “race prejudice, war hysteria and a failure of political leadership.”<sup>156</sup> This refuted the previous mainstream narrative that Japanese Americans as a group were disloyal and that mass incarceration was a justified national security measure. Finding “manifest injustice,” Judge Patel vacated *Korematsu*’s decades-old conviction.<sup>157</sup> Other courts did the same for *Hirabayashi* and *Yasui*.<sup>158</sup> By vacating the internment resisters’ convictions, these courts by extension cleared the names of all who had been incarcerated en masse. The *coram nobis* cases also importantly laid the groundwork for further steps in the social healing process, including the passage of the Civil Liberties Act of 1988.<sup>159</sup>

If Judge Chang decides to dismiss the indictments, his decision could bolster South Korea’s national and international reputation as a

democracy committed to protecting civil and human rights.<sup>160</sup> Judge Chang’s ruling may also lift the shame from the eighteen petitioners and those similarly wrongfully imprisoned during Jeju 4.3.

Judge Chang is scheduled to make his final ruling on January 17, 2019. A salutary—and just—outcome would be the dismissal of the charges or acquittal on the merits, clearing the survivors’ criminal records and symbolically clearing the records of the 2,500 others wrongfully convicted and all victims of the Jeju 4.3 violence. This ruling would mark a next step forward in the Jeju 4.3 social healing process. The retrials have already succeeded in bringing many of the involved parties together, providing the survivors a platform to share their experiences and educating many in South Korea and beyond about the history of Jeju 4.3. Judge Chang’s ruling would be significant. But it would not mark the end of Jeju 4.3 social healing through justice. Rather, it would be a salient next step toward a more just future for the people of Jeju and for democracies everywhere committed to civil and human rights.

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152) *Id.*

153) See Yamamoto & Obrey, *supra* note 72, at 33. See Jonathan R. Cohen, *Coping With Lasting Social Injustice*, 13 WASH. & LEE J. CIV. RTS. AND SOC. JUST. 259, 253 (2007); M. Brinton Lykes and Marcie Mersky, *Reparations and Mental Health: Psychosocial Interventions Toward Healing, Human Agency, and Rethreading Social Realities*, in THE HANDBOOK OF REPARATIONS, 589 (Pablo de Greif ed., 2007).

154) ERIC YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT & RECONCILIATION IN POST-CIVIL RIGHTS AMERICA*, 153–71, 185–90 (2000).

155) *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) (granting *Korematsu*’s writ of *coram nobis* petition).

156) *Id.* at 1417.

157) *Id.*

158) *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987); *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985).

159) Civil Liberties Act of 1988, Pub. L. No. 100–383, 102 Stat. 903 (codified at 50 U.S.C. § 4211 (2012)).

160) See Yamamoto & Obrey, *supra* note 72, at 35.