

Scott S. Brinkmeyer



History All Over Again?

*Those who fail to learn from history are doomed to repeat it.*¹

I recently enjoyed the delightful experience of speaking at two different events celebrating two landmark Supreme Court decisions, both having anniversaries this year. The first event was held in the auditorium of the Michigan Historical Center in February, and marked the launch of a Michigan Government Television² curriculum project for middle and high school students entitled *Defining Moments: Frank Murphy, Fred Korematsu and the Internment of Japanese Americans during World War II*. The *Korematsu* case³ was decided December 18, 1944.

Many of you may recall that Fred Korematsu was a second generation Japanese American who worked as a welder in the San Francisco shipyards at the time of the Japanese attack on Pearl Harbor. He was one of approximately 112,000 Americans of Japanese descent who were subjected to forced internment during World War II. Following the issuance of Civilian Exclusion Order No. 344⁴ by the commanding general of the Western Command, U.S. Army, in May 1942, Japanese Americans, such as Mr. Korematsu, were ordered to leave their homes in California and to report to "assembly centers," a sanitized term for internment camps. Mr. Korematsu refused to willingly submit to internment and was convicted of a misdemeanor offense. The conviction was upheld by the majority of the Supreme Court⁵ essentially on the basis that the military order was constitutional in a time of war and the measures were justified on the basis of national security.⁶

Beyond its historical significance, the case also has a notable tie to Michigan lawyers. A very compelling dissenting opinion was written by Justice Frank Murphy, a truly distinguished lawyer-politician-jurist⁷ from Michigan. Acknowledging that "great respect and consideration" of the judgments of the military in time of war must be accorded, Justice Murphy nonetheless opined that such an ex-

clusion of all persons of Japanese ancestry should not be approved as it exceeded "the very brink of constitutional power' and falls into the ugly abyss of racism."⁸ He concluded that "racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life."⁹ "Murphy's Dissent" was recognized by the State Bar of Michigan as the 24th Michigan Legal Milestone¹⁰ and dedicated in his home town of Harbor Beach, Michigan, in August 1996.

In March I had the pleasure of speaking to a distinguished audience of West Michigan lawyers and local dignitaries at the Grand Rapids Art Museum¹¹ in the observance of the 50th anniversary of the Supreme Court decision in *Brown v Board of Education*.¹² In researching the history of this decision, I was reminded again of its monumental significance in the legal and social history of our country. You also may recall that, despite the ratification on December 18, 1865, of the 13th Amendment abolishing slavery at the conclusion of the Civil War, followed shortly by passage of the 14th Amendment¹³ in 1868, a profusion of state and federal court decisions ensued which largely eviscerated the intended effect of those Constitutional Amendments.¹⁴ Perhaps most notable of those cases was the U.S. Supreme Court's decision in *Plessy v Ferguson*,¹⁵ which established the "separate but equal," doctrine, holding that a Louisiana statute requiring separate railroad accommodations for black passengers did not violate the equal protection guarantee of the 14th Amendment, provided that the separate facilities were substantially equal.

The views expressed in the President's Page, as well as other expressions of opinions published in the *Bar Journal* from time to time, do not necessarily state or reflect the official position of the State Bar of Michigan, nor does their publication constitute an endorsement of the views expressed. They are the opinions of the authors and are intended not to end discussion, but to stimulate thought about significant issues affecting the legal profession, the making of laws, and the adjudication of disputes.

Largely by virtue of that decision, legally enforced segregation carried the day for more than half a century.

In abolishing the "separate but equal" doctrine as applied to public schools, *Brown v Board of Education* effectively concluded that segregation denies equality and signaled a new era in judicial enforcement of civil rights. Perhaps no single judicial decision in our history has had such a profound impact upon American society. The ruling heralded an expansive attitude of the courts toward the application of the equal protection clause and required that lower courts were obligated to ensure that African Americans were to be admitted to schools on a non-discriminatory basis "with all deliberate speed." This established a new remedial role for the judiciary and began a movement toward a multiracial democratic society, which ultimately involved every branch of government.¹⁶ A key figure in accomplishing the *Brown* victory for minorities was Thurgood Marshall, who ultimately became the first African-American U.S. Solicitor General, and later the 96th and first African-American Justice of the Supreme Court.

The anniversary of the *Brown* decision coincides with another notable milestone with a Michigan connection. This past Bar year former Detroit Mayor, Michigan Supreme Court Justice, and State Bar President Dennis Archer became the first African-American president in the 125-year history of the American Bar Association. One of the key points of his presidential agenda was the celebration of the 50th anniversary of the *Brown* decision. I felt it appropriate to draw attention to these milestones, not only because of their critical significance in the history of American law, but also because they underscore the vital role of our profession in the development of that history. It is equally important to recognize the extraordinary contributions of lawyers of color and the continuing importance of diversity in our profession. In my judgment, our commitment to that principle should be unwavering.

I found it also noteworthy that the 60th and 50th anniversaries, respectively, of these decisions fall during a time period in which remarkably similar issues have or will come before the U.S. Supreme Court. The rulings in connection with the University of Michigan and affirmative action come to mind, as does the internment of prisoners as a result of the war in Afghanistan and the threat of terrorism to our citizens and our country. I cannot help but wonder how history will judge the decisions made and to be made by our highest court in connection with these issues. I fully appreciate that there are disparate, impassioned and well articulated arguments on both sides of these issues. Nonetheless, members of our profession will continue to be inextricably involved throughout the process. Regardless of one's personal viewpoint, that involvement alone is both remarkable and gratifying. ♦

speaker was Steve Drew, a Grand Rapids attorney who had also served as the first African American President of the Grand Rapids Bar Association. Steve delivered an inspiring address containing his personal observations about the impact of *Brown v Board of Education*.

12. 347 US 483 (1954).
13. In addition to expanding the due process requirements accorded in the 5th Amendment of the Bill of Rights, this Amendment precluded states

from denying any persons "the equal protection of the laws." Amendment XIV, Section 1.

14. Additionally, on March 30, 1870, the 15th Amendment was ratified guaranteeing the right to vote to all citizens, regardless of race, color or previous condition of servitude.
15. 163 US 537 (1896).
16. Congress took increasingly tougher positions in the Civil Rights Acts of 1957, 1960, 1964 and 1968, and the Voting Rights Act of 1965.

FOOTNOTES

1. Paraphrased from the letters of literary philosopher George Santayana.
2. "MGTV," a non-profit 501(c)3, is a public affairs initiative of Michigan's cable television industry.
3. 323 US 214 (1944).
4. This Order directed the exclusion after May 9, 1942, of all persons of Japanese ancestry from a specifically described West Coast military area. It was issued pursuant to the authority of Executive Order No. 9066 and Congress' Act of March 21, 1942, as a protection against espionage and sabotage.
5. The opinion written by Justice Hugo Black was concurred in by Justices Frankfurter (concurring opinion), Douglas, Reed, Stone and Rutledge. Justices Roberts, Jackson and Murphy dissented.
6. Importantly, the court recognized that no question was raised as to Mr. Korematsu's loyalty to the United States. Furthermore, the majority also noted that "all legal restrictions which curtailed the civil rights of a single racial group are immediately suspect." 323 US at 216.
7. Frank Murphy's (1890-1949) public service to Michigan and the nation was extraordinary. During his exemplary career, Justice Murphy served as a judge, law professor, Mayor of Detroit, Governor of Michigan, Governor-General of the Philippines, U.S. Attorney General and Justice of the U.S. Supreme Court.
8. 323 US at 233.
9. 323 US at 242.
10. There are now 28 Michigan Legal Milestones that have been dedicated in various locations throughout Michigan and celebrate notable persons and events important in Michigan legal history.
11. The event was coordinated with an exhibition of the artwork of Americans of color. The keynote