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REMEMBER KOREMATSU?

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You might be familiar with *Korematsu v. United States* (1944) 323 U.S. 214, as the Supreme Court case often cited for establishing the “strict scrutiny” standard of judicial review. Depending on where you went to law school, you might also have learned how, in that case, the Court justified the forcible removal of persons of Japanese ancestry from the west coast during World War II as a “military necessity,” and how, in the 80 years since it was decided, that case has come to be ranked among the worst Supreme Court decisions in history.

What you might not know is that the *Korematsu* court did not actually apply any judicial review to the Roosevelt administration’s wartime actions. Moreover, when given the opportunity to repudiate *Korematsu*, the Roberts court in its 2018 *Trump v. Hawaii* (2018) 585 U.S. 667, decision repeated what the *Korematsu* court did in saying one thing but doing another. After declaring that *Korematsu* was “overruled,” the Court then doubled down on the *Korematsu* logic and result, affirming broad judicial deference to the executive branch when it asserts the protection of national security interests without justification and even when those actions have discriminatory motivations and impact.

Confused? No wonder. There’s more to this convoluted *Korematsu* legacy than what gets described, often erroneously, in sound bites and blog posts, and there’s more to the individual whose

name has come to be associated with this difficult history.

On the morning of Sunday, December 7, 1941, 22-year-old Fred Korematsu was relaxing in the Oakland hills with his girlfriend, listening to music on the car radio. After hearing the abrupt radio announcement that Japan had attacked Pearl Harbor, Fred hurried home to his family’s flower nursery in San Leandro. His mother Kotsui was crying; his father Kakusaburo was disgusted. They and other immigrants from Japan had already experienced decades of racial prejudice, the result of politicians promoting anti-immigrant sentiments, workers and businesses fearing economic competition, and tensions relating to Japan’s rise as a military power. The Korematsus now braced for increased hatred against anyone with a Japanese face.

It didn’t take long for all persons of Japanese ancestry to be branded as potential spies and saboteurs. The political firestorm snowballed, and just ten weeks after the December 7 Pearl Harbor attack, President Franklin D. Roosevelt issued Executive Order 9066 on February 19, 1942 (<<https://catalog.archives.gov/id/5730250>>). On the basis of “military necessity,” the order authorized the U.S. military to forcibly remove all persons of Japanese ancestry from the west coast of Washington, Oregon, and California, and parts of Arizona. Congress made it a misdemeanor to not comply with the military orders.

Without any evidence of disloyalty or charges brought against them, and on short notice, they were placed under curfew and were then required to report for transportation under military guard to unknown destinations. Fred's immigrant parents, known as the "Issei" generation, were legally precluded from becoming naturalized citizens. Now the Issei were not just aliens, but "enemy aliens." It made no matter that Fred and his brothers were born in the United States; their generation of American citizens, known as "Nisei," constituted two-thirds of those who were subject to the military exclusion orders. To avoid recognizing the Nisei's birthright citizenship, the government referred to them in the military orders with the invented term of "non-aliens."

Under Civilian Exclusion Order No. 34 issued by the U.S. Army Western Defense Command on May 3, 1942, the Korematsus and other Japanese families living in southern Alameda County were banned from their homes and livelihoods as of noon, May 9. As they could only take with them what they could carry, they had to close businesses under duress, sell what they could to scavengers, and walk away from the fruits of their life efforts. Although the economic devastation has never been accurately tallied, families like the Korematsus lost everything.

When Fred's parents and two of his brothers reported for departure just five days after receiving notice of the exclusion order, they traveled under gunpoint and unsheathed bayonets to the Tanforan Racetrack in San Bruno. There, at the Santa Anita Racetrack in Arcadia, and on fairgrounds and abandoned Civilian Conservation Corps campgrounds throughout the west coast, a new branch of the Army's Western Defense Command had hurriedly fashioned so-called "assembly centers." At the same time, the government under the just-created War Relocation Authority (WRA) was scrambling to construct new long-term detention facilities in desolate inland locations. Ultimately more than 125,000 persons of Japanese ancestry were incarcerated in the temporary assembly centers, the WRA detention centers which became known as "the camps," and other detention facilities under the jurisdiction of the Department of Justice and the War Department.

As they arrived in the assembly centers, the Korematsus and others were euphemistically referred to as "evacuees" (they had not been removed *from* danger; they were considered *to be* the danger). They were horrified to realize that they were, in fact,

prisoners. For an unknown amount of time, they were going to be living behind barbed wire, with soldiers pointing guns at them from guard towers, search lights sweeping the grounds at night, officials conducting spot inspections of their barracks, and having to line up for twice-daily roll calls to make sure no one had escaped.

Fred was not with his family in the Tanforan Assembly Center because he had not wanted to leave his Italian-American girlfriend. Although he was breaking the law by staying behind, he didn't feel he was doing anything wrong. As an American and believer in the Constitution, he felt he had the right to be free. Nevertheless, Fred was arrested on May 30, 1942, when a police officer spotted him and his girlfriend walking down a San Leandro Street. After he was arrested, Fred and his girlfriend broke up, and he never saw her again.

While in jail, Fred was approached by an ACLU attorney who proposed that Fred be a test case for challenging the constitutionality of the exclusion orders. Two others were also challenging some aspect of the government's actions: Minoru Yasui of Oregon, arrested for failing to comply with the imposed curfew, and Gordon Hirabayashi of Seattle, arrested for failing to comply with the curfew and for failing to report to an assembly center. Although they did not know one another and at the time they were unaware of one another's actions, their names would become entwined in the legal journey ahead. All three were convicted of criminal charges and appealed their convictions to the Court of Appeals for the Ninth Circuit.

After some machinations with the Ninth Circuit, the Supreme Court agreed to hear the *Yasui* and *Hirabayashi* cases on May 10 and 11, 1943, and issued opinions in those cases on June 21, 1943: *Hirabayashi v. United States* (1943) 320 U.S. 81; *Yasui v. United States* (1943) 320 U.S. 115. In both cases, the Supreme Court unanimously upheld the criminal convictions. The Supreme Court sent Fred's case back to the Ninth Circuit on a procedural matter and heard the *Korematsu* case on its merits on October 11, 1944.

On Monday, December 18, 1944, the Supreme Court, by a vote of six to three, affirmed Fred's conviction and upheld the exclusion orders as a constitutional exercise of wartime executive power. (*Korematsu*, *supra*, 323 U.S. at p. 216.) In his majority opinion, Justice Hugo Black set forth words that have since become familiar in constitutional law: "all legal

restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny.” (*Ibid.*) Ironically, Justice Black failed to apply “rigid,” “strict,” or any scrutiny whatsoever to the justification for the exclusion orders, accepting without question the judgment of military leaders as to what constituted “necessary” actions to protect the country against espionage.

Justice Frank Murphy’s disagreement with the majority opinion was so deep that he used the word “racism” in his dissent, the first time that word appeared in a Supreme Court decision: “Such exclusion goes over ‘the very brink of constitutional power’ and falls into the ugly abyss of racism. [¶] ... [¶] I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.” (*Korematsu, supra*, 323 U.S. at pp. 233-242).

That day the Court also announced its unanimous ruling in *Ex parte Mitsuye Endo* (1944) 323 U.S. 283, brought by American-born Mitsuye Endo on a habeas corpus petition. The Court ruled that Endo was entitled to an unconditional release by the WRA, meaning the government could not continue to detain loyal American citizens against their will.

Tipped off to how the Court was going to rule in *Endo* and to timing of that case’s announcement, the White House and the War Department colluded to preempt the Court’s *Endo* announcement. On Sunday, December 17, 1944, the Western Defense Command issued a proclamation that the west coast exclusion orders would be lifted effective midnight January 2, 1945. Just as the Roosevelt administration had intended, the press paid more attention to the War Department’s unusual Sunday announcement than to the Supreme Court’s *Korematsu* and *Endo* announcements the following day. With this orchestration, the Court allowed the executive branch

to retain its control over the public’s perception of its moral leadership, and the executive branch avoided the appearance that it was being told what to do by the judiciary. In any event, Fred and the other incarcerated could finally go home.

From that point on, Fred had to live with the ramifications of having a criminal record, which compromised his employment possibilities. He returned to the San Francisco Bay area with his family in late 1949, keeping his wartime experience and criminal record to himself. When his daughter Karen heard about a Supreme Court case with the name of *Korematsu* in a high school class, she was shocked to learn that it involved her father.

Having grown weary of researchers and others who wanted to interview him about his Supreme Court case, Fred was wary when a professor by the name of Peter Irons phoned him on January 12, 1982. Irons wanted to explain that he had news. He and another researcher, Aiko Herzig-Yoshinaga, had uncovered thousands of wartime documents in the National Archives proving that government attorneys had withheld, altered, and destroyed evidence that showed the Japanese Americans in wartime were loyal. They saw evidence that the claims of the Issei and Nisei being security threats were baseless and that the “military necessity” of Executive Order 9066 was a falsehood. Significantly for the *Yasui*, *Hirabayashi*, and *Korematsu* cases, Irons and Herzig-Yoshinaga also found evidence that the government had lied to the Supreme Court in its briefs and oral arguments and had engineered a false and fraudulent record.

With the support of the three original litigants, Irons assembled teams of passionate and dedicated volunteers, one team in each of the three cities of the federal district courts where the original wartime criminal cases had taken place: San Francisco for Fred, Seattle for Hirabayashi, and Portland for Yasui. In their respective jurisdictions, the teams filed coordinated petitions for a writ of error coram nobis. Irons had identified this arcane procedure in which a person who has been convicted of a crime and who has already served a sentence can petition to have the case reopened and to have the conviction set aside if “manifest injustice” can be proven. In such an action, the normal statute of limitations does not apply.

For the most part, the coram nobis team volunteer members were recent law school graduates. Many were Japanese Americans of the third, “Sansei,”

generation whose grandparents and parents had been incarcerated. The teams also had an unusually strong component of females at a time when few women of color were practicing as attorneys.

Over a five-year period, the criminal convictions of all three Supreme Court litigants were vacated. As district court decisions, the criminal vacations did not reverse the wartime Supreme Court decisions. Nevertheless, Judge Marilyn Patel remarked from the bench in the *Korematsu* coram nobis hearing: “*Korematsu* remains on the pages of our legal and political history. As a legal precedent it is now recognized as having very limited application. As historical precedent it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees. It stands as a caution that in times of international hostility our institutions, legislative, executive, and judicial, must be prepared to exercise the authority to protect all citizens from the petty fears and prejudices that are so easily aroused.” (*Korematsu v. United States* (N.D.Cal. 1984) 584 F.Supp. 1406, 1420.)

When interviewed after the ruling, Fred said, “I had to do some real deep thinking in order to reopen this case again.... I am very happy I did, because this is important not only for Japanese American citizens but for all Americans who might get involved in similar conditions.” (*Conviction of Man Who Evaded WWII Internment Is Overturned*, L.A. Times (Nov. 11, 1983).)

The coram nobis decisions generated widespread publicity, achieving the teams’ goal to educate the public about the unjustness of the wartime forced removal and incarceration of persons of Japanese ancestry, including U.S. citizens. The coram nobis results also provided critically important impetus to the legislative initiatives to redress the government’s wartime actions. On August 10, 1988, President Ronald Reagan signed into law the Civil Liberties Act of 1988, which provided a formal apology and a token \$20,000 payment to each surviving incarcerated.

On January 15, 1998, President Bill Clinton presented Fred with the Presidential Medal of Freedom, our nation’s highest civilian award. During the White House ceremony, President Clinton described the significance of Fred’s role as a civil rights leader: “In the long history of our country’s constant search for justice, some names of ordinary citizens stand for millions of souls.... Plessy, Brown, Parks.... To that distinguished list, today we add the name of Fred Korematsu.” Until

his death on March 30, 2005, Fred continued to speak about the dangers that led to the Japanese American wartime incarceration and, especially after 9/11, to call out instances when he considered our government’s national security measures to be too extreme and in violation of civil liberties.

Fast forward to September 2017, when President Donald Trump began issuing a series of executive orders restricting travel to the United States from mainly Muslim-majority countries. Parallels were raised between the president’s rhetoric and executive actions and the context and actions of the government’s World War II incarceration of Japanese Americans. In World War II, the government successfully invoked racist stereotypes to allege that all persons of Japanese descent could have disloyal motivations and therefore all persons of that descent should be imprisoned. In the post 9/11 environment, the government was now justifying a ban on all persons from certain countries with Muslim-majority populations from entering the United States on the basis that any of them could be possible terrorists.

The state of Hawaii’s challenge to the second of the three executive orders ended up before the Roberts Supreme Court in *Trump v. Hawaii*. The members of 1980’s coram nobis teams regrouped and worked with the Fred T. Korematsu Center for Law and Equality at the Seattle University School of Law to file an amicus brief on behalf of Karen Korematsu, the daughter of Fred Korematsu; Holly Yasui, the daughter of Minoru Yasui; and Jay Hirabayashi, the son of Gordon Hirabayashi. In their amicus brief, the descendants of the wartime Supreme Court petitioners reminded the Court of the importance of its role in checking executive power when it asserts claims of “military necessity” or “national security.” National bar associations of color and numerous prominent civil rights organizations also filed amicus briefs.

On April 25, 2018, attorney Neal Katyal argued before the Supreme Court that the Trump administration had exceeded its constitutional authority in issuing the travel bans. Katyal’s perspective was unique. As Acting Solicitor General in the Obama administration, he issued a rare “confession of error,” acknowledging the Solicitor General Office’s mistakes in its handling of the *Yasui*, *Hirabayashi*, and *Korematsu* cases and in defending the government’s actions in the incarceration <<https://obamawhitehouse.archives.gov/blog/2011/05/20/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cas>>).

In its five-to-four opinion issued on June 26, 2018, the Roberts court upheld the Trump administration's third version of the travel ban, maintaining broad deference to executive power to restrict immigration on the premise of protecting national security. (*Trump v. Hawaii*, *supra*, 585 U.S. 667.) In dicta in his majority opinion, Chief Justice John Roberts sought to distinguish the case at hand from *Korematsu*, referring to that case as having been overruled "in the court of history." (*Id.* at p. 710.)

But Justice Sonia Sotomayor pointed out in her scathing dissenting opinion that their court in 2018 was actually reaffirming the rationale of the court in 1944: "By blindly accepting the Government's misguided invitation to sanction a discriminatory policy motivated by animosity toward a disfavored group, all in the name of a superficial claim of national security, the Court redeploys the same dangerous logic underlying *Korematsu* and merely replaces one 'gravely wrong' decision with another." (*Trump v. Hawaii*, *supra*, 585 U.S. at p. 754 (dis. opn. of Sotomayor, J.).)

Subsequent to the *Trump v. Hawaii* decision, Katyal wrote in *The Yale Law Journal*: "I am not someone who generally believes courts should be in the business of second-guessing national security decisions. But when those decisions are the product of animus, and when they are not fully vetted by the interagency process and the national security professionals trained to make such decisions, some judicial scrutiny is not only appropriate — it is necessary. [¶] ... [¶] And yet when given the chance to memorialize *Korematsu*'s lessons, the Court instead made almost every mistake in *Korematsu*'s playbook — it accepted the government's arguments at face value, deferred to the executive branch without ensuring that deference was warranted...." (Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu* (Jan. 30, 2019) 128 *Yale L.J.* 641, 652, 656, fns. omitted.)

In his 1944 *Korematsu* dissent, Justice Robert Jackson warned that that decision "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." (*Korematsu*, *supra*, 323 U.S. at p. 246.) Despite Justice Roberts's acknowledgement that "*Korematsu* was gravely wrong the day it was decided ... and ... has 'no place in law under the Constitution,'" *Trump v. Hawaii* in effect reloaded the *Korematsu* weapon. In the wake of *Trump v. Hawaii*, Karen Korematsu felt that her father would have been upset. She said, "We pointed to our fathers' cases as an urgent warning against executive power run amok." (*Korematsu*, *How the Supreme Court Replaced One Injustice with Another*, *N.Y. Times* (June 27, 2018) Opn. col.)

As soon as guns and bayonets were pointed at them, the west coast Issei and Nisei were powerless to change the political dynamic. Too few people spoke up for them when they couldn't speak for themselves. The real lesson of the *Korematsu* legacy should be that when cases come before the Supreme Court that impinge upon the civil liberties of a marginalized group, the judicial branch needs to hold the executive branch accountable under the Constitution, even when — especially when — national security is the concern. Those are the cases in which the protection of the civil liberties of marginalized populations is needed the most. The *Korematsu* case should be remembered for this; Fred's name deserves nothing less.

Susan H. Kamei was a volunteer attorney in the redress campaign. She is the author of When Can We Go Back to America: Voices of Japanese American Incarceration during World War II (Simon & Schuster 2021) and is an adjunct professor of history at the University of Southern California.

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