

The Legacy of Korematsu

A Story of Confinement and Vindication, As Told through Archival Documents

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In February 1942, President Franklin Roosevelt issued Executive Order No. 9066 authorizing the exclusion of certain citizens from the west coast of the United States. That order began a cascade of other measures that culminated in the displacement and internment of approximately 120,000 Japanese Americans and people of Japanese ancestry.¹ Fred Korematsu, a native-born citizen of the United States and resident of California challenged the legality of the order in a series of cases and appeals that eventually ascended to the US Supreme Court. In the culmination of those disputes, *Korematsu v. United States* (hereinafter “*Korematsu I*”), the Supreme Court upheld his conviction.²

This decision is widely condemned and comprises a mere handful of decisions considered by scholars to be so flawed that they are “anti-canon.”³ Justice Stephen Breyer has remarked that the case is often included among the three worst decisions ever issued by the Court and that it is “so thoroughly discredited that it is hard to conceive of any future Court referring to it favorably or relying on it.”⁴

This writing encompasses an exploration of research and source documents to give insight into the case and its plaintiff, Fred Korematsu, as well as the roles other branches of our tripartite government played in the outcome. The source documents tell a story of confinement and vindication that developed over a period of nearly forty years, and still has relevance to the present day. This story concludes by considering the resolution and reconciliation that may have existed for Korematsu, and contemplates an incident where substantial consideration is given to the providence of a single memorandum and ensuing footnote which was carefully preserved as part of the historical record. As the conclusion will demonstrate, archivists and information managers played a legitimate and significant role in preserving and protecting the documents that advanced this story, its outcome, and, to a degree, the civil liberties of us all.

Fred Korematsu

Fred Korematsu was a first-generation American, or “Nisei,” born in 1919 to Japanese immigrants. His family ran a flower nursery and Fred and his brothers worked in the family business from a young age. In June of 1941, as tensions rose between the United States and Japan, Korematsu attempted to serve in the US Army but was not permitted to enlist.⁵ When Executive Order 9066 was issued on February 19, 1942, Korematsu sought to avoid exclusion and internment by going into hiding, even having surgery on his eyelids to make himself appear more Caucasian.⁶ His attempts were unsuccessful, and he was arrested in May 1942.

Executive Actions

Executive Order No. 9066, promulgated by the president, authorized the secretary of war “to prescribe military areas in such places . . . , from which any or all persons may be excluded, . . . subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion.”⁷ On March 2, 1942, the “military areas” contemplated by the Executive Order were established by General DeWitt by Public Proclamation No. 1. The proclamation described the military areas and forewarned those affected, including those of Japanese ancestry, that they would “by subsequent proclamation be excluded from Military Area No. 1.” Military Area No. 1 was defined with specificity in the proclamation, but essentially encompassed the entire west coast of the United States, running along the coastlines of California, Oregon, and Washington and stretching inland from the Pacific Ocean approximately one hundred miles.

The proclamation also advised that people of Japanese ancestry would not be excluded from, nor face “prohibition or regulation or restriction” within, Military Area No. 2, which encompassed areas further inland. Korematsu himself

considered moving to Arizona, but would not leave when he could not convince his girlfriend to go with him.⁸

Executive Order No. 9102 soon followed, establishing the War Relocation Authority and tasking it with effectuating “a program for the removal [of persons designated in Executive Order 9066] and for their relocation, maintenance and supervision.” The window for voluntary evacuation closed abruptly a few days later, and those who had not relocated were prohibited from leaving and were soon ordered to report to relocation centers.

Fred Korematsu lived in Alameda County, California, and was required to report to a “civil control station” by Civilian Exclusion Order No. 34.⁹ After he was discovered, Korematsu was held temporarily at Tanforan Assembly Center, a racetrack where people were housed in former horse stables, before being moved to the Central Utah War Relocation Center in Topaz, Utah.¹⁰

Congressional Action

Even before the president issued Executive Order 9066, Congress had been discussing proposals to exclude or imprison people of Japanese ancestry within the United States. On February 13, 1942, Senator Stewart introduced Senate Bill S. 2293, which sought the incarceration of all Japanese people within the country, stating, “the time has arrived when we should deal sternly with the Japanese in this country.”¹¹ On February 18, 1942, Senator Rankin referred to the ongoing war in the Pacific as a “race war” and said that he supported confining “every Japanese in America” to a concentration camp before exiling them altogether.¹² The president bypassed Congress, and Executive Order 9066 followed the next day.

However, the military and the President turned to Congress a few weeks later to legislate criminal penalties for attempts to circumvent Executive Order 9066. In the wake of the Pearl Harbor attacks, Congress eagerly complied. On March 19, 1942, both chambers passed companion bills with little meaningful debate.¹³ Public Law 77-503 was signed into law on March 21, 1942 and made it a crime to violate the restrictions imposed by the president or a designated military commander.¹⁴

Judicial Action

After his arrest for the recently engendered crime of not evacuating or reporting for internment, Fred Korematsu was convicted and sentenced to five years of probation. He brought a legal challenge with the help of the ACLU and appealed his conviction to the Ninth Circuit.

In its ruling on Korematsu’s appeal of his conviction, the Ninth Circuit relied upon the Supreme Court’s recent precedent in *Hirabayashi v. United States*, which had upheld curfews

applied to those of Japanese ancestry.¹⁵ The Ninth Circuit issued their opinion in *Toyosaburo Korematsu v. United States* stating that “under the Constitution the government of the United States, in prosecuting a war, has power to do all that is necessary to the successful prosecution of a war although the exercise of those powers temporarily infringe some of the inherent rights and liberties of individual citizens.”¹⁶

This holding in the Ninth Circuit set the stage for an appeal to the Supreme Court. In 1944, and as previously discussed, the Supreme Court upheld Korematsu’s conviction in a decision referred to as “legalization of racism.”¹⁷ Writing for the majority, Justice Black stated, “The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion.”¹⁸

At least in part, the Court relied on General DeWitt’s *Final Report: Japanese Evacuation from the West Coast* (hereinafter “*Final Report*”), which outlined DeWitt’s arguments in favor and in defense of internment.¹⁹ DeWitt’s *Final Report* encompassed the thrust of his argument that the internment of people of Japanese ancestry was required by military necessity. DeWitt’s *Final Report* contained accounts of surreptitious signaling and contraband,²⁰ and it maintained that the Japanese population was “ideally situated with reference to points of strategic importance, to carry into execution a tremendous program of sabotage on a mass scale.”²¹

The government lawyers who entered DeWitt’s report before the Court were not convinced as to its conclusions or support. In their brief, they sought to distance themselves from the report, stating that they relied on it only for “statistics and other details.”²² An internal memorandum, which gave rise to that footnote, stated that the Justice Department had “substantially incontrovertible evidence that most important statements of fact advanced by General DeWitt . . . were incorrect, and furthermore that General DeWitt had cause to know, and in all probability did know, that they were incorrect at the time he embodied them in his final report.”²³ This revealing memorandum, maintained in the record, established that the government lawyers charged with defending the government had evidence that the underlying imputations that justified internment were false. Except for the obscure footnote, this information would not be revealed to the Court.

On the same day that the Court issued its ruling upholding the conviction of Korematsu for violating the exclusion order, the Court released its opinion in *Ex parte Endo*, holding that continued detention of loyal citizens by the War Relocation Authority was not permissible.²⁴ But, by the time the Court issued its opinion, the direction of the war had already turned in favor of the Allied forces. The day before the Court issued

its opinions, Executive Order 9066 and the related orders and proclamations were rescinded in Public Proclamation No. 21, effectively initiating the unwinding of internment.²⁵

Commission on Wartime Relocation and Internment of Civilians

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians (CWRIC) to conduct an official study of Executive Order 9066. In 1983, the CWRIC issued their report *Personal Justice Denied* after twenty days of public hearings. The Commission reviewed and considered countless documents in the archival record, including the aforementioned memoranda and footnotes entered before the Supreme Court. In their report, the Commission concluded that the internment of Japanese Americans was not justified by military requirements or fear of sabotage, but instead was the result of “race prejudice, war hysteria and a failure of political leadership.”²⁶ The Commission recommended monetary reparations and a public apology to those interned.

Civil Liberties Act of 1988

The “Civil Liberties Act of 1988” acknowledged “the fundamental injustice of the evacuation, relocation, and internment,” apologized and sought to “make restitution.”²⁷ Signing the bill into law, president Ronald Reagan recognized that the internment was “based solely on race” and referred to it as a “grave wrong” and a “mistake.”²⁸

Vindication for Fred Korematsu

The investigation of the CWRIC revived Korematsu’s case in 1983. Korematsu entreated the US District Court of Northern California to correct the error it made nearly forty years prior. Korematsu’s attorneys alleged that officials in the War Department had destroyed, misrepresented, and suppressed evidence. Further, Korematsu offered evidence that attorneys representing the government failed to notify the Supreme Court of the falsity of the information contained within the *Final Report*.

The court granted Korematsu’s petition to overturn his conviction in *Korematsu v. United States* (hereinafter “*Korematsu II*”) stating that “the court is not powerless to correct its own records where a fraud has been worked upon it or where manifest injustice has been done.”²⁹

The Court took notice of the findings of the CWRIC, including their conclusion that “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.”³⁰ The court also found “that the government knowingly withheld information from the courts,”³¹ and noted that “the record is replete with

protestations of various Justice Department officials that the government had the obligation to advise the courts of the contrary facts and opinions.”³²

On January 15, 1998, the birthday of Dr. Martin Luther King, Jr., President Clinton awarded Fred Korematsu the Presidential Medal of Freedom, the highest civilian honor.

Justice Preserved

The role that archivists and information professionals played in Korematsu’s eventual reprieve cannot be overstated. Almost forty years had passed from the time that internment was ordered to the time that the CWRIC was established to scrutinize its formulation. Yet, even decades later, the CWRIC found that information relevant to their inquiry, such as the aforementioned internal memorandum, had been skillfully preserved. The archival system had functioned according to its intent, thwarting efforts to circumvent preservation, including intentional destruction of documents.³³ Justice and vindication for Korematsu was preserved as effectively as the documents upon which he relied in his appeal.

The Continued Legacy of *Korematsu v. United States*

Even though Korematsu was granted his writ of error and achieved some level of amnesty, the government did not appeal the ruling and the matter did not rise through the appellate ranks to be considered again by the Supreme Court. Though Korematsu’s conviction had been overturned in the lower court, the Supreme Court ruling still stands.

In his stinging dissent in *Korematsu I*, Justice Jackson warned that the holding of the court in *Korematsu* had effectively validated the principle of racial discrimination in criminal procedure, forewarning that “the principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”³⁴ Indeed, the claim of military necessity was invoked after the terror attacks of September 11, 2001. Korematsu, himself, filed amicus briefs in support of detainees held at Guantanamo Bay, drawing parallels between his own internment and their prolonged detention.³⁵ More recently, journalists have seen concordance in the treatment of refugees and Muslims in the United States.³⁶

Though the principles that buttressed internment may remain, Judge Marilyn Hall Patel offered these words in her ruling: “As historical precedent [*Korematsu I*] stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees.”³⁶ Doubtless, archivists, government documents librarians, and other information professionals embody

such vigilance, protecting and defending our civil liberties and constitutional guarantees by preserving the documents which underpin them all.

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Notes

1. Peter Irons, *Justice at War* (New York: Oxford University Press, 1983), 76.
2. *Korematsu v. United States*, 323 U.S. 214 (1944).
3. Akhil Reed Amar, "Symposium: Supreme Mistakes: Plessy v. Ferguson and the Anti-canon," *Pepperdine Law Review* 39 (2011): 39; Jamal Greene, "The Anticanon," *Harvard Law Review* 125 (2011): 379; Matt Ford, "The Return of Korematsu," *Atlantic*, November 19, 2015.
4. Stephen Breyer, *The Court and the World: American Law and the New Global Realities* (New York: Knopf, 2015), 31; Stephen Breyer, *Making Our Democracy Work: A Judge's View* (New York: Knopf, 2010), 193.
5. Scholarship differs as to why he was prohibited from enlisting. Howes, perhaps relying on Chin, reports that he was turned away because of his Japanese ancestry. Irons reports that he was turned away for medical reasons. See Kelly King Howes, *World War II: Biographies* (Detroit: UXL, 1993), 130; Stephen A. Chin, *When Justice Failed: The Fred Korematsu Story* (New York: Dialogue Systems, 1993); and Irons, *Justice at War*, 94.
6. Howes, *World War II*, 131; Donna K Nagata, *Legacy of Injustice: Exploring the Cross-Generational Impact of the Japanese American Internment* (New York: Plenum, 1993), 24.
7. Executive Order No. 9066: Authorizing the Secretary of War to Prescribe Military Areas, 7 Fed. Reg. 1407.
8. Howes, *World War II*, 131.
9. Civilian Exclusion Order No. 34: Persons of Japanese Ancestry excluded from Restricted Area—Alameda County, California, 7 Fed. Reg. 3967, 1942.
10. Irons, *Justice at War*, 98.
11. US Congress, *Japanese in the United States*, 88 Cong. Rec. 1682 (1942).
12. US Congress, Amendment offered by Mr. Carter, 88 Cong. Rec. 1419-20 (1942).
13. US Congress, Senate Bill 2352: Control of Aliens and Others in Military Zones, 88 Cong. Rec. 2722 (1942); US Congress, House Resolution 6758: Penalty for Violation of Restrictions or Orders with Respect to Persons Entering or Leaving Military Areas or Zones, 88 Cong. Rec. 2729 (1942).
14. Military Areas or Zones, Restrictions, Public Law 77-503; 56 Stat. 173.
15. *Hirabayashi v. United States*, 320 U.S. 81 (1943).
16. *Toyosaburo Korematsu v. United States*, 140 F.2d 289 (9th Cir. 1943).
17. *Korematsu I*, 242; Justice Murphy's dissent.
18. *Ibid.*, 218
19. John L. DeWitt, *Final Report: Japanese Evacuation from the West Coast, 1942* (Washington DC: US GPO, 1943).
20. *Ibid.*, 8.
21. *Ibid.*, 10.
22. Brief for the United States, *Korematsu v. United States*, 323 U.S. 214 (1944).
23. John Burling, "Memo from John Burling to Solicitor General Fahy" (substantially reprinted and incorporated in chap. 2, footnote 175, of CWRIC report and cited as DOI 146-42-7, CWRIC 5759-64); The footnote underwent several revisions (see Irons, *Justice at War*, 282–92), but they would not be revealed to the Court.
24. *Ex parte Endo*, 323 U.S. 283 (1944).
25. "Public Proclamation No. 21: Persons of Japanese Ancestry Exemption from Exclusion Orders," 10 Fed. Reg. 53, 1944.
26. Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (Washington, DC: US GPO, 1983), 18.
27. Civil Liberties Act of 1988, Public Law 100-383, 102 Stat 903.
28. Ronald Reagan, Remarks on Signing the Bill Providing Restitution for the Wartime Internment of Japanese American Civilians (August 10, 1988).
29. *Korematsu v. United States*, 584 F. Supp. 1406, (N.D. Cal. 1984).
30. *Korematsu II*, 1416.
31. *Ibid.*, 1417
32. *Ibid.*, 1418.
33. Irons, *Justice at War*, 211.
34. *Korematsu I*, 246.
35. Brief of amicus curiae Fred Korematsu in support of petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004); Brief of amicus curiae Fred Korematsu, et. al., *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).
36. Matt Ford, "The Return of Korematsu" *Atlantic*, November 19, 2015.
37. *Korematsu II*, 1420.