

Fred Korematsu's Legacy to the History of Civil Liberties During Wartime

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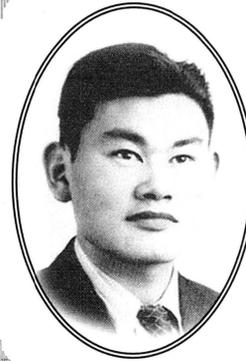
Fred Korematsu, a Japanese American who refused to be interned during World War II, passed away on March 30, 2005, at the age of eighty-six. U.S. v. Korematsu, 323 U.S. 214 (1944), became synonymous with the nation's agonized debate over civil liberties during times of war. The CSCHS sponsored an educational panel at the 2004 State Bar Annual Meeting addressing the history of civil liberties during wartime, which included discussions of the 1944 case as well as contemporary cases, by Professors John S. Park, Erwin Chemerinsky, and Michal Belkap, and Judge Michael Linfield. In addition, Professor Peter Irons discussed the litigation of Korematsu's coram nobis case, 584 F.Supp. 1406 (N.D. Cal. 1984), at the CSCHS's educational panel on forensic history and the use of historians as expert witnesses at the 2001 State Bar Annual Meeting.

In February, 1942, 120,000 U.S. residents of Japanese ancestry – both citizens and noncitizens – were ordered out of their homes and into camps following Japan's December 7, 1941, attack on Pearl Harbor. Fred Korematsu did not turn himself in and was arrested, jailed, and convicted of a felony for failing to report for evacuation.

Korematsu was one of several who challenged the constitutionality of President Franklin D. Roosevelt's Executive Order 9066 authorizing internment. His case eventually reached the United States Supreme Court and, in 1944, the Court upheld the order. But, as was discovered many years later, the Court – and the nation – had been gravely misled about the potential dangers from Japanese Americans.

Indeed, the Korematsu case was cited as recently as April, 2004. At issue before the Supreme Court was whether U.S. courts could review challenges to the incarceration of mostly Afghan prisoners held at Guantanamo Bay Naval Station in Cuba in the aftermath of the September 11, 2001, terrorist attacks. Korematsu, then eighty-four years old, filed a friend-of-the-court brief saying, "The extreme nature of the government's position is all too familiar." In June, 2004, the U.S. Supreme Court ruled that the Bush administration's policy of detaining foreign nationals without legal process at Guantanamo Bay was illegal.

The public stance taken by Korematsu in this and other civil liberties issues in the previous twenty years was in stark contrast to the four decades after the war when he hid many of the details of his ordeal from his own children. "He felt responsible for the internment



Fred Korematsu

in a sort of backhanded way, because his case had been lost in the Supreme Court," legal historian and author Peter H. Irons said in a PBS *P.O.V.* documentary on Korematsu by Eric Paul Fournier.

It was because of Irons, who in the 1980s was researching a book on wartime internment, that the Korematsu case was re-opened. Irons discovered

that the government had lied to the high court, a lie that would provide the basis for a landmark 1983 federal court decision to vacate Korematsu's conviction.

Fred Toyosaburo Korematsu was born January 30, 1919, in Oakland, where his Japanese-born parents ran a plant nursery. After graduating from high school, he was working as a welder when Japan's attack on Pearl Harbor plunged the United States into war.

Official concerns that Japan would find sympathizers in the Japanese American community on the west coast surfaced immediately, including the idea that there might be an effort to get messages to Japanese submarines offshore. Like many other Japanese American homes, the Korematsus' was searched for flashlights and cameras, "everything that they thought we would use for signaling," Korematsu said.

The following February, Roosevelt granted broad powers to the War Department to carry out internment, acting upon the assertions of General John L. DeWitt, the Army general in charge of the west coast, who believed that Japanese Americans were more loyal to Japan than to the United States. Korematsu, then twenty-two years old, watched as his parents prepared to leave their home, but he decided to remain behind with his Italian American girlfriend.

"I didn't think that the government would go as far as to include American citizens," Korematsu said in Fournier's documentary, which won an Emmy in 2002. He soon discovered it would. He traveled about, changed his name, and even had plastic surgery on his eyes. But on May 30, 1942, he was arrested.

While in jail, Korematsu had a visit from Ernest Besig, executive director of the American Civil Liberties Union of Northern California, who was looking for cases to test the constitutionality of internment. The lawyer posted five thousand dollars in bail to free Korematsu, but the military police wouldn't release him. Korematsu was taken to Tanforan racetrack, an assembly center for Japanese Americans south of San Francisco, where he spent time in a horse stall.

"There's no floor, it's just dirt, so the wind was

blowing through that and it was cracks all around the walls, and there was a lightbulb up there, one lightbulb on the ceiling and that was it," Korematsu recounted. He ended up in a camp in Topaz, Utah, where he was shunned by his fellow inmates for having attempted to dodge internment. Meanwhile, his case had proceeded through the courts, but Korematsu lost at every turn, including in the United States Supreme Court in 1944. Justice Frank Murphy, one of three justices who dissented, called the internment order "legalization of racism." But the six-man majority concluded that, in the words of Justice Hugo L. Black, "We could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal."

Toward the end of the war, Korematsu was allowed to work as a welder in Salt Lake City as long as he promised not to return to the west coast. He later went to Detroit.

The government ended internment in late 1944, and, like so many other Japanese Americans, Korematsu tried to put the ordeal behind him. He returned to the San Francisco Bay area, where he and his wife, Kathryn, raised a son and a daughter. Korematsu worked as a draftsman but could not get a job at a larger firm or government agency because of his felony conviction.

In 1981, Irons asked to see the original documents in the case, which were in the hands of the Justice Department. The documents had been mislabeled and misplaced but finally were located. "They were in two or three dusty cardboard boxes tied up with old string – obviously no one had ever looked at them since they were sent off to the warehouse back in the 1940s," Irons told the *Los Angeles Times* in 2004.

When Irons opened them, the first folder he saw contained a memo from a Justice Department lawyer to U.S. Solicitor General Charles Fahy, the person responsible for arguing the government's side in cases before the Supreme Court. In the memo, the Justice Department accused Fahy of lying to the Supreme Court.

In one example, the Justice Department strongly disputed the basis of the claim by DeWitt that people whose ancestry was Japanese, which DeWitt considered "an enemy race," were engaging in "extensive radio signaling and in shore-to-ship signaling" to Japanese ships. Such activity – which would be evidence of treason – had formed a primary basis for the internment.

But, the Justice Department memo asserted, DeWitt in fact had no evidence that overt acts of treason were being committed. There were some indications that the "signaling" was nothing more than kids going to outdoor toilets at night with flashlights. Even

FBI Director J. Edgar Hoover and officials at the Federal Communications Commission agreed there was nothing to the signaling reports. The 1944 Justice Department memo stated: "Since this is not so, it is highly unfair to this racial minority that these lies, put out in an official publication, go uncorrected."

In the final briefs filed with the high court, however, the Justice Department's views were diluted to such an extent that the Supreme Court could hardly have determined their meaning. The Supreme Court, Irons realized, had made its decision based on false information. "I was totally astounded," Irons said. "Then it struck me that this was evidence of a crime, to present lies to the Supreme Court."

He contacted Korematsu as well as Gordon Hirabayashi, who had gone to prison rather than obey curfew and evacuation orders, and Minoru Yasui, who had served time for violating the curfew. All three cases had reached the Supreme Court in the 1940s and all three men had lost. (See also *Hirabayashi v. U.S.*, 320 U.S. 81 (1943); *Yasui v. U.S.*, 320 U.S. 115 (1943).) Thus began a laborious two-and-a-half-year process to get the convictions of Korematsu, Hirabayashi, and Yasui overturned. They would be the fair trials that Japanese Americans never had.

The real significance of Korematsu's case, Irons said, was that it raised, for the first time, the central issue: Was the internment itself constitutional? The lead attorney was Dale Minami. He and the other lawyers petitioned the Ninth U.S. Circuit Court in San Francisco to correct the error that was made before the Supreme Court, which was that government prosecutors suppressed, altered, and destroyed material evidence during its wartime prosecution of Korematsu. Rarely is such a petition, called a writ of coram nobis, ever granted.

The petition put the Justice Department, which had the responsibility for responding to it, in a position of having to defend the government's action during internment, knowing that the department itself had failed to get accurate information to the Court in the original case.

In preliminary discussions with United States District Judge Marilyn Hall Patel, who was presiding over the case, Justice Department lawyers tried to evade the issue. They suggested a pardon for Korematsu instead of proceeding with the case in court, but Korematsu didn't want forgiveness for refusing to do something he believed was unlawful. The Justice Department also was unable to persuade Patel not to make formal findings of fact that would fix the blame on the government for the original misrepresentation. After studying the initial positions of Justice's attorneys, Patel said she viewed the department's position as "tantamount to confessing an error."

Judge Patel set a hearing for November 10, 1983, in a larger, ceremonial courtroom, anticipating the many internees and their families who would want to witness the historic hearing. Toward the end, in an unusual move, Patel invited Korematsu, then sixty-four years old, to speak. The courtroom stilled as Korematsu spoke for several minutes. "As long as my record stands in federal court, any American citizen can be held in prison or concentration camps without a trial or a hearing," he said.

Everyone expected Patel to take the case under submission for a later ruling, as would be normal. But, in another surprise, she ruled from the bench, saying she intended both to vacate the conviction and to make formal findings of fact – everything Korematsu's attorneys had asked for. "I don't think I was quite prepared for the response to it," Patel said in Fournier's documentary, "because it really didn't seem to me there was a dry eye in the courtroom."

Irons, who had been seated next to Korematsu, said, "The audience literally was stunned. They had just witnessed an unprecedented event that this whole internment issue had been resolved by a court forty years later in their favor." In her written ruling vacating Korematsu's conviction, Patel said in part: "[Korematsu] stands 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." Yasui's conviction was vacated in 1984, although no evidentiary hearing was held. Hirabayashi's conviction was vacated in 1987 by the Ninth Circuit, which found that the government had engaged in "suppression of evidence" in its presentation of his original case to the Supreme Court.

In 1971, Congress repealed the law under which all three men were convicted. Five years later, President Gerald Ford acknowledged that the internment had been a "national mistake," and, in 1983, a federal commission unanimously concluded that the factors that shaped the internment decision were "race prejudice, war hysteria, and a failure of political leadership" rather than military necessity. President Ronald Reagan in 1988 declared the internment a "grave injustice" and signed legislation authorizing reparations of twenty thousand dollars each to thousands of surviving internees, including Korematsu.

In 1999, President Clinton awarded Fred Korematsu the Presidential Medal of Freedom, the nation's highest civilian honor. "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," Clinton said. "To that distinguished list today we add the name of Fred Korematsu."

The "*Fred T. Korematsu v. U.S.* Coram Nobis Litigation Collection" – thirty-six boxes of legal



Korematsu received the Presidential Medal of Freedom in 1999
PHOTOGRAPH COURTESY OF SHIRLEY NAKAO

research, pleadings, memoranda, internal correspondence, and personal litigation papers – is now housed in the University of California, Los Angeles' Asian American Studies Center and the Young Research Library's Department of Special Collections.

"He had a very strong will," his attorney, Dale Minami, said, placing Fred Korematsu's actions in the context of Asian American history and the history of civil rights and civil liberties. "He was like our Rosa Parks. He took an unpopular stand at a critical point in our history. What Fred represents as a symbol is the significance of dissent in a free society. A courageous stance by individuals like Fred helps strengthen our Constitution and inspires us to be a stronger country."

An earlier version of this article appeared in the Los Angeles Times on April 1, 2005. It is reprinted here with permission of Tribune Media Services.

For more information on Fred Korematsu, the Japanese internment cases, and Japanese internment during WWII more generally, see Justice at War: The Story of the Japanese American Internment Cases, by Peter Irons (Oxford University Press, 1983); By Order of the President: FDR and the Internment of Japanese Americans, by Greg Robinson (Harvard University Press, 2003); and Democratizing the Enemy: The Japanese American Internment, by Brian Masaru Hayashi (Princeton University Press, 2004). Of Civil Wrongs and Rights: The Fred Korematsu Story, produced by Eric Paul Fournier, can be purchased through the National Asian American Telecommunication Association at (800) 343-5540. More information about the film can be found at www.pbs.org/pov/pov2001/ofcivilwrongsandrights/thefilm.html. Steven A. Chin has authored a young reader's biography of Fred Korematsu entitled When Justice Failed: The Fred Korematsu Story (Steck-Vaughn, 1992).