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Madelyn Sadler
murr8250@bears.unco.edu

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University of Northern Colorado
Greeley, Colorado

“I DISSENT, THEREFORE, FROM THIS LEGALIZATION OF RACISM:”
A LEGAL ANALYSIS OF *KOREMATSU V. UNITED STATES* (1944)

A Thesis
Submitted in Full
Fulfillment for Graduation with Honors Distinction and
The Degree of Bachelor of Arts

Madelyn Kiyomi Sadler

College of Humanities & Social Sciences

DECEMBER 2019

“I DISSENT, THEREFORE, FROM THIS LEGALIZATION OF RASISM:” A LEGAL
ANALYSIS OF *KOREMATSU V. UNITED STATES* (1944)

PREPARED BY: _____
Madelyn Kiyomi Sadler

APPROVED BY
THESIS ADVISOR: _____
Britton Morrell, Esq.

HONORS DEPT.
LIASON: _____
Kristin Bovaird-Abbo, PhD.

HONORS
DIRECTOR: _____
Loree Crow, M.A.

RECEIVED BY THE UNIVERSITY THESIS PROJECT COMMITTEE ON:

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Abstract

The Japanese Pearl Harbor attack on December 7, 1941, marked the beginning of total war between the United States and Japan. On February 19, 1942, President Franklin Delano Roosevelt issued Executive Order 9066, giving the military broad abilities to exclude any person(s) from prescribed military areas. Less than one week later, U.S. Army Lieutenant General John DeWitt began the process of removing Japanese Americans from their West Coast homes. Within four months of the Executive Order, the United States government forced over 100,000 Japanese Americans to abandon their lives and relocate to internment camps.

Fred Korematsu, a twenty-three-year-old, natural-born American citizen, was arrested and jailed on May 30, 1942, for refusing to relocate to an assembly center. Arguing that the Executive Order violated his Fourteenth Amendment equal protection rights, Korematsu appealed his case to the United States Supreme Court, which ultimately affirmed his conviction in a 6-3 decision. The Supreme Court limited the *Korematsu* decision to its facts, thus giving it no precedential value and failing to establish a practicable standard for future cases where wartime military actions are challenged. This examination of the *Korematsu* case will bring further understanding to the historical background surrounding the high court's decision, as well as the legal and social repercussions of Japanese internment.

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Contents

Chapter I.....	5
Chinese Immigration.....	5
Japanese Immigration	7
Chapter II	9
The Outbreak of War	9
Axis Sympathizers	12
Evacuation.....	15
Chapter III.....	20
<i>Hirabayashi & Yasui</i> (1943).....	20
<i>Korematsu v. United States</i> (1944)	22
Majority Opinion	24
Dissenting Opinions.....	26
<i>Ex parte Endo</i>	29
Chapter IV.....	32
Aftermath	32
The Future.....	34
Works Cited	38

Chapter I

“Citizenship has its responsibilities, as well as its privileges, and, in time of war, the burden is always heavier”

(Majority opinion, Korematsu v. United States, 1944).

Chinese Immigration

One hundred years prior to the bombing of Pearl Harbor, Asian immigration to the United States began to increase as major industries like farming and railroad construction expanded rapidly. In the mid 19th century, significant numbers of Chinese immigrants flooded into the United States, fleeing violent conflicts such as the Opium Wars, the Taiping Rebellion, and the Red Turban uprisings (Japanese American Citizens League, 2006). While many Chinese immigrants travelled to California in search of gold, others moved further inland to work on farms and railroads. Unfortunately, it was not long before the Chinese began to experience coercive, blatant racism in the United States. In 1852, shortly after gold was first discovered in California, the state legislature passed the Foreign Miner’s License Tax. This required non-citizen miners to pay an extra monthly fee simply to access the gold mines. Chinese immigrants, prohibited from becoming American citizens under the Naturalization Act of 1790, found it impossible to avoid the Foreign Miner’s Tax.

Meanwhile, the Central Pacific Railroad company heavily recruited Chinese immigrants, who “proved to be just as hardworking as whites and accepted less pay” (Japanese American Citizens League, 2006). By 1867, Chinese men accounted for over 90% of Central Pacific Railroad’s workforce. Despite their hard work that made the

transcontinental railroad possible, Chinese men faced brutal work conditions for paltry compensation.

On Cape Horn, a particularly notorious rock outcrop in the Sierra Nevada Mountains near Colfax, California, workers were lowered down the cliff face in a wicker basket to drill holes in a solid granite wall and then stuff them with dynamite. Those unlucky enough not to be pulled up before the dynamite exploded, perished. Many Chinese also died from harsh weather conditions. For their work, including those handling explosives, they received a flat salary below that of all white workers. In 1869, when tracks from east and west were joined at Promontory Point, Utah, no Chinese were allowed to attend the ceremony (Japanese American Citizens League, 2006).

After railroad construction was completed and the gold rush died down, Chinese immigrants found work in factories, and started businesses such as laundromats and grocery stores (Japanese American Citizens League, 2006). Public hatred for Chinese Americans grew as many were in direct competition with whites for jobs and business revenue. In the Chinese Massacre of 1871, a mob of over five hundred people overtook Chinatown in Los Angeles (Wallace, 2017). Eighteen Chinese men and boys were lynched in a racist frenzy. Their bodies were laid on the jailhouse lawn the next morning. Although it is still considered one of the worst mass lynchings in American history, the Chinese Massacre of 1871 was quickly forgotten and is widely unknown today.

President Chester A. Arthur signed the Chinese Exclusion Act in 1882. It was the first law to ever exclude an entire ethnic group from immigrating to the United States

(African American Policy Forum). The Act not only barred new Chinese immigrants from coming to the country—it also prohibited Chinese nationals from becoming citizens. The Chinese Exclusion Act was extremely popular amongst the American public. Worker’s groups and unions warned that the Chinese were taking the jobs of white men by undercutting wages (Woolf, 2015). Anti-Asian racism was not only widespread, but also commonplace in the United States far prior to the attack on Pearl Harbor.

The Supreme Court also has a long history of prejudicial attitudes towards Asians. The *Plessy v. Ferguson* decision of 1896 upheld racial segregation through the “separate but equal” principle. In Justice Harlan’s dissent, he wrote: “There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race” (*Plessy v. Ferguson*, 1896) (African American Policy Forum).

Japanese Immigration

Many 19th century American companies still had high demand for cheap and plentiful labor, despite the ban on Chinese immigration. This demand created an influx of immigration from another Asian nation (Japanese American Citizens League, 2006). In Japan, the radical Meiji imperial government imposed tremendous taxes on Japanese farmers to finance the island nation’s rapid transformation into a modern country with newly open borders. Although many Japanese were skilled farmers, the new policies made it nearly impossible for the majority of Japanese farmers to attain financial stability. Tens of thousands immigrated to Hawaii and the West Coast of the United States

throughout the late 19th and early 20th centuries. Although a great deal of business and landowners were initially happy to welcome the Japanese to work for long hours in return for low wages, hostility towards Japanese immigrants quickly started emerging.

During the early 20th century, Japanese American communities were becoming larger and more prosperous. By 1919, Japanese farmers owned 74,769 acres of land in California alone (Oppenheimer, Prakash, & Burns, 2016). The Japanese were seen as a growing threat to the American economy and way of life. In 1905, the *San Francisco Chronicle* (the most influential newspaper on the West Coast) published a front-page article titled “THE JAPANESE INVASION, THE PROBLEM OF THE HOUR” (Oppenheimer, et. al., 2016). Workers groups and farming communities led some of the most extreme movements to exclude Japanese Americans from public life. “In 1905, California trade unionists formed the Japanese and Korean Exclusion League, which existed solely to exclude Japanese and other Asian peoples” (Oppenheimer, et. al., 2016). The racist attitudes of the general public which were once directed at the Chinese had simply shifted to target the Japanese. The Immigration Act of 1924 effectively ended all immigration from Japan and, like the Chinese Exclusion Act of 1882, prevented Japanese nationals from becoming citizens altogether.

Chapter II

“To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue”

(Majority opinion, Korematsu v. United States, 1944).

The Outbreak of War

Japan’s 1937 invasion of China and Germany’s 1939 invasion of Poland led to World War II. The Japanese invasion of China frightened world leaders as word of the atrocities committed by the Imperial Japanese Army spread throughout the world. In early December 1937, the Japanese captured the Chinese city of Nanking (“Rape of Nanking”, 2017). Despite the immediate surrender of the Chinese military in Nanking, the Japanese Imperial Army carried out a six-week raid on the city. At least 200,000 Chinese women were raped, (other sources cite numbers as high as 800,000), and approximately 300,000 people were killed (“Rape of Nanking”, 2017). Although President Franklin D. Roosevelt vowed to keep the United States out of foreign wars, Japan’s acquisition of territory in China and Southeast Asia created an alarming reality for the rest of the world. Pressure grew for the United States to aid the allied powers until it officially joined the conflict following the attack on Pearl Harbor.

When Japan attacked Pearl Harbor on December 7, 1941, a sense of shock and hysteria surged through the United States. American musicologist Alan Lomax took to the streets the day after the bombing of Pearl Harbor to discuss the public’s perspective on the attack. One man called the attack on Pearl Harbor “very uncalled for”, and another expressed his bewilderment by saying: “How [the Japanese] could have approached so close to our great naval base without being discovered by our patrol airplanes is beyond my understanding” (LoProto, 2018). Although the possibility of war was looming, the

United States military was dramatically underprepared for the attack. As James Michener noted, the Japanese Americans residing on the West Coast were an easy scapegoat (Snyder, 2009). “One way to save face was to explain the disaster at Pearl Harbor was the result of espionage by Japanese living in Hawaii and along our West Coast” (Weglyn & Michener, 1996).

As the terror of World War II reached the United States, Japanese Americans began to fear the worst for their futures. Japanese American Akiko Kurose reported that she suddenly became aware of what was to come when she went to school the day after Pearl Harbor. “When I went back to school that following morning, December 8th, one of my teachers said, ‘You people bombed Pearl Harbor’” (Akiko Kurose oral history interview, 1997). Japanese Americans throughout the West Coast began to experience overt racial prejudice. Aiko Yoshinaga was a high school senior in California when Pearl Harbor was attacked. The principal of her school refused to issue diplomas to Aiko and the other Japanese American students that spring (Ellis & Smith, 2018). “To be deprived of that diploma was a big blow to us. It was proof that the feeling we had been carrying all the time, sort of a self-hatred for not being white, showed its ugly head at that time” (Ellis & Smith, 2018).

In his Congressional Address requesting a declaration of war with Japan, President Roosevelt proclaimed: “No matter how long it may take us to overcome this premeditated invasion, the American people in their righteous might will win through to absolute victory” (Roosevelt, 1941). When the United States officially entered the war, it did so by demanding unconditional surrender from the Axis powers. Although the Allied

powers prevailed within less than five years, one ill-fated group of Americans lost everything.

Immediately after the Pearl Harbor attack, President Roosevelt's top military officials recommended the removal of Japanese Americans from the West Coast. Military and intelligence advisors claimed it was impossible to distinguish loyal and disloyal Japanese Americans (Franklin D. Roosevelt Library & Museum, 2016). On February 19, 1942, President Roosevelt issued Executive Order 9066. This order gave the military broad abilities to "prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded" (Exec. Order 9066, 1942). Although the Executive Order did not provide for detention, Congress passed Public Law 77-503 shortly after the issuance of Order 9066 (Japanese American Citizens League, 2011). This act authorized the imposition of prison time and fines for any person found guilty of violating a military order (JACL, 2011). Public Law 77-503 effectively allowed federal courts to enforce the provisions of Executive Order 9066 (Niiya, 2013).

Like most other executive orders, Order 9066 was authored by a variety of presidential advisors and intelligence officials. President Roosevelt's advisors strongly believed that the removal of the Japanese from the West Coast was a military necessity. Budget Director Harold D. Smith asked President Roosevelt to review and sign a draft of what would become Order 9066:

Mr. James H. Rowe, on the part of the Department of Justice, and Lieutenant Colonel Karl R. Bendetson, on the part of the War Department, have presented the attached draft of Executive Order directing the Secretary of

War or any designated Military Commander to prescribe military areas from which any or all persons may be excluded (personal communication, February 19 1942).

Axis Sympathizers

Because no specific race was mentioned in Executive Order 9066, many assumed that German, Italian, and Japanese immigrants would all be equally affected. The United States government had been investigating the loyalty of German immigrants in particular, and detained hundreds prior to the attack on Pearl Harbor under suspicion of Nazi and Communist affiliation (Rosenfield, 2015). Within twenty-four hours of the Pearl Harbor attack, 106 ethnic Germans and Italians were arrested in Hawaii for suspected espionage (Rosenfield, 2015). Thousands of German and Italian descendants were apprehended and detained without cause following the attack on Pearl Harbor, and there were calls to imprison or deport all German and Italian nationals (Rosenfield, 2015).

By 1941, over one million people living in the United States had been born in Germany, and an additional five million had German-born parents (Rosenfield, 2015). The United States was also home to a great deal of Italian descendants, with over two million immigrating to the U.S. between 1901 and 1920 alone (Rosenfield, 2015). In 1941, the two largest foreign-born populations in the United States were Germans and Italians (Rosenfield, 2015). The sheer number of Germans and Italians living in the United States during World War II made the idea of complete internment out of the question. Instead, the United States government used a series of factors to determine the loyalty of a German or Italian individual. The FBI monitored membership in suspicious organizations, recent travel to Axis countries, bank accounts, magazine and newspaper

subscriptions, and a variety of other data points to determine whether or not to arrest a person of German or Italian descent (Rosenfield, 2017). In all, approximately 3,000 Italians and 11,000 Germans were interned in the United States during World War II (Associated Press, 2007).

Although approximately 14,000 were interned, Germans and Italians were individually investigated and vetted, albeit somewhat arbitrarily, to determine their loyalty to the United States. Japanese Americans were not. There was no reason to believe that Japanese Americans were less loyal to the United States or more likely to engage in espionage than their German and Italian counterparts. Several investigations concluded that the Japanese Americans living on the West Coast did not pose a security risk. The Munson Report of 1941 was ordered by President Roosevelt and conducted by investigator Curtis B. Munson (Niiya, 2014). Munson and a team of investigators spent three weeks interviewing Japanese Americans on the West Coast and meeting with local offices of Naval Intelligence (Niiya, 2014). Ultimately, Munson determined that Japanese Americans “Possessed a remarkable, even extraordinary degree of loyalty” to the United States, and that many were “Not Japanese in culture. They are foreigners to Japan” (Niiya, 2014). The findings of the Munson report were substantiated by several years of investigation conducted by the FBI (Japanese American Citizens League, 2011).

However, in spite of conclusions like those of the Munson Report, Japanese Americans as a whole were seen as eternally loyal to the Japanese Empire—and therefore undeserving of further investigation. President Roosevelt’s top intelligence advisors claimed it was impossible to distinguish between loyal and disloyal Japanese Americans. Lieutenant General John DeWitt stated: “[t]here isn't such a thing as a loyal Japanese and

it is just impossible to determine their loyalty by investigation—it just can't be done” (Niiya, 2015). These views were also shared by a great deal of the American public. A 1943 opinion poll showed that 62% of Americans believed that: “The Japanese people will always want to go to war to make themselves as powerful as possible” (National Opinion Research Center, 1946).

However, not all of Roosevelt’s advisors supported Japanese internment (Ellis & Smith, 2018). Attorney General Francis Biddle and FBI Director J. Edgar Hoover reportedly advised President Roosevelt that the security of the West Coast could be adequately ensured by arresting suspicious individuals and maintaining heightened security in vulnerable areas (Ellis & Smith, 2018). Although Attorney General Biddle advised against excluding Japanese Americans from the West Coast, Secretary of War Henry Stimson allegedly convinced Roosevelt that internment was the only way to protect the West Coast from invasion (Ellis & Smith, 2018).

In 1943, Lieutenant General John DeWitt submitted a Final Report on the Japanese Evacuation from the West Coast, justifying his rationale for recommending the complete removal of Japanese Americans from the Pacific Coast. DeWitt described them as a “tightly-knit racial group” whose communities were “virtually always adjacent to very vital shore installations, war plants, etc.” (Western Defense Command and Fourth Army [WDC], 1943). The report stated that numerous “Emperor worshipping ceremonies” had taken place within Japanese American communities (WDC, 1943). DeWitt described the increasing numbers of Japanese language schools on the West Coast, and also suggested that many American-born Japanese descendants were being sent back to Japan for “education and indoctrination” (WDC, 1943). Ultimately, DeWitt

concluded that a variety of suspicious incidents necessitated the complete removal of Japanese Americans from the West Coast, despite the lack of reliable evidence to substantiate his claims.

Evacuation

Lieutenant General John DeWitt issued four public proclamations following Executive Order 9066. The first proclamation “divided Washington, Oregon, California, and Arizona into two military areas, numbered 1 and 2” (National Parks Service, 2016). An accompanying press release explained that persons of Japanese descent would be removed from areas 1 and 2 at a later date. Several thousand Japanese Americans living in military areas one and two willingly relocated, knowing that if they remained, they would likely be removed by force. Approximately 10,000 Japanese Americans moved out from the West Coast area and relocated to Wyoming, Montana, Utah, Nevada, and Idaho. (JACL, 2011). However, the governors of these states protested vehemently once influxes of Japanese Americans began arriving (Ellis & Smith, 2018). They called for tightened security measures and the long-term detention of Japanese Americans. Wyoming Governor Nels Smith proclaimed that his state would not “stand for being California’s dumping ground”, while Idaho Attorney General Bert Miller insisted that “all Japanese be put in concentration camps, for the remainder of the war... We want to keep this a white man’s country” (Niiya, 2015).

Lieutenant General John DeWitt advised President Roosevelt’s Chief of Staff that removing Japanese Americans from the West Coast was a necessity to prevent an attack on the U.S. mainland (*Ex parte Endo*, 1944). Early evacuation proposals suggested the compulsory evacuation of Japanese Americans living on the West Coast into neighboring

states of Wyoming, Montana, Utah, Nevada, and Idaho (called “inter-mountain states”). According to John DeWitt, mass incarceration was not a necessity to protect the West Coast from invasion. If Japanese Americans were to disperse into the interior of the country, the danger of a mainland invasion would be greatly diminished. However, the governors of the inter-mountain states refused to accept mass numbers of unsupervised Japanese Americans (*Ex parte Endo*, 1944). John DeWitt reported: “The evacuation program necessarily and ultimately developed into one of complete Federal supervision was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration” (*Ex parte Endo*, 1944).

DeWitt’s second public proclamation established four additional military areas in the states of Idaho, Montana, Nevada, and Utah (National Parks Service, 2016). DeWitt allegedly planned to remove all Japanese Americans from these areas as well, although this plan was never executed (National Parks Service, 2016).

Proclamation number three placed a curfew on ‘all enemy aliens and persons of Japanese ancestry’ in Military area one (National Parks Service, 2016). Under the curfew, Japanese Americans were required to stay in their homes between 8:00 pm and 6:00 am. Gordon Hirabayashi challenged the curfew in the 1943 Supreme Court case *Hirabayashi v. United States*. The Court unanimously upheld Hirabayashi’s conviction.

Finally, proclamation number four prohibited remaining Japanese Americans in Military area one from leaving prior to removal. The military then began issuing mandatory evacuation orders, beginning on March 24, 1942 near Seattle (National Parks Service, 2016). The United States army issued a total of 108 Civilian Exclusion Orders, which were signs posted in West Coast communities notifying “all Japanese persons,

both alien and nonalien”- that they had six days to pack the possessions that they could carry and report to assembly centers near their homes (National Parks Service, 2016) (JACL, 2011).

Throughout their West Coast communities, Japanese American families scrambled to pack their most precious belongings and sell the rest of their possessions. Because they were told only to bring what they could carry, families left behind precious heirlooms, furniture, appliances, family businesses, automobiles, and much more. One Japanese American individual recalled his father, a grocery store owner, selling the store, equipment, and inventory for \$400—equal to about \$7,000 today (Ellis & Smith, 2018). While Japanese parents hurried to sell their possessions for what little they could, children grappled with the idea that they would soon leave their lives behind. With so little room available in suitcases and bags, few children were able to pack toys or favorite items. Crops and farm animals were left to fend for themselves. Family pets were also left behind.

Since they had no concept of when or if they would be able to return to their homes, and no idea where they would be sent, families struggled to decide what type of clothing to pack. The military provided little information to Japanese American families when the evacuation orders were issued. One Japanese woman recalled wondering, “It was hard to decide—do we take summer clothes, winter clothes, sneakers, boots? I found that the things I selected were totally inadequate for the weather that we finally did encounter” (Ellis & Smith, 2018). Some recalled wearing multiple garments to the assembly centers in an attempt to bring additional clothing. Others reported wearing their

best clothing when they reported to the assembly centers, as if to show that they were deserving of the respect of which they had been robbed (Ellis & Smith, 2018).

Once they arrived at assembly centers, Japanese families registered for removal and placed tags on their clothing and belongings (Ellis & Smith, 2018). They were then taken to temporary detention facilities, where they awaited transport to permanent internment camps. Many facilities were still being constructed, so some Japanese American families spent weeks or even months in temporary detention camps. County fairgrounds were common facilities for these temporary detention centers, and families were crowded into horse stalls and cowsheds for months at a time (National Archives, 2017). While they waited, military-style camps were constructed in remote, rural areas of California, Arizona, Utah, Idaho, Wyoming, Arkansas, and Colorado. Internees were eventually transported to internment camps by train. Once they arrived, the Japanese American prisoners tried to settle into some sort of normal routine. However, with four to five families living together in one barrack, and work and school habits virtually nonexistent, normalcy proved to be difficult.

Despite the hardships they faced, Japanese American prisoners living in internment camps made the best of their situations. They planted gardens, built facilities such as schools and stores, held wedding ceremonies, and published camp newspapers (Ellis & Smith, 2018). Japanese American men also volunteered to serve in the American armed forces in disproportionately large numbers. The 442nd Regimental Combat Team (RCT) was a segregated unit comprised almost entirely of Japanese American men, and ultimately became the most decorated unit in U.S. Military history given its size and average length of service (Odo, 2015). The 442nd RCT suffered heavy casualties, losing

at least 800 men within just one year (Odo, 2015). Although their lives were full of suffering and loss, Japanese Americans displayed remarkable endurance and courage throughout World War II.

Gaman (我慢) is a Japanese term that means “the display of calm forbearance and poise in the face of adverse circumstances beyond one’s control” (Dunn, 2006). For the 120,000 Japanese Americans who lived in prison camps during World War II, life was extremely difficult. However, despite the great injustices done to them by their neighbors, military, and government, Japanese American internees made do with what they could.

Chapter III

“It should be noted, to begin with, that 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”

Majority Opinion, Korematsu v. United States, 1944.

Hirabayashi & Yasui (1943)

Minoru Yasui and Gordon Hirabayashi were the first to challenge the government’s actions against Japanese Americans during World War II. Minoru Yasui walked into a police station at 11:20 P.M. on March 28, 1942 to test the constitutionality of the curfew order (Irons, 1983). He was found guilty of violating a military order and sentenced to serve one year in jail and ordered to pay a \$5,000 fine. Gordon Hirabayashi, a student at the University of Washington, was arrested on May 16, 1942 for violating the curfew order. Hirabayashi was also found guilty of violating a military order and ordered to serve two concurrent ninety-day sentences.

After the Ninth Circuit Court of Appeals refused to hear their cases, Yasui and Hirabayashi appealed to the Supreme Court of the United States, which granted certiorari on both cases. Hirabayashi and Yasui argued that the curfew order was issued through an unconstitutional delegation of Congress’s legislative power. They also claimed that the curfew order “unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment” (*Hirabayashi v. United States*, 1943). The Court ultimately wrote a lengthy decision in *Hirabayashi* to address both cases.

In a unanimous decision, the Court upheld Hirabayashi and Yasui’s convictions. Chief Justice Stone authored the majority opinion, while Justices Rutledge, Douglas, and

Murphy wrote separate concurring opinions. The Court rejected Hirabayashi's contention that the curfew order was issued through an unconstitutional delegation of Congress's legislative power. After President Roosevelt issued Executive Order 9066, it was ratified and confirmed by Congress. Consequently, the Court concluded that the government had the power to issue the curfew order.

The Court also rejected Hirabayashi's argument that the curfew violated the Fifth Amendment. When an individual claims that they have been denied due process of law, the government must show that the individual was provided with (1) notice that legal action was being taken against them, and (2) meaningful opportunity to participate or respond. Interestingly, Hirabayashi argued that the curfew order was in violation of the Fifth Amendment because it discriminated against Japanese Americans. The majority opinion asserted that the Fifth Amendment did not contain an equal protection clause, and therefore did not preclude the curfew order's racial distinction. Ultimately, the majority found that the curfew order did not amount to a denial of procedural due process.

While Justice Murphy agreed that the curfew order was within the Executive and Legislative powers of the government, he added several crucial points in his concurring opinion. Justice Murphy acknowledged that Congress and the Executive had the combined power to issue the curfew order, and also conceded that the curfew did not violate the Fifth Amendment. It was appropriate, Justice Murphy concluded, for the Military to bypass the standards of procedural due process given the severity of the situation on the West Coast. Justice Murphy stated:

In view, however, of the critical military situation which prevailed on the Pacific Coast area in the spring of 1942, and the urgent necessity of taking

prompt and effective action to secure defense installations and military operations against the risk of sabotage and espionage, the military authorities should not be required to conform to standards of regulatory action appropriate to normal times (*Hirabayashi v. United States*, 1943).

Although he ultimately concurred that the curfew order was issued legally in light of the extreme circumstances, Justice Murphy warned that a curfew based on a racial distinction went to “the very brink of Constitutional power” (*Hirabayashi v. United States*, 1943). In an instance of dictum, Justice Murphy added that although Japanese Americans residing on the West Coast could justifiably be subjected to a curfew, he asserted that they should not be prevented from leaving the area or moving freely within the country. In the end, Justice Murphy concluded that the curfew was constitutional, despite its risky and tenuous reliance on racial restrictions.

Korematsu v. United States (1944)

Fred Toyosaburo Korematsu born in Oakland, California to Japanese immigrant parents who owned a floral business (Fred T. Korematsu Institute). He volunteered to serve in the United States armed forces, but was rejected due to medical issues (Snyder, 2009). By the time the U.S. entered World War II, Korematsu was working as a foreman in an Oakland shipyard. At twenty-three years old, Fred Korematsu decided that he would not abide by the relocation orders. He underwent minor plastic surgery to alter the appearance of his eyelids and took on a false name in an attempt to disguise his Japanese ancestry, while his friends and family packed their belongings and moved in internment camps (Fred T. Korematsu Institute). Although he managed to evade the authorities for several weeks, Fred Korematsu was eventually arrested on May 20, 1942.

While he awaited trial in the San Francisco County Jail, Korematsu was approached by the director of the regional American Civil Liberties Union office, Ernest Besig (Fred T. Korematsu Institute). Besig proposed that Korematsu question the constitutionality of the government's actions against Japanese Americans by challenging his case to the United States Supreme Court. After he was convicted of violating DeWitt's military order in Federal Court, and the Ninth Circuit affirmed his conviction, Fred Korematsu appealed to the United States Supreme Court, which granted certiorari (Fred T. Korematsu Institute). When he later recounted his decision to challenge his conviction, Korematsu stated: "I didn't feel guilty because I didn't do anything wrong. Every day in school, we said the pledge to the flag, 'with liberty and justice for all,' and I believed all that. I was an American citizen, and I had as many rights as anyone else" (Goldstein, 2005). During the proceedings of the case, Korematsu lived at the Tonforan Assembly Center in San Bruno, California (Fred T. Korematsu Institute). He and his family were later relocated to an internment camp in Topaz, Utah.

The Court heard oral arguments for the *Korematsu* case in October 1944. Korematsu argued that the exclusion order violated his Fifth Amendment due process rights, as well as his Fourteenth Amendment equal protection rights. The case was decided by the Stone Court, which included six justices appointed by President Franklin Roosevelt. Hugo Black, who delivered the majority opinion, was once a member of the Ku Klux Klan (Rehnquist, 2000). Black's majority opinion included Justices Reed, Douglas, Rutledge, and Chief Justice Stone. Justice Frankfurter concurred. Justices Murphy, Jackson, and Roberts dissented.

The exclusion order was subjected to review under an early form of the strict scrutiny standard. The standard states that in order for a law which applies to a suspect class to be considered Constitutional, the government must show that (1) a *compelling state interest* exists, and that (2) the law is wholly necessary or *narrowly tailored* to achieve the compelling state interest. The Court ultimately evaluated the exclusion order using the highest form of judicial review.

Majority Opinion

The Court ruled that the exclusion order was constitutional for several reasons. In the majority opinion, Justice Black concluded that the exclusion order was not based on racial prejudice, but rather military urgency. The majority rejected Korematsu's claim that the exclusion order was unconstitutional on grounds of racial bias, and instead suggested that excluding Japanese Americans from their homes was necessary for the successful prosecution of war. Just as it did in *Hirabayashi*, the majority in *Korematsu* refused to strike the exclusion order because military authorities continuously insisted that it was a necessity. Ultimately, the Court insisted that the exclusion of Japanese Americans was an acceptable action in light of the ongoing war effort.

Although the exclusion order was based on a racial distinction, the majority held that it was narrowly tailored to achieve a compelling state interest. The majority stated: "Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice" (*Korematsu v. United States*, 1944). Instead, they insisted, the Court was tasked with assessing the constitutionality of an exclusion order, regardless of the "true nature" of the assembly centers. Excluding a racial group from a threatened area during wartime, the majority

contended, was constitutional. The majority went as far as declaring: “Korematsu was not excluded from the Military Area because of hostility to him or his race” (*Korematsu v. United States*, 1944). Although the majority acknowledged that Japanese Americans were the sole targets of the exclusion order, they held that the military’s decision to remove them from their homes was not motivated by racial prejudice.

Furthermore, the majority insisted that Korematsu did not have standing to challenge internment. In order to prove standing, a plaintiff must show (1) that they have been “injured”, or wronged, (2) that the injury is reasonably connected to the defendant’s conduct, and (3) that a court decision is likely to rectify the injury (US Legal, Inc.). The trial court found Korematsu guilty of failing to report to an assembly center, and he was jailed during the proceedings of his case before being sent to an internment camp. In light of these facts, the majority insisted that Korematsu did not have standing to challenge internment, since he had been convicted of failing to report to an assembly center, not an internment camp. The case’s syllabus included the following disclaimer: “The provisions of other orders requiring persons of Japanese ancestry to report to assembly centers and providing for the detention of such persons in assembly and relocation centers were separate, and their validity is not in issue in this proceeding” (*Korematsu v. United States*, 1944).

While the dissenting justices claimed that exclusion and internment were inseparable actions, the majority cited *Blockburger v. United States* to clarify that they did not intend on deciding the legality of Korematsu’s internment. Since DeWitt issued four separate public proclamations, and Korematsu was solely convicted of failing to report to an assembly center, the Court insisted that they could only issue a ruling on the

specific conviction at issue. The Court released their decision in *Ex parte Endo* on the same day as *Korematsu v. United States*. The *Endo* ruling addressed Mitsuye Endo's internment, while the *Korematsu* decision focused on Fred Korematsu's exclusion from his home.

Dissenting Opinions

While *Hirabayashi v. United States* was a unanimous ruling, *Korematsu* was a split 6-3 decision. Justices Roberts, Murphy, and Jackson saw enough distinctions between the curfew and exclusion orders to dissent in *Korematsu*. Justice Roberts pointed out that Korematsu was subjected to diametrically opposing orders, and therefore could not legally be punished for violating either. Justice Murphy's dissent focused mainly on the exclusion order's reliance on racial bias, and also included an assertion that the exclusion order was not narrowly tailored to the situation. Lastly, Justice Jackson insisted that asking a civilian court to sanction a military action would "weaponize" the statute by setting a precedent that any military commander could call upon to justify virtually any action. Although the *Hirabayashi* decision was unanimous, the *Korematsu* ruling ultimately divided the Court along ideological lines.

Justice Roberts began his dissent in *Korematsu* by asserting there was an obvious difference between a curfew and the complete exclusion from one's home. Unlike the majority, Justice Roberts insisted that forcing citizens to relocate based on a racial division was an unacceptable interpretation of military authority. Justice Roberts was the only Justice to refer to the relocation centers as "concentration camps", a classification that the majority outright rejected. Justice Roberts also recited a detailed chronological sequence of events leading up to Korematsu's arrest, and insisted that subjecting a citizen

to contradictory orders was a blatant violation of the Constitution. Finally, Justice Roberts rejected the majority's assertion that Korematsu did not have standing to challenge his imprisonment in an internment camp. He criticized the majority for "erroneously dividing that which is single and indivisible" (*Korematsu v. United States*, 1944). The Roberts dissent described Korematsu as an innocent man trapped between two diametrically opposing laws who simply wished to stay in his home but instead, had no choice but to submit himself to a concentration camp (*Korematsu v. United States*, 1944).

Justice Frank Murphy's dissent in *Korematsu v. United States* is one of the most renowned judicial opinions in recent history. In light of Justice Murphy's contention that the curfew order challenged in *Hirabayashi* "went to the very brink of Constitutional power", he insisted that excluding citizens from their homes went far beyond a narrowly tailored means to protect national security during a war. Although it was heavily focused on the prevalence of racism in DeWitt's actions, Justice Murphy's dissent also outlined several other Constitutional issues within the exclusion order.

Arguably the most crucial of Justice Murphy's allegations was that the exclusion order was not narrowly tailored to achieving the compelling state interest. While he acknowledged that winning the war was a compelling state interest, Justice Murphy claimed that the internment order had "no reasonable relation to an 'immediate, imminent, and impending' public danger" (*Korematsu v. United States*, 1944). Although he found that a curfew was an appropriate and narrow application of the military's authority, Justice Murphy contended that the exclusion order was not.

Justice Murphy's dissent cited DeWitt's Final Report on numerous occasions. Although the report was authored to show that the internment of Japanese Americans was a military necessity, Justice Murphy asserted that it merely proved that racism was the motivating force behind DeWitt's actions. Justice Murphy asserted that that the Commanding General's Final Report contained "no reliable evidence" to support its racist claims that all individuals of Japanese descent were inherently "subversive" and belonging to an "enemy race" (*Korematsu v. United States*, 1944). He also rejected the military's assumption that Japanese individuals were more likely to engage in espionage or nefarious activities. Justice Murphy's opinion was the first ever instance of the word "racism" in a Supreme Court decision. Ultimately, Justice Murphy condemned the Court's ruling, proclaiming, "I dissent, therefore, from this legalization of racism" (*Korematsu v. United States*, 1944).

Justice Jackson's dissent rejected the majority's suggestion that the Court was required to uphold any action that was deemed necessary by the military authorities. While the majority chose to defer to the wishes of the military given the urgency of the situation, Justice Jackson insisted that a civilian court could not be asked to interpret the Constitutionality of a military action. By doing so, he contended, the Court had validated the use of racial bias in criminal procedure. "The principle then lies about like a loaded weapon," Jackson warned, "Ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes" (*Korematsu v. United States*, 1944). Justice Jackson maintained that the majority had erred by blindly deferring to the military and asserted that Korematsu's conviction was unconstitutional.

The *Korematsu* decision shaped the strict scrutiny standard that the Court uses today to evaluate laws that touch upon suspect classifications such as race and national origin. Although it is considered the highest form of judicial review, the exclusion order ultimately passed the strict scrutiny test and was upheld by a majority of the Court. The terror and paranoia prompted by World War II ultimately led to the mass internment of over 120,000 Japanese Americans, despite the fact that no hard evidence existed to suggest that their presence on the West Coast created a danger to the nation.

Unfortunately, documents such as the Final Report on Japanese Evacuation from the West Coast led the majority in *Korematsu* to the conclusion that an indeterminate number of Japanese Americans were disloyal and dangerous. Ultimately, the Court chose to concede to the military authorities and Executive branch's assessment. When journaling about the *Korematsu* decision, Justice Frankfurter wrote that Justice Black began the Court's private conference by stating: "Somebody must run this war. It is either Roosevelt or us. And we cannot" (Breyer, 2018).

Ex parte Endo (1944)

Mitsuye Endo was twenty-two years old when she was fired from her job at the Department of Motor Vehicles because of her Japanese ancestry (Niiya, 2018). She was eventually relocated to the Tule Lake internment camp, where she was approached by attorney James Purcell. Purcell asked Endo to serve as a plaintiff in a test case. Purcell allegedly selected Endo because she was born in the United States, had never been to Japan, was a practicing Christian, and had a brother in the U.S. Army (Niiya, 2018). With Purcell's help, Mitsuye Endo filed a habeas corpus petition on July 12, 1942, in the federal district court of San Francisco (Niiya, 2018).

Habeas corpus is guaranteed by the Fifth Amendment's procedural due process clause. A writ of habeas corpus may be filed by an imprisoned person to challenge the legality of their detention. When a writ of habeas corpus is filed, a custodian (such as a warden) must bring the imprisoned individual before the court (U.S. Marshalls Service). The court must then provide a reason for detaining the individual. The trial court judge denied her petition over a year later, and Endo appealed to the Ninth Circuit Court of Appeals. The Appeals Court invoked certification to the Supreme Court, which heard oral arguments on October 12, 1944. The case was decided on the same day as *Korematsu*, December 18, 1944. The Department of Justice and War Relocation Authority acknowledged that Endo was a law-abiding citizen and that she was not suspected of disloyalty. However, they held that removing classes of citizens was a rightful power of the military authorities during wartime.

In a unanimous ruling, the Supreme Court granted Mitsuye Endo's petition for habeas corpus, and ordered that she be set free. However, the Court stopped short of addressing the constitutionality of Japanese internment, and instead focused on Endo's detention specifically. Justice Douglas wrote the majority opinion, which stated: "We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion, we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure" (*Ex parte Endo*, 1944).

The Court found that because Endo was a loyal, law-abiding citizen, she could not legally be detained. It was beyond the powers of the military, the Court held, to detain citizens who were indisputably loyal to the United States. Having been alerted of the Court's finding in *Endo*, President Roosevelt issued Public Proclamation 21 the day prior to the *Endo* ruling, which rescinded the exclusion orders (Niiya, 2018). Mitsuye Endo, Fred Korematsu, and thousands of other Japanese Americans were released from internment camps in January 1945.

Ex parte Mitsuye Endo and Korematsu v. United States were decided by the Court on the same day. The two cases consist of similar disputes and invoke similar arguments. However, the Court's decision in *Korematsu* could not be more different from their ruling in *Endo*. The two decisions are extremely difficult to reconcile due to their diametrically opposing logic. *Korematsu* and *Endo* were both ruled narrowly. Consequently, the Court has been criticized for refusing to address imperative constitutional issues that were invoked in both cases. The Court's decision to discharge Mitsuye Endo is challenging to reconcile with its decision to affirm Fred Korematsu's conviction. Ultimately, the *Korematsu* decision dealt only with the exclusion of Japanese Americans from the West Coast, while the *Endo* ruling concerned their prolonged detention in the interior. The Court wrote in *Korematsu* that the exclusion of Japanese Americans from their homes and their internment were divisible from one another. Although the dissenters vehemently disagreed, the majority was firm in its belief that they were correct to rule on the issues separately.

Chapter IV

“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”

(Justice Murphy dissenting opinion, Korematsu v. United States, 1944).

Aftermath

Korematsu v. United States is widely regarded as one of the most disturbing rulings in the history of the United States Supreme Court. Although it has not aged well, *Korematsu* is a glimpse into history. The horrors and fear of World War II made many Americans, including high-ranking military officials and the Commander-in-Chief of the armed forces, take actions which are now unthinkable. For the thousands of Japanese Americans living on the West Coast of the U.S., the *Korematsu* decision was a blow that would last generations. After internment, many Japanese Americans returned to the West Coast, while others relocated further inland. Many survivors of internment chose not to speak openly about their experiences. San Francisco attorney Dale Minami said the following about his parent’s reaction to their internment:

If you talk to any Sansei--third generation like myself--you will discover that we rarely heard our parents talk about the camp experience. I think they were profoundly ashamed by their experience, as if they must have done something wrong. They created a culture for their children to become 100% American and avoided questioning what the American government did to them (Minami, 2004).

In spite of this avoidance, a movement for redress began to gain speed during the late 1970's. In 1980, the Commission on Wartime Relocation and Internment of Civilians (CWRIC) was formed by Japanese American Congressmen Spark Matsunaga, Norman Mineta, and Robert Matsui (Yamoto, 2014). After hearing the testimonies of over 750 survivors and witnesses, the commission released their recommendations in 1982 as a book titled *Personal Justice Denied* (Yamoto, 2014). The commission determined that the exclusion orders were “not justified by military necessity, and the decisions which followed from it—exclusion, detention, the ending of detention and the ending of exclusion—were not founded upon military conditions” (Commission on Wartime Relocation and Internment of Civilians, 1982). Ultimately, the commission recommended that Congress offer an official apology to the Japanese American people, that the President pardon those who were convicted of violating the internment orders, and that the survivors of internment be paid \$20,000 each as compensation for their unjust imprisonment.

On August 10, 1988, President Reagan signed the Civil Liberties Act into law (Yamoto, 2014). The act acknowledged that the actions committed against Japanese Americans during World War II “were carried out without adequate security reasons and without any acts of espionage or sabotage, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership” (Yamoto, 2014). Once the act became law, each living survivor of Japanese internment was issued a check for \$20,000 and given a formal presidential apology. The redress movement was an attempt to right the wrongs done to over 100,000 Japanese Americans during World War II.

Fred Korematsu's case was reopened in 1983 when he filed a writ of *coram nobis* with the U.S. District Court of Northern California. During litigation, attorneys from the Justice Department offered Korematsu a full pardon if he would drop his lawsuit against the United States. Kathryn Korematsu, Fred Korematsu's wife, responded to this offer by saying that her husband was not interested in a pardon from the government—and in fact, that the government should have sought a pardon from him and from Japanese Americans for the injustices committed against them (Fred Korematsu Institute). Fred Korematsu's conviction was formally overturned by District Court Judge Marilyn Hall Patel in 1983.

Although this decision was a momentous occasion for Fred Korematsu and the survivors of internment, the Supreme Court's 1944 ruling still stands. The Court recently repudiated the *Korematsu* decision in their 2018 *Trump v. Hawaii* ruling, but in order for the Court to formally overturn *Korematsu*, a case of similar subject matter would have to come before them. The *Korematsu* decision was also limited to its facts, and therefore would not be considered binding precedent in the event that a similar case reached the Supreme Court. In light of this fact, the Court lacks a formal standard to test the constitutionality of a wartime racial exclusion order based on military necessity.

The Future

The Supreme Court limited the *Korematsu* decision to its facts, effectively stripping the decision of any precedential value to be applied in later similar situations. Thus, the Constitutional limits to military wartime powers (if any exist at all) are unclear, primarily because the Supreme Court gives the Executive Branch a tremendous amount of deference as to the military's factual findings, assumed risks, and proposed solutions in wartime.

In January 2017, President Trump issued a series of Executive Orders temporarily banning the entry of individuals from eight foreign nations into the United States. The matter was immediately challenged in numerous trial courts. Several plaintiffs, including the state of Hawaii, filed suit in District Court against President Trump for violating the Immigration and Nationality Act and the Establishment Clause (*Trump v. Hawaii*, 2018). The District Court granted a nationwide preliminary injunction prohibiting enforcement of the restrictions. The Ninth Circuit affirmed. Ultimately, the matter reached the Supreme Court when the Trump administration petitioned for review and the Court granted certiorari on January 19, 2018.

The judicial questions presented in *Trump v. Hawaii* were similar to those examined in *Korematsu*. The Court had to decide whether the President had the statutory authority to issue the Executive Order, and examined whether his action violated the Establishment Clause. The plaintiffs insisted that Trump's executive order was aimed at blocking the entry of Muslims into the United States based upon campaign statements in which Trump insisted that he would enact a "total and complete shutdown of Muslims entering the United States". However, the Trump administration maintained that since many majority-Muslim countries were not subject to restrictions, the Executive Order did not violate the Establishment Clause (*Trump v. Hawaii*, n.d.).

The Court ruled in favor of Trump in a 5-4 decision. In the majority opinion, Chief Justice John Roberts wrote that section 1182(f) of the Immigration and Nationality Act "vests the President with 'ample power' to impose entry restrictions" and that Trump's Executive Order "falls well within this comprehensive delegation" (*Trump v. Hawaii*, 2018). The majority also rejected the accusation that the Executive Order

violated the Establishment Clause. According to the majority opinion authored by Chief Justice John Roberts, the Executive Order did not favor or disfavor any particular religion on its face. Since several majority-Muslim countries were not subjected to regulations, and many non-Muslim majority nations were in fact subjected to exclusion, the Court rejected the plaintiff's claim. Ultimately, the Court refused to strike the Executive Order because the President felt it was necessary for national security purposes.

The dissenting Justices in *Trump v. Hawaii* saw the Executive Order as an obvious instance of racial prejudice. Justice Ginsberg joined Justice Sotomayor's scathing dissent in which she slammed the majority for failing to safeguard "the fundamental principle of religious neutrality in the First Amendment" (*Trump v. Hawaii*, 2018). Justice Sotomayor also made a remarkable comparison between the *Trump* ruling and the *Korematsu* decision. She described the striking similarities between the two cases, noting that both Presidents Roosevelt and Trump implemented "sweeping exclusionary policies" based upon "ill-defined national security threats" (*Trump v. Hawaii*, 2018). Just as it did in *Korematsu*, the Court upheld President Trump's Executive Order based on the dangerous assumption that national security must be preserved at any cost. Justice Sotomayor wrote: "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*, 2018).

Although *Korematsu* was limited to its facts, its legacy lives on within the heart of American jurisprudence. On December 8, 2015, then-candidate Trump stated that he was

“Calling, very simply, for a shutdown of Muslims entering the United States” (Liptak, 2018). Although this statement was not particularly unique for the Trump campaign, the presidential hopeful went on to cite a historical event as justification. “Take a look at what F.D.R. did many years ago. He did the same thing. This is a President who was highly respected by all—they named highways after him” (Liptak, 2018). Despite the adamant warnings of Justices Roberts, Murphy, and Jackson, the Court upheld yet another prejudicial exclusion order in *Trump v. Hawaii*. Although the *Korematsu* decision was recently repudiated by the Court and is widely considered a mistake, the horrors of legalized Japanese internment have not been forgotten, and will live on for as long as the Court continues to uphold exclusion orders based upon suspect classifications.

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