

How activists resisted — and ultimately overturned — an unjust Supreme Court decision

And why they must resist the court's current race-based precedents.

By Robert L. Tsai

Today, a growing number of states, including Virginia, California and Georgia, will celebrate the Fred Korematsu Day of Civil Liberties and the Constitution. The day commemorates Korematsu, a courageous American who defied the Roosevelt administration's internment policies during World War II.

Korematsu and more than 120,000 others of Japanese ancestry were forcibly evacuated from their homes, registered, tagged and eventually moved to what government officials privately called "concentration camps." At Tanforan Assembly Center, hastily converted from an old racetrack in California, Korematsu was forced to live in a horse stall with a cot and straw mattress. Medical facilities were nonexistent: At least one woman had to give birth in a horse stall on top of a wooden table.

The Supreme Court infamously signed off on the evacuation in *Korematsu v. United States*. But the subsequent history of *Korematsu* reveals that once the ink is dry on a judicial opinion, it returns to America's cultural marketplace, where the country as a whole renders its historical judgment. Was a decision legally correct? Was it wise? And since the very issue of equality is ultimately a moral question: Does it reflect who we want to be as a people?

For those who cherish liberty and equality, the decision was an abomination from Day One. In his dissent, Justice Frank Murphy argued that the internment "goes over 'the very brink of constitutional power,' and falls into the ugly abyss of racism," because fear of Japanese people rested merely on "the erroneous assumption of racial guilt." In one of the most memorable lines in U.S. constitutional law, Justice Robert Jackson worried in his dissenting opinion that the ruling had "validated the principle of racial discrimination," and as such the precedent "lies about like a loaded weapon."

But Jackson also realized that judges alone could not determine the practical meaning of the decision. Rather, "the political judgment of their contemporaries and the moral judgments of history" would determine the ultimate fate of the ruling. This insight explains how, while Jackson, Murphy and Justice Owen Roberts lost the vote within the Supreme Court, they prevailed in the court of public opinion. Activists did yeoman's work to change popular perceptions about the decision and deny social support for *Korematsu* — to the point that, for decades, most freedom-loving lawyers or public officials would not dare cite it.

Most of the tireless work in transforming the cultural meaning of *Korematsu* came from citizen activism and public education. Schools have been named after Korematsu, honoring his resistance to internment. Historical reenactments have dramatized the hardships encountered by the internees, as well as the flawed, breathless claims that they posed a threat to the country simply because of their race.

Art, too, has played a role in shaping perceptions about the legality and morality of internment. Photographs of the internment experience taken by Dorothea Lange — **impounded** by government officials and released only after war's end — punctured the impression of legitimate, well-run camps that the government had worked so hard to cultivate. Compared with Ansel Adam's wartime propaganda photos, which showed children smiling and engaging in leisure activities, Lange's images captured the chaos of evacuation and the haunting loneliness of indefinite detention. It's impossible to delude ourselves that it was all a minor inconvenience after seeing photos of parents clutching young children, their faces etched with concern, suitcases and duffel bags piled high as far as the eye can see, elderly men sitting forlornly in the dust, and drafty barns and barracks clumsily repurposed for the state's carceral ends.

These efforts — art, education, litigation, lobbying — forced an institutional reconsideration of *Korematsu* over the last few decades. In 1983, a federal court vacated Korematsu's criminal conviction for violating the military order, drawing on newly discovered evidence that the government had vastly overstated the threat of espionage on the part of Japanese Americans and lied to the courts about it. Though Judge Marilyn Hall Patel had no power to explicitly overrule the Supreme Court, her **findings** destroyed the factual basis for the government's argument that internment was justified by military necessity. All that was left were “unsubstantiated facts, distortions, and ... views [that] were seriously infected by racism.”

In 1988, Congress came to similar conclusions about the government's subterfuge, racism and “failure of leadership.” It passed a law expressing regret for interning Japanese Americans and offering reparations. The law acknowledged “the fundamental injustice of the evacuation.” While the amount of compensation never came close to making up for the “incalculable losses” suffered by internees, this statement, too, **repudiated** *Korematsu* and promised to “discourage the occurrence of similar injustices and violations of civil liberties in the future.”

When President Bill Clinton bestowed the Presidential Medal of Freedom on Fred Korematsu in 1998, he lifted him into the pantheon of Americans such as “Plessy, Brown, Parks” who made heroic sacrifices to advance the cause of equality. And where once the governor of California (Earl Warren) supported evacuating people of Japanese ancestry from the state and preventing them from returning after the war, in 2010 Gov. Arnold Schwarzenegger signed a law commemorating Korematsu Day that declared the Japanese Americans “posed no security risk” and that “the military had lied to the Supreme Court.”

Even the U.S. Solicitor General's office, which had defended internment in the courts, sought to atone for its lawyers' ethical lapses. In 2011, Acting Solicitor General Neal Katyal **admitted** that government lawyers had learned of a report that “only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody” but had suppressed this evidence. The lawyers also

failed to reveal that “a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC.” Finally, Katyal regretted that the lawyers had “relied on gross generalizations” about Japanese people to bolster their case.

Last spring, the transformation of the *Korematsu* precedent took a remarkable final turn. The legal showdown over President Trump’s entry ban against people from seven majority-Muslim countries provoked comparisons to internment. As a candidate, Trump himself had [cited](#) Roosevelt’s internment policies to support his proposal. In opposition, some children of people detained in the wartime camps filed briefs arguing that Trump’s order “[repeated](#)” all of the mistakes of Roosevelt’s internment policies: weak on national security justifications, harmful to political minorities and infected by bias.

In the end, the Supreme Court upheld the travel ban on a 5-4 vote largely because the lawyers who drafted the executive orders were clever enough not to mention religion and carved out some exceptions. But in approving the order, Chief Justice John G. Roberts Jr. went out of his way to explicitly overrule *Korematsu*. He wrote: “*Korematsu* was gravely wrong the day it was decided, has been overruled in the court of history, and — to be clear — ‘has no place in law under the Constitution.’ ”

These last words were taken directly from Jackson’s dissent in *Korematsu*, proof that the dissenters had won the long game. While noteworthy, formally discarding the precedent simply acknowledged the obvious after decades of work by activists, educators and government officials.

Unfortunately, Roberts’s opinion also exposed a sad reality: Although *Korematsu* died in the cultural realm, it has simply been replaced by a shinier version of the same. *Trump v. Hawaii* now stands for the assertion of executive power to wreak havoc in the lives of a despised minority population, repeating many of the same errors of judgment that members of the Supreme Court made in the 1940s. Moreover, Roberts left intact another internment ruling that had [upheld a race-based curfew](#), and the two cases can still be used to cause mischief when a president inflames the citizenry against an unpopular group. It will now take a new generation of educators, artists and civic leaders to wipe these reprehensible decisions from the legal imagination.

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