

Photo: Fred Korematsu holding a letter from the U.S Government apologizing for its unjust internment of Japanese Americans during World War II.

*One Man Seeks Justice from a Nation: *Korematsu v. United States**

ERIC YAMAMOTO, DALE MINAMI AND MAY LEE HEYE

“Mr. Korematsu, I just want to tell you that I saw you speak to my class two years ago at UC Berkeley, and you are the reason that I went to law school.”

—Josephine Yeh
First year law student
March 1999

Today, in law classes throughout the nation, *Korematsu v. United States* is studied as a central case of American constitutional law. Fred Korematsu challenged the United States two times: the first time in 1944, in which he defied the U.S. government's unconstitutional internment of Japanese Americans and refused to go into the camps, and the second time in 1983, in which his original 1944 conviction for refusing to go into the concentration camps was overturned by the federal court in San Francisco.

After September 11, 2001, Arabs, Middle Easterners, and South Asians in the U.S. often found themselves the victims of racial and media profiling and societal violence.

Some individuals were detained and incarcerated in prisons within the U.S. or placed in internment camps abroad, including Guantanamo Bay in Cuba. These groups are re-examining the Korematsu case in relation to asserting and vindicating their own legal, civil, and constitutional rights.

Born in the U.S.A.

Born in 1919, Fred Toyosaburo Korematsu grew up in Oakland as one of four sons of Japanese immigrants. His family owned a rose nursery, and he attended Castlemont High School, where his closest friends and girlfriend were Caucasian. “Being born in this country, I learned about American history, and this was my country,” he remembers, “I just thought of myself as American.” After graduation from high school in 1938, he attended the Master School of Welding and went to work on the Oakland docks as a steel welder, where he was quickly promoted to a foreman position.

The war in Europe, however, changed his life. America began providing war supplies to Great Britain in their war against Germany, while German allies — the Japanese — waged war in Asia and the Pacific. At home in California, when Fred entered restaurants, waiters refused to serve him. The same thing happened when he tried to get his hair cut. When he tried to join the United States Coast Guard

along with his Caucasian friends, he was not allowed to fill out an application. “We have orders not to accept you,” he was told by the recruiting officer. Later, a commanding officer even forbade one of his friends from associating with him. The Boiler Makers Union terminated his membership. He eventually found work with a trailer mobile company, but after the Japanese bombing of Pearl Harbor in December 1941, his employer fired him.

What Happened to Japanese Americans in 1942

On February 19, 1942, President Roosevelt signed Executive Order 9066 authorizing the military commanders on the West Coast to issue whatever orders were necessary for national security, including the removal of 120,000 Japanese Americans from the West Coast. Curfew and exclusionary orders soon followed. Japanese Americans were placed in remote desert and mountain concentration camps in barracks, guarded by barbed wire and gun towers.

Although his family reported to the Tanforan racetrack assembly center in San Mateo on May 9, 1942, as directed by Exclusion Order Number 34, twenty-two-year-old Fred chose to defy the order.

With his Caucasian girlfriend, Fred planned to move inland to Nevada. He sold his car, threw away his California driver’s license, and on his draft card



*Photos: this page, Fred Korematsu as a child inside the family's rose nursery.
Opposite page, Fred and family, circa 1939.*

assumed a new identity as Clyde Sarah, a Las Vegas-born Spanish Hawaiian. Fred even had plastic surgery in an attempt to change his appearance. Nevertheless, the police stopped him on May 30, 1942 in San Leandro, California and turned him over to the FBI. He was charged with violating the military's exclusion order. A newspaper headline read, "*Jap Spy Arrested in San Leandro.*"

While in the San Francisco federal prison, the Executive Director of the American Civil Liberties Union of Northern California, Ernest Besig, read about Fred's situation in the newspaper and offered to defend him. After spending two and a half months in jail, Fred was released when Besig paid his \$5,000 bail. The moment they stepped outside of the courthouse into the sunshine, however, military authorities handcuffed him and took him to the Tanforan Assembly Center.

Tanforan Assembly Center was a racetrack that had been hastily converted to hold thousands of Japanese-American families. Armed guards manned watchtowers. Barbed wire surrounded the entire area. At night, searchlights swept the camp watching for anyone attempting to escape. Like the other internees, Fred lived in a horse stall. "The stall had one big door to let the horse in and there was an opening of six to eight inches at the bottom where the wind was blowing right through. It was a dirt floor, with straw

on top of a cot, and a light up above; that was it. That was your room."

How Korematsu Challenged the Exclusion Order

Although imprisoned at Tanforan, Fred chose to challenge the exclusion order instead of pleading guilty. "The internment was wrong," he reasoned, "we didn't do anything disloyal." Nonetheless, he had little support from within the Japanese American community. The Japanese American Citizens League (JACL, a civil rights organization, founded in 1929) initially did not support his constitutional challenge.

Other Japanese Americans knew about him and avoided him, fearing for the safety of their own families. The federal district court in San Francisco ultimately found Fred guilty of violating military exclusion orders and sentenced him to five years probation under military authority. Attorneys from the ACLU appealed.

Upon his "release" on probation by criminal authorities, Fred was incarcerated in what he calls the "concentration camp." Fred and his family were moved to Topaz, Utah. After a year-and-a-half of laboring in the internment camp, Fred's qualifications as a skilled welder enabled him to leave the camp, provided that he not return to California. He got a



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PHOTOS COURTESY OF KAREN KOREMATSU

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Hirabayashi and Yasui

In addition to Fred Korematsu, two other young Japanese Americans, Minoru "Min" Yasui and Gordon Hirabayashi, defied the government's policies against Japanese Americans. Public Proclamation No. 3 issued by General John L. DeWitt, Military Commander of the Western Defense Command, imposed travel restrictions and a curfew on German, Italian, and Japanese nationals. However, it was also used against Americans of Japanese ancestry. The curfew required Japanese Americans to be indoors between 8 p.m. to 6 a.m.

Living in different cities and acting alone, Min and Gordon tested the constitutionality of the government's actions.

Minoru "Min" Yasui, a young lawyer, challenged the constitutionality of the curfew order. He began walking the streets of Portland, Oregon after 8 p.m. deliberately breaking the curfew. He approached a police officer and explained he was breaking curfew and asked to be arrested. The police officer told him to go home. He then walked into a police station, and an officer there accommodated his request.

Gordon Hirabayashi was a senior at the University of Washington. To comply with curfew, Gordon had to rush back to his dorm room while other students continued their own routines. He became angry. He was an American citizen and had done nothing wrong, so he decided to ignore the curfew order. No one at the university turned him in. When ordered to evacuate, Gordon openly defied the order.

Both Yasui and Hirabayashi were arrested, tried and convicted for their defiance. Like Fred Korematsu, their cases were appealed to the Supreme Court and like Korematsu, the Supreme Court upheld their convictions.

Many years later, Min and Gordon returned to the courts and were vindicated when their convictions were vacated. (Vacated is the legal term that means a conviction is dismissed.)

job as a welder in an iron works company in Salt Lake City. Eventually he made his way to Detroit.

The Supreme Court Case, 1944

Fred's appeal eventually reached the Supreme Court in 1944. The Court upheld the lower court's ruling in a 6-3 vote, sadly holding the U.S. Congressional and military rationalizations for interning Japanese Americans based on possible "disloyal members" who might have "constituted a menace to the national defense and safety."

And, in a statement that speaks volumes of the absurdity of this decision, the court declared, "Korematsu was not excluded from the Military Area because of hostility to him or his race."

Fred petitioned for a rehearing, but it was denied in February 1945. He was devastated. He had lost; Japanese Americans had lost; the Constitution had failed him. He worried about the impact his ruling may have on his own children and other Japanese Americans. "Are we Americans or not? Are we citizens of this country? They can put us away without a hearing. If you look like the enemy they can put you in a box."

Korematsu Challenges the Court Again, 1983

Fred hoped to reopen his case someday. He did not know, however, how he could do so, or who would help. The long road to the reconsideration of the Korematsu, Yasui, and Hirabayashi internment cases began with a letter from history professor Peter Irons. Irons and Aiko Herzig-Yoshinaga had discovered irrefutable evidence that top government officials knew and covered up significant government intelligence information that the Japanese Americans had not actually posed a threat to national security at the time of the internment. That evidence also revealed that top U.S. Justice Department officials, including the Solicitor General, lied to the Supreme Court about the "military necessity" justification for the internment. As the evidence of government misconduct began to accumulate, the possibility of reopening his case became more of a reality.

Three legal teams in San Francisco, Seattle, and Portland representing Korematsu, Hirabayashi and Yasui, respectively, made this unprecedented attempt to overturn cases that had been earlier decided by the Supreme Court.



PHOTO: CRYSTAL K.D. HUIE

Photo: Korematsu Legal Team at "60 Minutes" interview in 1983, from left to right: Donald Tamaki, Dale Minami, Karen Kai, Dennis Hayashi.

On January 19, 1983, a volunteer legal team filed a petition for writ of error *coram nobis* at the San Francisco federal district court for Fred Korematsu. This type of legal proceeding is so little known that the clerk had to ask whether they wanted it filed as a civil or criminal suit. A writ of *coram nobis* is limited to rare cases in which the courts are compelled to correct “fundamental error,” or “manifest injustice” in their own processes, which are discovered after a person has been convicted and released from prison.

Young Lawyers Challenge Injustice

Many of the lawyers, clerks and student volunteers were third-generation Japanese Americans whose parents and grandparents had been incarcerated. “When they first showed up at my house, I thought they looked like high school kids,” Mr. Korematsu recalls. The team of pro bono attorneys committed themselves to high intensity lawyering for eighteen months not only to clear Korematsu, Hirabayashi and Yasui, but also to vindicate all Japanese American internees.

They did so with three purposes in mind: first, to educate the American public by correcting the historical record that branded Japanese Americans as disloyal during World War II; second, to attack the precedent created through the three earlier Supreme Court cases that upheld the imprisonment of an entire minority group without charges, hearings or attorneys; and, third, to overturn the convictions of these three courageous men who stood up, virtually alone, to challenge the government’s racially discriminatory actions.

Despite the compelling evidence produced, the legal team still faced a monumental task — to reconstruct events 40 years before which denied a fair hearing.

Korematsu's Second Day in Court

At one point in the litigation, for instance, Fred was offered a pardon by the government. He rejected this offer, telling the legal team, “I don’t want a pardon. If anything, I should be pardoning the government.” So on that drizzly fall day

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anything disloyal."*

in November, 1983, in a packed ceremonial federal courtroom, Dale Minami, Fred's lead counsel, argued that the public interest demanded nullification of his conviction. Nullification of this individual's conviction would also expose the injustice of the massive incarceration of other Japanese Americans.

Minami stated:

This is not just a 40-year-old misdemeanor, as the government characterizes it. This is a monumental precedent which affected deeply and irrevocably the lives of 120,000 Japanese Americans, and countless numbers of friends and neighbors by the mass banishment of a single racial minority group . . . The public interest, then, demands more than a sterile recitation that we should let bygones be bygones and requires that the real substantial reasons [for the imprisonment] be exposed so that this tragedy will never be repeated.

Victor Stone, the United States Attorney representing the government, argued against such a position. The Court was silent and still when Fred stood to address the court that had convicted him 41 years earlier. In a simple but powerful manner he said:

As an American citizen being put through this shame and embarrassment and also all Japanese American citizens who were escorted to concentration camps, suffered the same embarrassment, we can never forget this incident as long as we live . . . 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 . . . Therefore, I would like to see the government admit that they were wrong and do something about it so this will never happen again to any American citizen of any race, creed or color.

At the conclusion of argument, United States District Court Judge Marilyn Patel ruled from the bench, vacating Mr. Korematsu's conviction on grounds of "manifest injustice." In her ruling, Judge Patel found that

[The] records show the facts upon which the military necessity justification for the Executive Order, namely Executive Order 9066, the legislative act . . . and the exclusion orders . . . were based upon and relied upon by the government in its arguments to the Court and to the Supreme Court on unsubstantiated facts, distortions and representations of at least one

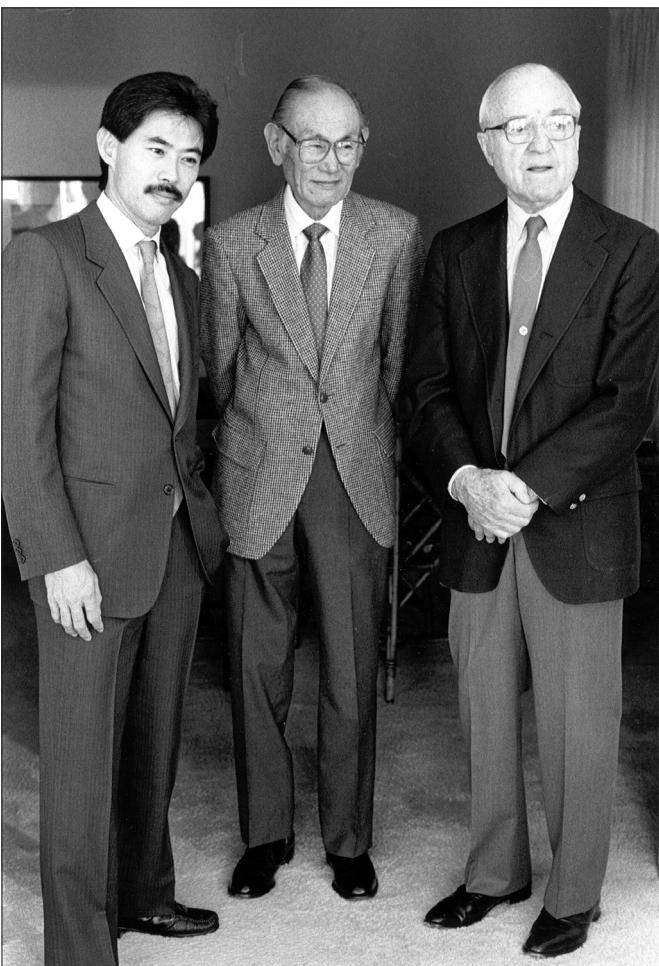


Photo: Dale Minami, Fred Korematsu, Ernest Besig.

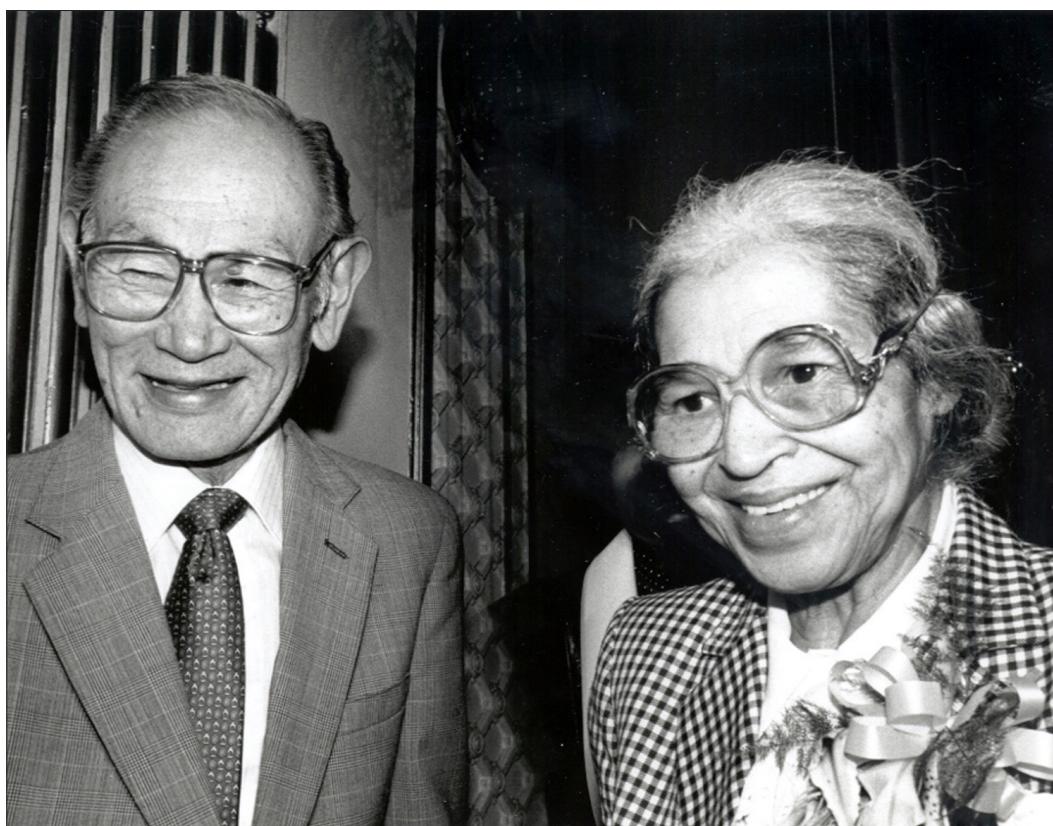


PHOTO: SHIRLEY NAKAO

Photo: Fred Korematsu and Rosa Parks at ACLU of Northern California Bill of Rights Day.

military commander, whose views were seriously infected by racism.

She went on to comment on the claims of military necessity by the government: The overwhelming number of Japanese were citizens, were residents of the United States, were loyal to the United States; that the various acts that suggested either the potential for espionage or sabotage that had occurred or could occur in the future, were essentially non-existent or were contradicted by evidence that was in the possession of the Navy, the Justice Department, the Federal Communications Commission and the Federal Bureau of Investigation.

In conclusion, Judge Patel commented on the lessons of *Korematsu v. United States*:

Korematsu remains on the pages of our legal and political history. As a legal precedent, it is now recognized as having very limited application. As historical precedent, it stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guaran-

tees. It 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. It stands as a caution that in times of international hostility and antagonisms our institutions, legislative, executive and judicial, must be prepared to exercise their authority to protect all citizens from the petty fears and prejudices that are so easily aroused.

After Fred's conviction was overturned, federal district courts in Portland and Seattle also vacated Min Yasui's and Gordon Hirabayashi's convictions respectively, although Hirabayashi had to endure a full trial and further appeal to the Ninth Circuit before his convictions were erased.

Aftermath: Redress and Coram Nobis

The new rulings on the three main World War II internment cases armed the proponents of the internee redress movement with powerful arguments against the legal claims that what was done to Japanese Americans was constitutional as held by

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PHOTO COURTESY OF SHIRLEY MAKAO



Photo: Fred Korematsu wearing the Presidential Medal of Freedom

the Supreme Court during World War II. The *coram nobis* rulings also became widely publicized, undermining the widely held view that Japanese Americans were disloyal. In 1988, after intense community organizing and political lobbying, the 100th Congress passed the Civil Liberties Act, authorizing reparations and mandating a national apology. The apology, sent to each internee in a letter from Presidents Ronald Reagan and George H.W. Bush, read:

More than fifty years ago, the United States Government unjustly interned, evacuated, relocated or otherwise deprived you and many other Japanese Americans of your liberty. Today, on behalf of your fellow Americans, I offer my sincere apologies for the actions that unfairly denied Japanese Americans and their families fundamental liberties during World War II.

In passing the Civil Liberties Act of 1988, we acknowledged the wrongs of the past and offered redress to those who endured such grave injustice. In retrospect, we understand that the nation's actions were rooted deeply in racial prejudice and wartime hysteria. We must learn from the past and dedicate ourselves as a nation to renewing the spirit of equality and our love of freedom. Working together, we can make the most of our great diversity.

You and your family have my best wishes for the future.

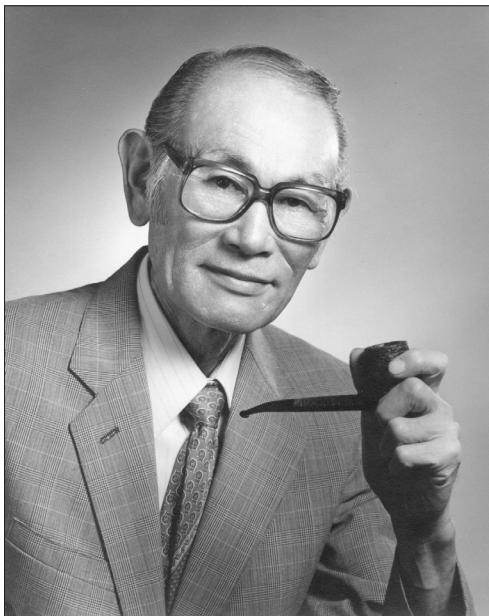
Fred's lead *coram nobis* counsel, Dale Minami, sounds a cautionary note, however. "I think the jury's out on the legacy of redress. Unless we continue the legacy of that struggle for other groups — like Latin American Japanese Americans and other minority groups — the legacy will have been wasted." Fred, speaking to young Asian Americans like Josephine Yeh, offers a similar warning.

Racial Profiling: Could it Happen Again?

“I hope this could never happen again. But it could and some [people] still think that what the government did was right. They don't understand what happened . . . Even though it was unconstitutional; you still have to tell them. You have to stay on your toes and be strong. That's what I want all of you kids to do. Be strong and do what you're doing, you're doing all right.”

So is Fred correct? Could the internment, or something like it happen again? Could the United

PHOTO COURTESY OF KAREN KOREMATSU



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States government deprive American citizens of their fundamental rights falsely in the name of national security solely by reason of those citizens’ race or color or country of origin? “Any group that’s different, unpopular, and less powerful is susceptible to being rolled over by the majority,” asserts Donald K. Takiuchi, who helped reopen Mr. Korematsu’s case in 1983.

Consider the 1944 *Korematsu v. United States* case — the decision that initially upheld the constitutionality of the Japanese American internment. The Supreme Court refused then to consider the issue before them as a case of unjust racial discrimination. Instead, the Court upheld the exclusion order reasoning that “[t]o cast [the] case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuse[d] the issue.”

And consider the government’s and public’s overheated, vilifying reactions to recent unsubstantiated charges of nuclear secrets spying for China by Chinese Americans. Could something similar to internment happen again — or more specifically, given the presence of sufficient “national security” dangers, could the United States government again justify the internment of American citizens based upon their ethnic background? A *Nightline* story recently aired echoing the same thoughts Fred expressed fifty years ago. The episode, titled “*What Happens When a Neighbor Looks Like an Enemy*,” chillingly revealed

the continuing inability of many Americans to grasp the distinction between American citizens of Asian ancestry and foreigners from Asian nations.

And after the September 11 attacks on New York and Washington D.C., the United States engaged in extensive racial and religious profiling and detention of Arabs, Middle Easterners, South Asians and Muslims in America, many of whom were citizens. The president claimed vast “national security” power over Americans without oversight by the courts. A civil rights official even predicted that if there were another attack the government would yield to public demands for the mass internment of Arab Americans.

But Fred Korematsu and other civil liberties advocates fought back. Korematsu spoke out publicly and submitted a “friend of the court” legal brief to the U.S. Supreme Court in the Guantanamo Bay indefinite detention case. He reminded the country that grave harms to innocent people and to the nation itself result from mass racial incarceration during times of public fear. He asked us all to be vigilant — not only over outside threats to our safety, but also over government abuses of power that threaten our fundamental liberties.

So perhaps the question is not “could internment, or something like it, happen again,” but rather, what will it take on all our parts to prevent it?