

Commentary

## 60 Years On, Again Battling an Abomination of Power

*Fred Korematsu opposed Japanese internment in the '40s. Now he's urging the Supreme Court not to make the same mistakes with today's detainees.*

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Largely unnoticed in the hustle and bustle of politics, a quiet and frail 82-year-old man made a symbolic return to Washington, D.C., this month.

His name is Fred Korematsu, and his name graces one of the most infamous decisions ever rendered by the U.S. Supreme Court, the 1944 case of *Korematsu vs. United States*. With that decision, Korematsu was sent to internment camps to join 120,000 other Japanese Americans who were imprisoned solely because of their ethnicity.

Recently, Korematsu filed a brief before that same court on behalf of hundreds of Muslims being held at Guantanamo Bay, Cuba. For Korematsu and thousands of camp survivors, one of the darkest and most painful chapters of American history is repeating itself.

The Korematsu case has been largely taught in law schools as an abomination, a case in which the Supreme Court yielded to fear and pressure in sending tens of thousands of innocent men, women and children into camps.

Then came 9/11.

Soon, the Bush administration was relying on the arguments from the Korematsu case to assert the same authority exercised by President Franklin Delano Roosevelt to put individuals into detention without trial or access to the courts.

The administration has further argued that the president may do with the Guantanamo detainees as he wishes, including executing them under his own set of rules and standards.

By locating the camp in Cuba, the president holds that his actions are no longer controlled by constitutional law. Despite the fact that Guantanamo Bay is a sealed, highly armed U.S. military base, the court has previously held that it is legally "foreign" territory under the control of Cuban President Fidel Castro.

Of course, unlike World War II, there is no declared war against a nation-state. Rather, the president has declared war on terrorism, which is a category of crime. Under this interpretation, any president could declare such a war and claim wartime authority to indefinitely detain people and even execute them without access to the courts.

Korematsu has heard much of this before -- 60 years ago.

In 1942, he was 22 years old and had twice tried to enlist in the Army to serve his country, only to be turned down for a physical disability. On Feb. 19, 1942, Roosevelt issued Executive Order No. 9066, giving the military's Western Defense Command the authority to issue any orders that it deemed

necessary to protect the nation -- the legal basis for the camps.

Korematsu desperately fought to remain free. He changed his name to Clyde and underwent eyelid surgery to look less Asian. It didn't work. He was arrested and thrown into a race-track horse stall to await "processing."

These are events that most Americans thought could never happen again. After all, Korematsu was given the Medal of Freedom in 1998 (the highest U.S. civilian honor) for his fight against internment, and Congress awarded reparations to the Japanese Americans sent to the camps. President Bush's father, President George H.W. Bush, apologized to Japanese Americans on behalf of the U.S.

Yet, last year, Korematsu, who lives in Northern California, watched as hundreds of people were sent to a camp in Cuba without hearings required under international law or access to U.S. courts. He watched as U.S. citizens were being stripped of their constitutional rights as "enemy combatants" and held in this country effectively as non-persons.

A new president was citing a new threat, but the claim of absolute power remained.

That is when Korematsu resolved to go back before the court that had failed him and thousands of other citizens decades before. His statement to the court in his brief is simple: "[t]o avoid repeating the mistakes of the past, this court should make clear that the United States respects fundamental constitutional and human rights -- even in time of war."

The return of Fred Korematsu should be a source of great shame for members of the Supreme Court.

Although other justices penned the 1944 decision, the institution failed the primary test of an independent judiciary: the ability to stand before the mob and to refuse to give legitimacy to racist impulse. Rather than being the bulwark against hate, the court became its vehicle.

After the 1944 opinion, some on the court regretted their actions, and the California attorney general who advocated mass internment, Earl Warren (later a chief justice of the Supreme Court), described himself as "conscience-stricken" over his role on the camps.

Warren's regrets, however, are not apparently shared by some members of the current court, particularly Chief Justice William Rehnquist. In his 1998 book, "All the Laws but One," Rehnquist defended the basis for the Korematsu decision and stated menacingly that "[t]here is no reason to think ... that future justices of the Supreme Court will decide questions differently."

While agreeing that some criticism of the 1944 ruling might be warranted, Rehnquist seems to endorse a variation on the ancient maxim *inter arma silent leges* -- "in times of war, the law is silent." Rehnquist suggests that while laws may "not be silent in times of war ... they will speak with a somewhat different voice."

That is a voice that Korematsu has already heard.

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<http://articles.latimes.com/2003/nov/17/opinion/oe-turley17>

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