

AALJ 2009 Spring Symposium  
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Justice Restored: The Legacy of *Korematsu II*  
and the Future of Civil Liberties

*Virtually everyone in the legal community has a cursory knowledge of Fred Korematsu and the infamous case that bears his name. During World War II, President Roosevelt issued Executive Order 9066, which facilitated the forced relocation and internment of 120,000 Japanese Americans from the West Coast. But Fred Korematsu, a young Japanese American man born and raised in the Bay Area, resisted the order, and challenged its constitutionality all the way to the United States Supreme Court.*

*In Korematsu v. United States (1944), the Court held that the forced relocation was constitutional, based on the rationale of wartime necessity—notably, without any critical analysis of the government’s evidence regarding the supposed security risks posed by Japanese Americans. In Korematsu, the Court also first articulated that racial classifications should be analyzed under the strict scrutiny standard of review, a judicial practice that exists to the present day.*

*Fortunately, the story does not end here. Almost forty years after the first Korematsu case, Peter Irons, a political science professor conducting research on the internment, and Aiko Yoshinaga-Herzig, a private citizen conducting research for personal reasons, discovered official government documents showing that the Department of Justice had provided false information to the Court and had purposely suppressed evidence favorable to Korematsu. Armed with this new evidence, Fred Korematsu, along with a group of community activists and young attorneys, filed a coram nobis suit to overturn his original conviction—and won.*

*Through our 2009 Symposium, “Justice Restored: The Legacy of Korematsu II and the Future of Civil Liberties,” the Asian American Law Journal celebrates the twenty-fifth anniversary of the coram nobis decision and its impact on the present day. Most of all, we hope to highlight the ways in which communities have come together—and continue to come together—to seek justice and speak truth to power. We continue to honor the memory of Fred Korematsu, who passed away in 2005. Fred’s courage, conviction, and quiet dignity remain an inspiration.*

*The Symposium's morning roundtable featured Karen Korematsu (Fred Korematsu's daughter), Dale Minami (lead attorney on the coram nobis team), and the Honorable Marilyn Hall Patel of the Northern District of California (who presided over and wrote the coram nobis decision).*

*Many thanks to Malcolm Yeung, Public Policy Manager at the Chinatown Community Development Center in San Francisco and the 2000-2001 Editor-in-Chief of the Asian American Law Journal (then Asian Law Journal) for moderating and for his gracious introduction of the panelists.*

*The following excerpt of the transcription of the panel discussion has been edited for brevity and clarity.*

KAREN KOREMATSU: Good morning. I was thinking this morning driving here, who would have known twenty-five years ago that we would all be gathered here talking about my father's *coram nobis* decision? If someone had told me that I was going to be speaking with this prestigious panel about my father's case, I would have said you're crazy, because I'm not an attorney and my profession is really far removed from law. So, I'm very thankful to the *Asian American Law Journal* here at Boalt Hall for focusing on this special anniversary, for continuing to bring the importance of my father's case to all of you.

I would like to begin, if you can imagine, a long time ago: I was sixteen, in high school, sitting in class, and a friend got up and gave a book report about the internment camps and the Japanese American experience. And she talked about a famous case, *Korematsu v. United States*. Well, I had never heard of that. Korematsu is a very unusual Japanese name; it's not common like Smith. I was sitting in the back of the room and I had thirty-five pairs of eyes turning around, staring at me thinking, "Well, who is that? Are they related?" And my friend Mia [*phonetic*] didn't mention my father by a first name. It was the last class of the day and so I confronted Mia, and I asked, "Who is this?" And she said, "I think it's your father." I said, "No, that can't be my father. I don't know anything about this."

This is the day before cell phones, if you can believe that, and there was one pay phone at school. Someone else was on the pay phone, and then I put my—what is it?—ten cents in there to call my mother and the line was busy. I never could get through to her, so I ran home and I told her what had occurred in the last class of the day. She said, "Well, that is your father." And I said, "Why didn't anyone tell me?" "Well," she said, "We were going to, but we were just trying to find the right time." We were all kind of busy with our activities—I had Girl Scouts and ballet, and all these different things that we were doing growing up as kids. My brother had little league. It was just an average American family.

So she said, “Just talk to father when he gets home.” And when he did—he worked late, he worked long hours—I asked him what this was all about. He said, “It just happened a long time ago, and I felt like it was the right thing to do at the time.” That was kind of the end of the discussion. We didn’t have the type of family where we had these long conversations and discussions. It wasn’t until later that I realized how he had carried this with him all those years. It wasn’t until his case was reopened that I found out that he had always been looking for someone to help him. But he never ran across that person. We’d get these phone calls, I think we even got one from UC Berkeley, where someone wanted him to come and speak. And it wasn’t the law school, it was an Asian American studies class. They wanted him to talk and he did. But he didn’t find it to be, at that time, a very satisfying experience. This was 1968, ’69, so it was way before even the possibility of the case being reopened.

But he always carried that with him. To understand why he made his decision not to evacuate with everyone, you’d have to know that he was the third of four boys. In a Japanese family, the first son kind of gets everything, the sun shines on him. And the second one kind of follows. My father was third. So he was kind of odd man out, he always felt. He always seemed like he was the rebel of the family. Most of his friends were Caucasian. He grew up as an average American kid. He was born in Oakland and went to Oakland schools. He was on the tennis team, the swim team, and the golf club at Castlemont High School. He learned about the Constitution in high school. He really took that to heart. He just happened to be of Japanese ancestry. His Japanese was not very fluent. It was more like children’s Japanese. It was enough to communicate with his parents, but certainly not like that of his other brothers. He just didn’t have that kind of identity with the culture.

Before Pearl Harbor—between the time that World War II started, which was September 3rd, 1939, and the time of Pearl Harbor—certainly, the United States was kind of edging towards maybe getting involved in the war. And there was talk of the draft. My father and his friends thought if they got drafted, they’d all probably end up in different armed forces. So what they decided to do was to try to enlist together. They first tried the National Guard, and the military officer who was responsible for applications gave applications to my father’s other two friends, but he wouldn’t give my father an application. My father asked, “Why not? I’m an American.” And all the officer said was, “We have orders not to give people of Japanese ancestry applications.” Then they tried the Coast Guard and it was the same situation. . . .

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*On December 7, 1941, the Japanese bombed Pearl Harbor. On February 19, 1942, President Roosevelt signed Executive Order 9066,*

*granting the military the power to exclude certain persons from specified areas due to wartime necessity. As a result, 120,000 Japanese Americans on the West Coast were put through a process of exclusion and detention, starting with a mandatory curfew, and quickly moving into forced exclusion from their homes, and forced detention in internment camps.*

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My father was a deep-feeling person. He had this unbelievable sense of right and wrong. During the curfew and then the evacuation, he also had a girlfriend, who I have to tell you, was not my mother. That influenced him as well. They wanted to stay together. If he went, she couldn't go. And she probably wouldn't want to go. And there was this very short window right after the notice of the evacuation where you could have the opportunity to go east. So they talked about maybe going to Nevada. But she, I think, was kind of dragging her heels. I don't think she really wanted to leave the Bay Area.

I think those were some of the reasons why my father, in the end, decided not to go with everyone else. He truly felt, "I'm an American." At the time of Pearl Harbor, he realized that possibly his parents would be in danger of getting shipped back to Japan or something else. But certainly, he believed, if you're born in this country, you have rights. You have constitutional rights. And he just carried that with him.

I think it was about three months later, after the evacuation, that my father was caught. He had changed his name, his draft card. They took him to a jail in Oakland first and he ended up in the Presidio, where he thought they actually had great food and treated him nicely. By the time he got to the assembly center, everyone was still there.

At the time of his first hearing, they decided that he was guilty. Mr. [Ernest] Besig, who was the attorney for the ACLU and the executive director at the time, went to see my father in prison and wanted to use my father as a test case. Here is another person who really stood by his convictions, because the ACLU, the National ACLU, didn't want Mr. Besig to take on my father's case. They said, "We will even excommunicate you if you do this." But he stood strong and said, "No, we're going to do this." And he carried it all the way, took it all to the Supreme Court, with the help of other attorneys like Wayne Collins.

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*Korematsu was tried and convicted in federal court on September 8, 1942, for violating Public Law No. 503, which criminalized the violations of military orders issued under Executive Order 9066. He was returned to the Tanforan Assembly Center, which was originally Tanforan Racetrack. Thereafter he and his family were placed in the Central Utah War Relocation Center situated at Topaz, Utah, where he remained during the appeals process and the rest of the war.*

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When my father was put into the assembly center with the rest of his family, it was just horse stalls. As he said in his statement in front of Judge Patel, “horse stalls are for horses, not for people.” What really upsets me is imagining my grandmother, an immigrant from Japan who doesn’t speak very much English at all, uprooted from home, put first into a horse stall, and then on a train with the blinds down to a camp out into the desert. This was done without any reason, no one ever charged them. There was never any day in court. My father always carried with him the fact that no one ever got their day in court.

When they all got to the internment camp, people treated my father like the Black Plague. No one wanted anything to do with my father because they were afraid that if they associated with him, they would somehow endanger their citizenship or their livelihood as well. So he just basically kept to himself. He worked there in Topaz. He helped build a hospital and made friends, actually, with some other contractors. But all that time, he felt like he was right and the government was wrong. I really just didn’t know that he was carrying all that until his case was reopened.

When Professor Peter Irons called, I was away working on a hotel project. My father and Peter, who found the evidence along with Aiko Herzig that there was no military necessity for the Japanese and Japanese Americans to be evacuated from the West Coast, had set up a meeting. Since I wasn’t sure if I could get back in time, I got a tape recorder. So, Peter had a tape recorder and my father had a tape recorder at this first meeting because my mother also wasn’t there. She was off picking me up from the airport and my plane was late. We walked in right at the very end of their meeting.

I was always kind of very suspicious of people. I’m always trying to protect my father, I suppose. At our first meeting of the *coram nobis* team, Dale Minami, Don Tamaki, Karen Kai, Bob Rusky, and all these attorneys, who were basically my contemporaries, came into my parents’ living room. They’re all sitting on the sofa, and I’m sitting in this rocking chair thinking, “Well geez, they’re kind of young.” Unbeknownst to me, my father was thinking the same thing, and in fact, said to Professor Irons, “They look awfully young.” Professor Irons reassured my parents that they were the best. And of course, they were.

But I said to them, “What’s in it for you? Why do you want to do this?” And someone said, “It was a chance of a lifetime. How often do you get to work on a famous Supreme Court case that you’ve read in your history books? And be able to possibly make a difference?” My father didn’t know any attorneys. I didn’t know any attorneys before that. We were just very, very far removed from the lawyer world.

I want to point out to you, as our future lawyers and public advocates, that this *coram nobis* team was very special. They sacrificed a lot

personally. They won't tell you that, but they did. And we realize that. They worked on this case pro bono. So I am a very big advocate of pro bono work. It really does make a difference and you can make a difference. If you get into a big law firm someday, make sure they have a pro bono department. And if they don't have a pro bono department, you can start one.

The other thing that's very special is that they ended up becoming our extended family. I just kind of took it for granted that's the way lawyers and clients were. But here we are, twenty-five years later or more, just as close now as we were back then. It's an opportunity, my father would tell you. He loved to talk to, especially, law students because he knew you would get it. And he looked to you as the keeper of the future. "Stay on your toes," he would say, "Go with what you think is right. And don't be afraid to speak up."

MR. DALE MINAMI: Thank you, again, to the *Asian American Law Journal* for inviting me here today. I'm honored for a lot of reasons because it's not just the twenty-fifth anniversary of the *coram nobis* decision. But I get to be here with the author of the decision, Judge Marilyn Hall Patel, and Fred's daughter, who's carrying on his legacy in a way that we had never expected. And we're so appreciative of her willingness to speak out and travel everywhere and tell his story because it's an American story, it's a civil rights story, and it's an inspirational story. I'm also happy to be here with my friend, Malcolm, who is carrying on that legacy of what Fred started and what we continued, and what Judge Patel did in her "activist" judicial days. No, I shouldn't use that word! I'd describe it as wonderful decisions imbued with the kind of courage she's shown over her lifetime on the bench to make the hard choices that were not always popular, like Fred did, but were the right ones to make.

I got a call in May of 1982 and it was from Professor Peter Irons, a person I had not known. He called to tell me that he was involved in a project. He had discovered some evidence that the United States Supreme Court was lied to in 1943 and 1944 when they heard and composed the famous *Hirabayashi*, *Yasui* and *Korematsu* decisions. He went over the evidence with me. Memos from the Department of Justice, the FBI, the Federal Communications Commission, and from, more importantly, the lawyers who were actually working on the case, stated that they were telling lies to the Supreme Court in these cases—intentional falsehoods that were unfair to this minority group. These government lawyers felt that they were committing ethical violations because they were telling things to the Supreme Court that they knew were untrue about the military necessity and danger of Japanese Americans.

I was blown away. I was thirty-two years old at the time and I asked Peter, "Where did you get my name?" One of the *coram nobis* petitioners,

Minoru Yasui, had given him my name because Min knew that I had done a number of class action cases against major institutions. I was young and stupid at the time, and if I brought those class actions today, I would get crushed in about five seconds under about a ton and a half of moving papers by big firms. But because Peter said that these men wanted to challenge the cases again and reopen them, I had to ask “Well, are these guys still alive?” I mean, this was forty years later. And in law school you get these discussions about cases and they’re abstract propositions about the different areas of law, the collision of rights, due process, equal protection, the rule of military, etc. You don’t really discuss the human drama behind these cases. You don’t even know who these people are, really.

When Peter said, “Yeah, they’re still alive, and they want to challenge their cases again,” it was hard for me to get my arms around this concept that these are living human beings, who are part of these famous cases, coming back to challenge Supreme Court decisions again. I called Don Tamaki, who was then at the Asian Law Caucus, and I explained what I had heard from Peter Irons and I knew that we would be engaging in a massive, massive project. We would have to retry history in this case. Don’s first question was, “Are those guys still alive?” We set up a meeting with the Korematsus and it was like meeting Mrs. Palsgraf [from the famous torts case *Palsgraf v. Long Island Railroad Company*] or Linda Brown from *Brown v. Board of Education*. You don’t put a human face or a drama or a personality behind that case. And we had heard that Fred had had some minor plastic surgery to avoid being detected as a Japanese so we were kind of curious as to what he looked like as well.

In the first meeting—I think Karen was not at that particular meeting—Peter and I went there because we thought we didn’t want to scare Fred off. We were worried that if too many people congregated at his house, it would create a little more of a drama than we needed. We knocked on the door, Fred answered, I immediately explored his face to see if I could see any difference, but he looked just like a lot of Japanese Americans. I couldn’t see any kind of difference at all. And then I got to meet Fred, who was exactly like people describe. He was a little bit wary of us. He thought we—well, I looked too young and I was young at that time, actually.

He invited us in and we met Karen’s mother, Kathryn, who is, in my mind after talking to her, so bright. I thought she might be the key to Fred’s reopening of his case. We need to win her over. So, you know, of course I was acting like a sycophant trying to curry her favor. But she’s smart; she got everything immediately. And where Fred was motivated by this really visceral sense of right and wrong—he had a really good instinct—Kathryn put this all in an intellectual construct and was so supportive. They were a team together.

So we started the case. We had three petitioners, Minoru Yasui in Portland, Gordon Hirabayashi in Seattle, and Fred Korematsu here. We decided, “Okay, we’re going to use this ancient writ of error *coram nobis*,” which when we filed Fred’s case, the clerk didn’t even know what it was. They had to call the chief clerk out to figure out what it was. In brief, it’s like habeas corpus. It asserts a fundamental injustice that has occurred in the past that the Court has the power to correct. *Coram nobis* is when your sentence has been served already. So it’s just slightly different than habeas corpus when you’re actually in custody.

We thought, “Okay, we could make a big splash. We could file this in the Supreme Court. Maybe in the Ninth Circuit.” But we didn’t trust those courts at that time. The composition of the Supreme Court was fairly conservative. So we hit on a strategy of filing in three different courts at three different times: the court of convictions of each of these men, respectively, in Seattle, Portland and San Francisco. Well, we had the best bench, the best judges in San Francisco: the ones whom we knew the best, the best panel of more progressive or moderate judges here. Washington was the second best, and Portland, a smaller venue, just didn’t have as many judges, so they didn’t have as many choices for us.

We decided that we would file first in San Francisco, where we had the best choice. . . . The day of the filing in San Francisco, we had a stack of petitions and exhibits. As Peter and I were crossing the Bay Bridge—we were taking the petitions to the court to be filed in San Francisco—I got in the shortest line [for the toll booth]. But it took the longest time. Some person was having an argument with the toll keeper and we just couldn’t get through. I said, “Peter, God, this happens to me all the time. I get in the shortest lines and it just takes the longest time.” He goes, “Yeah, it happens to me at grocery stores, too.” And so we’re thinking about this idea of luck. In the federal courts, the system for judicial assignments is random. In the old days, they used to have this wheel and then they started doing it by computer, but it was still random. So in many ways, the quality of justice you get, depending on the case you have, depends, of course, on the judge you get.

As we were thinking about the idea of luck and how unlucky we both are, we decided to call on our associate, Lori Bannai, who is now at Seattle University as a law professor. She’s had her share of good luck and bad luck, but mostly good luck in her life. She had really good karma. And so we turned the petitions over to her to file.

We had our first choice and our first choice was a judge that I knew from Oakland Municipal Court. She was a former General Counsel for the National Organization of Women before she became a judge. And I had a case in front of her in Oakland Municipal Court, where she had evidence of an illegal search in a case that I had and threw out the evidence, which was a very, very rare ruling against the police. And it was of course Marilyn

Hall Patel. She was then elevated by Jimmy Carter to the federal district court and we knew her to be somebody as very courageous, very smart, willing to do the right thing. You don't win a case or lose a case [because you get a certain judge] necessarily, but you at least know you're going to get a fair shake. We thought Judge Patel would be our first choice. Our second choice was Thelton Henderson. We didn't know him as well at the time.

Lori took this pile to the court, with her eyes bug-eyed and all our future hanging on her. She files and the clerks know what's going on, but this particular clerk said, "We didn't know how to file this case." They called the chief clerk out. He said, "I haven't seen one of these in thirty years." And so he said, "Well, is this a civil or criminal case?" Because it's kind of a hybrid, I immediately said, "It's a civil case." The reason I said that is I wanted to make sure we got civil discovery rights, rather than the more limited criminal discovery. The clerk turned to us and said, "You got Marilyn Hall Patel." And we were slapping high fives, we were very, very undignified. And, you know, it didn't guarantee a win but it guaranteed that we would have a day in court that the Japanese Americans never had.

Our strategy from 1982 to our actual hearing in November 19th of 1983 was to prepare in secret because we didn't know whether other court documents would disappear. We prepared our case totally in secret. When we finally presented it to the court, we were way ahead of the government. We kept pressing for a hearing. The government kept trying to delay because in Congress at that time, they were deliberating the bill on redress for Japanese Americans. They kept telling the court, "You know, a report's going to come out."

And I'm not going to take too much more time but I want to tell you one thing that I was very happy about. In the original *Korematsu*, *Hirabayashi* cases, they didn't have evidence of Japanese American disloyalty. There was no evidence that Japanese Americans were a threat in the original records of the trial courts. So what the Supreme Court in *Hirabayashi*, *Yasui*, and *Korematsu* did was to take judicial notice of certain racial, ethnic characteristics of Japanese Americans that they implied determined loyalty. It's racial profiling as deep as you can get.

And so that whole device of using judicial notice was really, I feel, somewhat misused at that time. So I said to Peter, "You know what, if we could use judicial notice in our case, wouldn't that be a really nice symmetry?" We knew the report coming out of Congress was going to be favorable to us. For the third or second continuance that the government was trying to get because they were trying to determine what role to take or what position to take, the court asked us whether we had objections to any continuance. We said, "Yes, we'd have objections unless counsel for the government is willing to allow us, the court to take judicial notice of the

congressional report,” which eventually concluded that the causes of the incarceration were war hysteria, racial prejudice, and lack of political leadership.

I remember Judge Patel leaned over and said, “You don’t have a problem with that, do you Mr. Stone?,” who was the U.S. Attorney. And Peter Stone said, “No, your honor.” And so judicial notice was taken of this report and that became part of her written decision.

We went forward and pushed this toward a hearing. The Executive Branch had already repudiated the imprisonment by rescinding Executive Order 9066. Congress had spoken with the report that it was making. It was only up to the judiciary to make that final judicial decision among the three branches.

And so we went to the hearing date, and I remember we were called in chambers in front of Judge Patel before the next day’s hearing. She was trying to get the government to take a position. They would not. One of the gaps in our research was filled in by some of the attorneys who worked for Judge Patel—that by not responding, the government’s position was tantamount to a confession of error. It was a big procedural jump that would be taken.

When I reported that back to my work team, because I was the only one in chambers at that time, they construed that as, “Well, we’re going to win.” But it was unclear because we still had to make arguments about whether it was appropriate for the judge to make findings of fact.

That day, with hundreds of people, we had to move to a ceremonial courtroom. I’m going to ask Judge Patel to tell the rest of the story because it was so dramatic at that time. Japanese Americans populated the audience, most of whom had been in camps. This was the trial they never had. Judge Patel let me argue for the Korematsu Team. Victor Stone, for the government, in a very unusual concession, allowed Fred Korematsu to address the court. Fred said, “I am doing this because I don’t want this to happen to any American again.”

That was our day in court. The decision was rendered that day and written later. But I’d like to turn it over to Judge Patel. Thank you.

JUDGE MARILYN HALL PATEL: First of all, it’s a pleasure to be here. And it’s a pleasure to be here with Karen Korematsu and Dale Minami. I often tell the story that Karen told about how she first learned about the case of *Korematsu* and who that was. But I still get goose bumps when I either tell it or hear it told. I thank both of these people for carrying on the legacy of this great hero. There’s nothing heroic or courageous about a federal judge who has lifetime tenure making a decision. When you have lifetime tenure, if you have no guts now, you’re never going to have them.

I think it was about three years or less into my tenure on the federal bench, a petition comes in and it's called a writ of *coram nobis*. And I thought, "What?" I remember studying something about that in law school but I'd never seen one. And, as it turned out in looking at the case law, there have been very few such cases. So that was a shock. Then I looked at the name of the case and what they were asking for and I said, "That's a Supreme Court decision. I remember that case from law school." I would call it the nadir of equal protection jurisprudence—although it really wasn't equal protection jurisprudence so much as wartime powers and some mention of due process. It was considered to be one of the worst decisions that had been rendered by the Supreme Court.

I thought, "I'm not the Supreme Court. Why don't they go to the Supreme Court for this relief? I don't think I have jurisdiction to undo something the Supreme Court has done." As it turned out, the conviction that Fred Korematsu sustained was of course sustained in the very court in which I sat. I assume if that judge had still been alive, the case might have been assigned to that judge. But of course, those times were long since past. In fact, ordinarily where there is a petition for a writ of *coram nobis*, it would start in a district court, even though there might have been an appellate court or reviewing court decision, even if it was the Supreme Court.

Also, I think the thing that really provided the nexus was the fact that the very misrepresentations that Dale has referred to that were made to the Supreme Court were made to the district court as well. And so the purpose, in fact, the meaning, of a petition for a writ of *coram nobis* is, "in our presence" or "before us." And it is essentially to correct an error before the court. The whole point is that there is no statutory remedy really available other than this for correcting essentially what is an issue of fact that was previously before court. As Dale said, it wouldn't be a petition for habeas corpus since obviously the person would have to be either in custody or subject to some liberty restriction.

Going to the decision that we issued in 1984, the very beginning of the opinion gives you the sense of the timing of what happened. On December 8th, 1941, the United States declared war on Japan. On February 19th, 1942, Executive Order Number 9066, which is the infamous Executive Order that was at the heart of this, authorized the Secretary of War and certain military commanders to prescribe "military areas from which any persons may be excluded as protection against espionage and sabotage." And then Congress enacted an order essentially enforcing that.

In the meantime, we had this delightful gentleman, General DeWitt, who was the military commander of the Western Defense Command, which included most of the western states and, of course, California. Pursuant to 9066, he issued a public proclamation that ordered that "the entire Pacific Coast. . .is subject to espionage and acts of sabotage, thereby

requiring the adoption of military measures necessary to establish safeguards against such enemy operations.” It seems that General DeWitt saw espionage and sabotage everywhere. And that was conveyed, of course, to the district court and to the Supreme Court.

Now with regards to what the FBI found, and I think also maybe it was the Department of the Navy, both of these entities had said that all of this espionage that DeWitt was talking about—Japanese ships offshore sending signals to Japanese on land and so forth—that those were our navy ships off the coast apparently signaling the Japanese. But of course it never really reached the attention of the district court or the Supreme Court that there was a lot of faulty “intelligence.”

As a result of all of this, Fred Korematsu found himself in a rather peculiar situation. He was not allowed to leave a certain area that he was in. Nor was he allowed to stay there. He essentially had one choice. And that was to show up at the assembly center. And of course, he didn’t do that. He stayed in the zone and he didn’t go to the center. And that was what he was ultimately convicted of, knowingly remaining in a prescribed area.

As Karen has said, it was uncontroverted at the time that Fred Korematsu was loyal to the United States. He had no dual allegiance to Japan. He never left the United States. He had demonstrated that he was willing to bear arms, register for the draft, but, as with a lot of other Japanese Americans, he was caught up in this proclamation that was ill-informed, based upon poor intelligence and, of course, we know what happened to so many Japanese during that period of time. Ultimately, he was convicted.

He was one of the three cases that Dale was talking about. The *Hirabayashi* decision went to the Supreme Court and came down in 1943. Fred Korematsu’s case was decided in 1944. Interestingly enough, the *Hirabayashi* case, on which the Supreme Court then relied a year later in deciding *Korematsu*, had concurring opinions but not a single dissent.

But in *Korematsu*, there were three dissents. Some of those dissents are interesting. Justice Murphy wrote, “I dissent. . .from this legalization of racism.” And then he goes on and talks about racial discrimination. Justice Jackson wrote something in his dissent that’s very poignant for us and that we’ve learned about in recent history: “But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient.” I think these are good words to live by.

The three dissents in the *Korematsu* case, unfortunately, were not enough. We know what carried the day. What was interesting is when we began to blow through what had happened. The information that had been gleaned by the team from the Asian Law Caucus and Peter Irons was the kind of information that had gotten into the record and had been conveyed

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only obliquely to both the district court and the Supreme Court. There is, in fact, this infamous footnote, which you hear referred to when we talk about the Supreme Court's decision.

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*The government's brief before the Supreme Court used a footnote to specify the factual data upon which the government relied for its military necessity justification. Originally, the footnote stated that General DeWitt's Final Report was in conflict with "information" in the possession of the Department of Justice.*

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Then it was revised and watered down. It talked about the fact that this recital was in conflict with the "views" of the Department. That's a little bit different from being at odds with facts. And then the final footnote was much more watered down and diluted than that. So there was no way to give a signal to the Supreme Court by way of this footnote that there were some real errors in the record.

By the way, what have you learned in law school? If you have something worth saying, you put it in the body of your pleadings. In your brief, you don't bury it in a footnote saying, "Hey, Supreme Court, look at this." I guess there just wasn't enough courage to place it in the body, or at least there were not enough people with the courage who had the kind of influence necessary to make it happen.

But forty years later, the government had much more courage. We were able to review the congressional report and certainly that played a role. But before that, the government came in and wanted to offer a pardon. Mr. Korematsu said, "Well, I did nothing wrong. You're the ones who erred." Then they wanted to dismiss the indictment under Rule 48(a) of the Criminal Rules of Civil Procedure, which is the embodiment of an old theory known as *nolle prosequi*, which is, "I will not prosecute." The only problem with that is 48(a) requires that you be in the middle of a prosecution, where the government decides, "Well, we've changed our minds, we're not going to prosecute and we're going to dismiss the indictment." Well, that was long gone. There is certainly case law that you could do that even while a defendant is serving a sentence. But that had long since happened too. There was no theory on which you could conjure up a basis under Rule 48(a) for dismissing the case. So I said, "We're going to go full steam ahead."

Now my recollection is that after some period of time, I called both sides into chambers the day before the hearing and said, "Look, we're having a hearing. The government really has not opposed this in any way other than to say we'll offer a pardon or we want to dismiss under Rule 48(a). They've submitted this report, which essentially explained all of the errors that had been made." And I said, "Something has to happen. Now,

we can conduct a full-blown hearing and a trial and reopen all the wounds of the past. Maybe that's a good idea. I don't know. But personally, I think the government has put itself in an untenable position. By submitting all of this evidence to the court, acknowledging that I can take judicial notice of it, acknowledging that this is an accurate record of what happened and didn't happen at the time of the conviction, it's tantamount to confessing error." That is another way that the government could have grappled with this case. They could have come in and said the magic words, "We confess error." But they didn't do it.

So I decided that there's more than one way to get at this. And that is if you're not going to confess error, but you're going to do everything but say the magic words, then that's sufficient for granting a petition for writ of *coram nobis*.

I've got just a couple of minutes left. I'll just say that it was so moving to be sitting in that court that day. By the end of the hearing and after what Mr. Korematsu had to say, I don't think there was a dry eye in the room. I was very moved by that as well because, you know, it feels good to do the right thing. It also feels good to be right. The government filed a notice of appeal as I recall, but they never perfected it. I guess if they thought it was a bad decision, they just didn't want a repeat of it from the Ninth Circuit.

I think it was heroic for Fred Korematsu, Mr. Yasui, and Mr. Hirabayashi to take the actions that they took so many years later. Keeping in mind, also, it wasn't just a matter of heroics. It was loyalty to the United States and to our Constitution. They were redressing a grievance that had been done not just to them, but to the Constitution. And it seems to me that what we have to do is to remember that lesson. We should have been remembering it these last few years, and we should remember it in the future. Thank you very much.

MR. YEUNG: Thank you very much to the three panelists. It looks like we have an extra five minutes for any questions from the audience.

AUDIENCE MEMBER: How do we address the fact that the original *Korematsu* decision has never been overturned?

MR. MINAMI: Well, I think the final paragraph of Judge Patel's opinion sums it up very well. And it's really interesting if you read *Hamdi v. Rumsfeld*<sup>1</sup> because Sandra Day O'Connor's opinion has a paragraph that almost is uncannily similar to this. Judge Patel writes:

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1. 542 U.S. 507 (2004).

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 guarantees. 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.<sup>2</sup>

This is written in 1984, and after September 11th it became even more prophetic. I totally agree that the legal precedential value is somewhat limited in the sense that if you ever read *Hamdan*, or some later Supreme Court decisions on the Guantanamo cases, they cite *Korematsu* hardly at all, except as historical precedent. If they were truly thinking of this as a legal precedent, they could have used that in one way or another. But I think it's been so criticized as a precedent and I think the *coram nobis* helped to the degree that it proved that the original decisions were based on a foundation of fraud. That you can uproot an entire minority group or group of people without due process, without trial, without hearing, without notice of charges, and take them away for indefinite periods—that kind of precedent is no longer good law. That's just my feeling about it.

But I think in the end it's going to be the political use of political power that's going to determine whether *Korematsu* precedent becomes an actual historical fact again.

AUDIENCE MEMBER: It sounded to me that each one of you felt different pressures. What helped you to go through that?

MS. KOREMATSU: Well, this was my father. So that, in itself, was special. He was so inspiring. As I said, he really felt like he was right and the government was wrong. We were just all supportive. He was such an endearing person to everyone and he wanted to do this not just for himself, but for all those who were interned. He just felt it was a great injustice.

MR. MINAMI: There was a lot of pressure. We had an ex-Supreme Court justice who said what we're doing is foolhardy. That was before we even got the decision. But we had a team. We had a number of things going for us. Number one, we had great facts, we had smoking guns. Number two, we had a great judge. Number three, we had a great work team of people that had a total belief that we were going to win the case

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2. 584 F.Supp. 1406,1420 (N.D. Cal. 1984).

because we felt the righteousness of a good cause. It was like we were on a mission. With the combination of good facts, good judge, pretty good law too, and most of all, perhaps, we felt that we had a good cause. So that insulated us against almost all pressures. With that team and the great clients we had who were very supportive, I think that helped us get through all of this.

JUDGE PATEL: I guess, given a position of being a judge with lifetime tenure, you don't feel quite the same pressures that other people feel. I ended up having to put pressure on the government: "You got to make a decision. You've got to do something one way or the other, or else I'm going to have to do it for you."

The only pressure was—and I wouldn't call it pressure—it was really important to try to get it right. And I think we must have because the government didn't decide to take an appeal. There were some real interesting procedural issues. I have to say that that the hardest decision of all was whether to have a full hearing—an evidentiary hearing and so forth—or whether this was the best way to proceed. It did not go up on appeal, as I said, unlike the *Hirabayashi* case. I also felt that the result was right. But you want to make sure that it's not just result oriented, that there is a basis for what is being argued and what you're doing. And the government helped in that respect by essentially not helping very much.

MR. YEUNG: I don't think we have any more time for questions. But I did see Don Tamaki<sup>3</sup> raise his hand in the back. Did you want to respond quickly, Don?

MR. DON TAMAKI: I just wanted to thank Judge Patel. I think she's being too modest. I think she belongs in a group of judges throughout American civil rights history who basically took a stand.

I also want to say that Fred Korematsu had extraordinary courage because when we were mapping this evidence, we alerted the press that we were going to file the next day. It was all over. It was on every network news, every national publication from the *Washington Times*, the *New York Times* to the *LA Times* and so on. We said, "Fred, you know, this is going to hit the news tomorrow. You might want to give your employer a heads up." And he did. The employer said, "Why are you bringing this up now? Why are you creating this problem? You're just being a trouble maker." It gave Fred pause. But he did not hesitate, even though I think he realized his job was at risk. He didn't have to do this. He had a nice life and family. He wondered whether he was going to get skewered and hung out

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3. San Francisco attorney Don Tamaki, currently of Minami Tamaki LLP, was another member of the *coram nobis* team.

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to dry again. But he was so determined to do this. And in fact, when it was filed, the reporters ended up on the Korematsus' front lawn basically ready to do the interviews when he walked out of the door.

MS. KOREMATSU: I just want to also mention about my father's courage, and all these kinds of roadblocks and hurdles. Even from his own younger brother, he did not have support. My uncle even said to him, "Why do you want to dig this up? It happened a long time ago." So it was basically our core family that was supportive and the legal team was very convincing. And really, I think, my father inspired them to even do more of their best work. When you have someone like that, you have a lot of confidence in yourself to say, "Yes, we can do this."