MISREMEMBERING *KOREMATSU*

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WHY IS IT SO EASY to misremember the holding of *Korematsu*?[1] In recent years, several respected legal commentators have got it wrong. In a 2017 essay on then-President Donald Trump's travel bans, David Cole remarked in passing that the Court in *Korematsu* had "upheld the internment" of people in the United States because of their Japanese ancestry, "without any evidence that any one of them was a spy or enemy agent."[2] In a 2022 review of Stephen Breyer's then-new book, Linda Greenhouse in passing described *Korematsu* as "the 1944 ruling that upheld the wartime internment of more than 120,000 people of Japanese descent, most of them American citizens."[3] And in a 2022 review of Brad Snyder's then-new book about Felix Frankfurter, Judge Jed Rakoff, again in passing, referred to *Korematsu* as the Court's "cavalier approval of the internment of loyal American citizens of Japanese descent during World War II."[4] These commentators are not alone. Justice Stephen Breyer, dissenting in *Ziglar v. Abbasi* in 2017, described *Korematsu*

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[1] *Korematsu v. United States*, 323 U.S. 214 (1944).

[2] David Cole, *Trump's Travel Bans – Look Beyond the Text,* New York Review of Books, May 11, 2017, last paragraph (at 7 of the NYR archive version).

[3] Linda Greenhouse, *A Powerful, Forgotten Dissent,* New York Review of Books, Oct. 6, 2022, first paragraph (at 2 of the NYR archive version).

[4] Jed S. Rakoff, *A Prisoner of His Own Restraint*, New York Review of Books, Nov. 3, 2022, third paragraph (at 2 of the NYR archive version).

as "this Court's refusal to set aside the Government's World War II action removing more than 70,000 American citizens of Japanese origin from their west coast homes and interning them in camps … ."[5]

Each of these characterizations of the *Korematsu* holding is incorrect (or, for Justice Breyer, incorrect in part). *Korematsu* addressed the criminal conviction of Fred Korematsu, which had been based on his failure to obey a 1942 order excluding persons of Japanese descent from designated war zones on the West Coast. The majority opinion makes clear that the Court was upholding only the 1942 exclusion order (and thus the criminal conviction), not internment, in the following words: "Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order."[6]

When I commented in the *New York Review of Books* on David Cole's characterization of the *Korematsu* holding, he replied that I was correct and expressed his appreciation for the correction, but went on to say that the distinction has been "lost to history" because

> it was a technicality to begin with. Korematsu's lawyers argued, with justification, that the Court could not separate exclusion from detention because all those excluded were in fact subsequently detained. Under the army's policy, and in reality, exclusion led inevitably to internment. The dissenters in *Korematsu* agreed, and the majority offered no convincing justification for blinding itself to the practical reality that exclusion and internment were inextricably linked.[7]

Was it a "technicality" to rule on the constitutionality of only the exclusion aspect of the order when faced with a criminal violation based on disobedience of that part of the order and not based on evading either temporary or long-term internment? Was it a "technicality" to observe that

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[5] *Ziglar v. Abbasi*, 582 U.S. 120, 181 (2017) (dissenting opinion of Justice Breyer, joined by Justice Ruth Bader Ginsburg).

[6] See 323 U.S. at 222.

[7] In fact, while Justices Owen Roberts and Robert Jackson based their dissents in part on the inextricability of the issues, their fellow dissenter Justice Frank Murphy did not. My letter and David Cole's reply are in the *New York Review* archive, directly following his essay cited in note 2 above.

"[s]ome who did not report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted"?[8] And was it a "technicality" to limit *Korematsu* to exclusion when a case being decided the same day as *Korematsu*, *Ex parte Endo*,[9] squarely presented the issue of internment? *Endo* came to the Court on a petition for a writ of habeas corpus on behalf of an interned American citizen, Mitsuye Endo, who the Army conceded was a loyal American posing no risk of espionage or sabotage.[10] The Court ruled that there was no statutory basis for keeping such a person in custody.[11]

David Cole again:

> Moreover, the Court's reasoning in *Korematsu*, which upheld the constitutionality of mass exclusion on the basis of racial and ethnic identity because the military assertedly could not tell the loyal from the disloyal, would also, as a logical matter, extend to detention. So the Court has been justly criticized both for accepting a wholly unsupported racial generalization and failing to acknowledge candidly the practical significance of its decision: it gave constitutional blessing to the internment of 110,000 people simply because they were of Japanese ancestry.[12]

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[8] 323 U.S. at 221. None of the three dissenters specifically took issue with this statement of fact, even though it may have been "highly misleading." Peter Irons, *Justice at War, The Story of the Japanese American Internment Cases* 329 (1983).

[9] 323 U.S. 283 (1944).

[10] *Id.* at 294 ("It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen"). The Government's brief rather buried this concession, which may have been clearer at oral argument: "The fact that these persons [apparently referring to Mr. Korematsu and Ms. Endo] are free from suspicion of disloyalty does not insure that their release might not produce serious consequences both to them and to others who have relocated." Brief for the United States in *Endo* at 64, 1944 WL 42559 at *64 (Oct. 9, 1944).

[11] Justice Roberts concurred only in the result in *Endo* because he rejected the majority's statutory ruling and believed that the internment of a loyal American citizen violated the Constitution. 323 U.S. at 308-10. Justice Murphy concurred in the Court's opinion but expressed his view that internment of "persons of Japanese ancestry regardless of loyalty" was unconstitutional. 323 U.S. at 307.

[12] Peter Irons, the author of the essential guide to the complex facts, proceedings, and arguments in the Japanese World War II cases, *Justice at War, supra* note 8, arrived at the

There is an important point here: the military "assertedly could not tell the loyal from the disloyal" in 1942, when the orders were issued and when Mr. Korematsu violated the exclusion order. But by August 23, 1943, when the War Relocation Authority granted Ms. Endo's conditional application for "leave clearance" under the applicable regulations, thus necessarily determining or accepting a concession of her loyalty, such a determination clearly could be made.[13] Even if we agree that the "logic" of *Korematsu* would have led the Court to uphold internment had it faced the question on 1942 facts, perhaps at the same time as the 1943 *Hirabayshi* decision,[14] it is too much to say that the Court gave "constitutional blessing" to internment in 1944. Faced with the opportunity to do so, the Court chose not to take such a step.

Linda Greenhouse correctly quoted Justice Jackson's dissent as saying that *Korematsu* lay "like a loaded weapon ready for the hand of any authority that can bring forth a plausible claim of urgent need."[15] Technically, it can no longer go off. A U.S. district court in California in 1984 set aside Mr. Korematsu's conviction on the ground that the government had withheld

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same conclusion as David Cole. At the end of his penultimate chapter, he concluded: "Subject only to explicit congressional approval, the Supreme Court had made clear, military officials faced no constitutional barriers to the wartime detention of American citizens singled out on a racial basis." *Id.* 346.

[13] Ms. Endo filed her habeas petition on July 13, 1942, alleging, apparently implicitly, that she was "a loyal citizen of the United States of America," owing "allegiance to no other country." Brief for Appellant Endo in the Supreme Court, 1944 WL 42557 at *6 (Sept. 14, 1944). The government filed no return, but sought dismissal on the claimed insufficiency of the allegations and on the applicable regulations and the failure to exhaust administrative remedies. The district court accepted the government's position in denying the petition on July 2, 1943. Brief for the United States, *supra* note 10, at *6-8. One wonders if it would have allowed the government to contest Ms. Endo's loyalty had it sought to do so before that decision. In any event, the War Location Authority granted Ms. Endo's application for leave clearance on August 23, 1943, *id.* at *8. While apparently not explicit on loyalty, that action appears to have been taken by all as conceding Ms. Endo's loyalty. Ms. Endo's continued internment after August 23, 1943, was based on her refusal to accept the conditions imposed on her release, relating in part to possible restrictions on employment and residence after release, and on her refusal to make further application based on those conditions. *Id.* at *17-18, *21-22.

[14] *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding a criminal conviction for violation of the wartime curfew order).

[15] 323 U.S. at 246.

relevant evidence at trial and from the Supreme Court.[16] And Chief Justice John Roberts, writing for the Court in 2018 in *Trump v. Hawaii*, the decision upholding the Trump entry restrictions on nine countries, most predominantly Muslim, stated that *Korematsu* "was gravely wrong on 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'" (quoting Justice Jackson's dissent).[17] But the danger may not be entirely gone. In dissent, Justice Sonia Sotomayor accused the Court of "redeploy[ing] the same dangerous logic underlying *Korematsu* and merely replac[ing] one 'gravely wrong' decision with another."[18]

It is fair to criticize *Korematsu* on the ground that its logic extends to internment (and beyond). But is it fair to mischaracterize *Korematsu*'s holding on that ground? Any student of Supreme Court decisions knows that the logic of prior decisions does not always carry the day. And fair or not, the unfortunately wrong characterization of the *Korematsu* holding remains an error. A Court already suffering serious harm to its reputation should not also be tarred with having upheld the constitutionality of the World War II internment of American citizens of Japanese ancestry on racial grounds.[19]

So why is it so easy to misremember the holding of *Korematsu*? Perhaps because the internment of Japanese Americans is so lamentable that one's natural instinct is to throw blame at every institution apparently involved. Understandable, but accuracy has its virtues.

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[16] *Korematsu v. United States*, 584 F. Supp. 1405 (N.D. Cal. 1984). Mr. Irons assisted in obtaining this ruling, based on the research for his book. Irons, *supra* note 8, at 366-67.

[17] *Trump v. Hawaii*, 138 S. Ct. 2392, 2423 (2018).

[18] 138 S. Ct. at 2448.

[19] There is considerable literature on *Korematsu*. One article that I found particularly interesting is Patrick O. Gudridge, *Remembering* Endo, 116 Harv. L. Rev. 1933 (2003).