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INTRODUCTION: PRAISING WITH FAINT DAMNATION—THE TROUBLING REHABILITATION OF *KOREMATSU*

ALFRED C. YEN*

It is my great pleasure to introduce this joint symposium issue of the *Boston College Law Review* and the *Boston College Third World Law Journal*. The articles printed here represent part of a spectacular day-long program entitled *The Long Shadow of Korematsu* which took place at Boston College Law School on October 3, 1998, during the fifth annual Conference of Asian Pacific American Law Faculty. Thanks are owed to all those at Boston College Law School who supported the conference and symposium, particularly Dean James Rogers. Special thanks must also be given to Aviam Soifer, who generously backed the first Conference of Asian Pacific American Law Faculty when it was just an idea, and graced the fifth Conference as a speaker.

In 1942, the United States interned 110,000 Japanese Americans.¹ These people were forced to leave their homes, businesses, jobs and communities despite never being formally charged with any civil or criminal offense. The government's justification for this was simple and chilling: the ancestry of Japanese Americans made them likely to side with Japan during World War II. To their credit, some Japanese Americans challenged internment in the courts. Their efforts failed, however, when the United States Supreme Court upheld the constitutionality of internment in the case of *Korematsu v. United States*.²

History has properly judged the *Korematsu* case harshly because it memorializes the Supreme Court's complicity in this gross violation of

* Professor of Law, Boston College Law School. The author would like to thank Keith Aoki for his assistance in organizing the Conference of Asian Pacific American Law Faculty, and Sumi Cho and Dean Hashimoto for their efforts and assistance in putting the symposium on *Korematsu* together. Frank Wu deserves credit for bringing the essay discussed herein to the author's attention, and Karin Yen, Sharon Beckman and Ilana Hurwitz provided valuable comments.

¹ SUCHENG CHAN, *ASIAN AMERICANS, AN INTERPRETIVE HISTORY* 122 (1991). The use of the term "Japanese Americans" is meant to include both American citizens of Japanese descent and resident aliens of Japanese descent. I include the resident aliens within the term "Japanese Americans" because many resident aliens of Japanese descent would have become naturalized American citizens but for the explicit legal prohibition against their doing so. See *infra* note 20 and accompanying text.

² 323 U.S. 214 (1944); see also *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding application of curfew order against Japanese Americans).

constitutional and human rights. The subsequent clearing of Fred Korematsu's criminal record³ and the payment of reparations to the victims of internment⁴ stand as evidence that the U.S. government acknowledges the terrible injustice it inflicted on Japanese Americans. This suggests that *Korematsu* has been permanently discredited; a mistake never to be repeated.

Unfortunately, proclamations of *Korematsu's* permanent discrediting are premature. The Supreme Court has never overruled the case. It stands as valid precedent, an authoritative interpretation of our Constitution and the "supreme Law of the Land."⁵ While modern courts continue to cite *Korematsu*, critical references to it are noticeably rare.⁶ Moreover, it is easy to confuse the healing of wounds brought on by the passage of time with acceptance of what happened more than fifty years ago. If our society forgets internment's misery and injustice, the *Korematsu* case may come to be viewed as one of those unfortunate, but necessary, compromises that "wasn't all that bad." Even if those who openly support the internment remain few in number,⁷ those who (to turn a familiar phrase upside down) "praise it with faint damnation" are likely to increase, thereby making it respectable to overlook, or even deny, the racism that made internment possible. This only heightens the chance that our country will someday intern innocent civilians once again.⁸

A prime example of the way in which *Korematsu* may be "praised with faint damnation" is a recent essay by no less than the Chief Justice of the United States Supreme Court, William H. Rehnquist. In *When the Laws were Silent*,⁹ the Chief Justice considers the internment and

³ *Korematsu v. United States*, 584 F. Supp. 140 (N.D. Cal. 1984) ("Korematsu Coram Nobis"); see also *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987) (affirming vacation of Hirabayashi's conviction for violating curfew).

⁴ See 50 U.S.C. § 1 (1994) (Civil Liberties Act of 1988, authorizing payment of reparations to Japanese Americans); CHAN, *supra* note 1, at 173-74 (recounting history of reparations legislation).

⁵ U.S. CONST. art. VI, cl. 1 (referring to the Constitution as the "supreme Law of the Land").

⁶ A Key Cite (Westlaw) search reveals 1964 documents citing the *Korematsu* opinion. Of these citations, only 2 is identified as critical or negative history. Similarly, a Shepard's search on Westlaw reveals 534 judicial citations to *Korematsu*. Of these cites, only 2 are marked as "questioned." Finally, a Lexis Auto-cite search identifies only one case that "criticizes" *Korematsu*.

⁷ For a discussion of those who still openly support the internment, see Robert Ito, *Concentration Camp or Summer Camp?*, MOTHER JONES, Sept. 15, 1998, available at <http://bsd.mojones.com/news_wire/ito.html>.

⁸ See *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting) (referring to *Korematsu* as a "loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes.").

⁹ William H. Rehnquist, *When the Laws Were Silent*, AM. HERITAGE, Oct. 1998, at 77-89. This

the criticisms advanced against the Supreme Court. The Chief Justice never endorses the internment, nor does he claim that the *Korematsu* decision was unproblematic. At the same time, however, the Chief Justice is curiously muted in his criticism of the internment and those responsible for it.

Consider the Chief Justice's description of the internment:

First a curfew was imposed on the ethnic Japanese, then they were required to report to relocation centers, and finally they were taken to camps in the interior of California and in the mountain states. There was no physical brutality, but there were certainly severe hardships: removal from the place where one lived, often the forced sale of houses and businesses, and harsh living conditions in the spartan quarters of the internment centers.¹⁰

This description of internment contains no glaring inaccuracies, yet its language suggests detached indifference. The Chief Justice notes that "there was no physical brutality," but internment is, by definition, brutal. Moreover, the word "physical" elides internment's psychological brutality. According to the Chief Justice, removal from one's home, the forced sale of property (often at prices so low as to be essentially confiscatory), and harsh living quarters are only "severe hardships," and not "brutality."

Admittedly, taken alone, this passage may not deserve the interpretation suggested here. Perhaps I have unnecessarily quibbled over the connotations of words like "brutality" and "hardship." The rest of Rehnquist's essay, however, creates even more discomfort because he studiously avoids criticizing every arm of the government responsible for internment.

The Chief Justice defends the military for exaggerating the alleged threat posed by Japanese Americans:

In defense of the military it should be pointed out that these officials were not entrusted with the protection of anyone's civil liberty; their job was making sure that vital areas were as secure as possible from espionage or sabotage. The role of General DeWitt was not one to encourage a nice calculation

essay appears in similar form as part of the Chief Justice's book. See WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 184-211* (1998).

¹⁰ *Id.* at 78.

of the costs in civil liberty as opposed to the benefits to national security.¹¹

The Chief Justice is similarly kind to Henry Stimson and John McCloy, the civilians charged with military oversight as Secretary and Assistant Secretary of War respectively. His assertion that these men felt no need to defend civil liberties seems odd given the fact that Stimson and McCloy took oaths "to support and defend the Constitution of the United States."¹²

The Chief Justice then completely omits the Justice Department's complicated role in the internment, especially the behavior of the Solicitor General's office. This lapse is particularly unfortunate given the Chief Justice's defense of the military. Even if the entire Department of War correctly felt no obligation to guard the constitutional rights of Japanese Americans, this claim cannot, by mere extension, apply to the Justice Department, whose function was the enforcement of the constitutional rights violated by internment.

Furthermore, to the extent that the case for internment stood on distortions about the threat posed by Japanese Americans, Justice Department lawyers—including the Solicitor General's office—owed an ethical obligation to correct those falsehoods before the Supreme Court.¹³ It is abundantly clear that the Solicitor General knew that the government's argument to the Supreme Court depended on such misrepresentations. Justice Department lawyer Edward Ennis drew the Solicitor General's attention to these misrepresentations, argued for rectification of the factual record, and was overruled.¹⁴ It is therefore not possible to defend the Justice Department by simply asserting that the Department (like the military) was simply "doing its job." The Chief Justice's failure to discuss the Justice Department is significant because it creates the impression that nobody in the executive branch of government had responsibility for protecting the constitutional

¹¹ *Id.* at 86.

¹² See 5 U.S.C. § 3331 (1994) (providing that all those appointed to civil service shall take an oath promising "to support and defend the Constitution of the United States against all enemies, foreign and domestic"); see also *United States ex rel. Reel v. Badt*, 152 F.2d 627, 630 (2d Cir. 1945) (mentioning oath taken under then 5 U.S.C.A. § 16, from which the present provision is derived, that included the phrase "to support and defend the Constitution of the United States").

¹³ See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4), (5), (6) (1998) (prohibiting use of false evidence); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1998) (requiring candor toward a tribunal).

¹⁴ See PETER IRONS, *JUSTICE AT WAR 195-206* (1983); see also *Korematsu Coram Nobis*, 584 F. Supp. 1417-19 (describing how the United States Justice Department knowingly withheld critical information from the Supreme Court); CHAN, *supra* note 1, at 138.

rights of Japanese Americans. By extension, it insinuates that the executive branch of our government, from the military to the Solicitor General, behaved correctly by carrying out and defending the internment of Japanese Americans.

The Chief Justice's analysis leaves the Supreme Court as the only organ of government that might be charged with responsibility for stopping the injustice of internment. Here too, the Chief Justice takes great pains to justify the Court's actions. Indeed, he is far easier on the Court than the Justices who dissented in *Korematsu*. The result is an analysis that is both fascinating and troubling.

The Chief Justice starts with a conventional defense of judicial deference to military decision in time of war.¹⁵ Concluding that judicial deference does not bestow unbridled freedom upon the military, the Chief Justice considers the argument that internment and the *Korematsu* decision were wrong because they were based on racial distinctions. It is here that the Chief Justice's reluctance to criticize becomes most clear. At the outset, he rejects the charge that racism caused internment or the *Korematsu* decision. He writes:

The Court's answer to this attack seems satisfactory: Those of Japanese descent were displaced because of fear that disloyal elements among them would aid Japan in the war. Though there were undoubtedly nativists in California who welcomed a chance to see the issei and nisei removed, it does not follow that this point of view was attributable to the military decisionmakers. They, after all, did not at first propose relocation.¹⁶

The inadequacy of this analysis is painful. The Chief Justice believes that Japanese Americans were interned because of fear that some Japanese Americans were disloyal, and not on account of racism. But why would anyone believe Japanese Americans to be disloyal? The obvious answer is "because they're Japanese." The Chief Justice therefore skirts perilously close to endorsing the argument that biological ancestry is rational evidence of political loyalty. He stops short of this endorsement, if at all, only by suggesting that the federal government could treat aliens of Japanese descent differently from citizens of Japanese descent. Even here, though, the Chief Justice seems curiously untroubled by either internment or the *Korematsu* majority.

¹⁵ See Rehnquist, *supra* note 9, at 87-88.

¹⁶ *Id.* at 88.

For example, the Chief Justice answers his own question about the constitutionality of internment Japanese-American citizens with the statement “[u]nder *today’s* constitutional law, certainly not.”¹⁷ The use of “today’s” suggests that the internment of U.S. citizens was constitutional when it occurred, and the Chief Justice never clears up this disturbing possibility. Among other things, he states that the fear of disloyal Japanese-American citizens “was not wholly groundless.”¹⁸ He then writes, “But although such information might well have *justified* exclusion of [Japanese-American citizens] . . . from work in aircraft factories without strict security clearance, it *falls* considerably short of justifying the dislodging of thousands of citizens from their homes on the basis of ancestry.”¹⁹ Notice the change in grammatical tense between the words “justified” and “falls.” By using the past tense in talking about the possible justification for treating Japanese-American citizens differently from other citizens, the Chief Justice clearly makes a statement about legal outcomes decided in the past. However, by using the present tense when discussing the lack of justification, he leaves open the possibility that he is still referring to “today’s constitutional law,” and not yesterday’s.

The Chief Justice’s analysis about the internment of aliens of Japanese descent does not fare much better. He justifies their internment²⁰ by referring to the Alien Enemies Law of 1798, which provided that the United States could arrest the unnaturalized citizens of countries with whom the United States was at war.²¹ Leaving aside for the moment whether the Alien Enemies Law was itself constitutional or just, the Chief Justice’s argument rests problematically on an overly blunt distinction between aliens and citizens. Many interned aliens of Japanese descent were not American citizens only because naturalization was legally restricted “to aliens being free white persons and to aliens of African nativity and to persons of African descent.”²² The very racism discredited by the Chief Justice actually lies at the core of the alien status that the Chief Justice relies upon in defending the internment of aliens of Japanese descent. Nevertheless, he seems untroubled

¹⁷ *Id.* at 88 (emphasis added).

¹⁸ *Id.*

¹⁹ *Id.* (emphasis added).

²⁰ See Rehnquist, *supra* note 9, at 89.

²¹ See *id.*

²² Charles J. McClain, *Tortuous Path, Elusive Goal: The Asian Quest for American Citizenship*, 2 *ASIAN L.J.* 33, 35 (1995) (quoting section 2169, Revised Statutes of 1875). This provision remained unchanged until after the internment. *Id.*

by the idea that racism creates legal distinctions that justify disparate legal treatment on the basis of race during time of war:

There is considerable irony, of course, in relying on previously existing laws discriminating against Japanese immigrants to conclude that still further disabilities should be imposed upon them because they had not been assimilated into the Caucasian majority. But in time of war a nation may be required to respond to a condition without making a careful inquiry into how that condition came about.²³

The Chief Justice concludes his essay by calling *Korematsu* "the least justified"—as opposed to unjustified—curtailment of civil liberty during wartime. His words show why it is important for scholars to study carefully *Korematsu* and its legal legacy. As noted earlier, the passage of time and healing of wounds make it easy to forget the injustice of internment. If "it wasn't that bad," the climate becomes ripe for rewriting the history that so rightly condemns internment. Perhaps the Chief Justice did not intend to rehabilitate *Korematsu*. Nevertheless, his reluctance to clearly criticize the internment and those responsible for it makes rehabilitation more likely.

Fortunately, the articles published here provide a powerful counterweight to essays like the Chief Justice's. By speaking out and publishing, the symposium participants nourish the vitally important project of making sure that our country remembers its history, and does not repeat it. As long as these words remain, those who try to defend *Korematsu* must confront scholarly research that casts doubt on their efforts. We must remember what happened over fifty years ago. We must remember that it was terrible, unjustified, and wrong.

²³ See Rehnquist, *supra* note 9, at 88.

