Background Information of Korematsu v. the United States (1944)
Excerpted from July 8, 2017 Keynote Speech by Donald K. Tamaki
Commemorating the Opening of the Topaz Internment Camp Museum in Delta Utah

In June, Jane Beckwith[1] took my wife and me to the Topaz detention site. Not much remains but the concrete footings of the barracks that housed over 11,000 Americans.[2]

Out there, I imagined my mother[3] and father[4] and their families walking on the dusty, hard-pan clay and wondering "how in the world did we end up behind barbed wire and surrounded by guard towers?"

My parents have passed—as well as most Americans confined in Topaz, including Fred Korematsu—so it occurs to me that, at least for today, I am their voice.

The rounding up of almost 120,000 Japanese Americans—70,000 of them American citizens by birth—occurred at a time when, regrettably, facts didn't matter.[5] Let it be remembered that not a single Japanese American was ever accused—let alone tried and convicted—of espionage or sabotage.[6]

So what was their crime? They happened to look like the enemy. General John L. DeWitt concluded that their race made Japanese Americans inherently disloyal:

> The Japanese race is an enemy race and while many . . . born on United States soil, possessed of . . . citizenship, have become "Americanized," the racial strains are undiluted. . . . It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. . . . *The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken*.[7]

Wrap your head around that circular logic: the very fact that you've never committed a crime is a "disturbing and confirming indication" that you will commit a crime.

How did this happen? December 7, 1941: Within hours of Japan's attack, agents swept through Japanese American communities, arresting their leaders.[8] February 19, 1942: President Roosevelt signed Executive Order 9066, empowering the military to designate Military Areas from which any persons could be excluded.[9] The next day, the eight most-western states were put under the authority of General DeWitt.[10] March 2, 1942: Dewitt issued Public Proclamation No. 1, designating all of California, the western halves of Oregon and Washington, and the southern half of Arizona as "Military Area 1."[11] March 21, 1942: President Roosevelt signed Public Law 503: "Whoever shall *enter, remain in, leave, or commit* any act in any military zone . . . shall . . . be guilty . . . and upon conviction shall be liable to a fine . . . or . . . imprisonment . . . or both."[12]

So imagine this room is Military Area 1—California, Oregon, Washington and Arizona—and you are Japanese American. You know you can't *enter* this room. Too late. This room has been your home for years. So you think you'll *remain*. Well, it's a crime for you to do that. So you decide to *leave*. Oops—that's also a crime.

So on March 27, 1942, General DeWitt issued an Order making it a crime for Japanese Americans to *leave* Military Area 1.[13] And on May 3, 1942, DeWitt issued another order, making it a crime for Japanese Americans to *remain* and ordering them into make-shift detention centers,

taking only that which they could carry.[14] For many who ended up in Topaz, this was Tanforan—a horse track south of San Francisco where 7,800 men, women, and children were crammed into horse stalls, surrounded by barbed wire and gun towers—while ten more permanent detention camps were being built from California to Arkansas.[15]

This was the predicament confronting Japanese Americans—they were faced with diametrically contradictory military orders which simultaneously made them criminals if they *left* their homes *or* if they *didn't leave*. Obedience to one part of Public Law 503 would necessarily violate the other.[16] The only way that Japanese Americans could avoid criminal prosecution was to submit to indeterminate confinement in detention camps.[17]

Fred Korematsu was born in Oakland, California. Alienated from his parents, in love with an Italian American girl, and regarding himself as 100 percent American, Fred decides to evade the law.[18]

He tore up his enemy alien registration card, which had been issued to all Japanese Americans, he took the name "Clyde Sarah"; and, indicative of his desperation, he underwent minor plastic surgery to look less Japanese.[19]

On May 30, 1942, while waiting to meet his girlfriend on a street, he was arrested.[20]

While held at the Army stockade in San Francisco, Fred was visited by Ernest Besig of the ACLU.

At Fred's arraignment, the judge set bail at $2,500; adjusted for inflation, that's about $40,000 today. To Fred's surprise Besig wrote a check for the bail, gave it to the clerk, and said "c'mon Fred," and the two walked towards the courthouse door, only to be stopped by four MPs. Despite the fact that Fred had posted bail which would have allowed any other person to go free, DeWitt's orders prohibited him, as a Japanese American, from being in Military Area 1.[21]

So Fred was taken back to the stockade and thereafter to Tanforan and ultimately to Topaz. Fred wrote to Besig: "These camps [are] definitely an imprisonment under armed guard with orders [to] shoot to kill. . . . These people should have been given a fair trial in order that they may defend their loyalty at court in a democratic way."[22]

Fred tried to do just that at his trial in September 1942. "As a citizen of the United States I am ready, willing, and able to bear arms for this country," he said.[23] He testified that he had registered for the draft and tried to volunteer for the Navy; that he had never been to Japan, couldn't read Japanese, and spoke it poorly.[24] Still, the judge found Fred guilty of violating Public Law 503, but allowed a military policeman to take him back to camp.[25]

There, Fred's decision to appeal was a lonely battle. At Topaz, almost no one supported him and he was shunned by those who felt he would make their situation worse. Indeed, they had reason to worry—but not because of Fred.

In February 1943, the government administered two poorly worded and confusing loyalty oaths, one asking if they would serve in combat and the other asking them to give up allegiance to Japan.[26]

In response to the question if they would serve in combat, some answered *no* as a form of protest. Those who answered a qualified *yes—if you free my family* were interpreted by the government as answering *no*.

Regarding the question of giving up allegiance to Japan, the first generation—born in Japan but prohibited by racist laws from becoming citizens—wondered if this was a trick question, wherein answering *yes* might result in them having no country at all. Their American-born children felt pressured to answer in the same way as their parents, for fear they would be separated from them, and they wondered how they could give up allegiance to Japan when they had none in the first place.[27]

Answering *no* and *no* had dire consequences. They were labeled disloyal, removed from Topaz and other camps, and sent to the Tule Lake Segregation Camp in California where conditions were harsh—consisting of double seven-foot high fencing topped with barbed wire, nineteen gun towers instead of six, a stockade, multiple tanks, and a battalion of 1,000 soldiers.[28]

In the meantime, as Fred's legal challenge made its way up on appeal, the government defended the mass roundup on two grounds: first—the Army claimed that Japanese Americans were committing acts of espionage in the form of shore-to-ship radio signaling; and second—they argued that Japanese Americans were so culturally, linguistically, and racially different as a people, that you couldn't trust them to be loyal.[29]

In 1944, the court heard Fred's case and, to his surprise, he lost: a majority on the high court ruled against him, calling the incarceration a "military necessity."[30]

But three justices dissented, including Justice Robert Jackson, who scathingly wrote: "the Court for all time has validated the principle of racial discrimination . . . and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."[31]

What did he mean? Without evidence, charges, or trial, an entire racial population—men, women, and children—could lose their property, their livelihood, their freedom, and, for some, even their lives, on the bald assertion of the military alone that they were dangerous.

Scholars described the ruling as a "civil liberties disaster."[32] Fast forward forty years. In 1982, Professor Peter Irons, working with researcher Aiko Yoshinaga Herzig, stumbled upon secret Justice Department documents.

Among them were memoranda written by Edward Ennis, a top Justice Department official supervising the drafting of the government's Supreme Court brief.[33] As Ennis began searching for evidence to support the Army's claims, he found precisely the opposite.

For example, the Office of Naval Intelligence, the lead intelligence agency responsible for the West Coast, recommended against the mass detention. It stated, "That, in short, the entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people . . . it is no more serious than the . . . German [or] Italian . . . population, and . . . should be handled on the basis of the individual . . . and not on a racial basis."[34]

When Ennis discovered that the Navy had not only concluded that Japanese Americans posed no threat but recommended against the mass round-up, Ennis wrote to Solicitor General Charles Fahy: "I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of [the Naval Intelligence] memorandum. . . . It occurs to me that any other course of conduct might approximate the suppression of evidence."[35]

Skeptical about DeWitt's claims that Japanese Americans were spying, Ennis called up a report from the Federal Communications Commission's radio intelligence chief, George Sterling, who wrote:

> The General launched into quite a discourse [about] radio transmitters operated by enemy agents . . . sending messages to ships at sea. . . . Since General DeWitt . . . seemed to believe that the woods were full of Japs with transmitters, I proceeded to tell him and his staff . . . of the FCC monitoring program. I know it virtually astounded the General's . . . officers. . . . Frankly, I have never seen an organization that was so hopeless to cope with radio intelligence requirements. . . . The personnel is unskilled and untrained. Most are privates who can read only ten words a minute. They know nothing about . . . [the] technical subjects so essential to radio intelligence procedure. They take bearings . . . on Japanese stations in Tokyo . . . and report to their commanding officers that they have fixes on Jap agents operating transmitters on the West Coast. These officers, knowing no better, pass it on the General, and he takes their word for it. It's pathetic to say the least.[36]

FBI Director J. Edgar Hoover similarly wrote back in response to Ennis' inquiry: "Every complaint has been thoroughly investigated, but in no case had any information been obtained which could substantiate the allegations that there has been illicit signaling from shore to ship since the beginning of the war."[37]

Caught in an ethical dilemma of not wanting to lie to the court, Ennis joined Justice Department lawyer John Burling in inserting a footnote in the government's brief, stating that DeWitt's claims were "in conflict with information in possession of the Department of Justice."[38]

Burling explained the importance of this footnote in a memo to Assistant Attorney General Herbert Wechsler: "You will recall that General DeWitt's . . . [r]eport makes flat statements concerning radio transmitters and ship to shore signaling which are categorically denied by the FBI and FCC. There is no doubt that these statements are intentional falsehoods."[39]

He further appealed to Wechsler for support: "I assume that the War Department will object to the footnote and I think that we should resist any further tampering with it with all our force."[40]

Well, the War Department did object. Under Secretary of War John J. McCloy called Solicitor General Fahy, who halted the printing of the brief.[41]

When Ennis learned of this, Ennis sent a memo to Wechsler "strongly recommending that the footnote be kept in its existing form," and attaching the FBI and FCC reports. He wrote:

> This Department has an ethical obligation to the Court to refrain from citing [DeWitt's claims] . . . if the Department knows that important statements . . . are untrue. . . . The general tenor of [DeWitt's] report is not only to the effect that there was a reason to be apprehensive, but also . . . that overt acts of treason were being committed. Since this is

> not so it is highly unfair to this racial minority that these lies . . . go uncorrected. This is the only opportunity which this Department has to correct them.[42]

Despite Ennis's protests, the footnote was deleted and, in its place, a new footnote was inserted asking the court to assume as fact DeWitt's claims, even though every intelligence agency had debunked them.

Thus, this attempt to alert the court that the mass detention rested on a foundation of falsehoods and fabrications failed. Was this relevant to the court's momentous decision? Justice Jackson wrote in his dissent:

> How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever has been taken by this or any other court. There is a sharp controversy as to the credibility of the DeWitt Report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable.[43]

So it was on this basis—governmental misconduct—that a team of pro bono lawyers reopened Fred's case in 1983, erasing his criminal conviction for defying Dewitt's orders.

In throwing out Fred's criminal conviction, Judge Marilyn Hall Patel of the Federal District Court wrote about the Supreme Court precedent:

> It stands as a constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting our constitutional guarantees. . . . [I]n times of distress the shield of military necessity and national security must not be used to protect governmental actions from close scrutiny and accountability. . . . [I]n times of international hostility . . . our institutions, legislative, executive and judicial, must be prepared to protect all citizens from the petty fears and prejudices that are so easily aroused.[44]

Judge Patel wrote these words in 1983—but their meaning resonates today.

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[1] Jane Beckwith is the executive director and founder of the Topaz Museum.
[2] "Topaz Camp," *Topaz Museum*, accessed April 4, 2018, topazmuseum.org/topaz-camp.
[3] Iyo Grace Yamashita.
[4] Minoru Tamaki.
[5] Peter H. Irons, *Justice Delayed: The Record of the Japanese American Internment Cases* (Middleton, CN: Wesleyan University Press, 1989), ix, x.
[6] "A Brief History of Japanese American Relocation during World War II," *National Park Service*, accessed March 21, 2018, nps.gov/articles/historyinternment.htm.
[7] John L. DeWitt, *Final Report: Japanese Evacuation from the West Coast, 1942* (Washington, D.C.: Government Printing Office, 1943), 34.
[8] John Tateishi, *And Justice for All: An Oral History of the Japanese American Detention Camps* (New York: Random House, 1984), xv.
[9] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942); see also "A Brief History of Japanese American Relocation."
[10] Public Proclam. No. 1, 7 Fed. Reg. 2320 (1942).
[11] Ibid.
[12] Pub. Law 77-503, 56 Stat. 173 (1942).
[13] Public Proclam. No. 4, 7 Fed. Reg. 2543 (1942).

[14] Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967 (1942).
[15] Ronald T. Takaki, *Strangers from a Different Shore: A History of Asian Americans* (Boston: Little, Brown, 1998), 394–95.
[16] *Korematsu*, 323 U.S., Justice Owen Roberts, dissenting at 230–32 (1944).
[17] *Korematsu*, 323 U.S., Justice Robert Jackson, dissenting at 243 (1944).
[18] Lorraine K. Bannai, *Enduring Conviction: Fred Korematsu and His Quest for Justice* (Seattle: University of Washington Press, 2015), 19.
[19] Bannai, *Enduring Conviction*, 17, 35–36. All persons of Japanese ancestry were classified as 4-C, enemy aliens, even those who, like Fred Korematsu, were American citizens.
[20] *Korematsu*, 323 U.S. at 215–16 (1944).
[21] Bannai, *Enduring Conviction*, 52.
[22] Ibid., 49.
[23] Ibid., 65.
[24] Ibid., 65.
[25] Erick Trickey, "Fred Korematsu Fought against Japanese Internment in the Supreme Court . . . and Lost," January 30, 2017, accessed March 21, 2018, smithsonian.com.
[26] "Loyalty Questionnaire," *Densho Encyclopedia*, accessed March 21, 2018, encyclopedia.densho.org/Loyalty_questionnaire/.
[27] "Tule Lake Unit," *National Park Service*, accessed March 21, 2018, nps.gov/nr/travel/cultural_diversity/tule_lake_unit_wwii_valor_in_the_pacific_national_monument.html
[28] Ibid.
[29] "Petition for Writ of Error Coram Nobis," *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984), reprinted in Irons, *Justice Delayed.*
[30] *Korematsu*, 323 U.S. at 223–24 (1944).
[31] *Korematsu*, 323 U.S. at 246 (1944).
[32] See for example, Eugene V. Rostow, "The Japanese American Cases—A Disaster," (1945) *Faculty Scholarship Series* 2155, digitalcommons.law.yale.edu/fss_papers/2155.
[33] Edward J. Ennis, Director of the Enemy Alien Control Unit of the Department of Justice, undertook supervision of the drafting of the government's brief. See "Petition for Writ of Error Coram Nobis," 23.
[34] K. D. Ringle to Chief of Naval Operations, "Japanese Question, Report on," January 26, 1942, memorandum, File BIO/ND 11BF37/A8-5, Records of the United States Navy; see also "Petition for Writ of Error Coram Nobis," 148–49
[35] Edward J. Ennis to Charles Fahy, Solicitor General, April 30, 1943, memorandum, File 146-42-20, no. 8 files, Department of Justice; see also "Petition for Writ of Error Coram Nobis," 45.
[36] "Conference with General DeWitt at San Francisco, Friday, January 9, [1942]," memorandum, Records of the Radio Intelligence Division, 173.11, Records of the Federal Communications Commission, RG 173, National Archives and Records Service, Washington, D.C.
[37] J. Edgar Hoover to the Attorney General, February 7, 1944, memorandum, box 37, fd-Japanese Relocation Cases III, Series IV., Office of Solicitor General Papers, 1940–1945, Charles Fahy Papers, Franklin D. Roosevelt Library, Hyde Park, New York; see also "Petition for Writ of Error Coram Nobis,"at page 59.
[38] John L. Burling to Assistant Attorney General Herbert Wechsler, September 11, 1944, memorandum, File 146-42-7, Records of the Department of Justice.
[39]Ibid.; see also "Petition for Writ of Error Coram Nobis," page 63
[40] John Burling to Herbert Wechsler, September 11, 1944, memorandum, File 146-42-7, Records of the Department of Justice.
[41] John L. Burling to Edward Ennis, October 2, 1944, memorandum, File 146-42-1, Records of the Department of Justice; see also "Petition for Writ of Error Coram Nobis," 64–65.
[42] Edward J. Ennis to Herbert Wechsler, September 30, 1944, memorandum, box 37, fd. 3, Fahy Papers; see also "Petition for Writ of Error Coram Nobis," 66–67.
[43] *Korematsu*, 323 U.S. at 245 (1944).
[44] *Korematsu v. United States*, 584 F. Supp. 1406, 1420 (N.D. Cal. 1984).