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## THERE WAS NOTHING “NEUTRAL” ABOUT EXECUTIVE ORDER 9066

Eric L. Muller\*

There is no more appropriate place to discuss the Japanese American cases of World War II<sup>1</sup> than in the pages of the *Arkansas Law Review*. This is not only because Arkansas was the only state outside the Western Defense Command<sup>2</sup> to host not one but two of the War Relocation Authority’s (WRA) concentration camps<sup>3</sup> for Japanese Americans.<sup>4</sup> It is because one of the most important lawyers to oversee the development and administration of all the WRA camps was the dean under whose leadership this law review was founded: Robert A. Leflar.

Leflar’s is not a name that constitutional lawyers are likely to remember in connection with the mass removal and detention of Japanese Americans in World War II. That’s because he,

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\* Dan K. Moore Distinguished Professor, University of North Carolina School of Law. I thank Professor Mark Killenbeck and the *Arkansas Law Review* for this opportunity to respond to Professor Killenbeck’s article.

1. See generally *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944); *Ex parte Endo*, 323 U.S. 283 (1944).

2. The Western Defense Command was an Army-administered zone designated by the War Department. It included Army troops and installations all along the West Coast of the United States. See *ENCYCLOPEDIA OF JAPANESE AMERICAN INTERNMENT* 201 (Gary Y. Okihiro, ed., 2013).

3. The government’s euphemistic label for these sites was “relocation centers.” ALICE YANG MURRAY, *HISTORICAL MEMORIES OF THE JAPANESE AMERICAN INTERNMENT AND THE STRUGGLE FOR REDRESS* 69 (2008). The term “concentration camp” was in common use while the facilities operated, however, and is the preferred term among Japanese Americans and among scholars today. See Eric L. Muller, *The Nazi Analogy in Japanese American Civil Rights Discourse*, 1 N.C. C.R. L. REV. (forthcoming 2021).

4. The states of Colorado, Idaho, Utah, and Wyoming were each home to one. See Greg Robinson, *War Relocation Authority*, *DENSHO ENCYCLOPEDIA*, (May 6, 2015) [<https://perma.cc/F3FK-X6ZN>].

unlike a Charles Fahy<sup>5</sup> or an Edward Ennis,<sup>6</sup> had no role in *Korematsu v. United States*,<sup>7</sup> the notorious Supreme Court decision that is the subject of Mark Killenbeck's article *Sober Second Thought? Korematsu Reconsidered*.<sup>8</sup> But he played a much bigger role than those men, supervising the day-to-day work of the agency lawyers stationed at each of the camps from 1942 to 1944.<sup>9</sup> It was Leflar and a few other lawyers at his level who shaped the circumstances under which Japanese Americans were confined and ultimately released.

Leflar's role reminds us of the danger of what we might call a *Korematsu* myopia in the constitutional vision of this tragic chapter in the legal history of the United States. Because it is *Korematsu* that generations of law students have read in their first-year classes and generations of scholars have analyzed, the Court's opinion (along with its opinion in the *Hirabayashi v. United States* case<sup>10</sup> of a year earlier) can be mistaken for an exhaustive account of the relevant history. But just as there were crucial actors outside *Korematsu*'s scope, so were there crucial facts.

This *Korematsu* myopia blurs the sharpest observations Professor Killenbeck draws in his article, not only of *Korematsu* but of its differences with the Supreme Court's recent opinion in

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5. Fahy was the Solicitor General of the United States who argued the *Korematsu* case in the U.S. Supreme Court. See Charles Sheehan, *Solicitor General Charles Fahy and Honorable Defense of the Japanese-American Exclusion Cases*, 54 AM. J. LEGAL HIST. 469, 469-70 (2014).

6. Ennis was Director of the Justice Department's Alien Enemy Control unit. See *id.* at 472. He is customarily celebrated for fighting—ultimately without success—against the War Department's efforts to secure President Roosevelt's authorization to uproot American citizens of Japanese ancestry and for urging Solicitor General Fahy to be more forthcoming and honest in his factual presentations to the Supreme Court in *Korematsu*. See Eric L. Muller, *Hirabayashi and the Invasion Evasion*, 88 N.C. L. REV. 1333, 1348-49, 1374 (2010). In truth, Ennis's role in cases involving Japanese Americans in World War II was far more ambiguous, and he himself was considerably less than fully forthcoming in the litigation he himself managed. See *id.* at 1348-49, 1369-73, 1377.

7. *Korematsu v. United States*, 323 U.S. 214 (1944).

8. See generally Mark Killenbeck, *Sober Second Thought? Korematsu Reconsidered*, 74 ARK. L. REV. 151 (2021).

9. Leflar served as Regional Attorney and Assistant Solicitor in the War Relocation Authority. See Edwin E. Ferguson and Robert A. Leflar, *The Law of the War Relocation Centers*, 14 GEO. WASH. L. REV. 564, 564 (1946); ROBERT A. LEFLAR, ONE LIFE IN THE LAW 58 (1985).

10. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

*Trump v. Hawaii*<sup>11</sup> upholding the Trump Administration’s so-called “travel ban.” In this brief response, I tell a fuller story about the executive order that authorized the uprooting and detention of Japanese Americans, one that reveals *Korematsu* and *Trump v. Hawaii* as essentially identical where Professor Killenbeck sees difference.

Many scholars see *Trump v. Hawaii* as a reenactment of the Court’s key mistake in *Korematsu*,<sup>12</sup> and it is not hard to see why. In each case, the Supreme Court encountered government action marred by bias against a disfavored minority group (Japanese Americans in *Korematsu*, Muslims in *Trump v. Hawaii*) and upheld it against constitutional challenge. This, it has long and correctly been maintained, was a betrayal of the strict scrutiny analysis the Court took pains to announce in *Korematsu*.<sup>13</sup> Strict scrutiny, when applied correctly, should have doomed mass removal, and it should have doomed the travel ban as well.

Professor Killenbeck, however, sees a “stark and potentially dispositive difference[.]”<sup>14</sup> between the two cases. *Korematsu*, as he describes it, was a situation in which illegal and unconstitutional bias corrupted the enforcement of a neutral government order.<sup>15</sup> The order, Executive Order 9066,<sup>16</sup> conferred power on the military to remove a person of any race from a military zone, but Lieutenant General John DeWitt subsequently enforced the order with invidious bias, targeting only Japanese Americans while leaving similarly situated German Americans and Italian Americans alone. By contrast, *Trump v. Hawaii*, as Professor Killenbeck sees it, was just the

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11. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018).

12. See generally Lorraine K. Bannai, *Korematsu Overruled? Far From It: The Supreme Court Reloads the Loaded Weapon*, 16 SEATTLE J. SOC. JUST. 897 (2018); Jamal Greene, *Is Korematsu Good Law?*, 128 YALE L.J.F. 629 (2019); John Ip, *The Travel Ban, Judicial Deference, and the Legacy of Korematsu*, 63 HOW. L.J. 153 (2020); Neal Kumar Katyal, *Trump v. Hawaii: How the Supreme Court Simultaneously Overturned and Revived Korematsu*, 128 YALE L.J.F. 641 (2019).

13. See Michael C. Dorf, *SCOTUS Travel Ban Argument Post-Mortem and the Surprising Relevance of Korematsu*, TAKE CARE (Apr. 25, 2018), [<https://perma.cc/6Y8J-NGXF>].

14. Killenbeck, *supra* note 8, at 153.

15. Killenbeck, *supra* note 8 at 169 (“Once in place, the scope and open-ended nature of the Order gave great leeway to the individuals charged with its implementation. On the West Coast, they transformed it into a weapon wielded almost exclusively against Japanese citizens and aliens.”).

16. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942).

opposite: a situation where Donald Trump, on the campaign trail, invidiously fantasized about banning travel by only Muslims, but then, once in office, implemented a ban that was religion-neutral.<sup>17</sup>

For Professor Killenbeck, this distinction creates a crucial doctrinal difference. As we know, illegal discrimination has two elements—invidious purpose and disparate impact.<sup>18</sup> In his view, both were present in *Korematsu*: the original government order was neutral, but a racially motivated enforcer saw to it that Japanese Americans alone felt its impact. In *Trump v. Hawaii*, on the other hand, Professor Killenbeck sees clear proof of only the first element, in the form of Trump’s biased statements against Muslims as a candidate. The second element appears to be lacking because the enacted travel ban said nothing about Muslims or adherents of any other faith.<sup>19</sup> It articulated neutral criteria for entry into the United States relating to security conditions in the countries where the travel originated.<sup>20</sup> Those countries included a few where Muslims were not in the majority, and the half dozen Muslim-majority countries reflected only a small fraction of the world’s Muslim population.<sup>21</sup> Professor Killenbeck does not go so far as to argue that the travel ban was categorically constitutional but says instead that its constitutionality turned on details of its enforcement that were unknown at the time of the litigation.<sup>22</sup>

Professor Killenbeck’s argument can be summarized more simply: in *Korematsu*, first there was neutrality, but it was replaced by invidious bias. In *Trump v. Hawaii*, first there was invidious bias, but it was replaced by what appears to be neutrality.<sup>23</sup> That is why the Supreme Court didn’t repeat the doctrinal error of *Korematsu* when it upheld the travel ban.

The problem with this argument is its grounding in an error of historical fact. The story of the removal of Japanese Americans

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17. Killenbeck, *supra* note 8, at 222.

18. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

19. Killenbeck, *supra* note 8, at 207.

20. *See id.*

21. *See id.* at 203.

22. *See id.* at 220-21.

23. *See id.* at 222.

from the West Coast did not begin with Executive Order 9066, and it did not begin with racial neutrality.

The idea of removing people from areas along the West Coast first came into the minds of military officials just three days after the Japanese attack at Pearl Harbor. On December 10, 1941, a rumor began to circulate that some 20,000 people of Japanese ancestry were planning an armed uprising in San Francisco to support a Japanese coastal invasion.<sup>24</sup> Convinced by it, the staff of Lieutenant General John DeWitt at the Presidio developed a plan to take all of them, aliens and citizens alike, into military custody. The plan received tentative approval, only to be scratched on the advice of the Federal Bureau of Investigation.<sup>25</sup> What is noteworthy is that even though the country was newly at war with Germany, Italy, and Japan, the plan envisioned the arrest of people of Japanese ancestry only.<sup>26</sup>

Deliberations about removing people from the coastal zone resumed in January, focusing on enemy aliens—nationals of the countries with which the United States was at war, over whom federal statutory law gave the federal government control.<sup>27</sup> The conversation at this point did not turn directly on race; there was discussion about Germans and Italians as well as Japanese.<sup>28</sup> But a highly dubious proposal surfaced within the Navy to treat American citizens of Japanese (but not German or Italian) ancestry as enemy aliens, their United States citizenship notwithstanding.<sup>29</sup> And General DeWitt also reserved special concern for Japanese aliens. According to notes of a conference in January, DeWitt stated that while he lacked confidence that enemy aliens generally were law-abiding or loyal, this was “[p]articularly” true of “the Japanese,” as to whose loyalty he “ha[d] no confidence . . . whatsoever.”<sup>30</sup>

In the middle of January 1942, Leland Ford, a member of the U.S. House of Representatives from Santa Monica, California,

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24. ROGER DANIELS, *THE DECISION TO RELOCATE THE JAPANESE AMERICANS* 15 (1975).

25. *See id.*

26. *Id.*

27. *See* Respecting Alien Enemies, ch. 66, 1 Stat. 577 (1798); 50 U.S.C. § 21.

28. DANIELS, *supra* note 24, at 15.

29. COMM’N ON WARTIME INTERNMENT AND RELOCATION OF CIVILIANS, *PERSONAL JUSTICE DENIED* 63-64 (2003).

30. DANIELS, *supra* note 24, at 20 (quoting Dewitt).

became the first political leader along the West Coast to press for mass evictions of people posing supposed threats to security.<sup>31</sup> In a letter to Secretary of War Henry Stimson, Ford proposed “[t]hat all Japanese, whether citizens or not, be placed in inland concentration camps.”<sup>32</sup> He said nothing about German or Italian Americans.

Pressure mounted for action against people of Japanese ancestry through the rest of the month. On January 29, 1942, a Justice Department official agreed to the military’s proposal to remove all people of Japanese ancestry, including United States citizens, from Bainbridge Island, across the Puget Sound from Seattle.<sup>33</sup> That same day, General DeWitt reported on the “tremendous volume of public opinion now developing against the Japanese of all classes, that is aliens and nonaliens, to get them off the land,” because “[t]hey don’t trust the Japanese, none of them.”<sup>34</sup> Two days later DeWitt told a top aide that he wanted “all Germans, all Italians who are enemy aliens and all Japanese who are native-born or foreign-born” to be taken out of critical areas.<sup>35</sup>

In early February, a battle opened in Washington between the War Department and the Justice Department over the scope of the President’s delegation to the military of authority to remove people.<sup>36</sup> The focal point of the disagreement was the treatment of United States citizens of Japanese ancestry. General DeWitt insisted on the power to remove all people of Japanese ancestry, including United States citizens; Justice Department officials believed such action unnecessary.<sup>37</sup> The wrangling continued throughout the first ten days of the month. Eventually the War Department, tired of the disagreement, went straight to President Roosevelt, seeking his authorization “to move American citizens

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31. *Id.* at 22.

32. ERIC L. MULLER, *FREE TO DIE FOR THEIR COUNTRY: THE STORY OF THE JAPANESE AMERICAN DRAFT RESISTERS IN WORLD WAR II* 25 (2001) (quoting Congressman Ford).

33. DANIELS, *supra* note 24, at 31.

34. *Id.*

35. *Id.* at 33.

36. COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, *supra* note 29, at 72.

37. *Id.* at 72, 74-75.

of Japanese ancestry as well as aliens” from “the entire West Coast.”<sup>38</sup>

President Roosevelt dealt with the matter in a brief telephone conversation with Secretary of War Henry Stimson on February 11. Neither man took notes of the call, but Assistant Secretary of War John McCloy reached out to DeWitt’s office almost immediately afterwards with the news that Roosevelt was willing to give the Army “*carte blanche* to do what we want to,” including the specific “authority to evacuate American citizens of Japanese ancestry.”<sup>39</sup>

President Roosevelt signed Executive Order 9066 on February 19, 1942.<sup>40</sup> It is true, as Professor Killenbeck notes, that the order did not mention race.<sup>41</sup> Instead, it gave military officials the authority to remove “any or all persons” from military zones of their creation.<sup>42</sup> Its language is neutral. But there can be no doubt of what it embodied, or of the essence of the disagreement it resolved between the War and Justice Departments. The order gave the military the specific power it had sought to affect the removal of United States citizens of Japanese ancestry—and only of Japanese ancestry—from the West Coast.<sup>43</sup>

Over the following couple of months, General DeWitt proceeded to issue proclamations designating terrain up and down the coastal strip as military zones and ordering the removal of all people of Japanese ancestry from them.<sup>44</sup> His motivation for doing this was transparently racist; he justified his actions on the basis that the “Japanese race [was] an enemy race” whose “strains” ran “undiluted” in the blood even of those born in the United States.<sup>45</sup> But he was not a biased enforcer corrupting a neutral order. Rather, he was a loyal enforcer bringing a biased project to fruition.

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38. DANIELS, *supra* note 24, at 44.

39. *Id.*

40. *See id.* at 49.

41. Killenbeck, *supra* note 8, at 167.

42. DANIELS, *supra* note 24, at 49-50.

43. COMM’N ON WARTIME RELOCATION & INTERNMENT OF CIVILIANS, *supra* note 29, at 85, 93.

44. ROGER DANIELS, PRISONERS WITHOUT TRIAL: JAPANESE AMERICANS IN WORLD WAR II 53 (Rev. Ed. 1993).

45. ERIC L. MULLER, AMERICAN INQUISITION: THE HUNT FOR JAPANESE AMERICAN DISLOYALTY IN WORLD WAR II 17 (2007) (quoting Dewitt) (emphasis omitted).

With this fuller account of how Japanese Americans came to be uprooted for wartime detention, let us now return to Professor Killenbeck's effort to distinguish *Korematsu* from *Trump v. Hawaii*. "In *Korematsu*," Professor Killenbeck argues, "an initially neutral presidential order was transformed"<sup>46</sup> by the work of "racist underlings"<sup>47</sup> into "one targeting a specific group on the basis of their ethnicity and national origin."<sup>48</sup> The situation in *Trump v. Hawaii*, he maintains, was the reverse,<sup>49</sup> noting that "pre-proclamation statements that were permeated with express bias eventually became a policy that was neutral on its face . . . ."<sup>50</sup>

In reality, the situations are not the reverse of each other, but the same. Japanese Americans were predefined as a security threat in 1942; Muslims were predefined as a security threat in 2016.<sup>51</sup> Neither General DeWitt nor President Roosevelt entertained the idea of uprooting any American citizens *en masse* other than those with Japanese parents, just as Donald Trump never spoke of a "total and complete shutdown" on entry into the United States for anyone but Muslims.<sup>52</sup> Thus, it is difficult to see "stark and potentially dispositive differences between . . . the directives litigated in *Korematsu* and *Trump [v. Hawaii]*,"<sup>53</sup> as Professor Killenbeck does. They were both rotten with malign motive, and it took no machinations by evil enforcers to see it.

I have argued elsewhere that there are meaningful legal differences between the mass removal of Japanese Americans from the West Coast in 1942 and Donald Trump's 2017 travel ban.<sup>54</sup> There is no need to catalogue them in detail here; suffice it to say that one can rationally distinguish the government's ability to push citizens around inside the country from its ability to prevent noncitizens from entering the country.<sup>55</sup> I therefore

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46. Killenbeck, *supra* note 8, at 222.

47. *Id.* at 153.

48. *Id.* at 222.

49. *Id.*

50. Killenbeck, *supra* note 8, at 222.

51. *Id.*

52. *Id.* at 199.

53. *Id.* at 153.

54. See Eric L. Muller, *Korematsu, Hirabayashi, and the Second Monster*, 98 TEX. L. REV. 735, 744-45 (2020).

55. See *id.* at 746.

agree with Professor Killenbeck's claim that *Trump v. Hawaii* cannot accurately be characterized as a reprise of *Korematsu*. The point of this brief response is simply to note that what distinguishes the presidential orders in the two cases is not that Roosevelt's was clean at conception and later corrupted, whereas Donald Trump's was corrupt at conception and later cleansed. Both were dirty from the start.