

The Relevance of Japanese Internment Today

*“Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis that, at the extremes of military exigency, inter arma silent leges. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution.”*¹ The late Justice Antonin Scalia noted that even during the most extreme military circumstances, the supreme law cannot fall silent.

Following the attack on Pearl Harbor, Congress expediently declared war against the Japanese Empire.² A few months later, President Roosevelt signed Executive Order 9066 and Public Law 77-503. Executive Order 9066 granted Secretary of War Henry Stimson the authority to designate Military Commanders—he appointed John DeWitt to protect the western coastal and interior states.³ Additionally, Secretary Stimson and General DeWitt acquired the power to prescribe military areas. The rights of certain individuals “to enter, remain in, or leave” these military areas were at the discretion of Secretary Stimson and General Dewitt. If these individuals defied the restrictions, they would be charged under Public Law 77-503, which carried a prison sentence and/or a fine of up to \$5,000 per count.⁴

Those of Japanese descent were immediately discriminated against due to their perceived connection to the Japanese Empire. Most complied, but some fought back through litigation. The landmark Japanese internment cases are: *Hirabayashi v. United States*, *Korematsu v. United States*, and *Ex Parte Endo*.

On May 16, 1942, Gordon Hirabayashi turned himself into the FBI for intentionally disobeying the curfew set by Public Proclamation No. 3, and for planning to violate Civilian Exclusion Order No. 57, which required him to report to a Civilian Control Station.⁵ When he faced trial at a United States district court, he was found guilty of violating the curfew and exclusion order; however, through appealing, his case reached the Supreme Court.⁶

¹ Hamdi v. Rumsfeld. 542 U.S. 507. Supreme Court. 28 June 2004. Justia. Web. 14 Apr. 2017.

² Hunter, Derek. "Watch FDR's Entire 'Infamy' Speech After Pearl Harbor [VIDEO]." *The Daily Caller*. Neil Patel, 07 Dec. 2016. Web. 14 Apr. 2017.

³ Lt. Gen. J.L. DeWitt to the Chief of Staff, U.S. Army, June 5, 1943, in U.S. Army, Western Defense Command and Fourth Army, *Final Report; Japanese Evacuation from the West Coast 1942*, Washington D.C.: Govt. Printing Office, 1943, pp. vii-x.

⁴ An Act of March 21, 1942, Public Law 77-503, 56 STAT 173, to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving, or Committing Any Act in Military Areas or Zones; 3/21/1942 ; 77th Congress, 2nd Session; Enrolled Acts and Resolutions of Congress, 1789 - 2011; General Records of the United States Government, Record Group 11; National Archives Building, Washington, DC.

⁵ Lyon, Cherstin. "Gordon Hirabayashi." *Densho Encyclopedia*. 14 Jul 2015, 21:44 PDT. 14 Apr 2017, 04:27

⁶ Ibid.

The Supreme Court unanimously held that the curfew order was constitutional, as this was a proper combination of Executive and Legislative power, and did not violate the due process clause of the Fifth Amendment.⁷ Notably, the Stone Court chose not to discuss the constitutionality of the exclusion order.⁸ Writing for the majority, Chief Justice Stone asserted that “Since the Constitution commits to the Executive and to Congress the exercise of the war power... it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.”⁹ By failing to question the actions of the other branches because of “wartime,” the Judiciary failed to uphold the “supreme law of the land,” the Constitution.¹⁰ Instead, it reaffirmed the maxim, *inter arma enim silent leges*; “in times of war, the law falls silent.”

On May 30, 1942, Fred Korematsu was arrested in his hometown of San Leandro, located in Alameda County, for defying Civilian Exclusion Order No. 34, which mandated that “...all persons of Japanese ancestry, both alien and non-alien, be excluded from...” certain portions of Military Area No. 1, including Alameda County.¹¹ Korematsu lost at the district court level, but his case eventually reached the Supreme Court.

The 6-3 Stone Court upheld the lower court’s decision. Writing for the majority, Justice Hugo Black based his decision heavily on *Hirabayashi* and “pressing public necessity.” He stated, “When, under conditions of modern warfare, our shores threatened by hostile forces, the power to protect must be commensurate with the threatened danger.”¹² Justice Frankfurter, concurring, added that “the war power of the Government is ‘the power to wage war successfully.’”¹³ Both used the success of the war to justify the Government’s actions, again reaffirming the maxim, *inter arma enim silent leges*.

Despite the military exigency, not every Justice fell silent—Justice Murphy, dissenting, recognized that this “exclusion goes over ‘the very brink of constitutional power,’ and falls into the ugly abyss of racism.”¹⁴

Both *Korematsu* and *Ex Parte Endo* were decided on December 18, 1944. In *Ex Parte Endo*, the Court unanimously held that the government could not continually detain a citizen it deemed

⁷ *Hirabayashi v. United States*. 320 U.S. 92, 100. Supreme Court. 21 June 1943. *Justia*. Web. 14 Apr. 2017.

⁸ *Ibid.*, 85.

⁹ *Ibid.*, 93.

¹⁰ *U.S. Constitution*. Art. VI.

¹¹ Imai, Shiho. "Korematsu v. United States." *Densho Encyclopedia*. 29 Jul 2015, 05:54 PDT. 14 Apr 2017, 04:53

¹² *Korematsu v. United States*. 323 U. S. 220. Supreme Court. 18 December 1944. *Justia*. Web. 14 Apr. 2017.

¹³ *Ibid.*, 224.

¹⁴ *Ibid.*, 233.

concededly loyal; however, it did not address the constitutionality of excluding citizens based on military necessity.¹⁵

Although the *Ex Parte Endo* decision benefited Japanese Americans, the government had already curtailed their procedural and substantive due process rights, which are granted by the 5th and 14th Amendment of the Constitution. This occurred because the auxiliary precautions built into our Constitution to prevent these obstructions of rights did not function as intended. For instance, checks and balances were insufficient because all three branches of the government were united under the Democratic party. James Madison asserted that this “accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many... may justly be pronounced the very definition of tyranny.”¹⁶ Furthermore, the concept of federalism, which Alexander Hamilton believed would “form[] a double security to the people,” failed because most of the states were also controlled by the Democrats.¹⁷ With a single faction controlling virtually all critical governmental institutions, the government quickly degenerated into an ochlocracy, or tyranny of the majority.

Today, the War on Terror parallels the epoch of internment in certain ways. Although unofficial, the United States has been fighting a war against terrorism. In recent months, President Donald Trump signed Executive Orders 13769 and 13780, often described as travel bans targeting Muslims.¹⁸ However, in this case, federal judges prohibited the silencing of the Constitution; they acted with urgency, granting emergency hearings and temporary restraining orders in response.¹⁹

Yet, the people must remain more vigilant than ever. With the appointment of Justice Gorsuch, all three branches of the federal government and the majority of states, are again united under a single party: the Republican party. Although this is dangerous, there is a solution—Madison states, “A dependence on the people is, no doubt, the primary control on the government.”²⁰ Thus, we must stand together to protect those without a voice.

¹⁵ *Ex parte endo*. 323 U. S. 297. Supreme Court. 18 December 1944. *Justia*. Web. 14 Apr. 2017.

¹⁶ Madison, James. "The Federalist No. 47." *The New York Packet* 1788-02-01 Print.

¹⁷ “New York Ratifying Convention. First Speech of June 21 (Francis Childs’s Version), [21 June 1788],” *Founders Online*, National Archives, last modified March 30, 2017, [Original source: *The Papers of Alexander Hamilton*, vol. 5, *June 1788–November 1789*, ed. Harold C. Syrett. New York: Columbia University Press, 1962, pp. 36–45.]

¹⁸ Hirschfield, Sarah Warman. "First Federal Judge Rules in Favor of Trump Travel Ban." *The Princetonian*. The Daily Princetonian, 28 Mar. 2017. Web. 20 Apr. 2017.

¹⁹ Burns, Alexander. "2 Federal Judges Rule Against Trump’s Latest Travel Ban." *The New York Times*. The New York Times, 15 Mar. 2017. Web. 14 Apr. 2017.

²⁰ Madison, James. "The Federalist No. 51." *Independent Journal* 1788-02-06 : . Rpt. in *The Documentary History of the Ratification of the Constitution*. Vol. 16. Ed. Gaspare J. Saladino and John P. Kaminski. Madison: Wisconsin Historical Society Press, 1986. 43-47. Print.