

115TH CONGRESS
1ST SESSION

S. 2250

To ensure due process protections of individuals in the United States against unlawful detention based solely on a protected characteristic.

IN THE SENATE OF THE UNITED STATES

DECEMBER 19, 2017

Ms. DUCKWORTH (for herself, Ms. HIRONO, Mr. BLUMENTHAL, Mr. SCHATZ, Mr. BOOKER, and Mrs. FEINSTEIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To ensure due process protections of individuals in the United States against unlawful detention based solely on a protected characteristic.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Korematsu-Takai Civil
5 Liberties Protection Act of 2017”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) On February 19, 1942, President Franklin
9 D. Roosevelt signed Executive Order 9066 (7 Fed.

1 Reg. 1407; relating to authorizing the Secretary of
2 War to prescribe military areas), endowing the Sec-
3 retary of War and the designated military com-
4 manders of the Secretary of War with the power to
5 create military zones and forcibly exclude persons as
6 the Secretary of War and the designated military
7 commanders determined to be “necessary and desir-
8 able”.

9 (2) On March 2, 1942, military commander
10 Lieutenant General John L. DeWitt promulgated
11 Public Proclamation No. 1, which declared that the
12 entire Pacific Coast was “particularly subject to at-
13 tack, to attempted invasion . . . and, in connection
14 therewith, [was] subject to espionage and acts of
15 sabotage” and that “[s]uch persons or classes of
16 persons as the situation may require will by subse-
17 quent proclamation be excluded from all of Military
18 Area No. 1 and . . . [some] zones . . . within Mili-
19 tary Area No. 2.”. On that basis, General Dewitt
20 designated all of California, the western halves of
21 Oregon and Washington, and the southern half of
22 Arizona as “Military Area No. 1”.

23 (3) On March 21, 1942, President Roosevelt
24 signed the Act of March 21, 1942 (56 Stat. 173,
25 chapter 191) (commonly referred to as “Public Law

1 503”), which stated, “[W]hoever shall enter, remain
 2 in, leave, or commit any act in any military area or
 3 military zone . . . shall . . . be guilty . . . and
 4 upon conviction shall be liable to a fine . . . or . . .
 5 imprisonment . . . or both. . . .”.

6 (4) Pursuant to Executive Order 9066 (7 Fed.
 7 Reg. 1407; relating to authorizing the Secretary of
 8 War to prescribe military areas), Public Proclama-
 9 tion No. 1, and Public Law 503, on March 27,
 10 1942, General DeWitt issued Civilian Exclusion
 11 Order No. 34, making it a crime for Japanese
 12 Americans to leave Military Area No. 1.

13 (5) On May 3, 1942, under the authority of Ci-
 14 vilian Exclusion Order No. 34, General DeWitt
 15 issued another military order making it a crime for
 16 Japanese Americans to remain in Military Area No.
 17 1 and ordering those Japanese Americans into
 18 make-shift detention centers, allowing those individ-
 19 uals to take only that which they could carry.

20 (6) The order of May 3, 1942, created an im-
 21 possible predicament for Japanese Americans—

22 (A) as those orders were diametrically con-
 23 tradictory because—

24 (i) simultaneously, Japanese Ameri-
 25 cans were made criminals whether they left

1 their homes or did not leave their homes;
2 and

3 (ii) obedience to one part of Public
4 Law 503 would necessarily violate the
5 other; and

6 (B) because the only way that Japanese
7 Americans could avoid criminal prosecution was
8 to submit to indeterminate incarceration in
9 temporary detention camps through what was
10 called an “evacuation”, which was in fact a
11 mass roundup of all individuals of Japanese an-
12 cestry, including orphans, babies, the ill, and
13 the elderly.

14 (7) Congress established the Commission on
15 Wartime Relocation and Internment of Civilians,
16 which later found that, “Decades of discrimination
17 against immigrants from Japan and public hostility
18 toward Americans of Japanese descent fueled out-
19 raged shock at the Pearl Harbor attack.”.

20 (8) The February 1942 recommendation of
21 General DeWitt said, “The Japanese race is an
22 enemy race and while many second and third gen-
23 eration Japanese born on American soil, possessed
24 of United States citizenship, have become ‘Ameri-
25 canized’, the racial strains are undiluted . . . It

1 therefore, follows that along the vital Pacific Coast
2 over 112,000 potential enemies, of Japanese extrac-
3 tion, are at large today . . . The very fact that no
4 sabotage has taken place to date is a disturbing and
5 confirming indication that such action will be
6 taken.”.

7 (9) By the spring of 1943, Japanese Americans
8 were volunteering to serve in the Armed Forces of
9 the United States, and there was growing sentiment
10 to allow them and their families to return home. The
11 testimony of General DeWitt before a subcommittee
12 of the Committee on Naval Affairs of the House of
13 Representatives on April 13, 1943, highlighted the
14 discriminatory nature of the orders to evacuate, relo-
15 cate, and incarcerate Japanese Americans. Histo-
16 rians have quoted General DeWitt as stating, “A
17 Jap’s a Jap! . . . It makes no difference whether he
18 is an American or not.”.

19 (10) In 1942, there were 1,100,000 nationals of
20 enemy nations in the United States, and, of those
21 individuals, fewer than 4 percent were Japanese na-
22 tionals. A curfew was enacted that applied to nation-
23 als from Germany, Italy, and Japan. American citi-
24 zens of Japanese ancestry also had to abide by the

1 curfew, whereas, American citizens of German an-
2 cetry and Italian ancestry did not.

3 (11) Individuals were forced to leave their
4 homes and livelihoods behind. Most bank accounts
5 were frozen or confiscated as enemy assets. People
6 were allowed to take what they could carry, exclud-
7 ing any item that the Government deemed “contra-
8 band”.

9 (12) There were 10 permanent incarceration
10 sites, all of which were in isolated areas—

11 (A) at Gila River, Arizona;

12 (B) at Poston, Arizona;

13 (C) at Jerome, Arkansas;

14 (D) at Rohwer, Arkansas;

15 (E) at Manzanar, California;

16 (F) at Tule Lake Segregation Center, Cali-
17 fornia;

18 (G) at Granada, Colorado (commonly re-
19 ferred to as “Amache”);

20 (H) at Minadoka, Idaho;

21 (I) at Topaz, Utah; and

22 (J) at Heart Mountain, Wyoming.

23 (13) Each incarceration site held between 7,000
24 and 18,000 individuals, and a total of approximately

1 120,000 Japanese Americans were ultimately de-
2 tained.

3 (14) Some Japanese Americans, including Fred
4 Korematsu, Gordon Hirabayashi, and Minoru Yasui,
5 challenged the detention, exclusion, and curfew or-
6 ders aimed at Japanese Americans.

7 (15) In June 1943, the Supreme Court of the
8 United States unanimously decided *Hirabayashi v.*
9 *United States*, 320 U.S. 81 (1943), and the com-
10 panion case *Yasui v. United States*, 320 U.S. 115
11 (1943). In the *Hirabayashi* case, the Supreme Court
12 found that both the power delegated to the military
13 to impose curfews and the Executive orders creating
14 that power were constitutional despite—

15 (A) their applications primarily to Ameri-
16 cans of Japanese ancestry on the basis of the
17 particular “racial characteristics” of Americans
18 of Japanese ancestry; and

19 (B) the fact that the ultimate result of the
20 orders was imprisonment for an indefinite pe-
21 riod of confinement that was imposed without—

22 (i) the right to an attorney;

23 (ii) the right to notice of the charges
24 against the individual being imprisoned;
25 and

1 (iii) the right to a trial.

2 (16) On December 18, 1944, the Supreme
3 Court of the United States, in the 6–3 decision in
4 *Korematsu v. United States*, 323 U.S. 214 (1944),
5 held that the order requiring exclusion of persons of
6 Japanese ancestry from States on the West Coast
7 was constitutional. The majority of the Court—

8 (A) found that the order did not violate
9 the Fifth Amendment to the Constitution of the
10 United States and was constitutional as a
11 “military necessity”; and

12 (B) cited the racial characteristic justifica-
13 tion from the *Hirabayashi* case to support the
14 decision in the *Korematsu* case.

15 (17) The dissenting Justices in the *Korematsu*
16 case pointed out the blatant race-based deprivation
17 of constitutional rights caused by the curfew and ex-
18 clusion orders as follows:

19 (A) Justice Jackson acknowledged the def-
20 erence afforded to the other branches of the
21 Federal Government in times of war but argued
22 that such deference should not force the Court
23 to ratify or enforce unconstitutional orders.
24 Justice Jackson noted that Fred *Korematsu*
25 should be found innocent, as his guilt was based

1 “only in that he was born of different racial
2 stock”.

3 (B) Justice Murphy emphasized that the
4 United States was not under martial law and
5 that “[s]uch exclusion goes over the ‘very brink
6 of constitutional power’, and falls into the ugly
7 abyss of racism”.

8 (C) Justice Roberts explicitly acknowl-
9 edged the racist basis of the orders, stating that
10 “[t]he obvious purpose of the orders made,
11 taken together, was to drive all citizens of Jap-
12 anese ancestry into Assembly Centers within
13 the zones of their residence, under pain of
14 criminal prosecution.”. Justice Roberts also ex-
15 plained the clear unconstitutional basis of the
16 orders, pointing out that “if a citizen was con-
17 strained by two laws, or two orders having the
18 force of law, and obedience to one would violate
19 the other, to punish him for violation of either
20 would deny him due process of law.”.

21 (18) The public, Congress, and the President
22 began efforts to address the wrongs of incarceration
23 and to provide redress for individuals who had been
24 incarcerated.

1 (19) In 1971, Congress repealed the Emergency
2 Detention Act of 1950, approved September 23,
3 1950 (64 Stat. 1019), which granted the President
4 the power to detain individuals without due process
5 and establish detention centers, through the passage
6 of the Act entitled “An Act to amend title 18,
7 United States Code, to prohibit the establishment of
8 detention camps, and for other purposes”, approved
9 September 25, 1971 (85 Stat. 348) (commonly re-
10 ferred to as the “Non-Detention Act of 1971”). Sen-
11 ator Daniel Inouye and the Japanese American Citi-
12 zens’ League led efforts to repeal the Emergency
13 Detention Act of 1950.

14 (20) Executive Order 9066 (7 Fed. Reg. 1407;
15 relating to authorizing the Secretary of War to pre-
16 scribe military areas) was officially terminated on
17 December 31, 1976, by President Gerald R. Ford
18 through Presidential Proclamation 4417, dated Feb-
19 ruary 19, 1976 (41 Fed. Reg. 7741). President Ford
20 condemned Executive Order 9066 as a national mis-
21 take, asking the public to affirm the “American
22 Promise”, a promise to learn from “the tragedy of
23 that long-ago experience forever to treasure liberty
24 and justice for each individual American, and resolve

1 that this kind of action shall never again be re-
2 peated.”.

3 (21) In 1980, Congress established the Com-
4 mission on the Wartime Relocation and Internment
5 of Civilians. After public hearings around the coun-
6 try and review of all documentation the Commission
7 was able to compile, the Commission—

8 (A) issued a report titled “Personal Justice
9 Denied” with recommendations on legislative
10 remedies to address the incarceration; and

11 (B) concluded that the military orders and
12 subsequent curfew, exclusion, and detention
13 were not based on military necessity but instead
14 arose due to “race prejudice, war hysteria and
15 a failure of political leadership.”.

16 (22) In 1983, petitions for writs of error coram
17 nobis were filed in Federal courts on behalf of Fred
18 Korematsu, Gordon Hirabayashi, and Minoru Yasui
19 based on the discovery of secret intelligence reports
20 and memoranda of the Department of Justice, the
21 Federal Bureau of Investigation, the Federal Com-
22 munications Commission, the Navy, and the Army
23 categorically denying that Japanese Americans had
24 committed any wrong and admitting that there was
25 no reason to incarcerate Japanese Americans. Law-

1 yers of the Department of Justice who were respon-
2 sible for defending the Government during the origi-
3 nal cases in 1943 and 1944 characterized the claims
4 of the Army that Japanese Americans were engaging
5 in espionage as “intentional falsehoods” and charac-
6 terized the justification of a “military necessity” as
7 a fabrication. The lawyers unsuccessfully pleaded
8 with the Solicitor General of the United States at
9 the time of the orders, Charles Fahy, to disclose to
10 the Supreme Court of the United States these intel-
11 ligence reports, stating that to withhold the contents
12 of the reports “would approximate the suppression
13 of evidence”. The Supreme Court of the United
14 States has cautioned that writs of coram nobis
15 should be granted “only under certain circumstances
16 compelling such action to achieve justice” and to
17 correct “errors of the most fundamental character”.

18 (23) Between 1983 and 1987, Federal courts
19 granted petitions for writs of coram nobis for Fred
20 Korematsu and Gordon Hirabayashi, vacating their
21 criminal convictions for violating Public Law 503,
22 finding that “fundamental error” had resulted from
23 suppression of evidence, destruction of evidence, and
24 presentation of false and misleading information to
25 the Supreme Court of the United States by the Fed-

1 eral Government. Minoru Yasui died while his case
2 was in the process of appeal, and, as such, he never
3 received an evidentiary hearing.

4 (24) President Ronald W. Reagan—

5 (A) urged Congress to pass the Civil Lib-
6 erties Act of 1988 (50 U.S.C. App. 1989b et
7 seq.), which apologized for the incarceration of
8 Japanese Americans and authorized payment to
9 the survivors, saying the Civil Liberties Act of
10 1988 was needed to end “a sad chapter in
11 American history in a way that reaffirms Amer-
12 ica’s commitment to the preservation of liberty
13 and justice for all”; and

14 (B) signed the Civil Liberties Act of 1988
15 into law on August 10, 1988.

16 (25) In 2011, the Acting Solicitor General of
17 the United States, Neal Katyal, issued an admission
18 of misconduct for the orders and actions against
19 Japanese Americans during World War II. Acting
20 Solicitor General Katyal admitted that his prede-
21 cessor, Solicitor General Charles Fahy, had made
22 gross generalizations based on race and had failed to
23 disclose a naval intelligence report concluding that
24 Japanese Americans, including those incarcerated,

1 did not pose a threat to the national security of the
2 United States.

3 (26) Fred Korematsu received the Presidential
4 Medal of Freedom for his civil rights work from
5 President William J. Clinton in 1998. Gordon
6 Hirabayashi received the Presidential Medal of Free-
7 dom in 2012 from President Barack H. Obama.
8 Minoru Yasui received the Presidential Medal of
9 Freedom from President Obama posthumously in
10 2015.

11 (27) *Korematsu v. United States*, 323 U.S. 214
12 (1944), is now part of the “anti-canon”, a group of
13 cases including *Dred Scott v. Sandford*, 60 U.S. 393
14 (1857), *Plessy v. Ferguson*, 163 U.S. 537 (1896),
15 and *Lochner v. New York*, 198 U.S. 45 (1905),
16 that, though found to be constitutional at the time,
17 are now viewed as precedent not to be relied upon
18 and as lessons on how not to repeat the mistakes of
19 history.

20 (28) The right to be free from discrimination
21 based on membership in a protected class and the
22 right to due process are enshrined in the Constitu-
23 tion of the United States.

24 (29) Section 1 of the 14th Amendment to the
25 Constitution of the United States provides that

1 “[n]o state shall make or enforce any law which
2 shall abridge the privileges or immunities of citizens
3 of the United States; nor shall any State deprive any
4 person of life, liberty, or property, without due proc-
5 ess of law; nor deny to any person within its juris-
6 diction the equal protection of the laws.”.

7 (30) The 14th Amendment to the Constitution
8 of the United States embodies the principle that
9 “the government must treat citizens as individuals,
10 and not as members of racial, ethnic, or religious
11 groups.”.

12 (31) Despite the rejection of *Korematsu v.*
13 *United States*, 323 U.S. 214 (1944), and the dark
14 legacy of the incarceration of individuals of Japanese
15 ancestry during World War II, the *Korematsu* case
16 is still used as a justification for discrimination
17 under the guise of national security.

18 (32) A spokesman for Great America PAC said
19 on a broadcast of the Fox News Network that incar-
20 ceration of Japanese Americans provided the prece-
21 dent for the proposal for a registry of Muslims made
22 by then President-elect Donald J. Trump.

23 (33) In 2015, then Presidential candidate Don-
24 ald J. Trump told the American Broadcasting Com-
25 pany (commonly referred to as “ABC”) that he

1 would have to consider the same policies as Presi-
2 dent Franklin D. Roosevelt, even on a “temporary”
3 basis because “what I am doing is no different than
4 what FDR—FDR’s solution for Germans, Italians,
5 Japanese, you know, many years ago.”.

6 (34) Courts have rejected efforts to ban entry
7 of individuals to the United States solely on the
8 basis of the national origin or religious background
9 of those individuals, efforts that include the deten-
10 tion of certain individuals at airports without indi-
11 vidualized due process following the implementation
12 of Executive Order 13769 (82 Fed. Reg. 8977; re-
13 lating to protecting the Nation from foreign terrorist
14 entry into the United States) and Executive Order
15 13780 (82 Fed. Reg. 13209; relating to protecting
16 the Nation from foreign terrorist entry into the
17 United States).

18 (35) Justice Jackson, in *Korematsu v. United*
19 *States*, 323 U.S. 214 (1944), warned that, “once a
20 judicial opinion rationalizes such an order to show
21 that it conforms to the Constitution, or rather
22 rationalizes the Constitution to show that the Con-
23 stitution sanctions such an order, the Court for all
24 time has validated the principle of racial discrimina-
25 tion in criminal procedure and of transplanting

1 American citizens. The principle then lies about like
2 a loaded weapon, ready for the hand of any author-
3 ity that can bring forward a plausible claim of an
4 urgent need.”.

5 (36) Leaders such as the late Representative
6 Mark Takai from Hawaii were dedicated to remem-
7 bering the injustices suffered by Japanese Ameri-
8 cans and fighting to ensure the equal protection of
9 the civil liberties of every citizen for all future gen-
10 erations. Representative Takai served 20 years in
11 the House of Representatives of Hawaii and had a
12 distinguished career in the National Guard of Ha-
13 waii, earning the rank of Lieutenant Colonel before
14 being elected to Congress in 2014. Representative
15 Takai was an advocate for the establishment of the
16 Honouliuli National Monument, the first monument
17 dedicated to teaching future generations about the
18 incarceration camps for individuals of Japanese an-
19 cestry during World War II. Representative Takai
20 said, “The internment of Japanese American citi-
21 zens during World War II is a tragic example of
22 what happens when we allow fear and hatred to take
23 the place of rational and just actions.”. One of the
24 last acts of Representative Takai in the House of
25 Representatives of Hawaii was the passage of “Civil

1 Rights Day’ legislation remembering Fred
 2 Korematsu and the historic fight of Fred Korematsu
 3 for due process and civil rights. Representative
 4 Takai said “Now more than ever, we must learn
 5 from the mistakes of the past . . . and educate the
 6 coming generations about the importance of civil lib-
 7 erties for all people.”.

8 **SEC. 3. PROHIBITION AGAINST UNLAWFUL DETENTION.**

9 Section 4001 of title 18, United States Code, is
 10 amended—

11 (1) by redesignating subsection (b) as sub-
 12 section (c); and

13 (2) by inserting after subsection (a) the fol-
 14 lowing:

15 “(b) PROHIBITION ON DETENTION BASED ON PRO-
 16 TECTED CHARACTERISTICS.—

17 “(1) IN GENERAL.—No individual may be im-
 18 prisoned or otherwise detained based solely on an ac-
 19 tual or perceived protected characteristic of the indi-
 20 vidual.

21 “(2) DEFINITION.—In this subsection, the term
 22 ‘protected characteristic’ includes—

23 “(A) race;

24 “(B) ethnicity;

25 “(C) national origin;

- 1 “(D) religion;
- 2 “(E) gender;
- 3 “(F) gender identity; and
- 4 “(G) sexual orientation.”.

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