

Statement of Lorraine K. Bannai

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584 F. Supp. 1406 (N.D. Cal. 1984)**

**Before the
United States Senate
Committee on the Judiciary**

**February 29, 2012
Washington, D.C.**

Chairman Leahy, Ranking Member Grassley, and members of the Committee: Thank you for allowing me to testify as you face this important opportunity to preserve for all of us the fundamental constitutional guarantee of due process.

As a member of the legal team that represented Fred Korematsu in reopening the infamous 1944 *Korematsu v. United States* Supreme Court case and as a third generation Japanese American whose parents, grandparents, aunts, and uncles were incarcerated at Manzanar in the California Mojave Desert during World War II, I appear before you to reflect on the important lessons I hope this country has learned from that dark chapter in our nation's history. We know now what Japanese Americans always knew—that their imprisonment was unlawful; that it was not based on military necessity; and that it occurred because we, as a country, chose to sacrifice fundamental rights characteristic of a nation of laws even as we were fighting to preserve those rights on the battlefield.

The lessons of the Japanese American incarceration are many, and I'd like to highlight a few. First, of course, is the real, tangible meaning of the guarantee of Due Process. That guarantee provides that "no person shall be . . . deprived of life, liberty, or property, without due process of law."¹ During World War II, persons of Japanese ancestry were incarcerated without any due process. Pursuant to authority granted by the President, subject to criminal penalties authorized by Congress, and under order of military authorities, they were removed from their West Coast homes and detained in camps in desolate regions of the interior United States surrounded by barbed wire and armed guards. Two-thirds of those incarcerated were American citizens. There were no charges brought against them; they had no hearings. Indeed, throughout the war, no Japanese American was ever charged with providing aid to Japan. They were rounded up because our country feared attack from the government of Japan, there were unfounded suspicions that some among their number were engaged in illegal activity, and they looked like the enemy.

In the face of that fear, the rule of law was suspended. We are now confronted with new fears against new peoples, and, while we do need to ferret out and prosecute criminal conduct, we need to do so in a way that preserves our system of laws.

Second, the Japanese American incarceration teaches us about the danger of unfettered discretion. Seventy years ago this month, on February 19, 1942, President Franklin Delano Roosevelt essentially issued the War Department and military authorities a blank check, delegating to them the authority to take whatever actions they deemed necessary against whomever they saw fit.² Pursuant to this authority, General John L. DeWitt, who had responsibility for the western defense, issued orders subjecting Japanese Americans to curfew

¹ U.S. Const. amend. V.

² Executive Order 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) (authorizing the Secretary of War, and any military commanders designated by him, to prescribe military areas "from which any or all persons may be excluded," subject to whatever restrictions were deemed necessary; authorizing the furnishing of, among other things, shelter and food; and authorizing the use of federal troops to assist in enforcing compliance).

and then removal from the West Coast and into indefinite detention. It must be said that the decision to incarcerate Japanese Americans was not one made by General DeWitt alone; responsible members of the government and military had sought and secured the signing of Executive Order 9066 knowing and intending that it would authorize the removal and incarceration of Japanese Americans. However, in the end, the army had carte blanche in its program of incarceration. While a Japanese American could apply to leave the camps for the interior of the U.S., he or she had to prove his or her entitlement to leave in a non-judicial process by proving his or her loyalty and that he or she would be accepted at, and able to support him- or herself, at the point of destination. Nothing otherwise limited the duration of detention. In 1943 and 1944, in *Hirabayashi* and *Korematsu v. United States*, the U.S. Supreme Court upheld the constitutionality of the orders subjecting Japanese Americans to curfew and removal, essentially deferring to the military judgment that those orders were necessary.³ Nothing checked the exercise of military discretion—the courts accepted the military judgment.

In 1983, Messrs. Korematsu and Hirabayashi reopened their wartime cases and subsequently won vacation of their convictions based on proof that the government during World War II suppressed, altered, and destroyed material evidence bearing on the issue of military necessity.⁴ In essence, the military orders had no factual basis; yet, Japanese Americans languished in camp, many for over three years. After the vacation of his conviction, Fred Korematsu went on to argue for the basic due process rights of others. In his amicus brief in *Rasul v. Bush*, he asked that the lessons of the Japanese American incarceration and redress not be forgotten and argued against the indefinite imprisonment, without charges, counsel, or trials, of so-called enemy combatants at Guantanamo Bay.⁵

Finally, the wartime incarceration of Japanese Americans teaches us about human frailty during times of crises. Those who played roles in the incarceration were smart and educated, and saw themselves as devoted public servants who thought that they were doing what was in the best interests of the country. Many came to later regret their decisions. The great former Chief Justice of the Supreme Court, Earl Warren, was Attorney General of California at the time of the internment and, in that role, vigorously and publicly joined the call for the removal of Japanese Americans from the West Coast. He later expressed regret for his actions:

I have since deeply regretted the removal order and my own testimony advocating for it, because it was not in keeping with our American concept of freedom and the rights of citizens. . . . It was wrong to react so impulsively, without positive evidence of disloyalty, even though we felt we had a good motive in the security of our state. It demonstrates the cruelty of war when fear, get-tough military psychology, propaganda, and racial antagonism

³ *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

⁴ *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987).

⁵ Amicus Brief of Fred Korematsu in Support of Petitioners, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-334), 2004 WL 103832.

combine with one's responsibility for public security to produce such acts.⁶

In this regard, we are warned to ensure that executive and military decisions are checked by the civil branches of government and constitutional limits. This is particularly true in times of crisis when fear and racism can infect responsible judgment.

The bill before you seeks to ensure that no citizen or lawful permanent resident apprehended on U.S. soil shall be detained without charge or trial. Our Constitution demands no less than what this legislation seeks. I would urge, however, that the constitutional guarantee of due process applies to all persons. That guarantee, by its terms, states that "no person" shall be deprived of liberty without due process, without distinction among those it covers. While I do not purport to be a constitutional law scholar, the Supreme Court's decision in *Mathews v. Diaz* reiterated this point that all persons are entitled to constitutional protection, whether citizen, lawful permanent resident, or not. There, the Court stated

There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.⁷

Thus, the constitutional guarantee of due process should be ensured to any person.

Further, the proposed legislation prohibits detention without due process unless authorized by an Act of Congress. On one level, the intercession of Congress can serve as an important protection against an improper exercise of Executive or military power. However, the language seems to permit Congress to authorize detention without due process, even the detention of American citizens and lawful permanent residents. That, I am concerned, is a frightening proposition. Congress's authority, of course, should always be limited by the demands of the Constitution. During World War II, Congress was complicit in the program of incarceration when it imposed criminal penalties on those, like Fred Korematsu, who defied the military orders issued against Japanese Americans.⁸ I would urge that you declare that no person shall be subject to detention without due process, omitting any suggestion that such a detention would be lawful if approved by Congress.

⁶ Earl Warren, *The Memoirs of Earl Warren* 149 (1977).

⁷ *Mathews v. Diaz*, 426 U.S. 67 (1976). See also *Plyler v. Doe*, 457 U.S. 202, 210 (U.S. 1982) (rejecting argument that undocumented aliens are not persons within the jurisdiction of a State entitled to equal protection under the Fourteenth Amendment and stating "Whatever his status under the immigration laws, an alien is surely a 'person' in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments."

⁸ Pub. L. No. 77-503, 56 Stat. 173 (1942).

The present legislation is truly a step in the right direction. It clarifies that citizens and permanent residents are guaranteed Due Process. However, in squarely addressing one danger, one does not want to authorize others.

In 1982, after an exhaustive investigation of causes and impacts of the Japanese American incarceration, the Congressional Commission on Wartime Relocation and Internment of Civilians addressed President Roosevelt's Executive Order 9066 and the decisions that followed from it. It concluded that "The broad historical causes which shaped these decisions were race prejudice, war hysteria and a failure of political leadership."⁹ This committee has before it the opportunity to demonstrate true political leadership by ensuring that no person shall be detained without the basic guarantees provided by our constitution.

Thank you for inviting me to testify today. I will be pleased to take your questions.

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⁹ U.S. Comm'n on Wartime Relocation and Internment of Civilians, Congress of 1980, Report: *Personal Justice Denied*, at 18 (The Civil Liberties Public Education Fund & University of Washington Press, 1997) (1982).