H. R. 4680

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

IN THE HOUSE OF REPRESENTATIVES

DECEMBER 19, 2017

Mr. TAKANO introduced the following bill; which was 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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.
This Act may be cited as the “Korematsu-Takai Civil Liberties Protection Act of 2017”.

SEC. 2. FINDINGS.
Congress finds the following:
(1) On February 19, 1942, President Franklin D. Roosevelt signed Executive Order 9066 (7 Fed. Reg. 1407; relating to authorizing the Secretary of
War to prescribe military areas), endowing the Secretary of War and the designated military commanders of the Secretary of War with the power to create military zones and forcibly exclude persons as the Secretary of War and the designated military commanders determined to be “necessary and desirable”.

(2) On March 2, 1942, military commander Lieutenant General John L. DeWitt promulgated Public Proclamation No. 1, which declared that the entire Pacific Coast was “particularly subject to attack, to attempted invasion . . . and, in connection therewith, [was] subject to espionage and acts of sabotage” and that “[s]uch persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and . . . [some] zones within Military Area No. 2.”. On that basis, General Dewitt designated all of California, the western halves of Oregon and Washington, and the southern half of Arizona as “Military Area No. 1”.

(3) On March 21, 1942, President Roosevelt signed the Act of March 21, 1942 (56 Stat. 173, chapter 191) (commonly referred to as “Public Law 503”), which stated, “[W]hoever shall enter, remain
in, leave, or commit any act in any military area or
military zone . . . shall . . . be guilty . . . and
upon conviction shall be liable to a fine . . . or . . .
imprisonment . . . or both. . . .”.

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

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

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

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

(i) simultaneously, Japanese Ameri-
cans were made criminals whether they left
their homes or did not leave their homes;
and

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

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

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

(8) The February 1942 recommendation of
General DeWitt said, “The Japanese race is an
enemy race and while many second and third gen-
eration Japanese born on American soil, possessed
of United States citizenship, have become ‘Ameri-
canized’, the racial strains are undiluted . . . It
therefore, follows that along the vital Pacific Coast
over 112,000 potential enemies, of Japanese extrac-
tion, 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.”

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

(10) In 1942, there were 1,100,000 nationals of
disorder in the United States, and, of those
individuals, fewer than 4 percent were Japanese na-
tionals. A curfew was enacted that applied to nation-
als from Germany, Italy, and Japan. American citi-
zens of Japanese ancestry also had to abide by the
curfew, whereas, American citizens of German ancestry and Italian ancestry did not.

(11) Individuals were forced to leave their homes and livelihoods behind. Most bank accounts were frozen or confiscated as enemy assets. People were allowed to take what they could carry, excluding any item that the Government deemed “contraband”.

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

(A) at Gila River, Arizona;
(B) at Poston, Arizona;
(C) at Jerome, Arkansas;
(D) at Rohwer, Arkansas;
(E) at Manzanar, California;
(F) at Tule Lake Segregation Center, California;
(G) at Granada, Colorado (commonly referred to as “Amache”);
(H) at Minidoka, Idaho;
(I) at Topaz, Utah; and
(J) at Heart Mountain, Wyoming.

(13) Each incarceration site held between 7,000 and 18,000 individuals, and a total of approximately
120,000 Japanese Americans were ultimately detained.

(14) Some Japanese Americans, including Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui, challenged the detention, exclusion, and curfew orders aimed at Japanese Americans.

(15) In June 1943, the Supreme Court of the United States unanimously decided Hirabayashi v. United States, 320 U.S. 81 (1943), and the companion case Yasui v. United States, 320 U.S. 115 (1943). In the Hirabayashi case, the Supreme Court found that both the power delegated to the military to impose curfews and the Executive orders creating that power were constitutional despite—

(A) their applications primarily to Americans of Japanese ancestry on the basis of the particular “racial characteristics” of Americans of Japanese ancestry; and

(B) the fact that the ultimate result of the orders was imprisonment for an indefinite period of confinement that was imposed without—

(i) the right to an attorney;

(ii) the right to notice of the charges against the individual being imprisoned; and
(iii) the right to a trial.

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

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

(B) cited the racial characteristic justification from the Hirabayashi case to support the decision in the Korematsu case.

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

(A) Justice Jackson acknowledged the deference afforded to the other branches of the Federal Government in times of war but argued that such deference should not force the Court to ratify or enforce unconstitutional orders. Justice Jackson noted that Fred Korematsu should be found innocent, as his guilt was based
“only in that he was born of different racial stock”.

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

(C) Justice Roberts explicitly acknowledged the racist basis of the orders, stating that “[t]he obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.”. Justice Roberts also explained the clear unconstitutional basis of the orders, pointing out that “if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law.”.

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

(20) Executive Order 9066 (7 Fed. Reg. 1407; relating to authorizing the Secretary of War to prescribe military areas) was officially terminated on December 31, 1976, by President Gerald R. Ford through Presidential Proclamation 4417, dated February 19, 1976 (41 Fed. Reg. 7741). President Ford condemned Executive Order 9066 as a national mistake, asking the public to affirm the “American Promise”, a promise to learn from “the tragedy of that long-ago experience forever to treasure liberty and justice for each individual American, and resolve
that this kind of action shall never again be re-
peated.”.

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

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

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

(22) In 1983, petitions for writs of error coram
nobis were filed in Federal courts on behalf of Fred
Korematsu, Gordon Hirabayashi, and Minoru Yasui
based on the discovery of secret intelligence reports
and memoranda of the Department of Justice, the
Federal Bureau of Investigation, the Federal Com-
munications Commission, the Navy, and the Army
categorically denying that Japanese Americans had
committed any wrong and admitting that there was
no reason to incarcerate Japanese Americans. Law-
yers of the Department of Justice who were responsible for defending the Government during the original cases in 1943 and 1944 characterized the claims of the Army that Japanese Americans were engaging in espionage as “intentional falsehoods” and characterized the justification of a “military necessity” as a fabrication. The lawyers unsuccessfully pleaded with the Solicitor General of the United States at the time of the orders, Charles Fahy, to disclose to the Supreme Court of the United States these intelligence reports, stating that to withhold the contents of the reports “would approximate the suppression of evidence”. The Supreme Court of the United States has cautioned that writs of coram nobis should be granted “only under certain circumstances compelling such action to achieve justice” and to correct “errors of the most fundamental character”.

(23) Between 1983 and 1987, Federal courts granted petitions for writs of coram nobis for Fred Korematsu and Gordon Hirabayashi, vacating their criminal convictions for violating Public Law 503, finding that “fundamental error” had resulted from suppression of evidence, destruction of evidence, and presentation of false and misleading information to the Supreme Court of the United States by the Fed-
eral Government. Minoru Yasui died while his case was in the process of appeal, and, as such, he never received an evidentiary hearing.

(24) President Ronald W. Reagan—

(A) urged Congress to pass the Civil Liberties Act of 1988 (50 U.S.C. App. 1989b et seq.), which apologized for the incarceration of Japanese Americans and authorized payment to the survivors, saying the Civil Liberties Act of 1988 was needed to end “a sad chapter in American history in a way that reaffirms America’s commitment to the preservation of liberty and justice for all”; and

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

(25) In 2011, the Acting Solicitor General of the United States, Neal Katyal, issued an admission of misconduct for the orders and actions against Japanese Americans during World War II. Acting Solicitor General Katyal admitted that his predecessor, Solicitor General Charles Fahy, had made gross generalizations based on race and had failed to disclose a naval intelligence report concluding that Japanese Americans, including those incarcerated,
did not pose a threat to the national security of the United States.

(26) Fred Korematsu received the Presidential Medal of Freedom for his civil rights work from President William J. Clinton in 1998. Gordon Hirabayashi received the Presidential Medal of Freedom in 2012 from President Barack H. Obama. Minoru Yasui received the Presidential Medal of Freedom from President Obama posthumously in 2015.

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

(28) The right to be free from discrimination based on membership in a protected class and the right to due process are enshrined in the Constitution of the United States.

(29) Section 1 of the 14th Amendment to the Constitution of the United States provides that
“[n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”.

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

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

(32) A spokesman for Great America PAC said on a broadcast of the Fox News Network that incarceration of Japanese Americans provided the precedent for the proposal for a registry of Muslims made by then President-elect Donald J. Trump.

(33) In 2015, then Presidential candidate Donald J. Trump told the American Broadcasting Company (commonly referred to as “ABC”) that he
would have to consider the same policies as President Franklin D. Roosevelt, even on a “temporary” basis because “what I am doing is no different than what FDR—FDR’s solution for Germans, Italians, Japanese, you know, many years ago.”.

(34) Courts have rejected efforts to ban entry of individuals to the United States solely on the basis of the national origin or religious background of those individuals, efforts that include the detention of certain individuals at airports without individualized due process following the implementation of Executive Order 13769 (82 Fed. Reg. 8977; relating to protecting the Nation from foreign terrorist entry into the United States) and Executive Order 13780 (82 Fed. Reg. 13209; relating to protecting the Nation from foreign terrorist entry into the United States).

(35) Justice Jackson, in Korematsu v. United States, 323 U.S. 214 (1944), warned that, “once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting...
American citizens. The principle then lies about like
a loaded weapon, ready for the hand of any author-
ity that can bring forward a plausible claim of an
urgent need.”.

(36) Leaders such as the late Representative
Mark Takai from Hawaii were dedicated to remem-
bering the injustices suffered by Japanese Ameri-
cans and fighting to ensure the equal protection of
the civil liberties of every citizen for all future gen-
erations. Representative Takai served 20 years in
the House of Representatives of Hawaii and had a
distinguished career in the National Guard of Ha-
waii, earning the rank of Lieutenant Colonel before
being elected to Congress in 2014. Representative
Takai was an advocate for the establishment of the
Honouliuli National Monument, the first monument
dedicated to teaching future generations about the
incarceration camps for individuals of Japanese an-
cestry during World War II. Representative Takai
said, “The internment of Japanese American citi-
zens during World War II is a tragic example of
what happens when we allow fear and hatred to take
the place of rational and just actions.”. One of the
last acts of Representative Takai in the House of
Representatives of Hawaii was the passage of “Civil
Rights Day” legislation remembering Fred Korematsu and the historic fight of Fred Korematsu for due process and civil rights. Representative Takai said “Now more than ever, we must learn from the mistakes of the past . . . and educate the coming generations about the importance of civil liberties for all people.”.

SEC. 3. PROHIBITION AGAINST UNLAWFUL DETENTION.

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

(1) by redesignating subsection (b) as subsection (c); and

(2) by inserting after subsection (a) the following:

“(b) PROHIBITION ON DETENTION BASED ON PROTECTED CHARACTERISTICS.—

“(1) IN GENERAL.—No individual may be imprisoned or otherwise detained based solely on an actual or perceived protected characteristic of the individual.

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

“(A) race;

“(B) ethnicity;

“(C) national origin;
“(D) religion;
“(E) gender;
“(F) gender identity; and
“(G) sexual orientation.”.