"Concededly Loyal":
Mitsuye Endo and the Continuing Significance of Ex parte Endo

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J.D., 2022, Fordham University School of Law; B.A., 2013, Wellesley College. I am deeply indebted to Judge Denny Chin, Senior Circuit Judge, U.S. Court of Appeals for the Second Circuit, and Professor Thomas H. Lee, the Leitner Family Professor of International Law at Fordham Law School, for their early and consistent support of this project. I would also like to thank Judge Chin, Professor Lee, and Kathy Hirata Chin for their leadership in establishing the Center on Asian Americans and the Law at Fordham Law School. Finally, additional thanks are owed to Michael Dolgushkin at the California State Library for generously providing access to materials from the James C. Purcell collection, and to Kylie Au and the staff of the APALJ for their diligent work in editing this piece.

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The internment of American residents of Japanese descent during World War II—including approximately seventy thousand American citizens—is a deep and indelible stain on the history of the United States.[1] Far from acquiescing to the government's program of systematic removal and incarceration, those who fell within the scope of the internment scheme fought back in a series of lawsuits that challenged, for example, the curfew regulations or the drafting of interned young men for the war effort.[2] Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu each challenged the blanket detention and incarceration of Japanese Americans by resisting the initial curfew and evacuation orders that preceded internment.[3] Each plaintiff lost his case before the U.S. Supreme Court and was subsequently detained in an internment camp. After the war, Hirabayashi, Yasui, and Korematsu challenged and had their convictions overturned on *coram nobis* review[4] and each received Presidential Medals of Freedom in recognition of their efforts to combat the injustices of the internment program.[5] To this day, their names are most often associated with the legal challenges to internment during and after the war.

Mitsuye Endo was only twenty-two years old when she was incarcerated for the crime of being Japanese American. Unlike Hirabayashi, Yasui,

1. *See, e.g.*, Erwin Chemerinsky, The Case Against the Supreme Court 58 (2014) ("[T]he Court's decision in *Korematsu* is regarded as one of its greatest embarrassments."); Patrick O. Gudridge, *Remember Endo?*, 116 Harv. L. Rev. 1933, 1937 (2003) ("[T]he internment of the West Coast Japanese is the worst blow our liberties have sustained in many years."). In his opinion for the Court in *Trump v. Hawaii*, Chief Justice John Roberts noted that "Korematsu was gravely wrong the day it was decided, has been overruled in the court of history, and—to be clear—'has no place in law under the Constitution.'" Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (citing Korematsu v. United States, 323 U.S. 214, 248 (1944) (Jackson, J., dissenting)).

2. Yamamoto et al., Race, Rights, and Reparations 85, 90 (2013).

3. *See* Korematsu v. United States, 323 U.S. 214 (1944), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018); Hirabayashi v. United States, 320 U.S. 81 (1943); Yasui v. United States, 320 U.S. 115 (1943).

4. *See* Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal 1984); Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987). *See also* Jerry Kang, *Denying Prejudice: Internment, Redress, and Denial*, 51 UCLA L. Rev. 933, 934-35 (2004) (describing Korematsu, Hirabayashi, and Yasui's *coram nobis* cases).

5. Fred Korematsu was awarded the Presidential Medal of Freedom in 1998 by President Bill Clinton. Akil Vohra, *Honoring Fred Korematsu*, The White House (Feb. 1, 2011, 12:58 PM), https://obamawhitehouse.archives.gov/blog/2011/02/01/honoring-fred-korematsu [https://perma.cc/VBQ6-KBW6]. Gordon Hirabayashi and Minoru Yasui were awarded the Presidential Medal of Freedom posthumously by President Barack Obama in 2012 and 2015, respectively. *President Obama Names Presidential Medal of Freedom Recipients*, The White House, Office of the Press Secretary (Apr. 26, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/04/26/president-obama-names-presidential-medal-freedom-recipients [https://perma.cc/UGW9-UXRG]; Frances Kai-Hwa Wang, *Minoru Yasui to Receive Presidential Medal of Freedom*, NBC News (Nov. 17, 2015), https://www.nbcnews.com/news/asian-america/minoru-yasui-receive-presidential-medal-freedom-n464971 [https://perma.cc/C2AZ-FB5K].

and Korematsu, who challenged the initial curfew orders that preceded internment, Endo challenged the detention orders directly. In 1942, while she was interned at the Tule Lake Relocation Center in California, a petition for a writ of habeas corpus challenging her incarceration was filed on her behalf. And in 1944—in a decision published on the same day as the *Korematsu* case—Endo won her case before the Supreme Court.[6]

Yet Endo is often overlooked in the discourse around the internment cases, even though her habeas corpus petition—and her efforts in ensuring that it proceeded to the Supreme Court—forced President Franklin Delano Roosevelt's administration to address the dubious legal bases for the internment program head on.[7] *Ex parte Endo* also compelled the Supreme Court to directly confront the issue of internment and, in the face of such a confrontation, the Court conspicuously avoided the constitutional questions raised by the petition and instead conducted a purely statutory review.[8] Following her release, Endo resettled in Illinois and, unlike Hirabayashi, Yasui, and Korematsu, gave few interviews about her time in internment or her consequential case.[9] Endo passed away in 2006 at the age of 85.[10]

Ex parte Endo was only able to reach the Supreme Court because of Endo's decision to remain incarcerated for an additional two years to ensure that the case could be fully litigated.[11] Efforts by the government to negate

6. Ex parte Endo, 323 U.S. 283 (1944); Roger Daniels, The Japanese American Cases: The Rule of Law in Time of War 38 (2013); Peter Irons, Justice at War: The Story of the Japanese American Internment Cases 103 (1983).

7. *See, e.g.*, Gudridge, *supra* note 1, at 1934 ("*Endo* closed the camps. Why don't we remember Endo?"); Amanda Tyler, *Unsung WWII hero deserves the Medal of Freedom*, The Sacramento Bee (Aug. 25, 2016), https://www.sacbee.com/opinion/california-forum/article97641497.html (arguing that Endo "deserves the same recognition" as Hirabayashi, Yasui, and Korematsu).

8. Irons, *supra* note 6, at 100; *see also* Amanda Tyler, *Honoring the Legacy of Mitsuye Endo*, Lawfare (Aug. 25, 2016), https://www.lawfareblog.com/honoring-legacy-mitsuye-endo [https://perma.cc/82DD-3CEP] (noting that while the Court sided with Endo, it did so with "a narrow ruling that glossed over the broader constitutional problems with the internment policy.").

9. *See* Lori Aratani, *She Fought the Internment of Japanese Americans during World War II and Won*, Wash. Post. (Dec. 18, 2019), https://www.washingtonpost.com/history/2019/12/18/she-fought-internment-japanese-americans-during-world-war-ii-won [https://perma.cc/JC4A-HZB4] (noting that "Endo never spoke publically about her role"). One of the few interviews that Endo gave was for John Tateishi's 1984 oral history project in which he interviewed thirty former internees about their experiences in the camps. *See* John Tateishi, *Mitsuye Endo*, *in* And Justice for All: An Oral History of the Japanese American Detention Camps 60 (1984); *see also* Irons, *supra* note 6, at 103 (describing how Endo "disappeared from public view after the Supreme Court ruled on her case.").

10. Stephanie Buck, *Overlooked No More: Mitsuye Endo, a Name Linked to Justice for Japanese-Americans*, N.Y. Times (Oct. 9, 2019), https://www.nytimes.com/2019/10/09/obituaries/mitsuye-endo-overlooked.html [https://perma.cc/8NLQ-GLFS]; Joel Noel, *Mitsuye Tsutsumi*, Chicago Tribune (Apr. 25, 2006), https://www.chicagotribune.com/news/ct-xpm-2006-04-25-0604250259-story.html.

11. Irons, *supra* note 6, at 102–3.; *see also* Amanda L. Tyler, Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay 217, 235 (2017) ("Endo was

her case via a conditional release were stymied by her steadfast "refus[al] to conform" to the relevant leave procedures at the camp.[12] Her determined efforts to challenge the constitutionality of her confinement are even more compelling when considered alongside the Court's peculiar focus on the criterion of loyalty and its conclusion that Endo's incarceration was unauthorized because, among other things, she was a "concededly loyal" citizen.[13]

Ex parte Endo involves issues ranging from the constitutionality of detaining citizens during wartime, judicial avoidance in cases alleging fundamental rights violations, the selectively porous barrier between the judicial and executive branches, the evaluation of a citizen's loyalty, and the implication of disloyalty due to one's ancestry—in short, questions of enduring social and legal import that demand further and engaged study with the case and the woman who made it possible. This Article argues that *Ex parte Endo*[14] and the petitioner at its center merit greater attention and recognition in both legal and cultural discourse.

I. Historical Background

The U.S. government's surveillance of American residents of Japanese, German, and Italian ancestry in an effort to disrupt "fifth-column" activities was already widespread by the time Pearl Harbor was attacked on December 7, 1941.[15] German and Italian seamen were interned by federal authorities in the early 1940s,[16] and the Alien Registration Act of 1940[17] required all resident aliens to register and obtain identity cards.[18] Though Roger Daniels, a prominent Japanese American internment scholar, notes that federal officials had not initially intended to "seize any sizable percentage of the alien enemy population," that sentiment changed after the attack on Pearl Harbor in 1941

a determined (indeed, heroic) litigant, for she endured almost two additional years in the camps to keep her habeas petition alive after turning down the government's offer of release, which was conditioned upon not returning to restricted areas on the West Coast.")

12. Brief for the United States at 46.

13. Ex parte Endo, 323 U.S. 283, 297 (1944).

14. 323 U.S. 283 (1944).

15. Daniels, *supra* note 6, at 6. "Fifth column" activities are those in which a "group or faction of subversive agents [] attempt to undermine a nation's solidarity" or war efforts. Fifth Column, Britannica (Jan. 19, 2023), https://www.britannica.com/topic/fifth-column.

16. Some 1,600 to 3,000 Italian Americans (the estimates vary) and some 11,500 people of German ancestry were interned during World War II. *See* Paula Branca-Santos, *Injustice Ignored: The Internment of Italian-Americans During World War II*, 13 Pace L. Rev. 151, 165 (2001); Alan Rosenfeld, *German and Italian detainees*, Densho Encyclopedia (2020), encyclopedia.densho.org German_and_Italian_detainees [https://perma.cc/BGN6-FG7L]; *see also* David A. Taylor, *During World War II, the U.S. Saw Italian-Americans as a Threat to Homeland Security*, Smithsonian Magazine (Feb. 2, 2017), www.smithsonianmag.com/history/italian-americans-were-considered-enemy-aliens-world-war-ii-180962021 [https://perma.cc/2P86-6HQC].

17. Alien Registration (Smith) Act of 1940, Pub. L. No. 76-670, 54 Stat. 670 (codified at 8 U.S.C. § 451) (repealed 1952).

18. Daniels, *supra* note 6, at 6–7.

amplified existing sentiments and prejudices about the purported foreignness[19] of Japanese Americans.[20]

A. *Federal and State Responses to the Attack on Pearl Harbor*

Following the attack on Pearl Harbor on December 7, 1941, President Roosevelt issued a series of executive actions to address the alleged Japanese threat to the West Coast. Among those was Executive Order 9066,[21] which was issued on February 19, 1942 and authorized the War Secretary to exclude certain individuals from designated military areas for national security reasons.[22] The order did not mention specific nationalities but was issued shortly after President Roosevelt received a resolution signed by every member of the West Coast congressional delegation urging for "the immediate evacuation of all persons of Japanese lineage and all others, aliens and citizens alike, from the states of California, Oregon, and Washington, and the territory of Alaska."[23] Despite the Roosevelt administration's "Germany-first" strategy

19. This assumption of the purported "foreignness" of Asians has contributed to both historic and contemporary instances of anti-Asian violence. *See* Ho Ah Kow v. Nunan, 12 F. Cas. 252, 256 (Cir. Ct. D. Cal. 1879) ("We are aware of the general feeling—amounting to positive hostility—prevailing in California against the Chinese, which would prevent their further immigration hither and expel from the state those already here. Their dissimilarity in physical characteristics, in language, manners and religion, would seem, from past experience, to prevent the possibility of their assimilation with our people."); *see, e.g.*, Frank H. Wu, *Foreword*, *The Rising Tide of Hate and Violence against Asian Americans in New York During COVID-19: Impact, Causes, Solutions*, AABANY (Feb. 10, 2021) ("There are many reasons for the omission of Asian Americans from discussions of race and civil rights whether deliberate or negligent. We are regarded as perpetual foreigners who have no standing within the community to hint at injustice over which others if it were them would be outraged.").

20. AABANY, *The Rising Tide of Hate and Violence against Asian Americans in New York During COVID-19:* Impact, Causes, Solutions 7 (2021); *see also* Neil Gotanda, "*Other Non-Whites" in American Legal History: A Review of Justice at War*, 85 Colum. L. Rev. 1186, 1191 (1985) (noting that "[a] Japanese-American citizen in 1942 was easily considered 'foreign'").

21. 7 Fed. Reg. 1407 (Feb. 19, 1942).

22. Executive Order 9066 read: "I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion." *Id.*

23. Daniels, *supra* note 6, at 11. Japanese Americans comprised nearly thirty percent of the population of Hawaii. Though the Roosevelt cabinet was in favor of interning the entire Japanese population in the islands, Lieutenant General Delos C. Emmons, the Hawaii army commander, pointed out the impracticalities of segregating and housing a large percentage of the workforce and replacing them with laborers from the mainland. In the end, there was no comparable system of internment in Hawaii as existed on the mainland. About 2,000 Hawaiian residents of Japanese ancestry were sent to the mainland to be interned. *See id.* at 12–14.

and the unlikelihood of a Japanese invasion of the western United States, the mass incarceration of Japanese Americans and residents of Japanese descent was instituted at the urging of elected officials.[24]

Pursuant to Executive Order 9066, Secretary of War Henry L. Stimson delegated authority for the evacuation scheme to Lieutenant General John L. DeWitt. General Dewitt proceeded to issue more than one hundred curfew and exclusion orders that herded residents and citizens of Japanese ancestry into temporary assembly centers and internment camps (euphemistically termed "Relocation Centers") scattered from California to Arkansas.[25] President Roosevelt subsequently issued Executive Order 9102,[26] which established and designated the War Relocation Authority ("the WRA") as the agency jointly responsible with the War Department for implementing the evacuation orders.[27] On March 21, 1942, President Roosevelt signed Public Law 503,[28] effectively ratifying Executive Order 9066 and criminalizing violations of any order promulgated in furtherance of it.[29]

At the same time, efforts were underway in California to remove Japanese American employees from the state's civil service.[30] Though all of the affected civil servants were native-born American citizens—a prerequisite for their employment—they were required to complete questionnaires that asked for details about their fluency in Japanese, all prior visits to Japan, and any memberships they held in organizations with connections to Japan.[31] On April 13, 1942, state employees were sent an identical statement of charges alleging that they were each "a subject of the Emperor of Japan" and setting out a series of grounds justifying their dismissal, including "failure of good behavior, fraud in securing employment, incompetency, [and] inefficiency."[32]

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24. *Id.* at 8–10.

25. *See* Ex parte Endo, 323 U.S. 283, 288 (1944); Jerry Kang, *Watching the Watchers: Enemy Combatants in the Internment's Shadow*, 68 Law & Contemp. Probs. 255, 257 (2005).

26. 7 Fed. Reg. 2165 (Mar. 18, 1942).

27. Irons, *supra* note 6, at 69.

28. Act of Mar. 21, 1942, Military Areas or Zones, Restrictions Pub. L. No. 77-503, 56 Stat. 173 (1942).

29. "The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066." Hirabayashi v. United States, 320 U.S. 81, 91 (1943).

30. Daniels, *supra* note 6, at 18. During an April 2, 1942 meeting of the California State Personnel Board, a motion was made that "all State civil service employees of Japanese ancestry employed by any department, agency, board, or commission be suspended effective immediately, and the Secretary instructed to file charges within the statutory time limit." *See #48 Item on Suspension of Japanese Employees* in *California State Government & the Incarceration of Japanese Americans During World War II*, California State Archives (April 2, 1942) (Identifier 2015_164_MB11_002), https://exhibits.sos.ca.gov/s/exhibits/item/53812 [https://perma.cc/7V5P-BTJN; https://perma.cc/293Q-JYNZ].

31. Irons, *supra* note 6, at 100; *State Employee Questionnaire* in *California State Government & the Incarceration of Japanese Americans During World War II*, California State Archives (Identifier LP335_748_001), https://exhibits.sos.ca.gov/s/exhibits/item/53799 [https://perma.cc/42XC-HQWU].

32. *Id.* at 101; *see* Tateishi, *supra* note 9, at 60. On June 3, 1942, the California State

B. *Personal Background*

Endo was born in Sacramento on May 10, 1920.[33] In the 1940s, she and her family were living in the city's Japantown neighborhood—one of the country's largest—when they were forced to leave their home and relocate to the Walerga Assembly Center pursuant to General DeWitt's civilian exclusion orders.[34] She was the second of four children—three daughters, one son—of Japanese immigrants.[35] Her father, Jinshiro Endo, worked at a grocery store while her mother, Shima (Ota) Endo, was a homemaker.[36] Endo's family had strong ties to the United States. Her father had not been to Japan since 1918 and Endo's brother, Kunio, was drafted into the Army in 1941 before the attack on Pearl Harbor.[37] Endo herself did not read or speak Japanese, had never been to Japan, and was a practicing Methodist.[38]

Endo was recruited to join the legal battle against Japanese American internment in 1942. When the campaign to expunge Japanese American state employees began, she was working as a typist at the California Department of Motor Vehicles.[39] James Purcell, a young lawyer working with the Japanese American Citizens League (JACL), was seeking an internee on whose behalf he could file a habeas corpus petition challenging her detention. Purcell had originally joined the litigation efforts of the JACL to challenge the impending dismissal of Japanese American state employees.[40] Yet in light of the speed with which General DeWitt's orders were implemented—before Purcell and the JACL could file any complaints, all potential litigants had been removed to assembly centers[41]—Purcell changed course and sought instead to find a

Personnel Board in Sacramento approved the filing of supplemental charges against 68 Japanese-American state employees, including Endo. Purcell appeared on behalf of 55 employees, including Endo, to protest the filing of these additional charges. *See #2/#3 List of Suspended State Employees* in *California State Government & the Incarceration of Japanese Americans During World War II*, California State Archives (June 3, 1942) (Identifier 2015_164_MB11_004a-2015_164_MB11_004b) https://exhibits.sos.ca.gov/s/exhibits/item/53816 [https://perma.cc/2MSH-LA4P]. In 2013, the California State Assembly approved a resolution formally apologizing to Japanese American state employees who had been fired due to their ancestry. *See* S. Res. 19, 2013 Assemb. (Ca. 2013), http://www.leginfo.ca.gov/pub/13–14/bill/asm/ab_0001–0050/acr_19_bill_20130909_chaptered.pdf [https://perma.cc/4CDM-8ZN4]; *Assembly Approves Apology to State Employees Fired in 1942*, Rafu Shimpo (Aug. 22, 2013), https://rafu.com/2013/08/assembly-approves-apology-to-state-employees-fired-in1942 [https://perma.cc/U7FK-Y6TH].

33. Petition of Writ of Habeas Corpus at 1, Endo v. Eisenhower (N.D. Cal. July 12, 1942) (Purcell Archive 2:6, at 2–7, on file with California State Library) [hereinafter Habeas Petition]; *see also* Buck, *supra* note 10.

34. Buck, *supra* note 10; *see also* Daniels, *supra* note 6, at 37.

35. Buck, *supra* note 10.

36. *Id.*; *see also* Tateishi, *supra* note 9, at 60.

37. Tateishi, *supra* note 9, at 60; *see also* Purcell Affidavit (Purcell Archive 3:6, at 61, on file with California State Library).

38. Daniels, *supra* note 6, at 37.

39. *Id.*; *see also* Tateishi, *supra* note 9, at 60.

40. Daniels, *supra* note 6, at 100.

41. Irons, *supra* note 6, at 101.

plaintiff who had already been interned and would represent the cause well in court.[42] He found that plaintiff in Endo, whose background and record made her the "perfect type"[43] of petitioner.[44] In Endo's own words, "[t]hey felt that I represented a symbolic, 'loyal' American."[45]

Endo was dismissed from her position on April 8, 1942, via a letter from the California State Personnel Board.[46] The Board stated that there was a "general lack of confidence on the part of the public and state employees in the loyalty of persons of Japanese ancestry," and that this "adversely affected and lowered the quality of work and morale of many employees associated with you in the state civil service."[47] By early June, Endo and her family were forcibly relocated to the Walerga Assembly Center. Shortly thereafter, Endo sent Purcell a card to notify him of her change in address.[48]

After being held at the Walerga Assembly Center in Sacramento for a month, Endo was sent to the Tule Lake War Relocation Center in Newell, California, in the summer of 1942.[49] She was incarcerated at Tule Lake for one year before being moved to the Central Utah Relocation Center in Topaz, Utah, in the fall of 1943, where she remained for two years.[50]

Initially, Endo harbored hesitations about serving as the lead plaintiff in the case. She described her feelings years later to John Tateshi for his 1984 book on former internees:

> I was very young, and I was very shy, so it was awfully hard to have this thing happen to me. In fact, when they came and asked me about it, I said, well, can't you have someone else do it first. It was awfully hard for me. I agreed to do it at that moment, because they said it's for the good of everybody, and so I said, well if that's it, I'll go ahead and do it. I never imagined it would go to the Supreme Court. In fact I thought it might be thrown out of court because of all that bad sentiment toward us. While

42. *Id.* at 101–2.

43. *Id.*; *see also* Daniels, *supra* note 6, at 37 (further suggesting that "as a woman [Endo] was less threatening.").

44. Though Purcell issued a questionnaire of his own to interned state workers in his efforts to locate a model plaintiff, the literature is unclear as to whether or how Purcell first met Endo. Daniels describes Purcell's interview with Endo "in her horse stall accommodation" at Walerga prior to his filing the writ of habeas corpus. Daniels, *supra* note 6, at 37. Peter Irons notes that Purcell did not meet with Endo personally prior to filing the writ. Irons, *supra* note 6, at 102. But when speaking with Tateishi, Endo recalls that she "never talked to Purcell—never met the man." Tateishi, *supra* note 9, at 61.

45. Tateishi, *supra* note 9, at 61.

46. Letter from California State Personnel Board, to Mitsuye Endo (Apr. 8, 1942) (Purcell Archive, 6:7 at 18, on file with California State Library).

47. *Id.*

48. Letter from Mitsuye Endo, to James Purcell (Purcell Archive, 6:7 at 20–21, on file with California State Library); *see also* Figure 4, *infra*.

49. Daniels, *supra* note 6, at 37.

50. Tateishi, *supra* note 9, at 61. Endo was moved as a part of a WRA policy where internees classified as "loyal" were moved from Tule Lake to other camps in order to make room to receive other, "disloyal" internees. Daniels, *supra* note 6, at 39; Greg Robinson, A Tragedy of Democracy: Japanese Confinement in North America 223 (2009).

> all this was going on, it seemed like a dream. It just didn't seem like it was happening to me.[51]

Endo noted that while she was interned, she was "anxious to have my case settled because most of my friends had already gone out, been relocated, and I was anxious to get out too."[52] But she also knew that "Purcell needed me to be in camp" because her release would moot her habeas corpus petition.[53] Accordingly, she chose to remain interned for an additional two years to enable her case to wind its way through the courts.[54]

II. Procedural History

Shortly after Endo was sent to Tule Lake, Purcell filed a habeas petition on her behalf on July 12, 1942, in the U.S. District Court for the Northern District of California.[55] The petition alleged that Endo was "a loyal citizen of the United States of America, and owes allegiance to and is a citizen of no other country."[56] It described Endo as currently "confined in [a] concentration camp under armed guard, . . . detained there against her will, . . . [and] deprived of her liberty."[57] The petition further alleged that Endo was detained without process or charge, and that "the sole reason for [her] detention . . . [was] that she is an American citizen of Japanese ancestry."[58]

At a scheduling conference held eight days after the petition was filed, Judge Michael Roche surprised counsel by hearing arguments on the merits, but then proceeded to hold the case for a year, even though such writs are meant to be handled expeditiously.[59] On July 3, 1943, thirteen days after the Supreme Court issued its decisions in the *Hirabayashi* and *Yasui* cases,[60]

51. Tateishi, *supra* note 9, at 61.
52. *Id.*
53. *See* Tyler, *supra* note 11, at 235.
54. *Id.*
55. Daniels, *supra* note 6, at 36.
56. Habeas Petition at 2.
57. *Id.*
58. *Id.* at 4.
59. *See* Daniels, *supra* note 6, at 36; Roger Daniels, *The Japanese American Cases, 1942–2004: A Social History*, 68 Law & Contemp. Probs.159, 159–160; Tyler, *supra* note 11, at 234-35. *See also* Robinson, *supra* note 50 ("[A]lthough a habeas corpus petition is supposed to be an expedited proceeding, in which a judge rules quickly, Judge Roche deliberately stalled his decision for over one year, during which Mitsuye Endo remained arbitrarily confined.").
60. *Hirabayashi v. United States* and *Yasui v. United States* were the first two challenges to the government's curfew and evacuation orders. In May 1942, Gordon Hirabayashi sought to challenge the evacuation scheme by turning himself in to a local FBI office in Washington state and submitting a statement detailing how removal violated his citizenship rights. Minori Yasui similarly decided to test the legality of the curfew orders. Yasui had studied law at the University of Oregon but relocated to Chicago and took a job at the Japanese consulate after he was unable to procure legal work in Oregon. Robinson, *supra* note 50 atat 218. In March 1942, after securing legal representation, Yasui walked around Portland after curfew and turned himself in to a local police station.

Both plaintiffs explicitly challenged the constitutionality of Executive Order

Judge Roche summarily denied the writ in a two-sentence order, concluding that Endo had not properly exhausted her administrative remedies and that the petition, in any event, did not present a proper ground for relief.[61]

In August 1943, Purcell appealed the decision to the U.S. Court of Appeals for the Ninth Circuit.[62] Instead of resolving the appeal, however, the Ninth Circuit suggested that the case be certified directly to the Supreme Court.[63] The Court agreed to hear the case in May 1944 and scheduled argument for the fall 1944 term.[64] All the while, Endo remained imprisoned at Topaz in southern Utah.[65]

From the beginning, the WRA was keenly aware that a verdict in favor of the petitioner would severely undermine the military justifications that were foundational to the agency's evacuation and detention program.[66] It also understood that such an outcome was extremely likely.[67] The government had initially justified mass removal by arguing that the emergency

9066 in their briefs to the Court. The justices unanimously upheld Hirabayashi and Yasui's convictions for violating the curfew and evacuation orders, holding that the orders constituted proper emergency war measures and declining to assess their constitutionality. As to the discriminatory nature of the orders, the Court noted that despite the "odious" nature of racial discrimination, "it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances. . . which may in fact place citizens of one ancestry in a different category from others." *Hirabayashi*, 320 U.S. at 100. *See also* Robinson, *supra* note 50 at 218–222.

61. The full text of the order read:

In the above entitled cause, it appearing upon the face of the petition that petitioner is not entitled to a writ of habeas corpus, and it further appearing that she has not exhausted her administrative remedies under the provisions of Executive Order #9102 (7 Fed. Reg. 2165) and the regulations promulgated thereunder.

It is therefore ordered that the petition for writ of habeas corpus be, and the same is hereby denied.

Notice of appeal at 1–2, In re: Mitsuye Endo (No. 23688-s) (August 1943) (Purcell Archive 1:6, at 20–21, on file with California State Library); Irons, *supra* note 6, at 255.

62. Daniels, *supra* note 6, at 61.

63. *Endo v. Eisenhower*, 64 S. Ct. 1059 (1944) ("In accordance with section 239 of the Judicial Code (28 U.S.C.A. § 346), it is ordered that the entire record in this case be certified up to this Court so that the whole matter in controversy may be considered by the Court. The case is assigned for argument immediately following the hearing of [*Korematsu v. United States*]." *See also* Daniels, *supra* note 6, at 62.

64. Daniels, *supra* note 6, at 62. The Court also rescheduled the *Korematsu* case from the spring to the fall 1944 term. *Id.* at 63.

65. *Id.* at 63 (noting that the Supreme Court's scheduling decision "extended Mitsuye Endo's imprisonment to at least twenty-nine months.").

66. *Id.* at 63 (describing how the WRA "fear[ed] that a successful result of Endo's case would interfere with the WRA's ability to detain citizens.").

67. *See* Eric L. Muller, American Inquisition: The Hunt for Japanese American Disloyalty in World War II 78-79 (2007). Muller describes how "[i]n the agency's very earliest days, as internees began filing habeas corpus petitions, its lawyers were already urging WRA staff to scour the camps for evidence" of disloyalty among internees. One of the WRA's lawyers is noted as admitting that the "keystone of our defense in any litigation . . . will be the proof of the facts showing disloyalty or possibility of disloyalty among the Japanese to an extent justifying the special precaution of detention."

situation on the West Coast in 1942 rendered it impossible to conduct individual loyalty determinations of individuals of Japanese ancestry.[68] When presented with a petitioner whom the WRA itself conceded was loyal[69]—and in light of the War Department's recent creation of a joint board to screen the loyalty Japanese Americans—the primary justification for mass removal could no longer be sustained.[70]

In recognition of these stakes, the WRA solicitor, Phillip M. Glick, personally visited Endo while she was interned at Topaz and attempted to convince her to apply for indefinite leave.[71] Endo had applied for leave clearance on February 19, 1943[72] but had not yet applied for indefinite leave.[73] Doing so would have completed the process by which internees could obtain leave from the camps, subject to certain provisions that prohibited them from, among other things, returning to regions where evacuation orders remained.[74] Significantly, a grant of indefinite leave would moot Endo's habeas corpus petition because the writ requires that the petitioner be in custody.[75] Glick assured Endo that, if she applied for indefinite leave, her application would be granted, though she would be barred from returning home to California because it remained designated as a restricted area. Despite the WRA's seemingly generous proposal—"part of the government's effort to avoid a Supreme Court test of its powers to detain Japanese Americans"[76]—Endo refused to apply for indefinite leave, allowing her case to proceed to the Supreme Court.[77]

III. Ex parte Endo

The Supreme Court heard argument in both the *Korematsu* and *Endo* cases in a two-day proceeding on October 11th and 12th, 1944.[78] Unlike the briefs in *Korematsu*, in which "both sides struggled with the detention issue," the question of detention "was not only the sole issue in the *Endo*

68. Robinson, *supra* note 50.

69. *See* Ex parte Endo, 323 U.S. 283,294 (1944).

70. Robinson, *supra* note 50 at 221; Daniels, supra note 6, at 64 (noting that the WRA "opposed Endo's petition because, if granted, it could prevent the retention of those it regarded as disloyal.").

71. Daniels, *supra* note 6, at 62.

72. Endo's petition for leave clearance was granted on August 16, 1943. *See* Ex Parte Endo, 323 U.S. at 294.

73. *See id.* at 293–94; Daniels, *supra* note 6, at 63.

74. Ex parte Endo, 232 U.S. at 292 ("[E]ven if the application meets [the requirements for indefinite leave], no leave will issue when the proposed place of residence or employment is within a locality where it has been ascertained that 'community settlement is unfavorable' or when the applicant plans to go to an area which has been closed by the Authority . . . . Moreover, the applicant agrees to give the Authority prompt notice of any change of employment or residence.").

75. Daniels, *supra* note 6, at 63.

76. Irons, *supra* note 6, at 102–3.

77. *Id.* at 100–103; Ex parte Endo, 323 U.S. 283, 294 (1944); Robinson, *supra* note 50.

78. Daniels, *supra* note 6, at 63.

case but one on which even [the government] was virtually willing to concede defeat."[79] The key issue in *Korematsu* concerned the legality of the curfew orders; detention remained an imminent and inevitable—yet still abstract—element in the case.[80] *Endo*, in contrast, featured a petitioner who was detained for the entirety of the litigation and challenged the constitutionality of wide-spread incarceration of citizens absent due process. Confronted with these facts, the government grasped at the thin authorities that existed to justify the detention program and, in the end, "pointedly failed to argue that Endo's decision was constitutionally valid."[81]

A. *Arguments*

Endo's brief to the Court began with an extensive and detailed review of suspension and martial law.[82] Wayne Collins, to whom Purcell delegated the writing of the brief, first argued that Endo's incarceration contravened all the key authorities that governed the issue and cited at length from *Ex parte Milligan*[83] in particular,[84] a case that he noted would be familiar to "[e]very lawyer of even ordinary learning."[85] Collins relied on *Milligan* to argue that the President of the United States, absent suspension, had no authority to detain citizens outside the criminal process or without due process.[86] Since martial law had not been not invoked, there was consequently no justification for the detention program and its suspension of constitutional rights.[87] In light of the controlling martial law authorities, the brief queried:

> Since the military authorities have no jurisdiction by virtue of a Presidential proclamation to *try* a civilian for an alleged offense in a district where the civil Courts are open, how much less right have they to imprison a citizen without any trial at all, when he is neither charged with, nor suspected of, any crime, and when his loyalty (as in this case), is not called into question?[88]

Collins then noted that it was "significant that appellees admit that nowhere is there a specific authorization to the commanding general to detain Miss Endo or any other American citizen."[89] Neither Congress nor the President had specifically authorized detention, and "there [was] not even an indication that where loyalty has been determined in a citizen, imprisonment

79. Irons, *supra* note 6, at 307.
80. Tyler, *supra* note 11, at 232.
81. Irons, *supra* note 6, at 308.
82. Tyler, *supra* note 11, at 235. Purcell delegated the writing of the brief to Wayne Collins, who was also an advocate in Korematsu. *See also* Irons, *supra* note 6, at 308.
83. Ex parte Milligan, 71 U.S. 2 (1866).
84. Opening Brief for Appellant at 16-30, Ex parte Endo, 323 U.S. 283 (1944); *see also* Tyler, *supra* note 11, at 235.
85. Opening Brief for Appellant at 16, Ex parte Endo, 323 U.S. 283 (1944).
86. *Id.* at 17–20, 36–37.
87. *Id.* at 31.
88. *Id.* at 31.
89. *Id.* at 43–44.

should be her lot."[90] Finally, Collins emphasized that the government did not contest any of the allegations Endo had made in her habeas petition and conceded, among other things, that she was a loyal citizen being held without charge in a region where martial law had not been declared.[91]

The local and national chapters of the ACLU filed amicus briefs in support of Endo and went even further, arguing that even if Congress had suspended the writ of habeas corpus, the absence of a rebellion or invasion of the mainland would have invalidated such a suspension.[92]

In response, the government sought to defend an evacuation and detention scheme in which the authorizing legislation and regulations were silent on detention.[93] In marked contrast to the petitioner's suspension and constitutional arguments, the government chose instead to "recite[] a descriptive narrative of the history of the military orders issued under the auspices of [Executive Order] 9066" and emphasize the scope of the war power of both Congress and the Executive.[94] The government argued that the case presented a much narrower inquiry than that presented by the petitioner, and only raised the question of "whether [Endo was] lawfully detained in a Relocation Center because of the operation of War Relocation Authority procedures to which she refuses to conform."[95] The government focused at length on the procedures for obtaining leave, emphasizing that Endo has been afforded the opportunity to obtain leave clearance from the internment camp but had pointedly failed to avail herself of these procedures.[96] The government meticulously outlined the technicalities of the leave clearance program and argued that certain elements of the scheme—such as the period of detention following a grant of leave clearance—were essential to ensure its orderly administration.[97]

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90. *Id.* at 44.

91. *Id.* at 40 ("As a matter of fact, there is not a single allegation in the petition for a writ of habeas corpus that is challenged. No order to show cause was issued.").

92. Brief of American Civil Liberties Union as Amicus Curiae Supporting Appellant at 6–7, Ex parte Endo, 323 U.S. 283 (1944).

93. Irons, *supra* note 6, at 307 ("The obvious difficulty [in the government's approach] was that none of the executive or legislative measures that purported to authorize the evacuation of Japanese Americans made any reference to detention.").

94. Brief for the United States at 43, Ex parte Endo, 323 U.S. 283 (1944); *see also* Tyler, *supra* note 11, at 235.

95. Brief for the United States, *supra* note 72, at 96.

96. "The narrow issue presented, therefore, is whether appellant is lawfully detained in a Relocation Center because of the operation of War Relocation Authority procedures to which she refuses to conform and which have as their purpose and orderly relocation of evacuees . . . bearing mind that those procedures are designed as a means of restoring the liberty of which she was originally deprived because of the exclusion of persons of Japanese ancestry from the West Coast area as a matter of military judgment." *Id*. at 46.

97. "The military necessity for the evacuation and the nature of the problems growing out of it have given rise to the relocation measures. Careful procedures have been devised to enable the evacuees to become established in communities as rapidly as possible." *Id*. at 45; *Endo* at 295.

Notably, the government did not argue that Endo's detention was constitutionally valid.[98] Indeed, it evaded discussion of the constitutional issues almost entirely.[99] Though it attempted to reframe the central question as whether the WRA had the authority to detain Endo, the government seemed to answer its own query in a footnote quoting a former Supreme Court Justice.[100] Though it purported to elaborate on the "difficulty of the question," the footnote cited a recent instance where former Justice James F. Byrnes had recently told a congressional committee that "[t]he detention or internment of citizens of the United States against whom no charges of disloyalty have been made . . . is beyond the power of the War Relocation Authority."[101] Accordingly, one of the administration's early justifications for the internment scheme's extensive scope—namely, the difficulty in evaluating the loyalty of each internee—could not withstand scrutiny when confronted with a concededly loyal citizen. When forced to address Endo's direct challenge to the constitutionality of the internment program, the government "barely put up a fight."[102]

B. *The Court's Decision*

The Supreme Court released its decisions in *Korematsu* and *Endo* on December 18, 1944.[103] Writing for the majority, Justice William O. Douglas held that under the terms of the executive orders and the Act of March 21, 1942, Endo was "entitled to an unconditional release"[104] because "[a] citizen who is concededly loyal presents no problem of espionage or sabotage."[105] The Court noted the government's concession that Endo was a loyal and law-abiding citizen, and observed that the government made "no claim that

98. Irons, *supra* note 6, at 308. Insofar as the government addressed constitutional issues, it argued that detention did not violate due process as required by the Fifth Amendment. Brief for United States at 44, Ex parte Endo, 323 U.S. 283 (1944). It pointed to examples of circumstances where confinement was justified, such as "confinement of jurors and material witnesses and of persons who are confined in the interests of health." *Id.*

99. *Id.*

100. Brief for the United States at 79 n.67, Ex parte Endo, 323 U.S. 283 (1944) (citing Sen. Doc. No. 96, pp. 19–20).

101. *Id*. Byrnes continued by noting that, "[i]n the first place, neither the Congress nor the President has directed the War Relocation Authority to carry out such detention or internment. Secondly, lawyers will readily agree that an attempt to authorize such confinement would be very hard to reconcile with the constitutional rights of citizens." *Id*.; *see also* Irons, *supra* note 6, at 308.

102. Corinna Barrett Lain, *Three Supreme Court "Failures" and A Story of Supreme Court Success*, 69 Vand. L. Rev. 1019, 1057 (2016).

103. Ex parte Endo, 323 U.S. 283 (1944); Troy J. H. Andrade & Ryan M. Hamaguchi, *American Internment*, 23 Haw. B. J. 4, 9 (2019) (describing the pair of decisions as "a way to uphold the government scheme, while opening the doors for internees to be released.").

104. Ex parte Endo, 323 U.S. at 304.

105. *Id.* at 302. The Court described the primary purpose of the Act and orders as "the protection of the war effort against espionage and sabotage." *Id.* at 218.

she is detained on any charge or that she is even suspected of disloyalty."[106] After conducting a detailed review of the agency's objectives and leave clearance program, the Court concluded that "whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure."[107]

The Court took great pains, however, to cabin its holding as one of statutory interpretation only. It asserted that, "in reaching [our] conclusion[,] we do not come to the underlying constitutional issues which have been argued."[108] Instead, the Court stressed that the suspension issues in *Ex parte Milligan* and *Ex parte Quirin* were not implicated because Endo was detained by a civilian agency and not by the military.[109] Though the Court briefly described several constitutional provisions—including the Suspension Clause and the Fifth and Sixth Amendments—it did so "not to stir the constitutional issues which have been argued at the bar"[110] but rather to explain its narrow reading of the executive and legislative actions, in a studied example of constitutional avoidance.[111] Instead, the Court concluded that because neither the executive orders nor the relevant legislation explicitly authorized detention, the implied power to detain citizens "must be narrowly confined to the precise purpose of the evacuation program."[112] Because the purpose of the internment program was to prevent espionage or sabotage, the detention of a concededly loyal citizen was unauthorized.[113]

When confronted squarely with a citizen's challenge to the legality of incarceration without process or charge, the Court lauded the petitioner's loyalty and heralded this particular trait—rather than any constitutional deficiencies of the internment scheme—as the decisive factor in her release. The Court evaded the constitutional questions and the extensive martial law precedents strenuously argued by Endo's lawyers by conducting a purely statutory analysis and finding that the legislative and executive actions had not explicitly authorized the WRA to detain Endo.[114] The Court carefully detailed the history of the executive orders and the WRA's leave clearance procedures and at one point suggested that it was the WRA—not the Executive, the legislature, or the military—that shouldered the blame for Endo's detention.[115]

106. *Id.* at 294.

107. *Id.* at 297.

108. *Id.* at 297. Irons describes Douglas as having "matched Black [in his *Korematsu* opinion] in his determination to evade the question of detention." Irons, *supra* note 6, at 341–42.

109. Ex parte Endo, 323 U.S. 283, 298 (1944).

110. *Id.* at 299.

111. *See infra* notes 145-165 and accompanying text.

112. Ex parte Endo, 323 U.S. at 301–2.

113. *Id.* at 302.

114. *Id.* at 297; *see also* Robert J. Pushaw, Jr., *The Enemy Combatant Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 Notre Dame L. Rev. 1005, 1038 (2013).

115. "[W]hatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its

In the end, Endo's loyalty and the internment program's lack of statutory authorization were the decisive factors that necessitated her release, rather than the fact that the arbitrary detention of a citizen without charge offended fundamental constitutional principles.[116]

Two Justices filed concurrences to address the Court's evasion of the case's constitutional issues.[117] Justice Owen Roberts accused the majority of "endeavor[ing] to avoid constitutional issues which are necessarily involved" and criticized its attempt "to show that neither the executive nor the legislative arm of Government authorized" Endo's detention.[118] In the Justice's words, "[t]his seems to me to ignore patent facts."[119] Justice Roberts also contested the majority's holding that Congress had not ratified the WRA's activities, despite granting appropriations to the agency and having access to "the reports, the testimony at committee hearings and the full details of the procedure of the Relocation Authority."[120] As Justice Roberts observed, "[i]n light of the knowledge Congress had as to the details of the programme, I think the court is unjustified in straining to conclude that Congress did not mean to ratify what was being done."[121]

Justice Frank Murphy wrote separately to denounce the discriminatory nature of the internment program itself, and chided the majority for granting nominal relief to Endo.[122] He declared that the detention of Japanese Americans at Relocation Centers—"regardless of loyalty"[123]—was just "another example of the unconstitutional resort to racism inherent in the entire evacuation program."[124] He decried the government's suggestion that "the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go."[125] Moreover, Justice Murphy observed that, following her release from the camp, Endo would still be prohibited from returning home to Sacramento under the existing exclusion orders.[126] This, he noted, appeared to undermine "the right to pass freely from state to state" implied in the Court's grant of "unconditional release."[127] Finally, Justice Murphy emphasized his repug-

leave procedure." Ex parte Endo, 323 U.S at 297; *see also* Daniels, *supra* note 6, at 77.

116. Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 Case W. Res. L. Rev. 1183, 1210 (2018).

117. Ex parte Endo, 323 U.S. at 307–8 (Murphy, J., concurring), 308–10 (Roberts, J., concurring).

118. Ex parte Endo, 323 U.S. at 308 (Roberts, J., concurring).

119. *Id.* at 309.

120. *Id.*

121. *Id.* at 310.

122. *Id.* at 307-309.

123. *Id.* at 307 (Murphy, J., concurring).

124. *Id.*; *see also* Eugene V. Rostow, *The Japanese American Cases-A Disaster*, 54 Yale L.J. 489, 513 (1945) (noting that Roberts and Murphy "urg[ed] that the decision be based on the constitutional grounds stated in their opinions in the *Korematsu* case.").

125. Ex parte Endo, 323 U.S. 283, 308 (1944) (Murphy, J., concurring).

126. *Id.*

127. *Id.* at 308.

nance with the prejudicial nature of the internment scheme—also noted in his *Korematsu* dissent[128]—and declared that "racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people."[129]

IV. Significance of the Decision

Scholars sometimes describe *Ex parte Endo* as a notable and significant victory in the history of the internment cases because the Court concluded that the WRA's detention of loyal citizens was illegal.[130] To be sure, the case and Endo's determination in seeing it through forced the administration to address the internment issue and precipitated its eventual demise. Moreover, the case not only secured Endo's release, but arguably that of thousands of other internees.

What the Court chose not to do, however, renders the case more of a partial or "hollow" victory, and demands further scrutiny.[131] When confronted with a case that exposed core constitutional fallacies in the government's mass detention program, the Court absolved the executive and legislative branches of responsibility and rewarded the petitioner with an "unconditional release"[132] on the grounds that she was "a loyal and law-abiding citizen."[133] The Court shielded the political branches by choosing to elide the constitutional questions presented and issuing a decision that would minimize the case's immediate impact and its long-term effects. Such acts of evasion demand both continued scrutiny for their legal implications and recognition of the petitioner's efforts—despite attempts by multiple government actors to thwart her case and its impact—in ensuring that the litigation moved forward.

A. *Immediate Impact*

The lengths to which the WRA went to moot Endo's petition spoke to the wide-ranging effects of her case—if the Court held in her favor, it would undermine the government's scheme of detaining thousands of Japanese Americans.[134] A recognition of these stakes is reflected in the timeline of events following the oral argument. On Sunday, December 17, 1944, Major General Henry C. Pratt issued Public Proclamation No. 21 and declared that the prohibition on Japanese Americans returning to their homes was rescinded, effectively closing the camps.[135] The next morning, the Court released the *Endo* decision.

128. Korematsu v. United States, 323 U.S. 214 (1944)
129. *Id.*
130. *See* Kang, *supra* note 4, at 963.
131. *Id.* at 964.
132. Ex parte Endo, 323 U.S. at 304.
133. *Id.* at 294; Kang, *supra* note 4, at 963.
134. *See* Daniels, *supra* note 6, at 63; *supra* notes 66–78 and accompanying text.
135. Daniels, *supra* note 6, at 79; Tyler, *supra* note 11, at 237. See also *Public Proclamation No. 21* in *California State Government & the Incarceration of Japanese*

Scholars have since argued that the delay in releasing the opinion was driven primarily by political concerns—namely, to avoid political backlash before the November 1944 presidential election and prevent the internment issue from complicating President Roosevelt's reelection efforts. The delay was also intended to provide the Roosevelt administration with sufficient time to preempt the decision. This is evident not only by the timing of the decision but also the Court's choice to delay hearing argument until the fall 1944 term. In doing so, the Court avoided having to weigh in on the issue while Roosevelt was seeking reelection.[136] Immediately after the election, administration officials found themselves in a "mid-December rush to beat the Supreme Court's Endo decision."[137] "[E]xquisitely aware" that an adverse ruling in Endo was imminent, executive branch officials sought to "blunt the impact of such a ruling by announcing an end to mass exclusion before the Supreme Court ordered it."[138]

The Justices themselves—particularly Justice Douglas, the author of the majority opinion—were also evidently aware of the political nature of the delay in releasing the decision. Though the Justices had agreed to grant Endo's petition during their October 16 conference, the Court held the opinion until long after the November 7 election. Justice Douglas expressed his frustration with the situation in a letter sent to Chief Justice Harlan F. Stone on November 28, arguing that the opinion that Douglas had circulated on November 8 should be released and lamenting that the executive branch's policy deliberations were the likely reason for the delay.[139] Daniels, pointing to communications between Chief Justice Stone, the White House, and the War Department during this period, argues that "the chief justice deliberately delayed justice to accommodate" the President and his political agenda[140] By

Americans During World War II, California State Archives (December 17, 1945) (Identifier F3640_17589_002), https://exhibits.sos.ca.gov/s/exhibits/item/53536 [https://perma.cc/7Z5D-LUMD].

136. Robinson, *supra* note 50,at 224.

137. Muller, *supra* note 67, at 98.

138. Muller, *supra* note 67, at 97; Robinson, *supra* note 50,at 223 ("It seemed obvious that the government had little chance of prevailing in the *Endo* case.")

139. *See* Gudridge, *supra* note 1, at 1935, n.11 (quoting Memorandum from William O. Douglas to Harlan Stone (Nov. 28, 1944) (on file with the Library of Congress)).

140. Daniels, *supra* note 6, at 78. An illustration of the timeline of the case can be useful in charting the potential coordination between the executive branch and the Court:

Date (1944)	*Event*
October 11–12	*Endo* argument
November 7	Presidential election
November 8	Draft circulated by Justice Douglas
November 28	Memo from Justice Douglas to Chief Justice Harlan
December 17	General Pratt announcement closing internment camps
December 18	Opinion filed

the time the decision was released on December 18, General Pratt's weekend announcement had preempted the decision's practical effect on the 85,000 people interned.[141] The Court then remanded the case to the district court to comply with its order that Endo be released.[142]

The coordination between the executive and judicial branches and the Court's choice to decide the case on statutory grounds robbed Endo and thousands of other Japanese Americans of two things—the vindication that their constitutional rights had been violated and the knowledge that the steadfast efforts of a similarly detained citizen had instigated their release.[143]

B. *Continued Significance*

Ex parte Endo is best known as the only successful wartime case challenging internment. However, the fact that Endo was released should not absolve the Court of its calculated evasion of the constitutional deficiencies at the center of the evacuation and internment scheme. The Court's careful capitulation to the executive branch in a case involving the arbitrary detention of a citizen—both in the substance and the manner in which it announced its decision—raises several concerns.

First, the Court's reasoning for releasing Endo hinged not on the discriminatory nature of the internment program but on its ostensible lack of statutory authorization.[144] The Court declined to read the executive orders and the Act of March 21, 1942, as "broadly"[145] granting authority for internment, since this would imply that the government was discriminating against Japanese Americans "wholly on account of their ancestry."[146] Rather than suggest that the internment program was motivated, at least in part, by racial animus—citizens of German and Italian descent, despite also tracing their heritage to an Axis power, were not incarcerated in masse—the Court declared that it "must assume that the Chief Executive and members of Congress . . . are sensitive to and respectful of the liberties of the citizen" and

141. Tyler, *supra* note 11, at 237.

142. *See* Chang, *supra* note 117, at 1211.

143. Kang, Denying Prejudice, at 960.

144. Recall that the Court in *Hirabayashi* found that Executive Order 9066 authorized–and the Act of March 21, 1942 ratified–the curfew for Japanese-Americans, even though each was silent on the curfew. *See* Hirabayashi v. United States, 320 U.S. 81, 91 (1943); Kang, *supra* note 25, at 260.

145. Ex parte Endo, 323 U.S 283, 303 (1944).

146. The Court then included a quote from President Roosevelt praising Japanese Americans. ("As the President has said of these loyal citizens: 'Americans of Japanese ancestry, like those of many other ancestries, have shown that they can, and want to, accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and well-being. In vindication of the very ideals for which we are fighting this war it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities.'") *Id.* at 303–4. The functioning of Relocation Centers is described in the Final Report, supra note 2, Part VI and in Segregation of Loyal and Disloyal Japanese in Relocation Centers, Sen. Doc. No. 96, 78th Cong., 1st Sess., p. 2

that "law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."[147]

Instead, the Court concluded that the Act of March 21, 1942, Executive Order 9066, Executive Order 9102, and the relevant legislative history "offer[ed] no support" for the internment program because each was "silent on detention."[148] In doing so, the Court effectively shielded the political branches from accountability for the internment scheme and instead placed the blame on the WRA, an executive agency, for exceeding its delegated authority.[149]

It is "preposterous"[150] to suggest that Congress did not authorize the internment camps.[151] Even though the Act of March 21, 1942, did not explicitly mention evacuation or detention, Congress' annual appropriations to the WRA were supported by congressional reports, testimony, and hearings, making it extremely unlikely that Congress was wholly unaware of the internment scheme.[152] The government itself, in its brief to the Court, conceded that "[c]ongressional awareness of the nature of the War Relocation Authority's regulations and procedures is evidenced generally by the reports and hearings," which the government was privy to.[153]

This assertion that the program lacked statutory authority because it was not explicitly identified also found a skeptical audience at the Court. In his concurrence, Justice Roberts found it "inadmissible to suggest that some inferior public servant exceeded the authority granted by executive order in this case"[154] and argued that the Court's requirement that a program be explicitly named by Congress in order to find that it was ratified was "an element never before thought essential to congressional ratification."[155]

Though the avoidance canon—the practice of construing a statute with a presumption in favor of its constitutionality[156]—is an established interpretive doctrine, the Court's invocation of the canon in response to Endo's constitutional challenge merits greater interrogation. Endo's release often obscures the fact that the Court addressed a constitutional challenge to a mass detention program by conducting a narrow, statutory review, asserting that it must "approach the construction of Executive Order No. 9066 as we should

147. Ex parte Endo, 323 U.S at 300 (1944).

148. *Id.* at 301–3.

149. *See* Kang, *supra* note 25, at 260.

150. Kang, *supra* note 4, at 961.

151. *See* Peter Margulies, *The Travel Ban Decision, Administrative Law, and Judicial Method: Taking Statutory Context Seriously*, 33 Geo. Immigr. L.J. 159, 187 (2019).

152. Ex parte Endo, 323 U.S. 283, 309 (1944) (Roberts, J., concurring); Kang, *supra* note 4, at 961–62.

153. Brief for the United States at 66, Ex parte Endo, 323 U.S. 283 (1944).

154. Ex parte Endo, 323 U.S. 382, 309 (1944).

155. *Id.*

156. *See, e.g.*, William K. Kelley, *Avoiding Constitutional Questions As A Three-Branch Problem*, 86 Cornell L. Rev. 831, 831-32 (2001) (noting that "the avoidance canon holds that courts are bound to choose an interpretation that avoids raising serious constitutional doubts.").

approach the construction of legislation in this field."[157] It is critical, then, that we understand the case not solely as a personal victory for Endo, but also as part of the Court's "total judicial abdication"[158] and its careful efforts to shield the political branches from accountability for internment.[159] Far from a neutral arbiter that stepped in to secure a loyal citizen's release, the Court was "a full participant in the internment machinery, and it deployed its enormous intellectual resources to avoid interfering with the internment, while at the same time, never granting the internment official approval."[160]

Moreover, the Court's decision runs the risk of standing for the proposition that wartime detention by a civilian agency is legal if it is statutorily authorized. Indeed, Jerry Kang argues that *Ex parte Endo* has been mistakenly cited as an authority on statutory interpretation,[161] most recently in the Supreme Court's decision in *Hamdi v. Rumsfeld.*[162] Kang notes the dissonance that arises when Justice Souter, in an effort to promote political accountability, refers to *Ex parte Endo*, which sought to absolve accountability.[163] Kang argues that citing *Ex parte Endo* as a statutory interpretation case risks misrepresenting it as having been anything but a studied example of constitutional avoidance.[164]

Second, the Court's cursory dismissal of Endo's suspension and martial law arguments is alarming in light of the constitutional rights implicated in the case.[165] The Court opened its analysis by summarily rejecting Purcell's suspension arguments because it found that a civilian agency—not the military—detained Endo.[166] Even though the War Department was jointly responsible for administering the evacuation and internment program, the Court held that the case was distinct from *Milligan* because the program "was not left exclusively to the military."[167] This constitutes, as Professor Amanda Tyler argues, "an absurdly narrow assessment"[168] of *Milligan*, where the Court held that the petitioner was entitled to release because Congress had not

157. Ex parte Endo, 323 U.S 283, 298 (1944).

158. Aya Gruber, *Raising the Red Flag: The Continued Relevance of the Japanese Internment in the Post-Hamdi World*, 54 U. Kan. L. Rev. 307, 372 (2006).

159. *See, e.g.*, Robert J. Pushaw, Jr., *The "Enemy Combatant" Cases in Historical Context: The Inevitability of Pragmatic Judicial Review*, 82 Notre Dame L. Rev. 1005, 1038 (2013) (noting that "Endo hardly represents a courageous rebuke to government overreaching"); Robert S. Chang, *Whitewashing Precedent: From the Chinese Exclusion Case to Korematsu to the Muslim Travel Ban Cases*, 68 Case W. Res. L. Rev. 1183, 1211 (2018) ("[E]ven the remedy given to Ms. Endo, based only on statutory grounds, left intact the constitutionalization of disparate treatment in *Hirabayashi, Yasui,* and *Korematsu*.").

160. Kang, supra note 4, 935-6.

161. *See* Kang, *supra* note 25, at 267–73.

162. 542 U.S. 507, 544 (2004).

163. *See* Kang, *supra* note 22, at 270–73.

164. "More worrisome is the naïve manner in which Endo is cited for the proposition that citizen detention must be clearly authorized." Kang, *supra* note 22, at 270.

165. Tyler, *supra* note 11, at 236.

166. Ex parte Endo, 323 U.S 283, 297 (1944).

167. *Id.* at 298; Gruber, *supra* note 159, at 344.

168. Tyler, *supra* note 11, at 236.

ratified the detention scheme and his military trial was unconstitutional.[169] Unlike the *Milligan* Court, the Court in *Ex parte Endo* chose to condition the petitioner's release not on a finding of unconstitutionality, but on her loyalty, a criterion that is conspicuously absent from any of the governing regulations.

Third, the Court's focus on Endo's loyalty as the definitive factor requiring her release—rather than addressing her challenge to the constitutionality of her detention—sets a dangerous precedent.[170] Central to the notion of loyalty and the exercise of finding Endo "concededly loyal'[171] is the belief that the inherent "foreignness" of Japanese Americans necessarily meant that their wartime loyalties were in dispute.[172] By concluding that Endo's loyalty to the United States required her release, the Court effectively sanctioned the government's ability to act as an arbiter of loyalty and treat punitively those it deemed disloyal.[173] In the eyes of the Court, Endo's "otherness"—only ameliorated once she was able to sufficiently prove her loyalty—outweighed the enormity of arbitrarily incarcerating a citizen.[174] How, exactly, Endo was deemed to possess sufficient loyalty remains unclear.[175]

The practice of conducting large-scale loyalty assessments of citizens during wartime and detaining those deemed disloyal is repugnant to democratic and constitutional values. The Roosevelt administration's incoherent administration of these assessments resulted in a situation where "Japanese American disloyalty became a chimera for each of [the agencies involved in making loyalty determinations], a wall on which each could project a constantly shifting show."[176] In making these assessments, the government conflated loyalty towards one country with the risk of an actual threat to

169. *Id.*

170. *See* Masumi Izumi, *Alienable Citizenship: Race, Loyalty and the Law in the Age of 'American Concentration Camps,' 1941–1971*, 13 Asian Am. L.J. 1, 15 (2006).

171. Ex parte Endo, 323 U.S. 283, 297 (1944).

172. *See* Gotanda, *supra* note 20, at 1191.

173. Natsu Taylor Saito, *Interning the "Non-Alien" Other: The Illusory Protections of Citizenship*, Law & Contemp. Probs. 173, 183 (2005).

174. Though both the government and the petitioner describe Endo as "a loyal citizen," neither the opinion nor the briefs identify the process by which Endo's loyalty was assessed. *See* Brief for United States at 5, Ex parte Endo, 323 U.S. 283 (1944); Opening Brief for Appellant, *supra* note 85, at 6.

175. During the war, four agencies were involved in making distinct loyalty findings of individual Japanese Americans. The agencies were (1) the Western Defense Command, the army organization responsible for defense of the West Coast; (2) the War Relocation Authority, (3) the army's Provost Marshal General's Office, which was responsible for military policing and domestic security; and (4) the Japanese American Joint Board, an interdepartmental council. Each entity used its own criteria for gauging loyalty and none managed to adhere to one coherent definition for loyalty, even for itself. Interestingly, the WDC's process for evaluating loyalty was the subject of a federal lawsuit. *See* Ochikubo v. Bonesteel, 60 F. Supp. 916 (S.D. Cal. 1945). For more on the different mechanisms government agencies employed to assess the loyalty of Japanese Americans, *see* Muller, *supra* note 67.

176. Muller, *supra* note 67, at 3.

national security.[177] More specifically, the government assessed the risk of subversion and criminal activity largely as a function of a citizen's racial or ethnic identity, or the extent to which they were deemed to have culturally assimilated.[178] Condoning the use of such an ambiguous and malleable metric—as the Court did—to make consequential decisions about a citizen's liberty leaves ample room for mischief. As Professor Eric Muller has observed, "[l]oyalty is too ephemeral and ambiguous a criterion to support a national security program, especially in a racially or ethnically charged setting."[179]

The Court thus reinforced the idea that disloyalty "can be legitimately incorporated into the racialized identity of a particular ethnic group,"[180] a belief intricately tied to stereotypes about Asian immigrants and the racial differences that were central to the Court's decisions in *Takao Ozawa v. United States*[181] and *United States v. Baghat Singh Thind*.[182] In its efforts to construe the case as a statutory issue, the Court in *Ex parte Endo* introduced the dangerous implication that loyalty—particularly of non-white Americans—was a decisive factor when evaluating the arbitrary detention of a citizen. Although the Court also pointed to statutory justifications for securing Endo's release, its emphasis on loyalty and the ambiguity of such a criterion arguably created a similar "loaded weapon"[183] as that left behind in the *Korematsu* case.

The Forgotten Petitioner

The egregiousness of the decision is perhaps only preempted by the extent to which Endo herself—the petitioner at the center of this landmark case—has remained in the shadows in cultural and legal discourse around the internment cases. The precedential value and historical importance of *Ex parte Endo* were only possible because of Endo's perseverance and her steady determination to see her case through. Endo later described her relationship to the case as follows:

> When I think about it now—that my case went to the United States Supreme Court—I'm awed by it. I never believed it, that I would be the one. It doesn't seem like it's me that I'm looking at when I see it in print, it was so long ago. . . . Do I have any regrets at all about the test case? No, not now, because of the way it turned out.[184]

In a letter to a friend years later, Endo noted that "[t]he fact that I wanted to prove that we of Japanese ancestry were not guilty of any crime

177. *Id.* at 142.
178. *Id.* at143.
179. *Id.* at 145.
180. *See* Saito, *supra* note 174, at 183.
181. 260 U.S. 178 (1922).
182. 261 U.S. 204 (1923). In these early cases, the Court pointed to the racial differences of Asian immigrants as a reason for barring them from naturalization. *Ozawa*, 260 U.S. at 198; *Thind*, 261 U.S. at 215.
183. Korematsu v. United States, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting), *abrogated by* Trump v. Hawaii, 138 S. Ct. 2392 (2018).
184. Tateishi, *supra* note 9, at 61.

and that we were loyal American citizens kept me from abandoning the suit."[185] Unlike Hirabayashi, Yasui, and Korematsu, Endo complied with all the initial evacuation orders but agreed to act as a model petitioner after she was fired indiscriminately from her job, forced out of her home, and confined in an internment camp.[186] Far from taking the path of least resistance, Endo refuted the WRA's offer of release and instead chose to remain interned for an additional two years to allow the litigation to continue[187]. Endo chose to give few interviews after she was released from Topaz and resettled in Chicago, an understandable choice after having been arbitrarily incarcerated by her own government.[188]

For her heroic dedication to challenging her internment and her choice to remain incarcerated to do so, Endo deserves official recognition on par with that bestowed upon other citizens who have fought to preserve constitutional rights. One form of such recognition would be the Presidential Medal of Freedom, one of the nation's highest civilian honors and one that has been awarded to the other three plaintiffs in the Japanese internment cases.

Efforts to recognize Endo in this manner are ongoing. On May 11, 2015, Senator Brian Schatz of Hawaii sent a letter to then-President Barack Obama recommending that Endo be posthumously awarded the Presidential Medal.[189] Senator Schatz argued that the honor "would provide long overdue recognition of the courage and sacrifice of a civil rights heroine whose low-key demeanor belied her steadfast pursuit of justice."[190] He also heralded Endo as having exemplified "a core American principle; [that] we are a nation of laws where one person can stand up against an injustice and alter the course of our democracy."[191] Numerous state and federal lawmakers supported Senator Schatz's efforts.[192] On August 28, 2015, the California State Senate issued a joint resolution supporting Endo's nomination for the Presidential Medal of Freedom.[193]

185. Tyler, *supra* note 11, at 235 (citing Letter from Mitsuye [Endo] Tsutsumi to Anne Saito Howden (June 5, 1989)).

186. *See supra* notes 44–45 and accompanying text.

187. *See, e.g.*, *supra* note 75 and accompanying text.

188. *See supra* note 9 and accompanying text.

189. *Senator Schatz Recommends Mitsuye Endo for Presidential Medal of Freedom*, Off. of Sen. Brian Schatz (May 11, 2015), https://www.schatz.senate.gov/news/press-releases/senator-schatz-recommends-mitsuye-endo-for-presidential-medal-of-freedom [https://perma.cc/J7D3-CWTF]; *see also Schatz Recommends Mitsuye Endo for Presidential Medal of Freedom*, Rafu Shimpo (May 13, 2015), https://rafu.com/2015/05/schatz-recommends-mitsuye-endo-for-presidential-medal-of-freedom [https://perma.cc/Y3J4-WPL6].

190. *Senator Schatz Recommends Mitsuye Endo for Presidential Medal of Freedom*, Off. of Sen. Brian Schatz (May 11, 2015).

191. *Id.*

192. Frances Kai-Hwa Wang, *Supporters Push for Mitsuye Endo's Presidential Medal of Freedom*, NBC (July 14, 2015), https://www.nbcnews.com/news/asian-america/supporters-recommend-presidential-medal-freedom-mitsuye-endo-n391736.

193. S.J. Res. 12, 2015–2016 Sess. (Cal. 2015), https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SJR12 [https://perma.cc/8U25-DD2R].

In 2016, on the seventieth anniversary of the closing of the internment camps, Tyler argued that "it is time to recognize Mitsuye Endo's enormous personal sacrifice to accomplish that end," and urged that she be recognized in the form of "one of our nation's highest honors."[194] That the Court deprived Endo of constitutional vindication and the satisfaction of having her litigation efforts release tens of thousands of interned Japanese-Americans makes such recognition more urgent.

Conclusion

Recent news stories have shed light on Endo's case and queried why she is not more well known outside of legal circles.[195] In light of her personal sacrifice and the wide-ranging impact of her consequential case, Endo's relative lack of recognition compared to the other plaintiffs in the internment cases is an injustice and erasure that must be rectified. Mitsuye Endo deserves to join the ranks of Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu and receive national commendation for her courage in standing up against one of the most fundamental and widespread violations of civil liberties in the nation's history, all while remaining incarcerated in rural California and southern Utah for the crime of being an American of Japanese descent.

194. Tyler, *supra* note 8.

195. *See, e.g.*, Tamiko Nimura, *Mitsuye Endo is the Japanese American hero you probably don't know about. But you should*, S.F. Chronicle, (May 22, 2021), https://www.sfchronicle.com/opinion/openforum/article/Opinion-Mitsuye-Endo-is-the-Japanese-American-16194858.php [https://perma.cc/K36R-C5MZ]; Ashley Wong, *Graphic novel shows Sacramento's Japanese American WWII activities like you've never seen*, The Sacramento Bee (May 4, 2021), https://www.sacbee.com/article251141809.html; Buck, *supra* note 10; Tyler, *supra* note 7; Aratani, *supra* note 9.

Appendix

Figure 1: Endo (left) with a coworker. Source: Utah State Historical Society.

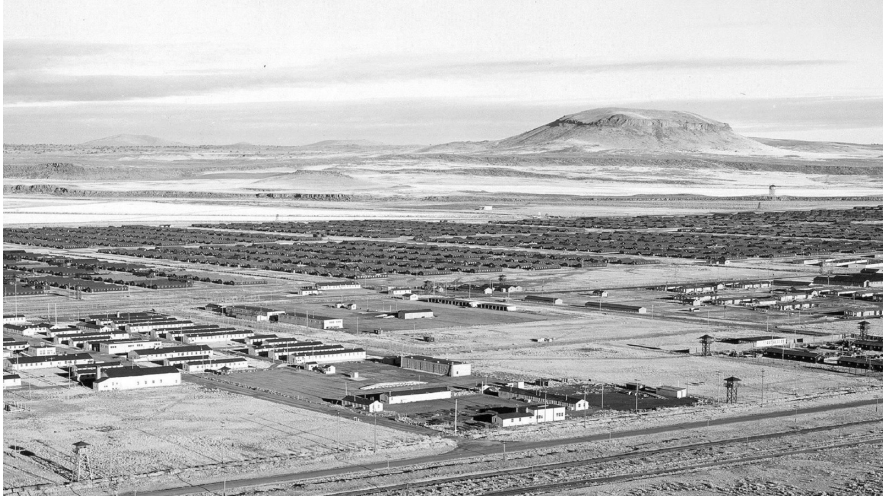
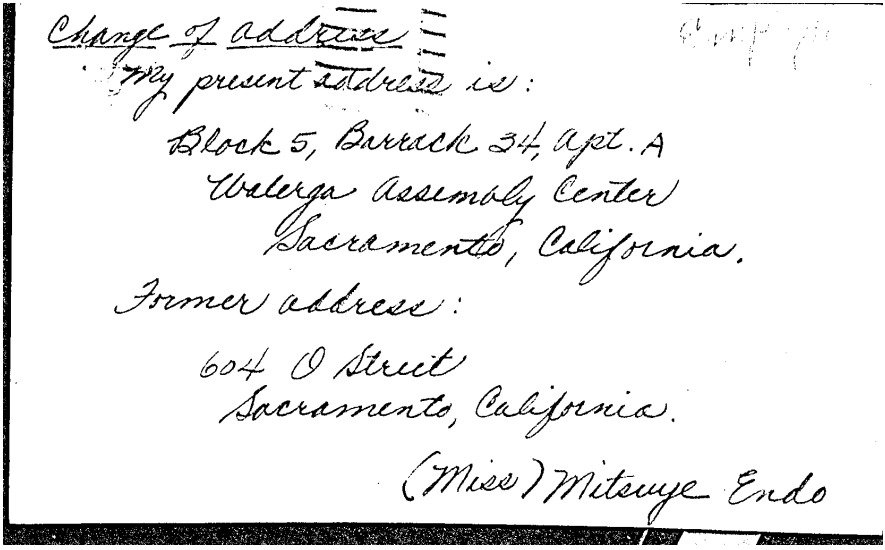


Figure 2: Tule Lake Relocation Center. Source: National Park Service.

Figure 3: Central Utah Relocation Center (Topaz). Source: National Park Service.



Change of address

My present address is:

Block 5, Barrack 34, Apt. A
Walerga Assembly Center
Sacramento, California.

Former address:

604 O Street
Sacramento, California.

(Miss) Mitsuye Endo

Figure 4: Correspondence from Endo to Purcell notifying him of her recent change in address. June 3, 1942. Source: California State Archive, James Purcell Collection.

39-9-B
Topaz, Utah
October 9, 1943

Mr. James C. Purcell
Mills Tower
San Francisco, California

Dear Mr. Purcell:

This is in reply to your letter of September 29, 1943.

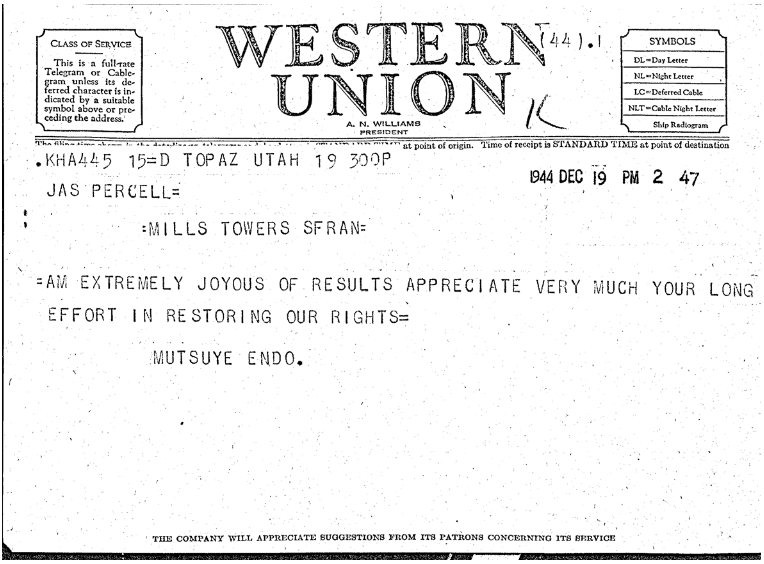
Since this case has an bearing on not only those who were formerly employed by the State of California but on all Japanese-Americans who are eager to go back to their homes in the Western Defense Command Area, I am willing to go as far as I can on this case.

I would like your advise on one problem which is troubling me. Would it be necessary for me to return to Sacramento alone should Writ of Habeas Corpus be granted me, or would it be possible for me to wait until there are sufficient number of people who will be able to return with me to Sacramento.

Sincerely yours,

Mitsuye Endo

Figure 5: Letter from Endo to Purcell. October 9, 1942. Source: California State Archive, James Purcell Collection.



CLASS OF SERVICE
This is a full-rate Telegram or Cablegram unless its deferred character is indicated by a suitable symbol above or preceding the address.

WESTERN UNION
A. N. WILLIAMS PRESIDENT

SYMBOLS
DL=Day Letter
NL=Night Letter
LC=Deferred Cable
NLT=Cable Night Letter
Ship Radiogram

.KHA445 15=D TOPAZ UTAH 19 300P

1944 DEC 19 PM 2 47

JAS PERCELL=

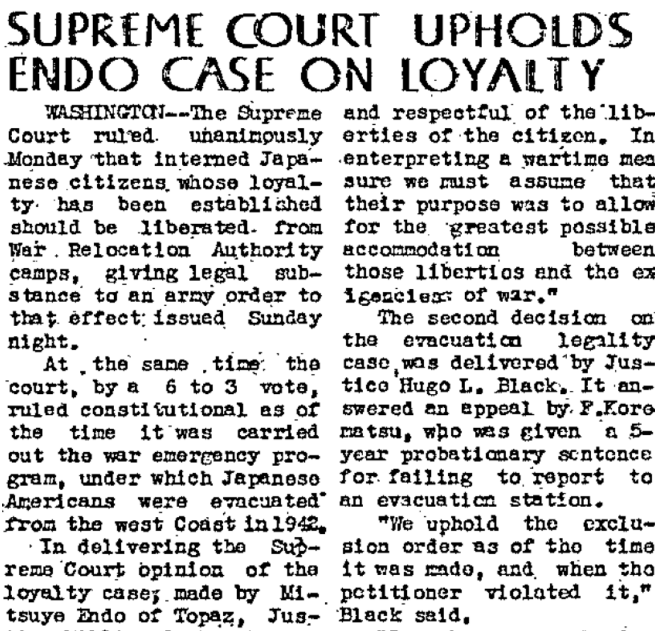
=MILLS TOWERS SFRAN=

=AM EXTREMELY JOYOUS OF RESULTS APPRECIATE VERY MUCH YOUR LONG EFFORT IN RESTORING OUR RIGHTS=

MUTSUYE ENDO.

THE COMPANY WILL APPRECIATE SUGGESTIONS FROM ITS PATRONS CONCERNING ITS SERVICE

Figure 6: Telegram from Endo to Purcell following December 18, 1944 release of *Endo* decision. December 19, 1944. Source: California State Archive, James Purcell Collection.



SUPREME COURT UPHOLDS ENDO CASE ON LOYALTY

WASHINGTON--The Supreme Court ruled unanimously Monday that interned Japanese citizens whose loyalty has been established should be liberated from War Relocation Authority camps, giving legal substance to an army order to that effect issued Sunday night.

At the same time the court, by a 6 to 3 vote, ruled constitutional as of the time it was carried out the war emergency program, under which Japanese Americans were evacuated from the west Coast in 1942.

In delivering the Supreme Court opinion of the loyalty case, made by Mitsuye Endo of Topaz, Justice ... and respectful of the liberties of the citizen. In enterpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war."

The second decision on the evacuation legality case was delivered by Justice Hugo L. Black. It answered an appeal by F. Korematsu, who was given a 5-year probationary sentence for failing to report to an evacuation station.

"We uphold the exclusion order as of the time it was made, and when the petitioner violated it," Black said.

Figure 7: Topaz Times, 1944-12-20. Source: Utah Digital Newspapers

Figure 8: Endo leaving the Topaz camp for the last time. Source: Utah State Historical Society.