

Colorado House Bill 17-1230
Senate Judiciary Committee, 71st General Assembly
Written Testimony of Nancy Ehrenreich
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Hello. My name is Nancy Ehrenreich and I am a Professor of Law at the University of Denver's Sturm College of Law. Thank you for the opportunity to speak in support of House Bill 17-1230.

In my opinion, this bill is a check on the tendency of federal governmental actors to use fear to gain support for unpopular and unconstitutional policies – such as wars abroad and restrictions of civil liberties at home. Governments often stoke popular fear during times of war or national distress by scapegoating vulnerable subgroups in the society.

The recent Muslim ban, enforced briefly by the Trump administration before it was enjoined, is an example of such an effort. Colorado has both the right and the duty to refuse to support such scapegoating of vulnerable minorities and the creeping authoritarianism it could be used to justify.

One of the most infamous U.S. examples of this sort of fear-mongering is the detention of Japanese citizens and others during World War II, mandated by a wartime exclusion order for parts of the West Coast (Executive Order #9066) that applied to “all persons of Japanese ancestry, both alien and non-alien.” *Korematsu v. United States*, 323 US. 214, 233 (1944). Between 110,000 and 120,000 people of Japanese ancestry were subjected to internment (for up to 3 years) under this program. About two-thirds of them were American citizens.

As you know, the Supreme Court upheld these detentions in the infamous case of *Korematsu v. United States*, 323 U.S. 214 (1944), finding a “definite and close relationship” between the governmental actions directed at this group and “the prevention of espionage and sabotage.” *Id.* at 218.

Today, one would be hard-pressed to find a Supreme Court case with less persuasive power than *Korematsu*. A presidential commission has called the detentions “racist.” In 1983, the conviction of Fred Korematsu was vacated, after it was revealed that U.S. intelligence services had actually informed U.S. military and war department officials *before the detentions* that Japanese on the West Coast “posed no serious danger to the war effort and that no need for mass evacuation existed...” Eric K. Yamamoto, “Korematsu Revisited,” 26 SANTA CLARA L. REV. 1, 2 (1986). In 1988, President Ronald Reagan signed into law a bill that formally apologized for the detentions and awarded a small amount in reparations.

As Justice Murphy wrote in his *Korematsu* dissent, the majority's conclusion was necessarily based upon “the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage.” *Korematsu*, 323 U.S., at 234. (Murphy, J., dissenting). We see exactly the same thinking reflected in candidate Trump's calls for a “total and complete shutdown” of Muslims entering the United States. *See* Alexander Burns,

"2 Federal Judges Rule Against Trump's Latest Travel Ban," NYT 3/15/17, available at https://www.nytimes.com/2017/03/15/us/politics/trump-travel-ban.html?_r=0. Trump's surrogates have even cited *Korematsu* as supporting precedent for a Muslim ban.

Today, over 70 years after *Korematsu*, we as a society know that ascribing criminality or disloyalty to individuals based upon nothing more than their race, nationality, or religion constitutes discrimination. That is why thousands of people in this nation protested the administration's Muslim ban and several federal courts enjoined it, in either its first or second iteration, as unconstitutional.

The story of the Japanese internments illustrates how easily a people and their government can forget their cherished ideals. Thus, HB 17-1230 provides a valuable mechanism to prevent knee-jerk state cooperation with federal policies that violate Colorado values. The state will be on the right side of history if it obligates itself to refuse to support racist or authoritarian federal policies – if and when they recur.