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# United States Senate

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August 1, 2018

## VIA ELECTRONIC DELIVERY

The Honorable James N. Mattis  
Secretary of Defense  
U.S. Department of Defense  
1100 Defense Pentagon  
Washington, DC 20301

Dear Secretary Mattis:

I am writing to express grave concern and strong opposition to the U.S. Department of Defense (DOD) decision to favorably cite the deeply flawed and discriminatory 1943 ruling of the United States Supreme Court in *Hirabayashi v. United States*. As you should be aware, *Hirabayashi v. United States* joins decisions in *Korematsu v. United States* and *Yasui v. United States* to form a disgraceful trio of World War II-era opinions that have been ignored and criticized to such a degree that they are commonly referred to as “anti-canon.”

Setting aside the specific facts and circumstances associated with the motion in hand in *United States of America v. Khalid Shaikh Mohammad et al* being heard before the military commission in Guantanamo Bay, Cuba – I am concerned that DOD appears to be seeking to rehabilitate a pillar of the disgraced World War II-era Japanese internment decisions by positively citing *Hirabayashi* as good law:

The power to wage war is the power to wage war successfully. See *Hirabayashi v. United States*, 320 U.S. 81, 93 (1943). The Department of Defense has decided part of the way to win this war is to cut off a vital recruiting tool al Qaeda uses; the words and statements of their fighters who have successfully attacked America. This power to successfully wage war

...extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war.

*Hirabayashi*, 320 U.S. at 93. To be sure, each accused, including Mr. Ali, will be able to speak on pertinent legal issues before the Commission, testify if he so chooses, and assist in his defense. And make no mistake, contrary to the Defense claims, “embarrassment”

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has nothing to do with this prohibition on dissemination of non-legal material: at trial the United States will not be apologizing for actions taken to prevent other attacks from occurring, or for any prohibitions it places on these men in order to defeat al Qaeda, even as it continues to ensure the war is prosecuted within the laws of armed conflict.<sup>1</sup>

*Hirabayashi* and its closely related cases, *Korematsu* and *Yasui* have been widely discredited. For example, Chief Justice John Roberts authored an opinion in *Trump v. Hawaii* this year asserting:

“The dissent’s reference to *Korematsu*, however, affords this Court the opportunity to make express what is already obvious: *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.” 323 U. S., at 248 (Jackson, J., dissenting).”

Indeed, the U.S. Department of Justice filed a notice on May 20, 2011 confessing the Solicitor General’s errors during *Hirabayashi* and *Korematsu* and noting that, were it not for these mistakes, the Supreme Court likely would not have ruled the same way.<sup>2</sup> For DOD to cite, even in part, from *Hirabayashi* is highly alarming and I hope reflects a clerical error and not the official DOD legal interpretation. To provide clarity, please confirm the following:

1. Is it the position of DOD that *Hirabayashi v. United States* represents good law;
2. Is it the position of DOD that *Yasui v. United States* represents good law; and
3. Is it the position of DOD that *Korematsu v. United States* represents good law?

If DOD’s position is that none of the three cases represent good law, please provide an explanation of why *Hirabayashi* was positively cited and explain what reforms are in place or being implemented to prevent a repeat of this grave error. Thank you for your prompt attention to this matter.

Sincerely,



Tammy Duckworth  
United States Senator

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<sup>1</sup> *United States of America v. Khalid Shaikh Mohammad; Walid Muhammad Salih Mubarak Bin ‘Attash; Ramzi Binalshibh; Ali Abdul Aziz Ali; Mustafa Ahmed Adam Al Hawsawi*. AE 563A (GOV). April 13, 2018.

<sup>2</sup> U.S. Department of Justice. “Confession of Error: The Solicitor General’s Mistakes During the Japanese-American Internment Cases.” May 20, 2011. <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases>. Retrieved July 26, 2018.