

WHAT ROMAN MARS CAN LEARN ABOUT CON LAW

Enemy Aliens

ROMAN MARS: So, it is Thursday, October 24th, at 10:45 AM. What are we going to be talking about today?

ELIZABETH JOH: All right, Roman. In the 1940s, Art Shibayama was a 13-year-old kid living with his family in Lima, Peru. And his family, like many other Japanese nationals, had immigrated to Peru for a better life. And the Shibayamas did become successful. Art's parents ran a textile importing business. His grandparents operated a department store. So, they were a prosperous Japanese Peruvian family--that is, until March 1st, 1944. That's when Peruvian police arrived at the Shibayama home, looking to round up the family--including the kids--and hand them over to American soldiers.

The Shibayamas were eventually put on a U.S. Army transport ship--The Cuba--that would take them and dozens of other Peruvian Japanese families to the United States. The United States was at war, and the American government was looking for "potentially dangerous persons" to be sent to the United States from Latin America--especially those who were ethnically Japanese. And before setting foot in the United States, these Peruvian Japanese were stripped of their passports. And then they were taken to internment camps. The Shibayama family was shipped to an internment camp in Crystal City, Texas, where they were supposed to remain until the end of the war. There was a 10-foot fence surrounding the camp, 80 families shared one community bathhouse, and the school in the internment camp taught the Shibayama children lessons in Japanese--but they only spoke Spanish.

Most people are familiar with the internment of Japanese Americans During World War II. Two months after the Japanese attack on Pearl Harbor on December 7th, 1941, President Roosevelt issued Executive Order 9066. That order permitted the forced internment of about 120,000 Japanese Americans from the west coast. They sent these families to what were called relocation camps behind barred wire, guarded by military police. And it was the internment of Japanese Americans that led to the Supreme Court's 1944 decision in *Korematsu versus the United States*. In *Korematsu*, the Supreme Court upheld the forced relocation of Japanese Americans. The *Korematsu* decision was later described by Chief Justice Roberts, in 2018, as "gravely wrong on the day it was decided" and as "having no place in the Constitution."

But most people don't know about this other program of internment that swept up Art Shibayama's family and detained them in camps, too. During World War II, about 3,000 people were sent from Latin America to the United States for internment. More than two thirds of them were of Japanese ancestry, and most of the Japanese were from Peru. And just like with the Japanese Americans who were sent to internment camps in the United States, there was little evidence

that any of these Japanese Peruvians taken from their homes were saboteurs or spies. Instead, they were teachers, small business owners, tailors... Some of them had Peruvian wives and Peruvian born children. Why were they taken to the United States? Mostly racism from a Peruvian government that wanted them expelled and an American government that considered them a hemispheric threat. Why did the federal government think it could detain Art Shibayama and hundreds like him? Because the Roosevelt administration considered them "enemy aliens."

In October of this year, Donald Trump told his supporters at a campaign rally in Colorado of his intention to launch a plan called Operation Aurora. Trump said he was going to send elite squads of ICE, border patrol, and federal law enforcement officers to arrest and deport every last illegal alien gang member until there is not a single one left in this country. Could Trump do that if he's reelected in 2024? And what does Operation Aurora have to do with the story of Art Shibayama and the hundreds of other interned Japanese Peruvians whose stories have been mostly forgotten? Time to find out.

ROMAN MARS: Let's do it. This is What Roman Mars Can Learn About Con Law--an ongoing series of indeterminate length and sporadic release, where we look at Trump's threat of mass deportations by invoking the broad and terrifying powers of the Alien Enemies Act and use it to examine our constitution like we never have before. Our music is from Doontree Records. Our professor and neighbor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

[AD BREAK]

ROMAN MARS: So, why did Roosevelt think he had the right to imprison these Peruvian citizens of Japanese descent?

ELIZABETH JOH: Because of 50 U.S. Code § 21, also known as the Alien Enemies Act. So, Roman, why don't you read part of the act?

ROMAN MARS: Okay, it reads, "Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government, all natives, citizens, denizens, or subjects of the hostile nation or government shall be liable to be apprehended, restrained, secured, and removed as alien enemies."

ELIZABETH JOH: Now, this act dates back to the 18th century. And in the 1790s, the United States seemed to be on the brink of war with France. And the Federalist Party, which controlled Congress, was concerned that there were French aliens--that's just another word for non-citizens--in the United States who would be primarily loyal to the French, not the United States. So, Congress enacted the Alien Enemies Act of 1798 as part of a group of federal laws known as the Alien and Sedition Acts. But only the Alien Enemies Act is still good law today.

ROMAN MARS: And so what were they trying to get at with the acts?

ELIZABETH JOH: Well, the Alien Enemies Act gives the president the power to detain or deport a large category of aliens or non-citizens. And that includes all natives, citizens, denizens, or subjects of a hostile nation or government. And the act makes no distinction between non-citizens who are lawfully within the United States and those who are not--nor does the act require that the president prove that any individual non-citizen actually poses a threat to national security. Instead, the act allows the president to target these alien enemies without a hearing--just based on the fact that they are from an enemy nation. And the idea of the act is to provide the president of the United States the power to prevent foreign spying and sabotage during wartime.

ROMAN MARS: And can he do this just any old time he wants to? I mean, when is he allowed to sort of act on this?

ELIZABETH JOH: Well, the law itself says that the president can use the powers under the act in time of "declared war" or when a foreign government threatens or actually engages in what the act calls an "invasion or a predatory incursion against the United States." So, that means a war, which only Congress has the constitutional authority to declare, or an invasion, which the president seems to have the sole authority to determine. And so the act has been used a couple of times during the War of 1812, World War I, and World War II.

ROMAN MARS: I mean, as loathsome as I find this all, I find it particularly, like, strange to imagine Peruvian citizens being somehow roped into this act. Can you explain that part of it?

ELIZABETH JOH: Yeah. It's a very strange story. First of all, the Alien Enemies Act doesn't explain why these foreign nationals could have been taken by the U.S. military from their home countries. It's not exactly clear what legal authority the United States possessed to force these unwilling Japanese Peruvians to get on ships and then to be sent to these internment camps. These people weren't trying to enter the United States at all. But once they were present inside of the United States, the act did apply to them. Remember, the Alien Enemies Act allows the president to declare, by proclamation, that every alien enemy who is older than 14 can be apprehended, detained, and even deported under the right conditions. And that's exactly what President Roosevelt did. He issued Presidential Proclamation 2525, issued on December 7th, 1941, the date of the attack on Pearl Harbor. And that proclamation said that, under the Alien Enemies Act, Roosevelt declared that "an invasion has been perpetrated upon the territory of the United States by the Empire of Japan" and that "all natives, citizens, and subjects of Japan over 14 were considered enemy aliens" and that "these enemy aliens could be apprehended, detained, or deported." So, this was a very, very broad power invoked by FDR. And the proclamation allowed FDR to target people of Japanese descent as enemy aliens based on nothing more than their ancestry.

And so, by 1944, when Art Shibayama's family found themselves behind a fence at the Crystal Springs Prison Camp, they were just a few among thousands of foreign nationals who had been targeted this way. And remember, they were being held involuntarily in these camps. And it was the same Alien Enemies Act that President Truman relied on, on July 14th, 1945, to issue Proclamation 2655. And in that proclamation, Truman announced that all enemy aliens held by the United States who were considered dangerous to the public peace and safety could be deported. So, remember, the Alien Enemies Act allows the President not just to round up people who are considered national security threats but also to have them deported, too.

ROMAN MARS: But the part that I find weird is the importing of them from Peru. I understand-- Or at least I understand the logic of the second part of this--if somebody's a citizen or in the country and then... I don't know. You have this existential threat based on racism that for some reason you're acting on in these sort of immoral ways. But why would you bring people from other countries into this country? That part doesn't make sense to me. And I can't imagine doing it without the complicity of the country of Peru as well.

ELIZABETH JOH: Absolutely. When the Latin American countries got together with the United States, each country seemed to have a variety of interests at stake about why they were willing to cooperate with the United States.

ROMAN MARS: I see. I see.

ELIZABETH JOH: And the United States just felt that they were going to secure the southern border. How were they going to do that? By taking the people they considered threats in different Latin American countries and then just imprisoning them essentially.

ROMAN MARS: Inside of the United States.

ELIZABETH JOH: Right.

ROMAN MARS: So, then what happened to the Peruvians?

ELIZABETH JOH: Well, they were in a terrible bind. First, they were dragged into the United States against their will. And then President Truman said, "Get out." So, what happened to most of the Japanese Peruvians was that they had had their passports confiscated before they set foot in the United States by the American government. So, these people were--through no fault of their own--illegally present in the United States. And not only that, during World War II, several hundred of them--and this is one of the reasons why they were there--have been sent to Japan in exchange for American hostages during the war. And that included Art Shibayama's grandparents. He never saw them again. And as for the remaining Peruvians? President Truman relied on the Alien Enemies Act to order them deported. But where could they go? Peru refused to take them back. And

so between 1945 and 1946, more than a thousand Japanese Peruvians were deported to Japan. These were considered voluntary departures by the American government. But remember, these people had no choice. Peru didn't want them back, and the U.S. government considered them illegally in the country. And it was also the case that many of these Japanese Peruvians were people who had lived in Peru for decades. They had no real ties to Japan at all.

Eventually, Peru announced that it would allow some Japanese Peruvians who were Peruvian citizens or married to Peruvian citizens to return. But just 100 of these internees moved back to Peru in 1946. And in 1947, long after the end of the war, there were still 300 Peruvian Japanese remaining in the United States. And they were essentially stateless. Eventually, these internees asked the federal government to suspend their deportation orders. But it wasn't until 1954 that Congress changed federal law to allow these non-citizens who had been unwillingly brought from Peru and other Latin American countries to become eligible for a U.S. citizenship. This ended years of uncertainty for the Japanese Peruvians who never wanted to come to the United States and then were unable to return home.

ROMAN MARS: Okay, so that's the prologue to this. So, what does this have to do with Trump using these various acts potentially if he's reelected?

ELIZABETH JOH: That's right. I mean, so Roman, as you can see, that Alien Enemies Act gives the President of the United States a very broad power to target people who are perceived as national security threats. And in theory, that's a useful tool during wartime. But of course, in the wrong hands, because the tool is so broad, it can easily be abused by a bad faith president. And Trump has said several times during his reelection campaign that, if he becomes president again, he will immediately rely on the Alien Enemies Act to begin mass deportations of non-citizens from countries like Mexico and Venezuela--people who are living in the United States. So, for instance, in September of 2023, Trump said this: "I'll invoke immediately the Alien Enemies Act to remove all known or suspected gang members--the drug dealers, the cartel members--from the United States, ending the scourge of illegal alien gang violence once and for all." And more recently, Trump has said, "We will have an Operation Aurora at the federal level to expedite the removal of these savage gangs. And I will invoke the Alien Enemies Act of 1798." And Trump has said he would use the act to target every illegal migrant criminal network operating on American soil. And this, of course, is part of Trump's increasing reliance on nativism, racism, and fear to gin up support for his reelection in the last weeks before Election Day.

ROMAN MARS: I mean, there is absolutely no declared war with anybody related to what Trump is talking about in particular. So, how can he do this?

ELIZABETH JOH: So, that's a great question. Even though many people have claimed that the act is only for the president's wartime authority, the act doesn't limit itself to formal declarations of war by Congress. Instead, the Alien Enemies Act allows the

president to target non-citizens, either when there is a formally declared war or when there's what the act calls an "invasion" or a "predatory incursion." And in those cases, the president doesn't have to wait for Congress at all. And in fact, FDR relied on the Alien Enemies Act to declare that non-citizens from Japan, Germany, and Italy were alien enemies right after the Pearl Harbor attack. Roosevelt didn't wait for Congress to formally declare war.

ROMAN MARS: So, we're certainly not at war with Mexico. Being invaded or an invasion is kind of a broad term. But this even seems like it's sort of outside the bounds of any sort of definition of invaded or invasion when it comes to Mexico, right? I mean, I don't--

ELIZABETH JOH: Yeah, if you look at the law itself, it does seem to be a sticking point. So, Trump keeps claiming--falsely--that there's a migrant crime wave in the United States. And he keeps using language like "animals," "thugs," and "sadistic monsters" to describe the people involved in this alleged crime wave. So, Trump's argument to his supporters is that he's going to begin these mass deportations of non-citizen migrants because they have brought with them an "invasion of crime." That's the language he keeps using. So, the problem for Trump's plan is that the Alien Enemies Act refers to an invasion or predatory incursion perpetrated by a foreign nation. So, the Alien Enemies Act doesn't apply to decisions of individuals from other countries to do things like commit crimes. And you're right, nobody believes that the governments of Mexico or Guatemala or any other nation is leading an invasion--a formal invasion--into the United States. But some supporters of Trump's plan have argued, "Well, we don't have to rely on the literal reading of the Act. Maybe we can think of some countries as having been so taken over by criminal gangs that you really can't separate the criminal gangs from the government itself."

So, if that were to happen and Trump were to say, "I don't need a literal reading of the Act, I just need to kind of wave my hands near the Act," then the Alien Enemies Act is written so broadly that it applies not just to non-citizens who are illegally within the United States but also non-citizens who are lawfully within the United States, too. And remember, there isn't any procedure for someone targeted by the Act to appeal to the president's decision to detain them or to order them deported. And that's because the president doesn't need to show that any particular person detained under the Alien Enemies Act actually poses a national security threat. It doesn't matter if you have evidence that you aren't a national security threat or that you are, in fact, loyal to the United States. It doesn't matter because that's not how the Act works.

ROMAN MARS: Oh my God. I can't believe that the only thing holding it in check is the idea of what is a war or what is an invasion. From there on, even that is such a slippery and elusive definition that could be used to bad ends... The idea that it just gets worse from there--there is not even nominal protections from that point of that declaration--is so chilling.

ELIZABETH JOH: Yeah, that's right. And it's supposed to be a kind of flexible power in a time of war. But as you can see, it's kind of a legal sledgehammer. And it works against the idea that we have under our modern conception of law that people are supposed to be judged on the things that they individually have done, not their ancestry or their group characteristics.

[AD BREAK]

ROMAN MARS: So, what's the Supreme Court's take on this? Have they ever decided anything related to the Alien Enemies Act?

ELIZABETH JOH: They have. When World War II ended in 1945, the Truman Administration continued to rely on the Alien Enemies Act to intern and deport non-citizens until 1951. And Kurt Lüdecke was a German national who was considered an enemy alien and was ordered deported by the Truman Administration on January 18th, 1946. Lüdecke argued that he couldn't be deported under this act because Germany had already surrendered to the United States. That was his argument. The war was over. Truman could not rely on this power. But in 1948, the Supreme Court rejected Lüdecke's argument. The Supreme Court said that whether the United States was still in a state of war was within the judgment of the political branches--that's Congress and the president--not the courts. In the Lüdecke case, the Supreme Court called the president of the United States "a person entrusted with such vast powers in relation to the outside world" and "someone entrusted by Congress almost throughout the whole life of the nation with the disposition of alien enemies during a state of war." In other words, not only did the Supreme Court reject Lüdecke's specific claim that the war wasn't quite over, the Supreme Court also used the case to insert some broad sweeping language to describe the president's powers under the Alien Enemies Act. You're mostly, like, a open mouth during--

ROMAN MARS: Well, I know. It just gets worse and worse. I mean, this expansive view of what are the powers of the president and what they're able to get away with reminds me of these recent immunity cases. And so I'm just wondering, is there any type of court that would limit this type of action from Trump?

ELIZABETH JOH: Well, first of all, if Trump were to be reelected and he relied on this act to try and start a mass deportation program, there's no doubt that there would be a flood of lawsuits--people trying to run to the courts to stop all of this. Now, maybe someone would bring a court challenge arguing that Trump is misinterpreting the idea of the invasion or predatory incursion that's mentioned in the Alien Enemies Act. And maybe a court might say, "Yes, that's absolutely right. He's gone too far. But there is a potential hurdle--a legal doctrine called the political question doctrine.

And what the political question doctrine means is that sometimes courts refuse to weigh in on even very, very important issues because, in their view, it's just not the kind of subject a court should be involved in--in other words--that there

are some matters that are for the political branches, Congress, and the president to decide. And courts have relied on the political question doctrine to avoid getting involved in certain very sensitive topics, especially around war and foreign policy. They just don't want to get involved. And you know that Ludecke decision from 1944? The Supreme Court gives some hints that, well, there's a lot around the Alien Enemies Act that appears to be centered on political issues rather than legal determinations. So, what all of this means is that, while it's possible that a court might say, "No, a second Trump administration can't rely on the Alien Enemies Act to justify mass deportations," I think it's also possible that a court might say, "Well, as troubling as this is, this isn't something we can really resolve. This is really about a political issue about the appropriate meaning of wartime authority. And we'll just kick it to the political branches."

ROMAN MARS: Yeah, I mean, I think there's a notion out there that the people who agree with or are sympathetic to Trump--that this rhetoric only applies to people who are in the country without documentation. But what is super clear to me in this Alien Enemies Act is that there is no notion that there's any difference of who Trump could target with this. They could be here legally, they could be undocumented, they could be from another country... The degree to which this allows him to target any type of person of dissent from another country is just terrifying to me.

ELIZABETH JOH: Yeah, I mean, I think that's absolutely right. And what's more, when you think about the way the act is written, it's really giving the president this enormous authority. But let's say Trump is wrong; let's say he's totally misinterpreting the act, which he probably is. In the meantime, even if eventually a court says, "This is wrong, and this is not the way this act is supposed to be applied," you can easily see how so many people who've done nothing wrong can be caught up in an enforcement action in which their lives are ruined. I mean, even if at the end of the day, well, this mass deportation program was a mistake and shouldn't have been started and stopped doing it, in the meantime, there are always people who are targeted by these even unlawful acts by a president. And we don't talk about that even short-term but very damaging action.

ROMAN MARS: Yeah. And they could just take their passport away, and then there's nothing they can do. I mean, given all this and the broadness of it and the fact that foreign invasion is not a huge part of American history in this way, why is this act still around? Has it ever been chipped away at?

ELIZABETH JOH: Well, there are definitely proposals. There have been recent proposals, in fact, to try and either change the Alien Enemies Act or to just abolish it altogether. But it hasn't garnered a lot of traction. I think there's some reluctance--some fear that... "Do we really want to take away a power that seems to be necessary in a time of war? What would we do if the president needed some broad authority in a time of war?" And generally, you don't want to be the politician who strips the president of the president's authority in wartime. So, there's definitely some nervousness around that. But as I said, one of the strange things about this law,

which has been on the books since 1798, is that it's absolutely contrary to the way we think about modern law. What do you do when you're caught up in such a system and you say, "I'm loyal to the United States. I'm not a spy. There's no evidence against me." The Alien Enemies Act doesn't really seem to care about that. It allows targeting based on group characteristics, which is antithetical to the way we normally think about how the law treats people.

ROMAN MARS: Yeah. Yeah. I mean, the Sedition Act--which came along with the Alien Act--that totally ran out of favor very quickly.

ELIZABETH JOH: Right.

ROMAN MARS: It's interesting that that one is the one that people felt was completely un-American and this one is something that's passed through a couple of centuries.

ELIZABETH JOH: Yeah, no, absolutely right. I mean, it's not that Trump couldn't rely presumably on other legal authorities to target people that he wants to target. I mean, I don't think that that's the point--that this is the only act that's a problem. But this is, I think, one of the more obvious illustrations of what you have when you have the potential of a bad faith president using powers that are not supposed to be used in particular ways, but it's very likely that he's going to try.

ROMAN MARS: Yeah. So, going back to our original story, what happened to Art Shibayama?

ELIZABETH JOH: Well, in 1988, President Reagan signed a law called the Federal Civil Liberties Act. Every surviving former Japanese internee from World War II received a \$20,000 payment and an apology letter with the presidential seal. But the law addressed only Japanese Americans who were interned under Executive Order 9066. It did not include the Japanese Peruvians, and actually it's stranger than that. The children who were born to Japanese Latin Americans in these detainee camps were considered U.S. citizens because of birthright citizenship--and they were eligible for the full \$20,000 not the Japanese Latin Americans. So, in the 1990s, this group of Latin Americans sued the U.S. government to receive compensation. And a settlement with the federal government resulted in each Latin American of Japanese ancestry receiving just a fourth of what the Japanese American internees received--\$5,000. And 17 attorneys rejected the amount as being "so small that it was insulting."

And in 2017, Art Shibayama and his brothers turned to the Inter-American Commission on Human Rights--part of the Organization of American States. The case dragged on for years, and Art did not live to see it resolved. He died on July 31st, 2018, at the age of 88 in San Jose, California. But in 2020, the Inter-American Commission on Human Rights agreed that the United States violated the Shibayama's rights under the American Declaration on the Rights and Duties of Man. But the commission can only issue findings. It can't impose

any penalties, and it has no enforcement authority. And the Trump administration? It had refused to participate in the hearings at all.

ROMAN MARS: Elizabeth, what are you doing to me? This is awful stuff. I'm glad people are aware of this. I don't know if anyone listening to this has anything but a negative opinion of Trump, but the idea of this at his disposal and the history of this being so shameful across all kinds of administrations and courts--it's just chilling. The amount of power represented here--it's just Kafkaesque type of power--that you could put someone in a complete legal limbo who's from another country who gets imported here and then is subject to all of these laws and has no way out of it just seems like a completely anti-humanist stance. It's just diabolical.

ELIZABETH JOH: Yeah. I mean, to be fair, the organizers for the rights of Japanese Latin Americans have also petitioned the Biden administration for help and recognition, and they haven't been terribly responsive either. But I think the overall theme here is that, yes, when you have these broad sweeping laws giving power to the president of the United States, can they be abused? Yes, they can be abused. And the story of the Japanese Peruvians during World War II is not only one that most people don't know about. It is an exact example of how abuse has happened and what happens to people whose lives are ruined. They were, as I said, essentially stateless. They had nowhere to go. They were taken from their homes. They lost their livelihoods. They lost their property. And while we lament what happened to the Japanese Americans, it seems very strange that we didn't acknowledge the suffering of the Japanese Latin Americans in the same way.

ROMAN MARS: For sure. Well, I hope everyone keeps this stuff in mind and knows that this type of power is bad when it's in Roosevelt's hands, it's bad when it's in Trump's hands, and it's bad power. It's bad power to have. So, keep it in mind and make sure that--if what we're relying on is the character of the people that we're electing to not use it in the worst possible way--then vote accordingly.

ELIZABETH JOH: That's right.

ROMAN MARS: Thank you, Elizabeth.

ELIZABETH JOH: Thanks, Roman.

ROMAN MARS: This show is produced by Elizabeth Joh, Isabel Angell, and me, Roman Mars. It's mixed by Haziq bin Ahmad Farid. Our executive producer is Kathy Tu. You can find us online at learnconlaw.com. All the music in What Roman Mars Can Learn About Con Law is provided by Doomtree Records, the Midwest Hip Hop Collective. You can find out more about Doomtree Records, get mech, and learn about the new SHREDDERS EP--they provide the music for our intro and outro music every week--at doomtree.net. We are part of the Stitcher and SiriusXM podcast family.