

The Rule of Law Under Stress

A Survey of Historical and Contemporary Tests
of Judicial Authority and of Executive Compliance

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This article discusses several events that have tested the limits of the rule of law throughout US history as the executive and legislative branches seek to expand their own authority.

The drafters of the US Constitution sought to implement the rule of law by establishing a system of checks and balances among the separate executive, legislative, and judicial branches, all of which would be governed by the Constitution. Alexander Hamilton wrote:

The courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A constitution is, in fact, and must be regarded by the judges, as a fundamental law. It therefore belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body.¹

While the system of checks and balances established in the Constitution has remained largely unchanged, during times of crisis, real or perceived, the executive and legislative branches frequently test the limits of the rule of law as they seek to expand their own authority. This article examines historical moments when fear, expediency, or assertions of unchecked power led government actors to test or exceed constitutional limits, the consequences for those most affected, and the continuing role of the rule of law in restraining power and sustaining democratic governance.²

The Treaty of Fort Laramie: Legislative and Judicial Attempts to Remedy Violations of Native American Treaties

The violation of the 1868 Treaty of Fort Laramie³ is one of many examples of the United States' violations of its treaties with Native American tribes. The history relating to this treaty illustrates the lengthy legislative and judicial efforts

to remedy the executive branch's violation, though the Sioux Nation continues to contest the status quo.

In 1868, the US government met with the Sioux tribes at Fort Laramie and negotiated the Treaty of Fort Laramie. Pursuant to this treaty, the tribes gave up their rights (other than hunting and fishing) to land previously promised to them under prior treaties, and the tribes agreed not to attack railroads or settlers. The US government agreed to establish the Great Sioux Reservation for the exclusive use of the Sioux. This land includes the Black Hills, which is sacred ground for the Sioux.⁴

However, gold was discovered in the Black Hills in 1874, and miners and settlers encroached onto the Sioux's hunting grounds, where they sought and received protection from the US Army. This interference disrupted the Sioux's ability to hunt, leading to severe hunger among the Sioux and to fighting, including the Battle of Little Bighorn in 1876. The US government attempted to compel the Sioux to relinquish their rights to the Black Hills and to hunt in the unceded territories, in exchange for subsistence rations.⁵ In 1877, Congress implemented this agreement through the 1877 Act,⁶ effectively abrogating the Treaty of Fort Laramie.⁷

Decades later, in response to lobbying by the Sioux, Congress passed legislation that provided a forum for Native American tribes to sue the United States.⁸ The Sioux initiated a breach of treaty claim in the Court of Claims in 1923. The Sioux's claim that the United States had violated the Fifth Amendment by taking the Black Hills without just compensation was denied in 1942.⁹ In response, Congress passed the Indian Claims Commission Act¹⁰ in 1946. The Sioux continued to argue their claim before the Indian Claims Commission and the Court of Claims between 1950 and 1979. In 1978,

Congress passed legislation that specifically allowed the Court of Claims to review the merits of the Indian Claims Commission's 1974 determination that the 1877 Act effected an unconstitutional taking of the Black Hills.¹¹ In 1979, the Court of Claims affirmed the Commission's holding and awarded damages of at least \$17.1 million in principal plus interest from 1877.¹²

In 1980, more than a hundred years after the 1877 Act violation of the Treaty of Fort Laramie, the Supreme Court in *United States v. Sioux Nation of Indians* affirmed the Court of Claims' holding that the Black Hills had been unconstitutionally taken from the Sioux Nation, and awarded the principal plus interest from 1877 as damages.¹³ However, despite this judicial attempt to remedy the violation of the treaty, the Sioux Nation has refused to accept the \$105 million award and continues to seek the return of the Black Hills.¹⁴

Japanese Internment: Deference Amidst the Claims of National Security

In December of 1941, Japan attacked Pearl Harbor. In response, President Roosevelt issued the now infamous Executive Order 9066, authorizing military commanders to designate "military areas" from which "any or all persons" could be excluded.

Just a few months later, General J.L. DeWitt publicly announced restriction zones along the West Coast; people of Japanese descent were to be forcibly removed from the West Coast and confined to concentration camps, often referred to as internment camps, inland.¹⁵ The camps were justified in the name of national security. General Dewitt reported that "pervasive disloyalty" existed among people of Japanese descent and that there was "no practicable way to separate the loyal from the disloyal."¹⁶

However, the allegations in the DeWitt report were unsubstantiated and, in fact, contradicted by other intelligence known to the administration.¹⁷ Curtis Munson, a state department investigator, authored a report, based on comprehensive surveillance and information from both naval intelligence and the Federal Bureau of Investigation (FBI), concluding: “There is no Japanese ‘problem’ on the West Coast.”¹⁸ To the contrary, the information secured by various intelligence services “certified a remarkable, even extraordinary degree of loyalty among this generally suspect ethnic group.”¹⁹ Both the Office of Naval Intelligence and the FBI went on record as opposing the administration’s decision to forcibly remove and relocate people of Japanese ancestry.²⁰

Regardless, 120,000 people of Japanese descent were removed from the West Coast and placed in inland internment camps. The camps were harsh, overcrowded, and unsanitary. Vacated racetracks, stables, and livestock areas were converted into living quarters for families; up to 25 people were forced into living spaces built for four.²¹ During the four years the camps were occupied, 6,000 babies were born and 1,862 people died.²²

In the legal challenges that ensued, the government succeeded in arguing that it deserved substantial leeway in matters of national security, even in the face of a record demonstrating racial animus. In 1944, the US Supreme Court upheld the constitutionality of the removals in *Korematsu v. United States*, concluding that Fred Korematsu had not been subject to exclusion on the basis of his race but rather due to time-sensitive national security concerns.²³ The majority gave the government’s security concerns ultimate deference. Notably, the Court did not hear the evidence contained in the Munson report. Still, some justices raised concerns about accepting the government’s terse evidence that people of Japanese descent presented a threat to the nation’s security. Justice Jackson argued in his dissent that the extreme deference afforded to the executive left the principle of racial discrimination a “loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”²⁴

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If McCarthyism illustrates what happens when the courts move too slowly, *United States v. Nixon* illustrates what can happen when they act decisively and the other branches comply. The Watergate affair grew from a third-rate burglary at the Democratic National Committee headquarters on June 17, 1972, into a constitutional crisis of the first order.”

The Court nonetheless paved the way for the closure of the internment camps when it held in a separate case, *Ex parte Endo*,²⁵ that loyal citizens could not be detained without cause. Thus, while military necessity rendered the forced removals of citizens constitutional, the government’s subsequent incarceration of those loyal citizens was unconstitutional. So, the internment camps began to close; the last shut its doors in March 1946. But the suffering continued and racial animus remained high. Beyond the disruptions to work and careers, many had no home or land to return to. Tenant farmers lost their farmland when they were forcibly evacuated, and homes and businesses were looted and destroyed during their occupants’ absence.²⁶

A partial reckoning of this catastrophic injustice began in the decades that followed. The public at large began to recognize the indisputable truth that Roosevelt’s internment policies and the *Korematsu* decision were based on unfounded fears steeped in racial

prejudice. Some 30 years after the exclusionary zones were put in place, President Carter tasked the Commission on Wartime Relocation and Internment with investigating whether internment was “justified.” The commission’s findings were clear: the internment policy had been the result of racism rather than factual military necessity.²⁷

Finally, in 1988, President Reagan signed the Civil Liberties Act, which contained a formal apology and authorized \$20,000 payments to every former detainee.²⁸

Korematsu’s conviction was formally overturned in 1983, and in 2011 the Department of Justice admitted that the government had misled the courts by actively suppressing evidence showing that people of Japanese descent did not pose a threat to national security.²⁹

The Supreme Court has also disavowed the *Korematsu* decision. In the 2018 *Trump v. Hawaii* opinion, Chief Justice Roberts recognized 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.’”³⁰ But many, including the dissenting justices, felt this recognition fell short given that the majority opinion upheld President Trump’s so-called “Muslim ban” restricting by executive order citizens from Iran, Libya, Somalia, Sudan, Syria, and Yemen from traveling to the United States due to purported national security concerns.³¹ In her dissent, Justice Sotomayor concluded that the “Muslim ban,” much like the internment camp policies, “invoked an ill-defined national-security threat to justify an exclusionary policy of sweeping proportion.”³²

So, it appears that *Korematsu’s* animating principle remains intact: the executive branch is awarded great leeway in policies implemented in the name of national security.

McCarthyism and the Loyalty Purge Era: Legislative Power as a Weapon

The Red Scare of the early 1950s tested the proposition that constitutional rights require an independent judiciary willing to enforce them against the political branches. Senator Joseph McCarthy of Wisconsin did not invent anti-Communist paranoia in America, but he mastered it. McCarthy, claiming to possess a list of Communists in the State Department, exploited congressional investigative power as a prosecutorial weapon. He used that power to drag witnesses before his Senate Permanent Subcommittee on Investigations and demand that they name names. These legislative hearings destroyed careers through mere accusation; those appearing were stripped of all the procedural protections traditionally accompanying a criminal charge.

The Supreme Court’s initial response was accommodation. In *Dennis v. United States*, decided in 1951, the Court upheld the convictions of 11 Communist Party leaders under the Smith Act, which criminalized advocacy of violent government overthrow. Chief Justice Vinson’s plurality applied a modified “clear and present danger” test, asking whether the gravity of the evil, discounted by its improbability, justified the restriction on speech.³³ Chief Justice Vinson’s opinion modified the traditional “clear and

present danger” test in ways that critics then and since have characterized as bending legal doctrine to the political climate. Justices Black and Douglas dissented vigorously, arguing that punishing membership in or advocacy for an organization, absent any concrete incitement, was flatly inconsistent with the First Amendment.³⁴

The Court’s implicit acknowledgment that it had erred in *Dennis* came gradually, beginning in 1957 with *Yates v. United States* and culminating in 1969 with *Brandenburg v. Ohio*, which established the modern incitement standard that *Dennis* had failed to respect.³⁵ Further, through those later cases, the Court began recognizing protections for witnesses who appeared before congressional committees, sustaining the Fifth Amendment privilege against self-incrimination for those called to testify.

However, the extralegal consequences of invoking the privilege, such as job loss, public stigma, and placement on an informal blacklist, fell outside judicial reach. When the executive branch constructed a parallel means of stifling dissent through loyalty programs, the courts largely stood aside. In *Bailey v. Richardson*, the D.C. Circuit upheld the dismissal of a federal employee on the basis of undisclosed informant allegations, reasoning that government employment was not a constitutional right.³⁶ The Supreme Court affirmed by an equally divided vote. This result avoided setting a precedent but provided no protection.

Course correction eventually came from an unexpected direction. McCarthy’s ultimate undoing was not judicial; it was theatrical. The Army-McCarthy hearings of 1954 exposed his methods to a national television audience, and attorney Joseph Welch’s famous rebuke wherein he queried “Have you no sense of decency?”³⁷ crystallized a shift in public sentiment that no court order had produced. McCarthy was censured by the Senate in December 1954. The Warren Court followed with *Watkins v. United States* in 1957, holding that congressional investigative demands must be tied to a legitimate legislative purpose and that witnesses have a right to know whether questions are pertinent to that purpose.³⁸ It was a meaningful limit, but the damage was done. The episode illustrates a recurring pattern in American constitutional

history: the judiciary, when it moves, often moves late.

The Nixon Era and *United States v. Nixon*: The Rule of Law at Its Apex—and Its Limit

If McCarthyism illustrates what happens when the courts move too slowly, *United States v. Nixon* illustrates what can happen when they act decisively and the other branches comply. The Watergate affair grew from a third-rate burglary at the Democratic National Committee headquarters on June 17, 1972, into a constitutional crisis of the first order. Senate hearings in 1973 revealed that President Nixon had secretly recorded his Oval Office conversations. When Special Prosecutor Archibald Cox subpoenaed the tapes, Nixon had him fired in the “Saturday Night Massacre,” which prompted the resignations of both the attorney general and his deputy and accelerated the collapse of the administration’s political position.

Cox’s successor, Leon Jaworski, renewed the subpoena. Nixon released edited transcripts, which Jaworski rejected as insufficient. The dispute reached the Supreme Court in July 1974. The Court’s response was unanimous and unambiguous. In an 8-0 decision authored by Chief Justice Burger,³⁹ the Court held, first, that the dispute was justiciable and was not an executive overreach. Second, the Court held that executive privilege, while constitutionally grounded, is not absolute. A generalized claim of presidential confidentiality cannot override a demonstrated need for evidence in a pending criminal proceeding.⁴⁰ The Court ordered production of the tapes.

Nixon complied. On August 5, 1974, the White House released the subpoenaed recordings. One such recording, the “smoking gun” tape from June 23, 1972, six days after the break-in, revealed that Nixon was directing the CIA to block the FBI’s investigation.⁴¹ His remaining political support evaporated. Nixon resigned the presidency on August 9, 1974, the only sitting president to have done so. The constitutional machinery had worked: the Court ruled, the president complied, the republic survived.

Yet even this textbook success carries a cautionary footnote. The executive privilege

doctrine the Court recognized in *Nixon*, though limited in that opinion, has since been invoked by successive administrations to resist congressional and judicial oversight in ways the opinion's authors likely did not intend. Decades after *Nixon*, the doctrine announced in that case to corral presidential power became a tool for expanding it.

The First Trump Administration: Legalistic Noncompliance and the Administrative Procedure Act as a Judicial Check

The first Trump administration did not openly defy the courts. What it did was more subtle and, in many respects, more instructive: it used the legal process itself to delay, dilute, and sometimes circumvent judicial rulings, while technically remaining within the bounds of formal compliance. The sheer volume of adverse rulings driven by the administration's aggressive pace of executive action, particularly in immigration and environmental deregulation, made the pattern visible in aggregate, even when each individual response appeared facially lawful.

The travel ban litigation is the most prominent example of this phenomenon. Executive Order 13769, issued on January 27, 2017, restricted entry from seven Muslim-majority nations.⁴² Federal courts moved quickly, issuing injunctions within days. Rather than challenging the injunctions directly, the administration revised the ban *twice*, each time attempting to cure the constitutional and statutory defects the courts had identified. Critics argued that revision was itself a form of evasion, using procedural maneuvering to buy time while continuing to deny entry to affected individuals. Supporters characterized it as appropriate executive responsiveness to judicial feedback. The Supreme Court ultimately upheld the third iteration of the ban 5-4 in *Trump v. Hawaii*, extending broad deference to the president's national security determination.⁴³ As touched on above, Chief Justice Roberts, writing for the majority, simultaneously condemned *Korematsu* as "gravely wrong" while upholding a policy that Justice Sotomayor's dissent found structurally similar to the one *Korematsu* had blessed.

But it was the Deferred Action for Childhood Arrivals program (DACA) rescission that produced the administration's most significant legal defeat. In *Department of Homeland Security v. Regents of the University of California*, decided in 2020, the Supreme Court held 5-4 that the administration's termination of DACA was arbitrary and capricious under the Administrative Procedure Act.⁴⁴ The Court found that the agency failed to consider the reliance interests of approximately 700,000 recipients and had not offered a reasoned basis for the change beyond a contested assertion of DACA's unconstitutionality. The decision reaffirmed that procedural requirements constrain executive discretion even in politically charged policy areas.

The administration's response illustrated the phenomenon scholars would later call "legalistic noncompliance."⁴⁵ Acting Department of Homeland Security Secretary Chad Wolf issued a memorandum in July 2020 restricting new DACA applications and shortening renewal periods, preserving the administration's policy objectives while nominally operating within the space the Court had left open. Courts subsequently found that Wolf had not been lawfully serving as acting secretary at the time, rendering the memorandum unauthorized.⁴⁶ The episode encapsulates the pattern: adverse judicial rulings were met not with defiance but with procedural maneuvers designed to preserve as much of the underlying policy as could survive judicial scrutiny, while the litigation continued. The rule of law held, but at significant cost to those whose interests hung in the balance during years of litigation and administrative delay.

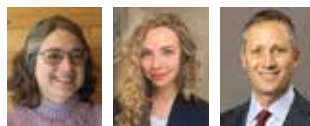
Crises Continue, So Does the Rule of Law

When our country faces crises, so too does the rule of law. For the rule of law to persevere, two things must continue. First, dissenters against abuse of power, from concerned constituents to the loftiest elected and unelected officials, must continue to speak out against misuse of the law. Second, citizens must also remember and face our history, including the injustices perpetrated on vulnerable or unpopular demographics. This exercise requires that we contend with the fact that most historical atrocities were committed under the guise of the law. That we now see the error in those situations does not change that they were once deemed legally justifiable. As the Commission on Wartime Relocation and Internment recognized decades ago:

Our nation's ability to honor democratic values even in times of stress depends largely upon our collective memory of lapses in our constitutional commitment to liberty and due process. Nations that forget or ignore injustices are more likely to repeat them.⁴⁷

It seems apparent that we are in a challenging time for the rule of law in the face of a concerted effort to concentrate power in the executive branch. James Madison wrote, "the great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."⁴⁸

In this spirit, we encourage continued vigilance and action in support of the legislative branches as they exercise their constitutionally mandated resistance to encroachment. **CL**



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NOTES

1. *The Federalist No. 78* (Alexander Hamilton).
2. Challenges to the rule of law in other contexts, such as civil rights, are addressed by other articles in this edition of *Colorado Lawyer*.
3. Treaty With the Sioux Indians, Apr. 29, 1868, 15 Stat. 635.
4. *Id.*
5. See *United States v. Sioux Nation of Indians*, 448 U.S. 371, 380–38 (1980). The executive branch spearheaded the effort to abandon treaty obligations, and the Department of Interior appointed a commission to negotiate with the Sioux. Congress was also frustrated by the failure of the Sioux to become self-sufficient given the Sioux's entitlement to subsistence rations. In 1876, Congress's appropriations bill conditioned further subsistence appropriations on the Sioux giving up hunting grounds outside the reservation, ceding the Black Hills, and reaching an agreement with the United States that would enable them to become self-sufficient. The commission presented an agreement that was signed by only 10 adult Sioux men despite the Fort Laramie Treaty's requirement that it would have to be signed by three-fourths of adult males.
6. Act of Feb. 28, 1877, ch. 72, 19 Stat. 254.
7. *United States v. Sioux Nation of Indians*, 448 U.S. 371.
8. Act of June 3, 1920, ch. 222, 41 Stat. 738.
9. *Sioux Tribe v. United States*, 97 Ct.Cl. 613 (1942), *cert. denied*, 318 U.S. 789 (1943).
10. Indian Claims Commission Act, 60 Stat. 1049, 25 USC §§ 70 et seq.
11. Pub. L. No. 95-243, 92 Stat. 153, amending § 20(b) of the Indian Claims Commission Act. See 25 USC § 70s(b) (1976 ed., Supp. II).
12. *Sioux Nation of Indians v. United States*, 601 F.2d 1157 (Ct.Cl. 1979), *aff'd*, 448 U.S. 371 (1980).
13. *United States v. Sioux Nation of Indians*, 448 U.S. 371.
14. See Great Lakota Dakota Nakota Nation, "Reclaiming the Black Hills," <https://lakotadakotanakotanation.org/reclaiming-the-black-hills>.
15. President Roosevelt himself referred to the camps as concentration camps. Weglyn, *Years of Infamy: The Untold Story of America's Concentration Camps* 45–46 (Morrow 1976).
16. *Id.* at 44.
17. The Munson report was sent to President Roosevelt in February 1942, weeks before the executive order went into place.
18. Weglyn, *supra* note 15 at 45–46.
19. *Id.* at 34.
20. *Id.* at 35.
21. Sandler, *Imprisoned: The Betrayal of Japanese Americans During World War II* (Bloomsbury USA 2013).
22. Fiset, "Medical Care in Camp," *Densho Encyclopedia* (Aug. 29, 2024), <https://encyclopedia.densho.org/Medical%20care%20in%20camp>.
23. *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944).
24. *Id.* at 246 (Jackson, J., dissenting).
25. *Ex parte Endo*, 323 U.S. 283 (1944).
26. National Archives, "World War II Japanese Americans Incarceration: Justice Denied," part 1, chap. 4: Economic Loss (Dec. 1982), <https://www.archives.gov/research/aapi/ww2/justice>.
27. *Id.* at part 2: Recommendations (June 1983).
28. Civil Liberties Act of 1987, Pub. L. No. 100-383, H.R. 442, 100th Cong. (1988), <https://www.congress.gov/bill/100th-congress/house-bill/442>.
29. Katyal, "Confession of Error: The Solicitor General's Mistakes During the Japanese American Internment Cases," US Department of Justice Archives (May 20, 2011), <https://www.justice.gov/archives/opa/blog/confession-error-solicitor-generals-mistakes-during-japanese-american-internment-cases>.
30. *Trump v. Hawaii*, 585 U.S. 667, 710 (2018) (citing *Korematsu*, 323 U.S. at 248) (Jackson, J., dissenting)).
31. *Id.*
32. *Id.* at 753 (Sotomayor, J., dissenting).
33. *Dennis v. United States*, 341 U.S. 494, 510 (1951).
34. *Id.* at 579, 589–91.
35. *Yates v. United States*, 354 U.S. 298 (1957) (distinguishing advocacy of abstract doctrine from advocacy of concrete action); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (establishing that the First Amendment protects advocacy of lawlessness unless directed to producing imminent lawless action and likely to do so).
36. *Bailey v. Richardson*, 182 F.2d 46 (D.C.Cir. 1950), *aff'd by an equally divided Court*, 341 U.S. 918 (1951). The D.C. Circuit's reasoning that government employment was a privilege, not a right, was later repudiated by the due process revolution of the 1960s and 1970s.
37. See US Senate, "Have You No Sense of Decency?," <https://www.senate.gov/about/powers-procedures/investigations/mccarthy-hearings/have-you-no-sense-of-decency.htm>.
38. *Watkins v. United States*, 354 U.S. 178, 201 (1957) ("Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible.") (emphasis added).
39. *United States v. Nixon*, 418 U.S. 683, 706 (1974). The Court recognized executive privilege for the first time, grounding it in the constitutional separation of powers, while holding that it was not absolute.
40. *Id.* at 713. The Court held that a "generalized assertion" of privilege must yield to "the demonstrated, specific need for evidence in a pending criminal trial."
41. Woodward and Bernstein, *The Final Days* 422 (Simon & Schuster 1976). Nixon's chief of staff, Alexander Haig, reportedly told Nixon that refusing the Supreme Court's order was not a viable option.
42. Exec. Order No. 13769, 82 Fed. Reg. 8,977 (Jan. 27, 2017). Federal district courts in Washington, Minnesota, Massachusetts, Hawaii, and Maryland issued temporary restraining orders or preliminary injunctions within weeks.
43. *Trump v. Hawaii*, 585 U.S. at 710. Chief Justice Roberts simultaneously declared *Korematsu*, 323 U.S. 214, "gravely wrong" and "overruled in the court of history" while upholding a policy whose critics saw structural parallels to the earlier case.
44. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1 (2020). The five-justice majority held that the rescission was arbitrary and capricious under 5 USC § 706(2)(A) because the agency had neither adequately considered reliance interests nor provided a reasoned basis for the change beyond a contested legal conclusion.
45. Dacon and Litman, "Legalistic Noncompliance," 75 *Duke L.J.* 1437 *passim*.
46. *Wolf v. Vidal*, No. 17-cv-5228 (E.D.N.Y. Nov. 14, 2020); *Vidal v. Wolf*, No. 16-cv-4756, 2020 U.S. Dist. LEXIS 228328 (E.D.N.Y. Dec. 4, 2020). The Eastern District of New York found that Wolf had not been lawfully serving as acting secretary under the Federal Vacancies Reform Act at the time he issued the July 2020 memorandum.
47. National Archives, "World War II Japanese Americans Incarceration: Justice Denied," part 2: Recommendations, <https://www.archives.gov/research/aapi/ww2/justice>.
48. *The Federalist No. 51* (James Madison).