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L'internamento dei cittadini di origine giapponese nell'analisi di Eugene V. Rostow

a cura di Bruna Bianchi, trascrizione di Serena Tiepolato

Lo scritto di Eugene V. Rostow (1912-2002): The Japanese American Cases. A Disaster*, fu pubblicato per la prima volta in "The Yale Law Journal" nel giugno 1945 (vol. 54, n.3, pp. 489-533), quando l'autore era docente presso la Yale Law School. Con la riproduzione integrale di questo saggio riprendiamo uno dei temi trattati nel numero precedente della rivista: il trasferimento forzato, a partire dal 1942, dei cittadini americani di origine giapponese della costa occidentale degli Stati Uniti in numerosi campi di concentramento. Nel saggio* I casi giudiziari dei cittadini americani di origine giapponese 1942-2004: una storia sociale, *Roger Daniels, tra i più autorevoli studiosi dell'argomento, ricostruendo le reazioni del governo e dell'opinione pubblica all'internamento di massa, ha indicato nell'intervento di Eugene Rostow sulla prestigiosa rivista giuridica il "primo deciso attacco" alla politica del governo e delle autorità militari degli Stati Uniti. Rostow definì il trasferimento forzato di massa un provvedimento "affrettato, non necessario e sbagliato". Il sostegno del Presidente e della Corte Suprema di un provvedimento militare rappresentò un pericoloso precedente, un'abdicazione del potere civile di fronte al potere militare, responsabile della violazione dei diritti garantiti dall'articolo terzo della Costituzione e nell'articolo quinto del Sesto Emendamento. "La Corte - scrive Rostow - ha sostenuto le linee principali del programma, facendo di una follia del tempo di guerra una dottrina politica e un aspetto permanente della legge" (p. 491). Un tale precedente avrebbe incoraggiato ulteriori violazioni dei diritti civili, avrebbe favorito programmi politici reazionari volti ad acquisire potere sfruttando le divisioni sociali e il pregiudizio razzista (Ibid.). Lo spirito "di linciaggio", che avrebbe potuto essere contrastato solo da una ferma asserzione dell'inviolabilità dei diritti civili, ne risultò incoraggiato. In questo modo si era posta una potente arma nelle mani di una qualsiasi autorità che volesse richiamarsi al principio della necessità.*

Il rapporto tra potere civile e potere militare è dunque il nodo teorico di questo scritto, un rapporto in cui, sostiene Rostow, risiede la possibilità di sopravvivenza di una democrazia in un momento di crisi. Le argomentazioni avanzate nel 1945 dall'autorevole giurista saranno determinanti per il movimento che condurrà al riconoscimento dei torti subiti dai cittadini di origine giapponese e al risarcimento

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approvato nel 1982. Per un inquadramento generale dal punto di vista storico e giuridico della questione del trasferimento forzato e della carcerazione dei cittadini di origine giapponese si rimanda al già citato saggio di Roger Daniels e alla recensione del suo volume: Prisoners Without Trial. *Per un confronto con quanto accadde nel corso della prima guerra mondiale si rimanda alla bibliografia commentata* Cittadini stranieri di nazionalità nemica, *tutti contributi apparsi nel numero precedente della rivista.*

Si ringrazia la direzione di "The Yale Law Journal" per averci accordato l'autorizzazione a riprodurre integralmente lo scritto di Eugene Rostow.

The Japanese American Cases. A Disaster

di

*Eugene V. Rostow**

He [the King of Great Britain] has affected to render the Military independent of and superior to the Civil Power.

THE DECLARATION OF INDEPENDENCE

War is too serious a business to be left to generals.

CLEMENCEAU

I

Our war-time treatment of Japanese aliens and citizens of Japanese descent on the West Coast has been hasty, unnecessary and mistaken. The course of action which we undertook was in no way required or justified by the circumstances of the war. It was calculated to produce both individual injustice and deep-seated social maladjustments of a cumulative and sinister kind[1] [end p. 489].

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The following short-form citations will be used: Tolan Committee Hearings: *Hearings before House Select Committee Investigating National Defense Migration pursuant to H. Res. 113*, 77th Cong., 2nd Sess. (1942); Tolan Committee Reports (Preliminary) and (Fourth Interim): H. R. Rep. No. 1911 (Preliminary Report and Recommendations) and H. R. Rep. No. 2124 (Fourth Interim Report), 77th Congo, Ed Sew (1942); DeWitt Final Report: U. S. Army, Western Defense Command, Final Report, Japanese Evacuation from the West Coast, 1942 (1943, released 1944).

All in all, the internment of the West Coast Japanese is the worst blow our liberties have sustained in many years. Over one hundred thousand men, women and children have been imprisoned, some seventy thousand of them citizens of the United States, without indictment or the proffer of charges, pending inquiry into their "loyalty". They were taken into custody as a military measure on the ground that espionage and sabotage were especially to be feared from persons of Japanese blood. They were removed from the West Coast area because the military thought it would take too long to conduct individual loyalty investigations on the ground. They were arrested in an area where the courts were open, and freely functioning. They were held under prison conditions in uncomfortable camps, far from their homes, and for lengthy periods - several years in many cases. If found "disloyal" in administrative proceedings they were confined indefinitely, although no statute makes "disloyalty" a crime; it would be difficult indeed for a statute to do so under a Constitution which has been interpreted to minimize imprisonment for political opinions, both by defining the crime of treason in extremely rigid and explicit terms, and by limiting convictions for sedition and like offences[2]. In the course of relocation citizens have suffered severe property losses, despite some custodial

[1] See Message from the President of the United States, Segregation of Loyal and Disloyal Japanese in Relocation Centers, Report on S. Res. 166, 78th Cong., 1st Sess., S. Doc. No. 69 (1943); Tolan Committee Reports (Preliminary and Fourth Interim); McWilliams, *Prejudice*, 1944; McWilliams, *What About Our Japanese Americans*, 1944; Leighton, *The Governing of Men*, 1945; An Intelligence Officer, *The Japanese in America: The Problem and the Solution*, in "Harper's", CLXXXV, 1942, p. 489; Miyamoto, *Immigrants and Citizens of Japanese Origin* in "Annals of American Academy of Political Science and Social Science", CCCXXIII, 1942, p. 107; Fisher, *What Race Baiting Costs America*, in "Christian Century", LX, 1943, p. 1009; Heath, *What About Hugh Kiino*?, in "Harper's", LXXXVII, 1943, p. 450; "Issei, Nisei, Kibei", in "Fortune", XXIX, April 1944, p. 8; Bellquist, *Report on the Question of Transferring the Japanese from the Pacific Coast*, "Tolan Committee Hearings, part 29, 1942, p. 11240; La Violette, *The American-Born Japanese and the World Crisis*, in "The Canadian Journal of Economics and Political Science", VII, 1941, p. 517; Redfield, *The Japanese-Americans*, in Ogburn (ed.), *American Society in Wartime*, 1943, p. 143; Stonequist, *The Restricted Citizen*, in "Annals of American Academy of Political Science and Social Science", CCCXXIII, 1942, p. 149.

The War Relocation Authority has compiled an admirable bibliography on Japanese and Japanese Americans in the United States; Parts I and II were published November 7th, 1942, and Part III August 14th, 1943. "The Pacific Citizen", a newspaper published in Salt Lake City by the Japanese American Citizens League is an indispensable source of material on events and attitudes with respect to the process of evacuation, internment and relocation.

[2] See Cramer v. United States, 65 Sup. Ct. 918 (U. S. 1945) (treason). For the evidence required to justify imprisonment for attacking the loyalty of the armed forces, see Hartzel v. United States, 322 U. S. 680 (1944). It is notable that persons - citizens or aliens-who actively propagandize in favour of the Axis cause cannot be convicted of sedition, nor placed into protective custody, although loyal citizens of Japanese descent can be arrested and held in preventive custody for periods of more than three years. See also Keegan v. United States, 65 Sup. Ct 1203 (U. S. 1945), which reverses the conviction of active members of the German-American Bund, a Nazi organization, for conspiracy to obstruct the draft. Apparently the defendants included persons of German nationality as well as of German descent, *id*. at 1212. As for the difficulty of obtaining individual exclusion orders against persons - usually naturalized citizens - with strong German political affiliations, see cases cited *infra* note 13.

assistance by the Government[3]. Perhaps 70.000 persons are still in camps, "loyal" and "disloyal" citizens and aliens alike, more than three years after the programs were instituted. Although the process of relocation has been recently accelerated, many will remain in the camps at least until January 2, 1946[4].

By the time the question reached the Supreme Court, the crisis which was supposed to justify the action had passed. The Court faced two issues: should it automatically accept the judgment of the military as to the need for the relocation program, or should it require a judicial [end p. 490] investigation of the question? Was there factual support for the military judgment that the course of the war required the exclusion and confinement of the Japanese American population of the West Coast? Clearly, if such steps were not necessary to the prosecution of the war, they invaded rights protected by the Third Article of the Constitution, and the Fifth and Sixth Amendments.

If the Court had stepped forward in bold heart to vindicate the law and declare the entire program illegal, the episode would have been passed over as a national scandal, but a temporary one altogether capable of reparation. But the Court, after timid and evasive delays, has now upheld the main features of the program[5]. That step converts a piece of war-time folly into political doctrine, and a permanent part of the law. Moreover, it affects a peculiarly important and sensitive part of the law. The relationship of civil to military authority is not often litigated. It is nonetheless one of the two or three most essential elements in the legal structure of a democratic society. The Court's few declarations on the subject govern the handling of vast affairs. They determine the essential organization of the military establishment, state and federal, in time of emergency or of war, as well as of peace. What the Supreme Court has done in these cases, and especially in *Korematsu v. United States*, is to increase the strength of the military in relation to civil government. It has upheld an act of military power without a factual record in which the justification for the act was analyzed. Thus it has created doubt as to the standards of responsibility to which the military power will be held. For the first time in American legal history, the Court has seriously weakened the protection of our basic civil right, the writ of habeas corpus. It has established a precedent which may well be used to encourage attacks on the civil rights of citizens and aliens, and

[3] On the handling of evacuees' property see War Relocation Authority, *A Statement on Handling of Evacuee Property* (May 1943); DeWitt Final Report, c. xi; Tolan Committee Reports (Fourth Interim) pp. 173-97.

[4] See Myer, *The WRA Says "Thirty"*, in "New Republic", CXII, 1945, p. 867.

[5] S. Hirabayashi v. United States, 320 U. S. 81 (1943); Korematsu v. United States, 323 U. S. 214 (1944); *Ex parte* Mitsuye Endo, 323 U. S. 283 (1944). See Fairman, *The Law of Martial Rule*, 2nd ed. 1943, pp. 255-61; Dembitz, *Racial Discrimination and the Military Judgment*, in "Columbia Law Review", XLV, 1945, p. 175; Fairman, *The Law of Martial Rule and the National Emergency*, in "Harvard Law Review", LV, 1942, p. 1253; Freeman, *Genesis, Exodus and Leviticus: Genealogy, Evacuation and the Law*, in "Cornell Law Quarterly", XXVIII, 1943, p. 414; Graham, *Martial Law in California*, in "California Law Review", XXXI, 1942, p. 6; Lerner, *Freedom: Image and Reality* in "Safeguarding Civil Liberty Today", 1945; Watson, *The Japanese Evacuation and Litigation Arising Therefrom*, in "Oregon Law Review", XXII, 1942, p. 46; Wolfson, *Legal Doctrine, War Power and Japanese Evacuation*, in "Kentucky Law Journal", XXXII, 1944, p. 328; Comment, in "Yale Law Journal", LI, 1942, p. 1316; Note, in "George Washington Law Review ", XI, 1943, p. 482.

may make it possible for some of those attacks to succeed. It will give aid to reactionary political programs which use social division and racial prejudice as tools for conquering power. As Mr. Justice Jackson points out, the principle of these cases "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need"[6] [end p. 491].

The opinions of the Supreme Court in the Japanese American cases do not belong in the same political or intellectual universe with Ex parte *Milligan*[7], *DeJonge v. Oregon*[8], *Hague v. CIO*[9], or Mr. Justice Brandeis' opinion in the *Whitney* case[10]. They threaten even more than the trial tradition of the common law and the status of individuals in relation to the state. By their acceptance of ethnic differences as a criterion for discrimination, these cases will make it more difficult to resolve one of the central problems in American life - the problem of minorities. They are a breach, potentially a major breach, in the principle of equality. Unless repudiated, they may encourage devastating and unforeseen social and political conflicts.

II

What General DeWitt did in the name of military precaution within his Western Defense Command was quite different from the security measures taken in Hawaii or on the East Coast - although both places were more active theatres of war in 1942 than the states of Washington, Oregon, California, and Arizona, which comprised the Western Defense Command.

On the East Coast and in the United States generally, enemy aliens were controlled without mass arrests or evacuations, despite a considerable public agitation in favour of violent action. A registration of aliens had been accomplished under the Alien Registration Act of 1940 and the police authorities had compiled information about fascist sympathizers among the alien population, as well as about those who were citizens. "On the night of December 7, 1941", the Attorney General has reported, "the most dangerous of the persons in this group were taken into custody; in the following weeks a number of others were apprehended. Each arrest was made on the basis of information concerning the specific alien taken into custody. We have used no dragnet techniques and have conducted no indiscriminate, large-scale raids"[11]. Immediately after Pearl Harbor restrictions

[6] Korematsu v. United States, 323 U.S. 214, p. 246 (1944).

[7] 4 Wall. 2 (U. S. 1867).

[8] 299 U. S. 353 (1937).

[9] 307 U. S. 496 (1939).

[10] Whitney v. California, 274 U. S. 357, pp. 372-80 (1927). See Professor Riesman's thoughtful essay, *Civil Liberties in a Period of Transition*, in "Public Policy", III, 1942, p. 33; Chafee, *Free Speech in the United States*, 1941, *passim*, especially pp. 440-90; Lusky, *Minority Rights and the Public Interest*, in "Yale Law Journal", LII, 1, 1942.

[11] *Annual Report of the Attorney General for Fiscal Year Ended June 30*, 1942 (1943) 14. In the first few weeks of war, 2.971 enemy aliens were taken into custody, 1,484 Japanese, 1,256 Germans and 231 Italians. See "New York Times", Jan. 4th, 1942, § IV, p. 8, col. 3. The basic Presidential proclamations on the treatment of enemy aliens appear in 6 Fed. Reg. 6321, 6323, 6324 (1941).

were [end p. 492] imposed upon the conduct of all enemy aliens over 14 years of age. They were forbidden the Canal Zone and certain restricted military areas thereafter to be specified. They were not to leave the country, travel in a plane, change their place of abode, or travel about outside their own communities, without special permission. They were forbidden to own or use firearms, cameras, short-wave radio sets, codes, ciphers or invisible ink. The District Attorneys were given broad discretion to allow aliens of enemy nationality to carry on their usual occupations, under scrutiny, but without other restriction. A new registration of aliens of enemy nationality was conducted. The basic object of the control plan was to keep security officers informed, but otherwise to allow the aliens almost their normal share in the work and life of the community.

Aliens under suspicion, and those who violated the regulations, were subject to summary arrest on Presidential warrant. "The law", the Attorney General said, "does not require any hearing before the internment of an enemy alien. I believed that nevertheless, we should give each enemy alien who had been taken into custody an opportunity for a hearing on the question whether he should be interned"[12]. Those arrested were therefore promptly examined by voluntary Alien Enemy Hearing Boards, consisting of citizens appointed for the task by the Attorney General. These Boards could recommend that individuals be interned, paroled, or released unconditionally. This operation was smoothly conducted, with a minimal interference with the standards of justice in the community. Of the 1,100,000 enemy aliens in the United States, 9,080 had been examined by the end of the fiscal year 1943; 4,119 were then interned, 3,705 paroled, 1,256 released, and 9,341 were still in custody. On June 30, 1944, the number in custody had been reduced to 6,238. The number of those interned was then 2,525, those paroled, 4,840, and those released, 1,926[13] [end p. 493].

Regulations under them are issued from time to time by the Attorney General. See, *e.g*., 7 Fed. Reg. 844 (1942). See Tolan Committee Reports (Fourth Interim), part 25; Biddle, *Taking No Chances*, "Collier's", March 21st, 1942, p. 21; Lasker, *Friends or Enemies?* (1942) 31 Survey Graphic 277; Rowe, *The Alien Enemy Program - So far* (Summer 1942) 2 Common Ground 19; Bentwich, *Alien Enemies in the United States* (1943) 163 Contemp. Rev., 225; Comment (1942) 51 Yale aw Journal 1316.

[12] *Annual Report of the Attorney General for Fiscal Year Ended June 30*, 1942 (1943), p. 14.

[13] The number in custody is greater than the number interned by reason of the inclusion of members of internees' families who request internment, as well as certain alien enemy seamen and alien enemies held for Central and South American countries. See *Annual Report of the Attorney General for Fiscal Year ended June 30*, 1944 (1945), p. 8.

A small number of citizens and enemy aliens suspected of a propensity for espionage or sabotage by reason of their political opinions were ordered removed from designated security areas both on the East and West Coasts under the statute of March 21st, 1942, cited *infra* note 27. This process met with notable judicial resistance. Schueller v. Drum, 51 F. Supp. 383 (E. D. Pa. 1943); Ebel v. Drum, 52 F. Supp. 189 (D. Mass. 1943); Scherzberg v. Maderia, 57 F. Supp. 42 (E. D. Pa. 1944). *Cf.* Labedz v. Kramer, 55 F. Supp. 25 (D. Ore. 1944); Ochikubo v. Bonesteel, 57 F. Supp. 513 (S. D. Calif. 1944). See also United States v. Meyer, 140 F. (2d) 652 (C. C. A. 2d, 1944); Alexander v. DeWitt, 141 F. (2d) 573 (C. C. A. 9th , 1944) The standards developed in these cases to justify the exclusion of persons from military areas as dangerous now closely correspond to those applied in sedition cases. Exclusion will be sustained, that is, only on a showing of "clear and present danger", of aid to the enemy, something more than opinions alone.

In Hawaii a somewhat different procedure was followed, but one less drastic than the evacuation program pursued on the West Coast. "Immediately after Pearl Harbor martial law was declared in Hawaii, and the commanding general assumed the role of military governor. Courts were reopened for some purposes shortly after the bombing raid, but the return of civil law to Hawaii has been a slow, controversial process, not yet complete. During the period of three and a half years after Pearl Harbor, military power was installed in Hawaii, constitutionally or not, and the normal controls against arrest on suspicion were not available[14]. The population of Hawaii is 500,000, of whom some 160,000, or 32%, were of Japanese descent. Despite the confusions of the moment in Hawaii, only 700 to 800 Japanese aliens were arrested and sent to the mainland for internment. In addition, fewer than 1.100 persons of Japanese ancestry were transferred to the mainland to relocation centres. These Japanese were arrested on the basis of individual suspicion, resting on previous examination or observed behaviour, or they were families of interned aliens, transferred voluntarily. Of those transferred from Hawaii to the mainland, 912 were citizens, the rest aliens[15]. Even under a regime of martial law, men were arrested as individuals, and safety was assured without mass arrests.

These procedures compare favourably in their essential character with the precautions taken in Britain and France. The British procedure was the model for our general practice in dealing with enemy aliens. The British Government began in 1939 by interning only those enemy aliens who were on a "security list". Others were subjected to minor police restrictions, pending their individual examination by especially established tribunals. One hundred and twelve such tribunals were set up, under citizens with legal experience, to examine all enemy aliens in Britain. There was an appeals advisory committee to advise the Home Secretary in disputed cases. Aliens were divided into three classes: those judged dangerous were interned; if judged doubtful [end p. 494] in their loyalty, they were subjected to certain continuing restrictions, especially as to travel, and the ownership of guns, cameras and radios; those deemed entirely loyal to the Allied cause were freed without further restraint. At first 2,000 enemy aliens on a black list were interned. But the entire group was then examined individually, and by March 1940 only 569 of approximately 75,000 aliens were ordered interned. During the panic period of 1940, a new screening was undertaken, to intern all those of doubtful loyalty, and other measures of mass internment were undertaken. Beginning as early as July

[14] See Fairman, *The Law of Martial Rule*, (2d Ed. 1943), pp. 239-55; Lind, *The Japanese in Hawaii under War Conditions*, 1942; Anthony, *Martial Law in Hawaii*, in "California Law Review", XXX, 1942, p. 371 or in "California Law Review", XXXI, 1943, p. 477; Frank, *Ex parte Milligan v The Five Companies: Martial Law in Hawaii*, in "Columbia Law Review", XLIV, 1944, p. 639; Coggins, *The Japanese Americans in Hawaii*, in "Harper's", CLXXXVII, 1943, p. 75; Fisher, *Our Two Japanese American Policies*, in "Christian Century", LX, 1943, p. 961; Henderson, *Japan in Hawaii*, in "Survey Graphic", XXXI, 1942, p. 328; Home, *Are the Japs Hopeless*?, "Saturday Evening Post", Sept. 9th, 1944, p. 16; Lind, *Economic Succession And Racial Invasion in Hawaii* (1936); Lind, *An Island Community* (1938); Smith, *Minority Groups in Hawaii* in "Annals of American Academy of Political Science and Social Science", CCXXIII, 1942, p. 36.

[15] Communication from the Hon. Abe Fortas, Under Secretary of the Interior, June 28, 1945.

1940, however, the policy of wholesale internment was modified, and releases were granted, either generally, or on certain conditions – the proved politics of the internee, his joining the Auxiliary Pioneer Corps, his emigration, and so on[16]. The maximum number interned, during July 1940, was about 27,000 of a total enemy alien population (German, Austrian and Italian) of about 93,000. By September 1941, the number of internees dropped to about 8,500. At the same time, the British undertook to arrest certain British subjects on suspicion alone, under the Emergency Powers Act of 1939. A constitutional storm was aroused by this procedure, which was finally resolved in favour of the government[17]. The general pattern of British security practice was thus to treat enemy aliens on an individual basis, and to arrest British subjects of fascist tendencies in a limited number, and then only on strong personal suspicion.

In France all men enemy aliens between the ages of 17 and 65 were interned in 1939. After a good deal of confusion and complaint, and a vigorous parliamentary protest, many were screened out, either upon joining the Foreign Legion, or, for older men, upon examination, and sponsorship by French citizens. Further parliamentary criticism in December 1939 led to relief for the internees, but the crisis of May and June, 1940, produced mass internment. In France, though less effectively than in Britain, the principle of internment on an individual basis was the objective of policy, if not always its norm[18].

But on the West Coast the security program was something else again. A policy emerged piecemeal, apparently without sponsors or [end p. 495] forethought. By May 1, 1942, it had become a policy of evacuating all persons of Japanese ancestry from the West Coast, and confining them indefinitely in camps located away from the coastal area. After some hesitation, General DeWitt proposed evacuation. Quite clearly, a conflict took place between the military authorities on the West Coast and some of the representatives of the Department of justice over the justification for such action[19]. But no one in the Government would take the responsibility for overruling General DeWitt and the War Department which backed him up.

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[16] Report, *The Position of Aliens in Great Britain During the War*, Tolan Committee Hearings, part 31, 1942, p. 11861; Koessler, *Enemy Alien Internment: With Special Reference to Great Britain and France*, in "Political Science Quarterly", LVII, 1942, p. 98; Kempner, *The Enemy Alien Problem in the Present War*, in "American Journal of International Law", XXXIV, 1940, p. 443; Kohn, *Legal Aspects of Internment*, in "The Modern Law Review", IV, 1941, p. 200; Feist, *The Status of Refugees*, in "The Modern Law Review", V, 1941, p. 51.

[17] Liversidge v. Anderson (1942) A. C. 206; Greene v. Secretary of State (1942) A. C. 284; Keeton, *Liversidge v. Anderson* (1942) 5 Mod. L. Rev. 162; Allen, *Regulation 18B and Reasonable Cause*, in "Law Quarterly Review", LVIII, 1942, p. 232; Goodhart, *Notes*, in "Law Quarterly Review", LVIII, 1942. pp. 3, 9, and *A Short Replication*, in "Law Quarterly Review", LVIII, 1942, p. 243; Holdsworth, *Note*, in "Law Quarterly Review", LVIII, 1942, p. 1; Carr, *A Regulated Liberty*, in "Columbia Law Review", XLII, 1942, p. 339, and *Crisis Legislation in Britain*, in "Columbia Law Review", XL, 1940, p. 1309.

[18] See Koessler, *supra* note 16, at 114 *et seq*.

[19] See DeWitt Final Report at pp. 3, 7, 19. Mr. Tom Clark (now the Attorney General) stated that mass evacuation was not contemplated as necessary on Feb. 23rd, 1942. 29 Tolan Committee Hearings 11164.

The dominant factor in the development of this policy was not a military estimate of a military problem, but familiar West Coast attitudes of race prejudice. The program of excluding all persons of Japanese ancestry from the coastal area was conceived and put through by the organized minority whose business it has been for forty-five years to increase and exploit racial tensions on the West Coast. The Native Sons and Daughters of the Golden West, and their sympathizers, were lucky in their general, for General DeWitt amply proved himself to be one of them in opinion and values. As events happened, he became the chief policy maker in the situation, and he has caused more damage even than General Burnside in 1863, whose blunderings with Vallandigham, the Ohio Copperhead, were the previous high in American military officiousness[20].

In the period immediately after Pearl Harbor there was no special security program on the West Coast for persons of Japanese extraction, and no general conviction that a special program was needed[21]. Known enemy sympathizers among the Japanese, like white traitors and enemy agents, were arrested. There was no sabotage on the part of persons of Japanese ancestry, either in Hawaii or on the West Coast. There was no reason to suppose that the 112,000 persons of Japanese descent on the West Coast, 1.2% of the population, constituted a greater menace to safety than such persons in Hawaii, 32% of the Territory's population. Their access to military installations was not substantially different in the two areas; their status in society was quite similar; [end p. 496] their proved record of loyalty in the war has been the same. Although many white persons were arrested, and convicted, as Japanese agents, no resident Japanese American has so far been convicted of sabotage or espionage as an agent of Japan[22].

After a month's silence, the professional anti-Oriental agitators of the West Coast began a comprehensive campaign. There had been no sabotage in the area, although there was evidence of radio signalling from unknown persons within the area to enemy ships at sea. The West Coast Congressional delegation, led by Senator Hiram Johnson, memorialized the Administration in favour of excluding all persons of Japanese lineage from the coastal area. Anti-Oriental spokesmen appeared as witnesses before the Tolan Committee[23], and later the Dies

[20] See 2 Sandburg, Abraham Lincoln, *The War Years*, 1939, pp. 160-5. President Lincoln wrote to General Burnside, "All the Cabinet regretted the necessity of arresting for instance Vallandigham - some perhaps doubting that there was a real necessity for it, but being done all were for seeing you through with it". Lincoln arranged to have Vallandigham passed through the Confederate lines and banished. Randall, *Constitutional Problems Under Lincoln*, 1926, pp. 176-9. The text of Lincoln's remarks is given somewhat differently by Sandburg and Randall. See also Klaus, *The Milligan Case*, 1929, pp. 12-6.

[21] See Rowell, *Clash of Two Worlds*, in "31 Survey Graphic", IX, 1942, p. 12; McWilliams, *Prejudice*, 1944, pp. 108-14; Tolan Committee Reports (Fourth Interim), pp. 154-6; An Intelligence Officer, *The Japanese in America: The Problem and the Solution*, in "Harper's", CLXXXV, 1942, p. 489.

[22] See McWilliams, *Prejudice*, 1944, p. 111.

[23] Tolan Committee Hearings, part 29, pp. 10973, 11061, 11068, 11087, 11111; Id., part 30, at pp. 11303-6, 11314-21, 11325; Id., part 31 at p. 11642.

Committee[24], and they explained the situation as they conceived of it to General DeWitt[25]. Some of the coast newspapers, and particularly those owned by William Randolph Hearst, took up the cry. Politicians, fearful of an unknown public opinion, spoke out for white supremacy. Tension was intensified, and doubters, worried about the risks of another Pearl Harbor, remained silent, preferring too much caution to too little. An opinion crystallized in favor of evacuating the Japanese. Such action was at least action, promising greater relief from tension than the slow, patient work of military preparation for the defense and counter-attack. German and Italian aliens were too numerous to be arrested or severely confined, and they were closely connected with powerful blocs of voters. There were too many Japanese Americans in Hawaii to be moved. The 100,000 persons of Japanese descent on the West Coast thus became the chief available target for the release of frustration and aggression.

Despite the nature of the emergency, the military refused to act without fuller legal authority. Executive Order No. 9,066 was issued on February 19, 1942, authorizing the Secretary of War, and military commanders he might designate, to prescribe "military areas" in their discretion, and either to exclude any or all persons from such areas, or to establish the conditions on which any or all such persons might enter, remain in or leave such areas[26]. Lieutenant General J. L. DeWitt, head of the Western Defense Command, was ordered on February 20, 1942, to carry out the policy of the Executive Order. During the first two weeks of March, more than three months after Pearl Harbor, General DeWitt issued orders in which he announced that he would [end p. 497] subsequently exclude "such persons or classes of persons as the situation require" from the area.

But the Army's lawyers wanted more authority than the Executive Order. With inevitable further delays, a statute was therefore obtained prescribing that

> "... whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanour and upon conviction shall be liable to a fine of not to exceed $5.000 or to imprisonment for not more than one year, or both, for each offence"[27].

The statute thus authorized the exclusion of people from the military areas. It said nothing about their subsequent confinement in camps. This omission was

[24] *Hearings before Special Committee on Un-American Activities on H. Res. 282*, 78th Cong., 1st Sess., XV, XVI, 1943.

[25] 31 Tolan Committee Hearings 11643; *Hearings before Special Committee on Un-American Activities, supra* note 24, XV, p. 9207.

[26] 7 Fed. Reg. 1407 (1942).

[27] 56 Stat. 173 (1942), 18 U. S. C. § 97a (Supp. 1943).

seized upon in Ex parte *Endo* as a crucial fact limiting the power of the Government to hold persons shifted under military orders to relocation centers[28].

Starting on March 27, 1942, almost four months after Pearl Harbor, the first actual restrictions were imposed. A policy of encouraging the Japanese to move away on a voluntary and individual basis had shown signs of producing confusion and irritation[29]. It was decided to have a uniform and comprehensive program of governmentally controlled migration. At first Japanese aliens and citizens of Japanese ancestry were subjected to the same controls applied to German and Italian aliens. Citizens of German and Italian descent were left free. Early in April, the first of a series of civilian exclusion orders were issued. They applied only to Japanese aliens and citizens of Japanese descent, who were to be excluded altogether from West Coast areas, ordered to report to control stations, and then confined in camps conducted by the newly organized War Relocation Authority, which became an agency of the Department of Interior on February 16, 1944[30] [end p. 498].

The rules and policies of these camps were perhaps the most striking part of the entire program. Despite the humanitarian character of the WRA, which was from the beginning entrusted to high-minded and well-meaning men, a policy for discharging Japanese was developed which encouraged lawlessness and refused support to the simplest constitutional rights of citizens and aliens. It was originally thought that the camps would give temporary haven to some Japanese refugees from the West Coast who could not easily arrange new homes, jobs and lives for themselves. Then it was decided to make a stay in the camps compulsory, so as to facilitate the loyalty examinations which were supposed to have been too difficult and prolonged to conduct on the West Coast. Further, it was wisely decided that a loyalty "screening" would facilitate relocation and combat anti-Japanese agitation. The fact that all released evacuees had been approved, so far as loyalty was concerned, gave practical support to their position in new communities. Japanese aliens and citizens of Japanese origin found by this administrative process to be disloyal were confined indefinitely in a special camp. Persons of Japanese descent found to be loyal were to be released from the camps upon the satisfaction of certain conditions. As applied to citizens especially, those conditions upon the right to live and travel in the United States are so extraordinary as to require full statement:

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[28] *Ex parte* Mitsuye Endo, 323 U. S. 283, 300-1 (1944).

[29] See DeWitt Final Report, C. ix. But see Fisher, *Japanese Colony: Success Story* (1943) 32 Survey Graphic 41.

[30] Public Proclamations No. 1, 7 Fed. Reg. 2320 (1942), No. 2, 7 Fed. Reg. 2405 (1942), No. 3, 7 Fed. Reg. 2543 (1942), and other public proclamations established restrictions on travel, residence, and activities for enemy aliens and citizens of Japanese extraction. Civilian Exclusion Order No. 1, March 24, 1942, 7 Fed. Reg. 2581 (1942), and subsequent exclusion orders established the basis of evacuation. Civilian Exclusion Order No. 34, 7 Fed. Reg. 3967 (1942), was the basis of Korematsu's case. The War Relocation Authority was established by Executive Order 9102, 7 Fed. Reg. 2165 (1942).

> "In the case of each application for indefinite leave, the Director, upon receipt of such file from the Project Director, will secure from the Federal Bureau of Investigation such information as may be obtainable, and will take such steps as may be necessary to satisfy himself concerning the applicant's means of support, his willingness to make the reports required of him under the provisions of this part, the conditions and factors affecting the applicant's opportunity for employment and residence at the proposed destination, the probable effect of the issuance of the leave upon the war program and upon the public peace and security, and such other conditions and factors as may be relevant. The Director will thereupon send instructions to the Project Director to issue or deny such leave in each case, and will inform the Regional Director of the instructions so issued. The Project Director shall issue indefinite leaves pursuant to such instructions.
>
> "(f) A leave shall issue to an applicant in accordance with his application in each case, subject to the provisions of this Part and under the procedures herein provided, as a matter of right, where the applicant has made arrangements for employment or other means of support, where he agrees to make the reports required of him under the provisions of this Part and to comply with all other applicable provisions hereof, and where there is no reasonable [end p. 499] cause to believe that applicant cannot successfully maintain employment and residence at the proposed destination, and no reasonable ground to believe that the issuance of a leave in the particular case will interfere with the war program or otherwise endanger the public peace and security.
>
> "(g) The Director, the Regional Director, and the Project Director may attach such special conditions to the leave to be issued in a particular case as may be necessary in the public interest"[31].

In other words, loyal citizens were required to have official approval of their homes, jobs and friends before they were allowed to move. They had to report subsequent changes of address, and remain under scrutiny almost amounting to parole. Officials were required to ascertain that community sentiment was not unfavourable to the presence of such citizens before they were permitted to enter the community. The briefs in behalf of the United States before the Supreme Court in the *Korematsu* and *Endo* cases explain the kind of evidence regarded as sufficient to uphold a finding of unfavorable community sentiment, and a suspension of the relocation process: the introduction of anti-Japanese bills in the

[31] War Relocation Authority, *Issuance of Leave for Departure from a Relocation Area*, in "Federal Register", VII, 1942, pp. 7656, 7657. These regulations were revised in detail from time to time, but their basic policy was not substantially altered. See War Relocation Authority, Administrative Notice No. 54 (Summary of Leave Clearance Procedures), March 28th, 1944. The basic security data on an evacuee is provided by the FBI and other intelligence agencies, not by independent investigation. This data is supplemented by his answers to questionnaires, particularly as to his loyalty to the United States, and by field investigations in doubtful cases. These field investigations include interviews with the evacuee. An appeal is provided to a Board of Appeals for leave clearance, consisting of citizens not employed by the War Relocation Authority. This Board has the power to advise the Director. Actually, leave was granted *pending inquiry* in cases where the applicant did not have an adverse FBI record; had answered the loyalty questions affirmatively; was not a Shinto priest; and had not spent the larger part of his life in Japan. Thus in fact Japanese Americans were given permission to leave the camps and, after the decision in the *Endo* case, to return to their homes, on the basis of very little information, beyond their answers to questionnaires, which was not available on the West Coast in 1942. Administrative Notice No. 54, *supra*. See discussion of issues in the report of the House Special Committee on Un-American Activities, H. R. Rep. No. 717, 78th Cong., lst Sess. (1943) pp. 13-6, 25.

local legislature, the occurrence of riots or other lawless episodes, and similar expressions of minority opinion[32].

This policy played a part in encouraging the growth and violent expression of race antagonisms in American society. The forces of the national government were not devoted to protecting and vindicating what *Edwards v. California* had recently upheld as the privilege of a United States citizen, or indeed of any resident, to move freely from state to state, without interference[33]. Local lynch spirit was not [end p. 500] controlled and punished by the agencies of law enforcement. On the contrary, it was encouraged to manifest itself in words and unpunished deeds. The threat of lawlessness was allowed to frustrate the legal rights of colored minorities unpopular with small and articulate minorities of white citizens. In March 1943, a small number of Japanese returned to their homes in Arizona, which had been removed from the military zone, without substantial incident[34]. In the spring of 1945, however, the Ku Klux Klan spirit in California had been manifested in at least twenty major episodes of arson or intimidation[35]. The War Relocation

[32] *Brief for United States*, pp. 35-6, *Ex parte* Mitsuye Endo, 323 U. S. 283 (1944); *Brief for United States*, p. 15, Korematsu v. United States, 323 U. S. 214 (1944).

[33] Edwards v. California, 314 U. S. 160 (1941). Justices Douglas, Black, Murphy and Jackson concurred specially on the ground that California's ban on indigent migrants front the South West was not only an unconstitutional interference with commerce, but a violation of privileges and immunities of national citizenship. See Myers, *Federal Privileges and Immunities: Application to Ingress and Egress*, in "Cornell Law Quarterly", XXIX, 1944, p. 489.

[34] See *Encyclopaedia Britannica Book of the Year: 1944*, 1944, p. 47.

[35] *Are Japs wanted?*, "Newsweek", May 28th, 1945, p. 33. Including minor episodes, there were 59 such incidents by the end of April 1945. See "New York Times", May 6th, 1945, § IV, p. 7, col. 4. Some of the episodes are terroristic shooting by night riders; others are arson, the desecration of cemeteries, posting of approbrious handbills, etc.; still others are commercial boycotts, like the refusal of Portland, Ore., vegetable merchants (largely of Italian descent) to buy farm produce from a Japanese American farmer. See "Pacific Citizen", May 5th, 1945, p. 5, col. 4. See also "New York Times", Jan. 11th , 1945, p. 4, col. 7; Id., Jan. 21st, 1945, p. 4, col. 3; id., Feb. 17th, 1945, p. 2, col. 5; id., Feb. 25th, p. 26, col. 4; id., March 18th, 1945, p. 17, col. 1. Both West (Coast judges and juries have so far tended to acquit persons charged with violence directed against the Japanese, often after confessions by defendants and inflammatory appeals by defence counsel. See "Pacific Citizen", April 28th, 1945, p. 1, col. 4; p. 4, col. 1 ("This is a white man's country"); "The Nation", 1945, n. 160, pp. 531, 598. Labor leaders, historically one of the strongest anti-Japanese groups in West Coast life, are in the forefront of resistance to the return of the Japanese to their homes. See, *e.g.*, the position of Dave Beck, reported in "The Pacific Citizen", April 21st, 1945, p. 4, col. 2; p. 5, col. 4.

Strong reactions of opinion and of citizens groups in favor of protecting the rights of Japanese Americans have been manifested, led by Secretary of War Stimson, Secretary of Interior Ickes, and the staff of the War Relocation Authority. See "Pacific Citizen", April 7th, 1945, p. 1, col. 1, quoting Secretary Ickes' forceful statement of April 4th, 1945; "Pacific Citizen", April 14th, 1945, p. 2, col. 1 (Secretary Stimson's remarks at press conference of April 5). Many West Coast groups have been organized to oppose the Klan movement in the Far West. See "Pacific Citizen", April 28th, 1945, p. 7, col. 1; id., April 21st, 1945, p. 3, col. 1. See excellent speech of Attorney General Robert W. Kenny of California, delivered to a convention of California sheriffs, calling on law enforcement officers to protect the legal rights of returning Japanese Americans. "New York Times" March 18th, 1945, p. 17, col. 1; "Pacific Citizen", March 24th, 1945, p. 1, col. 4; id., March 31st, 1945, p. 5, col. 1 (partial text of Mr. Kenny's speech); Beshoar, *When Good Will Is Organized*, in "Common Ground", V, Spring 1945, p. 19; "Pacific Citizen", March 3rd, 1915, p. 6, col. 1 (speech by Joe E. Brown before

Authority has been consistently and effectively on the side of facilitating resettlement and combatting race prejudice. Yet the terms of its leave regulations constituted an extraordinary invasion of citizens' rights, as the Supreme Court later held. They were a practical compromise, under the circumstances, but a compromise nonetheless, with social forces which might better have been opposed head-on.

Studies are beginning to appear about conditions within the camps [end p. 501]. They make it plain that the camps were in fact concentration camps, where the humiliation of evacuation was compounded by a regime which ignored citizens' rights, and the amenities which might have made the relocation process more palatable[36].

Thus there developed a system for the indefinite confinement and detention of Japanese aliens and citizens of Japanese descent, without charges or trial, without term, and without visible promise of relief. By May 1942, it was compulsory and self-contained. On pain of punishment under the Act of March 21, 1942, all had to leave the West Coast through Assembly Centers and the Relocation Centers. Counsel in the *Hirabayashi* case called it slavery; Mr. Justice Jackson said it was attainder of blood[37]. The Japanese radio discussed it at length, finding in the system ample propaganda material for its thesis that American society was incapable of dealing justly with colored peoples.

III

Attempts were made at once to test the legality of the program. The district courts and the circuit courts of appeals had a good deal of difficulty with the issues. Although troubled, they generally upheld both the exclusion of Japanese aliens and citizens from the West Coast, and at least their temporary confinement in WRA camps[38].

The question of how and on what grounds the Supreme Court should dispose of the cases was one of broad political policy. Would a repudiation of the Congress, the President and the military in one aspect of their conduct of the war affect the people's will to fight? Would it create a campaign issue for 1944? Would it affect the power, status and prestige of the Supreme Court as a political institution? How would a decision upholding the Government influence civil liberties and the condition of minorities? A bench of sedentary civilians was reluctant to overrule the military decision of those charged with carrying on the war. Conflicting

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Commonwealth Club of San Francisco in behalf of fair play for Japanese Americans); "Time", May 28th, 1945, p. 13 (Quakers aid returned evacuees in Oregon).

[36] See Leighton, op. cit. *supra* note 1.

[37] *Brief for Northern California Branch of the American Civil Liberties Union*, p. 93; Korematsu v. United States, 323 U. S. 214, 243 (1944).

[38] See, *e.g.*, United States v. Yasui, 48 F. Supp. 40 (D. Ore. 1942); Korematsu v. United States, 140 F. (2d) 289 (C. C. A. 9th, 1943).

loyalties, ambitions and conceptions of the Court's duty undoubtedly had their part in the positions the justices took.

The issue first came before the Supreme Court in May 1943, and the first cases, *Hirabayashi v. United States* and *Yasui v. United States*, were decided on June 21, 1943[39]. No Japanese submarines had been detected off the West Coast for many months. Midway was won; Libya, Tripolitania and Tunisia had been conquered. Guadalcanal and a good deal of New Guinea were in Allied hands. The posture of the war had changed profoundly in a year. We had suffered no defeats since the [end p. 502] fall of Tobruk in July 1942, and we had won a long series of preliminary victories. Our forces were poised for the offensive. The phase of aggressive deployment was over.

The problem presented to the Supreme Court was thus completely different from that which confronted worried legislators and officials in the bleak winter and spring of 1942. Invalidation of the exclusion and confinement programs would do no possible harm to the prosecution of the war. The Court could afford to view the issues in full perspective. The war powers of the legislative and executive must of course be amply protected. But the special concerns of the Supreme Court for the development of constitutional law as a whole could be given proper weight, free of the pressure of the Pearl Harbor emergency.

It was only half the truth to say that the cases had to be decided as if the date of decision were February 1942. It was not in fact the date of decision, and could not be made so. The issue was not only whether the military should have excluded the Japanese in the spring of 1942, but whether the Court should now validate what had been done. As many episodes in the history of the United States eloquently attest, these are different issues. The problem of the Court in the *Hirabayashi* case was not that of General DeWitt in 1942, but an infinitely more complex one. Whether it faced the issues or tried to ignore them, whether it decided the cases frankly or obliquely, by decision or evasion, the Court could not escape the fact that it was the Supreme Court, arbiter of a vast system of rules, habits, customs and relationships. No matter how inarticulate, its decision could not be confined in its effect to the United States Reports. It would necessarily alter the balance of forces determining the condition of every social interest within range of the problems of the cases – the power of the military and the police; our developing law of emergencies, which is beginning to resemble the French and German law of the state of siege; the status of minorities and of groups which live by attacking minorities; the future decision of cases in police stations and lower courts, involving the writ of habeas corpus, the equal rights of citizens, the protection of aliens, the segregation of racial groups, and like questions.

In a bewildering and unimpressive series of opinions, relieved only by the dissents of Mr. Justice Roberts and of Mr. Justice Murphy in *Korematsu v. United States*[40], the Court chose to assume that the main issue of the cases – the scope and method of judicial review of military decisions – did not exist. In the political process of American life, these decisions were a negative and reactionary act. The

[39] 320 U. S. 81 and 115 (1943)

[40] 323 U. S. 214, 225, 233 (1944).

Court avoided the risks of overruling the Government on an issue of war policy. But it weakened society's control over military authority – one of the polarizing forces on which the organization of our society depends. And it [end p. 503] solemnly accepted and gave the prestige of its support to dangerous racial myths about a minority group, in arguments which can be applied easily to any other minority in our society.

The cases are worth separate statement, for they are by no means alike. In *Hirabayashi v. United States* the Court considered a conviction based on the Act of March 21, 1942, for violating two orders issued by General DeWitt under authority of the Executive Order of February 19, 1942. Gordon Hirabayashi, a citizen of the United States and a senior in the University of Washington, was sentenced to three months in prison on each of two counts, the sentences running concurrently. The first count was that Hirabayashi failed to report to a control station on May 11 or May 12, 1942, for exclusion from the duly designated military area including Seattle, his home. The first count thus raised the legality of the compulsory transportation of an American citizen from one of the military areas to a WRA camp, and of his indefinite incarceration there. The second count was that on May 9, 1942, he had violated a curfew order, by failing to remain at home after 8 p.m., within a designated military area, in contravention of a regulation promulgated by the military authority. The Court considered the violation of the second count first, upheld the curfew order and the sentence imposed for violating it. Since the two sentences were concurrent, it said, there was no need to consider the conviction on the first count.

In fact, of course, the Court was entirely free to consider the first count if it wanted to. It would have been normal practice to do so. Its refusal to pass on the more serious controversy cannot be put down to wise and forbearing judicial statesmanship. This was not the occasion for prudent withdrawal on the part of the Supreme Court, but for affirmative leadership in causes peculiarly within its sphere of primary responsibility. The social problems created by the exclusion and confinement of the Japanese Americans of the West Coast states increased in seriousness with every day of their continued exclusion. The rabble-rousers of California now were demanding the permanent exclusion of all persons of Japanese ancestry from the West Coast area. They were living at peace, altogether free of the threat of Japanese invasion. Yet they were still successful in their efforts to keep the Japanese out. The business and professional capital of the Japanese was being profitably used by others. Intelligent and resourceful competitors had been removed from many markets. At the expense of the Japanese, vested interests were being created, entrenched, and endowed with political power. All these interests would resist the return of the Japanese by law if possible, if not, by terror. The refusal of the Supreme Court to face the problem was itself a positive decision on the merits. It gave strength to the anti-Oriental forces on the West Coast, and made a difficult social situation more and more tense. A full assertion of the [end p. 504] ordinary rights of citizenship would have shamed and weakened the lynch spirit. It

would have fortified the party of law and order. Instead, that party was confused and weakened by the vacillation of the Court[41].

The reasoning of the Court itself contributed to the intensification of social pressure.

In the *Hirabayashi* case the Court held that its problem was the scope of the war power of the national government. The extent of Presidential discretion was not presented as a separate issue, because the statute of March 21, 1942, and appropriation acts under it, were passed with full knowledge of the action taken and proposed by General DeWitt, and thus fully authorized the curfew. Both Congress and the Executive were held to have approved the curfew as a war measure, required in their judgment because espionage and sabotage were especially to be feared from persons of Japanese origin or descent on the West Coast during the spring of 1942.

The premise from which the Court's argument proceeded was the incontestable proposition that the war power is the power to wage war successfully. The State must have every facility and the widest latitude in defending itself against destruction. The issue for the Court, the Chief Justice said, was whether at the time "there was any substantial basis for the conclusion" that the curfew as applied to a citizen of Japanese ancestry was "a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion"[42]. The formulation of the test followed the lines of the Court's familiar doctrine in passing on the action of administrative bodies: was there "reasonable ground" for those charged with the responsibility of national defense to believe that the threat was real, and the remedy useful? The orders of the commander, the Court held, were based on findings of fact which supported action within the contemplation of the statute. The findings were based on an informed appraisal of the relevant facts in the light of the statutory standard, and published as proclamations. The circumstances, the Court said, afforded a sufficiently rational basis for the decision made.

The "facts" which were thus held to "afford a rational basis for decision" were that in time of war "residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of different ancestry", and that in time of war such persons could not readily be isolated and dealt with individually[43]. This is the basic factual hypothesis on which all three cases rest.

The first part of this double-headed proposition of fact is contrary [end p. 505] to the experience of American society, in war and peace[44]. Imagine applying an ethnic presumption of disloyalty in the circumstances of the Revolution or the Civil War! In the World War and in the present war, soldiers who had ethnic affiliations with the enemy – German, Austrian, Hungarian, Finnish, Romanian, Bulgarian,

[41] See materials cited *supra* note 34.

[42] 320 U. S. 81, 95 (1943).

[43] Id. at 101-2.

[44] Compare the opinion of Mr. Justice Black, for a unanimous Court, in *Ex parte* Kumezo Kawato, 317 U. S. 69, 73 (1942).

Japanese and Italian – fought uniformly as Americans in our armed forces, without any suggestion of group disloyalty. As a generalization about the consequences of inheritance, as compared with experience, in determining political opinions, the Supreme Court's doctrine of ethnic disloyalty belongs with folk proverbs – "blood is thicker than water" – and the pseudo-genetics of the Nazis. It is flatly contradicted by the evidence of the biological sciences, of cultural anthropology, sociology, and every other branch of systematic social study, both in general, and with specific reference to the position of Japanese groups on the West Coast. The most important driving urge of such minority groups is to conform, not to rebel. This is true even for the American minorities which are partially isolated from the rest of society by the bar of color[45]. The desire to conform is stronger than resentments and counter-reactions to prejudice and discrimination. Insecure and conscious of the environment as a threat, such minorities seek to establish their status by proving themselves to be good Americans. The younger generation rejects the language, customs and attitudes of the older. The exemplary combat records of the Japanese American regiments in Italy and in France is a normal symbol of their quest for security within the environment. It is an expected part of the process of social adjustment, repeated again and again in our experience with minorities within American society. By and large, men and women who grow up in the American cultural community are Americans in outlook, values and basic social attitudes. This is the conclusion of the scientific literature on the subject. It has been the first tenet of American law, the ideal if not always the practice of American life.

To support its contrary opinion, the Supreme Court undertook a [end p. 506] review of its own intuitions, without a judicial record before it, and without serious recourse to available scientific studies of the problem. Kiplingesque folklore about East and West is close to the heart of the opinions. The Japanese, the Court said, had been imperfectly assimilated; they constituted an isolated group in the community; their Japanese language schools might be sources of Japanese propaganda. Moreover, the discriminatory way in which the Japanese on the West Coast were treated may have been regarded as contributing to Japanese solidarity, preventing their assimilation, and increasing in many instances their attachments to Japan and its institutions[46].

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[45] See *infra*, pp. 520-3 and materials cited *supra* notes 1 and 14; Wirth, *The Problem of Minority Groups* in Linton (ed.), *The Science of Man in the World Crisis*, 1945, p. 347; Myrdal, *An American Dilemma*, 1944, cc. 3, 33-9, app. 10; Sherman, *Basic Problems of Behaviour*, 1941, pp. 289-91; Mead, *And Keep Your Powder Dry*, 1942, cc. 3, 46; Warner and Srole, *The Social Systems of American Ethnic Groups*, 1945, pp. 283-4; Benedict, *Patterns Of Culture* (1934) especially cc. 1-3, 7, 8; Benedict, *Race: Science And Politics*, 1940; Locke and Stern (eds.), *When Peoples Meet*, 1942, cc. 7-12; Miyamoto, *Social Solidarity among the Japanese in Seattle*, 1939; Dollard, *Caste and Class in a Southern Town*, 1937, cc. 12-6; Thompson (ed.), *Race Relations and the Race Problem*, 1939; Stonequist, *The Marginal Man, A Study in Personality and Culture Conflict*, 1937, cc. 3-4, particularly pp. 101-6; Cox, *Race and Caste: A Distinction*, in "The American Journal of Sociology", L, 1945, pp. 360, 365-6; MacIver (ed.), *Group Relations and Group Antagonisms*, 1944, pt. 1.

[46] 320 U. S. 81, 98 (1943). See *infra*, pp. 520-3. Such fears arising from sentiments of guilt are of special interest to the student of social psychology.

There was no testimony or other evidence in the record as to the facts which governed the judgment of the military in entering the orders in question. They were not required to support the action they had taken by producing evidence as to the need for it. Nor were they exposed to cross-examination. By way of judicial research and notice the Court wrote four short paragraphs to explain "some of the many considerations" which in its view might have been considered by the military in making their decision to institute a discriminatory curfew[47].

The second part of the Court's basic premise of fact was that it was impossible to investigate the question of loyalty individually. As to the validity of this proposition there was neither evidence in the record nor even discussion by the Court to indicate a basis for the conclusion which might appeal to a reasonable man, or even to a choleric and harassed general, faced with the danger of invasion and the specter of his own court martial. The issue was dismissed in a sentence. "We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it"[48]. In view of the history of security measures during the war, it would not have been easy to establish strong grounds for such a belief. There were about 110.000 persons subject to the exclusion orders, 43% of them being over 50 or under 15[49]. At the time of the exclusion orders, they had lived in California without committing sabotage for five months after Pearl Harbor. The number of persons to be examined was not beyond the capacities of individual examination processes, in the light of experience with such security measures, both in the United States and abroad[50]. The fact was that the loyalty examinations finally undertaken [end p. 507] in the Relocation Authority camps consisted in large part of filling out a questionnaire, and little more, except in cases of serious doubt as to loyalty. Most of those released from the camps were given their freedom on the basis of little information which was not available on the West Coast in 1942[51].

Actually, the exclusion program was undertaken not because the Japanese were too numerous to be examined individually, but because they were a small enough group to be punished by confinement. It would have been physically impossible to confine the Japanese and Japanese Americans in Hawaii, and it would have been both physically and politically impossible to undertake comparable measures against the 690,000 Italians or the 314,000 Germans living in the United States. The Japanese were being attacked because for some they provided the only possible outlet and expression for sentiments of group hostility. Others were unable or unwilling to accept the burden of urging the repudiation of a general's judgment which he placed on grounds of military need.

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[47] *Id*. at 99.

[48] *Ibid*.

[49] DeWitt Final Report, at 403-4.

[50] See *supra*, pp. 494-5.

[51] See note 31 *supra*.

The *Hirabayashi* case states a rule which permits some judicial control over action purporting to be taken under military authority. It proposes that such action be treated in the courts like that of administrative agencies generally, and upheld if supported by "facts" which afford "a rational basis" for the decision. For all practical purposes, it is true, the *Hirabayashi* case ignores the rule; but the Court did go to great lengths to assert the principle of protecting society against unwarranted and dictatorial military action. *Korematsu v. United States* seems sharply to relax even the formal requirement of judicial review over military conduct. Korematsu, an American citizen of Japanese descent, was convicted under the Act of March 21, 1942 for violating an order requiring his exclusion from the coastal area. The Court held the problem of exclusion to be identical with the issue of discriminatory curfew presented in the *Hirabayashi* case. There, it said, the Court had decided that it was not unreasonable for the military to impose a curfew in order to guard against the special dangers of sabotage and espionage anticipated from the Japanese group. The military had found, and the Court refused to reject the finding, that it was impossible to bring about an immediate segregation of the disloyal from the loyal. According to Mr. Justice Black, the exclusion orders merely apply these two findings - that the Japanese are a dangerous lot, and that there was no time to screen them individually. Actually, there was a new "finding" of fact in this case, going far beyond the situation considered in the *Hirabayashi* case. The military had "found" that the curfew provided inadequate protection against the danger of sabotage and espionage. Therefore the exclusion of all Japanese, citizens and aliens [end p. 508] alike, was thought to be a reasonable way to protect the Coast against sabotage and espionage. Mr. Justice Black does not pretend to review even the possible foundations of such a judgment. There is no attempt in the *Korematsu* case to show a reasonable connection between the factual situation and the program adopted to deal with it.

The Court refused to regard the validity of the detention features of the relocation policy as raised by the case. Korematsu had not yet been taken to a camp and the Court would not pass on the issues presented by such imprisonment. Those issues, the Court said, are "momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us"[52]. This is a good deal like saying in an ordinary criminal case that the appeal raises the validity of the trial and verdict, but not the sentence, since the defendant may be out on probation or bail. It is difficult to understand in any event why this consideration did not apply equally to the evidence before the Court on the issue which the Court conceded was raised by the pleadings, *i.e.*, the decision of the General to exclude all Japanese from the Defense Area. On this problem there was literally no trial record or other form of evidence in the case.

There were four other opinions in *Korematsu v. United States*. Mr. Justice Roberts and Mr. Justice Murphy dissented on the merits, in separate opinions. Mr. Justice Roberts said that while he might agree that a temporary or emergency

[52] 323 U.S. 214, 222 (1944).

exclusion of the Japanese was a legitimate exercise of military power, this case presented a plan for imprisoning the Japanese in concentration camps, solely because of their ancestry, and "without evidence or inquiry" as to their "loyalty and good disposition towards the United States"[53]. Such action, he said, was clearly unconstitutional.

Mr. Justice Murphy's substantial opinion does not join issue with the opinion of the Court on the central problem of how to review military decisions, but it does contend that the military decisions involved in this case were unjustified in fact. The military power, he agreed, must have wide and appropriate discretion in carrying out military duties. But, "like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled…

> "The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his [end p. 509] constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger… Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast 'all persons of Japanese ancestry, both alien and non-alien', clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law"[54].

The action taken does not meet such a test, Justice Murphy argues, because there was no reasonable ground for supposing that all persons of Japanese blood have a tendency to commit sabotage or espionage, nor was there any ground for supposing that their loyalty could not have been tested individually where they lived. A review of statements made by General DeWitt before Congressional committees and in his Final Report to the Secretary of War clearly reveals that the basis of his action was "an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices"[55]. These are compared with the independent studies of experts, and shown to be nonsensical. The supposed basis for the exercise of military discretion disappears, and the case for the order falls.

Mr. Justice Jackson wrote a fascinating and fantastic essay in nihilism. Nothing in the record of the case, he said very properly, permits the Court to judge the

[53] *Id*. at 226.

[54] *Id*. at 234-5.

[55] *Id*. at 239. See discussion *infra*, pp. 520-3.

military reasonableness of the order. But even if the orders were permissible and reasonable as military measures, he said, "I deny that it follows that they are constitutional"[56].

> "I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy [end p. 510].
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> "Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.
>
> "My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think that they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner"[57].

Thus the justice proposes to refuse enforcement of the statute of March 21, 1942. Apparently, in this regard at least, the statute would be treated as unconstitutional. The prisoner would then be taken to the camp and kept there by the military, and all judicial relief would be denied him.

It is hard to imagine what courts are for if not to protect people against unconstitutional arrest. If the Supreme Court washed its hands of such problems, for what purposes would it sit? The idea that military officers whose only authority rests on that of the President and the Congress, both creatures of the Constitution, can be considered to be acting "unconstitutionally" when they carry out concededly legitimate military policies is Pickwickian, to say the least. For judges to pass by on the other side, when men are imprisoned without charge or trial, suggests a less appealing analogy. The action of Chief Justice Taney in Ex parte *Merryman* is in a more heroic tradition of the judge's responsibility[58].

What Justice Jackson is saying seems to be this: Courts should refuse to decide hard cases, for in the hands of foolish judges they make bad law. The ark of the law must be protected against contamination. Therefore law should not be allowed to grow through its application to the serious and intensely difficult problems of modern life, such as the punishment of war criminals or the imprisonment of

[56] *Id*. at 245.

[57] *Id*. at 247-8.

[58] *Ex parte* Merryman, 17 Fed. Cas. 144, No. 9487 (D. Md. 1861). See Swisher, Roger B. Taney (1935) c. 26.

Japanese [end p. 511] Americans. It should be kept in orderly seclusion, and confined to problems like the logical adumbration of the full faith and credit clause, and other lawyers' issues[59]. The problems which deeply concern us should be decided outside the courts, even when they arise as the principal and inescapable issues of law suits. Judges are thus to be relieved of the political responsibilities of their citizenship and their office. They will be allowed to pretend that the judicial function is to "interpret" the law, and that law itself is a technical and antiquarian hobby, not the central institution of a changing society.

Mr. Justice Frankfurter concurred specially, answering Mr. Justice Jackson's dissent. "To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as 'an unconstitutional order' is to suffuse a part of the Constitution with an atmosphere of unconstitutionality", he said[60]. But one of the first issues of the case was whether or not the military order in question did express an "allowable judgment of war needs". That was the question which the Court was compelled to decide, and did decide, without benefit of the testimony of witnesses, or a factual record, and without substantial independent study on its own motion.

Ex parte *Endo* was the next stage in the judicial elucidation of the problem[61]. In Ex parte *Endo*, decided on December 18, 1944, an adjudication was finally obtained on about one half the question of the validity of confining Japanese aliens and citizens in camps. The case was a habeas corpus proceeding in which an American citizen of Japanese ancestry sought freedom from a War Relocation Center where she was detained, after having been found loyal, until the Authority could place her in an area of the country where local disorder would not be anticipated as a result of her arrival. The Court held that the statute, as rather strenuously construed, did not authorize the detention of persons in the petitioner's situation, although temporary detention for the purpose of investigating loyalty was assumed to be valid as an incident to the program of "orderly" evacuation approved in the *Korematsu* case.

The purpose of the statute under which exclusion and detention were accomplished, the Court said, was to help prevent sabotage and espionage. The act talks only of excluding persons from defence areas. It does not mention the possibility of their detention. While the Court assumes that an implied power of temporary detention may be ac- [end p. 512]cepted, as an incident in the program of exclusion, for the purpose of facilitating loyalty examinations, such an implied power should be narrowly confined to the precise purpose of the statute, in order to minimize the impact of the statute on the liberties of the individual citizen. The authority to detain a citizen as a measure of protection against sabotage and

[59] See Jackson, *Full Faith and Credit - The Lawyer's Clause of The Constitution*, in "Columbia Law Review", XLV, 1945, p. 1. See also *Northwestern Bands of Shoshone Indians v. United States* 65 Sup. Ct. 690, 700-2 (U. S. 1945); Jackson, *The Rule of Law Among Nations*, in "American Bar Association Journal", XXXI, 1945, pp. 290, 292-3. Compare his report to the President on trials for war criminals, "New York Times", June 8th, 1945, p. 4.

[60] 323 U. S. 214, 224-5 (1944).

[61] 323 U.S. 283 (1944).

espionage is exhausted when his loyalty is established. The persistence of community hostility to citizens of Japanese descent is not a ground for holding them in camp under the present statute. The disclosure of the full scope of the detention program to various committees of the Congress, including appropriation committees, was held not to support a ratification by the Congress of what was done. The basis of this conclusion was the extraordinarily technical proposition that the appropriation acts which might have been considered to ratify the entire program were lump-sum appropriations, and were not broken down by items to earmark a specific sum for the specific cost of detaining citizens found to be loyal pending their relocation in friendly communities. In this respect the reasoning of the Court is contrary to that in the *Hirabayashi* case, where Congressional ratification of the plans of the executive branch was established in a broad and common-sense way. Justices Roberts and Murphy concurred specially, urging that the decision be based on the constitutional grounds stated in their opinions in the *Korematsu* case, rather than on the statutory interpretation underlying Justice Douglas' opinion.

IV

The many opinions of the three Japanese cases do not consider the primary constitutional issues which are raised by the West Coast anti-Japanese program as a whole. This was a program which included (a) a discriminatory curfew against Japanese persons; (b) their exclusion from the West Coast; (c) their confinement pending investigations of loyalty; and (d) the indefinite confinement of those persons found to be disloyal. These measures were proposed and accepted as military necessities. Their validity as military measures was an issue in litigation. By what standards are courts to pass on the justification for such military action? Were those standards satisfied here?

The conception of the war power under the American Constitution rests on the experience of the Revolution and the Civil War. It rests on basic political principles which men who had endured those times of trouble had fully discussed and carefully articulated. The chief architects of the conception were men of affairs who had participated in war, and had definite and sophisticated ideas about the role of the professional military mind in the conduct of war.

The first and dominating proposition about the war power under the Constitution is that the Commander-in-Chief of the armed forces is a civilian and must be a civilian, elected and not promoted to his [end p. 513] office. The subordination of the military to the civil power is thus primarily assured. In every democracy the relationship between civil and military power is the crucial social and political issue on which its capacity to survive a crisis ultimately depends. Inadequate analysis of this problem, and inadequate measures to deal with it, led to the downfall of the Spanish Republic, and gravely weakened the Third French Republic. British experience, especially during the First World War, puts the

problem in dramatic perspective[62]. In its own proper sphere of tactics, the professional military judgment is decisive. In waging war the larger decisions – the choice of generals, the organization of command, the allocation of forces, the political, economic and often strategic aspects of war – these have to be made by responsible civilian ministers[63]. Clemenceau's famous remark, quoted at the head of this article, is not a witticism, but the first principle of organizing democracy for war. It reflects a balanced view of the proper relation in policy-making between the expert and the practical man. It expresses a keen sense of the supremacy of civil power in a republic. The image of Napoleon is never far from the surface of French political consciousness. France's experience with Pétain has once more underscored the danger. In our own national life recurring waste and incompetence in the handling of war problems – in the Mexican War, the Civil War, and the Spanish-American War – led to important reforms in the organization of the War Department under Elihu Root, and further developments under later Secretaries of War[64]. The process of achieving adequate organization and control is by no means complete.

The second political principle governing the exercise of the war power in a democracy is that of responsibility. Like every other officer of government, soldiers must answer for their decisions to the system of law, and not to the Chief of Staff alone. Where, as in the Japanese exclusion program, military decisions lead to conflicts between individuals and authority, the courts must adjudicate them. Even if Mr. Justice Jackson's doctrine of the judicial function is accepted, the courts will adjudicate nonetheless, by refusing relief, and thus decide [end p. 514] cases in favor of the military power. The problem is the scope of the military power, and means for assuring its responsible exercise. It is not a problem which can be avoided by any verbal formula.

Most occasions for the exercise of authority in the name of military need will not present justiciable controversy. When a general attacks or retreats in the field, sends his troops to the right or to the left, he may have to justify his decision to a court martial, but not often to a court. On the other hand some steps deemed to be required in war do raise the kind of conflict over property or personal rights which can be presented to the courts. A factory or business may be taken into custody, prices and wages may be established, whole classes of activity, like horse-racing, temporarily forbidden. Without stopping for an overnice definition of the terms,

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[62] See *War Memoirs* of David Lloyd George, 1933-1937, Vol. 6, c. 10 (*Some Reflections on the Functions of Governments and Soldiers Respectively in a War*); Vol. 1, cc. 5, 6, 9, 10, 14, 15; Vol. 2, cc. 8-10, 17-9; Vol. 3, cc. 3-6, 9-11; Vol. 4, cc. 9-11, 13; vol. 5, cc. 6, 8; Churchill, *The World Crisis*, 1931, cc. 4, 19, 38, pp. 733-45; Wilkinson, *War And Policy*, 1910, pp. 259-300; Wright, *At the Supreme War Council*, 1921; Rogers, *Civilian Control of Military Policy*, in "Foreign Affairs", XVIII, 1940, p. 280.

[63] See Palmer, *Washington, Lincoln, Wilson, Three War Statesmen*, 1930, pp. 224-7, 282-3; Palmer, *America in Arms*, 1941, pp. 145-6; De Weerd, *Civilian and Military Elements in Modern War* in Clarkson and Cochran, *War as a Social Institution*, 1941, p. 95. See also McKinley, *Democracy and Military Power*, 2nd Ed. 1941; Vagts, *A History of Militarism*, 1937.

[64] See 1 Jessup, *Elihu Root*, 1938, pp. 240-64; Root, *The Military and Colonial Policy of the United States*, 1916; Rogers, op. cit. *supra*, note 62, at pp. 288-91.

these are justiciable occasions – situations in which courts have customarily decided controversies, and determined the legality of official action when such problems were implicit in the conflicts presented to them[65]. It is essential to every democratic value in society that official action taken in the name of the war power be held to standards of responsibility under such circumstances. The courts have not in the past, and should not now, declare the whole category of problems to be political questions beyond the reach of judicial review. The present Supreme Court is dominated by the conviction that in the past judicial review has unduly limited the freedom of administrative action. But surely the permissible response to bad law is good law, not no law at all. The Court must review the exercise of military power in a way which permits ample freedom to the Executive, yet assures society as a whole that appropriate standards of responsibility have been met.

The issue for judicial decision in these cases is not lessened or changed by saying that the war power includes any steps required to win the war. The problem is still one of judgment as to what helps win a war. Who is to decide whether there was a sensible reason for doing what was done? Is it enough for the General to say that at the time he acted, he honestly thought it was a good idea to do what he did? Is this an example of "expertise", to which the courts must give blind deference?[66] Or must there be "objective" evidence, beyond the General's state of mind, to show "the reasonable ground for belief" which the *Hirabayashi* [end p. 515] case says is necessary?[67] Should such evidence be available before the action is taken? Should the rule be a procedural one that the general has to consider evidence, and then come to a decision, or should it be only that at the subsequent trial suitable evidence is available to justify the result? As the Chief Justice remarked, the Constitution "does not demand the impossible or the impractical"[68]. The inquiry should be addressed to the rationality of the general's exercise of his judgment as a general, not as a master in chancery. It should give full and sympathetic weight to the confusion and danger which are inevitable elements in any problem presented for military decision.

Unless the courts require a showing, in cases like these, of an intelligible relationship between means and ends, society has lost its basic protection against the abuse of military power. The general's good intentions must be irrelevant. There should be evidence in court that his military judgment had a suitable basis in fact. As Colonel Fairman, a strong proponent of widened military discretion, points

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[65] See, *e.g.*, Block v. Hirsh, 256 U. S. 135 (1921); Bowles v. Willingham, 321 U. S. 503 (1944); Home Building & Loan Ass'n v. Blaisdell, 290 U. S. 398 (1934); Yakus v. United States, 321 U. S. 414 (1944); Montgomery Ward & Co. v. United States, C. C. A. 7th, June 8, 1945.

[66] Railroad Commission of Texas v. Rowan & Nichols Oil Co., 310 U. S. 573 (1940), *mod*., 311 U. S. 614 (1941); Railroad Commission v. Rowan & Nichols Oil Co., 311 U. S. 570 (1941). *Cf.* Thompson v. Consolidated Gas Corp., 300 U. S. 55 (1937); *Note*, in "Yale Law Journal", LI, 1942, p. 680.

[67] See note 17 *supra*. For recent treatments of administrative and executive findings by various justices of the Supreme Court in cognate, if not directly comparable situations, see Schneiderman v. United States, 320 U. S. 118 (1943); ICC v. Inland Waterways, 319 U. S. 671 (1943); FPC v. Hope Natural Gas Co., 320 U. S. 591 (1944); Connecticut Light & Power Co. v. FPC, 65 Sup. Ct. 749 (U. S. 1945); Bridges v. Wixon, 65 Sup. Ct. 1443 (U. S. 1945).

[68] Hirabayashi v. United States, 320 U. S. 81, 104 (1943).

out: "When the executive fails or is unable to satisfy the court of the evident necessity for the extraordinary measures it has taken, it can hardly expect the court to assume it on faith"[69].

The *Hirabayashi* case proposes one test for the validity of an exercise of military power. Even though that test is not applied in the *Hirabayashi* case, and is roughly handled in the *Korematsu* case, it is not hopelessly lost. As the Court said in *Sterling v. Constantin*, the necessity under all the circumstances for a use of martial power "is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression"[70].

Perhaps the closest judicial precedent and analogy for the Japanese American cases is *Mitchell v. Harmony*, which arose out of the Doniphan raid during the Mexican war. The plaintiff was a trader, whose wagons, mules, and goods were seized by the defendant, a lieutenant colonel of [end p. 516] the United States Army, during the course of the expedition. The plaintiff, who wanted to leave the Army column and trade with the Mexicans, was forced to accompany the troops. All his property was lost on the march and in battle. The action was of trespass, for the value of the property taken, and for damages. The defenses were that the control of the trader and the destruction of his property were a military necessity, justified by the circumstances of the situation. After a full trial, featured by depositions of the commanding officers, the jury found for the plaintiff.

> "The defence has been placed… on rumours which reached the commanding officer and suspicions which he appears to have entertained of a secret design in the plaintiff to leave the American forces and carry on an illicit trade with the enemy, injurious to the interests of the United States. And if such a design had been shown, and that he was preparing to leave the American troops for that purpose, the seizure and detention of his property, to prevent its execution, would have been fully justified. But there is no evidence in the record tending to show that these rumors and suspicions had any foundation. And certainly mere suspicions of an illegal intention will not authorize a military officer to seize and detain the property of an American citizen. The fact that such an intention existed must be shown; and of that there is no evidence.
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> "The 2d and 3d objections will be considered together, as they depend on the same principles. Upon these two grounds of defence the Circuit Court instructed the jury, that the defendant might lawfully take possession of the goods of the plaintiff, to prevent them from falling into the hands of the public enemy; but in order to justify the seizure the danger must be immediate and impending, and not remote or contingent. And that he might also take them for

[69] Fairman, *The Law of Martial Rule*, 2d ed. 1943, pp. 217-8. See also Id. at pp. 47-9, pp. 103-7; Fairman, *The Law of Martial Rule and the National Emergency*, in "Harvard Law Review", LV, 1942, pp. 1253, 1259-61, 1272. The test is put by Wiener, *A Practical Manual of Martial Law*, 1940, pp. 26-7, for "the hapless Guardsman who commands the troops", as "What can you justify afterwards?" See *Comment*, in "Yale Law Journal", XLV, 1936, p. 879. The statute of March 21st, 1942 should be interpreted to pose the same issue, despite its broad language.

[70] 287 U. S. 378, 398 (1932). Id. at 401: "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions". Certain cases, though technically distinguishable, seem to proceed from different hypotheses. Martin v. Mott, 12 Wheat. 19 (U. S. 1827); The Prize Cases, 2 Black 635 (U. S. 1862); Moyer v. Peabody, 212 U. S. 78 (1909).

public use and impress them into the public service, in case of an immediate and pressing danger or urgent necessity existing at the time, but not otherwise.

"In the argument of these two points, the circumstances under which the goods of the plaintiff were taken have been much discussed, and the evidence examined for the purpose of showing the nature and character of the danger which actually existed at the time or was apprehended by the commander of the American forces. But this question is not before us. It is a question of fact upon which the jury have passed, and their verdict has decided that a danger or necessity, such as the court described, did not exist when the property of the plaintiff was taken by the defendant. And the only subject for inquiry in this court is whether the law was correctly stated in the instruction of the court; and whether any thing short of an immediate and impending danger from the public enemy, or an urgent necessity for the public service, can justify the taking of private property by a military commander to prevent it from falling into the hands of the enemy or for the purpose of converting it to the use of the public [end p. 517].

"The instruction is objected to on the ground, that it restricts the power of the officer within narrower limits than the law will justify. And that when the troops are employed in an expedition into the enemy's country, where the dangers that meet them cannot always be foreseen, and where they are cut off from aid from their own government, the commanding officer must necessarily be entrusted with some discretionary power as to the measures he should adopt; an if he acts honestly, and to the best of his judgment, the law will protect him. But it must be remembered that the question here, is not as to the discretion he may exercise in his military operations or in relation to those who are under his command. His distance from home, and the duties in which he is engaged, cannot enlarge his power over the property of a citizen, nor give to him, in that respect, any authority which he would not, under similar circumstances, possess at home. And where the owner has done nothing to forfeit his rights, every public officer is bound to respect them, whether he finds the property in a foreign or hostile country, or in his own.

"There are, without doubt, occasions in which private property may lawfully be taken possession of or destroyed to prevent it from falling into the hands of the public enemy; and also where a military officer, charged with a particular duty, may impress private property into the public service or take it for public use. Unquestionably, in such cases, the government is bound to make full compensation to the owner; but the officer is nota trespasser.

"But we are clearly of opinion, that in all of these cases the danger must be immediate and impending; or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for. It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency that gives the right, and the emergency must be shown to exist before the taking can be justified.

"In deciding upon this necessity, however, the state of the facts, as they appeared to the officer at the time he acted, must govern the decision; for he must necessarily act upon the information of others as well as his own observation. And if, with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser. But it is not sufficient to show that he exercised an honest judgment, and took the property to promote the public service; he must show by proof the nature and character of the emergency, such as he had reasonable grounds to believe it to be, and it is then for a jury to say, whether it was so pressing as not to admit of delay; and the occasion such, according to the information upon

> which he [end p. 518] acted, that private rights must for the time give way to the common and public good.
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> "But it is not alleged that Colonel Doniphan was deceived by false intelligence as to the movements or strength of the enemy at the time the property was taken. His camp at San Elisario was not threatened. He was well informed upon the state of affairs in his rear, as well as of the dangers before him. And the property was seized, not to defend his position, nor to place his troops in a safer one, nor to anticipate the attack of an approaching enemy, but to insure the success of a distant and hazardous expedition, upon which he was about to march.
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> "The movement upon Chihuahua was undoubtedly undertaken from high and patriotic motives. It was boldly planned and gallantly executed, and contributed to the successful issue of the war. But it is not for the court to say what protection or indemnity is due from the public to an officer who, in his zeal for the honor and interest of his country, and in the excitement of military operations, has trespassed on private rights. That question belongs to the political department of the government. Our duty is to determine under what circumstances private property may be taken from the owner by a military officer in a time of war. And the question here is, whether the law permits it to be taken to insure the success of any enterprise against a public enemy which the commanding officer may deem it advisable to undertake. And we think it very clear that the law does not permit it"[71].

Applied to the circumstances of the Japanese exclusion cases, these precedents require that there be a showing to the trial court of the evidence upon which General DeWitt acted, or evidence which justifies his action under the statute and the constitution. Nor will it do to say that there need be only enough evidence to prove his good faith, or to provide a possible basis for the decision. This was the contention expressly overruled in *Mitchell v. Harmony*[72]. The varying formulae about presumptions, and the quantum of proof required in different classes of cases, merely conceal the court's problem. There must be evidence enough to satisfy the court as to the need for the grave and disagreeable action taken – arrest on vague suspicion, denial of trial, and permanent incarceration for opinions alone. The standard of reasonableness, here as elsewhere, is one requiring a full evaluation of all circumstances. But the law is not neutral. It has a positive preference for protecting civil rights where possible, and a long-standing suspicion of the military mind when acting outside its own sphere. In protecting important social values against frivolous or unnecessary interference by generals, the courts' obligations cannot be satisfied by a scintilla of evidence, or any other mechanical rule supposed [end p. 519] to explain the process of proof. There must be a convincing and substantial factual case, in Colonel Fairman's phrase, to satisfy the court of "the evident necessity" for the measures taken.

No matter how narrowly the rule of proof is formulated, it could not have been satisfied in either the *Hirabayashi* or the *Korematsu* cases. Not only was there insufficient evidence in those cases to satisfy a reasonably prudent judge or a reasonably prudent general: there was no evidence whatever by which a court might test the responsibility of General DeWitt's action, either under the statute of March 21, 1942, or on more general considerations. True, in the *Hirabayashi* case

[71] Mitchell v. Harmony, 13 How. 115, 133-5 (U. S. 1851).
[72] *Id*. at 119-20.

the Court carefully identified certain of General DeWitt's proclamations as "findings", which established the conformity of his actions to the standard of the statute – the protection of military resources against the risk of sabotage and espionage. But the military proclamations record conclusions, not evidence. And in both cases the record is bare of testimony on either side about the policy of the curfew or the exclusion orders. There was every reason to have regarded this omission as a fatal defect, and to have remanded in each case for a trial on the justification of the discriminatory curfew, and of the exclusion orders.

Such an inquiry would have been illuminating. General DeWitt's Final Report and his testimony before committees of the Congress clearly indicate that his motivation was ignorant race prejudice, not facts to support the hypothesis that there was a greater risk of sabotage among the Japanese than among residents of German, Italian, or any other ethnic affiliation. The most significant comment on the quality of the General's report is contained in the Government's brief in *Korematsu v. United States*. There the Solicitor General said that the report was relied upon "for statistics and other details concerning the actual evacuation and the events that took place subsequent thereto. We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the Court to take judicial notice, and we rely upon the Final Report only to the extent that it relates such facts"[73]. Yet the Final Report embodies the basic decision under review, and states the reasons why it was actually undertaken. General DeWitt's Final Recommendation to the Secretary of War, dated February 14, 1942, included in the Final Report, is the closest approximation we have in these cases to an authoritative determination of fact. In that Recommendation, General DeWitt says:

> "In the war in which we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race and [end p. 520] while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized', the racial strains are undiluted. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects, ready to fight and, if necessary, to die for Japan in a war against the nation of their parents. That Japan is allied with Germany and Italy in this struggle is no ground for assuming that any Japanese, barred from assimilation by convention as he is, though born and raised in the United States, will not turn against this nation when the final test of loyalty comes. It, therefore, follows that along the vital Pacific Coast over 112,000 potential enemies, of Japanese extraction, are at large today. There are indications that these are organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken"[74].

[73] *Brief for United States*, p. 11, n. 2, Korematsu v. United States, 323 U. S. 214 (1944). See *Brief for United States*, p. 23, *Ex parte* Mitsuye Endo, 322 U. S. 233 (1944). It was peculiarly inappropriate to decide these cases on the basis of judicial notice alone. *Borden's Farm Products Co., Inc. v. Baldwin*, 293 U. S. 194 (1934); United States v. Carolene Products Co., 304 U. S. 144 (1938); Polk Co. v. Gloser, 305 U. S. 5 (1938). See *Comment*, in "Harvard Law Review", XLIX, 1936, p. 631.

[74] DeWitt Final Report at 34. See also Id. at vii, pp. 7-24. Some of the reasoning used to justify the discriminatory treatment of the Japanese Americans can only be described as astounding in its terms and in its refusal to consider or to evaluate available sociological data. See *e.g.*, Fairman, *The Law or Martial Rule*, 2d ed. 1943, p. 260 ("Fundamental differences in mores have made them inscrutable to

In his Final Report to the Secretary of War General DeWitt adduces somewhat more evidence than the absence of sabotage to prove its special danger. His report, and the briefs for the United States in *Hirabayashi v. United States* and *Korematsu v. United States* emphasize these points as well: The Japanese lived together, often concentrated around harbors and other strategic areas. They had been discriminated against, and it was suggested that their resentment at such treatment might give rise to disloyalty. Japanese clubs and religious institutions played an important part in their social life. Japanese language schools were maintained to preserve for the American-born children something of the cultural heritage of Japan. The Japanese Government, like that of Italy, France, and many other countries, asserted a doctrine of nationality which was thought to result in claims of dual citizenship, and thus to cast doubt on the loyalty of American citizens of Japanese descent. There were some 10,000 Kibei among the population of the West coast, Japanese Americans who had returned to Japan for an important part of their education, and who were thought to be more strongly affiliated with Japan in their political outlook than the others[75] [end p. 521].

Much of the suspicion inferentially based on these statements disappears when they are more closely examined. In many instances the concentration of Japanese homes around strategic areas had come about years before, and for entirely innocent reasons. Japanese fishing and cannery workers, for example, were compelled by the canneries to live on the waterfront, in order to be near the plants in which they worked. Japanese truck gardeners rented land in the industrial outskirts of large cities in order to be as close as possible to their markets. They rented land for agricultural purposes under high tension lines – regarded as a very suspicious circumstance – because the company could not use the land for other purposes. The initiative in starting the practice came from the utility companies, not from the Japanese[76]. Despite discrimination against the Japanese, many had done well in America. They were substantial property owners. Their children participated normally and actively in the schools and universities of the West Coast. Their unions and social organizations had passed resolutions of loyalty in great number, before and after the Pearl Harbor disaster[77]. It is difficult to find real evidence that either religious or social institutions among the Japanese had successfully fostered Japanese militarism, or other dangerous sentiments, among the Japanese American population. The Japanese language schools, which the Japanese Americans themselves had long sought to put under state control, seem to

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us"); Watson, *The Japanese Evacuation and Litigation Arising Therefrom*, in "Oregon Law Review", XXII, 1942, pp. 46, 47 ("Their mental and emotional responses are understood by but few of our people and in general the Japanese presents an inscrutable personality").

[75] See Tolan Committee Reports (Preliminary), part 16. Such persons were of course individually known, through travel records and otherwise.

[76] See McWilliams, *Prejudice*, 1944, pp. 119-21; Tolan Committee Hearings, part 29, p. 11225.

[77] See Tolan Committee Reports (Preliminary), part 15 ("We cannot doubt, and everyone is agreed, that the majority of Japanese citizens and aliens are loyal to this country"); An Intelligence Officer, *The Japanese in America: The Problem and the Solution*, in "Harper's", CLXXXV, 1942, p. 489.

represent little more than the familiar desire of many immigrant groups to keep alive the language and tradition of the "old country"; in the case of Japanese Americans, knowledge of the Japanese language was of particular economic importance, since so much of their working life was spent with other Japanese on the West Coast[78].

There were of course suspicious elements among the Japanese. They were known to the authorities, which had for several years been checking the security of the Japanese American population. Many had been individually arrested immediately after Pearl Harbor, and the others were under constant surveillance. We had many intelligence officers who knew both the language and the people well. So far as the police were concerned, there was no substance to the man-in-the-street's belief that all Orientals "look alike"[79]. On the contrary, the Japanese [end p. 522] were a small and conspicuous minority on the West Coast, both individually and as a group. They would have been an unlikely source of sabotage agents for an intelligent enemy in any case.

Apart from the members of the group known to be under suspicion, there was no evidence beyond the vaguest fear to connect the Japanese on the West Coast with the unfavorable military events of 1941 and 1942. Both at Pearl Harbor and in sporadic attacks on the West Coast the enemy had shown that he had knowledge of our dispositions. There was some signaling to enemy ships at sea, both by radio and by lights, along the West Coast. It was said to be difficult to trace such signals because of limitations on the power of search without warrant. There had been several episodes of shelling the coast by submarine, although two of the three such episodes mentioned by General DeWitt as tending to create suspicion of the Japanese Americans had taken place after their removal from the Coast. These were the only such items in the Final Report which were not identified by date[80]. And it was positively known that no suspicions attached to the Japanese residents for sabotage at Pearl Harbor before, during or after the raid[81]. Those subsequently arrested as Japanese agents were all white men. "To focus attention on local

[78] See McWilliams, *Prejudice*, 1944, pp. 121-2.

[79] See, *e.g.*, Tolan Committee Hearings, part 31, p. 11631; Denman, J., dissenting, Korematsu v. United States, 140 F. (2d) 289, 302-3 (C. C. A. 9th, 1943). As for the knowledge of the situation possessed by security officers, see Tolan Committee Hearings, part 31, pp. 11697-702; An Intelligence Officer, *loc. cit. supra* note 77. A considerable percentage - perhaps 19% - of the evacuees gave negative answers to the loyalty questions in their questionnaires. Many of those answers were expressly referred to the treatment the Japanese had received in being uprooted and imprisoned. It is estimated that many more of the answers were directly or indirectly referable to the shock of evacuation and confinement. See *Hearings before Committee on Immigration and Naturalization on H. R. 2701, 3012, 3489, 3446, and 4103*, 78th Cong., 1st Sess., 1944, pp. 36-43. Basically, of course, the issue is to a considerable extent irrelevant. Disloyalty is not a crime, even in the aggravated form of enthusiastic propaganda for the Axis cause. See note 2 *supra*. At most, it is a possible ground for interning enemy aliens, see "New York Times", June 27th, 1945, p. 15, col. 7, but hardly a sufficient ground for excluding individuals from strategic areas. See note 13 *supra*.

[80] DeWitt Final Report at 18; "New York Times", June 23rd, 1942, p. 1, col. 4; p. 9, col. 4; Id., Sept. 15th, 1942, p. 1, col. 3; p. 10, col. 5.

[81] See McWilliams, *Prejudice*, 1944, p. 144.

residents of Japanese descent, actually diverted attention from those who were busily engaged in espionage activity"[82].

It is possible that the absence of a trial on the facts may permit the Court in the future to distinguish or to extinguish the Japanese American cases; for in these cases the defendants did not bring forth evidence, nor require the Government to produce evidence, on the factual justification of the military action. Whoever had the burden of going forward, or of proof, Government or defendant, the burden was not met[83]. Not even the *Korematsu* case would justify the exclusion of such [end p. 523] evidence, nor the denial of a defendant's request to call the General as a witness. A future case may therefore create a better record for establishing appropriate criteria of judicial control over military conduct, and for applying such criteria to better purpose.

A trial on the factual justification of the curfew and exclusion orders would require the Court to confront Ex parte *Milligan*[84], which it sought to avoid in all three of the Japanese cases. Ex parte *Milligan* represents an application to a large and common class of semi-military situations of what Chief Justice Stone articulated in the *Hirabayashi* case as a "rule of reason" governing the scope of military power. The military power, the Chief Justice said, included any steps needed to wage war successfully. The justices in the majority in Ex parte *Milligan* declared in effect that it would be difficult, if not impossible, to convince them that there was or could be a military necessity for allowing the military to hold, try, or punish civilians – while the civil courts were open and functioning. And it held further that it is for the judges, not the generals, to say when it is proper under the Constitution to shut the courts, or to deny access to them.

Ex parte *Milligan* is a monument in the democratic tradition, and should be the animating force of this branch of our law. At a time when national emergency, mobilization and war are more frequent occurrences than at any previous period of our history, it would be difficult to name a single decision of more fundamental importance to society. Yet there is a tendency to treat Ex parte *Milligan* as outmoded, as if new methods of "total" warfare made the case an anachronism[85]. Those who take this view have forgotten the circumstances of the Civil War. Fifth columns, propaganda, sabotage and espionage were more generally used than in

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[82] Id. at 111.

[83] In applying the doctrine of *Mitchell v. Harmony*, the burden of proof in fact falls on the Government, claiming the privileges of the emergency. Whatever is said about the presumption of constitutionality of statutes, or the interest of the court in not substituting its judgment on the facts for that of the qualified executive or legislative authority, where the justification for extraordinary behaviour rests on a showing of extraordinary circumstances, it will finally be the Government's burden to bring in the evidence of emergency, or take the risk of not persuading the court. See, *e.g.*, cases cited *supra*, notes 13, 72, and 73.

[84] 4 Wall. 2 (U. S. 1867). See Frank, *Ex parte Milligan v. The Five Companies: Martial Law in Hawaii*, in "Columbia Law Review", XLIV, 1944, pp. 639; Klaus, *The Milligan Case*, 1929; Fairman, *Mr. Justice Miller and the Supreme Court*, 1939, c. 4.

[85] Brief for Respondent, pp. 45-8, *Ex parte* Quirin, 317 U. S. 1 (1942); *Ex parte* Ventura, 44 F. Supp. 520, 522-3 (W. D. Wash. 1942). For a moderate view see Schueller v. Drum, 51 F. Supp. 383, 387 (E. D. Pa. 1943). *Cf.* Frank, *supra* note 84, at 639.

any war since the siege of Troy, and certainly more widely used than in the second World War.

Ex parte *Milligan* illustrates the point. Milligan was convincingly charged with active participation in a fifth column plot worthy of Hitler or Alfred Hitchcock. A group of armed and determined men were to seize federal arsenals at Columbus, Indianapolis and at three points in Illinois, and then to release Confederate prisoners of war held in those states. Thus they would create a Confederate army behind the Union lines in Tennessee. Milligan and his alleged co-conspirators [end p. 524] acted in Indiana, Missouri, Illinois, and in other border states. Their strategy had a political arm. The Union was to be split politically, and a Northwest Confederation was to be declared, friendly to the South, and embracing Illinois, Wisconsin, Iowa, Kansas, Indiana and Minnesota. This plan was not an idle dream. It was sponsored by a well-financed society, the Sons of Liberty, thought to have 300,000 members, many of them rich and respectable; the planned uprising would coincide with the Chicago convention of the Democratic Party, which was sympathetic to abandoning the war, and recognizing the Confederacy[86].

The unanimous Court which freed Milligan for civil trial was a court of fire-eating Unionists. Mr. Justice Davis, who wrote for the majority, was one of President Lincoln's closest friends, supporters and admirers. The Chief Justice, who wrote the opinion for the concurring minority, was a valiant and resolute supporter of the war, whatever his shortcomings in other respects. The Court had no difficulty in freeing Milligan, and facing down the outcry of radical Republicans which was provoked by the decision. The issue dividing the Court in the *Milligan* case was parallel in some ways to the problem presented by the Japanese exclusion program under the statute of March 21, 1942. Congress had passed a statute in 1863 permitting the President to suspend the privilege of habeas corpus in a limited way whenever, in his judgment, the public safety required it, holding prisoners without trial for a short period. If the next sitting of the grand jury did not indict those held in its district, they were entitled to release under the statute.

The statute was in fact a dead letter, although the Court did not consider that aspect of the situation in deciding Milligan's case[87]. Milligan had been arrested by the military. The grand jury had not returned an indictment against him at its next sitting. He had nonetheless been tried by a military commission, and sentenced to death. The minority of the Court urged his release according to the terms of the statute, because no indictment had been presented against him. The Court, however, freed him for normal criminal trial on broader grounds. The controlling question of the case, the Court said, was whether the military commission had jurisdiction to try Milligan. This question was considered without express reference to the statute of 1863, as such, but on the evidence which might justify the exercise of martial law powers either under the statute or otherwise. The only constitutional reason, the Court said, for denying Milligan the trial provided for in the Third Article of the Constitution, and in the Fifth and Sixth Amendments, is that such a trial could not physically be conducted [end p. 525]. So long as the courts are open,

[86] See Klaus, *The Milligan Case*, 1929, pp. 27-33.

[87] See Randall, *Constitutional Problems Under Lincoln*, 1926, p. 167.

persons accused of crime, and not subject to the laws of war as members of the armed forces or enemy belligerents, must be brought before the courts, or discharged. Ex parte *Milligan* therefore holds Milligan's trial before a military commission to be unconstitutional, despite the President's action under the first section of the Act of 1863. The factual situation was not such as to justify the exercise of martial law powers, even for temporary detention, and certainly not for trial. Ordinary civilians could be held for military trial only when the civil power was incapable of acting – during an invasion, for example, or during a period of severe riot or insurrection.

> "It is difficult to see how the *safety* of the country required martial law in Indiana. If any of her citizens were plotting treason, the power of arrest could secure them, until the government was prepared for their trial, when the courts were open and ready to try them. It was as easy to protect witnesses before a civil as a military tribunal; and as there could be no wish to convict, except on sufficient legal evidence, surely an ordained and established court was better able to judge of this than a military tribunal composed of gentlemen not trained to the profession of the law".
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> "It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.
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> "If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.
>
> "The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power' – the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish[88] [end p. 526].

The Court's dismissal of Ex parte *Milligan* in Ex parte *Endo* requires some analysis. The Court said, "It should be noted at the outset that we do not have here a question such as was presented in Ex parte *Milligan*, 4 Wall. 2, or in Ex parte *Quirin*, 317 U. S. 1, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* proceedings. Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military;

[88] 4 Wall. 2, 127, 124-5 (U. S. 1867).

the Authority was given a large measure of responsibility for its execution and Congress made its enforcement subject to civil penalties by the Act of March 21, 1942. Accordingly, no questions of military law are involved"[89].

The proposition is extraordinary. Under penalty of imprisonment, the orders before the Court in Ex parte *Endo* required that enemy aliens and citizens of Japanese blood be removed from their home and confined in camps. If found to be "disloyal", they were kept in the camps indefinitely. If found to be "loyal", they were kept in the camps as long as was necessary for the Authority to place them in friendly communities.

The problems of Ex parte *Milligan* are avoided by the simplest of expedients. In Ex parte *Milligan* the Court said that the military could not constitutionally arrest, nor could a military tribunal constitutionally try, civilians charged with treason and conspiracy to destroy the state by force, at a time when the civil courts were open and functioning. Under the plan considered in the Japanese American cases, people not charged with crime are imprisoned for several years without even a military trial, on the ground that they have the taint of Japanese blood. Why doesn't the *Milligan* case apply a *fortiori*? If it is illegal to arrest and confine people after an unwarranted military Trial, it is surely even more illegal to arrest and confine them without any trial at all. The Supreme Court says that the issues of the *Milligan* case are not involved because the evacuees were committed to camps by military orders, not by military tribunals, and because their jailers did not wear uniforms. It is hard to see any sequence in the sentences. The Japanese Americans were ordered detained by a general, purporting to act on military grounds. The military order was enforceable, on pain of imprisonment. While a United States marshal, rather than a military policeman, assured obedience to the order, the ultimate sanction behind the marshal's writ is the same as that of the military police: the bayonets of United States troops. It is hardly a ground for distinction – that the general's command was backed by the penalty of civil imprisonment, or that he obtained civilian aid in running the relocation camps. The starting point for the program was a military [end p. 527] order, which had to be obeyed. It required enemy aliens and citizens of Japanese blood to be removed from their homes and confined in camps. As events developed, the general's command imposed confinement for three years on most of the people who were evacuated under it.

There are then two basic constitutional problems concealed in the Court's easy dismissal of Ex parte *Milligan*: the arrest, removal and confinement of persons without trial, pending examination of their loyalty; and the indefinite confinement of persons found to be disloyal. On both counts, at least as to citizens, the moral of Ex parte *Milligan* is plain. The *Milligan* case says little about the propriety of a curfew, or perhaps even of the exclusion orders as such. The military necessity of such steps are to be tested independently in the light of all the relevant circumstances. The *Milligan* case does say, however, that arrest and confinement are forms of action which cannot be taken as military necessities while courts are open. For such punitive measures it proposes a clear and forceful rule of thumb: the

[89] 323 U. S. 283, 297-8 (1944).

protection of the individual by normal trial does not under such circumstances interfere with the conduct of war.

Much was made in the Japanese American cases of the analogy of temporary preventive arrest or other restriction, approved for material witnesses, the protection of the public at fires, the detention of typhoid carriers, mentally ill persons, and so on[90]. The analogy has little or no application to the problems presented in these cases, except perhaps for the curfew or conceivably the abstract issue of exclusion, as distinguished from detention. The restrictions involved here were not temporary emergency measures, justified by the breakdown of more orderly facilities for protecting society against espionage and sabotage. As interferences with the liberty of the individual, they go well beyond the minimal forms of precautionary arrest without warrant which were permitted by the statute of 1863, discussed in the *Milligan* case; they are closely comparable to the forms of arbitrary action which were actually presented by the facts of the *Milligan* case, and strongly disapproved by the Court.

As for Japanese aliens, it is orthodox, though not very accurate [end p. 528], to say that as persons of enemy nationality they are subject only to the Government's will in time of war[91]. But the protection of the Fifth and Sixth Amendments extends generally to aliens[92]. Should arbitrary distinctions be permitted in our policy for enemy aliens, distinctions without reasonable basis? Is it permissible to intern all the Japanese who live on the West Coast, but to allow German and Italian aliens, and Japanese who live elsewhere, general freedom? Lower courts have said they would refuse to review executive action directed at the control of enemy aliens[93]. Such a view is far from necessary. The courts go to great lengths to assure

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[90] For temporary restrictions on access to localities see Warner, *The Model Sabotage Prevention Act*, "Harvard Law Review", LIV, 1941, pp. 602, 611-8; Pressman, Leider and Cammer, *Sabotage and National Defense*, in "Harvard Law Review", LIV, 1941, pp. 632, 641. The confinement of alcoholics, psychotic persons, and the like raises different problems. The issue in such cases is not whether persons can be confined in the social interest without trial, but without trial by jury. Ample individual investigation, hearings and other safeguards are required by way of "due" process of law. *Minnesota ex rel.* Pearson v. Probate Court, 309 U. S. 270 (1940); see Hall, *Drunkenness as a Criminal Offence*, in "Journal of Criminal Law and Criminology", XXXII, 1942, p. 297; Rostow, *The Commitment of Alcoholics to Medical Institutions*, in "Quarterly Journal of Studies on Alcohol", I, 1940, p. 372. Moreover, the limits to such interferences with individual freedom in the name of protecting society are jealously guarded. Skinner v. Oklahoma, 316 U. S. 535 (1942); see *Note*, in "Quarterly Journal of Studies on Alcohol", III, 1943, p. 668.

[91] See *Comment*, in "Yale Law Journal", LI, 1942, pp. 1316, 1317. *Cf.* 3 Hyde, *International Law Chiefly as Interpreted and Applied in the United States*, 2d ed. 1945, §§ 616-617; *De Lacey v. United States*, 249 Fed. 625 (C. C. A. 9th, 1918).

[92] See Alexander, *Rights of Aliens Under the Federal Constitution*, 1931, pp. 127-9; Gibson, *Aliens and the Law*, 1940, pp. 151-2, c. 7; Oppenheimer, *The Constitutional Rights of Aliens*, in "Bill of Rights Review", I, 1941, pp. 100, 106.

[93] *Ex parte* Graber, 247 Fed. 882 (N. D. Ala. 1918); *Ex parte* Gilroy, 257 Fed. 110 (S. D. N. Y. 1919). However, the premise of these cases is hardly compatible with that of *Sterling v. Constantin*, but rather depends on the proposition that the exercise of executive discretion in military and quasi-military matters is not reviewable, except for fraud, mistaken identity, etc. See also cases cited *supra* note 13. The statute and regulation involved in those cases applies to any persons, not only to citizens or friendly aliens.

reasonable protection to the property rights of enemy aliens, their privilege of pursuing litigation, and the like. It requires no extension of doctrine to propose that their control and custody in time of war be reasonably equal, and even-handed. So far as accepted notions of international law are concerned, the "single aim" of specialized enemy alien controls is to prevent enemy aliens from aiding the enemy[94]. The present pattern of discriminatory controls bears no relation to the end of safety.

V

These cases represent deep-seated and largely inarticulate responses to the problems they raise. In part they express the justices' reluctance to interfere in any way with the prosecution of the war. In part they stem from widely shared fears and uncertainties about the technical possibilities of new means of warfare. Such fears were strongly felt everywhere on the Allied side after the German victories of 1940 and 1941. It was common then, and still is common, to believe in a vague but positive way that the restoration of mobility in warfare, and the appearance of new weapons, have somehow made all older thought on the subject of war obsolete. We expected fifth-columns and paratroops to drop near San Francisco at any moment. In the panic of the time, it seemed almost rational to lock up Japanese Americans as potential enemy agents. [end p. 529]

But the airplane, the tank, and the rocket have not made it necessary to abandon the principles of Ex parte *Milligan.* Whatever the effect of such developments may be on Infantry Field Regulations and the Manual of Arms, they do not compel us to deny suspects the right of trial, to hold people for years in preventive custody, or to substitute military commissions for the civil courts. The need for democratic control of the management of war has not been reduced by advances in the technique of fighting. The accelerated rate of technical advance emphasizes anew the importance of civil control to guard against resistance to novelty, and the other occupational diseases of the higher staffs of all armies. And as warfare becomes more dangerous, and as it embraces more and more of the life of the community, the problem of assuring a sensible choice of war policies, and of preserving democratic social values under conditions of general mobilization, becomes steadily more urgent.

What lies behind Ex parte *Milligan, Mitchell v. Harmony,* and *Sterling v. Constantin* is the principle of responsibility. The war power is the power to wage war successfully, as Chief Justice Hughes once remarked. But it is the power to wage war, not a license to do unnecessary and dictatorial things in the name of the war power. The decision as to where the boundaries of military discretion lie in particular cases has to be made differently in different circumstances. Sometimes the issue will arise in law suits, more often in courts martial, Congressional investigations, reports of the Inspector General, or other law enforcement

[94] See Hyde, *loc. cit. supra* note 91. As for the status of enemy aliens in court, see *Ex Parte Kawato,* 317 U. S. 69 (1942); as to the property of enemy aliens see Symposium, *Enemy Property,* in "Law & Contemporary Problems", XI, 1945, pp. 1-201.

procedures. When a court confronts the problem of determining the permissible limit of military discretion, it must test the question by the same methods of judicial inquiry it uses in other cases. There is no special reason why witnesses, depositions, cross examination and other familiar techniques of investigation are less available in these cases than in others. As *Mitchell v. Harmony* and many other cases indicate, Mr. Justice Jackson is plainly wrong in asserting that judicial control of military discretion is impossible. Mr. Justice Jackson said:

> "The limitation under which courts always will labour in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order[95] [end p. 530].

The Supreme Court had a real alternative in the *Korematsu case*: it could have remanded for trial on the necessity of the orders. The courts have found no special difficulty in investigating such questions, and there is no reason why they should.

The first and greatest anomaly of the *Hirabayashi*, *Korematsu* and *Endo* cases is that they seem to abandon the requirement of a judicial inquiry into the factual justification for General DeWitt's decisions. Despite the careful language of the Chief Justice, these cases treat the decisions of military officials, unlike those of other government officers, as almost immune from ordinary rules of public responsibility. The judges were convinced by the *ipse dixit* of a general, not the factual record of a court proceeding. On this ground alone, the Japanese American cases should be most strenuously reconsidered.

An appropriate procedure for reviewing decisions taken in the name of the war power is an indispensable step towards assuring a sensible result. But the ultimate problem left by these cases is not one of procedure. In these cases the Supreme Court of the United States has upheld a decision to incarcerate 100,000 people for a term of several years. The reason for this action was the extraordinary proposition that all persons of Japanese ancestry are enemies, that the war is not directed at the Japanese state, but at the Japanese "race". General DeWitt's views on this subject are formally presented in his Final Recommendations and his Final Report to the War Department[96]. They are reiterated in his later testimony to a subcommittee of the Naval Affairs Committee. After testifying about soldier delinquency and other problems involving the welfare of his troops, General DeWitt was asked whether he had any suggestions he wanted to leave with the Congressmen. He responded:

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[95] Korematsu v. United States, 323 U. S. 214, 245 (1944). See procedure in *Ex parte* Duncan as described in Frank, *supra* note 84, at 649; General Wilbur has been a witness in the individual exclusion proceedings against one Ochikubo, now pending. See "Pacific Citizen", March 17th, 1945, p. 2, col. 1.

[96] See *supra*, pp. 520-1.

> "I haven't any except one – that is the development of a false sentiment on the part of certain individuals and some organizations to get the Japanese back on the west coast. I don't want any of them here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. There is a feeling developing, I think, in certain sections of the country that the Japanese should be allowed to return. I am opposing it with every proper means at my disposal".
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> Mr. Bates: "I was going to ask – would you base your determined stand on experience as a result of sabotage or racial history or what is it?". [end p. 531]
>
> General DeWitt: "I first of all base it on my responsibility. I have the mission of defending this coast and securing vital installations. The danger of the Japanese was, and is now – if they are permitted to come back – espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty".
>
> Mr. Bates: "You draw a distinction then between Japanese and Italians and Germans? We have a great number of Italians and Germans and we think they are fine citizens. There may be exceptions".
>
> General DeWitt: "You needn't worry about the Italians at all except in certain cases. Also, the same for the Germans except in individual cases. But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area – problems which I don't want to have to worry about"[97].

The Japanese exclusion program thus rests on five propositions of the utmost potential menace: (1) protective custody, extending over three or four years, is a permitted form of imprisonment in the United States; (2) political opinions, not criminal acts, may contain enough clear and present danger to justify such imprisonment; (3) men, women and children of a given ethnic group, both Americans and resident aliens, can be presumed to possess the kind of dangerous ideas which require their imprisonment; (4) in time of war or emergency the military, perhaps without even the concurrence of the legislature, can decide what political opinions require imprisonment, and which ethnic groups are infected with them; and (5) the decision of the military can be carried out without indictment, trial, examination, jury, the confrontation of witnesses, counsel for the defense, the privilege against self-incrimination, or any of the other safeguards of the Bill of Rights.

The idea of punishment only for individual behaviour is basic to all systems of civilized law. A great principle was never lost so casually. Mr. Justice Black's comment was weak to the point of impotence: "Hardships are a part of war, and war is an aggregation of hardships"[98]. "It was an answer in the spirit of cliché: "Don't you know there's a war going on?" It is hard to reconcile with the purposes of his dissent in *Williams v. North Carolina*, where he said that a conviction for

[97] *Hearings before Subcommittee of House Committee on Naval Affairs on H. R. 30*, 78th Cong., 1st Sess., 1943, pp. 739-40. The text of the testimony is given somewhat differently from current newspaper reports in McWilliams, *Prejudice*, 1944, p. 116.

[98] Korematsu v. United States, 323 U. S. 214, 219 (1944).

bigamy in North Carolina of two people who had been validly divorced and remarried in Nevada "makes of human liberty a very cheap thing – too cheap to be consistent with the principles of free government"[99] [end p. 532].

That the Supreme Court has upheld imprisonment on such a basis constitutes an expansion of military discretion beyond the limit of tolerance in democratic society. It ignores the rights of citizenship, and the safeguards of trial practice which have been the historical attributes of liberty. Beyond that, it is an injustice, and therefore, like the trials of Sacco, Vanzetti, and Dreyfus, a threat to society, and to all men. We believe that the German people bear a common political responsibility for outrages secretly committed by the Gestapo and the SS. What are we to think of our own part in a program which violates every democratic social value, yet has been approved by the Congress, the President and the Supreme Court?

Three forms of reparation are available, and should be pursued. The first is the inescapable obligation of the Federal Government to protect the civil rights of Japanese Americans against organized and unorganized hooliganism. If local law enforcement fails, prosecutions under the Civil Rights Act should be undertaken[100]. Secondly, generous financial indemnity should be sought, for the Japanese Americans have suffered and will suffer heavy property losses as a consequence of their evacuation. Finally, the basic issues should be presented to the Supreme Court again, in an effort to obtain a reversal of these war-time cases. In the history of the Supreme Court there have been important occasions when the Court itself corrected a decision occasioned by the excitement of a tense and patriotic moment. After the end of the Civil War, Ex parte *Vallandigham*[101] was followed by Ex parte *Milligan*. The *Gobitis* case has recently been overruled by *West Virginia v. Barnette*[102]. Similar public expiation in the case of the internment of Japanese Americans from the West Coast would be good for the Court, and for the country [end p. 533].

[99] Williams v. North Carolina, 65 Sup. Ct. 1092, 1116 (U. S. 1945).

[100] 18 U. S. C. §§ 51, 52 (Criminal Code §§ 19, 20) (1940); Hague v. CIO, 307 U. S. 496 (1939); United States v. Classic, 313 U. S. 299 (1941). *Cf.* Screws v. United States, 65 Sup. Ct. 1031 (U. S. 1945).

[101] 1 Wall. 243 (U. S. 1863).

[102] Minersville School District v. Gobitis, 310 U. S. 586 (1940); West Virginia State Board of Education v. Barnette, 319 U. S. 624 (1943).