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Hirabayashi and Korematsu: The Stone Court's Double-Edged Sword

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The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. . . . The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.

--O.W. Holmes Jr.

Law, as a fixed or immutable device for civilized social intercourse, is a myth. All too often the law has been construed in capital letters, and little has it been realized or remembered that the law has been written by people and interpreted by people. Rather than the rigidity and permanence of steel and stone, the law expounded by the Supreme Court has been more like clay. Case upon case, decision after decision, the law of the Court has been constantly re-molded and re-defined to meet the ever-changing needs of society, and to protect the personal freedoms of American citizens.

The touchstone for Supreme Court decisions as well as for Congressional legislation and Executive orders is the Constitution. It is from this document that the rules by which Americans are governed are formulated and sanctioned. Its provisions have withstood the test of time. It is not unlike the chameleon whose adaptive device of coloration insures it a remarkable capacity for survival. Like the chameleon, the Constitution has assumed various colors contingent to the various crises and issues which have played out their role in American history. The Constitution's "skin" of ambiguous words and interpretive phrases has remained constant or as substantial as the steel and stone of the Court building's foundation. Paradoxical as it may seem, the Constitu- has remained intact for so many years in this country--from an agrarian state to an industrial state, from a defenseless coastal federation to a continental military superpower--through its capacity to change. Moreover, it has changed and yet retained

broad principles of personal freedom which Americans call "civil liberties." These principles include, among others, the freedoms of speech, assembly and due process of the law which are considered "absolutes" yet subject to interpretation and therefore unique to every American. But its paradoxical nature does not stop here. The Constitution is also a strong social contract binding millions of citizens for collective security and prosperity yet guaranteeing each citizen freedom to fulfill their own sense of personal destiny. The effect of such sweeping and contradictory provisions is Conflict. Conflicting issues of Government versus personal freedom, majority rule versus minority rights, and even right versus wrong are the result of the Constitution's inherent capacity to mean something unique to every American.

This Conflict has been viewed by historian Herbert Wechsler as a type of "perpetual question." It is the Conflict of constitutional law in which lines are constantly drawn to mark the boundary between the field of individual liberty and rights, and governmental action for the good of society. Boundaries must be drawn to insure the integrity of both with minimal sacrifice to each other. Where the boundaries are drawn is a question without end, for it must be asked and restated again and again as the contingencies of time and place vary.

Supreme Court decisions act in part to answer this "perpetual question." To study Supreme Court decisions one must study the Court's decision-making process. Multiply the complexity of even one Supreme Court case in only one field of constitutional law by nine and one has a glimpse of the factors involved in a Supreme Court decision. Wechsler's "perpetual question" was il-

lustrated in the Supreme Court's role in Government during times of national emergency; and it was particularly illustrated in the Conflict between civil liberties and the war power of the Federal Government. Inclusive of this Conflict were the Japanese-American cases during World War II. Hirabayashi v. United States and Korematsu v. United States were the two key Japanese-American cases which forced the Supreme Court to re-examine the extent to which the Federal Government could impose its war power upon American citizens in its effort to successfully engage in, and conclude, the hostilities of war. However, Hirabayashi and Korematsu were unprecedented in the issues they brought before the Court, although Supreme Court history has accounted for many similar confrontations of citizens' rights abrogated by the Federal Government during wartime. What was unique about Hirabayashi and Korematsu, along with other less significant Japanese-American cases, was the fact that they . . .

> . . . brought to our law the first Federal measure of racial discrimination applicable to citizens; that is, the first instance in which the applicability of a deprivation or a restraint imposed by the Federal Government depended solely upon the citizen's race or ancestry. Furthermore . . . [they were] the first instances of Supreme Court approval of such discrimination, whether state or Federal.[1]

Equally unprecedented were the personal, legal, political and historical ramifications of the cases. The events subsequent to December 7, 1941, ushered in a turbulent confrontation between the legal and social situation of Japanese-Americans, and the political and constitutional issues which have always gripped

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[1]Nanette Dembitz, "Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions," Columbia Law Review, XLV (1945), 176.

this nation in times of war. Even the Court, still recovering from President Roosevelt's Court-packing threat of 1937, enveloped in litigation with the new and ambiguous field of civil liberties, found its ever-tenuous role in Government threatened even further in the hysteria-filled and crises-laden years of 1941-1945.

But all these over-lying ramifications boil down to one all-encompassing question: Why did the Supreme Court affirm the curfew restriction in Hirabayashi and the evacuation program in Korematsu?

To answer this sweeping question a number of considerations must be surveyed and analyzed. The Japanese-American situation on the West Coast, both in its historical context as an oppressed racial minority group, and as the recipient of military-imposed hardships during the early months of World War II, must be surveyed. Equally important, the extent of the war power of the Federal Government as defined by past Supreme Court decisions must be surveyed. Moreover, the mood and historical situation of the nation reeling under the shock of Pear Harbor and the resulting war with Japan, even the concept of total global warfare introduced and evidenced in these war years, must be taken into account.

All these considerations relate to the predicament the Supreme Court found itself in during the time it deliberated on Hirabayashi and Korematsu. However, these considerations contribute only a minor role in defining the complexity of these two cases and in determining why the Court reached these respective decisions. The relation of the Court with the other two branches of Government, and the decision-making processes of the Justices who were on the Court during the deliberation of these

two Japanese-American cases, are the most important considerations.

There is no fool-proof guide for delving conclusively into the metheds of judicial review and constitutional interpretation in the judicial decision-making process. However, judicial review can be broken down into judicial self-restraint and judicial activism, and constitutional interpretation can be broken down into strict construction and broad construction. Since Hirabayashi and Korematsu evoked constitutional issues, it must be known what method or methods, or what degrees or combinations, of judicial review and constitutional interpretation were employed in reaching these respective decisions. The Justices' applications of review and interpretation, as well as their views on the Court's role in Government especially dealing with civil liberties in wartime, must be known and shown in relation to these two Japanese-American cases. At best, however, such a study can only be an interpretive analysis--open to dispute--into that branch of Federal Government which has long enjoyed an envied awe and mystery.

I

The history of the Japanese on the West Coast was one of continuous, bitter oppression by the majority white population. With its beginnings in the latter half of the nineteenth century, Japanese immigrants bore the brunt of racial prejudice which was transferred to them from their oriental neighbors, the Chinese. Tagged as "tricky, unreliable and dishonest," they were from the start objects of suspicion and scorn.[1] Nor did the passing years

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[1] Jacobus tenBroek, Edward N. Barnhart and Floyd W. Matson, Prejudice, War and the Constitution (4th ed.; Berkeley and Los Angeles: University of California Press, 1970), pp. 23-24.

and generations contribute any alleviation of animosity between occidental and oriental; in fact, the history of Japanese-Americans can be surveyed as a series of events kindling the fire of passionate hatred between the races which exploded with the attack on Pearl Harbor.

The Russo-Japanese War (1904-1905) posed a symbolic threat of Japanese imperialism in the Far East and nurtured fears of a "yellow peril" in the West. As a result, minor evidences of racial harmony weakened between Japanese and whites in the United States. Labor and agricultural groups, patriotic societies and political organizations worked throughout the West Coast to pass discriminatory legislation against resident Japanese. The California Alien Land Law of 1913 which barred aliens already ineligible for citizenship from owning state land was specifically aimed towards orientals and particularly towards Japanese. The military expansion of Japan in the Far East during the 1920's furthered antagonism between America and Japan and played a significant role towards the passing of the Oriental Exclusion Act of 1924 which cut off Japanese immigration to the United States. Japan's agression into Manchuria in the 1930's did little to appease the entrenched suspicions and fears of West Coast whites towards Japan and all people of Japan descent; more than ever Japanese were considered a vile and dangerous race. Japan's attack on Pearl Harbor, made while their peace envoy was in Washington D.C., seemed to the people on the West Coast proof that Japanese-American aliens and citizens posed an all-too-realistic threat to their security.[1]

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[1] Ibid., pp. 62-67.

Resulting from that Day of Infamy were a series of defensive and restrictive measures enacted by the Federal Government and military.

President Roosevelt issued proclamations on December 7 and 8 declaring "all nationals and subjects of Japan, Germany and Italy who were not actually naturalized to be 'alien anemies.'"[1] The Department of Justice, long-prepared for such an eventuality, put into effect its program of enemy alien control.[2] Subsequently, Lieutenant General John L. DeWitt was placed in charge of the Western Defense Command (WDC). It was his responsibility to secure the West Coast against any and all forms of enemy hostilities.[3]

Although the Justice Department and the WDC acted concertedly with their respective activities, General DeWitt became dissatisfied with the Justice Department's administration of security measures and issued a series of "recommendations" from mid-December through mid-February in which he requested from the President an extended authority for the WDC.[4] His requests were summed-up in his "Final Recommendation" issued February 14, 1942, which asked Roosevelt for direction and authority to designate military areas in the "Western Theatre of Operations" for mass evacuation and internment of all aliens, Japanese and subversives, as a "temporary expedient" pending selective resettlement.[5]

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[1] Ibid., p. 100.

[2] Ibid., p. 101.

[3] Ibid., p. 100.

[4] Ibid., p. 102.

[5] Ibid., p. 110.

On February 19, Roosevelt complied by issuing Executive Order 9066 which . . .

> . . . authorized the creation of military areas from which any or all persons might be excluded and with respect to which the right of persons to enter, remain, or leave should be subject to such regulations as the military authorities might prescribe.[1]

And on March 18, he issued Executive Order 9102, establishing the War Relocation Authority to supervise the anticipated movement of Japanese inland from restricted areas already proclaimed by General DeWitt.[2]

Shortly thereafter General DeWitt, proclaiming military necessity, proposed a program of evacuation of persons of "suspected loyalty and enemy aliens and citizens of Japanese ancestry." He received full support from the War Department.[3] On March 21, Congress passed Public Law 503 which backed the Executive Orders by providing penalties for violations of military regulations and by granting enforcement of these penalties in the Federal Courts.[4]

Assured of Executive and Congressional support, General DeWitt immediately proclaimed military areas in Washington, Oregon, California and Arizona.[5] In a series of subsequent proclamations,

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[1]Robert E. Cushman, "West Coast Curfew Applied to Japanese American Citizens--U.S. Supreme Court Decision," American Political Science Review, XXXVIII (April, 1944), 266.

[2]tenBroek, Barnhart and Matson, Prejudice, War and the Constitution, p. 122.

[3]E.V. Rostow, "Our Worst Wartime Mistake," Harper's, September, 1945, p. 195.

[4]Cushman, American Political Science Review, XXXVIII (April, 1944), 266.

[5]tenBroek, Barnhart and Matson, Prejudice, War and the Constitution, p. 117.

he established on March 24 a curfew restriction, and on March 27 he established a compulsory evacuation program for all aliens and persons of Japanese ancestry.[1]

World War II brewed unprecedented hostility and fear. The United States military forces faced the awesome task of rebuilding its capacity to fight as Japanese victories in the Pacific appeared ubiquitous and unstoppable. Consequently, the winter of 1941-1942 was distressing and nerveracking on the West Coast. In mid-December, Elenor Roosevelt spoke for her husband to an anxious nation via radio broadcast:

> I have a boy at sea on a destroyer--for all I know he may be on his way to the Pacific. Many of you all over the country have boys in the service who will now be called upon to go into action; you have friends and families in what has become a danger zone. You cannot escape the clutch of fear at your heart and yet I hope that the certainty of what we have to meet will make you rise above those fears. . . . I feel as though I were standing upon a rock and that rock is the faith in my fellow citizens.[2]

In so many words, the First Lady echoed her husband's statement on "fear" but more importantly she appealed for, and received, a national unity and obedience under the Federal Government towards the momentous task at hand--to Win the War.

The new year saw the first of many attacks by the West Coast press and pressure groups against Japanese-Americans, demanding that "something be done" with these "inscrutable" descendents of the enemy.[3] Cries of evacuation, even internment of

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[1] Ibid., p. 121.

[2] Richard R. Lingerman, Don't You Know There's a War On? (New York: G.P. Putnam's Sons, 1970), p. 27.

[3] Audrey Girdner and Anne Loftis, The Great Betrayal: the Evacuation of the Japanese-Americans during World War II (Toronto: Collier-Macmillan Canada Ltd., 1969), p. 108.

Japanese-Americans echoed public opinion.[1]

The Federal House of Representatives' research in its National Defense Migration, popularly known as the Tolan Report, provided an exhaustive study on the West Coast Japanese-Americans in their relation to national security, and provided a valuable rationale supporting the necessity of curfew, evacuation and internment.[2] Arguments in favor of curfew, evacuation and internment from testimony and exhibits submitted to the Tolan Report were summed-up in a later work by Morton Grodzins:

> I. Sabotage, espionage, fifth column: The Japanese were actual or potential saboteurs, fifth-columnists, or espionage agents.
> II. Public morale: Widespread distrust of the Japanese population lowered public morale on the West Coast; correspondingly, evacuation would lift public morale.
> III. Humanitarianism: The Japanese (a) were themselves in danger from actual or potential vigilantees, and the evacuation (b) would be carried out with decency and without hardship.
> IV. Approval of Japanese militarism: The Japanese in America had earlier favored aggression in Asia; had been informed of Pearl Harbor in advance but had not revealed their secret; and in no single instance gave adverse information about dangerous members of their own race to the intelligence agencies.
> V. Migration and distribution: The Japanese had invaded America by fraudulent immigration, and they had located themselves in strategic areas.
> VI. Culture: Cultural practices (language schools, vernacular press, sending children to Japan for education) enhanced the racial barrier to assimilation and were further evidences of disloyalty.
> VII. Influence of Japanese government: The Japanese military government exerted great influence over Japanese in America, and even American citizens of Japanese ancestry were citizens of Japan.

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[1]Roger Daniels, Concentration Camps U.S.A.: Japanese Americans and World War II (New York: Hold, Rinehart and Winston Inc., 1972), p. 29.

[2]U.S., Congress, House, Select Committee Investigating National Defense Migration, National Defense Migration: Parts 29, 30, 31; 77th Congress, 2nd Session, 1942, H. Res. 113.

VIII. Race: Because of racial peculiarities, Japanese Americans were unassimilable, their thought-processes were inscrutable, and the loyal could not be distinguished from the disloyal. Their high birth rate was a mark of special danger.
IX. Economics: Economic practices made Japanese undesirable competition, and their productive contribution to the nation's economy was negligible. In any case, evacuees could be employed in productive work at points of concentration.
X. Appeal to Patriotism: Loyalty of the Japanese would be demonstrated by acceptence of evacuation; if they refused to co-operate, they had thereby showed their disloyalty.
XI. Necessity for drastic measures: Constitutional rights had to give way, in total war, to drastic measures.[1]

Attorney General of California, Earl Warren;[2] Attorney General of Washington, Smith Troy;[3] and the Governor of California, Culbert L. Olson;[4] along with many other prominent men in Government, business and the professions, gave testimony to their respective opinions in favor of restrictive measures against Japanese-Americans in the Tolan Report. Only U.S. Attorney General Francis Biddle, Federal Bureau of Investigation head J. Edgar Hoover, and a handful of other public officials were left to voice the small minority opinion against Japanese-American restrictions. These people believed that "the necessity for evacuation [was] based primarily upon public hysteria and political rather than factual data."[5]

General DeWitt, the WDC and the War Department concurred with the public's overwhelming favor towards Japanese-American

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[1]Morton Grodzins, Americans Betrayed (Chicago: The University of Chicago Press, 1949), pp. 400-401.

[2]U.S., Congress, House, Tolan Report: Part 29, pp. 10973-11023.

[3]Ibid: Part 30, pp. 11499-11512.

[4]Ibid: Part 31, pp. 11629-11642.

[5]Ralph de Toledano, J. Edgar Hoover (New York: Arlington House, 1973), pp. 182-183.

restrictions. General DeWitt, a cautious and conservative officer, was determined that there would be "no Pearl Harbors on the West Coast."[1] It was under the claim of military necessity to prevent sabotage and espionage on the West Coast, that he adopted a program of curfew and later voluntary, then forced evacuation of all people of Japanese ancestry.[2] During the early months of the war, General DeWitt said;

> . . . This is war. Death and destruction may come from the skies at any moment.[3]

It was also General DeWitt who said:

> . . .
> . . . In the war we are now engaged racial affinities are not severed by migration. The Japanese race is an enemy race.[4]

It was General DeWitt to whom the Federal Government granted large "discretionary" authority to defend the West Coast. And it was under his judgment that military necessity for defense was determined. The WDC acted solely under a military determination of military necessity through the deference of the Federal Government.[5]

Referring to their lesson at Pearl Harbor, the War Department, the Navy Department and the White House were thoroughly convinced that the first aggressive acts by the Japanese on the

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[1]Daniels, Concentration Camps U.S.A., p. 37.

[2]Dembitz, Columbia Law Review, XLV (1945) 201.

[3]Lingerman, Don't You Know?, p. 32.

[4]U.S. Army, Western Defense Command and Fourth Army, Final Report: Japanese Evacuation From the West Coast, 1942 (Washington: G.P.O., 1943), cited in tenBroek, Barnhart and Matson, Prejudice, War and the Constitution, p. 263.

[5]Galen M. Fisher, "Our Debt to the Japanese Evacuees," Christian Century, May 29, 1946, p. 683.

West Coast would be sabotage.[1] With this conclusion President Roosevelt and his advisors failed to insist on a selective evacuation which would reduce the hardships imposed on Japanese-Americans.[2]

Winning military victory was the main concern of Roosevelt. In formulating war policy, he all too frequently applied the narrow rule of thumb, "Will it help win the war?"[3] Unlike Woodrow Wilson, Roosevelt . . .

> . . . wanted to win the peace with the advice and consent of the Senate. He could read Congressional signs well and knew that cracking down on Japanese-Americans would be popular on the Hill and in the country generally. In addition, F.D.R. was himself convinced that Japanese, alien and citizen, were dangerous to American security.[4]

Although the nation was committed to a two-front war, and expediency and trust demanded that it hold the military in good faith for its actions, Roosevelt was not entirely given towards full deference to military estimations of military situations. However, in his course of "double-checking" Roosevelt received a report from Curtis B. Munson, a staff member under the Secretary of War, Henry L. Stimson, which spoke favorably of Japanese-American loyalty but stressed the precarious situation of the West Coast against sabotage and espionage. Munson's report, submitted early in the new year, noted how easily dams, bridges, harbors, water lines and railroads were subject to immediate destruction. Munson's

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[1]de Toledano, Hoover, p. 174.

[2]Fisher, Christian Century, May 29, 1946, p. 683.

[3]James MacGregor Burns, Roosevelt: The Lion and the Fox (New York: Harcourt, Brace and World, Inc., 1956), pp. 462-463.

[4]Daniels, Concentration Camps U.S.A., p. 72.

report, did not refute the notion that an indeterminable number of Japanese-Americans could and likely would carry out such potential measures of destruction on a moment's notice.[1] President Roosevelt, as well as all the departments of the Government, threw full support behind the War Relocation Authority's program of Japanese evacuation.[2] Little did they entertain the notion of adopting Britain's security program of screening subversives on an individual basis.[3] The Government had already established hearing boards to screen enemy aliens. All these hearing boards needed was the authority to pass upon Japanese-Americans as well.[4]

II

The Constitution of the United States authorizes the Government to wage war as well as to protect freedom. It invests the broad "war power of the United States in the hands of the President and Congress. This war power has unlimited scope. Its definition and limitation is entirely contingent upon the proximity and the immediate threat of the forces it is waged against.

In particular, the President as "Commander in Chief of the Army and Navy of the United States" has enjoyed in the field of national defense large discretionary authority; and it has been this exercise of military discretion which the courts have

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[1] Ibid., p. 28.

[2] Galen M. Fisher, "What Race Baiting Costs America," Christian Century, September 8, 1943, p. 1010.

[3] Eugene V. Rostow, "The Japanese American Cases--A Disaster," Yale Law Journal, LIV (1945), 495.

[4] "Justice for the Evacuees; Internment of the Japanese," Christian Century, June 10, 1942, pp. 751-752.

denied themselves any significant right to control.[1] Broadly speaking, the history of the Supreme Court has shown its refusal to speak about the war power in any but the "most guarded terms."[2] The Court has been eager to recognize conjoining Congressional approval of Presidential actions in order to dispel any overtones of Presidential unconstitutionality.[3] Equally significant, the Court has been quite "realistic about the constitutional ability of this nation, led by its President, to wage war."[4] The Court has realized that the urgencies and exigencies of total war require immediate and concerted action, with the success of that action taken by the war power as its primary goal. When the very existence of the nation is in doubt, the war power must meet the responsibility with the accompaning authority for preserving it. In total war "the Court necessarily loses some part of its needed freedom of decision and becomes assimilated, like the rest of society, to the mechanisms of national defense."[5]

When minority and individual rights have been called into question in relation to the successful execution of war, the Court has developed its relevant decisions cautiously, case by case.[6] Policy developed through the Court's decisions has

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[1]Clinton Rossiter, The Supreme Court and the Commander in Chief (New York: Da Capo Press, 1970), p. 2.

[2]Ibid., p. 4.

[3]Ibid., p. 6.

[4]Ibid., p. 7.

[5]Edward S. Corwin, Total War and the Constitution (New York: Alfred A. Knopf, 1947), p. 177.

[6]Louis Lusky, "Minority Rights and the Public Interest," Yale Law Journal, LII (1942), 1.

been at best piecemeal, as it has been entirely dependent upon the cases brought before its jurisdiction; the Court cannot develop a case on its own.[1]

As an aggregation of hardships, war has evoked varying degrees of restraint, restriction, and sacrifice. Through the years, the Supreme Court has had its share of these hardships.

Martin v. Mott (1827) and Luther v. Borden (1849) were two key cases in early Supreme Court history which established guidelines of judicial review towards the president's power of martial rule.[2] In Martin v. Mott Justice Story delivered the Court's decision granting the President full authority to determine military "exigencies" with the conjoining power to act upon his determinations. Story recognized the practical need for the President's power of martial rule in actual or imminent dangers of invasion,[3] and it was Chief Justice Taney, in Luther v. Borden, who spoke for the Court's extension of this power of martial rule. Taney said the Court could not sit in review of the President's emergency decisions, lest it overstep its own realm of power into that of the President's. Taney also stressed the importance of respect and trust in the Presidency, especially during times of emergency.[4]

This was the principle established for judicial review of

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[1]Harold J. Spaeth, An Introduction to Supreme Court Decision Making (2nd ed. rev.; San Francisco: Chandler Publishing Co., 1972), pp. 16-17.

[2]12 Wheaton 19; 7 Howard 1; cited in Rossiter, The Supreme Court, pp. 14-17.

[3]Ibid., pp. 14-15.

[4]Ibid., pp. 15-16.

Presidential military action in these two cases:

> When the President decides to use military force to preserve the peace, neither the decision itself nor the methods employed are open to question in the courts of the United States. In such instances, his discretion must control, and the courts cannot intervene and grant relief.[1]

Ex parte Milligan (1866) was a Civil War case which questioned the trial of civilians by military commission. Chief Justice Chase spoke for the Court with an opinion denying military commissions jurisdiction over civilians, provided the civilian courts were open and functioning.[2] However Milligan, as a landmark decision affirming the superiority of civil authority over military authority, has had precious little effect in restraining unusual Congressional or Presidential action:

> . . . No justice has ever altered his opinion in a case of liberty against authority because counsel for liberty has recited Ex parte Milligan. Judges, too, are practical men, and when they decide for liberty . . . they do it for better reasons than the fact that once upon a time a Supreme Court scolded a [dead] President . . . especially since that same Court with but one change in personnel had failed to scold him earlier [when he was alive] and when it might have done some good.[3]

The opinion and dictum of Milligan had little effect in World War II. It was contended by many prominent legal minds that Milligan's doctrine did not apply to the conditions of modern war. It was widely and prudently held that areas far removed from any "theatre of operations" were very much subject to enemy hostilities, especially by aerial attacks and fifth-collumn ac-

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[1] Ibid., pp. 15-16.

[2] 4 Wallace 2; cited in John Garraty (ed.), Quarrels That Have Shaped the Constitution (New York: Harper and Row, Publishers, 1966), p. 106.

[3] Rossiter, The Supreme Court, p. 34.

tivities.[1]

Thirty years passed after the Milligan decision before the Court had a chance to voice another opinion concerning the war power, particularly that of the President's. In In re Debs (1895) a unanimous Court sanctioned the exertion of Presidential authority against the wishes of a state governor to call out troops "in defense of the nation's interests, property and powers."[2]

Although World War I passed without presenting the Court an opportunity to deliberate on such matters as habeas corpus, military commissions, martial law and the use of troops, it did review two cases which challenged the constitutionality of the Espionage Act of 1917 and the Sedition Law amendment of 1918.[3] In Schenk v. United States (1919) and Abrams v. United States (1919), the Court upheld the power of Congress to pass these laws and the Department of Justice's power to enforce them.[4] Also, a series of minor cases did develop out of World War I to formulate the theory of "constitutional relativity."[5] As this theory dealt with conflicts between public interest and individual freedom, it was insisted by Justices Holmes and Brandeis that issues be restricted to a test of "clear-and-present-danger" for legitimizing Government actions.[6] Constitutional guarantees of freedom became

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[1] Charles Fairman, "The Law of Martial Rule and National Emergency," Harvard Law Review, LV (1942), 1264-1265.

[2] 158 U.S. 554; cited in Rossiter, The Supreme Court, p. 40.

[3] 249 U.S. 47; 249 U.S. 211; cited in Ibid., pp. 41-42.

[4] Ibid., p. 42.

[5] Corwin, Total War, p. 131.

[6] Lusky, Yale Law Journal, LII (1942) 8.

contingent upon the exigencies of emergencies. Civil liberties were not viewed by the law as absolutes and were subject to limitation or abrogation according to demands of public and military necessities.[1]

In the 1930's the Court again found opportunity to deliberate on, and extend, the war power of the United States. Sterling v. Constantin (1932) dealt with judicial scrutiny of a state governor's decisions in regard to martial law.[2] Chief Justice Hughes spoke for the Court, declaring that . . .

> " . . . such measures, conceived in good faith, in the face of emergency and directly related to the ending or prevention of the evil, fall within the discretion of the executive government." The nature of the power "necessarily implies that there is a permitted range of honest judgment as to the measures taken . . . " A court which takes a fair view of the relation between judicial power and the effective discharge of other governmental functions will not allow itself to be controlled by the dictum of Milligan.[3]

Hughes' most popular statement on the war power came from his Home Building and Loan Association v. Blaisdell (1934) opinion, stating that . . .

> . . . [it] is a power to wage war successfully, and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove constitutional limitations safeguarding essential liberties.[4]

It is significant to note that Hughes' statement has often been misquoted by deleting the second sentence.

In consequence of the World War I decisions, the Supreme

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[1]Grodzins, Americans Betrayed, p. 352.

[2]Rossiter, The Supreme Court, p. 17.

[3]Fairman, Harvard Law Review, LV (1942) 1289.

[4]290 U.S. 426; cited in Ibid., p. 1287.

Court in the 1930's went out of its way to extend its approval of the war power as an inherent power. Such an approval dismissed federalism as a system of checks and balances--that is, the Court denied itself extended review pursuant to the increased exercise of the war power by the other two branches of Government. In effect, the Court's deference helped the Executive and Congress further develop the "constitutional law of war."[1]

The Supreme Court under the Chief Justiceship of Harlan Fiske Stone (1941-1946) faced the difficult task of establishing an identity, or role for itself during a period of world hostility and crises. Still recovering from President Roosevelt's Court-packing threat, commonly known as the resulting "Court revolution of 1937;" the Court found its method of judicial review coerced into the ambiguous realm of judicial self-restraint. Roosevelt was blessed with an unprecedented opportunity for judicial appointments. He needed a Court which would give constitutional sanction to his New Deal administration and later, to his war power actions. By the late 1930's the Court had adopted this method of self-restraint as its new, progressive role, thereby shying away from provocative activism and "great dissents." However, this was not to suffuse the Stone Court in retrogression or surrender; the relatively new and ambiguous field of jurisprudence, otherwise known as civil liberties, made its presence known in the 1930's as a separate branch of constitutional law and was handled by the Court with an air of caution and extreme care in its development.

The Stone Court had not yet, in its early years, achieved

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[1]Corwin, Total War, pp. 76-77.

a stable majority understanding, much less a general agreement, about "either the propriety or the expediency of judicial supervision in the civil liberties field."[1] These Justices were "an unsettling and unsettled lot." In just six terms the Stone Court delivered fifteen decisions reversing precedents. There had been only sixty such reversals in the entire previous history of the Court.[2]

In dealing with the issue of racial discrimination, the Stone Court was more receptive towards individual claims than in any other time in United States history involving this issue under judicial review.[3] However, the Court was less decisive and libertarian about criminal procedures, especially when state procedures were challenged and in cases involving "federal arrest and trial."[4] In other issues questioning unreasonable or illegal search and seizure, the Court was again hesitant and reluctant to speak out in favor of individual claims.[5] It became apparent that a "public interest" doctrine was gradually being applied in issues between the individual and state.[6] But it is worth noting that the Court .

> . . . found for the individual in several cases bearing more directly on the war effort. Convictions under the Espionage

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[1]Robert G. McCloskey, The Modern Supreme Court (Cambridge: Harvard University Press, 1972), p. 51.

[2]Ibid., p. 53.

[3]Ibid., p. 34.

[4]Ibid.,

[5]Ibid., p. 40.

[6]Lusky, Yale Law Journal, LII (1942) 39.

> Act and the Selective Service Act were overturned by narrow readings of the statutes; a similarly strict standard was applied to denaturalization proceedings and to a prosecution for treason.[1]
>
> But . . . few if any of the decisions . . . imposed serious limits on the government's actual power to harry individuals in the name of patriotism or national defense.[2]

In dealing directly with the war power of the United States, the Stone Court discovered judicial self-restraint as a handy tool for refusing to intervene in frequently resulting political questions and highly controversial constitutional issues which provoked the practical and realistic limitations of judicial power:

> . . . While it considers constitutional liberties, the Court cannot ignore other constitutional mandates. The government's constitutional power to wage war and the extensive nature of the war power must be balanced against the individual's constitutional rights. The magnitude of civil liberties deprivation must be judged in terms of the threat to common welfare.[3]
>
> Under these circumstances the Court may work with a presumption of constitutionality. The clear and present danger test becomes of secondary importance or disappears entirely. The Court simply asks if the administrative or legislative arm of the government can show its action to be reasonably related to lawful ends. If such a reasonable relationship can be shown, the Court, using this frame of judicial analysis, will declare the civil liberties violation a constitutional one.[4]

By the time the Japanese-American cases were reviewed the Stone Court consisted of Justices Roberts, Frankfurter, Douglas, Black, Murphy, Reed, Rutledge, Jackson, and Chief Justice Stone. All but Roberts and Stone were appointed by President Roosevelt. Justice Roberts and Chief Justice Stone sat on the Court during the entire Roosevelt administration. Stone was appointed Chief Justice

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[1] 322 U.S. 680 (1944); 320 U.S. (1943); cited in McCloskey, The Modern Supreme Court, pp. 43-44.

[2] Ibid.

[3] Grodzins, Americans Betrayed, p. 352.

[4] Ibid.

by Roosevelt in 1941.

III

Gordon K. Hirabayashi was a Japanese-American citizen born in the United states of Japanese immigrant parents. He was a member of the Quaker faith and attended the University of Washington.[1] On May 9, 1942, he purposely strayed from his residence after 8:00 p.m., and on May 11 and 12, he knowingly failed to report to register for evacuation from a designated military area.[2] Hirabayashi was subsequently convicted for his actions in the district court of violating Executive Order 9066, Public Law 503, and Public Proclamation No. 3 of the WDC.[3] Referring to the previous designation of military areas by Public Proclamations Nos. 1 and 2, General DeWitt's Public Proclamation No. 3 established curfew hours for all alien Japanese, alien Germans, alien Italians, and all persons of Japanese ancestry within Military Area No. 1 (which included Hirabayashi's residence in Seattle, Washington) to be within their place of residence between the hours of 8:00 p.m. and 6:00 a.m.[4] Public Proclamation No. 3 was vested of authority by Executive Order 9066 and subjected violators to criminal penalties provided by the Act of Congress of March 21, 1942 (Public Law 503).[5] Pursuant to the provisions of the WDC's Public Proclamation No. 1, General DeWitt issued a series of Civilian Exclusion Orders beginning on March 23, 1942. The order applic-

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[1] tenBroek, Barnhart and Matson, Prejudice, War and the Constitution, p. 234.

[2] Hirabayashi v. United States, 320 U.S. 81 at 84.

[3] Ibid., p. 85.

[4] Ibid.

[5] Ibid., p. 88.

cable to Hirabayashi was Civilian Exclusion Order No. 57 of May 10, 1942. It directed all persons of Japanese ancestry to be excluded from portions of Military Area No. 1 in Seattle and required certain people affected by the order to report on May 11 or 12 to a designated Civil Control Station in Seattle.[1] Hirabayashi was convicted, tried by jury, and found guilty of violating both the curfew order in Public Proclamation No. 3 and the Civilian Exclusion Order No. 57 of May 10, 1942, and was sentenced to imprisonment for a term of three months on each count, the sentences to run concurrently.[2] Hirabayashi appealed and the Court of Appeals for the Ninth Circuit certified questions of law to the United States Supreme Court for instructions upon the decision of the case.[3]

The Supreme Court assumed full jurisdiction and heard the arguments of Hirabayashi v. United States in May and delivered its decision on June 21, 1943. The questions recognized for their decision were:

> . . . whether the particular restriction violated, namely that all persons of Japanese ancestry residing in such an area be within their place of residence daily between the hours of 8:00 p.m. and 6:00 a.m., was adopted by the military commander in the exercise of an unconstitutional delegation by Congress of its legislative power, and whether the restriction unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment.[4]

It followed that:

> . . . [S]ince the sentences of three months each imposed by the district court on the two counts were ordered to run concurrently, it will be unnecessary to consider questions raised

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[1] Ibid., pp. 88-89.

[2] Ibid., p. 84.

[3] Ibid., pp. 84-85.

[4] Ibid., p. 83.

with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained.[1]

Hirabayashi did not deny that he knowingly failed to obey the curfew order, or that the order was authorized by Executive Order 9066, or that Public Law 503 provided criminal punishment for disobeying the curfew order. He only contended that "Congress unconstitutionally delegated its legislative power to the military by authorizing him (General DeWitt) to impose the challenged regulation (curfew), and that, even if the regulation were in other respects lawfully authorized, the Fifth Amendment prohibits the discrimination made between citizens of Japanese descent and those of other ancestry."[2] He also insisted that the military should have imposed a curfew upon all citizens within the Military Area, or should have imposed it on none. Without this alternative military measure, Hirabayashi contended, needless hardship was wrongfully inflicted upon a select few.[3]

It was Solicitor General Charles Fahy's responsibility, on behalf of the Government, to defend the WDC's curfew measures. He said the curfew measure was constitutional by its authorization from Executive Order 9066 and Public Law 503, and argued in favor of its reasonableness and efficacy determined by General DeWitt. Fahy reiterated General DeWitt's belief that the curfew order was a reasonable and effective measure for the prevention of sabotage and espionage on the West Coast at the time it was ordered.

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[1] Ibid., p. 85.

[2] Ibid., p. 89.

[3] Ibid., p. 95.

The Court affirmed Hirabayashi's conviction of violating the curfew order. Chief Justice Stone delivered the unanimous decision. Justices Douglas, Murphy and Rutledge submitted concurring opinions.

The Court held that Executive Order 9066, ratified and confirmed by Congress' Public Law 503, "authorized and implemented" General DeWitt's curfew order.[1]

To affirm the constitutionality of the curfew order, Stone indicated that the President and Congress concertedly authorized General DeWitt to defend the West Coast. Executive Order 9066 and Public Law 503 were "each an exercise of the power to wage war conferred on the Congress and on the President, as Commander in Chief of the armed forces, by Articles I and II of the Constitution."[2] Stone took pains to stress Chief Justice Hughes' statement, that the war power of the Federal Government was "'the power to wage war successfully.'"[3] This war power, Stone said, extended "to every matter and activity so related to war as substantially to affect its conduct and progress."[4] In order to combat the imminent or present dangers of war, the Executive and Congress must by given a wide scope of judgment and discretion; and "it [was] not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs."[5] Stone also emphasized the historical events which surrounded the authorization, pro-

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[1] Ibid., p. 91.

[2] Ibid., p. 92.

[3] 42 A.B.A. Rep. 232, 238; cited in Ibid., p. 93.

[4] Ibid.

[5] Ibid.

mulgation and implementation of the curfew order; and he referred directly to the devastation at Pearl Harbor, the early Japanese victories in the Pacific, and particularly to the military "findings" that warranted the need to meet threats of espionage and sabotage suspected of persons of Japanese ancestry which would adversely affect the nation's war effort.[1] In view of the "findings" known at the time the President, Congress, and the military based their respective decisions, Stone said they were able to "reasonably" conclude that their actions were proper and just.[2]

Stone also claimed that the curfew order did not unconstitutionally discriminate against citizens of Japanese ancestry. The intention of the President and Congress was only to prevent sabotage and espionage.[3] Although he stressed the fact that racism was "odious to a free people," Stone indicated that the Fifth Amendment contained no equal protection clause and that it only restrained discriminatory legislation that denied due process of the laws.[4] The curfew order was within the boundaries of the war power at the time it was applied, and it was not within the purview of the Court to scrutinize all the relevant information which contributed to General DeWitt's "findings," even if racial distinctions were considered.[5] The appropriate exercise of the war power was not considered invalid because it restricted the liberty of citizens.[6]

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[1] Ibid., pp. 93-98.

[2] Ibid., p. 98.

[3] Ibid., p. 101.

[4] Ibid., p. 100.

[5] Ibid., p. 102.

[6] Ibid., p 99.

Stone also said that General DeWitt's curfew order was based on a constitutional delegation of legislative power. The curfew order was founded upon a rational basis of information and was a reasonable expedient for maintaining the national defense, thus the curfew order was in conformance with the war power delegated to the WDC.[1]

The reasoning of the Court was simple and direct. The main issue was the scope of the war power of the Federal Government:

> In the bulk of the previous cases involving war measures, it had been sufficient for [the Court] to refer in general terms to the great breadth of the war power and in the wide discretion allowed in its exercise, whether because: (1) the major question had concerned the interpretation or effect of the measure rather than its basic validity; or (2) because the major question had concerned the effect of various specific constitutional limitations or guarantees; or (3) merely because the Court regarded the fact that the measure was comprehended by the war power as too clear for debate.[2]

By merely passing on the validity of the exercised war power, and not on its "rightness" or "wrongness" nor its "wisdom" or "unwisdom," the Court avoided constitutional issues where ever possible and rendered its opinion specifically to the issues explicitly presented in the case.[3] The Court refused to pass upon the first count of Hirabayashi's failure to comply with the Civilian Exclusion Order, and readily acknowledged the cooperative actions of the President and Congress as the "war power of the United States" in order to avoid expanding upon the sticky matter of the curfew's constitutionality. The curfew order was upheld because it had

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[1] Ibid., p. 102.

[2] Dembitz, Columbia Law Review, XLV (1945) 183.

[3] Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law (New York: Viking, 1956), p. 679.

"some relation" to winning the war and because the Government "did not have ground for believing" the curfew unnecessary.[1] Nowhere did the Court apply a close scrutiny test upon the reasonableness of conclusions and actions rendered by the President, Congress or military, although the Court did perfunctorily review the "findings" of General DeWitt.

The Court accepted two propositions as "facts" which were held to afford . . .

> . . . a sufficiently "rational basis" for the [military's] decision [for curfew]. (a) First was 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." (b) The second was that on the West Coast in 1942 there was no time to isolate and examine the suspected Japanese on an individual basis.[2]

The Court reviewed Hirabayashi with judicial self-restraint. Stone and the other Justices did not find room to speak out against the discriminatory affects of the curfew order, nor did they scrutinize the rationale and reasonableness of the decisions and actions of the President, Congress and military; nor did they propose any limitations upon the war power. It was apparrent that the Court accepted rather than approved the Hirabayashi conviction, although this attitude was of no benefit to Gordon Hirabayashi.

Judicial self-restraint was reinforced with a strict construction approach. The Court applied a literal adherence to the constitutional provisions concerning the war power of the United States; yet the Court read the Fifth Amendment as a inadequate protector of Hirabayashi's liberty. However, Stone did state the

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[1]Grodzins, Americans Betrayed, p. 353.

[2]Rostow, Harper's, CXCI (September, 1945), 198.

need for the Constitution's adaptive capacity during times of war. He quoted Chief Justice John Marshall's opinion in McCulloch v. Maryland: "We must never forget, that it is a constitution we are expounding, a constitution intended to endure for ages to come, to be adapted to the various crises of human affairs."[1]

The Stone Court did considerable constitutional weaving to arrive at a predetermined end.

Hirabayashi was the first of many Japanese-American cases which involved, whether admittedly or not, issues concerning the extent of minority and civilian rights during wartime. Hirabayashi was a war case developed during a time of ever-increasing hostilities in the Pacific. The Stone Court, not wishing to obstruct the prosecution of the war, yet sensitive towards individual and minority rights, were confronted with the "poignant dilemma" faced by President Lincoln during the Civil War: "Must a government of necessity be too strong for the liberties of its people, or too weak to maintain its own existence?"[2]

Surely the Court shared the widespread fears and uncertainties about the new technological means of modern warfare. The German victories across central Europe in 1940 and 1941 plus the swiftness which Japan moved across the Pacific proved the awesome dangers of aerial bombing and attack, land and sea mobility, and sophisticated fifth-collumn activity.[3] The Court was forced to re-estimate their already diffident stand on the war power of the

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[1]4 Wheaton 316; cited in Hirabayashi, pp. 100-101.

[2]Barnette case, p. 631; cited in Mason, Stone, p. 681.

[3]Rostow, Yale Law Journal, LIV (1945) 529.

United States. It needed to soberly reflect upon the extent to which the nation's defense could function successfully. Never before was the demand for public safety greater than in early 1942.

Surely the Court questioned the possible affects of reversing the Hirabayashi conviction:

> 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, the status and prestige of the Supreme Court as a political institution?[1]

The careful language and deferential reasoning of the Hirabayashi decision illustrated many unresolved doubts about the limits and propriety of the Court's power as the third branch of Government engaged in war. Hirabayashi was but a hesitant step towards "the formulation of a constitutional doctrine adequate to the needs of American society in its present state of siege."[2]

Chief Justice Harlan Fiske Stone's guiding rule of judicial review was judicial self-restraint.[3] His judicial technique stressed complexity; he dealt with cases in the light of precedent, facts, legislative intent--according to his own reason and values.[4] Stone appeared to his colleagues as a "pillar of law." He stood immutably fixed in his conception of the Court's role in Government and on the function of the law. On the role of the Court he said:

> The only check upon our own exercise of power is our own sense of self-restraint. . . . It is rooted in a respect for the dignity and high purpose of the other branches of

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[1] Ibid., p. 502.

[2] Eugene Rostow, "The Democratic Character of Judicial Review," Harvard Law Review, LXVI (1952) 210.

[3] Alpheus Thomas Mason, The Supreme Court From Taft to Warren (Baton Rouge: Louisiana State University Press, 1968), p. 167.

[4] Ibid., p. 169.

> government, and a sympathetic understanding of the problems they must try to resolve . . . .[1]
>
> Courts are not the only agency of government that must be presumed to have the capacity to govern.[2]

Stone was well aware that legislation may be constitutional even though it was bad legislation.[3] He believed that the law in a free society needed continuity " . . . not of rules but of aims and ideals which will enable government in all the various crises of human affairs to continue to function and to perform its appointed task within the bounds of reasonableness."[4]

It was Stone's task to harmonize and unify one of the most divergent collections of Justices in Supreme Court history.[5] Stone found it to his best interest, and to the best interest of the Court as a whole, to decide Hirabayashi upon the narrowest possible grounds. It was generally agreed that they deal with only Hirabayashi's violation of the curfew order. Concentrating on the curfew order's racial overtones, Stone was "jarred" by the fact that citizens were subjected to it, but finally reasoned that, given the circumstances of the early months of the war, the order was not unreasonable.[6]

Underlying Stone's judicial self-restraint was his belief in the need for increased governmental power in the twentieth century, as exemplified in his general support of Roosevelt's

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[1]Rostow, Harvard Law Review, LVI (1952) 213.

[2]Mason, Taft to Warren, p. 167.

[3]Mason, Stone, p. 6.

[4]Ibid.

[5]Mason, Taft to Warren, p. 167.

[6]Sidney Fine, "Mr. Justice Murphy and the Hirabayashi Case," Pacific Historical Review, May, 1964, p. 201.

New Deal administration.[1]

Justice Felix Frankfurter was one of the leading spokesmen of judicial self-restraint in modern Supreme Court history.[2] He maintained a very realistic view on the power of the the Court: " . . . The Court's authority--possessed neither of the purse nor the sword--ultimately rests on sustained public confidence in its moral sanction."[3]

Frankfurter viewed the war power as an integral part of the Constitution, and its effective exercise was not to be hampered by the Court if it adhered to "due process of the law."[4] He believed that Hirabayashi's conviction and his resulting trial adhered to "due process of the law." He agreed with Chief Justice Hughes' remark that; "while emergency does not create power, emergency may furnish the occasion for the exercise of power."[5] The war power, he believed, came under judicial scrutiny for only its legal, not political nor social, ramifications.[6] War power measures were to be held constitutional if they were not unreasonable and if their military judgments were not unfounded. It would follow that Frankfurter would uphold such measures if the proper authorities had some ground for thinking the war measures necessary.[7]

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[1]Mason, Taft to Warren, p. 135.

[2]Spaeth, Supreme Court Decision Making, p. 57.

[3]McCloskey, The Modern Supreme Court, p. 54.

[4]Helen Thomas, Felix Frankfurter, Scholar on the Bench (Baltimore: The Johns Hopkins Press, 1960), p. 249.

[5]290 U.S. 398; cited in Ibid.

[6]Ibid.

[7]Milton Konvitz, The Alien and the Asiatic in American Law (Ithaca: Cornell University Press, 1946), p. 260.

He believed that if the Executive and legislative branches were to utilize successfully their war power, the Constitution would have to exist as a fighting one as well as a peaceful one.[1]

Justice Hugo Black followed the progressive trend of judicial self-restraint propounded by Stone and Frankfurter. His adherence to judicial self-restraint was deepened by his belief in "laissez faire" for legislators.[2] It was Black who declared, during the Court's conference on Hirabayashi on May 16, 1943, "I want it done on the narrowest possible points."[3] It would seem that Black's sentiments in Hirabayashi followed that of Stone's. However, Black's opinions on these two Japanese-American cases were expressed in his majority opinion in Korematsu v. United States.

Justice Robert Jackson followed the theory of judicial self-restraint but shared, with Justice Frankfurter, a conjoining realization of the Court's practical limits of power.[4] He also agreed with Stone that judicial activism often led to a judicial usurpation of democratic government: "[It] is my belief that the attitude of a society and its organized political forces, rather than its legal machinery, is the controlling force in the character of free institutions . . . ."[5]

Jackson had a realistic, although almost deferential, view

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[1]Thomas, Frankfurter, p. 249.

[2]Vincent M. Barnett, Jr., "Constitutional Interpretation and Judicial Self-Restraint," Michigan Law Review, IXL (1940), 236.

[3]Fine, Pacific Historical Review, May, 1964, p. 201.

[4]Alan F. Westin (ed.), The Supreme Court: Views from the Inside (New York: W.W. Norton and Co., Inc., 1961), p. 158.

[5]Ibid., p. 170.

of the extent to which the war power could spread in times of war. He said, "total war means total subjection to the state" and "military socialization is accepted a patriotic, and dissenters are coerced into obedience."[1] However, he had fears of the war power extending beyond judicial reach, and that the exertion of the war power as well as super-patriotism would not be easily subdued when peace was restored to the nation.[2] The preservation of civil liberties, especially in times of war, depended upon "the support of an enlightened and vigorous public opinion." Jackson believed America during World War II did not have this degree of public opinion.[3] It would seem that Justice Jackson upheld the Hirabayashi conviction because it involved a minor restraint and was decided on narrow grounds.

Justice Stanley Reed was a moderate; he was a swing-winger between judicial activism and self-restraint, although his stand in Hirabayashi and Korematsu indicated a deference to the war power. Apparently, his only significant contribution to Hirabayashi was his remark to Justice Murphy:

> "Military protection only needs reasonable grounds, which this record has. You cannot wait for an invasion to see if [Japanese-American] loyalty triumphs."[4]

After Stone completed the Hirabayashi opinion, Reed discreetly commented to the Chief Justice: "You have stated a very difficult situation in a way that will preserve rights in different cases

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[1] Ibid., p. 157.

[2] Ibid., pp. 156-157.

[3] Ibid., p. 170.

[4] Comment on Draft of Murphy Dissent; cited in Fine, Pacific Historical Review, May, 1964, p. 206.

and at the same time enable the military forces to function."[1]

Justice Owen Roberts, another moderate, was notorious for his "slot machine" theory or "plain meaning" approach to statutory construction.[2] There was nothing to indicate that he did not apply a similar literal interpretation to Hirabayashi's constisutional issues as well. As indicated by his silent approval of the Court's opinion, he believed the military's authorization of the curfew order was constitutional. However, Roberts came to the judicial fore in his Korematsu dissent.

Justice William O. Douglas concurred in Hirabayashi, but he was disturbed by the case's implication of racial guilt in which all Japanese-Americans were considered potential subversives. He thought it important to reiterate the narrow grounds on which the case was decided.[3] He anticipated, as did the rest of the Court, a series of subsequent cases, as evidenced by Korematsu and Ex parte Endo, which would test the Civilian Exclusion Act dismissed in Hirabayashi and other issues concerning Japanese-American evacuation and internment.[4] Prior to the Hirabayashi decision, Stone wrote to his former law student:

> "I am anxious to go as far as I reasonably can to meet the views of my associates, but it seems to me that if I accept your suggestions very little of my opinion would be left, and that I should lose most of my adherents. It seems to me, therefore, that it would be wiser for me to stand by.

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[1]Stanley F. Reed to H.F.S., June 3, 1943; cited in Mason, Stone, p. 676.

[2]Barnett, Michigan Law Review, IXL (1940) 217.

[3]Daniels, Concentration Camps U.S.A., pp. 134-135.

[4]Konvitz, The Alien and Asiatic, p. 248.

> the substance of my opinion and for you to express your views . . . as you have already done."[1]

Stone's brief note reflected his desperate effort to maintain a visage of unanimity in the Court as well as Douglas' ambivalence towards Stone's decision-to-come.

Douglas said the Court must credit the military with good faith and that it was not the Court's role to judge the military's determination of the curfew order.[2] He believed a "temporary treatment on a group basis [as] the only practical expedient" during times on immediate national peril; although he tempered his opinion by stressing that [l]oyalty [was] a matter of mind and heart, not race."[3] He said Hirabayashi went no further than "to deny the individual the right to defy the law."[4] But it was to the credit of his foresight that Douglas stressed the need for loyalty hearing boards whereby "the individual could demonstrate his loyalty as a citizen in order to be reclassified . . ." on an expedient basis.

Steeped in an Irish-Catholic heritage, Justice Frank Murphy was a minority member, of sorts, during his early life, and he carried throughout his years a crusading impulse for minority rights. Courts, despite the confines of their constitutional powers, had a "mission of justice" to fulfill.[6] Particularly in

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[1] H.F.S. to William O. Douglas, June 4, 1943; cited in Mason, Stone, p. 675.

[2] Hirabayashi, p. 106.

[3] Ibid., p. 107.

[4] Ibid., p. 109.

[5] Ibid.

[6] J. Woodford Howard, Jr., Mr. Justice Murphy (Princeton: Princeton University Press, 1968), p. 343.

his stand on the Japanese-American cases, Murphy utilized the judicial activist role; whereby the laws of the country should be harmonized with the needs of the country, and the Court should act, upon the failure of the other two branches of Government to act, as the pace-setter for "progress." Murphy's conception of "needs" and "progress" lay within the sacrosanct posture of individual and minority rights against Government interference.

Although Murphy concurred in the Hirabayashi decision, he readily asserted that a state of war did not suspend "the broad guarantees of the Bill of Rights and other provisions of the Constitution in protecting essential liberties."[1] He also denounced "distinctions based on color or ancestry" as "inconsistent with our ideals."[2] Murphy had a hunch that the military curfew orders were based on "a priori" assumptions of racial guilt; however, he defered to the military judgment.[3] But Murphy also stated that the due process clause of the Fifth Amendment provided a restraint on the Federal Government as well as citizens when allowing a "measure of reasonable classification."[4] His adherence to the Milligan philosophy of civilian authority superior to military authority, however, lost its fervor as he yielded to the differences of "regulatory action" in times of peace and of war.[5]

His concurrence was originally intended as a dissent, but given the pressures of public opinion and colleague Frankfurter,

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[1] Hirabayashi, p. 110.

[2] Ibid.

[3] Howard, Murphy, pp. 307-309.

[4] Hirabayashi, p. 112.

[5] Ibid.

plus his sensitivity to his personal standing within the Court, Murphy engaged in a long, hard re-evaluation of his preliminary opinion.[1] He was also filled with "nagging insecurities" about a lone dissent in the middle of a war. As opinion day approached, Justice Frankfurter wrote an informal note to Murphy, as he endeavored to pressure him to "close the ranks."

> Of course I shan't try to dissuade you from filing your dissent in that case--not because I do not think it highly unwise but because I think you are immovable. But I would like to say two things to you about the dissent: (1) it has internal contradictions which you ought not to allow to stand, and (2) do you really think it is conducive to the things you care about, including the great reputation of this Court, to suggest that everybody is out of step except Johnny, and more particularly that the Chief Justice and seven other Justices of the Court are behaving like the enemy? Compassion is, I believe, a virtue enjoined by Christ. Well, tolerance is a long, long way from compassion--and can't you write your views with such expressed tolerance that you won't make people think that when eight others disagree with you, you think their view means that they want to destroy the liberties of the United States, and lose the war at home?[2]

Murphy's deep patriotism and apprehensions of a lone dissent surrendered to Frankfurter's biting words. Murphy concurred on the narrow ground that there was a rational basis for discriminatory curfew at the time it was applied.[3] He salved the pains of his surrender with the remark, "[W]hether such a restriction is valid today is another matter."[4] Discriminatory curfew went "to the very brink of constitutional power."[5]

Justice Wiley Rutledge was a silent partner in the strong judicial self-restraint of Stone, Frankfurter and Black. He con-

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[1]Howard, Murphy, p. 235.

[2]F.F. to F.M., June 10, 1943, No. 870, Box 132; Cited in Ibid., pp. 307-308.

[3]Ibid., p. 308.

[4]Hirabayashi, p. 113.

[5]Ibid.

curred with Stone's contention of non-judicial scrutiny of military discretion in military areas.[1] However, Rutledge believed there were "bounds beyond which [the military commander] cannot go and, if he oversteps them . . . the courts . . . have power to protect the civilian."[2] He hastened to add that Hirabayashi did not question the extent to which military discretion was bound.

Hirabayashi sustained the first substantial restriction of citizens' personal liberty based on racial distinctions.

Throughout his legal battles, Gordon Hirabayashi was crippled with the "burden of proof" which, rightly, should have been the Government's responsibility as prosecutor. Solicitor General fahy's reliance on military "findings" rather than conrete facts--that is, military conclusions based on "not unfounded beliefs," enabled the Government to substantiate the "reasonableness" of their war power exertion on a scale which defied mortal opposition. "Generally believed" notions towards Japanese-Americans as pernicious, inscrutable subversives were regarded by the military, hence sanctioned by the Government, as valid evidence supporting the alleged exigency of the curfew order. It was impossible for Hirabayashi to refute such "findings" or "beliefs," especially when the curfew order was, for all practical affects, an exertion of martial law--but with Executive and Congressional approval.

Yasui v. United States was a companion case to Hirabayashi. Chief Justice Stone summarily dismissed Yasui's contention of the unconstitutionality of the same curfew order. However, the district

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[1] Ibid., p. 114.

[2] Ibid.

court's ruling also terminating Yasui's citizenship was remanded to the district court to afford Yasui an opportunity to regain it.[1]

But the major significance of Hirabayashi lay in the path it cut for the perfunctory majority opinion and the biting dissents in Korematsu v. United States.

IV

Fred Korematsu was an American citizen of Japan descent born and raised in California. Educated in the public schools, he could neither read nor write Japanese. He was not a dual citizen nor had he ever been outside the United States. Korematsu was convicted in a federal district court for remaining in San Leandro, California on May 30, 1942, contrary to Civilian Exclusion order No. 34 of the WDC. This order, issued May 3, 1942, provided for the exclusion of all Japanese-Americans from a given portion of Military Area No. 1 which included Korematsu's residence in San Leandro, and required these evacuees to report to assembly centers. Korematsu was prosecuted under Public Law 503 with the accompaning authority of Executive Order 9066 for remaining within the restricted area but not in an essembly center. He was found guilty. His sentence was suspended but he was placed on probation for five years.[2]

Prior to his conviction the WDC promulgated Public Proclamation No. 4 on March 27, 1942. It terminated the original exclusion, or evacuation program which allowed evacuees to choose

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[1] Yasui v. United States, 320 U.S. 115.

[2] tenBroek, Barnhart and Matson, Prejudice, War and the Constitution, pp. 235-236.

for themselves their own evacuation destination, and subsequently restricted their further movement except as authorized and directed by the WDC.[1] Also, on May 19, 1942, the WDC promulgated Restrictive Order No. 1 which provided for internment of those of Japanese ancestry in assembly or relocation centers.[2]

The Ninth Circuit Court of Appeals affirmed the lower court decision and the Supreme Court granted certiorari to petitioner Korematsu. The Court heard the case in October and rendered its decision on December 18, 1944.[3]

Korematsu argued, before the Court, that Civilian Exclusion Order No. 34 was without adequate military justification; the order was geared to prevent sabotage and espionage but was promulgated after all danger of Japanese invasion of the West Coast, hence fifth-column threats, had disappeared.[4] He also challenged the assumptions upon which the Court rested their conclusions in Hirabayashi, particularly in affirming the military orders based on discriminatory "findings" and the alleged exigencies of defense which necessitated the curfew order.[5] He realized the Hirabayashi precedent could be detrimental to his case. Korematsu argued further that on the day of his conviction "there were conflicting orders outstanding, forbidding him to both leave the area and to remain there."[6] He contended that Civilian Exclusion Order No. 34

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[1] Ibid., p. 235.

[2] Korematsu v. United States, 323 U.S. 214 at 221.

[3] Ibid., p. 216.

[4] Konvitz, The Alien and the Asiatic, p. 255.

[5] Korematsu, p. 218.

[6] Ibid., p. 220.

could not be separated from Restrictive Order No. 1 and that if detention or internment by Restrictive Order No. 1 would have "illegally deprived [him] of his liberty, then exclusion order and his conviction under it could not stand."[1] The main issue then, it was argued, was "whether or not a citizen of the United States [could] because [he was] of Japanese ancestry, be confined to a barbed-wire stockade."[2] Korematsu's arguments involved two principle questions: " . . . (a) was the [exclusion] order necessary as a war measure? (b) if it was necessary as a war measure, was it a transgression of the Bill of Rights?"[3]

For the Government, Solicitor General Fahy stressed the constitutionality of the evacuation program and its efficacy in preventing feared sabotage and espionage.[4] Evacuation was "reasonably related" to winning the war.[5] He relied upon the rationale presented by him in Hirabayashi and emphasized that case's importance as precedent. It was also in Fahy's favor, although it was never mentioned, that any governmental action, however unwise, may nevertheless be constitutional.[6]

Justice Black delivered the opinion of the Court. Civilian Exclusion Order No. 34 was held constitutional at the time it was issued and when Korematsu violated it. It followed that the lower

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[1] Ibid., p. 221.

[2] Konvitz, The Alien and the Asiatic, p. 255.

[3] Ibid., p. 261.

[4] Rostow, Yale Law Journal LIV (1945) 509.

[5] Grodzins, Americans Betrayed, p. 358.

[6] United States Department of the Interior, Legal and Constitutional Phases of the WRA Program (Washington: D.C.: U.S. Government Printing Office, 1946), p. 4.

court's decision against Korematsu was affirmed.[1] Black believed the order necessary because of the following observations:

> (1) The presence of an unascertained number of disloyal persons of Japanese ancestry.
> (2) Because it was impossible to bring about an immediate segregation of the disloyal from the loyal, temporary exclusion of the whole group was deemed a military necessity.
> (3) Subsequent to the exclusion it developed that about 5,000 American citizens of Japanese ancestry refused to swear unqualified alegiance to the United States, and several thousand evacuees requested Japanese repatriation.
> (4) In time of war citizenship may carry with it heavier burdens and responsibilities than in time of peace; citizens must recognize the fact that the "power to protect must be commensurate with the threatened danger."[2]

Black also referred heavily to the assumptions approved and conclusions reached in Hirabayashi to sustain the constitutionality of the military orders and the Executive and Congressional actions taken which were contested by Korematsu.[3] Black equated the Exclusion Order in Korematsu to the curfew order in Hirabayashi by declaring both of them as reasonable, "not unfounded" and necessary measures aimed at the twin dangers of sabotage and espionage. Exclusion was initiated because curfew was believed an inadequate defense and security measure.[4]

Black dismissed Korematsu's contentions of conflicting orders forbidding him to both leave and remain in the prohibited area where he was convicted. Public Proclamation No. 4, issued March 27, was specifically limited in time "until and to the extent that a future proclamation or order should so permit or

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[1] Korematsu, p. 219.

[2] Konvitz, The Alien and the Asiatic, p. 258.

[3] Korematsu, pp. 216-219.

[4] Ibid., p. 217.

direct.[1] That future order was Civilian Exclusion Order No. 34, issued May 3. Consequently, the only order affecting Korematsu was the Civilian Exclusion Order. Therefore, Korematsu was not subject to punishment under these two orders simultaneously.[2]

Black declined to pass upon the provisions included in the Exclusion Order and Civilian Restrictive Order No. 1 which required persons of Japanese ancestry to report to assembly centers, subject to subsequent detention in assembly or relocation centers. The issues that concerned the subsequent detention program were not introduced or resolved at the lower court level. The Court's sole concern was Korematsu's violation of the Exclusion Order:

> Since the petitioner has not been convicted of failing to report to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the frame work of the pleadings or evidence in this case . . . [3]

The Exclusion and Restrictive Orders fromulated a three-step requirement procedure for the Japanese evacuation program. Each requirement imposed distinct, separate duties. A violation of one did not necessarily denote violations of the other two. Korematsu violated the first-step requirement; whether he would have (2) failed to report to and temporarily remain in an assembly center, or (3) failed to be evacuated to a relocation center, was irrelevant to the case.[4]

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[1] 7 Fed. Reg. 2601; cited in Ibid., p. 220.

[2] Ibid.

[3] Ibid., p. 222.

[4] Ibid., pp. 221-222.

Black dismissed Korematsu's final argument claiming the invalidation of the Exclusion Order because it led to subsequent detention:

> . . . The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of detention is selected . . . .[1]

The order in which Korematsu was convicted was valid even though evacuation and detention were inseparable. The Exclusion Order required him to leave the designated area only by way of an assembly center.[2]

Black also denied any alleged racial overtones to the Exclusion Order: "To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue."[3] He stressed the importance of holding the military in good faith, and reiterated as well the priorities of public necessity and immediacy of security measures during times of national emergency.[4]

Despite Justice Black's unquestioned devotion to civil liberties, he adopted, in times of national emergency the legal maxim: "The welfare of the people is the supreme law." He traditionally upheld governmental action in extraordinary circumstances, such as war; although he declined to do the same under peaceful or "normal" circumstances.[5] In the Japanese-American cases, he

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[1] Ibid., p. 323.

[2] Ibid.

[3] Ibid.

[4] Ibid.

[5] Charlotte Williams, Hugo Black, A Study in the Judicial Process (Baltimore: The Johns Hopkins Press, 1950), p. 165.

saw racial distinctions, rather than racial discrimination in the military "findings" and actions. He believed his Korematsu opinion was justified, given the extraordinary conditions it encompassed.[1] However, during the time Black wrote his opinion, it was generally understood that wartime controls, such as the detention or internment program, would soon be modified if not discontinued. It was on March 11, 1943--exactly eight months prior to the first Court hearings on Korematsu--that the director of the War Relocation Authority first suggested repeal of evacuation and exclusion orders.[2]

Black used the judicial self-restraint role to his advantage; he declined to make any serious constitutional waves concerning the nation's "power to protect" and held the Court to what he believed a consistent and realistic effort in support of the Hirabayashi precedent. In Korematsu, as with Stone in Hirabayashi, Black adhered to a strict construction approach by recognizing the war power of the United States without interpretative limitation and by construing the military orders at their face value without acknowledging their racist affect upon Japanese-Americans.

But it was to Black's credit that he decided in favor of several Japanese-American petitioners in matters separated from the issue of national emergency: "He [denounced] a California statute forbidding ownership of agricultural lands by aliens ineligible for citizenship on the ground that it [denied] them the equal protection of the laws[3]. . . and upon the same reasoning

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[1] Ibid., p. 166.

[2] Mason, Stone, p. 677.

[3] Oyama v. California, 332 U.S. 633 (1948); cited in Williams, Black, p. 166.

he struck down a California law which forbade the issuance of commercial fishing liscences to the same group."[1]

In assigning the opinion to Black, Chief Justice Stone impressed upon him that it should not indicate any more than that the war power existed and that it had been reasonably exercised. In an early draft, Black said:

> "Nothing short of apprehension of the gravest imminent danger to the public safety can constitutionally justify either curfew or detention at assembly centers." "I think you should qualify this sentence," Stone suggested, "so to show, as we were at pains to show in the Hirabayashi case, that it is not our apprehension or our judgment of the gravity and imminence of the danger which governs, but that of the military authorities charged with the responsibilities in the premises, provided only there is a basis for their judgment. Knowing your attitude about these matters, I am sure you will agree that it is important for us to make it plain that we do not impose our judgment on the military unless we can say they have no ground on which to go in formulating their orders."[2]

Stone had originally intended to submit a concurring opinion to explain why . . .

> ". . . we are not free to decide petitioner's main contention that a relocation order applied to him would be unconstitutional. . . . He has been convicted of violating an Act of Congress; Entrance into an assembly center did not automatically presume detention under a relocation order. Many who were sent to the assembly center were not sent to relocation centers, but instead were released and sent out of the military area. We cannot say that petitioner would not have been released, as others were."[3]

Stone sent this concurring opinion to Black. It appeared by reading Black's final opinion, that Stone felt he would not need to submit a final concurring opinion upon the day Korematsu was read in Court.

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[1] Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); cited in Ibid., p. 167.

[2] H.F.S. to H.B., November 9, 1944; cited in Mason, Stone, pp. 677-678.

[3] H.F.S. to H.B., November 9, 1944; cited in Ibid., p. 678.

Justice Frankfurter Filed a concurring opinion. He agreed with Black's opinion affirming the necessity of the Exclusion Order as a war measure and re-emphasized the nation's need to maintain a fighting Constitution as well as a peaceful one.[1] He approved of the Exclusion Order because he believed it to be an appropriate means for successfully conducting the war. He equated the Constitution with reason--that is, the Exclusion Order was constitutional because it was reasonably judged necessary by the military insofar they had "some grounds" for fearing dangers of sabotage and espionage.[2] But Frankfurter's "reason" method was deceptive; for it was impossible, much to Korematsu's misfortune, to disprove that there were not "some grounds" for fearing Sabotage and espionage, and reason had little to do in civil court which dealt with miltary judgments that relied considerably upon hearsay and conjecture.

But the substance of his consurrence implied an awareness of the difficulty of Korematsu to prove his contentions, and yet an understanding of the untold constitutional ramifications of the case's issues. Although he acknowledged the authority and expediency of the military's actions, he did not approve them:

> . . . To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and Executive did. That is their business, not ours.[3]

Frankfurter appeared to take a position between Black and the dissents of Roberts, Murphy and Jackson with his apparent

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[1] Korematsu, p. 224.

[2] Konvitz, The Alien and the Asiatic, pp. 259-260.

[3] Korematsu, p. 225.

desire to elaborate upon the bounds in which the military could function constitutionally. But his judicial self-restraint held him to view Korematsu wholly in the context of war;[1] the Constitution provided extraordinary powers during extraordinary times, and it was not the Court's role to constantly meddle in the affairs of the war power in these extraordinary times.

> That action is not to be stigmitized as lawless because like action in times of peace would be lawless . . . . If a military order . . . does not transcend the means appropriate for conducting war, such action by the military is . . . constitutional . . . .[2]

Frankfurter's method of self-restraint was geared toward preserving the vitality of the war power with little concern for "righting all the wrongs" that could flow from its exercise.[3] In an address in the fall of 1942, he said the supreme task for the United States was the successful conclusion of the war and that "any interest or issue that stood in its way should be put aside."[4]

He looked upon the Constitution as an organic whole, whereby all of its clauses were on an equal footing. Therefore, he rejected any "preferred freedoms" doctrine, especially when it conflicted with public interest, such as the efficacy of Government power during wartime.[5]

The main reason why the Court declined to pass upon Korematsu's contention of the invalidity of Restrictive Order No. 1

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[1] "Supreme Court and Radicalism: Korematsu Case," Nation, December 30, 1944, p. 788.

[2] Korematsu, pp. 224-225.

[3] Thomas, Frankfurter, p. 248.

[4] Ibid., p. 244.

[5] Ibid., pp. 195-196.

was revealed in its subsequent decision in Ex parte Endo.[1] Delivered on the same day as Korematsu the Court reversed the lower court's decision denying Miss Endo's suing for writ of habeas corpus to gain her freedom from a relocation center. The Court said the War Relocation Authority could not detain a "concededly" loyal and law-abiding citizen of the United States.[2] Justice Douglas delivered the unanimous decision of the Court.

In his silent agreement in Korematsu Justice Douglas was apprehensive about sanctioning the implied racial guilt of Japanese-Americans as potential saboteurs in the military decision for exclusion but placed an extraordinary faith in the good intentions of the War Relocation Authority to screen the loyal from the disloyal on an expedient basis. His failure to speak out in Korematsu was also due to his belief that the military was carrying out its job as it thought best, and to his subsequent opinion in Endo which stressed the temporary nature of the whole Japanese-American program and the legal measures open to these citizens to regain their freedom.

The Korematsu decision was accompanied with biting dissents from Justices Roberts, Murphy and Jackson. Where the majority of the Court acknowledged dispassionate racial distinctions, the minority found rampant racial prejudice. When Korematsu was debated in late 1944, the war in the east and west appeared to be certain of Allied victory, and these Justices found less outside pressure restraining their individual views. They were no longer willing to sanction all military decisions and actions unquestioningly.

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[1] Ex parte Endo, 323 U.S. 283.

[2] Ibid., p. 226.

Justice Roberts, as did Murphy and Jackson, looked beyond the narrow scope of review used by the majority of the Court toward the broad effects and implications of the confusion between the Exclusion Order and Public Proclamation No. 4.

Roberts dissented because "the indisputable facts exhibit a clear violation of constitutional rights."[1] ". . . [I]t is the case of convicting a citizen as punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or enquiry concerning his loyalty and good disposition towards the United States . . ."[2] He believed the Constitution to be color-blind and thus he could not grant constitutionality to military actions based on racial discrimination.

Roberts believed the confusion between Public Proclamation No. 4 and the Exclusion Order was intentionally constructed to force Korematsu to evacuate his residence by way of an assembly center and subsequent internment in a concentration camp.[3]

> The Government has argued this case as if the only order outstanding at the time the petitioner was arrested . . . was Exclusion Order No 34 ordering him to leave the area in which he resided, which was the basis of the information against him . . . . This, I think, is a substitution of an hypothetical case for the case actually before the Court . . . .[4]

He also disagreed with the narrow ground upon which the majority decided, especially their sanctioning the validity of the . . .

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[1] Korematsu, p. 225.

[2] Ibid., p. 226.

[3] Ibid., pp. 229-230.

[4] Ibid., p. 231.

> . . . [t]emporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to close our eyes to reality.[1]

Roberts' silent concurrence in Hirabayashi could not sustain a similar opinion in Korematsu. His dissent was enfluenced by a detailed perusal of facts relating, and leading, to, Korematsu's conviction which led him to distrust the reasonableness of the military judgments and to condemn the governmental actions which authorized the entire Japanese-American program of curfew, evacuation and internment. Roberts believed the majority had determined too broadly the extent to which the war power could infringe upon civil liberties.

He concurred in Endo but questioned whether or not Endo's detention violated "the guarantees of the Bill of Rights of the Federal Constitution and especially the guarantee of due process of law."[2] In Endo Roberts again displayed a factual analysis of the issues as in his Korematsu dissent.

Whatever misgivings or apprehensions Justice Murphy held with the reasoning of Stone's Hirabayashi opinion, he felt constrained to withold them no longer with Black's provocative Korematsu opinion. When Murphy learned that Black wrote his opinion citing the principles of Hirabayashi as the basis for upholding the Exclusion Order, Murphy exploded, "The Court has blown up on the Jap case--just as I expected it would."[3] Murphy believed the

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[1] Ibid., 232.

[2] Endo, p. 310.

[3] Murphy Letter to Gene [Eugene Gressman], undated, Box 183, Murphy Papers; cited in Fine, Pacific Historical Review, May, 1964, p. 208.

issues raised in Korematsu were far more serious than those in Hirabayashi yet the Court failed to apply a tougher method of review towards the military justification for the more punitive Exclusion Order. "[T]his exclusion . . . on a plea of military necessity in absence of martial law ought no to be approved . . . ."[1]

Murphy dissented primarily on the irrationality of the military decisions for evacuation. He did not challenge the means in which the Court determined the reasonableness of the military decisions. Nor did he work with evidence other than that presented before the Court. He also acknowledged the power of the President and Congress to authorize wide discretion to the military in wartime. But he maintained that the evacuation was "insupportable even under the Court's limited review."[2] He said,

> . . . . the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation [towards the prevention of sabotage and espionage] . . . because [it] must rely . . . upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage . . . Justification . . . sought . . . mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence . . .[3]

Murphy carefully perused the logic and alleged rationality of the "findings" in General DeWitt's Final Report. He cited expert independent studies supplying sociological data to refute the validity of most of the evidence and conclusions on which General DeWitt based his orders.[4] Murphy wanted to determine the "rightness" or

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[1]Korematsu, p. 233.

[2]Howard, Murphy, p. 304.

[3]Korematsu, pp. 235-237.

[4]Ibid., p. 240.

"wrongness" of the Exclusion Order, which was precisely what Frankfurter held that the Court should not do. He stated that the Exclusion Order ignored the fundamental constitutional principle of individual guilt as the sole basis for deprivation of rights.[1] He believed that the assertion "time was of the essence" was false. He stated that four months had elapsed after Pearl Harbor before the first Exclusion Order was issued and that eleven months had elapsed before evacuation was complete. Also, claims of military necessity did not seem so urgent or real when it was conceded that martial law was not initiated on the West Coast. The F.B.I. and the military and naval intelligence services were well-informed and adequately equipped to prevent any dangers of sabotage and espionage.[2] Murphy concluded, "I dissent, therefore, from this legalization of racism ."[3]

He also found the Exclusion Order, as well as the earlier curfew Order, defective by due process standards. Although he assumed the Fifth Amendment contained no equal protection clause, it did provide that due process, at some point, prohibited irrational discrimination. The Exclusion Order, he claimed, was based on irrational racial discrimination, and therefore deprived Japanese-Americans the scope of the Fifth Amendment's guarantee of equal protection of the laws.[4]

Murphy's evangelism and identification with underdogs, whether Jehovah's Witnesses, Indians, or even businessmen, seemed

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[1] Ibid.

[2] Ibid., p. 241.

[3] Ibid., p. 242.

[4] Howard, Murphy, p. 304.

to set him apart from his colleagues with an extra-sensitivity in favor of minority rights.[1] His different perspective on the same information the Court dealt with in Korematsu led him to different conclusions about the "reasonableness" of military decisions, and the need for tough judicial scrutiny of military power infringing upon the constitutional rights of minorities.

Concurring in Endo, Murphy joined the opinion of the Court but reiterated his declamation on the "unconstitutional resort to racism inherent in the entire evacuation program," and stated that Miss Endo's "unconditional" release by the War Relocation Authority implied the right to move freely into California in spite of military orders prohibiting her return to that state.[2]

Korematsu and Endo allowed Murphy to express his philosophy of judicial activism. He treated the Supreme Court as the vehicle needed to realize humane ideals, or as he ambiguously stated, "the American Dream."[3]

Justice Jackson's sense of judicial self-restraint led him to submit a contradictory and confused dissent. He agreed with Murphy's criticism of the inherent racism in the evacuation program but refused to say whether or not General DeWitt's orders were reasonable; in fact, he claimed that there was no way for him to discern their reasonableness at all.[4]

He agreed with Roberts' claim on the apparent contradictory provisions of Public Proclamation No. 4 and Civilain Ex-

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[1] Ibid., p. 337.

[2] Endo, pp. 307-308.

[3] Howard, Murphy, p. 307.

[4] Daniels, Concentration Camps U.S.A., pp. 139-140.

clusion Order No. 34, and reiterated Murphy's statement on guilt being personal and not inheritable or collective.[1] However, he did not attempt to define any limits upon the scope of the war power restricting the liberties of citizens. The main thrust of the dissent asserted that the Court should not become an instrument of military policy by affirming or justifying military decisions and actions:

> But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not . . . .[2] [O]nce a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all times has validated the principle of racial discrimination . . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.[3]

Jackson's silent approval of the Hirabayashi decision, with Stone's guarded language and the minor restraint at issue, ceased to be silent upon Black's illogical reasoning equating the mild curfew Order of Hirabayashi to the harsh Evacuation Order of Korematsu:

> Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is Hirabayashi. The Court is now saying that in Hirabayashi we did decide the very things we said we were not deciding . . . .[4]

Jackson's dissent contradicted his belief that wartime and peacetime were overlapping, inter-related situations. Although he would "reverse the judgment and discharge the prisoner" he would

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[1] Korematsu, p. 243.

[2] Ibid., pp. 244-245.

[3] Ibid., p. 246.

[4] Ibid., p. 247.

not set any limits or guidelines to prevent such deprivations of civil liberties in the future. Granted his dissent would not establish a "bad" war precedent to be employed during times of peace, it would also not guarantee freedom, to whatever extent, in times of war. In effect, he had confidence in the public that they would regain their freedoms in quieter times, although he really believed the public was not capable of doing so. Jackson probably realized he would likely be shouting into the wind, had his dissent been the majority opinion. Instead, he hoped the nation would struggle out of the rigors of war unscathed in the realms of peacetime constitutional law.[1]

In Korematsu the Court did not explicitly state that the Exclusion Order was wise or necessary but it did affirm its legality. They abandoned all tests of clear-and-present-danger towards military judgments, failed to consider whether alternative measures less drastic than exclusion were adequate to meet feared espionage and sabotage, and thus accepted the military judgments favoring exclusion without qualification.[2] By treading lightly on the main issue--the scope and method of judicial review of military decisions and the war power--they avoided the risks of overruling an important part of the Government's war policy.[3] Except for perhaps a showing of malice and lack of good will on the part of the military, Korematsu indicated that there was no basis for invalidating wartime action by military authorities.[4]

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[1]Westin, The Supreme Court: Views, pp. 31,170.

[2]Grodzins, Americans Betrayed, p. 354.

[3]Rostow, Yale Law Journal, LIV (1945) 503.

[4]Dembitz, Columbia Law Review, XLV 193.

The Court faced in Korematsu as well as in Endo the first program of protective custody exercised by the United States on a mass basis.[1] Korematsu immersed the Court in a boiling vat of controversy in which the life of the Court as a powerful third branch of Government was at stake as much as the viability of minority rights during wartime. But the Court's decision along with Hirabayashi, however guarded and limited in review; weakened civilian control over the military by defering to military "findings" as facts, failed to speak about the scope of the war power when it infringed upon civilian freedoms, and transformed Japanese-Americans to second-class citizens by allowing the military to restrict their freedom solely on racial grounds and by denying them even the palest protection under the Fifth Amendment.[2]

V

The Stone Court's Hirabayashi and Korematsu decisions wrote a tragic chapter in the annals of American civil liberties. The Court wrestled with Wechsler's "perpetual question" during the most devasting and fearsome war in this nation's history. America defeated totalitarian enemies in Europe and in the Pacific. America also liberated foreign citizens abroad but incarcerated its own citizens at home, all in the name of Freedom. The Court was forced to rationalize racism as an inherent principle in the Constitution which, during the 1930's and early 1940's, was construed as the safeguard for civil liberties and minority rights. But these two decisions of the Court must be tempered by the ex-

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[1] Ibid., p. 117.

[2] Rostow, Harper's, CXCI (September 1945), 198.

tenuating circumstances of a nation committed to total war against a totalitarian enemy. Hirabayashi and Korematsu were products of war; however these decisions, like war, should not be exonerated from the atrocities to human freedom and dignity they committed, but rather, should give rise to a public understanding and indignation so that their resurgence shall never again occur in the lives of free people.

The overall affect of these two decisions was a Court constitutionalization of Executive Orders and Congressional legislation, and the admissibleness in court of military half-truths, all of which were products of war hysteria and geared, whether admittedly or not, towards the abrogation of constitutional rights of Americans in times of national emergency. Citizenship and loyalty were determined not by heart or mind, but by race. Curfew and evacuation orders were impressed upon citizens as well as aliens by the authority of the nation's war power. In 1950, Congress passed the "Emergency Detention Act" which gave the President and the Attorney General the statutory right to set up concentration camps for the detention of persons "who there is reasonable grounds to believe will commit or conspire to commit sabotage and espionage . . . ."[1] However, this Act was revised in September, 1971. Conspiracy as well as evasion of apprehension and aiding evasion of apprehension were no longer grounds for detention unless subject to a pursuant Act of Congress.[2]

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[1]Daniels, Concentration Camps U.S.A., p. 143.

[2]Administrator of General Services by the Office of the Federal Register, National Archives and Records Service, United States Statutes At Large, CXXXV 91971), 347-348.

Placed in its proper historical context, the relationship between the Court and the war power in dealing with the supression of civil liberties in times of national emergency has evoked, up to this post-war era, a number of observations: Relevant cases have continued to be shaped by the President and Congress; it has been difficult, if not impossible, to place definitive judicial scrutiny upon any war power actions which work questionable intrusions upon civil liberties to do anyone any good, because such intrusions raise issues so politically explosive that the notion of "government by lawsuit" becomes unthinkable; whatever limits the Court has placed upon the war power have been largely theoretical rather than practical; the Constitution has split into two, serving both peace and war; the "reasonable" basis in which all actions of the war power are justified in the "fighting" Constitution are predicated upon the law's fictitious "reasonable and prudent man," which has been, after all, manifested in the President of the United States.[1] Any actions taken by the military, if found to be "reasonably" based, are constitutional, provided the military has the constitutional sanction of the war power. The Stone Court could not strike down General DeWitt's military orders as unreasonable without directly striking down the "reasonableness" of Roosevelt's Executive Orders and Congress' Public Law 503. No Court has dared to condemn a President as an unreasonable man during times of declared war. No Court has dared to declare the military incompetent without serious consequence of national scorn, especially during wartime when the nation's very existence depends upon the military to success-

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[1]Rossiter, The Supreme Court, pp. 126-131.

fully carry-out its job. When the nation's very existence is at stake its citizens have no choice but to hold a credulous trust in the military; and should "our men in uniform" infringe upon the personal freedoms of citizens, it should be held by those citizens who are infringed upon that they do so not from an itch for power but rather from misconception, excusable human error, or from honest efforts of defense commensurate to the threatening outside danger.

The Hirabayashi and Korematsu decisions reflected popular public opinion at the time they were delivered. But it must be stressed again that the Stone Court accepted rather than approved the actions of the war power and military. Hirabayashi and Korematsu were glutted with the dicta of Stone, Black, Frankfurter, Jackson, Rutledge and Douglas denying themselves and the Court any competence to review military estimates of military situations, or the authority to chance a crippling effect upon the war power's effort to preserve the nation. The Court was forced to carry-out a thankless job which no one, save General DeWitt the militarist-zealot, wanted. No court could have taken pride in confining American citizens into their homes and in harrying them into concentration camps under the implicit justification of racism. Curfew and evacuation were imposed upon Japanese-Americans because they were considered to be a greater source of danger than people of different ancestry on the West Coast. The Court, the military, the President and the Congress went to great lengths to draw a fine line between racial distinctions and racial prejudice. The former recognized a potential source of danger according to racial ancestry with the enemy; the latter denoted

irrational hatred or the characteristic of racial inferiority. The rationale of the Court, the military, the President and the Congress applied to curfew and evacuation was tantamount to absurdities in sophistry. They labled Japanese-Americans a potential saboteurs or war criminals and consequently disgraced them with all the ugly connotations such lables imply. Curfew and evacuation were tantamount to criminal guilt. A criminal was, and always has been, someone substandard to social mores. Consequently, criminal guilt did, and always has, denoted social inferiority. Japanese-Americans were considered guilty of sabotage and espionage until proven innocent. Racial distinctions were tantamount to social inferiority. Social inferiority was tantamount to racial inferiority. It was no laudable distinction to be known during World War II as a suspected saboteur or war criminal against one's adopted homeland or place of birth. The Court, the military, the President and the Congress tried to divide the indivisable. They could not impose curfew and evacuation upon Japanese-Americans without treating them as criminals, and in consequence, as social and racial inferiors. The Court realized it was in a delimma-filled situation: The Court was just as much damned as Gordom Hirabayashi and Fred Korematsu in selecting any alternative of judicial review. It had the option of heaping invective upon deaf ears and facing the possible consequences of being scorned or ignored, and of possibly crippling the nation's "power to protect;" or it could defer to public opinion and the war power and military in a disciplined retreat with the hope of gaining back civil libertarian ground in quieter times. It unanimously chose the latter in Hirabayashi and two-thirds of

the Court chose the latter in Korematsu. The Court followed the pattern of deference to public opinion and the war power and military as it did in World War I. The Espionage Act of 1917 and the Sedition Law amendment of 1918 were both declared constitutional; however, they were not without subsequent cases which established the need for the clear-and-present-danger of espionage or sedition as justification for prosecution.

In both cases the Court made narrow rulings in the hope that they would not further weaken those civil liberties already threatened. The Justices were unsure of themselves in their unprecedented situation. They were fearful of the unseen and devastating ramifications of their decisions upon future civil liberties during wartime. The majority Justices wanted to say as little as possible so that, as in all fields of constitutional law, they would have future occasions to develop and qualify themselves in the truest sense of pragmatic legal reasoning. Endo provided the Court an opportunity to determine the extent to which citizens could be detained in concentration camps and the means in which citizen-loyalty could be established for release. Unfortunately, Endo did not erase the racism inherent within the military orders for curfew, evacuation and internment. As a result, the majority Justices elected only to sustain the curfew and exclusion orders at the time they were promulgated and enforced and when the petitioners violated them. Thus Hirabayashi and Korematsu were deliberated in view of the gloomy months of early 1942 rather than the relatively confident and optimistic months in 1943 and 1944. Had they used the valuable tool of hindsight in their decision-making the majority Justices would possibly have rendered dif-

ferent decisions. But to do so would have surrendered the narrow grounds of review which they believed were the paramount considerations in the cases. They could have struck down the curfew and exclusion orders with only the possible result of exposing military blunders. Surely they realized the armed forces in the Pacific would have survived unharmed by ridicule while its victorious momentum carried it ever-closer to Japan. But this was a chance they were not willing to take: The nation's ability to fight and the power and prestige of the Supreme Court were still highly at stake. The majority Justices very likely remembered the disaster that the Dred Scott decision rendered upon the efficacy of the Court during the middle of the nineteenth century. The President, the Congress and the military did not want another Pearl Harbor at Los Angeles; the majority Justices did not want another Dred Scott in Hirabayashi and Korematsu: They did not want the Court to suffer another eclipse of power.

However, Justices Roberts, Murphy and Jackson were willing to take this chance: They were willing to judge by their own ideals of civil liberty during wartime: They were willing to save 70,000 Americans from second-class citizenship in spite of the possible detriment to the Court's power and prestige. But this is not to enshrine these three Justices in cloaks of valor and integrity; the majority of the Court were equally well-intentioned. Also, President Roosevelt, the Congress and the military were equally well-intentioned in enabling this nation to repel enemy forces and to Win the War. Roberts, Murphy and Jackson did not want to make what they considered "bad" constitutional law over highly polemical issues; the Court majority did

not want to preclude its ability to preserve civil liberties in the future. The dissenters must be highly praised for their idealism. The affirmers, however regrettably, must be commended for their realism.

The Hirabayashi and Korematsu decisions should not be judged in view of rightness or wrongness. World War II animated the horrors of total war and the conjoining extension of the nation's power to defend itself. As the threats of immediate and ubiquitous warfare developed, so did the authority of the war power.

But today this development is a grim and sad reality, especially with the development of nuclear warfare. However, these two decisions can be, and must be, judged by the grace of thirty years hindsight to indicate how the Court made and honest but disastrous error in predicting their role as guardian of civil liberties in the future against the war power.

The Court erred by distinguishing wartime and peacetime as two separate, non-related situations. Little did the Court expect this nation to be wrapped-up in a Cold War after World War II. Little did it expect our participation in Korea, Viet Nam and the Middle East, and our "confrontations" in Berlin and Cuba, all of which have placed this nation in a perpetual state of national emergency. Nor could it know that the world would soon hurdle itself into the nuclear age after Hiroshima and Nagasaki. The threat of nuclear warfare would soon become a meanacing factor in the conduct of world affairs. In conjunction, this nation erroneously viewed its history as a series of interpolating times of "crisis" and "normalacy." President Harding led the nation after

World War I with the slogan, "Back to Normalacy," and President Truman introduced his Fair Deal after World War II to consolidate the nation's unprecedented advances in industrial production and to steer an anxious America back to a peacetime life-style.

The Court majority desperately tried to say as little as possible in Hirabayashi and Korematsu by reviewing them with judicial self-restraint. But in effect, by saying little they said too much. It was what they didn't say--their silence on the racism against Japanese-Americans, their silence toward any practical limitations on the military's exercise of the war power in the twentieth century--that impaired the constitutional rights of us all. The Court majority's logic in Hirabayashi and Korematsu could be applied to any racial minority group should future contingencies dictate that those having racial affiliations with the enemy may be a greater source of danger than those who do not. Racial discrimination under the guise of military necessity did not definitively end with just those citizens of Japanese ancestry. Indeed, discrimination could appear today in any form, whether racial, religious, or political, under the guise of military necessity.

Hirabayashi and Korematsu still affirm the allowance of racial distinctions or racial prejudice in formulating military decisions. They also consolidate the pitifully deferential nature of the Court towards the unlimited scope of the war power.

> Individual rights cannot rely in this period of our history upon governmental stagnation for their protection. The only safeguard is to be found in such constitutional arrangements as best promise that necessary things be done in time, but that judgment be as widely representive as possible . . . . [L]iberty against government [must be main-

> tained_/ through a better organization of the relationship of President and Congress . . .[1]

Contingent upon the various threats to this nation's security, the principle of constitutional relativity can now render "absolute" guarantees of freedom, or civil liberties, to the vanishing point. It is now the primary responsibility of the President and the Congress, and not the courts, to reinstate guarantees of freedom upon a reasonable contingency basis. The war power must be held accountable by its electorate. The "reasonableness" of this contingency basis is the "perpetual question" restated.

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[1]Corwin, Total War, pp. 180-181.

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