AMERICAN CONSTITUTIONALISM
VOLUME I: STRUCTURES OF GOVERNMENT
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Supplementary Material

Chapter 8: The New Deal/Great Society Era – Separation of Powers

Ex parte Endo, 323 U.S. 283 (1944)

Mitsuye Endo, an American citizen, was evacuated by military order from Sacramento in 1942 and ultimately held in the Central Utah Relocation Center in Topaz, Utah. She filed a petition of habeas corpus with a federal district court in California where she was first being held, but it was denied. She appealed to the federal circuit court, and the circuit court certified questions of law regarding the case to the Supreme Court for further instruction, and the Court ordered that the entire case be transferred to it for decision.

Endo was relocated and detained under the same set of orders that set the stage for the Hirabayashi *and* Korematsu *cases. After the Japanese attacks on Pearl Harbor in December 1941 and the American declaration of war against Japan, President Roosevelt authorized military commanders to evacuate areas as needed and later authorized them to remove and detain classes of persons as "is necessary in the interests of national security." Congress subsequently ratified the executive order with legislation.*

Here the government admitted that Endo was not herself suspected of disloyalty, but instead argued that her current detention was merely an administrative necessity that was part of the process of bringing the evacuation to an orderly end. On that basis, however, the civilian arm of the government continued to assert its constitutional authority to detain Endo. In a unanimous decision, the Court disagreed and ordered Endo's immediate release. In reading the case, however, consider the strategy that the majority opinion takes in finding Endo's current detention unlawful. Does the majority opinion in fact avoid the "underlying constitutional issues"? How is the case distinct from Milligan *and* Quirin*? What implications does the majority's opinion have for the scope of federal power to detain citizens during wartime?*

JUSTICE DOUGLAS delivered the opinion of the Court.

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Her petition for a writ of *habeas corpus* alleges that she is a loyal and law-abiding citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the Relocation Center under armed guard and held there against her will.

It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty. Moreover, they do not contend that she may be held any longer in the Relocation Center. They concede that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation. But they maintain that detention for an additional period after leave clearance has been granted is an essential step in the evacuation program. . . .

It is argued that such a planned and orderly relocation was essential to the success of the evacuation program; that but for such supervision there might have been a dangerously disorderly migration of unwanted people to unprepared communities; that unsupervised evacuation might have resulted in hardship and disorder; that the success of the evacuation program was thought to require the knowledge that the federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation; that although community hostility towards the evacuees has diminished, it has not

disappeared and the continuing control of the Authority over the relocation process is essential to the success of the evacuation program. It is argued that supervised relocation, as the chosen method of terminating the evacuation, is the final step in the entire process and is a consequence of the first step taken. It is conceded that appellant's detention pending compliance with the leave regulations is not directly connected with the prevention of espionage and sabotage at the present time. But it is argued that Executive Order No. 9102 confers power to make regulations necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage. The leave regulations are said to fall within that category.

. . . We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.

It should be noted at the outset that we do not have here a question such as was presented in *Ex parte Milligan* (1866), or in *Ex parte Quirin* (1942), where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* proceedings. Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. . . .

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. . . . Broad powers frequently granted to the President or other executive officers by Congress so that they may deal with the exigencies of wartime problems have been sustained.[1] And the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and discretion so that war might be waged effectively and successfully. *Hirabayashi* v. *United States* (1943). At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government. Thus it has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals. Some of these are contained in the Sixth Amendment, compliance with which is essential if convictions are to be sustained. *Tot* v. *United States* (1943). And the Fifth Amendment provides that no person shall be deprived of liberty (as well as life or property) without due process of law. Moreover, as a further safeguard against invasion of the basic civil rights of the individual it is provided in Art. I, § 9 of the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." See *Ex parte Milligan*.

We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution. We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality. Those analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a wartime measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

The Act of March 21, 1942, was a war measure. . . . The purpose and objective of the Act and of these orders are plain. Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed.

Neither the Act nor the orders use the language of detention. . . . Moreover, unlike the case of curfew regulations *(Hirabayashi* v. *United States)*, the legislative history of the Act of March 21, 1942, is silent on detention. And that silence may have special significance in view of the fact that detention in Relocation Centers was no part of the original program of evacuation but developed later to meet what

[1] See, for example, . . . United States v. Curtiss-Wright Corp. (1936); Yakus v. United States (1944).

seemed to the officials in charge to be mounting hostility to the evacuees on the part of the communities where they sought to go.

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A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind, not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. . . . Detention which furthered the campaign against espionage and sabotage would be one thing. But detention which has no relationship to that campaign is of a distinct character. . . . To read them that broadly would be to assume that the Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. We cannot make such an assumption. . . .

Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.

JUSTICE MURPHY, concurring.

I join in the opinion of the Court, but I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program. As stated more fully in my dissenting opinion in *Korematsu* v. *United States* (1944), racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people.

Moreover, the Court holds that Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority. It appears that Miss Endo desires to return to Sacramento, California, from which Public Proclamations Nos. 7 and 11, as well as Civilian Exclusion Order No. 52, still exclude her. And it would seem to me that the "unconditional" release to be given Miss Endo necessarily implies "the right to pass freely from state to state," including the right to move freely into California. *Twining* v. *New Jersey* (1908); *Crandall* v. *Nevada* (1869). If, as I believe, the military orders excluding her from California were invalid at the time they were issued, they are increasingly objectionable at this late date, when the threat of invasion of the Pacific Coast and the fears of sabotage and espionage have greatly diminished. For the Government to suggest under these circumstances that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction.

JUSTICE ROBERTS, concurring.

As in *Korematsu* v. *United States,* the court endeavors to avoid constitutional issues which are necessarily involved. The opinion, at great length, attempts to show that neither the executive nor the legislative arm of the Government authorized the detention of the relator.

1. With respect to the executive, it is said that none of the executive orders in question specifically referred to detention and the court should not imply any authorization of it. This seems to me to ignore patent facts. As the opinion discloses, the executive branch of the Government not only was aware of what was being done but in fact that which was done was formulated in regulations and in a so-called

handbook open to the public. I had supposed that where thus overtly and avowedly a department of the Government adopts a course of action under a series of official regulations the presumption is that, in this way, the department asserts its belief in the legality and validity of what it is doing. I think it inadmissible to suggest that some inferior public servant exceeded the authority granted by executive order in this case. Such a basis of decision will render easy the evasion of law and the violation of constitutional rights, for when conduct is called in question the obvious response will be that, however much the superior executive officials knew, understood, and approved the conduct of their subordinates, those subordinates in fact lacked a definite mandate so to act. It is to hide one's head in the sand to assert that the detention of relator resulted from an excess of authority by subordinate officials.

2. As the opinion states, the Act of March 21, 1942, said nothing of detention or imprisonment, nor did Executive Order No. 9066 of date February 19, 1942, but I cannot agree that when Congress made appropriations to the Relocation Authority, having before it the reports, the testimony at committee hearings, and the full details of the procedure of the Relocation Authority were exposed in Government publications, these appropriations were not a ratification and an authorization of what was being done.

3. I conclude, therefore, that the court is squarely faced with a serious constitutional question, -- whether the relator's detention violated the guarantees of the Bill of Rights of the federal Constitution and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged.