AMERICAN CONSTITUTIONALISM
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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Equality/Race/Strict Scrutiny

## Hirabayashi v. United States, 320 U.S. 81 (1943)

*In February 1942, some two months after Pearl Harbor and the U.S. declaration of war on Japan, President Franklin Roosevelt issued an executive order authorizing military commanders, at their discretion, to define "military areas" and exclude any or all persons from them or impose "whatever restrictions" that seemed warranted on any persons who remained. In March, Congress made violations of such military orders a criminal offense. Lieutenant General John DeWitt of the Western Defense Command, acting on this authority, designated parts of the western United States to be military areas, imposed curfews in those areas, issued orders excluding persons from those areas, and eventually required the evacuation and resettlement of "alien Japanese and persons of Japanese ancestry" from some of those areas. Kiyoshi Hirabayashi, an American citizen of Japanese descent and a student at the University of Washington, was convicted, under the federal statute, of violating the curfew order and an order requiring persons of Japanese ancestry to report to a Civilian Control Station to register for evacuation. Hirabayashi challenged his conviction on the grounds that Congress had unconstitutionally delegated national legislative power to military commanders and that DeWitt's restrictions on "persons of Japanese ancestry" were unconstitutional race discrimination under the Fifth Amendment.*

*The Supreme Court unanimously sustained the curfew order. Chief Justice Stone's opinion for the Court maintained that both the executive order and the federal law were reasonable exercises of the war power. Stone maintained that racial distinctions were normally "odious." Why did he nevertheless sustain the curfew order? What standard, if any, did he hold the federal government to when making racial distinctions?*

CHIEF JUSTICE STONE delivered the opinion of the Court.

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It will be evident from the legislative history that the Act of March 21, 1942, contemplated and authorized the curfew order which we have before us. The bill which became the Act . . . was introduced . . . at the request of the Secretary of War who, in letters to the Chairman of the Senate Committee on Military Affairs and to the Speaker of the House, stated explicitly that its purpose was to provide means for the enforcement of orders issued under [President Roosevelt's] Executive Order No. 9066. . . . And each of the committee reports expressly mentions curfew orders as one of the types of restrictions which it was deemed desirable to enforce by criminal sanctions.

When the bill was under consideration, General DeWitt had published his Proclamation No. 1 of March 2, 1942, establishing Military Areas Nos. 1 and 2, and that Proclamation was before Congress. . . . A letter of the Secretary to the Chairman of the House Military Affairs Committee, of March 14, 1942, informed Congress that "General DeWitt is strongly of the opinion that the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce curfews and other restrictions within military areas and zones" . . . .

The Chairman of the Senate Military Affairs Committee explained on the floor of the Senate that the purpose of the proposed legislation was to provide means of enforcement of curfew orders and other military orders made pursuant to Executive Order No. 9066. He read General DeWitt's Public Proclamation No. 1, and statements from newspaper reports that "evacuation of the first Japanese aliens and American-born Japanese" was about to begin. . . .

The conclusion is inescapable that Congress, by the Act of March 21, 1942, ratified and confirmed Executive Order No. 9066. . . . And so far as it lawfully could, Congress authorized and implemented such curfew orders as the commanding officer should promulgate pursuant to the Executive Order of the President. The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive have constitutional authority to impose the curfew restriction here complained of. We must consider also whether, acting together, Congress and the Executive could leave it to the designated military commander to appraise the relevant conditions and on the basis of that appraisal to say whether, under the circumstances, the time and place were appropriate for the promulgation of the curfew order and whether the order itself was an appropriate means of carrying out the Executive Order . . . .

. . . We have no occasion to consider whether the President, acting alone, could lawfully have made the curfew order in question, or have authorized others to make it. The exercise of that power here involves no question of martial law or trial by military tribunal. . . . Appellant has been tried and convicted in the civil courts and has been subjected to penalties prescribed by Congress for the acts committed.

The war power of the national government is "the power to wage war successfully." . . . It extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense . . . Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs.

The actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942, many of which, since disclosed, were then peculiarly within the knowledge of the military authorities. . . . Although the results of the attack on Pearl Harbor were not fully disclosed until much later, it was known that the damage was extensive, and that the Japanese by their successes had gained a naval superiority over our forces in the Pacific which might enable them to seize Pearl Harbor, our largest naval base and the last stronghold of defense lying between Japan and the west coast. That reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that they must face the danger of invasion, take measures against it, and in making the choice of measures consider our internal situation, cannot be doubted.

. . . As the curfew was made applicable to citizens residing in the area only if they were of Japanese ancestry, our inquiry must be whether in the light of all the facts and circumstances there was any substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage . . . . The alternative which appellant insists must be accepted is for the military authorities to impose the curfew on all citizens within the military area, or on none. In a case of threatened danger requiring prompt action, it is a choice between inflicting obviously needless hardship on the many, or sitting passive and unresisting in the presence of the threat. We think that constitutional government, in time of war, is not so powerless and does not compel so hard a choice if those charged with the responsibility of our national defense have reasonable ground for believing that the threat is real.

In the critical days of March 1942, the danger to our war production by sabotage and espionage in this area seems obvious. The German invasion of the Western European countries had given ample warning to the world of the menace of the "fifth column." Espionage by persons in sympathy with the Japanese Government had been found to have been particularly effective in the surprise attack on Pearl Harbor. At a time of threatened Japanese attack upon this country, the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern. . . .

There is support for the view that social, economic and political conditions which have prevailed since the close of the last century, when the Japanese began to come to this country in substantial numbers, have intensified their solidarity and have in large measure prevented their assimilation as an integral part of the white population. In addition, large numbers of children of Japanese parentage are sent to Japanese language schools outside the regular hours of public schools in the locality. Some of

these schools are generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan. Considerable numbers, estimated to be approximately 10,000, of American-born children of Japanese parentage have been sent to Japan for all or a part of their education.

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As a result of all these conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area, there has been relatively little social intercourse between them and the white population. The restrictions, both practical and legal, affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions.

Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions. . . . We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.

. . . If it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty. Like every military control of the population of a dangerous zone in war time, it necessarily involves some infringement of individual liberty, just as does the police establishment of fire lines during a fire, or the confinement of people to their houses during an air raid alarm—neither of which could be thought to be an infringement of constitutional right. . . .

But appellant insists that the exercise of the power is inappropriate and unconstitutional because it discriminates against citizens of Japanese ancestry, in violation of the Fifth Amendment. The Fifth Amendment contains no equal protection clause and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process. . . .

Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Yick Wo* v. *Hopkins* . . . We may assume that these considerations would be controlling here were it not for the fact that the danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas. Because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for our national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others. "We must never forget, that it is *a constitution* we are expounding," "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs." *McCulloch* v. *Maryland* (1819) . . .

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Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew. We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry. Nor can we deny that Congress, and the military authorities acting with its authorization, have constitutional power to appraise the danger in the light of facts of public notoriety. We need not now attempt to define the ultimate boundaries of the war power. We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power. In this case it is enough that circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made. Whether we would have made it is irrelevant.

What we have said also disposes of the contention that the curfew order involved an unlawful delegation by Congress of its legislative power. The mandate of the Constitution that all legislative power

granted "shall be vested in Congress" has never been thought, even in the administration of civil affairs, to preclude Congress from resorting to the aid of executive or administrative officers in determining by findings whether the facts are such as to call for the application of previously adopted legislative standards or definitions of Congressional policy.

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It is true that the Act does not in terms establish a particular standard to which orders of the military commander are to conform, or require findings to be made as a prerequisite to any order. But the Executive Order, the Proclamations and the statute are not to be read in isolation from each other. They were parts of a single program and must be judged as such. The Act of March 21, 1942, was an adoption by Congress of the Executive Order and of the Proclamations. The Proclamations themselves followed a standard authorized by the Executive Order—the necessity of protecting military resources in the designated areas against espionage and sabotage. And by the Act, Congress gave its approval to that standard. We have no need to consider now the validity of action if taken by the military commander without conforming to this standard approved by Congress, or the validity of orders made without the support of findings showing that they do so conform. . . .

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The Constitution as a continuously operating charter of government does not demand the impossible or the impractical. The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government. . . .

The conviction under the second count is without constitutional infirmity. Hence we have no occasion to review the conviction on the first count since, as already stated, the sentences on the two counts are to run concurrently and conviction on the second is sufficient to sustain the sentence. For this reason also it is unnecessary to consider the Government's argument that compliance with the order to report at the Civilian Control Station did not necessarily entail confinement in a relocation center.

JUSTICE DOUGLAS, concurring.

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After the disastrous bombing of Pearl Harbor the military had a grave problem on its hands. The threat of Japanese invasion of the west coast was not fanciful but real. . . . We cannot possibly know all the facts which lay behind that decision. Some of them may have been as intangible and as imponderable as the factors which influence personal or business decisions in daily life. The point is that we cannot sit in judgment on the military requirements of that hour. Where the orders under the present Act have some relation to "protection against espionage and against sabotage," our task is at an end.

. . . [T]he wisdom or expediency of the decision which was made is not for us to review. Nor are we warranted where national survival is at stake in insisting that those orders should not have been applied to anyone without some evidence of his disloyalty. . . . [W]here the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those who are detained for cause. Nor should the military be required to wait until espionage or sabotage becomes effective before it moves.

. . . [M]ilitary decisions must be made without the benefit of hindsight. The orders must be judged as of the date when the decision to issue them was made. To say that the military in such cases should take the time to weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it. But as the opinion of the Court makes clear, speed and dispatch may be of the essence. . . .

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But I think it important to emphasize that we are dealing here with a problem of loyalty not assimilation. Loyalty is a matter of mind and of heart not of race. That indeed is the history of America. Moreover, guilt is personal under our constitutional system. Detention for reasonable cause is one thing. Detention on account of ancestry is another. . . . Obedience to the military orders is one thing. Whether an

individual member of a group must be afforded at some stage an opportunity to show that, being loyal, he should be reclassified is a wholly different question.

JUSTICE MURPHY, concurring.

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We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed, for instance, that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the law of war . . . could be deprived of due process of law and the benefits of trial by jury, in the absence of a valid declaration of martial law. . . .

Distinctions based on color and ancestry are utterly inconsistent with our traditions and ideals. They are at variance with the principles for which we are now waging war. We cannot close our eyes to the fact that for centuries the Old World has been torn by racial and religious conflicts and has suffered the worst kind of anguish because of inequality of treatment for different groups. There was one law for one and a different law for another. Nothing is written more firmly into our law than the compact of the Plymouth voyagers to have just and equal laws. To say that any group cannot be assimilated is to admit that the great American experiment has failed, that our way of life has failed when confronted with the normal attachment of certain groups to the lands of their forefathers. . . .

Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon the accident of race or ancestry. Under the curfew order here challenged no less than 70,000 American citizens have been placed under a special ban and deprived of their liberty because of their particular racial inheritance. In this sense it bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany and in other parts of Europe. The result is the creation in this country of two classes of citizens for the purposes of a critical and perilous hour—to sanction discrimination between groups of United States citizens on the basis of ancestry. In my opinion this goes to the very brink of constitutional power.

Except under conditions of great emergency a regulation of this kind applicable solely to citizens of a particular racial extraction would not be regarded as in accord with the requirement of due process of law contained in the Fifth Amendment. . . . It is true that the Fifth Amendment, unlike the Fourteenth, contains no guarantee of equal protection of the laws. . . . It is also true that even the guaranty of equal protection of the laws allows a measure of reasonable classification. It by no means follows, however, that there may not be discrimination of such an injurious character in the application of laws as to amount to a denial of due process of law as that term is used in the Fifth Amendment. I think that point is dangerously approached when we have one law for the majority of our citizens and another for those of a particular racial heritage.

In view, however, of the critical military situation . . . , the military authorities should not be required to conform to standards of regulatory action appropriate to normal times. . . . Accordingly I think that the military arm, confronted with the peril of imminent enemy attack and acting under the authority conferred by the Congress, made an allowable judgment at the time the curfew restriction was imposed. Whether such a restriction is valid today is another matter.

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JUSTICE RUTLEDGE, concurring.

I concur in the Court's opinion, except for the suggestion, if that is intended (as to which I make no assertion), that the courts have no power to review any action a military officer may "in his discretion" find it necessary to take with respect to civilian citizens in military areas or zones, once it is found that an emergency has created the conditions requiring or justifying the creation of the area or zone and the institution of some degree of military control short of suspending habeas corpus. Given the generating conditions for exercise of military authority and recognizing the wide latitude for particular applications

that ordinarily creates, I do not think it is necessary in this case to decide that there is no action a person in the position of General DeWitt here may take, and which he may regard as necessary to the region's or the country's safety, which will call judicial power into play. The officer of course must have wide discretion and room for its operation. But it does not follow there may not be bounds beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen. But in this case that question need not be faced and I merely add my reservation without indication of opinion concerning it.