XIX

Military and Civilian Mobilization in Wartime

NOTE

The impact of World War II upon the rights and privileges of American citizens and upon the national defense problem called for a re-examination of the basic principles governing the proper relations between military authority and civilian rights.[1] Under the exigencies of total war, American citizens of Japanese ancestry living in the western states were made subject to curfew regulations,[2] exclusion from the West Coast area, and detention within inland relocation centers.[3] The validity of an exclusion order promulgated by the Commanding General of the Western Defense Command under authority of an executive order and an act of Congress was upheld by the Supreme Court in 1944 in *Korematsu* v. *United States*.

In the past there have been several occasions upon which the courts have sought to reconcile the conflicting interests of national security with the rights of individual citizens guaranteed by the Constitution. Most of the problems encountered in World War I and World War II had likewise to be faced during the Civil War. In a sense the experience of government under President Lincoln served as a model for subsequent wartime administrations. The difference between the position of the citizen in relation to his government in 1942 and his position in 1862 was one of degree, not of kind. President Lincoln and his Congresses had a war to win; they had dissidents to combat and disloyal citizens to restrain; they had also to impose rigid controls upon private property in the interests of national emergency. In some instances the President had pursued a course not authorized by Congress or the Constitution.

Perhaps the most drastic measure taken by the executive at that time was one by which military commanders were empowered to suspend the writ of *habeas corpus*. Inasmuch as the provision 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,'[4] appears in that section of the Constitution devoted entirely to limitations upon Congressional action, it was argued that the President's suspension of the right without Congressional approval was unlawful.

Mr. Chief Justice Taney examined this point in 1861. Sitting as a circuit judge in Baltimore he was petitioned for a writ of *habeas corpus* by a Maryland agi-

[1] See Corwin, Edward S., *Total War and the Constitution*, New York, 1947.

[2] It had been decided in *Hirabayashi* v. *United States*, 320 U.S. 81 (1943) that the discriminatory curfew orders were valid emergency war measures.

[3] In *Ex parte Endo*, 323 U.S. 283 (1944), the Court held that a Japanese American of unquestioned loyalty must be released from a War Relocation Center.

[4] Art. 1, sec. 9.

tator, John Merryman, who had been arrested by military authority and imprisoned in Fort McHenry. A writ was issued directing the fort's commander to appear with his prisoner at the court in Baltimore; the general refused; instead, he submitted a statement outlining the President's authorization for the suspension of the writ. In consequence of the general's ignoring the court's order, Chief Justice Taney issued a writ of contempt and sent a United States marshal to enforce it. When the general ignored this citation the Chief Justice handed down his opinion in *Ex parte Merryman*.[5] He declared that the right of suspension of the writ belonged exclusively to Congress, and then only under circumstances 'when the public safety may require it.' Furthermore, he insisted, a civilian could not be imprisoned and tried by a military court in violation of the Sixth Amendment. Finally, he castigated the President for his dereliction of duty in failing to 'take care that the laws be faithfully executed.' In his view, it was incumbent upon the President to support and enforce the lawful orders of the judiciary as well as the orders of the military. This opinion has since been recognized as a classic defense of civil liberties against military authority.

It should be remembered that prior to this time no case involving these suspensions of the writ had come before the highest court of the land. When that event did take place, as it did during the war in *Ex parte Vallandigham*,[6] the Supreme Court evaded the question by stating that it lacked jurisdiction to review the decision of a military commission,[7] since such a body was not a court within the meaning of laws prescribing the Court's competence. However, shortly after the end of the war the Court squarely faced the issue which it had carefully avoided during the hostilities and denied the power of the President to suspend the writ of *habeas corpus* and to substitute military trial of civilians for trial by the regular courts in areas not immediately in the theatre of war.[8]

Lambdin P. Milligan, a citizen of Indiana, was an active member of the Order of American Knights or Sons of Liberty, a secret society allegedly devoted to the overthrow of the government. Arrested in October, 1864, by order of Brevet Major-General Hovey, commander of the District of Indiana, Milligan was confined in a military prison and tried before a military commission upon charges of conspiracy against the government of the United States, affording aid and comfort to rebels, inciting insurrection, and disloyal practices. The commission sentenced him to be hanged. A short while before sentence was to be executed Milligan petitioned the United States Circuit Court in Indiana for his release; he contended that he had been unlawfully convicted and claimed the constitutional right of a jury trial.

The Habeas Corpus Act of March 3, 1863,[9] had authorized the President to suspend the writ of *habeas corpus* throughout the United States, but further

[5] 17 Fed. Cas. No. 9487 (1861). [6] 1 Wall. 243 (1864).

[7] Soon after the United States entered World War II eight Nazi saboteurs were captured in this country, arrested by the Federal Bureau of Investigation, tried by a military commission and convicted. Six were executed. Their conviction was sustained under the laws of war. *Ex parte Quirin*, 317 U.S. 1 (1942). See also *In re Yamashita*, 327 U.S. 1 (1946), and *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946).

[8] *Ex parte Milligan*, 4 Wall. 2 (1866). [9] 12 Stat. 755.

provided that where a grand jury had met and adjourned without taking action against a person charged with violation of national law, it was to be the duty of the court to discharge such person. A grand jury of the United States circuit court for the District of Indiana had in fact met and adjourned without indicting Milligan; accordingly, the circuit court was bound to consider his release. Uncertain of the legality of Milligan's conviction, the judges of the court certified the question to the Supreme Court.

Mr. Justice Davis wrote the opinion of the Court in *Ex parte Milligan.* Noticeably relieved by the cessation of hostilities and the opportunity to decide this pressing question 'without passion or the admixture of any element not required to form a legal judgment,'[10] Mr. Justice Davis declared Milligan to have been convicted unlawfully and ordered his release. He denied the President's authority to establish military commissions for the trial of civilians in such cases and went so far as to imply that even Congress could not authorize the use of such a device outside of the actual theaters of war. He granted, however, that the safety of every government necessitates the 'power somewhere of suspending the writ of *habeas corpus*'[11] on the ground that emergency conditions may not permit recourse to the ordinary legal processes of peacetime.

Concurring in the Court's decision, but disagreeing with its reasoning, Mr. Chief Justice Chase spoke on behalf of four members of the Court in an opinion which has since become the more controlling of the two. He said: 'Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. *This power necessarily extends to all legislation essential to the prosecution of war with vigor and success. . .*'[12] And when the nation is exposed to invasion, 'it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offences against the discipline or security of the army or against the public safety.'[13]

Each of these cases arising out of the Civil War involved the commission by citizens of overt acts which were admittedly intended to hamper the successful prosecution of the war by the Union; the insurrectional, treasonable or disloyal character of the acts was unquestioned. In the case below the question of martial law was not involved; Korematsu had not been tried and sentenced by a military commission, nor had his right to a writ of *habeas corpus* been suspended either by Congress or the President. The professed reasons for the regulation which Korematsu had violated were the pressure of time and security and the presence in that vital coastal area of large numbers of Japanese Americans whose loyalty, under the circumstances, could not be deliberately tested. There were no grounds

[10] 4 Wall. 2, 109 (1866). [11] Ibid. 125.

[12] Ibid. 139, italics ours. Addressing the American Bar Association at Saratoga, New York, on 5 September 1917, Charles Evans Hughes discussed the subject, 'War Powers Under the Constitution.' He spoke as a former Justice of the Supreme Court, and his statement: 'The power to wage war is the power to wage it successfully,' has since become a favorite aphorism. *The New York Times,* 6 September 1917, p. 1. [13] Ibid. 140.

for suspecting him of disloyalty. His conviction in a Federal District Court for remaining in a military area contrary to an exclusion order of a military commander did, however, re-present the basic problem of the compatibility between 'the law of paramount necessity' and the 'inalienable rights of the individual citizen.'

KOREMATSU v. UNITED STATES
323 U.S. 214 (1944)

Certiorari, 321 U.S. 760, to review the affirmance of a judgment of conviction.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a 'Military Area,' contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that '. . . whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.'

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that 'the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . .'

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a 'protection against espionage and against sabotage.' In *Hirabayashi* v. *United States*, 320 U.S. 81, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction

and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the *Hirabayashi* case, *supra,* at p. 99, '. . . we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. 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.'

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the ex-

clusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. . . In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. *Ex parte Kawato,* 317 U.S. 69, 73. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time 'until and to the extent that a future proclamation or order should so permit or direct.' 7 Fed. Reg. 2601. That 'future order,' the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did 'direct' exclusion from the area of all persons of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 27 and May 3 orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as 'assembly centers,' in order 'to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration.' Public Proclamation No. 4, 7 Fed. Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed. Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the

exclusion order and his conviction under it cannot stand.

We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. *Blockburger* v. *United States,* 284 U.S. 299, 304. There is no reason why violations of these orders, insofar as they were promulgated pursuant to Congressional enactment, should not be treated as separate offenses.

The *Endo* case . . . graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or 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 framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. 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 removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation cen-

ters—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an 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. Korematsu was not excluded from the Military Area because of hostility to him or his race. He *was* excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

MR. JUSTICE FRANKFURTER, concurring. . .

MR. JUSTICE ROBERTS, dissenting. . .

MR. JUSTICE MURPHY, dissenting.

This exclusion of 'all persons of Japanese ancestry, both alien and non-alien,' from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.' *Sterling* v. *Constantin,* 287 U.S. 378, 401.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States* v. *Russell,* 13 Wall. 623, 627-8; *Mitchell* v. *Harmony,* 13 How. 115, 134-5; *Raymond* v. *Thomas,* 91 U.S. 712, 716. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast 'all persons of Japanese ancestry, both alien and non-alien,' clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional

rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. In it he refers to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose 'racial strains are undiluted,' and as constituting 'over 112,000 potential enemies . . . at large today' along the Pacific Coast. In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, 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. Individuals of Japanese ancestry are condemned because they are said to be 'a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.' They are claimed to be given to 'emperor worshipping ceremonies' and to 'dual citizenship.' Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, together with facts as to certain persons being educated and residing at length in Japan. It is intimated that many of these individuals deliberately resided 'adjacent to strategic points,' thus enabling them 'to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so.' The need for protective custody is also asserted. The report refers without identity to 'numerous incidents of violence' as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the 'situation was fraught with danger to the Japanese population itself' and that the general public

'was ready to take matters into its own hands.' Finally, it is intimated, though not directly charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area, as well as for unidentified radio transmissions and night signalling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow. No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group 'were unknown and time was of the essence.' Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these 'subversive' persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese an-

cestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free, a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved —or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women. Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

MR. JUSTICE JACKSON, dissenting. . .