

to the reestablishment of peace" between belligerents. The previous year, the Court had twice struck down what it termed excessive delegation in domestic matters, and the only question the Court faced involved whether Congress could delegate more broadly in international affairs. The case never should have involved the existence of an independent presidential power, since the litigants raised only the question of whether Congress had exceeded its powers.

Sutherland's opinion closely tracks an article he had written as a senator in 1910 and published in his 1919 book, *Constitutional Power and World Affairs*. There and in other places, Sutherland advocated a vigorous—even belligerent—diplomacy that unceasingly asserted American rights. In the opinion, Sutherland claimed that only the federal government had any control over foreign affairs, and with the exception of the advise and consent powers of the Senate, all foreign powers resided in the executive branch. Scholars have attacked both the history on which Sutherland relied, showing that the states did not give up all of their powers following the Revolution and that the Constitution grants Congress a large voice in foreign policy, including the power of the purse. The Framers, it is claimed, made no such distinction between foreign and domestic affairs, and certainly in modern times, the line is often difficult to discern.

Roosevelt began to expand his foreign policy prerogatives in the mid-1930s by negotiating a set of secret executive agreements with Great Britain and France to establish cooperative defense arrangements. After the outbreak of the war in 1939, he used executive agreements to fashion foreign policy and avoid confronting isolationist opposition in the Senate. In October 1939, the United States and nineteen Latin American countries agreed to the Declaration of Panama, which established a "neutrality belt" around the western hemisphere. In August 1941, Roosevelt and British Prime Minister Winston Churchill issued the famous Atlantic Charter, which set out the war aims of the United Nations.

The most famous executive agreement involved an exchange of destroyers for naval bases in September 1940. Britain had lost nearly half the ships it needed to defend her home waters, and Churchill pleaded with the president for some fifty or sixty "over-age" World War I destroyers to use against Nazi submarines. Roosevelt wanted to help, but he worried not only that the ships might be needed for American defense, but that providing warships to a belligerent would violate international law and be seen as an act of war. Moreover the Walsh Act, passed in June 1940, allowed the sale of older vessels only if the navy certified them as useless for defense; naval officers, in order to prevent Congress from scrapping the destroyers, had just testified that the ships still had defense value. If Roosevelt sought approval for the deal from Congress, isolationists might easily have blocked the sale.

Roosevelt bypassed the Congress by negotiating an executive agreement in which the United States traded fifty old destroyers for the use of British bases in Newfoundland, Bermuda, and the Caribbean. Attorney General Robert Jackson prepared a memorandum assuring military leaders that they could certify the ships as nonessential to national security, since the bases the nation would receive in return would be far more valuable for that purpose. Although most Americans approved of the deal—even some of the isolationists welcomed the expanded control over nearby waters that the bases made possible—critics attacked Roosevelt for the method he had chosen. He had, they claimed, flouted the congressional will, transgressed international law, and ignored

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### Executive Agreements

Roosevelt had never been afraid to exercise power, and as the international situation worsened, he assumed that the Constitution gave him powers as commander-in-chief to meet the emergency. Despite the isolationists' efforts to prevent involvement in foreign wars, no one seriously challenged the idea that the president had primary responsibility for directing foreign policy. The Supreme Court, in *United States v. Curtiss-Wright Export Corporation* (1936), had noted the "plenary and exclusive power of the President as the sole organ of the federal government in foreign relations," a phrase reminiscent of John Marshall's description many decades earlier. In addition, Justice Sutherland ruled that the president's control over foreign relations did not rely on any act of Congress, but derived independently from the Constitution.

There has been considerable criticism of *Curtiss-Wright*, both for its logic and its history. The case arose after Congress had delegated authority to the president to declare an arms embargo in Latin America if he found that to do so would "contribute

the public. "Mr. Roosevelt today committed an act of war," fumed the *St. Louis Post-Dispatch*. "He also became America's first dictator." But the president's supporters applauded his willingness to bypass unmoded conventions of international law when Britain's very survival depended on quick action. To them, he had displayed statesmanship of the highest order.

The constitutional questions surrounding the destroyer-bases deal have been largely ignored due to the brilliant success of the scheme. A case can be made, however, that the transfer violated the intent of Congress as statutorily expressed in the Walsh Act. Attorney General Jackson had to distort words in the law that were otherwise plain in meaning to conclude that the destroyers could be disposed of if more valuable properties for the national defense could be secured. The possibility that the delivery of warships, even overage ones, to a belligerent might involve the United States in war would, on its face, seem sufficient justification to have the matter approved either by Congress through statute or at least by the Senate through treaty ratification. In fact, Roosevelt hesitated a long time before consenting to the transfer by executive agreement, because he feared that it might prove constitutionally defective.

Two years later, in one of the few cases testing presidential authority to make executive agreements, the Court upheld one of Roosevelt's earliest arrangements, the so-called Livinov assignment, by which the United States recognized the Soviet Union as the successor of czarist Russia, and assigned to it all claims for Russian assets frozen in the United States at the time of the communist revolution in 1917. *United States v. Pink* (1942).

### Presidential Power

By the fall of 1940, many Americans considered the United States a nonbelligerent rather than a neutral nation, involved in everything except the actual fighting. Roosevelt had declared a limited national emergency on September 8, 1939, to, as he put it, "make wholly constitutional and legal certain necessary measures." In May 1941, he proclaimed an "unlimited" emergency to justify additional measures for the defense of the Western Hemisphere.

What these declarations meant, and what constitutional basis they relied on, remained uncertain. After the first decree in 1939, the Senate asked the attorney general to explain what, if any, additional executive powers the president now had. Frank Murphy refused to be specific but maintained that "the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance." And so the "adequacy of the Constitution" theory, which had justified Lincoln's conduct of the Civil War, reappeared in modern garb. Roosevelt had argued from his very first day in office that the Constitution's broad and flexible grants of power gave the American government in general—and the executive in particular—more than sufficient authority to meet any crisis.

Like Lincoln and Wilson before him, Roosevelt's assumption of broad authority under the war powers relied less on constitutional clauses than on public approval. So long as the citizenry perceived him as acting in the best interests of the country, they would support him regardless of what constitutional theories he invoked to justify his policies. If, however, the president lost this broad-based political support, it mattered little what he claimed the Constitution said. Roosevelt's extensive use of executive agreements and

executive orders, revolutionary by themselves, masked the fact that more often than not he sought—and received—legislative authorization for his policies.

Much of the president's policy, in fact, could be constitutionally justified by the broad grants of authority that Congress delegated to the executive. The Neutrality Act of 1939 gave him the discretion he had sought in imposing embargoes, and the peace-time draft legislation passed in September 1940 expanded executive policy-making powers. The Lend-Lease Act of March 1941 not only repealed the cash-and-carry provisions of the 1939 Neutrality Act, but authorized the president to manufacture or procure any article needed for the defense of any country he deemed vital to American interests, and then to sell, lend, lease, exchange, or otherwise supply that article in any way that he thought proper. When he first proposed Lend-Lease, a reporter asked whether the concept would require congressional approval. "Oh, yes," the president replied, "this would require various types of legislation, in addition to appropriation."

Suppose my neighbor's home catches fire, and I have a length of garden hose four or five hundred feet away. If he can take my garden hose and connect it up with his hydrant, I may help him to put out his fire. Now what do I do? I don't say to him before that operation, "Neighbor, my garden hose cost me \$15; you have to pay me \$15 for it." What is the transaction that goes on? I don't want \$15—I want my garden hose back after the fire is over.

—Franklin D. Roosevelt, Explaining Lend-Lease (1940)

In April of 1941, Roosevelt chose to ask Congress for authority to allow him to confiscate and make use of foreign merchant vessels in American ports. At the time, about 80 foreign ships lay idle in American ports, and another 150 in other ports in the hemisphere. Declining to act under his powers as commander-in-chief, the president stated that he lacked authority to seize the ships; Congress quickly provided the necessary legislation. Throughout the war, Roosevelt always preferred congressional validation and authority, but he had no hesitation in acting on what he perceived to be the broad powers of the presidency.

Some of Roosevelt's most important activities lacked statutory authorization. He utilized executive orders to embargo the shipment of aviation fuel and scrap metals to Japan and to freeze Japanese assets in the United States. His order in October 1939, establishing a "Neutrality Patrol" in the western Atlantic, derived from the traditional powers of the commander-in-chief to use the navy as an instrument of foreign policy, a tradition that went back to John Adams. Roosevelt ignored a seeming proscription in the Lend-Lease Act and ordered the navy to convoy merchant ships carrying war goods to Great Britain. In July 1941, the president sent American troops to Iceland as a result of an executive agreement with the new Republic of Iceland. Roosevelt now had to arrange for convoys for the supply ships to Iceland, convoys that also protected the delivery of Lend-Lease goods that were headed farther east.

As some critics warned, convoys meant shooting. In September 1941, in response to an alleged U-boat attack on the destroyer *Greer*, Roosevelt used his own authority as commander-in-chief to order the navy to hunt down German submarines. To some people, this appeared that the president, and not Congress, had declared war; whatever the technicalities may have been, no one doubted that a de facto state of hostilities existed between the two countries, without formal constitutional requirements having been met. Isolationists later charged that Roosevelt had deceitfully and unconstitutionally involved the country in war, by subverting the express will of Congress that the nation should remain neutral. Yet, like Lincoln before him, Roosevelt believed that the Constitution gave him the authority he needed to act; moreover, between 1939 and 1941, the mood of Congress shifted dramatically. The isolationists, triumphant in 1937, had the ground cut out from under them as Americans came to understand—and fear—the menace of fascism. Roosevelt may have been ahead of Congress on some issues, but the conflict that marked the prewar years soon dissipated. If Congress had really opposed Roosevelt's policy, it could have refused his requests on the draft or Lend-Lease and nullified his executive orders by legislation. Instead, public and congressional opinion endorsed his policies. How long this type of foreign policy management could have continued is difficult to say, but the Japanese attack on Pearl Harbor on the morning of December 7, 1941, focused all attention on the president, with both Congress and the nation looking to him for leadership.

### Organizing for War

Less than two weeks after the attack on Pearl Harbor, Congress enacted the first War Powers Act, essentially reinstating the Overman Act of World War I and authorizing the president to reorganize the government almost any way he saw fit. Roosevelt had already created, by administrative order, the Office of Emergency Management in May 1940; it now became the coordinating agency for the vastly expanded wartime executive. All together, Roosevelt created some twenty-nine separate agencies to prosecute the war, such as the War Production Board, the Office of Civilian Defense, the War Manpower Commission, the Office of Defense Transportation, and others. These were counterparts of the Wilsonian war agencies, although on a vastly larger scale, and for the most part they ran fairly efficiently. Unlike 1917, the government now had a large body of experienced bureaucrats, and the statistics that had been collected by the National Recovery Administration and other New Deal agencies provided for the first time a detailed picture of the nation's manufacturing capacity. The United States could and must, in Roosevelt's words, become "the arsenal of democracy."

It will not be sufficient for us and the other United Nations to produce a slightly superior supply of munitions to that of Germany, Japan and Italy. The superiority of the United Nations in munitions and ships must be overwhelming... a crushing superiority of equipment in any theater of the world war.

—Franklin D. Roosevelt to Congress (1942)

Direction of the government assumed a certain pattern. Congress passed legislation delegating broad authority to the president, often without the direction or restraints that the Supreme Court had declared necessary in the *Schechter* case. Roosevelt then established agencies or did whatever he thought was needed to further the war effort. The War Powers Act of December 1941, and a similar measure in March 1942, provided catchall authority for a variety of executive functions, from regulating production to impounding enemy property, from censoring overseas communications to requisitioning entire factories. The Emergency Price Control Act of January 1942 and the War Labor Disputes Act of June 1943 addressed more specific issues, but they too gave the commander-in-chief broad discretion in exercising vast powers.

Roosevelt not only exercised the powers Congress gave him, but, as he told the nation, he would utilize whatever powers he considered necessary to the successful prosecution of the war. At one point, Roosevelt warned that if Congress failed to repeal a portion of the Price Control Law, "I shall accept the responsibility, and I will act... The President has the power, under the Constitution, and under Congressional acts, to take measures necessary to avert a disaster." But, he assured the people, he would always act with due regard to the Constitution, and "when the war is won, the powers under which I act automatically revert to the people—where they belong."

### The Court and Wartime Regulations

Among the wartime agencies, the Office of Price Administration (OPA) had been created to carry out provisions of the Emergency Price Control Act of 1942. Congress had delegated sweeping power to set prices; it had also created an Emergency Court of Appeals with exclusive jurisdiction over challenges to OPA policies on price fixing, rationing, salary limits, and other controls. In *Yakus v. United States* (1944), the Supreme Court approved the creation of the Emergency Court and also validated the wide discretionary powers that Congress had delegated to the executive. Justices Rutledge and Murphy, however, argued that by denying the regular Title III courts authority to review the constitutionality of the regulations, Congress in effect had asked the judiciary to act unconstitutionally. The dissenters could not accept the majority argument that Congress had the power to limit appeals, both in terms of timeliness and venue, that is, which courts could hear an appeal and when. Shortly after the decision, Congress decided that perhaps the dissenters had been right and repealed the time and venue restrictions in the Stabilization Extension Act of 1944.

For the most part, however, the Roosevelt Court gave Congress and the administration an almost unrestricted power to regulate the wartime economy. In *Stewart and Company v. Bowles* (1944), the Court approved OPA sanctions that had suspended allotments of fuel oil to dealers who violated the rationing scheme. The failure to allow for any sort of judicial review obviously ran afoul of normal standards of procedural due process, but Justice Douglas interpreted the OPA order not as a punishment, but as a means to promote more efficient distribution of scarce resources. A little earlier in the year, in *Bowles v. Willingham* (1944), the Court had also sustained an OPA order freezing rental rates on apartments. When the nation calls on men and women to sacrifice

their lives in war, it is not constitutionally obligated to "assure each landlord a 'fair return' on his property."

The sanctity of property rights, still a powerful doctrine in 1936, was replaced less than five years later by the view that property had to give way to other priorities established by the state and had to be subject to the state's police powers, or in case of war, to the war powers. The Court refused to second-guess the executive or legislative branches on what had to be done to win the war, and it sustained all challenges to the Price Control Act.

The most extreme exercise of federal authority over private property—presidential seizure of industrial plants—never came before the Supreme Court. Both Lincoln and Wilson had exercised similar authority; Lincoln had taken over some railroad and telegraph lines, while Wilson had acted when labor problems or managerial inefficiency had threatened war production. Neither president had specific statutory authority, but had relied on the constitutional powers allegedly available to the commander-in-chief in wartime.

Roosevelt invoked a similarly vague justification when he seized a California plant of the North American Aviation Company in June 1941—six months *before* Pearl Harbor—to break a strike that had crippled production of badly needed planes. He took over a half dozen other plants under the same war powers claim, until Congress granted him statutory authority in the War Disputes Act of 1943. Nearly forty additional seizures occurred under color of this act, but only one—the well-publicized takeover of nine Montgomery Ward plants—led to litigation in the lower courts. The government returned the property before an appeal could be carried to the high court.

If anything, the enormous authority wielded by the federal government between 1939 and 1945 proved again the marvelous elasticity of the Constitution. As in 1861 and 1917, tensions arose between the need to secure near dictatorial authority to prosecute the war and formal constitutional limitations on government—separation of powers and protection of individual rights. At every turn, the former won out over the latter, but neither Roosevelt nor Congress wanted to subvert civil liberties or destroy property rights. At all times, they justified their actions not just in light of wartime exigencies, but in constitutional terms as well. Like Lincoln and Wilson, Franklin Roosevelt had to bend the Constitution, but he did not break it.

### Anti-Japanese Sentiment

As noted in the previous chapter, overall, the Supreme Court and the Roosevelt administration received high marks from civil libertarians during the war except in one area—the internment of Japanese-Americans. In the worst violation of civil liberties in American history, the government forcibly transferred 112,000 persons of Japanese origins—70,000 of them American citizens—away from their homes, jobs, and property, locked them in detention centers, and kept some of them there up to four years.

Immediately after the Japanese attack on Pearl Harbor in 1941, the general attitude toward the Japanese-American population, nearly all of whom lived on the West Coast, remained fairly tolerant. "Let's not get rattled," urged the *Los Angeles Times*; most of the Japanese in this country were "good Americans, born and educated as such," and the paper urged its readers that "there be no precipitations, no riots, no mob law."

General John L. DeWitt, head of the Western Defense Command, termed the idea of evacuating Japanese from the coastal areas as "damned nonsense!"

But prejudice against the Japanese dated back decades before the war. After Congress passed the Chinese Exclusion Act in 1882, Californian nativists began a campaign to keep the Japanese out of the country as well. Because of their small numbers, however, the Japanese initially attracted little attention, although they began to buy up small farms in supposedly barren areas, which through hard work they made enormously productive. Papers soon carried headlines and editorials on "the Yellow Peril," and in 1906, the San Francisco school board agreed to transfer all Japanese students to the segregated school already reserved for the Chinese.

Two years later, Theodore Roosevelt negotiated a "Gentlemen's Agreement," in which Japan agreed to limit the flow of male workers to the United States if Congress did not legislate to that effect. Exemptions in the agreement, however, allowed another 118,000 immigrants, including thousands of so-called mail-order or picture brides, to enter the country between 1908 and 1924. Anti-Japanese organizations now sought to bar further land purchases, and in 1913, the California legislature passed an Alien Land Law, prohibiting further purchases or leasing of land by aliens ineligible for citizenship.

Although Congress had never specifically excluded Asians from naturalization, it had referred in various laws to whites and Africans. Lower court judges had on a number of occasions interpreted the law as allowing the naturalization of Japanese immigrants. In *Ozawa v. United States* (1922), however, the Supreme Court unanimously put an end to this practice, ruling that Congress, by the wording of the statute, had not intended persons of other than white or of African ancestry to be eligible for naturalization. When Congress passed the Immigration Restriction Act of 1924, which reduced the quotas on nearly all groups, it singled out the Japanese for total exclusion, despite the protests of the State Department.

Given this background, it was little wonder that within six weeks of Pearl Harbor, the initial tolerance had given way to a full-throated cry to get Japanese-Americans, all of whom allegedly might be saboteurs or spies, away from the West Coast, which alarmists claimed would soon be invaded by the Emperor's forces. Although the government had no evidence of even a single instance of sabotage by a Japanese-American, public hysteria demanded that the military do something. General DeWitt, now eager to accommodate, began a campaign to secure approval for the mass removal of the Japanese, the same idea that he had recently denounced. The respected columnist Walter Lippmann, after a talk with DeWitt, informed his readers that "nobody's constitutional rights include the right to reside and do business on a battlefield. There is plenty of room elsewhere for him to exercise his rights." A few days later, the less restrained columnist Westbrook Pegler called for every Japanese man and woman to be put under armed guard, "and to hell with habeas corpus until the danger is over."

In fairness, one should note that responsible military analysts at this time viewed the Pacific as a Japanese lake, and in fact, until the Battle of Midway in June 1942, it appeared that nothing could stop the Imperial Fleet or prevent an invasion of the West Coast. One should also recall that the treatment of Japanese-Americans, unfair as it was, came nowhere close to the way the Japanese and Germans treated minority groups in the countries they occupied.

## Japanese Relocation

On February 19, 1942, without discussing it with his cabinet, President Roosevelt signed Executive Order 9066. Some critics of the relocation have claimed that Roosevelt himself should bear little responsibility, since he had no part in originating or developing the program, and, with so many other war-related demands on his time and energy, he did not recognize the problem. But while presidents ought not to be blamed for every act of their subordinates, the person in the White House is, under the Constitution, the chief executive of the United States and therefore is responsible for what executive agencies and officers do. Protests against 9066, including warnings from his own attorney general, ought to have alerted the president to the danger; furthermore, he augmented and continued the program through other executive orders and personally prohibited its discontinuation until after the 1944 election.

Executive Order 9066 authorized the secretary of war and certain military officers to designate parts of the country as "military areas" from which any and all persons might be excluded, and in which travel restrictions might be imposed. Roosevelt issued the order solely on his power as military commander-in-chief, but army lawyers feared the actions that were necessary to implement 9066 might not withstand court scrutiny on such a narrow base. They wanted more authority, and got it on March 21, when Congress enacted the major provisions of 9066 into law and added stringent penalties for those who resisted relocation.

General DeWitt had already begun the program on March 2, 1942, designating the entire Pacific Coast as a military area because of its susceptibility to attack. This initial proclamation made no reference to any personal restrictions, but noted that future notices would set out particulars. On March 24, with congressional authority having been added to that of the president, DeWitt established a curfew along the coastal plain between 8:00 p.m. and 6:00 a.m. for German and Italian nationals and for all persons of Japanese ancestry. Three days later, military officials prohibited not only Japanese nationals (Issei) but American citizens of Japanese ancestry (Nisei) from leaving the military areas. Then on May 9, the army excluded all Japanese-Americans, both Issei and Nisei, from the West Coast military zones. Japanese-Americans could comply with these contradictory orders only by reporting to designated central locations, from which they would be transported to "relocation centers" in the interior. The War Relocation Authority, which had been established under Executive Order 9102 for the sole purpose of helping the military in its evacuation program, operated these centers, which amounted to nothing more than detention camps.

Although relocated families could stay together, they had to leave homes and jobs; property owners suffered enormously because they had to dispose of their holdings in a matter of days and accept whatever price they could get. Inside the camps, despite a variety of busy work activities, they had little to do. Amazingly, the 110,000 men, women, and children responded cooperatively for the most part. A number of younger Nisei volunteered to serve in the army, and their unit, the 442nd Regimental Combat Team, turned out to be among the most highly decorated in the European theater of operations.

The relocation program constituted the most serious invasion of individual rights by the federal government in the history of the country. The entire operation proceeded on racist

assumptions and brought forth such astounding statements as that of Congressman Leland Ford of California that "a patriotic native-born Japanese, if he wants to make his contribution, will submit himself to a concentration camp." Despite the absence of even a shred of evidence of disloyalty, the entire Japanese-American population—including native-born citizens—stood condemned, because, as General DeWitt so eloquently put it, "A Jap is a Jap." In contrast to the treatment of Japanese on the West Coast, it is instructive to see what happened to Italians on the East Coast. After Mussolini's declaration of war against the United States in December 1941, some 600,000 Italians—more than ten percent of the entire Italian-American community—remained Italian citizens and were automatically labeled as "enemy aliens." But the Roosevelt administration had been actively cultivating Italian voters, and the president instructed Attorney General Nicholas Biddle to cancel that designation. The announcement was made to a cheering 1942 Columbus Day crowd in Carnegie Hall, New York, just weeks before the congressional elections.

## The Relocation Cases

The constitutional basis for both Roosevelt's executive orders and congressional legislation left much to be desired, but they nonetheless received the imprimatur of the nation's highest tribunal. The first case resulting from the internment program to reach the Court was *Hirabayashi v. United States* (1943). Gordon Hirabayashi, a University of Washington senior and a native-born citizen, had been arrested for failing to report to a control center and for violating the curfew. The Court sustained the legitimacy of the curfew, but evaded any ruling on the wider implications of the relocation program. Chief Justice Stone, for a unanimous Court, held that the power to impose a curfew in wartime clearly lay within the presidential war powers, as well as congressional authority. He noted the gravity of the situation (which no one questioned) and the possible disloyalty of some Japanese-Americans (which no one could prove), and said that the Court ought not challenge the discretion of the military in interpreting the war powers broadly. Any discrimination based on race, while "odious to a free people," had clearly been relevant to the situation, and Congress had properly taken it into account.

Do you 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 the Chief Justice and seven other justices of this Court are behaving like the enemy and thereby playing into the hands of 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.

—Felix Frankfurter, pleading with Frank Murphy not to dissent in *Hirabayashi v. United States* (1943)

Justices Murphy, Douglas, and Rutledge entered concurring opinions, which practically amounted to dissents. This proved especially true of Murphy's remarks, in which he objected to any invasion of rights based on race, even in wartime. The curfew order, he noted, had "a melancholy resemblance" to the way Jews were being treated in Germany and Nazi-occupied Europe. But the three men reluctantly consented to what they considered an unconstitutional program because of the allegedly critical military situation.

The Court heard two other cases the following year, testing the relocation program, and in both, they shied away from dealing with the central issue. In *Korematsu v. United States* (1944), an American citizen, turned down because of ulcers after he had volunteered for the army, had refused to leave the war zone. Justice Black's opinion for the majority separated the exclusion issue from that of detention, and found the war power of Congress and the president sufficient to sustain the order. In wartime, civilians had to defer to military judgment and bear the resulting hardships that had always accompanied war. Somewhat disingenuously, Black denied that race had anything to do with Fred Korematsu's arrest; he had been ordered to leave the war zone not because of his race, but because of military necessity.

This time three justices, Murphy, Roberts, and Jackson, entered strenuous dissents. Justice Jackson wrote that Korematsu had been convicted of nothing more than "being present in the state whereof he is a citizen, near the place where he was born, and where he lived all his life." Jackson also attacked the cruel quandary that the military proclamations had created. On the one hand, they forbade Japanese-Americans from leaving, and on the other, forbade them from remaining, with the only option left open being "submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps."

Justice Roberts proved even blunter in his dissent, charging that Korematsu had been convicted "for not submitting to imprisonment in a concentration camp." Justice Murphy also dissented eloquently "from this legalization of racism" and exposed the central problem of the relocation program: it had been based solely on prejudice, on unproven fears that some members of one group, identifiable because of their ethnicity, might be disloyal. No similar action had been taken against German-Americans or Italian-Americans, despite the fact that some German-Americans and German nationals were arrested for espionage and treason.

On the same day, the Court unanimously authorized a writ of habeas corpus for Mitsuye Endo, a citizen whose loyalty had been clearly established. Although the American Civil Liberties Union, which filed an amicus brief in all three cases, had hoped to make *Ex parte Endo* a challenge to the entire detention program, Justice Douglas carefully skirted that issue and confined his ruling to the single question of whether the War Relocation Authority could detain persons whose loyalty had been confirmed. He held that it could not, but he had difficulty with the opinion, since this case came perilously close to the larger issue raised in the minority opinions in *Korematsu*—whether a person accused of no crime could be detained by military officials outside a combat zone. In *Ex parte Milligan* (1866), decided *after* the fighting in the Civil War had stopped, the Chase Court had said no, but Douglas now tried to distinguish between the two; Milligan had been held by the army, whereas Endo had

been detained by a civilian agency. Douglas ignored the fact that the War Relocation Authority had been created for no purpose other than to assist the military to carry out the evacuation. In concurrences that nonetheless attacked the majority opinion, Murphy and Roberts decried the Court's refusal to resolve an important constitutional issue that had properly come before it—whether a loyal citizen who had committed no crime could be deprived of her liberty.

There has been a general condemnation of the internment program, and of the Supreme Court's condoning it, ever since. Recent evidence indicates that the solicitor general knew that no military necessity justified the relocation and that he deliberately misled the Court in this area. Perhaps it is too much to expect the Court to remain free of the passions that inevitably sweep a nation during wartime, but there is a bitter irony in comparing Stone's *Caroleene Products* footnote, which called for a "more exacting judicial scrutiny" of racially directed legislation, and his *Hirabayashi* opinion, which condemned discrimination in general, but then approved of it in this application. Nor can one find much evidence of the concern for rights that later marked the careers of Black and Douglas in their *Korematsu* and *Endo* opinions. Only Murphy seemed fully consistent between his earlier opinions and his position in the Japanese cases, but even he bowed to what the Court, and much of the nation, took to be military necessity.

### Milligan Redux

In *Ex parte Milligan* (1866), decided after the Civil War had ended, the Supreme Court had ruled that persons accused of crimes could not be tried before military tribunals as long as civilian courts remained open. That issue came before the Court again in the Second World War, and once again the justices reached the same conclusion. Shortly after the attack on Pearl Harbor, the government had imposed martial law on the Hawaiian Islands, and a comprehensive suspension of constitutional protections lasted until October 1944. Unlike the West Coast detention scheme, martial law in the islands applied to the entire population of 465,000, of whom slightly more than a third were of Japanese origin.

In February 1944, a civilian shipyard worker, Lloyd Duncan (a Caucasian), got into a fight with military sentries, who promptly arrested him. A military court tried and convicted him and sentenced him to six months in prison. Duncan's civilian attorney then sought a writ of habeas corpus in federal district court, claiming that since the civilian courts had remained open, the provost's court had no jurisdiction. The government put General Robert Richardson and Admiral Chester Nimitz on the stand to testify that a Japanese military menace, although weakened, still existed and thereby justified martial law. The local judge ordered Duncan freed on the basis of *Milligan* and that martial law had been illegal since at least March 1943.

The Supreme Court accepted the case for review and heard oral argument on December 7, 1945, four years to the day after the attack on Pearl Harbor. By a 7 to 2 vote the Court, speaking through Justice Black, upheld the lower court in *Duncan v. Kahanamoku* (1946). Black, who had been the author of *Hirabayashi*, had to distinguish between why the Court had accepted the military's rationale in 1943 but refused



to do so now. Black did this by ignoring the constitutional implications of martial law, and writing what amounted to a historical treatise on habeas corpus; the great writ had been created to fight the type of tyranny that army rule often brought. What Black did not say was that in the midst of war, he stood ready to believe what the military authorities had told him; in 1946, with the war over, he sat as an historian and found the army version unconvincing.

### The Judgment of History

The decisions on Japanese-Americans so jarred the legal community that they quickly came under universal attack. Historian Eugene V. Rostow summarized this judgment in the title of an article he wrote in 1945: "The Japanese American Cases—A Disaster." Since then, no reputable scholar has defended the decisions. Some members of the Court later admitted that the Court had erred badly; "the evacuation case was ever on my conscience," Justice Douglas declared in his memoirs.

The internment has continued to haunt the nation's conscience as well. In 1948, Congress took a first step toward making amends with enactment of the Japanese American Evacuation Claims Act. Although the Federal Reserve Bank estimated the loss of property at \$400 million, the statute limited compensation to claims that could be verified by written records, a burden most of the internees could not meet. As a result, the Treasury paid out \$37 million on claims of \$148 million. Then in 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians, with a mandate to "review the facts and circumstances" that had led to Executive Order 9066 and the resultant internments. Between July and December 1981, approximately 750 witnesses testified, many of them internees who told for the first time of the trauma they had suffered and the psychological scars they still bore; the commission also heard from some of the architects of the policy that had put those people behind barbed wire.

In its report in February 1983, *Personal Justice Denied*, the commission condemned the internment as a "grave injustice," which resulted from decisions "conceived in haste and executed in an atmosphere of fear and anger at Japan." The commission unanimously agreed that 9066 had not been justified by military necessity, but, as Frank Murphy had argued nearly forty years earlier, was the result of "race prejudice, war hysteria and a failure of political leadership." The commission also concluded that the Supreme Court decisions on relocation had been "overruled in the court of history." But those decisions are still on the books, and the fear remains that in some future crisis the argument of military necessity might again be used to limit the rights of citizens. The argument is not that farfetched. At the Relocation Commission hearings, Wall Street attorney John J. McCloy, still unrepentant over his role in shaping the internment program as assistant secretary of war, pointed out that a major threat to American security existed less than 90 miles from the Florida coast and urged the commission not to recommend any restrictions that might hamper the government from responding to the threat of fifth columnists.

At the same time that the Relocation Commission began its hearings, lawyers for Gordon Hirabayashi, Fred Korematsu, and others began the lengthy process in federal district courts on the West Coast to have their convictions overturned. Utilizing evidence uncovered by Peter Irons in researching his book on the relocation cases, they

asked for the ancient and little-used writ of *coram nobis*, a final avenue of relief for persons who have been convicted of a crime and served their sentence, but who seek reversal of the judgment on the grounds that the original conviction had been tainted by governmental misconduct. Irons had found evidence that not only did General DeWitt know that the Japanese-Americans posed no security threat, but so did the government lawyers, especially John Fahy, who argued the cases before the Supreme Court.

They did me a great wrong.

—Fred Korematsu, deciding to seek reversal of his conviction (1982)

In 1984, the district court vacated Korematsu's conviction, and the other trials also resulted in a resounding defeat for the government. The Justice Department appealed the one of the reversals, but ran into a stone wall in the Ninth Circuit, which upheld the lower court's decision. In response to the government's claim that so much time had passed as to make the issue moot, Judge Mary M. Schroeder declared: "A United States citizen who is convicted of a crime on account of race is lastingly aggrieved." At that point the government decided not to appeal to the Supreme Court.

In August 1988, Congress passed a redress bill that provided \$20,000 to each internment camp survivor, and on August 10, President Ronald Reagan signed the bill into law. The law included a national apology as well as money for an educational fund to instruct future generations of Americans about the lessons of the internment. By the time the law's ten-year limit for applying had run out, some 60,000 survivors had entered claims totalling \$1.2 billion.