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Wartime Power of the Military Over Citizen Civilians Within the Country

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"WHEN an area is so beset," said Justice Jackson in his *Korematsu* dissent, "that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. . . . No court can require such a commander in such circumstances to act as a reasonable man; . . . He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

"But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient."[1]

"I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority."[2]

To this, Justice Frankfurter, concurring with the majority, took vigorous exception.

"To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as 'an unconstitutional order' is to suffuse a part of the Constitution with an atmosphere of unconstitutionality . . ." The Constitution, he said, explicitly granted the war power "for safeguarding the national life by prosecuting war effectively . . ." Hence, "If a military order . . . does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission. . . ."[3]

This Jackson-Frankfurter exchange highlighted and placed in modern context one of the oldest, most crucial and well-migh insoluble problems of

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1 Korematsu v. United States, 323 U.S. 214, 244 (1944).

2 *Id.* at 247.

3 *Id.* at 224-225.

constitutional democracy, viz., how to reconcile the conflicting demands of unfettered military power necessary to preserve the State in times of crises with the system of constitutional limitations and individual rights. Can this sort of military power be brought within the confines of the Constitution, subjected to rule, circumscribed by limitation—or is it governed only by necessity as uninhibited and elemental as national self-preservation?[4] Must we, as Justice Jackson suggests, regard unconstitutionality as an inevitable concomitant of the exercise of military authority even when it is "reasonable?"

The evacuation of American citizens of Japanese ancestry from the west coast, and their subsequent detention, carried out during World War II by the military under a plea or pretext of military necessity, provided the occasion for the Jackson-Frankfurter exchange and placed the perennial issue in its most critical modern form.[5] The circumstances contained at

[4] This question has been raised not only by modern total war but by the total war in years gone by. Said Abraham Lincoln after the presidential election of 1864 which some sober-minded citizens would have postponed because of the war: "It has long been a grave question whether any government not too strong for the liberties of its people, can be strong enough to maintain its existence in great emergencies. On this point the present rebellion brought our government to a severe test, and a presidential election occurring in regular course during the rebellion, added not a little to this strain . . ."Speech of November 10, 1864, quoted in CORWIN, TOTAL WAR AND THE CONSTITUTION 132 (1947).

[5] KONVITZ, THE ALIEN AND THE ASIATIC IN AMERICAN LAW 241-279 (1946); Alexandre, *The Nisei—A Casualty of World War II,* 28 CORNELL L. Q. 385 (1943); Corwin, *op. cit. supra* note 4, at 91-100; Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's* Korematsu *and* Endo *Decisions,* 45 COL. L. REV. 175 (1945); Fairman, *The Law of Martial Rule and the National Emergency,* 55 HARV. L. REV. 1253 (1942); and THE LAW OF MARTIAL RULE 157-167, 255-261 (2d ed. 1943); Freeman, *Genesis, Exodus, and Leviticus. Genealogy, Evacuation, and Law,* 28 CORNELL L. Q. 414 (1943); Graham, *Martial Law in California,* 31 CALIF. L. REV. 6 (1942); Rostow, *The Japanese American Cases—A Disaster,* 54 YALE L. J. 489 (1945); Watson, *The Japanese Evacuation and Litigation Arising Therefrom,* 22 ORE. L. REV. 46 (1942); Wolfson, *Legal Doctrine, War Power, and Japanese Evacuation,* 32 KY. L.J. 328 (1944). The war power of the national government is variously described as a single inherent power and as an aggregate of all the specifically delegated constitutional powers having a bearing upon the conduct of war. The most famous recent expression of the first of these theories is the statement of Justice Sutherland in United States v. Curtiss-Wright Corp., 299 U.S. 304, 316 (1936): "A political society cannot endure without a supreme will somewhere. Sovereignty is never held in suspense. When, therefore, the external sovereignty of Great Britain in respect of the colonies ceased, it immediately passed to the Union . . . ."

"It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality." *Id.* at 318.

A list of the specifically delegated powers having a bearing on the conduct of war might include: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to . . . provide for the common defense and general welfare of the United States" (U. S. CONST. Art. I, § 8, clause 1);

"To borrow money on the credit of the United States; . . . (clause 2); To declare war . . . (clause 11);

least two complicating factors. The first was the discriminatory character of the action taken. Had that factor not been present—had the question simply been the validity of a universally applied curfew or of the evacuation of all persons from a limited area threatened even remotely by invasion—it is doubtful that there would have been so much question about the power of the military to impose the restriction, though a basic constitutional issue of fact would still have had to be decided. But the curfew reached citizens of Japanese ancestry only, and mass evacuation and detention were applied exclusively to persons of that ancestry.[6]

Second, the problem was complicated by the fact that it involved military control over civilians within the country and thus opened to view the baffling lay and professional chaos surrounding martial law.[7] Had a civilian

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"To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years (clause 12);

"To provide and maintain a navy" (clause 13);

"To make rules for the government and regulation of the land and naval forces (clause 14);

"To provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions (clause 15);

"To provide for organizing, arming and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress (clause 16);

". . . To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof (clause 18);

". . . The executive power shall be vested in a President of the United States of America (Art. II, § 1, clause 1) . . . The President shall be commander in chief of the army and navy of the United States, and of the militia of the several states, when called into the actual service of the United States . . . ." (Art. 2, § 2, clause 1).

[6] In a strict sense, the separate classification of all Japanese Americans was based on ancestry and not on race, since all Orientals belong to the same race and only the Japanese Americans were evacuated. Yet basically, the classifying trait was race since those Americans having an ethnic affinity with our Asiatic enemy alone were excluded and imprisoned; those Americans having an ethnic affinity with our white European enemies were not subjected to similar treatment.

[7] Compare the following statements, for example: ". . . there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." *Ex parte* Milligan, 4 Wall. 2 (U.S. 1866).

"Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed." WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 16 (1940).

"Martial law—or better, martial rule— . . . consists in the total or partial exercise by

agency alone handled the evacuation no martial law questions would have been raised to confuse the war powers problem.

The Japanese American cases required the Court to answer the following fundamental questions: (1) In time of war, what are the tests of the war power of the national government, vested by the Constitution in Congress and the Executive as the war-waging branches of government, especially over citizen civilians within the country? (2) How far does the power of the military extend over civilians in time of war and within the country? (3) Does such power arise from necessity and exist independently of the Constitution or is it constitutionally authorized and granted? (4) No matter what its sources, is such power subject to the limitations of the Constitution? (5) To what extent, if at all, is this power dependent upon the concept of martial law? (6) Is the military judgment of the military neces-

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military authority, of governmental functions over our own people in our own territory; . . . embeded in the very fiber of the Constitution, we find not only the authority for martial rule but the occasions which require and justify it, and as well the limits of its operations . . . the power delegated under Public Law 503 [and Executive Order 9066] to the Secretary of War and the military commanders named by him is enormous, and places under military jurisdiction, every man, woman and child on the Pacific Coast. And, in my judgment, except as it implies the trial by jury in federal courts of civilian violators, it authorizes martial rule without limit or restraint." Graham, *supra* note 5, at 7, 9, 14.

"Those exercises of the war power which involve the most drastic changes from governmental customs in times of peace have been, but need not be, termed exercises of martial law." "The test for the validity of the exercise of martial law is identical to the test for the propriety of any exercise of the war power . . .

"The fact that many exercises of the war power, such as the peace time maintenance of military establishments, require no particular formal invocation of the war power and the fact that martial law customarily is formally declared either by the Chief Executive or by a military commander supplies no basis for a distinction between the war power and martial law, because the proclamation of martial law is not necessary to its exercise but 'must be regarded as the statement of an existing fact, rather than the legal creation of that fact . . . '

"It is, therefore submitted that the fundamental question in the case at bar is whether the evacuation program is, under all the circumstances, a proper exercise of the war power. It is unnecessary legally, and it may be undesirable generally, to decide the subsidiary question of terminology whether this particular exercise of the war power falls within that part of the scope of the war power which is popularly called martial law. On the one hand it is a substantial exercise of the war power over personal liberty and for that reason might possibly be called martial law. On the other hand it is not the type of control usually associated with martial law . . . and might be exercised by civilian authorities as is contemplated under the English statute and regulations . . . without making any reference to martial law. Indeed, in view of the fact that in popular opinion greater military control than here involved and suspension of the civil government including the courts is associated with the state of martial law, it might be more useful not to label the exercise of the war power here involved as martial law." Brief for the United States, pp. 80-81, Yasui v. United States, 320 U.S. 115 (1943).

"Probably the problem will only be confused by talking about martial law. The President had made no such proclamation and if he did his constitutional powers would not be increased one whit. The question in every case of military control would still be, can the action complained of be justified as apparently reasonable and appropriate under the circumstances, to the defense of the nation and the prosecution of the war?" San Francisco Chronicle, March 4, 1942, p. 14.

sity for controls over civilians final? Does the responsibility rest primarily with Congress to determine the existence of conditions justifying the establishment of partial or total military government, and of establishing it? To what extent, and by what tests, if any, are such judgments, by the military or by Congress, subject to judicial review and control? (7) To what degree, if any, do the methods and character of modern warfare require that we relax our democratically indispensable doctrines of the civil control of the military and the responsibility of the latter for its acts?

The Milligan Case and the Alternatives

Merely to mention these questions raises immediately the character and scope of the decision in Ex Parte Milligan.[8] Decided in 1866 and arising out of an episode of the Civil War,[9] that case has stood as a landmark in our constitutional history on the nature and extent of the war-time power of the military over civilians within the country. It was a "brooding omnipresense" in the Japanese American cases, albeit undiscussed, unanalyzed and all but unmentioned. Like many another historical landmark, it has been held to stand for various and often conflicting propositions. In recent years, the majority opinion in the *Milligan* case has been sharply criticized as importing "into the Constitution a mechanical test" which, though a "salutary restraint upon the tyranny of the Stuarts," is not "an appropriate limit on the powers of both executive and legislature in the highly responsible national government."[10] Just as stoutly, the majority opinion has been defended as "a monument in the democratic tradition" which "should be the animating force of this branch of our law."[11]

The facts of the *Milligan* case were not exactly like those of the Japanese American cases. In October, 1864, Milligan was arrested by military order, tried, found guilty and sentenced to hang by a military commission. The offense charged was not disloyalty or suspicion of disloyalty but conspiracy to overthrow the government, a crime under the laws of Congress, punishable in the civil courts, as disloyalty or suspicion of disloyalty is not. In May, 1865, Milligan petitioned the United States Circuit Court to be discharged from unlawful imprisonment. The two-judge circuit court divided and certified the question to the United States Supreme Court.

By Act of March 3, 1863, Congress had authorized the President to suspend the privilege of the writ of habeas corpus "whenever, in his judgment, the public safety may require it;" and the President had acted by

[8] *Ex parte* Milligan, 4 Wall. 2 (U.S. 1866).

[9] Stampp, *The Milligan Case and the Election of 1864 in Indiana,* 31 MISS. VALLEY HIST. REV. 41 (1944) explodes the belief traditionally held by constitutional writers that the conspiracy with which Milligan was charged was a serious and substantial one.

[10] Fairman, *supra* note 5, at 1286.

[11] Rostow, *supra* note 5, at 524.

proclamation doing so. Under the statute, however, the privilege of the writ was not to be suspended if the person;

> was detained in custody by the order of the President, otherwise than as a prisoner of war; if he was a citizen . . . and had never been in the military or naval service, and the grand jury of the district had met, after he had been arrested, for a period of twenty days, and adjourned without taking any proceedings against him. . . .

Milligan was not a prisoner of war and had not been in the military or naval service. Moreover, a Federal Grand Jury had convened in the district and failed to indict him. The privilege of the writ therefore had not been suspended as to him. So the United States Supreme Court unanimously held. The case being settled on these narrow statutory grounds, the Court might have rested. Unlike their successors eighty years later, however, these judges were not seeking opportunities to evade the underlying grave constitutional issues.

Justice Davis, for a majority of the Court, went on to enunciate the doctrine which is our principal heritage from the *Milligan* case. Trial by military commission, he maintained, violated the Third Article of the Constitution vesting the judicial power in courts ordained and established by Congress and composed of judges appointed during good behavior. It also violated the jury trial guarantees in the original Constitution and in the Fifth and Sixth Amendments and the search and seizure provisions of the Fourth Amendment. The Fathers, said Justice Davis:

> secured the inheritance they had fought to maintain, by incorporating in a written constitution the safeguards which *time* had proved were essential to its preservation. Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of *habeas corpus*.[12]

The Fathers "limited the suspension to one great right, and left the rest to remain forever inviolable."[13] "No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its [the Constitution] provisions can be suspended during any of the great exigencies of government."[14] It did not follow, said Justice Davis, that the nation was helpless in the face of a war crisis, barring the allowance of a theory of power by necessity; "for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence; . . ."[15]

This, then, was the system of the *Milligan* majority: That the power

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[12] *Supra* note 8, at 125.
[13] *Id.* at 126.
[14] *Id.* at 121.
[15] *Ibid.*

to wage war and to wage it successfully, the power to preserve the existence of the nation, is granted by the Constitution; but at no point and in no crisis will its exercise justify the suspension of the constitutional guarantees and limitations, with the single exception of the privilege of the writ of habeas corpus. Moreover, the privilege of the writ of habeas corpus could be suspended only to the extent of warranting detention of individuals, in an hour of emergency, without trial; not to the extent of supplying unconstitutional trials. This aspect of the *Milligan* majority opinion, showing the power of the military to be constitutionally derived and constitutionally limited, is often ignored in the preoccupation of courts and commentators with Justice Davis' remark about martial law.

This position of the *Milligan* majority is sustained and amplified by the claim that it rejected. That claim was that:

> in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge) has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will*; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

Justice Davis answered:

> If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.
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> The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power"—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.[16]

The Court's opinion in the *Milligan* case thus makes clear that military necessity, even when approved by the executive, is not a self-justifying plea; that the military judgment that military necessity exists, cannot be allowed to stand alone; that the commander is responsible not only to his superiors and the President but to the law and the courts; that the military must act, at least when dealing with citizens within the country, within the

[16] *Id.* at 124-125.

confines of the Constitution and subject to civil, that is, judicial control.

All of this is true, said the *Milligan* majority, with one exception; and it is the scope of that exception upon which critics of the opinion have concentrated. Justice Davis said:

> . . . there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then,* on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued *after* the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war.[17]

> . . . Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.[17a]

Thus in these conditions, when warfare is actually raging in the community and has knocked out civil government, the military is in control by default and necessity. Its power arises from these facts and not from the Constitution, which does not limit it. But even here, the facts establishing the necessity are not finally determined by the military. The Supreme Court will have to be satisfied that the courts are actually closed and civil administration deposed.

Chief Justice Chase, joined by Justices Wayne, Swayne and Miller, expressed basic disagreement. In their view, ". . . there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution."[18] Thus, presumably even in a civil government vacuum, the military does not derive its power from extra-constitutional necessity. "The Constitution itself," said the Chief Justice, "provides for military government as well as for civil government."[19] Military government is derived from the constitutional powers to declare and wage war, to raise and support armies and perhaps from the power to provide for the government of the national forces. Moreover, continued the Chief Justice, military government is not confined to the area and circumstance of actual military conflict. Though the courts are not closed and the civil officials deposed, mili-

[17] *Supra* note 8 at 127.

[17a] *Ibid.*

[18] *Id.* at 141.

[19] *Id.* at 137.

tary government may constitutionally be established "in time of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."[20] The Chief Justice's description of the situation prevailing in Indiana at the time of Milligan's arrest, though historically incorrect, still supplies an example of particular circumstances included within this general formula:

> . . . the state was a military district, was the theatre of military operations, has been actually invaded, and was constantly threatened with invasion. . . . a powerful secret association, composed of citizens and others, existed within the state, under military organization, conspiring against the draft, and plotting insurrection, the liberation of prisoners of war at various depots, the seizure of the state and national arsenals, armed cooperation with the enemy, and war against the national government.[21]

What branch or agency of government was authorized to establish military government and determine the circumstances warranting it? The answers can be guessed from the depository of the constitutional powers involved. The Chief Justice said:

> . . . 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 . . . .[22]

> MARTIAL LAW PROPER . . . is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President . . . .[23]

Finally, to military government, when operating within its proper sphere, "the civil safeguards of the Constitution"[24] have no application. Citizens may thus be tried by military commissions instead of constitutional courts and constitutionally guaranteed juries.

With respect to the questions above formulated and presented to the Court in the Japanese American cases: the majority and minority in the *Milligan* case agreed that the wartime power of the military over civilians within the country, in most circumstances, is only such as is authorized by Congress and the Executive in the exercise of their constitutional powers to wage war and is subject to all limitations, guarantees and civil controls of the Constitution. The majority and minority agreed moreover that there were circumstances in which the military could displace, alter or substitute for civil government and could operate unrestrained by constitutional limi-

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[20] *Id.* at 142.
[21] *Id.* at 140.
[22] *Ibid.*
[23] *Id.* at 142.
[24] *Id.* at 137.

tations. They disagreed as to the character of those circumstances: the majority finding them present only when civil government was knocked out and there existed a governmental vacuum; the minority finding them present more broadly "where ordinary law no longer adequately secures public safety and private rights." The majority and minority agreed that when those circumstances were present the military is not limited by the civil rights and guarantees of the Constitution. They disagreed as to the source of the power of the military; the majority found it outside the Constitution in necessity, "usages of war," or "martial law"; the minority, in the war powers vested by the Constitution—the term "martial law" merely describing the circumstances in which the war powers might be exercised uninhibited by the Constitution. The majority thus regarded martial law as a "generating source of power"; the minority, though its use of the terms was not careful, seems to have regarded it as an explanatory rubric. The majority and minority disagreed as to the agency of government responsible for finally determining the existence of the conditions freeing the military from constitutional restraints, though they agreed the military judgment was not final. The majority thought this a function of the judiciary and in this very case reversed the conclusion of the military on that point. The minority spoke mainly in terms of a congressional determination or, "temporarily . . . in the case of justifying or excusing peril," a presidential determination. The minority said nothing as to whether the judges would review the factual determination of Congress or the President.[25] But it must be remembered both that discussion on this point was not necessary in the opinion, and that in 1866, the methods and character of judicial review, as presently conceived, were still in their infancy. Neither the majority nor the minority commented on the provision of the Act of 1863 authorizing the President to suspend the privilege of the writ "whenever, in his judgment, the public safety may require it."

In brief, the difference between the majority and the minority in the *Milligan* case comes down to this: the minority maintained that, short of conditions of actual warfare and civil government vacuum, there is an area in which the military may operate with respect to civilians within the country, unrestrained by the civil guarantees of the Constitution except that it must act pursuant to congressional or executive findings and authorization. This the majority denied, holding rather that in that area constitutional restraints as well as constitutional powers apply.

Against the background of the *Milligan* case, the Court in the Japanese American cases had a number of alternatives:

[25] Contrary to Professor Fairman's presumption there is nothing in Chief Justice Chase's opinion to indicate that the judiciary would subject the legislative or executive action to normal constitutional tests as to the legitimacy of the end and the appropriateness of the means.

(1) Strict application of the rule of the *Milligan* majority. This would confine the constitutionally unhindered wartime powers of the military over civilians within the country to those areas in which battle is raging and civil government is unable to function. Since neither of these conditions was present on the west coast, the rule would require testing the validity of the curfew, evacuation and detention program within the ordinary framework of the constitutionally granted and constitutionally limited executive and legislative power to wage war.

(2) Adoption of the position of the *Milligan* minority—that Congress can declare martial law short of a breakdown of civil government and in areas removed from actual combat; that accordingly Congress can authorize military government over selected subjects or activities in the presence of civil authority duly and regularly functioning in all other respects; that it is up to Congress to decide in what "districts such great and imminent public danger exists" as to justify the military measures authorized; and that once the military power is thus properly invoked constitutional safeguards of civil and individual rights are irrelevant.

(3) Accept the martial rule doctrine in the *Milligan* majority but expand the area and liberalize the conditions of its application. This might be done under the guise of interpreting and applying that doctrine in the light of the conditions and methods of modern warfare. As stated by the Attorney-General of California:

> In a total global war not confined to the actual scene of hostilities but waged swiftly and violently and at long range upon civilians, factories and fields far beyond the front line and conducted by sabotage, espionage and propaganda everywhere, the army must undertake certain precautionary and preventive measures in areas not directly under the siege guns of the enemy, the object of which is the protection of the civilian population and the successful prosecution of the war .... The touchstone by which these preventive measures are justified is the military necessity [for them].[26]

> The view of the majority [in the *Milligan* case] that martial law must be confined to the locality of actual war does not require a change of this phase of the test of necessity but merely a new and realistic conception of the type of warfare being waged today.[27]

While this might be called an interpretation and application of the martial-law-rule-of-necessity dictum of the *Milligan* majority, it would be a basic repudiation of the whole spirit and tendency of the *Milligan* majority opinion, which sought to restrict the area of martial law to the narrowest confines of absolute necessity. It would in effect be tantamount to an adop-

[26] Brief for California as *Amicus Curiae*, pp. 6-7, Korematsu v. United States, 323 U.S. 214 (1944).

[27] *Id.* at 11.

tion of the inherent war powers theory classically stated by John Quincy Adams in 1831:

> Sir, in the authority given to Congress by the Constitution of the United States to declare war, all the powers incidental to war are, by necessary implication, conferred upon the government of the United States. Now, the powers incidental to war are derived, not from the internal municipal sources, but the laws and usages of nations . . . . There are, then, in the authority of Congress and in the Executive, two classes of powers altogether different in their nature and often incompatible with each other—war power and peace power. The peace power is limited by regulations and restricted by provisions in the Constitution itself. The war power is only limited by the usages of nations. This power is tremendous. It is strictly constitutional, but it breaks down every barrier so anxiously erected for the protection of liberty and of life.[28]

The Answers of the Japanese Cases

The *Hirabayashi* case stands generally upon the first of these alternatives; the *Korematsu* case upon the third; and the *Endo* case, though the judges there evaded all constitutional alternatives, stands as a disparagement of the spirit and rule of *Milligan.*

In *Hirabayashi* v. *United States,*[29] a Japanese American, born in the United States of Japanese immigrant parents, reared in the United States and never having visited Japan, a member of the Quaker faith, educated in our public schools and at the time a senior at the University of Washington, was criminally prosecuted for violation of the curfew order, tried by jury, convicted and sentenced to three months imprisonment. The United States Supreme Court upheld the conviction and sentence. The legal foundation for the prosecution rested on Executive Order 9066, issued February 19, 1942, Public Law 503, adopted March 21, 1942, and Public Proclamation No. 3 of the Western Defense Command promulgated March 24, 1942. In Executive Order 9066, the President, after declaring that:

> the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, . . . premises and . . . utilities

authorized and directed the Secretary of War or any military commander designated by him

> to prescribe military areas . . . from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or appropriate Military Commander may impose in his discretion.[30]

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[28] Register of Debates xii, pp. 4037-38 quoted by CORWIN, *op. cit. supra* note 4, at 78.
[29] Hirabayashi v. United States, 320 U.S. 81 (1943).
[30] 7 Fed. Reg. 1407 (Feb. 19, 1942).

Public Law 503 provided:

> 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 fine or imprisonment or both].[31]

Public Proclamation No. 3, issued by General DeWitt, proclaimed that "military necessity" required "the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry" within Military Area No. 1, prescribed by earlier proclamations. Accordingly, Public Proclamation No. 3 ordered that:

> all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Militry Area No. 1 . . . shall be within their place of residence between the hours of 8 p.m. and 6 a.m. . . .[32]

Chief Justice Stone's opinion for the Court is divided into three main areas. In the first, he considers the extent of the national war power and whether prevention of espionage and sabotage falls within it. In the second, he considers whether the military peril, that is, danger of "air attack and invasion," actually existed, whether there was a likelihood of attempts to commit acts of espionage and sabotage and their bearing, if committed, on air attacks and invasion, and, finally, whether curfew was a device reasonably adapted to the prevention of these dangers. In the third, the Chief Justice specifically analyzes the issue of whether the curfew "unconstitutionally discriminated between citizens of Japanese ancestry and those of other ancestries in violation of the Fifth Amendment" stated at the outset of the opinion to be "the question for our decision. . . ."[33]

Thus, the Court in the *Hirabayashi* case, invokes for the military curfew the tests which are traditionally announced for all other constitutional powers: (1) was the end sought to be achieved within the war powers granted by the Constitution; (2) were the means employed appropriate to the achievement of that end; (3) were the means chosen selected with due recognition of the substantive and comparative guarantees of the Fifth and other Amendments?

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[31] 18 U.S.C. § 97a (1946).

[32] 7 Fed. Reg. 2543 (March 24, 1942).

[33] Hirabayashi v. United States, *supra* note 29 at 83.

Whatever quarrel one may have with the Court's actual decision on these points, there can be little doubt but that the Court regarded the exercise of military power as subject to these limitations.

Justices Murphy and Rutledge wrote concurring opinions. Justice Murphy especially asserted that "the mere existence of a state of war" does not "suspend" the broad guarantees of the Bill of Rights and other provisions of the Constitution protecting essential liberties." ". . . the war power like the other great substantive powers of government, is subject to the limitations of the Constitution."[34] Justices Murphy and Rutledge apparently agreed that drastic wartime invasion of constitutional rights could only be permitted if martial law were declared and in circumstances warranting martial law.

Like that of Hirabayashi, Korematsu's conviction was based on violation of orders issued by the Western Defense Command under the authority of the President and Congress granted in Executive Order 9066 and Public Law 503. At the time of his conviction, there were three such military orders outstanding and applicable to him. The first of these was Public Proclamation No. 4 of March 27, 1942,[35] terminating the original exclusion program which had left free choice of route and destination to the evacuee and instituting a system of rigid controls on movement. It forbade persons of Japanese ancestry to leave the area except as authorized and directed by the Western Defense Command. The second outstanding military order applicable to Korematsu was Civilian Exclusion Order No. 34, issued on May 3, 1942.[36] It provided that after midnight, May 28, all Japanese Americans were to be excluded from a given portion of Military Area No. 1 which included San Leandro, Alameda County, California, the place of Korematsu's residence. Civilian Exclusion Order No. 34 required a responsible member of each family and each individual living alone to report to a civil control station for instructions to go to an assembly center. By its terms, the order did not apply to Japanese Americans who were within the area and in assembly centers. The effect of these two orders, therefore, was to direct all Japanese Americans to proceed to assembly centers according to instructions to be received from a civil control station. The third outstanding military order was Civilian Restrictive Order No. 1, of May 19, 1942.[37] It provided for the indefinite detention of persons of Japanese ancestry in assembly or relocation centers.

Korematsu was born in Oakland and graduated from high school. He was classified as 4-F because of stomach ulcers. After graduation he worked

[34] Hirabayashi v. United States, *supra* note 29 at 110.

[35] 7 Fed. Reg. 2601 (1942).

[36] 7 Fed. Reg. 3967 (1942).

[37] 8 Fed. Reg. 982 (1943).

in a shipyard as a welder until, after the outbreak of war, the Boiler Makers Union cancelled his membership because of his race. He could not read or write Japanese, had never been outside of the United States, and was not a dual citizen. Romance rather than disloyalty was his undoing. The evacuation orders disrupted his plans to marry a Caucasian girl, so he decided to evade them and remain behind. He hoped to escape detection by having a plastic surgical operation performed on his nose and by changing his name. The ruses failed and the F.B.I. seized him.

Korematsu was prosecuted in the Federal District Court under Public Law 503 for knowingly remaining within the forbidden territory contrary to Civilian Exclusion Order No. 34, that is, for remaining within the forbidden territory but not in an assembly center.

> The court set the bail at $1,000 which was posted by the American Civil Liberties Union. But when served with the court order for Korematsu's release, the gaoler telephoned Military Police, who, without any warrants or writ whatever, placed Korematsu in military custody and took him to the Tanforan Assembly Center. . . . Judge Welch subsequently sanctioned this action and refused to release the bail despite the fact that the defendant was in the hands of the Government. Instead, the bail was raised to $2,500 when Korematsu declined to sign the useless bail bond. The unsigned bond was exonerated and the defendant was ordered into the custody of the United States Marshal and again placed in the county jail.[38]

On the trial, Korematsu was found guilty but his sentence was suspended and he was placed on probation for five years.

At no stage of the proceeding had Korematsu's loyalty to the United States been put in issue.

Confronted with the situation of a Japanese American still at large in the prohibited area after the sanctions provided by the law of Congress had been applied, the Western Defense Command again resorted to its own devices. Once more Korematsu was picked up by soldiers and lodged in the assembly center.

The Supreme Court's opinion in the *Korematsu* case is an attempt to occupy both areas marked out and imperatively separated by the *Milligan* majority: the rule of necessity, and the rule of the Constitution. It is a futile attempt to reconcile the irreconcilable. The opinion, as a result, is a muddled hodge-podge of conflicting and barely articulate doctrine. On the one hand, Justice Black explicitly builds upon the *Hirabayashi* case and treats the evacution decision as largely settled by the principles announced there. On the other hand, he lays such heavy stress upon the emergency character of the military action as in effect to take the position of the *Milligan* majority martial law dictum that the existence of dire emergency re-

[38] American Civil Liberties Union News, July 1942, p. 1.

sults in substituting untrammeled military judgment for constitutional limitations. Justice Black said:

> 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 Japanese attack.[39]
> . . . exclusion from threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.[40]
> The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, . . .
> * * *
> 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.[41]

To this explicit assimilation of the *Korematsu* and *Hirabayashi* cases must be added the Court's express denial that Korematsu was evacuated "because of hostility to him or his race."[42] This at least suggests that the military decision is subject to some judicial review, however perfunctory, in terms of the legitimacy of its purpose.

Side by side with these remarks and implications, however, are others far more reminiscent of the *Milligan* dictum than of *Hirabayashi*. For example:

> 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.[43]

And look again at this passage:

> He [Korematsu] *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 . . . .[44]

This language of military necessity is augmented by other statements in the opinion. The courts, said Justice Black, must give "rigid scrutiny" to "legal restrictions which curtail the civil rights of a single racial group. . . ."[45] Just such restrictions were before the Court. Yet nothing like

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[39] *Supra* note 1 at 217.
[40] *Id.* at 218.
[41] *Id.* at 217-18.
[42] *Id.* at 223.
[43] *Id.* at 219-220.
[44] *Id.* at 223.
[45] *Id.* at 216.

"rigid scrutiny" was given. Nor could it be in the presence of the latitude allowed to the military. But, in any event, legal restrictions of this order, that is, legal restrictions abrogating constitutional rights, can be justified, said Justice Black by "pressing public necessity."[46] No doubt they can be, but this is hardly a constitutional test.

In determining whether the stress on "pressing public necessity" as the justifying basis of the *Korematsu* decision should be regarded, on the one hand, as a mere shift in emphasis or rhetorical deviation, or, on the other hand, as a real departure from the reasonable relation formula of the *Hirabayashi* case, several factors must be borne in mind. It must be remembered, in the first place, that the Court which had reached a unanimous holding in the *Hirabayashi* case was now bitterly and publicly divided. Not only did the dissenters feel that the hardship of evacuation was quite out of the class of that involved in curfew but they denied that it was justified by the military situation at the time and raised serious questions about the extent to which non-military considerations entered into the decision. General DeWitt's "Final Report" which had come out prior to the *Korematsu* decision, in addition to casting a curious light on some of the General's beliefs, gave plausibility, if not something more, to the points of the dissenters. In these circumstances it was certainly easier for the Court to sustain the evacuation as an emergency action within the allowable discretion of the military than to attempt to justify it as reasonable in detail. In the second place, if one rejects this interpretation of the *Korematsu* case and assumes that the reliance on the *Hirabayashi* case implies a basic acceptance of the formula there stated, the question must be answered whether the application of the formula was not so feeble and uncertain as to amount to no application at all and thus in effect to leave the Constitution suspended. The later day, the diminished emergency, the incomparably more drastic invasion of individual rights, the application of the evacuation order exclusively to Japanese Americans (whereas German and Italian enemy aliens had also been included in the curfew), the evidence that racism played a part in the final decision—all demanded, if not a rigid and minute scrutiny, at least a substantial re-evaluation of ends and means. If the reasonable relation test was to mean anything in these circumstances, one would think that it required something more than the cursory and almost imperceptible application given it by Justice Black.

In view of these factors, it is difficult to avoid the conclusion that the *Korematsu* decision is the exact antithesis of the spirit and decision of the *Milligan* majority. In fact, a more complete rejection of the entire *Milligan* case, majority and minority, is hard to imagine.

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[46] *Ibid.*

The principle doctrine of the *Milligan* majority, that the exigencies of government, even the exigencies of war—which the war-waging power is constitutionally granted to meet—do not suspend the limitations and guarantees of the Constitution, is spurned.

Korematsu sustained far-reaching military controls over the lives and property of citizen civilians within the country on the theory that "pressing public necessity" or "dire emergency" justified them and were their sources of power and sole limitations, thus in effect, suspending the Constitution.

The *Milligan* majority dictum about martial law is also distorted out of its contemplated proportions. In the sense of the Attorney-General of California that dictum was interpreted and applied in *Korematsu*. It was simply given "a new and realistic conception" in the light of "the type of warfare being waged today." That conception, however, so interpreted and applied, is of such a character as to destroy the conception of the *Milligan* majority. *Korematsu* vastly enlarged the sphere in which the military is freed of the Constitution by necessity. It permitted the institution of constitutionally unrestrained military rule in an area which was not actually invaded, or even subjected to a sizable threat of invasion. In *Korematsu*, the threat of hit-and-run raids is apparently sufficient, for, after Midway, that was all that was possible. Could an historical landmark such as the *Milligan* case, in which military authority had been boldly resisted and constitutional guarantees firmly vindicated, ever come to a more ignominious end than that a dictum there uttered about a rigidly confined area in which the military might prevail over the Constitution should now be expanded to consume the principle which made the case a landmark? When to this doctrine is added automatic acceptance by the Court of the military judgment that the course of the war required mass evacuation of the Japanese Americans, without the Court itself investigating the factual relationship of the course of the war to the evacuation, or requiring the military to make any showing on that point; and when, in addition, in the presence of an open avowal by the commander that he acted on and justified the program by beliefs about race, the Court attributed to the military the judgment that the course of the war necessitated the program, without evidence or proof that the military held such judgment; one can see how far the *Korematsu* case relaxes judicial control of the military, how doubtful the standards of military responsibility have become, and the degree to which the *Milligan* dictum has been interpreted to the point of extinction. The *Milligan* majority was emphatic that, in the end, the courts—not the military—would have to decide whether the facts were such as to justify substitution of martial rule for the civil government and gnarantees of the Constitution.

Finally, by the *Korematsu* ruling, even the *Milligan* minority is left far

in the dust. The minority there contemplated martial rule in connection with the suspension of the privilege of the writ of habeas corpus. No such suspension was involved in *Korematsu;* but the martial rule was tolerated. Further, according to the *Milligan* minority, it was up to Congress—or "temporarily, . . . in the case of justifying or excusing peril . . . when the action of Congress cannot be invited," up to the President—to determine whether the circumstances exist justifying martial law and to establish it. The *Korematsu* case leaves this to the military. Lastly, since under Public Law 503 the ordinary courts were to enforce the military decisions, the *Korematsu* case far outstrips the *Milligan* minority in permitting Congress "to throw over martial law the sanctifying aegis of civil authority."[47]

Justice Jackson dissented in the *Korematsu* case, but on the ground that the civil courts could not be required to enforce the military evacuation orders. As to the unconstitutional source of the power of the military and the absence of constitutional limitations, he agreed with the Court's opinion. He merely stated it with the irresponsible clarity of a dissenter. Though he wrote a concurring opinion, the real dissenter in the *Korematsu* case, on the war powers issue, was Justice Frankfurter. He thought that the military power exercised in the evacuation was merely a part of the national government's power, constitutionally derived and constitutionally limited, as any other power granted by the Constitution. The real debate on this phase of the *Korematsu* case was between Justices Jackson and Frankfurter, not between the dissenter and the majority. And the division was not along the lines of the *Milligan* majority and minority. The Jackson-Frankfurter points of view represented tendencies in the *Milligan* majority opinion, Frankfurter invoking the rules applicable short of extra-constitutional martial rule, Jackson, the rules of constitutionally unfounded and unfettered power.[48]

Thus, as to the answers to the questions posed at the outset of this section, the *Hirabayashi* and *Korematsu* cases are poles apart. The *Hirabaya-*

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[47] CORWIN, *op. cit. supra* note 4, at 98.

[48] Justice Roberts dissented on the ground that "the indisputable facts exhibit a clear violation of Constitutional rights . . . it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States." Korematsu v. United States, *supra* note 1, at 225-26.

"The opinion refers to the *Hirabayashi* case, to show that this court has sustained the validity of a curfew order in an emergency. The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature, —a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case actually before the court." *Id.* at 231. "No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained, at the date of the restraint out of which the litigation arose." *Id.* at 231, n.8.

shi case, at least as to the doctrine announced, treated the wartime power of the military over civilians within the country as part of the war-waging powers of the national government. It is accordingly both constitutionally derived and constitutionally limited. It may be exercised under the authority of Congress and the President when it is directed to an end within the war powers, when it is reasonably appropriate to the achievement of that end, and when it does not violate the civil and individual guarantees of the Constitution. The techniques of warfare do not alter these constitutional rules or the need for civil control. They do, however, affect the circumstances which are determinative of appropriateness. The *Korematsu* case uses *Hirabayashi* as a justifying foundation but shunts its doctrine aside. It turns to necessity, rather than to the Constitution, as the source and sole limitation of the authority of the military; and, in view of the character and conditions of modern warfare, apparently would apply this rule whenever the nation is at war. Neither case discusses martial law, but in *Korematsu* it is apparently the basic conception underlying the outcome.

The Alternative Answers Evaluated

As against the doctrine of necessity, time has, if anything, sustained and strengthened the wisdom of the doctrine of the *Milligan* majority. This results from nothing so much as the very reason given for abandoning or modifying that doctrine: namely, the changed conditions of modern warfare. Total war, we are told, implies a degree of military control over civilians as a military matter of waging war successfully not hitherto imaginable.[49] The need for the increased participation of the military in the regu-

[49] Note for example the language of the Attorney General in the case of the Nazi saboteurs: "... war today is so swift and so sudden and so universal that it would be absurd to apply a doctrine like the doctrine in the *Milligan* case, where they said that Indiana during the Civil War had not recently been invaded. The facts existing in 1863 do not today exist, and a bomber may drop a bomb tomorrow in Chicago. Can it be said that there is no area of warfare, no area of military operations in Chicago under those circumstances? I think not." Transcript of Oral Argument quoted by FAIRMAN, *op. cit. supra* note 5, at 199. Ochikubo v. Bonesteel, 60 Fed. Supp. 916, 932 (S.D. Cal. 1945): "The contention fails to take into consideration the patent fact, so awful in its consequence, that modern wars are not limited to clashes at arms on particular fields of battle of comparatively insignificant area, but are exertions of the complete strength and ingenuity of all our people and all our resources wherever located, against the complete strength and ingenuity of the enemy and all their resources wherever located."

"Judge Lloyd J. Black delivered an oral opinion in *Ex parte* Ventura, 44 Fed. Supp. 520, 522 (W.D. Wash. 1942): "In the Civil War . . . no invasion could have been expected into Indiana except after much prior notice and weary weeks of slow and tedious gains by a slowly advancing army. They then never imagined the possibility of flying lethal engines hurtling through the air . . . They never visioned the possibility of far distant forces dispatching an air armada that would rain destroying parachutists . . . and invade and capture far distant territory overnight. They never had to think then of fifth columnists far, far from the forces of the enemy successfully pretending loyalty to the land where they were born, who, in fact, would forthwith guide or join any such invaders. The past few months in the Philippines . . . established that apparently peaceful residents may become enemy soldiers overnight. The

lation and administration of wide areas of national life, however, increases rather than decreases the necessity to retain normal judicial safeguards in the management of war and preparations for war. To allow this expansion of military activity under an expanded martial law doctrine, with its lack of constitutional bases and limitations—justified, if at all, only under a conception severely limited to facts that overwhelm—is to create a breach in the Constitution, relax the constitutionally and democratically required judicial control of the military and cut down immeasurably the operative sphere of civil rights. It is virtually to surrender the government to the military in time of war, and perhaps even in time of international stress and national preparedness. Standards that make sense when the allowable area of military absolutism is very small and confined to an extreme exigency, make little sense indeed when the scope of military authority is extended to embrace areas related to the war effort by the nature of modern warfare. Martial rule accepted and applied in these circumstances represents the sort of military accretion of power apprehended and reprobated by Justice Davis. It is based upon the doctrine characterized by him as the most "permicious . . . ever invented by the wit of man." The Japanese American program itself stands as a most convincing modern example that Justice Davis' conception and words have not been outmoded by time.

Lying between the *Korematsu* surrender to the military and the *Milligan* majority's insistence on the application of constitutional limitations (but far nearer to the former than to the latter) is the ground taken by the *Milligan* minority. The most effective and forceful exponent of this position in recent years is Professor Charles Fairman. In a much quoted article, Professor Fairman has stated the case thus:

> When one considers certain characteristics of modern war—mobility on land, surprise from the air, sabotage and the preparation of fifth columns [the depth and dispersion of the Army,]—it must be apparent that the dictum that "martial rule cannot arise from a threatened invasion" is not an adequate definition of the extent of the war power of the United States. . . . It does not take an actual bombing of Pearl Harbor or a shelling of Santa Barbara to unchain the hands of the commander on the spot. Facts of this sort prove the reality of the danger, but the courts should be prepared to sustain vigilant precautions without waiting for such proof. A commander should not be put in a worse position legally because he has contrived to keep disaster at arm's length.

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orders and commands of our President and the military forces, as well as the laws of Congress, must, if we secure that victory that this country intends to win, be made and applied with realistic regard for the speed and hazards of lightning war."

Judge Denman, concurring in Korematsu v. United States, 140 F.2d 289, 296 (1943), reached the conclusion that: "A threatened air invasion, directed by saboteur signals, which in an hour's time could destroy every federal court house in California presents the necessity for the substitute [sic] of military action against such sabotage for that of civil courts."

> . . . The war power, distributed between Congress and the President, comprehends all that is requisite to wage war successfully.[50]

In modern dress and in apter phrase, this is the position of the Milligan minority. Its essential feature is not that the war power is traced to a constitutional source, for the *Milligan* majority does that. Rather, its essential feature is the broad field in which the suspension of constitutional guarantees is allowed. That can be the only point to allowing martial law in cases of threatened invasion; the *Milligan* majority thought that ample power existed to prepare against and resist threats of invasion, but maintained that within that range, the war power was subject to constitutional limitations.

There can be no quarrel with the proposition that the war power "comprehends all that is requisite to wage war successfully." That is a virtual tautology. The critical question is, does waging war successfully, in the circumstances envisioned, necessarily involve removing from the hands of the commander on the spot the chains of the Constitution? Under the *Milligan* rule, is such a commander "put in a worse position legally because he has contrived to keep disaster at arm's length?" To what extent is such a military commander hindered in his military function by the constitutional machinery and requirements of criminal justice; by the due process and equal protection requirements of fair dealing and reasonable classification? Certainly, such a commander is not "put in a worse position legally" if he has "contrived to keep disaster at arm's length" by the preparation of shore defenses, the maintenance of air and naval patrols, the disposition and maneuver of the men and machines of war. It is only if the commander seeks to protect Pearl Harbor and Santa Barbara from the threat of air delivered bombs and submarine delivered shells by abolishing jury trial and the civil courts, by doing away with confrontation of witnesses, immunity from self-incrimination, counsel for the defense, and the other guarantees of the Bill of Rights that the commander is "put in a worse position legally;" and these are not likely contrivances to keep that sort of disaster at arm's length. Moreover, even when the bombs and shells are actually falling rather than merely threatened, it does not automatically follow that closing the courts or suspending constitutional rights will be a helpful military measure or one calculated to improve the military situation. If the bombs that are falling are atomic, they may blast whole districts into perdition and along with them all civilian agencies. Such facts as these raise constitutional questions about the meaning of "invasion" amid the new methods of producing a civil government vacuum, much more than they justify overruling the dictum about threatened invasions. Whatever one

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[50] Fairman, *supra* note 5 at 1287, 1288.

might say about Pearl Harbor, the shelling of Santa Barbara and the threat of other such acts along the coast, for instance, left the courts open and in the unobstructed exercise of their jurisdiction, and left the civilian agencies in the unhindered performance of their duties. What in these conditions would justify military trial of citizen civilians or patently unreasonable and discriminatory classification? Can we not be mindful of Professor Fairman's admonition that we ought not legally to place at a disadvantage the commander who by his vigilant precautions has kept disaster from our shores without, at the same time, automatically concluding that everything the military does in a period of possibly threatened invasion must be permitted, at the expense of personal rights and civil liberties? Would all of the proper functions of the military be impaired by a constitutional rule of reasonableness applied in a context of constitutional limitations and rights?

What the *Milligan* minority says in effect is that when Congress establishes martial law in the broad area in which it is permitted to do so, constitutional rights lose their special weight. They are then of the order of all other rights and interests. Military measures are to be judged exclusively in the light of their military appropriateness. Their constitutional validity does not depend upon whether they result in an invasion of the most precious and basic rights of men or some mere statutory privilege.[51] By this view, in the area mentioned, a military order which will accomplish an end within the war power will be sustained no matter what rights of civilians are destroyed thereby. Different degrees of military necessity will not be required to sustain curfew, evacuation and detention since distinctions based on the character of the rights invaded by the military order are immaterial.

Though this position does not surrender to the military with the abandon of *Korematsu,* one must still ask whether it too does not grant to the military more than is necessary to win wars.

Some phases of the *Milligan* majority doctrine, in the opinion of the present writer, require modification. These phases, however, do not directly involve the basic proposition of the normal subjection of the military to the Constitution. Nor do they involve directly the dictum about threatened

[51] Professor Fairman does not associate himself with this phase of the *Milligan* minority position. Instead, he suggests an adaptation of the rule of appropriateness: "The nature and proximity of the danger," he argued, "must, of course, have a bearing on the type of control which the military authorities may reasonably enforce. The *Milligan* case had to do with an attempt to inflict the extreme penalty, death, for an offense known to the law and triable . . . by judges. . . . The removal of civilians, for cause or suspicion, from areas of military importance, interferes with interests of a much lower order. Measures of prevention, such as curfew, may be appropriate where no reason could be offered for assuming the functious of the courts of law." *Ibid.*

invasions, so vigorously attacked by Professor Fairman.[52] They do not even directly involve the techniques and character of modern warfare. They turn rather upon the mechanical appearance of the test applied and the rigid conception of constitutional rights and guarantees apparently entertained. Both must be modified to adjust to the modern view of the function of the Court as judgematic rather than automatic and to the modern view of constitutional rights and guarantees as relative rather than absolute.

Whether the martial rule test of the *Milligan* majority is "mechanical" is of course a matter of interpretation. So long as the test is to be applied by the courts, its rigidity or flexibility will depend upon the attitude of the court in each particular case rather than upon anything controlling in the nature of the test itself. Certainly, its use as an absolute command unrelated to a specific situation could not be defended. Properly construed, the test presents a matter of fact, not of fiction; of substance, not of form. The question is, are the courts open in the sense that they are able to function substantially in their usual way and with their usual degree of efficiency, not are the courts formally closed. "Are the courts open and in the proper and unobstructed exercise of their jurisdiction?" In the words of Charles Evans Hughes in his 1917 war powers address:

> Certainly, the test should not be a mere physical one, nor should substance be sacrificed to form. The majority [in the *Milligan* case] recognized "a necessity to furnish a substitute for the civil authority," when overthrown, in order "to preserve the safety of the army and society." If this necessity actually exists it cannot be doubted that the power of the Nation is adequate to meet it, but the rights of the citizen may not be impaired by an arbitrary legislative declaration. Outside the actual theatre of war, and if, in a true sense, the administration of justice remains unobstructed, the right of the citizen to normal judicial procedure is secure.[53]

In present day judicial discussion, constitutional rights are seldom described as fixed and immutable. They are viewed rather as conditional guarantees, dependent on time, place and circumstance for their meaning and substance. The rights of life, liberty and property, for example, guaranteed by the due process clause of the Fifth and Fourteenth Amendments, and mainly at stake in the curfew, evacuation and detention situations, are nothing in our law, if not governed by the rule of reason. In fact, the due process clauses are held to impose upon government little more than a rule of judicially determined reasonableness. Life, liberty and property may all be taken away, singly or collectively, if the courts find an adequate or reasonable factual justification.

The First Amendment's rights, too, are conditional and dependent upon

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[52] See also 3 WILLOUGHBY, CONSTITUTIONAL LAW 1602 (2d ed. 1943) and GLENN, THE ARMY AND THE LAW 188-90 (1943).

[53] Hughes, *War Powers Under the Constitution*, 42 A.B.A. REP. 232, 245-46 (1917).

circumstances, as anyone may see who reads the line of cases from *Schenk*[54] to *Dennis*.[55] Even the relatively fixed criminal law procedural safeguards of the Fifth and Sixth Amendments and, for that matter, the Third Article's vestiture of the judicial power in constitutional courts, are not absolutely applied. Still other rights, of course, are stated in qualified terms. Only "unreasonable searches and seizures" are forbidden by the Fourth Amendment.

The civil rights and guarantees of the Constitution are treated as a flexible but weighty set of values which must be thrown into the scale of every relevant decision. They may never be ignored, though they may be outbalanced. They should not and need not be withdrawn from consideration altogether because the times are militarily troubled and many programs are administered by uniformed men.

But if the restraints are not absolute, neither is the war power plenary; and certainly it is not self-contained and self-defining. It "comprehends all that is requisite to wage war successfully." But that is all. It is not a grant of authority to do all manner of irrelevant things. Actions taken under the war power may not be so arbitrary as to violate the due process requirement. The situation may not be so lacking in clear and present danger that the actions violate First Amendment guarantees of speech, press and assembly. Without emergency justification, they may not be so sweeping as to treat dissimilar things alike or so uneven as to treat similar things differently without violating the constitutional guarantee of equality. They may not interfere with the processes and jurisdiction of the civil courts in the absence of battlefield conditions.

Understood as thus modified to encompass a conception of constitutional rights and gnarantees governed by the rule of reason and as expressive of a test governed by substance rather than form, the *Milligan-Hirabayashi* doctrine, now as in the past—precisely because of the nature of total war and the need for an ommipresent military, and notwithstanding modern techniques of fighting—is the only hopeful path to the adjustment of military power and constitutional guarantees, to allowing the military such freedom of action as is necessary to preserve the nation and at the same time retaining democratic controls. That doctrine would subject the

[54] Schenck v. United States, 249 U.S. 47, 52 (1919): "The character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. . . . When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."

[55] Dennis v. United States, 341 U.S. 494 (1951).

wartime power of the military to the same rule as a peace-time exertion of the war powers or any other power.

The *Milligan-Hirabayashi* doctrine might be restated thus: Even in time of global and total war, when the nation is straining at every sinew fighting on world-wide battle fronts, when invasion is threatened and island outposts have fallen or been crippled, when the waters off-shore are infested with enemy submarines, the coast line itself shelled and remote parts of the mainland bombed—in circumstances such as these, the military, though its authority increases as military necessity increases, still must act within the confines of the Constitution and the safeguards of individual rights, at least with respect to civilians within the country. The military may take drastic measures, it may impose dimouts, brownouts, blackouts. It may restrict travel of all persons within given areas. It may evacuate all inhabitants from prospective landing beaches. It may take precautionary steps to protect power and water supplies and other public utilities or productive facilities. But these measures must be both appropriate to meet the emergency and reasonable in the circumstances. One part of the circumstances with respect to which reasonableness must be determined consists of the rights invaded and the interests disturbed. Consequently, a measure thoroughly appropriate to meet the emergency when only the military features are considered, may not be reasonable in the circumstances when the constitutional rights of citizens are thrown into the balance. The effect of applying constitutional limitations and guarantees to wartime exertions of the war power is to add a determinative factor in selecting among measures all reasonably appropriate to meet a given military danger; it is to forbid the choice of militarily appropriate measures which displace civil government or invade civil rights if less civilly drastic but militarily adequate alternatives are available. Curfew may not be imposed if dimouts, with their less drastic invasions of the liberty of the citizen civilians, will serve the same military purpose. Exclusion of an individual from an entire military district may not be ordered if terminating his employment in war plants and access to military secrets will end his threat of harm. Evacuation of a portion of the population is forbidden if curfew is adequate to meet the danger, or, given the time, if individual hearing will identify the disloyal. Evacuation will not be tolerated at all if the basis of selection is a trait unrelated to the war objectives.

Of course, all or any of these measures will not be tolerated if there is no military peril, or if there is a military peril but the measures are not appropriate to meet it. Even in the absence of the specific limitations of the Constitution, the war power is, after all, only the power to wage war. Military necessity and military fiat are not necessarily identical. If they turn out not to be, the fiat is null.

Because the war power is a grant within the framework of a constitutional system in which power not granted is not possessed, because the war power in addition is subject to the amendments and guarantees provided elsewhere in the Constitution, and because in our system the judges have become the final enforcers of constitutional allocations and limitations—the courts will sit in judgment on the military requirements of the hour, at least to the extent of determining whether the military judgment as to the existence of the emergency, the appropriateness of the means, and the necessity to invade civil rights which makes that invasion reasonable, have a substantial basis.

The programs for the curfew and evacuation of Japanese Americans during World War II—the very programs before the Court in the *Hirabayashi* and *Korematsu* cases—especially reveal the urgent reasons supplied by total war for applying the *Milligan-Hirabayashi* doctrine.

For the first two-and-a-half months after Pearl Harbor, dangers of espionage, sabotage and fifth column activity thought to arise out of the presence of Japanese on the west coast were within the jurisdiction of the Justice Department. Under a plan prepared in advance, sizable numbers of Japanese American aliens, believed on some evidence to be dangerous or disloyal, were apprehended and detained. Enemy aliens, including Japanese, were subjected to travel restrictions, were required to surrender as contraband firearms and other weapons and certain radio and camera equipment. Enemy aliens were registered. In fact, the department, on recommendation of the Western Defense Command, established the first prohibited zones from which all enemy aliens were excluded. These surrounded airports and airfields, hydro-electric dams, pumping and power plants, gas and electric works, harbor areas and military installations. In addition, restricted zones were established along the coast within which enemy aliens were curtailed as to travel and were curfewed. Executive Order 9066, sigued on February 19, 1942, turned the whole matter over to the War Department. This was done with the concurrence of the Justice Department because, first, the Justice Department thought that further restrictive measures were unnecessary; because, second, it was unwilling to extend restrictions to citizens on a discriminatory basis, and, finally, because it lacked the staff and facilities to carry out any more far-reaching project. The first two of these reasons justify adamant resistance to the proposal rather than concurrence in it; and the mere possession of facilities by the War Department is hardly an argument for undertaking the plan.

On March 24, 1942, the Western Defense Command issued a curfew order covering all persons of Japanese ancestry, and German and Italian aliens.[56] On March 27, it announced, and on March 30, actually commenced

[56] Curfew applied to such individuals in Military Area No. 1 and in the 1,132 small zones in the other parts of the Western Defense Command.

the compulsory uprooting and removal of all Japanese Americans, aliens and citizens alike, herding them first into assembly and then relocation centers.[57] Once the removal was accomplished, custodianship was given, at least in part, to the War Relocation Authority, a civilian agency. The actual process of removal could have been carried on as well by the Justice Department as by the Army if the former had had the manpower, the disposition and the barbed-wire enclosures. There was nothing peculiarly military about the function. In performing it, the Western Defense Command and the War Department were acting as an extended arm of the F.B.I.

Why should not the action of the military in such cases be measured by the same "conventional tests of constitutionality" which are applied to civil government when doing the identical tasks? Why is it "impracticable and dangerous idealism" to insist that tasks appropriately performed by the military in time of war and when it has much of the manpower and many of the facilities, but which are not peculiarly military in character, conform to the standards exacted of civilians? There is certainly little justification for the view that a military commander, even in carrying out such civilian tasks, should not, in the words of Justice Jackson, be required to act like a "reasonable man," or at least as like a reasonable man as the civilians are.

Milligan, Endo and Detention

Under the doctrine of the *Milligan* majority, curfew and exclusion would stand or fall upon their individual merits as particular exertions of the war power, to be judged in the light of all relevant circumstances. If there was a danger of invasion by the forces of Japan, if ethnic affiliation with the Japanese people determined the loyalty of American citizens, if the circumstances were such that persons loyal to Japan could and were likely to do acts helpful to Japan and harmful to us, if curfew or exclusion as the chosen method of prevention was appropriate to achieve that end, and, if, finally, there were no available alternative methods of prevention which would accomplish the military objective, and, at the same time, be more consistent with the individual and civil guarantees of the Constitution, then curfew and exclusion were constitutionally authorized exercises of the national war power. If these conditions did not obtain, curfew and exclusion were unconstitutional both as going beyond the granted war power and as transcending the guarantees and prohibitions of the Constitution.

The same test must be applied to detention. If detention was an appropriate means for meeting an existing or imminently threatening peril and could not reasonably have been replaced by some other means less de-

[57] This proclamation applied only to Military Area No. 1 of course.

structive of individual rights and civil guarantees, it too was a constitutional exercise of the nation's war power. With respect to the existence of danger and the likelihood that Japanese Americans would assist the forces of Imperial Japan, exactly the same factual inquiry was necessary for detention as for evacuation. But, with respect to the appropriateness of the means, detention was far more difficult to justify than evacuation, just as evacuation in turn had been far more difficult than curfew. Not only was the deprivation of the rights of the victim group far more drastic but as a method of preventing Japanese American collaboration with submarine-landed saboteurs, hit-and-run air raids, or with invasion itself, detention added little to evacuation. If exclusion was not only constitutional but also successful in keeping the Japanese Americans out of the coastal area, detention was entirely unnecessary for that purpose.

If detention had been intended as a device to facilitate the separation of the disloyal from the loyal, or if, though not itself helpful in the sifting process, it had been instituted as an intermediate make-shift pending sorting, the case for the constitutionality of detention would be placed on its strongest grounds. In that event, however, the duration of the incarceration would be a determinative factor. Detention for a few weeks, or, considering the size of the group, for two or three months, might have been held administratively necessary; but hardly the two-and-a-half years which was the period of confinement for most excludees. In that event, also, unconditional release should immediately have followed a determination of loyalty, instead of the continued detention and conditional leave procedure actually enforced. However, it is clear from the facts that the plan for detention originated with the War Relocation Authority and not with the military, that so-called voluntary migration was tried before the program of detention was initiated, and that no plan for the separation of the disloyal from the loyal was undertaken until about four months after assembly center detention had begun. It is clear from these facts that incarceration was not originally intended as a step in or an aid to a process of sorting. The historical fact is that segregation of the disloyal from the loyal came almost as an afterthought.

Whatever may be said of the military's participation in its legal authorization and in its execution, the program for the wartime detention of the Japanese American population resulted not from a judgment of military necessity made by the military, but from a judgment of social desirability made by civilians.

A clearcut statement in General DeWitt's *Final Report* bears upon the attitude of the Western Defense Command toward the introduction of detention and the non-military reasons for it:

> Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration.[58]

The reasoning of the WRA is plainly set forth in a remarkable pamphlet prepared by WRA lawyers and published over the signature of the Director of the WRA and the Secretary of the Interior.

> Detention was a policy which the responsible officers of WRA decided upon reluctantly, out of a conviction that no other course was administratively feasible or genuinely open to them. The agitation for mass evacuation had repeatedly asserted that west coast residents of Japanese ancestry were of uncertain loyalty. The Government's later decision to evacuate was widely interpreted as proof of the truth of that assertion. Hence, a widespread demand sprang up immediately after the evacuation that the evacuees be kept under guard, or at the very least, that they be sorted and that the dangerous ones among them be watched and kept from doing harm. In these circumstances it was almost inescapable that the program administrators should come to the conclusion that if the right of free movement throughout the United States was to be purchased for any substantial number of the evacuees, the price for such purchase would have to be the detention of all the evacuees while they were sorted and classified, and then the continued detention of those found potentially dangerous to internal security. The detention policy of WRA was born out of a decision that this price would have to be paid, that it was better to pay this price than to keep all the evacuees in indefinite detention, and that to refuse to pay this price would almost certainly mean that the prevailing fear and distrust could not be reasoned with and could not be allayed.[59]

Speaking of the leave program, the pamphlet continued:

> These conditions to departure—that the evacuee shall have been found to be nondangerous to internal security, that he shall have a job or some other means of support, that there shall be "community acceptance" at his point of destination, and that he shall keep the Authority notified of his changes of address—represented, in fact, the heart of the relocation program. They were designed to make planned and orderly what must otherwise have been helter-skelter and spasmodic.[60]

Again,

> If the constitutionality of the evacuation itself be assumed, the situation that was inevitably created by the evacuation does of itself give rise to new problems which Government must undertake to solve by appropriate means. Thus, the conditions attached to departure from the centers enabled a

[58] *Final Report: Japanese Evacuation from the West Coast 1942* 43-44 (1943).

[59] *Legal and Constitutional Phases of the War Relocation Authority Program* 11 (1946).

[60] *Id.* at 12.

> sifting of a possibly questionable minority from the wholesome majority whose relocation it became the principal object of WRA to achieve. These restrictions enabled WRA to prepare public opinion in the communities to which the evacuees wished to go for settlement, so as to avoid violent incidents, public furor, possible retaliation against Americans in Japanese hands, and other evil consequences. The leave regulations "stemmed the flow"; they converted what might otherwise be a dangerously disordered flood of unwanted people into unprepared communities into a steady, orderly, planned migration into communities that gave every promise of being able to amalgamate the newcomers without incidents, and to their mutual advantage. The detention, in other words, was regarded as a necessary incident to this vital social planning.[61]

Even as to the disloyal, detention was not justified as a means of preventing them from committing acts harmful to the war effort.

> WRA took the position that it sought to detain those deemed ineligible to leave until after all those deemed eligible had been relocated. Such detention, it maintained, was necessary to build upon public acceptance of those found eligible to relocate. The detention was thus regarded as an essential step in the accomplishment of the relocation objective. Since the war ended before relocation of the eligibles had been completed, the Government never had to face the question of whether it could or would attempt to detain those deemed ineligible after the relocation objective had been fully achieved.[62]

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[61] *Id.* at 12-13. The Justice Department made a similar justification for relocation center detention in its argument for the constitutionality of that program before the Supreme Court. It said: "It is clear from the facts stated above that the program and procedures of the War Relocation Authority have been undertaken as a result of the situation arising from the evacuation of persons of Japanese ancestry from the West Coast area. If the evacuation is upheld by this Court [Korematsu v. United States] as a measure validly undertaken in the prosecution of the war, conditions occasioned by it may properly be dealt with under the war power by reasonable means. A relocation problem was inescapable as a result of the evacuation. By the removal of 110,000 persons from the West Coast area the Government assumed moral and political responsibility for their fate and for the wise handling of conditions which their relocation might precipitate." Brief for the United States, p. 75, *Ex parte* Endo v. United States, 323 U.S. 283 (1944).

"The purpose of the relocation program has been to minimize the sufferings of the evacuated population. This purpose has entailed a restriction of the liberty of the individuals affected—liberty to go and come, to seek out opportunity wherever they might choose, to meet with such failure or success in the world at large as fortune and individual capacity might yield. This restriction is each day becoming less as additional persons are granted leave. The principle of restoration of the citizen's liberty has been kept constantly in mind. We do not contend that under any set of circumstances less unique or less definitely a product of an extreme war measure the Government might bestow advantage, as viewed by officials, at the price of the elementary personal freedom of individuals *sui juris*. We suggest, however, that the issue here involved must be judged in the light of its origin in a measure adopted in the course of a declared war, under a threat of invasion to which it was related—a measure fraught with the gravest human consequences, which the Government has striven to render as little productive of permanent harm as the forces with which it has had to cope permitted." *Id.* at 81-82.

[62] *Supra* note 59 at 15. The WRA centers were analogized to temporary refuges, set up by the government following a flood or other natural disaster to provide shelter for the victims, and as to which the government "would have . . . to regulate the entries and departures." *Ibid.* It was admitted that the regulations with respect to departure at least were somewhat more stringent in the case of the Japanese Americans than in the case of flood victims.

Detention, the only course "genuinely open" or "administratively feasible"; the purchase price for "the right of free movement"; "a method of allaying popular fear and distrust"; "a necessary incident to . . . vital social planning"; "an essential step in the accomplishment of the relocation objective"—these are hardly the categorical imperatives of military necessity. They are the social desiderata of welfare planners.

In the *Korematsu* case the Court passed upon the constitutionality of evacuation after declaring it to be separable from assembly center detention. The Court indicated, however, that if detention were not separable from evacuation, if detention was the means for executing evacuation, the detention would be constitutional. Said Justice Black for the majority:

> 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.[63]

No doubt assembly centers might reasonably be instituted "as a part of the machinery for group evacuation." As such, they would serve as control points or check stations to make certain that the excludees were actually departing from the area. Once having the excludees in the assembly centers for this purpose, the government might reasonably convert the centers into permanent shelters for those who, whatever the cause, did not wish to disperse in the interior; and the government might lay down appropriate rules of notice and sign-out prior to departure from the shelters. But control-point processing would have warranted compulsory confinement for a few days, or, at the most, a few weeks. Assembly center detention lasted months and did not end in dispersal in the interior or a voluntary decision to remain in a government provided shelter. The assembly centers were in fact prisons and could never be properly analogized to refuges for, say, flood victims, as to which the government might reasonably regulate the entry and departure. Moreover, they were not so much "part of the machinery for group evacuation" as they were part of the machinery for further detention. Confinement in the assembly centers was simply a prelude to more confinement in the relocation centers. The Court's analysis in the *Korematsu* case, while perhaps a reasonable statement of the general principle, had little relevance to the facts there presented.

The issue of relocation center detention was squarely and unavoidably presented to the Court in the *Endo* case.

Mitsuye Endo was an American citizen of Japanese ancestry, 22 years old, who prior to the evacuation was a civil service employee of the State of California. Her brother Kumio was serving in the U.S. Army. On May 14,

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[63] *Supra* note 1 at 223.

1942, she was ordered to an assembly center and then to the Tule Lake Relocation Center. On July 13, 1942, she petitioned for a writ of habeas corpus to seek freedom from Tule Lake. The United States District Court signed a brief order declaring (1) that Endo was not entitled to the writ and (2) that she had not exhausted her administrative remedies because she had not sought to secure her release under WRA regulations. On February 19, 1943, she appealed from the District Court decision. Later in the same month the WRA granted leave clearance but Endo made no application for indefinite leave. The Circuit Court certified four questions to the Supreme Court on April 22, 1944:

1. May an American citizen be held in a concentration camp without the right to a hearing which has all the elements of due process merely because such citizen is of Japanese ancestry?

2. May a loyal citizen be so confined until she satisfies the WRA that she can support herself and receive assistance in the community where she desires to live?

3. May such issues of self-support and community acceptance be decided by the WRA without a hearing at which the citizen enjoys all the elements of due process?

4. May the WRA in addition require that she report after she has left the camp?

The Supreme Court held that Endo must be given her liberty. The WRA, the Court said, had "no authority to subject citizens who are concededly loyal to its leave procedure"[64] or to detain them or release them conditionally. Any power of detention possessed by the WRA, the Court argued, would have had to be received by redelegation from General DeWitt of powers conferred on him under Executive Order 9066 and Public Law 503. Executive Order 9102, establishing the WRA, was issued only to implement the measures already authorized by Executive Order 9066. These two executive orders, the Act of Congress and the pertinent legislative history do not "use the language of detention."[65] Hence, the authority to detain, if it existed, must be implied. And "[If] there is to be the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program."[66]

The "single aim" of Executive Orders 9066, 9102 and Public Law 503, said Justice Douglas for the Court, was "to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized . . . ."[66a]

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[64] *Ex parte* Endo, 323 U.S. 283, 297 (1944).

[65] *Id.* at 300.

[66] *Id.* at 301.

[66a] *Id.* at 302.

> A citizen who is concededly loyal presents no problem of espionage or sabotage . . . .[67]
> Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. . . . Community hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if authority for their custody and supervision is to be sought on that ground, the Act of March 21, 1942, Executive Order 9066 and Executive Order 9102, offer no support. . . . To read them that broadly would be to assume that the Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country.[68]

Thus, in the *Endo* case, the Supreme Court invalidated relocation center detention for persons whose loyalty was granted and who therefore were clearly held in confinement or subjected to leave procedures and conditional release for social rather than for military reasons. The ground for the action was that WRA and the Western Defense Command lacked authority to make such detentions under the pertinent executive orders and congressional legislation. The majority of the Court steadfastly declined to place its holding upon a constitutional basis, though some of the reasons given for confining the executive orders and legislation to a narrow scope were equally, if not more, compulsive of a constitutional negative on the program. The Court, however, was content to refer to the relevant constitutional provisions:

> not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution.[69]

If the broad doctrine enunciated in the *Milligan* case and subsequently repeated but not followed in the *Hirabayashi* case were to be applied, it is difficult to see how the detention of a concededly loyal citizen, not charged and convicted of crime, could escape constitutional condemnation. Certainly, such detention cannot constitutionally be justified as "a necessary incident" of "vital social planning" or as the purchase price "of the right of free movement throughout the United States . . . for any substantial number of the evacuees." Rendering "planned and orderly what must otherwise [be] helter-skelter and spasmodic" is not a power conferred by the Constitution on the national government; and the purchase price of the

[67] *Ex parte* Endo, *supra* note 64 at 302.
[68] *Id.* at 302-304.
[69] *Id.* at 299.

right of free movement of citizens was paid a long time ago, when the right was embodied in the Constitution. To exact a new purchase price, in these circumstances, would ordinarily go by the name of extortion. Imprisonment of a hapless racial minority as an element in "vital social planning" for the improvement of race relations hardly seems a promising approach either to the Constitution or to the problem of race relations. Mass and racially discriminatory incarceration of well over 100,000 persons, as a result of "vital social planning" to protect them aginst community hostility, is the compulsory acceptance of an unwanted benefit which can be constitutionally justified, if at all, not in terms of the good done for the victims but in terms of the interests of society. In the words of Miss Dembitz:

> . . . the theme of benefaction which runs through the utterances of the military as well as, subsequently, of the War Relocation Authority, may have given the officials involved a feeling of satisfaction, it does not make the deprivations and restraints imposed on the donees any more constitional.[70]

Detention of the entire group while they were being sorted and classified as to loyalty, justified not on military grounds but as a means of reasoning with and allaying "prevailing popular fear and distrust"; detention of disloyals, not in order to prevent activities harmful to the war efforts, but "as necessary to build public acceptance of those found eligible to relocate," and thus "as an essential step in the accomplishment of the relocation objective"—these are merely variants of the self-same protective custody argument that "it was all for their own good." As such, they stand upon the same constitutional footing as the detention of concededly loyal citizens pending efforts by the WRA "to prepare public opinion in the communities to which the evacuees wished to go . . . ." Detaining disloyal persons for the reasons given, however, could not even be rested on the spurious ground that it was for their own benefit since their detention was for the benefit of the members of the group who were eligible for leave.

If detention is to be sustained against a claim of unconstitutionality on any of the grounds advanced by the Western Defense Command or the WRA, it must be on the ground that protective custody is a reasonable method for preventing disturbances of such a character or extent as to interfere with the prosecution of the war. Evaluated in these terms, the program would have had to hurdle a number of serious obstacles. What was the likelihood of such disturbances in the interior? General DeWitt's *Final Report* contains no assessment. The WRA produced none supported by fact. Could such threat as existed have been subdued by reasonably vigorous precautionary action on the part of local police backed up by firm

[70] Dembitz, *supra* note 5, at 202-203.

statements from the War Department that the measures taken by it were adequate to prevent espionage and sabotage and that lawless acts against the migrants would be punished? Normally, of course, efforts to prevent violence center about those likely to perpetrate it rather than about the prospective victims of it. Also bearing upon the existence of the danger and its degree is the fact that all of the evidence tends to show that, had assembly and relocation centers been shelters rather than prisons, there would still have been no "dangerously disordered flood of unwanted people into unprepared communities." The Japanese Americans themselves would understandably not have been anxious to rush into hostile communities. Having been completely uprooted, many would prefer to sit out the war in government supplied refuges. Still others, possessed of more initiative and adjustive capacity, would lack the means to go and establish themselves in new communities. All but a very few, if they left the shelters at all, would in all likelihood have been anxious to avail themselves of government proffered assistance to assure "migration into communities that gave every promise of being able to amalgamate the newcomers without incidents and to their mutual advantage." In that event, the movement, though not proceeding out of compulsory confinement, would, because of the self-interest of the group affected, have been planned and orderly. That detention was necessary to the accomplishment of these objectives, even assuming the constitutionality of the objectives, is consequently far from established.

The narrow rule or holding of the *Milligan* case also stands squarely against the constitutionality of the detention imposed on the Japanese Americans.

Justice Davis' opinion, in substance, was that the judicial and jury trials prescribed by the Constitution do not unreasonably interfere with the prosecution of war and their abolition is not reasonably appropriate to its conduct, unless the area is a battlefield where the military is supreme, not by the Constitution but by compelling fact. Accordingly, except in such battlefield conditions, the military may not arrest, try and punish citizen civilians within the country.

Suppose the military arrests and confines without trial. Suppose, further, that the military is aided in accomplishing detention by a civilian agency. Suppose, finally, that the persons so arrested and imprisoned are not guilty or even charged with being guilty of any crime at the common law, by the statutes of the country, or by the laws of war. In all three of these respects—true of the mass detention of Japanese Americans—the situation differed from that presented to the Court in the *Milligan* case. Would these be grounds for a different decision or would they merely make the unconstitutionality of the action more apparent?

Remarkable as it may seem, the Court in the *Endo* case relied on the absence of a military trial and the presence of civil participation and sanctions as bases for distinguishing and refusing to apply the *Milligan* rule. Justice Douglas, speaking for the Court, said:

> . . . we do not have here a question such as was presented in Ex parte Milligan, . . . or in Ex parte Quirin, . . . where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* proceedings. Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military; the Authority was given a large measure of responsibility for its execution and Congress made its enforcement subject to civil penalties by the Act of March 21, 1942. Accordingly, no questions of military law are involved.[71]

To Justice Douglas' list of the civil elements in the detention program should be added other items, in addition to the administrative role of the War Relocation Authority and the civil sanctions under Public Law 503. As we have already pointed out, there was nothing peculiarly military about the operation of the whole program. That the decision to undertake the program itself was not strictly military is plain from General DeWitt's *Final Report.* Moreover, such steps as were taken in the total process by the Army were taken under the supervision and approval of the civilian heads of the War Department. They in turn acted under the authority of Executive Order 9066 and Public Law 503. The WRA itself and the detention camps were established by Executive Order 9102 and the civilian head of the WRA was appointed by the President. Finally, the WRA did not justify detention on grounds of military necessity, but on grounds of desirable social policy.

All of these civilian elements, however, though they existed and need to be given their due weight, do not warrant Justice Douglas' subordination of the part actually played by the military authorities. The original decision to evacuate was made by military authorities. They made the decision first to carry it out on a voluntary basis, that is, leaving to the individual the choice of route, means and destination. They made the decision later to change to a compulsory and controlled exodus. They issued all of the various 108 civilian exclusion orders which marked the step by step progress of the evacuation. These were published in the form of and were widely publicized and understood to be military commands. Transporta-

[71] *Supra* note 64 at 297. In *Ex parte* Quirin, 317 U.S. 1 (1942) the case involving the Nazi saboteurs who entered the country secretly from German submarines as embodied elements of the German Armed Forces, the Court was at pains to point out that the military might try Haupt—the only American citizen among the saboteurs—on the ground that "Citizens who associate themselves with the military arm of the enemy government . . . are enemy belligerents" under the laws of war, and to be treated as such. *Id.* at 37-38.

tion of the victims from gathering places to assembly centers was under armed military guard. The assembly centers were run by the military and armed military personnel were abundantly in evidence. Conveyance from assembly centers to relocation centers again was under military auspices and guard. At the relocation centers, the administration was civilian and some of the guards had different uniforms. Law and order were maintained within the camps in ordinary circumstances by WRA personnel. Military police, however, were at the gates to prevent unauthorized ingress and egress. At Camp Gila in the summer of 1943 they shot and killed a Nisei who strayed outside the barbed wire. Everybody understood that disturbances which could not be quelled by center authorities would bring the troops. At Tule Lake, that is exactly what happened. Following riot or near riot conditions, the army took over and actually ran the center from November 4, 1943 to January 15, 1944.[72] It was the military which suppressed the Manzanar riot of early December 1942. The army stood ready to intervene in the Poston disturbance of November 18, 1942, but the project director thought such intervention unnecessary. All of the relocation centers, including that in far-off and unindustrialized Arkansas were declared by the military to be military areas.[73] This made the civil sanctions of Public Law 503 applicable, which could only be done, under Executive Order 9066, by the Secretary of War or by commanding generals, not by the WRA. By a series of orders issued by General DeWitt and by the War Department for the four camps outside of the Western Defense Command, evacuees were forbidden to leave their relocation centers or their work sites except with written permission.[74] Evacuees granted indefinite or other leaves remain "in the constructive custody of the military commander . . . ."[75] The Joint Army-Navy Board, from January 1943 to April 1944, investigated individuals in the camps, held hearings and made recommendations to the civil administration concerning leave clearances. The Western Defense Command alone could rescind the civilian exclusion orders and proclamations. A word from it or the War Department could have brought the whole program, including the detention, to an end conditionally or unconditionally. And that is what happened finally.

Thus, the total program of exclusion and detention began with a military order, continued during the pleasure of the military, and was terminable at the will of the military. It included the physical removal of the victims by the military. It proceeded with their incarceration for a time in

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[72] THOMAS AND NISHIMOTO, THE SPOILAGE c. 6 (1945).

[73] Public Proclamation No. 8, 7 FED. REG. 8346 (June 27, 1942); Public Proclamation W. D. 1, 7 FED. REG. 6593 (August 13, 1942).

[74] *War Relocation Authority Administrative Instruction No. 22*, ¶ 9 (June 20, 1942).

[75] *Final Report, supra* note 58, at 242.

camps run by the military. It ended, for thousands of American citizens, in three years of imprisonment, the prisons being located in places designated military areas in order to assure adequate military authority and controls, and being manned by administrators and jailers, maintained in their positions at times by the active presence of troops and always with troops in the background. Throughout the process, the sounds and trappings of the military were to be heard and seen.

Yet, said Justice Douglas, there are here "no questions of military law" and the *Milligan* case is not in point! Military arrest and military confinement, says the *Milligan* case, cannot be tolerated while the courts are open. In the Japanese American cases, there was such military arrest. There was also militarily enforced and militarily terminable confinement. Surely the ground will not be taken that military arrest and imprisonment which flout the Constitution when connected with a military trial, become constitutional when executed without such a trial. Surely, also, the ground will not be taken that such arrest and imprisonment lose their military character by having behind them the added sanction of civil imprisonment or when the jail is run by civilians.

The differences between *Milligan* and *Endo* advanced by Justice Douglas serve no purpose quite so much as to make clearer the unconstitutionality of the *Endo* detention. To say otherwise is to say that in this context a military order has a different constitutional significance from the action of a military tribunal; or that imprisonment by civilians stands in a better constitutional position than imprisonment by the military which, after all, is permissible in some circumstances.

Conclusion

The Japanese American cases—*Hirabayashi, Korematsu* and *Endo*—though shrouded in great confusion of rhetoric, and despite the careful statement of doctrine by Chief Justice Stone in *Hirabayashi,* which the Chief Justice failed to apply, represent a constitutional yielding to the awe inspired in all men by total war and the new weapons of warfare. They disclose a judicial unwillingness to interfere with, or even to look upon, the actions of the military taken in time of global war, even to the extent of determining whether those actions are substantially or somehow connected with the prosecution of the war. That the actions were directed to and drastically affected citizen civilians within the country and involved decisions, policies and administration dominantly civil rather than military in character were facts that were hardly noticed, let alone assigned their proper significance. In this context, the Japanese American cases diminish and render uncertain the public responsibility of the military, and relax democratic and judicial controls. In these cases, the historically established bal-

ance between the military and the civil—constitutionally sanctified in the United States by the classic majority opinion in *Ex parte Milligan*—has been shifted dangerously to the side of the military by the known and unknown terrors of total war and by a quiescent and irresolute judiciary. In them, the *Milligan* rule of subordination of the military to the Constitution except in battlefield conditions is abandoned. Instead, the national war powers, though explicitly conferred by the Constitution and not exempted from its limitations, are founded on and circumscribed by a military estimate of military necessity. Citizens, on a mass basis, were allowed to be uprooted, removed and imprisoned by the military without trial, without attribution of guilt, without the institutional or individual procedural guarantees of Article III and Amendments V and VI, and without regard to the individual guarantees of Amendments I, IV, V, and others. The military action was taken upon a mere suspicion of disloyalty arising from racial affinity with the enemy, and was applied discriminatorily to one race only. During most of the period of evacuation and detention, there was not even a threat of invasion. The *Milligan* dissenters do not go nearly so far. Can circumstances short of battlefield conditions justify this kind of surrender of the Constitution to the generals? Does the winning of total war require so much—that the military be immune from review in its civil, sociological and anthropological judgment; that the military be allowed to do militarily irrelevant things; that the military be permitted arbitrarily and unnecessarily to invade individual and civil rights? One may insist with Charles E. Hughes that

> the power to wage war is the power to wage war successfully[76] [and] that power, explicitly conferred and absolutely essential to the safety of the Nation is not destroyed or impaired by any later provision of the Constitution or by any one of the amendments.[77]

One may insist on all that and yet at the same time not deviate from the basic proposition—equally plain if not equally explicit in the Constitution and "absolutely essential" to the perpetuation of the Republic—that the war power, when exerted in the military government of citizen civilians within the country, does not exist in the absence of a grave military peril, does not exceed measures reasonably appropriate to cope with that peril, and does not comprehend violations of civil and individual guarantees of the Constitution in the presence of a militarily adequate alternative.

The war powers of the national government traverse a wide area, ranging from economic regulations such as were embodied in the Emergency Price Control Act of 1942 to the command of troops in battle. So far as

[76] HUGHES, *supra* note 53, at 238.

[77] *Id.* at 248.

those powers are exerted in the government of citizen civilians within the country, in a place not actually a battlefield, whether administered by the military or civilian executive, the Court should exercise its constitutional and historical function of review and impose the above listed standards of public responsibility. This is not to say that the judges should not candidly appreciate their own fallability. Nor is it to say that the rigor of judicial scrutiny will not or should not vary as the circumstances vary. The military, when making strictly military decisions, must be allowed a reasonable latitude of military error. Yet keeping the military within the confines of the Constitution, at least when it acts with respect to citizen civilians within the country, is a civil imperative if the Republic is to persist. The self-restraint and constitutional sensitiveness of the generals cannot be relied upon as adequate sources of protection. Because of its organization, mode of selection and function, the military is less likely thus to confine itself than are other agencies of government which, despite their representative and responsible character, have traditionally been subjected to judicial surveillance. The techniques and instruments of judicial review are, on the whole, not less applicable or efficient in the case of the military. The courts are hardly the agency to subdue a rebellious general; but in most contexts, where the military touches the civilian in the country, the courts can render it less "vagrant," less "heedless of the individual," and less a "threat to liberty." The expectation of judicial review, or the mere continuing possibility of it, will make most generals more careful.

In the history of the United States, rebellious generals have not been a substantial source of military danger to civil institutions. The real source of that danger is found in other quarters. This point has been well made by Dean Louis Smith:

> Militarism is more than a formal system of thought. It is a type of public opinion and as such is present to some degree in every society. As is true in regard to other such questions, public opinion relative to military doctrines constantly fluctuates in response to various psychological and environmental conditions. The chief danger to states in which militarism is currently in a minor position is that under stress of chronic anxiety over military insecurity, aggravated by a percussive train of war crises, each stopping short of actual conflict but tending ever nearer to it with inescapable indications of its inevitability, militaristic opinion may spread until it captures the minds of almost the whole people.
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> These facts indicating how the garrison state may possibly come into existence among a hitherto free people are worth pondering. This state may come, not by willful usurpation by the military but by successive adaptations for defense having support of public opinion. It may be ushered in, not by conspiracy, but by plebiscite. It may come into power, not over the wreckage of the civil organs traditionally expected to repress it, but with their active support. It may arrive, not through violence, but by influence,

> an influence born of the demand of the masses that they not be exposed to annihilation from hostile attack by the omission of any security factor. . . . Thus, among peoples obsessed with deepening anxiety regarding imminent warfare and their slender chances of survival in it, by a process which in a less sinister context has been called the "inevitability of gradualism," the garrison state may come into full power.[78]

In this context, the role of the Court is only in part to maintain the proper relationship between the military and civil authority. It is only in part to see that the military does not become master where it should be servant. Beyond that, the function of the Court is to determine the nature of the Constitution itself—the scope of the national war powers exerted by the military and by the civil officials who direct the military vis-a-vis the rights of civilians. Military usurpation may be less a danger to constitutional limitations established to protect the individual than an expansion of the war powers carried out by civil consent and popular insistence. It is the function of the Court to see that "hyperlegality does not impair security and that the shibboleth of 'military necessity' does not justify unnecessary destruction of the rights of the people and bring about an improper impairment of democratic processes of government."[79] When the balance between safety and liberty is struck, it may be the hazardous and often immediately thankless task of the Court to safeguard the people from itself. The performance of this stern task may call, doubtless does call, for statesmanlike self-restraint; it does not call for resignation.

Justice Jackson's worry that wartime review of military action will tend to distort the Constitution and find unhappy application in peacetime cases is certainly legitimate. Yet, it must be remembered that the Supreme Court is often the willing, sometimes the reluctant, but never the helpless victim of its own precedents. The Court also always has the alternative of avoiding bad precedents by not making them. This danger, in any event, must be measured against the danger of constitutionally and judicially unfettered military power.

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[78] SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 8-9 (1951).

[79] *Id.* at 303.