LEGAL DOCTRINE, WAR POWER, AND JAPANESE EVACUATION

By Richard F. Wolfson*

In Anglo-American jurisprudence appellate courts not only determine the disposition of a case but also describe in written opinions the factual background and legal reasoning which, in theory, resulted in the actual decision. Every opinion so rendered becomes precedent, and upon this concept of precedent has been established our hierarchy of case-law.

But precedent, if running riot, tends to have a reactionary rather than a stabilizing influence. Doctrine evolved in an era of different social needs and beliefs is repeated by judges upon whom the words, having lost their traditional implications, have little behavioral effect. Conventional verbalizations are, in practice, rarely applied. An example is "Cuirs est solum, eius est usque ad coelum et ad infernos" in the law of property.

Yet courts do show a certain minimum concern with symmetrization between what is done and what is said. Now and then the Supreme Court disapproves a previous decision, no doubt feeling that the statement of law there presented and the determination now made are in hopeless contradiction. The usual practice, however, has been to refrain from overruling old cases, insofar as possible. It is the assumption of this article that it would be a "healthier" procedure for courts more frequently to overrule cases out of line, for although the life of the law has been experience, not logic, nevertheless if, through a reexamination of legal experience, a measure of symmetry can be achieved, then by writing into the law the newly discovered harmonization of past and present or of word and act the ap-

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* S.B., Harvard, 1942 (as of 1943) Yale Law School.
1 See Alexander, Our Age of Unreason (1942) 145: "A performance found satisfactory in the past must now be foregone and replaced. This means effort, and the organism disposed to save its energy on the principle of economy resists the change. This energy-saving principle we shall call 'inertia. It is one of the fundamental characteristics of living organisms and is both the key to understanding all morbid phenomena and the basis of social disintegration through cultural lag."
2 The disapproval of a previous "case" means, of course, the disapproval of the opinion there written, since the actual holding, whether plaintiff or defendant wins, can no longer be changed.
application of precedent will more nearly coincide with the orthodox concept of precedent. Specifically, it will be argued that *ex parte Milligan*, a milestone in our constitutional development, has already been disapproved *sub silendo* and that in a case dealing with the constitutionality of Japanese evacuation, *Korematsu v United States*, which should soon come before the United States Supreme Court, this disapproval ought to be made explicit. Moreover, it is proposed that the traditional theory of war power expounded in the *Milligan* case and the subsidiary theory, which differentiates between martial law and other types of wartime governmental control, be abolished and a new verbal standard be substituted in their place.

To understand the significance of the *Korematsu* case a brief review of the legal history of the curfew and evacuation orders imposed on all Japanese, citizens and aliens alike, is necessary. Three months after the outbreak of war, the President issued Executive Order 9066 authorizing the Secretary of War or subordinate military commanders to establish military areas "from which any or all persons may be excluded." Under this blanket authority, Lieutenant General De Witt, then charged with the Western Defense Command, issued proclamations creating zones in which Japanese-Americans were later to be restricted. At the same time, the *nisei*, American citizens of Japanese descent were requested to move into the continental interior or be subjected to stringent military regulations. Before further restrictive measures were undertaken, however, Congress, at the

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3 Wall. 2 (U.S. 1870)
5 See also Alexandre, The Nisei—A Casualty of World War II (1943) 28 CORN. L. Q. 385; Freeman, Genealogy, Evacuation, and Law (1943) 23 CORN. L. Q. 414; Note (1943) 11 GEO. WASH. L. REV. 482; Note (1943) 17 TULANE L. REV. 652; Recent Decision (1942) 41 MICH. L. REV. 522; Comment (1942) 51 YALE L. J. 1316.
6 See Hirabayashi v United States, 320 U.S. 81, 93-94 (1943) for Chief Justice Stone’s review of the military history in the war with Japan during this period.
7 7 Fed. Reg. 1407 (1942)
9 See Brief for the Government in Hirabayashi v United States, No. 10,308 (C.C.A. 9th, 1943) 7-8, 9-10. It may be remarked, however, that due to the inflamed state of public opinion it would have been unwise, if not dangerous, for any person of Japanese racial characteristics to have moved to a foreign section of the country. The alternative, therefore, does not appear to have been real. But cf. Honda v People, 141 F. (2d) 178 (Colo. 1943)
request of the War Department, enacted Public Law 503 ratifying the previous Executive Order and sanctioning future limitations upon the Japanese-American population. Immediately thereafter, this national-racial group was subjected to an eight o'clock curfew; and a gradual evacuation under a series of Civilian Exclusion Orders was begun, nisei and aliens being transported to detention camps.

In two cases arising under the curfew and evacuation orders, voluntary violations occurred in order to test their constitutionality Hirabayashi, a nisei with a record of national loyalty, was convicted and sentenced to concurrently running three month terms. The District Court, in its opinion, broadly approved the evacuation. Yasui, another citizen, similarly tested the curfew Both cases on appeal were certified by the Ninth Circuit Court of Appeals to the Supreme Court; three questions were asked—the constitutionality of Public Law 503, of the curfew, and of the Civilian Exclusion Orders.

56 Stat. 173 (1942) 18 U.S.C. § 97(a) (Supp. 1943) “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 of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.”


See Civilian Restrictive Order No. 1, 8 Fed. Reg. 982 (1942), which prohibited any internee leaving without military permission.

United States v Hirabayashi, 46 F Supp. 40 (W D. Wash. 1942)

United States v Yasui, 48 F Supp. 40 (W D. Wash. 1942)

Judge Fee, although he rejected the view that any classification of citizens according to race could be constitutionally valid, found, nevertheless, that the defendant had by his registering as a propaganda agent for Japan and by his employment at the Japanese Consulate General in Chicago effectively deprived himself of American citizenship. Cf. Yasui v United States, 320 U.S. 115, 117 (1943)

Yet there can be no doubt of Yasui’s loyalty He was a second lieutenant in the United States Army Reserves, a member of the Oregon bar, and resigned from his position with the Japanese Consulate the day war was declared. His test case was undertaken after consultation with an agent of the Federal Bureau of Investigation.

This decision is unreported; it is Hirabayashi v United States, No. 10,308 (C.C.A. 9th, 1943)

Judge Denman dissented from the certification of these
The Supreme Court, in an opinion written by Chief Justice Stone, and with separate concurrences by Justices Douglas, Murphy, and Rutledge, held constitutional the curfew, but refused to consider the issue of evacuation, using the excuse that because Hirabayashi had been sentenced to concurrently running prison terms on the two counts of violation of the exclusion orders and the curfew orders, "it will be unnecessary to consider questions raised with respect to the first count if we find that the conviction on the second count, for violation of the curfew order, must be sustained." It furthermore limited the general issue to "whether, acting in cooperation Congress and the Executive have constitutional authority to impose the curfew restriction," and refused to consider the issues of martial law, the breadth of executive authority, legislative delegation, or the general scope of the war powers, all of which had been argued by litigants or by lower courts.

It seems highly probable that the Court refused to pass upon the constitutionality of the evacuation orders because of grave doubts as to their validity. There are many statements, especially in the concurring opinions, which may be taken as indicating an opposite holding or at least much more serious consideration if the problem of evacuation or continued enforced detention were squarely before the Court. Typical are "Detention for reasonable cause is one thing. Detention on account of ancestry is another." where the peril is great and the time short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those retained for cause." "But if it were plain that no machinery was available whereby the individual could demonstrate his loyalty as a citizen in order to be reclassified, questions of a more serious character would be presented." "When the danger is past, the restrictions imposed on them should be promptly removed and their freedom of action restored." It
was hoped, however, that future administrative action which would free the proven loyal from concentration camps would moot the issue.\textsuperscript{25}

The preliminary question before the Court was whether under any circumstances discrimination by the federal government upon the basis of origin is justifiable. The answer was in the affirmative, although at least one justice took cognizance of the fact that never before had the Supreme Court permitted the privileges of citizenship to depend upon ethnic affiliations.\textsuperscript{26} And apparently in only one case since the Civil War has any federal statute based upon racial considerations been sustained, the Court of Appeals for the District of Columbia in \textit{Wall v. Oyster}\textsuperscript{27} upheld segregation of Negro and Caucasian children in District of Columbia schools.\textsuperscript{28} Nor can it be doubted that in the \textit{Hirabayashi} case, although the restrictions were due not to considerations of race but general loyalty, yet the result was to single out one national group for regulation.\textsuperscript{29}

Because of the type of question presented, the further issue arose as to what standard should be applied. \textit{United States v Wong Kim Ark}\textsuperscript{30} had held that under the theory of \textit{jus soli} all persons born within the jurisdiction of the United States are citizens thereof. And although there have been recent attempts to reverse that decision,\textsuperscript{31} its binding effect cannot be ques-

\textsuperscript{25} Cf. Zimmerman v. Walker, 132 F. (2d) 442 (C.C.A. 9th, 1942), cert. denied on the ground that the cause had become moot, 319 U.S. 744 (1943) (martial law and suspension of the writ of habeas corpus in Hawaii on December 7, 1941)
\textsuperscript{26} That the issue is not yet moot, see N.Y. Times, January 8, 1944, p. 12, col. 5.
\textsuperscript{27} Mr. Justice Murphy, in his concurring opinion, said: “Today is the first time, so far as I am aware, that we have sustained a substantial restriction of the personal liberty of citizens of the United States based upon accident or ancestry” \textit{Hirabayashi v United States}, 320 U.S. 81, 111 (1943)
\textsuperscript{28} 36 App. D.C. 50, 54 (1910)
\textsuperscript{30} See McWilliams, \textit{Japanese Out of California} (1942) 106 New Republic 456, 457: “...if American-born Japanese are to be evacuated en masse, but no such action is taken involving citizens of German or Italian ancestry, then obviously one group of citizens will have been discriminated against solely on the basis of race.”
\textsuperscript{31} 169 U.S. 649 (1898)
\textsuperscript{32} See 88 Cong. Rec. 2779-2781 (1943) for the speech of Senator
tioned. Here for the first time was a federal discrimination against certain citizens upon a group basis. What the Government wanted the Court to say was, in effect, that although the \textit{Wong Kim Ark} decision had made all American-born persons citizens, nevertheless neither in the Constitution nor in that case had there been any assurance of equal treatment at all times. But even if the Government’s contention were accepted, some standard determinative of the permissible limits of discriminatory treatment seemed to be necessary. All previous tests such as "a clear and present danger" or "a reasonable apprehension to organized government" had been developed to protect the individual.

Yet the majority opinion did not evolve any new formula for examining group discriminations. Indeed, the same words could have been used had the case before the Court been that of discrimination against an individual citizen or against the entire population, Occidental and Oriental, of the Pacific area. Time-honored truisms were reiterated—the war power is "the power to wage war successfully," there had been a basis for reasonably prudent men to conclude, at the time, that the Western states were in danger of invasion. The regulation was per

\footnotesize{Steward favoring depriving American-born Japanese of their citizenship. "I refer to the Wong Kim Ark case. I think that decision was wrong in theory and in reason, and ought to be overruled or reversed." See also Hearings before the Select Committee Investigating National Defense Migration, Part 29, 77th Cong., 2d Sess. (1942) 11085 for a statement of the California Joint Immigration Committee: "a grave mistake was made when citizenship was granted to all born here, regardless of fitness or desire for such citizenship. Another grave mistake was the granting of citizenship to the Negroes after the Civil War."

\footnotesize{See Regan v. King, 49 F Supp. 222 (N.D. Cal. 1942), aff'd, 134 F. (2d) 413 (C.C.A. 9th, 1943) aff'd, 319 U.S. 753 (1943)


\footnotesize{Herndon v Lowry, 301 U.S. 242, 258 (1937)

\footnotesize{It has been suggested that the standard for military restrictions on civilians be that of a "grave potential danger." See Comment (1942) 51 \textit{Yale L. J.} 1316, 1330, n.90.

\footnotesize{Hughes, \textit{The Scope of War Powers under the Constitution} (1917) 42 A.B.A.R. 232, 238. But is the power to keep peace also the power to keep it successfully? And a similar question may be asked as to the power to maintain prosperity

\footnotesize{Hirabayashi v. United States, 320 U.S. 81, 94 (1943) "That reasonably prudent men charged with the responsibility of our national defense had ample ground for concluding that they must face the danger of invasion cannot be doubted."}
missible, Chief Justice Stone summed up, because a large Japanese population residing in the zone of danger was a circumstance relevant to defensive measures and imperative in the determination of military plans.

The approach, then, was not one which brought into focus the novel nature of the discrimination. Rather, it treated the issue as similar to previous cases before the Court where the war power and individual civil liberties had been in conflict. Thus, it simply sustained within a new context the view, never before judicially accepted, that the power of government in war is unspecifiedly large, yet highly relative to the time and the place in which it is employed. Such a doctrine, however, has been implicit in the acts of the political branches of the federal government. If such a statement of the elastic nature of the war power is accepted, then the traditional statement that emergency does not create new powers but calls dormant ones into use is

38 The concurrences of Mr. Justices Douglas and Murphy however, emphasize the nature of the discrimination here, terming it "odious". They dealt, as Stone did not, with the contention that individual administrative action was the only proper method for testing loyalty suggesting that "peacetime procedures do not necessarily fit wartime needs." Id. at 106.

39 See 4 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 206-207 (1935) where the President, in commenting on the decision in Schechter Corp. v United States, 295 U.S. 495 (1935), said at a press conference: "Some of us are old enough to remember the war days—the legislation that was passed in April, May and June of 1917. Being a war, that legislation was never brought before the Supreme Court. Of course, as a matter of fact, a great deal of that legislation was far more violative of the strict interpretation of the Constitution than any legislation that was passed in 1933. All one has to do is to go back and read those war acts which conferred upon the Executive far greater power over human beings and over property than anything that was done in 1933. But the Supreme Court has finally ruled that extraordinary conditions do not create or enlarge constitutional power! It is a very interesting statement on the part of the Court!"

40 See Home Bldg. & Loan Assc. v Blaisdell, 290 U.S 398, at 425-26 (1934)

"Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or received. The Constitution was adopted in a period of grave emergency Its grants of power to the Federal Government were determined in the light of emergency and they are not altered by emergency"

"While emergency does not create power, emergency may furnish the occasion for the exercise of power. Thus the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet that emergency It is a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to
erroneous, for under conceivable circumstances, war or peace, any of the provisions of the Constitution, whether general or particular, might be suspended. In the past, the distinction between the two theories of war power has been unclear because ordinarily it was claimed that some broad clause of the Constitution, itself elastic, such as due process, had been violated. But it is possible, for example, that Congress, under certain compulsions of war, might extend its own term of office. According to the traditional conception of war power, such a statute could never be held constitutional, whereas the implication in the Hirabayashi case is that if the emergency were sufficiently severe, the law would be sustained. Yet there is no need even to take the road of speculation, for the allegations that evacuation is a "lettre de cachet," a "cruel and unusual punishment," and a bill of attainder can be seriously entertained. And the Court, if it cares to deal with these problems, will be obliged to decide whether very specific constitutional guarantees have been violated, and if so, whether the violation should be upheld on the ground of emergency.

The only limitation upon this new theory of war power is that the power exercised must never exceed the gravity of the emergency which calls it forth. "It is an unbending rule of law that the exercise of military power, where the rights of the citizen are concerned, shall never be pushed beyond what the
We need not quibble whether or not such a doctrine is implicit in the Constitution. If it is necessary, in order to satisfy the American lawyer's desire to depend on no fundamental law but that represented by the Constitution, it can be read into the Fifth Amendment, so that that Amendment, usually considered by the judiciary as marking some absolute limit for the use of power, becomes, according to the new interpretation, not a minimum standard in an absolute sense, but a measuring stick for determining the need of government and allowing an authority sufficient for that need.

And it is evident that there can be no definite temporal limitations upon the war power. War emergencies, as we have seen in the years 1937 to 1941, exist before the declaration of war, and the dangers, as we may see, are not entirely dispelled by a treaty of peace. The Supreme Court has said of the war power that it is "not limited to victories in the field and the dispersion of insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

In the past, the only practical restriction upon the power to make war—although there have been, as we have seen, important doctrinal obstacles—has been the rule of ex parte Milligan that martial law "cannot arise from a threatened invasion." And already in one case dealing with Japanese evacuation, ex parte Venutra, the Milligan rule has been criticized as inadequate to meet the conditions of contemporary warfare.

"In the Civil War when Milligan was tried by military commission no invasion could have been expected into Indiana except after much prior notice. They never imagined the possibility of flying lethal engines hurtling several hundred miles within an hour. They

46 Raymond v Thomas, 91 U.S. 712, 716 (1875).
47 See United States v Cohen Grocery Co., 255 U.S. 81, 88 (1921)
48 the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the powers of Congress of the guarantees and limitations of the Fifth and Sixth Amendments.
49 Contra: Miller v United States, 11 Wall. 268, 304-05 (U.S. 1870) "if they are an exercise of the war powers of government, it is clear they are not affected by the restriction imposed by the Fifth and Sixth Amendments." Cf. Tyler v Defrees, 11 Wall. 331 (U.S. 1870)
50 4 Wall. 2 (U.S. 1870)
51 Id. at 127.
52 44 F Supp. 520 (W.D. Wash. 1942)
never visioned the possibility of far distant forces dispatching an armada that would ram destroying parachutists from the sky and invade and capture far distant territory over night."

If by martial law is meant only the most extreme exercises of war power, then the Milligan case means nothing more than the theory of war power here presented—there must be a need for the use of extreme power in order that such power be constitutionally employed. But generally it has been said that martial law is a difference not of degree but of type. Thus in the Hirabayashi case, Stone held that despite the severity of the measures there was "no question of martial law." Such a finding apparently denied the contention that the West Coast was under de facto or qualified martial law and may, by implication, have given Supreme Court approval to the traditional view that martial law must, by necessity, be formally declared and, moreover, can only be declared when the civil courts are no longer able properly to function. Yet it may be asked what use martial law henceforward will have if the Supreme Court holds that without it such extreme measures as a discriminatory curfew and evacuation were permissible? If under a theory of war power such regulation is constitutional, then the very concept of martial law is outmoded and unnecessary. A declaration of urgent emergency will be as constitutionally efficacious as a declaration of martial law.

If, on the other hand, the newer concept that martial law is elastic and can be qualified and may come into existence without formal declaration is accepted, there likewise appears no reason

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52 Id. at 522.
53 320 U.S. 81, 92 (1943)
54 The great weight of opinion is that the Pacific region is not now and never was under martial law. Contra: Graham, Martial Law in California (1942) 31 Cal. L. Rev. 6, 13. See also Brief for State of California as Amicus Curiae in Hirabayashi v. United States, No. 10,308 (C.C.A. 9th, 1943) 19 for a similar implication.
56 The leading case advocating a recognition of qualified martial law is Commonwealth ex rel Wordsworth v Shortall, 206 Pa. 165, 55 Atl. 952 (1903) Accord: In re Boyle, 6 Idaho 609, 57 Pac. 706 (1899), In re McDonald, 49 Mont. 454, 143 Pac. 947 (1914) State ex rel Roberts v Swope, 38 N.M. 53, 28 P (2d) 4 (1933), 1 Bishop Criminal Law (9th ed. 1923) §52: "Martial law is elastic in its nature, and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of the criminal authority; or its touch may be light, scarcely felt at all by the mass of the people,
to differentiate it from emergency power. Both, according to our interpretation, are graduated, and both can be automatically employed upon the advent of crisis.

Judge Denman, in his concurrence in Korematsu v United States holds that the Milligan case is “not controlling because implicit in its reasoning is the hypothesis that in the absence of actual invasion the slower and more deliberate procedures of the civil courts are a sufficient protection from disloyal citizens lending aid to the enemy, and because the possibility of air invasion covering the state of Indiana in less than two hours was not even ‘lurking’ in the minds of the Justices.” But rather than simply disregarding the Milligan case, Judge Denman in effect said that we should keep one of the two tests of that decision—threatening invasion. Yet the other test, that of the ability of courts to function normally, should be eliminated, for “air invasion, directed by saboteur signals in an hour’s time could destroy every federal court house in California.” But if the possibility of air invasion is made the standard for the imposition of martial law, then, in effect, there is no practical limitation, for in days of long-range planes any city in the nation can be subjected to sudden attack with or without declaration of war. Judge Denman’s effort to save half of the Milligan case is no more successful than attempts totally to reconcile it with, or totally to distinguish it from, the curfew and evacuation orders.

But in United States v Yasum, the second Yasum case, the district court in re-sentencing the defendant after the Supreme Court decision, held that “indicia of invasion have disappeared.” Yet even as of July 14, 1943, the date of this decision, it would seem that an attempt, unsuccessful perhaps, by the Japanese to invade the Pacific Coast, was not impossible, certainly Pacific cities were still threatened with aerial bombardment from carrier launched planes. What the court was really

\[\text{140 F.(2d) 291-304 (C.C.A. 9th, 1943)}\]
\[\text{Id. at 296.}\]
\[\text{Id. at 296.}\]
\[\text{51 F Supp. 234 (D. Ore. 1943)}\]
\[\text{Id. at 235.}\]
saying was that the emergency was no longer so serious as to permit extremely discriminatory measures.62

Similar results have obtained in two cases dealing with "Individual Exclusion Orders" issued by Lieutenant General Drum of the Eastern Military Command. In both Schueller v Drum63 and Ebel v Drum,64 district courts held that naturalized citizens of German birth could not be excluded under Executive Order 9066. In the former case, Judge Ganey seemed to take judicial notice that normal civilian life was continuing on the Atlantic seaboard, and in the latter case, Judge Ford said "I do not believe in the light of conditions prevailing in the Eastern Military Area in April of this year, there was present a reasonable and substantial basis for the judgment the military authorities made, i.e., that the threat of espionage and sabotage to our military resources was real and imminent."65 Moreover, he rested his decision on a broad basis of emergency,66 distinguishing the Hirabayashi case on the ground that "conditions in the Western and Eastern Areas were radically different."67

Thus, the lower courts have followed the practice of the Supreme Court in fact judging the degree of emergency. Yet they have not applied as their only test the standard of "threatening invasion," although unwilling to dispense with it altogether. To summarize, this standard was borrowed by the Supreme Court from the Milligan case and applied to the Japanese cases. And although the Court has been willing to judge cases involving martial law and those involving general

62 That the court recognized the existence of less urgent circumstances, but nevertheless of an emergency can be seen from its statement that "If defendant remain here, he will be kept under close surveillance." Id. at 235. The implication was, apparently, that although invasion is unlikely, the possibility of sabotage still exists.
63 This case is unreported. See No. 3161, E.D. Pa. 1943.
64 52 F Supp. 189 (D. Mass. 1943)
65 Id. at 197.
66 "Each case must be bottomed on its own facts, especially when dealing with the nature of the power exercised here by the military authorities. Appropriate action with respect to one type of restriction in a situation at a certain time and place is not at all helpful in determining the appropriateness of action at another time and place unless the conditions and degree of restraint upon personal liberty imposed are reasonably comparable. Military necessity will vary materially in different localities and at different times and the appropriate degree of restriction, not to be excessive, must bear a reasonable relation to the degree of danger." Id. at 196.
67 Id. at 196.
war power by the same verbal formula, nevertheless it has con-
tinued the doctrinal distinction between the two legal concepts.

The theory of war power here presented in no way contro-
verts the view that although the determination of the military
is presumptively correct, it is reviewable by the courts. Sterling
v Constantin remains good law. And although one court
has implied that the judgment of the military is conclusive as
to the degree of crisis, yet if the existence of any standard is
admitted, a court must, in order to apply it, investigate the
nature of that crisis. It is true, of course, that where funda-
mental liberties are at stake the discretion exercised by the
military will be given closer judicial scrutiny. And indeed our
theory of war power assumes that the judiciary will, in periods
of emergency, be unwilling to approve usurpations of power, by
any group, which are unnecessary to meet the exigency. If that

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68 See Sterling v Constantin, 287 U.S. 378, 400-401 (1932) “It
does not follow from the fact that the Executive has this range of
 discretion that every sort of action the Governor may take, no
matter how unjustified by the exigency or subversive of private
right and the jurisdiction of the courts, otherwise available, is con-
clusively supported by mere executive fiat. The contrary is well
established. What are the allowable limits of military discretion
and whether or not they have been overstepped in a particular case,
are judicial questions.” See also Moyer v Peabody, 212 U.S. 79, 85
(1909) “No doubt there are cases where the expert on the spot
may be called upon to justify his conduct in court. But even
in that case great weight is given to his determination and the
matter is to be judged on the events as they appeared then and not
merely in the light of the event.”
69 See 140 F. (2d) 297-8 (C.C.A. 9th, 1943).
70 Ex parte Kanai, 46 F Supp. 288, 288 (E.D. Wisc. 1942) “Neither
the general public nor the judges of our courts have any information
upon which they can properly base a conclusion as to the proper
necessary area to be included in military areas or defense zones.”
The investigating committee of the Congress which enacted Public
Law 503 also refused the burden. Report of the Select Committee
2d Sess. (1942) 13: “This committee does not deem its proper prov-
ince to encompass a judgment of the military need for the present
(and any subsequent) evacuation orders.”
72 It has been alleged, for example, that certain groups on the
West Coast used the war in order to solve a long existing racial
difficulty. See McWilliams, California and the Japanese (1942) 106
New Republic 295 for a careful analysis of the dangers and pres-
ures involved in Japanese evacuation; Brief for Appellant, Hira-
bayashi v. United States, No. 10,308 (C.C.A. 9th, 1943) 19: “It is
inconceivable, yet apparently true, that groups of persons who
parade as good American citizens would take advantage of the
condition of war to stir up a racial hatred and attempt to have their
selfish, mercenary and un-American prejudice satisfied in such an
inhuman manner.”
assumption is incorrect, then any discussion of war power is in vain.

We have faith that "To each his need. from each his power" is a sufficiently intellectually valid and emotionally stimulating doctrine to meet the two purposes of any statement of law. The first and conscious aim is to provide certainty Mr. Justice Cardozo has written

there is certainty that is genuine and a certainty that is illusory a symmetry that is worth attaining and a symmetry to be shunned. One of the reasons why our law needs to be restated is that judges strive at times after the certainty that is sham instead of the certainty that is genuine. Particular precedents are carried to conclusions which are thought to be their logical development. The end is not foreseen. Every new decision brings the judge a little farther. Before long he finds himself in a dilemma. He does not like the spot where he is placed, yet he is unwilling and perhaps unable to retreat from it. The certainty that is arrived at by adherence to precedent is attained, but there is a sacrifice of another certainty that is larger and more vital. This latter certainty is lost if we view the law in shreds and patches, not steadily and whole with a sweep that reaches the horizon.

An elastic conception of the war power allows for certainty and predictability of a general sort, for while it is not an uninhibited doctrine of salus respublicae suprema lex, yet it permits any constitutional provision to be ignored if, in the future, we are faced with urgency. If some day the nation is confronted with a situation where national elections cannot be held, then it is far more satisfying both to the legal and lay mentality to have a constitutional doctrine which allows for their suspension rather than interpreting the Constitution in such a manner that we necessarily breach it. Such an interpretation satisfies the second and unconscious aim, that of a myth. No

\[\text{References:}\]

\[\text{180. Auden and Isherwood, The Dog Beneath the Skin (1936) 180.}\]


\[\text{175. See Fairman, The Law of Martial Rule (1940) 27: "When a movement-strike, racial unrest, or what not—threatens to destroy the social or economic equilibrium of a community it will be resisted instinctively, often frantically, by those whose position is menaced. They have come to identify their own well-being with the public good. If they control the government they will employ its power to suppress the subversive movement."}\]

\[\text{See Note (1928) 42 Harv. L. Rev 265, 269; cf. Note (1942) 90 U.Pa.L.Rev 598, 601, n.30.}\]

\[\text{176. See Burnham, The Machiavellians (1943) 269; "A dilemma confronts any section of the elite that tries to act scientifically. The political life of the masses and the cohesion of society do not permit belief in the truth of the myths. But the leaders must profess, indeed}\]
myth can continue to be believed if too frequently contradicted by the facts. If the Supreme Court sustains the Japanese evacuation without introducing some doctrinal explanation that is a new myth, then the legend that republican government does not permit public discriminations based upon race or nationality will already twice have been found untrue and therefore weakened. And the broad generalization that inherent in government is the power to meet need and the converse statement of the same doctrine that emergency power may not be exercised over and above the requirements of the emergency make excellent social ideals.

Be it admitted, however, that such a doctrine does not of itself decide whether or not the evacuation orders should be sustained by the Supreme Court. It merely overrules the doctrinalizations derived from ex parte Milligan and makes explicit what appears to have been the true ratio decidendi in that case and in United States v. Hirabayashi.

foster, belief in the myths, or the fabric of society will crack and they be overthrown.”

See, for example, N. Y. Times, June 20, 1943, sec. 4, p. 10, col. 3: “Probably the chief black mark on the nation’s record was the wholesale imprisonment of Japanese and Nisei on the West Coast without regard to whether the individual himself was disloyal.”

For a general discussion of minority rights, see Lusky Minority Rights and the Public Interest (1942) 52 YALE L. J. 1, Cushman, Civil Liberties (1942) 37 AMER. POL. SCI. REV. 49.

Cf. FRIEDRICH, CONSTITUTIONAL GOVERNMENT AND POLITICS (1937) 223: “Certain it is that the provisions of modern constitutions for the establishment of temporary constitutional dictatorship and the practice of constitutional governments in “neutralizing” the armed forces seem woefully inadequate in times of crisis. Whether effective changes can be brought about in the light of all this experience is a question beyond the judgment of the scientist. He can merely exhort: Videant consules, ne respublica detrimentum capiat.”

See (1943) 9 Town Meeting, No. 11 for the reprint of an intelligent radio discussion between John M. Costello, Robert R. Gros, Carey McWilliams, and Max Radin on the question whether there should be continued exclusion of Japanese-Americans from the Pacific Coast. See also Freeman, Genealogy, Evacuation, and Law (1943) 28 CORN. L. Q. 414.
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