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LECTURES

THE CONSTITUTION IN THE SUPREME COURT:
THE SECOND WORLD WAR, 1941-1946

David P. Currie*

When Harlan F. Stone was named to succeed Charles Evans Hughes as Chief Justice of the Supreme Court in 1941, the ballgame was new and so were the players. Dead and buried were the once burning controversies over economic liberties and the scope of enumerated federal powers. While devoting much of their attention to a number of troublesome issues brought about by the Second World War, the Justices were to focus increasingly on the new agenda of civil rights and liberties that Stone had laid out for them in United States v. Carolene Products Co.1 in 1938.2

It was altogether fitting that Justice Stone, the prophet of the new order, was elevated to Chief Justice after fifteen distinguished years of intellectual leadership on the Court.3 The only other familiar face was that of Owen Roberts, who, more than any other single Justice, had helped to precipitate the change by abandoning his restrictive view of regulatory authority when he held the balance of power.4 All the other Justices owed their initial appointments to President Franklin D. Roosevelt, and he had been careful in their selection.

Eldest of those in service was former Senator Hugo Black of Alabama, the “ultra-radical of the Senate” who had shocked the legal world by a series of

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1. 304 U.S. 144, 152 n.4 (1938).
3. “No other President,” said former Justice Brandeis when Stone was appointed Chief Justice, “has performed such a signal service.” See A. Mason, Harlan Fiske Stone: Pillar of the Law 570 (1956).
unrestrained populistic dissents immediately following his appointment and who had spoken out eloquently for the oppressed in voiding a conviction based on a coerced confession in *Chambers v. Florida.* Next in service was former Solicitor General Stanley Reed of Kentucky, who had written several significant and competent opinions reflecting the broad modern view of federal and state authority over the economy and who had authored a strong dissent evincing an even greater degree of constitutional protection for labor picketing than the majority after *Thornhill v. Alabama* was prepared to afford.

Next to Justice Black sat the man who was to be his principal adversary over the next twenty years in one of the epic struggles of American constitutional history, former Professor Felix Frankfurter of Harvard. Best known for his controversial opinion denying Jehovah’s Witnesses a constitutional exemption from a compulsory flag salute, Justice Frankfurter was to respond to the lesson of *Lochner v. New York* by becoming the Court’s foremost exponent of an uncompromising judicial restraint as the press of new issues revealed differences that had been concealed by unanimity on the questions of the 1930’s.

The remaining holdovers from the last days of Chief Justice Hughes were destined to be steadfast allies of Justice Black in this coming controversy. The young William O. Douglas, one-time professor and Securities Exchange Commission Chairman, had written the Court’s most sweeping condemning

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5. See, e.g., Connecticut General Life Ins. Co. v. Johnson, 303 U.S. 77, 83 (1938) (Black, J., dissenting) (denying after all those years that a corporation was a “person” within the fourteenth amendment); G. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 25, 178-79 (1977).


tion of economic due process. Former Attorney General and Michigan Governor Frank Murphy, father of the expansive protection for picketing in *Thornhill*, was to be even more insistent than Justices Black or Douglas in pressing the claims of civil liberty.

Appointed to fill the vacancies created by the departure of Chief Justice Hughes and Justice McReynolds in 1941 were South Carolina Senator James F. Byrnes and yet another Attorney General, Robert H. Jackson. The former, who served the shortest term of any Justice ever confirmed, left the following year to work for Roosevelt; the latter stayed to become one of history's must illustrious Justices. Byrnes' replacement, former professor and circuit judge Wiley Rutledge, was to do yeoman service as an ally of Justices Black, Douglas, and Murphy in defense of civil liberties. The only other change in membership before Stone's death in 1946 was President Truman's appointment of Ohio Senator Harold H. Burton to replace Justice Roberts at the end of the period.

Only two months after Stone took his seat as Chief Justice, Pearl Harbor was bombed and Congress declared war. It was not long before the war effort confronted the Court with a panoply of challenging problems ranging from military trials to price regulation and selective service, as well as the much lamented internment of citizens of Japanese descent. It is with the

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13. For an excellent study, see J. Howard, *Mr. Justice Murphy* (1968).
war cases that this Article begins. The remaining decisions will be the subject of another study.

I. MILITARY TRIALS

A. Ex parte Quirin

Six months after the bombing of Pearl Harbor, eight German saboteurs secretly landed on New York and Florida beaches, equipped with explosives. Apprehended, they were held for trial by a military commission established pursuant to Presidential order. Sitting in an extraordinary summer session in July of 1942, the Supreme Court in *Ex parte Quirin*17 upheld the commission's jurisdiction in an unanimous opinion by Chief Justice Stone.

In *Ex parte Milligan*,18 in 1866, the Court had courageously held that the military trial of civilians for giving aid to the rebellion offended both the constitutional guarantee of jury trial and article III's requirement that federal judicial power be vested in judges appointed during good behavior. The *Milligan* Court had conceded that military trials might be permissible "on the theatre of active military operations," as a matter of necessity. If "the courts [w]ere actually closed" by hostilities, military tribunals were unavoidable if justice was to be dispensed at all.19 This concession, however, was of no use in *Quirin*. As the Court acknowledged, "ever since petitioners' arrest the state and federal courts in Florida, New York, and the District of Columbia, and in the states in which each of the petitioners was arrested or detained, have been open and functioning normally."20

The Court in *Milligan* had also conceded that the explicit exception from the fifth amendment's grand jury requirement for "cases arising in the land or naval forces, or in the [m]ilitia, when in actual service, in time of [w]ar or public danger,"21 implicitly limited other procedural protections of the criminal defendant as well.22 Over the objections of four Justices, this exception was appropriately construed in *Milligan* not to embrace prosecutions of civilians for giving comfort to the enemy,23 and Chief Justice Stone did not rely on it in *Quirin*.24 Rather, Stone invoked history. Offenses against the

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17. 317 U.S. 1, 18 (1942) (Justice Murphy did not participate).
21. U.S. CONST. amend. V.
22. 71 U.S. (4 Wall.) at 123.
23. *Id.* at 123-24.
24. 317 U.S. at 41. "We may assume, without deciding, that a trial prosecuted before a military commission . . . is not one 'arising in the land . . . forces,' when the accused is not a member of or associated with those forces." *Id.*
laws of war, including "unlawful belligerency," had consistently been tried by military tribunals both before and after the adoption of the Constitution. According to Stone:

The object [of article III's jury trial provision] was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law . . . , but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.25

If Chief Justice Stone was correct about the history of military commissions, he was on firm ground. The tradition of sovereign immunity had been read into the unqualified jurisdictional grants of article III on similar grounds;26 the tradition of courts-martial for offenses by military personnel had qualified article III's guarantee of tenured judges;27 the tradition of non-jury trials for petty offenses and for contempt had limited the jury-trial provisions themselves.28 Thus, while one might have hoped to find that the Constitution limited military trials to cases of strict necessity, it is hard to quarrel with the Court's contrary conclusion.29 Quirin is a salutary reminder that it is not the courts alone that have a responsibility to see that those charged with offenses are afforded appropriate procedural protections.30

B. In re Yamashita

Nearly four years after Quirin, General Yamashita, commander of a Japa-

25. Id. at 39. The fifth and sixth amendments, the Court added, "did not enlarge the right to jury trial as it had been established by that Article." Id. No challenge based upon the tenure provisions of article III was made; it would have been subject to the same historical argument. Cf. Milligan, 71 U.S. (4 Wall.) at 2. The history of military commissions is considered in Kaplan, Constitutional Limitations on Trials by Military Commissions, 92 U. Pa. L. Rev. 119 (1943).


29. In further contrast to Milligan, the President had acted pursuant to express statutory authorization in establishing the military commission in Quirin. It was unnecessary to decide whether, contrary to the suggestion of Chief Justice Chase in the earlier case, the President had inherent authority to establish such tribunals by virtue of his position as Commander-in-Chief in the absence of "controlling necessity." See Milligan, 71 U.S. (4 Wall.) at 139-40 (concurring opinion); Quirin, 317 U.S. at 29. For a discussion of Chief Justice Stone's doubts whether the proceedings had been in accordance with the Articles of War and his efforts to secure unanimity, see A. Mason, supra note 3, at 653-66.

30. See Cushman, Ex parte Quirin et al—The Nazi Saboteur Case, 28 Cornell L.Q. 54, 65 (1941) (finding it "a wholesome and desirable safeguard of civil liberty in time of war" that the Court took jurisdiction at all).
nese army in the Philippines, was condemned to death for war crimes by another military commission. In *In re Yamashita*, the Court once again upheld military jurisdiction in an opinion by Chief Justice Stone, but this time there were dissents by Justices Murphy and Rutledge.

With respect to the jurisdictional question, the most obvious difference between this case and *Quirin* was that the commission in *Yamashita* had been convened after hostilities had ceased. The Court readily found this distinction immaterial. "The war power," wrote Chief Justice Stone, "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy the evils which the military operations have produced." This sensible proposition had ample precedential support. Moreover, in the case of punishment for war crimes committed by enemy combatants "the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial." No one disagreed with this conclusion.

Justice Murphy's dissenting argument was that, in contrast to *Quirin*, the charge against Yamashita failed to state an offense under the laws of war. Yamashita had been charged not with committing or authorizing atrocities, but with failing to prevent his troops from committing them. At the time of the acts in question, said Murphy, the Japanese army had been so decimated by American attacks that its commander was in no position to control it. "International law," Murphy argued, imposed no "liability under such circumstances for failure to meet the ordinary responsibilities of command,"

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31. 327 U.S. 1 (1946).
32. See id. at 26-41 (Murphy, J., dissenting); id. at 41-81 (Rutledge, J., dissenting). Justice Jackson, who spent the entire term prosecuting German war criminals before a similar tribunal in Nuremberg, did not participate. Id. at 26.
33. Id. at 12. The grant of authority on which Congress had relied, "to define and punish Offenses against the Law of Nations," U.S. CONST. art. I, § 8, certainly does not suggest any limitation to periods of actual hostilities. See *Yamashita*, 327 U.S. at 7.
35. *Yamashita*, 327 U.S. at 12. It was true that the end of hostilities reduced the necessity for employing military courts for this purpose, as the civilian courts could now be reopened. As *Quirin* shows, however, the test of military judicial authority is not necessity but history; the civil courts were open in *Quirin* too.
36. Id. at 26-41.
37. Id. at 35 (Murphy, J., dissenting).
and thus, the proceeding was not within the traditional military jurisdiction.

Justice Rutledge, who agreed with Justice Murphy, added a separate constitutional argument of his own: The procedures followed by the military tribunal were not in accordance with the fifth amendment's requirement of due process of law. The admission of incompetent evidence, including much hearsay, had made it impossible for Yamashita to rebut the case against him, and he had had insufficient time to prepare a defense to the multifarious allegations.

The Court replied to Justice Rutledge with the traditional argument that habeas corpus lay only to determine the jurisdiction of the sentencing tribunal. Its response to Justice Murphy was a denial that there was any "contention... that the commission held petitioner responsible for failing to take measures which were beyond his control."

On this view the Court, as in Quirin, may well have been in no position to interfere. If this is so, then Yamashita is yet another example of the importance of recognition by the other branches of government of their constitutional and moral obligation to assure a fair trial. As Thomas Paine said in a passage Justice Rutledge quoted with force at the end of his opinion, "'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.'"
C. Duncan v. Kanahamoku

On the day Pearl Harbor was bombed, the Governor of Hawaii declared the territory under "'martial law,'" authorizing the Commanding General "'to exercise all the powers normally exercised' by the Governor and by the 'judicial officers and employees of this territory.'"43 The President, without knowing the exact terms of the order, approved it two days later.44

While this order was in effect, Duncan and White were convicted of criminal offenses by military tribunals. Both were civilians, and White's alleged offense—embezzlement from another private citizen—had nothing to do with the military.45 In Duncan v. Kanahamoku,46 both Duncan and White sought habeas corpus, and this time, in contrast to Quirin and Yamashita, the Court held the military tribunal without jurisdiction.

On the constitutional level, Duncan differed from Milligan in that Hawaii had been subject to a devastating enemy attack that obviously justified some immediate, extraordinary measures. On this basis, Justice Burton argued in a dissent joined by Justice Frankfurter that the Court should defer to what he viewed as a reasonable exercise of executive discretion to determine the scope of the emergency.47

However, Justice Murphy argued in an impassioned concurrence that by the time the defendants were tried "the territorial courts of Hawaii [like the Indiana courts in Milligan] were perfectly capable of exercising their normal criminal jurisdiction had the military allowed them to do so."48 As Milligan itself had made clear, and as the Court unanimously reaffirmed in its decision striking down a Texas governor's use of martial law in 1932, the courts

44. See id. at 308 & n.2. It is perhaps because the President was unaware that the civilian courts had been supplanted that there was no apparent effort to justify the order on the basis of the President's constitutional powers as Commander-in-Chief.
45. Duncan, on the other hand, had been convicted of assaulting two marines in violation of a military rule. See id. at 309-11.
46. 327 U.S. 304, 324 (1946).
47. Id. at 337-58 (Burton, J., dissenting, joined by Frankfurter, J.); cf. Prize Cases, 67 U.S. (2 Black) 635, 670-71 (1862) (upholding Presidential blockade of Confederate ports under statute authorizing use of armed forces to suppress insurrections: "The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure . . . ."), discussed in D. Currie, supra note 18, at 273-75; Martin v. Mott, 25 U.S. (12 Wheat.) 12, 18-20 (1827) (holding statute gave President unreviewable discretion to determine whether imminent danger of invasion existed for purposes of calling out militia).
48. Duncan, 327 U.S. at 327 (Murphy, J., concurring) (stressing right to trial by jury); see also id. at 333-34 (Murphy, J., concurring) (rejecting contention that presence of citizens of Japanese descent made jury trials impracticable); id. at 313-14 (opinion of the Court) (noting that neither defendant was connected with the military forces or charged with any offense against the laws of war); id. at 335-37 (Stone, C.J., concurring).
could not simply accept an executive determination as to the existence of an emergency or the measures necessary to meet it.49

Without attempting to resolve the constitutional question presented by Duncan, Justice Black chose a narrower ground of decision for the majority: The statute authorizing the Governor to declare “martial law,” read in light of constitutional traditions, did not authorize military trials of civilians. As Justice Black explained:

The phrase 'martial law' as employed in th[e Hawaii Organic] Act, . . . while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.50

History had saved the military trials in Quirin; it condemned those in Duncan.

Prudently, the Court announced this brave conclusion only after the war was safely over. Sensibly, it declined, unlike the impetuous Justice Murphy, to reach an unnecessary constitutional question. Nevertheless, Duncan stands with Milligan as a monument to the value of judicial review in protecting the essential liberties of the citizen.

II. THE JAPANESE-AMERICAN CASES

A. Hirabayashi v. United States

On March 24, 1942, Lieutenant General J.L. DeWitt, Military Commander of the Western Defense Command, issued a proclamation requiring "all persons of Japanese ancestry" within a "military area" comprising the entire Pacific coast to "be within their place of residence between the hours of 8:00 P.M. and 6:00 A.M."

Hirabayashi, an American citizen of Japanese descent living in Seattle, Washington, was prosecuted and convicted of

49. See Sterling v. Constantin, 287 U.S. 378, 402 (1932) (Hughes, C.J.) ("The assertion that such action can be taken as conclusive proof of its own necessity . . . has no support in the decisions of this Court."); Fairman, supra note 41, at 856 (arguing that "no convincing reason could have been advanced" why military trial of an embezzlement charge was "necessary to the defense of Hawaii"); Frank, Ex parte Milligan and the Five Companies: Martial Law in Hawaii, 44 COLUM. L. REV. 639, 665 (1944) (arguing that Milligan applied).

50. Duncan, 327 U.S. at 324. Only once, in the Reconstruction Act, said Justice Black, had Congress "authorized the supplanting of the courts by military tribunals"; and its power to do so had been seriously challenged. Id. at 323; see also id. at 320-21 (noting that the troops sent to put down both Shays' Rebellion and the Whiskey Rebellion in the 18th century had been specifically directed to turn over offenders to the civil courts for trial).

violating this curfew, and in Hirabayashi v. United States, the Supreme Court unanimously affirmed the decision.

General DeWitt was not acting entirely on his own. Responding to claims of military necessity, President Roosevelt had issued an Executive order empowering military commanders to restrict “the right of any person to enter, remain in, or leave” areas to be designated in the interest of preventing espionage and sabotage. Congress ratified the President’s action by enacting criminal penalties for violations of restrictions imposed pursuant to the Executive order, knowing that a curfew was among the restrictions contemplated. Reading the statute to “authorize[] curfew orders . . . for the protection of war resources from espionage and sabotage,” the Court found no forbidden delegation of legislative power:

The essentials of the legislative function are preserved when Congress authorizes a statutory command to become operative, upon ascertainment of a basic conclusion of fact by a designated representative of the Government. . . . [T]he basic facts . . . were whether th[e] danger [of sabotage] existed and whether a curfew order was an appropriate means of minimizing the danger.

This reasoning seems wholly in accord with the deferential attitude the Justices had displayed toward other delegations since 1937 and in most earlier cases as well.

“The war power of the national government,” wrote Chief Justice Stone once again for the Court, “extends to every matter and activity so related to war as substantially to affect its conduct and progress. . . . It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces . . . .” At the time the curfew was imposed, noted Stone, “the danger to our war production by sabotage and espionage in [the Pacific Coast] area seem[ed] obvious.” A curfew was “an

52. 320 U.S. 81, 83-84 (1943). Justices Douglas, Murphy, and Rutledge wrote separate concurring opinions. Id. at 105-14. Justice Murphy’s opinion had originally been drafted as a dissent. See J. Howard, supra note 13, at 300-09. In Yasui v. United States, 320 U.S. 115, 117 (1943), the Court sustained the district court’s judgment on the authority of Hirabayashi.
53. Hirabayashi, 320 U.S. at 85-86.
54. See id. at 85-91. Thus, as in Quirin and Yamashita, there was no need to decide whether the President could have imposed such a restriction without statutory authorization on the basis of his article II powers as Commander-in-Chief. Id. at 92.
55. Id. at 104; cf. Panama Refining Co. v. Ryan, 293 U.S. 388, 437-39 (1935) (Cardozo, J., dissenting); Hughes I, supra note 2, at 518 (construing NRA hot-oil provision, in light of statutory purposes, to limit Presidential discretion).
56. Hirabayashi, 320 U.S. at 104.
57. See Hughes I, supra note 2, at 517-23 (discussing delegation cases).
58. Hirabayashi, 320 U.S. at 93.
59. Id. at 96.
obvious protection against the perpetration of sabotage most readily committed during the hours of darkness." The Court added that although "racial discriminations [were] in most circumstances irrelevant," they were not so here: "We cannot close our eyes to the fact, demonstrated by experience, that in time of war residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry." Stone concluded, "We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour [disloyal] persons could not readily be isolated and separately dealt with . . . ." There was, accordingly, a "rational basis" for the decision to impose the curfew and, therefore, that measure was within the war powers of Congress and did not deprive Hirabayashi of his liberty without due process of law.

John Marshall had said that a measure was "necessary and proper" to the execution of federal authority only if it was an "appropriate" means to a "legitimate" end, and his successors had enunciated a similar test to determine the compatibility of substantive measures with due process. Though some have argued that General DeWitt was motivated as much by racial antagonism as by his professed security concerns, the Court has understandably been loath to question the motives behind official action. Furthermore, one could hardly deny that preventing sabotage was a legitimate federal concern. The most pressing question was whether the curfew was closely enough tailored to this end to survive judicial scrutiny.

Even assuming there was a sufficient danger of sabotage to support such a drastic measure as a curfew, the order actually promulgated was curiously

60. Id. at 99.
61. Id. at 101. The Court buttressed its conclusion that Japanese-Americans presented special dangers with the observation that "social, economic and political conditions"—by which Stone meant official and other forms of discrimination against Japanese-Americans—"have in large measure prevented their assimilation as an integral part of the white population" and "encouraged the[ir] continued attachment . . . to Japan." Id. at 96 n.4, 98. This was as indecent as it was true: The Court was saying that one instance of racial discrimination justified another.
62. Id. at 99.
63. Id. at 92-102. For a rare argument in support of this conclusion, see Alexandre, War-time Control of Japanese-Americans, 28 CORNELL L.Q. 385 (1943).
65. See, e.g., M. GRODZINS, AMERICANS BETRAYED, POLITICS AND THE JAPANESE EVACUATION 302 (1949) (discussing a later act in the same tragedy: "[T]he evacuation decision was predicated on a racist philosophy, nurtured by regional pressures, and eventually justified by falsehood.").
66. See, e.g., Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 129-30 (1810) (declining to decide whether land grant resulted from bribery of legislators), discussed in D. CURRIE, supra note 18, at 129; McCray v. United States, 195 U.S. 27, 59-64 (1904) (upholding prohibitive federal tax on margarine), discussed in Fuller I, supra note 10, at 356-57.
broad in one respect and curiously narrow in another. It restricted the liberty of all Japanese-Americans on the west coast because some of them might be dangerous; yet it applied neither to those in Hawaii nor to Americans whose forebears had come from Germany or Italy, with which we were also at war.\textsuperscript{67} One would not need to revert to the judicial arrogance of \textit{Lochner v. New York} \textsuperscript{68} and \textit{Railroad Retirement Board v. Alton Railroad Co.} \textsuperscript{69} to doubt whether a curfew at once so overinclusive and so underinclusive was a reasonably appropriate means of achieving the legislative goal. A Court less deferential to the conclusions of other branches might have found the measure unauthorized by the statute as construed, unnecessary to the exercise of Congress' war powers, and so arbitrary as to deprive those within its reach of their liberty without due process of law.\textsuperscript{70}

The principal achievement of the New Deal revolution, however, had been essentially to abandon both of the constitutional doctrines on which such a conclusion could have been based. Except in cases involving application of the "specific" provisions of the Bill of Rights to the states, the Court had not taken an argument of limited federal power or of substantive due process seriously since 1936.\textsuperscript{71} As early as 1919, the Justices had accepted an argument of military necessity at least as far-fetched as that in \textit{Hirabayashi} in upholding a postwar ban on liquor manufacture as a means to "'conserv[e] the man power of the Nation, and to increase efficiency in the production of arms.' "\textsuperscript{72} In 1942 the Court had made a mockery of the tenth amendment by allowing Congress to regulate planting for on-farm consumption because

\begin{itemize}
\item \textsuperscript{67} See \textsc{J. tenBroek, E. Barnhart & F. Matson, Prejudice, War, and the Constitution} 303-04 (1968) [hereinafter \textsc{J. tenBroek}].
\item \textsuperscript{68} 198 U.S. 45 (1905) (finding health risks to bakers insufficient to justify limiting their working hours despite strong evidence to contrary), \textit{discussed in Fuller I, supra note 10}, at 378-82.
\item \textsuperscript{69} 295 U.S. 330 (1935) (finding pensions for railroad workers not closely enough related to interstate transportation under commerce clause), \textit{discussed in Hughes I, supra note 2}, at 528-29.
\item \textsuperscript{70} \textit{Cf} De Jonge v. Oregon, 299 U.S. 353, 365-66 (1937) (holding danger of subversion did not justify punishing mere assistance in conducting meeting called by Communist Party), \textit{discussed in Hughes II, supra note 2}; \textsc{A.L.A. Schechter Poultry Corp. v. United States}, 295 U.S. 495, 551 (1935) (unanimously holding regulation of wages, prices, and product quality in local slaughterhouse beyond commerce power), \textit{discussed in Hughes I, supra note 2}, at 524-25. \textit{See generally \textsc{P. Irons, Justice at War} 278-310 (1983) (documenting the conclusion that the Government's brief effectively concealed from the Court evidence of serious doubts within the Administration as to the need for discriminatory measures); \textsc{Rostow, The Japanese American Cases—A Disaster}, 54 \textit{Yale L.J.} 489, 505-07 (1945) (arguing that there was no factual basis for the conclusion of military necessity).}
\item \textsuperscript{71} \textit{See generally Hughes I, supra note 2}, at 541-53.
\item \textsuperscript{72} \textsc{Hamilton v. Kentucky Distilleries & Warehouse Co.}, 251 U.S. 146, 166-67 (1919), \textit{discussed in White, supra note 34}, at 1125-26.
\end{itemize}
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"[h]ome-grown wheat . . . competes with wheat in commerce." Footnote 73 Five years before Hirabayashi, Justice Stone had written that "the existence of facts supporting the legislative judgment is to be presumed" and that "ordinary commercial" regulation was not to be set aside on due process grounds unless shown not to rest on "some rational basis." Footnote 74 Three years later the Court had dismissed substantive due process objections as "notions of public policy . . . which . . . should not be read into the Constitution." Footnote 75 Milligan, which had more strictly scrutinized a claim of military necessity, Footnote 76 was of no help since Hirabayashi involved only the discredited doctrines of substantive due process and enumerated powers, not the explicit guarantees of judge and jury.

Subsequent decisions have familiarized us with stricter levels of judicial scrutiny in cases involving either "fundamental rights" or "suspect classifications"—both of which could easily have been found in Hirabayashi. Footnote 77 Justice Stone himself had pointed the way in his famous footnote in the first Carolene Products case, suggesting the possibility of heightened scrutiny of measures disadvantaging "discrete and insular minorities." Footnote 78 Hirabayashi, unlike Carolene Products, involved no "ordinary commercial" measure. Decisions of the Hughes period seemed to confirm that the Court was less deferential in speech and press cases than in those where merely economic interests were involved. Footnote 79 Moreover, the year before the curfew case, the Court had expressly exercised "strict scrutiny" in striking down on equal protection grounds a state law providing for sterilization of habitual thieves but not embezzlers, arguing that the statute "involves one of the basic civil rights of man." Footnote 80 On the basis of these leads, one might have expected the

Footnotes:
76. See J. TENBROEK, supra note 67, at 238 (arguing that Korematsu was "the exact antithesis" of Milligan).
78. 304 U.S. at 153 n.4.
79. See, e.g., Thornhill v. Alabama, 310 U.S. 88, 95-96 (1940) ("Mere legislative preference for one rather than another means for combatting substantive evils . . . may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions."). See generally Hughes II, supra note 2, passim.
80. Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (opinion by Douglas, J.). Chief Justice Stone’s concurring opinion in Skinner made the due process argument for invalidating the overbroad curfew in Hirabayashi: "A law which condemns . . . all the individuals of a class to
Court to exercise stricter scrutiny in Hirabayashi.\textsuperscript{81}

It is easier, however, to find support for these varying levels of deference in political theory\textsuperscript{82} than in the due process or war clauses, which were at issue in Hirabayashi. It is one thing to conclude that the first amendment’s firm declaration that “Congress shall make no law . . . abridging the freedom of speech”\textsuperscript{83} imposes more stringent limitations than the “rational basis” requirement the Court had read into due process, or (as Justice Black was soon to suggest) that the privileges or immunities clause makes the same stringent restrictions applicable to the states.\textsuperscript{84} It is quite another to conclude that a single clause requires varying degrees of deference because five judges believe some rights more important or some classifications more suspect than others.\textsuperscript{85}

The fact of the matter is that Hirabayashi was a classic case of racial discrimination, which the Court had consistently held prohibited by the equal protection clause of the fourteenth amendment\textsuperscript{86}—which applies, alas, only such a harsh measure as the present because some or even many merit condemnation, is lacking in the first principles of due process.” \textit{Id.} at 545 (Stone, C.J., concurring).


\textsuperscript{82} \textit{See generally} J. Ely, \textit{Democracy and Distrust} (1980).

\textsuperscript{83} \textbf{U.S. CONST. amend. I.}

\textsuperscript{84} \textit{See} Adamson v. California, 332 U.S. 46, 71-72 (1947) (Black, J., dissenting).

\textsuperscript{85} It would have been easy to distinguish the economic cases if their basis had been the historically attractive argument that “liberty” meant only freedom from restraints on mobility, \textit{see} Fuller I, \textit{supra} note 10, at 375-78 (discussing Allgeyer v. Louisiana, 165 U.S. 578 (1897)), but it was not. To the extent that the test of due process was the reasonableness of the challenged measure, it did seem to require a balancing of costs and benefits; thus, a greater need might well be required to justify a more serious harm. For example, as Justice Jackson was soon to assert, arguments of military necessity sufficient to sustain a curfew might not suffice for more invasive measures such as exclusion from the entire west coast. \textit{See infra} text accompanying notes 91-107 (discussing Korematsu v. United States, 323 U.S. 214 (1944)). When the interests affected differ in kind rather than in degree, however, as liberty of contract and of movement do, the determination of relative importance becomes much more subjective.

Any claim of \textit{procedural} due process seems to have been foreclosed by Bi-Metallic Investment Co. v. State Board of Equalization, 239 U.S. 441, 445-46 (1915), which held that due process imposed no requirement of a hearing before adoption of rules of general applicability because the large numbers of persons affected both made a hearing impracticable and increased the effectiveness of political checks. As for due process in determining whether an individual was subject to the curfew, the substantive standard left no facts to try except Japanese ancestry, which was conceded.

\textsuperscript{86} \textit{See, e.g.}, Missouri \textit{ex rel.} Gaines v. Canada, 305 U.S. 337 (1938) (exclusion of blacks from state law schools); Nixon v. Herndon, 273 U.S. 536 (1927) (exclusion of blacks from primary election); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (exclusion of Chinese from laundry business); Strauder v. West Virginia, 100 U.S. 303 (1880) (exclusion of blacks from juries). As the Court had said in \textit{Strauder}, racial discrimination was at the heart of the fourteenth amendment, and the Court never suggested that it could be justified by any showing of alleged
to the states and not to the United States. "The Fifth Amendment," said Chief Justice Stone in echo of a myriad of decisions that had once appeared progressive, "contains no equal protection clause." Substantive due process is a shaky enough concept to begin with. To hold that it embraces equal protection would make an explicit clause of the fourteenth amendment redundant, which is hardly the most natural assumption. When the Court ultimately did hold that due process included equal protection, it could only protest that it was "unthinkable" that a Constitution prohibiting state racial classifications "would impose a lesser duty on the Federal Government." It may have been unthinkable, but unfortunately it was true. When the Constitution proves deficient, the proper course is to amend it by the procedure prescribed in article V.

B. Korematsu v. United States

Less than two months after promulgation of the curfew upheld in Hirabayashi, General DeWitt ordered that all persons of Japanese ancestry be excluded from designated west coast areas including Alameda County, California. Korematsu was convicted of violating this provision, and in Korematsu v. United States, the Court, affirming in a brief opinion by Justice Black, held that the case was governed by Hirabayashi. This time, however, the decision was not unanimous. Justices Roberts, Murphy, and Jackson dissented.

Justice Roberts zeroed in on an earlier proclamation prohibiting Japanese-Americans from leaving the same area in which Korematsu had been convicted for not leaving. Thus, in his view, Korematsu "was faced with two diametrically contradictory orders": one order "made him a criminal if he

necessity. See id. at 310; see also Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 67-72, 81 (1873), discussed in D. Currie, supra note 18, at 342-50.
87. Hirabayashi, 320 U.S. at 100 (citing Detroit Bank v. United States, 317 U.S. 329, 337-38 (1943)).
88. See Fuller I, supra note 10, at 378-82 (discussing Lochner v. New York, 198 U.S. 45 (1905)).
89. Overlap between the due process clause and other provisions of the Bill of Rights, however, though once ruled out on similar grounds, see Hurtado v. California, 110 U.S. 516, 534-35 (1884) (grand-jury indictment), discussed in D. Currie, supra note 18, at 366-68, had since become accepted. See, e.g., Powell v. Alabama, 287 U.S. 45, 60-71 (1932) (right to counsel and cases cited including uncompensated taking and free speech), discussed in Hughes II, supra note 2.
92. 323 U.S. 214, 217 (1944). Hirabayashi had also been convicted of violating an exclusion order. Because his concurrent sentence for curfew violation was upheld, however, it was immaterial whether or not his exclusion conviction was also valid, and the Court did not pass on it. See Hirabayashi, 320 U.S. at 85.
left the zone in which he resided,” the other “made him a criminal if he did not leave,”93 “I had supposed,” said Justice Roberts, “that if a citizen was constrained by two . . . orders . . . and obedience to one would violate the other, to punish him for violation of either would deny him due process of law.”94

For those who believe in substantive due process, Justice Roberts’ statement of the governing principle is certainly appealing. The majority, however, found no such contradiction: The order forbidding Korematsu to leave the area expressly applied only “until and to the extent that a future proclamation or order should so permit or direct,” and it had been superseded by the exclusion order.95

Justice Jackson waxed eloquent over the unconstitutionality of the exclusion provision itself, although he emphatically refused to decide whether or not it was reasonable.96 “Korematsu,” he stated, “has been convicted of an

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94. Id. at 228-29, 232 (Roberts, J. dissenting).
95. Id. at 220. Justice Roberts further argued that the exclusion order, which he “might” have agreed was constitutional if standing alone, could not be considered in isolation from accompanying provisions requiring those excluded to report to an “Assembly Center”—“a euphemism for a prison”—as part of a scheme “to lock [them] up in a concentration camp.” Id. at 230-32 (Roberts, J., dissenting). Justice Black fairly responded that the detention issue was not presented because the detention provisions were separable and Korematsu had not been charged with violating them. Id. at 221-22.
96. Id. at 248 (Jackson, J., dissenting). Courts were in no position, Jackson argued, to determine the reasonableness of military orders, and military commanders could not be expected to “conform to conventional tests of constitutionality” in emergencies. Id. at 244-45 (Jackson, J., dissenting). He stated, “I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution.” Id. at 248 (Jackson, J. dissenting).

Justice Frankfurter protested in a concurring opinion that this was double-talk: “If a military order . . . does not transcend the means appropriate for conducting war, such action . . . is . . . constitutional . . . .” Id. at 225. It is not plain, however, that the Constitution authorizes all “reasonable” means of making war. Congress must first declare war, unless the President is acting “to repel sudden attacks.” See 2 M. FARRAND, RECORDS OF THE CONSTITUTIONAL CONVENTION 318 (rev. ed. 1937). The order must either be authorized by statute or fall within the President’s authority as Commander in Chief; see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), and it must not offend constitutional limitations such as freedom of speech, the taking clause, or the jury and judge provisions that were enforced in *Milligan*. See supra notes 18-23 and accompanying text. Moreover, not only our own revolution but the adoption of the Constitution itself reflected Locke’s admonition that obedience to law might properly take second place in extremis. The experience of the totalitarian governments we were fighting when *Korematsu* was decided accentuated his wisdom—though one might wonder whether we really want every soldier to view our republican Constitution the way Jefferson viewed the British colonial system in 1776. See J. LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT chs. 18, 19 (C. Sherman ed. 1937) (right of revolution); The Declaration of Independence para. 4 (U.S. 1776) (right of people to alter or abolish bad government); 2 M. FARRAND, supra, at 469 (James Wilson: “We must . . . go to the original powers of Society, the House on
act not commonly a crime. It consists merely of being present in the state
whereof he is a citizen, near the place where he was born, and where all his
life he has lived." Moreover, noted Jackson, that act was made criminal
only "because his parents were of Japanese birth. . . . [H]ere is an attempt to
make an otherwise innocent act a crime merely because this prisoner is the
son of parents as to whom he had no choice, and belongs to a race from
which there is no way to resign."9

All this could have been said with equal force in Hirabayashi, where Jack-
son had been silent. But Hirabayashi, he added, was different:

Now the principle of racial discrimination is pushed from support
of mild measures to very harsh ones . . . . Because we said that
these citizens could be made to stay in their homes during the
hours of dark, it is said we must require them to leave home en-
tirely; and if that, we are told they may also be taken into custody
for deportation; and if that, it is argued they may also be held for
some undetermined time in detention camps. How far the princi-
ple of this case would be extended before plausible reasons would
play out, I do not know.99

For those who believe that federal authority is limited either by the
enumeration of powers itself or by substantive due process, the severity of a
deposition is surely relevant to the question whether it is an appropriate
means to its asserted goal. Justice Jackson's refusal to decide whether the

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9. See generally W. Shirer, The Rise and Fall of the Third Reich (1960). This is perhaps why article I
itself explicitly authorizes suspension of the writ of habeas corpus, which effectively precludes
determination of the lawfulness of executive actions, during certain emergencies. U.S. Const.
art. I, § 9, cl. 2. Justice Jackson added:

A military commander may overstep the bounds of constitutionality and it is an
incident. But if we review and approve, that passing incident becomes the doctrine of
the Constitution. . . . [T]he Court for all time has validated the principle of racial
discrimination . . . . The principle . . . lies about like a loaded weapon ready for the
hand of any authority that can bring forward a plausible claim of an urgent need.

97. Korematsu, 323 U.S. at 246 (Jackson, J., dissenting); cf. A. Bickel, The Least Dangerous
Branch 139-40 (1962) (arguing that the Court should refuse to "legitimate" deplorable prac-
tices it is unable to find unconstitutional lest, in the context of motion picture censorship, it
"encourage Comstockian tendencies").

Justice Jackson's argument seems, in fact, the more intellectually respectable; he suggested
not that the Court allow a misimpression of the law to prevail in hopes of influencing political
choices among legitimate alternative policies, but that the Court refuse to term constitutional
that which in his view was not. How the Court was to avoid "interfer[ing] with the Army in
carrying out its [arguably reasonable but unconstitutional] task" if an appropriate suit was
brought, Jackson did not say. See Korematsu, 323 U.S. at 248 (Jackson, J., dissenting).
98. Id. at 243 (Jackson, J., dissenting).
99. Id. at 247 (Jackson, J., dissenting).
exclusion order was reasonable, however, leaves one wondering how he could have found it unconstitutional, since both of the pegs on which that conclusion could have been hung had always been defined in terms of the appropriateness of the challenged action.

Justice Black, writing for the majority, conceded that exclusion was "a far greater deprivation" than curfew. Moreover, without adverting to the "rational basis" standard applied in Hirabayashi, he dramatically professed a more demanding one: "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. . . . [C]ourts must subject them to the most rigid scrutiny." "Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety” could justify either measure. Yet, in Black's view, even the exclusion order met this stringent test: "[E]xclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage.”

We come at last to Justice Murphy, who of the three dissenters was, as usual, the most impassioned. Making no effort to distinguish Hirabayashi, Murphy went to the heart of the difficulty with both exclusion and curfew by pointing to the gross overinclusiveness of the orders. Of course there had been individual instances of subversive activities by persons of Japanese descent, Murphy noted, "[b]ut to infer that examples of individual disloyalty . . . justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights.” The argument that there was no time to "treat . . . Japanese Americans [like German- or Italian-Americans] on an individual basis by holding investigations and hearings to separate the loyal from the disloyal,” he continued, was refuted by the facts:

[N]early four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these 'subversive' persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than

100. Id. at 218. The hardships inflicted by the exclusion order are detailed in the REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982).

101. Korematsu, 323 U.S. at 216. This was to assume the less deferential stance adumbrated by Chief Justice Stone in Carolene Products for measures affecting "discrete and insular minorities." See supra note 78 and accompanying text.


103. Id.

104. Id. at 240 (Murphy, J., dissenting).
speed.\(^105\)

In other words, the exclusion of all Japanese-Americans from the west coast was a means poorly tailored to the legitimate end of preventing sabotage. For all of Justice Black’s protestations, the Court did not seem to be scrutinizing the measure very strictly.\(^106\) Therefore, in Justice Murphy’s opinion, “the order deprive[d] all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment.”\(^107\)

There is only one weakness in this argument: There is no such provision.

C. Ex parte Endo

Pursuant to an exclusion order similar to that upheld in Korematsu, Endo was evacuated from Sacramento, California in May 1942. From then on, until the Supreme Court in an eloquent opinion by Justice Douglas ordered her release in December 1944 in Ex parte Endo,\(^108\) she was detained in “relocation centers”—which Justice Roberts in Korematsu had labeled concentration camps—against her will.

The government conceded that Endo was “a loyal and law-abiding citizen”; General DeWitt himself had declared that “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... would be eliminated.”\(^109\) This would appear to eliminate any military justification for detention. As Justices Murphy and Roberts insisted in separate concurring opinions,\(^110\) that was to leave the

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105. Id. at 241 (Murphy, J., dissenting); see also J. TENBROEK, supra note 67, at 295-96; Rostow, supra note 70, at 507.

106. See Dembitz, supra note 81, at 182, 195 (arguing that Korematsu was actually even more deferential than Hirabayashi); J. TENBROEK, supra note 67, at 237-38. But see, e.g., Craig v. Boren, 429 U.S. 190 (1976), where, in applying a supposedly less rigorous degree of scrutiny, the Court ruled that the fact that more males than females between the ages of 18 and 21 drove while intoxicated did not justify setting the drinking age higher for men than for women. Indeed, if Justice Black meant to suggest that the “strict” level of scrutiny he professed to apply in Korematsu would also govern a case of state racial discrimination under the equal protection clause, he seemed to be not increasing but decreasing the scrutiny level; for no decision before Hirabayashi (which had emphasized, as Justice Black did not, that the latter requirement applied only to the states) had ever suggested that racial discrimination could be justified at all. See supra note 86.

107. Korematsu, 323 U.S. at 234-35 (Murphy, J., dissenting). Justice Murphy's additional argument that the failure to conduct individual loyalty hearings offended the requirement of "procedural due process," id. at 242, overlooked the fact that under the order individual loyalty was irrelevant. Due process had long been held to impose no procedural restrictions at all on the promulgation of generally applicable rules. See supra note 85.

108. 323 U.S. 283, 285 (1944). Endo and Korematsu were decided on the same day.

109. Id. at 294-95; see J. TENBROEK, supra note 67, at 250.

110. 323 U.S. at 307-08 (Murphy, J., concurring) ("[D]etention in Relocation Centers of
order defenseless before any applicable requirement of equal protection or substantive due process—and possibly also to render it, even in the permissive climate of the times, neither necessary nor proper to the execution of any congressional power.\footnote{111}

Prudently, as in \textit{Duncan}, the Court chose a narrower and entirely convincing ground of decision: neither Congress nor the President had authorized the detention of loyal citizens after their evacuation. Neither the statute nor the Executive Order said a word about detention. Justice Douglas, writing for the majority, stated: “Their single aim was the protection of the war effort against espionage and sabotage. . . . [D]etention which has no relationship to that campaign [is unauthorized].”\footnote{112}

Thus, one of the most deplorable government programs in the history of the United States finally encountered its legal limit. Reading the story is likely to leave one feeling ill. As in the war-crimes cases, it was not principally the judges who let us down—though the decisions underline the cost of their studied indifference to the limited nature of Congress’ enumerated powers over the preceding few years.\footnote{113} That the evacuation program may not have been unconstitutional under prevailing standards, however, does not prove it was right. The episode is a sobering warning against complacency about government, even in this generally free country, and an arresting reminder that the Constitution does not provide a remedy for every wrong.\footnote{114}

\begin{quote}
persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program.”); id. at 310 (Roberts, J., concurring) (“An admittedly loyal citizen has been deprived of her liberty for a period of years” in violation of “the guarantee of the Bill of Rights . . . and especially the guarantee of due process of law.”).\footnote{111}. In fact the detention program had admittedly been “‘due primarily to the fact that the interior states would not accept an uncontrolled Japanese migration.’” Id. at 295-96 (quoting General DeWitt). Racial prejudice, as Justice Black said in \textit{Korematsu}, 323 U.S. at 216, is surely the least acceptable excuse for racial discrimination.\footnote{112}. \textit{Endo}, 323 U.S. at 300-02. Justice Roberts’ protest that Congress had implicitly ratified the detention plan by voting a general appropriation for the agency that administered it, id. at 308-10 (Roberts, J., concurring), seems hardly faithful to the familiar canon that statutes should be construed whenever possible to ensure their validity, see id. at 299 (opinion of the Court). Additionally, Justice Douglas was on solid ground in concluding that “a lump appropriation . . . for the overall program of the [Relocation] Authority” did not demonstrate congressional approval of detention of persons whose loyalty was unquestioned: “Congress may support the effort to take care of these evacuees without ratifying every phase of the program.” Id. at 303 n.24.\footnote{113}. A generation after the Japanese-American cases, Justices Black and Frankfurter showed how serious scrutiny of the connection between means and ends could be used to limit the reach of article I war powers in striking down a court-martial of servicemen’s spouses in \textit{Reid v. Covert}, 354 U.S. 1 (1957).\footnote{114}. In later years, lawsuits have been filed seeking to reopen the question of the legality of
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III. TREASON

“Treason against the United States,” article III provides, “shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort.” No one may be convicted of treason “unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court,” and punishments extending beyond the offender himself are forbidden.115

“In the century and a half of our national existence,” wrote Justice Jackson in 1945, “not one execution on a federal treason conviction has taken place.”116 Indeed, as Professor James Willard Hurst reported, during that period “less than two score [federal] treason prosecutions” were even “pressed to trial.”117 “We have managed to do without treason prosecutions,” Justice Jackson added, “to a degree that probably would be impossible except while a people was singularly confident of external security and internal stability.”118

Only once before, in Ex parte Bollman,119 an 1807 case growing out of Aaron Burr’s mysterious western adventures, had the Supreme Court had occasion to consider charges of treason. In Cramer v. United States,120

the evacuation program and to recover damages for the harm caused to its unfortunate victims. Apart from the necessity of showing that the government acted illegally, these actions present troublesome procedural obstacles, not the least of which is the statute of limitations. See, e.g., Hohri v. United States, 782 F.2d 227 (D.C. Cir.) (rejecting certain claims on grounds of sovereign immunity, failure to exhaust administrative remedies, and delay in filing suit while holding 2-1 that fraudulent concealment of information disputing the argument of necessity tolled the limitation period for claims that property had been taken without compensation), reh’g denied, 793 F.2d 304 (D.C. Cir. 1986), vacated for want of jurisdiction, 107 S. Ct. 2246 (1987).

The arguable lawfulness of the action, however, is no reason for Congress to refrain from granting full reparations. See The American-Japanese Evacuation Claims Act of 1948, 50 U.S.C. app. §§ 1981-1987 (1982) (provided for satisfying certain claims of property loss). Unlike damages, statutory compensation does not depend upon a finding that the program was unconstitutional, illegal, or even—as with the benefit of hindsight most people seem to believe—misguided. Like draftees, and like those whose property was condemned for military installations, Americans of Japanese descent were required to bear disproportionate burdens for what was viewed as the common good. Although the fifth amendment’s guarantee of just compensation of persons in such a position applies only to those called upon to sacrifice property, see U.S. CONST. amend. V, it should furnish a model to guide Congress in seeking a more equitable distribution of the entire burden.

115. U.S. CONST. art. III, § 3.
118. Cramer, 325 U.S. at 26 (footnote omitted).
119. 8 U.S. (4 Cranch) 46 (1807), discussed in D. CURRIE, supra note 18, at 82 n.132.
120. 325 U.S. 1 (1945); see also supra text accompanying notes 17-30 (discussing Quirin).
where the petitioner had been convicted of assisting two of the enemy saboteurs whose military trials were at issue in Quirin, it had another.

*Bollman* had given a narrow interpretation to the clause of article III making it treason to "levy[] War" against the United States. A mere conspiracy, Chief Justice Marshall insisted, was not enough; there must be "an actual assembling of men for the treasonable purpose, to constitute a levying of war."121 *Cramer* gave a similarly restrictive reading to the alternative offense of "adhering to [our] Enemies, giving them Aid and Comfort," and went on to decide an important question respecting the requirement of "two Witnesses to the same overt Act."

"[T]he basic law of treason in this country," Justice Jackson wrote, "was framed by men . . . taught by experience and by history to fear abuse of the treason charge almost as much as they feared treason itself."122 Responding to this fear of abuse, Jackson continued, the framers "adopted every limitation [on treason] that the practice of governments had evolved or that politico-legal philosophy . . . had advanced . . . and added two of their own[] . . . a prohibition of legislative or judicial creation of new treasons . . . [and the requirement of] two witnesses to the same overt act."123 By "closely circumscribing the kind of conduct which should be treason," the Constitution diminished the risk of "perversion . . . to repress peaceful political opposition"; by imposing "procedural requirements" it reduced the risk of "conviction of the innocent as a result of perjury, passion, or inadequate evidence."124

The clause recognizing treason by "adhering to . . . Enemies, giving them Aid and Comfort," Jackson concluded, stated only one offense, not two. The first phrase required a treasonable intention, the second an act promoting it. Both conditions had to be met before the offense was complete:

A citizen intellectually or emotionally may favor the enemy and

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121. *Bollman*, 8 U.S. (4 Cranch) at 126.


123. *Id.* at 23-24; cf. J. Hurst, *supra* note 117, at 126, 134 ("The basic policy of the treason clause written into the Constitution emerges from all the evidence available as a restrictive one . . . . [T]he debate . . . seems clearly to establish a general agreement on the wisdom of limiting the scope of the offense in all doubtful cases.").

124. *Cramer*, 325 U.S. at 27-28. English law had long required two witnesses in treason cases; what was new was the requirement that both testify to "the same overt Act." Dean Wigmore explained the utility of the addition: "[T]he opportunity of detecting the falsity of the testimony, by sequestering the two witnesses . . . and exposing their variance in details, is wholly destroyed by permitting them to speak to different acts." 7 *Wigmore, Evidence § 2037* (3d ed. 1940), quoted in J. Hurst, *supra* note 117, at 217; see also 2 M. Farrand, *supra* note 96, at 348 ("Docr Franklin wished this amendment to take place—prosecutions for treason were generally virulent; and perjury too easily made use of against innocence").
harbor sympathies or convictions disloyal to this country's policy or interest, but so long as he commits no act of aid and comfort to the enemy, there is no treason. On the other hand, a citizen may take actions which do aid and comfort the enemy—making a speech critical of the government or opposing its measures, profiteering, striking in defense plants or essential work, and the hundred other things which impair our cohesion and diminish our strength—but if there is no adherence to the enemy in this, if there is no intent to betray, there is no treason.\textsuperscript{125}

Cramer's own testimony showed that he had met with two of the saboteurs, that he had reason to suspect they had arrived clandestinely to further the enemy cause, and that one of them had given him $3600 in cash for safe keeping.\textsuperscript{126} Accepting the money, Justice Jackson conceded, was a highly suspicious act under the circumstances: "That such responsibilities are undertaken and such trust bestowed without the scratch of a pen to show it, implies some degree of mutuality and concert from which a jury could say that aid and comfort was given and was intended."\textsuperscript{127} The Court found it unnecessary to decide, however, whether Cramer's testimony qualified as a "Confession in open Court" or as that of one of the two required witnesses, for the Government had not submitted this transaction to the jury as one of the requisite "overt Act[s]."\textsuperscript{128}

What the prosecution had relied on were the meetings between Cramer and the saboteurs—duly observed and testified to by two federal agents, as article III required. Though adequately proved, Justice Jackson concluded, the meetings themselves were not "overt Act[s]" within the meaning of the constitutional provision. After noting that "[t]he very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy,"\textsuperscript{129} Jackson observed: There is no two-witness proof of what they said . . . . There is no showing that Cramer gave them any information whatever of value

\textsuperscript{125} Cramer, 325 U.S. at 29.

\textsuperscript{126} Id. at 5.

\textsuperscript{127} Id. at 39.

\textsuperscript{128} Id. Justice Douglas relied heavily on Cramer's testimony in his dissent, id. at 63-67 (Douglas, J. dissenting), but Justice Jackson seems correct that submission of the case to the jury, in a way that allowed them to convict on the basis of an "overt Act" not meeting the constitutional standard, required reversal. See id. at 36 n.45 (explaining the refusal to decide whether an alternative overt act submitted to the jury—false statements to FBI agents after arrest—met the article III standard: "Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient." ) (citation omitted).

\textsuperscript{129} Id. at 34 (footnotes omitted).
Cramer furnished them no shelter, nothing that can be called sustenance or supplies, and there is no evidence that he gave them encouragement or counsel, or even paid for their drinks. . . . [Without looking beyond the testimony of the two witnesses] it is difficult to perceive any advantage which this meeting afforded to [the saboteurs] as enemies or how it strengthened Germany or weakened the United States. . . .

This conclusion prompted an irate dissent by Justice Douglas, not generally perceived as hostile to the rights of the outcast, which Chief Justice Stone and Justices Black and Reed joined. The Constitution, they emphasized, requires that two witnesses testify not to every fact necessary to make out the offense of treason, but only to a single "overt Act." As in the law of conspiracy, that "act, standing alone, may appear to be innocent or indifferent, such as joining a person at a table, stepping into a boat, or carrying a parcel of food." Thus, according to the dissent, "a meeting with the enemy" sufficed when, as in Cramer, other evidence demonstrated its "character and significance."

Justice Douglas was right about the law of conspiracy, and most treason cases before Cramer had taken the same position. It follows logically from the perception that the function of the "overt act" requirement is, as Justice Douglas argued, "to preclude punishment for . . . plans or schemes or hopes which have never moved out of the realm of thought or speech," which was plainly one of the principal aims of the framers.

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130. Id. at 37-38. Professor Hurst argued that the Court misapplied its own test since the second meeting "afforded the essential opportunity to transfer [the saboteur's] money" and found it difficult to understand the Court's describing as "an 'apparently commonplace and insignificant act' a prearranged meeting with a known enemy agent for the probable purpose of undertaking the safekeeping of his funds." J. Hurst, supra note 117, at 208, 216. In all this, Professor Hurst, like Justice Douglas in his dissent, see infra note 132 and accompanying text, relied on facts about the meeting that were not proved by two witnesses.


132. Id. at 61-63 (Douglas, J., dissenting). For an approving view, see E. Corwin, Total War and the Constitution 123-27 (1947).

133. See W. LaFave & A. Scott, Criminal Law 547-49 (2d ed. 1986).

134. If the agreement has been established but the object has not been attained, virtually any act will satisfy the overt act requirement. Thus . . . an interview with a lawyer, attending a lawful meeting, . . . [and] making a phone call . . . have all been held to be overt acts in the context of the criminal object alleged.

135. See J. Hurst, supra note 117, at 209 ("Such ordinary commercial transactions as purchasing goods, holding money on deposit, provisioning a ship, and borrowing from a bank have been held sufficient overt acts, where they were linked with an intention thereby to give aid and comfort to the enemy.").
In a 1919 opinion questioning the applicability of the conspiracy standard, however, Judge Learned Hand had called attention to an additional purpose reflected in the distinctive procedural requirements of the treason provision. “I doubt very much,” Hand wrote, “whether that rule has any application to the case of treason, where the requirement affected the character of the pleading and proof, rather than accorded a season of repentance before the crime should be complete.”

Justice Jackson agreed: “[T]he function we ascribe to the overt act is significant chiefly because it measures the two-witness rule protection to the accused,” and this rule was designed in part to prevent “conviction of the innocent as a result of perjury, passion, or inadequate evidence.” If the government could “prove by two witnesses an apparently commonplace and insignificant act and from other circumstances create an inference that the act was a step in treason,” noted Jackson, this purpose would be poorly served.

Hand and Jackson may have had the better of this interesting dispute. In focusing on the purpose of the requirement that an overt act occur, Justice Douglas overlooked the purpose of the requirement that it be proved by two witnesses. “One witness shall not rise up against a man for any iniquity,” says the Mosaic law; “at the mouth of two...[or] three witnesses, shall the matter be established.” This formulation required the “iniquity” itself, not simply an “overt act” toward its accomplishment, to be shown by more than one witness. The initial proposal before the Constitutional Convention suggested a comparable requirement: “No person shall be convicted of treason, unless on the testimony of two witnesses.”

The stated reason for the amendment requiring that both witnesses testify “to the same overt act” was to make conviction more difficult, not less so. Thus the framers may have meant to require testimony by two witnesses to the same act of treason, not to some innocuous act in furtherance of an allegedly treasonable design.

The decision in Cramer, rendered over the dissent of two of the Court’s most vociferous civil libertarians, was an impressive blow for liberty and

the criminal intention the danger of prosecuting men for their thoughts alone has been met.”); W. LAFAVE & A. SCOTT, supra note 133, at 548; supra text accompanying note 133.


137. Cramer, 325 U.S. at 34, 27.

138. Id. at 34.


140. See 2 M. FARRAND, supra note 96, at 182, quoted in Cramer, 325 U.S. at 22.

141. See supra note 124 (quoting Dr. Franklin).

142. Jackson himself declined to go quite this far, saying only that this position “would place on the overt act the whole burden on establishing a complete treason.” Cramer, 325 U.S. at 34.
tolerance in a time too often characterized, as the cases so far discussed indicate, by their absence.\textsuperscript{143} The triumph was somewhat muted, however, by the Court's intimation that Cramer might have been punished for some other crime on the same record, if Congress had so provided.\textsuperscript{144} In so saying, Justice Jackson echoed Chief Justice Marshall's words of over a century before\textsuperscript{145} and quoted Rufus King's observation at the Constitutional Convention that the "controversy . . . might be of less magnitude than was supposed; as the legislature might punish capacitly under other names than Treason."\textsuperscript{146}

This passage raises questions about the treason provision even more fundamental than those resolved in \textit{Cramer} itself. Surely Justice Jackson was correct in adding that the cherished substantive and procedural protections of article III could not be evaded simply by changing the name of the crime.\textsuperscript{147} Surely he was also right in rejecting the position that nothing less

\textsuperscript{143} Not surprisingly, Professor Hurst viewed the decision from the opposite perspective: "[T]he majority opinion . . . has cast such a net of ambiguous limitations about the crime of 'treason' that it is doubtful whether a careful prosecutor will ever again chance an indictment under that head." J. \textsc{Hurst}, \textit{supra} note 117, at 218. This assessment seemed unduly lugubrious in light of the Court's discussion of the unsubmitted overt act of accepting the saboteur's money, \textit{see supra} text accompanying note 126, and Hurst's later work showed that 10 more treason cases arising out of the Second World War were pressed to conviction. \textit{See J. \textsc{Hurst}, \textit{supra} note 117, at 236.}

\textsuperscript{144} "Of course we do not intimate that Congress could dispense with the two-witness rule merely by giving the same offense another name. But the power of Congress is in no way limited to enact prohibitions of specified acts thought detrimental to our wartime safety." \textit{Cramer}, 325 U.S. at 45.

\textsuperscript{145} \textit{See Ex parte Bollman, 8 U.S. (4 Cranch) 46 (1807).}

\textit{Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment, because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case . . . .}

\textit{Id. at 77.}

\textsuperscript{146} 2 M. \textsc{Farrand, \textit{supra} note 96, at 347, quoted in \textit{Cramer}, 325 U.S. at 45.}

\textsuperscript{147} \textit{See supra} note 142. Chief Justice Marshall seemed to think the important thing was that the legislature formulate specific rules rather than leave the matter to ad hoc judicial interpretation:

\textit{[T]he framers of our constitution . . . must have conceived it more safe, that punishment [in cases not meeting the constitutional definition] should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation.}

\textit{Bollman, 8 U.S. (4 Cranch) at 77. But the Convention also rejected a proposal that would have empowered Congress itself to define treason. \textit{See 2 M. \textsc{Farrand, \textit{supra} note 96, at 136. It seemed for adequate reasons to have trusted Congress no more than the courts.}}
than treason was punishable at all. Yet strong arguments have been made that the framers did mean to forbid punishment of mere “treasonable” words under any label; otherwise their central goal of eliminating punishment for acts earlier viewed as “constructive” treason would not have been achieved.

Thus, *Cramer* by no means put an end to controversies over the treason provisions. But it did a fairly impressive job with the troublesome issues the case itself presented.

IV. PRICE CONTROL

Wars create a demand for goods and services and thus tend to increase prices. Less than two months after the bombing of Pearl Harbor, “when it was common knowledge . . . that there was grave danger of wartime inflation,” Congress passed the Emergency Price Control Act, authorizing a new Office of Price Administration (OPA) to fix maximum prices and rents.

148. *See Cramer*, 325 U.S. at 45 (“Congress repeatedly has enacted prohibitions of specific acts thought to endanger our security . . .”); *see also J. Hurst*, *supra* note 117, at 151 (“There is no evidence that the word was used in the Constitution with intent to exclude the creation of all possible varieties and degrees of subversive crime except the levying of war and adherence to enemies.”); *Ex parte Quirin*, 317 U.S. 1, 38 (1942) (rejecting on the basis of a not wholly convincing analogy to double jeopardy the contention that attempted sabotage by an American citizen on behalf of an enemy could be prosecuted only as treason), *discussed in J. Hurst*, *supra* note 117, at 147-48. Possible reasons suggested by Hurst for forbidding punishment of acts short of the constitutional definition only as treason include “the peculiar intimidation and stigma carried by the mere accusation of treason,” “the characteristic severity of the punishment,” and the since abandoned view that Congress would have no authority to punish any offenses beyond the few expressly mentioned in the Constitution. *See J. Hurst*, *supra* note 117, at 149-50, 155-56, 181-82.

149. *See J. Hurst*, *supra* note 117, at 141, 152, 166.

[T]he historic policy restrictive of the scope of “treason” under the Constitution was most consciously based on the fear of extension of the offense to penalize types of conduct familiar in the normal processes of the struggle for domestic political or economic power. . . . [T]he record does suggest that the clause was intended to guarantee nonviolent political processes against any theory or charge, the burden of which was the allegedly seditious character of the conduct in question. . . .

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Id.: *see also Mayton, Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91 (1984). In *Frohwerk v. United States*, 249 U.S. 204, 210 (1919), Justice Holmes rejected an argument to this effect with the curt observation that “[t]hese suggestions seem to us to need no more than to be stated.”

for a limited period.\footnote{151}

Emergency price limitation had survived due process scrutiny in much more hostile times,\footnote{152} and the revolution of the 1930's seemed to remove any doubts on that score.\footnote{153} The World War I precedent upholding federal prohibition of liquor manufacture\footnote{154} assured the validity of federal price control as a war measure, even if after\footnote{155} Wickard v. Filburn\footnote{155} there was still room to argue it was not necessary and proper to the regulation of interstate and foreign commerce. The interesting constitutional questions concerned the manner in which Congress had sought to achieve its goal.

A. Delegation

The Emergency Price Control Act directed the Administrator to establish prices that “in his judgment” were “generally fair and equitable” and “effected the purposes of [the] Act,” which were set out in detail in section 1(a).\footnote{156} In so doing, “[s]o far as practicable,” he was to “ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941” and to “make adjustments for such relevant factors as he may determine and deem to be of general applicability, including . . . general increases or decreases in cost of production, distribution, and transportation.”\footnote{157}

Alone among the nine Justices in\footnote{158} Yakus v. United States,\footnote{158} Justice Roberts believed the statute unlawfully delegated legislative power vested in Congress by article I. Focusing on the general statements of purpose in section 1(a) of the statute, Roberts concluded: “[t]he Act sets no limits upon the discretion or judgment of the Administrator. His commission is to take any action with respect to prices which he believes will preserve what he

\begin{footnotes}
\item[152] See Block v. Hirsh, 256 U.S. 135 (1921); see also White, supra note 34, at 1130.
\item[153] See, e.g., Olsen v. Nebraska ex rel. Western Reference & Bond Ass’n, 313 U.S. 236 (1941) (enunciating permissive standard in upholding limitation of employment agency fees); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (overruling decisions outlawing minimum-wage legislation); Nebbia v. New York, 291 U.S. 502 (1934) (eliminating the general requirement that the industry regulated be one especially “affected with a public interest” in upholding minimum prices for milk); see also Hughes I, supra note 2, passim. In Bowles v. Willingham, 321 U.S. 503, 516-19 (1944) (Douglas, J.), the Court accordingly rejected due process objections to World War II rent control despite the argument that “generally fair and equitable” rents might be unfair “as applied to a particular landlord.”
\item[155] 317 U.S. 111 (1942) (upholding federal limitation of wheat grown for on-farm consumption); see also Hughes I, supra note 2, at 545-46.
\item[156] 50 U.S.C. app. §§ 901(a), 902(a) (Supp. V. 1941-1946).
\item[157] Id. § 502(a).
\item[158] 321 U.S. 414 (1944).
\end{footnotes}
deems a sound economy during the emergency . . . .”159 In practical effect, Roberts lamented, “Schechter Corp. v. United States”160—where the Court had struck down a statute read as authorizing the President to do whatever was necessary to bring business out of the Depression—“is now overruled.”161

In contrast to Schechter, said Chief Justice Stone for the majority, in the price legislation at issue in Yakus Congress had “laid down standards to guide the administrative determination of both the occasions for the exercise of the price-fixing power, and the particular prices to be established.”162 Stone emphasized that “[t]he directions that the prices fixed shall be fair and equitable, that in addition they shall tend to promote the purposes of the Act, and that in promulgating them consideration shall be given to prices prevailing in a stated base period, confer no greater reach for administrative determination” than a flock of provisions the Court had upheld both before and after Schechter.163

Contrary to popular rumor,164 Yakus is not evidence of the demise of the salutary nondelegation doctrine. Congress had clearly enunciated the governing policy: Price levels prevailing in October 1941 were basically to be preserved, with adjustments for changing costs.165 Applying such a legislative policy to the myriad goods and services offered in the market is what the execution of the laws is all about.166

Justice Roberts had shown a notable ability to adapt to changing times in

159. Id. at 451 (Roberts, J., dissenting).
162. Yakus, 321 U.S. at 423.
163. Id. at 427; see also L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 71 (1965) (“There are still differences of degree between the NRA on the one hand . . . and the OPA on the other.”). In unnecessarily distinguishing Schechter on the additional ground that the “function of formulating the codes” in that case had been delegated to “private individuals,” Yakus, 321 U.S. at 424, Chief Justice Stone seemed to overlook the fact that the statute had vested the more significant power to promulgate the codes in the President. See Hughes I, supra note 2, at 519-20 (also summarizing several of the earlier decisions).
165. See supra text accompanying note 157.
166. Justice Stone’s focus upon a court’s ability “to ascertain whether the will of Congress has been obeyed” in reviewing a particular price order, Yakus, 321 U.S. at 426, seems to miss the main point of the delegation doctrine. A delegation of all Congress’ power would make it easy to determine whether the agency had exceeded its statutory mandate, but would hardly comport with the framers’ vision that basic policy should be made by elected representatives. See Fuller I, supra note 10, at 339-43 (discussing Field v. Clark, 143 U.S. 649 (1892)).
voting at last to uphold New Deal measures against federalistic and due process objections. In *Yakus* he showed he was not wholly in tune with the time by voting to strike down a delegation easily sustainable under the criteria applicable even when he was appointed. Five years earlier, in the company of Justices McReynolds and Butler, he had dissented from decisions upholding a very similar delegation to set milk prices. On this issue Roberts was, if nothing else, consistent.

**B. Judicial Review**

The Emergency Price Control Act (the Act) authorized any person subject to a price regulation or order to file a protest with the Administrator within sixty days after its promulgation, or later in the case of grounds arising after the original sixty days expired. Any person aggrieved by the denial of such a protest might within thirty days file a complaint with the Emergency Court of Appeals to enjoin enforcement of the challenged limitation, subject to Supreme Court review. The Act further stated, however: "Except as provided in this section, no court . . . shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside . . . any [relevant] provision of this Act . . . ." The Supreme Court took this jurisdictional restriction literally and upheld it against constitutional objections in two interesting opinions by Chief Justice Stone.

The first was *Lockerty v. Phillips*, a suit brought in federal district court to enjoin enforcement of OPA regulations setting maximum wholesale beef prices alleged to be so low as to deprive the plaintiffs of their property without due process of law. Relying on the jurisdictional limitation, the district court dismissed, and the Supreme Court unanimously affirmed.

This was easy. Although Chief Justice Stone’s invocation of the compromise that permitted but did not require Congress to create lower federal courts suggested that the federal courts might have been closed altogether to

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170. *Id*.
171. 319 U.S. 182, 184-87 (1943).
172. *Id.* at 189.
such claims, it was unnecessary to go this far. The Emergency Court of Appeals, an article III tribunal whose members were drawn from the regular courts, had jurisdiction under the statute to enjoin unconstitutional regulations, and "[t]here is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court."174

Yakus, already discussed in connection with delegation, presented a harder case. Yakus had been criminally prosecuted for violating the wholesale beef regulations, and the district court refused to hear arguments against their validity.175 Once again the Supreme Court affirmed, this time over a powerful dissent by Justice Rutledge, which Justice Murphy joined.176

"It is one thing," said Rutledge, "for Congress [as in Lockerty] to withhold jurisdiction. It is entirely another to confer it and direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them."177 The Constitution may not guarantee that judges can hear cases brought to keep other branches within their constitutional limits, but on even the narrowest view of Marbury v. Madison178 they may not themselves be required to violate the Constitution.179

As Professor Henry Hart pointed out in his famous Dialogue, the majority

173. See id. at 187 ("Article III left Congress free to establish inferior federal courts or not as it thought appropriate. It could have declined to create any such courts, leaving suitors to the remedies afforded by state courts, with such appellate review by this Court as Congress might prescribe." (citation omitted)); see also Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); 1 M. FARRAND, supra note 96, at 124-25. Chief Justice Stone did not suggest, however, that if Congress had closed the federal courts it could have closed state courts as well. The closing of all courts to a constitutional claim, in light of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), arguably would have effectively denied a constitutional right. See D. CURRIE, supra note 18, at 27, 304-05.

174. Lockerty, 319 U.S. at 187. For the composition of the Emergency Court, see § 204(c) of the Act, 56 Stat. 32 (1942).

175. Yakus, 321 U.S. 414, 418-19 (1944); see supra notes 158-68 and accompanying text.

176. Id. at 460-89. Justice Roberts' separate dissent went solely to the issue of delegation. See id. at 448-60 (Roberts, J., dissenting); supra text accompanying notes 167-68.

177. Yakus, 321 U.S. at 468 (Rutledge, J., dissenting).

178. 5 U.S. (1 Cranch) 137 (1803).


Name me a single Supreme Court case that has squarely held that, in a civil enforcement proceeding, questions of law can be validly withdrawn from the consideration of the enforcement court where no adequate opportunity to have them determined by a court has been previously accorded. When you do, I'm going back to re-think Marbury v. Madison.

Id. (footnote omitted).
did not argue that, by virtue of its power to limit jurisdiction, Congress could order the Court to act unconstitutionally: "Yakus . . . dealt directly with the scope of constitutional rights, with no nonsense about any question being foreclosed by the power to regulate jurisdiction." Chief Justice Stone, concluding that the statutory review procedure had afforded Yakus an adequate opportunity to obtain judicial review of the validity of the regulations, stated, "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."

Stringent time limits for challenging judicial or quasi-judicial orders have long been common. When the complaining party is singled out as a party to a proceeding and served personally with the resulting order, there is no unfairness in requiring him to challenge it within a short period or not at all. As Justice Rutledge argued, however, it is quite another matter to extend this principle to persons seeking to challenge regulations of general applicability. Not everyone affected by such a regulation will have participated in rulemaking proceedings or will hear about the requirement as soon as it is adopted. Indeed, persons who go into the affected business after the time for challenge expires arguably have no opportunity to object at all.

Influenced perhaps by the unfairness of this draconian provision, Congress repealed it after two years. Later Congresses, however, have made wholesale use of the precedent in imposing similar limitations on judicial review of ordinary pollution control regulations. There is not yet a re-

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180. Hart, supra note 179, at 1379.
181. Yakus, 321 U.S. at 444.
183. Yakus, 321 U.S. at 472 (Rutledge, J., dissenting) (distinguishing judicial examples on the ground that "the previous opportunity is in an earlier phase of the same proceeding, not as here a separate and independent one of wholly different character"). Yet Justice Rutledge oddly thought the opportunity to institute a "separate and independent" proceeding was adequate to preclude judicial review of OPA regulations in civil enforcement proceedings. "Since in these cases the rights involved are rights of property, not of personal liberty or life as in criminal proceedings, the consequences, though serious, are not of the same moment under our system, as appears from the fact they are not secured by the same procedural protections in trial." Bowles v. Willingham, 321 U.S. 503, 525 (1944) (Rutledge, J., concurring).
184. One hopes the Court in such a case would invoke the statutory provision permitting tardy challenges on "grounds" arising after expiration of the 60-day period, though the language of the statute seems directed more toward the arguments for invalidity than toward the standing of the complaining party. § 203(a), 56 Stat. 31; see also D. CURRIE, AIR POLLUTION: FEDERAL LAW AND ANALYSIS, § 9.15 (1981).
186. E.g., 42 U.S.C. § 7607(b)(1) (1982) (attacks on validity of certain air-pollution regula-
quirement that constitutional challenges to federal statutes be made within sixty days after their enactment. One hopes that, if there were, the Court would limit the harsh decision in *Yakus* to "the urgency and exigencies of wartime price regulation" on which Chief Justice Stone expressly relied.  

V. SELECTIVE SERVICE

Like wartime price regulation, compulsory military service had long been recognized as constitutional. 188 Like those of the contemporaneous price control law, however, the procedural provisions of the Second World War

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187. See *Yakus*, 321 U.S. at 435. In a less controversial part of the same opinion, Chief Justice Stone appropriately invoked decisions permitting the collection of taxes, *Phillips v. Commissioner*, 283 U.S. 589 (1931), and the destruction of allegedly contaminated food, *North Am. Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908), before hearing in sustaining a provision forbidding injunctive relief against unauthorized price regulations until after trial. *See Yakus*, 321 U.S. at 437-43. Justice Rutledge did not quarrel with this conclusion. *Id.* at 466 (Rutledge, J., dissenting); *see also* *Bowles v. Willingham*, 321 U.S. 503, 519-21 (1944) (reaffirming that no hearing was required before promulgation of rent limitations of general applicability: "To require hearings for thousands of landlords before any rent control order could be made effective might have defeated the program of price control.").

In *Case v. Bowles*, 327 U.S. 92, 101 (1946), the Court held that OPA price limitations could constitutionally be applied to sales of timber by a state to raise money for educational purposes. Declining the reasonable invitation to invoke precedents permitting federal taxation of proprietary state activities, *see Allen v. Regents of Univ. System*, 304 U.S. 439, 451-52 (1938) (revenue from state-university football games), on the ground that this "criterion ... has proved to be unworkable," Justice Black said only that "an absence of federal power to fix maximum prices for state sales or to control rents charged by a State might result in depriving Congress of ability effectively to prevent the evil of inflation" and render "the constitutional grant of the power to make war ... inadequate to accomplish its full purpose." *Case*, 327 U.S. at 101-02. In so reasoning, Justice Black was in line with other cases of the period upholding federal regulation of state activities, none of which had stressed the proprietary nature of the regulated activity. *See California v. United States*, 320 U.S. 577, 586 (1944) (Frankfurter, J.) (Shipping Act ban on preferences applied to state-owned marine terminal); *United States v. California*, 297 U.S. 175, 183-85 (1936) (Stone, J.) (Safety Appliance Act applied to state-owned railroad), *discussed in Hughes I*, supra note 2, at 540-41. Justice Black, however, gave no hint that state sovereignty ever implicitly limited federal authority, as had consistently been recognized in decisions involving both suits against and taxes upon the states. *See, e.g.*, *New York v. United States*, 326 U.S. 572 (1946) (upholding federal tax on state sale of mineral water over a dissent by Douglas in which Black joined, but with all Justices insisting that some state tax immunity remained); *Monaco v. Mississippi*, 292 U.S. 313 (1934) (foreign nation may not sue state in federal court); *Hans v. Louisiana*, 134 U.S. 1 (1890), *discussed in Fuller I*, supra note 10, at 327-30; *Collector v. Day*, 78 U.S. (11 Wall.) 113 (1871), *discussed in D. Currie*, supra note 18, at 355. Finding the constitutional question in *Case* to involve "substantial intrusions on the sovereignty of the States," Justice Douglas dissented, opting for a construction of the rather unambiguous statute that would avoid reaching the issue. *See Case*, 327 U.S. at 103 (Douglas, J., dissenting); *Hulbert v. Twin Falls County*, 327 U.S. 103, 105-06 (1946) (Douglas, J., dissenting).

188. *See Selective Draft Law Cases*, 245 U.S. 366 (1918) (invoking persuasive historical
draft law raised troublesome constitutional questions. The difficulties were illustrated by litigation that arose when local draft boards denied the requests of three Jehovah's Witnesses for classification as "ministers of religion" statutorily exempt from all forms of compulsory service.

In *Falbo v. United States*, the board had classified the applicant as a conscientious objector and ordered him to report for alternative civilian service. In a criminal prosecution for disobeying the order, the district court refused to decide whether the board had erred in rejecting the claim for ministerial exemption, and the Supreme Court affirmed.

In the context of "the need which [Congress] felt for mobilizing national manpower in the shortest practicable period," noted Justice Black for the majority, the omission of any provision for judicial review of an order to report for service must have been deliberate: "Against this background the complete absence of any provision for such challenges in the very section providing for prosecution of violations in the civil courts permits no other inference than that Congress did not intend they could be made." Justice Murphy spoke eloquently in construing the statute differently, but none of the other Justices suggested there was any constitutional problem.

The problem was that to which Justice Rutledge would soon call attention in *Yakus*: Here, too, a court was required to punish a man for violating an order whose validity it could not question. Indeed, the statute in *Falbo* lacked even the controversial procedure for Emergency Court of Appeals review that had shielded the price control provisions from constitutional attack. Unlike *Yakus*, *Falbo* had had no previous opportunity whatsoever to challenge in court the order he was charged with violating.

*Estep v. United States*, decided two years after *Falbo*, showed that the Court was not insensitive to this difficulty. Profiting from *Falbo*'s failure, Estep and his fellow petitioner had reported to the induction station after materials in holding draft within war power and unaffected by thirteenth amendment ban on involuntary servitude), *discussed in White, supra* note 34, at 1126 n.79, 1134 n.115.

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189. 320 U.S. 549 (1944).
190. *Id.* at 549-51.
191. *Id.* at 554-55.
192. *See id.* at 557, 560-61 (Murphy, J., dissenting).

The power to administer complete justice and to consider all reasonable pleas and defenses must be presumed in the absence of legislation to the contrary. . . .

. . . That an individual should languish in prison for five years without being accorded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action is not in keeping with the high standards of our judicial system.

*Id.* (Murphy, J., dissenting).
193. 327 U.S. 114 (1946).
their requests for ministerial classifications were denied, had been accepted for actual service, and only then had refused to be inducted. This time, by a five to three vote, the Court held the validity of the classifications should have been reviewed in the criminal proceedings.\textsuperscript{194}

Justice Douglas' majority opinion in \textit{Estep} reads like Justice Murphy's dissent in \textit{Falbo}:

\begin{quote}
[T]he silence of Congress as to judicial review is not necessarily to be construed as a denial of the power of the federal courts to grant relief in the exercise of the general jurisdiction which Congress has conferred upon them. . . .

. . . We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial . . . as to provide that a citizen of this country should go to jail for not obeying an unlawful order of an administrative agency.\textsuperscript{195}
\end{quote}

\textit{Falbo} was distinguished on the ground, hinted at in the earlier opinion, that \textit{Falbo} had not exhausted his administrative remedies by giving the authorities the opportunity to reject him at the induction center.\textsuperscript{196}

The tone of each of the two opinions is strikingly different. Nevertheless, in light of \textit{Estep}, the draft registrant did have an opportunity to challenge the classification order without submitting to it after all. Thus, the majority did not have to reach the constitutional question.\textsuperscript{197}

Relying heavily on a statutory provision making the classification decisions of local boards "final," Chief Justice Stone and Justices Frankfurter and Burton disagreed, without suggesting that their interpretation raised any constitutional problem.\textsuperscript{198} "Three Justices of the Supreme Court of the

\begin{footnotes}
194. \textit{Id.} at 116-17.
195. \textit{Id.} at 120, 122.
196. \textit{See id.} at 123; \textit{see also Falbo}, 320 U.S. at 553.
197. Later cases would raise the interesting question whether a registrant was entitled to injunctive relief to challenge his classification on the ground that the adverse consequences of a wrong guess made violation of the order an inadequate method of judicial review; but no such contention was made in \textit{Falbo} or \textit{Estep}. \textit{See} Oestereich v. Selective Serv. Sys., 393 U.S. 233, 240-43 (1968) (Harlan, J., concurring); \textit{cf. Ex parte Young}, 209 U.S. 123, 145-48 (1908) (severe criminal penalties unconstitutionally restricted judicial review of railroad rate order).
198. \textit{See Estep}, 327 U.S. at 134-46 (Frankfurter, J., concurring in the result on unrelated grounds; Burton, J. & Stone, C.J., dissenting). The majority, noting that the statute made board decisions final only if made "within their respective jurisdictions," argued somewhat artificially that a board acting "in the teeth of the regulations" would "exceed its jurisdiction." \textit{Id.} at 120-21. The result was a rather narrow scope of judicial review: "The decisions . . . made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction . . . is reached only if there is no basis in fact for the classification . . . ." \textit{Id.} at 122-23. Justice Murphy, concurring, gave the finality provision even less weight: "This merely determines the point of administrative finality, leaving to the courts the ultimate and
United States,” wrote Professor Hart indignantly, “were willing to assume that Congress has power . . . to direct courts created under Article III to employ the judicial power . . . to convict a man of crime and send him to jail without his ever having had a chance to make his defenses.”

Justice Murphy, as usual, protested that such a course would be unconstitutional. Justice Rutledge invoked his dissenting opinion in Yakus: If Congress could not “make it a crime . . . to violate an administrative order without affording an adequate opportunity to show its constitutional invalidity,” a fortiori it could not do so without affording any opportunity for challenge at all.

Justice Rutledge overstated his case somewhat; as the dissenting Justices noted, a registrant could challenge his classification by petitioning for habeas corpus after submitting to induction. Professor Hart protested that to rely on the availability of habeas corpus to justify denial of an earlier hearing “turns an ultimate safeguard of law into an excuse for its violation.” There were plenty of examples in which pressing public need had justified postponing a hearing until after the government had acted, but what is good enough for destruction of allegedly contaminated food might arguably be insufficient when personal liberty is at stake.

Insofar as the defenses in Estep rested upon statutory claims for exemption from compulsory service, the constitutional argument for review by the convicting court was somewhat more complicated than it had been in Yakus. When a court convicts without considering a constitutional objection to the order, the violation of which gave rise to the charge, it arguably offends the substantive provision invoked by the defense. Absent a constitutional objection to the order, however, the most obvious argument is that conviction without entertaining the defense is inconsistent with procedural due process. By modern standards, due process does require some opportunity to object to the individualized deprivation of a right to which one is entitled by statute. Less clear, despite limited judicial authority so suggesting, is why a

199. Hart, supra note 179, at 1382.
200. Estep, 327 U.S. at 125 (Murphy, J., concurring) (invoking due process of law).
201. Id. at 133 (Rutledge, J., concurring) (emphasis added).
202. See id. at 146 (Burton, J., dissenting).
203. Hart, supra note 179, at 1382.
204. See supra note 183 (discussing the prohibition of interlocutory relief in Yakus).
205. See Hamilton v. Regents of the University of California, 293 U.S. 245 (1934) (although distinguishable, suggesting that there was no valid constitutional claim to exemption).
quasi-judicial hearing before the administrative body itself would not satisfy
the constitutional standard.\textsuperscript{207} To the extent that an attempt is made to
satisfy the due process requirement in the administrative process, however,
\textit{Crowell v. Benson}\textsuperscript{208} suggests a further argument: Article III's requirement
that federal judicial power be exercised by tenured judges permits quasi-judici-
rial resolution of matters falling within that article only if questions of law
are reviewable by an article III court.\textsuperscript{209}

The Court's construction of the statute to permit judicial review in \textit{Estep}
made it possible to postpone decision of these vexing questions. Like the
price control decisions, the draft cases highlighted the absence of any explicit
constitutional guarantee of judicial review of administrative action.\textsuperscript{210} How-
far Congress can go in making such action final remains one of the great
unanswered questions in American constitutional law.\textsuperscript{211}

\section{VI. Conclusion}

The war produced a number of governmental actions difficult to reconcile
with our libertarian traditions—military trials, deportation and internment
of citizens accused of no offenses, and draconian limitations on judicial re-
view of administrative action. In each of these areas the Supreme Court
interfered only when the inconsistency with fundamental principles became
patent, and even then without invoking the rather hazy limits of the Consti-
tution. By and large, however, it was not the Court but the other branches
of government that were less than zealous in protecting our basic liberties.\textsuperscript{212}

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of statutory entitlement, a pretermination hearing is necessary to meet procedural due process
requirements).

\textsuperscript{207} See Ng Fung Ho v. White, 259 U.S. 276 (1922) (person ordered deported after quasi-
judicial hearing entitled to judicial redetermination of citizenship claim).

\textsuperscript{208} 285 U.S. 22 (1932).

\textsuperscript{209} \textit{Id.} at 54 (dictum) ("[T]he reservation of full authority to the court to deal with mat-
ters of law provides for the appropriate exercise of the judicial function in this class of cases.");
\textit{see also} Hughes I, \textit{supra} note 2, at 514-16.

\textsuperscript{210} \textit{Cf.} Basic Law of the Federal Republic of Germany, art. 19(4) ("Should any person's
right be violated by public authority, recourse to the court shall be open to him.").

\textsuperscript{211} See L. JAFFE, \textit{supra} note 163, at 381-89.

\textsuperscript{212} Professor Mason's assessment was rosier still:
"[T]he amazing thing is not that so much freedom was sacrificed on the altar of mili-
tary necessity during World War II, but that more was not. Even in the time of
the greatest stress, the Justices upheld the citizen's liberty to think, speak, and act to an
extent that the nation at peace has sometimes felt it could ill afford to maintain.
A. Mason, \textit{supra} note 3, at 698. \textit{Contra} J. TENBROEK, \textit{supra} note 67, at 220 (arguing that in the
Japanese-American cases the Court "carried judicial self-restraint to the point of judicial
abdication"); J. HOWARD, \textit{supra} note 13, at 377-78 ("Despite articulation of a stricter policy of
review over military trial of civilians in \textit{Duncan v. Kahanamoku}, the Court did little to dispel
the belief that total war had eroded constitutional barriers irrevocably.").

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