*Hirabayashi v. United States*

* Public Law 503: Made it a federal crime to disobey any duly authorized military order
* Public Proclamation No .3: Imposed a curfew on all enemy aliens (though it was only applied to the Japanese)
* Public Proclamation No. 4: “Freeze order” prohibiting enemy aliens from voluntarily leaving the designated military areas
* Civilian Exclusion Orders: Required Japanese American households within certain geographical regions to report to assembly centers
* Gordon Hirabayashi: Meant to challenge the exclusion order and violated the curfew order
* Question: Is the curfew law a denial of equal protection under the law?

1. Threshold issue:
   1. Purpose of severing the issue of the curfew from detention was…?
   2. Legally, they used
      * *US vs. Macintosh*: Congress and the Executive working together may employ such measures as are necessary and appropriate to provide for the common defense and to wage war “with all the force necessary to make it effective”.
      * *Detroit Bank v. US*: The Fifth Amendment contains no equal protection clause, and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process.
      * *McCulloch v*. *Maryland*: The Constitution is meant to last the ages and be adapted to “various crises of human affairs”. The adoption by Government, in the crises of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances…is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.
2. A government of limited powers:
   1. The USFG does/doesn’t possess the power to issue and enforce the orders under which Hirabayashi was convicted:
      * EVIDENCE
   2. The Court thinks that while the government’s war powers are not unlimited, they extend beyond those of peacetime, and that the present day cannot know what their exact thinking was, only that it was decided to be the best course of action
      * “The war power of the national government is ‘the power to wage war successfully’ […] The power is not restricted to the winning of victories in the field and the repulse of enemy forces” (Stone on 102)
      * “The conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making, it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs” (Stone on 102)
      * “We cannot sit in judgment on the military requirements of that hour” (Douglas on 106)
      * “Peacetime procedures do not necessarily fit wartime needs” (Douglas on 107)
      * “When the danger is past, the restrictions…should be promptly removed and…freedom of action fully restored” (Murphy on 109)
3. Heightened or Deferential Scrutiny:
   1. Action by race
      * For: “Where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient…nor should the military be required to wait until espionage or sabotage becomes effective before it moves” (Douglas on 107)
      * For: “The adoption by Government, in the crises of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances…is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and in most circumstances racial distinctions are irrelevant.” (Stone on 105)
      * Against: “Legislative classification or discrimination based on race alone has often been held to be a denial of equal protection. *Yick Wo v. Hopkins*…*Yu Cong Eng v. Trinidad*…*Hill v. Texas*” (Stone on 105)
   2. The language indicates that it deferred to the government’s justifications quite heavily (see above); the double negative is defensive, and it can be taken either as, “We tried to see things your way, but this squrirelly thing got in the way,” or, “We found a squirrelly thing to get in the way”
4. Strong enough reasons?
   1. There was little to no evidence mentioned with regard to how Japanese Americans were *not* a greater threat than other individuals in assisting the Japanese Empire, which either means the evidence wasn’t there (unlikely), or it was ignored (likely) and/or suppressed (also likely)
   2. The generalization better be pretty damn accurate; it was, as they saw it, a matter of national security versus a particular group that wasn’t liked very well’s status
   3. Race-based generalizations had better be suspect, particularly since they tend not to take into account the myriad issues that could affect them; no one has control over one’s race.
5. Rationalizing race
   1. The first brief says that Japanese people don’t assimilate well and are likely to have ties to Japan as a result. The second says that the reason they don’t assimilate well is because the US is full of a bunch of assholes, and it argues that those are superficial given those people’s exposure to the main stream of American life.
   2. The court was persuaded more by the government because reasons
   3. Discussing race is always a tricky subject, particularly when one can substitute out one for another and the justification be just as applicable.
   4. The court could address the issue of racial characteristics in terms of nationalism (which they did)
6. Race and unassimilability
   1. Basically, they said that we were assholes to the Japanese and didn’t let them into mainstream American life, and so we should be even more wary of them because they might turn against us (surprise, surprise)
7. The politics of advocacy
   1. Because the ACLU couldn’t challenge Roosevelt’s actions directly, they resorted to challenging the actions carried out by other people with similar justifications. However, because of their hands-off-on-Roosevelt policy, they had to challenge the justifications rather than a larger action, with mixed results.
8. The politics of drafting
   1. Interesting. Why did I sense that especially hard for Murphy?
9. Justice Douglas
   1. “We are dealing here with a problem of loyalty not assimilation...after induction [into Selective Service], he may obtain through *habeas corpus* a hearing on the legality of his classification by the draft board” (Douglas on 107, using an example of drafting to describe actions that can be taken)
   2. Douglas might have been thinking that there are legal ways of circumventing the law, but only after they’ve been on-face accepted
   3. He likely wasn’t envisioning everyone filing separate petitions for release, but rather that they find similar routes, possibly in the collective, to a similar effect.
   4. 100,000 filings for *habeas corpus* petitions is likely not feasible.
10. Justice Murphy
    1. He might have recharacterized his dissenting opinion as a concurrence because his opinion was that the action should be removed afterward, not that they shouldn’t have been applied in the first place.
    2. Additionally, politics are a thing, and he’s a former Attorney General. He didn’t make the switch entirely independently either; he was persuaded to change by Frankfurter.
11. Race and national origin:
    1. Italians and Germans were not flying the planes that bombed Pearl Harbor.
    2. They’re also really hard to pick out from a group by appearance/name alone, and they often mix with other nationalities.
    3. There was also little indication that they held any particularly loyalty for the regimes in their respective mother countries.
    4. National origin is better than racial classification in some respects and worse than others; consider the people leaving the UK to join IS and the refugees coming from the Middle East into Europe.
    5. Race complicates national origin analysis because race isn’t something one chooses; citizenship is. National origin is kind of yucky as well.
12. Kiplingesque folklore
    1. I don’t think that it was *entirely* based off of racial prejudice, though I admit that it made up a good chunk of it. Personally, my take on it is that there was some degree of paranoia, and the fact that there was racial prejudice made the Japanese easy targets.

*Yasui v. United States*

* Yasui: Army officer who walked into a police station and demanded to be arrested for curfew violation
* Question: Is the curfew law a denial of equal protection under the law? (same as Hirabayashi)

1. Justice Stone
   1. No, Yasui didn’t lose his citizenship, but see *Hirabayashi* for our decision reasoning
2. ACLU
   1. Not interested in taking the case because of Yasui’s association with the Japanese Consulate
3. JACL
   1. cooperation with war effort
   2. pledged total cooperation to the President
   3. cooperation with Federal Authorities = reciprocal cooperation
   4. contribution to the war effort is to accept all army regulations and orders
   5. public opinion is opposed to any challenges of the Army and its authority
   6. we might win the case, but lose goodwill
   7. any challenge might result in retaliation by the Army
   8. Biddle said there was little chance the courts would challenge the military’s authority
   9. ACLU didn’t want you either
   10. unfavorable as seen from the headlines

*Korematsu v. US*

1. Justice Black
   1. Hardships are hard, but that’s part of war
   2. We’re only dealing with an exclusion order, not a concentration camp case
   3. We shouldn’t ever review any military actions during wartime
2. Justice Frankfurter
   1. former Chief Justice Hughes said the war power of the Government is “the power to wage war successfully”
3. Justice Roberts
   1. Fuck y’all, he was in violation of curfew but he was also in a place that he shouldn’t have been; not disobeying one meant he’d have disobeyed another
   2. This is ridiculous and based on his ancestry with no question about loyalty or disposition toward the US
4. Justice Murphy
   1. Exclusion goes over “the very brink of constitutional power” and falls into the ugly abyss of racism
   2. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support
   3. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular sense, are judicial questions, *Sterling v. Constantin* (a.k.a. it *is* our place to question the justification behind military actions)
   4. The order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment…this order also deprives them of all their constitutional rights to procedural due process
   5. Let me talk about all the absurd rhetoric
   6. These people with this shitty rhetoric have racial and economic motivations
   7. Lumping a group together because of a single individual isn’t innocent until proven guilty
5. Justice Jackson
   1. Guilt is personal and not inheritable
   2. Even if they were permissible military procedures, I deny that it follows that they are constitutional, a.k.a. We need to look at what the military does.
   3. Their claims are ridiculous and the evidence that they cite we don’t have access to; in any other court, it would be inadmissible
   4. Okay, *Hirabayashi* said we weren’t deciding on the exclusion act, but why are we citing it???

*Endo*

* Mitsuye Endo: Argued that orders she followed violated the constitution; 22-year-old clerical worker in California DMV in Sacramento; raised Methodist; didn’t read or speak Japanese; had never visited Japan; had a brother in the Army
* Used a *habeas corpus* petition (requested that the government release someone unlawfully detained)
* Court didn’t actually decide on a constitutional issue by grounding the case in the statute

1. Justice Douglas
   1. “Yay, someone used my idea of *habeas corpus*” – not Justice Douglas, but actually though
   2. She’s entitled to unconditional release by the War Relocation Authority
2. Justice Murphy
   1. Detention unauthorized by Congress or the Executive
   2. Racism inherent in evacuation program
3. Justice Roberts
   1. You people aren’t handling the constitutional issues!
   2. Under the Constitution, she should be free to come and go as she pleases.