

Civil liberties versus military necessity: lessons from the jurisprudence emanating from the classification and internment of Japanese-Americans during World War II

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Abstract

Against the backdrop of a climate of fear and tension that has gripped the world since the events of 11 September 2001, as well as the legal and policy decisions being reeled out by the United States government in tackling perceived and real enemies, it becomes salutary for scholars and policy-makers to reflect on the historical parallels and lessons that stand to be learned from the past. This article explores the legal and policy framework that led to the internment of some 120 000 Japanese-Americans amidst the climate of fear and tension prevalent during the World War II. Extrapolating from the critical jurisprudence emanating from the war stretching even long after the cessation of hostilities, this article attempts to highlight some of the core considerations in determining the boundaries of civil liberties and military necessity, accentuating the need for the demystification of fear, even in the ongoing state-led responses to real and imagined threats of terrorism.

INTRODUCTION

The decision of the United States (US) government towards the end of 2009, to list certain countries with significant Islamic populations in its ‘terror

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watch list' sparked sentiments, both old and new.¹ The inclusion of Nigeria on this list, based on the supposed attempt by a single citizen from Africa's most populous state to detonate a bomb aboard a US-bound commercial airliner on Christmas Eve 2009, revived the outrage felt on similar occasions in the past.²

In the aftermath of the terrorist attacks of 11 September 2001, Arab-Americans, Muslim-Americans, and others of Middle-Eastern and South Asian ancestry, serving on strategic and economic institutions in the US, now have reason to question the efficacy of their constitutional rights, while, at the same time, fearing for their safety and freedom within US territory.³

¹ See US Department of State 'Terrorist Designation Lists' available at: <http://www.state.gov/s/ct/list/> (accessed on 14 February 2010); Charisse Van Horn, 'More names added to TSA Terror Watch List and 14 countries scrutinised' *US Examiner*, 5 January 2010, available at: <http://www.examiner.com/x-12837-US-Headlines-Examiner-y2010m1d5-More-names-added-to-TSA-terror-watch-list-and-14-countries-scrutinized-video> (accessed on 14 February 2010).

² See generally Radio Netherlands Worldwide (RNW) 'Nigeria disappointed to be on Washington's Terror Watchlist' available at: <http://www.rnw.nl/africa/article/nigeria-disappointed-be-washingtons-terror-watchlist> (accessed on 14 February 2010); Kola Alapinni 'Nigeria: the Terror Watch List – nations' response' 27 January 2010 available at: <http://allafrica.com/stories/201001270405.html> (accessed on 14 February 2010); 'Nigerian Senate to meet US Congressmen on Terror Watch List' available at: http://news.xinhuanet.com/english2010/world/2010-02/12/c_13173827.htm (accessed 14 February 2010); 'US says to reconsider rating of Nigeria on Terror Watch List' available at: http://news.xinhuanet.com/english2010/world/2010-02/10/c_13170064.htm (accessed 14 February 2010).

³ For some descriptive analyses of racial profiling and how it has affected these named groups, see American-Arab Anti-Discrimination Committee (ADC) *Report on Hate Crimes and Discrimination against Arab Americans: The Post-September 11 Backlash*, October 2003 31–104 available at: http://www.adc.org/hatecrimes/pdf/2003_report_web.pdf (accessed on 14 February 2010); American Civil Liberties Union (ACLU) 'Sanctioned bias: racial profiling since 9/11' February, 2004, pp 4–7 available at: <http://www.aclu.org/Files/OpenFile.cfm?id=15101> (accessed on 14 February 2010). See generally Natsu Taylor Saito 'Symbolism under siege: Japanese American redress and the "racing" of Arab Americans as "terrorists"' (2001) 8 *Asian Law Journal* 1; Eric L Muller '12/7 and 9/11: war, liberties, and the lessons of history' (2002) 104 *West Virginia Law Review* 571 (detailing growing negative perception about the Arab-American within the US and sometimes, attacks and threats against them); Susan M Akram & Kevin R Johnson 'Race, civil rights, and immigration law after 11 September 2001: the targeting of Arabs and Muslims' (2002) 58 *New York University Annual Survey of American Law* 295 (showing how US immigration policies have undergone a series of changes that negatively impact the liberties of the Arab-American); Jason A Abel 'Americans under attack: the need for federal hate crime legislation in light of post-September 11 attacks on Arab Americans and Muslims' (2005) 12 *Asian Law Journal* 41.

However, emotive state-led legal and policy outbursts experienced by such groups since the infamous incident of 11 September 2001 are not novel in US history. Chroniclers of global events would readily remember how, following the bombing of the US fleet at Pearl Harbour on 7 December 1941 by a Japanese Air Force unit, people of Japanese ancestry living in the US were subjected to broad and generalised acts of discrimination, prejudice and stereotyping that eventually resulted in the internment of some 120 000 people in various camps within the US.⁴

While the finer detail of the two historic events of 7 December 1942 and 11 September 2001 will continue to engage historians, political scientists and the like, it is how US courts responded to the earlier tragic event, the judicial precedents this established, and the legal challenges it engendered, that form the focus of this article.

Extrapolating from the landmark decisions of the US Supreme Court in two particular cases arising out of the post-Pearl Harbour military measures to forestall a further Japanese incursion, this article accentuates some of their lingering implications for the responses of US courts to contemporary and future challenges in the post-11 September 2001 era.

This article notes that while US constitutional law seeks to guarantee equal protection and freedom from discrimination to all citizens, the US judicial machinery is prone to running into murky waters whenever constitutional human rights guarantees are weighed against the doctrine of military necessity. This article thus examines the potential capacity of this doctrine to undermine the civil liberties of otherwise free citizens and argues for stricter scrutiny in its application in similar situations yet to arise.

⁴ Some of the scholarly works containing detailed accounts or reviews of the historical accounts of the internment of Japanese-Americans during World War II include: John H Culley 'Relocation of Japanese Americans: the Hawaiian experience' (1984) 24 *Armed Forces Law Review* 176–183; William Kramer 'A sordid time in our history: internment of Japanese Americans after Pearl Harbour' *Los Angeles Daily Journal*, April 12, 1989, p 7; Alison D Renteln 'A psychohistorical analysis of the Japanese American internment' (1995) 17 *Human Rights Quarterly* 618–648; Manjusha P Kulkarni 'Application of the Civil Act to Japanese Peruvians: seeking redress for deportation and internment conducted by the United States Government during World War II' (1996) 5 *Boston University Public International Law Journal* 309.

DOCTRINE OF MILITARY NECESSITY: SURVEY OF ORIGINS AND EVOLUTION

A doctrine of great antiquity, ‘military necessity’ was part of the rules codified in the ‘Instructions for the Government of Armies of the United States in the Field’, General Orders No 100 of 24 April 1863, more commonly referred to as the ‘Lieber Code’.⁵ Crafted with the aim of extracting general principles of human morality from empirical evidence, and issued by President Abraham Lincoln at the peak of the US Civil War in his determination to justify his policies on human reason,⁶ the Lieber Code may be considered the final product of the eighteenth-century movement to make war more humane through the application of reason.

The Code assumed the name of its architect and drafter, Dr Francis Lieber, who, as an experienced combatant against Napoleon in the Waterloo campaign and participant in the Greek War of Independence, and one whose own family had been divided by the American Civil War, was inimitably qualified to codify the laws by which that war should be conducted. Lieber migrated to the US from Europe in 1827 following political persecution in his native Prussia, and by 1857, had been appointed Professor of Modern History, Political Science and International, Civil and Common Law at Columbia College (later Columbia University).⁷

Before the Lieber Code, several states had attempted to set rules on how their armed forces should be internally controlled and disciplined, and scholars had long proposed rules on how states should conduct war and treat each other’s combatants, citizens, and property.⁸ The Lieber Code was, however, the first formal set of rules stipulated by a state as to how both its own armies and those of its enemies should be treated.⁹

⁵ Instructions for the Government of Armies of the United States in the Field (General Orders No 100), of 24 April 1863, quoted in Dietrich Schindler & Jiri Toman (eds) *The laws of armed conflicts* (3rev ed 1988) 279 [Lieber Code].

⁶ Craig JS Forrest ‘The doctrine of military necessity and the protection of cultural property during armed conflicts’ (2007) 37 *California Western International Law Journal* 177 at 188–190.

⁷ See Richard S Hartigan *Lieber’s Code and the law of war* (1983) 9 at 43; James McPherson ‘Lincoln and the strategy of unconditional surrender’ in Gabor Boritt (ed) *Lincoln: the war president* (1992) 31 at 41; Mark Grimsley *The hard hand of war* (1995) 11–13.

⁸ Ilana Tabacinic ‘Article II: the uses and abuses of executive power – the Enemy-Property Doctrine: a double whammy?’ (2008) 62 *University of Miami Law Review* 601 at 608.

⁹ Forrest n 6 above at 184.

Under the Lieber Code, article 14 defined ‘military necessity’ in the following terms:

Military necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war.

Notable authorities on the law of war have and continue to refer to this definition, particularly the phrase ‘indispensable for securing the ends of the war’, as justification for a failure to adhere to basic rules of the law of war.¹⁰ However, it is often forgotten that articles 15 and 16 of the same Code sought to limit and qualify the scope of the doctrine.¹¹

From this standpoint, the Lieber Code’s greatest contribution to the modern law of war would appear to be its identification of military necessity as a general legal principle by which to limit violence in the absence of any other rule.¹² This principle soon attained international recognition in the St

¹⁰ See generally William Hesselstine *Civil war prisons* (1930); Julius Stone *Legal controls of international conflict* (1954) 351–52; Frits Kalshoven *Belligerent reprisals* (1971) 366; William Tidwell, James Hall & David Gaddy *Come retribution* (1988) 245–48; Paul D Escott ‘Military necessity: civil-military relations in the Confederacy’ (2006); Michael A Newton ‘Modern military necessity: the role and relevance of military lawyers’ (2007) *Vanderbilt Public Law Research Paper* 07–16; Yuchun Kuo ‘Military necessity and the Principle of Discrimination in the just war tradition: a Kantian test of universality’ (paper presented at the WPSA Annual Meeting: Ideas, Interests and Institutions, Hyatt Regency Vancouver, BC, Canada, 19 March 2009 (on file)).

¹¹ Article 15 provides: ‘Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army, and of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.’ Article 16 says: ‘Military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any war, nor of the wanton devastation of a district. It admits of deception but disclaims acts of perfidy; and, in general, military necessity does not include any act of hostility which makes the return to peace unnecessarily difficult.’

¹² Burrus M Carnahan ‘Lieber and the laws of war: the origins and limits of the Principle of Military Necessity’ (1998) 92 *American Journal of International Law* 213, 214.

Petersburg Declaration of 1868,¹³ which was a precursor to modern international humanitarian law, as encapsulated in the four Geneva Conventions of 1949 and the Additional Protocols of 1977.

The need for a balance between the considerations of humanity and the military actions necessary to win a war, is today regarded as defining the very essence of international humanitarian law, making military necessity a central principle in this balance.¹⁴ It is on this basis that O'Brien has therefore described 'military necessity' as 'a basic principle of the law of war, so basic, indeed, that without it there could be no law of war at all'.¹⁵

Military necessity has also been interpreted as involving the necessity of those measures that are indispensable for securing the ends of war, 'which are lawful according to modern usage and usages of war'.¹⁶ Military necessity is different from *force majeure*. The former always involves a deliberate decision to disregard a rule, while the latter includes only extraneous events that make performance impossible.¹⁷ Although the doctrine has been criticised as providing a pretext for a 'barbarous system of warfare',¹⁸ military necessity has been applied to rules of self-defence,¹⁹ treatment of the wounded,²⁰ military commissions, and private property.²¹

Military necessity was soon to evolve into a principle in conflict with humanitarian values, rather than a general limitation on the means and methods of waging warfare. Consequently, while earlier conventional codifications of the law of war appear to use military necessity as a limitation on the means and methods of waging war, a narrower conception of

¹³ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, 29 November/11 December 1868, reprinted in Schindler & Toman n 5 above at 101.

¹⁴ See Forrest, n 6 above at 183; Yoram Dinstein *The conduct of hostilities under the law of international armed conflict* (2004) 16.

¹⁵ William V O'Brien 'The meaning of military necessity in international law' (1957) 1 *World Polity* 109, 110.

¹⁶ Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioner/Appellee Urging Affirmance in *Hamdan v Rumsfeld*, 415 F 3d 33 (DC Cir 2005) (No 04-5393) at 5-6.

¹⁷ See Carnahan n 12 above at 218.

¹⁸ Hartigan n 7 above at 123.

¹⁹ David L Willson 'An army view of neutrality in space: legal options for space negation' (2001) 50 *Armed Forces Law Review* 175 at 210.

²⁰ Stephen W Simpson 'Shoot first, ask questions later: double-tapping under the laws of war' (2006) 108 *West Virginia Law Review* 751 at 760.

²¹ See Aya Gruber 'Raising the red flag: the continued relevance of the Japanese internment in the post-Hamdi world' (2006) 54 *Kansas Law Review* 307 at 370-371; Tabacinic n 8 above at 606-607. See also Forrest n 6 above at 192-194.

necessity has developed in later conventions to act as a justification rather than a limitation, and which has acted to ‘privilege military necessity at the cost of humanitarian values’.²² The continual expansion of the reach of the concept of military necessity had tended to support the assertion that the doctrine could be used as a pretext for mischief.²³

The cases that form the fulcrum of this article demonstrate how military orders, when insulated from judicial review, can diminish the constitutional liberties of individuals even when measures taken under the guise of necessity have exceeded the bounds of the original conceptualisation of the doctrine.

US CONSTITUTIONALISM AND THE CLASSIFICATION OF PERSONS

The Fourteenth Amendment to the US Constitution provides that ‘no state shall make or enforce any law which shall ... deny to any person within its jurisdiction equal protection of the laws’.²⁴ This provision, now more commonly referred to as the Equal Protection Clause, imposes a general restraint on the governmental use of classifications. These classifications are based not only on race, but may extend to sex, origin, illegitimacy, wealth, alienage, or any other characteristic.²⁵

Nothing in the US Constitution explicitly requires the US federal government to provide equal protection of the laws. However, where the federal government makes a classification, which if it were made by a state, would violate the Fourteenth Amendment’s Equal Protection Clause, the US Supreme Court has treated this as a violation of the Fifth Amendment’s Due Process Clause.²⁶ Therefore, the equal protection standards are arguably equal for the federal and state governments. In contemporary times, however,

²² Carnahan n 12 above at 217.

²³ Tabacinic n 8 above at 609.

²⁴ US Constitution, Fourteenth Amendment s 1. The Fourteenth Amendment became a part of the US Constitution in 1868. See 15 Statute 706–707 (US). For an extensive scholarly analysis of the Fourteenth Amendment to the US Constitution, see Wayne D Moore ‘The Fourteenth Amendment’s initial authority: problems of constitutional coherence’ (2004) 13 *Temple Political & Civil Rights Law Review* 515.

²⁵ See *Rice v Cayetano*, 528 US 495 (2000); *Gratz v Bollinger*, 539 US 244 (2003). For a scholarly discussion on this point, see Melissa Hart ‘Conflating scope of right with standard of review: the Supreme Court’s “Strict Scrutiny” of Congressional efforts to enforce the Fourteenth Amendment’ (2001) 46 *Villanova Law Review* 1091 at 1092–1093.

²⁶ Hart n 25 above at 1094–1095, and accompanying footnotes 11–16, citing notable judicial authorities.

the US Supreme Court seems to have shown some willingness to grant acts of Congress more deference than acts of the state legislatures. This has especially been the case in statutes that affect aliens and classifications relating to the military.²⁷

The Equal Protection Clause further guarantees that people who are similarly situated should be treated similarly and those who are not similarly situated will not be treated similarly.²⁸ To this end, the US Supreme Court has over the years evolved three levels of review under the Equal Protection Clause: ‘strict scrutiny’, ‘intermediate scrutiny’, and ‘rational basis scrutiny’.²⁹

The court applies strict scrutiny to any statute that is based on a ‘suspect’ classification or that impairs a fundamental right.³⁰ The suspect classes under equal protection are racial or nationalist in origin. These suspect classifications are statutory classifications which, because they give distinct treatment to a group that has historically been a victim of discrimination, are subjected to strict scrutiny. Strict scrutiny may also apply even if no suspect classification is involved. This occurs when a fundamental right is involved.³¹ If a classification involves a suspect class or a fundamental right, then strict scrutiny will apply. Under this test, a classification will be upheld only if there is a compelling government interest, and the means used by the government are necessary to achieve that governmental interest.

²⁷ See *eg*, *Vance v US*, 434 Fed Supp 826 (1977). For a review of other cases on this point, see Bradford Russell Clark ‘Judicial review of Congressional section five action: the fallacy of reverse incorporation’ (1984) 84 *Columbia Law Review* 1969 at 1976; Hart n 25 above at 1094–1095 and accompanying footnote 16. See also Thane Somerville ‘The Equal Pay Act as appropriate legislation under section 5 of the Fourteenth Amendment: can state employers be sued?’ (2001) 76 *Washington Law Review* 279 at 284–286.

²⁸ *Plyler v Doe* 457 US 202, 216 (1982). *Cleburne v Cleburne Living Center* 473 US 432, 439 (1985). See further discussion in J Michael McGuiness ‘Equal protection for ordinary victims of governmental misconduct’ (1996) 11 *Maine Bar Journal* 52 at 53.

²⁹ See John E Nowak & Ronald Rotunda *Constitutional law* (4ed 1991) 570. See also Harvey Gee ‘Book review: civil liberties, national security, and the Japanese American internment’ (2005) 45 *Santa Clara Law Review* 771 at 776–789; Arthur H Garrison ‘National security and presidential power: judicial deference and establishing constitutional boundaries in World War Two and the Korean War’ (2009) 39 *Cumberland Law Review* 609 at 611.

³⁰ See Viktor Mayer-Schonberger ‘Substantive due process and equal protection in the fundamental rights realm’ (1990) 33 *Howard Law Journal* 287 at 289.

³¹ *Ibid*; McGuiness n 28 above. Fundamental rights include the right to vote, the right to court access and the right to travel which means the right to change one’s state of residence or employment. See *San Antonio Independent School District v Rodriguez* 411 US 1 (1973); *Plyler v Doe* 102 Supreme Court 2382 (1982). For a review of the pertinent cases, see Martha I Morgan ‘Fundamental state rights: a new basis for strict scrutiny in Federal equal protection review’ (1982) 17 *Georgia Law Review* 77.

The requirement that there must be a compelling objective provides an opportunity for the court to ferret out whether a discriminatory purpose was involved. Therefore, even if there is a necessary link between the means and ends, the legislation may still fail where the objective is in reality a pretext for discriminatory action. The other requirement that the means selected by the government must be necessary to the attainment of the objective of the legislation, is very difficult to meet. There is the view that less discriminatory alternatives must always be used, should they be available, to attain the objective. Sometimes, less discriminatory alternatives may be required even if they are less effective in meeting the compelling goal and the discriminatory means. Not since 1944 has the US Supreme Court upheld a statute based on racial or national origin classification to which strict scrutiny analysis applied.³²

Intermediate level review applies only to semi-suspect classes such as gender. Under this type of review, the means chosen by the legislature must be substantially related to an important governmental objective. This test does not impose the stringent standard of strict scrutiny, but it is also not as lenient as the rational basis test.³³

The rational basis review is the least probing and most deferential of the standards. It applies to all classifications that are not based on suspect or semi-suspect classifications and do not impair a fundamental right. Most general economic and social welfare statutes fall within this limited review category. In terms of this test, a classification will only be upheld if it is conceivable that the classification bears a rational relationship to a legitimate governmental objective. Although the legislature's purpose or objective in enacting the statute must be legitimate, the US Supreme Court generally defers to the legislature's right to define its objectives.³⁴ Therefore, the court will uphold a statute even if the objective is not the actual legislative purpose but a conceivable legislative purpose by the government. Furthermore, the court is often willing to consider any purpose that the statute's defenders can assert as having been a motivation or a consideration that may have

³² The last of such cases was *Toyosaburo Korematsu v US* [*Korematsu I*] 323 US 214 (1944). The case is one of the two pivotal decisions in this article.

³³ See Lucinda M Finley 'Putting "protection" back in the Equal Protection Clause: lessons from nineteenth century women's rights activists' understandings of equality' (2004) 13 *Temple Political & Civil Rights Law Review* 429.

³⁴ See, for illustration, *Baxstrom v Herold* 383 US 107 (1966) and *Loving v Virginia* 388 US 1 (1967). See also discussion in Roger Daniels 'Judgments judged and wrongs remembered: examining the Japanese American civil liberties cases on their sixtieth anniversary: the Japanese American cases, 1942–2004: a social history' (2005) 68 *Law and Contemporary Problems* 159.

motivated the legislature. Therefore, a statute may be upheld even if there is no real evidence that the purpose was the motivating factor for the legislature. This test is thus a very deferential standard and most statutes will be upheld under it.

These three standards of review under equal protection are very broad tests that allow considerable flexibility. This article will attempt to illustrate how these levels of review can be manipulated, particularly when the US Supreme Court seeks to achieve a specific outcome. In particular, this article explores how, during World War II, the court admitted the doctrine of military necessity as a means by which to circumvent the enumerated standards of review. Two prominent cases will be examined to illustrate this point.

JURISPRUDENCE EMANATING FROM THE CLASSIFICATION AND INTERNMENT OF JAPANESE-AMERICANS

By virtue of Executive Order 9066, the US President, Franklin D Roosevelt, directed and authorised the US Secretary of War and military commanders to ensure ‘every possible protection against espionage and against sabotage to national-defense material, national-defense premises and national-defense utilities’.³⁵ On 2 March 1942, General JL de Witt, military commander of the Pacific Coastal States, issued a proclamation which stated that

the entire Pacific Coast by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and in connection therewith, is subject to espionage and acts of espionage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations.³⁶

A further proclamation on 16 March 1942 stated that because of the military necessity of the situation, the territory of the Western Defence Command would be designated as military areas and zones.³⁷ Within these specific areas, certain persons or classes of persons could be excluded as the situation required.³⁸

³⁵ Executive Order No 9066, 19 February 1942. See Maisie Conrat & Richard Conrat *Executive Order No 9066: The Internment of 110,000 Japanese Americans* (UCLA Asian American Studies Center Publication, 1992) 4–12.

³⁶ Public Proclamation No 1, 7 Federal Register 2320.

³⁷ Public Proclamation No 2, 7 Federal Register 2405.

³⁸ *Ibid.* See Garrison n 29 above at 615; Eric L Muller ‘The Japanese American cases – a bigger disaster than we realized’ (2006) 49 *Howard Law Journal* 417 at 459; Gruber n 21 above at 335–336, for detailed narratives of the consequences of the various proclamations issued pursuant to Executive Order No 9066.

Then, on 24 March 1942, General De Witt issued a subsequent proclamation providing that the military situation required the enactment of regulations to govern all enemy aliens and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No 1. This proclamation held that persons of Japanese ancestry residing within this military zone should be within their place of residence between the hours of 20h00 and 06h00.³⁹ Pursuant to this proclamation, the military commander for a specific area then issued a ‘Civilian Exclusion Order’.

Hirabayashi v United States

The case *Hirabayashi v United States*,⁴⁰ deals with Civilian Exclusion Order No 57 dated 10 May 1942.⁴¹ His particular order stipulated that from 12:00 noon of 16 May 1942, ‘all persons of Japanese ancestry, both alien and non-alien, be excluded from a specified portion of Military Area No 1 in Seattle, including the appellant’s place of residence’.⁴²

In this particular case, the defendant, Kiyoshi Hirabayashi, was convicted of violating the Act of Congress that made it a misdemeanour to knowingly disregard restrictions made applicable by a military commander to persons in a military area prescribed by the authorities as such as authorised by an Executive Order of the US President. The defendant challenged the conviction on two grounds. First, that the US Congress unconstitutionally delegated its legislative power to the military commander by having him impose the regulation. Secondly, and which forms a focal point of this article, that the Fifth Amendment to the US Constitution ‘prohibits the discrimination made between citizens of Japanese descent and citizens of other ancestry’.⁴³

On the first point, the court held that Congress and the executive can together employ such measures as are necessary to provide for the common defence and to wage war. On the second point, the court held that there had been no violation of equal protection because of the military necessity of the situation.⁴⁴

³⁹ Public Proclamation No 3, 7 Federal Register 2543.

⁴⁰ *Kiyoshi Hirabayashi v United States* 320 US 81 (1943).

⁴¹ Civilian Exclusion Order No 57, May 10, 1942, 7 Federal Register 3725.

⁴² *Id* at 89.

⁴³ *Ibid.*

⁴⁴ *Id* at 91–92.

It is remarkable that the majority opinion conceded that when citizens are classified according to race or ancestry, this is often a violation of equal protection.⁴⁵ The court even conceded that equal protection analysis would have applied in this case if military necessity had not been involved. According to the court,

because racial discriminations are in most circumstances irrelevant and therefore prohibited, it by no means follows that, in dealing with the perils of war, Congress and the Executive are wholly precluded from taking into account those facts and circumstances which are relevant to measures for national defense and for the successful prosecution of the war, and which may in fact place citizens of one ancestry in a different category from others.⁴⁶

The court had therefore applied a rational basis test in evaluating whether the classification could be upheld under the Equal Protection Clause. It further stated that its inquiry, in light of all the relevant circumstances, was to determine whether the order and the statute provided a reasonable basis for the objective of the curfew.⁴⁷ The court, however, acknowledged that residents having ethnic affiliations with an invading enemy may be in greater danger of this type of classification, but it seemed to have disregarded this danger and stated that it only had to determine whether the curfew was within the boundaries of authority.⁴⁸ The court also accorded a great deal of deference to the military in making the decision as to whether there was a rational basis for this order.⁴⁹ In the final analysis, the court held that the curfew order did meet the rational basis test because the objective to protect from the danger of espionage and sabotage to military recourses was a legitimate objective and the use of the curfew order was an appropriate measure to meet that objective.⁵⁰

The *Hirabayashi* case is thus a clear illustration of how the court manipulated the standard of review to meet its objectives, whether political or military. In that particular case, the classification was based on race and, therefore, was a suspect classification. Suspect classifications were conventionally subject to strict scrutiny analysis. Instead of adopting this

⁴⁵ *Id* at 100, citing a long line of cases, including *Yick Wo v Hopkins* 118 US 356; *Yu Cong Eng v Trinidad* 271 US 500 [46 Supreme Court 619]; *Hill v Texas* 316 US 400 [62 Supreme Court 1159].

⁴⁶ *Id* at 100.

⁴⁷ *Id* at 101.

⁴⁸ *Id* at 102.

⁴⁹ *Id* at 102–103.

⁵⁰ *Id* at 104.

stringent standard, the court imposed the much more liberal standard of rational basis review. The court stated throughout the case that distinctions based on race should be subject to equal protection review but always qualified this with the fact that the US was in a situation of war. The court indicated that military necessity required that it be less critical in reviewing those actions taken by the military commanders. Curiously, when *Korematsu v United States*⁵¹ was decided in 1944, the court adopted a different approach. Instead of stating that its analysis would be based on the rational basis test, the court applied ‘strict scrutiny’ language.

Korematsu v United States I

In *Korematsu v United States*, the petitioner an American citizen of Japanese descent, was convicted in a US federal district court for violating the Civilian Exclusion Order 34 of 3 May 1942.⁵² Order 34 required that all persons of Japanese ancestry should be excluded from a military area in San Leandro, California. Order 34 was like many other military orders and proclamations based on Executive Order 9066.

The prosecution of Korematsu was based on a violation of an Act of Congress of 21 March 1942.⁵³ This statute stated,

whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive Order of the President, by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof be guilty of a misdemeanour and upon conviction shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both for each offense.⁵⁴

The US District Court for Northern California held that the petitioner had knowingly violated Order 34 and convicted him. The Circuit Court of Appeals affirmed the conviction of the appellant by the lower court.⁵⁵

In its review of the case, the US Supreme Court stated that ‘all legal restrictions which curtail the civil rights of a single racial group are

⁵¹ *Korematsu I* n 30 above.

⁵² *Korematsu I* n 32 above at 214.

⁵³ 56 Stat 173, 18 USCA (1942).

⁵⁴ *Id* at s 97a.

⁵⁵ *Korematsu I* n 32 above at 214.

immediately suspect'.⁵⁶ As one would expect, therefore, if there is a suspect classification (race, colour and national origin), then the court must engage in strict scrutiny analysis. However, the court also stated that a pressing public necessity could justify a restriction on civil rights such as Order 34. This was how the court ultimately justified its use of the rational basis review standard. The court never used the language of this deferential standard in its opinion, but rather appears to take the strict scrutiny standard and turn it into the rational basis standard. The court upheld the exclusion order and stated that it was not beyond the power of Congress and the Executive to exclude people of Japanese ancestry from the military area.⁵⁷ The court also held that the exclusion had 'a definite and close relationship to the prevention of espionage and sabotage'.⁵⁸ The court relied on the military authorities' analysis as to whether or not to order exclusion and whether it was in the United States' best interests to do so. The military authorities involved deemed that there were disloyal members of the population in the military area and that it was necessary to exclude them from the protected zones. The authorities also believed that it was not possible to segregate the disloyal from the loyal and, therefore, all people of Japanese ancestry had to be excluded from the area.⁵⁹ The court in this case was very deferential to the military authorities' findings and ultimately accepted their arguments for justification.

Furthermore, the court stated it understood that by excluding people of Japanese ancestry from the military area, it would impose hardships on American citizens although it opined that in a time of war, all citizens have burdens imposed upon them.⁶⁰ In the opinion of the court,

compulsory exclusion of large groups of citizens from their homes, except under circumstances of direct emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.⁶¹

The court's language in this case seemed to indicate that in times of war, analysis of infringement of civil rights is different and different standards must, therefore, apply. The court discussed the fact that the petitioner

⁵⁶ *Id* at 216.

⁵⁷ *Id* at 218.

⁵⁸ *Ibid.*

⁵⁹ *Id* at 219.

⁶⁰ *Ibid.*

⁶¹ *Id* at 220.

claimed that this exclusion was an imprisonment of a US citizen in a concentration camp, through reason of his ancestry.⁶² Incidentally, the petitioner argued that there had been no analysis of whether he was loyal or not to the US. The court nonetheless held that the exclusion was not based on racial prejudice, without giving reasons for that finding.⁶³ Rather, the court theorised on how military situations presented different scenarios which required different standards. According to the court, 'to cast this case into the outlines of racial prejudice without reference to the real military dangers which were presented, merely confuses the issue'.⁶⁴ The court further held that the exclusion was justified, based on the fact that the US was at war with Japan, because the authorities were concerned about an invasion of the West Coast, and because they believed that there was military urgency that justified this segregation.⁶⁵ The court had thus, once again, reaffirmed this military deference and stated that Congress gave expressed confidence in military authorities to make these decisions and the court should abide by these decisions.

In *Korematsu*, the court engaged much of the strict scrutiny language within the opinion. It used words such as 'necessary' and 'compelling'. However, the court was covertly imposing the rational basis review and if it had imposed the strict scrutiny analysis objectively, the exclusion order never would have stood. The requirements of strict scrutiny are that there must be a compelling governmental interest, and the means to achieve that interest must be necessary.⁶⁶ In this particular case, the court may have been able to prove that the government had a compelling interest in preventing espionage and sabotage on the West Coast. Predictably, however, the court would not have been able to meet the second requirement that the means and ends presented a necessary link. For there to be such a 'necessity', there must have been no other less discriminatory alternatives that would have achieved the objective. In that particular instance, the exclusion and detention of an entire group of people, based on their race, was not the only way the military could have prevented these invasions. It was simply the most discriminatory way to do so.

In conclusion, the court actually imposed a rational basis standard by placing the analysis in a context where there was considerable deference to the

⁶² *Id* at 223.

⁶³ *Ibid.*

⁶⁴ *Id* at 223.

⁶⁵ *Ibid.*

⁶⁶ *Ibid.*

military. The court only required that the military authorities supply reasons why these classifications were reasonably related to the objective of the military. The court used military necessity to move the standard of review from strict scrutiny to a rational basis.

In Justice Murphy's dissenting opinion to *Korematsu*, he argued that the appropriate test should be the rational basis test.⁶⁷ According to him,

the judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.⁶⁸

Although Justice Murphy's dissent imposed the same test as the majority – even though the majority labelled it 'strict scrutiny' – the result differed. The dissent held that the exclusion order did not meet the rational basis standard. The judge stated that there should not be too high standards when judging the actions of military authorities.⁶⁹ The means of the exclusion order had to balance with the reduction of espionage and danger to the West Coast.⁷⁰ However, even with this deferential standard, the dissent clearly indicated that there was no 'reasonableness' in the argument by the military that all people of Japanese ancestry posed a threat to the West Coast and were likely to commit espionage.

Justice Murphy found that racial generalisations played a large role in the reasons that the military officials gave for the exclusion order.⁷¹ These racial generalisations could not be the basis for this relationship between means and ends.

Justice Jackson's dissent was based on completely different grounds as those of Justice Murphy's. Instead of holding that the order did not meet the rational basis test, Justice Jackson held that the court should not be deciding issues involving this plea of military necessity. For Jackson, these military

⁶⁷ *Id* at 234.

⁶⁸ *Ibid.*

⁶⁹ *Id* at 235.

⁷⁰ *Ibid.*

⁷¹ *Id* at 236, observing that the 'forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity ...'

actions should not be subject to any judicial review at all.⁷² In other words, no standards of review should be imposed on those actions. Justice Jackson was comfortable with the fact that military officials may not meet the standards of constitutionality. The result of the proclamations was in order because those actions would last only as long as the military necessity required. His major concern was the long-term consequences of the court's imposition of judicial scrutiny on such unconstitutional actions. In his own words,

once a judicial opinion rationalises such an order to show that it conforms to the Constitution, or rather rationalises the Constitution to show that the Constitution sanctions such an order, the court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens.⁷³

Jackson believed that courts are unable to gather evidence about these military decisions so as to be able to enact judicial scrutiny. Jackson even added that the courts must defer to military officials' accounts.⁷⁴ He believed that it was fine to defer to this military judgment as long as it was not judicially scrutinised.

Korematsu v United States II

In 1984, the US District Court of the Northern District of California decided *Korematsu v United States (Korematsu II)*.⁷⁵ The petitioner, Korematsu, who was convicted pursuant to Exclusion Order 34, brought a petition for a writ of *coram nobis* to vacate his conviction based on the grounds that there had been government misconduct. The court granted Korematsu's petition for *coram nobis*, based on the findings of the Commission on Wartime Relocation and Internment of Civilians. The commission was established by Congress in 1980 to review, among other terms, Executive Order 9066 under which Order 34 was issued. The commission held that there was no military necessity to exclude people of Japanese ancestry from the West Coast.⁷⁶ The commission further concluded that there was no credible evidence of military necessity for these actions by the officials and that the 'broad historical

⁷² *Id* at 243.

⁷³ *Id* at 246.

⁷⁴ *Id* at 245.

⁷⁵ *Korematsu v United States [Korematsu II]* United States District Court, Northern District of Cal, 1984, Fed Supp 1406.

⁷⁶ *Ibid*. For a comprehensive view of the commission's terms of reference and work, see *Wartime Relocation of Civilians*, US Congressional Record – Senate, 100th Cong 2nd Sess, 134 Cong Rec S 4095, 15 April 1988.

causes which shaped these decisions [exclusion and detention] were race prejudice, war hysteria and a failure of political leadership'.⁷⁷ The evidence came from federal civilian and military agencies. These agencies contradicted a great deal of the report by General JL de Witt who issued Order 34.

Although the court granted the petitioner the writ of *coram nobis*, the first *Korematsu* case is still considered good judicial authority. *Korematsu II* only overturns *Korematsu I* on a factual basis, and therefore *Korematsu I* arguably remains the precedent for deference to military judgment and an imposition of the rational basis test cloaked in the language of strict scrutiny analysis.⁷⁸

JUDICIAL REACTIONS TO THE DOCTRINE OF MILITARY NECESSITY

Although there is no equal protection clause in the Fifth Amendment, the Fifth Amendment's Due Process Clause is interpreted to bar the federal government from making any classification that would be in violation of the Equal Protection Clause of the Fourteenth Amendment if it had been an action of the state.⁷⁹ Therefore, the US federal government should treat similarly situated people in a similar way. Agencies of the government should at all times bear in mind that the levels of review under the Equal Protection Clause are strict scrutiny, intermediate scrutiny and rational basis scrutiny. All of these three standards of review have specific requirements to meet the test in ascertaining whether a piece of legislation will survive equal protection inquiry. After all, the different levels of review were designed to protect certain classifications more than others.⁸⁰ In the area of strict scrutiny, suspect classifications were developed to specifically protect groups of people who were discriminated against previously. Strict scrutiny was developed so that analysis of these classifications would be carefully looked at to make sure that there was no discrimination.⁸¹

⁷⁷ *Id* at 1416–1417, quoting the commission's report.

⁷⁸ *Id* at 1420, where the District Court acknowledged that *Korematsu I* 'stands as the law'. See also Reggie Oh & Frank Wu 'The evolution of race in the law: the Supreme Court moves from approving internment of Japanese Americans to disapproving affirmative action for African Americans' (1996) 1 *Michigan Journal of Race & Law Review* 165 at 170 (noting that 'from 1945–1995 ... *Korematsu* was cited as authority more than fifty times ...').

⁷⁹ Frederick Mark Gedicks, 'An originalist defense of substantive due process: Magna Carta, higher-law constitutionalism, and the Fifth Amendment' (2009) 58 *Emory Law Journal* 585–673.

⁸⁰ *Ibid.*

⁸¹ See McGuinness n 28 above at 54–55.

The cases that ensued from Congressional actions during World War II and Executive Order 9066 led to a turning point in equal protection analysis. The US Supreme Court developed the theory that military necessity played a large role in equal protection cases. The court became very deferential to Congress and, more specifically, to the military's findings. This was a shift in the attitude of the court prior to the Pearl Harbour incident.

It was only a few years earlier that the court had decided *Lochner v New York*,⁸² where the US Supreme Court struck down, on due process grounds, a New York state law that limited the hours that a bakery employee could work. The court held that this was an infringement of the liberty of contract. Although the court subsequently overruled *Lochner* and there was a much criticism after the case, that decision illustrated the profound disposition of the court towards implementing these constitutional standards of review prior to Pearl Harbour. In *Lochner*, the court implemented strict scrutiny concerning an economic right in the area of due process.

After *Lochner*, a shift occurred in the US Supreme Court.⁸³ There was a great deal of deferential treatment in the area of economic legislation, not only in the area of due process but also in the area of equal protection. With this deferential and rational basis treatment of economic matters, and with particular regard to equal protection, the court applied a stricter scrutiny involving classifications based on race and national origin. In *US v Carolene Products Co.*,⁸⁴ the court held that

prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.⁸⁵

When the US became involved in World War II, and its military became concerned with the possible threat of danger to the West Coast by the Japanese, the court's equal protection analysis shifted. Thus, in the *Hirabayashi* case, the US Supreme Court upheld a curfew order implemented against American citizens of Japanese ancestry. In its determination of whether the classification made under the Executive Order 9066 violated

⁸² *Lochner v New York* 198 US 45 (1905).

⁸³ See generally David E Bernstein 'Lochner v New York: a Centennial retrospective' (2005) 85(5) *Washington University Law Quarterly* 1469–1528. See also Paul Kens *Lochner v New York: economic regulation on trial* (1998) 24–43.

⁸⁴ *United States v Carolene Products Co* 304 US 144 (1938).

⁸⁵ *Id* at 146.

equal protection, the US Supreme Court applied the rather toothless rational basis review. The court determined that the military necessity involved and the possible threat to the US West Coast justified the imposition of this curfew on those Japanese-Americans. The court also held that the curfew order was rationally related to military necessity and the Congressional objective of protecting the West Coast from possible invasion.

Two aspects of the court's review are problematic. First, the court imposed a rational basis review when a suspect class was involved. Imposing a classification on people of Japanese ancestry involves making a classification based on race. With this type of classification, strict scrutiny analysis should apply. The second problematic issue is that the court developed this idea of military necessity in the course of analysing equal protection. The court thus created a loophole for future analyses. It soon became obvious that the court was on a slippery slope that would allow it to impose whatever classification it deemed fit in wartime.

When *Korematsu I* was decided in 1944, it led to an entirely new type of standard of review by the court. This case involved a military order excluding people of Japanese ancestry from certain areas of the West Coast which resulted in their effective imprisonment. The court upheld the order. The court used the language of strict scrutiny analysis when examining the order. It held that there was a compelling need to prevent espionage and sabotage and there was no practical and fast alternative way for the military to distinguish the loyal from the disloyal. This had invariably become a significant instance where racial or ethnic classification survived strict scrutiny analysis.

What was also worrisome in *Korematsu I* was that although the court stated that it was implementing strict scrutiny analysis, it was indeed imposing a very deferential standard. It seems almost to be the rational basis standard disguised as the strict scrutiny standard. The criticism here is not so much about the compelling objective argument. It could indeed be plausible that the military had a compelling objective of preventing espionage and sabotage and protecting its citizens on the West Coast. However, what is not plausible is that the order was supposed to be necessary to achieve that objective. The court thus misused the word 'necessary' and erroneously applied a reasonable standard test. The necessary requirement under strict scrutiny requires that less discriminatory alternatives must always be used if they are available, in order to attain the compelling objective. In *Korematsu I*, the court did not analyse whether or not there were less discriminatory ways to

prevent espionage and sabotage. The court took the military's word that there was no way to determine whether or not a person of Japanese ancestry was loyal and did not pose a threat to the West Coast. The court seems to have suggested that the exclusion order was a rational means by the government in achieving this objective. Another problematic dimension to *Korematsu I* is the fact that the court, by using the language of strict scrutiny, undermined the analysis of that standard and allowed 'military necessity' to impede on the equal protection rights of citizens.

Some forty years later, the District Court in *Korematsu II* determined that these findings by the military were erroneous but simply limited this decision to the facts. Therefore, the court held that the standard used by the Court in *Korematsu I* is still the applicable judicial standard.⁸⁶

Before now, there had never been such a measure of concern for possible danger on US territory. The events of 11 September 2001 changed the attitudes of many concerning constitutional rights versus security measures *cum* military necessity. With precedents such as *Hirabayashi* and *Korematsu I*, the US Supreme Court demonstrated the ability to accord US Congress, and of course the executive, substantial deference in its actions concerning the war on terrorism. This poses a critical threat to the constitutional rights of individuals, especially in the area of equal protection.

Without unnecessarily obscuring the gist of this article, it is significant to note that rather than abate, the reasoning of the US Supreme Court in *Hirabayashi* and *Korematsu I* has resonated in at least three cases decided by the apex court in the post-11 September 2001 era. These are *Hamdi v Rumsfeld*;⁸⁷ *Rumsfeld v Padilla*;⁸⁸ and *Rasul v Bush*.⁸⁹ In all three cases involving US citizens, and in the context of the on-going US-led 'war on terror', the US Supreme Court has drawn extensive inferences from the earlier decisions in *Hirabayashi* and *Korematsu I*, stressing the importance of striking a proper balance between the grave harm done to an individual's civil liberties, and the dangers to the nation's security. So much has been written on these recent decisions and only time will fully reveal their full future implications.⁹⁰

⁸⁶ *Korematsu II* n 75 above.

⁸⁷ 124 S Ct 2633 (2004).

⁸⁸ 124 S Ct 2711 (2004).

⁸⁹ 124 S Ct 2686 (2004).

⁹⁰ For scholarly discussions on the historical significance of these cases, see Seth M Haines 'Rounding up the usual suspects: the rights of Arab detainees in a post-September 11 world' (2004) 57 *Arkansas Law Review* 105; Eugene Gressman 'Judgments judged and

CONCLUSION

As a sequel to the events of 11 September 2001, the extent of power the US government now wields in its actions concerning the ‘war on terrorism’ the classification of certain races and ethnicities, and the standards of review US courts implement in equal protection cases are important issues. This cursory critique of the cases involving Executive Order 9066 of 1942 and the subsequent orders that resulted from it, illustrates the point that the US Supreme Court ostensibly possesses a wide discretion in determining whether governmental action infringes on the equal protection and due process rights of citizens.

Although these decisions emerged in the wake of World War II, their underlying dynamics are applicable when looking at similar issues today. The deferential standard that the court imposed at that time can still hold sway today. After all, US courts in recent times accord Congress considerable deference in terms of military matters and cases involving aliens, particularly in light of the Patriot Act I and Patriot Act II of 2001 and 2003, respectively.⁹¹ The question that will continue to engage the minds of critical legal scholars is whether this type of deference enhances or detracts from the guarantee of constitutional rights and freedoms.

One unmistakable lesson from the internment of Japanese-Americans during World War II is this: that a government should not target an entire ethnic or racial group in the name of national security alone. Even during a time of crisis, human rights and freedoms should be safeguarded.

wrongs remembered: examining the Japanese American civil liberties cases on their sixtieth anniversary: Korematsu: a melange of military imperatives’ (2005) 68 *Law and Contemporary Problems* 15; Muller n 38 above at 417; Evelyn Gong ‘A judicial “green light” for the expansion of executive power: the violation of constitutional rights and the Writ of Habeas Corpus in the Japanese American internment and the post-9/11 detention of Arab and Muslim Americans’ (2007) 32 *Thurgood Marshall Law Review* 275; Jonathan M Justl ‘Disastrously misunderstood: judicial deference in the Japanese-American cases’ (2009) 119 *Yale Law Journal* 270; Garrison n 29 above 609.

⁹¹ For diverse critical perspectives on the growing powers of the US Congress in relation to national security measures since the terrorist attacks of 11 September 2001, and how the US Supreme Court has granted increasing latitude to the Congress, see Jennifer M Hannigan ‘Playing patriot games: national security challenges civil liberties’ (2004) 41 *Houston Law Review* 1371; Nora Graham ‘Patriot Act II and denationalization: an unconstitutional attempt to revive stripping Americans of their citizenship’ (2004–5) 52 *Cleveland State Law Review* 593; Timothy Edgar & Witold Walczak ‘Perspectives on the USA Patriot Act: we can be both safe and free: how the Patriot Act threatens civil liberties’ (2005) 76 *Pennsylvania Bar Association Quarterly* 21.

Far from being an *ex cathedra* pronouncement on all the dynamics involved in balancing civil liberties against military necessity, this contribution would have served its purpose if it stimulates further discourse towards ensuring that neither present nor future courts, within or outside of the US, will defer arbitrarily to military necessity quite so easily and comfortably and so defeat hard-earned constitutional liberties.