

File under evacuation

OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D. C.

July 28, 1943

Honorable Dillon S. Myer
War Relocation Authority
Washington, D. C.

Dear Mr. Myer:

On June 21, 1943, the Supreme Court in HIRABAYASHI v. UNITED STATES sustained the validity of the curfew measure adopted by Lieutenant General DeWitt on March 24, 1942, as applied to American citizens of Japanese descent. It is gratifying to observe that the decision was unanimous. However, the Court took pains to avoid passing upon the evacuation measure and there were several concurring opinions which, while agreeing with the Court's decision, appear to sound a waring note as to the constitutionality of the remainder of the program relating to the evacuation and detention of American citizens of Japanese ancestry, and particularly as to the constitutionality of such restrictions at the present moment.

Thus, Mr. Justice Douglas spoke of the "narrow ground of decision", and indicated that it rested upon "the imminent threat of a dire emergency", i.e., potential Japanese fifth column activity in connection with

a possible Japanese attack. He stated that "where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those who are detained for cause". He stated that "The orders must be judged as of the date when the decision to issue them was made", and that "the army had the power to deal temporarily with these people on a group basis." But he concluded that the denial of an opportunity to the individual to show personal loyalty to the United States in these circumstances "does not necessarily mean that petitioner could not have a hearing on that issue in some appropriate proceeding." And he indicated, without deciding, that habeas corpus might be available as a remedy to any individual who was not given the opportunity for a hearing so that he might be relieved of the restrictions not applicable to other American citizens.

Similarly, Mr. Justice Murphy gave notice that he was prepared to consider the present restrictions in a different light. In sustaining the conviction in the case before the Court, he said, "I think that the military arm, confronted with the peril of imminent enemy attack and acting under the authority conferred by Congress, made an allowable judgment at the time the curfew restriction was imposed.

Whether such a restriction is valid today is another matter."

He concluded:

Nor do I mean to intimate that citizens of a particular racial group whose freedom may be curtailed within an area threatened with attack should be generally prevented from leaving the area and going at large in other areas that are not in danger of attack and where special precautions are not needed. Their status as citizens, though subject to requirements of national security and military necessity, should at all times be accorded the fullest consideration and respect. When the danger is past, the restrictions imposed on them should be promptly removed and their freedom of action fully restored.

In a separate concurring opinion, Mr. Justice

Rutledge stated, in part:

The officer (General DeWitt) of course must have wide discretion and room for its operation. But it does not follow there may not be bounds, beyond which he cannot go and, if he oversteps them, that the courts may not have power to protect the civilian citizen. But in this case that questions need not be faced and I merely add my reservation without indication and opinion concerning it.

I cannot, of course, know whether the views expressed in these concurring opinions would lead their authors to vote against the validity of the exclusion and detention measures as of the present day, nor can I venture to predict whether such views would command the assent of a majority of the Court if the issue were squarely placed before it.

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However, I do feel that the validity of these measures is in jeopardy, and that I should advise you of the situation for your consideration in your program to afford necessary protection and at the same time avoid the dangers indicated by the opinions in this case.

Sincerely yours,

/s/ Francis Biddle

Francis Biddle
Attorney General