

KOREMATSU v. U.S. (1944)

BACKGROUND

Pre-War Japanese Immigration to U.S.

Severely restricted after 1908; totally prohibited after 1924
Federal Law barred Japanese immigrants (Issei) from U.S. citizenship
State Law barred Issei from owning land

West Coast in 1941

120,000 persons of Japanese ancestry; 70,000 citizens
Children of Japanese immigrants (Nisei) were U.S. citizens under the 14th
Amendment

December 7, 1941: Pearl Harbor

West Coast after Pearl Harbor

Six weeks of relative calm, followed by increasingly strident public demands for
control and then evacuation of ethnic Japanese residents. [incl. Earl Warren, CA
Attorney-General]

February 19, 1942: Executive Order 9066

Authorizes military commanders to exclude any persons from designated areas for
reasons of military necessity (e.g., prevention of sabotage and espionage).

March 21, 1942

Congress imposes sanctions on persons not complying with Executive Order
9066.

March 24, 1942

General DeWitt, Military Commander in charge of the West Coast, orders a
curfew (8pm to 6am) applicable to “all alien Japanese, all alien Germans, all alien
Italians, and all persons of Japanese ancestry”.

March to May 1942

DeWitt issues series of Civilian Exclusion Orders ordering the removal of all
persons of Japanese ancestry (but not persons of Italian or German ancestry) from
the West Coast to 10 Relocation Centers hastily built in deserts and swamplands.

Excluded persons given one week to dispose of their property, permitted to take along only what they were able to carry.

HIRABAYASHI

Hirabayashi v. United States (1943): Stone

Upheld the constitutionality of the curfew order.

Principle: Strict Scrutiny

Compelling End: prevention of sabotage and espionage

Necessary Means: curfew

Murphy's concurrence

The curfew order "bears a melancholy resemblance to the treatment accorded to members of the Jewish race in Germany... This goes to the very brink of constitutional power."

KOREMATSU: FACTS

Fred Korematsu tried to avoid the exclusion order by having (unsuccessful) cosmetic surgery. He was picked up by the authorities and sent to the Topaz Relocation Center. He then challenged the constitutionality of the Civilian Exclusion Order that excluded him from his home in San Leandro, CA. He lost in Federal District Court, in the Ninth District Court of Appeals, and then appealed to the U.S. Supreme Court.

THE DECISION

Korematsu v. United States (December 1944)

Upheld the constitutionality of the Civilian Exclusion Orders.

Principle: Strict Scrutiny

"All legal restrictions which curtail the civil rights of a single racial group are immediately suspect... Courts must subject them to the most rigid scrutiny."

Compelling End: prevention of espionage/sabotage

Necessary Means: exclusion from military areas

MURPHY'S DISSENT

Korematsu opinion goes over “the very brink of constitutional power” to which Murphy had referred in *Hirabayashi*.

Although the end may be compelling, the means are not necessary.

“no reliable evidence [that persons of Japanese descent] were generally disloyal, or had generally so conducted themselves...as to constitute a special menace to defense installations or war industries.”

Grounds for Exclusion Are All Unreasonable

- Lack of assimilation
- Emperor worshipping ceremonies
- Dual citizenship
- Children sent to Japanese language schools
- Children (Kibei) sent back to Japan to be educated
- Residences “adjacent to strategic points”
- Protective custody
- Minor acts of sabotage, radio and night signaling

Exclusion Order Was Arbitrary

- Loyalty hearings for those of German or Italian ancestry
- No loyalty hearings for those of Japanese ancestry

Exclusion Order Was Enforced with “Leisure and Deliberation”, rather than Speed

“Nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued.”

“No adequate proof that the FBI and the military and naval intelligence services did not have the espionage and sabotage situation well in hand.”

“Not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free.”

MURPHY'S CONCLUSION

Exclusion Order was Legalized Racism

“I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States.”

JACKSON'S DISSENT

Exclusion is a much more serious deprivation of liberty than a curfew (some rights are more stringent than others).

So *Korematsu* should be distinguished from *Hirabayashi*: the same principle that permits a curfew on grounds of military necessity might well disallow forced relocation on similar grounds.

JACKSON'S WARNING

“Once a judicial opinion...rationalizes the Constitution to show that the Constitution sanctions [an unconstitutional] order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need.”