struction of the statute. The immediate phrase, "engaged in commerce," has been held to include work which "is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.' "[17] Notwithstanding the seemingly clear direction toward a wholesome development of the Fair Labor Standards Act, the present decision results in an unwarranted limitation on this development, and if followed consistently will ultimately bring about the same incongruous result as did similar decisions under the Federal Employers Liability Act.[18]

CONSTITUTIONAL LAW

CURFEW FOR CITIZENS OF JAPANESE ANCESTRY

On February 19, 1942, President Roosevelt promulgated an executive order[1] conferring authority upon military commanders designated by the Secretary of War to effectuate a program for protection against espionage and sabotage to national-defense materials, premises, and utilities.[2] Pursuant to his authority under this order the commander of the Western Defense Command[3] issued various

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maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce...."

17. Overstreet v. North Shore Corp., 318 U.S. 125, 130 (1943). Cf. Overnight Motor Co. v. Missel, 316 U.S. 572 (1942); 83 Cong. Rec. 9169 (1938). Senator Bailey, even though he questioned the constitutionality of the Act, went so far as to say, "I would contend that the railroad organization is an instrumentality of commerce between the States and relates to every man wherever he may be and whatever he is doing, providing he is doing something with regard to the system. The instrumentality idea as applied to railroads takes in the whole system, not merely the men who run the engine or the conductor who manages the car or the brakeman, but the machinist in the shop who never leaves the borders of the State."

18. Shanks v. Delaware, L. & W. Ry., 239 U.S. 556 (1916); Chicago & N.W. Ry. v. Bolle, 284 U.S. 74 (1931); Chicago & E.I. Ry. v. Industrial Comm. of Ill., 284 U.S. 296 (1932); New York, N.H. & H. Ry. v. Bezue, 284 U.S. 415 (1932). Concerning the merits of such cases see Gavit, "The Commerce Clause" (1932) 155. "The truth is . . . that there was no real occasion for limiting the application of the Employers' Liability Act as it has been limited; and the present interpretation can easily be said to be too narrow." The Federal Employers Liability Act has since been amended. 53 Stat. 1404, 45 U.S.C.A. §51 (1939).

1. Executive Order No. 9066, issued February 19, 1942. 7 Fed. Reg. 1407.

2. The Order recited that "the successful prosecution of the war requires every possible protection against espionage and sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655."

3. The Secretary of War designated Lieutenant General J. L. DeWitt as Military Commander of the Western Defense Command to

public proclamations, the third[4] of which, inter alia, imposed a curfew upon persons of Japanese ancestry.[5] This proclamation subjected violators to criminal penalties prescribed by an Act of Congress of March 21, 1942.[6] Appellant here, an American citizen of Japanese ancestry, was convicted in a federal district court for violating the curfew order. On appeal the circuit court of appeals certified the entire record of the trial court to the United States Supreme Court to permit a review of the conviction. Held, affirmed. The scope of the war power of the national government embraces every phase of the national defense including protection against the dangers of espionage and sabotage which attend the rise, prosecution and progress of the war. Hirabayashi v. United States, 63 Sup. Ct. 1375 (1943).

There can be no doubt today that the war power of our national government is the power to prosecute the war with vigor and success.[7] This power is placed by the Constitution in the Congress and the Chief Executive; the portion granted to each is the complement of that given to the other.[8] In the instant case, whether or not the President exceeded the limitations on his power in promulgating Executive Order No. 9066,[9] the Congress indicated its approval by passing the Act of March 21, 1942.[10] The legislative history of the Act reveals that Congress considered not only the President's order but also the proposed plans of the commander of the Western Defense Command and purposely provided means of enforcing curfew and other restrictions.[11]

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carry out there the duties prescribed in Executive Order No. 9066. The Western Defense Command comprised the Pacific coast states and some others.

4. 7 Fed. Reg. 2543 (March 24, 1942).
5. The curfew order applied to all German, Italian, and Japanese aliens as well as to all persons of Japanese ancestry.
6. Pub. L. No. 503, 77th Cong., 2nd Sess. (Mar. 21, 1942).
7. Willis, "Constitutional Law" (1936) 446; Willoughby, "Constitutional Law of the United States" (2nd ed. 1935) 657; Hughes, "War Power Under the Constitution" (1917) 42 A.B.A.Rep. 232, 238; Fairman, "The Law of Martial Rule and the National Emergency" (1942) 55 Harv. L. Rev. 1253, 1288.
8. Willis, "Constitutional Law" (1936) 441; Willoughby, "Constitutional Law of the United States" (2nd ed. 1935) 656; Hughes, "War Powers Under the Constitution" (1917) 42 A.B.A. Rep. 232, 240; Hayes, "Emergencies and the Power of the United States Government to Meet Them" (1942) 16 Temp. L. Q. 173; Fairman, "The Law of Martial Rule and the National Emergency" (1942) 55 Harv. L. Rev. 1253, 1288.
9. See note 1 supra.
10. See note 6 supra. By such action Congress ratified the order of the President. Silas Mason Co. et al. v. Tax Commission of Washington et al., 302 U.S. 186, 208 (1937); Swayne & Hoyt, Ltd. et al. v. United States, 300 U.S. 297, 300-303 (1937); Isbrandtsen-Moller Co., Inc. v. United States et al., 300 U.S. 139, 146-148 (1937); Tiaco et al. v. Forbes, 228 U.S. 549, 556 (1913); United States v. Heinszen & Co., 206 U.S. 370, 382 (1907); Hamilton v. Dillin, 21 Wall. 73, 96 (U.S. 1874); The Brig Amy Warwick, 2 Black. 635, 671 (U.S. 1862).
11. See Sen. Rep. No. 1171, 77th Cong., 2nd Sess. (1942) 2; H. R. Rep. No. 1906, 77th Cong., 2nd Sess. (1942) 3; 88 Cong. Rec. 2725 (1942); 88 Cong. Rec. 2722-2726, 2729, 2730 (1942).

That the imposition of a curfew restriction is an appropriate measure in a program designed for protection against the dangers of espionage and sabotage is self-evident;[12] but the question is: did Congress and the President, acting together, have the power to impose the curfew under the circumstances?

The case of Ex parte Milligan,[13] decided in 1866, announced that martial rule cannot rise from a threatened invasion; that the necessity must be actual and present, the invasion such that it effectually closes the courts and deposes the civil administration. While this revered dictum has stood for years as a constitutional landmark, the facts of the Milligan case and those of the instant case are clearly distinguishable.[14] Furthermore, it seems obvious that the Milligan case should not[15] and cannot be followed today when victory depends upon social controls designed and applied with a "realistic regard for the speed and hazards of lightning war."[16] It would seem that Congress and the President have the power to do that which is recognized as a "military necessity" in the light of all the circumstances.[17]

12. "Appellant did not deny that, given the danger, a curfew was an appropriate measure against sabotage. It is an obvious protection against the perpetration of sabotage most readily committed during the hours of darkness." See instant case at 1385.

13. 4 Wall. 2 (U.S. 1866).

14. For an excellent discussion distinguishing the Milligan case from cases attacking the constitutionality of the curfew order see Ex parte Ventura et al., 44 F. Supp. 520, 522 (W.D.Wash. 1942). In that case the petitioner expressly contended that the Milligan case established the illegality of the curfew and other restrictions imposed by the commander of the Western Defense Command. See also Comment (1942) 51 Yale L. J. 1316, 1328.

15. Winthrop, "Military Law and Precedents" (2nd ed. 1896) 817. The author states his belief that the view of the minority of the Court in the Milligan case is the sounder and more reasonable one. Hughes, "War Powers Under the Constitution" (1917) 42 A. B. A. Rep. 232, 245-246. Chief Justice Hughes in discussing the Milligan case here said: "Certainly, the test (of the necessity of military rule) should not be a mere physical one, nor should substance be sacrificed to form. . . . If this necessity actually exists it cannot be doubted that the power of the Nation is adequate to meet it. . . . " Fairman, "The Law of Martial Rule" (1930) 145. Professor Fairman, discussing the Milligan case, says that "There is general agreement that Justice Davis went too far when he said that martial law cannot arise from a threatened danger, that the courts and civil administration must already have been deposed."

16. Ex parte Ventura et al., 44 F. Supp. 520, 523 (W.D. Wash. 1942); See Fairman, "The Law of Martial Rule" (1930) 144, n. 5; Weiner, "A Practice Manual of Martial Law" (1940) 106; Fairman, "The Law of Martial Rule and the National Emergency" (1942) 55 Harv. L. Rev. 1253, 1286; Comment (1942) 51 Yale L. J. 1316, 1329. See also McCullough v. Maryland, 4 Wheat. 316, 407, 415 (U.S. 1819) where the Court said: " . . . we must never forget that it is a constitution we are expounding. . . . a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."

17. During the war of 1812 General Andrew Jackson justified his action in declaring martial law in New Orleans during a threat-

"Questions of military necessity are determined by the military commander, subject to confirmation by his military superiors, including the President. They are questions of fact and not law. . . . authorities are generally in agreement that a military commander is allowed a wide latitude in the exercise of his discretionary power."[18] In determining that "military necessity" required, inter alia, a curfew restriction in military areas of the Western Defense Command the commander considered all the factors[19] pertinent to the situation, and conscious of his responsibilities, took appropriate action to safeguard the political and territorial integrity of the nation.[20] In the light of the emergency precipitated by the surprise attack on Pearl Harbor and the precarious position of defense plants and military installations on the Pacific coast thereafter, it seems hardly arguable that a military necessity existed which the national government had the power to meet.

Under our Constitution any legislative classification or discrimination based solely upon racial differences has consistently been held

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ened invasion of the city as a "military necessity." He was fined for contempt by a federal district court judge for refusing to produce a violator of his curfew order at a hearing on petition for habeas corpus. Nearly thirty years later (Feb. 16, 1844) Congress passed an Act [5 Stat. 651 (1844)] ordering repayment of the fine plus interest to General Jackson, thereby expressing its approval of his action. See Watson, "Japanese Evacuation and Litigation Arising Therefrom" (1942) 22 Ore. L. Rev. 46, 48-49; 2 Dictionary of American History (1940) 347. As also pointed out by Col. Watson, the term "military necessity" was much used by President Lincoln to justify exercise of powers during the Civil War. See also Comment (1942) 51 Yale L. J. 1316, 1328.

18. Watson, "The Japanese Evacuation and Litigation Arising Therefrom" (1942) 22 Ore. L. Rev. 46, 51. See also Fairman, "The Law of Martial Rule and the National Emergency" (1942) 55 Harv. L. Rev. 1253. Professor Fairman says at 1288: "The war power, distributed between Congress and the President, comprehends all that is requisite 'to wage war successfully.' What this implies materially will vary, from Bataan to Hawaii, from San Francisco to Indianapolis. If, under the circumstances as they appeared at the time and place, the control exercised by the commander was of a character appropriato to the situation, then it is the duty of the courts to concede that—paraphrasing the language of Chief Justice Hughes in the Constantin case—'such measures, conceived in good faith, in the face of emergency and directly related' to the ending or prevention of the evil, fall within the discretion of the executive government. The nature of the power 'necessarily implies that there is a permitted range of honest judgment as to the measures to be taken. . . . '"

19. For statistics on Japanese population in the area, facts concerning Japanese culture, dual citizenship and education, as well as information concerning the concentration of military and naval installations, see instant case at 1383, 1384. See also Watson, "The Japanese Evacuation and Litigation Arising Therefrom" (1942) 22 Ore. L. Rev. 46, 47.

20. Watson, "The Japanese Evacuation and Litigation Arising Therefrom" (1942) 22 Ore. L. Rev. 46, 47.

to be a denial of the protection of equal laws.[21] But the contention here that the curfew order discrimimated against citizens of Japanese ancestry in violation of the Fifth Amendment was unsound, because the distinction was based upon "facts and circumstances which are relevant to measures for our national defense . . . and which may in fact place citizens of one ancestry in a different category from others."[23] This was the obvious logic of the Court.

DIVORCE

IS ALIMONY A VESTED PROPERTY RIGHT?

Appellant wife obtained a final decree of divorce in 1928 which embodied a provision for payment of alimony. Respondent husband applied to the court in June, 1938, to have the alimony provision annulled, basing his application on a statute of 1938.[1] The court ordered the alimony allowance eliminated,[2] and from this order an appeal was taken. Held, reversed. The alimony allowed by a final judgment is a vested property right. Waddey v. Waddey, —— N.Y. ——, 49 N.E. (2d) 8 (1943).

An absolute divorce and the rights incident to it are purely statutory.[3] Courts derive jurisdiction to grant divorces solely from statutes which expressly confer such jurisdiction upon them.[4]

The text of the 1938 statute[5] covered the relationship which existed between appellant and another man;[6] therefore, if the statute was literally interpreted and applied retroactively to the 1928 divorce decree, the court could have annulled the alimony provisions. However, the court followed the established rule of statutory construction that the provisions of the statute would not be applied retrospectively

21. Hill v. Texas, 316 U.S. 400 (1941); Yu Cong Eng v. Trinidad, 271 U.S. 500 (1925); Yick Wo v. Hopkins, 118 U.S. 356 (1885).
22. See instant case at 1385.

1. N.Y. Laws 1938, c. 161; N.Y. Civil Practice Act §1172-c, second sentence, which states: "The court in its discretion upon application of the husband on notice, upon proof that the wife is habitually living with another man and holding herself out as his wife, although not married to such man, may modify such final judgment and any orders made with respect thereto by annulling the provisions of such final judgment or orders or of both, directing payment of money for the support of such wife."
2. Waddey v. Waddey, 259 App. Div. 852, 20 N.Y.S. (2d) 406 (2d Dep't 1940).
3. 1 Bl. Comm. *441; 2 Bishop, "Marriage, Divorce, and Separation" (1891) §1039.
4. Ackerman v. Ackerman, 200 N.Y. 72, 93 N.E. 192 (1910); Wilson v. Hinman, 182 N.Y. 408, 75 N.E. 236 (1905); Madden, "Persons and Domestic Relations" (1931) §82.
5. See note 1 supra.
6. " . . . counsel for the defendant [respondent] was instrumental in causing the introduction in and passage by the Legislature of the 1938 amendment. . . . " See instant case at 10.