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No. 10,308

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GORDON KOYOSHI HIRABAYASHI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE.

EARL WARREN,
Attorney General of the State of California,
JAMES H. OAKLEY,
Assistant Attorney General of the State of California,
600 State Building, San Francisco,
Attorneys for the State of California,
As Amicus Curiae.

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Subject Index

Table of Authorities Cited

Cases

Statutes, Proclamations, Orders, Reports

Texts and Encyclopedia

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To the Honorable Curtis D. Wilbur, Presiding Judge, and to the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

By leave of Court granted herein, the State of California files its brief as amicus curiae in support of the appellee for the purpose of presenting to this honorable Court the position of the State of California concerning some of the important questions of law raised herein.

STATEMENT OF FACTS PERTAINING TO THE INTERESTS OF THE STATE OF CALIFORNIA.

This appeal questions the validity of the curfew and evacuation measures imposed upon persons of Japanese ancestry residing in Pacific Coast military areas by the Commanding General of the Western

Defense Command and Fourth Army. The specific facts are set forth in brief of appellee (pp. 1-3). The solution calls for a determination of the powers of the President and his subordinate military commanders in time of war to adopt within a theater of operations controls over civilians in domestic territory. The interest of the State of California in the issues involved will appear from a consideration of the factual situation out of which the present case arises.

(a) The War With Japan and the Japanese Problem on the Pacific Coast.

On the occasion of the treacherous Japanese attack upon Pearl Harbor on December 7, 1941, over ninety per cent of all persons of Japanese ancestry resident in the United States were living on the Pacific Coast. 93,717 were living in the State of California, 33,000 of whom were aliens. Many of these Japanese were living in proximity to military installations and vital war industries. The presence of this large group, racial relatives of a nation with which America was suddenly thrust into war, presented, in view of the danger of Japanese attack upon the Pacific coastal mainland, a large and difficult problem which had to be dealt with quickly and effectively.

The Japanese of the Pacific Coast area, with some exceptions, have remained a group apart and inscrutable to their neighbors. Without any fault of their own, it may be said that they have lived in America without being of America. Regardless of the justification or lack of it, legislation directed at Orientals in the Pacific Coast States and agitation to deny citizenship to American-born Japanese have been

dividing influences. The Japanese Government's theory of dual citizenship has had a disuniting effect. While many Japanese, alien and citizen, are law-abiding and loyal, it is difficult to perceive that an adequate test could be devised which would demark disloyalty, potential or active, among this unassimilated group. With one out of three being an enemy alien, and with many families including aliens as well as citizens, it was impossible for the duly constituted law enforcing agencies to distinguish between those thoroughly American in thought and those of doubtful loyalty. It has been suggested that the problem can be better understood if one considers what attitude Americans born and living in Japan would have toward the present struggle. The significance of these factors concerning the concentration of Japanese on the Pacific Coast must be judged in the light of the problems of defending the coast against Japanese attack by air, land and sea as well as the prevention of sabotage and espionage.

(b) The Military Situation on the Pacific Coast.

At the time of the promulgation of the Proclamations and Orders here in issue by the Commanding General of the Western Defense Command and Fourth Army, the Pacific Coast was and still is within the theater of war and remains one of the potential battlefronts. A field army occupies the length and breadth of the State of California. Our ports are vital embarkation points for men and materials. Nearly one-third of the nation's war planes and one-fourth of the country's ships are being built on the Pacific Coast. Over a thousand miles of coastline

must be guarded. Dotted throughout California are numerous defense installations, including army camps, posts, forts, arsenals and large training centers and strategic naval installations. California lies wholly within the Western Defense Command's theater of operations, and a strip of land one hundred miles wide, extending down the coast and along the California-Mexico border, is part of the designated "combat zone". Japanese submarines have shelled installations on the Pacific Coast at Seaside, Oregon, Santa Barbara, California, and at Vancouver Island. Japanese in considerable numbers are now lodged in some of the Aleutian Islands, which are part of the Western Defense Command. Alaska has been subjected to repeated bombing attacks and the mainland has already been subject to one hit and run attack. These are some of the considerations which the Japanese problem in the Pacific War Zone presented at the outbreak of the war with Japan. As this Court recently said in *Zimmerman v. Walker,* C.C.A.-9, December 14, 1942:

> "The courts judicially know that the whole Pacific Area of the United States has continued in a state of the gravest emergency." (Op. p. 5.)

Some of the additional military reasons giving rise to the necessity for the measures adopted by the military commander on the Pacific Coast have since been disclosed.[1]

Study of this report furnishes ample proof of the imminent threat to the territorial integrity of the United States. Shorn of any effective naval arm in

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[1] *U. S. Navy Report,* S. F. Examiner, Dec. 6, 1942.

the Pacific Ocean, this western coast was without protection against an invading Japanese army. The fact that the strategy of Japan had not anticipated the crushing blow at Pearl Harbor with the opportunity thus afforded to invade the Pacific Coast of the United States, does not mitigate the fact that the prospect of a momentary invasion attempt was present and that this was known to our military leaders.

The reasonable relationship of the curfew and evacuation orders here under scrutiny can now be appraised in the light of this new evidence of the military situation which faced this Pacific Coast following the outbreak of the war with Japan.

That the Japanese as a race, citizen and alien, are recognized by the Japanese Government as potential agents to assist the Japanese army, navy and air force is revealed in the unabridged translation of the book "The Three Power Alliance and a U. S.-Japanese War,"[2] published just two years ago in Tokyo by Kinoaki Matsuo, an officer in the Japanese Naval Intelligence. Speaking of the expected use to be made of Japanese in aid of an invasion of Southern California, Matsuo says:

> "The climate being ideal, San Pedro is an exceptionally good harbor; there are many Japanese subjects in that area engaged in fishery." (page 143),

and of the Japanese in Hawaii, he writes:

> "* * * If a false step is made it might give rise to a regrettable incident such as a great

[2]*The Three Power Alliance and a United States-Japanese War*, Kinoaki Matsuo (1940); translation by Kilsoo K. Haan, *How Japan Plans to Win*, Little-Brown & Co., Boston (1942).

> massacre * * * but they will be of great help when a landing is made by our army. * * *" (p. 296.)

In addition, and of particular concern to the State of California, is the danger that the presence of persons of Japanese ancestry would, because of the war with Japan, constitute a source of domestic unrest and riot, which might have interfered with our internal security and national unity. This fear, prior to the carrying out of the evacuation precaution, had already materialized in various communities of California.

(c) The Action Taken.

On December 11, 1941, four days after the outbreak of war with Japan, the War Department constituted the eight western States and the Territory of Alaska as the Western Defense Command and designated it as a "theater of operations". An area one hundred miles wide, extending from the Canadian border down the Pacific Coast to the California-Mexico border, was declared to be a combat zone by Lieutenant General J. L. DeWitt, Commanding General of the Western Defense Command and Fourth Army. (Field Order No. 1, December 14, 1941.)[3] On February 19, 1942, Franklin Delano Roosevelt, as President of the United States and Commander-in-Chief of the Army

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[3]1. The theater of war comprises those areas of land, sea and air which are, or may become, directly involved in the conduct of the war.

2. A theater of operations is an area of the theater of war necessary for military operation and the administration and supply incident to military operation. The War Department designated one or more theaters of operation.

3. A combat zone comprises that part of a theater of operations required for the active operation of the combatant forces fighting. *Field Service Regulations—Operations, May 22, 1941.* Wartime Bulletin PM100-5.

and Navy, by Executive Order 9066 (U.S.C. Cong. Ser. No. 2, p. 157 (1942)) authorized and directed the Secretary of War or the military commanders designated by the Secretary to prescribe military areas whenever it was deemed necessary, from which all persons might be excluded and, within the discretion of either of such officers, to impose restrictions with respect to the right of any person to enter, remain in or leave such military areas. The President's order was based on the ground that the successful prosecution of the war required every possible protection against espionage and sabotage to national defense material, national defense premises and national defense utilities. The next day the Secretary of War designated Lieutenant General J. L. DeWitt as the military commander to carry out the terms of Executive Order 9066 in the Western Defense Command. (Letter from Secretary of War to General DeWitt, Feb. 20, 1942.)

On March 2, 1942, Lieutenant General DeWitt by Proclamation No. 1 declared that because the Pacific Coast was particularly subject to attack, to an attempted invasion, and in connection therewith to sabotage and espionage, it was necessary to adopt military measures to safeguard against such operations. Therefore, pursuant to the power granted by President Roosevelt in Executive Order 9066 and by authorization of the Secretary of War, Military Areas Nos. 1 and 2 were established as a matter of military necessity. Military Area No. 1 coincides approximately with the Army's Pacific Combat Zone. The proclamation then stated that such persons or classes of persons as the situation required would be excluded

from all of Military Area No. 1 and from certain zones in Area No. 2. (By Proclamation No. 2 (March 16, 1942) other areas were established under similar conditions.)

The War Relocation Authority was established on March 18, 1942, by Presidential Executive Order 9102 (U.S.C. Cong. Ser. No. 3, p. 265 (1942)) "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security". The Authority was authorized to formulate and effect a program for the removal from the areas of persons designated under Executive Order 9066 and to provide "for their relocation, maintenance, and supervision".

With Proclamations 1 and 2 and Executive Orders 9066 and 9102 before it, Congress on March 21, 1942, enacted Public Law 503 (77th Cong., 2nd Sess., Ch. 191), which declared it to be a misdemeanor for anyone to enter, remain in or leave or commit any act in any prescribed military area or zone contrary to the order of the Secretary of War or any designated military commander, provided such person knew or should have known of the restrictions or orders and that his act was in violation thereof.[4]

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[4]"BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That 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, or by any military commander designated 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 misdemeanor

By Public Proclamation No. 3, dated March 24, 1942, there were promulgated regulations concerning the hours of curfew to be observed by all alien Japanese, all alien Germans, all alien Italians and all persons of Japanese ancestry. This is the order which appellant was found to have violated under Count II of the indictment. (Tr. 35.)

By Public Proclamation No. 4 General DeWitt prohibited enemy aliens and all persons of Japanese ancestry from leaving Military Area No. 1 after March 29, 1942, until further notice. Thereafter a series of Civilian Exclusion Orders were issued by which all persons of Japanese ancestry, both alien and non-alien except in special cases, were excluded from all portions of Military Area No. 1 and certain portions of Military Area No. 2.

The Appellant, residing within Military Area No. 1, was ordered evacuated under Civilian Exclusion Order No. 57, dated May 10, 1942. (Tr. 3.)

On June 8, 1942, Proclamation No. 7, referring to the Civilian Exclusion Orders by which all persons of Japanese ancestry were excluded from portions of Military Area No. 1, declared that Lieutenant General J. L. DeWitt, pursuant to the authority vested in him by the President of the United States and by the Secretary of War and under his powers as Commanding General, ratified the Civilian Exclusion Orders and excluded all persons of Japanese ancestry from all portions of Military Area No. 1.

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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." (77th Cong., 2nd Sess., Ch. 191.)

At all times it is of the utmost importance to the questions here involved to keep in mind that the measures which were adopted with reference to curfew and evacuation of persons of Japanese ancestry are preventive and precautionary and in no way involve punishment or guilt or blame placed upon persons affected by the orders.

INTEREST OF THE STATE OF CALIFORNIA.

The questions raised by the attack upon the right of the military authorities to have adopted the measures for the exclusion of persons of Japanese ancestry from military areas and for observance of hours of curfew are of the utmost concern to the State of California. Most of the excluded Japanese-Americans reside in California. If the military authorities are to be held powerless to deal with what they conceive to be a potential or actual danger to the conduct of the war on the Pacific Coast, then the State of California, or the counties and cities in the absence of state action, must meet the danger, potential or actual, thus presented. The questions raised by the appellant also involve generally the validity of the principles and the situations which will justify the military authorities in taking measures for the protection of the civilian population and for the prosecution of the war on the Pacific Coast. The dim-out and air-raid regulations are examples of measures already adopted. In some instances constitutional limitations prevent necessary action by state authorities, in others state laws are not adequate to meet emergency situations. A clarification of the authority of the Presi-

dent and his military commanders in the exercise of their war powers and the right of Congress to provide sanctions for the enforcement of the military orders will assist state and local officers in the performance of their duties in connection with the war effort.

SUMMARY OF ARGUMENT.

1. In time of war the President and his subordinate military commanders within a theater of operations may exercise controls over civilians in domestic territory for the purpose of protecting the civilian population or aiding the conduct of the war. Such action known as martial law when appropriate to meeting the danger is a constitutional exercise of the war power to which individual constitutional rights are subject.

2. The measures of martial law must be justified on the ground of military necessity, but the occasion for the exercise of martial law should not have to await an invasion by the enemy which deposes the civil government or closes the civil Courts. The dangers and the apparent appropriateness of the action to meet them should be the test.

3. A declaration of martial law is not a prerequisite, nor must absolute control be taken by the military authorities before protective and preventive measures can be constitutionally imposed within a theater of operations. Under the doctrine of necessity, martial law measures must be limited to the particular military necessity.

4. The evacuation of persons from military areas, or the imposition therein of curfew hours by the military authorities, are proper measures of limited martial law. Such measures are preventive and precautionary only. As no crime is charged the constitutional rights of an accused are not denied.

5. Public Law 503 provides sanctions for the carrying out of the restrictions promulgated under the war powers of the President and his military commanders in military areas. It is not invalid as an unconstitutional delegation of power, nor upon the ground that it is uncertain.

6. The Courts in reviewing measures of martial law will allow the military authorities in time of war a wide range of discretion in view of the scope of the war power, the nature of the emergency, and the fact that public safety may not permit a full disclosure of the reasons for the actions taken.

I. THE PRESIDENT'S ORDER ISSUED AS PRESIDENT AND COMMANDER IN CHIEF AUTHORIZING THE IMPOSITION OF RESTRICTIONS UPON PERSONS IN MILITARY AREAS OR THEIR EXCLUSION THEREFROM, AND THE ORDERS OF THE COMMANDING GENERAL PURSUANT THERETO IMPOSING CURFEW ORDERS UPON PERSONS OF JAPANESE ANCESTRY AND EXCLUDING SUCH PERSONS FROM MILITARY AREAS ARE CONSTITUTIONAL EXERCISES OF THE WAR POWER.

A. THE EXERCISE OF MARTIAL LAW IS PART OF THE PRESIDENT'S WAR POWER.

One of the objects of the Federal Constitution as declared by its preamble is "to provide for the common defense". When, as at present, the Nation is

at war, its first function and primary duty is to provide for this common defense. The Constitution divides the war power between the President and Congress. Congress is granted the power to declare war and to provide for the common defense (Art. I, Sec. 8, Cls. 1, 11), to raise and support armies (Art. I, Sec. 8, Cl. 13), to make rules for the governance of the armed forces (Art. I, Sec. 8, Cl. 14), and to make all laws which shall be necessary and proper for carrying these powers into execution. (Art. I, Sec. 8, Cl. 18.) The duty of conducting the war is placed upon the President in his position as Commander-in-Chief of the armed forces. (Art. II, Sec. 2, Cl. 1.)[5]

The Supreme Court has said of these war powers in *Stewart v. Kahn,* 11 Wall. 493 (1870):

> "The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

Hamilton, writing in *The Federalist,* also pointed out that:

> "These powers ought to exist without limitation, because it is impossible to foresee and define the extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought

[5] "The power to make the necessary laws is in Congress, the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authority essential to its due exercise." *Ex parte Milligan,* 4 Wall. 2 (1866).

> to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense." (Federalist, XXIII.)[6]

In a total global war not confined to the actual scene of hostilities but waged swiftly and violently and at long range upon civilians, factories and fields far beyond the front line and conducted by sabotage, espionage and propaganda everywhere, the President as Commander-in-Chief, through his subordinate military commanders, must undertake certain precautionary and preventive measures even in areas not directly under the siege guns of the enemy, the object of which is the protection of the civilian population and the successful prosecution of the war. Such measures of control, when applied to civilians within our borders to meet actual or threatened danger, is a valid exercise of martial law. Individual rights guaranteed under the Constitution must temporarily bend to the exercise of the paramount and fundamental constitutional rights of the State to preserve itself.

The point is that the exercise of this control in domestic territory, namely martial law, is just as much a part of our Constitution as the provisions guaranteeing the individual rights which may be temporarily affected by martial law. The Constitution contemplates the necessity of limiting the exercise of some privileges, such as freedom of movement, in

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[6] "The Federalist * * * is a complete commentary on our Constitution." *Cohens v. Virginia,* 6 Wheat. 264.

order to secure the continuance of all our constitutional rights. In *Shimola v. Local Board,* 40 F. Supp. 808 (D.C. Ohio, 1941), the Court recently said:

> "The civil rights which petitioner contends for are more violently assailed from without than from within. The very name of the rights which petitioner champions implies a limitation on their use. Civil rights have always been subject to military exigency." (p. 810.)

As former Chief Justice Hughes said, when speaking of the war powers under the Constitution in an address before the American Bar Association in 1917 during another critical period in our history:

> "We are making war as a nation organized under the constitution, from which the established national authorities derive all their powers either in war or in peace. The constitution is as effective today as it ever was and the oath to support it is just as binding. But the framers of the constitution did not contrive an imposing spectacle of impotency. One of the objects of a 'more perfect union' was 'to provide for the common defense.' A nation which could not fight would be powerless to secure 'the Blessings of Liberty to Ourselves and our Posterity.' Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States. Otherwise, as Mr. Justice Story said, 'the country would be in danger of losing both its liberty and its sovereignty from its dread of investing the public councils with the power of defending it. It would be more willing to submit to foreign conquest than to domestic rule.'" (*Reports of A.B.A.,* 1917, p. 248; Sen. Doc. No. 105, 65th Cong., 1st Sess., p. 3.)

Martial law has been likened to the public right of self-defense by an individual:

> "Martial law is the public right of self-defense against a danger threatening the order or the existence of the state." (*Wiener, A Practical Manual of Martial Law,* p. 16 (1940).)
>
> *Winthrop, Military Law and Precedents,* Reprint, p. 820.

But martial law when instituted as an aid to the conduct of a national war is broader than the common law doctrine that force to whatever degree necessary may be used to repress illegal force, for the President and his military commanders charged with conducting the war have the duty of taking all reasonable measures which the conduct of the war makes necessary. Thus martial law in time of war has a different application than in times of peace where troops, either Federal or State, are employed or should be employed to assist the civil law enforcement authorities in the restoration of peace and order.[7] For this reason those martial law cases growing out of peace-time domestic disturbances, such as *Sterling against Constantin,* 287 U. S. 378 (1932) must be sharply distinguished from instances involving exercises of the national war power in providing for the common defense.

> "Thus imbedded in the very fiber of the Constitution, we find not only the authority for mar-

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[7]There has been a gross misuse of State troops in times of peace by Governors in capital-labor disputes and in the settlement of political and economical controversies. (Wiener, A Practical Manual of Martial Law, pp. 160-169.)

tial rule, but the occasions which require and justify it, and as well the limits of its operation." (*Martial Law in California,* 31 Cal. L.R. 6, Dec. 1942.)

B. JUDICIAL CONTROL OF MARTIAL LAW.

The touchstone by which these preventive measures are justified is the military necessity for the particular controls exercised. The best statement of this guiding principle is that contained in *Wiener, "A Practical Manual of Martial Law"* (1940):

> "Martial law is the public law of necessity. Necessity calls it forth, necessity justifies its exercise, and necessity measures the extent and degree to which it may be employed." (p. 16.)
>
> "Its occasion and justification thus is necessity. (Winthrop, Military Law and Precedents, Reprint, p. 820.)"

Of course, today when the homefront is equally as important as the battlefront, the power to conduct the war successfully cannot be limited to the activities of the battleline. It clearly contemplates the taking of all reasonable precautionary and preventive measures for the control of civilians within our own borders on the mainland. Even during the Civil War the Supreme Court, in *Stewart v. Kahn,* 11 Wall. 493 (1870), said:

> "* * * The power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

But martial law is not as some zealots declare, simply "the will of the general". Such a proposition is abhorrent to a nation fighting against military dictatorship. All will agree with the Supreme Court in the *Milligan* case, 4 Wall. 2 (1866), when it said:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace and covers with the shield of its protection all classes of men, at all times and under all circumstances." (p. 13.)

For as Justice Davis states in the *Milligan* opinion:

> "The country must be preserved, but in a way so that it is worth preserving." (p. 126.)

And most recently in the case of the German saboteurs the Court speaks of the "duty which rests on the Courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safegards of civil liberty".[8]

In war, as in peace, the judicial arm must be kept strong to pass upon the question of the validity of the measures taken by the military in exercising control over civilians in domestic territory. We agree with the appellant (Pet. Br., p. 16) that the Supreme Court was correct when it said in *Sterling v. Constantin,* 287 U.S. 378 (1932):

> "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." (p. 399.)[9]

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[8] *U. S. ex rel. Quirin v. Cox,* 11 U. S. L. W. 4001 (U. S. Sup. Ct,. Oct. 29, 1942).

[9] The extent of this review is discussed, infra, p. 53.

C. A DECLARATION OF MARTIAL LAW IS NOT REQUIRED.

Appellant argues that martial law has not been declared on the Pacific Coast. (App. Op. Br. p. 19.)

The fact that martial law has not been proclaimed in Washington or California or that the military authorities have not taken over all civilian functions does not mean that the within principles of martial law do not apply to the measures undertaken by the military authorities on the Pacific Coast. No formal declaration of martial law was needed as a prerequisite to the measures of martial law which have already been undertaken. If the necessity exists to exercise military control in a particular manner, a proclamation is unnecessary. It is the necessity which provides the justification, not the issuance of a proclamation.[10]

As Mr. Justice Haney said in *Zimmerman v. Walker* (CCA-9), No. 10093, Dec. 14, 1942:

> "In other words, whether military government prevails is a question of fact depending on the existence of facts in the territory where it is supposed to be controlling, and a proclamation of the military that it exists is superfluous and ineffective." (p. 15 of dissent.)

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[10]As Professor Charles Fairman, the author of "The Law of Martial Rule" (1930), said concerning the issuance of Executive Order 9066, under the authority of which the evacuation of Japanese Americans is being accomplished:

> "Probably the problem will only be confused by talking about martial law. The President has made no such proclamation and if he did his constitutional powers would not be increased one whit. The question in every case of military control would still be, can the action complained of be justified as apparently reasonable and appropriate, under the circumstances, to the defense of the nation and the prosecution of the war?" (San Francisco Chronicle, March 4, 1942, p. 14.)

D. MARTIAL LAW BY THE TEST OF NECESSITY MAY BE LIMITED.

Likewise it is not necessary for the military authorities to replace civilian authority completely. Under martial law all civilian functions may be taken over, or it may be limited to particular phases concerning the defense of a military area such as the institution of curfew, dim-out, and the requiring of the evacuation of certain persons as in the present case.

As *Winthrop* says in *Military Law and Precedents,* Reprint, page 820:

> "Martial law is indeed resorted to as much for the protection of the lives and property of peaceable individuals as for the repression of hostile or violent elements. It may become requisite that it supersede for the time the existing civil institutions, but, in general, except in so far as relates to persons violating military orders or regulations, or otherwise interfering with the exercise of military authority, martial law does not in effect suspend the local law or jurisdiction or materially restrict the liberty of the citizen; it may call upon him to perform special service or labor for the public defense, but otherwise usually leaves him to his ordinary avocation."

Commonwealth ex rel. Wadsworth v. Shortall, 206 Pa. St. 165, 55 Atl. 942 (1903);

Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914);

In re Boyle (Idaho, 1899), 57 Pac. 706.

One of the best expressions of the principle is contained in *Bishop, New Criminal Law,* 8th Ed., sec. 53 (1892):

> "Martial law is elastic in its nature and easily adapted to varying circumstances. It may operate to the total suspension or overthrow of civil authority; or its touch may be light, scarcely felt or not felt at all by the mass of the people, while the Courts go on in their ordinary course, and the business of the community flows in its accustomed channels."

E. THE TEST OF NECESSITY SHOULD BE CONSONANT WITH TODAY'S MILITARY PROBLEMS.

The attack upon the curfew and Exclusion Orders is made upon the ground that the situation does not justify any action under martial law because the civil authorities in Washington and in California have not been deposed by an invasion and the civil Courts are open. As already indicated, reliance for this proposition that the necessitous situation first must be in this extremity is placed mainly upon the dictum of the majority in *Ex parte Milligan,* 4 Wall. 2 (1866). (App. Op. Br. pp. 10, 19.)

In 1864 Lambdin P. Milligan, a civilian and resident of the State of Indiana, was arrested by order of General Hovey. He was tried before a military commission convened at Indianapolis, on various charges of aiding the Southern cause, and sentenced to be hanged. At the time of the arrest Indiana was not threatened with attack, although previously Southern troops had invaded the State. Milligan's petition for a writ of habeas corpus reached the United States Supreme Court upon a certificate of disagreement from the Federal Circuit Court. The writ was granted upon the ground that Congress, to whom, the Court said, the power was committed, had

not authorized trial by military commission. This decision, joined in by all members of the Court, disposed of the case upon jurisdictional grounds. However, a bare majority of five went on gratuitously to say that Congress in any case would not have had the power to authorize trial by military commission at any place outside the theater of active war, because, it said:

> "Martial law cannot rise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the Courts and deposes the civil administration. * * * Martial rule can never exist where the Courts are open and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war." (p. 127.)

On the other hand, a minority of four, led by Chief Justice Chase, in a specially concurring opinion, took issue with this dictum and contended that:

> "Where peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war and some portions of the country are invaded and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies the authorization of military tribunals for the trial of crimes and offenses against the discipline and security of the army or against the public safety." (p. 140.)

Because of the frequent reference made in this case to the fact that the Courts in this combat zone were open and in the proper and unobstructed exercise of their jurisdiction, it is important to note that

this part of the majority dictum must be confined to the serious question of whether or not and upon what occasion a civilian may be tried by military commission.[11] It is difficult to perceive what application, one way or another, the fact that the Courts are open or not would have upon a determination of the justification for the Army's taking precautionary measures to prevent sabotage and espionage and to protect the civilian population within a theater of operations.

The view of the majority that martial law must be confined to the locality of actual war does not require a change of this phase of the test of necessity but merely a new and realistic conception of the type of warfare being waged today. In 1866, when the Supreme Court rendered the *Milligan* decision, the methods of warfare were such that a civilian government would be disrupted and unable to secure public safety at home only when a locality lay under the siege guns of an attacking force. The Court then was looking at a scene where the principal offensive force was the foot soldier and cavalry and where civilian authority could carry out its function of maintaining the safety of citizens until it was forced to flee by the imminent danger of capture. Seventy-six years ago the theater of actual war wherein the army might have to exert control was the area of operations of the contending armies.[12]

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[11] As the Court itself puts the question, "Upon the facts stated in Milligan's petition, and the exhibits filed, has the military commission mentioned in it jurisdiction, legally, to try and sentence him?" *Ex parte Milligan,* 4 Wall. 2, 118 (1866).

[12] "It also seems that the range of those acts must extend to the prevention of aid and comfort to the enemy beyond the bounds of

Appellant relying upon the concept of what constitutes "a theater of war" as defined in the *Milligan* case, declares that martial law measures cannot be adopted on the Pacific Coast because "there is on the Pacific Coast no theater of war". (App. Op. Br. p. 19.)

Even during the last World War, in *United States ex rel. Wessels v. McDonald,* 265 Fed. 754 (1920), a Federal Court held that New York Harbor was "within the theater of war". The decision upheld the authority of a naval court martial to try the plaintiff, Herman Wessels, as a German spy because of his espionage activities in the vicinity of New York Harbor. Wessels contended that on the basis of the *Milligan* case, the naval court had no jurisdiction to try him because his activities were in the United States, rather than in Europe where the fighting was going on. Furthermore, he contended the Federal Courts in the New York Federal District were functioning. On appeal the Federal Court upheld the jurisdiction of the naval court and pointed out:

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places where warlike operations are in sight. In many places there may outwardly be peace, and yet modern means of communication may admit of important aid being conveyed to the enemy in the shape of information, supplies, and personal adherents. In this manner the effective radius of a state of war has been multiplied tenfold or more. By recognizing this fact we do not alter the law, but apply it to the facts as they exist; nor do we disparage the wisdom of our predecessors who declared their opinion of the law in a form appropriate to the facts as known to them."

Sir Frederick Pollock—Law Quarterly Review, Vol. XVIII, page 152. (Written in 1904 when "modern" means of communication were still far behind those of the present.)

"What was not necessary a century ago may be necessary today."

Haney, J., dissenting in *Zimmerman v. Walker* (p. 15 of Opinion) *supra.*

> "The term 'theater of war', as used in the Milligan case, apparently was intended to mean the territory of activity of conflict. With the progress made in obtaining ways and means for devastation and destruction, the territory of the United States was certainly within the field of active operations. Great numbers of troops were being sent abroad, and in large numbers, sailing from the Port of New York. * * * Ships were being destroyed within easy distance of the Atlantic coast; there was a constant threat of and fear of airships above the harbor and City of New York on missions of destruction." (p. 764.)

What the Court said twenty-two years ago is now many times as obvious and applicable to the present situation on the Pacific Coast. A review of the authorities indicates that there is general agreement that the majority dictum went too far when it said that martial law cannot arise from a threatened danger; that the Courts and civil administration must already have been deposed.

Fairman, The Law of Martial Rule, p. 145;
Willoughby, Constitutional Law, 2nd Ed. III, 1602;
Glenn, The Army and the Law, 188-190.

The dictum of the majority fails to meet today's war-time conditions. It requires an invasion and the complete breakdown of civil government before the military may act.

Insistence upon applying the dictum of the *Milligan* case to today's conditions may be a judicial example of the disastrous error into which many democracies have fallen—that of affording more protection to the

civil liberties at home than to safeguarding them from the attacks from without.

Former Chief Justice Hughes, speaking before the American Bar Association in 1917 about the test in the *Milligan* case, said:

> "Certainly, the test should not be a mere physical one, nor should substance be sacrificed to form." (*War Powers Under the Constitution,* Sen. Doc. No. 105, 65th Cong., 1st Sess.)

In 1919 Judge Learned Hand, writing in *Commercial Cable Co. v. Burleson,* 255 Fed. Rep. 99 (1919), with reference to the President's power as Commander-in-Chief to take over cable lines for war use, declared:

> "But, indeed, it would be a lame comprehension of the scope and variety of modern war, which limited its activities to the immediate theater of military operations." (p. 104.)

Today our nation-wide civilian defense preparations illustrate that the entire area of the United States can be considered a theater of war. This was recently and vividly made clear by the landing on our eastern shores of German saboteurs whose sabotage objectives lay in various places in the East and Midwest. Today long-range bombing planes and carrier-based aircraft and far-roving submarines place a large portion of our country and State within the area of threatened invasion.

As the Court said in the case involving the German saboteurs:

> "Modern warfare is directed at the destruction of enemy war supplies and the implements of

> their production and transportation quite as much as at the armed forces." (*U.S. ex rel. Quirin v. Cox,* 11 U.S.L.W. 4001, U.S. Sup. Ct. Oct. 9, 1942.)

A number of District Courts of this Circuit, in cases involving the evacuation, detention and curfew orders pertaining to American citizens of Japanese ancestry have already adopted the modern criterion of what conditions will justify the institution of martial law in time of war. In general in these cases it was contended that these orders were not proper exercises of martial law as under *Ex parte Milligan,* supra, no invasion had closed the Courts or deposed the civilian authorities.

In *Ex parte Ventura,* 44 Fed. Supp. 520 (1942), the petitioner, a Japanese-American citizen and resident of Seattle, sought by a petition for a writ of habeas corpus to question the authority of the Commanding General of the Western Defense Command to issue curfew orders applicable to American citizens of Japanese ancestry. The Court denied the petition not only on the ground that no actual detention was sought, but also because the curfew order was a proper military measure in the light of present conditions in the Western Theater of Operations despite the fact that the situation did not meet the test of necessity in the *Milligan* case, and said:

> "The United States is at war—a war such as this nation and this world has never seen before. We are in a recently declared Military Area. The orders, commands and laws complained of are intended to safeguard such Military Area." (p. 522.)

"In the Civil War when Milligan was tried by military commission no invasion could have been expected into Indiana except after much prior notice and weary weeks of slow and tedious gains by a slowly advancing army. They then never imagined the possibility of flying lethal engines hurtling through the air several hundred miles within an hour. They never visioned the possibility of far distant forces dispatching an air armada that would rain destroying parachutists from the sky and invade and capture far distant territory over night. They never had to think then of fifth columnists far, far from the forces of the enemy successfully pretending loyalty to the land where they were born, who in fact, would forthwith guide or join any such invaders. The past few months in the Philippines, of which the petitioner's husband is a citizen, establish that apparently peaceful residents may become enemy soldiers overnight. The orders and commands of our President and the military forces, as well as the laws of Congress, must, if we secure that victory that this country intends to win, be made and applied with realistic regard for the speed and hazards of lightning war.

* * * * * * *

"I do not believe the Constitution of the United States is so unfitted for survival that it unyieldingly prevents the President and the Military, pursuant to law enacted by the Congress, from restricting the movements of civilians such as petitioner, regardless of how actually loyal they perhaps may be, in critical military areas desperately essential for national defense." (p. 523.)

The trial Court in the instant case reiterated these views. (*United States v. Hirabayashi,* U.S.D.C., W.D. Wash., N.D. No. 45738 (Sept. 15, 1942)).

One Lincoln Seiichi Kanai, an American citizen of Japanese ancestry, sought to obtain his release through a writ of habeas corpus when he was taken into custody in Milwaukee, Wisconsin, for his return to San Francisco to stand trial upon an information charging him with having left Military Area No. 1 contrary to the exclusion orders of Lieutenant General DeWitt. His petition (*Ex parte Kanai,* 46 F. Supp. 286 (D.C., Wis. 1942)), challenged the reasonableness of creating the military areas. In denying the petition Judge F. Ryan Duffy said:

> "* * * This court will not constitute itself as a board of strategy, and declare what is a necessary or proper military area.
>
> "* * * The field of military operation is not confined to the scene of actual physical combat. Our cities and transportation systems, our coastline, our harbors, and even our agricultural areas are all vitally important in the all-out war effort in which our country must engage if our form of government is to survive. * * * The theater of war is no longer limited to any definite geographical area. Saboteurs have already landed on our coasts. This court can take judicial notice of the extensive manufacturing facilities for airplanes and other munitions of war which are located on or near our west coast." (p. 288.)

II. THE CURFEW AND EVACUATION MEASURES WERE PROPER EXERCISES OF MARTIAL LAW.

In an area of operations where there is a possibility that the civilian population will interfere with the defense of the area or decrease its usefulness as a

base for offensive action, the imposition of curfew and evacuation measures is a recognized procedure of limited martial law. In view of the contention that these measures deprived the appellant and his fellow Japanese of the right of trial by jury and the associated rights of an accused, it is of the utmost importance to keep in mind that these measures are preventive and precautionary only. The question in all cases is the apparent appropriateness of the measures as a means of meeting the emergency. Therefore the appellant's contentions concerning the denial of a trial by jury are not in point here. In those cases arising out of peace-time domestic disturbances the Courts conceded the right of the military authority to take precautionary and preventive measures such as the imposition of curfew hours or the removal of persons from disturbed areas until the restoration of peace, without holding any trial.

In *Moyer v. Peabody,* 212 U. S. 78 (1909), the Supreme Court upheld the sustaining of a demurrer to a complaint seeking damages against a governor and his military commanders for detaining one Moyer, the head of a miners' organization, on the ground that it was a proper measure of martial law. The disorder was attributed to the actions of the members of the organization. It was alleged that the imprisonment, which had been for a period of two and a half months, was without probable cause and that the plaintiff had been deprived of his liberty without due process of law. As in the present case, it was alleged that no complaint had been filed against Moyer and that the civil Courts were open, reliance

being placed upon *Ex parte Milligan,* 4 Wall. 2 (1866), and *Ex parte Merryman,* 9 Am. L. R. 524, 17 Fed. Cas. No. 9487 (1861). (p. 80 of 212 U. S.) The Court, in upholding the judgment, first pointed out that the detentions of persons for the purpose of restoring order were not by way of punishment "but are by way of precaution to prevent the exercise of hostile power". (p. 85.) Speaking through Mr. Justice Holmes the Court then said:

> "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See *Keely v. Sanders,* 99 U. S. 441, 446. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, *that the same is true of temporary detention to prevent apprehended harm.* * * *" (p. 85.) (Emphasis added.)

Moyer had previously petitioned the Colorado Courts for a writ of habeas corpus to obtain his release from the military detention. (*In re Moyer,* 35 Colo. 154, 85 Pac. 190 (1904).) The writ was denied and the detention as a proper measure of martial law was upheld in these words:

> "To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of

his constitutional rights. *He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of law* * * *. *His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the Governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress.* * * * *It is true that petitioner is not held by virtue of any warrant, but, if his arrest and detention are authorized by law, he cannot complain* * * *." (85 Pac. 193.) (Emphasis added.)

Cox v. McNutt, 12 F. Supp. 355 (1935);

In re Boyle (Idaho, 1899), 57 Pac. 706;

Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914).

The conclusion to be drawn from such precautionary measures of martial law has been well stated by Wiener, supra:

"Whenever there is riot or insurrection, there are pretty certain to be ringleaders; once these are apprehended, the back of the disturbance is likely to be broken. Accordingly, commanders ordered into the field to suppress domestic disorders have almost invariably centered their attention on the heads of the offending movement, have arrested them, and have kept them in custody until such time as the disorders subsided and/or the persons detained could be turned over to the civil authorities for trial. *In many instances, no trial ever took place; the detention was conceived to be entirely preventive and not at all punitive.* * * * This procedure, which did not involve the suspension of the writ of habeas corpus, or the supersession of civil courts

by military tribunals, or indeed any domination of the civil authorities by the military but rather the closest cooperation between them, *has come fairly generally to be known as qualified martial law or preventive martial law.* Where there has been violence or disorder in fact, continued detention of offenders by the military is so far proper as to result in a denial by the courts of writs releasing those detained and a refusal, after they have been released, of damages for false imprisonment. The legality of the practice has been sustained in Idaho, Colorado, Montana, New Mexico, Indiana, and Iowa, and has received the imprimatur of approval of the United States Supreme Court in *Moyer v. Peabody.* It is, therefore, hardly open to question today." (Para. 71, pp. 66-67.) (Emphasis added.)

Fairman reaches a similar conclusion:

"It would seem to follow from the foregoing that preventive detention for a reasonable period is regarded by the courts as a legitimate means of coping with an insurrection, and that in the exercise of judicial discretion a writ of habeas corpus may not be allowed if it would interfere with the governor in the performance of his duty to suppress insurrection." (Para. 44, p. 177, *The Law of Martial Rule.*)

If such precautionary measures may be undertaken in times of domestic unrest they are also proper in time of war when the life of the nation is at stake.

During the last World War the British House of Lords, in *Rex v. Halliday* (1917), A.C. 260, affirming (1916) 1 K.B. 238, upheld the propriety of regulations by which the residence of any person could be

regulated or any person removed or interned in view of the hostile origin or associations of the person, when it appeared to the Secretary of State expedient for securing the public safety. The Court said:

> "One of the most obvious means of taking precautions against dangers such as are enumerated is to impose some restriction on the freedom of movement of persons whom there may be any reason to suspect of being disposed to help the enemy. It is to this that reg. 14B is directed. *The measure is not punitive but precautionary.* It was strongly urged that no such restraint should be imposed except as the result of judicial inquiry, and indeed counsel for the appellant went so far as to contend that no regulation could be made forbidding access to the seashore by suspected persons. It seems obvious that no tribunal for investigating the questions whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. * * *" (p. 269.)

The Court then makes some observations which we believe are particularly pertinent to the instant case:

> "However precious the personal liberty of the subject may be, there is something for which it may well be to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. *It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the Executive.* What is contended is that the Executive has been empowered

during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of fact." (p. 271.)

"One of the most effective ways of preventing a man from communicating with the enemy or doing things such as are mentioned in s. 1, sub-s. 1(a) and (c), of the statute is to imprison or intern him. In that as in almost every case where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is, under this statute, inflicted for something much more important than his liberty or convenience, namely, for securing the public safety and defence of the realm." (p. 273.)

See

King v. Governor of Wormwood Scrubbs Prison (1920), 2 K. B. 305.

It is true that the regulations or orders provided that the internee could make any representations to an advisory committee against the order, which would then make a report to the Secretary. This in no way affected the broad discretionary power given to him, nor did it take from him the sole power to decide whether the internment order should be revoked or varied. This is evident from the language of the order, "If I am satisfied by the report * * * that the order may be revoked or varied without injury to the public safety or defence of the realm, I will revoke or vary the order * * *."

And more recently, under conditions of World War II, where sabotage and espionage are being

employed as instruments of warfare as never before, the English Courts have upheld the power of the Executive to remove or detain citizens whose actions might endanger the conduct of the war. In *Liversedge v. Anderson,* 3 All. Eng. Rep. 338 (1941), the House of Lords upheld the internment of a British citizen under Regulation 18B of the Emergency Powers (Defence) Act of 1939 (2 and 3 Geo. VI, c. 62), which provided that the Secretary of State could make detention orders "with a view to preventing (the internee) acting in a manner prejudicial to the public safety or defence of the realm." The House of Lords reiterated what it had previously said in *Rex v. Halliday,* supra:

> "At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention." (Per Lord Macmillan, p. 47.)

In commenting upon the English decisions Professor Fairman says:

> "All of this, one may say, is no precedent for construing our own Constitution. But where kindred people who once held the same doctrines as ourselves have been driven to adopt new views of war power, that experience is most persuasive in weighing the authority to be conceded to our own government in like emergencies." (55 Harvard L. Rev. 1253, 1256.)

III. CONGRESS HAD THE POWER TO ENACT PUBLIC LAW 503 IN AID OF THE PRESIDENT'S POWER AS COMMANDER-IN-CHIEF AND OF HIS SUBORDINATE COMMANDING GENERALS TO MAKE RULES PERTAINING TO THE CONDUCT OF CIVILIANS IN PRESCRIBED MILITARY AREAS.

Thus far it has been established that the President as Commander-in-Chief of the Army and Navy and his military commanders, in the exercise of their constitutional duty to conduct the war, may undertake measures of martial law by virtue of the military situation in Pacific Coast military areas. The validity of these measures springs from military necessity and does not depend upon a formal proclamation of martial law. The application of curfew or evacuation measures to all persons of Japanese ancestry in designated military areas on a group rather than on an individual basis was a measure reasonably appropriate under the emergency confronting the President and Lieutenant-General J. L. DeWitt, the Commanding General of the Western Defense Command. It was a valid exercise of limited martial law undertaken by them in the discharge of their constitutional powers and duty to conduct the war successfully.

This brings us to the third question involved herein, namely: Could Congress under its war powers enact Public Law 503 (77th Cong., 2nd Sess., Ch. 191, March 21, 1942)[13] to aid the President in the carrying out of the described constitutional duty to conduct the war?

As already noted in the statement of facts, Public Law 503 specifically refers to entering, remaining in

[13]Supra, n. 4.

or leaving a prescribed military area or the doing of any other act contrary to the restrictions applicable in the area, or to the order of the Secretary of War or any designated military commander. A person cannot be found guilty thereunder unless he knew or should have known of the existence and the extent of the restrictions and orders and that his act was in violation thereof. This law is attacked on the ground that it improperly delegates to the President, the Secretary of War or any designated military commander the power first to designate the military area or zone and then to determine the acts prohibited therein, the doing of which the law makes criminal. (App. Op. Br. p. 25.)

Public Law 503 is not an unconstitutional delegation because the power to designate military areas in domestic territory and, under military necessity, to forbid the doing of acts therein already resides in the President and his subordinate military commanders by virtue of the war power. (Supra, Pt. I.) Such are the martial law powers of the military authorities. This right to prescribe the military areas and to make restrictions therein resides in the military authorities without any authority from Congress.

Public Law 503 by its terms clearly recognizes the martial law powers of the President and his subordinate military commanders to be exercised within military areas and zones. All this law attempts to do is to provide a criminal penalty for disobedience of the restrictions which the military authorities thus impose under their constitutional powers. That this was

its purpose is evident from the congressional debates on the law at the time of its passage. (Congressional Record, March 19, 1942, pp. 2804 to 2808, 2812, 2813.)

The United States Supreme Court has recognized the power of Congress to provide sanctions for the carrying out of the constitutional powers of the Presidency. In *United States v. Curtiss-Wright Corporation,* 299 U. S. 304 (1936), the Supreme Court upheld a criminal statute passed for the purpose of assisting the President in carrying out his constitutional power to deal with foreign affairs. A congressional resolution authorized the President to prohibit the sale of munitions of war in the United States to countries engaged in war in the Chaco region of South America, except under such limitations and exceptions as he might prescribe, whenever he found that such prohibition would contribute to the re-establishment of peace between the countries involved. The resolution in effect provided a fine and/or imprisonment for sales made in violation of the proclamation. (p. 312.) The President thereafter made such findings in his proclamation. An indictment charging a violation of the Joint Resolution and the Proclamation of the President was demurred to on the grounds that the resolution constituted an unlawful delegation of legislative power to the executive. In part it was contended that the resolution was unconstitutional because it only went into effect upon the making of a proclamation which was left to his unfettered discretion, thus constituting an attempted substitution of the President's will for that of Congress, and also that the extent of its operation in particular cases

was subject to limitations and exceptions by the President, controlled by no standard. In rejecting these contentions (p. 329) the Court said that in such external matters as foreign affairs and the waging of war the general rule regarding unlawful delegation of legislative authority either did not apply to such matters or would be very broadly construed.

> "Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs."

Similarly the same freedom of action must be allowed the Commander-in-Chief in his conduct of the war. Part of the President's war power is the right to establish measures of martial law. This right is derived from his constitutional position and does not require an act of Congress for its exercise. Pointing out that the power to conduct foreign affairs was derived from the constitutional powers of the President, the Court said:

> "It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—*a power which does not require as a basis for its exercise an act of Congress,* but which, of course,

like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." (pp. 319-320.) (Emphasis added.)

Congress, to assist the President in the carrying out of his constitutional duty, may by statute provide a sanction to be administered in the Federal Courts, just as Congress did in the *Curtiss-Wright* case, to assist the President in carrying out his function in the field of international relations. It should be noted that in the *Curtiss-Wright* case the statute was upheld although it provided a punishment for the violation of the President's proclamation, which was to be made after the passage of the congressional act.

A. The Assumed Delegation of Authority in Public Law 503 Is Not Unconstitutional.

Measured by the principles prohibiting the delegation of legislative power the validity of the Act may be questionable if viewed from the standpoint of cases based upon peace time conditions. But its validity is much less in doubt when judged by what Courts have said with reference to the large scope which necessarily must be left to the executive in time of war.

Martial Law in California, 31 Calif. Law Rev. 6 at 14 (Dec. 1942).

It is becoming increasingly clear that today the rule prohibiting delegation is not absolute but is to be applied in view of the need in the particular case for the delegation.

While it is believed that Public Law 503 is valid when construed as a law which merely provides a

sanction for the carrying out of an otherwise proper constitutional power committed to the President, nevertheless the law is not unconstitutional if it is interpreted as delegating to the President, the Secretary of War or designated military commanders the power to define the military areas or zones and to prescribe restrictions therein the violation of which the statute makes criminal.

A leading case directly in point on the right of Congress to leave to the Executive the designation of the area within which an act may be criminal is

McKinley v. United States, 249 U. S. 397 (1919), wherein an Act of Congress authorizing the Secretary of War to do everything "deemed necessary to suppress and prevent the setting up of houses of ill fame * * * within such distance as he may deem needful of any military camp * * *" was not held to be an unconstitutional delegation of legislative power. As stated by the Court:

> "Congress may leave details to the regulation of the head of an executive department, and punish those who violate the restrictions."

In other phases of Federal activity, the Courts have upheld legislation making the violation of regulations a criminal act. In

Avent v. United States, 266 U. S. 127 (1924), the Transportation Act (41 Stat. 456) authorized the Interstate Commerce Commission whenever it is of the opinion that shortage of equipment, congestion of traffic or other emergency requiring immediate action exists in any section of the country, to make such reasonable rules with regard to it as in the Commis-

sion's opinion will best promote the service in the interest of the public and the commerce of the people. It also authorized the Commission to give directions for preference or priority in the transportation or movement of traffic. The defendant was indicted for a violation of a priority order. Holding that no constitutional question was involved, the Court said:

> "That it (Congress) can give the powers here given to the Commission, if that question is open here, no longer admits of dispute. *Interstate Commerce Commission v. Illinois Central Railroad Co.*, 215 U. S. 452; *United States v. Grimaud*, 220 U. S. 506.
>
> "The statute confines the power of the Commission to emergencies, and the requirements that the rules shall be reasonable and in the interest of the public and commerce fixes the only standard that is practicable or needed.
>
> "Congress may make violations of the Commission's rules a crime."

The standard implied in Public Law 503 is that the restrictions must be appropriate to the conduct of the war in a military area. Orders of the military authorities beyond this test would be held to be *ultra vires* as being beyond the constitutional powers of the armed forces. In other words Public Law 503 is likewise confined to emergency situations and impliedly contains the requirement that the measures of martial law must bear a reasonable connection to military necessity. This is the only practicable standard which Congress could set down. What restrictions would be appropriate will change, from time to time and from place to place, with the changing war situation. It is the

only standard under the circumstances "that is practicable or needed". (*Avent v. United States,* supra.)

With reference to the violation of Civilian Exclusion Orders such as No. 57, the one immediately involved here, it is important to note that the standard for these evacuation orders is specifically set forth in Public Law 503 which declares that "whoever shall enter, *remain in,* leave, * * *" any prescribed military area or zone contrary to the restrictions applicable in the area or zone shall be guilty of a misdemeanor. Hence, having in mind the foregoing authorities with reference to the power of Congress to authorize the issuance of regulations by executive branches of the government for the purpose of applying a standard and to make a disobedience of such regulations a crime, it clearly appears here that with reference to Civilian Exclusion Orders such as No. 57, the standard of remaining in a military area or zone is clearly set up in the statute.

In

Campbell v. Chase National Bank, 5 Fed. Supp. 156 (1933),

Congress (Title 50, App. sec. 5) authorized the President in time of war or other national emergency recognized and declared by him, to investigate, regulate and prohibit exporting, hoarding, melting or earmarking of gold or silver coin, etc. He was also authorized to make necessary rules and regulations. The Court, in holding that this grant of authority was not an unconstitutional delegation, declared:

> "It is now also settled that a regulation made within the mandate of such delegated power may

> be the basis of criminal proceedings." (Citing cases and *McKinley v. United States,* 249 U. S. 397.)

It should be noted that it is Congress which makes the disobedience of the military restrictions a crime and that no effort is made by the military authorities to prescribe, limit or enlarge the criminal penalty. In *United States v. Grimaud,* 220 U. S. 506 (1911), it was held that a statute providing that the Secretary of Agriculture "may make such rules and regulations * * * to regulate the use and occupancy (National Forest Reservations) and to preserve the forest therein from destruction; and any violation of the provisions of this act and such rules and regulations shall be punished" as provided by statute, was not an invalid delegation of legislative power, the Court saying:

> "A violation of reasonable rules regulating the use and occupancy of the property is made a crime, not by the Secretary, but by Congress. The statute, not the Secretary, fixes the penalty."

In the instant case the restrictions and orders are based upon military necessity and the carrying out of the President's power to conduct the war. The violation of these restrictions and orders based upon military necessity is made a crime, not by the President, the Secretary of War or the military commander, but by Congress. The statute, not the President, the Secretary or the military commander, fixes the penalty.

With reference to the general question of the delegation of legislative power raised in the brief of de-

fendant in the instant case, the Court will obtain considerable assistance from a discussion by former Chief Justice Charles Evans Hughes on the war power, in an address before the American Bar Association in 1917 (Sen. Doc. 105, 65th Congress, 1st Session) wherein he said in part:

> "We are making war as a nation organized under the Constitution, from which the established national authorities derive all their powers, either in war or in peace. The Constitution is as effective today as it ever was and the oath to support it is just as binding. *But the framers of the Constitution did not contrive an imposing spectacle of impotency. One of the objects of a 'more perfect Union' was 'to provide for the common defense'. A nation which could not fight would be powerless to secure 'the blessings of Liberty to Ourselves and our Posterity.'* * * *"

Then, directing his remarks to the question of the delegation of legislative powers in war time to the executive branch, the former Chief Justice said:

> "* * * War demands the highest degree of efficient organization, and Congress in the nature of things can not prescribe many important details as it legislates for the purpose of meeting the exigencies of war. Never is adaptation of legislation to practical ends so urgently required, and hence Congress naturally in very large measure confers upon the President the authority to ascertain and determine various states of fact to which legislative measures are addressed. Further, a wide range of provisions relating to the organization and government of the army and navy which Congress might enact if it saw fit, it authorizes the President to prescribe. The principles govern-

ing the delegation of legislative power are clear, and while they are of the utmost importance when properly applied, they are not such as to make the appropriate exercise of legislative power impracticable. 'The Legislature can not delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which can not be known to the lawmaking power, and must, therefore, be a subject of inquiry and determination outside of the halls of legislation.' (*Field v. Clark,* 143 U. S. 649, 694; see also *Little v. Barreme,* 1804, 2 Cranch 170, and *Martin v. Mott,* 1827, 12 Wheat. 29.) * * *"

Stewart v. Kahn, 11 Wall. 493 (1870).

The argument for the validity of Public Law 503, which seeks to assist the Commander-in-Chief in the conduct of the war, was best stated by Alexander Hamilton in the Federalist, when he was discussing the reasons for not defining and specifying the war power of Congress:

"The authorities essential to the common defense are these: to raise armies; to build and equip fleets; to direct their operations; to provide for their support. These powers ought to exist without limitation, *because it is impossible to foresee and define the extent and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power

ought to be coextensive with all the possible combinations for such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense." (Federalist XXIII.)

B. Ratification of Exclusion Orders by Congress.

Assuming that it was necessary for Congress to authorize the exclusion of persons from military areas in order to meet objections regarding the delegation of power, it adequately appears from the Congressional Record, March 19, 1942, pages 2804-2808, 2812, 2813, that Congress ratified the exclusion because at the time of the passage of Public Law 503 Congress had before it not only the Presidential Executive Order 9066, but the proclamations made pursuant thereto. These proclamations, Nos. 1 and 2, designated the military areas and specifically stated that such persons or classes of persons as the situation required would be excluded from the prescribed military areas.

C. Public Law 503 Is Not Invalid on the Ground of Uncertainty.

The contention is made that Public Law 503 is invalid because it falls within the rule that a criminal statute which does not define with certainty the acts prohibited is void. It is charged that the law does not inform a person of the nature and cause of the charge to be made against him and therefore violates the Fifth and Sixth Amendments to the United States Constitution.

The fundamental reason for all rules regarding certainty in criminal statutes is that a man cannot be

punished for the doing of an act unless he had an opportunity to know just what was prohibited and just what was permitted. Where a statute itself defines the prescribed act with certainty, the law says that ignorance of the terms of the statute is no excuse. The ready answer to the objections to Public Law 503 on the ground of uncertainty is that the law is far more considerate of an accused and fulfills the requirements of certainty with much greater strictness than the ordinary rules require, because it provides that a person can be punished only "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".

IV. THE DECISIONS OF DISTRICT COURTS HAVE UPHELD THE VALIDITY OF THE EXCLUSION AND CURFEW ORDERS.

In other cases coming before Federal District Courts involving the right to evacuate American citizens of Japanese ancestry, or to impose curfew regulations upon them, it was contended as here that such interference with the person was unconstitutional because it was accomplished without affording a trial by jury and deprived persons of liberty and property without due process of law. It was contended that there was no constitutional power to issue Executive Order 9066 or the evacuation orders of Lieutenant General J. L. DeWitt, under which persons of Japanese ancestry and other persons believed dangerous have been excluded from military areas or detained in connection

with such exclusion. Public Law 503 (77th Cong., 2nd Sess., Ch. 191), which makes it a misdemeanor for persons to disobey the orders of a military commander in a military area, was said to be an unconstitutional delegation of power to the military authorities. As already noted, these contentions were in part based upon the ground that these orders were not proper exercises of martial law as under *Ex parte Milligan,* supra, no invasion closed the Courts or deposed the civil authorities.

The Court below, in overruling the demurrer based upon the arguments just reviewed, declared:

> "After grave and careful consideration of the arguments and authorities presented and of the extremely important phases of this question I am satisfied that Executive Order 9066, Public Law 503, the curfew regulation and Exclusion Order 57 are constitutional and valid, that the indictment is sufficient and that the attack the defendant has made against it must fail."

The decision points to the fact that the extent of constitutional power depends upon the need for its exercise and, in the language of *State of California v. Anglim,* 128 Fed. (2d) 455 (CCA-9th, 1942), states:

> "'* * * The same act at one time may be regarded as constitutional by facts judicially noted or other facts then shown, and at another time, on other known or proved facts, be held unconstitutional. It was so held in an opinion by Mr. Justice Holmes in Chastleton Corp. v. Sinclair, 264 U. S. 543, 548, 549, 44 S. Ct. 405, 68 L. Ed. 841, in determining the constitutionality of the rent regulating law for the District of Columbia.'"

The views expressed by the same writer in *Ex parte Ventura,* 44 Fed. Supp. 520 (1942), with reference to the situation under modern conditions when measures of martial law may be imposed upon civilians in this country were affirmed, with the Court further stating:

> "Unquestionably, the constitutional grants and limitations of power applicable to the question here involved are set forth in general clauses. Therefore, our Constitution does permit Congress and our President, as Commander in Chief in time of war, to make and enforce necessary regulations to protect critical military areas desperately essential for national defense. In these days of lightning war this country does not have to submit to destruction while it awaits the slow process of Constitutional amendment."

In *United States v. Korematsu,* U.S.D.C., N.D. Cal., S.D., No. 27,635-W (1942), the defendant, an American citizen of Japanese ancestry, raised similar objections by demurrer to an information filed against him in the United States District Court in San Francisco charging him with the violation of an exclusion order issued by Lieutenant General J. L. DeWitt pursuant to Presidential Executive Order 9066 and Proclamation No. 1. The issues involved were thoroughly briefed by counsel representing the Government and the defendant, as well as the American Civil Liberties Union acting as *amicus curiae* on behalf of the defendant, and the State of California appearing in the same capacity on behalf of the plaintiff, the United States Government. The demurrer was overruled by Judge Martin I. Welsh on September 1, 1942, and later Korematsu was tried and convicted by Judge

A. F. St. Sure.[14] (San Francisco Recorder, Sept. 9, 1942.)

In *Ex parte Kanai,* 46 F. Supp. 286 (D.C., E.D. Wis. July 29, 1942), the petitioner challenged the constitutionality of Presidential Executive Order 9066, the exclusion orders and Public Law 503. Judge F. Ryan Duffy, in denying the petition, not only called for a new definition of the theater of war but held that the exclusion orders of the military authorities were a constitutional exercise of the war power.

> "Rights of the individual, under our federal Constitution and its amendments, are not absolute. When such rights come into conflict with other rights granted for the protection and safety and general welfare of the public, they must at times give way. * * * *In re Schroeder Hotel Co.* (CCA, 7th), 86 F. (2d) 491; *Hitchman Coal & Coke Co. v. Mitchell, et al.,* 245 U. S. 229. * * *
>
> "That there is nothing about the executive order, or the designation of the military areas, which is unconstitutional, is very certain, considering the necessities and the exigencies of war which have already struck upon our Pacific Coast." (p. 288.)

These rulings fully support the principles of law stated here.

In *U. S. v. Yasui* (D.C. Ore., No. C-16,056, Dec. 16, 1942), the defendant was convicted under Public Law 503 for violation of the curfew regulations here under review, the Court, rejecting arguments that 503 was unconstitutional. However, by way of dicta this Court expresses the sole doubt regarding the in-

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[14]An appeal has been taken to this Court. *U. S. v. Korematsu,* CCA-9, No. 10,248.

ability of military commanders to apply such restrictions to citizens residing within military areas. The basis for the decision, namely, that there must first be a declaration of martial law and that such restrictions cannot be adopted as a form of partial martial law is opposed by the great weight of authority.[15]

Fairman, Law of Martial Rule, Harvard Law Review, June, 1942, page 1287, et seq.

See Haney, J. dissenting in
Zimmerman v. Walker, supra.

V. EXTENT OF JUDICIAL REVIEW OF ACTS UNDER MARTIAL LAW.

In passing upon the means adopted to meet the war conditions on the Pacific Coast it must be remembered that the Courts will grant to the President as Commander-in-Chief and his Commanding General a range of honest discretion. In *Sterling v. Constantin,* 287 U. S. 378 (1932), the United States Supreme Court, referring to the use of martial law in peace time in aid of the civil authorities, states the principle in this way:

> "The nature of the power also necessarily implies that *there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless.* Such measures, conceived in good faith, in the face of the emergency and directly related

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[15] *Supra,* pp. 19-21.

> to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." (p. 399.) (Emphasis added.)

Certainly, in time of war, approval will be given to the exercise by the President and his military commanders of even greater powers of preventative and precautionary control, subject of course to the limitation that such measures, to use the language of *Sterling v. Constantin,* "are conceived in good faith in the face of the emergency and directly related" to the danger at hand.

Speaking of the scope in the choice of means to be allowed in the exercise of war powers, the Court said in *Stewart v. Kahn,* 11 Wall. 493 (1870):

> "The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

The removal as a group of persons of Japanese ancestry, alien and citizen alike, was an expeditious and effective way of removing from vital military areas those members of the group who might engage in sabotage or espionage. It cannot be said that the danger did not exist.

> "As a rough generalization—and since the attack on Pearl Harbor there has been opportunity for nothing more—it can hardly be said to be unreasonable to go on the assumption that among the Japanese communities along the coast there is enough disloyalty, potential if not active, to make it expedient to evacuate the whole. Perhaps

> ninety-nine peaceful Japanese plus an unascertainable one who would signal to a submarine would add up to a sufficient reason for evacuating. If it were a matter of punishment, this sort of reasoning would be brutal. But no one supposes that evacuation, any more than detention under Regulation 18B in England, is defensible on any other basis than prevention. When one considers the irreparable consequences to which leniency might lead, the inconvenience, great though it may be, seems only one of the unavoidable hardships incident to the war. In this judgment General DeWitt doubtless acted on such intelligence as was available, and, it is to be remembered, with the express sanction of the President and the Congress." (Fairman, *The Law of Martial Rule and the National Emergency,* 55 Harv. L. R. 1254, 1302 (June, 1942).)

The emergence of a substantial group of the supporters of Japan among the persons of Japanese ancestry at the Manzanar and Parker Dam Relocation Centers resulting in serious riot and bloodshed provides additional evidence that the fears of the military authorities that disloyal elements were resident within the Pacific military zones were well founded. The possibility that these elements would have been disclosed through the holding of individual hearings is, at least, sufficiently doubtful that it can not be said that the Commanding General committed an abuse of discretion when he elected to remove all persons of Japanese ancestry as a group from vital Pacific Coast military areas. The evacuation was obviously conceived in good faith in the face of emergency and directly related to the danger at hand, and the par-

ticular program selected was well within the range of honest judgment permitted the Commanding General in meeting the emergency. (*Sterling v. Constantin, supra.*)

As the United States District Court for the Southern District of New York recently said in *United States v. Uhl,* U.S.D.C., S.D.N.Y., July 10, 1942, 11 L. W. 2107, with reference to the President's proclamation in ordering the detention of enemy aliens:

> "This court, in times like these, will resolve any doubts it may have * * * in favor of the President's and Attorney General's actions."

Or as pointed out in *United States v. Hirabayashi,* U.S.D.C., W.D. Wash., N.D., No. 24,738 (1942), *supra:*

> "Nor can defendant substitute his judgment for the judgment of the Commander in Chief and the general acting under the President's direction, pursuant to constitutional powers and the Congressional ratification and authority of Public Law 503."

The argument here presented can well be concluded with what this Court recently said in *Zimmerman v. Walker,* CCA-9, No. 10,093, Dec. 14, 1942:

> "The civil courts are ill adapted to cope with an emergency of this kind. As a rule they proceed only upon formal charges. Their province is to determine questions of guilt or innocence of crimes already committed. In this respect their functions are punitive, not preventive; whereas the purpose of the detention of suspected persons in critical military areas in time of war is to forestall injury and to prevent the commission of acts helpful to the enemy. It is settled that the detention by the military authorities of persons

engaged in disloyal conduct or suspected of disloyalty is lawful in areas where conditions warranting martial rule prevail. Measures like these are essential at times if our national life is to be preserved. Where taken in the genuine interest of the public safety they are not without, but within, the framework of the constitution." Op. PJ

CONCLUSION.

The State of California, in view of its position in the Pacific combat zone and in the western theater of operations, is directly interested in having this Court define the principles of martial law upon which the military authorities during this period of war may adopt measures for the purpose of protecting the civilian population of the State and for facilitating the conduct of the war. It is believed that the military authorities should be able to act with reference to the present type of total warfare before invasion has deposed the civilian authorities and closed the civil Courts. To accomplish this it should be recognized that the military authorities may establish limited martial law, that is, measures may be adopted for the accomplishment of specific military objectives without otherwise impinging upon the authority of the civil officers of the State.

Upon the fundamental principle of necessity the test should be the appropriateness of the measures to meet the military situation. Such appropriateness in part would depend upon the ability of civil government, constitutionally and legally, within due time to take the action required. It would also partly depend

upon the adequacy of the civil-criminal law promptly and with sufficient severity to deal with acts endangering security in a theater of operations. Martial law is the law of necessity, civil law is not. However, when the necessity exists civil government, nevertheless, will attempt to take action that violates both constitutional and statutory law. It is far better to leave to the military authorities the power to carry out measures which the military situation requires for the protection of the community and the conduct of the war rather than to have civil government take action by short-cutting, democratic processes and overriding constitutional limitations.

At all times it is believed that the Courts must remain the final arbiter of what constitutes appropriate action within the range of honest judgment permitted to the President and his military commanders in the discharge of their constitutional duty of conducting the war to a successful conclusion.

It appears that the treating of persons of Japanese ancestry as a group rather than on an individual basis was justified in view of the pressing military necessity which confronted the Commanding General of the Western Defense Command. Public Law 503 validly provides a sanction for the enforcement of the orders of the President and his military commanders issued not under any delegated power but derived from their constitutional power to wage the war successfully. Even if the constitutionality of Public Law 503 is measured from the standpoint that such a delegation is attempted by the statute, the delegation is not improper. Congress, under its war power, could only thus meet the serious problem confronting the military

commanders on the Pacific Coast, not only with reference to evacuation of persons from military areas but also concerning the taking of all needful steps which the prosecution of the war and the protection of the civilian population required.

The considerations advanced here are made with a realization of the importance of preserving the fundamental rights of all citizens. But it is obvious that the great constitutional guarantees of personal and property rights are not absolute and must in times of war give way to the fundamental right of the public person, the State, to preserve itself. As Chief Justice Hughes said, when speaking before the American Bar Association in 1917, at another critical period in our history,

> "We are making war as a Nation under the constitution, from which the established national authorities derive all their powers either in war or in peace. Self-preservation is the first law of national life and the constitution itself provides the necessary powers in order to defend and preserve the United States." (Sen. Doc. 105, 65th Congress, 1st Session.)

If in time of war the State may conscript its citizens, possibly to give up their lives, and may requisition all that they possess for their country's cause, the State in order to better prosecute this war of national survival should be able to adopt the mild precautionary measures with reference to persons of Japanese ancestry living in the Pacific combat zone.

There is no merit in the contention that such a justifiable martial law measure as this will lead to military dictatorship. That it is necessary to curtail temporarily the rights of citizens through martial law

does not mean that such practice will be continued in times of peace. We cannot believe this any more than we can believe that "a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life".[16]

The fact that today we find it necessary to curtail the rights of citizens in the interest of a successful prosecution of the war does not mean that these rights will remain restricted throughout the indefinite peaceful future which we all trust lies before us.

Protection against excessive military action lies in our Courts, in the non-political character of our army and navy, in an independent Congress and in the need for securing popular support for the conduct of the war. The controls of martial law which the President and his military commanders find necessary to exert will pass with the passing of the war emergency, and then constitutional rights will flourish once more and in greater security.

Dated, San Francisco,
December 30, 1942.

Respectfully submitted,

EARL WARREN,
Attorney General of the State of California,

JAMES H. OAKLEY,
Assistant Attorney General of the State of California,

Attorneys for the State of California,
As Amicus Curiae.

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[16]Part of Abraham Lincoln's response when he was accused of tearing down constitutional guarantees. "Abraham Lincoln", by Carl Sandburg, Vol. II, page 167.

Due service and receipt of a copy of the within is hereby admitted

this.....day of December, 1942.

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Attorney for Appellant.

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United States Attorney,

Attorney for Appellee