T1.28

67/14
C

No. 10317

In the United States Circuit Court of Appeals for the Ninth Circuit

MINORU YASUI, APPELLANT,

v.

UNITED STATES, APPELLEE.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE UNITED STATES

CHARLES FAHY,
Director, War Division,
Department of Justice.
CARL O. DONAUGH,
United States Attorney,
District of Oregon.

EDWARD J. ENNIS,
JOHN L. BURLING,
NANETTE DEMBITZ,
LEO GITLIN,
Attorneys, War Division, Department of Justice,
CHARLES BURDELL,
Special Assistant to the Attorney General,
Of Counsel.

SUBJECT INDEX

511655—43——1

TABLE OF CASES

STATUTES, ORDERS, AND PROCLAMATIONS

MISCELLANEOUS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10317

MINORU YASU, APPELLANT

v.

UNITED STATES, APPELLEE

GOVERNMENT'S BRIEF

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction, entered on November 18, 1942, in the United States District Court for the District of Oregon, upon an indictment charging appellant with having violated Section 97A of Title 18, U. S. C. (Public Law 503, 77th Congress, Chapter 191, approved March 21, 1942).[1]

[1] *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 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.

The indictment charged that the appellant, Minoru Yasui, being within a properly designated military area, willfully remained away from his place of residence after the hour designated by the Commanding General of the area, thus knowingly acting contrary to and in violation of a regulation promulgated by the said Commanding General and applicable to defendant, a person of Japanese ancestry.

THE OPINION IN THE COURT BELOW

Upon trial, appellant did not dispute the facts charged in the indictment but raised the contention that he was a citizen of the United States and that as such the regulation of the Military Commander was unconstitutional as to him. At the conclusion of the trial the Court held that appellant had knowingly acted in violation of the regulation of the Military Commander, as charged, and further found that appellant had elected to accept Japanese citizenship, thus rejecting the American citizenship conferred upon him by birth in this country. Holding the regulation valid for such an alien, the Court found appellant guilty of the charge, a jury having been waived in writing.

In his opinion, however, the Court declared by way of dictum that in the absence of a declaration of martial law the court "must apply ordinary law and protect the rights of a citizen in a criminal case. If Congress attempted to classify citizens, based upon color or race and to apply criminal penalties for a violation of regulations, founded upon that distinction, the action is insofar void." (Tr. 45.)

By appropriate exceptions (Tr. 90) and assignments of error (Tr. 37) the appellant reserved exception to the judgment of guilty and the case thus comes to this Court upon appeal and was advanced on the calendar to be argued before the full Court *en banc* with the similar cases of *Korematsu* v. *United States* and *Hirabayashi* v. *United States.*

SCOPE OF GOVERNMENT BRIEF

This brief will be directed to the proposition that the Court should affirm the conviction of the appellant on the ground that the challenged regulation is constitutionally applicable not only to aliens but to citizens as well under the Federal war powers.

The only regulation actually involved in the instant case relates to a curfew for persons of Japanese ancestry. In the companion cases evacuation orders of the Commanding General of the Western Defense Command are also involved. Since the regulations in all three cases are interrelated as a part of a program to secure the defense of the nation, the validity of all regulations attacked in these cases will be considered herein.

STATEMENT

On December 8, 1941, Congress, in a joint resolution, declared a state of war to be existing between the Empire of Japan and the Government and people of the United States and authorized and directed the President,

> * * * to employ the entire naval and military forces of the United States and the resources of the Government to carry on War against the Imperial Government of Japan;[2]

[2] 55 Stat. 795, 77th Cong., 2d Sess., c. 561.

Congress further declared that,

> * * * to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.[3]

On December 11, 1941,[4] the eight Western States and the Territory of Alaska were activated by the War Department as the Western Defense Command and designated as a "theater of operations" (Tr. 81). An area approximately 100 miles wide extending from the Canadian border along the Pacific Coast to the California-Mexican border was declared to be a "combat zone." [5]

Subsequently, February 19, 1942, the President issued Executive Order No. 9066 [6] in which the Secretary of War and Military Commanders designated by him were authorized and directed, whenever such action was necessary,

> * * * to prescribe military areas in such places and of such extent as he or the appro-

---

[3] Idem.

[4] Field Order No. 1, December 14, 1941.

[5] "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.

"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 designates one or more theaters of operation.

"A combat zone comprises that part of a theater of operations required for the active operation of the combatant forces fighting." Field Regulations—Operations, War Department, May 22, 1941. Field Manual 100–5.

[6] United States Code Cong. Service, No. 2 (1942) p. 157.

> priate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion * * *.

Pursuant to the aforesaid Executive Order and the authority vested in him by the Secretary of War,[7] Lieutenant General John L. DeWitt, on March 2, 1942,[8] Commanding General of the Western Defense Command, declared the Pacific Coast of the United States (which area is included in the Western Defense Command) to be, because of its geographical location,

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

This proclamation designated certain areas within the Western Defense Command as "Military Areas" and "Military Zones" and declared that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these areas, and further declared that with regard to other of said areas "certain persons or classes of persons" would be permitted to

---

[7] Govt. Exhibit No. 3, Tr. 62.

[8] Public Proclamation No. 1, Govt. Exhibit No. 4, Tr. 64.

enter or remain thereon under certain regulations and restrictions to be subsequently prescribed.[9]

Public Proclamation No. 2, dated March 16, 1942, designated further Military Areas and Military Zones, and contained a recital similar to the one in Public Proclamation No. 1 concerning the exclusion of persons, or classes of persons, from these areas, and regulations and restrictions applicable to persons remaining within them.

Congress enacted and on March 21, 1942, the President approved Public Act 503, the statute under which this prosecution was brought.[10]

Public Proclamation No. 3,[11] dated March 24, 1942, recited that the present situation within the previously described Military Areas and Zones required—

> as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones * * *

and this Proclamation established the following regulations:

> 1. From and after 6:00 A. M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in

[9] Idem.

[10] See infra pp. 25–26.

[11] Govt. Exhibit No. 5, Tr. 68.

> Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew.[12]

It is the regulation contained in the above Proclamation which appellant was found to have violated by the Court below. The *Korematsu* and *Hirabayashi* appeals, argued with this case, also involve violation of the evacuation orders.

FACTS WARRANTING THE REGULATIONS HERE CHALLENGED

In the course of this brief it will be demonstrated that the regulation challenged in the instant case, as well as those challenged in the companion cases, are valid and constitutional as to citizens and aliens alike because they are reasonably related to the successful prosecution of the war. The question is whether the orders of the Commanding General of the Western Defense Command are so arbitrary and capricious that it can

[12] The Proclamation further declares that any person violating the established regulations will be subject to immediate exclusion from the Military Areas and Zones specified in Public Proclamation No. 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, leaving, or committing any act in military areas or zones."

be held by this Court that they have no relation to the war effort.[13] An American citizen may not be evacuated from his home even in time of war, if that evacuation has no reasonable relation to the proper exercise of the war power or to some other power delegated to the Federal Government by the Constitution. The appellant must demonstrate that the evacuation was unreasonable.[14]

With the issues so drawn it would appear to be appropriate at this point to examine as briefly as possible the conditions which prevailed on the West Coast following the outbreak of the war and during the period in which the challenged regulations were in operation.

A. Military conditions on the west coast following the declaration of war

In February of 1942 the Japanese were at the crest of their military fortunes.[15] They had succeeded in crippling the American Asiatic fleet at Pearl Harbor. They had swept the British, the Dutch, and the Americans from the Far East and from the Pacific Islands. The extent of the danger can be seen from the bold and confident attempt of the Japanese to take Midway Island in June of 1942. Had that attack

---

[13] The extent to which the decisions of the military authorities are subject to review by the Courts is discussed hereinafter at page 48.

[14] In the instant case, advanced for argument at the Government's request, the brief of appellant has not yet been received by the Government and we are thus unable to examine his position in this respect.

[15] This being a matter of historical fact it may be judicially noticed. *Ono* v. *United States*, 267 Fed. 359 (C. C. A. 9th, 1920); see also *Treeson* v. *Imperial Irrigation District*, 59 F. (2d) 592 (C. C. A. 9th, 1932).

succeeded, Midway Island would have fallen, Hawaii would have been under the immediate threat of occupation, and the West Coast itself would have become vulnerable. At the time the regulations here challenged were promulgated, sound military strategy clearly indicated that our western seacoast was in imminent danger of attempted invasion by the armed forces of Japan.

Contributing to the threat of invasion was the apprehension of the use by the enemy of the so-called fifth column technique of warfare,[16] The history of modern warfare prior to December 7, 1941, had amply demonstrated that one of the most effective weapons of an invader consists of sabotage and other forms of assistance afforded by sympathizers residing within the country under attack. Citizen and alien alike has been employed to carry on this type of warfare and the full extent of such assistance is, of course, not subject to determination until invasion has been successfully completed. Investigation by representatives of our Government proved that this type of warfare and the full extent of such assistance is, of Japanese armed forces in Hawaii, Malay, Burma, and New Guinea.[17]

---

[16] The fact that the fifth column is employed as an instrument of modern warfare may be judicially noticed. *Ex Parte Liebmann* [1916], 1 K. B. 268, 274–5, 278.

[17] Report of the Commission Appointed by the President of the United States to Investigate and Report the Facts Relating to the Attack Made by Japanese Armed Forces Upon Pearl Harbor in the Territory of Hawaii on December 7, 1941 (Justice Roberts' Report), pp. 12–13, Senate Document No. 159, 77th Congress, 2d Sess. The Court may take judicial notice of official Government reports. *Temple* v. *United States*, 248 U. S. 121 (1918).

It may be impossible to conduct any investigation which will adequately secure a guarantee against employment of the fifth column technique. To require evidence of that which, by definition, exists only by virtue of its ability to conceal all evidence of its existence would place upon the State an intolerable burden of proof at a time when it is struggling for survival against a dangerous and powerful enemy.

A matter warranting further apprehension was the fact that there are many vital defense installations within the area adjacent to the West Coast. The many ports on the Coast are vital embarkation points for men and materials. A large portion of the nation's war planes and one-fourth of its ships are being built in California alone. Troops and supplies and war materials are constantly being transported along railroads and highways within a few miles of the Coast. Throughout this section there are many Army camps and forts, training centers, arsenals and strategic naval defense bases. The continued operation of such projects is an important part of the war program and the presence of large numbers of Japanese in the area created grave danger of disturbance to the civil peace and order, as well as hazard to the safety of the Japanese themselves, with the consequent threat of interruption and delay in important war production.[18] Further, the fact that so many of these defense in-

[18] The Court may take judicial notice of economic and social conditions. *United States* v. *Hamburg-American Co.*, 239 U. S. 466; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U. S. 292; *United States* v. *Wainer*, 49 F. (2d) 789 (DCWD, Pa.).

stallations were within the area subject to possible invasion aggravated the dangers to be expected from the use of the fifth column technique of warfare.

The continued residence of persons of Japanese ancestry within the military area reasonably was believed to be not only dangerous to the security of the country but, in addition, would have subjected the Japanese themselves to serious threat of harm. In the event of invasion such persons would have been indistinguishable in appearance from Japanese invaders disguised as loyal American citizens. Even in the absence of invasion it was apparent that persons of Japanese ancestry were constantly suspected of disloyal conduct and were thus subject to possible harm from our own citizenry, so conscious were our people of the tremendous extent and success of fifth column activities in the course of the European conflict.[19] Incidents of violence against Japanese by Americans would have been seized upon by the enemy as propaganda fodder and as excuse for retaliatory measures against our own people who are so unfortunate as to be in the hands of the enemy.

B. The Japanese population within the Western Defense Command

At the outbreak of the war, approximately 130,000 persons of Japanese descent were residents of the three West Coast states. A considerable number of these resided in areas of great strategic importance,

---

[19] Fourth Interim Report of Tolan Committee, p. 145 (H. R. 2124, 77th Cong., 2nd Sess.).

either along portions of the Coast likely to be selected for attack, or in proximity to factories engaged in production of war materials.

These persons of Japanese ancestry, citizens as well as aliens, have not readily assimilated with persons of other races living in our country.[20] There are many reasons for this. As a result many gifted young American citizens of Japanese ancestry may not have had a completely free field for the employment of their abilities. The Japanese are keenly aware of this and have been affected by it. Whether our conduct toward them in the past has been wise or not, the existence of this situation is a fact that must be considered by those responsible for the conduct of the war.

Some reasons for the fact that the Japanese have lived within themselves in our country lie in the fact that physical characteristics, institutions, customs, and traditions of these persons have imbued in them a strong sense of ancestral and race loyalty. In this connection the Empire of Japan has made every effort to retain the allegiance of the American Japanese, and through the doctrine of dual citizenship, Japan has claimed the loyalty even of those persons of Japanese descent born in the United States. Japanese laws and consular practice recognize and encourage the retention of Japanese citizenship by such persons and a considerable, but unknown, number of American citizens of Japanese descent have registered at

[20] The Court may take judicial notice of the fact "that the Japanese do not readily assimilate with other races, and especially with the white race." *Farrington* v. *Tokushige*, 11 F. 2d, 710 (C. C. A. 9th, 1926). See also *Chun Kock Quon* v. *Proctor*, 29 F. 2d 330 (C. C. A. 9th, 1937).

Japanese Consulates under these laws. Likewise, the practice of sending American children of Japanese descent to Japan, there to be indoctrinated with Japanese nationalism and imperialism, has contributed to the tendency of the Japanese to isolate themselves in separate communities. It has been the Japanese official policy to encourage the education of American-born Japanese children in Japan, and the practice has assumed considerable proportions.

An important factor which must be considered in evaluating the loyalty of persons of Japanese descent during time of war between our own country and Japan is the fact that a considerable number of American citizens of Japanese ancestry are devotees of the cult of Shinto. By this philosophy, the Emperor of Japan and his ancestors are worshiped as deities, thereby creating a conflict between religious loyalty to the Japanese Emperor and political loyalty to the United States. Furthermore, Japanese tradition attaches extraordinary importance to filial respect and closely relates such respect to patriotism. Thus the American-born Japanese must be influenced and to a greater or lesser extent dominated by the loyalties and philosophies of his parents who for the most part are Japanese aliens.

With this background it is to be expected that many Japanese in this country are susceptible to the propaganda of the Japanese Empire to the effect that the present war is one between races, in which brown and yellow men are seeking to overthrow the imperialistic domination of the white man; and it is readily apparent that by reason of the conflict of emo-

511655—43——2

tions within the Japanese individual, resulting from the factors described above, the fact of citizenship alone, even when conferred by birth, might bear little relationship to the loyalty of the individual to our Government and institutions.

That persons of Japanese ancestry might be peaceful and law-abiding in the past is not the question. Rather, the question is whether or not the loyalty of such persons as a class may be relied upon in the event of an attempted invasion by the armed forces of Japan, particularly since it might appear that such an invasion would be construed as an indication that a Japanese victory was imminent.

In the light of such facts, it is submitted that it was a reasonable exercise of the war power to establish the regulations which are here challenged.

C. The evacuation program

The problem was met efficiently and humanely by Executive Orders 9066 and 9102, by the public proclamations of the military commander issued pursuant thereto, and by the manner in which the program was carried out. It was impossible to require a mass evacuation of persons without order and system and without assurance that they would be properly received in their new places of residence.[21] A curfew was adopted,[22]

[21] The governors of every western state save one publicly announced that disorder would result from the unorganized transportation of Japanese to any section of their respective states. See Tolan Committee House Report No. 1911, March 19, 1942 (Preliminary Report and Recommendations on Problems of Evacuation of Citizens and Aliens from Military Areas).

[22] Public Proclamation Number 3, Tr. 68.

pending plans for the organized evacuation of the Japanese to localities in which they would be properly received. Subsequently, the War Relocation Authority was established for the purpose of properly rehabilitating and relocating the evacuees in areas where they would be safe from any harm which might be caused by the prejudices arising from the fact of war. The evacuation itself was conducted systematically and efficiently. The evacuees were first moved to assembly centers, under management of civil authorities employed by the military authorities. Here they remained, attended by adequate medical personnel, pending the preparation of the more permanent relocation centers.

Thereupon, the evacuees were transported to the several relocation centers which had been prepared for their use. There the utmost possible liberty of action is accorded the evacuees. The internal management of the center is under the direction of the War Relocation Authority, a civilian agency. Within each center, there is a substantial degree of self-government. A local council, elected by the evacuee residents, promulgates ordinances having the force of law on practically every subject of police power and local concern relating to general welfare. These regulations are enforced by magistrates or commissions appointed from among the evacuees themselves. It is the policy in practice of the War Relocation Authority to accord the widest possible measure of democratic self-government.

All evacuees are given their subsistence and housing without charge. Employment is afforded within

the center to those who desire it, and a comprehensive program is under way to form cooperative organizations for the purpose of manufacturing articles useful to the war effort. In addition, an effort is being made by the War Relocation Authority to attract small private industries to locate adjacent to the centers, where the evacuees may be employed at prevailing wages. In the meantime, employment of evacuees outside the centers is being not only permitted but encouraged.

Elementary and high schools have been established in all centers, meeting state requirements for courses of study and providing curricula necessary for admission to colleges and universities. Evacuees who are qualified to attend colleges or universities are granted permission to leave the centers in order to pursue their education. Vocational training is offered within the centers themselves.

Each center is equipped with hospitals of the most modern type, as well as adequate medical and dental personnel.

Welfare services such as are approved in outside communities are furnished by the War Relocation Authority. Adequate recreational facilities are provided.

The citizen evacuee retains his legal domicile in the place of his former residence and exercises his civil rights, including the right to the ballot, precisely in the same manner as any other absentee citizen. Families in relocation centers are not separated. The Courts are open to the evacuee. In the management

and care of his property, he has the assistance of the appropriate Federal agency.

To facilitate group and individual employment outside relocation centers, to provide for attendance of the evacuees at educational institutions, and to allow the discharge of legal or other personal business, a system of leaves has been provided for by Regulations of the War Relocation Authority.[23] In addition to temporary or group work leave, an evacuee may apply for and receive an indefinite leave for no stated reason whatever except his desire to leave the relocation center. Persons granted indefinite leave may go to any part of the country and move from place to place provided they stay out of designated military areas. The policy of the War Relocation Authority is to encourage the application for and the issuance of indefinite leaves to the greatest possible extent consistent with job opportunities and with the prevailing attitudes and degree of receptivity of the communities in which the evacuees are to reside. The chief limitation in this regard is not one imposed by Government but by the opposition of some public opinion in this country to allowing the evacuees to work outside the relocation centers except under armed guard.[24] The evacuees are aware of these general attitudes and have been reluctant to leave the protection of temporary custody by the Government. If the fears both of the evacuees and the communities receiving them are dissipated, many more thousands of evacuees will apply for in-

[23] 7 Fed. Reg. 7656, Sept. 29, 1942.

[24] Fourth Interim Report of Tolan Committee, p. 32.

definite leave, thereby helping to relieve the serious labor shortage in this country.

Detention at the relocation center is not conceived as the necessarily ultimate objective of the program. Nor is it intended that the evacuees are to be kept at relocation centers until the end of the war. The relocation center is a staging point or depot for the care and protection of the evacuees during the inevitable period that must ensue in organizing and carrying out a systematic program for their resettlement. The objective of the program is the restoration of the Japanese to the normal life of the community in new places of residence, and it is hoped to carry this out for all those who wish to leave. For those who desire to remain, the relocation center will be a place of refuge from the unpredictable vicissitudes of war and public feeling. The restoration and reintegration of the detainees within the normal life of the rest of the community is the official policy of the Government and is being carried out in practice. This is the end phase of the program of resettlement and will be carried out by the device of the leave regulations promulgated by the Director of the War Relocation Authority. If this orderly program can be accomplished, it will not only solve the problem faced by mass evacuation in a humane manner worthy of a democracy, but it may lead to the permanent solution of the Japanese problem in the United States.

It is true that there are regulations imposed within the centers and that the evacuees are not permitted to leave the centers indiscriminately and completely at

will. However, any systematic program of resettling a large group of persons requires that they be kept temporarily in some place where they can live and be taken care of pending their orderly settlement in other communities. To maintain such places, rules have to be enforced on all residents, and the impatience to depart on the part of some must be restrained until proper conditions for their reception in their new places of permanent residence can be worked out. This would be true even if the resettlement program involved flood sufferers.

Given the decision to evacuate, temporary, precautionary detention was the only solution. It is argued by some, who admit the necessity for evacuation, that the Japanese should thereafter have been permitted to go freely into the interior communities. This indeed appears to be a superficially plausible solution, but it takes no account of political and social facts. What would have happened if 130,000 persons of Japanese descent had been shoved outside the borders of the coast States and told they were at liberty to go wherever they willed? They would have gone to communities where they were not wanted, and, without much regard for job opportunities or the housing situation. Large additional burdens would have been placed on the social service budgets of these communities. At the mere suggestion that the West Coast Japanese would be uprooted and dumped upon their States, the governors of every western State, with one exception, formally declared their opposition and warned against the consequences of such a move-

ment of population. Strong anti-Japanese sentiment began to form and threatened civil disorder. Demands arose from the press and from the other organs and representatives of public opinion that, since the problem had its origin in a Federal purpose, the responsibility for its orderly solution must be undertaken by the Federal Government instead of being unloaded on the States (H. R. 2124, *supra,* p. 145).

It is no answer to say that the reluctance of other communities to receive an influx of American citizens can be controlled and the prospect of violence can be met by sufficient police protection. The courts are under no obligation to ignore the facts that social struggle within the country when it is engaged in the greatest war of its history would be one of the most destructive forces against the success of our military effort.

The foregoing facts relating to conditions in the War Relocation Authority centers are not directly in issue here; but they are a part of a broad program of which the regulations which are challenged are but a part. The program as a whole must be considered in order to afford a clear exposition of the particular regulations. When an official sanction is assailed as a denial of due process, it is important not only to consider the terms in which the order for the action is formulated but also the manner in which the activity is carried out whether ruthlessly and arbitrarily or humanely and orderly. For this reason the foregoing material with respect to the evacuation program in its entirety has been included herein.

ARGUMENT

In the *Korematsu* and *Hirabayashi* cases the trial courts have held valid the application of the evacuation and curfew orders to American citizens of Japanese ancestry. The court below in the *Yasui* case, however, held that the curfew order was valid as to Japanese aliens and that the appellant, born in the United States, had elected to be a Japanese subject but that in the absence of a declaration of martial law Congress could not authorize the evacuation and curfew applicable to citizens on the basis of Japanese ancestry and could not make their acts criminal because they violated orders to be issued in the future by military commanders (Tr. 43–44).

The appellants' principal contention in the three cases appears to be that the particular exercise of the war power here attempted is invalid as applied to citizens because it involves a discrimination against a group based on race and therefore is prohibited by the due process clause of the Fifth Amendment to the Constitution.

The Government contends that the trial courts in the *Korematsu* and *Hirabayashi* cases correctly held that statutory provision making it a crime to violate the evacuation and curfew regulations applicable to all persons of Japanese ancestry was constitutionally applied in those cases. The court below held that the evacuation and curfew were valid only as to Japanese aliens. In view of the fact, however, that the other two appeals raise the question of the validity of the evacuation program as to citizens and in view of the

fact that the complete power over Japanese aliens given by other statutes and proclamations (Alien Enemy Act of 1798, 50 U. S. C. Sec. 21, Presidential Proclamation No. 2525 of December 7, 1941) indicates that it was not the intent that evacuation and curfew be separable and valid as to aliens alone, the Government does not here contend that the court below correctly held that the appellant elected to abandon his American citizenship and to become a Japanese subject. The correctness of the ground of the decision below is unnecessary to decide if the evacuation and curfew are determined to be valid.

I. THE EVACUATION AND CURFEW WERE AUTHORIZED BY EXECUTIVE ORDER 9066 AND BY ACTS OF CONGRESS

Appellants apparently have not contested the fact that the curfew and evacuation orders of General DeWitt, which they violated, were within the scope of the authority delegated by the President in Executive Order 9066, and by the Congress in Public Law 503, but instead appear to rest their case on the contention that the Executive Order, the statute and the action taken thereunder were unconstitutional. Nevertheless, for the sake of clarity, before proceeding to answer the appellants' constitutional arguments, we shall briefly recapitulate the legal history of the curfew and evacuation orders, for the purpose of demostrating precisely that such orders were within the scope of the power delegated by the President and the Congress.

General DeWitt was designated on February 20, 1942, by the Secretary of War, as the military com-

mander authorized to carry out the duties imposed by Executive Order 9066 within the area encompassed in the Western Defense Command, which had been established on December 11, 1941, to embrace the Pacific Coast States (Public Proclamations No. 1 and 2). Acting under the provision of Executive Order 9066, empowering a military commander duly designated by the Secretary of War "to prescribe military areas in such place and of such extent as he * * * may determine," General DeWitt issued Public Proclamations No. 1 and 2, which establish as military areas the regions in which the appellants resided. The subsequent orders excluding persons of Japanese ancestry from these areas were unquestionably authorized by the provision that "any and all persons may be excluded" from the duly prescribed areas, as well as by the provision that in all such areas "the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion." It is equally clear that the curfew order with respect to the duty of specified classes of persons in the military area to remain within their homes during specified hours was within General DeWitt's power to impose restrictions on "right of any person to enter, remain in, or leave" the area and thus was in the discretionary power delegated by Executive Order 9066.

While the fact that General DeWitt's orders are within the scope of the terms of Executive Order 9066 is sufficient authorization, it may be noted also

that the Executive Order followed closely, both in time and content, the Congressional recommendations that military authority be used to effect the evacuation of persons of Japanese ancestry from the Pacific Coast States (see Report No. 1911, by the Select Committee Investigating National Defense Migration, 77th Cong., 2d Sess., pp. 3–5).

Congressional authority for the promulgation of the curfew and evacuation orders is derived from several sources. The express language of Public Law 503 (Appendix p. 93) clearly ratified and gave the force of legislation to Executive Order No. 9066 and confirmed the grant of authority to military commanders contained therein, since the military orders to which the statute attaches criminal sanctions are described as those issued under authority of the Executive Order.

Furthermore, the legislative history of this statute shows that the congressional intent contemplated evacuation and curfew. The bill which became Public 503, was introduced in the Senate on March 9, 1942, and in the House on March 10, 1942, at the request of the War Department and was enacted for the express purpose of providing a means of enforcement of orders issued under Executive Order No. 9066.[25] Rep-

[25] Identical letters from the Secretary of War to the Speaker of the House and to the Chairman of the Senate Committee on Military Affairs stated (Cong. Rec. for March 19, 1942, p. 2804 (unbound edition, temporary pagination changed in bound volume); House Report No. 1906, 77th Cong., 2d Sess., p. 2):

"The purpose of the proposed legislation is to provide for enforcement in the Federal criminal courts of orders issued under the authority of the Executive Order of the President, No. 9066,

resentative Costello for the House Military Affairs Committee stated the legislative understanding that curfew restrictions and the removal of persons, citizens as well as aliens, from military areas was contemplated.[26] When the bill was discussed in the Senate, Senator Reynolds, Chairman of the Senate Military Affairs Committee, read a newspaper item stating that "evacuation of the first Japanese aliens and American-born Japanese from military area No. 1" was about to commence; described the proposed evacuation; read to the Senate the Report of the Committee on Military Affairs, which included the above-quoted letters; read General DeWitt's Public Proclamation

---

dated February 19, 1942. This Executive Order authorized the Secretary of War to prescribe military areas from which any and all persons may be excluded for purposes of national defense."

The Secretary of War wrote to the Chairmen of the Senate and House Committees on Military Affairs in identical letters dated March 13 and 14, 1942, respectively, as follows (Cong. Rec. for March 19, 1942, p. 2807; House Report No. 1906, p. 3), that "the bill, when enacted, should be broad enough to enable the Secretary of War, or the appropriate military commander to enforce curfews and other restrictions within military areas and zones."

[26] The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities. In order to provide such protection it has been deemed advisable to remove certain aliens as well as citizens from areas in which war production is located and where military activities are being conducted. To make such removal effective, it is necessary to provide for penalties in the event of any violation of the orders or restrictions which may be established, as well as to enforce curfews, where they may be required (House Report No. 1906, p. 2).

No. 1; and stated the common understanding of the bill.[27]

On the House Floor when the bill was being considered for enactment, its immediate passage was urged on the basis that "evacuation is taking place now" (Cong. Rec., March 19, 1942, p. 2812).

In addition to the Congressional authorization of the evacuation and curfew orders demonstrated by the language and the legislative history of the criminal statute, Congress further showed its approval of the program when subsequent to the issuance of the major part of General DeWitt's evacuation orders the Act of Congress of July 25, 1942, appropriated the sum of $70,000,000 for the War Relocation Authority, including in the authorized expenditures, "expense incident to the extension of the program provided for in the Executive Order of March 18, 1942 (Executive Order No. 9102 establishing the War Relocation Authority) to persons of Japanese ancestry not evacuated from military areas," as well as expenditures incurred in the maintenance of War Relocation Authority projects (P. L. 678, Laws of 77th Cong., 2d Sess., c. 524, 56 Stat. 704).

At the time the bill was approved by the President and became law on March 21, 1942, Lt. Gen. DeWitt

[27] It is my understanding that in order to carry out the objectives of the Proclamation, and thus keep clear the military areas which have been defined by General DeWitt, the commander of the western area, we are asked to provide the department with authority to keep certain individuals from entering or leaving military zones, or not complying with any of the curfew laws, or any regulations which might be established within those zones (Cong. Rec. for March 19, 1942, pp. 2804–2807).

had already issued Proclamation No. 1 of March 2, 1942, designating certain military areas and military zones and providing that such classes of persons as the situation may require would by subsequent proclamation be excluded from the areas and zones. Proclamation No. 2 of March 16, 1942, designating additional military areas and zones, repeated the provision that classes of persons as the situation might require would by subsequent proclamation be excluded from zones within the military areas and provided that German and Italian aliens and persons of Japanese ancestry residing in the Western Defense Command who changed their places of habitual residence were required to obtain and execute change-of-residence notices.

Immediately subsequent to March 21, 1942, Proclamation No. 3 of March 24, 1942, provided the curfew for German and Italian aliens and all persons of Japanese ancestry and provided that exclusion orders would thereafter be issued. Proclamation No. 4 of March 27, 1942, prohibited further voluntary evacuation of Japanese persons from Military Area No. 1. On May 3, 1942, Civil Evacuation Order No. 34, involved in the *Korematsu* appeal, and on May 10 Civil Evacuation Order No. 57, involved in the *Hirabayashi* appeal, were issued.

It is submitted that Public 503 constituted not only clear authorization of the action taken after March 21, 1942, but also a plain legislative ratification of Executive Order 9066 and of the evacuation and curfew pursuant thereto under settled doctrine that such

ratification is the legal equivalent of prior direction by Congress. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 300–303; *Isbrandtsen Moller Co.* v. *United States,* 300 U. S. 139, 146–148; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 382, 384; *Prize Cases,* 2 Black, 635, 671. The statutory ratification and authorization of the evacuation and curfew orders constituted them an exercise of authority granted by Congress to the President. In addition to Public 503 the Appropriation Act of July 25, 1942 constituted a Congressional ratification of the evacuation. Such appropriation acts are a common form of Congressional ratification. *Isbrandtsen Moller Co.* v. *United States, supra,* at page 147.

It is clear, therefore, that the evacuation was authorized by the President and the Congress and the only question is the constitutionality of the action taken under such executive and statutory authority.

II. THE EVACUATION AND CURFEW WERE A VALID EXERCISE OF THE WAR POWERS OF THE CONGRESS AND OF THE PRESIDENT AND A VALID EXERCISE OF THE PRESIDENT'S POWER TO EXECUTE THE LAWS

There can be no doubt that the evacuation and curfew were undertaken in connection with the war effort and as an attempted exercise of the war powers of this nation which are lodged completely in the federal government. The Government contends that the action taken was a valid exercise of the following grants of constitutional powers, among others:

ARTICLE I

SECTION 8. The Congress shall have Power (1) To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; * * *.

* * * * *

(11) To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

(12) To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than Two Years;

(13) To provide and maintain a Navy;

(14) To make Rules for the Government and Regulation of the land and naval Forces;

(15) To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

(16) To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * * *

(18) To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

511655—43——3

ARTICLE II

SECTION 1. (a) The executive Power shall be vested in a President of the United States of America. * * *

* * * * *

SECTION 2. (1) The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several states, when called into the actual service of the United States; * * *

SECTION 3. * * * he shall take Care that the Laws be faithfully executed, * * *.

Pursuant to their constitutional powers the Congress adopted and on December 8, 1941, the President approved Joint Resolution 116 (Public Law 328, Chap. 561, 77th Cong., 2nd Sess., 55 Stat. 795) which provides as follows:

> Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are

hereby pledged by the Congress of the United States.

On February 19, 1942, pursuant to his constitutional power and the authorization and direction of Congress to employ the entire naval and military forces and the resources of the Government to carry on the war, the President issued Executive Order No. 9066 which provides that whereas the successful prosecution of the war requires every possible protection against espionage and sabotage to national defense materials, premises, and utilities as defined in the Act of April 20, 1918, as amended (50 U. S. C. Sec. 104), the Secretary of War and the military commanders designated by him are authorized and directed to prescribe military areas in such places and to such extent as they may determine from which any or all persons may be excluded and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War, or the appropriate military commander, may impose in his discretion. The Executive Order authorizes the use of federal troops to enforce compliance with restrictions applicable to each military area and authorizes and directs other agencies to assist in carrying out the Executive Order.

The events of the war which had occurred between the attack on Pearl Harbor and the issuance of this order, stated elsewhere in this brief and well known to the court, amply warranted the President's action. The extent of the disaster at Pearl Harbor, only recently disclosed to the public, was all too well known

to the Commander in Chief and the military authorities and left the military and naval installations, airplane, shipyard, and other war manufacturing plants located on the West Coast more subject to destructive attack by the enemy. It was learned that Japanese espionage had supplied the Japanese forces with precise information as to the disposition of the vessels of the fleet in Pearl Harbor, the nature and location of antiaircraft defenses and the time and course of flight of air patrols.[28] On December 11, 1941, the Western Defense Command had been established and designated a theatre of operation (R. 146–147). Substantially all of the population of Japanese ancestry in the United States resided in the West Coast area. Great public apprehension was expressed, including expressions by members of Congress from the West Coast states and local officials, that even if the great majority of persons of Japanese ancestry were loyal to the United States, a number of them, citizens and aliens alike, might be disposed to assist the enemy, particularly in case of an attack. There was also great apprehension expressed that in the event of attack the Japanese population might be subjected to violence on a mass scale before the governmental authorities could prevent it. The federal civilian authority to control Japanese aliens which was lodged in the Department

[28] Report of the Commission Appointed by The President Of The United States To Investigate And Report The Facts Relating To The Attack Made By Japanese Armed Forces Upon Pearl Harbor In The Territory Of Hawaii On December 7, 1941 (Justice Roberts' Report), pp. 12–13, Senate Document No. 159, 77th Congress, 2nd Sess.

of Justice did not extend to American citizens of Japanese ancestry. It was in these circumstances that the military authorities requested and the President determined to issue Executive Order No. 9066.

Executive Order No. 9066 and the curfew and evacuation regulations issued pursuant to it and followed by Public 503 constituted not only an exercise of the constitutional war powers of the President, as Commander in Chief, and of Congress but also an exercise of the President's constitutional executive power to take care that the laws be faithfully executed. It is, therefore, not necessary to maintain that evacuation and curfew is an exercise of either the executive or legislative war power exclusively or to explore the precise constitutional limits of these powers separately or to review the much discussed general question of the field which either of these powers may occupy to the exclusion of the other. *Hamilton* v. *Dillin,* 21 Wall. 73, 87–88; Corwin, *The President, Office and Powers* (1940); Charles Warren, *Presidential Declarations of Independence,* 10 Boston University Law Review 1; Randall, *Constitutional Problems Under Lincoln* (1926); Berdahl, *War Powers of the Executive in the United States* (1921); Taft, *The Presidency* (1916).

A. An exercise of the Executive war powers is involved

Article I grants the legislative war power in express and specific language, but Article II grants the whole executive power to the President, including the executive war power, in general language. There is no specific limitation in the language of the Constitution granting the power, and in view of the nature of the

executive war power and the circumstances of national peril which call for its exercise, often before the legislative war power can be exercised, the courts have emphasized its broad and untrammeled scope when it is used to meet the wholly unprecedented emergency which every war brings to a democratic nation. The war power of the Commander in Chief is not limited to directing maneuvers of troops against the enemy but pervades the entire field of military activity. It involves the duty of taking whatever action is necessary to secure the military protection of the country and to wage the war successfully. *United States* v. *Sweeny,* 157 U. S. 281, 284; *Stewart* v. *Kahn,* 11 Wall. 493, 506; *Prize Cases,* 2 Black. 635, 670; *Hamilton* v. *Dillin,* 88 U. S. 73, 87–88; *Respublica* v. *Sparhawk,* 1 Dall. 357; *Commercial Cable Co.* v. *Burleson,* 255 Fed. 99 (SDNY); Story, *Commentaries on the Constitution,* Vol. 2, p. 314 (4th Ed. 1873).

In *Stewart* v. *Kahn, supra,* the Court, upholding the constitutionality of the Act of Congress of June 11, 1864, tolling state statutes of limitations, stated (p. 506–7):

> The President is the commander in chief of the army and navy, and of the militia of the several States, when called into the service of the United States, and it is made his duty to take care that the laws are faithfully executed. Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such ques-

> tions rests wholly in the discretion of those to to whom the substantial powers involved are confined by the Constitution.
>
> In the latter case 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. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority.

The first World War did not involve the risk of an enemy invasion which prompted the action taken in this case. The Civil War presents the only comparable situation calling for the prompt and vigorous exercise of the executive war power. President Lincoln, in the absence of Congressional action, dealt with an unprecedented national emergency by his Proclamations of April 15, 1861 (12 Stat. 1258), announcing the rebellion and calling for volunteers, and of April 19, 1861 (12 Stat. 1258), announcing the blockade of the ports of the southern States by the naval forces and providing that vessels running the blockade might be condemned as prize. In the *Prize Cases, supra,* the Supreme Court sustained the legality of the exercise of the executive war power to provide a blockade and stated (p. 670):

> Whether the President in fulfilling his duties, as Commander in Chief, in suppressing an in-

> surrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him,* and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands." The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. [Italics by the Court.]

It is submitted that if, as in the *Prize Cases,* prior to a declaration of war the executive war power could be constitutionally exercised against loyal citizens solely on the basis of their residence in the states where the rebellion was active, but in which they had no part, and could designate them as enemies and subject their property to forfeiture as prize, *a fortiori* after the declaration of war of December 8, 1941, directing him to use all resources of the government (55 Stat. 795, 77th Cong. 1st Sess. c. 561), the unprecedented emergency which faced the Chief Executive in this case could be dealt with constitutionally by the exercise of the executive war power to evacuate all persons of Japanese ancestry from the most crucial area in the country and to place them under a curfew as a restriction supplemental to the evacuation.

B. Exercise of the war power of Congress is involved

Evacuation and curfew were based not only on an exercise of the executive war power in Executive Order 9066, supported by the prior exercise of the legislative war power in the Joint Resolution declaring war and in the criminal statute making it a felony to damage national defense materials (50 U. S. C. 104), but also were based, as has been shown (Point I) on specific exercises of the legislative war power found in the Act of March 21, 1942, Public 503 of the last Congress (18 U. S. C. Sec. 97A), making it a misdemeanor to violate the military regulations and found in the appropriation acts of Congress appropriating funds to carry out the evacuation and relocation program.

The plenary character of the power of Congress to wage successful war, thus exercised in this case, and its extension to every matter relating to the carrying on of war has been repeatedly emphasized. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 326; *United States* v. *Macintosh,* 283 U. S. 605, 622; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 161; *McKinley* v. *United States,* 249 U. S. 397; *Schenk* v. *United States,* 249 U. S. 47; *Selective Draft Law Cases,* 245 U. S. 366; *Raymond* v. *Thomas,* 91 U. S. 712, 714–715; *Stewart* v. *Kahn,* 78 U. S. 493, 507; *Miller* v. *United States,* 11 Wall. 268. From the very numerous decisions of the Supreme Court upholding all types of exercise of the Congressional war power these cases are chosen to illustrate the unlimited range of subject matter which Congress

may constitutionally regulate under the war power. It is not believed that a case can be cited in which the Supreme Court has ever held that any act of Congress under the war power exceeds the constitutional limits of that power.[29] On the contrary, all the cases decided both in war and peace make it abundantly clear that the war powers of Congress are substantially unlimited. In *United States* v. *Macintosh, supra,* the Court reviewed the scope of the Congressional war power in the following words (p. 622–623):

> From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams—"This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and life." To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial

[29] *United States* v. *Cohen Grocery Co.*, 255 U. S. 281, cited by appellants, did not hold that Congress could not constitutionally achieve the legislative objective of the Lever Act but merely held that in exercising the war power to achieve that objective the Fifth Amendment prohibited the attempted creation of a crime so vaguely and indefinitely defined that a prospective defendant could not tell in advance whether his act would be criminal.

> by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war. These are but illustrations of the breadth of the power * * *.

In *Miller* v. *United States, supra,* holding valid the confiscation of property of persons aiding the enemy, the court said (p. 305):

> Of course, the power to declare war involved the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted.

In *Stewart* v. *Kahn, supra,* upholding the power of Congress to toll state statutes of limitations during and after the Civil War, the court stated (p. 507):

> * * * 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.

During the earlier wars in this nation's history, fought on a simple basis, it was not necessary in the prosecution of the war for the Government to take over the direction of the entire economic life of the nation. In the first World War, however, where this

was necessary to a degree, the Supreme Court unfailingly held that Congress had the power to control matters which Congress believed would assist in the prosecution of the war including, for example, operation of the railroads (*Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135); operation of systems of communications (*Dakota Cent. Tel. Co.* v. *South Dakota,* 250 U. S. 163); prohibition of the sale of liquor (*Hamilton* v. *Kentucky Distilleries Co., supra*); seizure of property of a wide class of persons defined as enemies (*Central Trust Co.* v. *Garvan,* 254 U. S. 554); regulation of speech to a degree not permissible in times of peace (*Schenk* v. *United States, supra*); suppression of prostitution in military areas (*McKinley* v. *United States, supra*); and compulsory draft of persons to serve in the armed forces (*Selective Draft Law Cases, supra*).

Following the last war and up to the present the courts have continued to recognize the necessity for giving the broadest scope to the war power. *Ashwander* v. *Tennessee Valley Authority, supra; Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 426, 447–448. Already in the present war the courts have approved hitherto unprecedented exercises of the war power, such as the draft before entry into the war. *Local Board No. 1* v. *Connors,* 124 F. (2d) 388 (C. C. A. 9). The exercise of the war power of Congress to deal with matters not immediately affecting the conduct of the war have been upheld. *Hamilton* v. *Kentucky Distilleries Co., supra; Raymond* v. *Thomas, supra; Stewart* v. *Kahn, supra.* *A fortiori,* the exercise of the war power

here involved, which was directly connected with the military situation, was clearly an exercise of the war powers of the national government.

Indeed, even if evacuation were a new type of exercise of the war power, these decisions cited clearly teach that Congress may extend the exercise of the war power to new subjects whenever in its judgment that course is necessary. In fact, however, evacuation and the analogous removal of goods which might fall into the hands of the enemy, is a customary exercise of war power and is recognized military strategy both in the present and in former wars and both here and abroad. *Lockington's Case,* Brightly N. P. (Pa.) 269; *Lockington* v. *Smith,* 1 Pet. C. C. 466, Fed. Cas. No. 8448 (requiring alien enemies to evacuate to 40 miles beyond tidewater); *Ronnfeldt-Phillips,* (K. B. 1918) 35 T. L. R. 46 (evacuation of an individual from a military area); *Emergency Powers (Defense) Act,* 1939 (2 & 3 George VI., c. 62); War Measures Act (c. 206, Rev. Stat. Canada 1927);[30] *Respublica* v. *Sparhawk,* 1 Dallas 357 (removal

---

[30] Under the English Act which authorizes regulations necessary for securing the public safety and the efficient prosecution of the war, the British Government provided by the Defense (General) Regulations, 1939, Part 2, Section 21 (S. R. & O., 1939, No. 927, as amended, 32 Halsbury's Statutes of England, p. 1237):

(1) A Secretary of State or the Admiralty * * * may, if it appears to him or them to be necessary or expedient so to do for the purpose of meeting any actual or apprehended attack by an enemy or of protecting persons and property from the dangers involved in any such attack, make, as respects any area in the United Kingdom. * * *

(a) an order directing that after such time as may be specified in the order, no person other than a person of such a class as may

The character of civilian evacuation as a military measure is also indicated by the German created evacuated areas along the Dutch and French coasts as a military protection against invasion. It is submitted that in this respect the United States cannot be held to have less power than its allies or its enemies to protect itself against invasion unless a specific prohibition against such an obvious exercise of the war power can be found in the Constitution, a question examined in Point III below.

---

be so specified shall be in that area without the permission of such authority or person as may be so specified; * * *

(2) An order made under paragraph (1) of this Regulation for the removal of persons or property from any area—

(a) may prescribe the routes by which persons or property, or any particular classes of persons or property, are to leave or be removed from the area;

(b) may prescribe different times as the times by or at which different classes of persons or property in the area are to leave or be removed therefrom;

(c) may prescribe the places to which persons are to proceed on leaving that area in compliance with the order;

(d) may make different provision in relation to different parts of the area; and may contain such other incidental and supplementary provisions as appear to the authority or person making the order to be necessary or expedient for the purposes of the order.

The defense of Canada Regulations are similar to the quoted English regulations and the Order of the Minister of Justice of August 18, 1942, under the Regulations (Canada Gazette, Extra No. 96, August 31, 1942) provided for a specific protected area in the Province of British Columbia along the Pacific Coast similar to our military areas, the following provisions in part:

"9. Every person of the Japanese race shall leave the protected area aforesaid forthwith.

"10. No person of Japanese race shall enter such protected area except under permit issued by the Royal Canadian Mounted Police."

C. Executive power to execute the laws is involved

Article II, Section 3 of the Constitution provides that the President "shall take care that the laws shall be faithfully executed * * *." It has been repeatedly recognized that it is the duty of the President, and that it is within his executive power, to take care that the laws be faithfully executed and that the sovereignty of the United States be maintained, not only in war (*Stewart* v. *Kahn, supra,* p. 506; *Prize Cases, supra,* p. 668), but also in peace. *In re Debs,* 158 U. S. 564; *In re Neagle,* 135 U. S. 1; *United States* v. *San Jacinto Co.,* 125 U. S. 273; *Wells* v. *Nickles,* 104 U. S. 444; Corwin, *The President, Office and Powers,* pp. 126–136. The Government contends that this power to execute the laws constitutes, if it were necessary in the absence of reliance on the war power, a separate constitutional basis for Executive Order 9066. In the *Neagle* case, *supra,* affirming an order granting a writ of habeas corpus releasing Justice Field's marshal from the custody of the California authorities by whom he was held on a murder charge for killing an individual who attempted to attack the Justice, the court upheld the exercise of the federal executive power to prevent interference with the exercise of its sovereignty through the federal judiciary and stated (pp. 63–64, 67):

> If we turn to the Executive Department of the government, we find a very different condition of affairs (from that in the legislative department. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed,"

and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfill the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms* or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution? * * *

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death * * *.

It is submitted that if a United States Marshal in the exercise of the federal executive power may kill a man in the course of protecting a federal judge, *a fortiori* the commanding general of the Western Defense Command may be designated to exercise the power of the chief executive to evacuate a group of civilians to protect the public safety of the entire country and the preservation of the sovereignty of the United States.

In the *Debs* case, *supra,* upholding an injunction, obtained by the Government in the absence of specific legislation, to protect the passage of mails and to keep open the railroad channels of interstate commerce, the court quoted from *Ex Parte Siebold,* 100 U. S. 371 (p. 395):

> We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

Moreover, in the instant case an Executive order was preceded not only by the Joint Resolution declaring war on the Empire of Japan, authorizing and directing the President to employ the resources of the Government to carry on the war, but there was also the specific statute of Congress enacted in exercise of the war power (50 U. S. C. 104) making it a felony to commit sabotage or any injury to national defense ma-

511655—43——4

terials. The Executive order of the President specifically recites as one reason for its issuance that the successful prosecution of the war requires every possible protection against espionage and sabotage to such materials. It is submitted that the Executive order and the evacuation and curfew undertaken thereunder was a proper exercise of power and the duty of the President to take care that the laws be faithfully executed.

It is submitted that the evacuation and curfew clearly were exercises of the war powers of Congress and the President and also exercises of the President's power to execute the laws and that the applications of curfew and evacuation in these cases were constitutional unless the appellants can show that these applications in their cases were so capricious that they were denied due process of law, the remaining major question now to be considered.

III. EVACUATION AND CURFEW DO NOT DENY THE APPELLANTS DUE PROCESS OF LAW

The appellants contend that the evacuation and curfew were unreasonable and deprived them of liberty without due process of law in violation of the Fifth Amendment of the Constitution. In addition to this general contention the appellants make the specific contentions (*Korematsu,* p. 62, 95; *Hirabayashi,* p. 13) that they were denied due process of law because the evacuation and curfew involved an arbitrary discrimination based on their race.

The Government contends (A) that it cannot be said that the evacuation program was not reasonably related to national defense; (B) that because evacuation

and curfew were reasonable exercises of the federal war powers they did not deprive the appellants of due process of law, and (C) that the application of evacuation and curfew to all persons of Japanese ancestry was a reasonable classification.

A. This court cannot find that the evacuation program was not reasonably related to the defense and reasonably necessary to the accomplishment of that purpose

In limine, it must be stressed that the test of reasonable military necessity which is to be applied to the exercise of the war power in this case is not whether this Court now will deem that the measures which have been taken were or are not now necessary, or even whether this Court would have acted as the military commander did at the time when he acted, but is solely whether the action taken was, in the honest judgment of the military commander, reasonably related to or reasonably necessary to the achievement of a military end. Any other test would be useless. Obviously the Court cannot judge the military necessity of action taken in February 1942, only two months after Pearl Harbor, in the light of the military situation as of February 1943. Similarly, the Court cannot judge the military situation by considering whether its members would have reached the same conclusion as the military commanders in fact did. They can only consider whether the military commander's judgment was honestly and reasonably exercised. In order for the Court, therefore, to find that the evacuation program was not a proper military measure, the Court would have to say that

a reasonable military commander could not honestly have believed that the evacuation of the Japanese was necessary. This the Court cannot do.

The military commander was responsible for repelling a possible Japanese invasion which, if successful, would have destroyed our nation. Faced with a responsibility of that sort, the obligation was to examine the cold facts that over 100,000 Japanese were grouped along the seacoast; our Pacific Fleet had been rendered all but powerless for the time being; there was grave danger that the Japanese would attempt to land an army on our coast. Taking all proper military precautions it was not unreasonable to believe that this group of a hundred thousand people might contain a large and formidable number who would assist the Japanese if they undertook to land, either by acts of espionage or sabotage or by more direct cooperation. The fact that the great majority of the people were loyal to the United States and would not assist an invasion is irrelevant since the cooperation of even a few hundreds or thousands strategically placed in the event of a surprise invasion attempt might make the difference between initial victory and defeat.

Appellants in their various briefs seek to avoid these real possibilities by urging that other less drastic modes of dealing with the military problem might have been adopted. Although it is legally sufficient to point out (infra, p. 69) that the choice of methods with which to deal with a military problem is peculiarly one for the military commander and constitutes a field

which is peculiarly ill-suited for judicial determination, it may also be said that neither of the alternatives proposed by appellants was in fact available.

Appellants assert that individual administrative hearings might have been given each Japanese for the purpose of determining whether his loyalty was such that he could safely be exempted from evacuation. In the first place, no hearing could be of any value without investigation, and any one investigation requires the expenditure of much of the time of a trained investigator. In addition, the hearing itself requires extensive time. Even assuming that investigations could be made and hearings conducted on the basis of family groups, it still would have been necessary to conduct thousands upon thousands of investigations and to hold thousands upon thousands of hearings. Meanwhile, the peril of a Japanese attack would by no means be abating. Granting, for the moment, that in a year or two years hearings would have been given to each Japanese, a hearing program obviously would not have answered the military problem. What General DeWitt needed was a method of removing the possible five or ten thousand persons who might assist in a Japanese invasion attack before the attack struck, and not a program for sifting out such persons within a period of one, two, or more years.[31]

The second answer to appellant's argument about hearings is that, even if there had been time to have

[31] Based on investigations by the Federal Bureau of Investigation over a course of years, about 10,000 hearings have been granted to alien enemies throughout the United States since December 7, 1941.

hearings, there is no reason to suppose that such hearings would be of sufficient practical value. As has already been said, the Japanese, with exceptions, constituted an ethnic and cultural minority which was little assimilated within the general population. The religion, the mores, and even the language of this minority was alien to the general population of the Pacific Coast. Under these circumstances, hearings to determine what particular Japanese would do in the event that the Japanese army and navy succeeded in putting a landing party ashore on our Pacific beaches would have been little more than a farce. We here concede that the vast majority of the Japanese population is thrifty, industrious, and law-abiding. We also concede that the majority is loyal to the United States. In every hearing evidence of thrift, industry, devotion to family and of the absence of a criminal record would have been introduced, and then the Hearing Board, on the basis of this evidence, would have been asked to look deep into the mind of a particular Japanese and tell whether it was his belief that loyalty to the Emperor and to Japan would require him to assist a Japanese invading army.

Appellants' second alternative proposal is that the Federal Bureau of Investigation and possibly other investigative agencies should have investigated the Japanese on the West Coast and have taken in custody those appearing to be disloyal.[32] Here the answer is three-fold. In the first place, although alien Japanese

---

[32] Hirabayashi Reply Brief, p. 4; Korematsu Closing Brief, p. 14.

individually conceived to be dangerous to the safety of the country have been apprehended and interned pursuant to Section 21, Title 50, U. S. Code, there is no statute whatever authorizing the internment of potentially dangerous United States citizens, and thus appellants' suggestion is without any legal basis. In the second place, even if there had been a legal basis, it is clear that the investigation of 100,000 cases would have taken several years, and there was no assurance that the enemy would wait until the investigation had been completed. In the third place, as has been said before of hearings, the question of what a Japanese would do in the event of an invasion is not one which is susceptible of investigation. Granted the high qualities of the Federal Bureau of Investigation and that it is able to investigate and determine matters of fact, it has never asserted that it can exercise powers of clairvoyance. Appellants cannot suggest any method by which the use of detective work would determine the question of whether a man's worship of Emperor Hirohito would lead him to take up arms if he had a chance or of determining out of a group of 100,000 persons of Japanese ancestry which ones of them in fact continued secretly to worship Hirohito and continued ready to die for his military glory.

Thus, for a variety of reasons the alternative proposals suggested by appellants are without value. Since no serious argument has been made or can be made which will persuade this Court that the Pacific Coast was not in danger of attack and that there was not a real and present danger that a significant number of the Japanese residing along the coast might

assist the Japanese army and navy if such an attack were made, and since there was no method of meeting this danger other than the evacuation of the entire group, it is clear that the evacuation program was dictated by military exigency. This Court, therefore, cannot find that the program was not an exercise of honest military judgment and that it was not reasonably related to the military problem, and that it was not reasonably necessary to military success. Thus, since the limits to the exercise of the war power by the federal Government are that the exercise be not forbidden by a specific provision of the Constitution, and that it be, in the honest judgment of the military commander, reasonable and related to the military end sought, and reasonably necessary to the achievement of that end, it follows that the Government's affirmative case has now been completely established and that appellants must fail unless they can demonstrate to the Court that a specific provision of the Constitution forbids the particular exercise of the war power.

B. Because the evacuation and curfew were not manifestly unreasonable due process of law was not denied

It is settled law that the exercise of the governmental power delegated to the federal government by the Constitution is not prohibited by the Fifth Amendment to that Constitution unless the action taken can be shown to be wholly unreasonable, arbitrary, and capricious. In the cases establishing the extent of the war power recourse to the due process clause on the ground that the exercise of power is a mere pretext or unreason-

able has uniformly and repeatedly failed.[33] *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Highland* v. *Russell Car Co.,* 279 U. S. 253; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *Selective Draft Law Cases,* 245 U. S. 366, 378.

Even where a deprivation or restriction of personal liberty is not by the exercise of such a paramount exclusive federal power as the war power but involves an exercise of the police powers of the state and the application of the due process clause of the Fourteenth Amendment, the courts hold that the due process clause only prevents an oppressive and arbitrary interference with personal liberty. *Cantwell* v. *Connecticut,* 310 U. S. 296; *Minnesota* v. *Probate Court,* 309 U. S. 270; *Compagnie Generale Francaise de Navigation a Vapeur* v. *Board of Health,* 186 U. S. 380. Even in respect of so important a personal right as that of expressing religious belief, the due process clause does not import that Government may not, under any circumstances, deprive an individual of this liberty, but only that the "power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom" of the in-

---

[33] In *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, relied on by appellants, the court merely held that the words used to define an offense under the Lever Act were too vague and indefinite to apprise a person of the conduct constituting a crime and that therefore a conviction would deny him due process of law, but did not hold that food regulation under the Lever Act was an unreasonable exercise of the war power. In the present cases there is no room for a contention that the offenses were not wholly specific and definite, namely, failure to obey the explicit curfew and evacuation orders.

dividual. *Cantwell* v. *Connecticut, supra,* at p. 304.

Possibly the most lucid expression of this doctrine is to be found in *Jacobson* v. *Massachusetts,* 197 U. S. 11, in which the Court held, in substance, that if it reasonably appeared that the health of the public generally required it, an individual could be compelled to submit to an actual physical cutting of his person in the form of vaccination. At pp. 26–30 the Court stated:

> * * * The defendant insists that his liberty is invaded when the State subjects him to fine or imprisonment for neglecting or refusing to submit to vaccination; that a compulsory vaccination law is unreasonable, arbitrary and oppressive, and, therefore, hostile to the inherent right of every freeman to care for his own body and health in such way as to him seems best; and that execution of such a law against one who objects to vaccination, no matter for what reason, is nothing short of an assault upon his person. But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members * * *.
>
> Real liberty for all could not exist under the operation of a principle which recognizes the right of each individual person to use his own, whether in respect of his person or his property, regardless of the injury that may be done to others * * *.

Upon the principle of self-defense of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members * * * in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand. An American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever or Asiatic cholera, although apparently free from disease himself, may yet, in some circumstances, be held in quarantine against his will on board of such vessel or in a quarantine station, until it be ascertained by inspection, conducted with due diligence, that the danger of the spread of the disease among the community at large has disappeared. The liberty secured by the Fourteenth Amendment, this court has said, consists, in part, in the right of a person "to live and work where he will," *Allgeyer* v. *Louisiana,* 165 U. S. 578; and yet he may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, to take his place in the ranks of the army of his country and risk the chance of being shot down in its defense. It is not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the con-

> stituted authorities, under the sanction of the State, for the purpose of protecting the public collectively against such danger.

There is, in fact, little doubt that an individual may even be confined, in the absence of any accusation of crime, if the safety of the state requires it. For example, in *Minnesota* v. *Probate Court, supra* at p. 275, legislation providing for the commitment of persons with psychopathic personalities was upheld. It is likewise not unusual for persons to be physically confined on other grounds related to the public welfare, as in the case of the confinement of jurors, of material witnesses, and of persons performing particular types of services, such as merchant seamen. See, for example, *Lively* v. *State*, 22 Okl. Cr. 271, 276–278; 211 Pac. 92, 94; *United States* v. *Von Bonim*, 24 Fed. Supp. 867 (SDNY); *State* v. *Netherton*, 128 Kan. 564, 279 Pac. 19; *Robertson* v. *Baldwin*, 165 U. S. 275; *Dinsman* v. *Wilkes*, 53 U. S. 390.

Similarly, even well persons may be excluded from areas within which epidemics are present, apparently on the theory that the entrance of the well persons would add fuel to the fire of the disease. *Compagnie Française* v. *Board of Health, supra.* On the question of reasonable interference with personal liberty compare the sex sterilization cases of *Skinner* v. *Oklahoma*, 316 U. S. 535 and *Buck* v. *Bell*, 274 U. S. 200.

Probably the cases presenting a factual situation most similar to that of the case at bar are cases such as the *Selective Draft Law Cases*, 245 U. S. 366, or *Local Board No. 1* v. *Connors*, 124 F. (2d) 388 (C. C. A. 9)

holding that an individual may be required to serve in the armed forces of the United States in time of war or of a national emergency short of war.

Although we concede that the existence of a state of war does not of itself suspend the operation of the due process clause, it is absurd to argue that the military situation can be ignored in determining what is due process. Since the test of what infringement of personal liberty is permissible within the limits of the Fifth Amendment is essentially one of reasonableness, it is obvious that the test cannot be applied *in vacuo,* but the relevant facts must be considered. What can be justified in wartime may very well be unjustifiable in peacetime. For example, it might be different if the Federal Government in time of peace and as a matter of economic and social legislation evacuated the Japanese on the West Coast. On the other hand, as has been shown above, the possibility of a Japanese invasion requires that the individual rights of the persons affected give way to the public good. The existence of a state of war justifies restraints which would otherwise be invalid because "no adequate reason therefor in time of peace and domestic tranquillity exists". *Meyer* v. *Nebraska,* 262 U. S. 390, 402. When the necessity created by war requires, "Private rights, under such extreme and imperious circumstances, must give way for the time to the public good * * * ". *United States* v. *Russell,* 13 Wall. 623, 629. See also *Block* v. *Hirsh,* 256 U. S. 135, 150–156; *Marcus Brown Holding Co.* v. *Feldman,* 256 U. S. 170; *Levy Leasing Co.* v. *Siegel,*

258 U. S. 242; *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Home Building & Loan Ass'n.* v. *Blaisdell,* 290 U. S. 398.

It is submitted that on the facts and the authorities cited it is clear that the exercise of the war powers here involved could not be condemned judicially as so capricious as to constitute a denial of due process of law. No reliance has been placed on the martial law group of cases involving the due process limitation on the exercise of war or similar powers (*Sterling* v. *Constantin,* 287 U. S. 378; *Moyer* v. *Peabody,* 212 U. S. 78) because it is believed that the constitutional question can be most clearly considered if it is demonstrated to the Court that the evacuation and curfew can be plainly sustained under the war powers without reference to or particular reliance on these authorities and if the opinion of the court below and the bearing of the martial law authorities, the most commonly misunderstood body of law, are considered separately (Point V below). But even though the absence of any restriction by due process on the exercise of the war power in this case to affect personal liberty can be established by other authorities (for example, the *Selective Draft Law Cases*) brief reference may be made here to the discussion of the relationship between due process and the exercise of the war powers or similar powers found in the martial law cases without placing any independent reliance on them at this point but using them as apt illustrations.

In *Sterling* v. *Constantin, supra,* holding that in the absence of any reasonable factual basis for the declaration of martial law by a State Governor due process warranted that he be enjoined from using the troops to regulate oil production in the state, the Court stated (p. 399):

> 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 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.

In the earlier case of *Moyer* v. *Peabody, supra,* the Court held that after the Governor with reasonable grounds declared a state of insurrection the arrest and temporary detention of persons not charged with crime was not objectionable under the due process clause of the Fourteenth Amendment, at least "so long as such arrests are made in good faith and in the honest belief that they are needed in order to head the insurrection off" (212 U. S. at p. 85).

Thus, under the Supreme Court rulings, the due process guarantee does not prevent a State Governor from exercising broad discretion in the application of military measures if such measures are directly related

to the maintenance of the peace, which is the permissible objective for the use of troops in peacetime. If measures taken by the President in wartime are related to the then permissible end of the achievement of military success, such measures must likewise be deemed valid if within the "range of honest judgment" and "conceived in good faith." While the breadth of discretion accorded to the Executive in *Peabody* and *Constantin* cases was premised on his use of troops as an emergency measure against persons engaged or threatening to engage in immediate physical violence, the existence of imminence of acts of physical violence by the persons against whom military action is taken cannot be the controlling factor with respect to the necessity for its use under conditions of modern warfare. The success of troops on the battlefield may be doomed to failure as a result of civilian cooperation with the enemy, either of a violent or non-violent sort; and attempts to deal with acts of cooperation either after the fact or when it has become clear that such acts are imminent may be completely futile. The military commander's discretion to take precautionary military measures must be at least as great when the survival of the country is at stake as when the peace is endangered by violence as envisaged in the *Constantin* and *Peabody* cases.

In this general connection the English practice and the English law is of interest. It must be apparent that the British respect for civil liberty is like ours and that even though England has no written constitution and, therefore, no due process clause, that

the concept that no person should be deprived of his liberty without due process of law is an inherent part of British constitutional law. Nevertheless, in the present military crisis the British Government has not hesitated to provide that British subjects might be detained at the discretion of the Secretary of State and that such detention is not reviewable in any court. This has not only been enacted, but has been sustained by the highest British courts. *Liversidge* v. *Anderson* [1942], 1 A. C. 206; *Greene* v. *Secretary of State For Home Affairs* [1942], I A. C. 284. In the *Liversidge* case Lord Macmillan stated in his opinion (p. 257):

> 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 minor precautions of detention.

Thus, since the exercise of both the Congressional and the executive war power under the particular circumstances is clearly reasonably necessary as a matter of the survival of the state, and since it clearly comes within the area of governmental conduct not prohibited by the due-process clause, appellants are not deprived of liberty without due process of law. Moreover, even if the reasonable nature of evacuation were not clearly demonstrable the courts would not undertake to review the military judgment which was exercised in the absence of an irrefutable showing by the appellants that the action taken was wholly capricious.

511655—43——5

C. Evacuation and curfew were not unconstitutional discriminations based on race

The appellants argue that the evacuation and curfew of "persons of Japanese ancestry, aliens and citizens" deprives them of equal protection of the laws in violation of the due process clause of the Fifth Amendment. The Government contends that the distinction based on Japanese ancestry in this situation does not deny any equal protection of the laws or due process of law in violation of the Constitution.

It is, of course, settled law that the due process clause of the Fifth Amendment does not forbid every governmental action which the equal protection clause of the Fourteenth Amendment would bar. *Helvering* v. *Lerner Stores Co.,* 314 U. S. 463, 468; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381; *Currin* v. *Wallace,* 306 U. S. 1, 14; *United States* v. *Carolene Products Co.,* 304 U. S. 144, 151; *Colgate* v. *Harvey,* 296 U. S. 404, 422–423; *Metropolitan Co.* v. *Brownell,* 294 U. S. 580, 584; *Sproles* v. *Binford,* 286 U. S. 374, 396; *Tax Commissioners* v. *Jackson,* 283 U. S. 527, 538; *Frost* v. *Corporation Commission,* 278 U. S. 515; *Louisville Gas Co.* v. *Coleman,* 277 U. S. 32, 37; *Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Rast* v. *Van Deman & Lewis,* 240 U. S. 342.

To succeed upon a claim of denial of equal protection of the laws by the federal government the appellants must establish that the discrimination is so shocking and arbitrary that it denies them due process of law under the Fifth Amendment. From what has been argued, it is submitted that it is clear that evacuation of persons of Japanese ancestry was not unrea-

sonable. But even assuming, *arguendo,* that the cases on equal protection against unfairly discriminatory state action are applicable to federal governmental action, a comparison of the leading cases relied on by the court below and by the appellants (*Yu Cong Eng* v. *Trinidad,* 271 U. S. 500; *Buchanan* v. *Warley,* 245 U. S. 60; *Yick Wo* v. *Hopkins,* 118 U. S. 356; but see *Ah Sin* v. *Wittman,* 198 U. S. 500; *Soon Hing* v. *Crowley,* 113 U. S. 703; *Wong Wai* v. *Williamson,* 103 Fed. 1 (N. D. Cal.)) with cases permitting a distinction between nationals of different countries or races on a reasonable basis (*Gong Lum* v. *Rice,* 275 U. S. 78; *Clarke* v. *Deckebach,* 274 U. S. 392; *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Plessy* v. *Ferguson,* 163 U. S. 537), makes it clear at once that this treatment of races based not on race prejudice but on a reasonable ground in the exercise of the war power is constitutional.

In *Clarke* v. *Deckebach, supra,* holding valid a municipal ordinance prohibiting the issuance of poolroom licenses to all aliens, the Court lucidly stated the difference between the two types of cases, as follows (p. 396):

> The objections to the constitutionality of the ordinance are not persuasive. Although the Fourteenth Amendment has been held to prohibit plainly irrational discrimination against aliens, *Yick Wo.* v. *Hopkins,* 118 U. S. 356; *Truax* v. *Raich,* 239 U. S. 33; *In re Tiburcio Parrott,* 1 F. 481; *In re Ah Chong,* 2 F. 733; *Ho Ah Kow* v. *Nunan,* 5 Sawy. 552, 12 Fed. Cas. No. 6,546; *Wong Wai* v. *Williamson,* 103

F. 1; *Fraser* v. *McConway & Torley Co.*, 82 F. 257, *it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification, Patsone* v. *Pennsylvania,* 232 U. S. 138; *Crane* v. *New York,* 239 U. S. 195, 198; *Terrace* v. *Thompson,* 263 U. S. 197; *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263 U. S. 313; *Frick* v. *Webb,* 263 U. S. 326; *Cockrill* v. *California,* 268 U. S. 258. Cf. *McCready* v. *Virginia,* 94 U. S. 391. [Italics supplied.]

The admitted allegations of the answer set up the harmful and vicious tendencies of public billiard and pool rooms, of which this court took judicial notice in *Murphy* v. *California,* 225 U. S. 623. The regulation or even prohibition of the business is not forbidden. *Murphy* v. *California, supra.* The present regulation presupposes that aliens in Cincinnati are not as well qualified as citizens to engage in this business. It is not necessary that we be satisfied that this premise is well founded in experience. We cannot say that the city council gave unreasonable weight to the view admitted by the pleadings that the associations, experiences, and interests of members of the class disqualified the class as a whole from conducting a business of dangerous tendencies.

It is enough for present purposes that the ordinance, in the light of facts admitted or generally assumed, does not preclude the possibility of a rational basis for the legislative judgment and that we have no such knowledge of local conditions as would enable us to say that it is clearly wrong. *Ft. Smith Light &*

Traction Co. v. *Board of Improvement,* ante, p. 387.

Some latitude must be allowed for the legislative appraisement of local conditions, *Patsone* v. *Pennsylvania, supra,* 144; *Adams* v. *Milwaukee,* 228 U. S. 572, 583, and for the legislative choice of methods for controlling an apprehended evil. It was competent for the city to make such a choice, not shown to be irrational, by excluding from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods. See *Westfall* v. *United States,* Ante, p. 256.

In *Plessy* v. *Ferguson, supra,* upholding the constitutionality of a statutory provision requiring equal but separate accommodations for the white and colored races in public vehicles, the Court answered the objection that the states might extend the mandatory separation from schools and public vehicles to places of business or even to the streets, as follows (P. 550):

The reply to all this is that every exercise of the police power must be reasonable, and extend only to such laws as are enacted in good faith for the promotion of the public good, and not for the annoyance or oppression of a particular class. Thus, in *Yick Wo* v. *Hopkins,* 118 U. S. 356, it was held by this court that a municipal ordinance of the city of San Francisco * * * was * * * a covert attempt on the part of the municipality to make an arbitrary and unjust discrimination against the Chinese race. * * *

> So far, then, as a conflict with the Fourteenth Amendment is concerned, the case reduces itself to the question whether the statute of Louisiana is a reasonable regulation, and with respect to this there must necessarily be a large discretion on the part of the legislature.

Surely, in pursuit of such a primary and proper objective of government activities in time of war as the public safety of the West Coast area most subject to attack, it was reasonable for Congress, the Commander in Chief, and the other military authorities to conclude that persons likely to assist an attack by the Japanese forces would be found within the group of persons of Japanese ancestry rather than in the rest of the population. This distinction was not an invidious discrimination prompted by race prejudice and seeking an objective of such prejudice such as the denial of a common calling to a particular race without any rational difference between the relations of that race and the remainder of the population to that particular occupation (*Yick Wo* v. *Hopkins, supra*). In the present case, however, the war power of the Federal Government was exercised to secure the lawful and imperative objective of public safety and the distinction was based not on race prejudice but on military judgment seeking to deal with the group most likely to contain persons who would assist an attack by the Japanese military forces. It is a shorthand inaccuracy of expression to say that the distinction was based solely on race. Legally, it is more accurate to say that the distinction was based upon possible allegiance of some members of a group to the Japanese enemy in case of

an attack and the group was properly and reasonably described in terms of persons of Japanese ancestry. In other words, the distinction is based not on the mere fact that these persons were of Japanese ancestry but on the facts that such persons have cultural and family ties which render it likely that among them will be found the persons who would help this particular enemy which was likely to attack the area in which they resided.

That the distinction is not based on race alone is also indicated by the reflection that even if Japanese had succeeded in the attempt to establish that they were "free white persons," members of the white race, eligible for naturalization (*Ozawa* v. *United States,* 260 U. S. 178), the result here would be the same and such naturalized Japanese-American citizens would have been excluded because the distinction is not based on race alone but on possible enemy loyalties of some of the group. Similarly, if a white person had become a Japanese citizen certainly the curfew would have been applied to him as an "alien Japanese" (Proclamation No. 3) because the distinction is not based on race alone.

The appellants also apparently object to the classification on the ground that Italian and German alien enemies were not included (*Korematsu*, p. 95). The complete legal answer to that contention is that Congress may deal with one problem even though it does not extend its control to a similar problem or to include all possible objects of its regulation. *United States* v. *Carolene Products Co.,* 304 U. S. 144, 151.

The factual answer is that the danger to be apprehended on the West Coast was an attack by the Japanese enemy and the ties of the Japanese on the Coast, not the Germans and Italians, to that enemy.

The appellants also contend that it was unreasonable to evacuate them without individual hearings to determine who were disloyal. To what has been said concerning the impracticability of that course as a matter of fact (*supra,* 49), there may be added here the complete legal answer that the individual hearing required by due process in matters involving exercise of power in its nature judicial is, of course, not a prerequisite of the legislative and executive action here involved. *Clarke* v. *Deckebach, supra,* p. 66. Quarantines affect the healthly as well as the ill in the area affected without prior hearings to determine to which members of the groups the infection is limited or which members may be immune in themselves and as carriers of the disease. *Ex parte Caselli,* 62 Mont. 201; *Ex parte Johnson,* 40 Cal. App. 242; *Highland* v. *Schulte,* 123 Mich. 350; cf. *Lilz* v. *Hesterberg,* 211 U. S. 31.

Where a class as a whole is the proper object of official action a hearing of the individual is entirely irrelevant except to determine membership in the class. The operative fact on which the classification was made was not the loyalty or disloyalty of the individuals composing the class, but the danger of the existence of a group of over 100,000 persons of Japanese descent on the West Coast. "It does not follow that because a transaction (person in this case) separately considered is innocuous it may not be included in a prohibi-

tion the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government." *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 291.

It is the central misapprehension of the argument for individual loyalty hearings to suppose that the action here was directed against persons on the basis of their loyalty. It is entirely irrelevant, therefore, to assert that the majority of the individuals evacuated were perfectly loyal citizens of the United States, as they are. The rationale of the action here in controversy is not the loyalty or disloyalty of individuals but the danger from the residence of the class as such within a vital military area. If there was a rational basis for this judgment of the military commander, then the only question that can be submitted to inquiry is whether a given individual was or was not a person of Japanese ancestry. And it is not contended that any mistake of fact was made on that issue.

It is submitted that the appellants have failed to establish any denial of due process of law in the evacuation and curfew requirement as applied to them in these cases.

IV. PUBLIC LAW 503 IS NOT INVALID BECAUSE OF ITS DELEGATION OF AUTHORITY TO THE MILITARY COMMANDER

It cannot be successfully contended that authorizing military commanders to fix the size of the military areas is a delegation of legislative power. *McKinley* v. *United States,* 249 U. S. 397. The objection must be that any primary standard is lacking

on the types of regulations authorized in the areas. The very fact, however, that the areas are to be *military* areas, in itself suggests a primary standard and that regulations appropriate to a military area, such as curfew and evacuation adopted in this case, are the regulations which are authorized. Moreover, the statute speaks expressly of entering, remaining in, leaving, or committing any act in any military area contrary to the regulations adopted for an area of such a character. Clearly one type of regulation contemplated by this is action of a kind related to leaving an area of a military character and evacuation is such a type of action applicable to a military area.

The appellants contend that Public Law 503 is invalid on the basis that it is an unconstitutional delegation of legislative power in that it does not circumscribe the executive discretion thereunder within sufficiently narrow limits. The Government contends that the words of the statute alone, and considered in connection with its legislative history and the nature of the power involved, the war power, establish that there is no delegation of purely legislative power. Moreover, it must be borne in mind that prior to the enactment of Public Law 503 on March 21, 1942, General DeWitt had issued, pursuant to Executive Order 9066, Public Proclamations Nos. 1 and 2 (on March 2 and March 16, respectively), which proclamations initiated the evacuation program. Each proclamation clearly indicated that persons would subsequently be excluded from the zones established by the proclamations. The evacuation program was at that time

a matter of public proclamation, public knowledge and discussion, including discussion involving members of Congress and representatives of the Government departments concerned. Under these circumstances, while Public Law 503 does not expressly mention the evacuation program, it may be interpreted as though "restrictions applicable to any such area or zone" to which it referred, meant restrictions imposed to effect the evacuation program.

Even assuming, however, that P. L. 503 were not to be construed as suggested above, it would nevertheless not constitute an unconstitutional delegation of power. The constitutionality of a delegation of Congressional power with respect to the prosecution of the war must be judged by a special standard rather than by that applicable to most Congressional powers, because in this field the Constitution itself grants powers to the President as well as to Congress. Corwin, op. cit. pp. 194–198. With respect to a similar sphere of action, the conduct of foreign relations, the Supreme Court discussed the question of Congressional delegation in the following terms:

> It is important to bear in mind that we are here dealing not only 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 * * * congressional legislation which is to be made effective through negotiation and injury within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. * * * When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay down narrowly define standards by which the President is to be governed * * * *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 319–322, 1936.[34]

---

[34] In the decision, the Court pointed out the similarity of the power there at issue with the war power in the following passage: "It results that the investment of the federal government with the powers of external sovereignty did not depend upon the affirmative grants of the Constitution. The powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties, if they had never been mentioned in the Constitution, would have vested in the federal government as necessary concomitants of nationality" (299 U. S. at p. 318).

Similarly, in *Field* v. *Clark,* 143 U. S. 649, the Court, again dealing with the conduct of foreign relations, indicated that the nature of the delegated power was of major significance in determining the permissible scope of its delegation (143 U. S. at p. 691). The logic of the Court's approach in the *Curtiss-Wright* opinion is particularly applicable to the war power. For in view of the broad power which the Constitution itself grants to the President with respect to the prosecution of the war (*supra,* p. 34), there would be little rationality in Congress narrowly limiting the scope of the President's discretion when delegating war power to him.

Broad powers have habitually been granted to the President in wartime legislation, a fact which in itself is important in considering the constitutionality of the instant delegation (*Field* v. *Clark,* cited *supra* at p. 683). In one of the few cases in which the constitutionality of a war measure has been discussed from the standpoint of the extent of the delegation of power, the Court said:

> The Act (respecting the disposition of alien enemies' property) went as far as was reasonably practicable under the circumstances existing. It was peculiarly within the province of the Commander in Chief to know the facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. *United States* v. *Chemical Foundation,* 272 U. S. 1, 12.

Generally, in upholding war legislation conferring broad powers on the President, the Court has not con-

sidered it necessary to discuss the delegation question but has merely adverted to the cognate powers of the President and the Congress in the war-making field. In an early case, *The Thomas Gibbons,* 8 Cranch, 420, the Court dealt with a statute authorizing the President " 'to establish and order suitable instructions for the better governing and directing the conduct' of private armed vessels," under which the President had commissioned privately owned vessels and instructed their masters as to the capture of prize (8 Cranch at p. 426, 431). The Court said that it did "not think it necessary to consider how far he (the President) would be entitled, in his character of commander in chief * * * independent of any statute" to take such action because he was clearly authorized to take it by the statute. On this point, the Court held: "The language of this provision (quoted above) is very general, and in our opinion, it is entitled to a liberal construction, both upon the manifest intent of the legislature, and the ground of public policy" (8 Cranch, at p. 426).

The Court handled in similar fashion the broad delegations of Congressional power to the President in the Civil War and in the last World War. In *Hamilton* v. *Dillin,* 21 Wall. 73, the Court considered a statute which prohibited commercial intercourse between the citizens of the North and the South except insofar as the President permitted such intercourse and subject to the conditions imposed by him. The Court declared:

> Whether, in the absence of Congressional action, the power of permitting partial inter-

> course with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject * * *. But without pursuing this inquiry, and whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that a concurrence of both affords ample foundation for any regulations on the subject (21 Wall. at pp. 87, 88).

During the last World War a statute gave the President power "to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable" (*Northern Pacific Railway Co.* v. *North Dakota, supra*). Without differentiating between the executive and legislative branches of the federal government, the Court gave effect to the statute on the basis of "the complete and undivided character of the war power of the United States" (205 U. S. at p. 149).

The case of *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163, involved a similar statute, which authorized the President to assume control of any communication system "and to operate the same in such manner as may be needful or desirable for the dura-

tion of the war." With respect to this delegation the Court merely said:

> * * * That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the North Dakota *Railroad Rate Case* (*Northern Pacific Railway Co.* v. *North Dakota, supra*). And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him (p. 183).

In *Highland* v. *Russell Car Co.*, 279 U. S. 253, the Court considered a statute giving the President the power to fix the price of coal; after discussing the development of the regulatory program the Court said: "But this arrangement having failed to give assurance of an adequate supply, Congress and the President found it necessary to take the steps here involved . . . the Congress and the President exert the war power of the nation, and they have wide discretion as to the means to be employed successfully to carry on" (279 U. S. at pp. 260, 261, 262).

In view of the doctrine of the *Curtiss-Wright* case, *supra*, the haziness of the line separating the executive and the legislative power with respect to the prosecution of the war, and the history of broad delegations of Congressional war power to the Presi-

dent, the authority delegated by Public Law 503 should not be considered to be unconstitutional.

V. EVACUATION AND CURFEW WERE NOT AN INVALID EXERCISE OF MARTIAL LAW

The court below apparently took the view that the evacuation and curfew constituted an exercise of the power of martial law; that "such power only is tolerated in the first instance if a state of 'martial law' has been proclaimed by the proper authority and in the ultimate only if the facts prove the existence of the military necessity therefor" (R. 30); that the failure to declare martial law strongly implies that there is no necessity for such action (R. 40); and that Congress might have declared martial law and thereupon the courts might have become adjuncts of the General Commanding but in its absence the court must apply ordinary law and protect the rights of a citizen in a criminal case and by such standards Congress could not constitutionally make a distinction based on Japanese ancestry (R. 44–45). The court below also states that any doctrine of partial martial law is unsound (R. 35) and that although Congress could declare martial law if the facts warranted such a declaration it could not in uninvaded loyal territory delegate to military commanders the power to make regulations having the effect of criminal laws.

The Government contends that if its view is correct, that this case plainly involves an exercise of the federal legislative and executive war powers which is not so arbitrary as to be prohibited by the Fifth Amendment, there is no need legally to consider the evacua-

511655—43——6

tion and curfew in terms of the martial law decisions in the absence of any such decision indicating that the particular action taken, evacuation and curfew, was unlawful except under a state of facts in which the civil government had been wholly replaced by the military authorities. In other words, if the decisions on the war powers not discussing martial law sustain the action taken and if no decision involving martial law requires a contrary result, reliance on the martial law authorities is unnecessary. In view of the fact, however, that the court below treats this case entirely as a matter of martial law, and does not discuss the other war-power judicial authorities relied on by the Government, the martial-law authorities will also be considered.

An examination of the martial law decisions invariably results in the conclusion that the decisions disclose conflict and confusion (8 Ops. A. G. 365; Charles Fairman, *Law of Martial Rule and the National Emergency,* 55 H. L. R. 1253, 1258), which perhaps is not surprising as a matter of human nature in that they express views of the civil judiciary concerning military control usually superseding judicial functions against the background of the historical political traditions of democratic peoples who view with alarm the ascendency of the military authorities in less democratic nations.[35]

---

[35] Charles Fairman, also author of "The Law of Martial Rule" (1930), speaking of this general question, was reported by the San Francisco Chronicle for March 4, 1942 (p. 14), as follows:

"Probably the problem will only be confused by talking about martial law. The President has made no such proclamation, and

It is submitted, however, that the application of these decisions to this situation is clear if it is understood that the exercise of federal martial law in time of war (as distinguished from a State Governor's exercise of martial law to quell a local insurrection) is just one of the many types of exercise of the federal war power. Many of the exercises of the war power obviously have no relation to what is popularly thought of as martial law. For example, when, in time of peace, the Congress appropriates money for the construction of a battleship or a dam or for the support of the army, no one would think Congress had declared martial law. *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288. On the other hand, the actions taken by the civil governor and by the military governor of the Territory of Hawaii following the attack of December 7, 1941, resulting in military custody of a citizen without trial, have been termed a valid exercise of martial law by this Court.

This difference of degree in the exercise of the war powers is a source of the conceptual confusion concerning martial law. Actually any exercise of the war power must, as has been shown above, be reasonably related to the military end sought and reasonably necessary to the achievement of that end. As the emergency becomes more grave, however, the scope of reasonable governmental conduct and even of military

---

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?"

conduct which is reasonable necessarily expands until finally, as some writers have put it, if the military situation actually requires it, the will of the general governs (Fairman, op. cit. 55 H. L. R. 1253, 1259).

Those exercises of the war power which involve the most drastic changes from governmental customs in times of peace have been, but need not be, termed exercises of martial law. *Sterling* v. *Constantin,* 287 U. S. 376; *Moyer* v. *Peabody,* 212 U. S. 78. The test for the validity of the exercise of martial law is identical to the test for the propriety of any exercise of the war power. An accepted definition of martial law is stated as follows, Wiener, "A Practical Manual Of Martial Law" (1940) p. 16.

> 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.

The fact that many exercises of the war power, such as the peacetime maintenance of military establishments, require no particular formal invocation of the war power and the fact that martial law customarily is formally declared either by the Chief Executive or a military commander supplies no basis for a distinction between the war power and martial law, because the proclamation of martial law is not necessary to its exercise but "must be regarded as the statement of an existing fact, rather than the legal creation of that fact." 8 Ops. A. G. 365, 374; Wiener, op. cit., pp. 19–20.

It is, therefore submitted that the fundamental question in the case at bar is whether the evacuation

program is, under all the circumstances, a proper exercise of the war power. It is unnecessary legally, and it may be undesirable generally, to decide the subsidiary question of terminology whether this particular exercise of the war power falls within that part of the scope of the war power which is popularly called martial law. On the one hand it is a substantial exercise of the war power over personal liberty and for that reason might possibly be called martial law. On the other hand it is not the type of control usually associated with martial law (*Ex parte Milligan,* 4 Wall. 2; *Zimmerman* v. *Walker,* decided by this Court December 14, 1942) and might be exercised by civilian authorities as is contemplated under the English statute and regulations (*supra,* p. 42) without making any reference to martial law. Indeed, in view of the fact that in popular opinion greater military control than here involved and suspension of the civil government including the courts is associated with the state of martial law, it might be more useful not to label the exercise of the war power here involved as martial law.[36]

---

[36] The most recent example of the varying degrees of military control which may be exercised under martial law is contained in General Emmons' proclamation a few days ago providing that in Hawaii where martial law in all senses of the term prevails and the suspension of the writ of habeas corpus is continued, nevertheless full jurisdiction and authority are relinquished by the Commanding General to the Governor and other civilian officers in respect of numerous matters including the conduct of both criminal and civil proceedings with certain exceptions, censorship of the mails, and various governmental activities such as control of transportation, public health, and other matters.

Appellants argue that the evacuation program is necessarily that type of exercise of the war power which must be called martial law, and that martial law could not be declared on the Pacific Coast under the dictum of the *Milligan* case, *supra*. As this Court knows, the question in the *Milligan* case was whether Milligan could constitutionally be tried by a military commission at Indianapolis, Indiana, and sentenced to death. By the Act of March 3, 1863, 12 Stat. 755, Congress had expressly provided that the President might, in his judgment, suspend the privilege of the writ of habeas corpus, and provided further for the detention of political prisoners pending the next sitting of the federal grand jury. The Supreme Court unanimously held merely that the Executive was not entitled to try Milligan by military commission, because Congress had provided a method of dealing with disloyal persons and had not provided for trial by military commission.[37] Compare *United States ex rel. Quirin* v. *Cox,* United States Supreme Court October 29, 1942; 87 Law Ed. 1.

Conceding for the sake of the particular argument, that the further doctrine of the majority opinion has been so often quoted that it has come to be declaratory of the law, that opinion is distinguishable. The fac-

---

[37] The dissenting opinion in *Zimmerman* v. *Walker*, *supra*, states that the broader views of the majority of the Court in the *Milligan* case are not dicta because the Government had argued that Milligan could be detained whether or not authorized by Congress. It is respectfully submitted here that the Government's argument may indicate that the dicta were well considered but nevertheless they were dicta.

tual question with which the Court was there dealing was whether the military commander, in the exercise of the war power could, in an area not threatened by invasion or insurrection and in which the courts were functioning entirely normally, usurp the function of the courts and try Milligan before a military commission. The dictum of the majority states that even Congress could not do this. The majority opinion in the *Milligan* case certainly does not hold that an exercise of the war power totally unrelated to the functioning or the nonfunctioning of the courts is to be tested by that criterion. The issue there decided was stated succinctly as follows (at pp. 118–119):

> The controlling question in the case is this: Upon the facts stated in Milligan's petition, and the exhibits filed, had the military commission mentioned in it jurisdiction, legally, to try and sentence him? Milligan * * * (was) arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission * * *. The power of punishment is alone thought the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment * * *.

The Court then declared that "every trial involves the exercise of judicial power"; that no part of the judicial power of the United States—which is vested "in the Supreme Court, and in such inferior courts as the Congress may * * * establish" by Article III, section 1 of the Constitution—was possessed by

the commission which tried Milligan; and that there was no sanction for Milligan's trial by a body which did not possess such judicial power when, in the State where he was tried, the "Courts (were) always open to hear criminal accusations" (4 Wall., at p. 121). The Court held that Milligan's trial was unconstitutional on the additional ground that under the Sixth Amendment to the Constitution "citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury in all criminal prosecutions" (4 Wall., at p. 123). Thus the rule of the *Milligan* case with respect to the significance of the uninterrupted functioning of the courts or the constitutionality of exercise of military power, was intended only to apply, and logically can only apply, in instances where the military forces assume civil judicial functions.

Although the *Milligan* case is not particularly relevant since neither opinion applies to the case at bar, it may be said that even the majority opinion precisely fits the theory of law which is here urged. As has been said repeatedly, the test of the exercise of the war power is reasonableness. This would appear to be eminently reasonable. Military necessity may require the detention of a person until the military crisis is over (*Moyer* v. *Peabody,* 212 U. S. 78), but this might be a sufficient military measure and it might not be necessary to impose a punishment which would endure after the termination of the military crisis (by the time Milligan's case reached the Supreme Court his sentence had been commuted to life imprisonment).

In fact, the majority opinion itself makes it abundantly clear that the majority believed that there was no military necessity for the action taken by the military in that case. At p. 122 it is said:

> Why was he (Milligan) not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offenses charged, provided for their punishment and directed that court to hear and determine them. And soon after this military tribunal was ended, the Circuit Court met, peacefully transacted its business and adjourned. It needed no bayonets to protect it and required no military aid to execute its judgments.

On p. 127 the majority said further:

> It is difficult to see how the *safety* of the country required martial law in Indiana. [Emphasis by the Court.]

The minority opinion also makes clear that a large measure of the difference of opinion between the majority and the minority was as to whether the Congress could reasonably have determined that the public danger in Indiana was sufficiently great to warrant the legislation which the majority gratuitously stated Congress could not enact. At p. 140 it is said:

> 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 or security of the army or against the public safety.

The Court then goes on to discuss those conditions prevailing in Indiana at the time of Milligan's arrest indicating danger to the public safety, and further states (at p. 140):

> We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of the military commission and for trial by that commission of persons engaged in conspiracy.

Thus it appears that much of the division of the court in that case was due to a different evaluation of the facts, and it is by no means clear that if all of the members of the court had found that military necessity required Milligan's trial by commission, any member of the court would have suggested that Congress lacked power to authorize such a trial.

Thus the military action tested in the *Milligan* case appears to have been in fact and in the opinion of the majority in excess of military necessity, arbitrary and unreasonable, and thus the majority opinion can be fitted precisely into the Government's theory of the law applicable to the case at bar.

The development of the English law also indicates that it is unnecessary to specify as a matter of terminology whether governmental control of liberty in time of war is martial law. The majority opinion

in the *Milligan* case appears to have been greatly influenced by the attitude in England that martial law cannot prevail where the civil courts are open expressed in connection with hostility towards severe military repression of revolts in Demerara and Jamaica. Fairman, op. ct. 55 H. L. R. 1253, 1254. By the time of the more serious national strife of the Boer War, however, the Judicial Committee of the Privy Council was prepared to abandon the doctrine that martial law may not obtain in areas in which the courts are open. *Ex parte Marais* (1902), A. C. 109. This view was affirmed in the cases arising during the Irish Rebellion. *The King* v. *Allen* (1921), 2 Ir. R. 241; *The King* (*Garde*) v. *Strickland* (1921), 2 Ir. R. 37; *The King* (*Ronayne and Mulcahy*) v. *Strickland* (1921), 2 Ir. R. 333. By the time of the present war, however, Parliament had gone beyond the concept of the necessity of formal martial law as a means of defense, and had provided in the Emergency Powers (Defense) Act (2 and 3 Geo. VI, c. 62 (1939)), extending the Defense of the Realm Act of the First World War (4 and 5 Geo. V, c. 29 (1914)), and conferring almost unlimited power on the executive. Under Section 18 (B) of the regulations under the Act the Secretary of State for Home Affairs is authorized to detain persons "with a view to preventing (the person detained) acting in a manner prejudicial to the safety or the defense of the Realm." The lawfulness of such a detention has been upheld by the House of Lords without reliance on martial law. *Liversidge* v. *Anderson* (1942), 1 A. C. 20. See

Carr, *A Regulated Liberty,* 42 Col. L. R. 339. The most striking parallel of British practice to the evacuation program is the regulations providing that the Secretary of State or the Admiralty might evacuate persons or classes from areas if it should appear necessary or expedient to do so for the purpose of meeting any actual or apprehended attack (*supra* 42). The significance of the British detention and evacuation regulations is that they are expressly to be imposed not by martial law, but merely by the ordinary civil executive authorities.

It is submitted that the court below erroneously viewed the problem as one in which, in the absence of a declaration of martial law replacing the ordinary functions of the civil government including the courts, the Congress and the President could not under the war powers order the evacuation and curfew. Whether or not this exercise of the war powers is termed an exercise of martial law, it was a reasonable exercise of the war power not prohibited by any specific clause of the Constitution and therefore is valid and constitutional.

VI. THE MISCELLANEOUS CONSTITUTIONAL OBJECTIONS RAISED BY THE APPELLANTS ARE WITHOUT MERIT

The appellants contend that Public Law 503 does not conform to the criteria established under the Fifth and Sixth Amendments with respect to the necessity for definite and certain standards of criminal conduct. The Government contends that whether or not the terms of the statute, standing alone, are sufficiently

definite to apprise the defendant of conduct made criminal thereby, the defendant has no valid constitutional objection if he had, prior to his commission of the offense, adequate guidance so that he could, if he chose, avoid unlawful conduct.

The regulations and orders authorized by the statute and violated by the appellants, define with minute particularity the conduct which is to be deemed criminal under the statute. In fact, the orders defining the conduct interdicted by Public Law 503 were so drawn, and given such publication, that no person in the area in which appellants resided could have escaped knowledge as to the precise physical movements that were lawful or criminal on his part. It is well established that the validity of a statute and indictment from the standpoint of certainty is to be judged not only by the terms of the statute but also by pertinent regulations or orders defining the offense. *Kay* v. *United States,* 303 U. S. 1, 8; *United States* v. *Shreveport Grain & El. Co.,* 287 U. S. 77; *International Harvester Co.* v. *Kentucky,* 234 U. S. 216.

United States v. *Cohen Grocery Co.,* 255 U. S. 81 is not controlling because the statute merely stated "that it is hereby made unlawful for any person willfully * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" (255 U. S. at 89) and since this general language was not defined by regulation or order. Since the statute, as the Court said, did not forbid "any specific or definite act" (p. 89), the public was not informed, except in vague and indefinite terms, of the

type of conduct that was to be penalized. The holding that the defendant could not be held to answer for commission of a crime under such circumstances is clearly inapplicable in the instant case.[38]

Very brief reference is believed to be sufficient for a few of the points raised. The constitutional prohibition of Bills of Attainder clearly has no application. The evacuation and curfew orders were precautionary measures and did not attempt, as appellant Hirabayashi suggests, to pronounce the persons affected thereby guilty of criminal conduct, either individually or collectively. "A Bill of Attainder is a legislative act which inflicts punishment without a judicial trial" for a past act which was not punishable at the time of its commission. *Cummings* v. *Missouri,* 4 Wall. 277, 323; *Ex parte Garland,* 4 Wall. 333, 377; *Pierce* v. *Carskadon,* 16 Wall. 234. As to the argument based on the prohibition of involuntary servitude, no order of detention is involved in the instant litigation; even if it were, the appellants have failed to note the Supreme Court decision with respect to this prohibition, in which it was stated: "The meaning of this is as

[38] The argument of the appellant Korematsu appears to confuse to some extent the question of delegation of power by a criminal statute with the question of the certainty with which criminal conduct must be defined. It is clear that where a delegation of legislative power would otherwise be valid, the fact that the statute employs a criminal sanction does not make the delegation unconstitutional. This was early affirmed in the case of *United States* v. *Grimaud*, 220 U. S. 506, and was recently reaffirmed in *Kay* v. *United States* (see *supra*), which cited the *Grimaud* case and *United States* v. *Shreveport Grain and El. Co.* (*supra*). On the same point, see *McKinley* v. *United States*, 249 U. S. 397.

clear as language can make it. The things denounced are slavery and involuntary servitude * * *. All understand by these terms a condition of enforced compulsory service of one to another." *Hodges* v. *United States,* 203 U. S. 1, 16. The prohibition of unreasonable searches and seizures applies to the physical action of breaking and entering a person's property or subjecting the property or the person to forcible search without that person's consent. The cases cited on this point by the appellants, which relate to the use of such seized material as evidence or the seizure of persons without warrant, show the inapplicability of this prohibition to the present case.

CONCLUSION

It is respectfully submitted that the judgments below in this case, and in the Korematsu and Hirabayashi cases, should be affirmed.

CHARLES FAHY,
Director, War Division,
Department of Justice.
CARL C. DONAUGH,
United States Attorney,
District of Oregon.

EDWARD J. ENNIS,
JOHN L. BURLING,
NANETTE DEMBITZ,
LEO GITLIN,
Attorneys, War Division,
Department of Justice.
CHARLES BURDELL,
Special Assistant to the Attorney General,
Of Counsel.

APPENDIX

Declaration of War Between Japan and the United States:

> Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America:
> Therefore be it
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That:* The state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.
>
> Approved, December 8, 1941, 4:10 p. m., E. S. T.
>
> [55 Stat. 795, 77th Cong. 1st Sess., c. 561.]

Public Law No. 503, 77th Congress (Section 97a, Title 18, U. S. C.):

> 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 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.

Wilful destruction of war or national-defense material (50 U. S. C. Secs. 104, 105):

§ 104. *Definition of national-defense terms.*— The words "national-defense material," as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies, munitions, and all other other articles of whatever description and any part or ingredient thereof, intended for the use of the United States in connection with the national defense or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.

The words "national-defense premises," as used herein, shall include all buildings, grounds, mines, or other places wherein such national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other military or naval stations of the United States.

The words "national defense utilities," as used herein, shall include all railroads, railways, electric lines, roads of whatever description,

511655—43——7

railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, or aircraft, or any other means of transportation whatsoever, whereon or whereby such national defense material, or any troops of the United States, are being or may be transported either within the limits of the United States or upon the high seas; and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures, and buildings, whereby or in connection with which water or gas may be furnished to any national defense premises or to the military or naval forces of the United States, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of communication to any national defense premises or to the military or naval forces of the United States. Apr. 20, 1918, c. 59, § 4, as added Nov. 30, 1940, c. 926, 54 Stat. 1220, amended Aug. 21, 1941, c. 388, 55 Stat. 655.

§ 105. *Destroying or injuring national defense materials, etc.*—Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, shall willfully injure or destroy, or shall attempt to so injure or destroy, any national defense material, national defense premises, or national defense utilities, as herein defined, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than ten years, or both. Apr. 20, 1918, c. 59, § 5, as added Nov. 30, 1940, c. 926, 54 Stat. 1220.

Executive Order No. 9066:

WHEREAS the successful prosecution of the war requires every possible protection against

espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

NOW, THEREFORE, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appro-

priate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments, and other Federal Agencies to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

[United States Code Congressional Service, No. 2 (1942), p. 157.]

Executive Order No. 9102:

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to provide for the removal from designated areas of persons whose removal is

necessary in the interests of national security, it is ordered as follows:

1. There is established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority, at the head of which shall be a Director appointed by and responsible to the President.

2. The Director of the War Relocation Authority is authorized and directed to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision.

3. In effectuating such program the Director shall have authority to—(a) Accomplish all necessary evacuation not undertaken by the Secretary of War or appropriate military commander, provide for the relocation of such persons in appropriate places, provide for their needs in such manner as may be appropriate, and supervise their activities.

(b) Provide, insofar as feasible and desirable, for the employment of such persons at useful work in industry, commerce, agriculture, or public projects, prescribe the terms and conditions of such public employment, and safeguard the public interest in the private employment of such persons.

(c) Secure the cooperation, assistance, or services of any governmental agency.

(d) Prescribe regulations necessary or desirable to promote effective execution of such program, and, as a means of coordinating evacuation and relocation activities, consult with the Secretary of War with respect to regulations issued and measures taken by him.

(e) Make such delegations of authority as he may deem necessary.

(f) Employ necessary personnel, and make such expenditures, including the making of loans and grants and the purchase of real property, as may be necessary, within the limits of such funds as may be made available to the Authority.

4. The Director shall consult with the United States Employment Service and other agencies on employment and other problems incident to activities under this order.

5. The Director shall cooperate with the Alien Property Custodian appointed pursuant to Executive Order No. 9095 of March 11, 1942, in formulating policies to govern the custody, management, and disposal by the Alien Property Custodian of property belonging to foreign nationals removed under this order or under Executive Order No. 9066 of February 19, 1942; and may assist all other persons removed under either of such Executive Orders in the management and disposal of their property.

6. Departments and agencies of the United States are directed to cooperate with and assist the Director in his activities hereunder. The Departments of War and Justice, under the direction of the Secretary of War and the Attorney General, respectively, shall insofar as consistent with the national interest provide such protective, police, and investigational services as the Director shall find necessary in connection with activities under this order.

7. There is established within the War Relocation Authority the War Relocation Work Corps. The Director shall provide, by general regulations, for the enlistment in such Corps, for the duration of the present war, of persons removed under this order or under Executive Order No. 9066 of February 19, 1942, and shall prescribe the terms and conditions of the work to be performed by such Corps, and the compensation to be paid.

8. There is established within the War Relocation Authority a Liaison Committee on War Relocation which shall consist of the Secretary of War, the Secretary of the Treasury, the Attorney General, the Secretary of Agriculture, the Secretary of Labor, the Federal Security Administrator, the Director of Civilian Defense, and the Alien Property Custodian, or their deputies, and such other persons or agencies as the Director may designate. The Liaison Committee shall meet at the call of the Director and shall assist him in his duties.

9. The Director shall keep the President informed with regard to the progress made in carrying out this order, and perform such related duties as the President may from time to time assign to him.

10. In order to avoid duplication of evacuation activities under this order and Executive Order No. 9066 of February 19, 1942, the Director shall not undertake any evacuation activities within Military areas designated under said Executive Order No. 9066, without the prior approval of the Secretary of War or the appropriate military commander.

11. This order does not limit the authority granted in Executive Order No. 8972 of December 12, 1941; Executive Order No. 9066 of February 19, 1942; Executive Order No. 9095 of March 11, 1942; Executive Proclamation No. 2525 of December 7, 1941; Executive Proclamation No. 2526 of December 8, 1941; Executive Proclamation No. 2527 of December 8, 1941; Executive Proclamation No. 2533 of December 29, 1941; or Executive Proclamation No. 2537 of January 14, 1942; nor does it limit the functions of the Federal Bureau of Investigation.

[United States Code Congressional Service, No. 3 (1942), p. 265.]

U. S. GOVERNMENT PRINTING OFFICE: 1943