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IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR
THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

In the Matter of the Application of TOKI WAKAYAMA for a Writ of Habeas Corpus	No. 2376-H
In the Matter of the Application of ERNEST WAKAYAMA for a Writ of Habeas Corpus	No. 2380

BRIEF OF STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF OPPOSITION TO ISSUANCE OF WRITS OF HABEAS CORPUS

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By leave of court granted on August 26, 1942, the State of California files herein its brief as amicus curiae in opposition to the issuance of writs of habeas corpus in the above entitled actions. As the issues presented by the above petitions are the same, the within brief will apply in both cases.

STATEMENT OF FACTS

The petitioners, persons of Japanese ancestry and American citizens, seek the issuance herein of writs of habeas corpus for the purpose of obtaining their release from certain War Relocation Project Areas or Assembly Centers located in California. Their detention at these centers is incidental to the evacuation of all persons of Japanese ancestry, aliens and citizens alike, from Pacific Coast military areas as ordered by Lieutenant General J. L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, acting under authorization from the

President of the United States.

It is here contended that the defense of the Pacific Coast area required this action and that such action is a justifiable exercise of the war power under conditions of martial law now obtaining on the Pacific Coast. The validity of the evacuation program and the detentions incidental thereto first require a brief consideration of the factual situation out of which the complained of detentions arise.

(a) The Japanese Problem.

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

The Japanese of the Pacific Coast area, with some exceptions, have remained a group apart and inscrutable to their neighbors. Without any fault of their own, it may be said that they have lived in America without being of America. Regardless of the justification or lack of it, legislation directed at Orientals in the Pacific Coast States and agitation to deny citizenship to American-born Japanese have been a dividing influence. The Japanese Government's theory of dual citizenship has had a disuniting effect. Japanese militarists look to persons of Japanese ancestry for fifth column assistance in case of an invasion of California.(1) While

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

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

(b) The Military Situation on the Pacific Coast.

At the time of the evacuation and during the present complained of detention of the petitioners, the Pacific Coast was and is within the theater of war and remains one of the potential battlefronts. A field army occupies the length and breadth of the State of California. Our ports are vital embarkation points for men and materials. Nearly one-third of the nation's war planes and one-fourth of the country's ships are being built on the Pacific Coast. Over a thousand miles of coastline must be guarded. Dotted throughout California are numerous defense installations, including army camps, posts, forts, arsenals and large training centers and strategic naval installations. California lies wholly within the Western Defense Command theater of operations, and a strip of land one hundred miles wide, extending down the coast and along the California-Mexico border, is part of the designated "combat zone". Japanese submarines operating within the Oregon and California waters have attacked

installations on the coast of Oregon and have shelled objectives at Santa Barbara, California. Japanese in considerable numbers are now lodged in some of the Aleutian Islands, which are part of the Western Defense Command. Alaska has been subjected to repeated bombing attacks and the mainland has already been subjected to one hit and run attack. These are some of the considerations which the Japanese problem in the Pacific War Zone presented at the outbreak of the war with Japan. How the President and his subordinate military commanders and Congress dealt with this problem is best seen from a brief chronological view of the steps taken.

On December 11, 1941, four days after the outbreak of war with Japan, the War Department constituted the eight western States and the Territory of Alaska as the Western Defense Command and designated it as a "theater of operations". An area one hundred miles wide, extending from the Canadian border down the Pacific Coast to the California-Mexico border, was declared to be a combat zone by Lieutenant General J. L. DeWitt, Commanding General of the Western Defense Command and Fourth Army (Field Order No. 1, December 14, 1941).(2) On February 19, 1942, Franklin Delano Roosevelt, as President of the United States and Commander-in-Chief of the Army and Navy, by Executive Order 9066 (U.S.C. Cong. Ser. No. 2, p. 157 (1942)) authorized and directed the Secretary of War or the military commanders designated by the

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

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

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

Secretary to prescribe military areas whenever it was deemed necessary, from which all persons might be excluded and, within the discretion of either of such officers, to impose restrictions with respect to the right of any person to enter, remain in or leave such military areas. The President's order was based on the ground that the successful prosecution of the war required every possible protection against espionage and sabotage to national defense material, national defense premises and national defense utilities. The next day the Secretary of War designated Lieutenant General J. L. DeWitt as the military commander to carry out the terms of Executive Order 9066 in the Western Defense Command. (Letter from Secretary of War to General DeWitt, March 2, 1942.)

On March 2, 1942, Lieutenant General DeWitt by Proclamation No. 1 declared that because the Pacific Coast was particularly subject to attack, to an attempted invasion, and in connection therewith to sabotage and espionage, it was necessary to adopt military measures to safeguard against such operations. Therefore, pursuant to the power granted by President Roosevelt in Executive Order 9066 and by authorization of the Secretary of War, Military Areas Nos. 1 and 2 were established as a matter of military necessity. Military Area No. 1 coincides approximately with the Army's Pacific Combat Zone. The proclamation then stated that such persons or classes of persons as the situation required would be excluded from all of Military Area No. 1 and from certain zones in Area No. 2. (By Proclamation No. 2 (March 16, 1942) other areas were established under similar conditions.)

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

formulate and effect a program for the removal from the areas of persons designated under Executive Order 9066 and to provide "for their relocation, maintenance, and supervision".

With Proclamations 1 and 2 and Executive Orders 9066 and 9102 before it, Congress on March 21, 1942, enacted Public Law 503 (77th Cong., 2nd Sess., Ch. 191), which declared it to be a misdemeanor for anyone to enter, remain in or leave or commit any act in any prescribed military area or zone contrary to the order of the Secretary of War or any designated military commander, provided such person knew or should have known of the restrictions or orders and that his act was in violation thereof.(3)

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

The petitioners herein, Ernest and Toki Wakayama, husband and wife, who were residing in the City of Los Angeles at 210 North San Pedro Street, were ordered evacuated under Civilian Exclusion Order No. 33 (May 3, 1942).

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(3) "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." (77th Cong., 2nd Sess., Ch. 191)

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

This was followed by Proclamation No. 8, which declared that as a matter of military necessity all persons of Japanese ancestry who had been evacuated from certain regions within Military Areas 1 and 2 should be removed to relocation centers for their "relocation, maintenance, and supervision, and that such relocation centers be designated as War Relocation Project Areas".

> "All persons of Japanese ancestry, both alien and non-alien, who now or shall hereafter be or reside, pursuant to exclusion orders and instructions from this headquarters, or otherwise, within the bounds of any established War Relocation Project Area are required to remain within the bounds of such *** Area at all times unless specifically authorized to leave *** ." (June 27, 1942)

This proclamation conformed to Civilian Restrictive Order No. 1 previously issued (May 19, 1942), which provided that persons of Japanese ancestry, before leaving assembly or relocation centers, had first to obtain a written authorization from headquarters of the Western Defense Command (Para. 1(b)). By subsequent orders many thousands of Japanese have been permitted to obtain private employment in areas outside the State of California (Civilian Restrictive Orders Nos. 1-16). By August 18th all persons of Japanese ancestry were excluded from the State of California (Proclamation No. 11, August 18, 1942).

As a result of these orders and proclamations the petitioner Ernest Wakayama is detained at the Pomona Assembly

Center, from which he seeks release by a writ directed to the Manager of that Center. His wife, the other petitioner, Toki Wakayama, is detained at the Santa Anita Assembly Center, and by her petition seeks a writ directed to the Director of that Center. Thus it appears that the Military Commander of the Western Defense Command believed that the military needs of the situation presented by the presence of a large group of persons of Japanese ancestry in vital Pacific Coast areas required the evacuation of these persons as a group. Time and the extreme difficulty, if not impossibility, of determining loyalties made it inadvisable to attempt to deal with the Japanese upon an individual basis. The apparent reasonableness of the evacuation of all persons of Japanese ancestry from military areas was set forth by the House of Representatives Select Committee on National Defense Migration in its report (H. Rep. No. 1911, 77th Cong., 2nd Sess.) to Congress, wherein it declared:

> "This committee does not deem its proper province to encompass a judgment on the military need for the present (and any subsequent) evacuation orders. In time of war the military authorities are obligated to take every necessary step and every precaution to assure the internal safety of the Nation. The need for these safeguards appears the more pressing when we consider that present-day warfare has developed the fifth-column technique in unprecedented fashion. It is naive to imagine that the enemy powers will not exploit these techniques to the full. The tragic events of Pearl Harbor have created in the public mind a consciousness, whatever the character of the evidence, that the dangers from internal enemies cannot be ignored." (p. 13)
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> "Various arguments were adduced in testimony before the committee why the Japanese, both citizen and alien, should be evacuated from the west coast. Most commonly it was said that homogeneity of racial and cultural traits made it impossible to distinguish between the loyal and the disloyal. Law enforcement officials were particularly concerned lest enraged public sentiment and possibly mob action, occasioned by reverses in the Pacific war theater, would work injury to innocent and guilty alike. Protection

for Japanese residents as well as for the whole Nation was said to require the immediate evacuation of all Japanese." (p. 14)

All observers agree that most of the Japanese-Americans in the Pacific coastal area have loyally cooperated with the government in carrying out the curfew and evacuation program and that despite the inconvenience and sometimes harsh dislocation they have shown a wise and even sympathetic understanding of the critical situation which required the Commanding General of the Western Defense Command to meet the Japanese problem on a group basis, rather than to attempt a solution through an adjudication of loyalty in each individual case.

At all times it is of the utmost importance to the questions here involved to keep in mind that the measures which have resulted in the detention of the petitioners and other persons of Japanese ancestry are preventive and precautionary and in no way involve punishment or guilt or blame placed upon persons affected by the orders.

INTEREST OF THE STATE OF CALIFORNIA

The questions raised by the attack upon the validity of the detention of the petitioners and the right of the military authorities to have adopted the measures just described for the exclusion of persons of Japanese ancestry from military areas are of the utmost concern to the State of California. Most of the excluded Japanese-Americans reside in California. If the military authorities are to be held powerless to deal with what they conceive to be a potential or actual danger to the conduct of the war on the Pacific Coast, then the State of California, or the counties and cities in the absence of state action, must meet the danger, potential or actual, thus presented. The questions raised by the petitioners also involve generally the validity of the principles and the situations which will justify the military authorities in taking measures for the protection of the civilian population and

for the prosecution of the war on the Pacific Coast. Such a clarification of the authority of the President and his military commanders and of the power of Congress will facilitate the cooperation of local law enforcement officers in the carrying out of the Army's regulations. The legal questions involved herein are before other federal district courts of the Ninth Circuit. In order to obtain uniformity of opinion the State of California respectfully presents its views here.

THE IMPORTANT QUESTIONS INVOLVED

The petitions state that martial law has not been declared in California or elsewhere in the United States and that at all times the federal and state courts have been open. Among the matters pertinent to the issuance of the writs herein, it is contended that the detention of the petitioners deprives them of liberty and property without due process of law and without a trial and thereby their fundamental constitutional rights have been abrogated (Petition of Ernest Wakayama, pp. 3-6). Thus it is claimed that the President, as Commander-in-Chief, had no constitutional authority to issue Executive Order 9066 and that the Commanding General of the Western Defense Command had no authority thereunder to issue Proclamations Nos. 1, 2, 4, 7 and 8 by which all persons of Japanese ancestry were evacuated from Military Area No. 1 and from certain zones in Military Area No. 2 and, as an incident to such evacuation, were detained in relocation centers. This raises the following important legal questions.

(1) Under what circumstances and to what extent may military authorities in time of war employ martial law to maintain control over civilians in the United States?

(2) Was it a valid exercise of the war power for the President and his subordinate military commanders to evacuate and detain citizens of Japanese ancestry residing in Pacific Coast military areas?

(3) To what extent may the courts review the actions taken with reference to persons of Japanese ancestry in Pacific Coast military areas?

The answers require a consideration of the principles of martial law in time of war and the relation of the courts to the military authorities.

ARGUMENT

I. THE PRESIDENT'S ORDER ISSUED AS PRESIDENT AND COMMANDER-IN-CHIEF, AUTHORIZING THE EXCLUSION OF PERSONS FROM DESIGNATED MILITARY AREAS OR THEIR DETENTION THEREIN, AND THE ORDERS OF THE COMMANDING GENERAL PURSUANT THERETO, EVACUATING PERSONS OF JAPANESE ANCESTRY FROM SUCH AREAS AND DETAINING THEM IN ASSEMBLY CENTERS AS AN INCIDENT TO SUCH EVACUATION, ARE CONSTITUTIONAL MEASURES OF MARTIAL LAW.

A. The Exercise of Martial Law Is Part of the President's War Power.

When, as at present, the nation is at war, its first function and primary duty is to preserve itself. The Constitution divides the war power between the President and Congress. Congress is granted the power to declare war (Art. I, Sec. 8, Cl. 11), to raise and support armies (Art. I, Sec. 8, Cl. 13), to make rules for the governance of the armed forces (Art. I, Sec. 8, Cl. 14), and to make all laws which shall be necessary and proper for carrying these powers into execution (Art. I, Sec. 8, Cl. 18). The duty of conducting the war is placed upon the President in his position as Commander-in-Chief of the armed forces (Art. II, Sec. 2, Cl. 1).(4)

The Supreme Court has said of these war powers in Stewart

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

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

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

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

> "These powers ought to exist without limitation, because it is impossible to foresee and define the extent and variety of the means which may be necessary to satisfy them. The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed. This power ought to be coextensive with all the possible combinations of such circumstances; and ought to be under the direction of the same councils which are appointed to preside over the common defense." (Federalist, XXIII) (Emphasis added)

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

The point is that the exercise of this control in domestic territory, namely martial law, is just as much a part of our Constitution as the provisions guaranteeing the individual rights

which may be affected by martial law. The Constitution contemplates the necessity of limiting the exercise of some privileges, such as freedom of movement, in order to secure the continuance of all our constitutional rights. As former Chief Justice Hughes said, when speaking of the war powers under the Constitution in an address before the American Bar Association in 1917 during another critical period in our history:

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

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

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

But martial law when instituted as an aid to the conduct of a national war is broader than the common law doctrine that force to whatever degree necessary may be used to repress illegal force, for the President and his military commanders charged with conducting the war have the duty of taking all reasonable measures

which the conduct of the war makes necessary. Thus martial law in time of war has a different application than in times of peace where troops, either Federal or State, are employed or should be employed to assist the civil law enforcement authorities in the restoration of peace and order.(5) The measures of civilian control undertaken by the military may be purely preventive in character, such as the detention of persons potentially dangerous. As Winthrop says in Military Law and Precedents, Reprint, page 820:

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

B. Judicial Control of Martial Law.

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

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

Of course, today when the homefront is equally as important as the battlefront, the power to conduct the war successfully

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

cannot be limited to the activities of the battleline. It clearly contemplates the taking of all reasonable precautionary and preventive measures for the control of civilians within our own borders. Even during the Civil War the Supreme Court, in Stewart v. Kahn, 11 Wall. 493 (1870), said:

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

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

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

For as Justice Davis states in the Milligan opinion:

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

And in war, as in peace, the judicial arm of the State must be kept strong to pass upon the question of the validity of the measures taken by the military in exercising control over civilians in domestic territory. As our Supreme Court said in Sterling v. Constantin, 287 U. S. 378 (1932):

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

C. Martial Law by the Test of Necessity May Be Limited.

By the very test of military necessity, martial law most often is something less than the complete taking over of the gov-

ernment in domestic territory, even in an area of military operations. Much of the argument and misunderstanding of the term "martial law" arises from the failure to realize that martial law need not be absolute or suspend all civilian authority, but that it may and in fact shall be exercised only to the qualified or limited extent that the military necessity requires. This principle was recognized by the United States Supreme Court in Mitchell v. Harmony, 13 How. 115 (1851), wherein the court, with reference to the Army's commandeering the property of a civilian during the war with Mexico, stated:

> "It is impossible to define the particular circumstances of danger or necessity in which this power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency which gives the right, and the emergency must be shown to exist before the taking can be justified." (pp. 133-134)

In Commonwealth ex rel Wadsworth v. Shortall, 206 Pa. St. 165, 55 Atl. 952 (1903), limited or qualified martial law was recognized:

> "Order No. 39 was, as said, a declaration of qualified martial law. Qualified, in that it was put in force only as to the preservation of the public peace and order, not for the ascertainment or vindication of private rights, or the other ordinary functions of government. For these the courts and other agencies of the law were still open, and no exigency required interference with their functions. But within its necessary field, and for the accomplishment of its intended purpose, it was martial law, with all its powers. The government has and must have this power or perish. * * * It is not unfrequently said that the community must be either in a state of peace or of war, as there is no intermediate state. But from the point of view now under consideration this is an error. There may be peace for all the ordinary purposes of life, and yet a state of disorder, violence, and danger in special directions, which, though not technically war, has in its limited field the same effect, and, if important enough to call for martial law for suppression, is not distinguishable, so far as the powers of the commanding officer are concerned, from actual war. The condition in

fact exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called." (p. 954)

The Montana court states the matter succinctly (Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914):

> "Martial law, however, is of all gradations, and although the Governor cannot, by proclamation or otherwise, establish martial law of the character above discussed, he is not barred from declaring it in any form. We must therefore assume that, in using that phrase in his proclamation, he meant only such degree or form of martial law as he was constitutionally authorized to impose. As we have seen above, he was authorized to detail the militia to suppress the insurrection and to direct their movements, without regard to the civil authorities, and they could in the performance of their work take such measures as might be necessary, including the arrest and detention of the insurrectionists and other violators of the law, for delivery to the civil authorities *** ." (p. 954) (Emphasis added)

Speaking of a proclamation of martial law by the Governor, the Idaho court said in In re Boyle, (Idaho, 1899) 57 Pac. 706:

> "The action of the Governor *** has the effect to put into force, to a limited extent, martial law in said county." (p. 707)

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

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

See Wiener, supra, page 10.

Fairman, Martial Law and Suppression of Insurrection, 23 Ill. Law Rev. 766, 775

However, the fact that martial law may be less than absolute control over civilians in domestic territory is to be distinguished from the question of whether or not a proclamation of martial law can be made only by Congress except that when time does

not permit it may be made by the President. That proposition pertains to the issuance of the proclamation and the calling out of the troops. While such a proclamation is held to be conclusive (Sterling v. Constantin, 287 U. S. 378 (1932)), it remains for the court to pass upon the particular measures taken by the troops. As will be shown, a proclamation is not a prerequisite of a valid exercise of martial law.

D. The Test of Necessity Should Be Consonant with Today's Military Problems.

The attack upon President Roosevelt's Executive Order and the detention orders of the Commanding General pursuant thereto is made upon the ground that the situation existent at the present time does not justify any action under martial law because the civil authorities in California have not been deposed by an invasion and the civil courts are open. Reliance for the proposition that the necessitous situation must first be in this extremity is placed mainly upon the dictum of the majority in Ex parte Milligan, 4 Wall. 2 (1866).

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

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

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

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

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

Because of the frequent reference made in this case to the fact that the courts in this combat zone were open and in the proper and unobstructed exercise of their jurisdiction, it is important to note that this part of the majority dictum must be confined to the serious question of whether or not and upon what occasion a civilian may be tried by military commission.(6) It is difficult to perceive what application, one way or another, the fact that the courts are open or not would have upon a determination of the justification for the Army's taking measures to

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(6) As the court itself puts the question, "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?" Ex parte Milligan, 4 Wall. 2, 118 (1866).

prevent sabotage and espionage and to protect the civilian population within a theater of operations.

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

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

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

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

upon Alaska and the Pacific Coast show that we have already been invaded and that the fear of further invasion is well founded. Our courts and our civil administrations may continue to function, yet they may be no longer able to adequately secure the public from these dangers. This new type of total war not only places the homefront within the theater of warfare but presents conditions of compelling military necessity which civilian authorities cannot nor should not be required to meet.

The situation clearly calls for a declaration by this Court that the test of necessity justifying actions under martial law should be in line with our present-day danger from total war so that the criterion is the imminence of the threatened attack and the appropriateness of the controls exercised by the Commanding General under the circumstances as they appear to him at the time and place.

As Professor Charles Fairman declares:

> "It does not take an actual bombing of Pearl Harbor or a shelling of Santa Barbara to unchain the hands of the commander on the spot. Facts of this sort prove the reality of the danger, but the courts should be prepared to sustain vigilant precautions without waiting for such proof. A commander should not be put in a worse position legally because he has contrived to keep disaster at arm's length." (Fairman, The Law of Martial Rule and the National Emergency, 55 Harv. L. R. 1254, 1288, June 1942.)

One of the first decisions rendered under the present conditions of total warfare and recognizing that under the present situation a new criterion of necessity must be applied is the case of Ex parte Ventura, 44 Fed. Supp. 520 (1942). The petitioner, a Japanese-American citizen resident of Seattle, by a petition for a writ of habeas corpus, questioned the authority of the Commanding General of the Western Defense Command, under Presidential Executive Order 9066, to issue curfew orders applicable to American citizens of Japanese ancestry. Relying upon the dictum of the majority in

the Milligan case, the petition alleged that the State of Washington had not been invaded and that the Federal and State courts there were open. The court denied the petition not only on the ground that no actual detention was shown but also because the curfew order was a proper military measure in the light of present conditions in the Western Theater of War, despite the fact that the situation did not meet the test of necessity in the Milligan case, and said:

> "The United States is at war--a war such as this nation and this world has never seen before. We are in a recently declared Military Area. The orders, commands and laws complained of are intended to safeguard such Military Area." (p. 522)
>
> "In the Civil War when Milligan was tried by military commission no invasion could have been expected into Indiana except after much prior notice and weary weeks of slow and tedious gains by a slowly advancing army. They then never imagined the possibility of flying lethal engines hurtling through the air several hundred miles within an hour. They never visioned the possibility of far distant forces dispatching an air armada that would rain destroying parachutists from the sky and invade and capture far distant territory over night. They never had to think then of fifth columnists far, far from the forces of the enemy successfully pretending loyalty to the land where they were born, who in fact, would forthwith guide or join any such invaders. The past few months in the Philippines, of which the petitioner's husband is a citizen, establish that apparently peaceful residents may become enemy soldiers over night. The orders and commands of our President and the military forces, as well as the laws of Congress, must, if we secure that victory that this country intends to win, be made and applied with realistic regard for the speed and hazards of lightning war.
>
> * * *
>
> "How many here believe that if our enemies should manage to send a suicide squadron of parachutists to Puget Sound that the Enemy High Command would not hope for assistance from many such American-born Japanese?
>
> "The law enacted by Congress and the President's orders and commands indicate that those who are charged with the defense of this area, of our Constitution and our institutions, deem Puget Sound to be a critical

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

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

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

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

courts and civil administration must already have been deposed.

Fairman, The Law of Martial Rule, p. 145

Willoughby, Constitutional Law, 2nd Ed. III, 1602

Glenn, The Army and the Law, 188-190

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

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

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

E. A Proclamation of Martial Law Is Not Necessary Before the Military May Take Steps to Protect the Civilian Population.

The argument is made that the measures taken on the Pacific Coast with reference to the Japanese-American citizens are not authorized because there has been no formal declaration that martial law has been established in the areas from which the evacuations were ordered. The fact is, no proclamation is necessary. If the necessity exists to exercise military control in a particular manner, therein lies the justification. If the necessity and the occasion for martial law are not present, words cannot give it life, nor if the necessity and the occasion do exist, is a proclamation necessary.(7) As Professor Charles Fairman, the

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(7) In 1914, after federal troops had been sent into Colorado to keep order there after the state forces were unable to cope with the situation, it was suggested to the Secretary of War that martial law be declared. The Secretary, Mr. Garrison, replied to the officer making the request: "I do not know of anything that you cannot do under existing circumstances that you could do any better if there was a written proclamation of martial law posted in your district." (Wiener, A Practical Manual of Martial Law, p. 19.)

author of the authoritative work, The Law of Martial Rule, declares, concerning Executive Order 9066, under which the defendant herein was ordered to comply with the curfew orders:

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

Congress has recognized the martial law powers of the President and his subordinate military commanders in military areas or zones. In Public Law 503 (77th Cong., 2nd Sess., Ch. 191) Congress makes it a misdemeanor for any person to disobey restrictions imposed by order of the Secretary of War or military commander designated by him as made applicable in military areas or zones (supra, p. 6). Of course the standard obviously implied in Public Law 503 is that the restrictions prescribed must be appropriate to the conduct of the war in the military area. Orders of the military authorities beyond this test would be held ultra vires as being beyond the constitutional powers of the armed forces. In other words, the measures of martial law must bear a reasonable connection to military necessity.

II. THE EVACUATION AND THE DETENTION INCIDENT THERETO WERE A PROPER EXERCISE OF MARTIAL LAW.

The detention of the petitioners and other persons of Japanese ancestry is and was a proper exercise of martial law. The situation on the Pacific Coast, involving as it did dangers from sabotage and espionage, justified the evacuation of persons of Japanese ancestry as a group. The same military necessity also justifies the policy of detention in Relocation Centers for the purpose of relocating these persons outside of military areas.

The House Select Committee Investigating National Defense Migration has published its study of the reasons for the relocation procedure (Fourth Interim Report, H.R. 2124, 77th Cong., 2nd Sess., May 1942). Its findings are summarized as follows:

> "On April 7 approximately 100 Federal officials, governors, and attorneys-general of 10 Western States met at Salt Lake City in a conference called by War Relocation Authority Director Eisenhower. The primary purpose of the meeting, as announced by Mr. Eisenhower, was to obtain mutual understanding between the Federal Government and the State officials of evacuation problems and how best to meet them. Colonel Bendetsen told a press conference that 'the voluntary evacuation program had broken down because only small groups left; there existed much misunderstanding; State officials had said "We won't take them"; and there was a great possibility of some untoward incident. So, on March 20, voluntary evacuation stopped and the War Department moved in.' The consensus of the governors and their representatives, with one or two exceptions, was that the inland States did not want California's Japanese. If they were to be resettled inland, it was stressed that the Federal Government should provide guards, should prevent evacuees from acquiring land, should take into protective custody those who had voluntarily evacuated, and should make express provision for removing them at the conclusion of hostilities." (p. 7)

The Committee states further (p. 17) that several alternatives suggested themselves as a means of dealing with the evacuees: (1) Internment; (2) Voluntary resettlement outside of prohibited areas; or (3) Resettlement under the supervision and control of the Federal Government. In explaining the reasons for the adoption of the plan of supervised resettlement the Committee says:

> "Voluntary settlement outside of prohibited and restricted areas has been complicated, if not made impossible for an indefinite period, by the resentment of communities to, what appeared to them, an influx of people so potentially dangerous to our national security as to require their removal from strategic military areas. The statement was repeated again and again, by communities outside the military areas, 'We don't want these people in our State. If they are not good enough for California, they are not good enough for us'.
>
> "While apparent respect for the rights of

> citizens prompted an early disposition to permit voluntary relocation outside prohibited areas, the seemingly insurmountable obstacles to such a program has led to an emphasis on Federal responsibility for resettlement. Only under a Federal program, providing for financial assistance, protection to person and property and an opportunity to engage in productive work, did it appear possible to minimize injustice. That this responsibility has been recognized by the Federal Government is evidenced in the Executive order of the President establishing the War Relocation Authority, and in subsequent proclamations of General DeWitt, 'freezing' voluntary evacuation and requiring that all evacuees clear through the assembly centers established by the Army." (p. 17)

Of course, the right to detain the petitioners in the respective Assembly and Relocation Centers at the present time is the essential question before the Court. However, it would be a mistake and most unrealistic to consider the detention apart from the evacuation. It should be judged as a phase of the evacuation program. The military authorities would be subject to criticism to order a large-scale removal of persons of Japanese ancestry from the Pacific Coast military zones only to create sources of public unrest and disorder in other parts of the country. Properly considered, the detention attacked here is merely a temporary phase of the evacuation program which seeks to effectively remove a potential danger and to relocate the Japanese in sections of the country where any dangers will be minimized and where the Japanese may reestablish themselves with safety and profit to themselves.

Already thousands of Japanese have left the Centers to establish self-supporting communities in the interior of the United States. The restrictions which confine them at the present time to the Centers in no sense constitute punishment nor is the confinement absolute. As already noted, upon a satisfactory showing individuals may obtain leave from the Centers (Civilian Exclusion Orders). As there is no question of the commission of a crime, the contentions concerning the denial of the right to a

trial by jury and of the associated constitutional rights are not in point.

In those cases arising out of peace-time domestic disturbances the courts have upheld the right of the military authorities to take the precautionary and preventive measures of detaining persons as a means of suppressing the distrubance. The cases point out that the question of the right to a trial by jury or punishment is not involved. The question in all cases of detention under genuine martial law situations is merely the apparent appropriateness of the detention as a means of meeting the emergency. Interference with the liberty of the person has been upheld even though no personal blame can be placed on the person detained.

In Moyer v. Peabody, 212 U. S. 78 (1909), the Supreme Court upheld the sustaining of a demurrer to a complaint seeking damages against a governor and his military commanders for detaining one Moyer, the head of a miners' organization, on the ground that it was a proper measure of martial law. The disorder was attributed to the actions of the members of the organization. It was alleged that the imprisonment, which had been for a period of two and a half months, was without probable cause and that the plaintiff had been deprived of his liberty without due process of law. As in the present case, it was alleged that no complaint had been filed against Moyer and that the civil courts were open, reliance being placed upon Ex parte Milligan, 4 Wall. 2 (1866), and Ex parte Merryman, 9 Am. L. R. 524, 17 Fed. Cas. No. 9487 (1861). (p. 80 of 212 U. S.) The court, in upholding the judgment, first pointed out that the detentions of persons for the purpose of restoring order were not by way of punishment "but are by way of precaution to prevent the exercise of hostile power". (p. 85) Speaking through Mr. Justice Holmes the court then said:

> "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield

> to what he deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process. See Keely v. Sanders, 99 U. S. 441, 446. This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm. *** " (p. 85) (Emphasis added)

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

> "To deny the right of the militia to detain those whom they arrest while engaged in suppressing acts of violence and until order is restored would lead to the most absurd results. The arrest and detention of an insurrectionist, either actually engaged in acts of violence or in aiding and abetting others to commit such acts, violates none of his constitutional rights. He is not tried by any military court, or denied the right of trial by jury; neither is he punished for violation of law ***. His arrest and detention in such circumstances are merely to prevent him from taking part or aiding in a continuation of the conditions which the Governor, in the discharge of his official duties and in the exercise of the authority conferred by law, is endeavoring to suppress. *** It is true that petitioner is not held by virtue of any warrant, but, if his arrest and detention are authorized by law, he cannot complain *** ." (85 Pac. 193) (Emphasis added)

During a genuine state of insurrection in Indiana, an injunction was sought to restrain, among other acts, the arrest and detention of the persons participating in the rioting (Cox v. McNutt, 12 F. Supp. 355 (1935)). In denying the petition the court said:

> "The purpose of martial law is to restore law and order. It is not necessarily to punish for the commission of an offense. If it becomes necessary to imprison a person, to deprive him of the right of a trial by jury, to deny him the right of habeas corpus, or to deprive him of other rights, in order to restore

law and order, the military authorities are given that power. Under the law, the Governor had authority to declare martial law in the affected area. That authority must be continued so long as it is necessary to assure the restoration of law and order." (p. 360)

Under similar circumstances leaders of movements resulting in public disorder have been detained under martial law as a means of dissolving the public danger.

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

Ex parte McDonald, 49 Mont. 454, 143 Pac. 947 (1914) (emphasizing the distinction between trial and punishment of civilians by the military authorities and mere detention as a means of avoiding public danger.)

The conclusion to be drawn from these instances of detention as measures of martial law has been well stated by Wiener, supra:

"Whenever there is riot or insurrection, there are pretty certain to be ringleaders; once these are apprehended, the back of the disturbance is likely to be broken. Accordingly, commanders ordered into the field to suppress domestic disorders have almost invariably centered their attention on the heads of the offending movement, have arrested them, and have kept them in custody until such time as the disorders subsided and/or the persons detained could be turned over to the civil authorities for trial. In many instances, no trial ever took place; the detention was conceived to be entirely preventive and not at all punitive. *** This procedure, which did not involve the suspension of the writ of habeas corpus, or the supersession of civil courts by military tribunals, or indeed any domination of the civil authorities by the military but rather the closest cooperation between them, has come fairly generally to be known as qualified martial law or preventive martial law. Where there has been violence or disorder in fact, continued detention of offenders by the military is so far proper as to result in a denial by the courts of writs releasing those detained and a refusal, after they have been released, of damages for false imprisonment. The legality of the practice has been sustained in Idaho, Colorado, Montana, New Mexico, Indiana, and Iowa, and has received the imprimatur of approval of the United States Supreme Court in Moyer v. Peabody. It is, therefore, hardly open to question today." (Para. 71, pp. 66-67) (Emphasis added)

Fairman reaches a similar conclusion:

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

While petitioners and their fellow Japanese are not associated with insurrection, they are associated with the apprehended harm that among their number there may be those who are or would be disposed to assist the country of their racial origin. The reasonable belief that there is special reason to apprehend interference with the defense of the Pacific Coast from members of the Japanese group on this coast justifies, in terms of the higher right of self preservation, interference with their personal liberty reasonably designed to meet the apprehended danger.

During the last World War the British House of Lords, in Rex v. Halliday, (1917) A.C. 260, affirming (1916) 1 K.B. 238, upheld the propriety of regulations by which the residence of any person could be regulated or any person removed or interned in view of the hostile origin or associations of the person, when it appeared to the Secretary of State expedient for securing the public safety. The court said:

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

ined less appropriate than a Court of law. No crime is charged. The question is whether there is ground for suspicion that a particular person may be disposed to help the enemy. *** " (p. 269)

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

> "However precious the personal liberty of the subject may be, there is something for which it may well be to some extent, sacrificed by legal enactment, namely, national success in the war, or escape from national plunder or enslavement. It is not contended in this case that the personal liberty of the subject can be invaded arbitrarily at the mere whim of the Executive. What is contended is that the Executive has been empowered during the war, for paramount objects of State, to invade by legislative enactment that liberty in certain states of act." (p. 271)
>
> "One of the most effective ways of preventing a man from communicating with the enemy or doing things such as are mentioned in s. 1, sub-s. 1(a) and (c), of the statute is to imprison or intern him. In that as in almost every case where preventive justice is put in force some suffering and inconvenience may be caused to the suspected person. That is inevitable. But the suffering is, under this statute, inflicted for something much more important than his liberty or convenience, namely, for securing the public safety and defence of the realm." (p. 273)
>
> See King v. Governor of Wormwood Scrubbs Prison, (1920) 2 K.B. 305

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

In Lloyd v. Wallach, (1915) 20 Commonwealth L. Rep. 299,

a statute authorized the Governor-General of Australia to make regulations for securing the defense of the Commonwealth. The court upheld a regulation by which any naturalized citizen could be detained in military custody if the Minister of Defence had reason to believe him disloyal. The belief of the Minister was the only necessary condition; the validity of the reasons for the belief were not examinable.

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

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

In commenting upon the English decisions Professor Fairman says:

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

III. THE DECISIONS OF OTHER DISTRICT COURTS UPON THE IDENTICAL ISSUES PRESENTED HERE.

A number of District Courts have already passed upon the questions presented here in cases involving the validity of the evacuation and curfew orders with respect to citizens of Japanese ancestry in Pacific Coast military areas. In general the contentions in these cases were that these orders of the Commanding General of the Western Defense Command deprived American citizens of Japanese ancestry of liberty and property without due process of law and without a trial by jury and that they constituted an unjustifiable discrimination based upon race alone. It was also contended that the evacuation and curfew orders were not a proper exercise of martial law as no proclamation had been made and that under Ex parte Milligan, supra, no invasion had closed the courts or deposed the civil authorities.

In United States v. Hirabayashi, U.S.D.C., W.D. Wash., N.D., No. 45738 (Sept. 15, 1942), the defendant, a person of Japanese ancestry and a resident of Seattle, Washington, was indicted in the District Court for the Western District of Washington for failing to obey civilian exclusion and curfew orders of Lieutenant General J. L. DeWitt. The defendant demurred on the ground that the orders and proclamations already described were unconstitutional by virtue of the privileges and immunities clause (Art. IV, Sec. 2, Cl. 1) and the prohibitions of the Fifth Amendment of the United States Constitution. It was further contended that the said orders were not authorized by the Executive Order of the President and that Public Law 503, under which the indictment was brought, was invalid. Justice Lloyd L. Black overruled the demurrer and filed a written opinion. Assuming that the defendant was a citizen of the United States, although it was not so alleged, the opinion concluded:

"After grave and careful consideration of

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

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

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

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

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

In United States v. Korematsu, U.S.D.C., N.D. Cal., S.D., No. 27635-W (1942), the defendant, an American citizen of Japanese ancestry, raised similar objections by demurrer to an information filed against him in the United States District Court in San Francisco charging him with the violation of an exclusion order issued by Lieutenant General J. L. DeWitt pursuant to Presidential Executive Order 9066 and Proclamation No. 1. The issues involved were

thoroughly briefed by counsel representing the Government and the defendant, as well as the American Civil Liberties Union acting as amicus curiae on behalf of the defendant, and the State of California appearing in the same capacity on behalf of the plaintiff, the United States Government. The demurrer was overruled by Judge Martin I. Welsh on September 1, 1942, and later Korematsu was tried and convicted by Judge A. W. St. Sure (San Francisco Recorder, Sept. 9, 1942).

The same constitutional questions were raised by the petitioner seeking a writ of habeas corpus in Ex parte Ventura, 44 Fed. Supp. 520 (1942), which, as we have seen, supports by strong dicta the principles of martial law advocated here as applied to the imposition of curfew orders upon Japanese-American citizens.

One Lincoln Seiichi Kanai, an American citizen of Japanese ancestry, sought to obtain his release through a writ of habeas corpus when he was taken into custody in Milwaukee, Wisconsin, for his return to San Francisco to stand trial upon an information charging him with having left Military Area No. 1 contrary to the exclusion orders of Lieutenant General DeWitt. His petition (Matter of Application of Kanai, U.S.D.C., E.D. Wis., July 29, 1942) challenged the constitutionality of Presidential Executive Order 9066 and raised similar questions to those presented here. In denying the petition Judge F. Ryan Duffy said:

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

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

This ruling fully supports the principles of law stated here.

In the detention cases arising out of domestic disturbances, the detention of the leaders of the movements which have resulted in violence has been upheld as appropriate action within the discretion of the military authorities. No blame for the particular acts of violence is involved. The detention sought to deprive the rioters of their leadership. In time of war the scope of action resulting in the interference with the liberty of individuals will naturally be broader than in the case of domestic disturbances. Here, in passing upon the restrictions placed upon the petitioners as persons of Japanese ancestry under the authority of President Roosevelt, may we not more truly say, in the language of the Supreme Court:

> "When it comes to a decision by the head of the State upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessities of the moment." (Moyer v. Peabody, 212 U. S. 78, 85 (1909).)

What has already been said has fully shown that in view of the dangers of sabotage and espionage from some persons of Japanese ancestry, the necessities of the moment presented by the large Japanese racial group within the Pacific theater of operations justified the evacuation of the Japanese as a group and validate the

present detentions as a reasonable means of accomplishing that evacuation.

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

In passing upon the means adopted to meet this emergency--the present evacuation program of which the complained of detentions are a part--it must be remembered that the courts will grant to the President as Commander-in-Chief and his Commanding General a range of honest discretion. In Sterling v. Constantin, 287 U. S. 378 (1932), the United States Supreme Court, referring to the use of martial law in peace time in aid of the civil authorities, states the principle in this way:

> "The nature of the power also necessarily implies that there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions, the power itself would be useless. Such measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." (p. 399) (Emphasis added)

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

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

> "The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such ques-

tions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution."

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

> "As a rough generalization--and since the attack on Pearl Harbor there has been opportunity for nothing more--it can hardly be said to be unreasonable to go on the assemption that among the Japanese communities along the coast there is enough disloyalty, potential if not active, to make it expedient to evacuate the whole. Perhaps ninety-nine peaceful Japanese plus an unascertainable one who would signal to a submarine would add up to a sufficient reason for evacuating. If it were a matter of punishment, this sort of reasoning would be brutal. But no one supposes that evacuation, any more than detention under Regulation 18B in England, is defensible on any other basis than prevention. When one considers the irreparable consequences to which leniency might lead, the inconvenience, great though it may be, seems only one of the unavoidable hardships incident to the war. In this judgment General DeWitt doubtless acted on such intelligence as was available, and, it is to be remembered, with the express sanction of the President and the Congress." (Fairman, The Law of Martial Rule and the National Emergency, 55 Harv. L. R. 1254, 1302 (June 1942).)

The present detentions are merely for the purpose of working out the program of supervised resettlement outside the military areas. The evacuation and supervised resettlement program was obviously conceived in good faith in the face of the emergency and directly related to the danger at hand, and the particular program selected was well within the range of honest judgment permitted to Lieutenant General DeWitt in meeting the emergency. (Sterling v. Constantin, supra.)

However, the suggestion may be made that regardless of the appropriateness of the wholesale evacuation and incidental detentions, hearings and investigations should now be held to

determine loyalty or disloyalty, and loyal Japanese should be permitted to return to their residences within the military area. It is extremely doubtful whether any safe and practical measure of prospective disloyalty could be employed. The possibility of violence against Japanese in vital war zones would not be removed, and the return of Japanese to the area would add to the difficulties in distinguishing them from Japanese agents landed or dropped by parachute on the Pacific Coast. It cannot be said that the determination of Lieutenant General DeWitt not to permit any Japanese to return to the war zones is unreasonable when the measure is preventive only and when, within the range of his discretion, he has come to the conclusion that to do so would be to endanger the conduct of the war in the Pacific Coast military areas.

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

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

Or as pointed out in United States v. Hirabayashi, U.S.D.C., W.D. Wash., N.D., No. 24738 (1942), supra:

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

CONCLUSION

The State of California, in view of its position in the Pacific Combat Zone and in the Western Theater of Operations, is directly interested in having this Court define the principles of

martial law upon which the military authorities during this period of war may adopt measures for the purpose of protecting the civilian population of the State and for facilitating the conduct of the war. It is believed that the military authorities should be able to act with reference to the present type of total warfare even though the civilian authorities have not been deposed and the civil courts remain open. To accomplish this it should be recognized that the military authorities may establish limited martial law, that is, measures may be adopted for the accomplishment of specific military objectives without otherwise impinging upon the authority of the civil officers of the State. At all times it is believed that the courts must remain the final arbiter of what constitutes appropriate action within the range of honest judgment permitted to the President and his military commanders in the discharge of their constitutional duty of conducting the war to a successful conclusion.

The evacuation of persons of Japanese ancestry on a group rather than on an individual basis was justified in view of the pressing military necessity which confronted the Commanding General of the Western Defense Command. The detentions in the Assembly or Relocation Centers are appropriate methods for accomplishing the evacuation and resettlement program.

The considerations advanced here are made with a realization of the importance of preserving the fundamental rights of all citizens. But it is obvious that the great constitutional guarantees of personal and property rights are not absolute and must in times of war bend to the fundamental right of the public person, the State, to preserve itself.

If in time of war the State may draft its citizens, possibly to give up their lives, and may requisition all that they possess for their country's cause, the State in order to better prosecute this war of national survival should be able to adopt the

milder precautionary measures with reference to persons of Japanese ancestry living in the Pacific Combat Zone.

There is no merit in the contention that such a justifiable martial law measure as this will lead to military dictatorship. That it is necessary to curtail temporarily the rights of citizens through martial law does not mean that such practice will be continued in times of peace. We cannot believe this any more than we can believe that "a man could contract so strong an appetite for emetics during temporary illness as to persist in feeding upon them during the remainder of his healthful life".(8)

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

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

Respectfully submitted,

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(8) Part of Abraham Lincoln's response when he was accused of tearing down constitutional guarantees. Abraham Lincoln, by Carl Sandburg, Vol. II, p. 167.

HEW:H