2:17 JAPANESE-AMERICAN EVACUATION UNITED STATES VS. MINORU YASUI n.d.
MEMORANDUM OF LAW

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Day Hampson Thelson

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA, Plaintiff vs. MINORU YASUI, Defendant	C-16056

MEMORANDUM OF LAW

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MEMORANDUM OF LAW

Introductory Statement[1]

On December 7, 1941, the Armed Forces of the Imperial Government of Japan savagely attacked United States citizens and property in the islands of the Pacific Ocean. On the following day, December 8, 1941, Congress, in a joint resolution, declared a state of war to be existing between Japan and the Government and people of the United States.[2]

Subsequently on February 19, 1942, the President signed Executive Order No. 9066[3] 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 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. . . ."

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[1] This section is the same as the corresponding section in the memorandum heretofore filed by the Government.

[2] Public Law 328, 77th Congress, United States Code Cong. Service, No. 9 (1941) p. 843. Declarations of War against Germany and Italy are at pages 844 and 845 of the same volume.

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

On February 20, 1942, the Secretary of War designated Lieutenant General DeWitt to carry out the duties and responsibilities imposed by the said Executive Order for that portion of the United States embraced in the Western Defense Command.[1]

Pursuant to the aforesaid Executive Order and the authority vested in him by the Secretary of War, as aforesaid, Lieutenant General DeWitt, on March 2, 1942,[2] 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."

Pursuant to the same authority, Lieutenant General DeWitt promulgated certain public proclamations relating to the designation of military areas and conduct to be observed by certain persons therein. Three of these public proclamations have direct bearing on this case. The first, Public Proclamation No. 1, of March 2, 1942, designated certain areas within the Western Defense Command as "Military Areas" and "Military Zones" and proclaimed 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 enter or remain thereon under certain regulations and restrictions to be subsequently prescribed.

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[1] Govt. Exhibit No. 3. Military necessity prohibits the use of the letter of authority from the Secretary of War to Lieutenant General DeWitt. However, Exhibit No. 3 is clearly a ratification of that authority.

The Western Defense Command includes the Territory of Alaska and the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah, and Arizona.

[2] Public Proclamation No. 1, Govt. Exhibit No. 4.

Public Proclamation No. 2, dated March 16, 1942, designated further Military Areas and Military Zones.

Public Proclamation No. 3,[1] 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 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."[2]

The Issue Involved

On March 21, 1942, the President approved Public Act 503 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." This Act provides as follows:

> "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

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[1] Govt. Exhibit No. 5.

[2] 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."

> 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 proof establishes that the defendant, on the date specified in the indictment, was not within his place of residence in accordance with the regulation prescribed in Public Proclamation No. 3, referred to above; and further establishes that at the time he committed the above act, he knew of the aforesaid regulation, knew that it was applicable to him, but acted deliberately and wilfully, contrary thereto and in violation thereof.

The defendant's contention is that the aforesaid Proclamation No. 3 is violative of the Fifth Amendment to the Constitution in that it is applicable only to American citizens of Japanese ancestry and to no other American citizens or persons whose ancestors are alien enemies.

Scope of Argument

In this memorandum it is proposed to establish:

(1) That the regulation here under consideration is a necessary and vital part of a complete war program;

(2) That when a particular object is within the power of the legislative body any classification may be imposed which bears a reasonable relationship to that object;

(3) That whatever guarantee of equal protection is afforded by the Fifth Amendment must be interpreted and defined in the light of the exercise of the war power;

(4) That in addition to the fact that the regulation is not invalid as discriminatory it is in effect a part of a program of qualified martial rule in which necessity establishes the scope of permissible regulation.

Argument

1. The Regulation here Challenged is a Necessary Part of a Complete and Competent War Program.[1]

Under the circumstances presently existing on the Pacific Coast, the regulation which is challenged herein is urgently and vitally necessary. These circumstances are matters and things of which the Court may take judicial notice. A complete enumeration and discussion of such circumstances is not necessary, because a brief mention of but a few of them will adequately demonstrate the necessity of the challenged regulation.

Situated within the Western Defense Command are numerous defense installations, including Army camps, posts, forts, arsenals, and training centers, as well as vital naval installations peculiar to the strategic defense of the Western portion of the United States. In addition to these military and naval installations there exist within this area vast quantities of national defense and war materials and large production centers and plants where war materials are in the process of construction. Further, the entire area is traversed by highways and thoroughfares which must at all times be utilized for transportation of troops and essential supplies and defense materials.

The presence of large numbers of persons of Japanese ancestry within this critical area would constitute a serious threat to its security and to the security of the nation. The physical characteristics, institutions, customs, and traditions of the Japanese people have imbued in them a sense of ancestral loyalty and pride of race. As a result of these factors the persons of Japanese ancestry living on American soil have not readily assimilated with persons of other races

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[1] This section is substantially similar to the corresponding section (pp. 15-20) in the memorandum heretofore filed by the Government.

living in our country.[1] In the light of such conditions, the fact of citizenship, conferred by birth, may bear little relationship to the status of an individual as a loyal member of our body politic.

It is not material that persons of Japanese ancestry affected by the restriction and regulation may have been peaceful and law-abiding in the past; rather, the question is what type of conduct can reasonably be expected of those of Japanese ancestry now or in case of an attempted invasion by the Imperial Japanese forces of our coastal areas.[2] Let us take the case of a white man born in Japan of American parents. Admit that he has resided in Japan all of his life and has never so much as visited America but has, like many of the Japanese in the United States, attended schools taught by citizens of the United States. America and Japan are at war. Is it unreasonable to assume that this man, although born in Japan, will be filled with a sense of racial or national pride upon victories of the American forces? Is it unreasonable to suppose that he will secretly or even openly rejoice in a Japanese defeat? Is it unreasonable to suppose that this man would assist the American forces in any invasion effort which they might launch? The answer is obvious. The fact is that it is entirely reasonable to presume that such a man would, as circumstances permit, support that side which represented the people of his own race, the people of his own creed and religion. It is just as reasonable, we submit, to anticipate that persons of Japanese ancestry will likewise sympathize to a greater or less degree with

[1] The Court may take judicial knowledge of racial customs and traditions and the fact that persons of a particular race do not readily assimilate with persons of other races. Chum Kock Quon v. Proctor, (C.C.A. 9, 1937) 92 F. (2d) 326; Farrington v. Tokushige, (C.C.A. 9, 1926), 11 F. (2d) 710. Other cases involving the concept of judicial notice which are applicable to the case at bar are: United States v. McFarland, 15 F. (2d) 823, (legislative history); United States v. Hamberg American Co., 239 U.S. 466, (transportation conditions); Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, (economic conditions); Atchison, Topeka, and Santa Fe R.R. Co. v. United States, 284 U.S. 248, (economic conditions); Louisville Bridge Co. v. United States, 242 U.S. 409, (transportation conditions); Mead v. United States, 257 Fed. 639, (existence of war); United States v. McNamara, 91 F. (2d) 986, (economic conditions); United States v. Wainer, 49 F. (2d) 789, (social conditions). See also Silverman v. United States, 59 F. (2d) 636; Norris v. United States, 49 F. (2d) 856; Bourke v. United States, 44 F. (2d) 371.

[2] Legislation or regulations may be directed at anticipated danger or evil. See infra, p.21.

any effort of the Japanese war machine.

Likewise now consider the matter from another aspect. It is axiomatic that the safety of American citizens, whatever their race, must be preserved at all times, and that there must be no waste of effort or diversion of attention from the problem at hand. Suppose that the area encompassed by Lieutenant General DeWitt's orders should be suddenly subjected to an air-borne invasion. Is it unreasonable to assume that the military and citizenry, fighting for its very life, might attack and attempt to kill all persons of Japanese ancestry in such a confused area of operations? Or that an enraged citizenry, after witnessing its members killed and property destroyed, might, while in the throes of the horror, attempt to wreak its vengeance on any members of the Japanese race encountered? Such a situation is too dreadful to contemplate, yet its counterpart has occurred in other less fortunate countries. Such a possibility, in itself, constitutes ample grounds for the distinction here drawn.

The above factual reasoning is not without foundation in law. In the case of In re Ventura, No. 498 (D.C. W.D.Wash.N.D. April 15, 1942)[1] a citizen of Japanese ancestry filed a petition for a writ of habeas corpus alleging that the curfew orders, here under attack, amounted to an unlawful deprivation of liberty. The Court denied the petition and stated in part as follows:

> "The petitioners allege that the wife 'has no dual citizenship,' that she is in no 'manner a citizen or subject of the Empire of Japan.' But how many in this court room doubt that in Tokyo they consider all of Japanese ancestry though born in the United States to be citizens or subjects of the Japanese Imperial Government? How many here believe that if our enemies should manage to send a suicide squadron of parachutists to Puget Sound that the Enemy High Commany would not hope for assistance from many such American-born Japanese?
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> * * *
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> "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.
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> "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, to restrict 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.

1 A certified copy of the opinion is attached to this memorandum.

"Aside from any rights involved it seems to me that if petitioner is as loyal and devoted as her petition avers she would be glad to conform to the precautions which Congress, the President, the armed forces, deem so requisite to preserve the Constitution, laws, and institutions for her and all Americans, born here or naturalized."

There has been and there can be no denial of the above conditions and other conditions which clearly demonstrate the necessity of the restriction which is challenged in the case at bar. As a matter of fact, failure to impose such a restriction would have been to temporize with the security of the nation. From a military standpoint there was no alternative to the establishment of this regulation. Delay in its imposition would have been to place in the hands of the enemy a potent weapon to be used in the defeat of this nation's war aims, which include the preservation of the territorial and political integrity of the United States.

2. Where, as in the Case at Bar, a Classification is Based on Reason and Necessity, it Will Not be Held Unconstitutional.

From the circumstances outlined above, and from other circumstances of which the Court may take judicial notice, it is clear that the restriction here challenged is well founded on reason and necessity. In fact, no one to our knowledge, including the defendant[1] or his counsel, has even attempted to challenge the reasonableness or necessity of the regulation from a factual point of view. The only question that arises, therefore, is whether the reasonableness and necessity for the regulation bears any relationship to its constitutionality.

A thorough analysis of the authorities would clearly indicate that the answer to the above question is in the affirmative; that is, that the constitutionality of regulations of this sort are to be tested by their

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[1] In fact, the record indicates that the defendant himself declared that the only way to guarantee the security of life and property on the Pacific Coast was to intern all persons of Japanese ancestry, citizens as well as aliens. The defendant sought to minimize the importance of this statement by saying that it was a "hypothetical question." That the question of preserving our national security is "hypothetical" is surely a novel position.

reasonableness. To put it another way: If a particular end is within the power of Congress, then the question of whether or not the legislature has made an unconstitutional classification or discrimination is to be determined by whether or not the means employed bears a reasonable and necessary relationship to the legitimate end. The authorities discussed hereinafter conclusively establish this proposition.

The Fifth Amendment contains no express "equal protection" clause. Whether or not a guarantee of equal protection is implied in the Fifth Amendment and whether, if so implied, it is as broad as the express guarantee in the Fourteenth Amendment, is a subject which will be discussed hereinafter. For the present we will assume that the Fifth Amendment contains a guarantee of equal protection which is as broad as that guaranteed by the Fourteenth Amendment, and we will demonstrate that even under the Fourteenth Amendment a classification such as the one which is here challenged would be permitted.

Under the Fourteenth Amendment a reasonable classification does not violate the guarantee of equal protection. In Tigner v. Texas, 310 U.S. 141, the Court held that an exemption relating to producers of agricultural commodities in the Texas Antitrust laws did not violate the equal protection clause, saying at page 147,

> ". . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. . ."

Under the Fourteenth Amendment the guarantee of equal protection extends not only to persons of different races but also to persons of different sex, to persons engaged in different lines of endeavor, to persons living in different sections of a particular city or state, to persons of different ages, and so on.

Yet the courts have repeatedly held that where there is a reason for it, legislation or regulationsmay be directed at persons of a particular sex, at persons who are engaged in a particular occupation, at persons living in a particular area, at persons within certain age groups, and so on. Upholding such legislation, the courts have taken pains to point out that

where the object of the legislation is within the legislative power, then any classification reasonably related to the exercise of that power is constitutional. The case of West Coast Hotel Co. v. Parrish, 300 U.S. 379, is illustrative of the above principle. In that case the Supreme Court upheld a Washington State Statute which provided for the establishment of minimum wages for women. The contention was made that the act was unconstitutional because it affected only employers of women; but the court held that this classification was reasonably and necessarily related to the welfare of the state and that, therefore, it was constitutional. The Court said, at page 391,

> "It [the Constitution] speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrolled liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals, and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process."

So far as we can determine from the authorities cited in opposing counsel's brief and from independent research, no different rule exists with respect to determining the constitutionality of classifications between races than exists with respect to determining the constitutionality of classifications involving other relationships. Certainly neither the case of Buchanan v. Warley, 245 U.S. 60, or the case of Yick Wo v. Hopkins, 118 U.S. 356, is any authority for holding that a different test should be applied to cases involving racial discrimination, since in both of these the Supreme Court was careful to point out that no reason in fact existed for the classification.[1]

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[1] In Yick Wo v. Hopkins, at page 374, the Court said:
"No reason for it [the classification] is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which in the eye of the law is not justified."

In the Buchanan v. Warley case, supra, the court took pains to point out that the classification was based on race alone.

Situations in which classifications as between races would be proper are reasonably and readily conceivable. Let us suppose the existence of physical characteristics in, for example, the negroes, which rendered them particularly adept carriers of a certain mortal disease, and suppose there were to be an impending epidemic of such a disease within a certain area inhabited by numerous negroes. In order to avert or subdue an epidemic it would possibly be impractical to expend the time and efforts of trained personnel which would be needed to examine each resident of the area to determine whether a particular individual was endangering the health and welfare of the rest of the population. Would it be contended that in such a situation a reasonable regulation, say in the nature of a quarantine, directed at all members of the negro race in the area would be invalid?[1] It seems quite apparent that if a legislative body having jurisdiction over the area reasonably believed that the negroes were the most prevalent carriers of the disease, a regulation would not be declared invalid merely because, as an expedient and practical means of classifying those from whom danger or evil might reasonably be expected, the legislature designated those subject to its restrictions as "members of the negro race within the area."

In the above illustration, the discrimination against members of the negro race within the area is not based upon race or color in the abstract, but rather upon the fact that certain physical characteristics or habits render them, as a class, apt communicators of the disease. The same is true with regard to the regulation here challenged. The class affected by the regulation is designated as the members of a particular race in a particular area. However, the regulations are not directed at those affected because of their race or color in the abstract, but rather because it appears that they are the persons toward whom, as a matter of military necessity, the regulation must be directed and because conditions and circumstances render their unrestricted presence in the area a threat to the welfare of the entire populace of the area, including themselves.

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[1] See Jacobson v. Massachusetts, 197 U.S. 11, pp. 26 and following.

In determining the constitutionality of such a regulation, we must seek to determine the reason or necessity for its adoption, rather than base a test simply upon the grammatical formula which may have been adopted to describe or designate the classification.

The reasoning here urged finds ample support in the authorities. A pertinent illustration is contained in the case of Plessy v. Ferguson,[1] 163 U.S. 537, wherein the Court upheld a state statute providing for separate railway accommodations for negroes and whites. At page 550, the Court said:

> "In determining the question of reasonableness, it ((the legislature)) is at liberty to act with reference to the established usages, customs and traditions of the people, and with a view to the promotion of their comfort, and the preservation of public peace and good order."

The classification in the case at bar is not unlike classifications which are implicit in legislation directed solely and exclusively at aliens. The situations are not distinguishable simply because of the fact that in the latter cases legislation is directed at aliens, because our Supreme Court has repeatedly held that aliens are entitled to guarantees and privileges of the Constitution. For example, in Truax v. Raich, 239 U.S. 33, at page 39, the Court said:

> ". . . the complainant, a native of Austria, has been admitted to the United States under Federal law. He was thus admitted with the privilege of entering and abiding in the United States, and hence of entering and abiding in any state in the Union . . . Being lawfully an inhabitant of Arizona, the complainant is entitled under the Fourteenth Amendment to the equal protection of its laws. The description - 'any person within its jurisdiction' - as it has frequently been held, includes aliens."

Nevertheless, the Supreme Court has repeatedly upheld legislation which is directed solely at an alien group. The reasoning upon which these opinions are based is similar to that which we are here urging, that is, that the associations, experiences, and interests of a particular racial group may, under circumstances such as here involved, furnish an adequate basis for a legislative classification.

1 See also Bryant v. Zimmerman, 278 U.S. 63; Miller v. Wilson, 236 U.S. 373; United States v. Carolene Products Co., 304 U.S. 144; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61; State of Missouri ex rel Gaines v. Canada, 305 U.S. 337.

In Clarke v. Deckebach, 274 U.S. 392 (1927), the Court upheld an ordinance of the City of Cincinnati which prohibited the issuance to aliens of licenses to operate pool and billiard rooms. In part, the Court said: (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 (cases cited), 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 (cases cited).
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> "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. The present regulation pre-supposes 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.
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> "It is enough for present purposes that the ordinanace, 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."[1]

The above illustrations clearly show that where there is a definite basis for discrimination between races, legislation directed toward a known or anticipated evil will not be held invalid merely because the legislature has for expedient and practical reasons designated the class affected by describing it as the members of a particular race.

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[1] See Also: Murphy v. California, 225 U.S. 623;
Terrace v. Thompson, 263 U.S. 197;
Webb v. O'Brien, 263 U.S. 313;
Porterfield v. Webb, 263 U.S. 225;
Frick v. Webb, 263 U.S. 326.

3. The Guarantee of Equal Protection Which is Implied in the Fifth Amendment is not as Confining as the Guarantee of Equal Protection Which is Expressly Contained in the Fourteenth Amendment.

The Fourteenth Amendment applies only to action by the states.[1] Therefore, in support of his claim that equal protection is here denied, the defendant must resort to the Fifth Amendment. The Fifth Amendment, however, "unlike the Fourteenth Amendment has no equal protection clause."[2]

The Supreme Court has, in several cases, expressed the view that no guarantee of equal protection is afforded by the Fifth Amendment. For example, in Sunshine Coal Co. v. Adkins, 310 U.S. 381, the Supreme Court held that a statute could be directed exclusively at coal companies which did not become members of a Code provided for by the act. In this connection the Supreme Court said, (p. 401):

> ". . . Rather appellant's objection is founded on its claim of discrimination. But the Fifth Amendment, unlike the Fourteenth, has no equal protection clause. Steward Machine Co. v. Davis, 301 U.S. 548, 584, and cases cited. And there is 'no requirement of uniformity in connection with the commerce power.' Currin v. Wallace, supra, p. 14."

In Currin v. Wallace, 306 U.S. 1, the Court held that it was proper for the Secretary of Agriculture to impose regulations upon certain tobacco warehouses, while at the same time permitting other warehouses, engaged in the same type of business and in competition with the former, to operate without such regulation. In that case, also, the Court expressly denied the existence of a guarantee of equal protection in connection with Federal legislation.

In United States v. Sugar, 243 Fed. 423, aff'd in 252 Fed. 79, it was held that the Conscription Act of 1917 was not discriminatory although it exempted from military service certain classes of persons. Considering the question of equal protection the Court said, (page 429)

> "It will be noted that the language quoted applies only to action by the states, and imposes no inhibitions against the action of the Federal Government."

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1 Steward Machine Co. v. Davis, 301 U.S. 548.

2 Sunshine Coal Co. v. Adkins, 310 U.S. 381, 400.

See also Liberty Paper Board Co. v. United States, 37 F. Supp. 751; Watson v. St. Louis I. M. & S. Ry. Co., 169 Fed. 942; Truax v. Corrigan, 257 U.S. 312; United States v. Carolene Products Co., 304 U.S. 144.

Certainly it is clear that the inhibitions respecting equal protection are less confining upon the Federal Government than upon the states. In Steward Machine Co. v. Davis, 301 U.S. 548, the Court upheld Title IX of Social Security Act as against the contention that it was discriminatory because it did not apply to certain employers. The Court said: (p. 584)

> "The Fifth Amendment unlike the Fourteenth has no equal protection clause. LaBello Iron Works v. United States, supra [256 U.S. 377]; Brushaber v. Union Pacific R. Co., supra, p. 24 [240 U.S. 1]. But even the states, though subject to such a clause, are not confined to a formula of rigid uniformity in framing measures of taxation. Swiss Oil Corp. v. Shanks, 273 U.S. 407, 413. . . If this latitude of judgment is lawful for the states, it is lawful, a fortiori, in legislation by the Congress, which is subject to restraints less narrow and confining. ."

4. The Rights and Privileges Guaranteed by the Fifth Amendment must be Defined in the Light of the Exercise of the War Powers.

Emergency cannot create power. With this proposition there is no dispute. But an emergency can call into play a power or authority already existing but previously unexercised or seldom exercised;[1] and the use of such a power, duly authorized and granted by the Constitution, must not be defeated or impaired by resort to popular conceptions which ignore its very existence. The war powers of Congress and the President are to be construed broadly.[2] The power to wage war is the power to wage war successfully, and this power includes the right and authority to enact whatever legislation is necessary to prosecute the war with vigor and bring it to a successful termination.[3] Cases in which the courts have challenged the decision of Congress that particular legislation is necessary in aid of the war effort are indeed rare. So long as the legislation can be seen to afford assistance to the war effort, and so long as it establishes an ascertainable standard of guilt, it will apparently be upheld.

Many restrictions of individual rights and privileges in time of war have been upheld which would doubtless be declared invalid in the absence of a situation requiring the exercise of the war power. It appears that in time of war the rights and privileges of individuals are considered to be those rights and privileges which are consistent with the necessary steps

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1 Wilson v. New, 243 U.S. 332; 348; Home Bldg. & L. Assn. v. Blaisdell, 290 U.S. 398, 425-426.

2 Hamilton v. Kentucky Distilleries Co., 251 U.S. 146.

3 McCormick v. Humphrey, 27 Ind. 144, 154; Hughes, War Powers Under The Constitution, 42 Am. Bar Assn. Reports, 232, 238-240:

> "The power to wage war is the power to wage war successfully. . . . The power of the National Government to carry on war is explicit and supreme, and the authority thus resides in Congress to make all laws which are needed for that purpose; that is, to Congress in the event of war is confided the power to enact whatever legislation is necessary to prosecute the war with vigor and success, and this power is to be exercised without impairment of the authority committed to the President as Commander-in-Chief to direct military operations."

which have been and must be taken by Congress or the President in furtherance of the effort to defend the nation. Concerning the application of the Fifth and Sixth Amendments in time of war, Chief Justice Hughes had this to say:

> ". . . Clearly these amendments, normally and perfectly adapted to conditions of peace, do not have the same complete and universal application in time of war."[1]

When it is necessary in order to win a war to restrict freedom of contract, that will be permitted.[2] When it is necessary in order to win a war to restrict freedom of speech, that will be permitted.[3] When it is necessary in order to win a war to infringe upon our ordinary conception of due process, that will be permitted.[4]

The Supreme Court applied this principle in the leading case of Schenck v. United States, 249 U.S. 47. In that case, the defendant had been charged with distributing circulars which tended to obstruct enlistment. The defendant contended that his acts were protected by the guarantee of freedom of speech and that the Espionage Act, declaring such acts to be illegal, was thereby unconstitutional. Rejecting this contention, Justice Holmes spoke as follows (p. 52):

> ". . . We admit that in many places and in ordinary times the defendants in saying all that was

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1 Hughes, War Powers Under the Constitution, 42 Am. Bar Assn. Reports, 233, 243.

2 Northern Pacific Railway Co. v. North Dakota, 250 U.S. 135; Moore & Tierney v. Rockford Knitting Co. 250 Fed. 278, Aff'd 265 Fed. 177; c. d. 253 U.S. 498; Highland v. Russell Car Co., 279 U.S. 253; LaJoie v. Millikin, 242 Mass. 508, 136 N. E. 419.

3 Schafer v. United States, 251 U.S. 466; Abrams v. United States, 250 U.S. 616; Schenck v. United States, 249 U.S. 47.

4 Southwestern Tel. & Tel. Co. v. City of Houston, 256 Fed. 690; Stoehr v. Wallace, 255 U.S. 239; In re Miller, 281 Fed. 764; Hamilton v. Dillin, 21 Wall. 73.

Other cases which illustrate the manner in which the exercise of the war power demands a re-interpretation of the scope of constitutional guarantees are: Miller v. United States, 11 Wall. 268; Hamilton v. Kentucky Distilleries Co., 251 U.S. 146; Ruppert v. Caffey, 251 U.S. 264; Ashwander v. Tennessee Valley Authority, 297 U.S. 288; McKinley v. United States, 249 U.S. 397.

> said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it is done. Aikens v. Wisconsin, 195 U.S. 194, 205, 206. . . . . When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right. . . ." [Italics Supplied]

The principle likewise has been applied in cases involving the right of Congress and the President to regulate and supervise the distribution of commodities during time of war. In Highland v. Russell Car Co., 279 U.S. 253, the Supreme Court had for consideration an order of the President, under the Lever Act, fixing a maximum price for the sale of coal. The Court held that the order was valid because (p. 261) "liberty [to contract] is not absolute or universal, and. . . Congress may regulate the making and performance of. . . contracts whenever reasonably necessary to effect any of the great purposes for which the National Government was created . . . ."

In LaJoie v. Milliken, 242 Mass. 508, 136 N.E. 419, 423-424, the Supreme Court of Massachusetts also upheld price fixing orders of the President issued under the Lever Act, speaking as follows (p. 424):

> "A state of war, however, may affect with a public interest articles, which under normal conditions are free to commerce in its usual channels, and thus render subject to governmental regulation that which otherwise would be unobstructed and unhindered by the law. . . ."

Illustrations of the same principle as applied to equal protection as guaranteed by the Fifth Amendment are to be found in the cases involving conscription acts.[1] All such acts are in themselves discriminatory and in addition permit a rather broad degree of classification and discrimination in their interpretation. For example, all of our conscription laws have been directed solely and exclusively at males rather than at both males and

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[1] Selective Draft Law Cases, 245 U.S. 366; United States v. Williams, 302 U.S. 46; Shimola v. Local Board, 40 F. Supp. 808; (D.C. N.D. Ohio, 1941).

See also Jacobson v. Massachusetts, 197 U.S. 11.

females,[1] although the guarantee of equal protection, of course, applies to the relationship between males and females.

The administration of the conscription act generally involves further discrimination. Only particular members of the male group are declared to be subject to the provisions of the acts.[2] Males who are outside particular age limits, and males who are engaged in specific occupations, are exempt from the provisions of the acts. These discriminations have repeatedly been urged as grounds for striking down conscription acts, it being contended that equal protection is thereby infringed. This contention, however, has repeatedly been rejected. The courts have refused to deny the constitutionality of the acts in this respect because the classifications are so obviously reasonable and necessary. As was stated by the court in Shimola v. Local Board, supra, at page 810:

> "The civil rights which petitioner contends for are more violently assailed from without than from within. The very name of the rights which petitioner champions implies a limitation on their use: civil rights have always been subject to military exigency."[3]

The above authorities clearly establish that the guarantees of the Fifth Amendment must be interpreted in the light of the exercise by Congress or the President of the constitutional war powers. Where, as here, legislation or regulations are enacted which have a reasonable relationship to the war effort, they should not be held to be violative of the Fifth Amendment, for to hold otherwise would be to hold that the Constitution is self-destructive.

Few people have denied that restrictions and regulations such as the one here challenged bear a direct relationship to the war effort. No facts have been brought to our attention which would indicate that this restriction is not absolutely essential to national safety and welfare. On the

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1 Since in the operation of the modern army many of the tasks performed by soldiers might adequately be performed by women, the discrimination is all the more apparent.

2 United States v. Sugar et al, 243 Fed. 423; aff'd. 252 F. 79, c.d. 248 U.S. 578.

3 See also Jacobson v. Massachusetts, 197 U.S. 11.

contrary, all the available facts point clearly to the conclusion that the restriction was part and parcel of a well-planned and vitally necessary program in aid of the defense of our land.

5. Tests for Determining the Reasonableness of a Classification.

(a) Legislation or Regulations may be directed toward Anticipated Evil.

One attack upon the reasonableness of the challenged regulation has been that the evil against which the regulation is directed does not, at present, exist. The argument runs something like this: The Japanese people residing within the Western Defense Command, and particularly the defendant, have been peaceable, law-abiding citizens in the past, and until they conduct themselves so as to deter the successful prosecution of the war, regulations may not be imposed upon them. This argument, however, disregards the fact that what we are concerned with here is the possible future conduct of persons of Japanese ancestry. In this connection it is wholly proper for a legislature or administrative body to anticipate harm or evil from a particular group and to direct preventative measures at such group. In Gitlow v. New York, 268 U.S. 652, the Court said at page 669:

> "The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipiency."

A like case is Murphy v. California, 225 U.S. 623, in which the Supreme Court considered the validity of a city ordinance prohibiting the operation of billiard halls except in connection with hotels. The defendant contended that his billiard hall was operated in a lawful manner and that it had no tendency to promote delinquency or any other form of evil. The Court rejected his argument, saying at page 629:

> "Playing at billiards is a lawful amusement; and keeping a billiard hall is not. . . .a nuisance per se. But it may become such; and the regulation or prohibition need not be postponed until the evil has become flagrant." (Italics Supplied.)

(b) Legislation or Regulations Directed Toward a Class or Group are not to be Tested by their Application to a Particular Individual within the Class or Group.

A legislature or administrative body cannot be required to define the class from which evil is to be feared with mathematical nicety. Thus, it has been repeatedly held that in determining the reasonableness of a classification its application to the class or group as a whole must be considered, rather than its application to a particular individual within the class or group. By way of illustration reference might well be made to the case of Purety Extract Co. v. Lynch, 226 U.S. 192. In that case it was argued to the court that a Mississippi prohibition statute was unconstitutional because included within the prohibited beverages was one which was non-intoxicating. The argument was that the statute was unreasonable when applied to such beverage. The Court said, at pages 201-204:

> "That the State in the exercise of its police power may prohibit the selling of intoxicating liquors is undoubted. It is also well established that, when a State exerting its recognized authority undertakes to suppress what it is free to regard as a public evil, it may adopt such measures having reasonable relation to that end as it may deem necessary in order to make its action effective. It does not follow that because a transaction separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Government. With the wisdom of the exercise of that judgment the court has no concern; and unless it clearly appears that the enactment has no substantial relation to a proper purpose, it cannot be said that the limit of legislative power has been transcended. To hold otherwise would be to substitute judicial opinion of expediency for the will of the legislature, a notion foreign to our constitutional system...A contrary conclusion logically pressed would save the nominal power while preventing its effective exercise. The statute establishes its own category. The question in this court is whether the legislature had power to establish it. The existence of this power, as the authorities we have cited abundantly demonstrate, is not to be denied simply because some innocent articles or transactions may be found within the proscribed class. The inquiry must be whether, considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat." (Italics Supplied)

The same question was considered in Clarke v. Deckebach, 274 U.S. 392. That case involved the validity of a city ordinance which prohibited the issuance to aliens of licenses to conduct pool and billiard rooms. It was

argued that the ordinance was unreasonable because the particular alien involved in the case was of a high standing in the community and of upright character. Rejecting this argument the Court said at page 397:

> "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 emperical methods."

The following cases are to the same effect: Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61; State v. Kozer, 116 Ore. 581, 242 Pac. 621; Fox v. Standard Oil Co., 294 U.S. 87; Ruppert v. Caffey, 251 U.S. 264; Continental Baking Company v. Woodring, 55 F. (2d) 347; Davidowitz v. Hines, 30 F. Supp. 470; Powell v. Pennsylvania, 127 U.S. 678; Atlantic and Pacific Tea Co. v. Grosjean, 301 U.S. 412; Murphy v. California, 225 U.S. 623; Hebe Co. v. Shaw, 248 U.S. 297; Silz v. Hesterberg, 211 U.S. 31; DeSoto Motor Co. v. Stewart, 62 F. (2d) 914; Mobile, J. & K.C. R.R. v. Turnipseed, 219 U.S. 35.

(c) Legislation or Regulations do not Violate the Guarantee of Equal Protection because they Fail to Embrace Every Possible Source of Harm.

One of the primary contentions of the defendant in this case is that the challenged regulation is discriminatory because it does not extend to citizens of German and Italian ancestry. This contention is completely without merit. Practical considerations require that the most imminent source of evil be disposed of first, leaving remaining classifications to be imposed when the necessity therefor becomes greater and when mechanical and practical problems involved permit such steps to be taken. In Executive Order No. 9066, the Commanding General of the Western Defense Command was ordered to prescribe the conduct to be observed by "any or all persons" within military areas.[1] The practical problems incident to the evacuation of persons of Japanese ancestry have clearly demonstrated that a program of wider scope could not have been effectively carried out. Furthermore, it is apparent that the necessity for regulations directed at persons of Italian and German ancestry is not as great as in the case of persons of

[1] If an evacuation program were necessary in this area, it would no doubt have to be carried out progressively. The classifications incident to such a program would not be based upon any grounds more reasonable than the classification challenged in the instant case.

Japanese ancestry. Any invasion of the Pacific Coast would in all probability be conducted by the forces of the Japanese military machine rather than by German or Italian forces; and consequently the dangers of subversive activities on the part of persons of Italian and German ancestry are not as great as from persons of Japanese ancestry. Likewise, it appears that citizens of Italian and German ancestry tend to become more nearly a part of the American way of life than do citizens of Japanese ancestry. Still further, in case of an invasion by Japanese forces, the danger to citizens of Italian and German ancestry would not be nearly as great as danger to persons of Japanese ancestry.

The considerations mentioned above seem to furnish a clear and adequate reason for failure to include persons of Italian and German ancestry within the challenged regulation. This, alone, under the authorities, is a sufficient answer to the defendant's contention.

A contention similar to that made by the defendant in the instant case was made in the case of Miller v. Wilson, 236 U.S. 373. That case involved a California statute which prohibited the employment of women in certain businesses, including hotels. It was contended that the statute denied equal protection because it omitted from its operation certain classes of female laborers. In support of the contention that equal protection was denied it was specifically argued that several classes of women employees whose work was not distinguishable from that done by hotel employees (e.g. stenographers, clerks, domestic servants, et cetera) were totally omitted. (p. 376) But the Supreme Court rejected this argument and upheld the constitutionality of the statute, speaking as follows, at page 384:

> "It (the legislature) is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be the clearest."

Whitney v. California, 274 U.S. 352, is to the same effect. In that case the Supreme Court upheld the constitutionality of a California statute which prohibited acts of force committed to accomplish a change in political organization or industrial ownership. At page 370 the Court said:

> "A statute does not violate the equal protection clause merely because it is not all-embracing. A State may properly direct its legislation against what it deems an existing evil without covering the whole field of possible abuses. The statute must be presumed to be aimed at an evil where experience shows it to be most felt, and to be deemed by the legislature coextensive with the practical need; and is not to be overthrown merely because other instances may be suggested to which also it might have been applied; that being a matter for the legislature to determine unless the case is very clear."

The following cases are to the same effect: Mutual Loan Co. v. Martell, 222 U.S. 225; Farmers Bank v. Federal Reserve Bank, 262 U.S. 649; Silver v. Silver, 280 U.S. 117; Ozan Lumber Co. v. Union County Bank, 207 U.S. 251; Tax Commissioners v. Jackson, 283 U.S. 527.

(d) There is a Presumption that a Legislative or Administrative Classification is Reasonable.

In Borden's Farm Products Co. v. Baldwin, 293 U.S. 194, the Supreme Court in considering certain provisions of the New York Milk Control Act stated the rule as follows, (p. 209):

> ". . . When the classification made by the legislature is called in question, if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails the classification must carry the burden of showing by a resort to common knowledge or other matters which may be judicially noticed, or to other legitimate proof, that the action is arbitrary . . . . ."

In United States v. Carolene Products Co., 304 U.S. 144, the defendant urged that the Federal Filled Milk Act of 1923 was unconstitutional because it denied equal protection of law. In ruling upon this contention, the Court said (pp. 153-154):

> ". . . we recognize that the constitutionality of a statute, valid on its face, may be assailed by proof of facts tending to show that the statute as applied to a particular article is without support in reason because the article, although within the prohibited class, is so different from others of the class as to be without the reason for the prohibition. . . . though the effect of such proof depends on the relevant circumstances of each case, as for example the administrative difficulty of excluding the article from the regulated class . . . . But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably

be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it. . . " (Italics Supplied)

The following cases are to the same effect: Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61; Clarke v. Deckebach, 274 U.S. 392; Mayflower Farms v. Ten Eyck, 297 U. S. 266; O'Gorman v. Hartford Insurance Co., 282 U.S. 251; Silver v. Silver, 280 U.S. 117; Clarke v. Paul Gray, 306 U.S. 583.

6. A Program of Partial or Qualified Martial Rule has been Established on the Pacific Coast, and the Order here Challenged is a Part of such a Program.

In the case at bar one of the important considerations is the fact that the charge in this case is a violation of a Congressional act-- a Congressional act which makes it unlawful to disobey any of the orders promulgated by the Commander of the Western Defense Command. The challenge is not to the Congressional act, but rather to the order of the military commander.

In the foregoing discussion it has been assumed that the military commander of the Western Defense Command, in promulgating orders under Executive Order No. 9066, was governed by the same Constitutional guarantees that are applicable in determining the validity of acts of Congress. While, as we shall show, the Government assumed an unnecessary burden in this regard, it did so because it felt so strongly that the particular regulation involved constituted no infringement of whatever guarantee of equal protection is implicit in the due process clause of the Constitution.

It is further felt, however (although without rejecting the former position), that the question of whether or not peace-time conceptions of equal protection may have been infringed is of no moment in this case. We know of no rule of law which holds that a military commander, during time of war and in an area already under invasion by the enemy and constantly subject to further invasion, cannot promulgate regulations which are necessary to

the security of the nation and its citizens without regard to peace-time Constitutional limitations. In short, under the circumstances which exist today in the Western Defense Command, necessity is the principle which must determine conduct; and the military commander is the one whose duty it is to establish the rules of conduct in the light of the necessity.

In the material which follows, it is proposed to show that orders in the nature of martial rule or qualified martial rule, may properly be issued under the circumstances presently existing on the Pacific Coast, and that the regulation challenged in the case at bar was such an order.

(a) Martial Law may Properly be Declared under Circumstances Presently Existing on the Pacific Coast.

In the classic case of Ex parte Milligan, 4 Wall. 2, the Supreme Court had for consideration the question of whether or not a military commission had jurisdiction to try and sentence Milligan. On March 3, 1863, during the course of the war between the states, Congress had passed an act authorizing suspension, by the President, of the writ of habeas corpus. The act provided, however, that where a grand jury in attendance within the district in which a prisoner was held should terminate its session without proceeding by indictment against the prisoner, then the writ might issue. Milligan was arrested by order of the military commandant of the district of Indiana and was tried and sentenced by a military commission convened at Indianapolis. Subsequently, Milligan filed a petition for a writ of habeas corpus. The Circuit Court certified the question to the Supreme Court and the Supreme Court held that the military commission was without jurisdiction and that Milligan should, therefore, be discharged. The basis for the opinion by the Supreme Court was that the conditions of the Congressional act had not been fulfilled, that is, that a grand jury had been convened at Indianapolis and had adjourned without filing any bill of indictment or presentment against Milligan.

The case has become classic for its lengthy dictum concerning the law of military government and martial rule. Five justices concurred in the majority opinion. In addition to other expressions relating to civil

liberty and martial law, the majority opinion contained the following declaration concerning martial rule, (page 127):

> "Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration."

The minority opinion was to the effect that the order of the Court was correct, that is, that Milligan should be discharged; but the minority[1] expressed vigorous disagreement with the dictum in the majority opinion. The minority, in effect, expressed the view that martial rule might well be necessary, and might properly be established, in situations where an invasion was threatened or imminent. The minority spoke as follows (pages 140-141):

> "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 offences against the discipline or security of the army or against the public safety.

The rule expressed by the minority opinion finds support in modern opinions. As was said by Judge Black in the Ventura case:[2]

> "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 petitioning husband is a citizen, establishes that apparently peaceful residents may become enemy soldiers over night. The orders and commands of our President and the military

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1 It is significant that David Dudley Field, who argued the case for petitioner, was a brother of Justice S. J. Field, who sat on the case and concurred in the majority opinion.

2 At pages 7 and 8 of the certified copy of the opinion attached hereto.

> 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 lightening war.
>
> "Since planes and ships and tanks now speed attacks the old-time restricted fort on small promontory or elevated rock will not suffice. The President, military forces, and Congress may perhaps consider all the military area where petitioners live as in effect an actual military fortress and a factory arsenal.
>
> "During the Civil War would anyone have been surprised at strict precautions as to movements of civilians within the confines of a Civil War fort or arsenal? Was not the government then in fort or arsenal entitled to exercise discretion as to which of such civilians should be permitted to move about in such a fort at night or to move at all around such an arsenal?"

The same view has been previously expressed. In United States ex rel. Wessels v. McDonald, 265 Fed. 755 (E.D. N.Y.1920), it was held that the City of New York was within the field of "active operations" and that a spy apprehended in that city was properly tried by court martial.[1]

It would appear, therefore, that modern authorities, in determining conditions under which martial rule might be declared, would apply the test expressed by the minority opinion in the Milligan case.

But whichever test is applied, it would seem clear that conditions on the Pacific Coast today warrant a declaration of martial rule. Ships of war have invaded our territorial waters and have actually shelled our lands. Our ships have been destroyed and sunk within sight of our shores. Planes of war have flown above our coastal cities and towns. There has been actual invasion; and a further invasion may take place at any moment.

It is, therefore, submitted that conditions warrant the existence of martial rule.

(b) Clearly, the Power to Proclaim and Enforce a State of Martial Rule must and does Include the Power to Declare and Establish a Partial or Qualified State of Martial Law.

Military necessity is the circumstance which brings a state of martial rule into being. The extent of martial rule should, therefore, be measured

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1 See also Winthrop's Military Law and Precedents (2d ed.), pp. 817-818, and materials there cited.

by the degree of necessity. As a practical matter, the military branch of the Government should not, in the midst of a strenuous war effort, be required, because of some technical conception, to undertake a greater authority or scope of duty than is necessary under the circumstances. As was said by Weiner, in A Practical Manual of Martial Law, (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." (Italics supplied.)

Thus, it was held in Commonwealth ex rel. Wadsworth v. Shortall, (Pa.) 55 Atl. 952, that a state of qualified martial law could exist. In that case, the Court said (p. 954):

> "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. And it must be real power, sufficient and effective for its ends, the enforcement of law, the peace and the security of the community as to life and property.
>
> "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 facts exists, and the law must recognize it, no matter how opinions may differ as to what it should be most correctly called."

The following cases are to the same effect: In re Boyle (Idaho 57 Pac. 706; In re Moyer (Colo.) 85 Pac. 190; In re McDonald (Mont.)

143 Pac. 947; Cox v. McNutt (Ind.) 12 F. Supp. 355.

In one case it was declared by way of dictum that there is no such thing as a state of partial or qualified martial rule (Bishop v. Vandercook[1] (Mich.) 200 N.W. 278). It is submitted that this declaration is illogical. It has been repeatedly declared that the law of martial rule is a law of necessity. Its scope must, therefore, be measured by the degree of necessity. The fact is that states of partial or qualified martial rule have been repeatedly established and enforced.[2]

It is, therefore, submitted that it must be recognized by the Courts that states of partial or qualified martial rule have in fact existed.

(c) No Formal Declaration is Necessary to Establish a State of Martial Rule or Qualified Martial Rule.

There is no magic phrase or grammatical formula necessary to establish the existence of a state of martial rule. Where martial rule is justified, any declaration which clearly advises affected persons of the conduct to be observed is sufficient. Military commanders cannot be expected to resort to some technical legal utterance in order to establish rules of conduct which are vitally and immediately necessary.[3] As was said by Winthrop:

> "Unlike military government, which exists as a consequence of occupation and possession of enemy's country, martial law, involving as it does a material change in the political condition of peaceful citizens and a considerable restriction perhaps of their rights or privileges, is properly and customarily (though this is not essential where the necessity is imminent) inaugurated by a formal proclamation of the President as Commander in Chief, or declaration of the commanding general . . . . The public notification ordinarily designates the place or district within which military authority is to be operative; setting forth also in some cases the reason or occasion for the action taken, how far and in what manner it shall affect the courts or civil administration, or the

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1 It is significant that four of the seven judges concurred in the result only.

2 Fairman, The Law of Martial Rule, ch..VIII; Bassett, Life of Andrew Jackson, pp. 173-174. Weiner, op. cit., p. 13.

3 Military Law and Precedents, p. 819.

> business habits of the community, and what direction shall be observed during the continuance of the new status, the duration of which is also sometimes specified."

Similarly, Weiner says:[1]

> "Just as martial law may not be declared when no necessity exists, so the declaration of martial law is not necessary to the validity of measures of military rule when the necessity is actually present. As was early pointed out, 'the proclamation must be regarded as the statement of an existing fact, rather than the legal creation of that fact'" (Citing 8 Op. Atty. Gen. 365, 374, per Caleb Cushing, A.G.).[2]

In the Shortall case, supra, there was no express statement of the fact that martial rule, as such, was being declared.

It would appear that Executive Order 9066 and the Public Proclamations issued thereunder sufficiently satisfy any requisite to the formal establishment of martial rule. These orders were brought to the attention of the public and were particularly made known to the persons affected.

(d) The Military Commander of the Western Defense Command was authorized to Establish the Regulation here Challenged.

In Executive Order 9066, the President authorized the Secretary of War and military commanders designated by the latter 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. . . ."

Government Exhibit No. 3 clearly establishes that Lieutenant General DeWitt was authorized to act pursuant to this Executive Order.

From the above, it would seem clear that under the conditions presently existing on the Pacific Coast a state of qualified martial rule

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1 A Practical Manual of Martial Law, p. 19.

2 See also Powers Mercantile Co. v. Olson, 7 F. Supp. 865; Sterling v. Constantin, 287 U.S. 378, 398-400; Chapin v. Ferry, 28 Pac. 754; Fairman, pp. 84-85.

might be established, and that such a state of law has been properly declared and established by an authorized person.[1]

CONCLUSION

It is respectfully submitted that the regulation here challenged does not violate that guarantee of equal protection which is contained in the Fifth Amendment. Further, the regulation here challenged was issued pursuant to a duly established program of partial or qualified martial law, and as such, the regulation is to be tested and its validity determined by the necessity of the situation presently existing. There has been, and there can be, no denial of the fact that reason and necessity warrant the establishment of the regulation.

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1 There is no inconsistency between the argument that the challenged regulation is not discriminatory and the argument that it is a part of a program of partial or qualified martial rule. Executive Order 9066 is not based upon any grant of authority from Congress, but was apparently issued by the President in his capacity as commander-in-chief of the armed forces. Subsequent to the issuance of the order, Congress passed Public Act 503. At the date of the passage of the Act, Public Proclamations 1 and 2 had already been issued by the commanding general of the Western Defense Command, and the legislative history of the Act discloses that Congress considered these Proclamations in framing the Act. Therefore, the Executive Order and Public Proclamations 1 and 2 were effectively ratified and are to be considered as having been issued pursuant to act of Congress. Tiaco v. Forbes, 228 U.S. 549; United States v. Heinszen & Co., 206 U.S. 370; O'Reilley de Camara v. Brooke, 209 U.S. 45; Swayne & Hoyt v. United States, 300 U.S. 297.