

T 1.183

67/14
c

Evacuation and Resettlement Study

7-1-17/

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

GORDON KOYOSHI HIRABAYASHI,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 10308

Upon Appeal from the United States District Court
For the Western District of Washington,
Northern Division.

APPELLANT'S BRIEF ANSWERING STATE OF CALIFORNIA
AS AMICUS CURIAE.

Office and Post Office Address:
828 Central Building
Seattle, Washington

FRANK L. WALTERS

Attorney for Appellant

SUBJECT INDEX.

	Pages.
Argument	4
Statement	1

Constitutions and Statutes.

ARTICLE I, section 8	5
Public Law No. 503	8,9

Cases cited.

Ex parte Milligan, 4 Wall (US) 2, 18 Led. 281	5
Ex parte Quirin, 57 Led. Adv. 1	8
Ex parte Yasui, (D.C.Ore., Nov. 16, 1942)	8
Hamilton v. Ky. Distilleries, 251 U. S. 146	7
Home Bldg. & Ln. Assn. v. Blaisdell, 290 U.S. 398, 78 Led. 413	6
Luther v. Borden, 7 How. 1, 18 Led. 581	4,5
U. S. v. Russell, 15 Wall (US) 625	7
Zimmerman v. Walker, (CJA-9, No. 10095)	8

Publications.

Harper's MAGAZINE, October, 1942.	1
-----------------------------------	---

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

GORDON KOYOSHI HIRABAYASHI,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 10908

Upon Appeal from the United States District Court
For the Western District of Washington,
Northern Division.

APPELLANT'S BRIEF ANSWERING STATE OF CALIFORNIA
AS AMICUS CURIAE.

Office and Post Office Address:
826 Central Building
Seattle, Washington

FRANK L. WALTERS,
Attorney for Appellant

STATEMENT

The State of California, as amicus curiae, has injected itself into this matter by filing a brief. On Pages 2 and 3 of this Brief, it makes some astonishing assertions, which have no basis in fact but arise out of a movement of years of standing by certain groups in the State of California, "to deny citizenship to American-born Japanese" to serve the selfish, economical or political interest of those groups. With that movement the people of the State of Washington have no sympathy and they will have no part of it.

The Attorney General of the State of California (Brief, Page 3) states "With one out of three being an enemy alien, and with many families including aliens as well as citizens, it was impossible for the duly constituted law enforcing agencies to distinguish between those thoroughly American in thought and those of doubtful loyalty." Such an assertion is not true in fact and is the more amazing because on February 21, 1942, Attorney General Earl Warren, who signs the brief, made public the following statement, "We have had no sabotage and no fifth column activities in this State (California) since the beginning of the War."

The truth of the matter is that for several years prior to Pearl Harbor, an American Army Intelligence Officer made a thorough study of this question of the loyalty of the Japanese on the Pacific coast and in an article by him (October Harper's Magazine, Page 491) he makes this significant statement "I consider that at least 75% of them (American-born

citizens of Japanese ancestry) are loyal to the United States." Further the Federal Bureau of Investigation had made thorough investigations of all Japanese on the Pacific coast, namely, the records of their activities bearing on the question of their loyalty to this country and had such complete case records on each one, that the F.B.I. could have determined within a very short time which of them were loyal and which were disloyal and they knew exactly where they could "lay there hands" on all of them.

The Attorney General further says "It is difficult to perceive that an adequate test could be devised which would demark disloyalty, potential or active, among this unassimilated group." Refer again to that Intelligence Officer's report in Harper's Magazine. He recommended "that individual examination is the core" of the proper method to determine the question of loyalty.

The people of the State of California were not interested in affording to a native born American citizen, a hearing before an impartial tribunal where he could be given the opportunity to establish his loyalty to his native land -- too many of them would have been able to establish not only a 100% loyalty but that as compared to the descendants of some other races, native born American citizens of Japanese ancestry would have proven themselves more desirable citizens and the entire movement to transport all Japanese out of the Pacific coast States, would have been thwarted.

Attorney General's brief, Page 5, refers to some publication in Tokio, Japan, alleging that the Japanese, citizen and alien, in America are recognized by the Japanese government as potential agents to assist the Armed forces of that country. This court should not be interested and is not

interested in this matter in what any official of the Japanese government thinks about our American citizens. Appellant and everyone in the same situation was entitled to a hearing on the question of his loyalty to this country and to deny it to him by any means and by any branch of the government was not only Unconstitutional but was un-American and in violation of the fundamental principles of our democratic way of life.

Attorney General admits, Brief, Page 6, "that the presence of persons of Japanese ancestry would, because of War with Japan, constitute a source of domestic unrest and riot." Yet it is now an established fact that as heretofore shown and as events have since proven, that the great majority of these American citizens were not and are not a source of domestic unrest and riot but on the other hand could have been and now are a great source of man power in our national War effort.

In Brief, Page 7, the Attorney General admits that because of the possibility of "sabotage and espionage, it was necessary to adopt military measures to safeguard against such operations". If the Attorney General knew on February 21 that there had been no sabotage and fifth column activities in California, why didn't he communicate that information to General Dewitt so that these unfortunate people could have had their day in court. There is no justification of the exclusion orders that they "are preventative and precautionary and in no way involve punishment or guilt or blame placed upon the person effected by the orders" because the effect of the application of the orders was to presumptorily intern those persons and impute guilt of disloyalty to the United States.

ARGUMENT

The Attorney General summarizes his argument under six headings and we will answer them in the same order.

I. The Power to Declare Martial Law. The power to declare martial law is not a part of the President's War power. All of the War powers under the Constitution are vested solely in the Congress, cite, Luther vs. Borden, 7 How. 1, 16 L.Ed. 581.

The Borden case involved the validity of an act of the Rhode Island Legislature, declaring martial law over the entire State to suppress what is known as Dorr's Rebellion. In the dissenting opinion of Justice Woodbury, that learned jurist traces in detail the history of martial law and in what branch of government, the power to declare martial law is vested. Prior to the reign of Charles the II in England, martial law had been used by the Kings in an arbitrary and oppressive manner, until the people of England forced Charles the II, to grant the Petition of Right whereby the King was forever divested of that power and it was placed solely in Parliament. In this connection, just as Woodbury said, "It appears also that nobody has dared exercise it (martial law) in war or peace, on the community at large in England for the last century and a half unless specially enacted by Parliament in some great exigency and under various restrictions, and then under the theory, not that it is consistent with bills of rights and constitutions, but that Parliament is omnipotent and for sufficient cause may over ride and trample on them all temporarily. . . . "Martial law like this (under the Rhode Island statute) was not considered by our fathers proper at all in time of peace and civil strife and in that country from which we derive most of our jurisprudence the King has long been forbidden to put it in force in war

or in peace, and that Parliament which is omnipotent in England never allows it except as being sovereign and unlimited in power and under peculiar restrictions."

Again in referring to the Constitutional provisions which place all of the War powers in Congress, the opinion continues "This exclusiveness of the war power in Congress in all cases, domestic and foreign, is confirmed to by Article I, Section 1 - - - both show the power to be exclusive in the Congress - - - -"

"But the President also did nothing to cause or give belligerent rights to the State. He might, perhaps, have conferred some such rights on the militia, had he called them out, under the consent of Congress, but it appears to be unreasonable, if not absurd, to argue that the President rather than Congress was thus (by calling out the militia) empowered to declare war, or that Congress meant to construe such insurrections and the means used to suppress them, as wars; else Congress itself intrust so dangerous a measure to mere executive discretion."

It is significant that the lesser war power of suspending the writ of habeas corpus was not given to the President until by an Act of Congress in 1865, after the Supreme Court had rendered its decision *Ex parte Milligan*, 4 Wall. (U.S.) 2, 13 L. Ed. 221. Even to this day Congress has not enacted any statute purporting to grant to the President, assuming that it could constitutionally do so, the power to declare martial law. So since this vital war power, which is applied to the whole population and deposes the civil courts and all civil authorities is vested solely in Congress, neither the President nor any military commanders acting under him could have declared martial law in the military areas on citizens of the Pacific States. Hence

it must follow that the military commanders were without Constitutional authority to exercise any of the powers of martial law or of any so-called modified or partial martial law.

II. Military Necessity can not Create War Powers in the Military Commanders. Assuming, for the purpose of argument, that military necessity existed on the Pacific coast which was of such emergency as to require the issuance of the arbitrary exclusion orders, yet that military necessity could not under the Constitution vest any power in the President or the Secretary of War or the military commanders designated by him to declare martial law or to exercise any of the powers of martial law or so-called partial martial law. Much less could the military necessity justify the denial to the appellant of a trial or hearing wherein he was charged with some offense against the laws of the United States.

In Home Bldg. & Loan vs. Blaisdell, 290 U.S. 398, 78 Fed. 413, the Supreme Court had under consideration, the Constitutionality of the Minnesota mortgage moratorium statute which was attacked on the count that it violated the Constitutional provision against the impairment of the obligation of contracts. The Court, speaking through Chief Justice Hughes, reviewed the types of limitations and restrictions on the Federal Government contained in the Constitution. In referring to the war powers of Congress under the Constitution, the opinion says "Thus the war power of the Federal Government is not created by the emergency of war, but it is a power given to meet the emergency. It is a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation. But even the war power does not remove

Constitutional limitations safeguarding the essential liberties. (Citing *Ex parte Milligan*, U.S. vs. *Russell*, 13 Wall 623 and *Hamilton vs. Kentucky Distilleries*, 251 U.S. 146) When the provisions of the Constitution in
grant or restriction, are specific, so particularized as not to admit of
construction, no question is presented. . . But where the Constitutional
limitations of power are set forth in general clauses, which afford a
broad outline, the process of construction is essential to fill in the
details. That is true of the contract clause*. (Underlining ours.)

We submit that the war powers given solely to Congress in Article I
Section 8 and the right of trial by jury guaranteed by the Fifth Amendment
are so specific and so particularized as to admit of no judicial construction
by the courts. Congress and Congress alone, since it has been in session
continuously since long before Pearl Harbor could, declare martial law or
so-called partial martial law or authorize the military commanders under
the President to exercise martial law powers.

So there being no power in the President or his military commanders
to exercise the powers of martial law, and the federal courts being open
and their process being unobstructed, before the appellant could be denied his
freedom of individual motion and before he could be interned, it was manda-
tory that his right of trial by jury be granted him.

III. A Declaration of Martial Law was not necessary. The Attorney
General contends that no declaration of martial law is necessary because the
military necessity justified the measures of martial law which the military

commander undertook to put into effect. The Attorney General, either innocently or willfully misconceives this whole issue.

Necessity only creates the basis for the exercise of the power or justifies the exercise of the power; necessity can not create the power; the power is created by the Constitution and it is lodged solely in the Congress.

The quotation from *Zimmerman vs. Walker* (C.C.A.-9) No. 10093, relative to "military government" has no application here because as decided in the *Milligan* case and confirmed in *Sterling vs. Constantin*, 287 U.S. 378 and *Ex parte Quirin* 87, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

So all of the contentions of the Attorney General of the State of California under his headings II, III and IV are of no force because the power to declare martial law in any form resides exclusively in the Congress and Congress has not acted in this matter.

IV. Public Law No. 503 is unconstitutional. We have heretofore shown that there was and is no Constitutional authority for exclusion order No. 9066, so far as it attempts to deal with any persons except alien enemies and for the public proclamations and civil exclusion orders of the military commanders.

The Attorney General states, Brief, Page 38, "All this law (Public 503) attempts to do is to provide a criminal penalty for disobedience of the restrictions which the military authorities thus impose under their constitutional powers." Since the military authorities had no Constitutional

power to issue the restrictions or promulgate the exclusion orders, it, of course, follows that the curfew regulations and exclusion restrictions being void, there was no duty upon the appellant to obey them and therefore he could be guilty of no crime punishable under 503.

The attempt to justify Public Law No. 503 as an assumed declaration of power can have no force because no court is going to assume that by such a poorly worded statute as Public No. 503 is, did Congress ever intend to lodge in the hands of an undetermined military commander such a dangerous power as martial law; and by the same token, Public Law No. 503 can not be held to ratify in futuro any acts of such a military commander to authorize him to use that dangerous power.

Finally, the Attorney General (Brief, Pages 49 to 53) cites and quotes from recent decisions in the District Courts but he fails to mention the well reasoned opinion of Judge Fee in the Yasui case, supra. We bring into court that opinion of Judge Fee as being a statement of the law as announced by the Supreme Court of the United States on the issues in this case and that that law controls here.

CONCLUSION

In conclusion, appellant submits that Attorney General of the State of California has failed to face the real issues in this case or has been unable to answer them. Before the appellant can be restricted or denied his freedom of movement, or excluded from his home for any length of time, or be interned in a Concentration Camp, it was mandatory under the Constitution that he be accorded a hearing where he could defend against specific charges for violation of laws of the United States; before the military commanders

could promulgate public proclamations creating the military zones and the exclusion orders, it was necessary that Congress declare some form of martial law and Congress alone had that Constitutional power; before the appellant could be found guilty under Public Law No. 503, the government had to prove that he had violated valid military orders and since the military orders had no basis in law, he could be guilty of no violation of them. Accordingly, the government had no case against the appellant, the judgment and sentence must be reversed and the appellant discharged.

Respectfully submitted,

FRANK L. GALTIER,
Attorney for Appellant.