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IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,
Plaintiff,
vs.
MINORU YASUI,
Defendant.

No. C-16056

BRIEF OF THE STATE OF CALIFORNIA
AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFF

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Cox v. McNutt, 12 F. Supp. 355 (1935)	24
King v. Governor of Wormwood Scrubbs Prison, (1920) 2 K.B. 305	25
Liversedge v. Anderson, 3 All. Eng. Rep. 338 (1941)	26
McDonald, Ex parte, 49 Mont. 454, 143 Pac. 947 (1914)	11,24
Milligan, Ex parte, 4 Wall. 2 (1866)	9,10,12, 16,18
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Rex v. Halliday, (1917) A.C. 260, aff. (1916) 1 K.B. 238	24,26
State ex rel Roberts v. Swope, (N.M.) 28 Pac. (2d) 4 (1933)	24
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Field Order No. 1, Dec. 14, 1941	2
House Select Committee Investigating National Defense Migration, Report, H. Rep. No. 1911, 77th Cong., 2nd Sess.	22
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Texts and Encyclopoedia

Bishop, "New Criminal Law", 8th Ed., sec. 53 (1892)	11
Fairman, "The Law of Martial Rule" (1930)	18,19
Fairman, "The Law of Martial Rule", San Francisco Chronicle, March 4, 1942, p. 14	18
Fairman, "The Law of Martial Rule and the National Emergency", 55 Harv. Law Rev. 1254, 1288 (June 1942)	16,27
Fairman, "Martial Law and Suppression of Insurrection", 23 Ill. Law Rev. 766, 775	12
Federalist, XXIII	6
Glenn, "The Army and the Law", 188-190	18
Hughes, Charles Evans, "War Powers Under the Constitution", Sen. Doc. 105, 65th Cong., 1st Sess.	7,19
Sandburg, Carl, "Abraham Lincoln", Vol. II, p. 167	34
Wiener, "A Practical Manual of Martial Law" (1940)	8,9,12
Willoughby, "Constitutional Law", 2nd Ed. III, 1602	18
Winthrop, "Military Law and Precedents", Reprint, p. 820	8,9

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4 UNITED STATES OF AMERICA,
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10 BRIEF OF THE STATE OF CALIFORNIA
11 AS AMICUS CURIAE
12 IN SUPPORT OF PLAINTIFF

13 By leave of this Court heretofore granted, the State of
14 California, by and through Earl Warren, Attorney General of the State
15 of California, presents herein its brief as amicus curiae in support
16 of the plaintiff for the purpose of presenting to this honorable
17 Court the viewpoint of the State of California concerning some of
18 the important questions of law raised herein.

19 BRIEF STATEMENT OF FACTS

20 The plaintiff has made a complete statement of the facts
21 which give rise to the important questions of law here involved.

22 On February 19, 1942, by Executive Order 9066 (U.S.C. Cong.
23 Ser. No. 2, p. 157 (1942)) President Franklin D. Roosevelt, as
24 President of the United States and as Commander-in-Chief of the Army
25 and Navy, authorized and directed the Secretary of War, or the mili-
26 tary commander designated by the Secretary, to prescribe military
27 areas, whenever it was deemed necessary, from which all persons
28 might be excluded, and within the discretion of either of such
29 officers to impose restrictions with respect to the right of any
30 person to enter, remain in or leave such military areas. The Presi-
31 dent's order was based on the ground that the successful prosecution
32 of the war required every possible protection against espionage and

1 sabotage to national defense material, national defense premises
2 and national defense utilities.

3 Previously, on December 11, 1941, the eight Western
4 States and the Territory of Alaska had been designated by the War
5 Department as a "theatre of operations" and an area approximately
6 one hundred miles wide extending from the Canadian border down the
7 Pacific Coast and along the California-Mexico border had been de-
8 clared to be a "combat zone"⁽¹⁾ by Lieutenant-General J. L. DeWitt,
9 U. S. Army, Commanding General of the Western Defense Command and
10 the Fourth Army. (Field Order No. 1, Dec. 14, 1941.)

11 On March 2, 1942, Lieutenant-General DeWitt by Proclama-
12 tion No. 1 declared that because the Pacific Coast was particularly
13 subject to attack, to an attempted invasion, and in connection
14 therewith to sabotage and espionage, it was necessary to adopt
15 military measures to safeguard against such operations. Therefore,
16 pursuant to the power granted by President Roosevelt in Executive
17 Order 9066 and by authorization of the Secretary of War, Military
18 Areas Nos. 1 and 2 were established as a matter of military neces-
19 sity. The proclamation then stated that such persons or classes of
20 persons as the situation required would be excluded from all of
21 Military Area No. 1 and from certain zones in Area No. 2. Military
22 Area No. 1 coincides approximately with the Army's Pacific Combat
23 Zone.

24

- 25 (1) 1. The theatre of war comprises those areas of land, sea and
26 air which are, or may become, directly involved in the
conduct of the war.
- 27 2. A theatre of operations is an area of the theatre of war
28 necessary for military operation and the administration
29 and supply incident to military operation. The War De-
partment designates one or more theatres of operation.
- 30 3. A combat zone comprises that part of a theatre of opera-
31 tions required for the active operation of the combatant
forces fighting. "Field Service Regulations - Operations,
May 22, 1941." Wartime Bulletin PM100-5.

32

1 On March 21, 1942, Congress enacted Public Law 503 (77th
2 Cong., 2nd Sess., Ch. 191), which declared it to be a misdemeanor
3 for anyone to enter, remain in or leave, or commit any act in any
4 prescribed military area contrary to the restrictions applicable in
5 any such area or the orders of the Secretary of War or designated
6 military commander, provided such person knew or should have known
7 of the restriction or order and that his act was in violation there-
8 of. (2)

9 Three days later Lieutenant-General J. L. DeWitt ordered
10 "as a matter of military necessity" all German, Italian and Japanese
11 aliens and all persons of Japanese ancestry residing within the
12 previously described military areas to remain within their places of
13 residence during certain curfew hours. (3)

14 The indictment charges the defendant with having violated
15 Public Law 503 by having disobeyed these curfew restrictions. The
16 evidence shows that the defendant, a person of Japanese ancestry
17 born in the United States, was not within his residence as required
18 by Proclamation No. 3 and that at the time of so doing he knew of
19 the regulation, knew that it was applicable to him, but wilfully
20 acted contrary thereto in violation of the law. The defendant
21 claims that the classification made in the proclamation as it per-
22 tains to American citizens of Japanese ancestry is unreasonable and
23 without due process in that it is based upon racial discrimination.

24
25 (2) "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF
26 THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That who-
27 ever shall enter, remain in, leave, or commit any act in any
28 military area or military zone prescribed, under the authority
29 of an Executive Order of the President, by the Secretary of
30 War, or by any military commander designated by the Secretary
31 of War, contrary to the restrictions applicable to any such
32 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 there-
of, 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."

(3) Public Proclamation No. 3, March 24, 1942.

1 It is argued that no basis exists for justifying the curfew orders
2 as a valid exercise of martial law. (Defendant's Memorandum, pp.
3 3-6.)

4 INTEREST OF THE STATE OF CALIFORNIA

5 The attack thus made upon the President's authority and
6 that of his military commander to impose curfew hours upon persons
7 of Japanese ancestry residing in Pacific Coast military areas is of
8 concern not only to the State of Oregon but to California and other
9 States lying within the Western Defense Command and embracing the
10 Pacific Combat Zone. Most of the excluded Japanese-Americans reside
11 in California. As the Court knows, the curfew orders were followed
12 by civilian exclusion orders also issued under Presidential Execu-
13 tive Order 9066, by which, because of military necessity, all persons
14 of Japanese ancestry, aliens and citizens alike, were evacuated
15 from Military Area No. 1 and certain zones in Military Area No. 2.

16 If the military authorities are to be held powerless to
17 deal with what they conceive to be a potential or actual danger to
18 the conduct of the war on the Pacific Coast, then the State of
19 California, or the counties and cities in the absence of state
20 action, must meet the danger, potential or actual, thus presented.
21 The questions raised by the motions of defendant also involve gen-
22 erally the validity of the principles and the situations which will
23 justify the military authorities in taking measures for the pro-
24 tection of the civilian population and for the prosecution of the
25 war on the Pacific Coast. Furthermore, as these measures and
26 regulations are made for the purpose of safeguarding California and
27 the nation, the State is anxious to have determined the validity of
28 Public Law 503, which provides a sanction for the enforcement of
29 these measures and regulations. Such a clarification of the
30 authority of the President and his military commanders and of the
31 power of Congress to pass Public Law 503 will facilitate the coopera-
32 tion of local law enforcement officers in the carrying out of the

1 Army's regulations and the federal statute. The legal questions
2 involved herein are before other federal district courts of the
3 Ninth Circuit. In order to obtain uniformity of opinion the State
4 of California respectfully presents its views here.

5 THE IMPORTANT QUESTIONS INVOLVED

6 The attack upon the constitutionality of Executive Order
7 9066, the validity of Proclamations Nos. 1, 2 and 3, and the legal
8 sufficiency and constitutionality of Public Law 503 raises the
9 following important legal questions.

10 (1) Under what circumstances and to what extent may
11 military authorities during a period of war exercise controls over
12 persons and civilian authorities?

13 (2) Where military necessity requires, may curfew regu-
14 lations be imposed upon citizens of Japanese ancestry residing in
15 Pacific Coast military areas?

16 (3) May Congress make it a misdemeanor to disobey curfew
17 orders and other restrictions of the President and his subordinate
18 military commanders, applicable to the acts of civilians in mili-
19 tary areas?

20 Correct answers require first a consideration of some of
21 the principles of martial law which justify the issuance of Execu-
22 tive Order 9066 and the orders of Commanding General J. L. DeWitt
23 issued pursuant thereto, including particularly Proclamation No. 3.

24 ARGUMENT

25
26 I. THE PRESIDENT'S ORDER ISSUED AS PRESIDENT AND COMMANDER-IN-
27 CHIEF, AUTHORIZING THE IMPOSITION OF RESTRICTIONS UPON PERSONS
28 IN DESIGNATED MILITARY AREAS WITH RESPECT TO THEIR RIGHT TO
29 REMAIN THEREIN, AND THE ORDERS OF THE COMMANDING GENERAL PUR-
SUANT THERETO, IMPOSING CURFEW HOURS UPON PERSONS OF JAPANESE
ANCESTRY IN SUCH AREAS, ARE CONSTITUTIONAL MEASURES OF MARTIAL
LAW.

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

32 When, as at present, the nation is at war, its first

1 function and primary duty is to preserve itself. The Constitution
2 divides the war power between the President and Congress. Congress
3 is granted the power to declare war (Art. I, Sec. 8, Cl. 11), to
4 raise and support armies (Art. I, Sec. 8, Cl. 13), to make rules
5 for the governance of the armed forces (Art. I, Sec. 8, Cl. 14),
6 and to make all laws which shall be necessary and proper for carry-
7 ing these powers into execution (Art. I, Sec. 8, Cl. 18). The
8 duty of conducting the war is placed upon the President in his
9 position as Commander-in-Chief of the armed forces (Art. II, Sec.
10 2, Cl. 1).⁽⁴⁾

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

13 "The measures to be taken in carrying on
14 war and to suppress insurrection are not
15 defined. The decision of all such ques-
16 tions rests wholly in the discretion of
17 those to whom the substantial powers in-
18 volved are confided by the Constitution."

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

21 "These powers ought to exist without limi-
22 tation, because it is impossible to fore-
23 see and define the extent and variety of
24 the means which may be necessary to satisfy
25 them. The circumstances that endanger the
26 safety of nations are infinite, and for this
27 reason no constitutional shackles can wisely
28 be imposed on the power to which the care of
29 it is committed. This power ought to be co-
30 extensive with all the possible combinations
31 of such circumstances; and ought to be under
32 the direction of the same councils which are
33 appointed to preside over the common defense."
(Federalist, XXIII) (Emphasis added)

34 In a total global war not confined to the actual scene of
35 hostilities but waged swiftly and violently and at long range upon

36 (4) "The power to make the necessary laws is in Congress, the
37 power to execute in the President. Both powers imply many
38 subordinate and auxiliary powers. Each includes all
39 authority essential to its due exercise." Ex parte Milligan,
40 4 Wall. 2 (1866).

1 civilians, factories and fields far beyond the front line and
2 conducted by sabotage, espionage and propaganda everywhere, the
3 President as Commander-in-Chief, through his subordinate military
4 commanders, must undertake certain precautionary and preventative
5 measures in areas not directly under the siege guns of the enemy,
6 the object of which is the protection of the civilian population
7 and the successful prosecution of the war. Such measures of con-
8 trol, when applied to civilians within our borders to meet actual
9 or threatened danger, is a valid exercise of martial law. Indi-
10 vidual rights guaranteed under the Constitution must temporarily
11 bend to the exercise of the paramount and fundamental constitutional
12 right of the State to preserve itself.

13 The point is that the exercise of this control in domestic
14 territory, namely martial law, is just as much a part of our Con-
15 stitution as the provisions guaranteeing the individual rights
16 which may be affected by martial law. The Constitution contem-
17 plates the necessity of limiting the exercise of some privileges,
18 such as freedom of movement, in order to secure the continuance of
19 all our constitutional rights. As former Chief Justice Hughes said,
20 when speaking of the war powers under the Constitution in an
21 address before the American Bar Association in 1917 during another
22 critical period in our history:

23 "We are making war as a nation organized under
24 the constitution, from which the established
25 national authorities derive all their powers
26 either in war or in peace. The constitution
27 is as effective to-day as it ever was and the
28 oath to support it is just as binding. But
29 the framers of the constitution did not con-
30 trive an imposing spectacle of impotency. One
31 of the objects of a 'more perfect Union' was
32 'to provide for the common defense.' A nation
which could not fight would be powerless to
secure 'the Blessings of Liberty to Ourselves
and our Posterity.' Self-preservation is the
first law of national life and the constitution
itself provides the necessary powers in order
to defend and preserve the United States.
Otherwise, as Mr. Justice Story said, 'the
country would be in danger of losing both its
liberty and its sovereignty from its dread of

1 investing the public councils with the power
2 of defending it. It would be more willing
3 to submit to foreign conquest than to domestic
4 rule." (Sen. Doc. No. 105, 65th Cong., 1st
5 Sess., p. 3) (Emphasis added)

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

8 "Martial law is the public right of self-
9 defense against a danger threatening the
10 order or the existence of the state." (Wiener,
11 A Practical Manual of Martial Law, p. 16
12 (1940).)

13 Winthrop, Military Law and Precedents,
14 Reprint, p. 820

15 But martial law when instituted as an aid to the conduct
16 of a national war is broader than the common law doctrine that
17 force to whatever degree necessary may be used to repress illegal
18 force, for the President and his military commanders charged with
19 conducting the war have the duty of taking all reasonable measures
20 which the conduct of the war makes necessary. Thus martial law in
21 time of war has a different application than in times of peace
22 where troops, either Federal or State, are employed or should be
23 employed to assist the civil law enforcement authorities in the
24 restoration of peace and order.⁽⁵⁾ The measures of civilian control
25 undertaken by the military may be purely preventative in character,
26 such as the imposition of curfew hours or the detention of persons
27 potentially dangerous. As Winthrop says in Military Law and
28 Precedents, Reprint, page 820:

29 "Martial law is indeed resorted to as much
30 for the protection of the lives and property
31 of peaceable individuals as for the repression
32 of hostile or violent elements. It may become
33 requisite that it supersede for the time the
34 existing civil institutions, but, in general,
35 except in so far as relates to persons violating
36 military orders or regulations, or otherwise
37 interfering with the exercise of military

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

1 authority, martial law does not in effect
2 suspend the local law or jurisdiction or
3 materially restrict the liberty of the
4 citizen; it may call upon him to perform
5 special service or labor for the public
6 defense, but otherwise usually leaves him
7 to his ordinary avocation." (Emphasis
8 added)

9
10 B. Judicial Control of Martial Law.

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

15 "Martial law is the public law of necessity.
16 Necessity calls it forth, necessity justifies
17 its exercise, and necessity measures the ex-
18 tent and degree to which it may be employed."
19 (p. 16)

20 "Its occasion and justification thus is neces-
21 sity." (Winthrop, Military Law and Precedents,
22 Reprint, p. 820)

23 Of course, today when the homefront is equally as impor-
24 tant as the battlefield, the power to conduct the war successfully
25 cannot be limited to the activities of the battleline. It clearly
26 contemplates the taking of all reasonable precautionary and pre-
27 ventative measures for the control of civilians within our own
28 borders. Even during the Civil War the Supreme Court, in Stewart
29 v. Kahn, 11 Wall. 493 (1870), said:

30 " *** the power is not limited to victories
31 in the field and the dispersion of the insur-
32 gent forces. It carries with it inherently
the power to guard against the immediate re-
newal of the conflict, and to remedy the evils
which have arisen from its rise and progress."

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

38 "The Constitution of the United States is a
39 law for rulers and people, equally in war

1 and in peace and covers with the shield of
2 its protection all classes of men, at all
times and under all circumstances." (p. 13)

3 For as Justice Davis states in the Milligan opinion:

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

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

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

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

16 By the very test of military necessity, martial law most
17 often is something less than the complete taking over of the gov-
18 ernment in domestic territory, even in an area of military opera-
19 tions. Much of the argument and misunderstanding of the term
20 "martial law" arises from the failure to realize that martial law
21 need not be absolute or suspend all civilian authority, but that
22 it may and in fact shall be exercised only to the qualified or
23 limited extent that the military necessity requires. This prin-
24 ciple was recognized by the United States Supreme Court in
25 Mitchell v. Harmony, 13 How. 115 (1851), wherein the court, with
26 reference to the Army's commandeering the property of a civilian
27 during the war with Mexico, stated:

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

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

4 "Order No. 39 was, as said, a declaration of
5 qualified martial law. Qualified, in that
6 it was put in force only as to the preserva-
7 tion of the public peace and order, not for
8 the ascertainment or vindication of private
9 rights, or the other ordinary functions of
10 government. For these the courts and other
11 agencies of the law were still open, and no
12 exigency required interference with their
13 functions. But within its necessary field,
14 and for the accomplishment of its intended
15 purpose, it was martial law, with all its
16 powers. The government has and must have this
17 power or perish. * * * It is not unfrequently
18 said that the community must be either in a
19 state of peace or of war, as there is no in-
20 termediate state. But from the point of view
21 now under consideration this is an error.
22 There may be peace for all the ordinary pur-
23 poses of life, and yet a state of disorder,
24 violence, and danger in special directions,
25 which, though not technically war, has in its
26 limited field the same effect, and, if impor-
27 tant enough to call for martial law for sup-
28 pression, is not distinguishable, so far as
29 the powers of the commanding officer are con-
30 cerned, from actual war. The condition in
31 fact exists, and the law must recognize it,
32 no matter how opinions may differ as to what
it should be most correctly called." (p. 954)

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

22 "Martial law, however, is of all gradations,
23 and although the Governor cannot, by procla-
24 mation or otherwise, establish martial law of
25 the character above discussed, he is not
26 barred from declaring it in any form. We must
27 therefore assume that, in using that phrase in
28 his proclamation, he meant only such degree or
29 form of martial law as he was constitutionally
30 authorized to impose. As we have seen above,
31 he was authorized to detail the militia to
32 suppress the insurrection and to direct their
movements, without regard to the civil authori-
ties, and they could in the performance of their
work take such measures as might be necessary,
including the arrest and detention of the insur-
rectionists and other violators of the law, for
delivery to the civil authorities *** ." (p. 954)

31 One of the best expressions of the principle is con-
32 tained in Bishop, New Criminal Law, 8th Ed., sec. 53 (1892):

1 "Martial law is elastic in its nature and easily
2 adapted to varying circumstances. It may
3 operate to the total suspension or over-
4 throw of civil authority; or its touch may
5 be light, scarcely felt or not felt at all
6 by the mass of the people, while the courts
7 go on in their ordinary course, and the
8 business of the community flows in its ac-
9 customed channels."

10 See Wiener, supra, page 10.

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

13 However, the fact that martial law may be less than abso-
14 lute control over civilians in domestic territory is to be dis-
15 tinguished from the question of whether or not a proclamation of
16 martial law can be made only by Congress except that when time does
17 not permit it may be made by the President. That proposition per-
18 tains to the issuance of the proclamation and the calling out of
19 the troops. While such a proclamation is held to be conclusive
20 (Sterling v. Constantin, 287 U. S. 378 (1932)), it remains for the
21 court to pass upon the particular measures taken by the troops.
22 As will be shown, a proclamation is not a prerequisite of a valid
23 exercise of martial law.

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

27 The attack upon President Roosevelt's Executive Order and
28 Proclamation No. 3 issued by the Commanding General pursuant there-
29 to is made upon the ground that the situation existent at the time
30 of the issuance of the proclamation did not justify any action under
31 martial law because the civil authorities in Oregon had not been
32 deposed by an invasion and the civil courts were open. Reliance
for the proposition that the necessitous situation must be in this
extremity is placed mainly upon the dictum of the majority in
Ex parte Milligan, 4 Wall. 2 (1866).

In 1864 Lambdin P. Milligan, a civilian and resident of

1 the State of Indiana was arrested by order of General Hovey. He
2 was tried before a military commission convened at Indianapolis,
3 on various charges of aiding the Southern cause, and sentenced to
4 be hanged. At the time of the arrest Indiana was not threatened
5 with attack, although previously Southern troops had invaded the
6 State. Milligan's petition for a writ of habeas corpus reached
7 the United States Supreme Court upon a certificate of disagreement
8 from the Federal Circuit Court. The writ was granted upon the
9 ground that Congress, to whom, the court said, the power was com-
10 mitted, had not authorized trial by military commission. This
11 decision, joined in by all members of the court, disposed of the
12 case upon jurisdictional grounds. However, a bare majority of
13 five went on gratuitously to say that Congress in any case would
14 not have had the power to authorize trial by military commission
15 at any place outside the theatre of active war, because, it said:

16 "Martial law cannot rise from a threatened
17 invasion. The necessity must be actual and
18 present; the invasion real, such as effect-
19 ively closes the courts and deposes the civil
20 administration. *** Martial rule can never
21 exist where the courts are open and in the
22 proper and unobstructed exercise of their
23 jurisdiction. It is also confined to the
24 locality of actual war." (p. 127)

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

28 "Where peace exists the laws of peace must
29 prevail. What we do maintain is, that when
30 the nation is involved in war and some por-
31 tions of the country are invaded and all are
32 exposed to invasion, it is within the power
33 of Congress to determine in what states or
34 districts such great and imminent public dan-
35 ger exists as justifies the authorization of
36 military tribunals for the trial of crimes
37 and offenses against the discipline and se-
38 curity of the army or against the public
39 safety." (p. 140)

40 Because of the frequent reference made in this case to
41 the fact that the courts in this combat zone were open and in the

1 proper and unobstructed exercise of their jurisdiction, it is
2 important to note that this part of the majority dictum must be
3 confined to the serious question of whether or not and upon what
4 occasion a civilian may be tried by military commission.⁽⁶⁾ It
5 is difficult to perceive what application, one way or another,
6 the fact that the courts are open or not would have upon a deter-
7 mination of the justification for the Army's taking measures to
8 prevent sabotage and espionage and to protect the civilian popula-
9 tion within a theatre of operations.

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

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

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

31 (6) As the court itself puts the question, "Upon the facts stated
32 in Milligan's petition, and the exhibits filed, had the mili-
tary commission mentioned in it jurisdiction, legally, to try
and sentence him?" Ex parte Milligan, 4 Wall. 2, 118 (1866).

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

9 Washington, Oregon and California are among the potential
10 battlefields of this war. A field army occupies the length and
11 breadth of these States, ready to forestall invasion by air, land or
12 sea. California ports are vital embarkation points for men and
13 materials. Nearly one-third of the nation's war planes and one-
14 fourth of the country's ships are being built on the Pacific Coast.
15 Over a thousand miles of coastline must be guarded. Dotted through-
16 out the States in this area are numerous defense installations,
17 including army camps, posts, forts, arsenals and large training
18 centers and strategic naval installations. The Pacific Coast States
19 lie wholly within the Western Defense Command theatre of operations,
20 and a strip of land one hundred miles wide, extending down the
21 Pacific Coast and along the California-Mexico border, is part of the
22 designated "combat zone". Japanese submarines operating within the
23 Oregon and California waters have attacked installations on the
24 coast of Oregon and have shelled objectives at Santa Barbara, Cali-
25 fornia. Japanese in considerable numbers are now lodged in some of
26 the Aleutian Islands, which are part of the Western Defense Command.
27 Alaska has been subjected to repeated bombing attacks. Therefore,
28 part of our country is invaded and the Pacific Coast stands in
29 imminent danger of invasion. Our courts and our civil administra-
30 tion may continue to function, yet they may be no longer able to
31 adequately secure the public from these dangers. This new type of
32 total war not only places the homefront within the theatre of warfare

1 but presents conditions of compelling military necessity which
2 civilian authorities cannot nor should not be required to meet.

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

10 As Professor Charles Fairman declares:

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

23 One of the first decisions rendered under the present
24 conditions of total warfare and recognizing that under the present
25 situation a new criterion of necessity must be applied is the case
26 of Ex parte Ventura, 44 Fed. Supp. 520 (1942). The petitioner, a
27 Japanese-American citizen resident of Seattle, by a petition for a
28 writ of habeas corpus, questioned the authority of the Commanding
29 General of the Western Defense Command, under Presidential Executive
30 Order 9066, to issue curfew orders applicable to American citizens
31 of Japanese ancestry. Relying upon the dictum of the majority in
32 the Milligan case, the petition alleged that the State of Washington
had not been invaded and that the Federal and State courts there
were open. The court denied the petition not only on the ground
that no actual detention was shown but also because the curfew order
was a proper military measure in the light of present conditions in
the Western Theatre of War, despite the fact that the situation did

1 not meet the test of necessity in the Milligan case, and said:

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

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

32 * * *

"How many here believe that if our enemies
should manage to send a suicide squadron of
parachutists to Puget Sound that the Enemy
High Command would not hope for assistance
from many such American-born Japanese?"

"The law enacted by Congress and the President's orders and commands indicate that
those who are charged with the defense of
this area, of our Constitution and our institutions, deem Puget Sound to be a critical
military area definitely essential to national
defense.

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

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

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

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

27 Fairman, The Law of Martial Rule, p. 145

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

29 Glenn, The Army and the Law, 188-190

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

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

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

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

12 The argument is made that the measures taken on the
13 Pacific Coast with reference to the Japanese-American citizens are
14 not authorized because there has been no formal declaration that
15 martial law has been established in the areas from which the
16 evacuations were ordered. The fact is, no proclamation is neces-
17 sary. If the necessity exists to exercise military control in a
18 particular manner, therein lies the justification. If the neces-
19 sity and the occasion for martial law are not present, words cannot
20 give it life, nor if the necessity and the occasion do exist, is
21 a proclamation necessary.⁽⁷⁾ As Professor Charles Fairman, the
22 author of the authoritative work, The Law of Martial Rule, de-
23 clares, concerning Executive Order 9066, under which the defendant
24 herein was ordered to comply with the curfew orders:

25 "Probably the problem will only be confused by
26 talking about martial law. The President has
27 made no such proclamation and if he did his
28 constitutional powers would not be increased
29 one whit. The question in every case of
30 military control would still be, can the action
31 complained of be justified as apparently reason-
32 able and appropriate, under the circumstances,

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1 to the defense of the nation and the prosecu-
2 tion of the war?" (San Francisco Chronicle,
March 4, 1942, p. 14)

3
4 F. Range of Discretion.

5 The constitutional power to wage war, being carried out
6 on the Pacific Coast by the President through his military commander,
7 Lieutenant-General J. L. DeWitt, commanding the Western Defense
8 Command and the Fourth Army, comprehends, as we have seen, the
9 taking of such measures of control over civilians on the Pacific
10 Coast which military necessity requires.

11 In passing upon the measures undertaken by military
12 authorities in California, such as the imposition of curfew hours
13 upon persons of Japanese ancestry, it must be remembered the courts
14 will allow the President as Commander-in-Chief and his Commanding
15 General a range of honest discretion. In Sterling v. Constantin,
16 287 U. S. 378 (1932), the United States Supreme Court, referring
17 to the use of martial law in peace time in aid of the civil
18 authorities, states the principle in this way:

19 "The nature of the power also necessarily
20 implies that there is a permitted range of
21 honest judgment as to the measures to be
22 taken in meeting force with force, in sup-
23 pressing violence and restoring order, for
24 without such liberty to make immediate
25 decisions, the power itself would be use-
26 less. Such measures, conceived in good
faith, in the face of the emergency and
directly related to the quelling of the
disorder or the prevention of its continu-
ance, fall within the discretion of the
Executive in the exercise of his authority
to maintain peace." (p. 399)

27 And speaking of the powers of a Governor as Commander-in-Chief of
28 the state militia in time of peace, the Court said:

29 " *** In the performance of its essential
30 function, in promoting the security and
31 well-being of its people the State must
32 of necessity, enjoy a broad discretion.
The range of that discretion accords with
the subject of its exercise. * * * As the
State has no more important interest than the

1 maintenance of law and order, the power it
2 confers upon its Governor as Chief Executive
3 and Commander in Chief of its military forces
4 to suppress insurrection and to preserve the
5 peace is of the highest consequence. The
6 determinations that the Governor makes within
7 the range of that authority have all the weight
8 which can be attributed to state action, and
9 they must be viewed in the light of the object
10 to which they may properly be addressed and
11 with recognition of its importance. * * *"
12 (p. 398)

13
14 In Moyer v. Peabody, 212 U. S. 78 (1909), Justice Holmes
15 said, with reference to the authority of a Governor to detain under
16 martial law a person who was actively interfering with the restora-
17 tion of public order:

18 "When it comes to a decision by the head of a
19 State upon a matter involving its life, the
20 ordinary rights of individuals must yield to
21 what he deems the necessities of the moment."
22 (p. 85)

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

29 It is of utmost importance to keep in mind that the
30 powers which the President and his military commander have exercised
31 under martial law on the Pacific Coast are part of their constitu-
32 tional powers to wage war and are not derived from any delegation
33 of power from Congress.

34 The foregoing principles concerning martial law in time
35 of war are disputed by counsel for the defendant. We urge upon
36 this honorable Court that it announce its approval of these prin-
37 ciples, not only because of their application in the instant case
38 but also because of their importance in clarifying the right of
39 the military authorities to act in the Pacific Coast war areas for
40 the taking of necessary measures for the vigorous prosecution of

1 the war and the protection of our civilian population. Such a
2 clarification will provide a guide under modern war conditions for
3 the military authorities, civilian authorities and the courts. We
4 now proceed to apply these principles to specific actions of the
5 President and his military commander, as complained of by the
6 defendant.

7
8 II. THE AUTHORITY OF THE PRESIDENT AND HIS MILITARY COMMANDER TO
9 IMPOSE CURFEW HOURS UPON PERSONS OF JAPANESE ANCESTRY IN
PACIFIC COAST AREAS.

10 The plaintiff in its brief has set forth the peculiar
11 military situation on the Pacific Coast and the real or potential
12 danger which the presence of persons of Japanese ancestry pre-
13 sented to the safety of the military operations in the area from
14 the standpoint of sabotage and espionage. In brief, the plaintiff
15 points to the imminence of Japanese attack, the racial conscious-
16 ness which might assert itself in some persons of Japanese ancestry
17 over attachment for America, the non-assimilability of the Japanese
18 racially and culturally, the concentration of Japanese and their
19 proximity to defense plants and military installations. Nearly
20 112,353 persons of Japanese ancestry were living in Military Area
21 No. 1 and of these, 41,000 were aliens (Select Com. Investigating
22 National Defense Migration, H. Rep. No. 1911, 77th Cong., 2nd Sess.,
23 p. 12).

24 The apparent reasonableness of the curfew orders is
25 indicated by what has been decided with reference to the more
26 severe evacuation measures. In its Preliminary Report and Recom-
27 mendations on Problems of Evacuation of Citizens and Aliens from
28 Military Areas, the House Select Committee on National Defense
29 Migration declares:

30 "This committee does not deem its proper
31 province to encompass a judgment on the
32 military need for the present (and any sub-
sequent) evacuation orders. In time of war
the military authorities are obligated to

1 take every necessary step and every precau-
2 tion to assure the internal safety of the
3 Nation. The need for these safeguards appears
4 the more pressing when we consider that
5 present-day warfare has developed the fifth-
6 column technique in unprecedented fashion.
7 It is naive to imagine that the enemy powers
8 will not exploit these techniques to the full.
9 The tragic events of Pearl Harbor have cre-
10 ated in the public mind a consciousness, what-
11 ever the character of the evidence, that the
12 dangers from internal enemies cannot be
13 ignored." (p. 13)

14 "Various arguments were adduced in testimony
15 before the committee why the Japanese, both
16 citizen and alien, should be evacuated from
17 the west coast. Most commonly it was said
18 that homogeneity of racial and cultural
19 traits made it impossible to distinguish
20 between the loyal and the disloyal. Law
21 enforcement officials were particularly con-
22 cerned lest enraged public sentiment and
23 possibly mob action, occasioned by reverses
24 in the Pacific war theater, would work in-
25 jury to innocent and guilty alike. Protection
26 for Japanese residents as well as for the
27 whole Nation was said to require the immediate
28 evacuation of all Japanese." (p. 14)

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

38 A. The Curfew Hours for Persons of
39 Japanese Ancestry in Pacific Coast
40 Military Areas Was a Proper Exer-
41 cise of Martial Law.

42 In view of the apparent reasonable connection between
43 the placing of preventative restraints upon those persons of
44 Japanese ancestry residing in Military Area No. 1 and parts of
45 Military Area No. 2 and the conduct of the war on the Pacific
46 Coast, the curfew orders here considered should be upheld as a

1 proper exercise of limited martial law. Where there is a danger of
2 sabotage and espionage, such restraint upon the movements of per-
3 sons considered to be disposed to assist the invader or to damage
4 our war industries or to inform our enemies of the number and
5 disposition of our troops, warships and the like is not only proper
6 but necessary to assure our success in the present conflict. As
7 we have seen (pages 20-22, supra), a broad range of discretion
8 must be allowed to the Commander-in-Chief in the taking of precau-
9 tionary measures in time of war to avert the anticipated danger.
10 Punishment is of little benefit to our war effort after the danger
11 has materialized.

12 In an area of operations where there is a possibility
13 that the civilian population will interfere with the defense of
14 the area, the imposition of curfew restrictions is one of the most
15 common practices of limited martial law. The measure is entirely
16 precautionary. It is supported by those cases arising out of
17 peace-time domestic disturbances where the courts have upheld the
18 power of the military to take the precautionary steps of detaining
19 persons suspected of aiding the disturbance.

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

21 In re Moyer, (Colo.) 85 Pac. 190 (1904)

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

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

24 State ex rel Roberts v. Swope, (N.M.) 28 Pac.
25 (2d) 4 (1933)

26 If detention is proper, so also are the much milder measures of
27 curfew.

28 During the last World War the British House of Lords,
29 in Rex v. Halliday, (1917) A.C. 260, affirming (1916) 1 K.B. 238,
30 upheld the propriety of regulations by which the residence of any
31 person could be regulated or any person removed or interned in
32 view of the hostile origin or associations of the person, when it

1 appeared to the Secretary of State expedient for securing the
2 public safety. The court said:

3 "One of the most obvious means of taking
4 precautions against dangers such as are
5 enumerated is to impose some restriction
6 on the freedom of movement of persons whom
7 there may be any reason to suspect of being
8 disposed to help the enemy. It is to this
9 that reg. 14B is directed. The measure is
10 not punitive but precautionary. It was
11 strongly urged that no such restraint should
12 be imposed except as the result of judicial
13 inquiry, and indeed counsel for the appellant
14 went so far as to contend that no regulation
15 could be made forbidding access to the sea-
16 shore by suspected persons. It seems obvious
17 that no tribunal for investigating the ques-
18 tions whether circumstances of suspicion
19 exist warranting some restraint can be imag-
20 ined less appropriate than a Court of law.
21 No crime is charged. The question is whether
22 there is ground for suspicion that a particu-
23 lar person may be disposed to help the enemy.
24 *** " (p. 269)

15 The court then makes some observations which we believe are particu-
16 larly pertinent to the instant case:

17 "However precious the personal liberty of
18 the subject may be, there is something for
19 which it may well be to some extent, sacri-
20 ficed by legal enactment, namely, national
21 success in the war, or escape from national
22 plunder or enslavement. It is not contended
23 in this case that the personal liberty of
24 the subject can be invaded arbitrarily at
25 the mere whim of the Executive. What is con-
26 tended is that the Executive has been empow-
27 ered during the war, for paramount objects of
28 State, to invade by legislative enactment
29 that liberty in certain states of fact." (p.
30 271)

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

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

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

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

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

32 In commenting upon the English decisions Professor Fairman
says:

 "All of this, one may say, is no precedent
for construing our own Constitution. But
where kindred people who once held the same
doctrines as ourselves have been driven to
adopt new views of war power, that experience

1 is most persuasive in weighing the authority
2 to be conceded to our own government in like
emergencies." (55 Harvard L. Rev. 1253, 1256)

3
4 III. CONGRESS HAD THE POWER TO ENACT PUBLIC LAW 503 IN AID OF THE
5 PRESIDENT'S POWER AS COMMANDER-IN-CHIEF AND THE ACTS OF HIS
6 SUBORDINATE COMMANDING GENERALS TO MAKE RULES PERTAINING TO
THE CONDUCT OF CIVILIANS IN PRESCRIBED MILITARY AREAS.

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

21 This brings us to the third question involved herein,
22 namely: Could Congress under its war powers enact Public Law 503
23 (77th Cong., 2nd Sess., Ch. 191, March 21, 1942)⁽⁸⁾ to aid the
24

25 (8) "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF
26 THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That who-
27 ever shall enter, remain in, leave, or commit any act in any
28 military area or military zone prescribed, under the authority
29 of an Executive Order of the President, by the Secretary of
30 War, or by any military commander designated by the Secretary
31 of War, contrary to the restrictions applicable to any such
32 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."

1 President in the carrying out of the described constitutional duty
2 to conduct the war?

3 As already noted in the statement of facts, Public Law
4 503 specifically refers to entering, remaining in or leaving a
5 prescribed military area or the doing of any other act contrary to
6 the restrictions applicable in the area, or to the order of the
7 Secretary of War or any designated military commander. A person
8 cannot be found guilty thereunder unless he knew or should have
9 known of the existence and the extent of the restrictions and
10 orders and that his act was in violation thereof. This law is
11 attacked on the ground that it improperly delegates to the Presi-
12 dent, the Secretary of War or any designated military commander
13 the power first to designate the military area or zone and then to
14 determine the acts prohibited therein, the doing of which the law
15 makes criminal. There is in fact no such delegation of power.
16 The power to designate military areas in domestic territory and,
17 because of military necessity, to forbid the doing of acts therein
18 is derived from the constitutional duty of the President and his
19 military commanders to conduct the war. Such are the martial law
20 powers of the military authorities. This right to prescribe the
21 military areas and to make restrictions therein resides in the
22 military authorities without any authority from Congress. Of
23 course the exercise of these martial law powers, as we have seen,
24 is reviewable by the courts, to determine whether or not the
25 restrictions have a reasonable connection with the conduct of the
26 war. On martial law principles restrictions upon civilians beyond
27 this test of appropriateness would be held invalid by our courts.

28 Public Law 503 by its terms clearly recognizes the
29 martial law powers of the President and his subordinate military
30 commanders to be exercised within military areas and zones. All
31 this law attempts to do is to provide a criminal penalty for
32 disobedience of the restrictions which the military authorities

1 thus impose under their constitutional powers. That this was its
2 purpose is evident from the congressional debates on the law at the
3 time of its passage (Congressional Record, March 19, 1942, p. 2807).
4 The United States Supreme Court has recognized the power
5 of Congress to provide sanctions for the carrying out of the consti-
6 tutional powers of the Presidency. In United States v. Curtiss-
7 Wright Corporation, 299 U. S. 304 (1936), the Supreme Court upheld
8 a criminal statute passed for the purpose of assisting the President
9 in carrying out his constitutional power to deal with foreign
10 affairs. A congressional resolution authorized the President to
11 prohibit the sale of munitions of war in the United States to coun-
12 tries engaged in war in the Chaco region of South America, except
13 under such limitations and exceptions as he might prescribe, when-
14 ever he found that such prohibition would contribute to the re-
15 establishment of peace between the countries involved. The resolu-
16 tion in effect provided a fine and/or imprisonment for sales made
17 in violation of the proclamation (p. 312). The President thereafter
18 made such findings in his proclamation. An indictment charging a
19 violation of the Joint Resolution and the Proclamation of the
20 President was demurred to on the grounds that the resolution consti-
21 tuted an unlawful delegation of legislative power to the executive.
22 In part it was contended that the resolution was unconstitutional
23 because it only went into effect upon the making of a proclamation
24 which was left to his unfettered discretion, thus constituting an
25 attempted substitution of the President's will for that of Congress,
26 and also that the extent of its operation in particular cases was
27 subject to limitations and exceptions by the President, controlled
28 by no standard. In rejecting these contentions (p. 329) the court
29 said that in such external matters as foreign affairs and the waging
30 of war the general rule regarding unlawful delegation of legislative
31 authority either did not apply to such matters or would be very
32 broadly construed.

1 "Practically every volume of the United States
2 Statutes contains one or more acts or joint
3 resolutions of Congress authorizing action by
4 the President in respect of subjects effecting
5 foreign relations, which either leave the exer-
6 cise of the power to his unrestricted judgment,
7 or provide a standard far more general than
8 that which has always been considered requisite
9 with regard to domestic affairs."

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

13 "It is important to bear in mind that we are
14 here dealing not alone with an authority
15 vested in the President by an exertion of
16 legislative power, but with such an authority
17 plus the very delicate, plenary and exclusive
18 power of the President as the sole organ of
19 the federal government in the field of inter-
20 national relations--a power which does not
21 require as a basis for its exercise an act of
22 Congress, but which, of course, like every
23 other governmental power, must be exercised
24 in subordination to the applicable provisions
25 of the Constitution." (pp. 319-320) (Emphasis
26 added)

21 Congress, to assist the President in the carrying out of
22 his constitutional duty, may by statute provide a sanction to be
23 administered in the federal courts, just as Congress did in the
24 Curtiss-Wright case, to assist the President in carrying out his
25 function in the field of international relations. It should be
26 noted that in the Curtiss-Wright case the statute was upheld
27 although it provided a punishment for the violation of the Presi-
28 dent's proclamation, which was to be made after the passage of the
29 congressional act.

30 A. Public Law 503 Is Not Invalid on
31 the Ground of Uncertainty.

32 The contention has been made that Public Law 503 is

1 invalid because it falls within the rule that a criminal statute
2 which does not define with certainty the acts prohibited is void.
3 It is charged that the law does not inform a person of the nature
4 and cause of the charge to be made against him and therefore vio-
5 lates the Fifth and Sixth Amendments to the United States Constitu-
6 tion.

7 The fundamental reason of all rules regarding certainty
8 in criminal statutes is that a man cannot be punished for the doing
9 of an act unless he had an opportunity to know just what was pro-
10 hibited and just what was permitted. Where a statute itself defines
11 the prescribed act with certainty, the law says that ignorance of
12 the terms of the statute is no excuse. The ready answer to the
13 objections to Public Law 503 on the ground of uncertainty is that
14 the law is far more considerate of an accused and fulfills the
15 requirements of certainty with much greater strictness than the
16 ordinary rules require, because it provides that a person can be
17 punished only "if it appears that he knew or should have known of
18 the existence and extent of the restrictions or order and that his
19 act was in violation thereof".

20
21 IV. OVERRULING OF DEMURRER IN UNITED STATES VS. KOREMATSU, U.S.D.C.,
22 N.D. (CALIF.), S.D., NO. 27635-W, INVOLVING THE IDENTICAL
ISSUES PRESENTED HERE.

23 At the moment of writing this brief, word has been re-
24 ceived that the demurrer to the information in United States v.
25 Korematsu (Northern District of California, Southern Division, No.
26 27635-W) has been overruled.

27 In that case one Fred Toyosaburo Korematsu, an American
28 citizen of Japanese ancestry, is now being tried in the United
29 States District Court in San Francisco upon an information charging
30 him with having violated Public Law 503 in that he failed to obey
31 an exclusion order excluding persons of Japanese ancestry from
32 Military Area No. 1, issued by Lieutenant-General J. L. DeWitt

1 (Civilian Exclusion Order No. 34), pursuant to Presidential Execu-
2 tive Order 9066 and Proclamation No. 1. The demurrer to the
3 indictment raised the same constitutional questions presented here.
4 It was claimed that the evacuation order as applied to American
5 citizens of Japanese ancestry constituted an unconstitutional
6 racial discrimination, was lacking in due process, and deprived
7 the defendant of his constitutional rights to liberty and property.
8 It was further claimed that the evacuation could not be justified
9 under principles of martial law as, under Ex parte Milligan, supra,
10 invasion had not closed the courts or deposed the civil authori-
11 ties. Furthermore it was contended that there had been no procla-
12 mation of martial law. Public Law 503 was attacked as constituting
13 an unlawful delegation of legislative power to military commanders.

14 These objections, identical with those raised in this
15 case, were thoroughly briefed by counsel representing the govern-
16 ment and the defendant, as well as the American Civil Liberties
17 Union acting as amicus curiae on behalf of the defendant, and the
18 State of California appearing in the same capacity on behalf of
19 the plaintiff, the United States Government.

20 The hearing was had before Judge Martin I. Welsh, and on
21 September 1, 1942, Judge Welsh entered an order overruling the
22 demurrer. It is believed that this ruling is fully supported by
23 the principles of law stated here.

24 CONCLUSION

25
26 The State of California, in view of its position in the
27 Pacific Combat Zone and in the Western Theatre of Operations, is
28 directly interested in having this Court define the principles of
29 martial law upon which the military authorities during this period
30 of war may adopt measures for the purpose of protecting the civilian
31 population of the State and for facilitating the conduct of the
32 war. It is believed that the military authorities should be able

1 to act with reference to the present type of total warfare even
2 though the civilian authorities have not been deposed and the civil
3 courts remain open. To accomplish this it should be recognized
4 that the military authorities may establish limited martial law,
5 that is, measures may be adopted for the accomplishment of specific
6 military objectives without otherwise impinging upon the authority
7 of the civil officers of the State. At all times it is believed
8 that the courts must remain the final arbiter of what constitutes
9 appropriate action within the range of honest judgment permitted
10 to the President and his military commanders in the discharge of
11 their constitutional duty of conducting the war to a successful
12 conclusion.

13 It appears that the treating of persons of Japanese
14 ancestry as a group rather than on an individual basis was justi-
15 fied in view of the pressing military necessity which confronted
16 the Commanding General of the Western Defense Command. Public Law
17 503 validly provides a sanction for the carrying out of the martial
18 law powers of the President and his military commanders issued not
19 under any delegated power but derived from their constitutional
20 power to wage the war successfully.

21 The considerations advanced here are made with a realiza-
22 tion of the importance of preserving the fundamental rights of all
23 citizens. But it is obvious that the great constitutional guaran-
24 tees of personal and property rights are not absolute and must in
25 times of war give way to the fundamental right of the public person,
26 the State, to preserve itself.

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

1 There is no merit in the contention that such a justifi-
2 able martial law measure as this will lead to military dictatorship.
3 That it is necessary to curtail temporarily the rights of citizens
4 through martial law does not mean that such practice will be con-
5 tinued in times of peace. We cannot believe this any more than we
6 can believe that "a man could contract so strong an appetite for
7 emetics during temporary illness as to persist in feeding upon them
8 during the remainder of his healthful life".⁽⁹⁾

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

14 Protection against excessive military action lies in our
15 courts, in the non-political character of our Army and Navy, in an
16 independent Congress and in the need for securing popular support
17 for the conduct of the war. The controls of martial law which the
18 President and his military commanders find necessary to exert will
19 pass with the passing of the war emergency, and legislation such
20 as here reviewed will then happily have no application.

21 Respectfully submitted,

22 EARL WARREN
23 Attorney General of California

24 HERBERT E. WENIG
25 Deputy Attorney General

26 Attorneys for the State of
27 California, Amicus Curiae.

28 DATED: September 3, 1942.

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