

T1.20

67/14
c

COPY

7/20

ORIGINAL
FILED

AUG 19 1942

With Clerk, U. S. Dist. Court
San Francisco

IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FRED TOYOSABURO KOREMATSU,

Defendant.

No. 27635-W

BRIEF OF THE STATE OF CALIFORNIA
AS AMICUS CURIAE

Dated: August 18, 1942.

EARL WARREN
Attorney General of California
HERBERT E. WENIG
JAMES A. ARNERICH
Deputies Attorney General
600 State Building
San Francisco, California
UNDERHILL 8700

Attorneys for the State of
California, Amicus Curiae.

INDEX

	Page
Brief Statement of Facts.....	1
Interest of the State of California.....	4
The Important Questions Involved.....	5
I. THE PRESIDENT'S ORDER ISSUED AS PRESIDENT AND COMMANDER-IN-CHIEF, AUTHORIZING THE EXCLUSION OF PERSONS FROM DESIGNATED MILITARY AREAS, AND THE ORDERS OF THE COMMANDING GENERAL PURSUANT THERE TO, EXCLUDING PERSONS OF JAPANESE ANCES- TRY FROM SUCH AREAS, ARE CONSTITUTIONAL MEASURES OF MARTIAL LAW.....	5
(a) Martial law is the law of public necessity.	5
(b) Judicial control of martial law.....	7
(c) Martial law by the test of necessity may be limited.....	8
(d) The test of necessity should be consonant with today's military problems.....	9
(e) A proclamation of martial law is not neces- sary before the military may take steps to protect the civilian population.....	16
(f) The President's constitutional power as Commander-in-Chief to conduct the war justifies reasonable measures of martial law in time of war.....	17
II. THE AUTHORITY OF THE PRESIDENT AND HIS MILITARY COMMANDER TO EVACUATE PERSONS OF JAPANESE ANCES- TRY FROM CALIFORNIA COASTAL AREAS.....	19
(a) The exclusion of persons of Japanese ances- try from Pacific Coast military areas was a proper exercise of martial law.....	22
III. CONGRESS HAD THE POWER TO ENACT PUBLIC LAW 503 IN AID OF THE PRESIDENT'S POWER AS COMMANDER- IN-CHIEF AND THE ACTS OF HIS SUBORDINATE COMMAND- ING GENERALS TO MAKE RULES PERTAINING TO THE CONDUCT OF CIVILIANS IN PRESCRIBED MILITARY AREAS.....	26
(a) The assumed delegation of authority in Public Law 503 is not unconstitutional.....	29
(b) Ratification of exclusion orders by Con- gress.....	34
(c) Public Law 503 is not invalid on the ground of uncertainty.....	35
CONCLUSION.....	35

TABLE OF AUTHORITIES

	Page
<u>Cases</u>	
Avent v. United States, 266 U. S. 127 (1924)	30,31
Boyle, In re, (Idaho) 57 Pac. 706	22
Campbell v. Chase National Bank, 5 Fed. Supp. 156 (1933)	32
Commercial Cable Co. v. Burleson, 255 Fed. Rep. 99 (1919)	12
Commonwealth ex rel. Wadsworth v. Shortall, 55 Atl. 952 (Pa.)	8
Cox v. McNutt, 12 F. Supp. 355	23
Home Building and Loan Ass'n v. Blaisdell, 290 U. S. 398, 426 (1934)	17
King v. Governor of Wormwood Scrubbs Prison, (1920) 2 K. B. 305	24
Liversedge v. Anderson, (1941) 3 All. Eng. Rep. 338	25
McDonald, Ex parte, 49 Mont. 454, 143 Pac. 947 (1914)	9,23
McKinley v. United States, 249 U. S. 397 (1919)	30
Milligan, Ex parte, 4 Wall. 2 (1866)	7,10,14
Mitchell v. Harmony, 13 How. 115 (1851)	8
Moyer, In re, (Colo.) 85 Pac. 190	22
Rex v. Halliday, (1917) A.C. 260, aff. (1916) 1 K. B. 738	23
State ex rel. Roberts v. Swope, (N.M.) 28 Pac. (2d) 4	23
Sterling v. Constantin, 287 U. S. 378	8,9,17,18
Stewart v. Kahn, 11 Wall. 493 (1870)	22,34
United States v. Curtiss-Wright Corporation, 299 U. S. 304 (1936)	28
United States v. Grimaud, 220 U. S. 506 (1911)	32
United States ex rel. Wessels v. McDonald, 265 Fed. 754 (1920)	15
Ventura, Ex parte, 44 Fed. Supp. 520 (1942)	13
<u>Statutes</u>	
Constitution of United States, Art. II, Sec. 2	5
Defense of the Realm Consolidated Act of 1915 (5 Geo. 5 c. 8)	23
Emergency Powers (Defence) Act of 1939 (2 and 3 Geo. VI, c. 62)	25
Public Law 503 (77th Congress, 2nd Session, Ch. 191)	3,4,5,26,27,29,31,34,35,36

TABLE OF AUTHORITIES

(Continued)

Page

Texts and Encyclopoedia

Bishop, "New Criminal Law", 8th Ed., 1892, sec. 53	9
Congressional Record, March 19, 1942, p. 2807	27
Fairman, "The Law of Martial Rule" (1930)	16
Fairman, "The Law of Martial Rule", San Francisco Chronicle, March 4, 1942, p. 14	17
Fairman, "The Law of Martial Rule and the National Emergency", 55 Harv. L. R. 1254, 1288 (June 1942)	13
Fairman, "Martial Law and Suppression of Insurrection", 23 Ill. Law Rev. 766, 775	9
Federalist XXIII	34
Glenn, "The Army and the Law, 188-190	16
Hughes, Charles Evans, "War Powers Under the Constitution", Sen. Doc. 105, 65th Congress, 1st Session	16,33,37
Matsuo, Kinosaki, "The Three Power Alliance and a U.S.-Japanese War", translated by Kilsco K. Haan under title "How Japan Plans to Win", Little, Brown & Co., 1941	20
Sandburg, Carl, "Abraham Lincoln", Vol. II, p. 167	37
Select Committee Investigating National Defense Migration, H. Rep. No. 1911, 77th Cong., 2nd Sess., p. 12	20,21
Wiener, "A Practical Manual of Martial Law" (1940)	6,7,9,16
Willoughby, "Constitutional Law", 2nd Ed. III, 1602	16
Winthrop, "Military Law and Precedents", Reprint, p. 820	6,7

1 EARL WARREN, Attorney General
HERBERT E. WENIG, Deputy
2 JAMES A. ARNERICH, Deputy
600 State Building
3 San Francisco, California

4 Attorneys for the State of
California, Amicus Curiae.
5
6
7
8
9

10 IN THE SOUTHERN DIVISION OF THE UNITED STATES DISTRICT COURT
11 FOR THE NORTHERN DISTRICT OF CALIFORNIA.
12

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 vs.

No. 27635-W

16 FRED TOYOSABURO KOREMATSU,

17 Defendant.
18

19 BRIEF OF THE STATE OF CALIFORNIA
20 AS AMICUS CURIAE.

21 By leave of this Court heretofore granted, the State
22 of California, by and through Earl Warren, Attorney General of the
23 State of California, presents herein its brief as amicus curiae
24 in support of the plaintiff for the purpose of presenting to this
25 Honorable Court the viewpoint of the State of California concern-
26 ing some of the important questions of law raised herein.

27 Brief Statement of Facts

28 On February 19, 1942, by Executive Order 9066 (Fed. Reg.
29 February 25, 1942) President Franklin D. Roosevelt, as President
30 of the United States and as Commander-in-Chief of the Army and
31 Navy, authorized and directed the Secretary of War, or the military
32 commander designated by the Secretary, to prescribe military areas,

1 whenever it was deemed necessary, from which all persons might
2 be excluded and within the discretion of either of such officers
3 to impose restrictions with respect to the right of any person to
4 enter, remain in or leave such military areas. The President's
5 order was based on the ground that the successful prosecution of
6 the war required every possible protection against espionage
7 and sabotage to national defense material, national defense prem-
8 ises and national defense utilities. Previously, on December 11,
9 1941, the eight Western States and the Territory of Alaska had
10 been designated by the War Department as a "theatre of operations"
11 and an area approximately 100 miles wide extending from the Canad-
12 ian border down the Pacific Coast and along the California-Mexican
13 border had been declared to be a "combat zone,"¹ by Lieutenant-
14 General John L. DeWitt, U.S. Army, Commanding General of the
15 Western Defense Command and the Fourth Army. (Field Order No. 1,
16 Dec. 14, 1941.) On March 2, 1942 Lieutenant-General DeWitt by
17 Proclamation No. 1 declared that because the Pacific Coast was
18 particularly subject to attack, to an attempted invasion, and to
19 sabotage and espionage in connection therewith, it was necessary
20 to adopt military measures to safeguard against such military
21 operations. Therefore, pursuant to the power granted by President
22 Roosevelt in Executive Order 9066 and by authorization of the
23 Secretary of War, Military Areas Nos. 1 and 2 were established as
24 a matter of military necessity. The Proclamation then stated

1. 1. The theatre of war comprises those areas of land, sea and
26 air which are, or may become, directly involved in the
27 conduct of the war.
2. 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 Depart-
30 ment designates one or more theatres of operation.
3. 3. A combat zone comprises that part of a theatre of opera-
31 tions required for the active operation of the combatant
32 forces fighting. "Field Service Regulations - Operations,
May 22, 1941." Wartime Bulletin PM100-5.

1 that certain persons or classes of persons, as the situation
2 required, would be excluded from all of Military Area No. 1
3 and from certain zones in Area No. 2. Military Area No. 1
4 coincides approximately with the Army's Pacific Combat Zone.
5 On March 21, 1942, Congress enacted Public Law 503 (77th Congress,
6 2nd Session, Ch. 191), which declared it to be a misdemeanor for
7 anyone to enter, remain in or leave, or commit any act in any
8 prescribed military area contrary to the restrictions applicable
9 in any such area or the orders of the Secretary of War or desig-
10 nated military commander, provided such person knew or should
11 have known of the restriction or order and that his act was in
12 violation thereof.² Subsequently, on May 3rd, 1942, the
13 Commanding General, pursuant to the foregoing authority and his
14 proclamation, issued Civilian Exclusion Order No. 34, which direc-
15 ted that after May 9, 1942 all persons of Japanese ancestry, both
16 alien and non-alien, were excluded from that portion of Military
17 Area No. 1 which embraced and included the City of San Leandro,
18 County of Alameda, State of California, and which stated that any
19 person subject thereto who was found in such area after May 9, 1942
20 would be liable to criminal penalties under Public Law 503.
21 By similar exclusion orders all persons of Japanese ancestry,
22 numbering over 112,000, were excluded from other portions of
23 Military Area No. 1 and specified zones in Military Area No. 2.

24
25 2. "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES
26 OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED,
27 That whoever shall enter, remain in, leave, or commit
28 any act in any military area or military zone prescribed,
29 under the authority of an Executive Order of the President,
30 by the Secretary of War, or by any military commander desig-
31 nated by the Secretary of War, contrary to the restrictions
32 applicable to any such area or zone or contrary to the order
of the Secretary of War or any such military commander, shall,
if it appears that he knew or should have known of the exis-
tence 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 The information charges the defendant, a person of
2 Japanese ancestry, with remaining in the area covered by Civilian
3 Exclusion Order No. 34 after May 9, 1942, knowing of the order
4 and that his act was in violation thereof.

5

6 Interest of the State of California

7 The demurrer to the indictment attacks the constitu-
8 tionality of Executive Order 9066, Civilian Exclusion Order No. 34
9 and Public Law 503. The attack upon the President's authority
10 and that of his military commander to exclude persons of Japanese
11 ancestry from the Pacific Coast combat zone and from the vicinity
12 of material defense plants and installations is of the utmost
13 concern to the State of California. Most of the excluded Japanese-
14 Americans are residents of California. If the military authori-
15 ties are to be held powerless to deal with what they conceive to be
16 a potential or actual danger to the conduct of the war on the
17 Pacific Coast, then the State of California, or the counties and
18 cities in the absence of State action, must meet the danger, poten-
19 tial or actual, thus presented. The questions raised by the
20 demurrer also involve generally the principles and the situations
21 which will justify the military authorities taking measures for the
22 protection of the civilian population and for the prosecution of
23 the war, in California. Furthermore, as these measures and regula-
24 tions are made for the purpose of safeguarding California and the
25 nation, the State is anxious to have determined the validity of
26 Public Law 503, which provides a sanction for the enforcement of
27 these measures and regulations. Such a clarification of the
28 authority of the President and his military commanders and of the
29 power of Congress to pass Public Law 503 will facilitate the
30 cooperation of local law enforcement officers in the carrying
31 out of the army's regulations and the Federal statute.

32

1 The demurrer, by attacking the constitutionality of
2 Executive Order 9066, the validity of Civilian Exclusion Order
3 No. 34 and the legal sufficiency and constitutionality of
4 Public Law 503, raises the following important legal questions:

9 (2) May citizens of Japanese ancestry be excluded
0 from Pacific Coast military areas on the ground of
1 military necessity?

16 Correct answers require first a consideration of some
17 of the principles of martial law which justify the issuance of
18 Executive Order 9066 and the orders of Commanding General
19 John L. DeWitt issued pursuant thereto, including particularly
20 Civilian Exclusion Order No. 34.

26 (a) Martial Law is the Law of
Public Necessity.

5.

1 against actual or threatened danger is exerted by our army within
2 our borders and with reference to the civilians therein, it is
3 termed martial law. As to some of the measures taken under such
4 circumstances, martial law is similar to the exercise of the
5 right of self-defense by an individual.

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

11 "The employment of martial law has been
12 likened to the exercise of the right of
13 self-defense by an individual." (Winthrop,
14 "Military Law and Precedents", Reprint,
15 page 820.)

16 But martial law when instituted as an aid to the conduct
17 of a national war is broader than the common law doctrine that
18 force to whatever degree necessary may be used to repress illegal
19 force, for the President and his military commanders charged with
20 conducting the war have the duty of taking all reasonable measures
21 which the conduct of the war makes necessary. Thus martial
22 law in time of war has a different application than in times
23 of peace, where troops, either Federal or State, are employed
24 or should be employed to assist the civil law enforcement authori-
25 ties in the restoration of peace and order.³ In a total global
26 war not confined to the actual scene of hostilities but waged
27 swiftly and violently and at long range upon civilians, factories
28 and fields far beyond the front line and conducted by sabotage,
29 espionage and propaganda everywhere, the army must undertake
30 certain precautionary and preventive measures in areas not directly
31 under the siege guns of the enemy, the object of which is the

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

1 protection of the civilian population and the successful prosecu-
2 tion of the war. As Winthrop says in Military Law and Precedents,
3 Reprint, page 820:

4 "Martial law is indeed resorted to as much
5 for the protection of the lives and property
6 of peaceable individuals as for the repression
7 of hostile or violent elements. It may become
8 requisite that it supersede for the time the
9 existing civil institutions, but, in general,
10 except in so far as relates to persons viola-
11 ting military orders or regulations, or other-
12 wise interfering with the exercise of military
13 authority, martial law does not in effect sus-
14 pend the local law or jurisdiction or materially
15 restrict the liberty of the citizen; it may call
16 upon him to perform special service or labor for
17 the public defence, but otherwise usually leaves
18 him to his ordinary avocation."

13 (b) Judicial Control of Martial Law.

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

18 "Martial law is the public law of necessity.
19 Necessity calls it forth, necessity justifies
20 its exercise, and necessity measures the extent
21 and degree to which it may be employed." (page 16)

22 "Its occasion and justification thus is necessity."
23 (Winthrop, "Military Law and Precedents," page 820)

24 But martial law is not as some zealots declare, simply
25 "the will of the general." Such a proposition is abhorrent to a
26 nation fighting against military dictatorship. All will agree
27 with the Supreme Court in the Milligan case, (4 Wall. 1 (1866)),
28 when it said:

29 "The Constitution of the United States is a law
30 for rulers and people, equally in war and in
31 peace and covers with the shield of its protec-
32 tion all classes of men, at all times and under
33 all circumstances." (page 13)

34 For as Justice Davis states in the Milligan opinion:

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

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

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

9
10 (c) Martial Law by the Test of
Necessity May Be Limited.

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

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

30 In Commonwealth ex rel Wadsworth v. Shortall, 55 Atl.
31 952, (Pa.) limited or qualified martial law was recognized:

32 "Order No. 39 was said to be a declaration of
qualified martial law. Qualified in that it was
put in force only as to the preservation of the
public peace and order, not for the ascertain-
ment or the vindication of private rights, or the
ordinary functions of government. For these the

1 courts and other agencies of the law were still
2 open and no exigency required interference with
3 their functions. But within its necessary field,
4 and for the accomplishment of its intended purpose
it was martial law with all its powers. The gov-
ernment has and must have this power or perish."

5 The Montana court states the matter succinctly:

6 "Martial law, however, is of all gradations."
7 (Ex parte McDonald, 49 Mont. 454, 143 Pac. 947
8 (1914))

9 One of the best expressions of the principle is contained
10 in Bishop, "New Criminal Law", 8th Ed., 1892, section 53:

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

15 See, Wiener, supra, page 10.

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

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

29 (d) The Test of Necessity Should Be
30 Consonant with Today's Military Problems.

31 The attack upon President Roosevelt's Executive Order
32 and Civilian Exclusion Order No. 34 issued by the Commanding
33 General pursuant thereto is made upon the ground that the situation
34 existent at the time of the issuance of Civilian Exclusion Order

1 No. 34 did not justify any action under martial law because the
2 civil authorities in California had not been deposed by an invasion
3 and the civil courts were open. Reliance for the proposition
4 that the necessitous situation must be in this extremity is
5 placed mainly upon the dictum of the majority in Ex parte Milligan,
6 4 Wall. 2 (U.S. 1866). In 1864 Lambdin P. Milligan, a civilian
7 and resident of the State of Indiana was arrested by order of
8 General Hovey. He was tried before a military commission con-
9 vened at Indianapolis, on various charges of aiding the Southern
10 cause, and sentenced to be hanged. At the time of the arrest
11 Indiana was not threatened with attack, although previously
12 Southern troops had invaded the State. Milligan's petition for
13 a writ of habeas corpus reached the United States Supreme Court
14 upon a certificate of disagreement from the Federal Circuit Court.
15 The writ was granted upon the ground that Congress, to whom, the
16 Court said, the power was committed, had not authorized trial by
17 military commission. This decision, joined in by all members of
18 the court, disposed of the case upon jurisdictional grounds.
19 However, a bare majority of five went on gratuitously to say that
20 Congress in any case would not have had the power to authorize
21 trial by military commission at any place outside the theatre
22 of active war, because, it said,

23 "Martial law cannot rise from a threatened invas-
24 ion. The necessity must be actual and present;
25 the invasion real, such as effectively closes the
26 courts and deposes the civil administration.
27 * * * Martial rule can never exist where the
28 courts are open and in the proper and unobstructed
29 exercise of their jurisdiction. It is also con-
30 fined to the locality of actual war." (page 127)

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

34 "Where peace exists the laws of peace must prevail.
35 What we do maintain is, that when the nation is
36 involved in war and some portions of the country

1 are invaded and all are exposed to invasion,
2 it is within the power of Congress to deter-
3 mine in what states or districts such great
4 and imminent public danger exists as justifies
5 the authorization of military tribunals for
6 the trial of crimes and offenses against the
7 discipline and security of the army or against
8 the public safety." (page 140)

9 Because of the frequent reference made in this case to
10 the fact that the courts in this combat zone were open and in the
11 proper and unobstructed exercise of their jurisdiction, it is
12 important to note that this part of the majority dictum must be
13 confined to the serious question of whether or not and upon what
14 occasion a civilian may be tried by military commission.⁴ It is
15 difficult to perceive what application, one way or another, the
16 fact that the courts are open or not, would have upon a determina-
17 tion of the justification for the army taking measures to prevent
18 sabotage and espionage and to protect the civilian population
19 within a theatre of operations.

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

4. As the court itself puts the question, "Upon the facts stated
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.

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

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

9 Today our nation-wide civilian defense preparations illustrate
10 that the entire area of the United States can be considered a
11 theatre of war. This was recently and vividly made clear by the
12 landing on our Eastern shores of German saboteurs whose sabotage
13 objectives lay in various places in the East and Midwest. Today
14 long range bombing planes and carrier based aircraft and far-
15 roving submarines place a large portion of our country and State
16 within the area of threatened invasion.

17 California is one of the potential battlefields of
18 this war. A field army occupies the length and breadth of the
19 State, ready to forestall invasion by air, land or sea. Our
20 ports are vital embarkation points for men and materials. Nearly
21 one-third of the nation's war planes and one-fourth of the
22 country's ships are being built in the State. Over a thousand
23 miles of coastline must be guarded. Dotted throughout the State
24 are numerous defense installations, including army camps, posts,
25 forts, arsenals and large training centers and strategic naval
26 installations. California lies wholly within the Western Defense
27 Command theatre of operations and a strip of land 100 miles wide,
28 extending down the California coast and along the California-
29 Mexican border, is part of the designated "combat zone." Japanese
30 submarines operating within California waters have shelled objec-
31 tives at Santa Barbara, California, and have attacked installa-
32 tions on the coast of Oregon. Japanese in considerable numbers
33 are now lodged in some of the Aleutian Islands, which are part

1 of the Western Defense Command. Alaska has been subjected to
2 repeated bombing attacks. Therefore, part of our country is
3 invaded and this State and other parts of the Pacific Coast
4 stand in imminent danger of invasion. Our courts and our civil
5 administration may continue to function, yet they may be no longer
6 able to adequately secure the public from these dangers. This
7 new type of total war not only places the home front within the
8 theatre of warfare but presents conditions of compelling mili-
9 tary necessity which civilian authorities cannot nor should not
10 be required to meet.

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

18 As Professor Charles Fairman declares:

19 "It does not take an actual bombing of
20 Pearl Harbor or a shelling of Santa Barbara
21 to unchain the hands of the commander on the
22 spot. Facts of this sort prove the reality
23 of the danger, but the courts should be
24 prepared to sustain vigilant precautions
25 without waiting for such proof. A commander
26 should not be put in a worse position legally
27 because he has contrived to keep disaster at
28 arm's length." (The Law of Martial Rule and
29 the National Emergency, Charles Fairman,
30 55 Harv. L. R. 1254, 1288, June, 1942.)

31 One of the first decisions rendered under the present
32 conditions of total warfare and recognizing that under the present
33 situation a new criterion of necessity must be applied, is the
34 case of Ex parte Ventura, 44 Fed. Supp. 520 (1942). The petitioner,
35 a Japanese-American citizen resident of Seattle, by a petition for
36 a writ of habeas corpus, questioned the authority of the Command-
37 ing General of the Western Defense Command, under Presidential

1 Executive Order 9066, to issue curfew orders applicable to American
2 citizens of Japanese ancestry. Relying upon the dictum of the
3 majority in the Milligan case, the petition alleged that the
4 State of Washington had not been invaded and that the Federal and
5 State courts there were open. The Court denied the petition not
6 only on the ground that no actual detention was shown but also
7 because the curfew order was a proper military measure in the
8 light of present conditions in the Western Theatre of War, despite
9 the fact that the situation did not meet the test of necessity in
10 the Milligan case, and said:

11 "The United States is at war - a war such
12 as this nation and this world has never seen
13 before. We are in a recently declared Military
14 Area. The orders, commands and laws complained
15 of are intended to safeguard such Military Area."
(page 522)

16 * * *

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

43 * * *

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

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

7 "I do not believe the Constitution of the United
8 States is so unfitted for survival that it unyield-
9 ingly prevents the President and the Military,
10 pursuant to law enacted by the Congress, from
11 restricting the movements of civilians such as
12 petitioner, regardless of how actually loyal
13 they perhaps may be, in critical military areas
14 desperately essential for national defense."
15 (page 523)

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

28 "The term 'theatre of war', as used in the
29 Milligan case, apparently was intended to mean
30 the territory of activity of conflict. With
31 the progress made in obtaining ways and means
32 for devastation and destruction, the territory
33 of the United States was certainly within the
34 field of active operations. Great numbers of
35 troops were being sent abroad, and in larger
36 numbers, sailing from the Port of New York.
37 * * * Ships were being destroyed within easy
38 distance of the Atlantic coast; there was a
39 constant threat of and fear of airships above
40 the Harbor and City of New York on missions of
41 destruction." (265 Fed. 764)

42 What the Federal court said twenty-two years ago is
43 now many times as obvious and applicable to the present situation
44 on the Pacific Coast. A review of the authorities indicates that

1 there is general agreement that the majority dictum went too
2 far when it said that martial law cannot arise from a threatened
3 danger; that the courts and civil administration must already have
4 been deposed.

5 Fairman, The Law of Martial Rule, page 145

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

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

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

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

13 "Certainly, the test should not be a mere physical
14 one, nor should substance be sacrificed to form."
15 ("War Powers Under the Constitution," an address
by Charles Evans Hughes, 1917, Sen. Doc. No. 105,
65th Congress, 1st Session.)

16 (e) A Proclamation of Martial Law Is Not
17 Necessary Before the Military May Take
Steps to Protect the Civilian Population.

18 The argument is made that the measures taken in Calif-
19 ornia with reference to the Japanese-American citizens are not
20 authorized because there has been no formal declaration that
21 martial law has been established in the areas from which the
22 evacuations were ordered. The fact is, no proclamation is nec-
23 essary. If the necessity exists to exercise military control in
24 a particular manner, therein lies the justification. If the nec-
25 essity and the occasion for martial law are not present, words
26 cannot give it life, nor if the necessity and the occasion do
27 exist, is a proclamation necessary.⁵ As Professor Charles

28
29 5. In 1914, after Federal troops had been sent into Colorado to
30 keep order there, after the State forces were unable to cope
31 with the situation, it was suggested to the Secretary of
32 War that martial law be declared. The Secretary, Mr. Garrison,
replied to the officer making the request: "I do not know of
anything that you cannot do under existing circumstances that
you could do any better if there was a written proclamation
of martial law posted in your district." (Wiener, A Practical
Manual of Martial Law, page 19.)

1 Fairman, the author of the authoritative work, "The Law of
2 Martial Rule" declares, concerning Executive Order 9066, under
3 which the defendant herein was ordered evacuated:

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

10 (f) The President's Constitutional Power
11 as Commander-in-Chief to Conduct
12 the War Justifies Reasonable Measures
13 of Martial Law in Time of War.

14 The war power is divided by the Constitution between
15 Congress and the President. As Chief Justice Hughes said, this
16 war power "is a power to wage war successfully (Home Building and
17 Loan Association v. Blaisdell (1934) 290 U.S. 398, 426.) The
18 duty of conducting the war successfully is placed upon the Presi-
19 dent as Commander-in-Chief. This duty is being carried out on
20 the Pacific Coast by the President through his military commander,
21 Lieutenant General John L. DeWitt, commanding the Western Defense
22 Command and the Fourth Army. The constitutional power to wage
23 war thus committed comprehends, as we have seen, the taking of
24 such measures of control over civilians on the Pacific Coast
25 which military necessity requires. For martial law finds its
26 fullest justification and use in a time of national war.

27 In passing upon the measures undertaken by military
28 authorities in California, such as the evacuation of persons of
29 Japanese ancestry, it must be remembered the courts will allow
30 the President as Commander-in-Chief and his Commanding General a
31 range of honest discretion. In Sterling v. Constantin, 287 U.S.
32 378, the United States Supreme Court, referring to the use of
martial law in peace time in aid of the civil authorities, states
the principle in this way:

1 "The nature of the power also necessarily
2 implies that there is a permitted range of
3 honest judgment as to the measures to be
4 taken in meeting force with force, in sup-
5 pressing violence and restoring order, for
6 without such liberty to make immediate
7 decisions, the power itself would be use-
8 less. Such measures, conceived in good
9 faith, in the face of the emergency and
10 directly related to the quelling of the
11 disorder or the prevention of its continu-
12 ance, fall within the discretion of the
13 Executive in the exercise of his authority
14 to maintain peace." (p. 399)

15 And speaking of the powers of a Governor as Commander-in-Chief
16 of the State militia in time of peace, the Court said:

17 "* * * In the performance of its essential
18 function, in promoting the security and
19 well-being of its people the State must
20 of necessity, enjoy a broad discretion.
21 The range of that discretion accords with
22 the subject of its exercise. * * * As the
23 State has no more important interest than the
24 maintenance of law and order, the power it
25 confers upon its Governor as Chief Executive
26 and Commander in Chief of its military forces
27 to suppress insurrection and to preserve the
28 peace is of the highest consequence. The
29 determinations that the Governor makes within
30 the range of that authority have all the weight
31 which can be attributed to state action, and
32 they must be viewed in the light of the object
to which they may properly be addressed and
with recognition of its importance. * * *"
(p. 398)

33 In Moyer v. Peabody, 212 U.S. 78 (1909) Justice Holmes
34 said, with reference to the authority of a Governor to detain
35 under martial law a person who was actively interfering with
36 the restoration of public order:

37 "When it comes to a decision by the head of
38 a State upon a matter involving its life,
39 the ordinary rights of individuals must yield
40 to what he deems the necessities of the moment."
41 (p. 85)

42 Certainly, in time of war approval will be given to
43 the exercise by the President and his military commanders of even
44 greater powers of preventive and precautionary control, subject
45 of course to the limitation that such measures, to use the
46 language of Sterling v. Constantin, "are conceived in good faith

1 in the face of the emergency and directly related" to the danger
2 at hand.

3 It is of utmost importance to keep in mind that the
4 powers which the President and his military commander have exer-
5 cised under martial law in California and on the Pacific Coast
6 are part of their constitutional powers to wage war and are not
7 derived from any delegation of power from Congress.

8 The foregoing principles concerning martial law in
9 time of war are disputed by counsel for the defendant. We urge
10 upon this Honorable Court that it announce its approval of these
11 principles, not only because of their application in the instant
12 case but also because of their importance in clarifying the
13 right of the military authorities to act in California's war
14 areas and elsewhere on the Pacific Coast for the taking of nec-
15 essary measures for the vigorous prosecution of the war and the
16 protection of our civilian population. Such a clarification
17 will provide a guide under modern war conditions for the military
18 authorities, civilian authorities and the courts. We now proceed
19 to apply these principles to specific actions of the President
20 and his military commander, as complained of by the defendant.

21 II

22 THE AUTHORITY OF THE PRESIDENT AND
23 HIS MILITARY COMMANDER TO EVACUATE
24 PERSONS OF JAPANESE ANCESTRY FROM
CALIFORNIA COASTAL AREAS.

25 The plaintiff in its brief has set forth the peculiar
26 military situation on the Pacific Coast and the real or potential
27 danger which the presence of persons of Japanese ancestry pre-
28 sented to the safety of the military operations in the area from
29 the standpoint of sabotage and espionage. (Pl. Br. pages 6-13)

30 In brief, the plaintiff points to the imminence of
31 Japanese attack, the racial consciousness which might assert
32 itself in some persons of Japanese ancestry over attachment for

1 America, the non-assimilability of the Japanese racially and
2 culturally, the concentration of Japanese and their proximity to
3 defense plants and military installations. Nearly 112,353 per-
4 sons of Japanese ancestry were living in Military Area No. 1 and
5 of these 41,000 were aliens (Select Com. Investigating National
6 Defense Migration, H. Rep. No. 1911, 77th Cong., 2nd Sess., p. 12).
7 Most likely the older Japanese accounted for the aliens. But
8 parental control and special schooling in Japanese schools are
9 influences that might assert themselves in a strategic hour.
10 That the Japanese as a race, citizen and alien, are recognized
11 by the Japanese Government as potential agents to assist the
12 Japanese army, navy and air force is revealed in the unabridged
13 translation of the book "The Three Power Alliance and a U.S.-
14 Japanese War," published just two years ago in Tokyo by Kinoaki
15 Matsuo, an officer in the Japanese Naval Intelligence (Translated
16 by Kilsco K. Haan under the title "How Japan Plans to Win,"
17 Little, Brown & Co., 1941). Speaking of the expected use to be
18 made of Japanese in aid of an invasion of Southern California,
19 Matsuo says:

20 "The climate being ideal, San Pedro is an
21 exceptionally good harbor; there are many
22 Japanese subjects in that area engaged
in fishery." (page 143),

23 and of the Japanese in Hawaii, he writes:

24 "* * * If a false step is made it might give
25 rise to a regrettable incident such as a
26 great massacre * * * but they will be of great
help when a landing is made by our army. * * *" (p.296)

27 In addition, and of particular concern to the State
28 of California, is the danger that the presence of persons of
29 Japanese ancestry would, because of the war with Japan, con-
30 stitute a source of domestic unrest and riot, which might have
31 interfered with our internal security and national unity. This
32 fear, prior to the carrying out of the evacuation precaution,

1 had already materialized in various communities in California.

2 The apparent reasonableness of the evacuation orders
3 has already been found by the House of Representatives Committee
4 investigating the evacuation of persons of Japanese ancestry
5 from the Pacific Coast. In its "Preliminary Report and Recommen-
6 dations on Problems of Evacuation of Citizens and Aliens from
7 Military Areas," the House Select Committee on National Defense
8 Migration declares:

9 "This committee does not deem its proper
10 province to encompass a judgment on the
11 military need for the present (and any subse-
12 quent) evacuation orders. In time of war the
13 military authorities are obligated to take
14 every necessary step and every precaution to
15 assure the internal safety of the Nation.
16 The need for these safeguards appears the
17 more pressing when we consider that present-
18 day warfare has developed the fifth-column
19 technique in unprecedented fashion. It is
20 naive to imagine that the enemy powers will
21 not exploit these techniques to the full.
22 The tragic events of Pearl Harbor have created
23 in the public mind a consciousness, whatever
24 the character of the evidence, that the
25 dangers from internal enemies cannot be
26 ignored." (page 13)

18 * * *

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

28 All observers agree that most of the Japanese-Americans
29 in the Pacific coastal area have loyally cooperated with the
30 government in carrying out the difficult evacuation program
31 and that despite the inconvenience and sometimes harsh disloca-
32 tion, have shown a wise and even sympathetic understanding of

1 the critical situation which required the Commanding General
2 of the Western Defense Command to meet the Japanese problem
3 on a group basis, rather than to attempt a solution through
4 an adjudication of loyalty in each individual case.

5 (a) The Exclusion of Persons of Japanese
6 Ancestry From Pacific Coast Military
7 Areas Was a Proper Exercise of Martial
8 Law.

9 In view of the apparent reasonable connection between
10 the evacuation of persons of Japanese ancestry from Military
11 Area No. 1 and from parts of Military Area No. 2 and the conduct
12 of the war on the Pacific Coast, the evacuation should be upheld
13 as a proper exercise of limited martial law. Where there is a
14 danger of sabotage and espionage, the exclusion and detention
15 of persons reasonably considered to be disposed to assist the
16 invader or to damage our war industries or to inform our enemies
17 of the number and disposition of our troops, warships and the
18 like, is not only proper but necessary to assure our success in
19 the present conflict.

20 As we have seen (pages 17-18, supra), a broad range of
21 discretion must be allowed to the Commander-in-Chief in the taking of
22 precautionary measures in time of war to avert the anticipated danger.
23 Punishment is of little benefit to our war effort after the danger has
24 materialized. In Stewart v. Kahn, 11 Wall. 493, the Court said:

25 "The measures to be taken in carrying on
26 war and to suppress insurrection are not
27 defined. The decision of all such questions
28 rests wholly in the discretion of those to
29 whom the substantial powers involved are
30 confided by the Constitution." (p. 506)

31 In cases of insurrection or public riot in States during
32 peacetime, the courts have recognized the power of the military
33 to detain persons suspected of aiding in the disturbance.

34 In re Boyle (Idaho) 57 Pac. 706

35 In re Moyer (Colo.) 85 Pac. 190

1 Ex parte MacDonald (Mont.) 143 Pac. 947

2 Cox v. McNutt, 12 F. Supp. 355

3 State ex rel Roberts v. Swope (N.M.) 28 Pac.(2d) 4

4 If detention is proper, so also is exclusion.

5 In England, where there is the most selfish regard
6 for the rights of Englishmen, the necessity and propriety of
7 detention and evacuation of British citizens in wartime has been
8 recognized. During the last World War, the Defense of the Realm
9 Consolidated Act of 1914 (5 Geo. 5 c. 8) conferred upon the
10 King in Council during the continuance of the war, power to issue
11 regulations for securing the public safety and the defense of
12 the realm. Under this broad grant, regulation No. 14B was issued
13 which empowered the Secretary of State, upon the recommendation
14 of the military authorities or of a designated advisory committee,
15 to order the removal or internment or regulate the residence of
16 any person, where "in view of the hostile origin or associations"
17 of such person it appeared to the Secretary expedient for secur-
18 ing the public safety and the defense of the realm.

19 Arthur Zadig, a naturalized British citizen of German
20 birth, was ordered interned. He petitioned for a writ of habeas
21 corpus, contending, among other things, that such a statute,
22 being repugnant to the constitutional traditions of the country,
23 could not be adopted. In denying the petition, the House of
24 Lords, in Rex v. Halliday (1917) A.C. 260, affirming (1916)
25 1 K. B. 738, said:

26 "One of the most obvious means of taking precau-
27 tions against dangers such as are enumerated is
28 to impose some restriction on the freedom of
29 movement of persons whom there may be any reason
30 to suspect of being disposed to help the enemy. The
31 measure is not punitive but precautionary. It
32 was strongly urged that no such restraint should
be imposed except as the result of judicial
inquiry, and indeed counsel for the appellant
went so far as to contend that no regulation
could be made forbidding access to the seashore
by suspected persons. It seems obvious that

1 no tribunal for investigating the questions
2 whether circumstances of suspicion exist
3 warranting some restraint can be imagined
4 less appropriate than a Court of law. No
5 crime is charged. The question is whether
6 there is ground for suspicion that a particu-
7 lar person may be disposed to help the enemy.
8 * * * " (page 269)

9
10 The Court then makes some observations which we believe
11 are particularly pertinent to the instant case:

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

25 * * * *

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

39
40 See King v. Governor of Wormwood Scrubbs Prison,
41 (1920) 2 K. B. 305

42 It is true that the regulations or orders provided
43 that the internee could make any representations to an advisory
44 committee against the order, which would then make a report
45 to the Secretary. This in no way affected the broad discretion-
46 ary power given to him, nor did it take from him the sole power
47 to decide whether the internment order should be revoked or

1 varied. This is evident from the language of the order, "If I am
2 satisfied by the report * * * that the order may be revoked or
3 varied without injury to the public safety or defence of the realm,
4 I will revoke or vary the order * * *."

5 And more recently, under conditions of World War II,
6 where sabotage and espionage are being employed as instruments of
7 warfare as never before, the English courts have upheld the power
8 of the Executive to remove or detain citizens whose actions might
9 endanger the conduct of the war. In Liversedge v. Anderson,
10 (1941 3 All. Eng. Rep. 338, the House of Lords upheld the intern-
11 ment of a British citizen under Regulation 18B of the Emergency
12 Powers (Defence) Act of 1939 (2 and 3 Geo. VI, c. 62), which pro-
13 vided that the Secretary of State could make detention orders "with
14 a view to preventing (the internee) acting in a manner prejudicial
15 to the public safety or defence of the realm." The House of
16 Lords reiterated what it had previously said in Rex v. Halliday,
17 supra:

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

27 In commenting upon the English decisions, Professor
28 Fairman says:

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

1 III

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

10 Thus far it has been established that the President as
11 Commander-in-Chief of the Army and Navy and his military commander
12 in the exercise of their constitutional duty to conduct the war,
13 may undertake measures of martial law by virtue of the military
14 situation in California and elsewhere in Pacific Coast military
15 areas. The validity of these measures springs from military neces-
16 sity and does not depend upon a formal proclamation of martial law
17 The evacuation of all persons of Japanese ancestry from designated
18 military areas without individual hearings was a measure reasonable
19 appropriate under the emergency confronting the President and
20 Lieutenant-General John L. DeWitt, the Commanding General of the
21 Western Defense Command. It was a valid exercise of limited martial
22 law undertaken by them in the discharge of their constitutional
23 powers and duty to conduct the war successfully.

24 This brings us to the third question involved herein,
25 namely: Could Congress under its war powers enact Public Law 503
26 (77th Congress, March 21, 1942)⁶ to aid the President in the carry-
27 ing out of the described constitutional duty to conduct the war?

28 As already noted in the statement of facts, Public Law
29 503 specifically refers to entering, remaining in or leaving a
30 prescribed military area or the doing of any other act contrary to

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

1 the restrictions applicable in the area, or to the order of the
2 Secretary of War or any designated military commander. A person
3 cannot be found guilty thereunder unless he knew or should have
4 known of the existence and the extent of the restrictions and orders
5 and that his act was in violation thereof. This law is attacked on
6 the ground that it improperly delegates to the President, the Secre-
7 tary of War or any designated military commander the power first to
8 designate the military area or zone and then to determine the acts
9 prohibited therein, the doing of which the law makes criminal. There
10 is in fact no such delegation of power. The power to designate
11 military areas in domestic territory and because of military neces-
12 sity to forbid the doing of acts therein is derived from the consti-
13 tutional duty of the President and his military commanders to conduct
14 the war. Such are the martial law powers of the military authori-
15 ties. This right to prescribe the military areas and to make re-
16 strictions therein resides in the military authorities without any
17 authority from Congress. Of course the exercise of these martial
18 law powers, as we have seen, is reviewable by the courts, to deter-
19 mine whether or not the restrictions have a reasonable connection
20 with the conduct of the war. On martial law principles restrictions
21 upon civilians beyond this test of appropriateness would be held
22 invalid by our courts. Public Law 503 by its terms clearly recog-
23 nizes the martial law powers of the President and his subordinate
24 military commanders to be exercised within military areas and zones.
25 All this law attempts to do is to provide a criminal penalty for
26 disobedience of the restrictions which the military authorities thus
27 impose under their constitutional powers. That this was its purpose
28 is evident from the congressional debates on the law at the time of
29 its passage. (Congressional Record, March 19, 1942, page 2807)

30
31 area or zone or contrary to the order of the Secretary of War or any
32 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 The United States Supreme Court has recognized the power of Congress
2 to provide sanctions for the carrying out of the constitutional
3 powers of the Presidency.

4 In

5 United States v. Curtiss-Wright Corpora-
6 tion, 299 U. S. 304 (1936)

7 the Supreme Court upheld a criminal statute passed for the purpose of
8 assisting the President in carrying out his constitutional power to
9 deal with foreign affairs. A congressional resolution authorized the
10 President to prohibit the sale of munitions of war in the United
11 States to countries engaged in war in the Chaco region of South
12 America, except under such limitations and exceptions as he might
13 prescribe, whenever he found that such prohibition would contribute
14 to the reestablishment of peace between the countries involved. The
15 resolution in effect provided a fine and/or imprisonment for sales
16 made in violation of the proclamation (p. 312). The President there-
17 after made such findings in his proclamation. An indictment charging
18 a violation of the Joint Resolution and the Proclamation of the
19 President was demurred to on the grounds that the Resolution consti-
20 tuted an unlawful delegation of legislative power to the executive.
21 In part it was contended that the resolution was unconstitutional
22 because it only went into effect upon the making of a proclamation
23 which was left to his unfettered discretion, thus constituting an
24 attempted substitution of the President's will for that of Congress,
25 and also that the extent of its operation in particular cases was
26 subject to limitations and exceptions by the President, controlled
27 by no standard. In rejecting these contentions (p. 329) the court
28 said that in such external matters as foreign affairs and the waging
29 of war the general rule regarding unlawful delegation of legislative
30 authority either did not apply to such matters or would be very broad
31 construed.

32 "Practically every volume of the United States

1 Statutes contains one or more acts or joint
2 resolutions of Congress authorizing action by
3 the President in respect of subjects affect-
4 ing foreign relations, which either leave the
5 exercise of the power to his unrestricted
6 judgment, or provide a standard far more gen-
7 eral than that which has always been consid-
8 ered requisite with regard to domestic affairs."

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

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

30 Congress, to assist the President in the carrying out of
31 his constitutional duty, may by statute provide a sanction to be
32 administered in the Federal courts, just as Congress did in the
33 Curtiss-Wright case, to assist the President in carrying out his
34 function in the field of international relations. It should be note
35 that in the Curtiss-Wright case the statute was upheld although it
36 provided a punishment for the violation of the President's proclama-
37 tion, which was to be made after the passage of the congressional
38 act.

39 The Assumed Delegation of Authority in
40 Public Law 503 is Not Unconstitutional.

41 While it is believed that Public Law 503 is valid when

1 construed as a law which merely provides a sanction for the carrying
2 out of an otherwise proper constitutional power committed to the
3 President, nevertheless the law is not unconstitutional if it is
4 interpreted as delegating to the President, the Secretary of War or
5 designated military commanders the power to define the military
6 areas or zones and to prescribe restrictions therein the violation
7 of which the statute makes criminal.

8 A leading case directly in point on the right of Congress
9 to leave to the Executive the designation of the area within which
10 an act may be criminal is

11 McKinley v. United States,
12 249 U. S. 397 (1919)

13 wherein an Act of Congress authorizing the Secretary of War to do
14 everything "deemed necessary to suppress and prevent the setting up
15 of houses of ill fame *** within such distance as he may deem need-
16 ful of any military camp ***" was not held to be an unconstitutional
17 delegation of legislative power. As stated by the Court:

18 "Congress may leave details to the regulation
19 of the head of an executive department, and
20 punish those who violate the restrictions."

21 In other phases of Federal activity, the courts have up-
22 held legislation making the violation of regulations a criminal act.
23 In

24 Avent v. United States, 266 U. S. 127 (1924)

25 the Transportation Act (41 Stat. 456) authorized the Interstate
26 Commerce Commission whenever it is of the opinion that shortage of
27 equipment, congestion of traffic or other emergency requiring
28 immediate action exists in any section of the country, to make such
29 reasonable rules with regard to it as in the Commission's opinion
30 will best promote the service in the interest of the public and the
31 commerce of the people. It also authorized the Commission to give
32 directions for preference or priority in the transportation or
movement of traffic. The defendant was indicted for a violation of

1 a priority order. Holding that no constitutional question was
2 involved, the Court said:

3 "That it (Congress) can give the powers here
4 given to the Commission, if that question is
5 open here, no longer admits of dispute. Inter-
6 state Commerce Commission v. Illinois Central
7 Railroad Co., 215 U.S. 452; United States v.
8 Grimaud, 220 U.S. 506.

9 "The statute confines the power of the Commis-
10 sion to emergencies, and the requirements that
11 the rules shall be reasonable and in the inter-
12 est of the public and commerce fixes the only
13 standard that is practicable or needed.

14 "Congress may make violations of the Commission's
15 rules a crime."

16 The standard implied in Public Law 503 is that the re-
17 strictions must be appropriate to the conduct of the war in a
18 military area. Orders of the military authorities beyond this
19 test would be held to be ultra vires as being beyond the constitu-
20 tional powers of the armed forces. In other words Public Law 503
21 is likewise confined to emergency situations ^{impliedly} and/contains the
22 requirement that the measures of martial law must bear a reasonable
23 connection to military necessity. This is the only practicable
24 standard which Congress could set down. What restrictions would be
25 appropriate will change, from time to time and from place to place,
26 with the changing war situation. It is the only standard under
27 the circumstances "that is practicable or needed". (Avent v.
28 United States, supra.)

29 With reference to the violation of Civilian Exclusion
30 Orders such as No. 34, the one immediately involved here, it is
31 important to note that the standard for these evacuation orders is
32 specifically set forth in Public Law 503 which declares that
33 "whoever shall enter, remain in, leave, ***" any prescribed mili-
34 tary area or zone contrary to the restrictions applicable in the
35 area or zone shall be guilty of a misdemeanor. Hence, having in
36 mind the foregoing authorities with reference to the power of
37 Congress to authorize the issuance of regulations by executive

1 branches of the government for the purpose of applying a standard
2 and to make a disobedience of such regulations a crime, it clearly
3 appears here that with reference to Civilian Exclusion Orders such
4 as No. 34, the standard of remaining in a military area or zone is
5 clearly set up in the statute.

6 In

7 Campbell v. Chase National Bank,
8 5 Fed. Supp. 156 (1933)

9 Congress (Title 50, App. sec. 5) authorized the President in time of
10 war or other national emergency recognized and declared by him, to
11 investigate, regulate and prohibit exporting, hoarding, melting or
12 earmarking of gold or silver coin, etc. He was also authorized to
13 make necessary rules and regulations. The Court, in holding that
14 this grant of authority was not an unconstitutional delegation,
15 declared:

16 "It is now also settled that a regulation
17 made within the mandate of such delegated
18 power may be the basis of criminal proceed-
19 ings." (Citing cases and McKinley v. United
20 States, 249 U.S. 397.)

21 It should be noted that it is Congress which makes the
22 disobedience of the military restrictions a crime and that no effort
23 is made by the military authorities to prescribe, limit or enlarge
24 the criminal penalty. In

25 United States v. Grimaud, 220 U.S. 506 (1911)

26 it was held that a statute providing that the Secretary of Agricul-
27 ture "may make such rules and regulations *** to regulate the use
28 and occupancy (National Forest Reservations) and to preserve the
29 forest therein from destruction; and any violation of the provisions
30 of this act and such rules and regulations shall be punished" as
31 provided by statute, was not an invalid delegation of legislative
32 power, the Court saying:

33 "A violation of reasonable rules regulating the
34 use and occupancy of the property is made a
35 crime, not by the Secretary, but by Congress.
36 The statute, not the Secretary, fixes the penalty."

1 In the instant case the restrictions and orders are based
2 upon military necessity and the carrying out of the President's
3 power to conduct the war. The violation of these restrictions and
4 orders based upon military necessity is made a crime, not by the
5 President, the Secretary of War or the military commander, but by
6 Congress. The statute, not the President, the Secretary or the
7 military commander, fixes the penalty.

8 With reference to the general question of the delegation
9 of legislative power raised in the brief of defendant in the instant
10 case, the Court will obtain considerable assistance from a discussion
11 by former Chief Justice Charles Evans Hughes on the war power, in an
12 address before the American Bar Association in 1917 (Sen. Doc. 105,
13 65th Congress, 1st Session) wherein he said in part:

14 "We are making war as a nation organized under
15 the Constitution, from which the established
16 national authorities derive all their powers,
17 either in war or in peace. The Constitution is
18 as effective today as it ever was and the oath
19 to support it is just as binding. But the
20 framers of the Constitution did not contrive
an imposing spectacle of impotency. One of the
objects of a 'more perfect Union' was 'to pro-
vide for the common defense.' A nation which
21 could not fight would be powerless to secure
the blessings of liberty to ourselves and our
posterity.' ***"

22 Then, directing his remarks to the question of the delega-
23 tion of legislative powers in war time to the executive branch, the
24 former Chief Justice said:

25 " *** War demands the highest degree of efficient
26 organization, and Congress in the nature of things
27 can not prescribe many important details as it
28 legislates for the purpose of meeting the exi-
29 gencies of war. Never is adaptation of legisla-
30 tion to practical ends so urgently required, and
31 hence Congress naturally in very large measure
32 confers upon the President the authority to ascer-
tain and determine various states of fact to which
legislative measures are addressed. Further, a
wide range of provisions relating to the organiza-
tion and government of the army and navy which
Congress might enact if it saw fit, it authorizes
the President to prescribe. The principles govern-
ing the delegation of legislative power are clear,
and while they are of the utmost importance when
properly applied, they are not such as to make the

1 appropriate exercise of legislative power
2 impracticable. 'The Legislature can not
3 delegate its power to make a law, but it
4 can make a law to delegate a power to deter-
5 mine some fact or state of things upon which
6 the law makes, or intends to make, its own
7 action depend. To deny this would be to
8 stop the wheels of government. There are
9 many things upon which wise and useful legis-
10 lation must depend which can not be known to
11 the lawmaking power, and must, therefore, be
12 a subject of inquiry and determination outside
13 of the halls of legislation.' (Field v. Clark,
14 143 U.S. 649, 694; see also Little v. Barreme,
15 1804, 2 Cranch 170, and Martin v. Mott, 1827,
16 12 Wheat. 29.) ***"

17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

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

33 The argument for the validity of Public Law 503, which
34 seeks to assist the Commander-in-Chief in the conduct of the war,
35 was best stated by Alexander Hamilton in the Federalist, when he
36 was discussing the reasons for not defining and specifying the war
37 power of Congress:

38 "The authorities essential to the common
39 defense are these: to raise armies; to build
40 and equip fleets; to direct their operations;
41 to provide for their support. These powers
42 ought to exist without limitation, because it
43 is impossible to foresee and define the extent
44 and variety of the means which may be necessary
45 to satisfy them. The circumstances that en-
46 danger the safety of nations are infinite, and
47 for this reason no constitutional shackles can
48 wisely be imposed on the power to which the care
49 of it is committed. This power ought to be co-
50 extensive with all the possible combinations
51 for such circumstances; and ought to be under
52 the direction of the same councils which are
53 appointed to preside over the common defense."
54 (Federalist XXIII)

55
56
57
58
59
60
61
62
63
64
65
66
67
68
69
70
71
72
73
74
75
76
77
78
79
80
81
82
83
84
85
86
87
88
89
90
91
92
93
94
95
96
97
98
99
100

Ratification of Exclusion Orders
by Congress

101 Assuming that it was necessary for Congress to authorize
102 the exclusion of persons from military areas in order to meet
103 objections regarding the delegation of power, it adequately appears
104 from plaintiff's brief, pages 16 and 17, that Congress ratified the
105 exclusion because at the time of the passage of Public Law 503
106 Congress had before it not only the Presidential Executive Order

1 9066, but the proclamations made pursuant thereto. These proclama-
2 tions, Nos. 1 and 2, designated the military areas and specifically
3 stated that such persons or classes of persons as the situation
4 required would be excluded from the prescribed military areas.

5
6 Public Law 503 is Not Invalid on
the Ground of Uncertainty.

7 The contention has been made that Public Law 503 is inval-
8 id because it falls within the rule that a criminal statute which
9 does not define with certainty the acts prohibited is void. It is
10 charged that the law does not inform a person of the nature and
11 cause of the charge to be made against him and therefore violates
12 the Fifth and Sixth Amendments to the United States Constitution.

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

26
27 CONCLUSION

28 The State of California, in view of its position in the
29 Pacific combat zone and in the western theatre of operations, is
30 directly interested in having this Court define the principles of
31 martial law upon which the military authorities during this period
32 of war may adopt measures for the purpose of protecting the civilian

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

14 It appears that the treating of persons of Japanese
15 ancestry as a group rather than on an individual basis was justified
16 in view of the pressing military necessity which confronted the
17 Commanding General of the Western Defense Command. Public Law 503
18 validly provides a sanction for the enforcement of the orders of
19 the President and his military commanders issued not under any
20 delegated power but derived from their constitutional power to wage
21 the war successfully. Even if the constitutionality of Public Law
22 503 is measured from the standpoint that such a delegation is
23 attempted by the statute, the delegation is not improper. Congress,
24 under its war power, could only thus meet the serious problem con-
25 fronting the military commanders on the Pacific Coast, not only
26 with reference to evacuation of persons from military areas but
27 also concerning the taking of all needful steps which the prosecu-
28 tion of the war and the protection of the civilian population
29 required.

30 The considerations advanced here are made with a realiza-
31 tion of the importance of preserving the fundamental rights of all
32 citizens. But it is obvious that the great constitutional guaran-

1 tees of personal and property rights are not absolute and must in
2 times of war give way to the fundamental right of the public person,
3 the State, to preserve itself. As Chief Justice Hughes said, when
4 speaking before the American Bar Association in 1917, at another
5 critical period in our history,

6 "We are making war as a Nation under the
7 constitution, from which the established
8 national authorities derive all their
9 powers either in war or in peace. Self-
10 preservation is the first law of national
11 life and the constitution itself provides
12 the necessary powers in order to defend
13 and preserve the United States." (Sen.
14 Doc. 105, 65th Congress, 1st Session)

15 If in time of war the State may conscript its citizens,
16 possibly to give up their lives, and may requisition all that they
17 possess for their country's cause, the State in order to better
18 prosecute this war of national survival should be able to adopt the
19 mild precautionary measures with reference to persons of Japanese
20 ancestry living in the Pacific combat zone.

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

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

34 7. Part of Abraham Lincoln's response when he was accused of
35 tearing down constitutional guarantees. "Abraham Lincoln",
36 by Carl Sandburg, Vol. II, page 167.

1 Protection against excessive military action lies in our
2 courts, in the non-political character of our army and navy, in an
3 independent Congress and in the need for securing popular support for
4 the conduct of the war. The controls of martial law which the
5 President and his military commanders find necessary to exert will
6 pass with the passing of the war emergency, and legislation such as
7 here reviewed will then happily have no application.

8
9 Respectfully submitted,

10
11 EARL WARREN
 Attorney General of California

12 HERBERT E. WENIG
 Deputy Attorney General

13 JAMES A. ARNERICH
 Deputy Attorney General

14
15 Attorneys for the State of
16 California, Amicus Curiae.

17
18 DATED: August 18, 1942.