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IN THE

# Supreme Court of the United States

**OCTOBER TERM 1942**

**No. 870**

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GORDON KIYOSHI HIRABAYASHI,

*Appellant,*

against

UNITED STATES OF AMERICA,

*Appellee.*

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## BRIEF FOR APPELLANT

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### 1. Opinions Below

The opinion of the District Court on demurrer will be found in 46 F. Supp. 657 and at pages 9-18 of the record.

The Circuit Court of Appeals for the Ninth Circuit has certified questions to this Court, Judge Denman dissenting. The certificate and Judge Denman's dissenting opinion have not yet been officially reported. They have not been printed in the record but will be found in the appendix to this brief, pages 33-48.

### 2. Jurisdiction

Jurisdiction of this Court to answer certified questions is founded on Judicial Code § 239 (28 U. S. C. A. 346). In addition the case is here under § 239 on the order of this Court to bring up the entire record (R. 43).

### 3. Statement of the Case

Appellant, a native born citizen, was indicted under the Act of Congress of March 21, 1942 (18 U. S. C. A. 97A), for failure to obey certain military orders issued by Lt. Gen. DeWitt, namely, that, being of Japanese ancestry, he must observe certain curfew regulations and report to a control station for the purpose of being evacuated from his home in Seattle, Washington. Appellant challenged the constitutionality of the military orders and of the Act of Congress by demurrer (R. 5) and plea in abatement (R. 8). These having been overruled (R. 19), appellant stood trial, renewed his objections by appropriate motions (R. 35), but was convicted and sentenced to three months' imprisonment (R. 24).

Appellant was born and has always lived in Seattle. While his parents were born in Japan, neither of them ever returned to that country or maintained any relations with it (R. 32). Appellant was brought up to consider himself an American only. He has been active in the Y. M. C. A. and the Boy Scout movement. At the time of his arrest he was a senior at the University of Washington (R. 34).

Appellant has not sought to evade any responsibility imposed upon him by law. He openly reported to government agencies advising them that he would not obey the military orders in question because he considered them to be violations of his constitutional rights as an American citizen (R. 32).

The military orders were issued by Gen. DeWitt in purported reliance on an order issued by President Roosevelt on February 19, 1942 (Executive Order 9066, *infra* p. 23). This provided, among other things, that the various military commanders might establish "military areas", from which "any or all persons may be excluded". On March 2, 1942, Gen. DeWitt created Military Area No. 1, which covered the entire West Coast, including the area

in which appellant lived (Public Proclamation No. 1, *infra* p. 25). On March 24, 1942, the General imposed curfew restrictions on "all persons of Japanese ancestry", which compelled them to remain in their homes between 8 P. M. and 6 A. M. and prohibited travel beyond five miles from their homes (Public Proclamation No. 3, *infra* p. 27). The second count in the indictment charged appellant with the violation of the curfew part of that order (R. 2).

Exclusion orders were issued from time to time covering various areas, and were 105 in number. (See Public Proclamation No. 7, June 8, 1942, *infra* p. 29). Number 57 (*infra* p. 33) affected the area in which appellant resided and was issued on May 10, 1942 (R. 13). The first count of the indictment charged appellant with failure to obey this particular exclusion order (R. 1).

No martial law has been declared in the affected areas, nor has the functioning of the ordinary courts of justice been in any way impaired, or the writ of habeas corpus suspended.

In the meantime Congress passed the law on which the indictment was based. It provides:

> "*Public Law #503:*
>
> Whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed under the authority of an Executive Order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone, or contrary to the order of the Secretary of War or any such military commander, shall if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000, or to imprisonment for not more than one year, or both, for each offense." (Act of March 21, 1942, 18 U. S. C. A. 97A.)

Appellant challenged this law on the ground that it was too vague to be enforcible, that it improperly delegated

legislative power to the military authorities, and on other grounds not necessary to detail here (R. 5-7). He challenged the military orders he was charged with disobeying on the ground that they were not authorized by law; on the ground that they deprived him of due process of law because involving discrimination based on race, and because they denied him any hearing; on the ground that they subjected to military authority civilians over whom the military had no jurisdiction and on the ground that they authorized an unreasonable seizure of his person (R. 5-8). Finally appellant challenged the Executive Order under which the military commander purported to act on the ground that it was not authorized by law and was beyond the constitutional power of the President (R. 6).

The Circuit Court of Appeals, after hearing argument, certified the following questions to this Court:

> "1. Was Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942, excluding all persons of Japanese ancestry, including American citizens of Japanese ancestry, from and after 12 o'clock noon, May 16, 1942, from a particular area in Seattle, Washington, within Military Area No. 1 established by General DeWitt's Proclamation No. 1 of March 2, 1942, and requiring a responsible member of each family, and each individual living alone, affected by the order to report on May 11 or 12, 1942, to the Civil Control Station in the said area in connection with said exclusion, a constitutional exercise of the war powers of the President derived from the Constitution and statutes of the United States.
>
> 2. Was Lt. Gen. DeWitt's Public Proclamation No. 3 of March 24, 1942, requiring all alien Japanese, Germans and Italians and all persons of Japanese ancestry, including American citizens of Japanese ancestry, residing or being within the geographical limits of Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942, to be within their place of residence between the curfew hours of 8:00 p. m. and 6:00 a. m. daily, a constitutional exercise of the said war powers.

3. If the answer to question One or the answer to question Two is in the affirmative, did the Act of March 21, 1942 (18 U. S. C. 97A), constitutionally make it a criminal offense for the appellant wilfully and knowingly to fail to report to the Civil Control Station as ordered or to remain outside of his place of residence during the curfew hours."

Under these and similar military orders the entire Japanese population of the West Coast, more than 110,000 men, women and children, 70,000 of whom were citizens, were torn from their homes, occupations and schools and forced to remain in camps surrounded by barbed wire and guarded by soldiers.[1] Their property interests were liquidated, the right of citizens to vote effectively impaired. For a time the Army even refused to draft the men of military age. While today the situation is somewhat improved the improvements benefit relatively few. Provision has been made for the release of individuals who can find placement outside the banned areas. Most of those evacuated cannot avail themselves of this privilege and will remain in the camps until the war is over.

Few of those evacuated have resisted the process. It is so much simpler to bow to superior force than to stand on constitutional rights. Yet here and there some individuals have asserted their rights. Sometimes, as in the cases now before the Court, the issue has arisen in criminal prosecutions instituted for refusal to obey orders. In one case indeed a strange spectacle was presented of a prosecution based on voluntary removal of a citizen from the proscribed area (*Ex parte Kanai,* 46 F. Supp. 286). In a few cases habeas corpus proceedings have been instituted. An attempt in this manner to challenge the curfew regulations failed on the ground that these imposed no present restraint of liberty (*Ex parte Ventura,* 44 F. Supp. 520).

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[1] The story has been told by the Tolan Committee of the House of Representatives (77th Congress, 2d Session, House Report 2124, pp. 59 ff.). See also Reports of War Relocation Authority and 51 Yale L. J. 1316, 1324 ff.

Some individuals vainly sought release from the camps. In addition to these mass evacuation orders the military authorities, both on the East Coast, and the West, have issued orders directing individual citizens to leave those areas.[2] Some of these orders are now being tested in the courts.

It is significant that no charge of espionage, sabotage or treasonable activity had been made against any American citizen of Japanese ancestry at the time of the evacuation order here in question. This was conceded by government counsel during the argument in the Circuit Court.

The total number of citizens evacuated from the West Coast was less than one percent of the population of the affected areas,[3] in sharp contrast with the situation in Hawaii where the danger was much greater both because of the larger Japanese population and its relative closeness to the enemy.[4]

No sabotage was committed in Hawaii at any time. James Rowe, Jr., Assistant to the Attorney General, wrote April 20, 1942, "Mr. John Edgar Hoover, Director of the Federal Bureau of Investigation, has advised me there was no sabotage committed there [in Hawaii] prior to December 7, on December 7, or subsequent to that time." (House Report 2124, p. 49.)

Immediately after Pearl Harbor martial law was declared and has been in force ever since in Hawaii. There was no evacuation of persons of Japanese ancestry though

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[2] See statement by General Drum, House Report, footnote [1] *supra*, p. 35.

[3] Adding the population of Portland, Oregon, 305,000, and that of Seattle, Washington, 368,000, to that of California, 6,907,000, gives a total of about 7,500,000 as against about 70,000 citizens evacuated.

[4] In Hawaii the total number of persons of Japanese ancestry in 1941 was 159,534, comprising 34.2% of the total population. Of these 35,183 were foreign-born, comprising 7.5% of the total population, and the remainder, 124,351, or 26.7% of the total population, were American born citizens.

a number of Japanese aliens have been interned and special regulations promulgated for the alien Japanese. No restrictions have been placed upon American citizens of Japanese descent not applicable to other American citizens, except restrictions on Japanese broadcasts and newspapers and the barring of persons of Japanese ancestry from certain districts. The good results which followed this manner of handling the problem is reflected in a statement made by General Emmons on January 28, 1943:

> "Once in a great while an opportunity presents itself to recognize an entire section of this community for their performance of duty. All of the people of the Hawaiian Islands have contributed generously to our war effort. Among these have been the Americans of Japanese descent. Their role has not been an easy one. Open to distrust because of their racial origin, and discriminated against in certain fields of the defense effort, they nevertheless have borne their burdens without complaint and have added materially to the strength of the Hawaiian area.
>
> "They have behaved themselves admirably under the most trying conditions, have bought great quantities of war bonds, and by the labor of their hands have added to the common defense." (Quoted in Foreword to "The Japanese in Hawaii Under War Conditions", by Andrew W. Lind.)

## Specification of Assigned Errors

It is intended by appellant to urge the following assignments of error: Nos. 1-7 (R. 37, 38).

In substance these assignments challenge the validity of the law under which appellant was convicted and the orders he was charged with violating.

## Summary of Argument

1. Appellant contends that the statute under which he was convicted is void because it is too vague and because, if construed to authorize the military orders, it unlawfully delegates legislative power to the military and improperly authorizes control over civilians by military authority.

2. He contends, moreover, that the military orders he is charged with having disobeyed were not authorized by law, or if authorized, they are unconstitutional as applied. Appellant urges that these orders deprive him of liberty without due process of law because no hearing machinery is established by which he can establish his loyalty and because they arbitrarily discriminate against him because of his race. He urges further that the orders purport to authorize an unreasonable seizure of his person contrary to the Fourth Amendment. Appellant disputes the power of the military authorities to act in the premises in the absence of a proper declaration of martial law.

## POINT I

### The Act of Congress of March 21, 1942, is unconstitutional.

Appellant contends that this law violates the due process clause of the Fifth Amendment because of its vagueness and violates Article I, §I, because legislative power is delegated to the military. He claims also that it is invalid because it vests the military with power over civilians not authorized by the Constitution.

#### (a) The statute is too vague to be enforcible.

It is settled by numerous decisions of this Court that a law which imposes criminal sanctions must contain in its

own language a sufficiently precise definition of what is being punished so that persons affected may know whether or not they are violating it.

> *United States* v. *Cohen Grocery Co.,* 255 U. S. 81.
> *Connally* v. *General Construction Co.,* 269 U. S. 385.
> *Lanzetta* v. *New Jersey,* 306 U. S. 451.

Certainly a statute which punishes "any act" committed in violation of a military order of undefined scope and extent is vague beyond the shadow of a doubt. Moreover, the law places the citizen in the gravest dilemma, because it punishes him if he remains in the proscribed area and also if he leaves it. And that this is not an idle form of words is apparent from the *Kanai* case (46 F. Supp. 286).

**(b) The statute unlawfully delegates legislative power.**

No statute, if it be not this one, gives the military authorities any power over civilians in the absence of martial law. Certainly the Articles of War do not (10 U. S. C. A. 1471-1593). It is evident from a mere inspection of this law that Congress has laid down no standards by which the military authorities may be guided either in their definition of military areas or in their determination of what restrictions should be imposed on the movement of civilians in the areas. The military are, in effect, given carte blanche to legislate on these subjects without restraint.

Surely that is delegation "run riot" more than even in *Schechter Poultry Co.* v. *United States,* 295 U. S. 495. There only property rights were affected and by civilian agencies; here personal rights of the utmost importance have been destroyed and by military action alone. See also *Panama Ref. Co.* v. *Ryan,* 293 U. S. 388. As this Court said in the *Schechter* case:

> "We recently had occasion to review the pertinent decisions and the general principles which govern the determination of this question. (Citing *Panama Refining Co.* v. *Ryan.*) The Constitution provides that 'All

> legislative powers herein granted shall be vested in a Congress of the United States.' * * *. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested. We have repeatedly recognized the necessity of adapting legislation to complex conditions involving a host of details with which the national legislature cannot deal directly. We pointed out in the *Panama Company* case that the Constitution has never been regarded as denying to Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the Legislature is to apply. But we said that the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." * * * (p. 529).
>
> "But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry" (p. 537).

It may be argued that criminal sanctions for violation of administrative orders are not new and have generally withstood challenge. But it will be found, on analysis of such cases, that they in no way resemble this one. Consider, for instance, the applicable provision of the Selective Service Act (50 U. S. C. App. 311). Draft boards have power to issue orders which if wilfully disobeyed subject the registrant to punishment. But no draft board can decide for itself what classes of citizens are to be drafted. Congress has carefully set up standards for the control of the draft board's actions. It has legislated on the subject, has not given the boards any power of legislation whatever. Moreover, each affected individual has a

hearing, with opportunities for review of possible errors in administration.

Here, however, there are neither standards nor protective hearings. Unless this statute be the foundation of the orders the military have issued there is no legal foundation for them. And if the Act of March 21, 1942, be relied on it is clearly invalid as an unlawful delegation of legislative power.

**(c) The statute gives the military excessive power over civilians.**

The Act of March 21, 1942, purports to authorize military officers to establish military areas and zones, to bar persons from such areas, to compel them to remain in the areas and to prohibit persons from doing "any act" therein. Such broad powers are unprecedented. We submit that they are unconstitutional.

We believe it to be incontrovertible that Congress has no constitutional power to grant the military authorities control over civilians except under conditions where martial law may prevail. The subject of military power was exhaustively considered by this Court in *Ex parte Milligan,* 4 Wall. 2. There Chief Justice Chase pointed out that there were three situations in which the army might rule:

> "There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished

> as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress; while the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights" (p. 141).

Clearly no one of the three situations justifies the law here enacted. It does not, as do the Articles of War (10 U. S. C. A. 1471 ff.), deal with the rights and duties of members of the armed forces, what the Chief Justice called "military law". It does not deal with occupied areas, what he called "military government". It does not deal with "martial law". On the contrary, this statute purports to create a new kind of military power not authorized by the Constitution. We believe that on this phase of the case the views expressed by Judge Fee in *United States* v. *Yasui,* 48 F. Supp. 40, 47, 48, are sound.

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We submit, therefore, that this statute is void. If we are correct in this view, the conviction cannot be sustained and it becomes unnecessary for this Court to consider the validity of the particular military orders.

## POINT II

**The military orders under consideration are unauthorized by law and unconstitutional.**

While this case can be disposed of by a ruling voiding the Act of Congress under which the conviction of appellant was obtained, the real questions of interest in this and similar cases relate to the validity of the military orders.

We start with certain uncontrovertible facts: First, that appellant and all other persons born in the United States are citizens, regardless of their race or ancestry (*United States* v. *Wong Kim Ark,* 169 U. S. 649). Second, that Congress has vested no one with authority to detain citizens merely because a war is on (Alien Enemy Act, 50 U. S. C. A. 21, is the only applicable statute and that does not extend to citizens). Third, that martial law may not operate in areas not subject to actual invasion or disorder and in which the ordinary courts are functioning (*Ex parte Milligan,* 4 Wall. 2; *Sterling* v. *Constantin,* 287 U. S. 378). Fourth, as Chief Justice Hughes said in *Home Bldg. & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 426:

> "But even the war power does not remove constitutional limitations safeguarding essential liberties."

What, then, is the authority for these orders which discriminate against a group of citizens because of their race, which remove them from their homes and detain them against their will and which set up no hearings machinery whatever? Clearly they derive no legal sanction from the Alien Enemy Act (50 U. S. C. A. 21) or the Articles of War (10 U. S. C. A. 1471ff). They purport to rest on Executive Order 9066 and to be justified by the Act of March 21, 1942. It will be noted, however, that neither the order of the President nor the Act of Congress authorize racial discrimination or action without due process. We shall consider each of the three grounds on which we consider the orders objectionable: 1. racial discrimination; 2. detention and evacuation by military authority; 3. lack

of hearings. We shall deal in each instance with the claim of military necessity advanced in support of the orders.

**1. Racial discrimination is abhorrent to our institutions.**

Never has Congress attempted to differentiate between citizens on the ground of their racial or national origins. The President has promulgated a policy condemning such discrimination in defense employment (Executive Order 8802, June 22, 1941). To effectuate that policy he established a Fair Employment Practices Committee which has held hearings in various parts of the country.

This Court has condemned discrimination on racial grounds whenever the problem has come before it.[5] True, these cases rest on the equal protection clause of the Fourteenth Amendment and that clause limits only the states, not the national government. Yet the due process clause of the Fifth Amendment bars classifications lacking in reasonable basis. (See *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139). And racial grounds have been held to be an improper basis of classification under the due process clause of the Fourteenth Amendment. (See *Buchanan* v. *Warley,* 245 U. S. 60; *City of Richmond* v. *Deans,* 37 Fed. [2d] 712, affd. 281 U. S. 704.) Indeed, there could be little doubt that any attempt on the part of Congress to divest citizens of important rights on the basis of race would be declared unconstitutional by this Court.

But it is said that these are war measures, justified by the circumstances of the threat to the West Coast. The only relevant circumstance is that one of our enemies has nationals living in our midst, some of whom may be under suspicion. Is that to constitute a rational ground for discriminating against all native born descendents of such nationals? Even an alien Japanese residing here is entitled to sue in the courts (*Ex parte Kawato,* 317 U. S. 69). In that case Mr. Justice Black noted that this alien had pre-

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[5] See *Yick Wo* v. *Hopkins,* 118 U. S. 356; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500. Cf. *Mitchell* v. *United States,* 313 U. S. 80.

sumably come here for the same reasons which prompted millions of others to do likewise: "a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them". What shall be said of the justice and equality of this wholesale discrimination against the native born children of immigrants such as these? With equal propriety could measures be advocated which sought to remove all citizens of Italian or German descent from the entire East Coast of the country.

Whatever the measures that war might justify, the wholesale attribution of disloyalty to a racial group of citizens by mere military order cannot, under the Constitution, be one of them.

**2. The military have no right to control civilians as here provided.**

It must be apparent at the outset that in the situation here presented the military authorities have not taken action solely because of military considerations. This is not the case of an order to evacuate a particular section of the coast which the Army wanted to use for military operations. On the contrary, the orders, both that imposing a curfew and those compelling evacuation, were not limited to areas of strategic importance. The former covered approximately half of the states of California, Washington and Oregon, and nearly one-third of Arizona. The evacuation orders cover also the remaining half of California. (Relocation Communities for Wartime Evacuees, War Relocation Authority, Sept., 1942). Moreover, the orders included all persons of Japanese descent, whether alien or citizen, adults or children, male or female, without regard to their individual records; they included the vast majority of unquestionably loyal persons as well as those few who may have been suspected of disloyalty. Also they involved the forced sales of properties and businesses and forced confinement of persons in "evacuation" camps. As was pointed out by the Tolan Committee of the House, there are many who believe that these measures were prompted

primarily by the antagonism of the white populations in the states affected. Interests which had long been anti-Japanese saw an opportunity at one stroke to get rid of the minority and of acquiring its properties (77th Congress, 2d Session, House Report 2124, pp. 147 ff.).

That the Army has not in fact proceeded on military grounds is at once apparent from the language of Executive Order 9066. The introductory clause refers not to the conduct of military operations, but to "protection against espionage and against sabotage". These are matters which concern the Department of Justice, not the War Department. Congress has passed laws designed to punish espionage and sabotage. Under our form of government persons charged with the violation of such laws are entitled to all the safeguards which the Bill of Rights affords to the individual—to freedom from the unreasonable seizure of his person, to trial only after indictment and before a jury, to the right to counsel and confrontation of witnesses. The Constitution forbids that any agency of government deprive a person (not an enemy alien) of his liberty merely on suspicion that he has violated a law. See *Stoutenburgh* v. *Frazier,* 16 App. Cases (D. C.) 229). How much more must it be a violation of these constitutional provisions to deprive a whole class of citizens of their liberty! It is evident that in so far as the President attempted to vest the military authorities with power to deal with persons suspected of violating the laws against espionage and sabotage he was going beyond his constitutional power.

The constitutional limitations on the power of the military to deal with offenses such as sabotage were but recently laid down by this Court in *Ex parte Quirin,* 317 U. S. 1. The opinion of the Chief Justice makes it perfectly clear that the military authorities do not acquire jurisdiction merely because the offense is that of sabotage. Necessarily that must be so, as otherwise there would be no limit whatever to military power during war time. For during a war every interference with production or morale aids the enemy. Yet not every violator of the Espionage Act and the other war time statutes can be punished by military

authority. It is clear that not the nature of the offense alone, but the identity of the individual as well, determines whether civil or military authority shall have jurisdiction. Thus the *Quirin* case allows the military to assume control only over individuals who are part of the armed forces of the enemy; ordinary civilians resident in this country remain subject to the ordinary criminal law. That was ruled in the *Milligan* case, *supra.* And this basic constitutional principle cannot be deprived of force by any contention that modern war is different. Such are always the arguments of those who seek unlimited power. Besides, the notion that sabotage and espionage are attributes especially of modern warfare is without historical support. In all times spies and wreckers have performed important functions, even "fifth columnists" are of ancient origin, though the name by which they went varied.[6]

Moreover, even in those situations in which military jurisdiction might attach, it does so for the purpose of trying the suspected individual. Not even the military may detain a citizen indefinitely without a hearing—at least not so long as the writ of habeas corpus remains unsuspended. See *Ex parte Merryman,* 17 Fed. Cases 144. Chief Justice Taney there pointed out that, since the civil courts were open and there was no danger of obstruction to action of the civil authorities, there was no justification for taking petitioner into custody by military authority.

As Justice Swayne said in *Raymond* v. *Thomas,* 91 U. S. 712, 716: "It is an unbending rule of law, that the exercise of military power, where the rights of citizens are concerned, shall never be pushed beyond what the exigency requires". And that the courts will determine when the exigency does justify military action, even in war time, was made plain in *Mitchell* v. *Harmony,* 13 How. 115. In that case the owner of property sued an army officer claiming that his property had been taken by the army during one of the campaigns in the War with Mexico. The officer sought

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[6] Cf. the "Trojan horse"; in our Civil War they were called "Copperheads".

to justify his acts, claiming that military necessity required that the property be seized lest it fall into the hands of the enemy. The Trial Court received evidence of the circumstances which indicated that the seizure was motivated by different considerations, namely, a desire to use the property on a projected attack. He charged the jury that the claim of military necessity could be sustained only if the danger was "immediate and impending and not remote or contingent". The jury, having found for the plaintiff, this charge was upheld. This Court made it perfectly plain that whenever military necessity is asserted as justification for an interference with the rights of a citizen the courts must determine whether the claimed necessity really existed. While, of course, the military authorities are not required to act at their peril, so that they will not be penalized merely because the event showed the necessity not to have existed, it is also not enough that they acted in good faith believing there was such necessity. There must be reasonable grounds for a belief that the necessity did exist.

Let us measure the actions of General DeWitt by these standards. Clearly there can be no claim that the 70,000 citizens ordered evacuated were enemy agents or part of the armed forces of the enemy. Nor is there any basis for a claim that appellant was so situated. Therefore, under the *Quirin* and *Milligan* cases the military had no jurisdiction to try these citizens. And if it had no jurisdiction to try them, it had even less to detain them. But it is said that "danger of invasion" required the removal of these citizens. While it is significant that Public Proclamation No. 1 refers to the possibility of invasion, the action foreshadowed in this document has to do not with any of the military aspects of invasion, but with the considerations which the President had referred to as the sole reason for his Executive Order, namely, the danger of sabotage and espionage. No claim of military necessity can make these matters the subject of military jurisdiction over ordinary citizens.

Judge Black, when he overruled the demurrer in the instant case (46 F. Supp. 657), sought to justify the orders

by reference to parachutists and infiltration tactics. It is difficult to follow the argument. Whatever may have been the panicky notion about a Japanese invasion of the West Coast right after Pearl Harbor, it was quite evident by the time the orders here in question were promulgated that the Japanese were not easily going to be able to do this. They had not invaded Australia; had not even attacked Hawaii a second time.[7] The picture of Japanese paratroops hiding among the Japanese residents of the West Coast to assist at an invasion is pure fantasy. The truth of the matter is that there was no military necessity, nor even reasonable ground for belief that such necessity required either general curfew regulations or wholesale evacuation orders. The experience in Hawaii demonstrates this beyond a shadow of a doubt.

We believe that the true view of these military orders was that laid down by Judge Fee in *United States* v. *Yasui,* 45 F. Supp. 40; now also before this Court on certification from the Ninth Circuit. No other view would be consistent with our constitutional form of government in which the civil power, not the military, is supreme.

If it be argued that war creates special problems the answer must always be that they must be solved under the Constitution. However great the emergency, its provisions control. At least such must be the answer in this Court. As the Chief Justice said in the *Quirin* case, a duty rests on the courts, "in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty". Nor are any insuperable difficulties presented by such an answer. For the framers of the Constitution, who had themselves just been through a great war, recognized that circumstances might arise in which the ordinary safeguards of the law might, temporarily at least, be suspended. In time of invasion or rebellion the Constitution authorizes the suspension of the writ of habeas corpus. The power of the Executive to order the detention

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[7] In March fighting was still going on in the Philippines—Bataan surrendered on April 9, Corregidor on May 6. And there was no attempt to attack Midway until the first week in June.

of persons on suspicion without possibility of judicial review thus exists. But it must be confined to the circumstances described in the Constitution and be exercised in the manner there provided. The only permissible exception is under martial law, a state of suspended civil power not expressly recognized in the Constitution but evidently deemed implicit in military power. But absent martial law, lacking the suspension of the writ of habeas corpus, military power does not extend to civilians. Any other rule would be destructive of the Constitution and the generator of tyranny.

### 3. A hearing was the minimum protection to which appellant was entitled.

Even if it be assumed that the Constitution permits discrimination based on race and the regulation of civilian life by military authority the minimum requirement of due process is that a person be given a hearing before being deprived of his liberty and compelled to abandon his home and occupation. Vast powers are today confided to various administrative agencies and executive officers. Never before has it been supposed that these powers could be exercised without any provision for a hearing at any stage of the process. Due process demands that there be some hearing "before the final order becomes effective" (*Opp Cotton Mills, Inc.* v. *Administrator,* 312 U. S. 126, 153).

Such hearings might have been held here at some stage of the process. The Government has found no difficulty in arranging for hearings for alien enemies before interning them. The Attorney General was able, within ten months of Pearl Harbor, to clear all of the 600,000 aliens of Italian origin because he had found that only 228 were disloyal (Statement of October 12, 1942; Order of October 14, 1942). He could certainly have made a similar investigation of the 70,000 American citizens of Japanese ancestry by the time the evacuation order here in question was issued. Surely citizens were entitled to the same consideration as aliens! That such hearings would have been

feasible is the considered opinion of one fully familiar with the situation. (See Harpers Magazine, October, 1942, pp. 489 ff.).

We submit, therefore, that no procedure, whether military or civil, can be sustained which makes no provision for hearings in order to determine whether the individuals affected come within the reason for the general action. (See *Buck* v. *Bell,* 274 U. S. 200; *Skinner* v. *Oklahoma,* 316 U. S. 535.)

## CONCLUSION

It is respectfully submitted that the conviction appealed from should be reversed and the indictment dismissed, either on the ground that the statute under which the prosecution was instituted is unconstitutional, or on the ground that the military orders which appellant disobeyed were unconstitutional or unauthorized by law. Often the question has been raised whether this country could wage a new war without loss of its fundamental liberties at home. Here is one occasion for this Court to give an unequivocal answer to that question and show the world that we can fight for democracy and preserve it too. And in no field is a clear decision so important as in that involving the relations between the races.

Respectfully submitted,

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FRANK L. WALTERS,
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## APPENDIX

### Executive Order of the President No. 9066

February 19, 1942

Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General

under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area hereinabove authorized to be designated, including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretotore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

## Public Proclamation No. 1

March 2, 1942

*To: The people within the States of Arizona, California, Oregon, and Washington, and the Public Generally:*

WHEREAS, By virtue of orders issued by the War Department on December 11, 1941, that portion of the United States lying within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah, and Arizona and the Territory of Alaska has been established as the Western Defense Command and designated as a Theatre of Operations under my command and;

WHEREAS, By Executive Order No. 9066, dated February 19, 1942, the President of the United States authorized and directed the Secretary of War and the Military Commanders whom he may from time to time designate, whenever he or any such designated commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion; and

WHEREAS, The Secretary of War on February 20, 1942, designated the undersigned as the Military Commander to carry out the duties and responsibilities imposed by said Executive Order for that portion of the United States embraced in the Western Defense Command; and

WHEREAS, The Western Defense Command embraces the entire Pacific Coast of the United States which by its geographical location is particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection

therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations:

Now THEREFORE, I, J. L. DeWitt, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General of the Western Defense Command, do hereby declare that:

1. The present situation requires as a matter of military necessity the establishment in the territory embraced by the Western Defense Command of Military Areas and Zones thereof as defined in Exhibit 1, hereto attached, and as generally shown on the map attached hereto and marked Exhibit 2.

2. Military Areas Nos. 1 and 2, as particularly described and generally shown hereinafter and in Exhibits 1 and 2 hereto, are hereby designated and established.

3. Within Military Areas Nos. 1 and 2 there are established Zone A-1, lying wholly within Military Area No. 1; Zones A-2 to A-99, inclusive, some of which are in Military Area No. 1, and the others in Military Area No. 2; and Zone B, comprising all that part of Military Area No. 1 not included within Zones A-1 to A-99, inclusive; all as more particularly described and defined and generally shown hereinafter and in Exhibits 1 and 2.

Military Area No. 2 comprises all that part of the States of Washington, Oregon, California and Arizona which is not included within Military Area No. 1, and is shown on the map (Exhibit 2) as an unshaded area.

4. Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A-2 to A-99, inclusive, as are within Military Area No. 2.

## Public Proclamation No. 3

March 24, 1942

*To the people within the States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona, and the Public Generally:*

WHEREAS, By Public Proclamation No. 1, dated March 2, 1942, this headquarters, there were designated and established Military Areas Nos. 1 and 2 and Zones thereof, and

WHEREAS, By Public Proclamation No. 2, dated March 16, 1942, this headquarters, there were designated and established Military Areas Nos. 3, 4, 5, and 6 and Zones thereof, and

WHEREAS, The present situation within these Military Areas and Zones requires as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones thereof:

NOW, THEREFORE I, J. L. DE WITT, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare and establish the following regulations covering the conduct to be observed by all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the Military Areas above described, or such portions thereof as are hereinafter mentioned:

1. From and after 6:00 A. M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as

those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2 dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew.

2. At all other times all such persons shall be only at their place of residence or employment or traveling between those places or within a distance of not more than five miles from their place of residence.

3. Nothing in paragraph 2 shall be construed to prohibit any of the above specified persons from visiting the nearest United States Post Office, United States Employment Service Office, or office operated or maintained by the Wartime Civil Control Administration, for the purpose of transacting any business or the making of any arrangements reasonably necessary to accomplish evacuation; nor be construed to prohibit travel under duly issued change of residence notice and travel permit provided for in paragraph 5 of Public Proclamation Numbers 1 and 2. Travel performed in change of residence to a place outside the prohibited and restricted areas may be performed without regard to curfew hours.

4. Any person violating these regulations will be subject to immediate exclusion from the Military Areas and Zones specified in paragraph 1 and to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions or Orders With Respect to Persons Entering, Remaining in, Leaving or Committing Any Act in Military Areas or Zone." In the case of any alien enemy, such person will in addition be subject to immediate apprehension and internment. * * *

## Public Proclamation No. 7

June 8, 1942

To: *The People within the States of Washington, Oregon, California and Arizona, and the Public Generally:*

WHEREAS, by Public Proclamation No. 1, dated March 2, 1942, this headquarters, there was designated and established Military Area No. 1; and

WHEREAS, by Civilian Exclusion Orders Nos. 1 to 99 inclusive, this headquarters, all persons of Japanese ancestry, both alien and non-alien, were excluded from portions of Military Area No. 1; and

WHEREAS, the present situation requires as a matter of military necessity that all citizens of Japan and all persons of Japanese ancestry, both alien and non-alien be excluded from all of Military Area No. 1:

NOW, THEREFORE, I, J. L. DEWITT, Lieutenant General, U. S. Army, by virtue of the authority vested in me by the President of the United States and by the Secretary of War and my powers and prerogatives as Commanding General, Western Defense Command, do hereby declare that:

1. Civilian Exclusion Orders Nos. 1 to 99 inclusive, this headquarters, together with all exclusions and evacuations accomplished thereunder, are hereby ratified and confirmed.

2. All citizens of Japan and all persons of Japanese ancestry, both alien and non-alien, except as provided in paragraph 3 hereof, are hereby excluded from all portions of Military Area No. 1.

3. The following persons are hereby temporarily exempted or deferred from exclusion and evacuation:

(a) Those individuals who are within the bounds of an established Wartime Civil Control Administration Assembly Center or the area of a War Relocation Authority Project, while such individuals are therein pursuant to orders or instructions of this headquarters.

(b) Those individuals who are involuntarily interned or confined in Federal, State, or local institutions and who are in the custody of Federal, State or local authorities, while such individuals are so interned or confined.

(c) Those individuals who, by written permits of this headquarters, have been heretofore or are hereafter expressly authorized to be temporarily exempted or deferred from exclusion and evacuation, subject to the terms and conditions of such permits.

4. All citizens of Japan and all persons of Japanese ancestry, both alien and non-alien, who are now in Military Area No. 1 and who are not excluded from all portions of said Area by Paragraph 2 hereof, and who are not temporarily exempted or deferred from exclusion and evacuation under Paragraph 3 hereof, shall, and they are hereby required to report in person to the nearest established Wartime Civil Control Administration Assembly Center, or, in the alternative, to the nearest Federal, State, County, or local law enforcement agency, within 8 hours from 12:00 o'clock, noon, P.W.T., June 8, 1942. Failure to so report will constitute a violation of this Proclamation.

5. Any person violating this Proclamation will be subject to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled: "An Act to Provide a Penalty for Violation of Restrictions

or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones," and any alien Japanese will be subject to immediate apprehension and internment.

J. L. DeWitt
Lieutenant General, U. S. Army
Commanding

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**Civilian Exclusion Order No. 57**

May 10, 1942

1. Pursuant to the provisions of Public Proclamations Nos. 1 and 2, this Headquarters, dated March 2, 1942, and March 16, 1942, respectively, it is hereby ordered that from and after 12 o'clock noon, P.W.T., of Saturday, May 16, 1942, all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1 described as follows:

> All that portion of the County of King, State of Washington, within the boundary beginning at the intersection of Roosevelt Way and East Eighty-fifth Street; thence easterly along East Eighty-fifth Street and East Eighty-fifth Street extended to Lake Washington; thence southerly along the shoreline of Lake Washington the point at which Yesler Way meets Lake Washington; thence westerly along Yesler Way to Fifteenth Avenue; thence northerly on Fifteenth Avenue to East Madison Street; thence southwesterly on East Madison Street to Fifth Avenue; thence northwesterly along Fifth Avenue to Westlake Avenue; thence northerly along Westlake Avenue to Virginia Street; thence northeasterly along Virginia Street to Fairview Avenue North; thence northerly along Fairview Avenue North to Eastlake Avenue; thence north-

erly along Eastlake Avenue to Roosevelt Way; thence northerly along Roosevelt Way to the point of beginning.

2. A responsible member of each family, and each individual living alone, in the above described area will report between the hours of 8:00 A.M. and 5:00 P.M., Monday, May 11, 1942, or during the same hours on Tuesday, May 12, 1942, to the Civil Control Station located at:

Christian Youth Center,
2203 East Madison Street,
Seattle, Washington.

3. Any person subject to this order who fails to comply with any of its provisions or with the provisions of published instructions pertaining hereto or who is found in the above area after 12 o'clock noon, P.W.T., of Saturday, May 16, 1942, will be liable to the criminal penalties provided by Public Law No. 503, 77th Congress, approved March 21, 1942, entitled "An Act to Provide a Penalty for Violation of Restrictions or Orders with Respect to Persons Entering, Remaining in, Leaving or Committing any Act in Military Areas or Zones," and alien Japanese will be subject to immediate apprehension and internment.

4. All persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters are excepted from the provisions of this order while those persons are in such Assembly Center.

J. L. DeWitt
Lieutenant General, U. S. Army
Commanding

## Certificate of United States Circuit Court of Appeals for the Ninth Circuit

Upon Appeal From The District Court Of The United States For The Western District Of Washington Northern Division

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Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth circuit desires instruction for the proper decision of a cause.

To the Honorable the Chief Justice and the Justices of the Supreme Court of the United States:

### STATEMENT OF CASE

This cause is pending before the United States Circuit Court of Appeals for the Ninth Circuit after argument on appeal from a judgment of conviction upon a jury verdict of guilty on each of two counts of an indictment returned in the District Court for the Western District of Washington, Northern Division. The first count of the indictment charges the appellant, Gordon Hirabayashi, is a native-born citizen of the United States of Japanese ancestry residing in Seattle, Kings County, Washington, within Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942 of Lt. Gen. John L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, pursuant to Executive Order 9066 of the President of the United States dated February 19, 1942; that Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942, pursuant to the provisions of the said Public Proclamation No. 1, ordered that from and after 12 o'clock noon May 16, 1942, all persons of Japanese ancestry be excluded from a particular described portion of the said Military Area No. 1 in Seattle, Washington, including the place of residence of the said appellant, required a re-

sponsible member of each family and each individual living alone, affected by the Civilian Exclusion Order to report on May 11 or 12, 1942 to the designated Civil Control Station in Seattle, Washington, and provided that any person who failed to comply would be subject to the criminal penalties of the Act of March 21, 1942; and that the appellant wilfully and knowingly failed and refused to report to the said Civil Control Station as ordered by the said Civilian Exclusion Order in violation of the said Act of March 21, 1942 which provides that whoever enters and remains in, leaves, or commits any act in any military area prescribed by a military commander designated by the Secretary of War under authority of an Executive Order of the President contrary to the restrictions applicable to any such area or the order of any such military commander, shall be guilty of a misdemeanor punishable by a fine not to exceed $5,000 or imprisonment of not more than one year or both 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 a violation. Executive Order 9066 authorizes the Secretary of War and the military commanders designated by him to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine from which any or all persons may be excluded and with respect to which the right of any person to enter, remain in or leave shall be subject to whatever restrictions the Secretary of War or the appropriate military commander may impose in his discretion.

The second count of the indictment charged that Lt. Gen. DeWitt's Public Proclamation No. 3 of March 24, 1942, pursuant to the authority of Executive Order 9066, required all alien Japanese, Germans and Italians and all persons of Japanese ancestry, including the appellant, residing or being within the geographical limits of Military Area No. 1, established by Lt. Gen. DeWitt's Public Proclamation No. 1 of March 2, 1942, after 6:00 a.m. March 27, 1942, to be within their places of residence daily between the curfew hours of 8:00 p.m. and 6:00 a.m.; and that the

appellant on the evening of March ....., 1942, knowingly and wilfully was not within his place of residence and was elsewhere after the curfew hour of 8:00 p.m. in violation of said Act of March 21, 1942.

In the District Court, and in his timely appeal from the judgment and sentence of conviction entered on October 21, 1942, based on appropriate and timely motions, objections and exceptions, the appellant did not deny that he is an American citizen of Japanese ancestry residing in the said military area and that he refused and failed to comply with the requirements of Civilian Exclusion Order No. 57 and the curfew requirement. He contends that the military control over American citizens here exercised is forbidden by the United States Constitution as interpreted in *Ex parte Milligan,* 4 Wall. 2 and other authorities. He also contends that neither the Congress nor the President has the power to command him, an American citizen not charged with any crime or disloyalty and solely on the basis of his Japanese ancestry, to report to a Civil Control Station in connection with the exclusion program and to remain in his place of residence during the curfew hours not applicable to other American citizens not of Japanese ancestry and that to do so deprives him of due process and equal protection of law. The appellant also contends, and the Government denies, that the Act of March 21, 1942 is an unconstitutional delegation to the military authorities of the power of Congress to define criminal conduct. The Government contends that the application of the military curfew and exclusion to all persons of Japanese ancestry is a valid exercise of the war powers of the President derived from the Constitution and the statutes of the United States. The Government also contends that the exclusion of all persons of Japanese ancestry was reasonable and constitutional in the military emergency which faced the military authorities on the West Coast at the beginning of the current war between the United States and the Empire of Japan.

This cause thus raises novel constitutional questions of great public importance pertaining to an exercise of the war powers to enforce two important regulations which form an important part of the wartime evacuation of the Pacific Coast Japanese population. This court is familiar with the decisions of the Supreme Court of the United States upholding broad exercises of the war powers of the Federal Government. On the one hand, however, this Court knows of no decision in which citizens residing in areas not subject to martial law have been required by military authorities to observe a curfew and to report to military control stations for exclusion from a military area designated by the military authorities. On the other hand, this Court is sensible of the fact that the military authorities held the view that military exigencies of modern warfare imperiling the nation and existing on the Pacific Coast at the beginning of the present war were far more grave than any situation hitherto existing in any war with a foreign nation. No doubt because of the military authorities' view of the extreme peril facing the nation this exercise of the war powers of the Federal Government was employed. The question whether this exercise of the war power can be reconciled with traditional standards of personal liberty and freedom guaranteed by the Constitution, is most difficult. This Court, therefore, pursuant to Judicial Code, Section 239, amended (28 U.S.C. Sec. 346), certifies to the Supreme Court of the United States the following questions of law concerning which instructions are desired for the proper decision of the cause:

## QUESTIONS CERTIFIED

1. Was Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942 excluding all persons of Japanese ancestry, including American citizens of Japanese ancestry, from and after 12 o'clock noon, May 16, 1942, from a particular area in Seattle, Washington within Military Area

No. 1 established by General DeWitt's Proclamation No. 1 of March 2, 1942 and requiring a responsible member of each family, and each individual living alone, affected by the order to report on May 11 or 12, 1942 to the Civil Control Station in the said area in connection with said exclusion, a constitutional exercise of the war powers of the President derived from the Constitution and statutes of the United States.

2. Was Lt. Gen. DeWitt's Public Proclamation No. 3 of March 24, 1942 requiring all alien Japanese, Germans and Italians and all persons of Japanese ancestry, including American citizens of Japanese ancestry, residing or being within the geographical limits of Military Area No. 1 established by Public Proclamation No. 1 of March 2, 1942 to be within their place of residence between the curfew hours of 8:00 p.m. and 6:00 a.m. daily, a constitutional exercise of the said war powers.

3. If the answer to question One or the answer to question Two is in the affirmative, did the Act of March 21, 1942 (18 U.S.C. 97A) constitutionally make it a criminal offense for the appellant wilfully and knowingly to fail to report to the Civil Control Station as ordered or to remain outside of his place of residence during the curfew hours.

Filed March 27, 1943,

CURTIS D. WILBUR,
Circuit Judge.

FRANCIS A. GARRECHT,
Circuit Judge.

BERT EMORY HANEY,
Circuit Judge.

CLIFTON MATHEWS,
Circuit Judge.

WILLIAM HEALY,
Circuit Judge.

DENMAN, Circuit Judge, Dissenting:

I dissent from the certification on the grounds,

(1) Because the questions simply transfer to the Supreme Court the final decision of the matters pending here, namely, as to the guilt or innocence of the appellant referred to.

(2) Because, assuming the questions are proper for certification, they take from this court, with its peculiarly clearly defined judicial cognizance of facts of the relationship of Japanese descended citizens to the white citizens in the social fabric of the Pacific coastal areas involved, the valuable contribution which such a court of appeals as this may give to the consideration of issues of such major importance. If the case were to be certified, the facts should have been stated in the certificate.

(3) Because certain important admissions were made by both the Government and the appellant at the hearing before this court, pertinent to the final decisions of the case involved in the questions, of which the certificate makes no mention.

(4) Because, although the certificate asks the questions, in effect, a final decision of the guilt or innocence of the appellant, the certificate purports to state but one of the many contentions made by appellant concerning the invalidity of the orders of General DeWitt, matters upon which we ask no advice, though they must be determined by the Supreme Court in its answers to the questions.

(5) I dissent from the war-haste with which the question involving the deportation of 70,000 of our citizens, without hearing, is hurried out of this court, with its peculiar qualifications for the consideration of the racial questions involved, on the plea of the Attorney General, one of the litigants, which, as I understand it, is that it will

discommode the Supreme Court to reassemble to consider the case in the time in which it would mature for hearing before that Court upon petition for certiorari. In this connection, I note that the Supreme Court did reconvene in its vacation period in a case of lesser importance. Ex parte Richard Quiren, argued on July 29 and July 30, 1942.

This dissent will be more fully stated in an opinion which is now in preparation and should be before the court by airmail by Tuesday morning next.

WILLIAM DENMAN,
Circuit Judge.

(Endorsed) Certificate to the Supreme Court of the United States of questions of law upon which the Circuit Court of Appeals for the Ninth Circuit desires instruction for the proper decision of a cause, and dissent of Denman, C.J.

Filed March 27, 1943,

PAUL P. O'BRIEN,
Clerk.

## Dissenting Opinion in the United States Circuit Court of Appeals for the Ninth Circuit

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

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Opinion of Denman, Circuit Judge, on his dissent from the certification of questions to the Supreme Court, and from the omission of facts therefrom.

DENMAN, Circuit Judge, dissenting:

Certain of my associates are of the opinion that it is not within the power of a participating member of the court to dissent from the decision of the court that it certify questions to the Supreme Court under section 239 of the Judicial Code (28 U. S. C. A. 346) or from the content of the certificate. With this contention I do not agree.

Certification is a judicial action vitally affecting the litigants, since it transfers from one tribunal to another the forum of adjudication of the questions certified. The primary issue argued here is one of classification of Japanese descended citizens from other citizens descended from aliens of countries with which we are at war. The validity of such a classification is entirely a question of fact largely in the ill-defined area of judicial notice. The Supreme Court in civil cases takes judicial notice of the laws of the several states, yet believes justice is better served if such questions are left to the respective circuit courts of appeals. If this be true of civil cases, it is true *a fortiori* of such criminal cases as those involving psychological facts which, in my opinion, alone could warrant the discriminating cruelty with which these Mongoloid people have been treated.

Entirely apart from the question of costs of a second presentation to a distant tribunal, these unfortunate per-

sons (if the certificate is granted) will have the decision of these questions of fact removed from the circuit court of appeals which is best qualified to find them. I dissent from a certification which seeks to avoid the exercise of our special knowledge of the psychology of these deported citizens.

If it be unusual for a judge of a court in which he is a participant to dissent from his associates on the matter of a certification, the occasion is even more unusual.

Under the threat of penitentiary sentences to these 70,000 American citizens who have relied on the right they believe the Constitution gives them, we are driving from their homes to internment camps, not men alone, as with the deportation of the Dutch by the Germans, but their wives and children, without giving the latter the choice to remain in their homes. We are destroying their businesses, in effect, as if such citizens were enemy aliens. The destruction of their business connections means for many that they will not be able to return to their native areas; in effect, as were the French Canadians so taken to Louisiana.

While none of the appellants had yet been interned, the deportation order was but the initial step in a single plan ending in imprisonment in barb wired enclosures under military guard. Descended from Eastern Asiatics, they have been imprisoned as the Germans imprisoned the Western Asiatic descended Jews.

The first omission of fact from the certificate, which I regard as prejudicial to the appellants, is the admission by the Government, at the hearing here, that not one of these 70,000 Japanese descended citizen deportees had filed against him in any federal court of this circuit an indictment or information charging espionage, sabotage or any treasonable act. This admission covered the five months from Pearl Harbor to General DeWitt's deportation order of May 10, 1942. I dissent from the absence of such an admission of fact from the certificate.

I also dissent from the omission from the certificate of the following facts concerning the issue of a "present danger of immediate evil [sabotage and espionage][1] or an intent to bring it about," [2] which would warrant General DeWitt's order, in effect, of deportation of citizens without trial for their immediate imprisonment. They are facts from which pertinent inferences may be drawn regarding the psychologic impulses and impelling convictions and personal loyalties and sympathies of a yellow Mongoloid body of citizens living in a predominantly Caucasian society and subject to legal and social compulsions because of race and color.

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[1] The President's military zone and deportation order of February 19, 1942, and its enforcing provisions, are

"Whereas the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November 30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U. S. C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorize and direct the Secretary of War, and the Military Commanders who he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, *from which any or all persons may be excluded,* and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. * * *

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to *enforce compliance* with the restrictions applicable to each Military area hereinabove authorized to be designated, *including the use of Federal troops* and other Federal Agencies, with authority to accept assistance of state and local agencies." (Emphasis supplied.)

[2] Justice Holmes in *Abrams* v. *United States,* 250 U. S. 616, 628.

In the summary of such facts is rejected the blind war antagonism expressed in the statements that all Japanese descended people are treacherous because, after the refusal of her demands, Japan began an undeclared war at Pearl Harbor. This is no more true than that all Americans in 1853 then were treacherous because, similarly, unwarned by our Government, Commodore Perry, with his fleet of American war vessels, their guns moved into their port holes, their gunners' fuses lit, ready and intending to destroy the feeble fortifications our spies had reported, sailed into the port of Yeddo (now called Tokyo) to compel Japan to open her commerce to the Yankee Clippers of the China trade,—a 90 years ago which is only yesterday to the Japanese schoolmaster and the Shinto priest.

It is a matter of common knowledge to people of detached thinking in Pacific Coast communities, formerly living among these deported citizens, that their Mongoloid features and yellow skins have among them persons of the same high spirit, intellectual integrity and consciousness of social obligation as have the surrounding Caucasians. What is also pertinent is the fact that they have the same contempt for any hypocrisy in their treatment by their white neighbors, and the same bitter resentment of a claim of their social inferiority as Americans have of the Nazi claim of Nordic racial supremacy. It is in the normal reactions of human beings to such treatment that are found factors in the problem of the validity of General DeWitt's orders.

Another admission of fact made at the hearing and not appearing in the record or in the certificate, is the presence among these citizens of a group of young men educated in Japan and returned to the United States to live in the Japanese communities. These men were admitted to be dangerously sympathetic with Japan in the present war.

What is peculiarly within our knowledge is that in our Pacific Coast schools, in their infancy and early childhood, the Japanese and Chinese children mix freely with their white companions. They are taught to revere the flag

with the freedoms it connotes. When they reach adolescence, with its mating instincts and its inevitable affections, which often know no boundaries set by complexion or cheekbones or slant of the eyes, freedom is denied them in the most powerful of human instincts by the laws against intermarriage with the Caucasians.[2a] The strongest paternal discipline is exercised over the white children. They are told it is a degradation to mate with an Oriental; and the yellow skinned youth are made to feel a racial inferiority and in social contempt. Such facts are pertinent in determining whether General DeWitt is entitled to find, among a people suffering an humiliation so inconsistent with the equality of the flag teachings, that there will be those who will hesitate or fail to perform a citizen's duty in aiding his soldiers against the saboteur or spy.

The second most powerful indicia in the war zone commanded by General DeWitt of separateness and implied racial inferiority of the Mongoloid people, are the laws prohibiting them from owning agricultural land.[3] Many of the Japanese who immigrated here were farmers. Yet under these laws no child of Japanese parentage can be born on his alien father's farm. State decisions [4] show the evasions and deceits employed to satisfy that farmer's historic land hunger, which led to our own early westward migrations of the last century. Whether or not it is still a proper concept that the farmers constitute the "backbone of the nation," these 70,000 citizens know that those in farming communities are separated from their white companions by a fundamental social distinction, sometimes the more bitter in its expression by their European descended neighbors because of the superiority often shown by the

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[2a] California Civil Code § 60; 2 Idaho Gen. Laws Ann. § 31-206; Montana Civil Code § 5702; Arizona Code Ann. (1939) § 63-107.

[3] 1913 Cal. Stat. 260, 1 Deering Gen. Laws, Act 261; 5 Oregon Comp Laws Ann. § 61-102; Washington, Rem. Rev. Stat. § 10582.

[4] *People* v. *Osaki* (1930) 286 Pac. 1025; *People* v. *Entriken* (1930) 288 Pac. 788; *Takeuchi* v. *Schmuck* (1929) 276 Pac. 345; *People* v. *Nakamura* (1932) 13 P. (2d) 805.

Japanese in both energy and agricultural skill. These facts are entitled to be considered with reference to the likelihood of disaffection among a class so treated, in determining General DeWitt's regulations for exclusion of dangerous people from the war areas bordering the Pacific.

A third distinction, the subject of long and repeated protest from Mongoloid China and Japan, is in the Congressional laws for the exclusion of their nationals from the immigration quotas of the Europeans, the Semitic and part Semitic Western Asiatics, and the Russians of part Mongoloid blood. Neither General DeWitt nor this court is concerned with the political or social justification of this stigma on the Mongolian, but both are concerned with its effect on proud spirited people so branded by the Congress. This court, however, is in a better position than any other to know the effect of such facts on the minds of some of the now deported citizens.

A fourth discrimination of race and color is the exclusion of these citizens from any labor unions. Nothing but the stress of war gives the special permits which allow the Chinese to work in some of our war industries. Despite the outstanding mechanical skill of the Mongolian people, the freedom to make a skilled living is denied to the youth taught in our schools to point their hands at the flag which, they are told, promises them the dignity of equality of opportunity among his fellows.

One is not here concerned with the vigorous dispute as to the wisdom of such laws, a dispute having on the one hand examples of persons of the United States and Latin America distinguished in statecraft, the sciences and the arts, who are of Eurasian blood, both immediate of Chinese and Japanese origin, and more remotely through the American Indian, and on the other the frustrated rejects from the societies of each blood.

Such questions are for the peace table. The case is solely concerned with the question whether such laws and social and industrial regulations have created a real and present danger on the eastern littoral of the Pacific, in a war which

the Japanese military caste is waging after, with the aid of assassination, it destroyed an evolving Japanese democracy, having ideals in common with our own.

As a result of these and other discriminations of race and color, the Japanese of our Pacific Coast cities and towns live in segregated quarters. Though compelled to reside there by social rather than governmental force, there are many similarities with the ghettos of Europe,—among them the denial of intermarriage, of land owning, and participating in many of the livelihoods of manual skill.

Because of such limitation of social intercourse, people do not become familiar with the Mongolian physiognomy. The uniform yellow skin and, on first impression, a uniformity of facial structure, makes "all Chinks and Japs look alike to me," a common colloquialism. Hence arises a difficulty for General DeWitt's soldiers or the federal civil officers in picking out from the other Japanese crowded together in the segregated districts, and including men educated in Japan, the suspected saboteurs or spies or fugitives from a commando landing or hiding parachutists. Also the difficulty of identification of Japanese of known or suspected enemy aid, by descriptions telegraphed or written to white enforcement officers.

So far as concerns the imminence of danger of Japanese attack on the Pacific Coast, this court would be compelled to find that General DeWitt has a rational ground to expect it. It is a fact of general knowledge that in every Japanese air attack on cities and military establishments,—among them Chungking, Singapore, Midway, Rangoon, Dutch Harbor, and the British naval station in Ceylon,—enough planes passed through the defenses of warned and expectant commanders to cause a conflagration sufficient to destroy the wooden cities of our Pacific Coast.

What is commonly known on the Pacific Coast and not elsewhere, is the fact that, unlike London with hundreds of simultaneous fires in its brick and stone structures and yet no great moving front of conflagration, in wooden-built San Francisco there was a conflagration front of a mile

length within five hours of the earthquake of 1906. It was a coalescence of but seven fires. There, luckily, the earthquake placed it on the lee-side of the city, but one started by the Japanese on its windward side, in its long maintained northwest trade wind, well could have the bulk of the city in flames in ten hours. The earthquake left the exterior of the city's frame buildings intact, save for some distortions which did not increase the conflagration hazard, but the present developed technique of shattering to pieces several acres of buildings with a single bomb, makes the debris of wooden material mere fuel piles for the succeeding inflammable projectiles. A similar conflagration danger exists in all the Pacific Coast cities. In all of them, General DeWitt well could fear the added menace of the saboteur's torches.

Since the questions certified, in effect, transfer the entire case to the Supreme Court, it is unjust to the appellant to omit from the summary of the contentions on which he relied, his claim of violations of Constitutional provisions other than the due process clause of the Fifth Amendment. He also urged here that such a classification of the Japanese descended citizens from others, in a unitary scheme leading to their imprisonment without a hearing, (1) made General DeWitt's Congressionally authorized regulation a bill of attainder prohibited by Article I of the Constitution; (2) was merely an incident of a single continuing plan to seize his person in violation of the Fourth Amendment, and (3) that the scheme providing for deporting people from their homes to be imprisoned by the Military, without trial, is a cruel and unusual punishment in violation of the Eighth Amendment.

It is now nearly ten months since General DeWitt's deportation order was made. The highest court of this great circuit is fully able to decide the submitted questions. The difference in time between certification and certiorari after our decision, is about four weeks if diligence is used by the Government in filing its sustaining or opposing brief. The time no doubt could be shortened by the agreement of counsel for the appellants seeking the freedom of their clients.

Because of this difference in time, the Supreme Court may have to reconvene in June or July, as it did in the much lesser important cases of Ex parte Richard Quiren and others, argued July 29, and July 30, 1942. It is my opinion that a month's delay, coming after the elapse of the ten months in which the order in question has been in existence, does not warrant the avoidance of a decision of this circuit court of appeals on the matters of law and of fact involved in the appeals.

For the above reasons I dissent from the attempt by certification to avoid the decision of this appeal by this court, and if it is to be avoided from omitting from the certificate the facts above described. I cannot but regret that this opinion is an overnight effort, without the required revision, but the certificate signed by a majority of the court was first seen by me yesterday (March 27th) and ordered sent at once by airmail to the Supreme Court.

March 28, 1943.

WILLIAM DENMAN,
United States Circuit Judge.

Endorsed: Opinion by Denman, Circuit Judge, on his dissent from the certification of questions to the Supreme Court, and from the omission of facts therefrom. Filed March 28, 1943. Paul P. O'Brien, Clerk.