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(The various proclamations and a number of the civilian exclusion orders referred to this brief are set forth in sequence at pages 293 to 351 of the Appendix of House Report No. 2124 of Select Committee Investigating National Defense Migration, May 1942, commonly known as the Tolan Committee Report.)

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 870

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

BRIEF FOR NORTHERN CALIFORNIA BRANCH OF THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE.

STATEMENT OF THE CASE.

This is an appeal prosecuted by the appellant from a judgment of conviction followed by a sentence to imprisonment rendered and entered against him in the United States District Court for the Western District of Washington, Northern Division, on October 21, 1942, in a criminal case arising out of an indictment charging him with the commission of two misdemeanors under Public Law No. 503. (18 U.S.C.A. 97a.) The case comes before this Court

upon a Certificate of Questions of Law upon which the Ninth Circuit Court of Appeals desires instruction for the proper disposition of the cause.

The appellant is a native-born American citizen of Japanese ancestry. He was born in Seattle, King County, Washington, on April 23, 1918, and at the time of his conviction in the District Court was 24 years of age and a student attending the University of Washington. On May 28, 1942, the said indictment was filed against him, the first count thereof charging him with a violation of the curfew regulation imposed upon him as an American citizen of Japanese ancestry by Public Proclamation No. 3 issued by General DeWitt on March 24, 1942, and the second count thereof charging him with a violation of the military evacuation provision of Civilian Exclusion Order No. 57 issued by General DeWitt on May 10, 1942, which commanded appellant as an American citizen of Japanese ancestry to submit to evacuation by the Army from his home in Seattle and destined him for internment by reason of his Japanese ancestry. The said proclamation and exclusion order were applied to appellant as an American citizen of Japanese ancestry to the exclusion of American citizens of other racial stock residing in the same area. The constitutional questions involved in this appeal were raised and urged in the District Court and the Ninth Circuit Court of Appeals in the proceedings below.

STATUTE, PROCLAMATIONS AND EXECUTIVE ORDERS, THE VALIDITY OF WHICH IS INVOLVED.

(1) *Public Law No. 503,* 77th Congress, 2nd Session, Chap. 191, H. R. 6758, approved March 21, 1942 (see Title 18, U. S. Code, sec. 97a), the validity of which is involved herein, reads as follows:

> "Whoever shall enter, remain in, leave, or commit any act in any military area or military zone which has been 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.

(2) *Executive Order No. 9066,* the validity of which is involved herein, was promulgated by the President under date of February 19, 1942. It appears in the *Federal Register* of February 25, 1942, in Vol. 7, No. 38, page 1407. It reads as follows:

> "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 restrictive 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 heretofore 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."

The continental United States is divided for military convenience into seven military districts, de-

partments or commands. One of these is designated the "Western Defense Command" which is under the command of J. L. DeWitt, Lieutenant-General, U. S. Army. It embraces the entire States of Washington, Oregon, California, Montana, Idaho, Nevada, Utah and Arizona and the Territory of Alaska. The public proclamations and civilian exclusion orders hereinafter discussed were issued by said General DeWitt and appear in Volume 7 of the Federal Register.

(3) *Public Proclamation No. 1,* the validity of which is involved herein, was promulgated March 2, 1942. It establishes two military areas. These are "Military Area No. 1", which embraces the western halves of Washington, Oregon and California and the southern half of Arizona, and "Military Area No. 2", which embraces the eastern halves of Washington, Oregon and California and the northern half of Arizona. (See 7 F. R. 2320.)

(4) *Public Proclamation No. 2,* the validity of which is also involved herein, was promulgated March 16, 1942, and establishes four additional military areas which are designated *"Military Areas Nos. 3, 4, 5 and 6",* respectively, and embrace the entire States of Idaho, Montana, Nevada and Utah. (See 7 F. R. 2405.)

These foregoing two zoning proclamations required alien enemies and persons of Japanese ancestry residing in the said Military Areas to report any change in their places of residence.

(5) *Public Proclamation No. 3,* promulgated March 24, 1942, imposed "curfew" regulations upon

these people, prohibited them from traveling beyond a distance of five miles from their residences and compelled the confiscation of certain articles of personal property they possessed, including weapons, radios, cameras and signal devices. (See 7 F. R. 2543.)

(6) *Public Proclamation No. 4,* promulgated March 27, 1942, prohibited all alien and non-alien Japanese within the limits of Military Area No. 1 from leaving the said military area. (See 7 F. R. 2601.)

(7) *Civilian Exclusion Order No. 57,* the validity of which is involved herein, was promulgated by said General DeWitt on May 10, 1942. It appears in 7 Federal Register at page 3725. It reads as follows:

> "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 nonalien, be excluded from that portion of Military Area No. 1 described as follows:
>
> (The particular description of the area in the County of King, State of Washington, is omitted for the sake of brevity.)
>
> 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, 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 Violations 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."

QUESTIONS INVOLVED.

The questions involved herein are as follows:

1. Can the appellant be punished under Public Law No. 503 for the exercise of his constitutional rights of national citizenship?

2. Is the statute void for uncertainty in failing to prescribe definite military areas and specific restrictions on the activities of all citizens alike therein?

3. Is the statute void for containing an unconstitutional delegation of legislative power to Courts and juries to determine what acts shall be criminal and punishable?

4. Can Congress ratify executive orders which are not *in esse* but which may or may not be prescribed *in futuro* by executive officials or military officers and which, when legislated by them, deprive the appellant of his constitutional rights and liberties?

5. Can the appellant as an American citizen engaged in civilian pursuits simply because he is descended from ancestors who were nationals of Japan be excluded from a military area of a comprehensive States-embracing extent prescribed by military officers but not by Congress and be punished under the statute for remaining therein when a like exclusion is not imposed by the military officers upon citizens therein of other racial stock?

6. Can the constitutional rights of the appellant as an American citizen be curtailed or destroyed at the whim and caprice of a military commander within the continental limits of the United States and outside a theater of war in the absence of martial rule and without a declaration of martial law by Congress?

7. Does the existence of a state of war or of national emergency in itself deprive Congress of legislative power and the judiciary of judicial power and concentrate these powers in the hands of executive or military officers and enable them, through the medium of executive fiats and discriminatory exclusion orders, to make the exercise of the rights of national and state citizenship by the appellant dependent upon his ancestry?

8. As the enforcement machinery of military exclusion orders which discriminate against and intern the citizen appellant and a whole segment of our citizenry simply because they are descendants of ancestors who once were Japanese nationals is not the statute, on its face and as applied to appellant, unconstitutional and void as depriving him of his liberty and of his property without *due process of law* and as denying him the *equal protection of the law* guaranteed to him by the Fifth Amendment, as constituting an *infamous punishment* forbidden by the Fifth Amendment, as abridging the fundamental *privileges and immunities* of national and state citizenship guaranteed to him by the Fifth and Fourteenth Amendments and Art. IV, Sec. 2, cl. 1 of the Constitution and as constituting a *bill of attainder* forbidden by Art. I, Sec. 9, cl. 34 of the Constitution?

9. As the enforcement procedure for illegal military orders which discriminate against the citizen appellant simply because of his Japanese ancestry and which subject him to unreasonable search, seizure and internment in a military concentration camp by the federal troops without accusation of crime and without affording him a judicial trial or administrative hearing is the statute not void as in derogation of the provisions of the Fourth and Sixth Amendments?

10. Is not the statute void as giving effect to military orders which, for no reason other than that he is of Japanese ancestry, banish and impose upon appellant a condition of slavery and involuntary servitude forbidden by the Thirteenth Amendment and

which also inflict upon him an infamous and cruel and unusual punishment in violation of the Fifth and Eighth Amendments?

11. In providing for an excessive fine and penalty upon appellant in the absence of criminal action and intention upon his part is the statute not void as repugnant to the provisions of the Eighth Amendment?

ARGUMENT.

It is probable that a case of more public importance than this has never been presented to a United States Court. It involves human liberty. Upon the final determination of its issues directly depends the rights of approximately 73,000 American citizens of Japanese ancestry and indirectly the rights of each and every citizen of the United States. If inviolable rights are not an illusion but a reality and inhere in national citizenship and are of significance they are to be preserved or lost herein.

OUTLINE OF EVENTS GIVING RISE TO ISSUES INVOLVED HEREIN.

Measures taken under the Alien Enemy Act.

On Sunday, December 7, 1941, we were attacked at Pearl Harbor and Honolulu on the Island of Oahu in the Territory of Hawaii by enemy forces of Japan. After the attack the Imperial Japanese Government formally declared war on the United States and Great Britain. Promptly, on the same day, the President

invoked the *Alien Enemy Act* in *Public Proclamation No. 2525** which enjoined Japanese nationals within our jurisdiction to preserve the peace and to obey regulations to be promulgated by him. This proclamation also authorized the Attorney General to enforce presidential proclamations on the mainland and the Secretary of War on our outlying possessions. It also prohibited these aliens from having possession of firearms, ammunition, signal devices, cameras and other articles of personalty. On Monday, December 8, 1941, Congress formally declared war on Japan and the President invoked identical prohibitions against German nationals in *Public Proclamation No. 2526* and against Italian nationals in *Public Proclamation No. 2527*. On Thursday, December 11, 1941, Germany and Italy declared war on the United States and Congress thereupon formally declared war against them.

During the remainder of the month of December there was an absence of clamor against the Japanese aliens resident on the Pacific Coast and the native-born Americans of Japanese descent. During January of 1942 an artificial clamor of a somewhat sporadic nature in its inception was initiated against them by sources long hostile to Orientals in general. These sources endeavored to inflame public opinion against them through the medium of petitions, the press and radio broadcasts. They increased the intensity of their

*The various proclamations and a number of the civilian exclusion orders referred to in the above outline are set forth in sequence at pages 293 to 351 of the Appendix of House Report No. 2124 of Select Committee Investigating National Defense Migration, May 1942, commonly known as the Tolan Committee Report.

propaganda in the hope the public might be gullible enough to pick up the hue and cry and thereby serve the special interests of these agitators. A few notorious public officials declaimed against them. A few city councils and boards of supervisors in rural areas passed illegal restrictive measures against these residents and petitioned Congress to enact legislation against them. They sought to invoke the spirit of vigilantism, long a curse of the Western States, for their own personal economic or political gain. The public which they sought to cast in a lawless role was not misled by the rising flood of propaganda and, consequently, greeted the avalanche of abuse and invective with calmness and exhibited no inclination to molest or harm these people. H. R. 2124, pp. 149-150.

On January 14, 1942, the President, by *Public Proclamation No. 2537* issued under the authority of the Alien Enemy Act, required all alien enemies, Japanese, German and Italian, to acquire certificates of identification. On January 29th the Attorney General, under authority delegated to him by the President, prohibited all alien enemies from certain areas on the Pacific Coast and extended these areas by subsequent proclamations on February 2nd, 4th and 7th. The areas from which these proclamations prohibited these alien enemies surrounded *national defense material, premises and premises* defined in Title 50 USCA, Section 104, a statute entitled *"Willful Destruction of War or National Defense Material"*, a violation of which is a felony punishable by 30 years imprisonment and $10,000.00 fine under 50 USCA 101. The

purpose of setting up these prohibited zones was asserted to be an attempt to prevent acts of espionage and sabotage to such material, premises and utilities.

On February 4, 1942, the Attorney General announced that an area extending from 50 to 150 miles inland from the Pacific coastline had been declared a "restrictive area" for all alien enemies. On the same date he set up *curfew* regulations and *travel* restrictions on all alien enemies living within the prohibited areas. All of these restrictive measures taken by the President and the Attorney General were imposed and enforced under the authority conferred by the *Alien Enemy Act,* Title 50 USCA, Sections 21-24, upon the executive. They applied only to alien enemies of the *"age of 14 years and upward"* as authorized by the Act and were neither applicable to nor applied to any American citizen. It is to be noted that executive action taken under this Act in time of war against alien enemies is valid and not reviewable by our Courts. Like action taken against a citizen, however, is unlawful and is reviewable and redressable by our Courts. See *Ex parte Franklin,* 253 Fed. 984; *Ex parte Risse* and *Stallforth,* 257 Fed. 102, and *Ex parte Gilroy,* 257 Fed. 110, deciding that habeas corpus lies to release a *citizen* detained under a presidential warrant issued under the Alien Enemy Act.

On February 13, 1942, a delegation of west coast congressmen, influenced by the rising tide of propaganda directed against alien enemies generally, sent a letter to the President suggesting that it might be desirable for the Army or the Department of Justice

to remove from "all strategic areas" persons whose presence was inimical to national defense. Its recommendation was not directed to an indiscriminate mass removal of a segment of our citizenry on a race origin basis. Although Executive Order No. 9066 thereafter issued by the President somewhat paralleled this recommendation there is no evidence that he acted thereon. In early February the Tolan Committee, the House of Representative's Select Committee Investigating National Defense Migration, was authorized to open public hearings touching upon the question of evacuating persons and made arrangements to open its hearings in San Francisco and Los Angeles on February 21st.

Measures taken under extra-constitutional powers.

From here on we become concerned with military orders which interfere with the constitutional rights and liberties of American citizens of Japanese ancestry and which are not referable to and do not derive authority from the Alien Enemy Act or any other law known to American jurisprudence. These peculiar and unprecedented orders follow the pattern of the prior orders of the President and the Attorney General restricting alien enemies but expand their scope and are made applicable to alien enemies and to American citizens of Japanese ancestry. The military exclusion orders which were to issue were finally applied only to Japanese aliens and to American citizens of Japanese ancestry. German and Italian alien enemies and their citizen progeny were unaffected thereby.

On February 19, 1942, *Executive Order No. 9066* was issued by the President. It authorized the Secretary of War and any military commanders he or the Secretary of War might designate *"to prescribe military areas in such places and of such extent as he or the appropriate military commander may determine, from which any and all persons may be excluded* * * *" and to use executive agencies to transport and give accommodation to the persons removed.

On February 21, 1942, the Tolan Committee assembled in San Francisco and opened the first of the congressional hearings. Whether these hearings were to determine the desirability of evacuating alien enemies generally from areas to be defined or to determine the necessity of a general evacuation of the civilian public from areas of danger does not appear from its reports. Most of the testimony was devoted to the question of removing alien enemies and a part to that of removing citizens of Japanese descent. Before the first report of this committee, *H. R.* 1911, ordered printed on March 15, 1942, was off the press and available for distribution Public Proclamations 1, 2 and 3 and the first group of civilian exclusion orders had been issued and the mass removal of Japanese aliens and citizens of Japanese ancestry was under way. As this mass evacuation proceeded apace hundreds of human jackals who viewed the proceedings with avaricious eyes, all of whom fall within the classification of whites, descended in packs to acquire the properties of these unfortunate evacuees at sacrifice prices. *H. R.* 2124, p. 173 et seq. General DeWitt

personally took what steps he could to mitigate property loss to the evacuees but the losses suffered by these people were enormous before the government devised means to stop the plunder and to protect the remainder.

On March 2, 1942, General DeWitt issued *Public Proclamation No. 1* which set up military areas ostensibly under authority conferred by Executive Order No. 9066. It prescribed Military Area No. 1 which embraces the western halves of Washington, Oregon, California and the southern half of Arizona, and Military Area No. 2 embracing the remaining halves of these states. This proclamation required all alien enemies of Japan, Germany and Italy, and all American citizens of Japanese ancestry within said areas to report "any changes in their place of residence". H. R. 2124, p. 317. The right to divide the country into areas, districts or departments for military convenience is not challenged herein but the right of the military authorities to interfere with the activities and liberties of citizens within such areas and the right to substitute military government and to apply military law therein over civilians is challenged.

On March 9, 1942, the War Department, by letter addressed to the Military Affairs Committee sought the passage of a statute, a penal statute, to make punishable any refusal of persons to remove themselves from forbidden military areas set up or to be set up by the military authorities. See U. S. Code, Cong. Ser. No. 3, page 281.

On March 16, 1942, General DeWitt issued *Public Proclamation No. 2* which set up four additional military departments for military convenience, namely, Military Areas Nos. 3, 4, 5 and 6 which embrace the entire States of Idaho, Montana, Nevada and Utah. It sets up in these States "A" Zones from which all alien enemies and citizens of Japanese ancestry are excluded. It also required these people "to report any changes in their place of residence". H. R. 2124, page 321. On March 18, 1942, the President issued *Executive Order No. 9106* which set up the "War Relocation Authority" to provide for the relocation "of persons or classes of persons" who might be moved from military areas. H. R. 2124, p. 315.

On March 18, 1942, *Public Law No. 503,* now codified as 18 *USCA* 97a, was approved and became effective. It makes it a misdemeanor for any person to remain in a military area forbidden to him as prescribed by a military commander.

On March 24, 1942, General DeWitt issued *Public Proclamation No. 3* (H. R. 2124, p. 320) which imposed *curfew* regulations and *travel* restrictions upon all alien enemies and citizens of Japanese ancestry in Military Area No. 1 and the "A" and "B" Zones in Military Areas Nos. 2, 3, 4, 5 and 6. This proclamation also prohibited these people from having possession of arms, munitions, weapons, cameras, signal devices, radios and other articles of personal property and threatens them with prosecution under Public Law No. 503 for a violation of its provisions. The appellant was convicted in the Court below of viola-

tions of the curfew regulations of this proclamation. On the same date the first of the civilian exclusion orders was issued. See 7 F. R. 2581.

On March 29, 1942, *Public Proclamation No. 4* was issued by General DeWitt prohibiting all Japanese aliens and citizens of Japanese ancestry from leaving Military Area No. 1 in Washington, Oregon, California and Arizona. This is sometimes referred to as the "freezing" order. *H. R.* 2124, p. 331. Thereafter, on March 30, 1943, *Public Proclamation No. 5* was issued by General DeWitt allowing certain German and Italian aliens to claim exemption from exclusion from Military Areas 2, 3, 4, 5 and 6. H. R. 2124, p. 331. No like exemptions were ever granted to Japanese nationals or to American citizens of Japanese ancestry.

On May 10, 1942, *Civilian Exclusion Order No. 57* was issued by General DeWitt. It is a blanket exclusion order providing for the exclusion of the appellant and other citizens of Japanese ancestry from their homes in Seattle and for their evacuation therefrom by the Army and temporary detention at a Civil Control. This order destined them for imprisonment in a concentration camp. The appellant was also convicted under Public Law No. 503 for a violation of this order. This order threatens "any person subject to it" will be prosecuted under Public Law No. 503 and that "alien Japanese" who violate it will be subject "to immediate apprehension and internment". It is significant that all citizens of Japanese descent who violate the provisions of any of these drastic

exclusion orders have been *interned* as though they were alien enemies. The few who were arrested for a violation thereof and who are not now languishing in prison but were either released, sentenced to probation or have served their prison sentences were thereupon cast into involuntary internment as though they were alien enemies or prisoners of war. The difference in treatment accorded citizens and aliens is merely one of the situs of the internment camps.

Under civilian exclusion orders issued by the command of General DeWitt approximately 70,000 American citizens of Japanese ancestry and 40,000 aliens have been exiled, banished and interned in concentration camps called Relocation Centers. These citizens have not been interned under authority of the Alien Enemy Act which has no application whatsoever to citizens. The orders do not invoke the Alien Enemy Act. They recite as their authority Executive Order No. 9066 issued by the President which asserts its own authority on extra-constitutional grounds, declaring its purpose was the taking of "every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities as defined in Title 50, U. S. Code, section 104", the act entitled "Willful Destruction of War or National Defense Material". *If any person, citizen or alien, violated the provisions of Title 50, U.S. Code, section 104, he ought to have been charged with a violation thereof and have been tried by our civil authorities and, if convicted, been punished as provided by the terms of section 101, namely,*

by imprisonment for 30 years and a $10,000 fine. Such a person would not have been tried for a mere misdemeanor. It is obvious that Public Law No. 503 was not intended as a substitute for Secs. 101 and 104 of Title 50 of the U. S. Code.

On October 29, 1942, the restrictive measures imposed upon Italian aliens were lifted and in December 24, 1942, General DeWitt lifted the curfew restrictions on German aliens. A like program has not yet been made applicable to Japanese aliens and citizens of Japanese ancestry. If lifted as to German and Italian aliens why has it not been lifted as to *American citizens* of Japanese ancestry in military area No. 2 and why have not these citizens been released and restored to their homes? The reason for this absurd discrimination cannot have originated with the Army but must have its origin in other sources and in all likelihood in the minds of those politicians who victimized these people and dictated this policy to the Army. Surely we have less to fear from these citizens and aliens whose facial characteristics superficially distinguish them from their white brothers and sisters than from the white alien enemies and their citizen sympathizers who commingle a bit more readily in the American scene and are accepted, with class reservations, as social and legal equals. We ought to feel a measure of alarm at the presence of white citizens whose sympathies are with our enemies. We can distinguish the Japanese in our midst but only God can single out the "white" followers of Hitler and Mussolini whether they be aliens or citizens sym-

pathetic with the psuedo-philosophies and imbued with the foreign ideologies and pernicious doctrines of these enemies of America. Yes, we have less to fear from the Japanese aliens here whose faces betray their origin than from German and Italian aliens whose faces conceal their origin and real nationality. We have far more to fear from hostile Axis nationals in this country and those American citizens who are their dupes and tools but whose faces classify them as so-called white men and at the same time conceal their enmity to us. If it is a hunt we must have let it be for these enemies but not a witch-hunt against innocent citizens of Japanese ancestry.

THE PERSONS AFFECTED BY STATUTE AND ORDERS.

The total number of Japanese residents, foreign and native born, on the mainland of the United States, according to the 1940 census takers, was 126,947. Of this number 62.7 per cent or 79,642, are native born Americans. See *Bureau of Census,* U. S. Dept. of Commerce, also *House Report* No. 2124, pages 91 and 94. In the eight states which make up the military district of the Western Defense Command there was to be found, prior to the general evacuation conducted by the Army, a total of 117,364, of which approximately 73,673 are native born Americans of the second, third and fourth generations.

About one-fifth of the total number of Japanese aliens have resided here for a period in excess of

thirty years. Two-thirds of their number entered the United States prior to 1924. Their birth rate is on the decline. The trend is towards urbanization inasmuch as fifty-five per cent reside in cities and forty-five per cent on farms. See *H. R.* 2124, pp. 91-93.

The native born generally have an acquaintance with colloquial Japanese but a reading and writing knowledge of Japanese is beyond the ken of the vast majority. The Kan-ji, ancient imported Chinese ideographs used in writing Japanese, offer too great a barrier to these Americans who, quite naturally, prefer the English language for expression and information.

Whether citizens or aliens, they seldom appear in our criminal and civil Courts. They are not litigious. Their criminal element is negligible and probably lower than that of any of our ethnic groups. If they possess any distinguishing characteristics these may well be said to be docility and obedience to the law. Not fewer than 5000 of these native born were serving in our military forces when this war broke out and this creditable ratio of youths eligible for such service to their ethnic group was not then bettered by any other ethnic group in our midst. Several thousand boys of Japanese descent served in our armed forces during the first World War. The military orders herein, however, constitute an amazing method of signifying governmental appreciation and paying a debt of honor for the contribution they made to our victorious arms.

Whether aliens or citizens this government, through the medium of the military orders and this enforcement statute, has enabled these people to be swindled of their homes, farms, businesses and possessions by avaricious citizens and denizens and has offered them neither compensation for their property losses nor surcease from their misery. See *H. R.* 2124, p. 173 et seq. It has stripped them of their rights and liberties and ruined their lives. It has converted them into pariahs—the untouchables of America. It holds out to them neither hope of relief from their poverty nor expectation for the future.

Their loyalty to America is undeniable.

The loyalty of these aliens and citizens to America does not seem to be in doubt. From their ranks not one authenticated case of treason, espionage or sabotage arose in Hawaii despite the vicious rumors, faked reports and outright lies to the contrary. See *H. R.* 2124, pp. 48 to 59.) Not one of these deported citizens had filed against him in any federal Court of the Ninth Circuit an indictment or information charging any such act. See *Opinion* of Denman, Circuit Judge, dissenting to omission of facts in certificate of questions of law herein. It would be foolish for anyone to charge that an intelligent Japanese who resided here for any period of time voluntarily would trade American for Japanese sovereignty. The privileges enjoyed under a republican democracy in contrast with those under a Japanese monarchy with its semi-feudal appendages holds an immeasurably greater

appeal for these residents and their children than anyone else.

The dual citizenship myth.

The dual citizenship sometimes charged to these citizens of Japanese stock is a vicious charge arising either from prejudice or ignorance. It is easy to attach a brand to another person one does not have to bear himself. Many of those who entertain this puerile suspicion are those hyphenated-Americans whose spiritual home is in Europe and who ought, in good conscience, take up residence there. Each citizen, regardless of his ancestry, who prefers allegiance to a foreign power ought to be permitted to seek the land of his choice. Others who attach this unfair label to these unfortunates are pseudo-patriots who prove their own peculiar brand of patriotism by accusing others of a want of patriotism without an iota of evidence to support their accusations. A few of those who bear neither prejudice nor malice against these people are guilty of repeating this familiar falsehood. However, a majority of our people neither charge them with a dual allegiance nor entertain a belief that these native-born are any more or any less loyal to the United States than American citizens generally.

The Japanese aliens who maintain permanent residence here came here for lawful purposes. They came here, just as our Pilgrim fathers came here, to escape a political, economic and social status that deprived them of dignity and nearly everything of value. They were hopeful of better opportunities than they had

enjoyed and were expectant of fair treatment. Each came for the precise reasons, in the words of Justice Black in *Ex parte Kumezo Kawato* (Nov. 9, 1942), 87 L. Ed. 94, 95, which

> "prompted millions of others to seek our shores —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."

They were so grateful to America for the refuge it gave and the opportunities it offered that they remained here of their own free choice and although they are not citizens because of our stringent naturalization laws they are every whit as much American as any citizen. The children of these aliens have become American citizens by reason of the fact of their birth in this country just as have all those of white origin born here, including those who would bring this unfair charge of dual allegiance against them. Those of white origin born here derive their citizenship from the *14th Amendment* but a few of them seem to believe they derive it merely from belonging to a so-called white race.

The unjust charge that American citizens of Japanese extraction have a dual allegiance is pure fiction. No sensible person who has visited Japan or who is familiar with Japanese government, customs and traditions would accuse these native born of dual allegiance or accuse them or the Japanese aliens here with being desirous of maintaining subversive links with the land of their ancestors. The aliens came here to escape from their homeland because of the low

status they occupied there. Their native-born children are part of America and the product of our institutions and traditions. These children have no love for the land, government and customs of the country that was unkind to their ancestors.

Since 1924 the Japanese nationality law has provided that the only way an American born Japanese can obtain Japanese citizenship is by being registered at birth with a Japanese consular official. See *H. R.* 2124, note 80, p. 85. Very few of our native born, if any, have been so registered and even if any have been it would not render them disloyal to America, the land of their birth. Does any American citizen care whether the country of his own ancestors might look upon him as a subject?

The American citizens of Japanese descent who were visiting Japan besieged the steamship offices for passage home just before the war storm broke. Those who were unsuccessful in gaining passage in time were gathered up by the Japanese government and were interned for the duration of the war. Radio reports from Tokyo received in the United States shortly after the Pearl Harbor attack announced their internment. The Japanese government interned them to prevent them from indoctrinating the Japanese people with American democratic principles and ideals and from proving themselves a real source of trouble to our eastern enemy. It is quite evident the Japanese government does not view American born citizens of Japanese ancestry as possessing an allegiance to Japan. The dual allegiance charge against these

native-born American citizens that is so lightly bandied about by gullible persons is an utterly false product of suspicion engendered by ignorance. Those who entertain the opinion that these native-born citizens owe a dual allegiance, one to America and one to Japan, are as ignorant as those who believe all Americans owe allegiance to their ancestral lands across the seas. A similar absurd opinion is held by a few biased persons who, unable to differentiate between spiritual and temporal matters, believe all Catholics are subversive because they possess a dual allegiance, one to America and one to the Romish Pope. It is the old barbarian undercurrent in American life, fostered and nursed in ignorance, that pits Protestant against Catholic, Gentile against Jew, the white against the dark skinned and sporadically gives rise to bias, hate, the lynch spirit, mob-violence and all the paraphernalia of pitiless brutality. Always the strong pick upon the weak—convinced the display of cowardice is a show of courage.

The assimilation rumor.

The appellee has asserted, but with some hesitancy and misgiving, that neither the alien Japanese nor our native-born citizens of Japanese ancestry have been or can be assimilated in America. The assertion is but the repetition of a rumor long circulated by the proponents of a white America. Thousands of our alien Japanese and native-born citizens of Japanese extraction fought in the first World War and are fighting in this one to preserve the American way of life for us all. They have served us well in war and in peace.

They live among us, associate with us and fight in our common cause yet appellee asserts they are not assimilated and, consequently, must be treated as they are being treated, like cattle.

A similar statement was current during the first World War when it was argued, without a scintilla of proof, that Germans, Austrians and Hungarians were not absorbed into the life and traditions of America. Persons of Teutonic and Middle European stock in this country then and now number many millions. Hundreds of thousands of them then served and now serve in our armed forces fighting for our democratic principles and ideals. They have served us well in war and in peace.

Similar reasons have been advanced in the case of American negroes. It is, nevertheless, a fact of common knowledge that millions of our inhabitants today are of a mixed white and black stock of varying coloration. It is likewise a well known anthropological fact that each year thousands of American negroes whose skin is light discover they can "pass" and, consequently, they move undetected and unsuspected into the social circles of the "superior" white race. They, too, have served us well in war and in peace.

Racial characteristics have long been advanced as arguments against the assimilation of the Jews here but they too have contributed their services to us in war and in peace. Too frequently one hears the familiar lie that Jews are not assimilated in America as though the Nazi falsehood re-echoed from our own

hills. The familiar statement that Catholics are not absorbed because of a spiritual link with Rome is also too frequently heard.

It is a strange groping for distinction that impels people to divide our population into classes, the superior and the inferior, the light and the dark, the assimilated and the unassimilated, *et cetera, ad nauseum.* Those who do so always identify themselves, of course, with the dominant class. It is this personal identification with superiority that characterizes the incipient oppressor and exploiter of the weak and unfortunate. It is generally these misguided persons who attach to minorities a suspicion of disloyalty unaware that in the attempt to suppress the rights of minorities they themselves are disloyal to American principles and traditions and to America. The contributions to human civilization made by George Washington Carver, Rabindranath Tagore and Hideyo Noguchi, among thousands of others not of Anglo-Saxon stock, long ago destroyed the myth of race superiority although there are a few individuals who still seem to be unaware of it. Race is a myth. Race prejudice is the offspring of ignorance for the lower the descent in the social-scale the more violent and vicious is the hatred of those whose immediate ancestry is different but whose remote ancestry is only believed to differ from one's own.

These are hundreds of Japanese aliens and native-born citizens of Japanese pedigree who have married native whites and whose offspring are of a mixed stock. In a few states the marriage of whites with

those of yellow or dark skin texture is prohibited by miscegenation statutes but in the majority no such statutes have been enacted. The barrier of these statutes has not prevented intermarriage, interbreeding and an increase in the number of children of mixed stock. These statutes have broken down but what they were designed to prevent still goes on and is not likely to be seriously checked. Indeed, it is not unlikely that Divine Providence has intended that one day, by reason of the steady commingling and intermarriage of peoples, there shall be no possibility of race distinction and the myth of race will have been forgotten.

The immigrants, European and Asiatic alike, who came to our shores were hopeful of a better life, expectant of fair treatment and eager to be assimilated. They have brought to America the creeds and customs of the world. Their dwindling adherence to their former customs is understandable and presents no argument against their assimilation. It is true they gather around their churches, Protestant and Catholic cathedrals, Jewish synagogues and Buddhist temples, all worshipping the same Divinity or Spirit albeit in foreign tongues, but their religious beliefs and rituals do not prevent them from being assimilated. Few, if any, of the older generation of Japanese immigrants are Shintoists. Their children are born and reared here. They are grateful to their adopted country. Their children are Americans. Whether or not the children carry a trace of white stock in their blood streams does not bear on their assimilation into

our ways of life. Type of ancestry does not render them disloyal to America. Many persons professing the faith of one religious institution believe those attached to others are subversive and their members disloyal to America in ignorance of the fact that each of these religious institutions preaches a not unworthy gospel in an endeavor to lead people into the living of a righteous, moral and spiritual life. The great majority of these aliens and citizens belong to the very churches to which we belong. These institutions are all devoted to the development of good and loyal Americans.

Consequences of exclusion.

It is to be regretted that these American citizens of Japanese extraction have been greeted with treatment we had thought reserved for prisoners of war especially when it is considered we have not so treated alien enemies owing allegiance to Nazi Germany and Fascist Italy. They are ready, willing and able workers who have contributed their share to our prosperity. We have, by the statute and exclusion orders, lost the benefit of their employment which would add millions to our wealth and lend great weight to our fighting and defense efforts. They have been given little consideration. The American taxpaying public, too, has been given little consideration for it must bear the staggering financial burden of their support for an indefinite period.

It has been reliably estimated that in 1940 there were 7,000,000 persons of German stock and 4,000,000

persons of Italian stock in the United States. These figures comprise those who are foreign born residents of the United States and native born citizens one or both of the parents of whom is foreign born. We then had in this country 1,237,772 foreign born Germans of whom 314,105 were aliens and 1,623,579 foreign born Italians of whom 690,551 were aliens. See John A. Hargood, "The Tragedy of German-America", N. Y. 1940, page 58, and *H. R.* 2124, pp. 230-239. No reliable figures appear to have been computed on the number of native-born descendants of German and Italian ancestry but it would seem safe to assume the figure exceeds 50,000,000 persons. Were military orders to seek the exclusion and internment of these aliens and their citizen descendants as has been the case with the Japanese the country would be largely depopulated. If these military orders possess legal efficacy commanders of military districts can exclude and intern anyone whom they please and be accountable only to their superior executive officers. The insignia of a general seemingly vests mystic powers.

PUBLIC LAW No. 503.

The military authorities were originally skeptical of their own powers under the executive order of the President and doubtful of the validity of their intended discriminatory evacuation orders. They did not, however, request of the President a clarification of the scope and meaning thereof but assumed its validity and that it conferred upon them an arbitrary discretion. They sought, through the medium of the

War Department, by letter of March 9, 1942 (see *H. R.* 2124, p. 167; also *U. S. Code Congressional Service* No. 3, page 281), a penal statute to enforce compliance with their intended future exclusion orders. Surreptitious Public Law No. 503 was the result and even Congress, apparently, was misled as to its purpose for it possesses no features on its face which appear to be of a discriminatory nature. Evidently this enforcement procedure was solicited from Congress without prior consultation with the President and there is nothing in the Act itself which would have put the President on notice that it was intended to be applied in an unreasonable manner or that the military exclusion orders thereafter to be issued would discriminate against citizens on the basis of ancestry.

Public Law No. 503 is a tragic caricature of a statute, conceived in excitement and applied arbitrarily, unreasonably and oppressively. As a penal statute it is to be strictly construed. *Prussian v. U. S.*, 282 U.S. 675; *U. S. v. Fruit Growers Express Co.*, 279 U.S. 363; 59 *Corpus Juris* 1113, Sec. 660(2). It endeavors to penalize the appellant for exercising lawful constitutional rights. It attempts to convert our Courts into an instrumentality of the military power by substituting the United States Marshals for the federal troops to enforce illegal military orders. As applied, it says in effect:

> "If you are an American citizen of Japanese ancestry and do not voluntarily exile yourself for an indefinite period from a geographical zone where you have a right absolute to be under the Constitution and laws you will be forcibly de-

> ported in *protective custody* by the military authorities and thereafter remain a *guest* of the federal government under military guard in a *concentration camp* wheresoever and for such time as the military authorities determine. In addition thereto, if you are discovered to be in a region where crime conceivably can be committed against this nation by another person you are guilty of a crime punishable by fine and imprisonment although you have no criminal intent and are not guilty of wrongdoing."

Because of this statutory monstrosity thousands of good, loyal and true American citizens who were unfortunate enough to have had ancestors who, by the accident of birth, were Japanese nationals, have been compelled, by the threat of imprisonment thereunder, to abandon their homes, farms, possessions and rights once considered sacred and face an exile of unknown duration which entails an involuntary servitude forbidden by the Thirteenth Amendment. Those who did not voluntarily leave the proscribed areas and seek exile outside the military district of the Western Defense Command before the freezing order (Public Proclamation No. 4) issued were forcibly removed and imprisoned in concentration camps by the Army.

This Act will one day be celebrated not only for its structural deficiencies but for the mailed fist it conceals and the grave injustice it wreaks upon innocent American citizens. It is a statute used as a lash to compel their exodus. By its threat it dispossesses, scatters, disinherits and deprives them of the privileges of national and of state citizenship simply be-

cause their crime is that they are not of pure-blood white stock. Is this not a recurrence of the myth of Aryan supremacy once sown in the Far East that has yielded the ill harvest of today? Is it not a revival of the infamous fable of the Nietzscheian superman? Is it not akin to the legend of a Nordic master-race utilized by Messrs. Hitler, Goering and Goebbels of Nazi ill-fame and the legend of a yellow imperialism advocated by Tojo and his ilk that has plunged the world into war and accounted for the sacrifice of millions of lives? Is this an example of racial equality we would hold up to the gaze of the thousands of American citizens of Japanese ancestry who are serving in our armed forces to defend with their lives our cherished constitutional rights and liberties? Are these courageous native born youths of America bearing arms to guarantee the imprisonment of their families? Is this an example of racial superiority we would impress upon our dark-skinned Allies, the Filipinos, East Indians, Chinese, Mexicans and Brazilians who make common cause with us in the titanic struggle we are engaged in on far-flung battle fields to establish equality in the world? Is this a precedent we would establish so that Jews, Negroes and other minorities may be suppressed and liberalism be crushed in the post-war period? If it is, the Constitution has been mutilated, Republican Democracy is gone and Liberty is dead.

Public Law No. 503 is void for uncertainty on its face.

The rule has long been established that where the terms of an act are so vague as to convey no definite

meaning to those whose duty it is to execute it, ministerially or judicially, it is inoperative. See 59 *Corpus Juris* 601, Sec. 160, and cases there cited. The Act herein challenged is not only vague and indefinite—it is meaningless. Its incurable legal deficiencies are as follows:

a. Neither a definition of a *"military area or military zone"* nor a declaration of the purposes thereof appears in the Act. What is or may be or might not be a military area or zone and the purposes thereof have been left to speculation and guesswork.

b. No specific military areas or zones are prescribed by the Act. It leaves the number, location and geographical limits, if any, of these areas or zones to our imagination. Whether they have been or will be prescribed at some future date does not appear. It is silent as to who is authorized to prescribe them. Whether they are within or without the geographical confines of the United States is a matter of speculation and guesswork.

c. No specific restrictions on the activities of any person, citizen, civilian or serviceman, are prescribed by the Act. The nature, number, character, extent, duration and limitation of these are also left to our imagination. It doesn't inform us whether they are permanent or transitory in character, flexible or inflexible in nature, prescribed or to be prescribed in the future. It doesn't inform us who has or will prescribe them or vest authority in anyone to prescribe them. Congress has left these matters entirely to guesswork. The very purpose of the restrictions is unmentioned in

the Act. The Act does not enable it to be known what is forbidden and hence is void as a delegation by Congress of legislative power to Courts and juries and the military authorities to determine what acts shall be criminal and punishable. *U. S. v. L. Cohen Grocery Co.,* 255 U.S. 81.

d. The Act fails to disclose the specific or particular executive order or orders of the President, the Secretary of War or military commanders designated by the Secretary of War to which it refers. It leaves unmentioned and to our imagination the number, purposes and contents thereof and fails to reveal whether they have been issued or will be issued at a future date.

e. The Act fails to provide for any notice to be given informing the public of the areas or zones circumscribed or to be circumscribed or of the restrictions applicable thereto. The manner in which the public is to be informed of these areas and of the restrictions applicable thereto is likewise left to imagination.

f. The Act does not disclose the nature of any specific acts of omission or commission which are proscribed or to be proscribed in the military areas or zones but leaves this to vague conjecture. Consequently, it does not adequately inform the appellant of the nature and cause of any accusation against him and hence contravenes the provisions of the Fifth and Sixth Amendments.

g. The Act does not delegate legislative power to the executive branch of government to set up any

military areas or zones or to prescribe any restrictions or regulations governing the conduct of civilians therein. It does not delegate a power to prescribe the type and manner of notice thereof, if any, to be given to the public. Congress is powerless so to do for it cannot delegate legislative power. *Field v. Clark,* 143 U.S. 649, 692; 16 *Corpus Juris Secundum* 349, Sec. 138, and cases there cited.

Although Congress can delegate to the Chief Executive and to his subordinate executive or administrative officials a *limited discretionary authority* to make subordinate rules and regulations in connection with the administration and enforcement of a given law (see 16 *Corpus Juris Secundum* 349, Sec. 138) the Act herein doesn't pretend to delegate such an authority and, obviously, couldn't for want of a Congressional Act which is to be administered and enforced.

Had Congress, either in the Act in question or in another Act, first established definite military areas, reasonable in extent, and restrictions upon the activities of civilians therein to be applied to all citizens on a like basis without discrimination it would then be empowered to delegate to the executive branch of government a limited discretionary authority to aid in the effective administration and enforcement of the Act. However, Congress first must have prescribed therein a policy, standard or rule for the guidance of the executive agency and left to it only the making of subordinate rules, within prescribed limits, and

the determination of facts to which the policy, as declared by Congress therein, was to apply. These are the necessary *conditions precedent* which Congress must impose before the executive branch can exercise a *limited discretionary authority* in the administration and enforcement of an Act. *Panama Refining Co. v. Ryan,* 293 U.S. 388, 55 S. Ct. 241; *Schechter Poultry Corp. v. U. S.,* 295 U.S. 495, 55 S. Ct. 837; 16 *Corpus Juris Secundum,* pages 349 and 352. None of these conditions are satisfied by the Act in question.

It is especially significant that when Public Law No. 503 was presented on the floor of the Senate, Senator Taft of Ohio severely criticized it but expressed an opinion it would probably be enforced in wartime but not in peacetime.*

We do not share the Senator's view that any Court would enforce this Act in wartime. If unenforceable

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*"Mr. President, I think this is probably the 'sloppiest' criminal law I have ever read or seen anywhere, I certainly think the Senate should not pass it. I do not want to object, because the purpose of it is understood. It does not apply only to the Pacific coast. It applies anywhere in the United States where there is any possible reason for declaring a military zone.

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All that does is to let somebody say what a military zone is.

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It does not say who shall prescribe the restrictions. It does not say how anyone shall know the restrictions are applicable to that particular zone. It does not appear that there is any authority given to anyone to prescribe any restriction.

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Mr. President, I have no doubt an act of that kind would be enforced in wartime. I have no doubt that in peacetime no man could ever be convicted under it, because the court would find that it was so indefinite and so uncertain that it could not be enforced under the Constitution."

(See Congressional Record, March 19, 1942, p. 2807. Also: *House Report No. 2124,* 77th Congress, 2d. Sess., May 1942, page 169.)

in peacetime it is likewise unenforceable in wartime. The transition of this nation from a peacetime to a wartime status does not lend validity to a void Act. We regret the Senator's unfortunate expression that seems to indicate a want of faith in the integrity of our Courts. Ours is still a government of laws and not of men. We believe this Court has faith in our Constitution, laws and traditions and the courage to maintain that faith. We believe it will exhibit its characteristic courage and fidelity, in compliance with its oath of office, in declaring Public Law No. 503 void for uncertainty as well as upon the constitutional grounds hereinafter specified. More we cannot and would not ask—less we do not deserve.

Congress cannot ratify executive orders which destroy constitutional rights or which are not in esse.

Congress has the power to ratify action taken by executive officers which gives rise to mere irregularities or technical defects in administration if the *"remedy can be applied without injustice". Graham v. Goodcell,* 282 U.S. 409, 429. See also *Taiko v. Forbes,* 228 U.S. 549; *O'Reilly De Camara v. Brooke,* 209 U.S. 45, and *U. S. v. Heinszen,* 206 U.S. 370. The ratification of prior action taken by administrative officers, where the ratifying intent is ascertained by reference to other statutes, is also permissible, the rule being that what Congress *"could have authorized, it can ratify if it can authorize at the time of ratification." Charlotte Harbor Ry. v. Welles,* 260 U.S. 8. However, whether the ratification is express or implied it cannot validate prior executive action if the

retrospective application of the curative statute affects the substantial rights or equities of a person or his right to an administrative hearing and determination and a judicial review. These constitutional rights must be preserved. See rules established in *Swayne & Hoyt v. U. S.,* 300 U.S. 297, and *Graham v. Goodcell,* supra, summarizing prior cases. Obviously no power resides in Congress to declare criminal the exercise by citizens of constitutional rights and hence any attempt upon its part to ratify executive action destructive of those rights would be void. See also 16 *Corpus Juris Secundum,* page 875, Sec. 422 for rules, and pages 876-877; *Dunkum v. Maceck Bldg. Corp.,* 256 N. Y. 275, 176 N. E. 352; *Buder v. First National Bank,* 116 Fed. (2d) 990, cert. denied 274 U.S. 743. Public Law No. 503 became effective on March 21, 1942, and, therefore, it does not and could not ratify Public Proclamation No. 3 which was issued three days later on March 24, 1942, and could not ratify Civilian Exclusion Order No. 57 which was issued fifty days later on May 10, 1942. Ratification validates prior action—not subsequent action. It is also significant that very substantial constitutional rights and equities of the appellant are here involved for the appellant was denied an administrative hearing as well as a judicial trial.

A statute incorporating future provisions is void.

Neither the proclamation nor this exclusion order is referred to, mentioned in or authorized by this statute or any other statute. How, then, can either be applied so as to punish appellant for the exercise

of acts which are not specifically proscribed by Public Law No. 503 itself or some other act of Congress? It has long been settled that a provision in a statute adopting legislation to be enacted in the future is void. This statute does not and could not confer authority upon the military commander to legislate, in the future, regulations referable thereto. If it could incorporate executive orders at all it would be restricted to incorporating existing ones. The Act herein is void inasmuch as it would penalize defendant for a violation of a proclamation and exclusion order which are not and could not have been incorporated therein by reference.

It has been repeatedly held that a *provision* in an Act which purports to adopt *future provisions* which may hereafter be enacted by Congress is void for uncertainty. *Ex parte Burke* (1923), 190 Cal. 326, 328, 212 Pac. 193. See also: *In re Kinney,* 53 Cal. App. 792; *Rose v. U. S.* (U.S.C.C. Ohio, 1921), 274 Fed. 245, cert. denied, 259 U.S. 655, 42 S. Ct. 97; *People v. Williams,* 309 Ill. 492, 141 N. E. 296; *People v. Eberle* (1911), 167 Mich. 477, 133 N. W. 519, 523, judgment affirmed in *Eberle v. People,* 232 U.S. 700, 34 S. Ct. 464; 59 *Corpus Juris* 618, Sec. 174(3). If the adoption in an Act by reference of provisions to be enacted by Congress at some future date renders a statute void for uncertainty, can it be said that the adoption by reference in an Act of unknown rules or regulations to be legislated in the future by the executive branch possesses the attributes of legality and certainty that lend it validity?

The rule is settled that where a statute makes a reference to some unknown and wholly indeterminate law it becomes too vague and uncertain to be effectual and if a reference to an existing law is so general and the intent so uncertain that it is impossible to determine what law is referred to it is void for uncertainty. See 59 *Corpus Juris* 609, Sec. 165(6), and cases there cited. The Act does not refer to any known law but to restrictions that may be declared *in futuro* in executive orders not *in esse*. The nature of the restrictions and the details of the future orders are left to surmise. The closer the Act is examined the greater is its confusion and senselessness.

It is a general principle of law that Congress can incorporate its own statutes by reference. *Cathcart v. Robinson,* 30 U.S. 264, 280; *Robinson v. Belt,* 187 U.S. 41, 47; *Robinson v. Long Gas Co.,* 221 Fed. 398, 136 C. C. A. 642; *Panama R. Co. v. Johnson,* 289 Fed. 964, affirmed, 264 U.S. 375; *People v. Frankovich,* 64 Cal. App. 184. However, for one department of government to incorporate the fiats or utterances of the others would be an abdication of its own powers. No case in American law seems ever to have decided that Congress may incorporate orders or proclamations of the President or opinions of the judiciary. If this were permissible there would be no reason for the existence of separate divisions of government—one, the executive branch, would suffice and a dictatorship over the people from above would be a reality.

The rules gleaned from the foregoing authorities are that if Congress incorporates one of its own statutes

by reference and the terms thereof are vague or the matter sought to be incorporated is unknown and indeterminate or the reference so general and the intent not ascertainable the incorporation does not cure the uncertainty, but adds to it, and the Act is void. If the incorporated material is matter emanating from another branch of government or unknown matter to emanate therefrom at some remote or future date it merely has accumulated additional vices and defects and is doubly void for uncertainty.

The act does not incorporate executive orders.

An examination of the Act reveals that it does not actually incorporate the two military orders by reference or recite that it was intended so to do. It doesn't refer to or identify any particular executive order. It does not specifically prescribe any military zone and does not set forth any specific restrictions on the conduct of civilians or any person therein or authorize anyone to prescribe any regulations thereon. It does not contain any provision for giving notice to the public of the zones or restrictions applicable thereto. It leaves these important matters to the realm of vagary and the haziest type of supposition and is void. Consequently, the insufficiencies of the Act are not remedied by reference to anything specific or tangible. All is left to imagination, speculation and guesswork. Congress has conjured a grotesque statute and left it dangling in mid-air and resembling nothing of heaven or earth. Its deficiencies are not supplied by the executive orders in any particular and there-

fore it lacks certainty and, in consequence, lacks validity.

It would be an unprecedented and dangerous practice for Congress to incorporate by reference in its own Acts restrictions on civilian activities to be prescribed by military orders to be issued *in futuro* for such would constitute a blanket authorization to the military class to establish a dictatorship and by the rule making power thus legitimated enable it to regulate Congress and the judiciary out of existence or to render them impotent. The practice would constitute an utter abandonment by Congress of the constitutional powers conferred and the duties imposed upon it and reduce it to the status of a rubber stamp to do executive bidding. Strange and novel indeed would it be to discover Congress had been so tarred by the military brush that it was willing to disperse of its own volition and leave the legislative field unopposed to the Army.

The people have never authorized Congress to abdicate its power or to surrender it to the executive department. On July 4, 1776, Congress was not so inclined and was not impotent for it exhibited open hostility to usurpation of power by the military authorities. It declared an unalterable opposition to rule by the military caste in memorable words in the Declaration of Independence, charging misrule by the Crown, *"He has affected to render the military independent of, and superior to, the civil power."* Has America strayed so far from this declaration—have we become so weak and timid that our vitality

is gone? Are we so unfit to govern ourselves that we must let military commanders do our thinking and legislating for us and abjectly submit to their dictation and permit them to substitute an unauthorized military rule over civilians for the civil rule guaranteed by the Constitution? Are we puppets that we must dance whenever military commanders pull strings?

THE CIVILIAN EXCLUSION ORDERS.

The numerous *Civilian Exclusion Orders* issued by General DeWitt, commencing with civilian exclusion order No. 1 dated March 24, 1942 (7 F. R. 2581), excluded all alien and non-alien Japanese from the areas described therein. By virtue of these orders all these people were evacuated from Military Areas Nos. 1 and 2 in the State of California and from Military Area No. 1 in Washington, Oregon and Arizona by federal troops. As yet they have not been evacuated from Military Area No. 2 in Washington, Oregon and Arizona or from Military Areas Nos. 3, 4, 5 and 6 in Idaho, Montana, Nevada and Utah but they are barred from those areas therein designated as "A" zones in Public Proclamations 1 and 2. In each of these areas, however, they are subject to the *curfew* regulations and *travel* restrictions. They are isolated —their freedom of movement is limited—they are hemmed in and, therefore, imprisoned. Their plight is not easily distinguishable from that of the citizens detained in the concentration camps.

These exclusion orders provided for the transfer of these native born Americans to various assembly or reception centers where they were detained under armed military guards until the Army moved them inland to concentration camps euphemistically called "Relocation Centers" where they are interned for an indefinite period of time. These centers are in control of the War Relocation Authority. (See Executive Order 9102; 7 F.R. 2165.) Six of these relocation centers are situated *within* the military district of the Western Defense Command. Four of them are situated *outside* said district, one at Heart Mountain, Wyoming; one at Granada, Colorado; one at Jerome, Arkansas, and one at Rohwer, Arkansas. (See Public Proclamation WD-1 dated August 13, 1942, published in 7 F.R. at page 6593 on August 20, 1942, which establishes these "War Relocation Projects".) In these centers they are confined under military guard and are subject to restrictive measures. (For example, see order of W.R.A. of Sept. 6, 1942, published in 7 F.R. 7656 entitled "Issuance of Leave", demonstrating that the barbarous European permit system has been introduced to America for these citizens by our own government.)

The general plan of these exclusion orders was to remove all these persons from immense geographical areas not contemplated by the President and having no reasonable relation to the declared purposes of the presidential order. No similar orders have ever been issued by General DeWitt under which American citizens of other racial stock, alien neutrals or alien enemies owing allegiance to Germany, Italy or other

Axis nations have been banned and interned because of their racial origin. Among the legion of military commanders only one has assumed to play this despotic role over the lives of American citizens engaged in civilian pursuits. In none of the other military commands has any such special exclusion, restraint and internment been imposed upon any segment of our citizenry because of a type of ancestry. If it were government for these unfortunate people within our borders would cease entirely.

The arbitrary and capricious character of these zoning proclamations and exclusion orders demonstrates they were not designed for the protection of these American citizens over whom the Army has exercised this extraordinary dominion. Their security was not threatened from any source against which the civil authorities could not give adequate protection. It is significant, too, that in the concentration camps the armed guards are not stationed to prevent the admission of outsiders but to prevent the escape of the internees.

Purpose of exclusion orders.

The exclusion of citizens of Japanese ancestry from the enormous geographical military areas set up by the zoning proclamations and their internment bears no relation to necessary military operations, offensive or defensive, and has no reasonable relation to the necessities or exigencies of war. It is, however, evidence that those responsible for this action are waging against them something that bears a striking resemblance to an unauthorized and undeclared war.

The motive that seems to have inspired this mass deportation seems to have been a capricious desire to banish these citizens permanently from the Pacific States, an objective long sought by baiters of Orientals.

The autocratic and precedent-shattering power wielded over the lives, property and liberties of these citizens simply because of their racial origin is unparalleled in our history. It is one of greater magnitude than has ever been wielded over any of our citizens and is of greater inherent danger to the Republic than any power heretofore exercised.

Has a part of the Army such an aversion to the civil law that it despises constitutional government? Has it waxed so big with power it has become a law unto itself, has seized the reins of government and now would ride roughshod over the people? If it can usurp and wield extra-constitutional power under the belief or pretext it is authorized by a valid presidential order and employ it to suppress the rights of a minority of citizens—does this not presage military suppression of groups on a larger scale in the post-war period—establish a precedent to justify unrestrained military action against the civilian population at some future date?

A few of these imprisoned aliens and citizens have recently been permitted to leave these concentration camps, a few children return to school to continue their education and a few to seek work in our fields and what other employment, if any, they can obtain. The W.R.A. has announced that in a few months

time it is expected that nearly all of these people, citizens and aliens, will have been released. None of them are permitted to return to their homes in the areas prohibited by General DeWitt however. The fact that they are being released in the mid-western and eastern States casts serious doubt on the statement that they were considered a menace to our security and negatives completely the lame excuse that danger of espionage and acts of sabotage from them gave rise to a military necessity justifying their banishment. The whole of America is a vast arsenal. The midwest and eastern States bristle with more munition factories and defense industries than the western States. If these people had ever been seriously regarded as constituting a menace to our safety none of them would have been released.

The fiction of military necessity.

The Army authorities, as are all citizens, are patriotic and devoted to the public welfare. They would not intentionally have initiated a move calculated to destroy the very Constitution they are bound by oath to *"preserve, protect and defend"*. They were not the original determiners that a military necessity existed that called for such a removal. They assumed the obligation of evacuation forced upon them by politicians and simply carried into execution the instructions they received as they would any other orders imposing duties upon them. They were responsive to the pressure. They probably assumed the task thrust upon them to be a military necessity or duty without inquiry upon their part as to the reasons inspiring it,

the validity thereof or whether it was, in fact, a military necessity. The Army did not conduct an inquiry into the question of a military necessity warranting the removal of these citizens and has never pretended that it did. It has never supplied any statement of facts either supporting or justifying the removal.

The Tolan Committee Report presents a very convincing picture how pressure groups, shortsighted politicians, jingoes operating "under the cover of wartime flag-waving patriotism", professional "patriots", agitators and propagandists endeavored to inflame public opinion against these people. (*H.R.* 2124, pp. 149-150.) Public opinion was not aroused against these people however for the agitation did not create an attitude of war hysteria in the public mind and the acts of violence the agitation was calculated to incite were conspicuous by their absence. That rather sordid economic motives and political reasons prompted a few agitators to howl for mass evacuation and wholesale internment amply appears from the evidence supplied by a number of honest and impartial witnesses. (See excerpts from their statements in *H.R.* 2124, pages 154 to 157.) Nowhere in the Tolan Committee Report does it appear that any military man whatsoever gave any testimony or drew any conclusion that a military necessity existed calling for the evacuation and internment of these people. The military was not originally responsible for this terrible wrong. The Army authorities were saddled with this burden through the machination of politicians, agitators for a white America and political propagandists who served their own selfish purposes and the special

interests of others. See the purposes disclosed in *H.R.* 2124, pp. 150, 154, 155 and 156. Because the Army authorities were compelled to execute the unsolicited duty thrust upon them and have exercised an unconstitutional dominion over citizens engaged in civil pursuits who are subject only to the civil law they must bear the brunt of criticism for this great injustice.

Those Axis nationals who were suspected of being hostile or dangerous to our security were rounded up by the Federal Bureau of Investigation at the outbreak of war under authority of the *Alien Enemy Act.* A total of 12,071 of these aliens were interned in *special internment camps* in North Dakota and elsewhere. The Department of Justice, an executive agency, gave these alien enemy suspects, German, Italian, Japanese and others, administrative hearings. The Wartime Civil Control Administration, an executive agency later set up by the War Department, denied like hearings to the alien Japanese and American citizens of Japanese descent who were evacuated and interned in separate camps under authority of the civilian exclusion orders involved herein. After examining these dangerous alien enemy suspects the Department of Justice released all of the alien Japanese except 1974 to return to their homes. (These figures were announced by Attorney-General Biddle during the week of December 1, 1942, in a survey of the activities of the Department of Justice.)

The alien Japanese and American citizens of Japanese descent who were unmolested by the Federal Bureau of Investigation but were later evacuated and

interned by the Army were not considered a menace by the Department of Justice. Had they been they too would have been taken into custody and have been examined as to their loyalty. It is evident the Department considered them to be loyal. From the total absence of acts of disloyalty upon the part of these people prior to and since their evacuation it must be concluded their loyalty to the United States is undeniable and that the suspicion of them that may have existed in the minds of prejudiced persons who were anxious to see them removed has been proven to have been without foundation. It is significant, too, that had there been exhibited any acts of disloyalty the Federal Bureau of Investigation would have apprehended the culprits and the government would have given press releases thereon and not have treated the matter as a military or governmental secret. Press releases of this nature have been conspicious by their absence. On December 9, 1942, trouble arose in a concentration camp at Manzanar between factional elements and was suppressed by gun-fire. A few newspapers and radio commentators who value truth little and stories highly were quick to seize the opportunity to spread a false story that the trouble arose out of a quarrel between loyal and disloyal internees. The falsity of the story was exposed by D. S. Myer, Director, War Relocation Authority, Washington, D.C., in a letter to Mr. Norman Thomas published in Vol. 8, No. 50, page 8 of *"The Call"*, in New York City under date of December 25, 1942. It is difficult to conceive that a whole segment of our citizenry considered loyal by the Department of Justice could be deemed

to be a menace to our security by the War Department or Army.

In the Opinion of Denman, Circuit Judge, on his dissent from the certification of questions to this Court, appears a statement that at the hearing before the Circuit Court an admission of fact was made that there was a group of young men among these people who had been educated in Japan and who were "dangerously sympathetic with Japan in the present war". The admission consisted of a statement made by counsel for the appellant that an agent of the F.B.I. had informed him that some of those educated in Japan, known as Kibei, were dangerous and that a few witnesses expressed a distrust of them in the Tolan Committee Report. However, if any of the Kibei were agents of Japan or dangerous they would have been taken into custody by the F.B.I. promptly on the outbreak of war and have been deposited in the special internment camps in North Dakota and elsewhere along with the aliens deemed dangerous to our security. There they would have been examined by the Department of Justice and have been released if found to be loyal and have been indicted if found guilty of conspiracy or have been interned for the duration of the war. The Kibei were known to the F.B.I. and had it suspected them it would have examined them individually. The Department of Justice was fully able to cope with the problem of ferreting out subversive elements in the ranks of our civilian population. It reposed its confidence in the Federal Bureau of Investigation. It did not solicit

the intervention of the Army. The military power usurped its functions.

The protective custody fiction.

The appellee has suggested, as an alternative excuse to the military necessity one, that the removal was a precautionary measure designed to protect these people from lawless elements which might have become infected with war-hysteria and have resorted to violence against them but fails to cite a single actual occurrence of any such violence. The lawlessness the appellee mentions failed to materialize. The *protective custody* in which these people are detained was not designed to protect them from trouble from persons outside the concentration camps—imprisonment never is. It was designed as punishment for wrongs they never committed but of which the sponsors of the internment deemed a few in their ranks might be able to commit except for the detention even though these sponsors knew that all aliens deemed dangerous were already in custody of the Department of Justice. Peculiarly enough their hypothesis that harmless alien Japanese and their citizen offspring might contemplate the commission of crime has not been extended to include European alien enemies and their citizen offspring.

Good motive may beget evil.

Good motive is not a sound argument justifying the destruction of citizenship rights. Under the guise of military necessity the technique of fascism operates best. The seizure of power by Mussolini and D'An-

nunzio with their fascist henchmen and the seizure of power by Hitler with his Nazi minions and the Reichswehr wrote the obituaries for civil rights and liberties in Italy and Germany. The dejected Italian and German peoples were given military dictatorships which have brought them to the brink of destruction. Do not these military exclusion orders and the statute herein as part of its enforcement machinery drive this nation along the same path to the same inevitable goal? It is melancholic to discover that what we once termed the "American dream" has been, by these orders and statute, distorted into the "American nightmare". This nation was founded for the very purpose of preserving the liberties of its citizens. What is worth preserving in a nation if it is not the liberty of its citizens?

The fear of incurring military displeasure struck fear into the hearts and minds of these victims and silenced their protests. A like fear infused in the populace succeeded in stifling a large-scale public protest but it did not still public indignation. The American public was not entirely apathetic to what occurred. A part of it was alive to the dangers this removal implied. The danger presented is nothing less than the destruction of democracy. Is it not by just such encroachments on liberties that fascism rears its ugly head—always under the pretense it comes as a saviour and never as an oppressor? Is action which crams the virus of dictatorship down the throat of the public justifiable as a military necessity? If it is democracy has already been dethroned and the regimentation of

the American people has been ushered in. If the conscience of America yet retains its concepts of liberty a halt can be called to this dangerous trend that threatens the security of every American citizen. The damage done to these unfortunates can never be repaired but their liberties can be restored. This Court can supply the antidote for this poisonous virus and give us relief from the internal damages which beset American democracy as a result of these orders and this statute.

EXECUTIVE ORDER No. 9066.

The President's Executive Order No. 9066, issued on February 19, 1942, does not invoke the Alien Enemy Act. It recites that it was executed by virtue of the authority vested in him *"as President of the United States, and Commander in Chief of the Army and Navy"*. Ostensibly it authorizes his military commander *"to prescribe military areas in such places and of such extent as he * * * may determine, from which any and all persons may be excluded * * *"* and to use executive agencies to transport and give accommodation to the persons evacuated. It declares his purpose, in placing this authority in the military commander, to be the taking of *every possible protection against espionage and sabotage to national defense material, national defense premises, and national defense utilities"* as defined in 50 U. S. C. A. 104.

The order is a legislative expression in excess of any constitutional power reposed in the President and inasmuch as it was promulgated without the sanc-

tion of Congress it must have been issued under the erroneous impression it was within the scope of executive authority. Apart from this it is to be presumed it was not intended by the President to be construed to vest in the military commander an arbitrary and uncontrolled discretion in the exercise of the powers presumptively conferred.

Exclusion orders lacked presidential approval.

It is to be inferred the President had neither knowledge nor realization of the discriminatory features of the exclusion orders of his military commander until after the machinery for the mass deportation and exile of American citizens of Japanese ancestry had been set up and the deportation had been accomplished or was well in progress. On June 10, 1942, he asked Congress for an appropriation of some seventy millions of dollars to alleviate their suffering and to provide housing facilities for these unfortunates who had been summarily removed from their homes and were deposited in *"concentration camps"* and are now retained in a sort of *"protective custody"* where they are considered *"guests of the government"*. The apparatus of removal was set up promptly and functioned smoothly. The evacuation was executed with such rapidity that the President who, apparently, had not been consulted thereon, had no opportunity to clarify the scope and meaning of Executive Order No. 9066 and had no chance to curb or countermand the exclusion orders insofar as they were made applicable to American citizens until it was too late. The exclusion orders were ill-advised, premature and

neither intended by the President nor sanctioned by Congress. This conclusion seems to be correct for the President signified his opposition to a general removal of all alien enemies from some sixteen (16) eastern states which had been sought by Lieutenant General Hugh A. Drum, Commanding General of the Eastern Defense Command and First Army, about the middle of June, 1942, according to newspaper reports. We doubt that he would ever have sanctioned the involuntary removal of these citizens. Had he done so it is likely he would also have ordered the removal of German, Italian and other alien enemies together with their citizen children so as to have had his orders impartially applied.

A citizen is not the creature of the state.

The citizen does not exist for the benefit of any division of the government. He is not a creature of the State. The government is his creation and exists for him. The President is the President of American citizens of Japanese ancestry just as much as and no more than he is of all other citizens. They owe him, as a division of government, the loyalty all citizens owe—he owes them the faithful and impartial execution of the laws and the same protection he accords, by reason of his office, all other citizens. He would not, we are sure, abdicate government for them by declaring them outlawed and outside his protection or authorize his military commanders to wage war against them as was once done to all Americans. See *Declaration of Independence,* Par. 25. He could not by temperament be so insensible of the rights of

American citizens as to have authorized them to be discriminated against, to be herded into concentration camps and be detained there under armed military guards and be treated like alien enemies, prisoners of war or cattle on a mere suspicion of possible disloyalty among a few of their members.

Internment was not authorized.

The executive order does not authorize the *internment and imprisonment* of these people. It does not authorize anything but an *evacuation* from areas adjacent to government owned, operated or controlled plants, buildings, structures and premises vital to national-defense purposes as its open declaration of purposes reveals. The provision therein authorizing the Secretary of War *"to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary"* is not a direction or authorization to do anything except aid in transporting these residents from their places of residence to places outside the boundaries of necessary military areas.

The authority *to evacuate* is not to be construed as the authority *to intern.* Executive Order No. 9066 is not to be construed as a direction for the military commanders to seize and detain any person, alien or citizen, in military or protective custody. It is not to be construed as authorizing any citizen to be exiled or banished. It is not to be construed as ordering the internment or imprisonment of any person in any military camp. It does not designate any American citizen or any alien a prisoner-of-war. The exclusion

orders of the military commander herein and the mistreatment of these citizens has exceeded not only the authorization sought to be conferred by the President but the bounds of reason also.

The removal and internment of Japanese alien enemies, if referable to the *Alien Enemy Act,* was a proper and legal exercise of executive power by the military commander provided, of course, such action was intended or commanded by the President pursuant to an executive order, oral or written. Executive Order No. 9066 contains no express reference thereto. The compulsory exclusion, removal and internment of *American citizens* of Japanese ancestry has no like basis of legality however and does not seem to have been intended by the President under Executive Order No. 9066. This seems to have been action initiated by the military commander pursuant to a notion that the presidential order intended these citizens were to be classified as alien enemies, be restrained of their liberties along with Japanese aliens and be interned. Mistaken or deliberate, however, it is a power usurped by the military commander whether intended by the presidential order or merely referable thereto but unsanctioned by it. The fact that military orders are referable to or claimed to be referable to a presidential order is not a guaranty of validity even if it does seem to have an hypnotic effect upon a few minds or the mass-mind and herein lies a danger of great gravity. It is usually from those who pass as the great of the world that we have the most to fear. Whence does the military power derive

authority to treat American citizens as chattels and to reduce them to a state of servility and bondage? Did we not fight one war to destroy human slavery?

WAR POWERS.

The theory upon which the government relies upon this appeal to support its contention of the validity of the military orders and statute involved is as follows: Under his war powers the President, or military commanders under him, can set up enormous geographical military areas embracing the whole or any part of this country and arbitrarily and capriciously exclude therefrom and intern citizens engaged in civil pursuits. The argument is simply that the Constitution from which the President derives all his power may be suspended by him in wartime and that he may thereupon substitute a military government over civilians in such areas in lieu of civil government. Reduced to its essence the argument is one for the introduction of a dictatorship which would assume complete control of all civilian activities. This would reduce Congress to a rubber stamp to do Executive bidding and would reduce the civil population to the level of a herd of brutes. We would be left to hope that constitutional government would be restored when the war or emergency terminated. It is significant, however, that America has never yet enjoyed an era in which it could not be asserted that a national crisis, emergency, war or threat of war did not confront us, consequently our liberties would not

be restored. The government's contention is that during wartime a state of anarchy or dictatorship exists —that the highest power is no longer the Constitution but irresponsible and uncontrolled military fiats. Such a contention and the vicious doctrines it incorporates and implies was expressly repudiated by a unanimous Court in the *Milligan* case.

Wartime powers of the President must find their origin either in the Constitution or in acts of Congress or they do not exist. The chief executive is not a power unto himself. The restrictions of the Constitution fix the field in which his authority is operative. Congress translates the will of the American people into law. The President is the executor of these laws. He has neither peacetime nor wartime powers not conferred by the Constitution or Congress. The powers to declare war, to raise and support Armies, to provide and maintain a Navy and to supply the executive branch of government with the troops, munitions and the means necessary to wage war successfully are the exclusive prerogatives of Congress. (See Art. I, Sec. 8, subds. 1, 10-18, U. S. Constitution.) The President is made, by Article II, Section 2, the "Commander in Chief of the Army and Navy", but this is a mere declaratory clause—there is nothing for him to do until Congress, under its constitutional powers, provides him with the means therefor. He has the active direction of troops in the field but no like authority over civilians. He is amenable to the laws of the United States and is neither above nor beyond them. If there be no law for him to exe-

cute he cannot act. If he is not provided with the means to act he is powerless.

The precise powers of the President are enumerated in Sections 1, 2 and 3 of Article II of the Constitution. By this vestiture of executive power and also by his oath of office (Cl. 8, Sec. 1, Art. II) he is limited to executing the laws of the United States. In the absence of laws he is not empowered to act, but is required, by the mandate of Section 3 of Article II to recommend the laws or measures he judges *"necessary and expedient"* to Congress for consideration and adoption and, as an instrumentality to obtain their passage, he is empowered *"on extraordinary occasions"* to *"convene both Houses"*. In issuing his order he neglected to follow this procedure and, consequently, neither he nor his military commanders have ever been authorized to set up any military zones or to prescribe restrictions on civilian activities therein. Such orders, therefore, cannot have application to the civilian public. They can affect only those engaged in the military service and the civilian personnel employed by the executive and administrative offices of the federal government. His order and the orders of his military commander as applied herein are not, therefore, authorized by the Constitution or Act of Congress and are ineffectual as law. *Muir v. Louisville & N. R. Co.*, 247 Fed. 888.

On its face the presidential order reveals that it does not derive its authority from an Act of Congress. It recites, in its own justification, an authority vested in him *"as President of the United States, and*

Commander in Chief of the Army and Navy". Inasmuch as the Constitution neither expressly nor by implication vests such a power in him and Congress has not conferred such upon him its exercise and application are *extra-constitutional.* The exercise of extra-constitutional powers would render the wielder greater than the people. It would make him master instead of the servant of the people and would make a mockery of the government we know as a Republic and term a Democracy. Public Proclamations, Nos. 1, 2, 3 and 4 and Civilian Exclusion Order No. 57 issued by the military commander herein, insofar as they affect American citizens, proceed from a mistaken opinion that such a power is an executive one reposed in the President by the Constitution and is delegable to his military commander. They are void as extra-constitutional abuses of power whether the motives that impelled their issuance were good or evil.

There is no graver danger to American democracy than government by executive fiats which usurp legislative and judicial power. One usurpation of power leads to another and each is destructive of republican rights. In critical times there are always to be found a few who would sacrifice—the rights of others. They would be the first to wail if their own rights were threatened. Does America desire a government by executive fiats? The great majority of our people desire nothing of the kind whether they be articulate or silent on the question. Representative government is challenged by these military orders. Are we witnessing the breakdown of democracy and the specter of a dictatorship arising from the grave of constitu-

tional government? Is America, long regarded as the last sanctuary of freedom, so blinded to libertarian views that it is to permit a dictatorship over its people to emerge triumphant from the world struggle?

War does not suspend the Constitution.

If the appellee does not rely upon the martial law theory it must believe the power here exercised over citizens is pursuant to some broad but undisclosed, undefined and undiscoverable wartime power vested in military officers which authorizes the conversion of immense geographical areas into gigantic military reservations wherein the civil power is negated and the military power is supreme. Such, however, is wholly illusory. No such power is conferred by the Constitution. The only law the military authorities can enforce is the law of the United States derived directly and immediately from the Constitution itself or mediately from it through statutes of Congress. Neither Congress nor the Executive Department is authorized to wield extra-constitutional power. The war powers of the federal government are subject to the applicable provisions and limitations of the Constitution which is not superseded by war. Neither the Constitution nor constitutional rights can be suspended in wartime and war measures fall if rights guaranteed by the Constitution are infringed or taken away thereby. *Ex parte Milligan,* supra; *Despan v. Olney,* supra; *Corbin v. Marsh,* supra; Chief Justice Hughes's comments in *Sterling v. Constantin,* 287 U. S. 378, 402; *U. S. v. Bernstein,* 267 Fed. 295. The existence of a state of war does not suspend the guar-

antees of the Fourth, Fifth, Sixth and other Amendments guaranteeing personal security, due process of law and property from being seized without just compensation. *U. S. v. L. Cohen Grocery Co.,* 255 U. S. 81; *Hamilton v. Kentucky Distilleries,* 251 U. S. 146; *Ex parte Harvell,* 267 Fed. 997; *Willson v. McDonnell,* 265 Fed. 432, error dism. 257 U. S. 665, 42 S. Ct. 46; *Griffin v. Wilcox,* 21 Ind. 370. See, also: *Gulf Refining Co. v. U. S.,* 58 Ct. Cl. 559; *Borland v. U. S.,* 57 Ct. Cl. 411; *Lajoie v. Milliken,* 242 Mass. 508, 136 N. E. 419; *Highland v. Russell,* 288 Pa. 230, 135 A. 759. Consequently, in the absence of conditions creating an actual war arena where martial rule necessarily prevails in the *"theater of war"* as defined in the *Milligan* case constitutional guaranties cannot be suspended or destroyed by the military authorities or by Congress.

Spurious martial law question.

There is no merit to a contention that the seizure, evacuation and internment of American citizens is pursuant to a state of martial law. Neither the presidential order nor the military orders constitute a recognition of martial rule or of a state of facts justifying such a rule. The authority to suspend constitutional rights exists only where martial law has been declared or where martial rule prevails. The power to proclaim and institute martial law *within* the continental limits of the mainland United States is a legislative one lodged exclusively in Congress. *Ex parte Milligan,* 4 Wall. (U. S.) 2, and *Despan v. Olney,* 7 Fed. 3822. It is not a presidential power. Congress

has not declared martial law applicable to any region on the mainland of the United States because it has not seen any necessity for the application of martial rule within our boundaries. The President has not attempted to usurp or to apply martial law to any area within our jurisdiction. Had he desired this type of rule to be applied to any region he would have sought a proclamation of martial law from Congress.

Martial law within the United States can be invoked only in a *theater of war,* which is an area where actual conflict rages and an invasion prevents the civil law-enforcing agencies from functioning and effectively closes our Courts. *Ex parte Milligan,* supra. The Pacific States are not within a theater of war. Our Courts and other law-enforcing agencies have been open and functioning in a normal manner and the military forces have not been needed to preserve law and order. Of these facts this Court has judicial knowledge and takes judicial notice.

Martial rule can be a reality and a military government of a provisional nature can be established *outside* the continental limits of the United States without a declaration thereof by Congress. This occurs when our armed forces invade, conquer and occupy enemy territory. It is a temporary jurisdiction exercised over the occupied territory and its inhabitants for the purpose of promoting the military operations of the occupying forces and of preserving the safety of the inhabitants. See 67 *Corpus Juris,* 421, Sec. 171 B and cases there cited.

Conceivably it could be a reality *inside* our borders and without a declaration thereof. The arrival of hostile troops would be such a declaration in itself. But martial rule in such an event would be limited to the actual *"theater of war"* where the conflict raged and offensive and defensive military operations necessitated the appropriation of the area circumscribed thereby. In such a case the civil law-enforcing agencies could not, by reason thereof, operate therein. The right of civilians to remain therein would impede military operations and, consequently, could be curtailed and civilians would be subject to expulsion therefrom and to punishment for violation of military commands.

However, the military authorities here, *outside* any *theater of war,* have set up immense comprehensive zones having no reasonable relation to military operations. The proclamations and exclusion orders do not pretend they have any such relationship. They were set up under a claim they were designed to accomplish the objectives set forth in Executive Order No. 9066, namely, protection against espionage and sabotage to national defense material, premises and utilities. The military authorities appear to have misconstrued the legal phrase *theater of war* to mean *theater of operations* which, in military parlance as used in the zoning proclamations, is synonymous with *military district* which embraces eight whole states.

It is settled that where the Courts are open and have not been expelled by hostile force from the outside the Constitution and laws apply and a citizen not

connected with the military forces cannot be punished by the military power of the United States and is not amenable to military orders. *Griffin v. Wilcox,* 21 Ind. 370; *Ex parte Milligan,* supra. Even when martial law is properly invoked the will or power of the military commander is not to be exercised arbitrarily. *Despan v. Olney,* supra; *Ex parte Jones,* 71 W. Va. 567, 77 S. E. 1029, 1034, 45 L. R. A. (N. S.) 1030. *Within* the United States martial law, when proclaimed, must be administered and enforced in accordance with the Constitution and it cannot be used as justification to deprive a private citizen of his personal or property rights secured thereby unless he is an enemy to the government and has been guilty of an overt hostile act to the government. *Corbin v. Marsh* (Ky.), 2 Duv. 193.

Under the *Milligan* decision civil rights and liberties guaranteed by the Constitution to a citizen cannot be suspended by the military power and the military power cannot regulate the conduct of civilians unless the law-enforcement agencies of civil government have broken down in the area circumscribed by the theater of war and are not functioning and cannot function by reason of the circumstances, conditions or fortunes of war at the focal center of the conflict. The breakdown of such agencies must not be occasioned by the mere whim or caprice of the military authorities but by the actual existence of active warfare in the zone of military operations. See also: *Bishop v. Vandercook,* 228 Mich. 299, 200 N. W. 278; *Allen v. Oklahoma City,* 175 Okla. 421, 52 Pac. (2d) 1054, 1058; *Griffin v.*

Wilcox, supra. See also: 67 *Corpus Juris* 425, Sec. 186 (D) and p. 426, Sec. 187(2).

The civil law enforcing agencies have not ceased functioning in the Pacific States, consequently, neither "martial law" nor a "limited martial law", nor a "partial martial law", nor a "quasi martial law", which are phrases coined by apologists for military misrule, is operative. See *Constantin v. Smith,* 55 Fed. (2d) 227, 239, appeal dism. 287 U. S. 378, 53 S. Ct. 190; *Griffin v. Wilcox,* 21 Ind. 370, 377; *Bishop v. Vandercook,* 228 Mich. 299, 200 N. W. 278. See also 67 *Corpus Juris* 426, Sec. 187(2) where the rule is stated:

> "Martial law or rule cannot exist in company with civil law or authority, nor unless and until the civil power is suspended, for if the civil law is in force and civil authorities are acting thereunder martial law cannot be in force either in whole or in part in the same territory."

Whence does the military authority derive this awful, autocratic and arbitrary power to judge American citizens without hearing, intern them and treat them as prisoners of war? If it has this right it can turn all the oppressive weight of military power against other minorities and against the people as a whole on any pretext. If right it has it is not derived from the presidential executive order which is an indefensible legislative expression. It is not derived from statute or the Constitution. The Army has gone beyond, grasped and wielded unlawful power. Until the Courts restore the rights of these citizens

civil government for them does not exist—an arbitrary government depending upon the whim of a military commander is the substitute.

Geographical confusion.

Has not the military commander who issued these coercive orders confused his geography and the locus of the war? This war is being fought abroad—outside the continental limits of the United States. America is not imperiled by her enemies today as she was in the Revolutionary War, the War of 1812 and the Civil War. In 1775 the foe was in our midst occupying as much of our soil as we did; in 1812 the foe sacked and burned our national capitol and in 1861 our rebel brothers bid fair to capture the whole country. The appellee would have us believe, on the authority of statements in the opinion of the District Court below, 46 Fed. Supp. 657, that a fugitive shelling in the vicinity of Puget Sound from unknown sources, a vagrant and ineffective shelling of uninhabited terrain in the vicinity of Ventura by what is suspected to have been an unidentified submarine and the suspected dropping of an incendiary bomb in an obscure Oregon forest create a *theater of war* which embraces the greater part of eight western states. Would the appellee suggest that war which develops a high order of personal courage in our fighting forces, in the face of such trifling incidents, produces a correspondingly low moral courage in our civilian ranks? Does the appellee believe the civil authorities are so wanting in courage to enforce the civil law in time of

war that this justifies the suspension of civil rule on the theory that our civil authorities become incompetent because they are infected with fear and unable to perform their duties? Acute panic reigning in a few minds may produce a battle ground in their mental recesses but does not create a geographical theater of war in reality.

Military government over civilians is unconstitutional.

As Commander in Chief of the Army and Navy the President, in time of war, is empowered to establish or direct the establishment of a temporary *de facto* civil government, under military jurisdiction, in *invaded* or *conquered* territory. *Hamilton v. Dillin,* 21 Wall. (U. S.) 78, 22 L. Ed. 528; *Texas v. White,* 7 Wall. (U. S.) 700, 19 L. Ed. 227; *Cross v. Harrison,* 16 Howard (U. S.) 164, 15 L. Ed. 889; *U. S. v. Gordin,* 287 Fed. 565; 67 *Corpus Juris,* 422, sec. 175(2). But a military government cannot be established in *domestic territory* unless it is in a state of rebellion or civil war. *Heffernan v. Porter,* 6 Coldw. (Tenn.) 391, 98 Am. Dec. 459; *Ex parte Milligan,* supra; and 67 *Corpus Juris,* 422, sec. 176(3). The President, as Commander in Chief, has not ordered the Army to occupy the Pacific States under a belief that this area was in a state of rebellion or insurrection or that hostile forces were in possession of the area. What the military power has attempted to do in this region, however, is to set up an unauthorized limited military government or a limited provisional government over a segment of our civilian

population on a race discrimination basis in the absence of any such circumstances. It was precisely the exercise of this type of usurped power over the civilian population by the military class of Britain that evoked the open hostility of the early colonists and produced the Declaration of Independence wherein Continental Congress condemned the practice. This area is not under the heel of the enemy and will not be. This area is not held by an army of occupation of our own forces. The war powers of the Executive do not license him or his military commanders to use our troops to make war against American citizens who are not in a state of rebellion or insurrection.

THE PROSECUTION FAILED TO SUSTAIN ITS BURDEN OF PROOF.

The military orders involved herein all stem from Executive Order No. 9066 and consequently were designed to prevent acts of espionage and sabotage to national defense material, premises and utilities which was the declared purpose of the presidential order. Such unlawful acts are made felonies under 50 U.S. C. A. 101 punishable by 30 years imprisonment and $10,000 fine. The appellant was not charged with any such crime. Had the prosecution been able to prove any such criminal act or a conspiracy to commit any such act on the part of the appellant it would have offered evidence thereon at the trial below. The appellant was charged and convicted of a violation of the curfew regulation of Public Proclamation No. 3

and of a violation of Civilian Exclusion Order No. 57 which were made punishable under Public Law No. 503. The gist of the charges against him, therefore, was simply that he, as a citizen engaged in civilian pursuits, was exercising lawful citizenship rights common to all citizens.

Military action taken against a participant in a rebellion or insurrection is justifiable provided the measures taken are "conceived in good faith, in the face of an emergency, and directly related to the quelling of the disorder or the prevention of its continuance". In such cases the executive or military commander "is permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order". The taking of such measures where a rebellion or insurrection has broken out is not conclusively supported by *"mere executive fiat"* however. (*Sterling v. Constantin,* 287 U. S. 378; *Moyer v. Peabody,* 212 U. S. 78.) Neither the appellant nor any of these excluded citizens were engaged in any rebellion or insurrection. There is no evidence in the record of any such criminal conduct upon the part of the appellant. Had he or any of these citizens been engaged in such unlawful acts they would not have been charged with the commission of a mere misdemeanor under Public Law No. 503 but with treason which carries a death penalty. Had he or any of these citizens been guilty of espionage or sabotage they would have been charged with a violation of Title 50

U. S. Code, Sec. 101, a felony made punishable by 30 years imprisonment and a $10,000 fine.

In a criminal proceeding the burden of proof of the elements of crime rests upon the prosecution. The military orders involved herein are "mere executive fiats" which, on their faces and as applied herein, discriminated against the appellant solely by reason of his race, color or the geographical origin and old nationality of a few of his ancestors and therein abridged his fundamental constitutional rights and liberties. No factual basis for the application of these orders to the appellant was established by the prosecution at the trial below. The failure of the prosecution to show that the appellant was guilty of anything but being where he had a right to be and doing what he had a right to do on a like basis as other citizens under the Constitution is an admission that his conduct was lawful. It is also an admission that it could not prove any substantial reason to support the application to him of these military orders which abridged his fundamental constitutional rights. The government failed to sustain its burden of proof. In the absence of any such evidence the only presumption that can be drawn from the face of these orders is that they were applied to the appellant and other citizens solely by reason of his race, color or the geographical origin and old nationality of a few of his ancestors. The proclamation, orders and statute are, therefore, unconstitutional and void.

CONSTITUTIONAL RIGHTS INVADED.

Statute and orders are void as denying equal protection of the laws forbidden by the Fifth Amendment.

The military orders and Public Law No. 503 which gives them effect make the constitutional rights of citizens dependent upon their ancestry. If of *white pedigree* these rights are still considered to be indestructible—if of *yellow,* destructible. If this discrimination among citizens may be made ancestral background has assumed an exaggerated and amazing importance and citizenship has lost its significance. The exclusion orders and statute thereby appear to grant the title of nobility of *"White"* or *"Aryan"* to all citizens except those whose lineage is Japanese. Is this not prohibited by Article I, Section 9, clause 8 of the Constitution? When the rights of American citizens become dependent upon either their ancestry or complexion equality before the law vanishes. It is extraordinary that rights are denied to a group of citizens simply because a few descendants of Adam and Eve assert that other descendants of Adam and Eve are not related to them.

The white race is a product of the imagination. There is no pure race—there is only mixture. Even the detested Nazi Aryan is a Baltic admixture and not free from a touch of Mongol blood—the Hun in him has twice put in an appearance during our generation. The loose term "white" does not mean an "albino" but a "pink" as George Bernard Shaw has so acutely observed. Nevertheless, the orders seem to indicate that a citizen must be classified as "white"

in order to enjoy the traditional blessings and privileges of citizenship. They seem to have been inspired by a notion that the so-called "white man" is a special creature of God and destined, by reason of his complexion,—to be eternally suspicious and distrustful of his darker-skinned brothers even though they be fellow-citizens. The division of our citizenry into special types for the receipt or withholding of rights, privileges and benefits is a dangerous policy not only as has here been practiced but also in its implications. Discrimination against citizens by reason of race or color is expressly forbidden by Congress in the *Civil Rights Statutes.* See 8 U. S. C. A., Secs. 41, 42 and 43. Compare also, 18 U. S. C. A., Secs. 51 and 52.

There is no higher title in America than that of *"citizen".* Whether acquired by birth or naturalization citizenship is not a thing of degrees. It is an absolute and indivisible status. It does not depend upon race, color or creed. Public Proclamation No. 3, Civilian Exclusion Order No. 57 and the similar sweeping exclusion orders issued by the military authorities and Public Law No. 503 discriminate against defendant and other citizens of Japanese ancestry on the basis of race and color. They are, therefore, unconstitutional and void as a denial of the *"equal protection of the laws"* which is forbidden by the *"due process clause"* of the *5th Amendment.* The legal significance of the due process clauses of the 5th and 14th Amendments is identical. (*Heimer v. Donnan,* 285 U. S. 312; *Hibben v. Smith,* 191 U. S. 310; 16 *Corpus Juris Secundum* page 1141.) The *"equal pro-*

tection of the laws" is guaranteed by the *"due process"* clause of the *5th Amendment* which is not suspended by war. (*U. S. v. Yount,* 267 Fed. 861; *Sims v. Rives,* 84 Fed. (2d) 871, cert. denied 298 U. S. 682, 56 S. Ct. 960.) Due process of law forbids *racial discrimination.* (*Yu Cong Eng v. Trinidad,* 271 U. S. 500, 528.)

These orders have not been applied so as to discriminate against any other type of citizen whether native-born or naturalized. That *native-born citizens of other ancestry* should enjoy greater rights in America is an evil in itself. That *naturalized citizens* should enjoy greater rights and liberties in America than the native-born is a negation of equality. That *aliens* here from neutral countries should enjoy greater rights than these unfortunate people is unwarranted. That *Japanese nationals* here should enjoy rights equal to theirs is indefensible. *That alien enemies, nationals of Nazi Germany and Fascist Italy, should possess greater rights, privileges, immunities and liberties in America than these native-born citizens is a negation of citizenship and a disgraceful travesty on justice.*

These native-born Americans are part and parcel of America—they have contributed to America—this is their country as much as ours. What have they done that they deserve treatment we thought reserved for prisoners of war? What have they done that they are denied the equalities to which all citizens are entitled? What have they done to merit such ill-treatment? Nothing. Either they are political pawns or

a few among them are suspected by the military authorities or political pressure groups of constituting a possible source of treasonable intention and activity, and therefore, whole communities of these unhappy people are uprooted and interned as enemies of the government. Does the Army suspect that there may be spies or saboteurs in their ranks? It made no pronouncement thereon prior to the evacuation. It is not the police agency of the federal government—it is the military agency. The duty to guard us against spies and saboteurs among the civilian population in this country is lodged in the Department of Justice which is competent to cope with this problem. The Military and Naval Intelligence officers can lend it assistance but for the Army to usurp the functions of the Department of Justice is an unwarranted interference with the federal administration of justice. *For the Army to intern any citizen is an usurpation of judicial power and an interference with judicial administration.* Who suspects these citizens—who accuses them of disloyalty or of any subversive acts? The dissenting opinion of Denman, Circuit Judge, to the Certificate of Questions propounded shows no such acts were committed.

Loyalty is a product of nationality.

Loyalty to the government cannot be determined along ethnic lines. To judge the loyalty of citizens upon such a basis would destroy national unity. America is a vast melting-pot that has welcomed immigrants from the four quarters of the globe and has conferred upon them the mantle of citizenship—a

status of legal equality transcending all theories of race, color and creed. What has happened to these citizens of Japanese forebears has instilled fear in the hearts of loyal Germans and Italians here and their native-born citizen issue and depressed public morale. Loyalty has no connection with ancestry. It is a product of nationality. These citizens are nationals of the United States and their loyalty is undeniable.

Whence does the Army derive authority to play this omnipotent role over the lives of these citizens? Not from the President—not from Congress. It is not empowered to determine whether there is a necessity for depriving citizens of their statutory and constitutional rights. Congress alone can give and take away statutory rights, but not even Congress can take away constitutional rights. The Constitution is still the *"supreme law of the land."*

Bill of attainder.

The statute, Public Law No. 503, is a Bill of Attainder as applied to defendant and to other citizens of Japanese ancestry and hence is repugnant to the provisions of Art. I, Sec. 9, cl. 3 of the Constitution. It is a law which, by the threat of its application, encourages and aids the military authorities, without judicial trial, to expatriate or banish a citizen not for the commission of crime but solely by reason of race or color. *In re Yung Sing Hee* (C. C. Or.), 36 Fed. 437; 16 *Corpus Juris Secundum* 902-3.

Abridgement of fundamental liberties.

Civilian Exclusion Order No. 57 and Public Law No. 503 which is an instrument designed to intimidate and coerce these citizens of Japanese descent into compliance with the fiats thereof are unconstitutional and void on their faces and as applied to appellant herein. They are arbitrary, unreasonable and oppressive. They deprive him and all other citizens of similar ancestry, within the areas prescribed and beyond said areas, of the fundamental *"privileges and immunities"* of citizens guaranteed by Art. IV, Sec. 2, Cl. 1 of the Constitution. See *Corfield v. Coryell,* 4 Wash. (U. S.) 371, 6 Fed. Cas. No. 3,230; *Hague v. C. I. O.,* 307 U. S. 496. These *"privileges and immunities"* are implied, are inherent in citizens and arise as an incident to national and to state citizenship (see Sec. 1, 14th Amendment) and are safeguarded to them by the *"due process" clause of the 5th Amendment.*

What are these rights? They have been termed *"rights so vital to the maintenance of democratic institutions"* (*Schneider v. Irvington,* 308 U. S. 147, 161); the *"immutable principles of justice which inhere in the very idea of free government"* (*Holden v. Hardy,* 169 U. S. 366, 389); and the *"fundamental rights which belong to every citizen as a member of society"* (*U. S. v. Cruikshank,* 92 U. S. 542). Included among them is *"protection by the government"* and the *blessings of life, liberty and property* (*Corfield v. Coryell,* supra); *"freedom of movement"* (*Crandal v. Nevada,* 6 Wall. 35, 48-9; *People v. Ed-*

wards, 314 U. S. 160, 62 S. Ct. 164; *Williams v. Fears,* 179 U. S. 279); the right *"to live and work" where one wills* (*Allgeyer v. Louisiana,* 165 U. S. 578, 589); and the *"right to establish a home"* (*Meyer v. Nebraska,* 262 U. S. 390, 399; *Truax v. Raich,* 239 U. S. 33, 41.) The right to *earn a livelihood* too is necessarily one of these fundamental rights. Of all of these rights the appellant and other unfortunate citizens have been deprived without the *"due process of law"* guaranteed by the 5th Amendment.

Unreasonable search and seizure.

Civilian Exclusion Order No. 57 is unconstitutional and void on its face and as applied to appellant herein and to all citizens of Japanese ancestry upon whom it operates in that it compels him and them, under threat of prosecution under Public Law No. 503, without any hearing of any sort, judicial or administrative, to abandon home and possessions and seek exile. If they fail so to do they are thereunder summarily seized by federal troops and confined to concentration camps for such time as the military authorities may determine. This is not only a compulsory banishment for an unknown duration but is also an internment indistinguishable from that which we impose upon prisoners of war. This treatment is meted out without charging or accusing them with the commission of crime or the intent to commit crime. The appellant and other citizens of Japanese ancestry have been seized and imprisoned in these camps by the military authorities in violation of the *"unreasonable search and seizure"* clause of the *4th Amendment.*

The appellant and others have been arrested without warrant issued upon probable cause and supported by oath or affirmation particularly describing the person to be seized in violation of the provisions of the 4th Amendment and, thereafter, have been charged with a violation of Public Law No. 503 which is nothing but a charge of having Japanese ancestry. The fact the country is at war does not justify such arrest. The exclusion order violates the *4th Amendment* and the *"due process"* clause of the *5th. Casserly v. Wheeler* (C. C. A. Cal.), 282 Fed. 389.

Deprival of liberty without due process of law.

Neither the exclusion order nor the statute adequately informs appellant of the nature and cause of any accusation against him and, consequently, both are void as repugnant to the *5th* and *6th Amendments.* Reduced to their essence this exclusion order and similar ones issued by the military authorities do precisely this: They accuse citizens of Japanese ancestry of an undefined and indeterminate crime, prejudge them without a hearing or trial of any character, judicial or administrative. They find them guilty on a nebulous suspicion lacking the dignity of evidence and existing only in the minds of those responsible for these injustices. The suspicion is elevated to a conclusive presumption of guilt and they have no opportunity to protest, to establish their innocence and prove their loyalty. After prosecution under the statute, or without such prosecution, these people are, under the exclusion orders, arrested by the troops and cast into concentration camps where

they remain interned under military guards until such time as the Army sees fit to release them. Can this treatment be said to constitute the *"due process of law"* guaranteed by the *5th Amendment?* It cannot. It has been repeatedly held that the *"existence of a state of war"* cannot and does not suspend or destroy the guaranties and limitations of the *5th* and *6th Amendments.* See *U. S. v. L. Cohen Grocery Co.,* 255 U. S. 81; *Hamilton v. Kentucky Distilleries,* 251 U. S. 146; and also, *Northern Pacific Ry. Co. v. North Dakota,* 250 U. S. 135; *Juillard v. Greenman,* 110 U. S. 421; *U. S. v. Russell,* 13 Wall. (U. S.) 623; *McCulloch v. Maryland,* 4 Wheat. 316; *Strutwear v. Olson,* 13 Fed. Supp. 384.

Taking private property without just compensation.

These exclusion orders also discriminate against and deprive these citizens of the possession of their homes, farms and possessions which they are compelled to leave behind them when they are exiled. Does this not constitute a taking of private property under a claim that it is for public use or necessity without just compensation and therein violate the provisions of the Fifth Amendment also? See 67 *Corpus Juris* 373, Sec. 62, and p. 373, Sec. 66, and cases there cited. The right of requisitioning and expropriating private property for war purposes is recognized when it is an urgent military necessity but it must be accompanied or later followed by compensation in order to satisfy the requirement of the Fifth Amendment. *Smith v. Brazelton,* 1 Heisk. (Tenn.), 44, 2 Am. R. 678; 67 *Corpus Juris* 373 and

376 and cases there cited. These citizens have been deprived of the means of earning a livelihood and of the possession of their properties without compensation and in the absence of any military necessity or urgency.

Congress is vested with power by Art. I, Sec. 8, Cl. 11 of the *Constitution* to confiscate property of the enemy. See also, 67 *Corpus Juris* 388, Sec. 102(b). No similar power over the property of citizens or aliens within this country, however, resides in Congress or in the military forces unless based upon urgent military necessity in the theater of war and followed by compensation as required by the *Fifth Amendment*. The property of these citizens has been confiscated as though it were captured enemy property without color of any statutory right and in violation of the constitutional guarantee.

Deprival of a judicial trial.

Public Law No. 503 is, in form and effect, a threat to American citizens of Japanese ancestry to submit to the military rule displayed by Public Proclamation No. 3 and Civilian Exclusion Order No. 57 and similar exclusion orders issuing from military sources under penalty of being prosecuted under its terms. It is a whip used to drive them from civil and military jurisdiction. If enforced as law our Federal Courts would become an instrumentality of the military power and be converted into mere courts-martial. The military power would then exercise an unchecked control over these unfortunate civilians and have the power to determine whether or not these unhappy victims of

oppression are entitled to the privileges of citizenship. The military authorities have usurped judicial functions—they have tried *in absentia* and *in camera* and *without right* a whole segment of our citizenry and condemned it without accusation or hearing to banishment and internment.

The destruction of the rights, personal and property, of the appellant and other American citizens of Japanese ancestry under a claim of military urgency, necessity or emergency is without a foundation. Neither ulterior design nor suspicion of disloyalty reposing in the minds of the military authorities or others is a legal justification for such action. That the military class instead of Congress should have the right, to determine that such a necessity exists in an area within our boundaries and outside a theater of war where martial law has no application, would result in military absolutism. If upheld, these military exclusion orders have the effect of announcing the debasement of our Courts.

In subjecting appellant to forcible removal by the federal troops from a place where he had a legal right to be without first accusing him of crime and offering him the opportunity to be heard in his own defense Exclusion Order No. 57 deprives him of the *right to a speedy and public trial* and the incidents thereof, including the right of counsel, in violation of the *Sixth Amendment* of the federal Constitution. One has the right to be informed of the nature of the accusation against him. *U. S. v. Potter* (C.C. Mass.), 56 Fed. 83, 88, reversed on other grounds, 155 U. S.

438. The right of a *citizen* to be informed of the nature and cause of accusation against him and to a fair trial is not suspended by a state of war and even Congress cannot deny this right guaranteed by the *Sixth Amendment* and also by the *"due process"* clause of the *Fifth. U. S. v. L. Cohen Grocery Co.*, supra; *Hamilton v. Kentucky Distilleries,* supra; *Ex parte Milligan,* supra.

Our Constitution provides for a judicial trial where one is accused of sedition or treason but the military here would judge appellant according to its motion of military law and expediency and dispose of the formality of an accusation and trial. Alien belligerants engaged in espionage and sabotage activities caught red-handed and while in flight are granted trials before military tribunals (*U. S. ex rel. Quirin v. Cox, et al.,* decided by this Court on October 29, 1942), or in our Federal Courts. However, where the unexpressed and fictitious charge against a citizen of Japanese stock at most is a mere suspected disloyalty a military commander dispenses with a hearing before a military commission and prevents a judicial trial simply by incarceration induced by the show of bayonets.

Orders usurp judicial powers.

In war or in peace if a *citizen* is charged with the violation of a federal law he is *triable* only by the Federal Courts where the judicial power of the United States resides. Sec. 1, Art. III, *U. S. Constitution.* If a citizen is *charged* with treason he is triable only in the Federal Courts. Cl. 1, Sec. 3, Art. III. Neither

Congress nor the military authority is authorized to interfere with judicial administration or usurp judicial power but the Army has nevertheless interned the appellant.

The Courts are powerless to punish appellant on a mere suspicion or to punish him unless he is guilty of some overt act and had criminal intent at the time. If the judiciary cannot punish a person except on proof of a criminal act accompanied by criminal intent where does the military derive such power? That 73,000 citizens could be punished for crime that has not been committed taxes the imagination and is incredible.

Under authority of General DeWitt approximately 200 *individual* exclusion orders have issued from October, 1942, to date, banning individuals from the military district of the Western Defense Command. With the possibility of a few exceptions these persons so banned were naturalized citizens of prior German or Italian ancestry. It is highly significant to this appeal to note that these suspected persons were given written notice to appear before various Hearing Boards set up by the General under the Wartime Civil Control Administration, a military agency, each board consisting of three army officers. Thereafter administrative hearings in each of these cases were given by these tribunals before the individual banning orders issued. The suspected persons were given the opportunity to be present with counsel in an advisory capacity. Like hearings for the evacuated citizens of Japanese ancestry were never given however. It is

significant that the Attorney General has brought suits to annul the citizenship papers of these naturalized Germans and Italians on the ground of fraud in the procurement thereof. These suits are designed to prove them to be aliens and thereby to demonstrate that their exclusion was justified under the *Alien Enemy Act* and that it was not the result of arbitrary military action. Like reasoning has no application to the native born citizens of Japanese ancestry who are citizens by birth under the 14th Amendment.

Lettres de cachet.

The exclusion orders and the statute which gives them effect are, in reality, penal *lettres de cachet* which, on their faces, suggest they were intended to be applied impartially to citizens and aliens. In operation, however, they have been applied to citizens on a race discrimination basis. To plague American citizens shrewd minds have revived these letters which once occasioned so much suffering to innocent French citizens. It took the French Revolution of 1789 and a decree of the Constituent Assembly of France to abolish them. It is significant that Napoleon Bonaparte, a military man and executive official of megalomaniacal tendencies who became a dictator, thereafter restored them under a plea of *military necessity* in a decree issued on March 9, 1801, on the states prisons. This was one of the chief reasons he was thereafter charged by the *sénatus-consulte* which pronounced his fall on April 3, 1814, with having violated *"the constitutional laws"* of France. The 4th, 5th, 6th and 8th *Amend-*

ments of our federal Constitution were adopted to prevent what such letters occasion.

Banishment is illegal.

The exclusion orders and the statute, as their enforcement machinery, compel the exodus of a people. Compelling a person to quit a *city, place* or *country* for a period of time or for life is *banishment. Exile* is banishment. *Transportation* is a banishment which deprives one of liberty after arrival at the place to which one is asported. *Relegatio* is a banishment in civil law which leaves a few rights of citizenship in a person. *Abjuration of the realm* is a species of banishment under oath never to return unless by permission. See *Black's Law Dictionary* for definitions and supporting citations. A banishment of any of the foregoing types is an *infamous punishment* specifically prohibited by the provisions of the *5th Amendment.* See *U. S. v. Moreland,* 258 U. S. 433, 66 L. Ed. 700. See also the discussion of Justice Brewer in a separate opinion in *U. S. v. Ju Toy,* 198 U. S. 253, 269-270, 49 L. Ed. 1040, stating that banishment is also a *cruel and unusual punishment* prohibited by the *8th Amendment* in addition to the *5th Amendment.* See also, *Ex parte Wilson,* 114 U. S. 417, 428, 29 L. Ed. 89, 93.

There was no justification for the issuance of civilian exclusion orders by the military authorities under which citizens are condemned to banishment simply because of their race. Never, in war or in peace, has such an outrageous invasion of the rights and liberties of American citizens been undertaken in America.