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CITATIONS

525634—43——1

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 870

GORDON KIYOSHI HIRABAYASHI

v.

THE UNITED STATES OF AMERICA

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court for the Western District of Washington (R. 9–18) is reported in 46 F. Supp. 657. The opinion of Circuit Judge Denman, dissenting from the certification of questions by the Circuit Court of Appeals, is not reported.

JURISDICTION

The certificate of questions of law upon which the Circuit Court of Appeals desired instruction for the decision of this case was filed on March 30, 1943. On April 5, 1943, this Court directed that the entire record be certified up to this Court

so that the whole matter in controversy might be considered. The jurisdiction of this Court rests on Section 239 of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The defendant, an American citizen of Japanese ancestry, was convicted under the Act of March 21, 1942, which made it a misdemeanor to violate restrictions prescribed by a military commander for a military area which had been designated as such in accordance with an executive order of the President. The violations consisted of wilful failure to observe an 8 P. M. to 6 A. M. curfew and to report at a designated place in connection with the exclusion of all persons of Japanese ancestry from that area. The validity of the conviction raises the following questions:

1. Whether the curfew and exclusion measures were within the war powers granted by the Constitution to Congress and the President.

2. Whether the exclusion of all persons of Japanese ancestry as a group was an unreasonable classification and denial of due process under the Fifth Amendment.

3. Whether the Act of March 21, 1942, making it a misdemeanor to violate orders of military commanders involves an invalid delegation of legislative power.

CONSTITUTION, STATUTES, ORDERS, AND PROCLAMATIONS INVOLVED

The various provisions of the Constitution, statutes, orders and proclamations involved are set forth in Appendices A, B, C, and D, *infra,* pp. 83–124.

The important statutory provisions, orders and proclamations may be summarized chronologically as follows:

The Joint Resolution of Congress of December 8, 1941, declared a state of war to exist with the Empire of Japan, authorized and directed the President to employ the entire naval and military forces and the resources of the Government to carry on the war and pledged all of the resources of the country to bring the conflict to a successful termination.

On December 11, 1941,[1] the eight Western States and the Territory of Alaska were activated by the War Department as the Western Defense Command and designated as a "theater of operations." An area approximately 100 miles wide extending from the Canadian border along the Pacific Coast to the California-Mexican border was declared to be a "combat zone."[2]

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[1] General Order No. 1, December 11, 1941. See record in *Yasui* v. *United States*, No. 871, pp. 79–80.

[2] "The theater of war comprises those areas of land, sea, and air which are, or may become, directly involved in the conduct of the war.

"A theater of operations is an area of the theater of war necessary for military operation and the administration and

On February 19, 1942, the President issued Executive Order No. 9066 in which he recited the necessity for protection against espionage and sabotage and in which he authorized the Secretary of War and Military Commanders designated by him, whenever such action was necessary—

> * * * 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 * * *.

Pursuant to the aforesaid Executive Order and the authority vested in him by the Secretary of War, Lieutenant General John L. DeWitt, Commanding General of the Western Defense Command and Fourth Army, in Public Proclamation No. 1, *infra,* p. 97, on March 2, 1942, declared the Pacific Coast of the United States (which area is included in the Western Defense Command) to be, because of its geographical location—

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supply incident to military operation. The War Department designates one or more theaters of operation.

"A combat zone comprises that part of a theater of operations required for the active operation of the combatant forces fighting" (Field Service Regulations—Operations, War Department, May 22, 1941, Field Manual 100–5, pars. 1–2).

> * * * particularly subject to attack, to attempted invasion by the armed forces of nations with which the United States is now at war, and, in connection therewith, is subject to espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations.

This proclamation designated certain areas within the Western Defense Command as "Military Areas" and "Military Zones" and declared that "such persons or classes of persons as the situation may require" would, by subsequent proclamation, be excluded from certain of these areas, and further declared that with regard to other of said areas "Certain persons or classes of persons" would be permitted to enter or remain therein under certain regulations and restrictions to be subsequently prescribed.

Public Proclamation No. 2, *infra,* p. 101, dated March 16, 1942, issued by General DeWitt, designated further Military Areas and Military Zones, and contained a recital similar to the one in Public Proclamation No. 1 concerning the exclusion of persons or classes of persons, from these areas, and regulations and restrictions applicable to persons remaining within them.

Executive Order No. 9102, dated March 18, 1942 (7 F. R. 2165), established the War Relocation Authority in the Office for Emergency Management in the Executive Office of the President;

authorized the Director of the War Relocation Authority to regulate and effectuate a program for the removal, relocation, maintenance, and supervision of persons from areas designated pursuant to Executive Order No. 9066; and authorized the Director to prescribe regulations necessary or desirable to promote effective execution of the program.

The Act of March 21, 1942, *infra,* p. 86, provides that whoever shall enter, remain in, leave or commit any act in any military area or zone prescribed under the authority of Executive Order of the President by the Secretary of War or a military commander designated by him, 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 restrictions and order and his act was in violation thereof, be guilty of a misdemeanor.

Public Proclamation No. 3, *infra,* p. 105, dated March 24, 1942, recited that the present situation within the previously described Military Areas and Zones required—

> as a matter of military necessity the establishment of certain regulations pertaining to all enemy aliens and all persons of Japanese ancestry within said Military Areas and Zones * * *

and this Proclamation established the following regulations:

> 1. From and after 6:00 A. M., March 27, 1942, all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry residing or being within the geographical limits of Military Area No. 1, or within any of the Zones established within Military Area No. 2, as those areas are defined and described in Public Proclamation No. 1, dated March 2, 1942, this headquarters, or within the geographical limits of the designated Zones established within Military Areas Nos. 3, 4, 5, and 6, as those areas are defined and described in Public Proclamation No. 2, dated March 16, 1942, this headquarters, or within any of such additional Zones as may hereafter be similarly designated and defined, shall be within their place of residence between the hours of 8:00 P. M. and 6:00 A. M., which period is hereinafter referred to as the hours of curfew. * * *

Beginning March 24, 1942, General DeWitt also issued a series of Civilian Exclusion Orders, pursuant to the provisions of Public Proclamation No. 1, each such order relating to a specified area within the territory of his command. The order applicable to the defendant herein was Civilian Exclusion Order No. 57, issued May 10, 1942, *infra,* p. 119; it declared that from and after 12 o'clock noon, May 16, 1942, all persons of

Japanese ancestry be excluded from a specified portion of Military Area No. 1 in Seattle, Washington, including the place of residence of the defendant, and required a responsible member of each family and each individual living alone affected by the order, to report on May 11 or 12, 1942, to a designated Civil Control Station in Seattle, Washington.

Meanwhile, General DeWitt had issued Public Proclamation No. 4 on March 27, 1942, which recited the necessity of providing for the welfare and assuring the orderly evacuation and resettlement of the Japanese, and provided that commencing midnight March 29, 1942, all Japanese were prohibited from leaving the military area until future orders would permit or direct.

STATEMENT

The defendant was found guilty under an indictment for violating the Act of March 21, 1942 (Public Law No. 503, 77th Congress, 2d Sess.). The indictment had been returned in the United States District Court for the Western District of Washington, and was in two counts. The first count charged that the defendant, a person of Japanese ancestry residing in Seattle, Kings County, Washington, failed to report to a designated Civil Control Station in Seattle on May 11 or 12, 1942, as required by the terms of Civilian Exclusion Order No. 57 of May 10, 1942, *infra,* p. 119, issued by Lieutenant General John L. DeWitt, Commanding

General of the Western Defense Command and Fourth Army, and that the defendant knew or should have known of the existence and extent of the order. (R. 1–2.)

The second count of the indictment charged that the defendant on or about May 4, 1942, between the hours of 8 p. m. and 6 a. m., was not within his place of residence as required by General DeWitt's Public Proclamation No. 3 of March 24, *infra,* p. 105, effective on and after 6 a. m. March 27, 1942, for all persons of Japanese ancestry, and that the defendant knew or should have known of the existence and extent of those restrictions (R. 2–3).

An amended demurrer (R. 5–8) and a plea in abatement (R. 8–9) alleging that the defendant never was a subject of, and never bore allegiance to, the Empire of Japan, were overruled and denied (R. 18–19).

The Government's evidence showed that the defendant had failed to report to the Civil Control Station on May 11 or May 12, 1942, to register for evacuation, and that the defendant had admitted his failure to do so by reason of a conviction that he would be waiving his rights as an American citizen (R. 32). The evidence also showed that for like reason he was away from his residence after 8 p. m. on May 9, 1942 (R. 33).

The defendant offered to prove that his parents were born in Japan of Japanese ancestry; that subsequent to their conversion in the Christian reli-

gion they came to the United States; that they were married in the United States and have never returned to Japan (R. 31–32); that the defendant was born in Seattle on April 23, 1918, and educated in the public schools and at the time of his arrest was a senior at the University of Washington majoring in mathematics (R. 34); that the defendant has never been to Japan and has never had any connection with the Japanese living in Japan; that the defendant has been active in the Boy Scout Movement and the University Y. M. C. A. (R. 34); that the defendant honestly believed that the exclusion order and curfew regulation discriminated against him purely on the basis of race or color and were unconstitutional and that for him to obey them voluntarily would be a waiver of his constitutional rights; that the defendant believed that it was his right and his duty as an American citizen to refuse to obey the exclusion order and the curfew regulation and to defend the prosecution in order to have the constitutional questions determined. (R. 34–35.)

The defendant was found guilty on both counts (R. 19), and was sentenced to three months imprisonment on each count, the execution of the sentence on both counts to run concurrently (R. 24).

FACTS UNDERLYING THE CHALLENGED ORDERS AND PROCLAMATIONS

The record in this case does not contain any comprehensive account of the facts which gave rise to the exclusion and curfew measures here

involved. These facts, which should be considered in determining the constitutionality of the Act of March 21, 1942, as here applied, embrace the general military, political, economic, and social conditions under which the challenged orders were issued. These historical facts, which we shall endeavor to set forth, are of the type that are traditionally susceptible of judicial notice in considering constitutional questions,[3] and in particular, many of these facts appear in official documents, such as the contemporary Tolan Committee's reports (H. Rep. No. 1911 and No. 2124, 77th Cong., 2d Sess.), which are peculiarly within the realm of judicial notice.[4]

[3] See *Chastleton Corp.* v. *Sinclair*, 264 U. S. 543, 548; *Adkins* v. *Children's Hospital*, 261 U. S. 525, 560; *The Appollon*, 9 Wheat. 362, 374; *Mugler* v. *Kansas*, 123 U. S. 623, 622; *Austin* v. *Tennessee*, 179 U. S. 343, 348; *Schaefer* v. *United States*, 251 U. S. 466, 472–473; *Meyer* v. *Nebraska*, 262 U. S. 390, 403; *Liggett Co.* v. *Baldridge*, 278 U. S. 105, 113–114; *Alberto* v. *Nicolas*, 279 U. S. 139; *The Atchison, etc. Ry. Co.* v. *United States*, 284 U .S. 248, 260; *Central Kentucky Co.* v. *Comm'n*, 290 U. S. 264, 274; *Ashwander* v. *Valley Authority*, 297 U. S. 288, 327; *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399; *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1; *Ohio Bell Telephone Co.* v. *Comm'n*, 301 U S. 292, 301 See also Wigmore, *Evidence* (3rd ed. 1940), sec. 4L, 2555; Barnett, *External Evidence of the Constitutionality of Statutes*, 58 Am. L. Rev. 88 (1924); Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv. Law Rev. 6 (1924).

[4] See *Hoyt* v. *Russell*, 117 U. S. 401, 405; *Jones* v. *United States*, 137 U. S. 202, 216; *Brown* v. *Piper*, 91 U. S. 37, 42; *Shapleigh* v. *Mier*, 299 U. S. 468, 475; *Labor Board* v. *Jones & Laughlin*, 301 U. S. 1, 43; *Arizona* v. *California*, 283 U. S. 423, 453; *United States* v. *Carolene Products Co.*, 304 U. S.

A

THE MILITARY SITUATION ON THE PACIFIC COAST

The exact and detailed military situation affecting the Pacific Coast after the attack on Pearl Harbor, which was within the personal and official knowledge of the President, the Secretary of War and General DeWitt when it was determined that the entire Japanese population should be evacuated, was a closely guarded military secret. It was not a matter of public knowledge then or now, and probably cannot be a matter of public knowledge at least until the military authorities decide that there is no possible military risk. However, the facts about the military situation which were then publicly known or have since been disclosed may be stated in support of the action taken.

Japanese Victories.—On the morning of Decembed 7, 1941, the Japanese attacked the United States Naval Base at Pearl Harbor without warning. Simultaneously they struck against Malaysia, Hong Kong, the Philippines, and Wake and Midway Islands.

On the day following, the Japanese Army invaded Thailand. Shortly thereafter, the British battleships "H. M. S. Wales" and "H. M. S. Repulse" were sunk off the Malay Peninsula. The

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144, 148–150; *H. J. Heinz Co.* v. *Labor Board*, 311 U. S. 514, 523–524; *Nebbia* v. *New York*, 291 U. S. 502, 516–521; *Muller* v. *Oregon*, 208 U. S. 412, 419–421; *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 183–184; cf. *Jacobson* v. *Massachusetts*, 197 U. S. 11, 31–34. See also Wigmore, *Evidence* (3rd ed. 1940), Sec. 2567a; Thayer, *Preliminary Treatise on the Law of Evidence* (1898), pp. 307–308.

enemy's successes continued without interruption. On the 13th of December, Guam was taken, and on December 24th and 25th, respectively, the Japanese captured Wake Island and occupied Hong Kong. On January 2nd Manila fell and on February 10th Singapore, Britain's great naval base in the East, fell; on the 27th of February the battle of the Java Sea resulted in a naval defeat to the United Nations. Thirteen United Nations' warships were sunk and one damaged, whereas Japanese losses were limited to two warships sunk and five damaged.

On the 9th of March the Japanese forces established full control over the Netherlands East Indies; Rangoon and Burma were occupied. Bataan and Corregidor, which were then under attack, subsequently gave way on April 9 and May 6, respectively. The Philippines had completely fallen.

Thereafter, on June 3rd, Dutch Harbor, Alaska, was attacked by Japanese carrier-based aircraft. And on June 7th, contemporaneously with an attack on Midway the Japanese gained a foothold on Attu and Kiska Islands,[5] from which they have not yet been dislodged. Moreover, on two occasions, once in February and once in June 1942, the coasts of California and Oregon, respectively, had been shelled.[6] The extent of the danger can be seen from the contem-

[5] *New York Times* for June 13, 1942, p. 1, col. 8; World Almanac for 1943.

[6] *New York Times*, June 23, 1942, p. 1, col. 4; p. 9, col. 4.

poraneous attempt of the Japanese to occupy Midway Island in June. If that attack had succeeded and Midway Island had fallen, Hawaii would have again been under the immediate threat of occupation, and peril to the West Coast itself would have mounted.

Although the effect of the Japanese attack of December 7, 1941, on the security of the continental United States for military reasons was not fully brought home to the American public at the time, the extent and the significance of the damage were revealed by the Secretary of the Navy in December 1942.[7] In explanation of the Secretary's report on the damage, it was stated that the Japanese had a naval superiority of three or four to one in the Pacific Ocean following the Pearl Harbor attack, and that the Japanese could have seized Oahu Island, on which Pearl Harbor is located, if they had realized the full extent of the inability of the United States to defend itself. The Secretary pointed out that a follow-up attack had been feared.[8] The importance to the security of the continental United States of the damage done in the at-

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[7] *New York Times* for December 6, 1942, p. 69, col. 2 (report of Secretary of the Navy Knox on the extent of the damage at Pearl Harbor); see previous statement by Secretary Knox, *New York Times* for December 16, 1941, p. 1, col. 7; p. 7, col. 2; *New York Times* for December 18, 1941, p. 2, col. 3.

[8] *New York Times* for December 6, 1942, p. 71, col. 2; p. 69, col. 3.

tack on Hawaii is underlined by the facts that the Island of Oahu constituted the largest naval base of the United States, and probably its strongest fortified area of any nature, and that it was the last stronghold of defense lying between Japan and the West Coast.[9]

Accordingly, at the time of the initiation of the evacuation program here in issue, it was the utmost military importance to prepare against an invasion of the Pacific Coast. It was incumbent to consider whether any condition existed within the West Coast area which might obstruct its successful defense in the event of an attempted invasion. There also was a danger, even in the absence of attempted invasion, of bombing raids on the West Coast, particularly in view of the American raid over Japan for which reprisal raids seemed possible.[10] Whether the success and effect of Japanese air raids might be influenced by internal conditions on the West Coast was plainly a consideration that had to be taken into account. Therefore, attention neces-

[9] See comment by Lt. Col. Franz J. Jonitz, Quartermaster Corps Headquarters, Hawaiian Department, in the *Quartermaster Review* for May-June 1941, p. 17; A. R. Elliott, *United States Defense Outposts in the Pacific*, Foreign Policy Reports (published by the Foreign Policy Association) for March 15, 1941, particularly p. 5; F. MacLiesh and C. Reynolds, *Strategy of the Americas* (1941), pp. 67, 71; George Fielding Eliot, *The Ramparts We Watch* (1938), pp. 161, 167–169; Hanson W. Baldwin, *Our Gibraltar in the Pacific*, New York Times for February 16, 1941, sec. 7, p. 4.

[10] See statements of Secretary of War Stimson in the *New York Times* for May 15, 1942, p. 14, col. 6; for May 29, 1942, p. 1, col. 5.

sarily had to be directed to the nature of modern warfare and the disposition of the inhabitants of that area toward the war.

Fifth Column Threat.—The threat of invasion and attack inevitably created apprehension of the use by the enemy of the so-called fifth column technique of warfare. The history of modern warfare prior to December 7, 1941, had amply demonstrated that one of the most effective weapons of an invader consists of sabotage and other forms of assistance afforded by sympathizers residing within the country under attack. Citizen and alien alike have been employed to carry on this type of warfare; and the full extent of such assistance is, of course, not subject to determination until the invasion or attack has been completed or is at least well under way.[11]

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[11] See Col. William Donovan and Edgar Mowrer, *Fifth Column Lessons for America* (with introduction by Secretary of the Navy Knox) (published by the American Council on Public Affairs), pp. 6 *et seq.;* C. Porter, *Crisis in the Philippines* (1942), p. 140. See *Ex parte Liebmann* [1916], 1 K. B. 268, where it was stated (p. 278): "methods of warfare or ancillary to warfare have come into practice on the part of our foes which involve the honeycombing the realm with enemies, not only for the purpose of obtaining and dispatching information, but for purposes directly helpful to the carrying out of enterprises either actually warlike or eminently calculated to assist the successful prosecution of war." It was also stated that "the Courts are entitled to take judicial notice of certain notorious facts which may be summarized thus: There are a large number of German subjects in this country. This war is not being carried on by

West Coast War Industries.—The concentration of war facilities and installations on the West Coast made it an area of special military concern at any time and especially after the sensational Japanese successes. Important Army and Navy bases [12] and a large proportion of this nation's vital war production facilities were located in that region.

For the period from June 1940 through December 1941 contracts equalling in value approximately one-fourth of the total value of the major aircraft contracts let by the principal procurement agencies, were to be performed in the State of California. During the same period, California ranked second, and the State of Washington ranked fifth, of the States of the Union with respect to the total value of shipbuilding contracts to be performed therein. Of the total value of supply contracts of all types let by these agencies during this period, California was again in first place with about one-tenth of the total. The relative importance of California and Washington for the entire period from June 1940 to February 1943 in the combined production of aircraft and

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naval and military forces only. Reports, rumours, intrigues play a large part. Methods of communication with the enemy have been entirely altered and largely used" (pp. 274–275).

[12] See MacLiesh and Reynolds, *op. cit. supra*, pp. 66–67; Eliot, *op. cit. supra*, p. 162.

ships is approximately the same as for the earlier period.[13]

In view of such concentration of defense facilities in this region and in view of the course of the war at that time, it was of the highest order of military importance to take into account the extent and nature of the Japanese residents on the West Coast and their possible cooperation with the enemy.

B

THE JAPANESE POPULATION WITHIN THE WESTERN DEFENSE COMMAND

Approximately 112,000 persons of Japanese descent, consistituting almost ninety percent of the total number of approximately 126,000 of such persons in the United States, resided in the three West Coast states of California, Washington, and Oregon at the time of the promulgation

[13] See *State Distribution of War Supply and Facility Contracts—June 1940 through December 1941* (issued by Office of Production Management, Bureau of Research and Statistics, January 18, 1942); *State Distribution of War Supply and Facility Contracts—Cumulative through February 1943* (issued by War Production Board, Statistics Division, April 3, 1943). While complete information on the location of the individual plants is not available to the public, it has been stated that more than half of the airplane plants in the country were on or near the Pacific Coast and that many of the key aircraft plants were in Los Angeles County (See *New York Times* for February 26, 1942, p. 1, col. 3). See also C. F. McReynolds, *Condors and Humming Birds*, *Aviation* (August 1941), p. 80, as to the concentration of aircraft plants in Southern California.

of the military regulations here in issue. About two-thirds of the total number and of the number residing in these three states are native-born citizens of the United States.[14] Not only were the great majority of persons of Japanese descent within this country concentrated on the West Coast, but also they were concentrated within particular counties and cities in the three West Coast states, notably in or near Seattle, Portland, and Los Angeles.[15]

Japanese Problem on the West Coast.—Japanese immigration to this country had created special problems at least since the close of the nineteenth century when the Japanese began to come to this country in substantial numbers.[16] The intensity

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[14] See *16th Census of the United States, for 1940, Population, 2nd Series, Characteristics of Population* (Dept. of Commerce)—for California, p. 10; for Oregon, p. 10; for Washington, p. 10; Fourth Interim Report of the Select Committee Investigating National Defense Migration, House of Representatives, House Report No. 2124, 77th Cong., 2d Sess., pp. 94, 96, hereinafter called the Tolan Committee Report.

[15] See *16th Census of the United States, supra*, for California, p. 61; for Oregon, p. 50; for Washington, p. 52.

[16] See Mears, *Resident Orientals on the American Pacific Coast* (1927), pp. 19–22, 39–43, 146–147, 156, 193; P. J. Treat, *Japan and the United States* (1928), p. 275; E. K. Strong, *The Second-Generation Japanese Problem* (1934), p. 1, ch. 4, p. 149; R. D. McKenzie, *Oriental Immigration*, 11 Encyclopedia of Social Sciences (1935), 490, 492–493; Hans Kohn, *Race Conflict*, 13 Encyclopedia of Social Sciences (1935), 36, 38; R. L. Buell, *Anti-Japanese Agitation in the United States*, 37 Political Science Quarterly (1922), 605, 608, *et seq.*, 38 Pol. Science Quarterly (1923), 57, *passim;* B.

of the situation, involving their relationship to the rest of the community, has fluctuated under the stimulus of politics and some parts of the press.[17] The prevailing viewpoint towards them was expressed in state legislation prohibiting alien Japanese from owning land [18] and prohibiting inter-marriage with Caucasians,[19] and by Section 13c of the Federal Immigration Law of 1924 (c. 190, 43 Stat. 161, U. S. C., Tit. 8, Sec. 213) which, rather than allowing a quota to enter as in the case of non-Asiatics, excluded persons of the Mongolian race with limited exceptions. On the economic level, the Japanese could secure professional or skilled employment, with rare exceptions, only among others of the Japanese race and such employment opportunities were not sufficient to satisfy the number of Japanese who desired to engage in such work.[20]

Schrieke, *Alien Americans, A Study of Race Relations* (1936), pp. 24–36, 43.

[17] Mears, *op. cit. supra*, at p. 398; P. J. Treat, *op. cit. supra*, p. 281; S. L. Gulick, *The American Japanese Problem* (1914), p. 169; H. A. Millis, *The Japanese Problem in the United States* (1915), pp. 249–250; J. Pajus, *The Real Japanese California* (1937), p. 167.

[18] 1913 Cal. Stat. 206, 1 Deering Gen. Laws, Act 261; 5 Oregon Comp. Laws Ann. Sec. 61–102; Washington, Rem. Rev. Stat. Sec. 10581–10582.

[19] California Civil Code Sec. 60; 2 Idaho Code Ann Sec. 31–206; Revised Code of Montana, Sec. 5702; Arizona Code Ann. (1939), Sec. 63–107.

[20] Mears, *op. cit. supra*, p. 188 *et seq.*, particularly pp. 198–209, 402–403; Strong, *op. cit. supra*, pp. 1–11, c. 10; *Hearings Before the House Committee Investigating National Defense*

There was relatively little social intercourse between the Japanese and the white population,[21] and the Japanese were, in general, physically isolated with respect to their places of residence.[22]

The reaction of the Japanese to their lack of assimilation and to their treatment is a question which of course does not admit of any precise answer. It is entirely possible that an unknown number of the Japanese may lack to some extent a feeling of loyalty toward the United States as a result of their treatment,[23] and may feel a consequent tie to Japan, a heightened sense of racial solidarity, and a compensatory feeling of racial pride or pride in Japan's achievements.

Alienage.—An additional factor to be considered is the alienage of a substantial portion of the

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Migration, 77th Cong. 2d Sess., hereinafter called Tolan Committee Hearings, pp. 11558, 11560.

[21] Millis, *op. cit. supra*, pp. 288–289; Gulick, *op. cit. supra*, pp. 169–171; Schrieke, *op. cit. supra*, pp. 39–40.

[22] Mears, *op. cit. supra*, at pp. 341–342, 348–349; Steiner, *The Japanese Invasion* (1917), pp. 104–107, c. 8.

[23] Iyenago and Sato, *Japan and the California Problem*, pp. 167–168, 172–177; Mears, *op. cit. supra*, pp. 106, 109–110, 153–154, 342; H. B. Johnson, *Discrimination Against the Japanese in California* (1907), *passim;* Ichihashi, *Japanese in the United States*, at p. 347. Cf. Strong, *op. cit. supra*, pp. 30–31.

On the other hand, an officer of the Japanese-American Citizens League expressed the view that he had not "become bitter" or lost faith as the result of discrimination and wished to combat it exclusively by democratic methods. Tolan Committee Hearings, pp. 11138, 11196–11197. And it was stated in H. Rep. No. 1911, 77th Cong., 2d Sess., p. 20, that "most of the evacuees are loyal to this country."

Japanese who were born abroad and are therefore ineligible for citizenship. *Ozawa* v. *United States,* 260 U. S. 178. Although the alien Japanese comprised only about one-third of the Japanese on the West Coast,[24] they represented a much greater proportion of those who were likely to be an active force in the community. While over 60% of the native-born population was under the age of 20, over 95% of the foreign-born population was between the ages of 19 and 70.[25] Furthermore, approximately 24% of the alien Japanese population on the West Coast had last arrived in the United States since 1929,[26] and thus have been in Japan during the period of its emphasis on nationalism and expansion. The influence of the first, or alien, generation on the second generation must be considered in the light of the preponderance of persons of mature years among the former as compared with the latter, and also in the light of the family relationships between persons of the two generations, for filial obligation and emphasis on the family unit constitute a conspicuous phase of Japanese culture. It may be noted, however, that because of the stress of the attempt by second-

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[24] See *16th Census of the United States*, *loc. cit. supra*, note 14.

[25] Source of computation: Bureau of Census Figures contained in Hearings before the Subcommittee of the Committee on Military Affairs of the United States Senate on S. 444, Part I, 1943, p. 65.

[26] Tolan Committee Report, p. 96.

generation Japanese to become assimilated and because of language difficulties between children and parents who have not learned to speak English fluently, parents have in many cases been unsuccessful in attempting to perpetuate the view that their children should follow their guidance, and a marked cleavage between the viewpoints and associations of the first and second generations has been observed.[27]

As to those of the first generation, the fact of their alienage would tend to cause them to have some association with the Japanese Consulate.[28] And in general, the Japanese consuls were viewed as persons of considerable prestige by the alien population, and even some of the second generation seem to have regarded them as personages of some importance.[29] The possibility of Japanese propaganda through this means, as part of its preparations for any war against this country, is obvious.

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[27] See Ichihashi, *op. cit. supra*, at p. 348; Tolan Committee Hearings, pp. 11148, 11223; Second Quarterly Report (June 1 to September 30, 1942) of the War Relocation Authority, pp. 55–58; Schrieke, *op. cit. supra*, pp. 36–39.

[28] See H. Rep. No. 1911, Preliminary Report of Select Committee Investigating National Defense Migration, House of Representatives, 77th Cong., 2d Sess., p. 17.

[29] See Miyamoto, *Social Solidarity Among the Japanese in Seattle*, 11 University of Washington Publications in the Social Sciences (December 1939), pp. 112–113; Tolan Committee Hearings, p. 11637.

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Dual Nationality.—The possibility of a continuing loyalty to Japan, even on the part of the second generation is a significant consideration when viewed in the light of the provisions for dual nationality.[30] A child born in the United States of Japanese alien parents prior to December 1, 1924, automatically became entitled to and retained Japanese citizenship unless a petition of renunciation was filed on his behalf by a legal representative before his 15th birthday, or by him at any time between his 15th and 17th birthdays. Such petitions would not become effective as renunciation of Japanese citizenship, however, unless personally approved by the Japanese Minister of the Interior.[31]

On the other hand, a child of Japanese alien parentage born in the United States after December 1, 1924, could claim or qualify for Japanese citizenship only if within 14 days of birth there had been filed on his behalf with the Japanese Consulate a written statement of intention to retain Japanese nationality.[32]

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[30] Cf. Nationality Law of Japan, Article 1, Flournoy and Hudson, *Nationality Laws*, p. 382.

[31] Nationality Law of Japan, Article 20, Section 3, Regulations (Ordinance No. 26) of November 17, 1924, Flournoy and Hudson, *Nationality Laws*, pp. 385–387. See also *Foreign Relations of the United States*, 1924, Vol. 2, p. 412 (Note of Honorable Jefferson Caffrey, The Chargé in Japan to the Secretary of State); Mears, *Resident Orientals on the American Pacific Coast*, pp. 107–108.

[32] See Mears, *Resident Orientals on the American Pacific Coast*, p. 108.

No official census of the number who did so is available. The Japanese consulates in the United States, however, have issued from time to time reports of the number of American-born children of Japanese parentage who still retain their Japanese citizenship, and the number of such children who have renounced or otherwise lost their Japanese nationality. On the basis of statistics released in 1927 by the Consul General of Japan at San Francisco, it appears that over 51,000 of the approximately 63,700 American-born persons of Japanese parentage in the United States held Japanese citizenship.[33] A census of the Japanese in the United States conducted in 1930 under the auspices of the Japanese Government purported to disclose that approximately 47% of the American-born persons of Japanese parentage in California held Japanese citizenship.[34]

An important aspect of dual citizenship was that the Japanese Government regarded all Japanese citizens as liable to military conscription and required them to apply for out-of-Empire deferment in order to avoid it.[35]

Shintoism.—Another factor to be taken into account in considering the viewpoints and loyalties

[33] See Mears, *op. cit. supra*, p. 429.

[34] See Strong, *op. cit. supra*, p. 142.

[35] See, *e. g.*, military conscription notice appearing in *Rafu Shimpo* (Los Angeles Japanese language daily newspaper), October 11, 1941.

of the West Coast Japanese is the existence and nature of Shintoism. It seems to be accepted that the basic doctrine of Shinto is the apotheosis of, and reverence for, the Japanese Imperial Family, and that the Japanese Government has, since at least the middle of the 19th century, made it a primary function of government to spread belief in Shinto throughout Japan.[36] As an amplification of the doctrine of the divinity of the Emperor, an attempt has been made in Japan to identify the extension of Japanese rule or influence as a sacred purpose.[37]

While the force of Shinto in Japan as a source of stimulation for patriotism and loyalty to the

[36] See Yamashita, Yoshitaro (formerly chancellor, Imperial Japanese Consulate, London), *The Influence of Shinto and Buddhism in Japan*, Transactions and Proceedings of the Japan Society of London, Vol. 14, p. 257, quoted in D. C. Holtom, *The National Faith of Japan* (1938), pp. 4–5; *Japan, Religion*, 15 Encyclopedia Brittanica (11th Ed., 1911), p. 222; *Japan, Religion*, 12 Encyclopedia Brittanica (14th Ed., 1936), pp. 926–927; *Shintoism*, 20 Encyclopedia Brittanica (14th Ed., 1936), p. 504; M. Anesaki, *Shinto*, 14 Encyclopedia of Social Sciences (1935), p. 24; A. M. Young, *Rise of a Pagan State* (1939), ch. 6; A. M. Underwood, *Shintoism* (1934), ch. 9; D. C. Holtom, *The Political Philosophy of Modern Shinto; A Study of the State Religion of Japan*, 49 Transactions of the Asiatic Society of Japan, Part II (1922), pp. 299–301; D. C. Holton, *Modern Japan and Shinto Nationalism* (1943), ch. 1, 2, and 3. For complete accuracy this form of Shinto is frequently termed State Shinto, since sects exist which emphasize reverence of others than the Emperor.

[37] See D. C. Holtom, *The National Faith of Japan* (1938), p. 289; Otto D. Tolischus, *Tokyo Record* (1934), pp. 13–16.

Japanese Emperor cannot be doubted, the prevalence of Shintoism among the West Coast Japanese is a difficult factor to evaluate. For one thing, religious surveys do not show the number of its adherents since belief in Shintoism together with simultaneous belief in another religion is possible and common, and also because the Japanese Government has frequently maintained that Shintoism could not properly be classed as a religion.[38] However, there can be no doubt that at least those Japanese who were at any time in Japan were exposed to Shinto indoctrination. And it has been stated that there was an increase in Shintoism on the West Coast in recent years.[39]

While Shinto doctrine was not originally a part of the Buddhist religion, Buddhism in Japan has

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[38] See Holtom, *The National Faith of Japan* (1938), p. 290, *et seq.*

[39] See Schrieke, *op. cit. supra*, p. 41.

While it is true that a 1936 census listed only one Shintoist Temple in Los Angeles (see 1 Religious Bodies, 1936, Department of Commerce, Bureau of Census, 1941, p. 7), there were in 1941, according to directories published by the West Coast Japanese language papers, 28 Shinto shrines in California, 2 in Washington, and 2 in Oregon. (The New World Sun Year-Book for 1941, pp 122, 112, 517, 319, 371, 279, 393, 190, 90, 497, 209, 612, 17, 492, 282, 629, 591; Japanese-American Directory (Nichibei Jusho Roku) for 1941, pp. 77, 82, 530, 268, 503, 232, 307, 156, 56, 177, 2, 429, 236, 549, 579). Some of these shrines, however, may have been devoted to the practice of sects of Shinto other than State Shinto. As to the number of shrines in Los Angeles, see also Japanese Telephone & Business Directory of Southern California, No. 29.

accommodated itself to, and has aided in the indoctrination of State Shinto.[40] On the West Coast a substantial number of Japanese were Buddhists,[41] and it has been stated that some of the Buddhist priests in the West Coast communities also attempted to indoctrinate their congregations with Japanese nationalism.[42]

Education of American-born children in Japan.—It has been estimated by the Tolan Committee that approximately 10,000 American-born children of Japanese parents had been sent to

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[40] D. C. Holtom, *Modern Japan and Shinto Nationalism* (1943), pp. 124, 148–151. Compare Sir Charles Eliot, *Japanese Buddhism* (1935), pp. 179–196.

[41] According to the 1936 survey, there were 65 Japanese clergymen, together with two deans and one bishop, connected with the Buddhist Mission of North America on the West Coast. The Mission had 31 churches in the three West Coast states, with 12,718 members, out of a total of 35 churches with 14,388 members in the United States as a whole. In connection with the Buddhist churches, some Japanese Language Schools of a religious nature were maintained (2 *Religious Bodies*, 1936, Department of Commerce, Bureau of Census, 1941, pp. 341–346).

[42] See Millis, *op. cit. supra*, pp. 267–268. Thus, a Buddhist priest at a dedication ceremony of a new Temple, was reported in the Los Angeles Japanese language daily, Rafu Shimpo, for November 22, 1940, as suggesting to his audience that "We are the race of Yamato which has received and carried on the flesh and blood of our ancestors over a period of 2,600 years. Therefore, there is no necessity for us to give up our spirit to the United States merely because we have received a little education."

Japan for part or all of their education. See H. Rep. No. 1911, 77th Cong., 2d Sess., p. 16.[43] Although some of them have doubtless become antagonistic towards the Japanese Government as a result of their visits,[44] this group of 10,000 is nevertheless regarded as containing some of the most dangerous elements in the Japanese community. H. Rep. No. 11, *supra.* Youths thus educated in Japan are essentially and culturally[45] Japanese, and it is probable that many of them are intensely loyal to Japan.[46] It is reasonable to assume that such students were inculcated with Japanese nationalistic philosophy and were exposed to the religious training which identifies the Emperor as a deity.[47]

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[43] The foregoing report estimates that there are about 60,000 American-born Japanese who had not been sent to Japan. These estimates should be compared with a survey conducted by the San Francisco Chapter of The Japanese American Citizens League in October 1940 which disclosed that 22.8% of the second generation were American-born and had been to Japan. See Tolan Committee Hearings, p. 11151. See also *id.*, pp. 11199–11200.

[44] See Tolan Committee Hearings, pp. 11220–11229.

[45] Ichihashi, *op. cit. supra*, pp. 319–320.

[46] *The Japanese in America*, Harpers Magazine (October 1942), pp. 489, 491, 492.

[47] See Holtom, *Modern Japan and Shinto Nationalism* (1942), pp. 6–7, 26, which indicates that religious training is an integral part of the Japanese educational program. Not only does such education stress the national character of Japan, but it focuses upon the divinity of the Imperial Family. See Holtom, *The National Faith of Japan* (1938), pp. 79–85, 125, 131–138.

Japanese Language Schools on the West Coast.—A further potential influence on the Japanese on the West Coast were the Japanese language schools. It has been stated that there were 248 such schools with 19,000 pupils in Southern California at the outbreak of the war,[48] that there were 14 schools in Oregon and 9 in Seattle, Washington.[49] The sessions at these schools were held outside the regular hours of the public schools.[50]

Although it has been suggested that the children were sent to these schools so that they might more easily converse with their parents [51] and because of increased employment opportunities in Japanese firms,[52] it nevertheless appears likely that the schools may have afforded a convenient medium for indoctrinating the pupils with Japanese nationalistic philosophy. There is evidence that the textbooks used at these schools were printed in Japan,[53] and that the Japanese

[48] Statement in the *Los Angeles Times* of January 23, 1942, quoted in Report on Japanese Activities, Appendix 6 to Hearings before a Committee on Un-American Activities, House of Representatives, 77th Cong., 1st Sess., p. 1894.

[49] Tolan Committee Hearings, pp. 11393, 11394; see also pp. 11348, 11338, 11702.

[50] See Mears, *op. cit. supra*, p. 358; Tolan Committee Hearings, pp. 11145, 11223.

[51] See Tolan Committee Hearings, p. 11,145.

[52] See Mears, *op. cit. supra*, p. 358; Strong, *op. cit. supra*, at p. 203; Tolan Committee Hearings, pp. 11144–11145, 11222–11223.

[53] See *Los Angeles Times*, cited in footnote 48, *supra*.

Government assisted the schools both financially and by sending teachers from Japan.[54]

Japanese Organizations.—There is evidence that the Japanese in this country were highly organized, and that many of the local associations were part of an integrated structure dominated by The Japanese Association of America which had been organized under the guidance of the Japanese Consulate.[55] Moreover, there were numerous other Japanese organizations which maintained close ties with Japan.[56] Whatever may be the full significance of these organizations, it is apparent that they probably tended to stimulate cohesiveness and social solidarity of the Japanese community and that they offered the Japanese Consulate a means at least for the dissemination of propaganda.

Possibility of Civil Disorder.—Finally, a consideration that cannot be ignored in viewing the

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[54] See *Un-American Activities in California* (Report to California legislature 1943), pp. 327–328. Cf. Tolan Committee Hearings, p. 11637.

[55] See Tolan Committee Hearings, p. 10975, *et seq.;* Beikoku Chuo Nihonjin Shi (History of the Central Japanese Association of America) edited by Shiro Fujioka (published in Tokyo in 1940), pp. 15, 170, 171, 175, 191, 303–304; cf. Mears, *op. cit. supra*, p. 342.

[56] For example, Heimusha Kai, The Society of Men Eligible For Military Duty, was listed as having 15 branches in California by The New World Sun Year-Book for 1941. As to its activities and relationship to Japan, see *Zaibei Nihonjin Shi* (History of Japanese Residents in the United States published by Zaibei Nihonjin Kai (Japanese Association of America) in Tokyo, 1940, p. 672.

situation at the time the exclusion program was carried out was the possibility of civil disorder arising from local violence against the Japanese. There was substantial reason to believe that the likelihood of such physical violence was more than a mere theoretical possibility, and that protective measures were necessary.[57]

SUMMARY OF ARGUMENT

I

The evacuation and curfew measures were authorized by the Act of March 21, 1942. That statute was enacted for the express purpose of implementing Executive Order No. 9066, which had been promulgated on February 19, 1942, and the evacuation and curfew measures adopted under that Order were plainly within its contemplation.

II

The Act of March 21, 1942, was a valid exercise of the war powers and is constitutional as applied here. This case does not involve any question of martial law. There has been no suspension of the privilege of the writ of habeas corpus, and the civil courts have not been superseded by military tribunals. This case does not present any of the large issues discussed in *Ex parte Milligan,* 4 Wall. 2.

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[57] See Tolan Committee Report No. 2124, pp. 145–147, 149–150; Tolan Committee Hearings, p. 11156.

The central question is whether there is support in the Constitution for the statute as applied. Article I grants comprehensive powers to the Congress, and Article II independently confers sweeping authority directly upon the President as Commander in Chief. The Joint Resolution of December 8, 1941, declared a state of war between the United States and Japan, and directed the President to employ the entire naval and military forces of the country and the resources of the Government to prosecute the war.

The Act of March 21, 1942 was amply warranted in the circumstances. The extent of the disaster at Pearl Harbor, only recently revealed to the public, left the West Coast exposed to destructive enemy attack. The Japanese, during the winter of 1942, were at the crest of their military fortunes, and were making bold and impressive strides in many theaters of war. The condition of our temporarily crippled Pacific fleet and the course of the war at that time rendered it imperative that those charged with the defense of our shores take adequate protective measures against a possible invasion of the West Coast.

The great majority of persons of Japanese ancestry in this country were concentrated on the West Coast. About one third of them were aliens, and the majority of the American-born were in the younger age groups. A significant number of the American-born had been sent to Japan for

their education, and many of them were regarded, by reason of their training abroad, as highly dangerous. The fact that the so-called fifth column type of warfare had been so apparently successful in recent years, and the fact that there had been evidence of extensive espionage at Pearl Harbor, made it imperative to take adequate precautionary steps.

Although it may be assumed that the majority of the Japanese residents on the West Coast were loyal to the United States, the very presence of the entire group presented grave danger because that group comprehended an unknown number of unidentified persons who constituted a serious threat. Prompt and decisive action was necessary, and it cannot be said that it was unreasonable to determine to exclude the Japanese as a whole from these vital areas, and to adopt such supplementary measures as the curfew.

The action thus taken did not result in any denial of due process. The exercise of governmental power generally interferes with one's liberty to a greater or lesser degree, and the only question is whether that interference is wholly unreasonable or arbitrary.

The exigencies of war may demand the imposition of restraints that would be unwarranted in times of peace. Indeed, an individual may be required to give up his freedom and lay down his life.

Selective Draft Law Cases, 245 U. S. 366. The curfew and exclusion measures herein are certainly less drastic than compulsory military service.

Nor is there any absence of due process in that all the Japanese have been evacuated as a group. The classification was not based upon invidious race discrimination. Rather, it was founded upon the fact that the group as a whole contained an unknown number of persons who could not readily be singled out and who were a threat to the security of the nation; and in order to impose effective restraints upon them it was necessary not only to deal with the entire group, but to deal with it at once. Certainly, it cannot be said that such a conclusion was beyond the honest judgment, reasonably exercised, of those whose duty it was to protect the Pacific Coast against attack.

The Act of March 21, 1942, does not involve any unconstitutional delegation of legislative power. To the extent that it constitutes a ratification of the previously issued Executive Order No. 9066, there is no delegation whatever. And to the extent that the curfew and exclusion measures were thereafter adopted, they were well within the scope of the statute, as construed in the light of its history. Moreover, as in the field of foreign relations, the war power admits of far wider latitude of authority delegable to the executive branch than is permissible in the case of ordinary

domestic affairs. Cf. *United States* v. *Curtis-Wright Corp.*, 299 U. S. 304.

III

This case does not properly involve any question as to the validity of any subsequent detention of the Japanese as a group which followed evacuation. It is important to bear in mind precisely what occurred in the execution of the evacuation program.

In order to assure the effectiveness of the evacuation, the Japanese were temporarily placed under restraint at nearby so-called Assembly Centers. At the time the orders herein were issued there was no provision whatever for detention at the Relocation Centers to which they were subsequently transferred. Moreover, this defendant was not sent to any Relocation Center. Upon being admitted to bail after conviction, he was permitted to leave the military area, and to proceed inland for the purpose of accepting employment. Furthermore, the regulations adopted for the Relocation Centers provide for leave where there is opportunity for employment and residence of the individual at his proposed destination and where such leave is consistent with the public safety, etc. Thus, even if the defendant had been sent to a Relocation Center, there is no reason to believe that he could not have qualified for such leave, and he therefore has no standing to com-

plain of the detention of others who are presently at such centers.

ARGUMENT

I

THE EVACUATION AND CURFEW MEASURES WERE AUTHORIZED BY THE ACT OF MARCH 21, 1942

The defendant did not contend in the court below that the curfew and evacuation orders of General DeWitt, which he violated, were outside the scope of the authority delegated by the President in Executive Order 9066, and by Congress in the Act of March 21, 1942. He rested his case on the contention that the Executive Order, the statute and the action taken thereunder were unconstitutional. Nevertheless, it will be helpful to review the history of the curfew and evacuation orders, for the purpose of showing that they were properly authorized.

On February 20, 1942, the Secretary of War designated General DeWitt as the military commander authorized to carry out the duties imposed by Executive Order 9066 within the area encompassed in the Western Defense Command, which had been established on December 11, 1941. See Public Proclamations Nos. 1 and 2. See Appendix D, *infra,* pp. 97–124. See also record in *Yasui* v. *United States,* No. 871, pp. 62–63. Acting under the provision of Executive Order 9066, empowering a military commander duly designated

by the Secretary of War "to prescribe military areas in such places and of such extent as he * * * may determine," General DeWitt issued Public Proclamation No. 1, which established as a military area the region in which the defendant resided.

General DeWitt's subsequent orders excluding persons of Japanese ancestry from this area were unquestionably authorized by the provision of Executive Order 9066 that "any or all persons may be excluded" from the duly prescribed areas, as well as by the provision that in all such areas "the right of any person to enter, rèmain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion." It is equally clear that the curfew order with respect to the duty of specified classes of persons in the military area to remain within their homes during specified hours was within General DeWitt's power to impose restrictions on the "right of any person to enter, remain in, or leave" the area and thus was in the discretionary power delegated by Executive Order 9066.[58]

[58] While the fact that General DeWitt's orders are within the scope of the terms of Executive Order 9066 is sufficient authorization, it may be noted also that the Executive Order followed closely, both in time and content, the recommendations by members of Congress that military authority be used to execute the evacuation of persons of Japanese ancestry from the Pacific Coast states. Tolan Committee Preliminary Report (H. Rep. No. 1911, 77th Cong., 2d Sess.), pp. 3–5.

Congressional authority for the promulgation of the curfew and evacuation orders is clear. The very purpose of the Act of March 21, 1942, was to confirm and implement Executive Order No. 9066. The bill which became the Act of March 21, 1942, was introduced in the Senate on March 9, 1942, and in the House on March 10, 1942, at the request of the Secretary of War, who stated explicitly that the purpose of the legislation was to provide a means for enforcement of orders issued under Executive Order 9066.[59] Representative Costello for the House Military Affairs Committee made plain the legislative understanding that curfew restrictions and the removal of persons, citizens as well as aliens, from military areas were

[59] Identical letters from the Secretary of War to the Speaker of the House and to the Chairman of the Senate Committee on Military Affairs stated (Cong. Rec., Vol. 88, part 2, p. 2722; H. Rep. No. 1906, 77th Cong., 2d Sess., p. 2):

"The purpose of the proposed legislation is to provide for enforcement in the Federal criminal courts of orders issued under the authority of the Executive order of the President No. 9066, dated February 19, 1942. This Executive order authorizes the Secretary of War to prescribe military areas from which any and all persons may be excluded for purposes of national defense."

The Secretary of War wrote to the Chairman of the Senate and House Committee on Military Affairs in identical letters dated March 13 and 14, 1942, respectively, as follows (Cong. Rec., Vol. 88, part 2, p. 2725; H. Rep. No. 1906, p. 3) that "the bill, when enacted, should be broad enough to enable the Secretary of War or the appropriate military commander to enforce curfews and other restrictions within military areas and zones."

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contemplated.[60] When the bill was discussed in the Senate, Senator Reynolds, Chairman of the Senate Military Affairs Committee, read a newspaper item stating that "evacuation of the first Japanese aliens and American-born Japanese from military area No. 1" was about to commence; described the proposed evacuation; read to the Senate the Report of the Committee on Military Affairs, which included the letters of the Secretary of War, referred to in footnote 59, *supra;* read General DeWitt's Public Proclamation No. 1; and stated the common understanding of the bill.[61]

On the House Floor when the bill was being considered for enactment, its immediate passage

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[60] "The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities. In order to provide such protection it has been deemed advisable to remove certain aliens as well as citizens from areas in which war production is located and where military activities are being conducted. To make such removal effective, it is necessary to provide for penalties in the event of any violation of the orders or restrictions which may be established, as well as to enforce curfews, where they may be required" (H. Rep. No. 1906, 77th Cong., 2d Sess., p. 2).

[61] "It is my understanding that in order to carry out the objectives of the Proclamation, and thus keep clear the military areas which have been defined by General DeWitt, the commander of the western area, we are asked to provide the department with authority to keep certain individuals from entering or leaving military zones, or not complying with any of the curfew laws, or any regulations which might be established within those zones" (Cong. Rec., Vol. 88, part 2, pp. 2722–2726).

was urged on the basis that "evacuation is taking place now" (Cong. Rec., Vol. 88, part 2, p. 2730).

At the time the bill was approved by the President and became law on March 21, 1942, General DeWitt had already issued Proclamation No. 1 of March 2, 1942, designating certain military areas and military zones, and providing that such classes of persons as the situation may require would by subsequent proclamation be excluded from the areas and zones. Proclamation No. 2 of March 16, 1942, designating additional military areas and zones, repeated the provision that such classes of persons as the situation might require would by subsequent proclamation be excluded from zones within the military areas, and provided that German and Italian aliens, and persons of Japanese ancestry residing in the Western Defense Command who changed their places of habitual residence were required to obtain and execute change-of-residence notices.

Immediately subsequent to March 21, 1942, Proclamation No. 3, issued on March 24, 1942, provided the curfew for Germans and Italian aliens, and all persons of Japanese ancestry, and announced that exclusion orders would thereafter be issued. Proclamation No. 4 of March 27, 1942, prohibited further voluntary evacuation of Japanese persons from Military Area No. 1. On May 10, Civil Exclusion Order No. 57, involved in this case, was issued.

It is submitted that the Act of March 21, 1942, constituted not only clear authorization of the action taken, but also a plain legislative ratification of Executive Order 9066, and of the orders issued thereunder. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 300-303; *Silas Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 208; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 146–148; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 382, 384; *Prize Cases,* 2 Black 635, 671. Cf. *Standard Oil Co.* v. *Johnson,* 316 U. S. 481, 484. Moreover, the Congressional authorization is further confirmed by the $70,000,000 appropriation made by the Act of July 25, 1942, for the War Relocation Authority, in connection with the evacuation program. Public Law No. 678, 77th Cong., 2d Sess., c. 524, 56 Stat. 704. Such appropriation acts are a familiar form of expression of Congressional understanding and approval. *Brooks* v. *Dewar,* 313 U. S. 354, 360–361; *Isbrandtsen-Moller Co.* v. *United States, supra,* at page 147.

II

THE ACT OF MARCH 21, 1942, WAS A VALID EXERCISE OF THE WAR POWERS AND IS CONSTITUTIONAL AS APPLIED HERE

1. *This case does not present any question of martial law.*—It is important at the outset to bring the constitutional issue into proper focus.

This case does not involve any question of martial law as that term is commonly understood. There has been no suspension of the privilege of the writ of habeas corpus, and the civil courts have not been superseded by military tribunals. Indeed, this very case commenced as a prosecution in a United States District Court. The question is not whether the defendant may be tried by a military tribunal (cf. *Ex parte Quirin,* 317 U. S. 1). There is not here involved any of the large issues discussed in *Ex parte Milligan,* 4 Wall. 2, and considered by the District Court in *Yasui* v. *United States,* No. 871. Nor is it necessary to determine whether the principles enunciated by the majority in the *Milligan* case should be reexamined.[62]

The defendant was charged with violating an act of Congress. The law that is here being enforced was enacted by the legislature, and to the extent that there has been any delegation to the executive branch of the Government, the problem in this respect does not differ from that presented in *McKinley* v. *United States,* 249 U. S. 397. If the delegation is a valid one, as we contend that it is

[62] Those principles, once accepted in Great Britain (see Fairman, *The Law of Martial Rule and the National Emergency* (1942), 55 Harv. L. Rev. 1253, 1254), have not been followed in some of the more recent cases in the English and Irish courts. Cf. *Ex parte Marais,* [1902] A. C. 109; *The King* v. *Allen,* [1921] 2 Ir. R. 241; *The King* (*Garde*) v. *Strickland,* [1921] 2 Ir. R. 317; *The King* (*Ronayne and Mulcahy*) v. *Strickland* [1921], 2 Ir. R. 333. See Carr, *A Regulated Liberty* (1942), 42 Col. L. Rev. 339.

(*infra,* pp. 65–70), then the only question is whether there is support in the Constitution for the statute as applied.

We contend that the war powers in the Constitution furnish ample authority for the evacuation and curfew measures [63] adopted under the Act of March 21, 1942, and that those measures were not framed in such manner as to be violative of the requirements of due process.

2. *The scope of the war powers under the Constitution.*—The war powers are not concentrated in any one clause in the Constitution. They consist of the aggregate of many powers, set forth in full in Appendix A, *infra,* pp. 83–85. Not only are comprehensive powers delegated to Congress by

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[63] The indictment herein was in two counts, the first charging the defendant with failing to report to the Civil Control Station on May 11 or May 12, 1942, as required by Civil Exclusion Order No. 57, in connection with the evacuation which was to take place pursuant to that order on May 16, 1942 (R. 1–2). It is assumed that the defendant may raise the validity of the evacuation measure, since the requirement that he report at the Civil Control Station was merely ancillary to evacuation. The second count charged violation of the curfew provision of Public Proclamation No. 3 (R. 2–3). The defendant was found guilty upon both counts, but the three-month sentences which he was given on each count were to run concurrently (R. 24). Accordingly, if the conviction was proper on either count, it would be unnecessary to consider the other count. Cf. *Pierce* v. *United States*, 252 U. S. 239, 252–253; *Brooks* v. *United States*, 267 U. S. 432, 441; *Abrams* v. *United States*, 250 U. S. 616, 619; *Evans* v. *United States*, 153 U. S. 608, 609; *Claassen* v. *United States*, 142 U. S. 140, 146; *Doe* v. *United States*, 253 Fed. 903, 904 (C. C. A. 8).

Article I, but, in addition, Article II confers most sweeping authority directly upon the President.

(a) Pursuant to its power under Article I, Congress adopted on December 8, 1941, and the President approved a joint resolution, declaring a state of war between the United States and the Imperial Government of Japan. See Appendix B, *infra*, p. 86. The resolution directed the President to employ the entire naval and military forces of the United States and the resources of the Government to prosecute the war; and it pledged all the resources of the country to bring the conflict to a successful termination.

The events which had occurred between the attack on Pearl Harbor and the enactment of the Act of March 21, 1942, amply warranted such legislation. The extent of the disaster at Pearl Harbor, only recently disclosed to the public, was all too well known to the military authorities, and left the military and naval installations, shipyards, airplane and other war manufacturing plants on the West Coast exposed to destructive enemy attack. It was learned that Japanese espionage had supplied the Japanese forces with precise information as to the disposition of the vessels of the fleet at Pearl Harbor, the nature and location of anti-aircraft defenses and the time and course of flight of air patrols.[64] On December

[64] Report dated January 23, 1942, of the Commission Appointed by The President Of The United States To Investigate And Report The Facts Relating To The Attack Made

11, 1941, the Western Defense Command had been established and designated a theatre of operations; the commanding general was charged with the duty, *inter alia,* of protecting that area against enemy attack. The overwhelming majority of persons of Japanese ancestry in the United States resided on the West Coast. See *supra,* p. 18. Great apprehension was felt that even if the majority of those Japanese were loyal to the United States, a number of them, citizens and aliens alike, might be disposed to assist the enemy, particularly in the case of an attack. And there was also concern lest the resident Japanese be subjected to mass local violence in the event of an attack.[65] These circumstances and the imperative need for prompt protective action were fully known to the President when he issued Executive Order No. 9066, which was to form the basis for the curfew and evacuation regulations. And both the House and the Senate were informed of the grave dangers inherent in permitting the Japanese to remain in the numerous critical areas along the West Coast, and of the peril to the nation that might result from the treacherous action of some of those Japanese.

By Japanese Armed Forces Upon Pearl Harbor In The Territory Of Hawaii On December 7, 1941 (The Roberts' Committee Report), pp. 12–13, Senate Document No. 159, 77th Congress, 2nd Sess.

[65] See Tolan Committee Report, pp. 145–147, 149–150; Hearings, pp. 11044, 11156.

See Cong. Rec., Vol. 88, part 2, pp. 2722–2726, 2729–2730.

It is in the light of these circumstances that the validity of the Act of March 21, 1942 and the related orders must be examined under the war powers. The plenary character of the power to wage war and its extension to every matter relating to the carrying on of war have been repeatedly emphasized. As former Chief Justice Hughes remarked during the first World War, "The power to wage war is the power to wage war successfully." (Hughes, *War Powers under the Constitution,* 42 A. B. A. Rep. 232, 238.) And in *United States* v. *Macintosh,* 283 U. S. 605, this Court indicated the extraordinary breadth of the war power as follows (pp. 622–623):

> From its very nature, the war power, when necessity calls for its exercise, tolerates no qualifications or limitations, unless found in the Constitution or in applicable principles of international law. In the words of John Quincy Adams,—"This power is tremendous; it is strictly constitutional; but it breaks down every barrier so anxiously erected for the protection of liberty, property and of life." To the end that war may not result in defeat, freedom of speech may, by act of Congress, be curtailed or denied so that the morale of the people and the spirit of the army may not be broken by seditious utterances; freedom of the press curtailed to preserve

> our military plans and movements from the knowledge of the enemy; deserters and spies put to death without indictment or trial by jury; ships and supplies requisitioned; property of alien enemies, theretofore under the protection of the Constitution, seized without process and converted to the public use without compensation and without due process of law in the ordinary sense of that term; prices of food and other necessities of life fixed or regulated; railways taken over and operated by the government; and other drastic powers, wholly inadmissible in time of peace, exercised to meet the emergencies of war.
>
> These are but illustrations of the breadth of the power; * * *

Moreover, as noted in *Stewart* v. *Kahn,* 11 Wall. 493, upholding the power of Congress to toll state statutes of limitations during and after the Civil War (p. 507):

> * * * the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. * * *

See also *Ashwander* v. *Valley Authority,* 297 U. S. 288, 326; *Home Bldg. & L. Assn.* v. *Blaisdell,* 290 U. S. 398, 426, 447–448; *Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146, 161; *McKinley* v. *United States,* 249 U. S. 397; *Schenck*

v. *United States,* 249 U. S. 47; *Selective Draft Law Cases,* 245 U. S. 366; *Raymond* v. *Thomas,* 91 U. S. 712, 714–715; *Miller* v. *United States,* 11 *Wall.* 268.

Thus, under the war powers, this Court has sustained the compulsory draft of persons to serve in the armed forces (*Selective Draft Law Cases, supra*); suppression of prostitution in military areas (*McKinley* v. *United States,* 249 U. S. 397); prohibition of the sale of liquor even after hostilities had ceased (*Hamilton* v. *Kentucky Distilleries Co.,* 251 U. S. 146; *Jacob Ruppert* v. *Caffey,* 251 U. S. 264); Government operation of the railroads (*Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135); Government operation of systems of communications (*Dakota Cent. Tel. Co.* v. *South Dakota,* 250 U. S. 163); and regulation of maximum prices (*Highland* v. *Russell Car Co.,* 279 U. S. 253).[66]

The evacuation and related curfew measures herein plainly constituted an exercise of the war powers, and indeed were more directly concerned

[66] *United States* v. *Cohen Grocery Co.,* 255 U. S. 81, relied upon by petitioner in the court below as indicating a more restricted view of the war powers, is plainly distinguishable. The Court there held invalid certain provisions of the Lever Act because they did not establish a sufficiently ascertainable standard of guilt. That decision certainly can have no application here, for, under the Act of March 21, 1942, the prosecution must show that the accused "knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof." Cf. *Gorin* v. *United States,* 312 U. S. 19, 27–28.

with the actual conduct of the war than many of the measures which have been sustained in the foregoing decisions. Evacuation of persons from critical areas is a familiar exercise of war power and constitutes recognized military strategy both here and abroad. *Lockington's Case,* Brightly N. P. (Pa.) 269; *Lockington* v. *Smith,* 1 Pet. C. C. 466, 15 Fed. Cas. p. 758, No. 8448 (C. C. Pa.) (requiring alien enemies to evacuate to 40 miles beyond Atlantic tidewater); *Ronnfeldt* v. *Phillips* (K. B. 1918) 35 T. L. R. 46 (evacuation of an individual from a military area); *Emergency Powers (Defense) Act,* 1939 (2 & 3 George VI., c. 62); War Measures Act (c. 206, Rev. Stat. Canada 1927).[67] Cf. *Respublica* v. *Sparhawk,* 1

[67] Under the English Act which authorizes regulations necessary for securing the public safety and the efficient prosecution of the war, the British Government provided by the Defense (General) Regulations, 1939, Part 2, Section 21 (S. R. & O., 1939, No. 927, as amended, 32 Halsbury's Statutes of England, pp. 1294–1295):

"(1) A Secretary of State or the Admiralty, * * * may, if it appears to him or them to be necessary or expedient so to do for the purpose of meeting any actual or apprehended attack by an enemy or of protecting persons and property from the dangers involved in any such attack, make, as respects any area in the United Kingdom * * *—

"(a) an order directing that after such time as may be specified in the order, no person other than a person of such a class as may be so specified shall be in that area without the permission of such authority or person as may be so specified;

* * * * *

"(2) An order made under paragraph (1) of this Regulation for the removal of persons or property from any area—

Dall. 357 (removal of goods to prevent seizure by the enemy). Indeed, under the recent British legislation, it has been held that a British subject may be arrested and detained in prison merely because the Home Secretary "had reason to believe" that he was a person of "hostile origin or associations". *Liversidge* v. *Anderson,* [1942] A. C. 206; *Greene* v. *Secretary of State for Home Affairs,* [1942] A. C. 284.

(b) In considering the evacuation and curfew measures above, we directed our discussion to-

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"(a) may prescribe the routes by which persons or property, or any particular classes of persons or property, are to leave or be removed from the area;

"(b) may prescribe different times as the times by or at which different classes of persons or property in the area are to leave or be removed therefrom;

"(c) may prescribe the places to which persons are to proceed on leaving that area in compliance with the order;

"(d) may make different provision in relation to different parts of the area; and may contain such other incidental and supplementary provisions as appear to the authority or person making the order to be necessary or expedient for the purposes of the order."

The Defence of Canada Regulations are similar to the quoted English regulations and the Order of the Minister of Justice of August 18, 1942, under the Regulations (Canada Gazette, Extra No. 96, August 31, 1942) provided for a specific protected area in the Province of British Columbia along the Pacific Coast similar to our military areas, and stated in part as follows:

"9. Every person of the Japanese race shall leave the protected area aforesaid forthwith.

"10. No person of Japanese race shall enter such protected area except under permit issued by the Royal Canadian Mounted Police."

wards establishing the validity of the Act of March 21, 1942, under which those measures were taken. But even if that statute had not been enacted the President had ample power under the Constitution to authorize such measures without supporting legislation.

During the Civil War, President Lincoln, in the absence of congressional action, dealt with an unprecedented national emergency by his Proclamations of April 15, 1861 (12 Stat. 1258), announcing the rebellion and calling for volunteers, and of April 19, 1861 (12 Stat. 1258), announcing the blockade of the ports of the southern states by naval forces and providing that any vessel running the blockade might be condemned as prize. In the *Prize Cases,* 2 Black 635, this Court sustained the legality of the President's exercise of the executive war power to provide a blockade and stated (p. 670):

> Whether the President in fulfilling his duties, as Commander-in-chief, in suppressing an insurrection, has met with such armed hostile resistance, and a civil war of such alarming proportions as will compel him to accord to them the character of belligerents, is a question to be decided *by him,* and this Court must be governed by the decisions and acts of the political department of the Government to which this power was entrusted. "He must determine what degree of force the crisis demands."

> The proclamation of blockade is itself official and conclusive evidence to the Court that a state of war existed which demanded and authorized a recourse to such a measure, under the circumstances peculiar to the case. [Italics by the Court.] [68]

It is submitted that if, as in the *Prize Cases,* prior to a declaration of war the executive war power could be constitutionally exercised against loyal citizens solely on the basis of their residence in the states where the rebellion was active, but in which they had no part, and could designate them as enemies and subject their property to forfeiture as prize, *a fortiori* after the declaration of war of December 8, 1941, directing him to use all resources of the government (55 Stat. 795, 77th Cong., 1st Sess., c. 561), the unprecedented emergency which faced the Chief Executive in this case could be dealt with constitutionally by the exercise of the executive war power to evacuate all persons of Japanese ancestry from the most crucial area in the country and to place them under a curfew as a restriction supplemental to the evacuation. See Corwin, *The President, Office and Powers* (1940), p. 158 *et seq.;* Randall, *Constitutional Problems Under*

[68] Lincoln's action had been thereafter approved by Congress, and the Court stated (p. 671) that even if his action were illegal, the congressional ratification operated to cure the defect.

Lincoln (1926), pp. 29 *et seq.*, 514 *et seq.;* Berdahl, *War Powers of the Executive in the United States* (1921), pp. 182, *et seq.;* Taft, *The Presidency* (1916), pp. 85, *et seq.;* 2 Story, *Commentaries on the Constitution,* pp. 327, *et seq.* (5th Ed. 1891).

Moreover, apart from the war power committed to the President by the Constitution, the measures herein could be sustained under Article II, Section 3 which provides that the President "shall take Care that the Laws shall be faithfully executed * * *." In *In re Neagle,* 135 U. S. 1, this Court ruled that a Federal marshal could not be detained by state authorities upon a charge of murder for killing an individual who had attempted to attack Mr. Justice Field. In commenting upon the sweep of executive authority, this Court stated (pp. 63–64, 67):

> If we turn to the executive department of the government, we find a very different condition of affairs [from that in the legislative department]. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are

thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfil the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms,* or does it include the rights, duties and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

* * * * *

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, * * *.

Thus, if a United States Marshal in the exercise of the federal executive power may kill a man in the course of protecting a federal judge,

it would seem that the commanding general of the Western Defense Command may be designated to exercise the power of the chief executive to evacuate a group of civilians to protect the public safety of the entire country and the preservation of the sovereignty of the United States. Compare *Ex Parte Siebold,* 100 U. S. 371, 395; *In re Debs,* 158 U. S. 564.

However, it is unnecessary to determine whether the curfew and evacuation measures could have been carried out by executive action, unaided by legislation, for the Act of March 21, 1942, was enacted for the express purpose of throwing the full weight of Congressional power behind these measures. Compare *Hamilton* v. *Dillin,* 21 Wall. 73, 87–88:

> Whether, in the absence of Congressional action, the power of permitting partial intercourse with a public enemy may or may not be exercised by the President alone, who is constitutionally invested with the entire charge of hostile operations, it is not now necessary to decide, although it would seem that little doubt could be raised on the subject. * * *
>
> But without pursuing this inquiry, and whatever view may be taken as to the precise boundary between the legislative and executive powers in reference to the question under consideration, there is no doubt that a concurrence of both affords ample

> foundation for any regulations on the subject.

See also *Prize Cases,* 2 Black 635, 671.

3. *The petitioner has not been denied due process of law.*—It is, of course, familiar doctrine that the exercise of governmental powers may interfere with one's liberty to a greater or lesser degree. The constitutional requirement of due process stands in the way only where the interference is of such character as to be wholly unreasonable, arbitrary, or capricious.

Thus, in sustaining provisions for compulsory vaccination in *Jacobson* v. *Massachusetts,* 197 U. S. 11, this Court said (p. 26):

> But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. * * *

See also *Compagnie Francaise &c.* v. *Board of Health,* 186 U. S. 380; *Minnesota* v. *Probate Court,* 309 U. S. 270; *Moyer* v. *Peabody,* 212 U. S. 78.[69] And since the reasonableness of the restraint

[69] Compare the decisions upholding the confinement for reasons related to the public welfare of such persons as merchant seamen, jurors, material witnesses, etc. *Robertson* v. *Baldwin,* 165 U. S. 275; *Dinsman* v. *Wilkes,* 12 How. 389;

must always be measured in terms of the surrounding circumstances, it is apparent that restrictions demanded by the exigencies of war may go far beyond the limits permissible in periods of tranquillity.

The all-pervasive character of the war power has been discussed above, pp. 47–49. Its reach extends over the entire range of human affairs. Under the war power, the Government may, consistently with due process, regulate or take over the economic life of the country (*Highland* v. *Russell Car Co.*, 279 U. S. 253; *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135; *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163); it may regulate the morals of the community (*McKinley* v. *United States*, 249 U. S. 397; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U. S. 146); it may deny freedom of speech to an extent not permissible during times of peace (*Schenck* v. *United States*, 249 U. S. 47, 52); and it may command an individual to give up his freedom and lay down his life (*Selective Draft Law Cases*, 245 U. S. 366).

The curfew and exclusion measures herein are certainly less drastic than compulsory military service, and we do not understand petitioner to contend otherwise. The core of his contention is, however, that due process is lacking because the

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Lively v. *State*, 22 Okla. Cr. 271, 276–278, 211 Pac. 92, 94; *United States* v. *Von Bonim*, 24 F. Supp. 867 (S. D. N. Y.); *State* v. *Netherton*, 128 Kan. 564, 279 Pac. 19.

Japanese have been treated arbitrarily as a racial group [70] and because no opportunity was afforded for hearings to relieve individual members of that group from compliance with those measures. We submit that in the unique circumstances here presented the action taken was reasonable and therefore not violative of the requirements of due process.

Since, as we shall undertake to show, the classification is a reasonable one in the circumstances, it will be unnecessary to place more than passing reliance upon the fact that the Fifth Amendment, unlike the Fourteenth, contains no equal protection clause (see *Helvering* v. *Lerner Stores Corp.*, 314 U. S. 463, 468; *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 401; *Currin* v. *Wallace*, 306 U. S. 1, 14; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 151; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, 584; *LaBelle Iron Works* v. *United States*, 256 U. S. 377, 392), or to attempt to determine what, if any, type of governmental action is restrained by the equal protection clause that is not already fully subject to the due process clause (cf. *Heiner* v. *Donnan*, 285 U. S. 312, 317, 326, 338).

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[70] It is, of course, a misconception to assert that only Japanese have been subjected to curfew or have been removed from critical areas. Public Proclamation No. 3 imposed curfew restrictions for Italian and German aliens, and many individuals, alien and citizen alike, have been excluded under individual exclusion orders promulgated pursuant to Executive Order No. 9066.

Nor, in view of the extraordinarily unique situation in this case, will it be profitable to explore the various decisions either approving (*Gong Lum* v. *Rice,* 275 U. S. 78; *Clarke* v. *Deckebach,* 274 U. S. 392; *Terrace* v. *Thompson,* 263 U. S. 197; *Porterfield* v. *Webb,* 263 U. S. 225; *Webb* v. *O'Brien,* 263 U. S. 313; *Frick* v. *Webb,* 263 U. S. 326; *Crain* v. *New York,* 239 U. S. 195; *Patsone* v. *Pennsylvania,* 232 U. S. 138; *Plessy* v. *Ferguson,* 163 U. S. 537), or disapproving (*Mitchell* v. *United States,* 313 U. S. 80, 97; *Missouri ex rel. Gaines* v. *Canada,* 305 U. S. 337; *Truax* v. *Raich,* 239 U. S. 33; *Meyer* v. *Nebraska,* 262 U. S. 390; *Yu Cong Eng* v. *Trinidad,* 271 U. S. 500; *Yick Wo* v. *Hopkins,* 118 U. S. 356) various classifications based upon racial or similar grounds.

The situation which gave rise to the curfew and evacuation measures was wholly unprecedented in the history of this country. The validity of those measures must be tested, not in the light of the military situation as it exists today, nor even in the light of the military situation as it existed at that time viewed as a matter of hindsight. Rather, the crucial question is whether the action taken was, in the honest judgment of those charged with the responsibility of defending our shores, reasonably necessary from a military point of view. We submit that, as recounted above (p. 12 *et seq.*), the military situation was so grave, the danger of an enemy attack was so far within

the realm of probability, and the peril to be apprehended from treacherous assistance to the enemy on the part of an unknown number of Japanese concentrated in critical areas along the West Coast was so substantial, it was a matter of high military necessity to take prompt and adequate precautionary steps.

Our Pacific Fleet had been rendered all but powerless for the time being, and the Japanese forces were making bold and impressive strides. Indeed, our very coast had been shelled. Faced with the responsibility of repelling a possible Japanese invasion which might have threatened the very integrity of our nation, it was the duty of the commanding general to take into account the plain fact that over 100,000 Japanese were grouped along the coast. It was essential to recognize that although the majority of these people might be regarded as loyal to the United States, a disloyal minority, if only a few hundreds or thousands, strategically placed, might spell the difference between the success or failure of any attempted invasion.

This grave emergency called for prompt and decisive action. It was imperative that adequate protective measures be taken. If those Japanese who might aid the enemy were either known or readily identifiable, the task of segregating them would probably have been comparatively simple. However, the identities of the potentially disloyal

were not readily discoverable. Even assuming that administrative hearings might have been held for each Japanese, such hearings would have been virtually worthless unless each were preceded by an investigation carefully conducted by a trained investigator. Many months, or perhaps years, would be required for such investigations and hearings.[71] Meanwhile the threat of a Japanese attack would persist. What was needed was a method of removing at once the unknown number of Japanese persons who might assist a Japanese invasion, and not a program for sifting out such persons in the indefinite future.

Moreover, even if there had been time for individual hearings, there is no reason to suppose that they could have solved the problem. A hearing to determine what a particular Japanese would do in the event that the Japanese forces should succeed in effecting a landing on the Pacific Coast would have been of doubtful utility. In every such hearing there would undoubtedly be evidence of thrift, industry, devotion to family, absence of criminal record, etc. And it would be upon the basis of such evidence that the Hearing Board would be asked to look deep into the mind of a particular Japanese and determine whether his

[71] Based on investigations by the Federal Bureau of Investigation over a course of years, about 10,000 hearings have been granted to alien enemies throughout the United States since December 7, 1941.

allegiance to the United States was so dominant within him as to overcome the ties of kinship or other intangible forces which might bind him to the members of an invading Japanese army.

It can hardly be said, therefore, that the exclusion of all Japanese from the critical West Coast area was unreasonable or capricious. They were treated as a group, not because of racial discrimination, but because the group contained an unknown number of persons whose continued presence on the West Coast was thought to be highly dangerous to the safety of the entire country. Their removal was imperative. Since they were not easily identifiable, the only certain way of removing them was to remove the group as a whole.

Furthermore, where the class as a whole is the proper object of official action a hearing for any individual is entirely irrelevant except to determine membership in the class. The operative fact on which the classification was made was the danger arising from the existence of a group of over 100,000 persons of Japanese descent on the West Coast and the virtually impossible task of promptly segregating the potentially disloyal from the loyal. "It does not follow that because a transaction [person in this case] separately considered is innocuous it may not be included in a prohibition the scope of which is regarded as essential in the legislative judgment to accomplish a purpose within the admitted power of the Gov-

ernment." *Jacob Ruppert* v. *Caffey,* 251 U. S. 264, 291–292.

It is the central misapprehension of the argument for individual loyalty hearings to suppose that the action here was directed against persons on the basis of their individual loyalty. It is entirely irrelevant, therefore, to assert that the majority of the individuals evacuated were perfectly loyal citizens of the United States. The rationale of the action here in controversy is not the loyalty or disloyalty of individuals but the danger from the residence of the class as such within a vital military area. If there was a rational basis for this judgment, then the only question that remains is whether a given individual was or was not a person of Japanese ancestry.

In times of war a citizen may be required, under the Constitution, to make the supreme sacrifice (*Selective Draft Law Cases, supra*). Can it be said that there is an absence of due process where he is required to evacuate critical areas in order to insure the evacuation of persons within his group whose presence is reasonably regarded as a significant threat to the safety of the nation? In sustaining the detention of a British subject merely upon the ground that the Home Secretary had reason to believe that he was a person of "hostile origin or associations", Lord Macmillan de-

clared (*Liversidge* v. *Anderson*, [1942] A. C. 206, 257):

> At a time when it is the undoubted law of the land that a citizen may by conscription or requisition be compelled to give up his life and all that he possesses for his country's cause it may well be no matter for surprise that there should be confided to the Secretary of State a discretionary power of enforcing the relatively mild precaution of detention. * * *

The objection that the exclusion measure was invalid because it did not include Italians and Germans is without substance. The principal danger to be apprehended was a Japanese invasion, and the possible assistance to attacking Japanese forces would be most likely to come from the Japanese residing on the West Coast. It is not a denial of due process to recognize degrees of danger or harm and if the law strikes at the evil where it is most felt, "it is not be overthrown because there are other instances to which it might have been applied." See *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400, and cases cited.

4. *The Act of March 21, 1942, does not involve any unconstitutional delegation of legislative power.*—The contention that the Act of March 21, 1942, contains an invalid delegation of legislative authority is without merit. It should be recalled that Executive Order 9066, under which the evacuation and curfew orders were issued, had been pro-

mulgated on February 19, 1942, more than a month before the enactment of the statute. And, as shown above, p. 39, it was the recognized purpose of the statute to implement Executive Order 9066 and to place its legality beyond the possibility of challenge. Moreover, the history of the Act shows that Congress was plainly concerned with the projected evacuation program and with such subsidiary protective measures as the curfew. See *supra,* pp. 38–41. Accordingly, even tested by the usual standards applicable to legislation dealing with ordinary domestic affairs, the Act of March 21, 1942, when construed in the light of its history, did not go beyond the limits of permissible delegation. Cf. *Field* v. *Clark,* 143 U. S. 649; *Buttfield* v. *Stranahan,* 192 U. S. 470; *Union Bridge Co.* v. *United States,* 204 U. S. 364; *United States* v. *Grimaud,* 220 U. S. 506; *Hampton & Co.* v. *United States,* 276 U. S. 394; *Currin* v. *Wallace,* 306 U. S. 1; *United States* v. *Rock Royal Co-op.,* 307 U. S. 533; *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381; *Opp Cotton Mills* v. *Administrator,* 312 U. S. 126. Indeed, to the extent that the statute may be viewed as ratifying prior executive action (see *supra,* p. 42), there was no delegation whatever. Cf. *Prize Cases,* 2 Black 635, 671; *Hamilton* v. *Dillin,* 21 Wall. 73, 87, 88.

But there is an even more conclusive answer to the contention that there was an invalid delegation. We are here concerned with the war power which

requires a far wider latitude for executive judgment and action than is involved in the exercise of ordinary governmental powers.

Where the war power is involved, the very fate of the nation may at times depend upon prompt and effective measures taken under a general program outlined by the legislature that might otherwise be impossible under a statute which too narrowly circumscribed the area of executive discretion. Moreover, in view of the wide range of human affairs to which the war power extends and in view of the rapidly changing state of conditions during times of strife, it is peculiarly appropriate, as it is traditional, to avoid legislative particularization.

Thus, during the first World War a statute authorized the President "to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable." *Northern Pac. Ry. Co.* v. *North Dakota,* 250 U. S. 135, 142. And without differentiating between the executive and legislative branches of the Government, the Court gave effect to the statute on the basis of the "complete and undivided character of the war power." 250 U. S. at 149.

Similarly in *Dakota Cent. Tel. Co.* v. *South Dakota,* 250 U. S. 163, which involved a statute empowering the President to assume control of any system of communication (p. 181) "and to operate the same in such manner as may be needful or desirable for the duration of the war," the Court stated (p. 183):

> That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the *North Dakota Railroad Rate Case.* And the completeness of the war power under which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other contentions urged as to the want of power in Congress to confer upon the President the authority which it gave him.

That the generality of the Congressional mandate can not be subject to successful attack if it is as specific as circumstances reasonably permit was recognized in *United States* v. *Chemical Foundation,* 272 U. S. 1. In referring to legislation dealing with the disposition of enemy property, the Court said (p. 12):

> The Act went as far as was reasonably practicable under the circumstances existing. It was peculiarly within the province of the Commander-in-Chief to know the

> facts and to determine what disposition should be made of enemy properties in order effectively to carry on the war. * * *

See also *McKinley* v. *United States,* 249 U. S. 397; *Highland* v. *Russell Car Co.,* 279 U. S. 253.[72]

The war power is in this respect similar to the general federal power in the field of foreign relations under which, as this Court has ruled, Congress may accord the Executive "a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved." *United States* v. *Curtiss-Wright Corp.,* 299 U. S. 304, 320.[73] And the opin-

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[72] Compare *The Thomas Gibbons*, 8 Cranch 420, where the Court dealt with a statute authorizing the President "'to establish and order suitable instructions for the better governing and directing the conduct' of private armed vessels," under which the President had commissioned privately owned vessels and instructed their masters as to the capture of prize (8 Cranch at 426). The Court said that it did "not think it necessary to consider how far he (the President) would be entitled, in his character of commander in chief * * * independent of any statute" to take such action because he was clearly authorized to take it by the statute. On this point, the Court held: "The language of this provision (quoted above) is very general, and in our opinion, it is entitled to a liberal construction, both upon the manifest intent of the legislature, and the ground of public policy" (8 Cranch at 426).

[73] Only in two instances has this Court declared legislation invalid on the ground of excessive delegation. *Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter Poultry Corp.* v. *United States*, 295 U. S. 495. However, the Court in the *Curtiss-Wright* case apparently thought that those decisions were wholly irrelevant where the field of foreign relations is

ion of the Court made clear that the power "to declare and wage war" is to be treated as cognate to the power "to make treaties [and] to maintain diplomatic relations with other sovereignties (299 U. S. at p. 318) [74]

Finally, the contention that there has been an unconstitutional delegation of legislative power must fail for an entirely different reason. As we have endeavored to show above, pp. 52–56, the various orders here under review were a proper exercise of executive power derived directly from the Constitution. If that position is correct, then they do not need any Congressional support. The mere fact that Congress has undertaken to implement those orders by declaring that one who violates them shall be guilty of a misdemeanor, does not detract from the central consideration that the orders may be treated as resting independently upon their own foundation. Cf. *Ky. Whip & Collar Co.* v. *I. C. R. Co.*, 299 U. S. 334.

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involved, for it did not even cite the *Schechter* case, and it made only an oblique reference to the *Panama Refining* case, 299 U. S. at p. 327.

[74] The opinion also adverted to numerous instances in the history of the United States where Congress had conferred exceedingly broad authority upon the Executive. 299 U. S. at 322–327. Thus, as early as 1794, the President was "authorized" "whenever, in his opinion, the public safety shall so require" to lay an embargo upon all ships and vessels in ports of the United States "under such regulations as the circumstances of the case may require, and to continue or revoke the same, whenever he shall think proper" (c. 41, 1 Stat. 372).

III

NO DETENTION OF THE DEFENDANT IN A WAR RELOCATION CENTER IS INVOLVED IN THIS CASE

In addition to the curfew violation, the defendant has been convicted of failure to report to a Civil Control Station in the locality of his residence for instructions pertaining to evacuation. The defendant did not appear for the instructions and thereafter did not appear for the evacuation and was not evacuated. He did not become a resident of any assembly center operated by the military authorities or of any war relocation center operated by the War Relocation Authority. He was confined in King County Jail, Seattle, Washington, until after his conviction (R. 28). Thereafter, he was admitted to bail and granted permission by the military authorities to leave the military area and to proceed inland to reside and to accept employment.

It was contended in the court below that the conviction involves the question of the constitutionality of the restraint upon the liberty of Japanese persons not only during evacuation and during temporary residence in assembly centers but also subsequently in war relocation centers. The Government has not urged that the defendant's failure to report for evacuation instructions limits his contentions to the question whether this requirement to report was a reasonable aid to

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evacuation and that he is barred from questioning the validity of the evacuation. In other words, it is not urged that the defendant's standing to contest the constitutionality of the evacuation would be greater if he had appeared for the preliminary instructions on May 11 or 12, 1942, but had failed to appear for evacuation as instructed on or before May 16, 1942. The Government contends that the requirement that all persons affected report for preliminary instructions was a reasonable regulation ancillary and incidental to valid evacuation and that the evacuation was valid as applicable to the defendant. Moreover, the Government does not contend that the defendant could not question the validity of such temporary restrictions on his personal liberty as would necessarily be required in connection with providing food, shelter, and protection for so large a group of people during the temporary period required to assemble them and to evacuate them from the military area to places where they could safely reside.

On the other hand, the Government does urge that this defendant has no standing whatsoever to question the constitutionality of any restraint which may have been placed subsequently upon the freedom of movement of other persons of Japanese ancestry who have been removed from the military areas and are residing in war relocation centers pending the procurement of places

of residence and employment elsewhere for them without any restraint in various communities throughout the United States. It is true, as appears from General DeWitt's proclamations summarized below, that if the defendant had appeared for evacuation he probably would have been sent to an assembly center and subsequently to a war relocation center and prohibited from departing from the assembly center or war relocation center without obtaining permission. It must be noted, however, that the defendant has indicated that he was able to arrange for a residence and employment inland even after conviction and while imprisoned. If he had complied with the evacuation program he might have been able to obtain such employment at the time of evacuation and to have obtained permission to proceed inland to the place of employment either before being transported to an assembly center or thereafter while residing in an assembly center or in a war relocation center as has happened in the case of numerous other evacuees. In view of these numerous alternatives which were available to the defendant to obtain freedom from restraint on personal movement, he cannot now contend that evacuation was unconstitutional because other persons who have been evacuated are still residing in war relocation centers. A fuller chronological account of the various steps taken in connection

with the execution of the evacuation program will perhaps be helpful.

Restraint on movement of Japanese persons in military areas pending evacuation.—In order to conduct evacuation of so large a group of persons in an orderly manner and in order to protect them from the resistance of inland communities to an unregulated voluntary migration of Japanese, the proclamations and civilian exclusion orders placed the following restraints on the movements of Japanese in designated military areas.

Civilian Exclusion Order No. 1 of March 24, 1942, *infra,* p. 114, pursuant to Public Proclamations Nos. 1 and 2, ordered that all persons of Japanese ancestry be excluded from that portion of Military Area No. 1 described as "Bainbridge Island" in the State of Washington on or before noon March 30, 1942, either by voluntary removal of such persons to a place of their own choice outside of Military Area No. 1 on or prior to March 29 or by evacuation on March 30 to such place as should then be prescribed. Instructions to all Japanese living on Bainbridge Island, which accompanied Civilian Exclusion Order No. 1, advised them that no Japanese person would be permitted to leave or enter Bainbridge Island after 9 A. M. on March 24 without obtaining permission from the Civil Control Office established on the Island; that individuals and families would be permitted to leave prior to the date for

complete evacuation on condition that their destination be outside of Military Area No. 1 and that arrangements would have been made for employment and shelter at the destination; and that evacuees who did not go to an approved destination of their own choice would be given temporary residence in a Reception Center under Government supervision outside of Military Area No. 1.

Public Proclamation No. 4 of March 27, 1942 (7 F. R. 2601), *infra,* p. 110, provided that whereas it was necessary to restrict and regulate the migration in order to provide for the welfare and assure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, commencing at midnight March 29, 1942, all Japanese persons were prohibited from leaving the military area for any purpose until and to the extent that a future proclamation or order would permit or direct.[75]

Thereafter Japanese persons were not permitted to depart from Military Area No. 1 to places of their own choice but were required to report for evacuation to Civil Control Stations of General DeWitt's Wartime Civil Control Administration in their neighborhood, and were evacuated to Assembly Centers established and operated by the WCCA. A series of similar Civil Exclusion

[75] Voluntary and unregulated evacuation had resulted in threats to the Japanese and public disturbance in communities outside of Military Area No. 1, in which the Japanese had sought to resettle. Tolan Committee Report, pp. 17, 201 *et seq.*

Orders up to and including Civilian Exclusion Order No. 99 dated May 30, 1942 (7 F. R. 4437), were issued for particular portions of Military Area No. 1 and pursuant to these orders the Japanese population was transferred to Assembly Centers and then to War Relocation Authority Relocation Centers when they became ready for occupancy.

Public Proclamation No. 6 of June 2, 1942 (7 F. R. 4436), provided that all Japanese persons within the California portion of Military Area No. 2 (all of California not within the coastal Military Area No. 1, were prohibited from leaving that area or, if outside, from entering Military Areas Nos. 1 and 2 without permission.[76] This proclamation extended the curfew for all Japanese persons to the California portion of Military Area No. 2. Civilian Exclusion Order No. 100 dated June 30, 1942 (7 F. R. 5369, 5370), to Civilian Exclusion Order No. 108 dated July 22, 1942 (F. R. 5915, 5916), excluded all Japanese from designated parts of the California portion of Military Area No. 2.

Public Proclamation No. 7 of June 8, 1942 (7 F. R. 4498), ratified and confirmed all exclusions under Civilian Exclusion Orders Nos. 1 to 99 and excluded all persons who might not already have

[76] Public Proclamation No. 5 of March 30, 1942 (7 F. R. 2713), not here involved, provided that certain classes of German and Italian aliens could apply for exemption from any evacuation or from observance of the curfew regulation applied to all alien enemies and persons of Japanese ancestry by Public Proclamation No. 3 (7 F. R. 2543).

been excluded by the Civilian Exclusion Orders with the exception of those already within established Wartime Civil Control Administration Assembly Centers or the area of a War Relocation Authority Project.

Public Proclamation No. 8 of June 27, 1942 (7 F. R. 8346), established each War Relocation Authority Center within the Western Defense Command as a War Relocation Project Area and required all Japanese persons within such area to remain therein unless the Japanese person should, before leaving the area, "obtain a written authorization executed by or pursuant to the express authority of this [General DeWitt's] headquarters setting forth the effective period of said authorization and the terms and conditions upon and purposes for which it has been granted." [77]

[77] Public Proclamation No. 9 of June 27, 1942 (7 F. R. 5719), not here involved, rescinded paragraph 6 of Public Proclamation No. 1 which had adopted and continued in effect the designation of prohibited and restricted areas by the Attorney General pursuant to Presidential proclamations of December 7 and 8, 1941. Public Proclamation No. 10, of August 5, 1942 (7 F. R. 6631), not here involved, provided dimout and lighting restrictions within a zone of restricted lighting. Public Proclamation No. 12 of October 10, 1942 (7 F. R. 8377), not here involved, amended Public Proclamation No. 10 in respect of lighting regulations. Public Proclamation No. 13 of October 13, 1942 (7 F. R. 8565), not here involved, following the amendment of the Attorney General's Regulations exempting all Italian aliens from the general classification of alien enemies, exempted Italian aliens, and all alien enemies during military service in the armed forces of the United States, from military curfew and travel regulations.

Public Proclamation No. 11 of August 18, 1942 (7 F. R. 6703), ratified and confirmed Civilian Exclusion Orders Nos. 100 to 108 inclusive and excluded from the California portion of Military Area No. 2 all Japanese persons not heretofore excluded with the exception of those within the bounds of an established Wartime Civil Control Administration Assembly Center or the area of the War Relocation Authority Project, and those within penal or internment institutions or those with military permits.

Pursuant to Executive Order No. 9102, the War Relocation Authority adopted regulations dated September 26, 1942 (7 F. R. 7656) in respect of issuance of leave "as a matter or right" for departure from War Relocation Areas.[78] These regulations provide for a short term leave for not more than 30 days, leave to participate in a work group outside the relocation center or indefinite leave for residence outside the relocation Area. The Project Director of the relocation center in which the applicant resides is authorized to grant a short term or work group leave. Indefinite leave is granted by the Director of the War Relocation Authority after securing from the Federal Bureau of Investigation any information obtainable and

[78] Regulations for enlistment in the War Relocation Authority Work Corps pursuant to Executive Order No. 9102 were issued on April 29, 1942 (7 F. R. 3231), but were thereafter revoked on December 19, 1942 (7 F. R. 10667).

after taking steps necessary to satisfy himself concerning the applicant's means of support, willingness to make required reports, opportunity for employment and residence at proposed destination, probable effect of the leave upon the war program and the public peace and safety, and such other conditions and factors as may be relevant. Reports of changes of address and employment are required from the persons on leave. The regulations provide that the Director may revoke any leave when conditions are so far changed or when such additional information has become available that an original application for leave would be denied. Upon expiration of any leave the applicant shall return to the Relocation Center unless otherwise directed by the Director of the War Relocation Authority.

Under the public proclamations and civilian exclusion orders, on and after March 29, 1942, no Japanese person including the defendant could leave Military Area No. 1 voluntarily and every such person was required to be evacuated into an assembly center or relocation center from which he could not depart without violation of a military regulation and the Act of March 21, 1942, or without permission granted by the military authorities or the War Relocation Authority.

Release of Japanese from restrictions.—During and subsequent to evacuation the military and war relocation authorities pursued the policy

of releasing Japanese from assembly and relocation centers as quickly as employment and residences could be found for them in communities which would accept them. An undetermined but considerable number of Japanese at the time of evacuation were permitted to go directly inland instead of going through assembly centers when they were able to establish that residence and employment were provided for them through the assistance of relatives or others. A large number of Japanese were evacuated directly to agricultural areas to assist in harvesting the sugar beet and other crops and thereafter obtained other employment or entered assembly or relocation centers. Numerous Japanese persons were released from assembly centers for purposes of employment and residence elsewhere. A principal purpose of the program of the War Relocation Authority is to grant indefinite leave to Japanese for whom employment and safe residence can be found outside of military areas.

The group of 808 Japanese affected by Civilian Exclusion Order No. 57, applicable to the defendant, was evacuated to the Puyallup Assembly Center in the State of Washington within Military Area No. 1, and thereafter was transferred to the Minidoka War Relocation Center in the State of Idaho. Over 10% of the 10,000 residents of this relocation center already have been

released upon indefinite, group, or temporary leave; and a much larger percentage of the young adult American educated men in the center, such as the defendant, have been released.

It is clear from the actual operation of the evacuation and relocation program that the defendant, who was granted permission to leave the military area and to take up residence and employment inland even after the conviction, would have had substantial opportunities to have proceeded to a residence and employment inland if he had complied with the evacuation and relocation program. It cannot be contended that if he had complied he would now be in detention in a war relocation center and therefore has a standing to raise the validity of that detention in this criminal proceeding. An individual will not be heard to question the constitutionality of the application of a regulation to other persons under circumstances not applicable to him. Cf. *Tyler* v. *Judges of Court of Registration,* 179 U. S. 405, 410; *Corporation Commission* v. *Lowe,* 281 U. S. 431; *Hatch* v. *Reardon,* 204 U. S. 152; *Electric Bond Co.* v. *Comm'n,* 303 U. S. 419, 443.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

EDWARD J. ENNIS,
Director, Alien Enemy Control Unit.

ARNOLD RAUM,
Special Assistant to the Attorney General.

JOHN L. BURLING,
NANETTE DEMBITZ,
LEO GITLIN,
Attorneys.

MAY 1943.

APPENDIX A

Constitution of the United States:

ARTICLE I

SECTION 8. The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *

* * * * *

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to executie the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

* * * * *

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers

vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

* * * * *

ARTICLE II

SECTION 1. The executive Power shall be vested in a President of the United States of America. * * *

* * * * *

SECTION 2. The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; * * *

* * * * *

SECTION 3. * * * he shall take Care that the Laws be faithfully executed, * * *.

Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment:

SECTION 1. All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

APPENDIX B

STATUTES

Declaration of War Between United States and Japan (c. 561, 55 Stat. 795):

> Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and, to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States.
>
> Approved, December 8, 1941, 4:10 p. m., E. S. T.

Act of March 21, 1942 (Public Law 503, 77th Cong., 2d Sess., c. 191, 56 Stat. 173, U. S. C., Tit. 18, Sec. 97a):

> *Be it enacted by the Senate and House of Representatives of the United States of*

America in Congress assembled, That whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense.

Approved, March 21, 1942.

Act of April 20, 1918, c. 59, 40 Stat. 533, as amended by c. 926, 54 Stat. 1220, and c. 388, 55 Stat. 655 (U. S. C., Tit. 50, Secs. 104, 105):

SEC. 4. DEFINITION OF NATIONAL-DEFENSE TERMS.—The words "national-defense material" as used herein, shall include arms, armament, ammunition, livestock, stores of clothing, food, foodstuffs, fuel, supplies munitions, and all other articles of whatever description and any part or ingredient thereof, intended for the use of the United States in connection with the national defense or for use in or in connection with the producing, manufacturing, repairing, storing, mining, extracting, distributing, loading, unloading, or transporting of any of the materials or other articles hereinbefore mentioned or any part or ingredient thereof.

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The words "national-defense premises", as used herein, shall include all buildings, grounds, mines, or other places wherein such national-defense material is being produced, manufactured, repaired, stored, mined, extracted, distributed, loaded, unloaded, or transported, together with all machinery and appliances therein contained; and all forts, arsenals, navy yards, camps, prisons, or other military or naval stations of the United States.

The words "national-defense utilities", as used herein, shall include all railroads, railways, electric lines, roads of whatever description, railroad or railway fixture, canal, lock, dam, wharf, pier, dock, bridge, building, structure, engine, machine, mechanical contrivance, car, vehicle, boat, or aircraft, or any other means of transportation whatsoever, whereon or whereby such national-defense material, or any troops of the United States, are being or may be transported either within the limits of the United States or upon the high seas; and all dams, reservoirs, aqueducts, water and gas mains and pipes, structures, and buildings, whereby or in connection with which water or gas may be furnished to any national-defense premises or to the military or naval forces of the United States, and all electric light and power, steam or pneumatic power, telephone and telegraph plants, poles, wires, and fixtures and wireless stations, and the buildings connected with the maintenance and operation thereof used to supply water, light, heat, power, or facilities of communication to any national-defense premises or to the military or naval forces of the United States.

SEC. 5. DESTROYING OR INJURING NATIONAL DEFENSE MATERIALS, ETC.—Whoever, with intent to injure, interfere with, or obstruct the national defense of the United States, shall wilfully injure or destroy, or shall attempt to so injure or destroy, any national-defense material, national-defense premises, or national-defense utilities, as herein defined, shall, upon conviction thereof, be fined not more than $10,000 or imprisoned not more than ten years, or both.

APPENDIX C

EXECUTIVE ORDER No. 9066, dated February 19, 1942, 7 F. R. 1407

AUTHORIZING THE SECRETARY OF WAR TO PRESCRIBE MILITARY AREAS

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 whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby

authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designations of prohibited and restricted areas by the Attorney General under the Proclamations of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamations in respect of such prohibited and restricted areas.

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

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

This order shall not be construed as modifying or limiting in any way the authority heretofore