In the Supreme Court

OF THE

United States

OCTOBER TERM, 1944

No. 22

FRED TOYOSABURO KOREMATSU,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF THE STATES OF CALIFORNIA, OREGON, AND WASHINGTON AS AMICI CURIAE, ON BEHALF OF APPELLEE.

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The States of California, Oregon, and Washington, file this brief as *amici curiae,* on behalf of appellee, by permission of this court.

INTEREST OF THE STATES OF WASHINGTON, OREGON, AND CALIFORNIA.

At the time of the issuance of Public Proclamations Nos. 1 and 2 by the Commanding General, Western

Defense Command and the civilian exclusion orders thereunder, by which all persons of Japanese ancestry were evacuated from Military Area No. 1 and a portion of Military Area No. 2, the States of California, Oregon, and Washington, were faced with the danger of an invasion in force at some point along the coast-lines. Bombing raids and attacks from the sea were imminent. Military Area No. 1 included the Western portions of the three states and Area No. 2, the Eastern portions. One thousand miles of the coastline of Area No. 1 had to be guarded not only against attack by sea, land, and air, but also against infiltration by enemy agents. The ports of embarkation through which flowed the supply of men and materials to the Pacific battlefronts, the aircraft factories, shipyards, other war plants, and numerous military and naval establishments located in Military Area Nos. 1 and 2 made these areas particularly sensitive to sabotage and espionage. From a tactical military standpoint, the Western Defense Command was a Theater of Operations, the area encompassed within Military Area No. 1 a "Combat Zone" and Military Area No. 2, immediately adjacent to Military Area No. 1, was part of the vital zone of communication of the said Command. Concentrated within the Washington, Oregon, and California portions of Military Area Nos. 1 and 2 were 88.5% of the persons of Japanese ancestry resident in the United States. A large majority were located in the vicinity of ports of embarkation, prospective landing beaches, vital war plants, and lines of communication. The ethnic, educational, economic, political, language, and family ties

MILITARY AREAS NOS 1 AND 2

WESTERN DEFENSE COMMAND

RESTRICTIONS

1. All persons of Japanese Ancestry

a. Prohibited from entering or being in and except on permit from Commanding General, Western Defense Command and Fourth Army issued in cases of:

(1) Grave emergency involving death or critical illness of immediate relative
(2) Visit to Tule Lake and Manzanar
(3) A limited number of certain essential Federal employes
(4) Certain persons of 50% or less Japanese ancestry
(5) Certain Japanese wives of Caucasian husbands who have mixed blood children whose environment has been non-Japanese
(6) Persons too ill to be evacuated without danger to life
(7) Totally deaf, dumb or blind and in an institution
(8) Persons incarcerated in penal institutions.

Chart 1.

Exclusion areas established by Public Proclamations Nos. 1 and 2

Source: Bull. No. 12, March 15, 1943, Wartime Civil Control Administration, San Francisco, California

of this group, with the enemy Japan, caused the military commander, Lt. Gen. J. L. DeWitt, to conclude that in order to remove the large number of potentially disloyal but unidentified Japanese from the strategic Pacific Coast area it would be necessary to evacuate as a group all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2. (Chart 1, opposite.)

Both the time required to examine this large group and the lack of an adequate test of loyalty and trained personnel, made treatment upon an individual basis impossible in the face of the emergency which required prompt action. The appellant, however, claims that the evacuation was the result of pressure brought by exclusion agitation groups and Japanese baiters claimed to have been long active within Pacific Coast states. It is charged that the Commanding General was guilty of an abuse of his discretion and bad faith in that he acted to satisfy political and economic groups and not as a matter of military necessity. This charge was partly dissipated when this court held in *Hirabayashi v. United States* (320 U. S. 81 (1943)), that the curfew order which this Commanding General directed to all persons of Japanese ancestry, within the sensitive military areas, was issued for reasons of military necessity. As Mr. Justice Murphy stated in his concurring opinion,

> "It is not to be doubted that the action taken by the military commander in pursuance of the authority conferred upon him was taken in complete good faith and in the firm conviction that it was required by considerations of public safety and military security." (p. 109.)

Amici curiae are aware of the tremendous problem which would have faced the civil authorities within their states if they had been called upon to act with reference to the threat of espionage and sabotage presented by the fact that there were hidden, within this group, citizens in considerable numbers who were potentially disloyal. Now that the evacuation order is before this court, the States of California, Oregon, and Washington, believe that the facts surrounding the action taken to safeguard the national security and to protect the lives and property of the people of these states also provided a rational basis for the military decision that, because the peril was great and the time short, temporary treatment on a group basis was the only reasonable method of removing the disloyal but unidentified persons of Japanese ancestry resident within the critical military areas of these states.

STATEMENT.

In *Hirabayashi v. United States* (320 U. S. 81 (1943)) the second count of the indictment pertained to the curfew imposed upon all persons of Japanese ancestry, while the first count involved the question of the constitutionality of the civilian exclusion orders excluding such persons from Military Area No. 1 and the California portion of Area No. 2. This court, however, following an established practice of deciding only those questions which must be passed upon to sustain a sentence of conviction, stated that because sentences of the same length on

both counts were to run concurrently, there was no occasion to consider the validity of the conviction on the first count involving the constitutionality of the exclusion order. Now the instant case involving as it does the validity of a judgment of conviction under Public Law 503 (Act of March 21, 1942, 56 Stat. 173) for the violation of an exclusion order[1] necessarily brings that question before this court.[2] Most of the facts which were presented in the *Hirabayshi* case[3] as affording a rational basis for the action of the military authorities in ordering not only curfew, but evacuation of persons of Japanese ancestry were given judicial notice by this court in its decision in *Hirabayashi v. United States,* supra. Likewise, the principles to be applied here were mostly settled in that case. (*Korematsu v. U. S.*, 140 Fed. (2d) 289, 290 (1943).)

THE PRINCIPLES ESTABLISHED BY THE HIRABAYASHI CASE.

In the *Hirabayashi* case, the court upheld the validity of the curfew order directed to all persons of Japanese ancestry, resident within Military Area No. 1 and certain zones of other areas within the Western Defense Command, established by the Commanding

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[1]Korematsu disobeyed the particular order which applied to him on May 30, 1942, and Hirabayashi refused to obey his order on May 11 and 12, 1942.

[2]It is assumed that all the relevant facts upon this appeal will be stated in Government's brief.

[3]See brief of these *amici curiae* in the *Hirabayashi* case, No. 870, Oct. Term 1942.

General, Western Defense Command. The establishment of these areas by Public Proclamations Nos. 1 and 2 (7 Fed. Reg. 2320, 2405) issued pursuant to Presidential Executive Order No. 9066 (7 Fed. Reg. 1407) and under ratification of Congress (Public Law No. 503, Act of March 21, 1942) were approved by this court. It was also there decided that the President and Congress, acting jointly in the exercise of their war powers, could authorize a designated military commander to imposed curfew upon persons within the military areas and that the facts pertaining to the military situation and American-Japanese within Military Area Nos. 1 and 2 at the time and place afforded a reasonable basis for the military commander's action taken pursuant to the Presidential and Congressional authorization in imposing curfew upon all persons of Japanese ancestry within the prescribed area and zone.

In making this decision, the court recognized the following legal concepts which are common to that case and the instant case, and which should guide the decision now to be made:

(1) The President and Congress acting jointly in the exercise of the war power could grant a designated military commander the authority to impose reasonable restrictions upon citizens within military areas.

(2) Under the war power a military commander duly authorized has a wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened danger and in the selection of the means for resisting it.

(3) The extent of judicial review is to determine if there was a rational basis for the decision of the military commander—but this decision made in meeting the danger need not necessarily be the one which the court would make.

(4) The reasonableness of the action is to be judged in the light of the circumstances as they appeared to the military commander at the time.

(5) The issuance of Presidential Executive Order No. 9066 and the enactment of Public Law 503 did not constitute an unconstitutional delegation of Presidential or Congressional war power because a standard was provided and approved for the action to be taken by the military commander, namely, that orders were to be appropriate for "protection against espionage and sabotage" to national defense materials, premises and utilities.

(6) In creating the military areas and stating the type of measures to be prescribed therein, Public Proclamations Nos. 1 and 2 issued by the Commanding General, Western Defense Command, pursuant to Executive Order No. 9066, conformed to the stated standards and were otherwise valid.

(7) Congress through the enactment of Public Law 503 ratified Executive Order No. 9066 and Public Proclamations Nos. 1 and 2.

(8) Public Law 503, a criminal statute, is to be read in the light of the fact that Congress at the time of enactment had before it the Executive Order and Public Proclamations Nos. 1 and 2, which contained

adequate standards and findings. It was, therefore, not void for uncertainty.

(9) Although in most circumstances racial distinctions are irrelevant, the facts and circumstances pertaining to the Japanese population of the Pacific Coast when considered in the light of a threatened attack by Japan and the danger of espionage and sabotage afforded a reasonable basis for dealing with all persons of Japanese ancestry in the area as a group. Restrictions placed upon this group, if reasonable in the light of these dangers, would not constitute an unlawful discrimination in violation of the "due process" requirements of the Fifth Amendment.

(10) In time of war a person may be tried and convicted under Public Law 503 for violating an order of an appropriate military commander made applicable to citizens within a military area provided that the said order is based upon findings of the commander which conform to the standards approved by the President and Congress, and provided further that the measure appears at the time to be reasonably necessary for carrying out the Presidential and Congressional authority.

QUESTIONS PRESENTED.

With these above stated facts and principles recognized by this court there are but three questions presented here:

(1) Did the President authorize and did Congress ratify the exclusion of persons from military areas

with particular reference to persons of Japanese ancestry within military areas of the Pacific Coast?

(2) Was the exclusion of persons of Japanese ancestry from Pacific Coast military areas within the bounds of the war powers of the President and Congress?

(3) At the time and place did a rational basis exist for the decision of the Commanding General, Western Defense Command, to exclude as a group, first on a voluntary and then on a controlled basis, all persons of Japanese ancestry from certain Pacific Coast military areas?

SUMMARY OF ARGUMENT.

(1) The court in *Hirabayashi v. U. S.* (320 U. S. 81) (1943) upheld the power of the President and Congress in time of war to authorize the military commander of the Western Defense Command to issue Public Proclamations Nos. 1 and 2, and of Congress to provide through the enactment of Public Law 503 (Act of March 21, 1942) criminal sanctions for the violation of orders issued pursuant to this authorization.

(2) The President authorized and Congress ratified the exclusion of all persons of Japanese ancestry from those military areas indicated by the said proclamations.

(3) The exclusion of persons from military areas is within the war powers of the President and Congress.

(4) The scope of the judicial review is to determine if in the light of all the relevant circumstances there was a rational basis for the exclusion orders directed to all persons of Japanese ancestry.

(5) At the time of the issuance of the exclusion orders, there was a rational basis for the military decision to evacuate as a group all persons of Japanese ancestry.

ARGUMENT.

I.

THE PRESIDENT AUTHORIZED AND CONGRESS RATIFIED THE EXCLUSION OF PERSONS FROM PACIFIC COAST MILITARY AREAS WITH PARTICULAR REFERENCE TO PERSONS OF JAPANESE ANCESTRY.

That the President by Executive Order No. 9066 and Congress, by the enactment of Public Law 503 (Act of March 21, 1942), authorized the exclusion of persons of Japanese ancestry is even clearer than the authorization given for the imposition of curfew upon members of this group.

Executive Order No. 9066 authorized a designated military commander to establish military areas in such place and of such extent as he might determine *"from which any or all persons may be excluded,* and with respect to which, the *right of any persons 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". (7 Fed. Reg. 1407.)

Proclamations Nos. 1 and 2 (7 Fed. Reg. 2320, 2405), issued pursuant to the Executive Order, expressly stated that "such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from Military Area No. 1" and also from certain zones of Military Area No. 2.

As this court has pointed out, the Executive Order and these Proclamations were before Congress when it enacted Public Law 503 for the purpose of providing sanctions for the enforcement of orders issued under the authority of the Executive Order. The opinion further emphasizes that the legislative history shows particularly that the exclusion from prescribed military areas of all persons of Japanese ancestry, citizens as well as aliens, was one of the clearly stated objectives of the statute[4] and that evacuation of this group was thus clearly ratified by the Congress.

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[4] "The Chairman of the Senate Military Affairs Committee explained on the floor of the Senate that the purpose of the proposed legislation was to provide means of enforcement of curfew orders and other military orders made pursuant to Executive Order No. 9066. He read General DeWitt's Public Proclamation No. 1, and statements from newspaper reports that *'evacuation of the first Japanese aliens and American-born Japanese'* was about to begin. He also stated to the Senate that 'reasons for suspected widespread fifth-column activity among Japanese' were to be found in the system of dual citizenship which Japan deemed applicable to American-born Japanese, and in the propaganda disseminated by Japanese consuls, Buddhist priests and other leaders, among American-born children of Japanese. *Such was stated to be the explanation of the contemplated evacuation from the Pacific Coast area of persons of Japanese ancestry, citizens as well as aliens.* 88 Cong. Rec. 2722-26; see also pp. 2729-2730. Congress also had before it the Preliminary Report of a House Committee investigating national defense migration of March 19, 1942, which approved the provisions of Executive Order No. 9066, and which recommended the evacuation, from military areas established under

II.

THE EXCLUSION OF PERSONS FROM MILITARY AREAS WAS WITHIN THE COMBINED WAR POWERS OF THE PRESIDENT AND CONGRESS.

The exclusion of persons from critical areas in time of war, when required by military necessity, is within the scope of the joint war powers of Congress and the President.

The war power, which the court has found was jointly exercised by the President and Congress through the issuance of Executive Order 9066 and the enactment of Public Law 503, will permit in time of war and when military necessity requires, the evacuation from critical military areas of persons deemed to be potentially dangerous to the national security.

As this court said in the *Hirabayashi* case:

> "The war power of the National Government * * * extends to every matter and activity so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war

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the Order, of all persons of Japanese ancestry, including citizens. H.R. Rep. No. 1911, 77th Cong., 2d Sess." (p. 91.)

The Hirabayashi opinion refers to the letters which the Secretary of War wrote to the Chairman of the Senate Committee on Military Affairs and to the Speaker of the House. The Secretary stated that the purpose of Public Law 503 was to provide enforcement for Presidential Executive Order No. 9066, which authorized the *exclusion of all persons* from prescribed military areas "for purposes of national defense". 88 Cong. Rec. 2722; H.R. Rep. No. 1906, 77 Cong., 2d Sess.; S. Rep. No. 1171, 77 Cong., 2d Sess. (pp. 89-90.)

Emphasis throughout this brief is ours unless otherwise indicated.

> materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war. * * * Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it. Ex parte Quirin, supra (317 U. S. 1), 28-29 (ante 12, 13, 65 S. Ct. 2); cf. Prize Cases (2 Black (U.S.) 670, 17 L. ed. 477); Martin v. Mott, 12 Wheat. (U.S.) 19, 29, 6 L. ed. 537, 540. Where, as they did here, the conditions call for the exercise of judgment and discretion and for the choice of means by those branches of the Government on which the Constitution has placed the responsibility of war-making; it is not for any court to sit in review of the wisdom of their action or substitute its judgment for theirs." (p. 93.)

Exclusion undertaken in times of dire emergency is a preventive measure only and does not involve the adjudgment of a penalty for a crime without a trial—a point consistently overlooked by those challenging the exclusion orders. Such preventive action is taken, as this court said in *Moyer v. Peabody* (212 U. S. 78, 85) (when speaking of temporary detention to put down insurrection) "by way of precaution to prevent the exercise of hostile power" and "to prevent apprehended harm".

The Ninth Circuit Court, in the instant case, *Korematsu v. U. S.* (140 Fed. (2d) 289 (1943)), directly held that the power to exclude all persons of Japanese ancestry existed and, as delegated, was properly exercised. It found its authority in the principle laid down by this court in the Hirabayashi decision.

> "However, the Supreme Court held that under the Constitution the Government of the United States, in prosecuting a war, has power to do all that is necessary to the successful prosecution of a war although the exercise of those powers temporarily infringe some of the inherent rights and liberties of individual citizens which are recognized and guaranteed by the Constitution. We are of the opinion that this principle, thus decided, so clearly sustains the validity of the proclamation for evacuation, which is here involved, that it is not necessary to labor the point." (p. 290.)

The individual rights which were affected by the evacuation are of the highest order, but these rights, precious and valuable as they are, are not absolute and must at times be temporarily curtailed in the exercise of the war power—which is the paramount and fundamental right of the public person, the Nation, to defend itself.[5]

> "Self-preservation is the first law of national life and the Constitution itself provides the neces-

[5] "If it was an appropriate exercise of the war power its validity is not impaired because it has restricted the citizen's liberty. Like every military control of the population of a dangerous zone in wartime, it necessarily involves some infringement of individual liberty • • •." (*Hirabayashi v. U. S.*, supra, at page 99.)

> sary powers in order to defend and preserve the United States." (Hughes, War Powers Under the Constitution, ABA Reports, 1917, page 248.)

Of course, such an exercise of the war power must be reasonable under the circumstances to satisfy the "due process" requirements of the Fifth Amendment.

Hence, because of what has been so recently decided, the only substantial question here is whether or not, in the light of the authorized standard, there existed a rational basis for the decision of the military commander to evacuate and exclude all persons of Japanese ancestry from the Pacific coastal areas.

III.

AT THE TIME OF THE ISSUANCE OF THE EVACUATION ORDER AND CIVILIAN EXCLUSION ORDER NO. 34 UNDER IT, THERE WAS A RATIONAL BASIS FOR THE MILITARY DECISION TO EVACUATE AS A GROUP ALL PERSONS OF JAPANESE ANCESTRY.

In holding that there was a reasonable basis for the application of curfew to *all* persons of Japanese ancestry, citizens and aliens alike, residing within Military Area No. 1 and zones of other military areas within the Western Defense Command, this court, in the *Hirabayashi* case, found that the following factors provided that reasonable basis.

> —In the early months of 1942, the results of the disastrous attack on Pearl Harbor and the Japanese land and naval advances in the Pacific area

afforded ample ground for reasonably prudent men charged with the responsibility of national defense to conclude that there was a danger that the Pacific Coast would be invaded and that measures had to be taken to meet that danger. (At p. 95.)

—"The challenged *orders*[6] were defense measures for the avowed purpose of safeguarding the military area in question, at a time of threatened air raids and invasion by the Japanese forces, from the danger of sabotage and espionage." (At pp. 94-95.)

—In the critical days of March, 1942, the danger to our war production by sabotage and espionage in the Pacific Coast area was obvious.

—The great majority (112,000 out of 126,000) of persons of Japanese ancestry resided in the States of California, Oregon, and Washington. (At p. 96.) See Chart 2, inserted opposite.

—Most of these persons were concentrated in or near ports of embarkation located in Military Area No. 1. (p. 97.) See Chart 3, opposite page 18.

—There was support for the view that social, economic and political conditions have intensified the solidarity of Japanese in this country and have in large measure prevented their assimila-

[6]This apparently alludes to the exclusion orders, which were also before the court. The decision, however, is carefully limited to the validity of the curfew order.

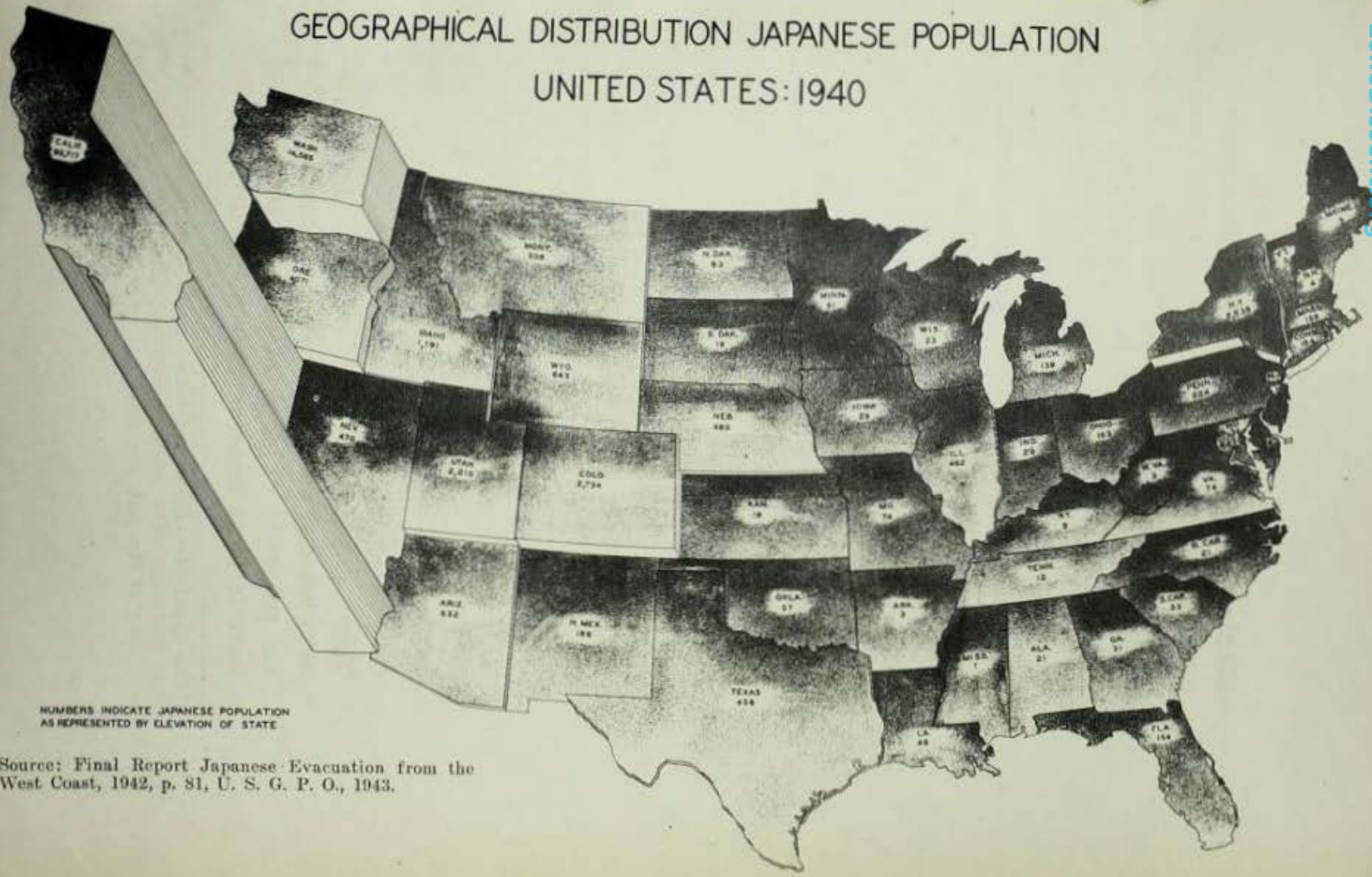


Chart 2.

Source: Final Report Japanese Evacuation from the West Coast, 1942, p. 81, U. S. G. P. O., 1943.

tion as an integral part of the white population. (p. 97.)

—Attendance of large numbers of Japanese children at Japanese language schools, some of these schools being generally believed to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan. (pp. 97, 98.)

—The education of a considerable number of American-born children of Japanese parentage in Japan for all or a part of their education. (p 97.)[7]

—Congress and the Executive, including the military commander, could have attributed special significance in its bearing on the loyalties of persons of Japanese descent, to the maintenance by Japan of its system of dual citizenship.

—Statistics released in 1927 by the Consul General of Japan at San Francisco asserted that over 51,000 of the approximately 63,000 American-born

[7]In support of this finding, extended investigation since this decision, of Ship Manifests for 1930-1941, shows that 13,705 American-born males of Japanese ancestry returned through the ports of Los Angeles, San Francisco, and Seattle, after having lived in Japan. 5225 of the "Kibei" who were fifteen years of age or older had spent two or more years in Japan. The same records reveal that *during 1941 alone*, 1573 "Kibei" (including infants and children) entered west coast ports from Japan, and 1147 Issei, or alien Japanese, re-entered the United States from Japan. The 563 U. S. born male Japanese less than twenty-five years of age who re-entered west coast ports from Japan during 1941 had an average age of 18.2 years and had spent an average of 5.2 years in Japan. Of these, 239 had spent more than three years there. This latter group had spent an average of 10.2 years in Japan. Of the returning Japanese, more than 50% had a close relative in Japan. —Derived from Ships' Manifests filed at the San Francisco, Seattle and Los Angeles Port Offices of the Federal Immigration and Naturalization Service, Department of Justice.

persons of Japanese parentage then in the western part of the United States held Japanese citizenship. (pp. 97-98 and footnote 8.)

—The large number of resident alien Japanese, approximately one-third of all Japanese inhabitants of the country, are of mature years and occupy positions of influence in Japanese communities. (p. 98.)[8]

—Japanese Consulates had maintained the influence of the Japanese Government with the Japanese population in the United States. (p. 98.)[9]

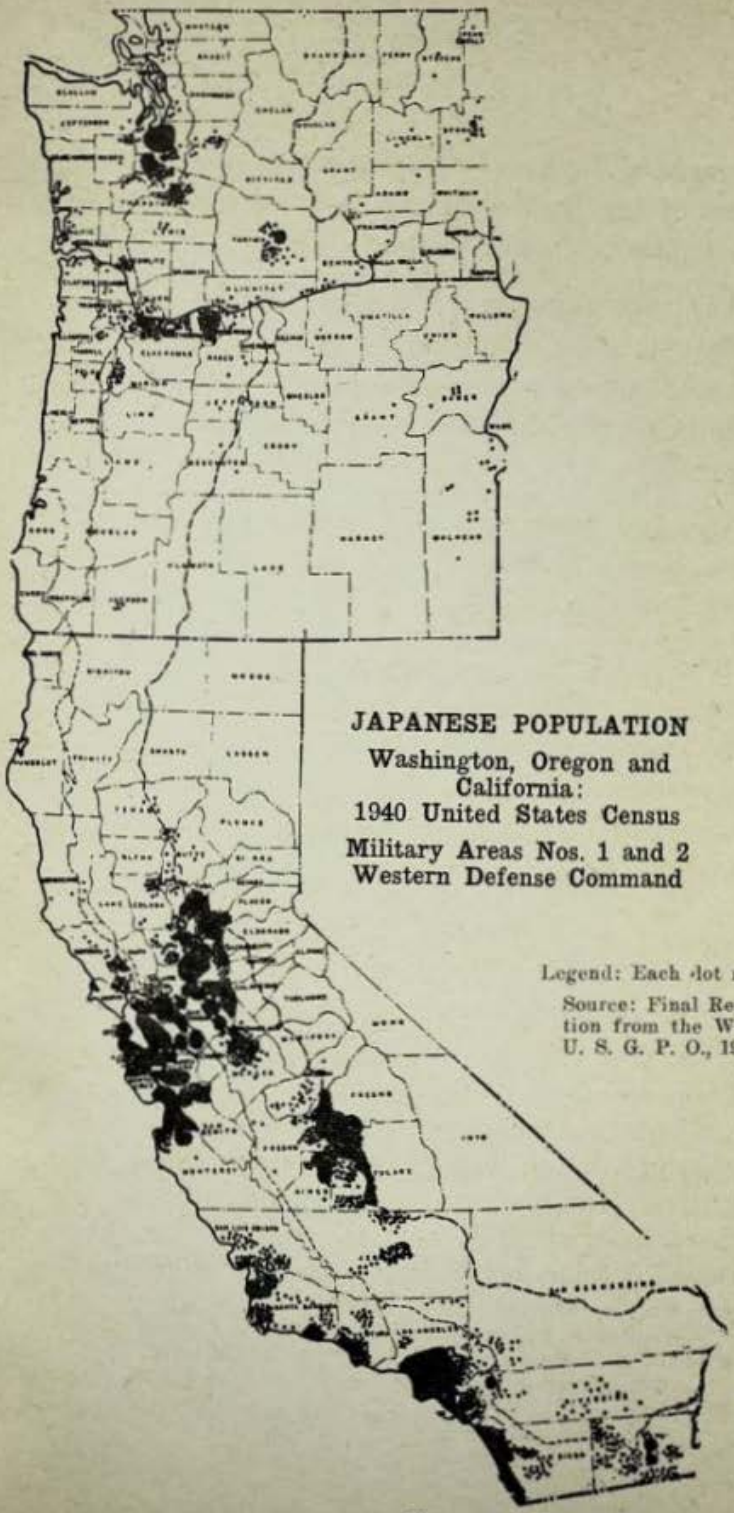
—The conditions affecting the life of the Japanese, both aliens and citizens, in the Pacific Coast area have been sources of irritation and may well have tended to increase their isolation, and in many instances their attachments to Japan and its institutions. (p. 98.)

Summing up this part of the *Hirabayashi* case, this court declared:

"Viewing these data in all their aspects, Congress and the Executive could reasonably have concluded that these conditions have encouraged the continued attachment of members of this group to Japan and Japanese institutions. These are only some of the many considerations which those charged with the responsibility for the national defense could take into account in deter-

[8]See "Significance of the Issei" in brief of these *amici curiae* in Hirabayashi brief. No. 870, 1942 Term, pp. 20-22.

[9]See "Japanese Nationalistic Organizations of the Pacific Coast", ibid., pp. 12-18.



JAPANESE POPULATION

Washington, Oregon and California:
1940 United States Census

Military Areas Nos. 1 and 2
Western Defense Command

Legend: Each dot represents ten people

Source: Final Report Japanese Evacuation from the West Coast, 1942, p. 83, U. S. G. P. O., 1943.

Chart 3.

> mining the nature and extent of the danger of espionage and sabotage, in the event of invasion or air raid attack. The extent of that danger could be definitely known only after the event and after it was too late to meet it. Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, we cannot reject as unfounded the judgment of the military authorities and of Congress *that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.*" (pp. 98-99.)

When considering the foregoing factors to determine if they also provide a rational basis for the decision of the military commander to evacuate the Japanese as a group from coastal military areas, it cannot be emphasized too strongly that (in the words of this court) "The actions taken must be appraised in the light of the conditions with which the President and Congress were confronted in the early months of 1942 many of which, since disclosed, were then peculiarly within the knowledge of the military authorities."[10]

It is submitted that the above summarized findings of conditions which existed at the time of the issuance

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[10]pp. 93-94 of Hirabayashi opinion.

of the appellant's civilian exclusion order also support the reasonableness of the decision to exclude first by unregulated and then by regulated evacuation,[11] all persons of Japanese ancestry from Military Area No. 1 and the California portion of Military Area No. 2. Voicing this same view, the court in *U. S. v. Fujii*, 55 F. Supp. 928 (1944), says of the Hirabayashi decision:

> "* * * yet it would seem that the same logic which led to the conclusion that the curfew law did not violate their (i.e. persons of Japanese ancestry) constitutional rights would justify a like conclusion in regard to removal and relocation." (p. 931.)

It is certainly understandable that the effects upon each individual's loyalty of the conditions set forth in the Hirabayashi opinion could not be readily determined among a group of over 100,000 people. Administrative hearings could not have been had in time nor could proper tests have been applied in the period when the critical military situation demanded the taking of the preventive action to offset the danger of sabotage and espionage.[12] It was at least doubtful if an adequate test could have been readily employed to judge such an imponderable as prospective loyalty. Only a brief consideration of the task of investigating and holding individual hearings for 100,000 people, with the usual "due process" steps taken in adminis-

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[11]The reasons why voluntary relocation would not work, principally due to the hostility of communities outside the exclusion areas, are fully set forth in Government's brief herein.

[12]Hirabayashi opinion supra, p. 98.

trative hearings, reveals the difficulties and scope of the task and the time required.[13] To judge such an imponderable thing as prospective loyalty in these cases would call for a careful consideration, requiring time and investigation, of the effect which the facts as noted by this court may have had upon the loyalty of the individual American-Japanese citizen.

Therefore, with these difficulties as to time and lack of investigative technique, it was reasonable for the military commander to meet the danger threatened from the unidentified disloyal members of the group by excluding the group as a whole.[14] As Mr. Justice Douglas has pointed out in his concurring opinion in the *Hirabayashi* case:

> "The orders must be judged as of the date when the decision to issue them was made. To say that the military in such cases should take the time to

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[13]Even if such hearings were had for only American citizens of the group who were 17 years or older, approximately 40,000 individual hearings would have been required. The estimate is based upon the U. S. Census for 1940, as published by the Statistical Division, Wartime Civil Control Administration, Bull. No. 12, p. 8, dated March 15, 1943.

[14]"• • • it can hardly be said to be unreasonable to go on the assumption that among the Japanese communities along the coast there is enough disloyalty, potential if not active, to make it expedient to evacuate the whole. Perhaps ninety-nine peaceful Japanese plus an unascertainable one who would signal to a submarine would add up to a sufficient reason for evacuating. If it were a matter of punishment, this sort of reasoning would be brutal. But no one supposes that evacuation, any more than detention under Regulation 18B in England, is defensible on any other basis than prevention. When one considers the irreparable consequences to which leniency might lead, the inconvenience, great though it may be, seems only one of the unavoidable hardships incident to the war. In this judgment General DeWitt doubtless acted on such intelligence as was available, and, it is to be remembered, with the express sanction of the President and the Congress'. (Fairman, The Law of Martial Rule and the National Emergency, 55 Harv. L. R. 1254, 1302 (June, 1942).)"

> weed out the loyal from the others would be to assume that the nation could afford to have them take the time to do it. But as the opinion of the Court makes clear, speed and dispatch may be of the essence. Certainly we cannot say that those charged with the defense of the nation should have procrastinated until investigations and hearings were completed. At that time further delay might indeed have seemed to be wholly incompatible with military responsibilities.
>
> "Since we cannot override the military judgment which lay behind these orders, it seems to me necessary to concede that the army had the power to deal temporarily with these people on a group basis." (p. 107.)

The prospect that there were a substantial number who were disloyal but unidentified or whose potential loyalty required careful checking is now materializing.

Among those evacuated, 6096 persons of Japanese ancestry of the age of 18 and over, born in the United States, have thus far requested expatriation to Japan. See Chart 4 inserted opposite. The number of applications has increased each month in the last six months.[15]

This loyalty question was asked of male citizens of Japanese ancestry, 17 years of age and older, in War Relocation Centers:

> "Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any or all attacks by foreign or domestic forces and foreswear any

[15] According to Repatriation Application Papers filed with the Wartime Civil Control Administration and the War Relocation Authority, as of September 21, 1944.

American-born Japanese Applying for Expatriation to Japan, by Age, Sex, Citizenship, Residence and Educ

Age and Sex	Total applying for expatriation	Citizenship Claimed		Residence in Japan by Number of Years							Educ
		Dual	U.S.	No Japanese residence	Less than one year	1-2 years	3-4 years	5-9 years	10-14 years	15-19 years	20 years and over	No Japanese education
Both Sexes												
All ages ..	11,447	4,738	6,709	6,930	300	764	210	811	1,437	899	96	8,074
0-4 years	1,590	147	1,443	1,577	8	5	—	—	—	—	—	1,590
5-9 years	1,240	197	1,043	1,152	38	50	—	—	—	—	—	1,240
10-14 years ...	1,386	199	1,187	1,197	62	110	11	5	1	—	—	1,369
15-19 years ...	2,092	665	1,427	1,519	91	226	40	105	91	20	—	1,847
15-17 years .	1,135	244	891	914	45	120	10	31	13	2	—	984
18-19 years .	957	421	536	605	46	106	30	74	78	18	—	771
20-24 years ...	2,603	1,721	882	973	58	220	91	301	597	358	5	1,268
25-29 years ...	1,621	1,182	439	340	24	102	34	240	482	362	37	489
30-34 years ...	620	429	191	110	8	28	15	108	205	121	25	155
35 and over...	295	198	97	62	11	23	19	52	61	38	29	116
Males												
All ages ..	6,519	3,042	3,477	3,573	171	413	113	520	1,044	630	55	4,192
0-4 years	782	75	707	776	4	2	—	—	—	—	—	782
5-9 years	637	102	535	587	26	24	—	—	—	—	—	637
10-14 years ...	754	119	635	654	38	53	5	3	1	—	—	743
15-19 years ...	1,151	426	725	801	45	128	20	74	64	19	—	981
15-17 years .	598	143	455	474	20	65	4	23	10	2	—	467
18-19 years .	553	283	270	327	25	63	16	51	54	17	—	422
20-24 years ...	1,609	1,137	472	509	33	128	46	179	454	258	2	670
25-29 years ...	961	735	226	158	12	50	21	152	320	235	13	231
30-34 years ...	405	293	112	56	3	14	10	72	152	84	14	77
35 and over...	220	155	65	32	10	14	11	40	53	34	26	71
Females												
All ages ..	4,928	1,696	3,232	3,357	129	351	97	291	393	269	41	3,882
0-4 years	808	72	736	801	4	3	—	—	—	—	—	808
5-9 years	603	95	508	565	12	26	—	—	—	—	—	603
10-14 years ...	632	80	552	543	24	57	6	2	—	—	—	626
15-19 years ...	941	239	702	718	46	98	20	31	27	1	—	866
15-17 years .	537	101	436	440	25	55	6	8	3	—	—	517
18-19 years .	404	138	266	278	21	43	14	23	24	1	—	349
20-24 years ...	994	584	410	464	25	92	45	122	143	100	3	598
25-29 years ...	660	447	213	182	12	52	13	88	162	127	24	258
30-34 years ...	215	136	79	54	5	14	5	36	53	37	11	78
35 and over...	75	43	32	30	1	9	8	12	8	4	3	45

*Source: Repatriation Application Papers filed with the Wartime Civil Control Administration (Forms R-100 and R-101) and the War R

Chart 4

for Expatriation to Japan, by Age, Sex, Citizenship, Residence and Education in Japan: July, 1944*

imed	Residence in Japan by Number of Years								Education in Japan by Number of Years					
	No Japanese residence	Less than one year	1-2 years	3-4 years	5-9 years	10-14 years	15-19 years	20 years and over	No Japanese education	Less than one year	1-2 years	3-4 years	5-9 years	10-14 years
9	6,930	300	764	210	811	1,437	899	96	8,074	8	150	205	1,918	1,092
3	1,577	8	5	—	—	—	—	—	1,590	—	—	—	—	—
3	1,152	38	50	—	—	—	—	—	1,240	—	—	—	—	—
7	1,197	62	110	11	5	1	—	—	1,369	—	7	5	4	1
7	1,519	91	226	40	105	91	20	—	1,847	2	37	28	147	31
1	914	45	120	10	31	13	2	—	984	1	18	7	30	3
6	605	46	106	30	74	78	18	—	771	1	19	21	117	28
2	973	58	220	91	301	597	358	5	1,268	2	69	85	727	452
9	340	24	102	34	240	482	362	37	489	3	21	48	644	416
1	110	8	28	15	108	205	121	25	155	—	9	26	272	158
7	62	11	23	19	52	61	38	29	116	1	7	13	124	34
	3,573	171	413	113	520	1,044	630	55	4,192	7	79	127	1,362	752
	776	4	2	—	—	—	—	—	782	—	—	—	—	—
	587	26	24	—	—	—	—	—	637	—	—	—	—	—
	654	38	53	5	3	1	—	—	743	—	4	3	3	1
	801	45	128	20	74	64	19	—	981	1	18	18	108	25
	474	20	65	4	23	10	2	—	467	—	6	6	24	3
	327	25	63	16	51	54	17	—	422	1	12	12	84	22
	509	33	128	46	179	454	258	2	670	2	39	42	545	311
	158	12	50	21	152	320	235	13	231	3	12	31	410	274
	56	3	14	10	72	152	84	14	77	—	4	22	192	110
	32	10	14	11	40	53	34	26	71	1	2	11	104	31
	3,357	129	351	97	291	393	269	41	3,882	1	71	78	556	340
	801	4	3	—	—	—	—	—	808	—	—	—	—	—
	565	12	26	—	—	—	—	—	603	—	—	—	—	—
	543	24	57	6	2	—	—	—	626	—	3	2	1	—
	718	46	98	20	31	27	1	—	866	1	19	10	39	6
	440	25	55	6	8	3	—	—	517	1	12	1	6	—
	278	21	43	14	23	24	1	—	349	—	7	9	33	6
	464	25	92	45	122	143	100	3	598	—	30	43	182	141
	182	12	52	13	88	162	127	24	258	—	9	17	234	142
	54	5	14	5	36	53	37	11	78	—	5	4	80	48
	30	1	9	8	12	8	4	3	45	—	5	2	20	3

with the Wartime Civil Control Administration (Forms R-100 and R-101) and the War Relocation Authority. (W.R.A. 230.)

Chart 4

> form of allegiance or obedience to the Japanese emperor, or any other foreign government, power or organization?"

Out of 19,104 questionnaires checked, 4850 American citizens or 25.4% answered in the negative.[16] 9.7% of the female citizens of Japanese ancestry, 17 years of age and older, whose questionnaires were checked, also answered this question in the negative.[17]

It has now been discovered that many thousands of Japanese, resident in the United States, had a financial stake in Japan through the purchase of "Fixed Yen Deposits"[18] and other moneys on deposit in Japanese banks.[19]

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[16]"Table 1.—Response to question 28 (Form 304A) by relocation centers, male citizens of Japanese ancestry, 17 years of age and older, May 1, 1943." Some few qualified "Yes" answers are included in the figures given. Report of the Subcommittee of the Senate Committee on Military Affairs, May 7, 1943, approved by the Full Committee. 78th Cong. 1st Sess. p. 48. The replies represented 31,705 responses out of a total 39,710 citizens of Japanese ancestry in the age group.

[17]"Table 2.—Responses to question 28 • • • female citizens of Japanese ancestry • • • 17 years of age and older, May 1, 1943." See footnote No. 16 above for source.

[18]The August 1941 statement of the Yokohama Specie Bank, San Francisco Branch, now in the files of the California Superintendent of Banks, listed Fixed Yen Deposit Certificates owned by alien and citizen Japanese, resident in the Continental United States, valued at 80,923,670.07 yen deposited in Japan and representing 21,167 deposits. It is not clear from the statement whether this represents different depositors or the number of accounts. They would appear to be different depositors. The same files contain a letter from this branch directed to the West Coast Japanese in November 1938, which reads in part "It is unnecessary for us to repeat that the transfer of money from America to Japan by the Japanese in this country is the result of their desire to support their Motherland. Under conditions of the present emergency, we ask you to make remittances and deposits, small or large, through our bank."

[19]The records of the California Superintendent of Banks show a "Tabulation of Depositors in Japan according to Different Kens"

On the other hand it is likewise becoming evident that there are a large number of American-Japanese among those evacuated who were and are loyal to the United States. In time of war, however, a citizen, as a member of a particular group of citizens—the military age group, for example—may be called upon to make many a sacrifice of those things of liberty and property normally safeguarded by our Constitution. He may be required even to make the supreme sacrifice in his country's cause. If then, a citizen such as the appellant here, happens to be a member of a group of persons, among whom there are unidentified persons who are potentially disloyal, can it be said in view of the grave danger that his constitutional rights were improperly curtailed when he was required to move, as a member of the group, from sensitive military areas if that was a reasonable way to insure the removal of those other members of the group who might weaken our defense against invasion or interfere with the successful prosecution of the war by the commission of espionage and sabotage?

In time of war, evacuation has been held to be a reasonable method of removing potentially dangerous persons from critical military areas. (*Rex v. Halliday* (1917), 1 A. C. 260, affirming (1916) 1 K. B. 238; *King v. Governor of Wormwood Scrubbs Prison* (1920), 2 K. B. 305; *Greene v. Secretary of State for Home*

[i.e., prefectures] where the deposits originated through the West Coast offices of the Sumitomo Bank in the U. S. According to the January 31, 1939 statement, there were 54,270,698.23 yen on deposit in Japan to the credit of 12,676 individual depositors, who apparently were in large part West Coast Japanese.

Affairs (1942), 1 A. C. 284.)[20] The Canadian Government also found it necessary to order the removal of all persons of the Japanese race from a specified area along the Pacific Coast.[21] After reviewing the facts pertaining to the evacuation of appellant, the Ninth Circuit Court found that the principles of the *Hirabayashi* case so clearly sustained the validity of the evacuation that it said "* * * it is not necessary to labor the point". (*Korematsu v. U. S.*, 140 Fed. (2d) 289, 290.) That the evacuation of all persons of Japanese ancestry from military areas as a group was not, at the time and under the circumstances, a denial of due process, was directly held in *Ex parte Kanai* (46 Fed. Supp. 286 (D.C. E.D. Wis.)). See also *Ex parte Ventura* (44 Fed. Supp. 520 (W.D. Wash. N.D.)).

CONCLUSION.

A realistic consideration of the facts pertaining to the evacuation cannot avoid noting the charges made by appellant and others that the removal of alien and citizen Japanese from the Pacific Coast military areas was the result of pressure from "anti-Japanese"

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[20]The significance of the English authorities is discussed in the brief of these *amici curiae* in the *Hirabayashi* case. (p. 55.)

[21]Pursuant to the Defense of Canada Regulations, the Minister of Justice, by order dated August 18, 1942, established a protected area in the Province of British Columbia along the Pacific Coast, and in part stated:

"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." (Canada Gazette Extra No. 96, August 31, 1942.)

groups opposed to the Japanese for racial and economic reasons, who secured the removal under the cloak of a war measure.[22] There is no evidence that such pressure motivated the military decision. Because of the very fact that social and economic problems have existed in California, Oregon, and Washington, with reference to persons of Japanese ancestry, it is important that this court state that the action was taken as a matter of military necessity to safeguard national security from enemy action, both from without and from within.

This court has emphasized that except in the most unusual circumstances racial discriminations are prohibited.[23] The restrictions placed upon this group of our citizens must be removed as soon as the military authorities determine and the national security permits.

Dated, San Francisco, California,
October 4, 1944.

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[22]See Fortune Magazine for April, 1944, Vol. XXIX, p. 4, "Issei, Nisei, Kibei".

[23]See Murphy, J., in *Hirabayashi v. U. S.*, supra, pp. 110-111.