In the Supreme Court
OF THE
United States

OCTOBER TERM, 1944

No. 22

FRED TOYOSABURO KOREMATSU, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A REHEARING.

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To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petitioner, Fred Toyosaburo Korematsu, demands a rehearing of the within cause upon the following grounds:

I.

CONSEQUENCES OF THE MAJORITY OPINION.

Far better were it that the grim lines of the incredible majority opinion herein never had been written than that they might stand as a judicial precedent justifying not only the summary deprivation of the liberties of the petitioner and other unfortunate citizens but also those of future generations of citizens on the fiction of race and other irrelevant bases. That opinion seems to be founded on the assumption that liberty was our affliction and that our pursuit of a legal right was a painful symptom for which no remedy exists. If it is to stand it will serve but to demonstrate that equality before the law is a mere abstraction and not a fact. It is not an acceptable judicial pronouncement from a tribunal entrusted with the duty of preserving constitutional guaranties. It is the first historic example in which this Court has rejected the concept of the Constitution as a shield and adopted the view that it is a sword that may be wielded without remorse against citizens and classes of citizens. The decision paves the road down which even now a regimented people is being compelled to march unwittingly to state-socialism or state-capitalism. If military control over civilians is to be unlimited we might as well openly declare in favor of a modern police-state patterned after the old Byzantine law or Visigothic code. Citizen Korematsu deserved a better fate at the hands of this, his Court, than he has encountered, wherefore we trouble you to grant a rehearing of his cause, to withdraw the opinion and to

reverse the judgment below. This is the only chance this Court will have to abrogate the dangerous doctrine of inequality announced by the majority opinion. What we require is a reiteration of faith in those fundamental liberties considered inviolate by our Founding Fathers and incorporated in the Constitution they wrote not merely for the benefit of their generation but for this and coming generations of citizens as well.

II.

COURT OVERLOOKED CONFLICT IN ORDERS REQUIRING PETITIONER BOTH TO CONFINE HIMSELF TO AREA AND TO LEAVE THE AREA.

The majority opinion concludes that the order of March 27, 1942 (Public Proclamation No. 4; 7 F.R. 2601), forbidding the petitioner to leave the area and that of May 3, 1942 (Civilian Exclusion Order No. 34), ordering him to leave it through the assembly center route did not contain contradictory commands because the former, by its own express terms, was supplanted by the latter. However, what the Court overlooked was that there were, nevertheless, two contradictory orders outstanding on May 20, 1942, when the information was filed against the petitioner, one forbidding him to leave the area which was not supplanted and one commanding him to leave. The effect of these two orders was neither considered nor passed upon by this Court although the validity of each was in issue.

Public Proclamation No. 3 (7 F.R. 2453) of March 24, 1942, was in full force and effect on May 20, 1942.

It was not supplanted. It remained in full force and effect until January 2, 1945, when it, along with other military orders issued by General DeWitt, was revoked specifically by General H. C. Pratt in Public Proclamation No. 21 issued on December 17, 1944. It commanded the petitioner to confine himself to his home between the hours of 8 P.M. and 6 A.M. and commanded him to stay in and not remove himself beyond a five mile radius from his place of residence in the following language:

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

Section 4 thereof makes a violation of section 2 punishable as a misdemeanor under Public Law No. 503. This order does not contain a proviso limiting its effect in time as does Public Proclamation No. 4 of March 27, 1942, which was discussed by the Court. It commanded the petitioner to remain within the five mile circumscribed area and not to leave it. Civilian Exclusion Order No. 34 of May 3, 1942, commanded him to leave it by the avenue of a Civil Control Station situated in Hayward, Alameda County, California, for the Tanforan Assembly Center situated in San Mateo County, California, a distance exceeding 20 miles from his residence, and destined him to final imprisonment in Topaz, Utah, a thousand miles away. The trap was sprung. It was impossible for him to obey both orders. Both were imprisoning orders. The first imprisoned

him within a small geographical area in the vicinity of his home. The second narrowed the corridor through which he was transported to another cell where he was scheduled to remain for an indefinite period. Although each required diametrically opposite acts the petitioner could not escape punishment. A violation of either was made punishable as a misdemeanor by Public Law No. 503. The majority opinion herein admits "a person cannot be convicted for doing the very thing which it is a crime to fail to do". By virtue of that declaration applied to the facts herein we are entitled to have this petition granted and the judgment reversed.

Detention was inherent in program from its inception.

The majority opinion states that had the petitioner left the forbidden area and gone "to an assembly center" it could not say either as a matter of fact or law that his presence in that center would have resulted "in his detention in a relocation center" because some who reported to the assembly centers were not sent to relocation centers but were released upon condition they remain outside the prohibited zones until the military orders were modified or lifted. We are unable to discover the source of the Court's information upon which these strange conclusions appear to have been based and believe the Court to have been misinformed and in error.

Suffice to say that it was not until March 30, 1942, that General DeWitt first announced that an evacuation "was in prospect for practically all Japanese".

See H.R. 2124, page 165, and press release of the Wartime Civil Control Administration, March 30, 1942. Until that time petitioner had no knowledge he might be evacuated. It is significant, however, that the General already had imprisoned the petitioner within a five mile radius from his home by Public Proclamation No. 3 on March 24, 1942. The petitioner had neither notice nor knowledge that the General intended to evacuate him until May 3rd and never had an opportunity to migrate voluntarily. Those who left the forbidden areas prior to March 24, 1942, did so because they suspected they might be evacuated. A majority of them were aliens. The petitioner had no reason to suspect that the General would desire his evacuation. Why should any loyal citizen suspect any such thing? Further, we know of no instance where a person reporting to an assembly center was not detained thereafter in a relocation center. Neither are we aware of any case of any person reporting to an assembly center being released upon condition of remaining outside the prohibited zone until the military orders were lifted. Perhaps the Court's information upon which it based its conclusion is derived from the respondents' brief in the *Endo* case, page 16, stating that General DeWitt's letter of August 11, 1942, delegated authority to the W.R.A. to issue permits for conditional leave to detained citizens. Although we have not seen the General's letter we are informed by the W.R.A. that it contained a delegation of authority to that agency to release volunteer workers from the camps for temporary periods under special permits in order that

they might harvest perishable crops, that is, to dig potatoes, turnips and beets while under surveillance. The workers were not released from the provisions of the exclusion orders, however, for they were retaken to the camps when their work was finished. Consequently, it must be said that as a matter of fact and of law the presence of petitioner in an assembly center was certain to result in and did result in his detention in a relocation center as it was scheduled to do. The issues framed at the trial under a "not guilty" plea involved not only the petitioner's remaining in the area forbidden by Civilian Exclusion Order No. 34 of May 3, 1942, but also the provisions of Public Proclamation No. 3 of March 24, 1942, which commanded him to remain there.

In the light of the facts the reasons recited in the majority opinion for a refusal to pass upon the validity of the whole imprisoning program, including the original confinement of citizens to designated localities, their removal to assembly centers, their deportation and subsequent detention in relocation centers, each a successive phase of one plan of treatment, lose their support. This Court heretofore has decided that such a program is reviewable in its entirety. See *Hirabayashi v. U. S.*, 320 U. S. 81, and *Lovell v. Griffin*, 303 U. S. 444. Must a program be attacked successively in piecemeal fashion so that in three generations we may have a final declaration that it was a mistake and wholly unconstitutional from inception to completion or that it was constitutional in one part and unconstitutional in another? The Court erred in stating

that to pass upon the validity of the whole program would be to go "beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case". The program involved continuous imprisonment for the petitioner from and after March 24, 1942, at various prisons despite the fact that he had been ordered by Public Proclamation No. 3 to remain in the first on peril of punishment under Public Law No. 503. He was ordered to leave the first by Civilian Exclusion Order No. 34 on May 3, 1942, to report to the second prison for final incarceration in a third at Topaz on peril of like punishment. Consequently, all the "momentous issues" mentioned by the Court were tendered by the "not guilty" plea. It will not do to answer petitioner's contention by stating that it will be time enough "to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him". These very orders were certain to be applied to him and were applied to him. The issues were raised by demurrer to the information, by the not guilty plea and were argued in this Court and the Courts below. The serious constitutional questions involved in this barbarous evacuation program are not avoidable in this case. There never will be another test of the issues in the manner mentioned in the majority opinion because such has been rendered impossible. The assembly centers are closed—the relocation centers, by judicial decision in the *Endo* case, are now converted into protectional camps and proposed

legislation threatens to close them by the middle of the year—and the military mass exclusion orders have been revoked. It will not do for this Court to stamp the program with the label of judicial approval by avoidance of the real issues. This case and the *Endo* case precipitated the revocation of the mass exclusion orders and but for these test cases loyal citizens still would be incarcerated and might have waited until doomsday for deliverance from their plight. What we require now is a declaration that loyal citizens cannot be branded criminal for the exercise of constitutional rights. It is the duty of this Court to declare the statute a bill of attainder.

III.

CAUSE SHOULD BE REMANDED TO TRIAL COURT FOR DETERMINATION OF FACTUAL ISSUES TO PREVENT SUBSTITUTION OF FICTION FOR FACT.

The majority opinion concluded, evidently upon the grounds of which it took judicial knowledge when it considered the *Hirabayashi* case, that the evacuation program did not involve "racial prejudice" but was a military imperative dictated by military necessity and was devised to prevent possible acts of espionage and sabotage. Possibilities are always hypothetical. A necessity exists only when we deal with actualities such as threats, overt acts or omissions. The DeWitt report shows that the only matters which he considered were in the nature of vague potentialities and that he was actuated by personal prejudice. If this Court

entertains the belief that there might have been facts undisclosed by him that might be deemed to form a rational basis for his program it would be its duty to remand the cause to the trial Court for a determination of the issues of fact.

At the trial below the respondents did not meet their burden of proof. The rule long has been established that military action taken against a participant in a rebellion or insurrection is justifiable provided the measures taken are "conceived in good faith, in the face of an emergency, and directly related to the quelling of the disorder or the prevention of its continuance". It is in such cases that a military commander "is permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order". Such drastic measures are not conclusively supported by "mere executive fiats" however. See *Sterling v. Constantin,* 287 U. S. 378, and *Moyer v. Peabody,* 212 U. S. 78. The orders violated by the petitioner were mere executive fiats of one of our many generals. They contravened substantial constitutional rights of the petitioner who was proved loyal and not to have been engaged in any criminal or reprehensible act. The taking of judicial knowledge of doubtful matters is not a proper substitute for evidence. It offers no legitimate excuse for the respondent's failure to introduce facts into evidence to sustain its burden of proof on the issue of the military commander's good faith and the factual basis for the necessity claimed to justify the deprivation of fundamental constitutional

rights of the petitioner. If the respondent could have sustained its burden of proof it would have done so at the trial below. If the Court has any doubt that the failure was occasioned by a want of facts supporting the existence of a claimed military necessity justifying the action taken or believes there was a factual basis therefor judicial knowledge ought not to be substituted for concrete evidence and the cause should be remanded for a determination of these issues of fact. It seems to us that the majority opinion says, in effect, that had a general gone so far as to have ordered our federal judges and justices from a forbidden area on the plea that their decisions might have interfered with his plans which arose from an undisclosed military necessity that such action would have been justified in the absence of a declaration of martial law. If such orders would lack constitutionality the orders involved herein lack constitutional sanction.

IV.

INVESTIGATIONS CONDUCTED SUBSEQUENT TO EVACUATION DO NOT CONFIRM BLANKET CHARGE OF DISLOYALTY.

The majority opinion also states that "there were members of the group who retained loyalties to Japan" and that this was confirmed by investigations made "subsequent to the exclusion". The retention of such loyalty on the part of aliens long ineligible to citizenship carries no suggestion that they would have committed any disloyal acts against this nation. If the group contained citizens who preferred loyalty to

Japan it does not follow that they would commit disloyal acts against this nation. The Court also states that subsequent investigation found some five thousand American citizens of Japanese ancestry who "refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan".

The statement of the Court was derived from sources which did not reveal a complete picture of the truth. The frightened internees were asked to fill out a questionnaire. It is to be borne in mind that this questionnaire was required to be filled in by a group of citizens singled out of the whole body of citizens merely because they were of Japanese ancestry. Question No. 28 in DSS-Form 304A asked them to renounce "allegiance or obedience" to the Japanese Emperor. (The same question originally was asked of the aliens ineligible to citizenship but later was revised to ask them to swear "to abide by the laws of the United States and to take no action which would in any way interfere with the war effort of the United States".) The W.R.A. Application For Leave Clearance, Form W.R.A.-126 Rev., contained the same obnoxious Question No. 28. Approximately 5000 of the citizens refused to answer the question at all because such a renunciation involved a false admission of allegiance to Japan. Their failure to answer the question was misinterpreted to indicate that they were attached to Japan.

We draw attention to the fact that this oath was asked of interned citizens who had been denied all the

rights of citizenship without expectancy of relief and who, to all intents and purposes, had been repudiated by their own government. The very oath asked of them carried an admission that they owed allegiance to Japan which allegiance they were to renounce. Renunciation in itself would have involved an admission of attachment to Japan which loyal American citizens viewed as false and could not and would not admit. Would white citizens renounce allegiance to the country of their ancestors when they do not recognize any allegiance except to the United States? Why did not our governmental agencies ask them a simple but fair question, that is, ask them to admit or deny any allegiance or attachment to Japan or any foreign power? The falsity of the charge of wholesale disloyalty is proven by the fact that despite their mistreatment only a few citizens have asked for expatriation and a trifling number of aliens for repatriation to Japan when peace returns. Special legislation recently has been enacted enabling them to exercise this choice. It is significant that since its passage fewer than seventy aliens and citizens have applied for permission to be sent to Japan in the post-war period. These were sent to special alien internment camps during January of this year. In the light of these facts the conclusion of the Court is erroneous and ought to be corrected so that it may not stand in a judicial decision as a permanent brand of disloyalty against innocent citizens.

V.

AUTHORITY TO IMPRISON, EVACUATE AND DETAIN CANNOT BE READ INTO THE STATUTE BY IMPLICATION.

In the *Hirabayashi* case this Court decided that Public Law No. 503 authorized a military commander to establish a curfew on a race discriminating basis. It reached this conclusion because the Secretary of War's letter of March 14, 1942, addressed to the House Committee on Military Affairs (H.R. 2124, p. 168) stated that General DeWitt desired the passage of S. 2352 and H.R. 6758 (Public Law No. 503) to enable the enforcement of "curfews and other restrictions" in military areas. It was on the basis of this indirect notification to Congress that this Court decided that Congress contemplated the establishment of a curfew and, consequently, read into the statute the *implied* intent of Congress to authorize a curfew. However, no like conclusion can be reached concerning the imprisoning program which has been called an evacuation although it involved imprisonment from its inception. The original confinement to small areas, the evacuation and subsequent detention were mere steps in one imprisoning program. Congress does not seem to have been informed that the General intended or desired to institute a generalized imprisonment program. The first notice that any members of Congress had that anyone was to be evacuated was gleaned from the reading of a Washington newspaper report on March 19, 1942, that the General was going to evacuate a limited number of aliens and citizens from the Los Angeles area "early next week". (See 88 Cong. Rec.

2722-26.) The report was erroneous because none were excluded from that area until April 5, 1942, pursuant to Civilian Exclusion Order No. 2. (See H.R. 2124, p. 334.) The congressional committee reports are barren on the subject of evacuation. Consequently, we submit that this Court is unjustified in finding that Congress, either expressly or impliedly, authorized imprisonment, deportation and detention, matters never within its intention or contemplation when it enacted Public Law No. 503. It is significant that on June 18, 1942, S. 2293 providing for the taking into custody of all Japanese was introduced into the Senate and rejected. (88 Cong. Rec. 5317.) On June 22, 1942, the bill was debated and rejected, it being pointed out that the passage of such vicious legislation would constitute "winking at the Constitution". (88 Cong. Rec. 5427-29.)

VI.

THE HIRABAYASHI DECISION IS NOT A PROPER PRECEDENT UPON WHICH TO DETERMINE ISSUES HEREIN.

The majority opinion acknowledges the petitioner challenges the assumptions upon which this Court rested its conclusions in the *Hirabayashi* case. In answer to the challenge the Court relies upon the statement from that case that it could "not reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose numbers and strength could not be precisely and quickly ascertained", a statement made

by the Court long prior to the time General DeWitt's Final Report had been released revealing the error of the conclusion. Nowhere can it be found that Congress ever made any such judgment. Nowhere can it be found that the military authorities ever made any such judgment. Only General DeWitt drew such a conclusion and if his conclusion is to be deemed a judgment it must be considered one divorced from reason, unsupported by fact and founded solely upon prejudice as his letter of February 14, 1942, discloses. (F.R. p. 33.) The Court herein ought not to rely upon the assumptions it made in the *Hirabayashi* case when a rational basis for the program had to be assumed because the General's reasons were treated as military secrets. There are no military secrets that should be kept from the public except matters directly related to the strength and disposition of our forces and the sources and disposition of their supplies. The Final Report itself disputes the assumptions the Court relied upon in the *Hirabayashi* case and proves there was no rational basis for the General's action. This Court ought not to have resorted to the vague and unreliable field of judicial knowledge to support the curfew regulation in the *Hirabayashi* case and ought not now to use that decision as a precedent to determine the issues herein. Such would necessitate a reliance upon fiction for fact to support the General's discriminatory action against citizens.

There was ample time before and during the progress of the evacuation in which the number and strength of disloyal members, if any, could have been

ascertained but no effort was expended in so doing. The Final Report removes any suggestion that the evacuation program had a rational factual basis. It bluntly admits the program was based upon prejudice mingled with suspicion. In actuality there never existed a bona fide military imperative justifying the terrible program. The government has openly admitted on page 57 of its brief herein that the discrimination practiced by the General had no rational basis. The admission reads as follows:

> "In essence, the military judgment that was required in determining upon a program for the evacuation was one with regard to tendencies and probabilities as evidenced by attitudes, opinions, and slight experience, rather than a conclusion based upon objectively ascertainable facts."

Does the Court desire us to believe that the program now can be upheld upon such trifling reasons where the destruction of substantial constitutional rights are involved?

The reasons General DeWitt assigns in justification for his terrible program were collected and assembled in the hodge-podge Final Report long after the program had been carried into execution. They are the products of hindsight and possess the vice of inaccuracy, half-truth and untruth. They prove however that his suspicion and prejudice were erected into a monumental mass of fragile material from which we are to believe a rational basis can be fabricated to justify his colossal military blunder.

The majority opinion also denies that the program was the product of "racial prejudice". General DeWitt's final report, however, demonstrates that it was the product of racial prejudice beyond the shadow of a doubt. (See Final Report, pp. vii-x, 1-39.) His letter of February 14, 1942 (F.R. p. 33), to the Secretary of War reveals that on that date, without evidence of any danger from these people, he nevertheless adopted the arbitrary notion that all Japanese descended persons were "potential" enemies. (F.R. p. 34.) His observers attended the Tolan Committee hearings but neither offered any evidence of disloyalty against these people nor voiced any suspicion of them. His representatives attended the various trials in the Federal District Courts where his orders were challenged but in none of them did they offer any evidence of disloyalty against the defendants or voice any suspicion of them. The respondent is unable to point out a single instance of any act of espionage or sabotage having been committed by any of the excluded citizens or aliens before, during or since the evacuation although such acts could be committed anywhere in the country and the evacuees had and still have opportunities to commit such crimes if so inclined. So have white persons if so inclined. The evacuation was not prompted because of a genuine belief the excluded persons were disloyal but because General DeWitt harbored prejudice against them because of their race.

VII.

NEW AND DANGEROUS PRINCIPLE ESTABLISHED BY MAJORITY OPINION.

In the majority opinion we discover an incredible statement establishing an alien and dangerous principle of law. It reads as follows:

> "It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonisms never can."

Apparently, the fiction of race is given a validity it never possessed and does not merit. There are no races in the United States. Mankind is a race but it is not divisible except into nationalities. In this country all citizens possess but one nationality and that nationality is American. If citizens are divisible into groups it can only be on such irrelevancies as size, configuration, pigmentation or situation, none of which justifies discrimination. The curtailment of constitutional rights on a discriminatory basis is not only immediately suspect but is an outright violation of the Constitution.

If discrimination practiced under the color of governmental authority is merely to be suspect and subject to the most rigid scrutiny we are confronted with a strange principle which for the first time crops into juridical thought. Such a principle leaves it to the

individual citizen to guess whether his act or omission is lawful or unlawful and his guess is made dependent upon what this Court long thereafter, on appeal, may decide his rights to be after "the most rigid scrutiny", the plain language of the Constitution and prior judicial interpretation of its provisions to the contrary notwithstanding. This means simply that the Court may decide momentous issues on the caprice of the moment and contrary to precedent. All is left to surmise and to obscurity. The citizen must act at his own peril. How then is anyone to know what his rights are? Must every whimsical command of a military commander be obeyed by civilians and the matter be left to a Court's "most rigid scrutiny" before it can be determined whether it be valid or not? How is a civilian to learn what military orders he must obey and what he may ignore? What is become of civil rights under the Constitution that the citizen must play the part of an anvil to the administration's hammer? A power invoked in wartime that can be rationalized by the Court so as to be asserted to conform to the Constitution can be utilized at all times and find justification on the ground of public emergency, a vagrant term comprehending various forms of crises, political and economic, from one or the other of which we never are free. While expressly denouncing racial prejudice the majority opinion nevertheless upholds its application as though it viewed the affected citizens not as citizens but as part of the landscape. It also sacrifices consistency in declaring that a loyal citizen not charged with crime can be imprisoned

whereas the *Endo* decision declares such a citizen cannot be imprisoned.

It does this tribunal little good and the public a great measure of injury to state that Korematsu, a loyal citizen, was not imprisoned and branded criminal because of his race. On December 17, 1944, General H. C. Pratt, by Public Proclamation No. 21, revoked the mass exclusion orders issued by his predecessor, the revocation taking effect as at January 2, 1945, and obviously being a policy dictated by the War Department. On the same date General Pratt issued a press release admitting his predecessor had based the exclusion on racial grounds, stating therein "it is apparent that the logical and proper course is to terminate mass exclusion based solely on ancestry". The revocation was announced on Sunday the day before this Court handed down its opinions in this and the *Endo* case. On the surface the sudden revocation, timed so perfectly, had the appearance of a face-saving procedure as though it had been adopted because of an anticipated condemnation of the program in the two cases. However, the injury is not undone. Although mass exclusion has been terminated Public Proclamation No. 21 informs us that a system of individual exclusion will act as its substitute. It is by this adroit method that the military authorities may continue to exclude citizens at their whim in the absence of a genuine military necessity for such exclusion. In such circumstances, under the majority opinion herein, a private citizen will have no opportunity to question the validity of the individual exclusion order and no

power to escape its effects. The Court's opinion in the *Endo* case would not be controlling in such an instance because the military authorities arbitrarily might declare the individual disloyal and hold him indefinitely without a hearing on the question of his loyalty. It is little comfort the majority opinions in this and the *Endo* case offer the individual who may incur the enmity or suspicion of a military commander.

VIII.

A CONCENTRATION CAMP IS A CONCENTRATION CAMP.

It is with amazement that we read in the majority opinion that it is unjustifiable to call the assembly and relocation centers by their true names. It is shocking to learn that it is now become distasteful to term a concentration camp a concentration camp. We neither solicited nor deserved the admonition—that truth has become unmentionable. The citizens who were ruthlessly ordered from their homes and thrown into huts and hovels in camps where they have been confined for years, mistreated and forgotten, know them for what they really are. Whatever these camps may be called they are exactly what they were designed to be, what they are conducted as and what they are—concentration camps. The American public is not a kindergarten that it will accept the notion that these shameful prisons are sanctuaries. The narration of a few incidents may present them in their true light.

On December 6, 1942, two young evacuees were shot dead and nine wounded by military police at Manzanar for congregating in a crowd. A few newspapers which value rumors higher than the truth because of what has been termed "story-value" were quick to spread the ugly but false report that the incident had been provoked by disloyal internees. There was nothing sinister in the assemblage however. Its purpose was petitioning the W.R.A. officials for redress of wrongs, a matter we have been taught was guaranteed by the First Amendment. (See W.R.A. Quarterly Report, Oct. 1 to Dec. 31, 1942, pp. 37-38.) Evidently the right to intern loyal citizens also carries the right to shoot them with impunity. The fact that the camp was converted into the appearance of an abattoir impresses us as one of the characteristics of a typical concentration camp.

On November 4, 1943, eighteen evacuees in the Tule Lake Center were treated for injuries received at the hands of special police and an army detachment stationed there arising out of strike-breaking activities of a few internees. (See W.R.A. Semi-Annual Report, July 1 to Dec. 31, 1943, p. 20.) It has been charged that Caucasian internal security police at the camp brutally beat several helpless internees into insensibility without cause. (See American Civil Liberties Union-News, San Francisco, August, 1944.) The authorities in charge are reluctant to divulge the results of their investigations into the cause of this brutality. Are we to believe that because the injured were hospitalized at government expense that the camp was a

sanctuary and that the bludgeoning of helpless citizens was justified because the medical staff needed patients upon whom to exercise their medical skill? Thereafter, several hundred internees were dragged from the shacks that housed them and held incommunicado in a special prison within the camp boundaries known as "The Stockade", the detention varying from a few days to in excess of eleven months. No complaints were lodged against the prisoners and no hearings were granted them. The stockade is mentioned in the W.R.A. reports merely as "an isolation area". Barbarism has its own peculiar nomenclature.

Although the interned citizens of military age are not free agents it has been the policy of the administration to induct them into the Army. Those who by reason of their imprisonment and impoverishment have refused to report for induction have been indicted for a violation of the draft law.* The administration's act in imprisoning them raises the presumption that it suspects them of disloyalty. It inducts them into the Army from imprisonment and thereby admits their loyalty. The inconsistency of its position is susceptible of no explanation except caprice. It falls into the same class of arbitrariness as General DeWitt's orders prohibiting soldiers of Japanese ancestry from enter-

*The practice of indicting imprisoned Nisei for refusing to report for induction has been condemned as a denial of due process of law. See *U. S. v. Kuwabara*, 56 Fed. Supp. 716, under which District Judge Goodman, releasing 26 Nisei, declared it "to be shocking to the conscience that an American citizen be confined on the ground of disloyalty, and then, while so under duress and restraint, be compelled to serve in the armed forces, or be prosecuted for not yielding to such compulsion."

ing the forbidden areas set up by him. Evidently the administration shares the view with General DeWitt that a person admittedly loyal in one part of the country is disloyal in another, the measure of a loyal citizen being his ancestral line. The fact that an administrative branch of government ignored traditional legal rights and indicted these Nisei under such circumstances indicates an interest in persecution and a disinterest in the administration of justice. Persecution is an attribute of the concentration camp.

We entertain the view that a concentration camp is one in which innocent citizens are imprisoned without charge of crime being lodged against them and held without a hearing of any sort before a competent tribunal and where they are subjected to abusive treatment. These camps meet this description. No intelligent effort was made to ascertain whether there were any spies or saboteurs in their midst. The F.B.I. looked elsewhere, knowing these camps harbored none. If these camps contained any persons who were not friendly to this nation it is to be remembered that there existed no reliable evidence or reasonable suspicion that any of them would have raised a hand against this nation. It is no more likely that any of them would have done so than that any other group of citizens white or yellow would have done so. The proclivities of the average white citizen do not differ from those of the average yellow.

While the evacuation of these citizens startled a sober thinking part of our populace a few notorious agitators seeking the doubtful benefits of cheap but

sensational publicity protested not only the miserable shelter given these unfortunates but also begrudged them the very food they consumed and declared they were being coddled by the administration.

CONCLUSION.

No other military commander in our history ever perpetrated such an outrage or exerted such a mischievous power over the lives and destinies of American citizens as General DeWitt. We do not believe that the intelligence of one military commander is to be the measuring rod by which a military necessity is to be determined when the rights of some 130,000 civilians are involved. If Congress could vest such power in him it could lodge all power in the executive. In such an event the Constitution would become a nullity and our Courts would exist by sufferance and be permitted to act only as apologists for dictatorial action while the populace winced under the lash of tyranny. Neither the congressional nor the judicial mantle has yet grown so threadbare that our representatives and judicial officers must wear the livery of the executive instead of that of the nation.

It was Oswald Spengler who observed that the advent of Caesarism brings "that kind of government which, irrespective of any constitutional formulation that it may have, is in its inward self a return to thorough formlessness". (Decline of the West, vol. 2, p. 431.) Rationalizing the Constitution to justify an invasion not only of its express provisions but of its

very spirit distorts it into formlessness and spells its doom. It is a poor patching of fig leaves to conceal the naked Truth. The majority opinion injects into the Constitution the foreign germs of its decay. It needs but one additional decision of like import to write its final epitaph and the tribunal entrusted with its guardianship will have become its destroyer. The Founding Fathers never intended such a power to be exercised by this Court and the nation would not approve it were it aware of its real significance.

For the foregoing reasons we demand this petition be granted and that upon a rehearing of the cause the judgment be reversed that the mission for which this Court was ordained be fulfilled and that justice be done the petitioner.

Dated, San Francisco, California,
February 5, 1945.

Respectfully submitted,
WAYNE M. COLLINS,
Counsel for Petitioner.

CERTIFICATE OF COUNSEL.

The foregoing petition for rehearing is well founded in point of fact and law, is presented in good faith and is not interposed for delay.

Dated, San Francisco, California,
February 5, 1945.

WAYNE M. COLLINS,
Counsel for Petitioner.