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IN THE

1539

Supreme Court of the United States

OCTOBER TERM 1942

No. 870

GORDON KIYOSHI HIRABAYASHI,

Appellant,

against

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLANT

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GORDON KIYOSHI HIRABAYASHI,
 against

UNITED STATES OF AMERICA,

Appellant,

Appellee.

1. Opinions Below

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

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

3. Statement of the Case

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

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

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

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

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

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

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

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

"Public Law #503:

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

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

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

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

"1. Was Lt. Gen. DeWitt's Civilian Exclusion Order No. 57 of May 10, 1942, excluding all persons of Japanese ancestry, including American citizens of Japanese ancestry, from and after 12 o'clock noon, May 16, 1942, from a particular area in Seattle, Washington, within Military Area No. 1 established by General DeWitt's Proclamation No. 1 of March 2, 1942, and requiring a responsible member of each family, and each individual living alone, affected by the order to report on May 11 or 12, 1942, to the Civil Control Station in the said area in connection with said exclusion, a constitutional exercise of the war powers of the President derived from the Constitution and statutes of the United States.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"Once in a great while an opportunity presents itself to recognize an entire section of this community for their performance of duty. All of the people of the Hawaiian Islands have contributed generously to our war effort. Among these have been the Americans of Japanese descent. Their role has not been an easy one. Open to distrust because of their racial origin, and discriminated against in certain fields of the defense effort, they nevertheless have borne their burdens without complaint and have added materially to the strength of the Hawaiian area.

"They have behaved themselves admirably under the most trying conditions, have bought great quantities of war bonds, and by the labor of their hands have added to the common defense." (Quoted in Foreword to "The Japanese in Hawaii Under War Conditions", by Andrew W. Lind.)

Specification of Assigned Errors

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

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

Summary of Argument

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

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

POINT I

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

Appellant contends that this law violates the due process clause of the Fifth Amendment because of its vagueness and violates Article I, §1, because legislative power is delegated to the military. He claims also that it is invalid because it vests the military with power over civilians not authorized by the Constitution.

(a) The statute is too vague to be enforceable.

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

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

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

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

(b) The statute unlawfully delegates legislative power.

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

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

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

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

"But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry" (p. 537).

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

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

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

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

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

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

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

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

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

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

POINT II

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

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

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

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

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

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

1. Racial discrimination is abhorrent to our institutions.

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

This Court has condemned discrimination on racial grounds whenever the problem has come before it.⁶ True, these cases rest on the equal protection clause of the Fourteenth Amendment and that clause limits only the states, not the national government. Yet the due process clause of the Fifth Amendment bars classifications lacking in reasonable basis. (See *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139). And racial grounds have been held to be an improper basis of classification under the due process clause of the Fourteenth Amendment. (See *Buchanan v. Warley*, 245 U. S. 60; *City of Richmond v. Deans*, 37 Fed. [2d] 712, affd. 281 U. S. 704.) Indeed, there could be little doubt that any attempt on the part of Congress to divest citizens of important rights on the basis of race would be declared unconstitutional by this Court.

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

⁶ See *Yick Wo v. Hopkins*, 118 U. S. 356; *Yu Cong Eng v. Trinidad*, 271 U. S. 500. Cf. *Mitchell v. United States*, 313 U. S. 80.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,

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APPENDIX

Executive Order of the President No. 9066

February 19, 1942

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

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

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

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

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

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

Public Proclamation No. 1

March 2, 1942

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

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

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

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

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

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

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

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

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

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

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

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

Public Proclamation No. 3

March 24, 1942

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

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

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

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

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

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

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

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

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

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

Public Proclamation No. 7

June 8, 1942

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

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

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

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

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

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

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