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WARTIME CONTROL OF JAPANESE-AMERICANS

I

THE NISEI — A CASUALTY OF WORLD WAR II†

MAURICE ALEXANDRE

At 11:20 P. M. on March 28, 1942, Minoru Yasui, an American-born Japanese,¹ walked into a police station in the city of Portland, Oregon. Less than one month later, he was indicted for this act. Although at first blush this may sound like something which occurred in an Axis country, the fact remains that it happened in the State of Oregon, and resulted from curfew regulations established pursuant to authority granted by an executive order² issued by the President of the United States and enforced pursuant to a statute³ duly enacted by the Congress of the United States.

Brought to trial for violating the curfew restrictions, Minoru Yasui contended that because he was a citizen of the United States, the regulations were unconstitutional insofar as they applied to him. Yasui's trial ended in his conviction, the district court having concluded from the evidence that Yasui had at his majority chosen allegiance to the Emperor of Japan in preference to American citizenship.⁴ Holding the curfew regulations valid as to aliens, the court during the course of its opinion bitterly attacked their constitutionality insofar as they applied to citizens of the United States. Two months earlier, another court had sustained them.⁵

†Since this paper was written, the Supreme Court has unanimously held that the curfew regulations were constitutional when issued, because of the danger of invasion existing at that time. The Court expressed no opinion regarding the present or future validity of any portion of the evacuation program. *Hirabayashi v. United States*, 11 U. S. L. WEEK 4539 (U. S. 1943); *Yasui v. United States*, 11 U. S. L. WEEK 4547 (U. S. 1943). [Ed.]

¹The American-born children of Japanese immigrants are called *Nisei*—the second generation. They comprise two-thirds of the 127,000 Japanese in the United States. *Preliminary Report of the Tolan Committee on Evacuation Problems*, H. R. REP. No. 1911, 77th Cong., 2d Sess. (1942) 16; *Tolan Committee Hearings*, part 31, 11815.

²Exec. Order No. 9066, February 25, 1942, 7 FED. REG. 1407 (1942).

³Pub. L. No. 503, 77th Cong., 2d Sess. (1942).

⁴*United States v. Yasui*, 48 F. Supp. 40, 55 (D. Ore. 1942).

⁵*United States v. Hirabayashi*, 46 F. Supp. 657 (W. D. Wash. 1942). Executive Order No. 9066, the exclusion regulations (see note 11 *infra*), and Pub. L. No. 503 were likewise held to be constitutional. See *Ex parte Lincoln Seiichi Kanai*, 46 F. Supp. 286, 288 (E. D. Wis. 1942). *Hirabayashi* and *Yasui* have filed appeals from their respective

The evacuation program undertaken by the government raises a number of extremely interesting and important issues involving wartime civil rights of American citizens of Japanese extraction. The purpose of this paper is to explore the constitutional validity of the curfew and other regulations as applied to such citizens, as well as the legality and effect of the statute enacted as an aid to the enforcement of these regulations.

I. CHRONOLOGICAL EVENTS

The attack upon Pearl Harbor, of course, was the first of the events leading to the Yasui trial. On February 19, 1942, the President issued Executive Order No. 9066⁶ authorizing and directing the Secretary of War and military commanders designated by him to prescribe military areas from which all persons might be excluded, and to promulgate regulations concerning the right of any person to enter, remain in, or leave such areas. The following day the Secretary of War designated Lieutenant General John L. DeWitt, commanding general of the Western Defense Command, as the military commander to carry out the duties imposed by the executive order for that portion of the United States embraced in the Western Defense Command. Pursuant to such authority, General DeWitt issued two proclamations establishing military areas on the west coast from which persons to be designated in subsequent regulations would be excluded.⁷ These proclamations also provided that any Japanese, German, or Italian alien, or any person of Japanese ancestry, then resident in the designated areas, who desired to change his place of habitual residence, was required to execute a change of residence notice.

In order to formulate and effectuate a program of removal and a long range plan of relocation, maintenance, and supervision of persons to be designated, the President on March 18, 1942, created the War Relocation Authority.⁸ Three days later, on March 21, the President approved Public Law No. 503 providing that anyone who violated any regulation issued pursuant to Exec-

convictions. The Ninth Circuit Court has certified the questions raised to the Supreme Court, which heard argument on May 10 and 11, 1943.

⁶7 FED. REG. 1407 (1942). Prior to the issuance of the executive order, the activities of enemy aliens were regulated primarily by the Attorney General pursuant to Presidential Proclamation Nos. 2525 and 2526 which invoked the operation of the Alien Enemy Act of 1918 [50 U. S. C., §§ 21 and 24 (1940)]. Executive Order No. 9066 shifted authority to the Secretary of War and gave him power to deal, not only with enemy aliens, but with all persons within military areas designated by him.

⁷Public Proclamation No. 1, March 2, 1942, 7 FED. REG. 2320 (1942); Public Proclamation No. 2, March 16, 1942, 7 FED. REG. 2405 (1942).

⁸Exec. Order No. 9102, March 18, 1942, 7 FED. REG. 2165 (1942). The Western Defense Command, on March 14, 1942, had created the Wartime Civil Control Administration to employ designated military personnel and to enlist the cooperation of civilian agencies in carrying on the evacuation.

utive Order No. 9066 would be guilty of a misdemeanor. Shortly thereafter, General DeWitt issued his first curfew proclamation requiring all alien Germans and Italians, and all Japanese, whether citizen or alien, who resided within the military areas heretofore designated, to be within their places of residence between the hours of 8 P. M. and 6 A. M.⁹ Any person who violated the regulation was to be subject to immediate exclusion from the designated areas and to the criminal penalties provided by Public Law No. 503.¹⁰ On the same day, General DeWitt issued the first evacuation regulation, ordering that all persons of Japanese ancestry, alien or non-alien, be excluded from the designated areas by March 30, 1942.¹¹ It was also provided that evacuees might obtain permission to proceed to any approved place of their own choosing beyond the limits of the prohibited zone.¹² Voluntary evacuation was begun,¹³ but on March 27, because of resentment against the Japanese in the areas to which they had chosen to remove,¹⁴ it was ordered to cease until further notice.¹⁵

On March 30, 1942, another proclamation was issued by General DeWitt establishing certain classes of persons entitled to obtain exemption from the curfew and evacuation orders.¹⁶ Whereas the new regulation established six exempt classes for German and Italian aliens, only two of the classes were available to Japanese persons, citizen and alien alike.¹⁷ The same day, the second

⁹Public Proclamation No. 3, March 24, 1942, 7 FED. REG. 2543 (1942).

¹⁰Enemy aliens would, in addition, be subject to immediate apprehension and internment.

¹¹Civilian Exclusion Order No. 1, March 24, 1942, 7 FED. REG. 2581 (1942).

¹²The Wartime Civil Control Administration instructed the evacuees that they could receive special permission to proceed to an approved place of their own choosing beyond the limits of the designated military areas provided that they had completed arrangements for employment and shelter. Any person who had not departed by the prescribed day was to be evacuated by the Administration and would be provided with transportation and temporary residence elsewhere. *Fourth Interim Report of the Tolan Committee*, H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 333.

¹³After the issuance of Executive Order No. 9066 on February 19, 1942, persons of Japanese descent were urged to relocate outside the military zones on their own initiative, and during February and March, approximately 8,000 responded. See FIRST QUARTERLY REPORT ON WAR RELOCATION AUTHORITY, 2-3.

¹⁴See FIRST QUARTERLY REPORT OF WAR RELOCATION AUTHORITY, 3.

¹⁵Public Proclamation No. 4, March 27, 1942, 7 FED. REG. 2601 (1942). The proclamation recited that it was necessary to restrict and regulate the migration "in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1." A press release issued by Gen. DeWitt stated that the purpose of the order was to protect the Japanese and to insure that proper shelter awaited them at their designated destination. Press Release, Wartime Civil Control Administration, March 27, 1942.

¹⁶Public Proclamation No. 5, March 30, 1943, 7 FED. REG. 2713 (1942).

¹⁷The exempt classes were as follows, only the last two being available to the Japanese:

(a) German and Italian aliens seventy or more years of age.

and third Japanese exclusion orders were issued.¹⁸ These and the subsequent exclusion orders, however, did not authorize the evacuees to choose new locations; instead, relocation centers were selected for them. Additional exclusion orders followed rapidly,¹⁹ and evacuation of the Japanese began in earnest.

On May 19, 1942, General DeWitt issued a general detention order.²⁰ This order provided that all persons of Japanese ancestry, alien and non-alien, then or thereafter residing within established assembly, reception, or relocation centers pursuant to exclusion orders of the Western Defense Command headquarters, must remain within such centers unless written authority²¹ to leave was obtained from such headquarters.²² On June 27, 1942, General DeWitt

(b) In the case of German and Italian aliens, the parent, wife, husband, child of (or other person who resides in the household and whose support is wholly dependent upon) an officer, enlisted man or commissioned nurse on active duty in the Army of the United States (or any component thereof), U. S. Navy, U. S. Marine Corps, or U. S. Coast Guard.

(c) In the case of German and Italian aliens, the parent, wife, husband, child of (or other person who resides in the household and whose support is wholly dependent upon) an officer, enlisted man or commissioned nurse who on or since December 7, 1941, died in line of duty with the armed services of the United States indicated in the preceding subparagraph.

(d) German and Italian aliens awaiting naturalization who had filed a petition for naturalization and who had paid the filing fee therefor in a court of competent jurisdiction on or before December 7, 1941.

(e) Patients in hospital, or confined elsewhere, and too ill or incapacitated to be removed therefrom without danger to life.

(f) Inmates of orphanages and the totally deaf, dumb, or blind.

On October 19, 1942, by Public Proclamation No. 13 (7 FED. REG. 8565), two additional exempt classes were established as follows:

(a) All citizens or subjects of Italy and all aliens who at present are stateless but who at the time at which they became stateless were citizens or subjects of Italy.

(b) Aliens of enemy nationalities during their terms of military service in the armed forces of the United States.

¹⁸Civilian Exclusion Order No. 2, March 30, 1942, 7 FED. REG. 3944 (1942), and Civilian Exclusion Order No. 3, March 30, 1942, 7 FED. REG. 3945 (1942).

¹⁹Up to the present time, 108 exclusion orders have been issued, not including Public Proclamation No. 1 of the Commanding General of the Alaska Defense Command excluding from the Territory of Alaska all persons of the Japanese race of greater than the half blood and all males of the Japanese race over 16 years of age of half blood. 7 FED. REG. 4859 (1942). It was said as early as May, 1942, that "the forced migration thus set in motion surpasses anything of a similar character in the history of this Nation." *Fourth Interim Report of the Select Committee Investigating National Defense Migration*, H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 1.

²⁰Civilian Restrictive Order No. 1, May 19, 1942, 8 FED. REG. 982 (1942).

²¹The written authority was to set forth the hour of departure, the hour of return, and the terms and conditions upon which permission to leave was granted.

²²The following day, May 20, 1942, Gen. DeWitt issued Civilian Restrictive Order 2, approving evacuation by the War Relocation Authority of about 400 persons of Japanese ancestry from a designated assembly center for private employment in a specified area. 8 FED. REG. 982 (1943). Such approval was given upon the express condition that all the evacuees proceed only to the area designated and return to a center specified by the War Relocation Authority. A number of similar employment evacuation orders followed rapidly. See 8 FED. REG. 982 *et seq.* (1943).

issued Public Proclamation No. 8 designating the territory within all existing and future relocation centers in the Western Defense Command as military areas, and imposing similar leave restrictions.²³ By letter dated August 11, 1942, General DeWitt delegated to the Director of the War Relocation Authority the power to authorize applicants to leave such centers. On August 13, 1942, the Secretary of War issued a similar proclamation²⁴ with respect to relocation centers outside the Western Defense Command, and providing that permission to leave such relocation centers could be obtained from the Secretary of War or the Director of the War Relocation Authority.²⁵

II. POWER TO ISSUE EXCLUSION, CURFEW, AND DETENTION REGULATIONS

A. *Martial Law*

The crux of the court's dicta in the *Yasui* case was that the curfew regulations (and by inference the exclusion and detention regulations) were unconstitutional as applied to citizens of the United States. Referring "to the power of the military commander to issue regulations binding indiscriminately upon citizen and alien," the court had this to say:²⁶

"Such power only is tolerated in the first instance if a state of 'martial law' has been proclaimed by the proper authority and in the ultimate only if the facts prove the existence of the military necessity therefor."

The court, however, was of the opinion that martial law²⁷ had not been established on the west coast, and accordingly that the curfew regulations were invalid insofar as they applied to citizens of the United States.

The power of the military to issue such regulations during the existence of martial law cannot be open to serious doubt. The Supreme Court has declared²⁸ that the "nature of the power" of the President to call the militia into service necessarily implies that "there is a permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing

²³7 FED. REG. 8346 (1942).

²⁴Public Proclamation No. WD 1, August 13, 1942, 7 FED. REG. 6593 (1942).

²⁵See regulations governing leave issued by the War Relocation Authority, 7 FED. REG. 7656 (1942).

²⁶*United States v. Yasui*, 48 F. Supp. 40, 48 (D. Ore. 1942).

²⁷Martial law is to be distinguished from "military law" which consists of the rules and regulations made by the legislative power for the government of persons in the military and naval services, and is enforceable at all times regardless of the absence of emergency. *United States v. McDonald*, 265 Fed. 754, 761 (E. D. N. Y. 1920); *Ex parte Milligan*, 4 Wall. 2, 141 (U. S. 1866). It is also distinguishable from "military government" which is the dominion exercised by a general over a conquered state or province. *Commonwealth v. Shortall*, 206 Pa. 165, 55 Atl. 952, 954 (1903).

²⁸*Sterling v. Constantin*, 287 U. S. 378, 399, 53 Sup. Ct. 190, 196 (1932).

violence and restoring order." It does not follow from this that any action taken by the military, "no matter how unjustified by the exigency or subversive or private right," is permissible.²⁹ The contrary, said the Court in *Sterling v. Constantin*,³⁰ is well established.³¹ In that case, although holding that there was no military necessity to justify interference with the operation of private oil wells by the state militia, the Supreme Court indicated the rule governing executive power³² during martial law. Referring to the decision in *Moyer v. Peabody*,³³ the Court declared:³⁴

"In that case it appeared that the action of the Governor had direct relation to the subduing of the insurrection by the temporary detention of one believed to be a participant. . . ."

If "direct relation to the subduing of the insurrection" is the test in the absence of war, then the rule when war has come surely must be direct, if not indirect,³⁵ relation to the subduing of the enemy. In the *Moyer* case, the Supreme Court, several years before its decision in *Sterling v. Constantin*, had stated that the ordinary use of soldiers in repelling or suppressing an actual or threatened invasion of, or insurrection in, a state included the killing of persons who resisted, as well as the milder measure of seizing the bodies of those whom the governor considered as standing in the way of restoring peace. And many years before the *Moyer* case, the Supreme Court, in *Luther v. Borden*,³⁶ had held that the existence of martial law justified the forcible

²⁹*Id.* at 400, 53 Sup. Ct. at 196 (1932). *But cf.* *United States v. Diekelman*, 92 U. S. 520, 526 (1875): "Martial law is the law of military necessity in the actual presence of war. It is administered by the general of the army, and is in fact his will. Of necessity it is arbitrary; but it must be obeyed." See also *In re Egan*, 8 Fed. Cas. 367, No. 4,303 (C. C. N. D. N. Y. 1866); *State ex rel. Mays v. Brown*, 71 W. Va. 519, 77 S. E. 243 (1912); *Ex parte Jones*, 71 W. Va. 567, 77 S. E. 1029 (1913); *Carver v. United States*, 16 Ct. Cl. 361, 385, 386 (1880). *But see* 3 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, (2d ed., 1929) pp. 1591-1592.

³⁰287 U. S. 378, 400, 53 Sup. Ct. 190, 196 (1932).

³¹Referring to the power of the military during martial law, the Supreme Court in *Luther v. Borden*, 7 How. 1 (U. S. 1849) said at 45: "No more force, however, can be used than is necessary to accomplish the object. And if the power is exercised for the purposes of oppression, or any injury wilfully done to person or property, the party by whom, or by whose order, it is committed would undoubtedly be answerable." See *In re Ezeta*, 62 Fed. 972, 1002 (D. Cal. 1894).

³²The Court declared that the executive power of the governor derives from the state constitution which makes the governor the chief Executive of the state and commander-in-chief of its military forces, with power to call forth the militia to execute the laws of the state, to suppress insurrections, repel invasions, and protect the frontier. In addition, the constitution requires the governor to cause the laws to be faithfully executed.

³³212 U. S. 78, 29 Sup. Ct. 235 (1909).

³⁴287 U. S. 378, 400, 53 Sup. Ct. 190, 196. See *Cox v. McNutt*, 12 F. Supp. 355, 360 (D. Ind. 1935); *Powers Mercantile Co. v. Olson*, 7 F. Supp. 865, 868 (D. Minn. 1934).

³⁵*Cf.* cases cited in notes 71 *et seq. infra*.

³⁶7 How. 1 (U. S. 1849).

entry and search of a private house for a person, where there were reasonable grounds for believing that he was aiding in an insurrection and that he was concealed in the house. The court stated that such a person might also be lawfully arrested by the military,³⁷ and referring to the use of military power by a state to put down an armed insurrection too strong to be controlled by civil authority, declared:³⁸

"Without the power to do this, martial law and the military array of the government would be mere parade, and rather encourage attack than repel it."

In the light of these decisions the conclusion is inescapable that during the existence of martial law, especially in time of war, the military have the power to issue, for citizen and alien alike, regulations providing for curfew, exclusion, or detention.

Whether the imposition of martial rule in the areas affected by such regulations would have been, or is now, justified is a more difficult question.³⁹ Although the statement of the majority in the *Milligan* case⁴⁰—"Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present, the invasion real, such as effectually closes the courts and deposes the civil administration."—has been severely criticized both as being unnecessary dictum and as being unsound in principle,⁴¹ the Court was entirely correct in declaring that the necessity must be actual and present. Unquestionably the mere declaration of necessity where no necessity actually exists would be insufficient to justify martial law.⁴² The test laid down in the *Milligan* case that the civil courts must be closed and unable to function certainly should not be the test.⁴³ On the other hand, it would seem that the mere fact that the country is at war is not a sufficient basis, without more, for establishing

³⁷See *Cox v. McNutt*, 12 F. Supp. 355 (D. Ind. 1935); *Despan v. Olney*, 7 Fed. Cas. 534, No. 3,822 (D. R. I. 1852).

³⁸7 How. 1, 45 (U. S. 1849).

³⁹For a good discussion of the scope of review of an executive finding that martial law is necessary, see CORWIN, *THE PRESIDENT, OFFICE AND POWERS*, (2d ed. rev., 1941) 180-184.

⁴⁰4 Wall. 2, 127 (U. S. 1866).

⁴¹Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253; WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1896).

⁴²*Sterling v. Constantin*, 287 U. S. 378, 53 Sup. Ct. 190 (1932).

⁴³It seems unthinkable that our government should have to await actual attack and inability of the civil courts to function before taking precautionary measures. Willoughby has pointed out that although the fact that the courts are open and undisturbed will in all cases furnish a powerful presumption that there is no necessity for a resort to martial law, it should not furnish an irrebuttable presumption. 3 WILLOUGHBY, *CONSTITUTIONAL LAW OF THE UNITED STATES*, (2d ed. 1929) 1602. See the recent case of *Ex parte Quirin*, 317 U. S. 1, 45, 63 Sup. Ct. 2, 19 (1942) in which the Supreme Court confined the *Milligan* case to the peculiar facts therein involved.

martial rule.⁴⁴ Applying the test of imminence of danger of invasion,⁴⁵ the attack on Pearl Harbor would probably have justified imposition of martial law on the west coast;⁴⁶ martial law today might have less justification. One thing, however, is certain: there has been no express declaration of martial law in any of the areas in which exclusion, curfew, or detention regulations have been adopted.⁴⁷

It has been suggested that Executive Order No. 9066 was a declaration of "limited," "implied," or "quasi" martial law,⁴⁸ the inference being that the regulations were thereby justified. The decision in the *Yasui* case refers to "partial martial law" and unhesitatingly labels the concept as a "pernicious doctrine." The concept is not entirely new, and has been urged in the past in connection with the asserted powers of a governor during civil disturbances. It has been contended on behalf of the governor that even when a civil disturbance does not amount to an insurrection, if the military are called to aid in restoring order, they may exercise certain powers, not otherwise existing, in order to carry out their mission. In *Commonwealth ex rel. Wadsworth v. Shortall*,⁴⁹ the relator, a private in the state militia, acting pursuant to orders of his commanding general, shot and killed a person who refused to halt upon being challenged. The relator was arrested and charged with manslaughter, whereupon he filed a writ of habeas corpus. It appeared that during a strike, the Governor of Pennsylvania had called up the militia to restore order upon request of the county sheriff. In discharging the relator from custody, the Supreme Court of Pennsylvania declared that the governor's order was a declaration of "qualified martial law" for the preservation of public peace and order, and not for the "ascertainment or vindication of private rights, or the other ordinary functions of government." For the latter functions, the opinion

⁴⁴Cf. Morgan, *Court-Martial Jurisdiction over Military Persons under the Articles of War* (1920) 4 MINN. L. REV. 79, 81 suggesting that in time of war, the entire United States might be considered to be within a military zone and subject to martial law. And see *Ex parte Lincoln Seichi Kanai*, 46 F. Supp. 286, 288 (E. D. Wis. 1942).

⁴⁵"... Congress may lawfully provide for cases of imminent danger of invasion, as well as for cases where an invasion has actually taken place. . . . One of the best means to repel invasions is to provide the requisite force for action, before the invader himself has reached the soil." *Martin v. Mott*, 12 Wheat. 19, 28 (U. S. 1827). See concurring opinion in *Ex parte Milligan*, 4 Wall. 2, 132 (U. S. 1866).

⁴⁶Martial law was established in Hawaii on December 7, 1941.

⁴⁷With respect to whether the President may declare martial law, the concurring opinion in *Ex parte Milligan*, 4 Wall. 2, 142 (U. S. 1866) stated: "... martial law . . . 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."

⁴⁸*Fourth Interim Report of the Select Committee Investigating National Defense Migration*, H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 21, 170.

⁴⁹206 Pa. 165, 55 Atl. 952 (1903).

stated, the courts and other agencies of the law were still open and no exigency required interference. The court also said that it was not true that the community must be either in a state of peace or a state of war. There could be an intermediate state. Accordingly, the court found that the order to shoot to kill was not illegal and that the killing was justified by the circumstances.

A contrary view, however, has been taken by other courts. In *Bishop v. Vandercook*,⁵⁰ it appeared that the governor, upon request of the local authorities, had called up the militia to aid in putting down disorders arising from the importation of liquor into Michigan. Defendants, captain and colonel of the state militia, had ordered that if automobiles along the Dixie Highway refused to halt when signaled, a log was to be dragged across the highway in order to stop them. In sustaining a judgment in favor of the owner of a taxi which was destroyed when it crashed into a log placed on the highway by defendants, the court rejected the rule of the *Shortall* case, saying:⁵¹

"There is no such thing as 'qualified martial law.' There is no middle ground, or twilight zone, between government by law and martial rule. Martial law or rule cannot arise unless and until there is a suspension of civil power."

The court then held that full martial law had not been declared and that defendants had exceeded their authority. That plaintiffs might have been violating the federal or state prohibition laws, or the state motor vehicle laws, would not relieve defendants from liability for injuries wantonly planned and wilfully inflicted.

In *United States ex rel. Palmer v. Adams*,⁵² a federal court rejected a claim that limited martial law justified detention of individuals active in fomenting violence during a strike, and ordered their release. The court, however, recognized that martial law brings into operation a number of powers which are necessary for effective military rule.⁵³ The *Adams* and *Bishop* cases are undoubtedly correct in holding that all of these powers cannot be exercised unless martial law in its full sense has been declared. These cases come into conflict with the *Shortall* case on the issue as to whether a declaration of partial martial law permits the exercise of the limited powers necessary "for preservation of public peace and order." Assuming, *arguendo*, that the rule of the *Bishop* and *Adams* cases is correct with respect to the gubernatorial power to

⁵⁰228 Mich. 299, 200 N. W. 278 (1924).

⁵¹*Id.* at 309, 200 N. W. at 281 (1924).

⁵²26 F. (2d) 141 (D. Colo. 1927).

⁵³*Id.* at 144: "If the Governor here had declared martial law, we would have an entirely different situation. All the rules applicable thereto, which this court and others are bound to recognize, would come into play."

declare partial martial law during peacetime, it does not necessarily follow that the same rule is applicable with respect to the powers of the President during a war. It is not necessary, however, to justify the issuance of Executive Order No. 9066 and the exclusion, curfew, and detention regulations by a doctrine as questionable as partial martial law. Justification may be found in a more venerable concept—the Presidential war power.⁵⁴

B. War Power

The statement of the court in the *Yasui* case that the power to issue curfew regulations is dependent upon the existence of martial law⁵⁵ is, in the opinion of this writer, incorrect, for it fails to recognize that the exercise of the President's war powers is not confined to circumstances in which martial law would be appropriate.

Executive Order No. 9066⁵⁶ recited as the authority⁵⁷ for its issuance the authority vested in the President of the United States and Commander in Chief of the Army and Navy, that is, constitutional authority.⁵⁸

The President's powers, apart from statute, have been the subject of controversial debate for many years. Two views of the President's constitutional powers are open: (1) his powers are purely executive; or (2) in the presence of emergency and in the absence of congressional action, he may perform any and all acts necessary to preserve the nation. The first view, held by ex-President Taft,⁵⁹ would confine the President to the mere execution of con-

⁵⁴Perhaps the sole difference between the war power and partial martial law is merely one of terminology.

⁵⁵See note 29 *supra*.

⁵⁶7 FED. REG. 1407 (1942).

⁵⁷The preamble to Executive Order No. 9066 cites several statutes, but not as a source of the power exercised.

⁵⁸The following provisions of the Constitution may be treated as comprising the war power of the President:

"The executive Power shall be vested in a President of the United States of America." (Art. II, § 1, cl. 1).

"Before he enter on the Execution of his Office, he shall take the following Oath or Affirmation:—

"I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States." (Art. I, § 1, cl. 8).

"The President shall be Commander in Chief of the Army and Navy, and of the Militia of the several States, when called into the actual service of the United States. . . ." (Art. II, § 2, cl. 1).

"... he [the President] shall take care that the Laws be faithfully executed . . ." (Art. II, § 3).

"The United States shall guarantee to every State in the Union a Republican Form of Government, and shall protect each of them against invasion. . . ." (Art. IV, § 4).

⁵⁹"The true view of the executive functions is, as I conceive it, that the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise." TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS (1916) 139-140.

gressional enactments. Thus, the designation of the President as Commander in Chief would be construed merely as authorizing him to direct the military operations of the armed forces, and not as a grant of power.⁶⁰ The second view, however, has greater support in the decided cases as well as in past presidential action.⁶¹ Directly in point on the question of detention pursuant to an order of the President is *Ex Parte Vallandigham*.⁶² There, the petitioner, a citizen of the United States, was arrested during the Civil War by General Burnside and held for trial before a military commission on the charge of making seditious speeches in public. Petitioner filed a writ of habeas corpus, contending that since he was in neither the military nor naval service, he was not liable to arrest by the military. In refusing to discharge the prisoner, a very enlightened Court pointed out that "In time of war, the President is not above the constitution, but derives his power expressly from the provision of that instrument declaring that he shall be Commander in Chief of the Army and Navy."⁶³ Although it is difficult to define what acts are properly within the scope of the war power, the Court continued, "they must undoubtedly be limited to such as are necessary to the protection and preservation of the government and the constitution, which the President has sworn to support and defend."⁶⁴ Then the Court, in its zeal to support the power of the President, indulged in language somewhat broader than necessary in connection with the scope of review of presidential action. Said the Court:⁶⁵

"And in deciding what he may rightfully do under this power where

⁶⁰Cf. *Myers v. United States*, 272 U. S. 52, 47 Sup. Ct. 21 (1926).

⁶¹Washington, Jefferson, Lincoln, McKinley, Cleveland, Theodore Roosevelt, Wilson, and Franklin D. Roosevelt exercised their constitutional powers for purposes other than the mere execution of the laws of Congress. See BERDAHL, *WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES* (1921). In this connection, Theodore Roosevelt wrote in his autobiography:

"The most important factor in getting the right spirit in my administration, next to the insistence upon courage, honesty, and a genuine democracy of desire to serve the plain people was my insistence upon the theory that the executive power was limited only by specific restrictions and prohibitions appearing in the Constitution or imposed by the Congress under its Constitutional powers. My view was that every executive officer, and above all every executive officer in high position, was a steward of the people bound actively and affirmatively to do all he could for the people, and not to content himself with the negative merit of keeping his talents undamaged in a napkin. I declined to adopt the view that what was imperatively necessary for the Nation would not be done by the President unless he could find some specific authorization to do it. My belief was that it was not only his right but his duty to do anything that the needs of the Nation demanded unless such action was forbidden by the Constitution or by the laws."

⁶²28 Fed. Cas. 874, No. 16,816 (C. C. S. D. Ohio, 1863), *cert. den.* 1 Wall. 243 (U. S. 1864).

⁶³*Id.* at 922.

⁶⁴*Ibid.*

⁶⁵*Ibid.*

there is no express legislative declaration, the President is guided solely by his own judgment and discretion and is only amenable for an abuse of his authority by impeachment, prosecuted according to the requirements of the constitution."⁶⁶

The general principle was stated to be:⁶⁷

"The occasion which justifies the exercise of this power exists only from the necessity of the case; and when the necessity exists, there is a clear justification of the act."

The Court also declared that the foregoing view of presidential power "undoubtedly implies the right to arrest persons who, by their mischievous acts of disloyalty, impede or endanger the military operations of the government." Finally, the Court said that this power may be exercised by the military, and "it is not necessary that martial law should be proclaimed or exist, to . . . justify the arrest."⁶⁸

The war power of the President has been the basis for other types of action.⁶⁹ For example, the courts have sustained the power of the President, apart from statute, to establish maximum prices and rents,⁷⁰ to requisition⁷¹ or destroy⁷²

⁶⁶Cf. *Luther v. Borden*, 7 How. 1 (U. S. 1849); *Moyer v. Peabody*, 212 U. S. 78, 29 Sup. Ct. 235 (1909); *Sterling v. Constantin*, 287 U. S. 378, 53 Sup. Ct. 190 (1932).

⁶⁷*Ex parte Vallandigham*, note 62 *supra* at 922. Though Vallandigham was convicted by the military commission and sentenced to imprisonment for the duration of the war, the sentence was never carried out due to an order of President Lincoln directing that Vallandigham be placed beyond the military lines of the Union army. Counsel for Vallandigham filed a writ of certiorari to obtain review of the proceedings of the military commission by the Supreme Court, but the application was denied on the ground that a military commission was not a court within the meaning of the Judiciary Act of 1789, and therefore the Court had no jurisdiction in such a case. 1 Wall. 243 (U. S. 1864).

⁶⁸The case is distinguishable from *Ex parte Milligan* in that: (1) the question discussed by the majority in the latter case was whether the military commission had jurisdiction to try and sentence Milligan, whereas in the *Vallandigham* case, the issue was one of power to arrest and detain temporarily, and, as the Court pointed out at 923, "Whether the military commission for the trial of the charges against Mr. Vallandigham was legally constituted and had jurisdiction of the case, is not a question before this court"; (2) the *Milligan* case was decided after the war had ended.

⁶⁹See *Lapeyre v. United States*, 17 Wall. 191, 204 (U. S. 1872): "Proclamations by the king alone, or by the king by the authority of Parliament, or by the President by the authority of Congress, or as part of the executive power, embrace an immense range of subjects."

⁷⁰See *Export Syndicate of Steel Producers, Inc. v. Dilsizan*, 36 N. Y. S. (2d) 868 (Sup. Ct. 1942) (price schedule establishing maximum price issued pursuant to executive order declared to have "the force and character of law," and prior contract providing for price in excess of maximum held unenforceable); *Swanee Fabrics, Inc. v. American Bleached Goods Co., Inc.*, N. Y. Sup. Ct., July 18, 1942 (108 N. Y. L. J. 148, col. 5) (dismissing action by seller to recover difference between contract price and maximum price established pursuant to executive order); *Pennsylvania Co. for Ins. on Lives & Granting Annuities v. Cincinnati & L. E. Ry.*, U. S. Dist. Ct. S. D. Ohio, Sept. 19, 1941 (OPA Service, ¶ 620:9); *Kramer & Uchitelle, Inc. v. Eddington Fabrics Corp.*, 288 N. Y. 467, 48 N. E. (2d) 493 (1942); *United States v. Gordin*, 287 Fed. 565, 568 (D. Ohio, 1922), *aff'd*, 9 F. (2d) 394 (C. C. A. 6th, 1925); *United States v. Kraus*,

property, to exact duties upon imports,⁷³ to permit partial commercial intercourse with the enemy,⁷⁴ to make contracts binding upon the United States,⁷⁵ to establish a temporary state government,⁷⁶ to create provisional courts in ceded territory,⁷⁷ to maintain a censorship of radio stations, and to close them down or take them over in order to preserve the nation's neutrality.⁷⁸ Even in the absence of war, if the necessity arises, the President has the constitutional power as Chief Executive to take action in the absence of statutory prohibition.⁷⁹ Thus, the President was authorized, without a statute, to appoint a deputy marshal to protect a Supreme Court Justice whose life had been threatened, and the killing of an assailant by the marshal was held to be an

33 F. (2d) 406, 409 (C. C. A. 7th, 1929). *But cf. In re Riggs*, U. S. Dist. Ct. E. D. Pa., Oct. 28, 1941 (OPA Service, ¶ 620:10).

⁷¹*United States v. Russell*, 13 Wall. 623 (U. S. 1871); *Mitchell v. Harmony*, 13 How. 115 (U. S. 1851); *Dow v. Johnson*, 100 U. S. 158 (1879); *United States v. McFarland*, 15 F. (2d) 823, 826 (C. C. A. 4th, 1926), *cert. granted*, 273 U. S. 688, 47 Sup. Ct. 449 (1927), *cert. revoked*, 275 U. S. 485, 48 Sup. Ct. 27 (1927); *The Prize Cases*, 2 Black 635, 665 (U. S. 1862); *Gates v. Goodloe*, 101 U. S. 612 (1879). See *The Flying Fish*, 2 Cranch 170, 176 (U. S. 1804); *Columbus Ry., Power & Light Co. v. City of Columbus, Ohio*, 253 Fed. 499, 510 (D. Ohio, 1918); *American Economic Mobilization* (1942) 55 HARV. L. REV. 427, 516.

In *Mitchell v. Harmony*, Chief Justice Taney stated (at 133-134) that in order to justify the taking of private property by an officer to supply his troops, "the danger must be immediate and impending, or the necessity urgent for the public service, such as will not admit of delay, and where the action of the civil authority would be too late in providing the means which the occasion calls for." *But cf.* 12 OPS. ATT'Y GEN. (1866) 54 (President has no power as Commander in Chief to restore to the former owner property in the possession of a person claiming under a confiscation sale.)

⁷²*Cf. Wiggins v. United States*, 3 Ct. Cl. 412 (1867).

⁷³*Dooley v. United States*, 182 U. S. 222, 21 Sup. Ct. 762 (1901); *Cross v. Harrison*, 16 How. 164 (U. S. 1853).

⁷⁴See *Hamilton v. Dillin*, 21 Wall. 73 (U. S. 1874). *Cf. The Orono*, 18 Fed. Cas. 830, No. 10,585 (D. Mass. 1812) holding that the President has no power to prohibit commercial intercourse with any nation, or to revive an expired statute which gave him such power; *The Matilda Lewis*, 16 Fed. Cas. 9281 (S. D. N. Y. 1867) declaring illegal an order of the Secretary of War prohibiting the purchase and sale of livestock intended for export because not based upon an act of Congress; *United States v. Western Union Telegraph Co.*, 272 Fed. 893 (C. C. A. 2d, 1921), *rev. by stip.* 260 U. S. 754, 43 Sup. Ct. 91 (1922); 22 OPS. ATT'Y GEN. (1898) 13. *But cf. United States v. La Compagnie Française Des Cables Télégraphiques*, 77 Fed. 495 (S. D. N. Y. 1896).

⁷⁵See *Totten v. United States*, 92 U. S. 105 (1875). *Cf. In the Matter of Bethlehem Steel Corp.*, National War Labor Board Case Nos. 30, 31, 34 35 (President's war power is sufficient authority for War Labor Board order directing an employer to enter into a prescribed contract in settlement of a labor dispute).

⁷⁶*Texas v. White*, 7 Wall. 700, 730 (U. S. 1868).

⁷⁷*Santiago v. Nogueras*, 214 U. S. 260, 29 Sup. Ct. 608 (1909). *Cf. Fleming v. Page*, 9 How. 603 (U. S. 1850) (President has no power to annex to the United States any territory which he has invaded and captured.)

⁷⁸30 OPS. ATT'Y GEN. (1914) 291, citing *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658 (1890), note 80 *infra*.

⁷⁹See letter from the Attorney General to the President of the United States Senate, dated October 4, 1939, SEN. DOC. NO. 133, 76th Cong., 2d Sess. (1939).

act performed in pursuance of a "law" of the United States.⁸⁰ It has also been held that despite the absence of congressional authorization, the Secretary of the Interior may seize and sell timber removed from public lands, and may effect a compromise binding upon the United States with the claimant of such timber.⁸¹ The President as Chief Executive may also remove a postmaster from office,⁸² and as Commander in Chief may establish rules having the force of law for the armed forces.⁸³

The presence of an emergency was recognized by the court in the *Yasui* case.⁸⁴ No inconsistent action had been taken by Congress.⁸⁵ Accordingly, in the face of the imposing array of precedents established over a period of many years, it is difficult to understand how the court could have concluded that there was no authority to issue the curfew order. If such a result was prompted by the fear that the President might otherwise usurp legislative powers too extensive to be ignored, such fears may be put to rest. The vigilance of Congress in taking steps to effectuate its desires is well illustrated by the act⁸⁶ removing the President's recent limitation upon salaries.⁸⁷

III. CONSTITUTIONAL LIMITATIONS UPON THE EXERCISE OF THE WAR POWER

It is fundamental that the mere existence of war does not place in abeyance the individual rights guaranteed by the Constitution.⁸⁸ It thus becomes neces-

⁸⁰*In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658 (1890). See *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900 (1895).

⁸¹*Wells v. Nickles*, 104 U. S. 444 (1881).

⁸²*Myers v. United States*, 272 U. S. 52, 47 Sup. Ct. 21 (1926).

⁸³*United States v. Eliason*, 16 Pet. 291 (U. S. 1842); *Gratiot v. United States*, 4 How. 80, 117 (U. S. 1846); *United States v. Symonds*, 120 U. S. 46, 7 Sup. Ct. 411 (1887). *Contra*: 6 OPS. ATT'Y GEN. (1853) 10.

⁸⁴At pp. 44-45, the Court declared:

"The areas and zones outlined in the proclamations became a theatre of operations, subjected in localities to attack and all threatened during this period with a full scale invasion. The danger at the time this prosecution was instituted was imminent and immediate. The difficulty of controlling members of an alien race, many of whom, although citizens, were disloyal, with opportunities of sabotage and espionage, with invasion imminent, presented a problem requiring for solution ability and devotion of the highest order."

Although the Supreme Court may treat a presidential finding of imminence of danger as a non-reviewable political question, it would seem proper for the Court to inquire into whether such a finding is arbitrary and capricious. See cases cited note 66 *supra*.

⁸⁵See discussion of Pub. L. No. 503 *infra*.

⁸⁶Pub. L. No. 34, 78th Cong., 1st Sess. (April 10, 1943).

⁸⁷Exec. Order No. 9250, October 6, 1942, 7 FED. REG. 7871 (1942).

⁸⁸*Ex parte Milligan*, 4 Wall. 2, 119 (U. S. 1866); *United States v. L. Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. 298 (1921); *Louisville Joint Stock Land Bank v. Radford*, 295 U. S. 555, 589, 55 Sup. Ct. 854, 863 (1935); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155, 40 Sup. Ct. 106, 107-108 (1919). *But cf.* *Chemical Foundation, Inc. v. E. I. Dupont de Nemours & Co.*, 29 F. (2d) 597, 603 (D. Del. 1928), *aff'd*, 283 U. S. 152, 51 Sup. Ct. 403 (1931).

sary to consider to what extent, if any, the exclusion, curfew, and detention regulations conflict with the requirements of due process and equal protection established by the Fifth Amendment.⁸⁹

A. Due Process

In determining whether the regulations with regard to exclusion, curfew, and detention are violative of the due process clause of the Fifth Amendment, it is necessary to consider whether such regulations constitute deprivations of liberty within the contemplation of the Constitution; and if so, whether such deprivations have any reasonable basis to justify them.

It is obvious that physical detention is a deprivation of liberty which, in the absence of justification, is prohibited.⁹⁰ Equally without doubt is the conclusion that physical exclusion falls into the same category.⁹¹ It was recently held, however, that a curfew restriction is not such a deprivation of liberty as would warrant a discharge upon a writ of habeas corpus.⁹² Other restrictions similar to curfew have likewise been held not to constitute such a restraint upon liberty as to require discharge upon habeas corpus.⁹³ It does not necessarily follow from these cases, however, that a curfew regulation constitutes no restraint upon liberty whatever. Not every restriction upon liberty can be tested by a writ of habeas corpus,⁹⁴ and the mere fact that habeas corpus will not lie does not preclude a person subject to curfew from raising the contention that his constitutional liberties have been violated. Indeed, it was pointed out in the *Ventura* case⁹⁵ that upon a trial for violation of a curfew order, the defendant would have the opportunity to assert all constitutional rights. If, then, exclusion, curfew, and detention operate to deprive persons of their liberty, are such deprivations repugnant to the Fifth Amendment?

Justice Holmes has said that "what is due process of law depends on

⁸⁹No question of involuntary servitude is raised since none of the regulations involve compulsory service. The restrictions upon liberty imposed by the regulations are not, of course, intended as punishment for a crime. Accordingly, there is likewise no problem of denial of a jury trial.

⁹⁰In *Meyer v. Nebraska*, 262 U. S. 390, 399, 43 Sup. Ct. 625, 626 (1923), the Court stated that the liberty guaranteed by the Fifth Amendment denoted freedom from "bodily restraint" as well as other types of freedom.

⁹¹See *The Japanese Immigrant Case*, 189 U. S. 86, 23 Sup. Ct. 671 (1903); *Frank Waterhouse & Co. v. United States*, 159 Fed. 876, 880 (C. C. A. 9th, 1908); *United States v. Ju Toy*, 198 U. S. 253, 263, 25 Sup. Ct. 644, 646 (1905); *Zucht v. King*, 260 U. S. 174, 43 Sup. Ct. 24 (1922).

⁹²*Ex parte Ventura*, 44 F. Supp. 520 (D. Wash. 1942).

⁹³For example, in *Wales v. Whitney*, 114 U. S. 564, 5 Sup. Ct. 1050 (1885) the Supreme Court refused to discharge an officer of the Navy who had been ordered to consider himself under arrest, to remain within the limits of the City of Washington, and to report upon a designated date for trial by a court martial.

⁹⁴"A mere moral restraint will not support habeas corpus." *Van Meter v. Sanford*, 99 F. (2d) 511 (C. C. A. 5th, 1938).

⁹⁵44 F. Supp. 520, 522 (D. Wash. 1942).

circumstances. It varies with the subject matter and the necessities of the situation."⁹⁶ In construing the requirements of due process of the Fourteenth Amendment, the courts have not invalidated every interference with personal liberty, but have confined themselves to declaring unconstitutional only those statutes which have arbitrarily interfered with personal liberty. The general rule has been thus stated:⁹⁷

"The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect."

In other words, if the legislature exercises its police power for the public welfare in a reasonable manner, individual rights must be subordinated to the paramount public necessity. Thus, for example, despite interference with private rights, the courts have sustained state statutes protecting the public health,⁹⁸ morals,⁹⁹ and safety.¹⁰⁰ The right of the Federal government, in the proper exercise of its constitutional powers, to override individual rights, is no less than that of the states.¹⁰¹ In balancing the protection afforded by the due process clause against an exercise of a constitutional power, the courts have recognized that the existence of a public emergency, such as war, is an

⁹⁶*Moyer v. Peabody*, 212 U. S. 78, 84, 29 Sup. Ct. 235, 236 (1909).

⁹⁷*Meyer v. Nebraska*, 262 U. S. 390, 397, 43 Sup. Ct. 625, 626 (1923). Similar language appears in *Pierce v. Society of Sisters*, 268 U. S. 510, 535, 45 Sup. Ct. 571, 573-574 (1925).

⁹⁸*Radice v. New York*, 264 U. S. 292, 44 Sup. Ct. 325 (1924) (maximum hours of labor for women); *Northwestern Laundry v. City of Des Moines*, 239 U. S. 486, 36 Sup. Ct. 206 (1916) (ordinance forbidding emission of smoke in certain part of the city); *Hutchinson Ice Cream Co. v. Iowa*, 242 U. S. 153, 37 Sup. Ct. 28 (1916) (prohibiting sale of product as ice cream where it contained less than the required amount of butter fat); *Dent v. West Virginia*, 129 U. S. 114, 9 Sup. Ct. 231 (1889) (regulating the medical profession).

⁹⁹*Mutual Film Corp. v. Ohio*, 236 U. S. 230, 35 Sup. Ct. 387 (1915) (motion pictures); *Booth v. Illinois*, 184 U. S. 425, 22 Sup. Ct. 425 (1902) (gambling); *Vance v. W. A. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674 (1898) (intoxication); *Stone v. Mississippi*, 101 U. S. 814 (1879) (lotteries).

¹⁰⁰*Wabash Ry. Co. v. Defiance*, 167 U. S. 88, 17 Sup. Ct. 748 (1897) (elimination of grade crossing).

¹⁰¹In *Nebbia v. New York*, 291 U. S. 502, 525, 54 Sup. Ct. 505, 510-511 (1934), the Supreme Court said:

"The Fifth Amendment, in the field of federal activity, and the Fourteenth, as respects state action, do not prohibit governmental regulation for the public welfare. They merely condition the exertion of the admitted power, by securing that the end shall be accomplished by methods consistent with due process. And the guaranty of due process, as has often been held, demands only that the law shall not be unreasonable, arbitrary, or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained . . . the reasonableness of each regulation depends upon the relevant facts." See also *Ruppert v. Caffey*, 251 U. S. 264, 41 Sup. Ct. 41 (1920).

important element in determining the reasonableness of legislative or administrative action. Thus, in *Highland v. Russell Car & Snow Plow Co.*,¹⁰² in sustaining the constitutionality of a federal price control statute enacted during World War I, and an executive order implementing the statute, the Supreme Court said:¹⁰³

"The principal purpose of the Lever Act was to enable the President to provide food, fuel and other things necessary to prosecute the war without exposing the government to unreasonable exactions. . . . As applied to the coal in question, the statute and executive orders were not so clearly unreasonable and arbitrary as to require them to be held repugnant to the due process clause of the Fifth Amendment."

More recently, the Emergency Price Control Act of 1942,¹⁰⁴ "a statute born of the exigencies of war,"¹⁰⁵ was held consistent with the due process clause.¹⁰⁶

The cases considering the question of whether a person has been deprived of his physical liberty without due process are very few, and have chiefly involved state statutes. In *Jacobson v. Massachusetts*,¹⁰⁷ the Supreme Court upheld a state statute providing for compulsory vaccination when the Board of Health found it necessary for the public health or safety. Confirming the supremacy of the public welfare over individual rights, the Court said:¹⁰⁸

"But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good."

¹⁰²279 U. S. 253, 49 Sup. Ct. 314 (1929).

¹⁰³*Id.* at 262, 49 Sup. Ct. at 317 (1929).

¹⁰⁴Pub. L. No. 421, 77th Cong., 2d Sess. (Jan. 30, 1942).

¹⁰⁵*Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 17, 62 Sup. Ct. 875, 883 (1942).

¹⁰⁶*Henderson v. Kimmel*, 47 F. Supp. 635 (D. Kan. 1942). See *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 40 Sup. Ct. 106 (1919); *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458 (1921); *Marcus Brown Holding Company v. Feldman*, 256 U. S. 170, 41 Sup. Ct. 465 (1921); *Levy Leasing Co. v. Siegel*, 258 U. S. 242, 42 Sup. Ct. 289 (1922). In *Meyer v. Nebraska*, 262 U. S. 390, 43 Sup. Ct. 625 (1923), the Supreme Court, holding unconstitutional a peacetime statute which established a penalty for teaching in school any modern language other than English to any child who had not passed the eighth grade, said at 402, 628:

"Unfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the State and conflict with rights assured to plaintiff in error. *The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquillity has been shown.*" (Italics supplied).

¹⁰⁷197 U. S. 11, 25 Sup. Ct. 358 (1905).

¹⁰⁸*Id.* at 26, 25 Sup. Ct. at 361 (1905).

Particularizing the rule, the Court said:¹⁰⁹

"Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."

As a further example of a reasonable interference with personal liberty, the Court pointed out that an American citizen, arriving at an American port on a vessel in which, during the voyage, there had been cases of yellow fever, although apparently free from disease himself, may in some circumstances be held in quarantine against his will. The Court again recognized the necessity for subordinating private rights to insure the public safety when it said:¹¹⁰

"There is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will. *But it is equally true that in every well-ordered society charged with the duty of conserving the safety of its members the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand.*" (Italics supplied.)

Other restrictions upon personal liberty have been held consistent with due process: legislation providing for the commitment of persons proven to be of a "psychopathic personality,"¹¹¹ providing for the sex sterilization of certain types of mental defectives,¹¹² permitting the exclusion of healthy persons from a locality infected with a contagious disease,¹¹³ and excluding unvaccinated children from schools.¹¹⁴ In *Moyer v. Peabody*,¹¹⁵ the Supreme Court held that during an insurrection, the temporary detention of the leader of the outbreak at the order of the governor did not deprive him of his liberty without due process of law. In the *Selective Draft Law Cases*,¹¹⁶ the first selective draft act was held constitutional against the contention that forced military service was "in conflict with all the great guarantees of the Constitution as to individual liberty."¹¹⁷

¹⁰⁹*Id.*, at 27, 25 Sup. Ct. at 362 (1905).

¹¹⁰*Id.*, at 29, 25 Sup. Ct. at 362 (1905).

¹¹¹*Minnesota v. Probate Court*, 309 U. S. 270, 60 Sup. Ct. 523 (1940).

¹¹²*Buck v. Bell*, 274 U. S. 200, 47 Sup. Ct. 584 (1927). See *Skinner v. Oklahoma*, 316 U. S. 535, 62 Sup. Ct. 1110 (1942).

¹¹³*Compagnie Française v. Board of Health*, 186 U. S. 380, 22 Sup. Ct. 811 (1902).

¹¹⁴*Zucht v. King*, 260 U. S. 174, 43 Sup. Ct. 24 (1922).

¹¹⁵212 U. S. 78, 29 Sup. Ct. 235 (1909).

¹¹⁶245 U. S. 366, 38 Sup. Ct. 159 (1918).

¹¹⁷See also, *Angelus v. Sullivan*, 246 Fed. 54 (C. C. A. 2d, 1917); *Local Board No. 1 v. Connors*, 124 F. (2d) 388 (C. C. A. 9th, 1941).

There can be little doubt that the exclusion and curfew regulations constitute reasonable wartime measures necessary for the protection of the national safety. When a nation is engaged in war, the military are the proper persons to determine which areas are vulnerable, which contain vital productive facilities, and which may become theaters of operations. Espionage and sabotage present a distinct threat to strategic zones, and potentially dangerous persons must be rendered harmless.

The cry of the American-born Japanese, "We are citizens!" constitutes a powerful but unconvincing argument against the reasonableness of curfew and exclusion. The argument amounts to a contention that citizenship creates a presumption of loyalty. Differences of race, religion, customs, and language have, however, prevented the Japanese from being assimilated within the general population.¹¹⁷ Being thus segregated, the American-born Japanese become more susceptible to the influence of their alien enemy parents, whose ties to their native land, in many cases, are very powerful. The possibility, therefore, that persons of Japanese ancestry, although born in this country, will sympathize with and aid Japan becomes extremely great.¹¹⁸ Because we do not speak their language, and because they are congregated together in large numbers, detection of traitorous individuals is virtually impossible. It would be unreasonable, moreover, to expect the military to wait for a determination of individual loyalty before taking precautionary measures. The danger from the enemy demands speed in insuring safety; their treachery emphasizes the need for immediate action. To establish a curfew for, and to exclude, all the Japanese¹¹⁹ hastily and to inquire into individual cases at leisure is by no means an unreasonable policy in time of war.

¹¹⁷While it is true that state laws such as those prohibiting ownership of land by the Japanese have not contributed toward their assimilation, the wisdom of such legislation is not relevant to the present issue.

¹¹⁸The Ninth Circuit Court recently referred to the Hawaiian Islands as including in their population a large element "presumptively alien in sympathy." See *Ex parte Zimmerman*, 132 F. (2d) 442, 446 (C. C. A. 9th, 1942), *cert. den.* 11 U. S. L. WEEK 3332 (U. S. 1942).

¹¹⁹The Government has conceded that the vast majority of the Japanese population in America are loyal to the United States. See Brief for the United States, *Yasui v. United States*, — F. (2d) — (C. C. A. 9th, 1943). Nevertheless, because of the difficulties in discovering the disloyal persons, it is proper to impose necessary restrictions upon the entire group. Cf. *Ford v. Surget*, 97 U. S. 594, 604 (1878) where the Supreme Court said:

"The district of country declared by the constituted authorities during the late civil war, to be in insurrection against the government of the United States, was enemy territory, and all the people residing within such district were, according to public law, and for all purposes connected with the prosecution of the war, liable to be treated by the United States, pending the war, and while they remained within the lines of the insurrection, as enemies, *without reference to their personal sentiments and dispositions.*" (Italics supplied).

Detention presents a somewhat more difficult but not impossible type of restriction to justify. Granting that no presumption of loyalty to this country is attached to citizenship where the Japanese are concerned, the unrestricted privilege of going anywhere in the United States (except, of course, into the prohibited zones) would enable the disloyal individuals to commit acts inimical to the successful prosecution of the war.^{119a} The necessity for protective custody of the Japanese, moreover, may be an additional justification for their detention. Feeling against the Japanese has run very high in all parts of the United States as a result of the attack on Pearl Harbor,¹²⁰ and protection of the Japanese in the United States against physical violence is certainly to be desired, both from a humanitarian view and because of the possibility of reprisals by the enemy.

The doctrine of protective custody does not appear to have been the subject of litigation or prior legislation in this country. It has not been uncommon for police officers to offer protection to persons threatened with bodily injury.^{120a} In Germany the authorities have found protective custody a useful label for the illegal arrest of important public officials.

The case of *Buchanan v. Warley*¹²¹ does not present an obstacle to the adoption of the theory of protective custody as justification for detention. The case involved a city ordinance which prohibited white or colored persons from occupying a house in any block where a greater number of houses were occupied by persons of the other race. One of the purposes of the ordinance was the promotion of the public peace by providing for racial segregation. In holding that the ordinance imposed upon property owners an unreasonable restriction on their right to dispose of their houses in violation of the due process clause, the Supreme Court stated that although the preservation of the public peace is highly desirable, it could not be accomplished by laws which denied rights protected by the Constitution. Even conceding that detention constitutes a more serious invasion of personal liberty than does a restriction upon freedom of property disposition, the case is distinguishable.

^{119a}Professor Fairman questions the value of individual hearings as a satisfactory solution because of the difficulty of establishing a proper standard of loyalty, because of our lack of understanding of the Japanese, and because of the long time which would be required to make a thorough investigation in even a small fraction of the cases. He suggests that in view of the irreparable consequences which might result from unrestricted freedom to disloyal Japanese, the inconvenience to the loyal Japanese caused by the evacuation program "seems only one of the unavoidable hardships incident to the war." Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253, 1301-1302.

¹²⁰Hearings before the Select Committee Investigating National Defense Migration Pursuant to H. Res. 113, 77th Cong., 2d Sess. (1942) 11015-11016.

^{120a}See, for example, *The Evening Star*, Washington, D. C., June 12, 1943, p. A-3.

¹²¹245 U. S. 60, 38 Sup. Ct. 16 (1917).

For one thing, the restriction upon occupancy was permanent, whereas the detention of the Japanese is a temporary wartime measure. Moreover, the consequences of racial clashes during peacetime between colored and white persons would not be as far reaching as those which would flow from attacks upon the Japanese. The former would result in bodily harm in isolated instances, and in most cases would be adequately handled by peace officers. On the other hand, as already pointed out, antagonism towards the Japanese, alien and citizen, has achieved great proportions in the United States. The governor of every western state but one actively protested against the settlement of the Japanese within his state.¹²² It is too much to expect that persons of alien ancestry who are forced to leave their homes, their jobs, and their businesses, who are refused admission to other states, who are unable to find adequate shelter and a means of livelihood, and who are subjected to physical violence should remain loyal to the United States. It therefore becomes extremely important that the Japanese be protected from such difficulties. Accordingly, their detention in war relocation centers appears to be a reasonable method of insuring the safety of the nation.^{122a}

B. Equal Protection

Exclusion, curfew, and detention, as noted above, have been imposed, apart from enemy aliens; only upon citizens of Japanese ancestry. Superficially, this might appear to be a highly invalid example of race prejudice at odds with our constitutional notions of equal treatment.¹²³ A closer analysis, however, will reveal that ample justification for the classification exists, and that the regulations do not violate the Fifth Amendment.

There appears to be some question as to whether, and to what extent, the equal protection of the laws is guaranteed by the Fifth Amendment. As frequently pointed out, the Fifth Amendment contains no equal protection clause.¹²⁴ Yet the contention that a federal statute or regulation is discrim-

¹²²*Fourth Interim Report of Tolan Committee*, H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 203; *Preliminary Report of Tolan Committee*, H. R. REP. No. 1911, 77th Cong., 2d Sess. (1942) 27 *et seq.*

^{122a}With the termination of the emergency detention would no longer be reasonable. See *Chastleton Corp. v. Sinclair*, 264 U. S. 543, 547, 44 Sup. Ct. 405, 406 (1924). The writer ventures to suggest, however, that serious danger of sabotage and espionage requiring the detention of the Japanese will not cease earlier than the time of cessation of hostilities between Japan and the United States.

¹²³This was the opinion of the Federal District Court in *United States v. Yasui*, 48 F. Supp. 40, 53 (D. Ore. 1942).

¹²⁴*Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 37 Sup. Ct. 180 (1917); *Labelle Iron Works v. United States*, 256 U. S. 377, 41 Sup. Ct. 528 (1920); *Truax v. Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124 (1921); *Steward Machine Co. v. Davis*, 301 U. S. 548, 57 Sup. Ct. 883 (1937); *United States v. Carolene Products Co.*, 304 U. S. 144, 58 Sup. Ct. 788 (1938); *Curran v. Wallace*, 306 U. S. 1, 59 Sup. Ct. 379

inatory has never been rejected by the Supreme Court solely on the ground that the Constitution does not prohibit discriminatory federal action.¹²⁵ The Supreme Court has said that there is no requirement of uniformity in the exercise of a power granted in the Constitution, where the grant of the power contains no such express requirement.¹²⁶ The discrimination must be of such injurious character as to bring into operation the due process clause of the Fifth Amendment.¹²⁷ Invariably, the decisions have sustained or invalidated legislation on the ground that the classification established by the statute is or is not founded upon a reasonable basis. Thus, discrimination is not, *per se*, unconstitutional. The requirements of equal protection of the Fifth Amendment, however, subject the Federal Government "to restraints less narrow and confining" than those imposed upon the states by the Fourteenth Amendment, and consequently any statute which does not deny the equal protection of the laws required by the Fourteenth Amendment would not, *a fortiori*, violate the Fifth Amendment.¹²⁸ It is important to note that even the Fourteenth Amendment permits latitude in classification, and does not confine the states to a formula of rigid uniformity.¹²⁹ "The equal protection clause of the Fourteenth Amendment," said the Supreme Court in *Lindsley v. National Carbonic Gas Co.*,¹³⁰ "does not take from the state the power to classify in the

(1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 60 Sup. Ct. 907 (1940); *Liberty Paper Board Co., Inc. v. United States*, 37 F. Supp. 751 (D. Ohio, 1941); *Florida Fruit & Produce, Inc. v. United States*, 117 F. (2d) 506 (C. C. A. 5th, 1941); *Carleton Screw Products Co. v. Fleming*, 126 F. (2d) 537 (C. C. A. 8th, 1942).

¹²⁵See dissenting opinion in *Colgate v. Harvey*, 296 U. S. 404, 441, 56 Sup. Ct. 252, 264 (1935). *But cf.* *United States v. Hirabayashi*, 46 F. Supp. 657, 661 (W. D. Wash. 1942).

¹²⁶*Curran v. Wallace*, 306 U. S. 1, 59 Sup. Ct. 379 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 60 Sup. Ct. 907 (1940); *Clark Distilling Co. v. Western Maryland R. Co.*, 242 U. S. 311, 37 Sup. Ct. 180 (1917). In *Curran v. Wallace*, the Supreme Court, in discussing the commerce power, stated at 13-14, 386:

"We have repeatedly said that the power given to Congress to regulate interstate and foreign commerce is complete in itself, may be exercised to its utmost extent, and acknowledges no limitation, other than are prescribed. To hold that Congress in establishing its regulation is restricted to the making of uniform rules would be to impose a limitation which the constitution does not prescribe. There is no requirement of uniformity in connection with the commerce power (Art. I, Sec. 8, cl. 3, Const. U. S. C. A.) such as there is with respect to the power to lay duties, imposts, and excises."

Cf. *United States v. Macintosh*, 283 U. S. 605, 622, 51 Sup. Ct. 570, 574 (1931) in which the Court stated: "From its very nature the war power, when necessity arises for its exercise, tolerates no qualifications or limitations, unless found in the Constitution. . . ."

Accord, *North Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502 (1918).

¹²⁷*Curran v. Wallace*, 306 U. S. 1, 59 Sup. Ct. 379 (1939); *Steward Machine Co. v. Davis*, 301 U. S. 548, 47 Sup. Ct. 883 (1937); *Detroit Bank v. United States*, 317 U. S. 329, 63 Sup. Ct. 297 (1943).

¹²⁸*Curran v. Wallace*, 306 U. S. 1, 59 Sup. Ct. 379 (1939).

¹²⁹*Lindsley v. National Carbonic Gas Co.*, 220 U. S. 61, 31 Sup. Ct. 337 (1911).

¹³⁰220 U. S. 61, 31 Sup. Ct. 337 (1911).

adoption of police law, but admits of the exercise of a wide scope of discretion in that regard, and voids what is done only when it is without any reasonable basis, and therefore is purely arbitrary." Furthermore, the validity of a classification depends upon the facts of each individual case.¹³¹

It is well settled, of course, that a classification based on nothing more than race prejudice is unreasonable;¹³² but "it does not follow that alien race and allegiance may not bear in some instances such a relation to a legitimate object of legislation as to be made the basis of a permitted classification."¹³³ The situation surrounding American citizens of Japanese ancestry is far different from that of citizens whose ancestors lived in the other alien enemy countries. As already pointed out, the Japanese have always encountered the problem of racial segregation. Large numbers are concentrated on the west coast. Across the Pacific lies Japan. The combination of these facts makes it entirely reasonable for the military to believe that there is greater danger from the possibility of enemy allegiance among the Japanese than among others. "The legislature," the Supreme Court has said, "is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. . . . If the law presumably hits the evil where it is most felt, it is not to be overthrown because there are other instances in which it might have been applied."¹³⁴ The validity of confining exclusion, curfew, and detention to citizens of Japanese ancestry, however, does not necessarily depend upon the fact that a greater degree of danger may be anticipated from this class. Neither the Fifth Amendment nor the Fourteenth Amendment compels the prohibition of all like evils.¹³⁵ "The Legislature may hit at an abuse which it has found, even though it has failed to strike at another."¹³⁶

Little more need be said with reference to the application of these regulations to all the Japanese, regardless of individual loyalty. The Supreme Court has regarded as settled the principle that "when it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so."¹³⁷

¹³¹Connolly v. Union Sewer Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431 (1902).

¹³²Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064 (1886); Nixon v. Condon, 286 U. S. 73, 52 Sup. Ct. 484 (1932); Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7 (1915).

¹³³Clarke v. Deckebach, 274 U. S. 392, 396, 47 Sup. Ct. 630, 631 (1927); see also Gong Lum v. Rice, 275 U. S. 78, 48 Sup. Ct. 91 (1927); Plessy v. Ferguson, 163 U. S. 537, 16 Sup. Ct. 1138 (1896).

¹³⁴Miller v. Wilson, 236 U. S. 373, 384, 35 Sup. Ct. 342, 344-345 (1915). See *Patson v. Pennsylvania*, 232 U. S. 138, 144, 34 Sup. Ct. 281, 282 (1914).

¹³⁵United States v. Carolene Products Co., 304 U. S. 144, 151, 58 Sup. Ct. 778, 783 (1938); Florida Fruit and Produce, Inc. v. United States, 117 F. (2d) 506, 508 (C. C. A. 5th, 1941).

¹³⁶*Ibid.*

¹³⁷Westfall v. United States, 274 U. S. 256, 259, 47 Sup. Ct. 629, 630 (1927). In

IV. CONGRESSIONAL ACTION

- Executive Order No. 9066 contains the following provision:

"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." (Italics supplied.)

It was soon recognized¹³⁸ that the use of troops as a means of enforcement of exclusion, curfew, and detention orders was unsatisfactory.¹³⁹ Accordingly, the Secretary of War addressed letters to the Speaker of the House of Representatives¹⁴⁰ and to Senator Reynolds, Chairman of the Senate Military Affairs Committee¹⁴¹ enclosing a draft of a proposed bill¹⁴² "to provide a penalty for violation of restrictions or orders with respect to persons entering, remaining in, or leaving military areas or zones," and recommending its enactment into law. On March 21, 1942, the bill, with one change, was approved by the President.¹⁴³

Clarke v. Deckebach, 274 U. S. 392, 47 Sup. Ct. 630 (1927), the Supreme Court, sustaining against a claim of discrimination a municipal ordinance prohibiting the issuance to aliens of licenses to operate pool rooms, said that it was competent for the city to exclude "from the conduct of a dubious business an entire class rather than its objectionable members selected by more empirical methods." See also *Ford v. Surget*, note 119 *supra*.

¹³⁸During the debates on S. 2352, now Pub. L. No. 503, 77th Cong., 2d Sess., March 21, 1942, Senator Reynolds stated: "To quote the words of Colonel Bryan, of the War Department, who appeared before our committee:

"The purpose of this bill is to provide for enforcement in the Federal courts of orders issued under the authority of this proclamation. As things now stand orders can be issued but there is no penalty provided for violation of orders and restrictions so issued. Last evening General DeWitt called me on the telephone from the west coast, talked to me personally, and he stated that the passage of this bill was necessary to enable him to properly carry out the provisions of the Executive order."

88 CONG. REC. 2724 (1942).

¹³⁹Enforcement through the injunctive process [see *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900 (1895)] is equally unsatisfactory because it is slow and cumbersome.

¹⁴⁰H. R. REP. No. 1906, 77th Cong., 2d Sess. (1942) 2.

¹⁴¹88 CONG. REC. 2725 (1942).

¹⁴²S. 2352 and H. R. 6758, identical bills, were introduced in the Senate and House of Representatives, respectively.

¹⁴³Pub. L. No. 503, 77th Cong., 2d Sess. (March 21, 1942) provides as follows:

"... 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."

It thus becomes important to determine the effect of this statute upon Executive Order No. 9066 and the regulations issued thereunder, and to examine its constitutionality.

A. Effect of Public Law No. 503

It is necessary to draw a distinction between the effect of the statute upon orders and regulations issued prior to its enactment and upon those issued subsequently. The distinction is the difference between ratification and delegation, and must be made because it is questionable whether punishment for the violation of a regulation committed prior to the enactment of Public Law No. 503 would have been consistent with the constitutional provision prohibiting *ex post facto* legislation.

The entire legislative history of Public Law No. 503 indicates a Congressional intention to ratify the action theretofore taken by the President, the Secretary of War, and General DeWitt. Not only did the Secretary of War, in his letters to Congress, state that the purpose of the proposed legislation was to provide for the enforcement in the federal criminal courts of regulations issued pursuant to Executive Order No. 9066,¹⁴⁴ but Senator Reynolds, who sponsored the Senate bill, read to the Senate a considerable portion of Public Proclamation No. 1.¹⁴⁵ The power of Congress to ratify executive action is, of course, settled.¹⁴⁶ It would, therefore, seem unnecessary to re-issue either the executive order or the regulations issued pursuant to its authority.¹⁴⁷

The large majority of regulations were issued subsequent to the enactment of Public Law No. 503. While it is true that the language of that statute merely provides a penalty for the violation of such regulations, a further examination of its legislative history discloses an intention to confer broad powers on the military authorities.¹⁴⁸ Thus, Senator Reynolds explained the purpose of the bill as follows:¹⁴⁹

"It is my understanding that in order to carry out the objectives of the Proclamation, and thus keep clear the military areas which have been defined by General DeWitt, the Commander of the western area, we are asked to provide the department with authority to keep certain indi-

¹⁴⁴See notes 140 and 141 *supra*.

¹⁴⁵88 CONG. REC. 2724 (1942).

¹⁴⁶*Brooks v. Dewar*, 313 U. S. 354, 61 Sup. Ct. 979 (1941); *Isbrandtsen-Moller Co. v. United States*, 300 U. S. 139, 147, 57 Sup. Ct. 407, 411 (1937).

¹⁴⁷*Cf.* § 206 of the Emergency Price Control Act, Pub. L. No. 421, 77th Cong., 2d Sess. (1942).

¹⁴⁸At 88 CONG. REC. 2724 (1942), Senator Reynolds stated: "The War Department has asked me to sponsor this bill which will confer broad powers on the military authorities charged with the protection of certain zones in our country."

¹⁴⁹88 CONG. REC. 2725 (1942).

viduals from entering or leaving military areas, from not complying with any of the curfew laws, or any regulations which might be established within those zones."

Public Law No. 503 may thus be reasonably construed to contain a delegation of authority.

B. Constitutionality of Public Law No. 503

The constitutionality of Public Law No. 503 involves these questions: Does the power sought to be exercised exceed the authority of Congress?¹⁵⁰ Does the statute contain a proper delegation of legislative authority?¹⁵¹

1. *War Power of Congress.*—

It has long been recognized that the war power of Congress includes the authority to take all measures reasonably appropriate to the effective mobilization of the entire resources of the nation, human and material, for the successful waging of war.¹⁵² Among the measures which the Supreme Court has sustained as appropriate exercises of the war power, have been the taking over and operation of the railroads,¹⁵³ telephone and telegraph lines,¹⁵⁴ selective service legislation,¹⁵⁵ the regulation of fuel prices,¹⁵⁶ and the prohibition of the sale or manufacture of beverages of more than one-half per cent alcoholic content.¹⁵⁷ There can be little doubt that the establishment of criminal penalties for violation of regulations relating to evacuation, curfew, and detention in military areas constitutes a proper exercise of the congressional war power.

2. *Delegation.*—

It is well settled that the Constitution does not completely forbid delegation of legislative power, but prohibits only excessive delegation. Prior to the

¹⁵⁰The discussion of the constitutional limitations upon the exercise of the presidential war powers, *supra*, is equally applicable here.

¹⁵¹Inasmuch as the regulations describe the prohibited acts with particularity, the statute does not violate the requirements of the Fifth and Sixth Amendments that adequate standards of criminal conduct must be established. *Kay v. United States*, 303 U. S. 1, 58 Sup. Ct. 468 (1938); *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 380 (1910). The latter case also held that the establishment of criminal penalties for violation of administrative regulations does not constitute a delegation of the power to create crimes.

¹⁵²*Legal Tender Cases*, 12 Wall. 457 (U. S. 1870).

¹⁵³*Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502 (1919); *Dupont de Nemours Co. v. Davies*, 264 U. S. 456, 44 Sup. Ct. 364 (1924).

¹⁵⁴*Dakota Central Telephone Co. v. So. Dakota*, 250 U. S. 163, 39 Sup. Ct. 507 (1919).

¹⁵⁵*Selective Draft Law Cases*, 245 U. S. 366, 38 Sup. Ct. 159 (1918).

¹⁵⁶*Highland v. Russell Car and Snow Plow Co.*, 279 U. S. 253, 49 Sup. Ct. 314 (1929).

¹⁵⁷*Ruppert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141 (1920).

decisions in *Panama Refining Co. v. Ryan*¹⁵⁸ and *Schechter Poultry Corp. v. United States*,¹⁵⁹ the Supreme Court had never declared a statute unconstitutional on the ground that it contained an invalid delegation of legislative authority. The decision in the *Schechter* case was that Congress had established insufficient statutory standards to guide the President with respect to the type of regulations he might issue. The *Panama* case enunciated the principle that legislative standards are insufficient if they do not indicate under what circumstances the delegatee may act. Since these cases, the pendulum has swung the other way, and the recent delegations have been consistently upheld.¹⁶⁰ Accordingly, if Public Law No. 503 is not open to the same objections as the statutes involved in the *Schechter* and *Panama Refining* cases, it should be sustained.

Public Law No. 503 in effect empowers the Secretary of War or any military commander designated by him to issue regulations with respect to the right of any person to enter, remain in, leave, or commit any act in, any military area or zone prescribed by them under the authority of an executive order of the President. The respective reports of the Senate and House Military Affairs Committee reveal that Executive Order No. 9066 is the one which Congress had in mind.¹⁶¹ That order recited the need for every possible protection against espionage and sabotage to "national-defense material, national-defense premises, and national-defense utilities," as defined in Title 50, Section 104, of the United States Code. This need is reiterated in the House committee report.¹⁶² Thus, although the statute itself sets forth no legislative policy, it would seem to be a fair argument that Congress, aware that the purpose of the statute was to permit enforcement of regulations issued pursuant to Executive Order No. 9066, adopted the aims which guided the President in issuing his order. In addition, the House committee report describes the safety of the evacuees as a further purpose of the statute.¹⁶³

"The passage of this legislation will not only provide for the protection of the military areas or zones, but also be a means for preserving the safety and security of the persons who are to be removed."

¹⁵⁸293 U. S. 388, 55 Sup. Ct. 241 (1935).

¹⁵⁹295 U. S. 495, 55 Sup. Ct. 837 (1935).

¹⁶⁰*Curran v. Wallace*, 306 U. S. 1, 59 Sup. Ct. 379 (1939); *United States v. Rock Royal Co-op.*, 307 U. S. 533, 59 Sup. Ct. 993 (1939); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 60 Sup. Ct. 907 (1940); *Opp Cotton Mills v. Administrator*, 312 U. S. 126, 61 Sup. Ct. 524 (1941).

¹⁶¹SEN. REP. No. 1171, 77th Cong., 2d Sess. (1942) 2; H. R. REP. No. 1906, 77th Cong., 2d Sess. (1942) 1.

¹⁶²H. R. REP. No. 1906, 77th Cong., 2d Sess. (1942) 2.

¹⁶³*Ibid.*

There appears to be, therefore, no lack of a legislative policy in connection with the statute.

The delegation of authority to prohibit the entry into, departure from, or remaining within a military zone is an unambiguous standard. Some question may arise with respect to delegation of authority to prohibit "any act." The legislative history of Public Act No. 503, however, indicates that Congress was concerned with the prohibition of curfew violations.¹⁶⁴ Moreover, the rule of *ejusdem generis* may well be applied to limit the delegation of power to prohibit acts similar in nature to the more specific grant of power.¹⁶⁵

The validity of delegation of authority to establish military areas and zones is similarly open to question because of the absence of guiding standards. Resort once more to the purposes and legislative history of Public Act No. 503 is appropriate. The House committee report contains this illuminating statement with reference to the need for protection against espionage and sabotage:¹⁶⁶

"In order to provide such protection it has been deemed advisable to remove certain aliens as well as citizens from *areas in which war production is located and where military activities are being conducted.*" (Italics supplied.)

By congressional definition, then, a military area is a center of war production¹⁶⁷ or of military activities, and such definition appears to be an adequate indication of the areas in which evacuation and curfew regulations might be issued. But what of the war relocation centers in which the Japanese have been detained? True, these have been designated as military areas,¹⁶⁸ but it is difficult to square such designations with the definition of military areas as war production or military activities centers. It is well to remember, however, that Public Act No. 503 was in part intended as a means for preserving the safety of the evacuees, and it may be reasonably inferred that in using the term "military area" Congress was aware that the detention of the Japanese

¹⁶⁴*Ibid.* SEN. REP. NO. 1171, 77th Cong., 2d Sess. (1942) 2; 88 CONG. REC. 2725 (1942).

¹⁶⁵Kay v. United States, 303 U. S. 1, 9, 58 Sup. Ct. 468 472-473 (1938).

¹⁶⁶H. R. REP. NO. 1906, 77th Cong., 2d Sess. (1942) 2. See also Public Proclamation No. 1, March 2, 1942, 7 FED. REG. 2320 (1942) which, before the enactment of Pub. L. No. 503, 77th Cong., 2d Sess. (March 21, 1942) had established as military areas and zones certain territory 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."

¹⁶⁷It is doubtful that the Congressional conception of a military area requires the coincidence of war production and military activities in the same place.

¹⁶⁸See note 23, *supra*.

in zones of war production or military activities would defeat the entire purpose of the legislation. Accordingly, it is not an unfair construction of the congressional intent to say that a military area should likewise include any area in which, in the judgment of the Secretary of War or his designated commanders, the purposes of the statute would be best effectuated.¹⁶⁹ Particularly in legislation involving protection of the national security against its enemies, "it is no argument against constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme."¹⁷⁰

V. CONCLUSION

Without doubt, the restrictions imposed upon the American-born Japanese are not pleasant. It is no light matter to be uprooted from one's home, and sent to unfamiliar surroundings, faced with the necessity of adjustment to a new mode of living. Nevertheless, the problem presented by the presence of the Japanese in this country should not be met with less harsh methods at the expense of effectiveness. We cannot afford—to borrow the words of the President in his recent appeal to the striking coal miners—to "gamble with the lives of American soldiers and sailors and the future security of all our whole people. It would involve an unwarranted, unnecessary and terribly dangerous gamble with our chances for victory." Given the necessity for action, legal justification is not lacking.

¹⁶⁹See *Ex parte* Lincoln Seiichi Kanai, 46 F. Supp. 286, 288 (E. D. Wis. 1942).

¹⁷⁰*United States v. Rock Royal Cooperative*, 307 U. S. 533, 574, 59 Sup. Ct. 993, 1013 (1939). An interesting possibility is that even if the delegation in Pub. L. No. 503, 77th Cong., 2d Sess. (March 21, 1942) would otherwise be invalid, it might be sustained on the ground that since the President derives authority to establish the regulations from the Constitution as well as the statute, broader standards may accompany the statutory delegation. See, for example, *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 57 Sup. Ct. 216 (1936), in which the Supreme Court upheld a delegation of power to the President to place an embargo on the sale of arms to certain countries engaged in war if he found that he would thus contribute to the re-establishment of peace between them. The Court pointed out that it was dealing with authority granted by Congress plus the constitutional power of the President in the field of international relations—"a power which does not require as a basis for its exercise an act of Congress." The decision seems, however, to be limited to the delegation of powers of "external sovereignty," that is, "the powers to declare and wage war, to conclude peace, to make treaties, to maintain diplomatic relations with other sovereignties. . . ."

Although the Supreme Court will probably sustain the delegation in Pub. L. No. 503, 77th Cong., 2d Sess. (March 21, 1942), a more detailed statute should have been enacted so that a favorable decision could be reached without resort to legal gymnastics.

II

GENESIS, EXODUS, AND LEVITICUS GENEALOGY, EVACUATION, AND LAW¹

HARROP A. FREEMAN

Neither interest in family trees, nor childhood reading of the innumerable "begats" in Genesis, nor the famous words of Justice Holmes, "Three generations of imbeciles are enough,"² accounts for the present attention to genealogy. Strange as it may seem, it is the association of the same three ideas identified with the first three books of the *Bible*—Genealogy, Evacuation, and Law—which brings us back to inquire into the bearing of ancestry upon a person's rights and the protection which he shall be afforded in society.

The presence of Jewish blood in one's veins, traced not merely to the third and fourth but to the *n*th generation has been the occasion in Germany for "days of broken glass," pogroms, mass evacuations, and slaughter. Many dismiss the insistent question, "Can these things be under law" by denying that Germany operates under a system of law. But the question cannot thus be downed.

On January 2, 1942, the President of the United States issued a statement: "Remember the Nazi technique: 'Pit race against race, religion against religion, prejudice against prejudice. Divide and conquer.' We must not let that happen

¹If any who read this article look upon persons of Japanese ancestry with suspicion and hatred and accept the phrase, "A Jap's a Jap," then, if they would protect the basic liberties by which they themselves live, they must be the *more* cautious to see that these rights and liberties are protected to those whom they deem most objectionable. This has been well expressed by Macauley in his simile on liberty: "Liberty resembles the Fairy of Ariasto who, by some mysterious law of her nature, was condemned to appear at certain seasons in the form of a foul and poisonous snake. Those who injured her during the period of her disguise, were forever excluded from participation in the blessings which she bestowed. But to those who, in spite of her loathsome aspect, pitied and protected her, she afterwards revealed herself in the beautiful and celestial form which was natural to her, accompanied their steps, granted all their wishes, filled their houses with wealth, made them happy in love. . . . Such is the spirit of Liberty. At times she takes the form of a hateful reptile. She grovels, she hisses, she stings. But woe to those who in disgust shall venture to crush her! And happy are those who, having dared to receive her in her degraded and frightful shape, shall at length be rewarded by her in the time of her beauty and her glory."

As Judge Pound of New York said, "Although the defendant may be the worst of men, the rights of the best of men are secure only as the rights of the vilest and most abhorrent are protected." Quoted by Zechariah Chaffee, Jr., *The Bill of Rights Belongs to the People* (1942) 2 BILL OF RIGHTS REV. 92, 93.

The review by the United States Supreme Court of the saboteur trials is typical of the tenacity with which our legal system holds to this position. *Ex parte Quirin*, 317 U. S. 1, 63 Sup. Ct. 1 (1942). See Cushman, *Ex parte Quirin et al.—The Nazi Saboteur Case* (1942) 28 CORNELL L. Q. 54.

²*Buck v. Bell*, 274 U. S. 200, 47 Sup. Ct. 584 (1927).

here."³ Yet within ninety days after those words were spoken we had evacuated 112,000 persons of Japanese ancestry, of whom 79,000 were American citizens, from five states on the west coast.

On May 10, 1942, three cases involving the constitutionality of this evacuation were argued before the United States Supreme Court.⁴ These cases present the crucial issue of this war on the "home front."

It is to be hoped that the Supreme Court will squarely face the constitutionality of the action taken.⁵

I. THE STATUTES, ORDERS, AND PROCLAMATIONS

By the Act of July 6, 1798, authority was given the President to control "all natives, citizens, denizens, or subjects" of the enemy within the United States.⁶ This was one of a series of acts known as the Alien and Sedition Laws. To certain parts of these acts, particularly those permitting the apprehension of persons "suspected to be dangerous to the peace and safety of the United States," and those interpreted as applying to alien friends as well as alien enemies, the opposition was immediate and vocal,⁷ and resulted in substantial non-enforcement of these objectionable provisions.

³Hearings before Select Committee Investigating National Defense Migration on Problems of Evacuation of Enemy Aliens and Others from Prohibited Military Zones Pursuant to H. R. Res. 113, 77th Cong., 2d Sess. (1942) [hereafter referred to as *Tolan Committee Hearings*] 11,042; yet in government briefs we see this pitting of race against race, religion against religion, prejudice against prejudice. Brief for Appellee, 12-32, *Hirabayashi v. United States*, — U. S. —, 63 Sup. Ct. 1375 (1943).

⁴*Hirabayashi v. United States*; *Korematsu v. United States*; *Yasui v. United States*. All three cases were certified to the Supreme Court from the United States Circuit Court of Appeals for the Ninth Circuit.

⁵Compare *Ex parte Vallandigham*, 1 Wall. 243 (U. S. 1864), wherein certiorari was denied during the war, with *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866). Should the Supreme Court uphold the constitutionality of the evacuation program, I would not, as many a more illustrious colleague has, assert that "the Constitution is gone." See collection of statements: Fairlie, *Has the Constitution Gone?* (1935) 33 MICH. L. REV. 1037. One might, however, see the fulfillment of the words of Chief Justice Hughes uttered in 1920: "We may well wonder in view of the precedents now established, whether constitutional government as heretofore maintained in this republic could survive another great war, even victoriously waged" and might raise the question, if this is a "survival war," as President Roosevelt has said, for *what* are we surviving but those very rights asserted by the appellants in the three cases?

➡ Since the preparation of this article, on June 21 the Supreme Court upheld the convictions in these cases based upon violation of the curfew regulations but expressly refused to decide the constitutionality of the evacuation program. *Hirabayashi v. United States*, 318 U. S. —, 63 Sup. Ct. 1375 (1943); *Yasui v. United States*, 318 U. S. —, 63 Sup. Ct. 1392 (1943). The question may again be presented in a case involving only the evacuation.

⁶40 STAT. 531 (1918), 50 U. S. C. § 21 (1940).

⁷Mr. Livingston, speaking in the Senate: 4 ELLIOT'S DEBATES (1876) 440. The Virginia Resolution declaring the acts unconstitutional, passed December 24, 1798. *Id.* at 528. The Kentucky Resolutions of 1798 and 1799 were drafted largely by Jefferson.

In 1812 when our eastern coast was ravaged by Britain, proclamations were made prohibiting male British subjects over eighteen years of age from dwelling within forty miles of the eastern tidewater. This was enforced by voluntary removal to places farther inland, and by compulsion by the United States marshals upon refusal.⁸

In 1917, in furtherance of the Act of 1798, proclamations were issued under which alien enemies were controlled.⁹ In broad outline these may be said to have liberalized the treatment of alien enemies, assured them that they would not be molested in their ordinary pursuits so long as they obeyed the law and acted loyally, and subjected them "to restraint, or to give security, or to remove and depart from the United States" if they failed so to act. The amendments of the Act of 1798 on April 16, 1918,¹⁰ and in 1940 were slight, chiefly to broaden the application to females.¹¹

It was under these laws that President Roosevelt made his proclamations of December 7 and 8, 1941,¹² restraining German, Italian, or Japanese aliens from violating the laws of the United States, giving aid or information to its enemies, or interfering in any way with its defense and making such aliens "liable to restraint, or to give security, or to remove and depart from the United States." Possession of various articles including firearms and cameras

Id. at 540. When these resolutions were circulated to the various states, those states which argued for the constitutionality of the laws did so on the basis that aliens did not have the rights of citizens, and conceded that the acts would be improper as applied to citizens, *e.g.*, the reply of Massachusetts. *Id.* at 534-535. This distinction was recognized in Madison's report to the Virginia House of Delegates in 1800. *Id.* at 554. The position taken by the states of Virginia and Kentucky resulted in a change of administration; the Alien and Sedition Laws were very laxly enforced; and the whole issue of detention of aliens or citizens disappeared from significance. In *Case of Fries*, 9 Fed. Cas. 826, No. 5,126 (C. C. D. Pa. 1799) the act was upheld on the theory of detention to prevent the commission of a crime. See 2 BEVERIDGE, *THE LIFE OF JOHN MARSHALL* (1919) 381 ff.; BOWERS, JEFFERSON AND HAMILTON: *THE STRUGGLE FOR DEMOCRACY IN AMERICA*, (1937) 375-80.

⁸Such action was upheld in *Lockington v. Smith*, 15 Fed. Cas. 758, No. 8, 448 (C. C. D. Pa. 1817); *Lockington's Case*, 1 Brightly 269 (Pa. Sup. Ct. 1813) and *Brown v. United States*, 8 Cranch 110, 121 (U. S. 1814).

⁹40 STAT. 1650, 1651 (1917); 40 STAT. 1716 (1917); 40 STAT. 1729 (1917). Although during the first World War indiscriminate and wholesale internment of aliens took place in Great Britain, Germany, and France, the Attorney General in the United States was governed by a determination of whether the particular alien was dangerous to the public safety. REP. ATT'Y GEN. (1918) 26.

¹⁰40 STAT. 531 (1918), 50 U. S. C. §§ 21-24 (1940).

¹¹This act was upheld as to restraints upon and removal of alien enemies against the argument of lack of due process in *Minotto v. Bradley*, 252 Fed. 600 (N. D. Ill. 1918) and *DeLacey v. United States*, 249 Fed. 625 (C. C. A. 9th, 1918).

¹²Proclamation No. 2525, December 7, 1941, 6 FED. REG. 6321 (1941); H. R. REP. NO. 2124, 77th Cong., 2d Sess. (1942) 294-97. Proclamation No. 2526, December 8, 1941, 6 FED. REG. 6323 (1941); H. R. REP. NO. 2124, 297-298. Proclamation No. 2527, December 8, 1941, 6 FED. REG. 6324 (1941); H. R. REP. NO. 2124, 299-300. Each preamble reads: "Whereas, section 21 of title 50 of the United States Code provides as follows:"

was forbidden; and travel, membership in organizations and similar activities were restricted. Execution of the regulations was vested in the Attorney General as to continental United States, the Virgin Islands, and Puerto Rico, and in the Secretary of War as to the Philippine and Hawaiian Islands, the Canal Zone, and after December 29, Alaska.¹³ The Attorney General and Department of Justice immediately began to apprehend and detain alien enemies who were considered dangerous.¹⁴ By Presidential Proclamation No. 2537, issued January 14, 1942,¹⁵ all alien enemies were required to obtain identification certificates from the Attorney General under such regulations as he should deem necessary. The Attorney General issued orders and regulations clarifying and carrying out the presidential proclamations; through all

¹³Alaska was withdrawn from the jurisdiction of the Attorney General and transferred to the Secretary of War by Proclamation No. 2533, 7 FED. REG. 55 (1942); H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 300.

¹⁴Attorney General Biddle stated his policy: "All alien enemies could be incarcerated. . . . But it was determined to be more in accordance with our American tradition, wiser, more humane, to hold only those who were dangerous to our safety, or who might become so." Collier's Magazine, March 21, 1942, also statement in H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 28. This was in accordance with our tradition of 125 years, [see Koessler, *Enemy Alien Internment*, (1942) 57 POL. SCI. Q. 98] in recognition of the fact that "wholesale internment, without hearing and irrespective of the merits of individual cases, is the long and costly way round, as the British discovered by painful experience," and in the light of the justification of the policy of interning only dangerous aliens during the last war. REP. ATT'Y GEN. (1918) 27; Statement of Attorney General Biddle, H. R. REP. No. 2124, 27. Almost immediately after the outbreak of war, 5,000 aliens were interned. ANNUAL REP. F. B. I. (1941); New Republic, March 16, 1942, 355. By April 15, 1942, 8,010 aliens had been arrested. N. Y. Times, April 16, 1942, p. 7, col. 3. By June 30, 1942, 9,405 had been apprehended. ANNUAL REP. F. B. I. (1942) 6. By June, 1942, the F. B. I. had investigated 10,100 cases of reported sabotage, obtained 218 convictions and found not a "single foreign directed act of sabotage, except the sabotaging of Italian ships by their crews." *Id.* at 5. Hearing boards were established in all federal judicial districts [see (1942) 10 U. S. L. WEEK 2456] which by May, 1942, had released one-half of the 2,500 interned aliens who had appeared before them. Interpreter Release No. 198. Large amounts of contraband were seized from enemy aliens including "3,008 guns, 209,767 rounds of ammunition, 2,016 short wave radio receiving sets and 13 short wave radio transmitting sets, 522 other signalling devices" together with cameras, photographs, maps, and confidential information. ANNUAL REP. F. B. I. (1942) 6. Action was also taken by the Attorney General to reach naturalized former Axis nationals believed to be dangerous. N. Y. Times, March 26, 1942, p. 25, col. 2; N. Y. Times, July 8, 1942, p. 1, col. 3; (1942) 10 U. S. L. WEEK 2456. The F. B. I. during the year June 1941 to June 1942 smashed two major spy rings and held in custody awaiting trial members of other rings; it convicted 56 persons of espionage; and its efficiency in apprehending seven of the Nazi saboteurs landed on our shores in June, 1942, is one of the high points in the history of crime detection. ANNUAL REP. F. B. I. (1942) 5. There has never, to my knowledge, been any serious suggestion that the efforts of the Attorney General have been inadequate in controlling subversive activities of enemy aliens of whom there are upwards of one and one-half million, or American citizens of enemy stock of whom there are at least eleven million. In fact we may conclude that the Attorney General is more thorough than is General DeWitt for the General, in June, 1942, permitted German and Italian aliens to return to vital defense areas on the west coast from which the Attorney General removed them. N. Y. Times, June 29, 1942, p. 4, col. 1.

¹⁵7 FED. REG. 329 (1942); H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 301.

of which runs the test of "source of danger."¹⁶ Beginning with January 29, 1942, Attorney General Biddle designated limited areas on the west coast from which all alien enemies were to be excluded,¹⁷ and on February 4 proclaimed the entire coastline of California from the Oregon border to Los Angeles and from 30 to 150 miles inland a "restricted area" from which aliens were not excluded but in which curfew was maintained and other restrictions were imposed as to all aliens.¹⁸ These regulations necessitated the removal of approximately 10,000 German, Italian, and Japanese aliens and their re-establishment in jobs inland, not in concentration or relocation camps.¹⁹

On February 19, 1942, the President issued Executive Order No. 9066 transferring the prescription of military areas "from which any or all persons may be excluded" from the Department of Justice to the Secretary of War and military commanders whom he might designate.²⁰ On the same day, a bill, S. 2293, was introduced in the Senate to authorize "the taking into custody . . . of any or all Japanese"; this bill failed of passage.²¹ The Department of Justice gave its opinion that American citizens of Japanese ancestry could not be removed under the President's executive orders.²² The reason for transferring this control was stated to be that since the Attorney General was merely promulgating regulations for the areas recommended by the army, the division of authority and responsibility seemed undesirable and that "as a legal matter" and for the "acceptance [by] . . . the people generally" it would be better if regulation of citizens were "an exercise of the war power."²³

¹⁶(1942) 10 U. S. L. WEEK 2405; (1942) 10 U. S. L. WEEK 2425; (1942) 10 U. S. L. WEEK 2441; 7 FED. REG. 844 (1942); Interpreter Releases No. 60 *et seq.*, summarized in H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 159-160.

¹⁷Two areas in San Francisco and Los Angeles on January 29th; sixty-nine areas around mouths of rivers, lighthouses, power plants, manufacturing locations on January 31st; fifteen areas in California around bridges, harbors, military reservations on February 2nd; forty-two additional strategic areas on February 4th; eighteen prohibited areas in Arizona on February 7th. H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 302-314.

¹⁸*Id.* at 310-12. Both the prohibited and "restricted" areas were described and recommended by the War Department and that department made no recommendation for other areas.

¹⁹This removal was conducted by the aliens themselves. *Tolan Committee Hearings*, 11024 ff.

²⁰7 FED. REG. 1407 (1942); H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 314. This order does not recite the Alien Enemy Act of 1798 (as amended) as authorization, but depends on the President's powers as Commander-in-Chief to prevent espionage and sabotage.

²¹88 CONG. REC., February 19, 1942; *Report of the Committee on Immigration of the Senate*, S. REP. No. 1496, Calendar No. 1541 (1942).

²²*Ibid.*

²³H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 166. Edward J. Ennis, Director of the Alien Enemy Control Unit, Department of Justice, testifying before the Senate Committee on Immigration on March 23 and 24, 1942. In the Tolan Committee Hearings, neither General DeWitt, the President, nor the Attorney General introduced any other

Between March 2 and March 21 by Public Proclamations No. 1 and No. 2, Lieutenant General DeWitt prescribed approximately the *same military areas* as had previously been established by the Attorney General and gave notice that "Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded."²⁴

The "instructions, rules, and regulations prescribed" by the Attorney General²⁵ "with respect to such prohibited and restricted areas," were "adopted and continued in full force and effect" and the responsibility of the F.B.I. to investigate alleged acts of espionage and sabotage was "not altered."²⁶ On March 15, when General DeWitt announced the formation of the wartime Civil Control Administration, he still referred only to "areas from which Axis enemies are to be removed."²⁷

On March 21, at the request of the Secretary of War, Public Law No. 503 was adopted, which made any person guilty of a misdemeanor who knowingly did any act in a military area or zone contrary to the order of the Secretary of War or military commander.²⁸

In the request for the bill and in the House and Senate discussion, the emphasis was at all times on the removal of *certain individuals from limited areas*.²⁹ And even as thus restricted serious question was raised as to the constitutionality of the law.³⁰

statement as to the reasons for transfer of authority. The West Coast Congressional Delegation on February 13 had merely asked the President to determine the policy on "loyalty" rather than "citizenship." H. R. REP. No. 1911, 77th Cong., 2d Sess. (1942) 3.

²⁴H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 317-329.

²⁵See notes 17, 18, 19 *supra*.

²⁶7 FED. REG. 2320 (1942); H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 317-320. The N. Y. Times, March 4, 1942, p. 1, col. 3, reported General DeWitt as intending to evacuate gradually from an area 100 miles wide along the coast "all Japanese." This was coupled with a statement that he might require the complete evacuation of *all enemy aliens*. The proclamations required that any alien, "or any persons of Japanese ancestry" obtain and execute a change of residence notice, in addition to the travel permits required of all *aliens* by the Attorney General.

²⁷H. R. REP. No. 1911, 77th Cong., 2d Sess. (1942) 10.

²⁸Act of March 21, 1942, Pub. L. No. 503, 77th Cong., 2d Sess., c. 191 (1942); 56 STAT. 173, 18 U. S. C. A. § 97a (Supp. 1942).

²⁹88 CONG. REC., part 2, pp. 27722-27725 (1942); H. R. REP. No. 1906, 77th Cong., 2d Sess. (1942) 2-3. Representative Costello for the House Military Affairs Committee said: "... to remove certain aliens as well as citizens from *areas in which war production is located and where military activities are being conducted*." *Id.* at 2. Senator Reynolds, Chairman of the Senate Military Affairs Committee said: "we are asked to provide the department with authority to keep certain individuals from entering or leaving military zones. . . ."

³⁰Senator Robert Taft said: "Mr. President, I think this is probably 'the 'sloppiest' criminal law I have ever read or seen anywhere. . . . I have no doubt that in peace time no man could ever be convicted under it because the Court would find that it was so indefinite and so uncertain that it could not be enforced under the Constitution." 88 CONG. REC., March 19, 1942, 2807; H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 169.

It was only on March 24, 1942, after Public Law No. 503 had been passed, that the first discrimination between the German-Italian group and the Japanese was effected by General DeWitt's Public Proclamations No. 3 and 4. Proclamation No. 3 prescribed a curfew for "all alien Japanese, all alien Germans, all alien Italians, and all persons of Japanese ancestry" in Military Area No. 1 and directed that "no person of Japanese ancestry shall have in his possession or use" certain items including cameras and firearms.³¹ Public Proclamation No. 4 prohibited "all alien Japanese and persons of Japanese ancestry" in Military Area No. 1 "from leaving that area for any purpose. . . ."³²

On March 24 the first exclusion order³³ required all persons of Japanese ancestry to evacuate Bainbridge Island by March 30; the instructions which accompanied this order made it clear that persons could remove to areas of their own choosing or accept the government's provisions for "temporary residence."³⁴ On March 30, 1942, in announcing certain classes of aliens who might acquire exemption from exclusion orders, the General for the first time pointed out that evacuation was in prospect for practically all Japanese.³⁵ One hundred and five exclusion orders were issued, beginning March 30, the first ninety-nine covering specified limited sections of Military Area No. 1, and Public Proclamation No. 7 covering all the remainder of that Area.³⁶ The instructions accompanying these orders did not permit persons to remove to areas of their own choosing, although the movement was still referred to as "temporary residence."³⁷

A War Relocation Authority was established by the President by Executive Order No. 9106³⁸ to arrange for the care and employment of the evacuees. Although about 7,000 evacuees are now on leave from the W.R.A. camps to work at various points,³⁹ small numbers have been permanently reestablished in inland homes,⁴⁰ and the War Relocation Authority has recently recognized

³¹*Id.* at 330-331.

³²*Id.* at 331. This was said to be necessary "to insure the orderly evacuation and resettlement of Japanese *voluntarily* migrating from Military area No. 1." *Id.* at 165.

³³*Id.* at 332-333.

³⁴*Id.* at 333-334.

³⁵Press Release, Wartime Civil Control Administration, March '30, 1942; H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 165. Application of the same exemption to Japanese would have left few to evacuate.

³⁶N. Y. Times, June 8, 1942. By a queer coincidence Exclusion Order No. 57, under which Gordon Hirabayashi was required to move from Seattle, Washington, was issued on May 10, 1942, exactly one year to the day before his case attacking the constitutionality of the order was argued before the United States Supreme Court.

³⁷H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 344.

³⁸*Id.* at 315-317.

³⁹Pacific Citizen, May 20, 1943, p. 6, col. 4.

⁴⁰*Id.* at 1, col. 3.

that the establishment of relocation centers was a mistake and the evacuees should be freed,⁴¹ the great bulk of the evacuees still reside, surrounded by barbed wire and armed guards, in concentration camps, euphemistically referred to as "relocation centers."

Although German and Italian aliens were, under the original orders of the Attorney General, excluded from certain areas on the west coast, they have, since June, 1942, been permitted to return to these areas.⁴²

II. THE CONSTITUTIONAL PROBLEM

Two broad constitutional questions are presented, each of which involves determination of matters of degree or reasonableness. First, was the evacuation program under the conditions existing on the west coast in February to May of 1942 a constitutional exercise of the general power of the government, often referred to as the "police power"? Second, if the evacuation program was thus justified, was the method employed within constitutional authorization?⁴³ This approach accepts the oft repeated statement that the Constitution is an instrument drawn for government in war as well as in peace⁴⁴ and goes forward to essay an interpretation in keeping with the underlying concepts of the Constitution and our framework of government.

We, therefore, need to restate the elementary and basic premises of our system of jurisprudence before we attempt to formulate the rules of law to be applied or to examine the available facts to guide our determination of "degree" or "reasonableness."

Dean Roscoe Pound, in a recent address, lists "five characteristics of our Anglo-American law . . . (1) . . . supremacy of law . . . (2) subordination of the military to the civil power . . . (3) . . . emergencies do not suspend the constitution, (4) . . . there are fundamental individual rights, guaranteed and protected by the constitutions . . . (5) . . . the constitutions set up and the courts maintain a separation of powers."⁴⁵ I may be pardoned for briefly

⁴¹*Id.* at 1, col. 1-2.

⁴²N. Y. Times, June 29, 1942, p. 4, col. 1.

⁴³More attention will be given to the first question since the second has been fairly exhaustively argued in the Supreme Court whereas the first seems to me ultimately determinative.

⁴⁴*United States v. MacIntosh*, 283 U. S. 605, 622, 51 Sup. Ct. 570, 574 (1931); *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 326, 56 Sup. Ct. 466, 473 (1936); *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919); *Selective Draft Law Cases*, 245 U. S. 366, 38 Sup. Ct. 159 (1918); *Moyer v. Peabody*, 212 U. S. 79, 85, 29 Sup. Ct. 235, 237 (1908); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 161, 40 Sup. Ct. 106, 110 (1919); and *Home Building and Loan Assn. v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231 (1933); see also Hughes, *War Powers under the Constitution* (1917) 42 A. B. A. REP. 232.

⁴⁵Pound, *War and the Law* (1943) 14 PA. BAR ASS'N Q. 110, 112-113.

documenting some portions of this most felicitous expression particularly pertinent to the consideration at hand. Any law student knows the expressions of the first characteristic; we may select the concise statement of Justice Miller in *United States v. Lee*.⁴⁶

Of less familiarity, if we can judge from the attitude of the military, other executives, and even law writers,⁴⁷ is the second characteristic—the subordination of the military to the civil power. We need not go back to English precedent, though persuasive authority may also there be found. Our Declaration of Independence stated the eleventh charge against the King as justification for overthrowing a “government . . . destructive of these ends” for which “governments are instituted among men” that “he has affected to render the military independent of, and superior to the civil power.” It was “Lord Dunmore’s proclamation declaring his intention to execute martial law in that province” [Virginia] which caused the first representative government to be created in this country.⁴⁸ The change of wording in the proposed Constitution from “make war” to “declare war” was expressly for the purpose of “clogging rather than facilitating war; but for facilitating peace.”⁴⁹ In the Constitutional Convention on August 20, 1787, proposals to be incorporated in the draft constitution were submitted to the Committee of Five; included was a provision: “The military shall always be subordinate to the civil power, and no grants of money shall be made by the legislature for supporting military land

⁴⁶106 U. S. 196, 1 Sup. Ct. 240 (1882). “No man in this country is so high that he is above the law. No officer of the law may set that law at defiance, with impunity. All the officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it. It is the only supreme power in our system of government, and every man, who by accepting office, participates in its functions, is only the more strongly bound to submit to the supremacy, and to observe the liabilities which it imposes upon the exercise of the authority which it gives.” General Myron C. Cramer, Judge Advocate General, recently vivified this concept when he said: “Democracy and totalitarianism are gripped in a mighty battle and totalitarianism must be destroyed. Constitutional government must find within itself the powers necessary to its own preservation. In this total war, the rule of law rather than the rule of men must be preserved. This contrast in philosophy of government and in the rights of men is the world issue today.” Cramer, *Trial of the Eight Saboteurs* (1942) 17 WASH. L. REV. 247.

⁴⁷See Hatcher, *Martial Law and Habeas Corpus* (1940) 46 W. VA. L. Q. 187; *Tolan Committee Summary*, H. R. REP. NO. 2124, 77th Cong., 2d Sess. (1942) 147; Edward J. Ennis, *id.* at 166; Hughes, *War Powers under the Constitution* (1917) 42 A. B. A. REP. 232, 238; Brief for government, *Hirabayashi v. United States*, 47. See also statements: Colonel Bendtsen, H. R. REP. NO. 2124, 9; Tom C. Clark, representing General DeWitt, *Tolan Committee Hearing*, 11158; President Roosevelt in the preamble to his Executive Order No. 9066 [H. R. REP. NO. 2124, 314] and in his Labor Day address to Congress [both of which are criticized by Edward S. Corwin in *American Government in War-Time* (1943) 37 AM. POL. SCI. REV. 18 ff.]. Similar expressions were frequent during the Civil War. RANDALL, *CONSTITUTIONAL PROBLEMS UNDER LINCOLN* (1926) 30.

⁴⁸1 ELLIOT’S DEBATES (1876) 52.

⁴⁹3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA (1894-1905) 553, 554; 1 ELLIOT’S DEBATES (1876) 246.

forces for more than one year at a time."⁵⁰ As the Constitution wended its way through ratification in the states, either in debate or by proposed amendments, the various states showed their insistence upon the supremacy of civil over military power.⁵¹

Though extreme advocates of the war power have always asserted that the Constitution is not operative in wartime,⁵² the Supreme Court has so often repeated the rule that war does not abolish constitutional protections and that

⁵⁰ ELLIOT'S DEBATES (1876) 249. Apparently, from their report, the committee deemed the first portion sufficiently covered by the proposed constitution and inserted the second part in Art. I, § 8 of the Constitution. WARREN, *THE MAKING OF THE CONSTITUTION* (1928) 504-505.

⁵¹ *Rhode Island* in its ratification declared: "at all times the military should be under strict subordination to the civil power." 1 WARREN, *op. cit. supra* note 50, at 336. *New York* did "declare and make known" its interpretation of the Constitution and necessary amendments to be adopted by its ratification: "At all times the military should be under strict subordination to the civil power." *Id.* at vol. 1, p. 237. The whole history of the ratification of the Constitution is one of insistence upon the inclusion of a bill of rights, the fear that central government would be too strong, the release of the *militia* from martial law except in time of war. Any opposition to these protections was not based on their undesirability but on the assertion that under our system of *delegated* powers no supremacy of the military, no infringement of basic rights, no usurpation of power could occur. ELLIOT'S DEBATES, vol. 1, pp. 325, 327, 334 ff.; vol. 2, pp. 32, 80, 123, 220, 251, 269, 316, 359, 398, 429, 435, 449, 455, 545 ff.; vol. 3, pp. 52, 317, 445, 449, 502, 649, 651, 660, are typical examples. See also Madison's remarks, 1st Cong., 1st Sess., June 8, 1789; also WARREN, *op. cit. supra* note 50, at 508, 769.

It should not be forgotten that the men whose views we are citing had just gone through seven years of war, the outstanding feature of which was the hindrances to our military effort by the weak Confederation government; yet with all this the one point on which more people agreed than on any other was the necessity for restricting the central power from encroaching upon their basic liberties by military authority or otherwise.

As Chafee, *Free Speech in the United States* (1941) 30, points out: "The first ten amendments were drafted by men who had just been through a war. The Third and Fifth Amendments expressly apply in war."

James A. Randall in *Constitutional Problems under Lincoln* (1926) 25-26 has summarized very concisely the American position of the military power:

"Under the old German system, it was within the competence of the Kaiser to proclaim a 'state of war' throughout Germany, and thus to inaugurate a sweeping military regime. . . .

"In contrast to this extension of executive action, during war, the Anglo-Saxon tendency has been always to emphasize the 'rule of law', and to regard the military power as subordinate to the civil. . . .

"The law of military necessity, however, is not the typical American principle. To say that military force is not to be restrained by the superior power of law, is to quote the militaristic view as against that which has always prevailed here.

"Even during war the person and property rights of the citizen, according to the Anglo-Saxon viewpoint, must be preserved."

Even many of the state constitutions contain provisions assuring the supremacy of the civil power; e.g. West Virginia.

Nor can it be gainsaid that the rationale of the majority and minority opinions in *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866) is that the civil power is supreme over the military, a position which has not, so far as I am aware, been denied in any comment on the case.

⁵² RANDALL, *op. cit. supra* note 47, at 30; H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 147.

emergency cannot create power,⁵³ that the question should by now be foreclosed from debate.

It may be difficult to define or even to list all the fundamental rights to which individuals are entitled under our system of government. Certain it is that the principle that men are endowed with certain "inalienable rights" is well grounded.⁵⁴ A partial list of some of these rights possibly involved in our problem appears in Footnote 55 and may prove helpful.

A. *Extent of the Federal Police Power in Wartime*

The above enumeration of the basic characteristics of our system of law

⁵³*Ex parte Quirin*, 317 U. S. 1, 63 Sup. Ct. 1 (1942); *Schechter v. United States*, 295 U. S. 495, 528, 55 Sup. Ct. 837, 842 (1934); *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231 (1933); *Highland v. Russell Car Co.*, 279 U. S. 253, 261, 49 Sup. Ct. 314, 316 (1928); *United States v. Cohen Grocery Co.*, 255 U. S. 81, 88, 41 Sup. Ct. 298, 299 (1920); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 155, 40 Sup. Ct. 106, 108 (1919); and *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866).

⁵⁴In *Magna Charta* in 1215; *Bill of Rights* in 1688; *Declaration of Independence* in 1776; *Articles of Confederation*, and state and Federal Constitutions.

⁵⁵*Right of free movement.* *Edwards v. California*, 314 U. S. 160, 62 Sup. Ct. 164 (1941). "The conclusion that the *right of free movement* is a right of national citizenship stands on firm historical ground." See also *Crandall v. Nevada*, 6 Wall. 35, 48 (U. S. 1867); *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128 (1900); *United States v. Wheeler*, 254 U. S. 281, 41 Sup. Ct. 133 (1920); and Note (1940) 40 *COL. L. REV.* 1032.

Right to occupation, home, family, knowledge, worship, etc. *Meyer v. Nebraska*, 262 U. S. 390, 399, 43 Sup. Ct. 625, 626 (1922): "While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration, and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." See also *Truax v. Raich*, 239 U. S. 33, 41, 36 Sup. Ct. 7, 10 (1915).

Right to live and work where one wills. *Allgeyer v. Louisiana*, 165 U. S. 578, 589, 17 Sup. Ct. 427, 431 (1897); and *Colgate v. Harvey*, 269 U. S. 404, 56 Sup. Ct. 252 (1925).

Right to protection by government in the blessings of life, liberty, property and occupation. *Corfield v. Coryell*, 6 Fed. Cas. 546, No. 3,230 (C. C. E. D. Pa. 1823); *Murray v. Schooner Charming Betsy*, 2 Cranch 64 (U. S. 1804); and *Butchers' Union S. H. & L. S. L. Co. v. Crescent City*, 111 U. S. 746, 4 Sup. Ct. 652 (1883).

Right to peaceable assembly and petition for redress of grievances. *United States v. Cruikshank*, 92 U. S. 542 (1875).

Right to discuss national issues. *Hague v. C. I. O.*, 307 U. S. 496, 59 Sup. Ct. 954 (1938).

Right to immunity from denial of voting or similar privileges because of race. *United States v. Reese*, 92 U. S. 214 (1875); and *Ex parte Yarbrough*, 110 U. S. 651, 4 Sup. Ct. 152 (1884).

These rights have been said to be "fundamental rights which belong to every citizen as a member of society" (*United States v. Cruikshank*, 92 U. S. 542 (1875)), "vital to the maintenance of democratic institutions" (*Schneider v. State of New Jersey*, 308 U. S. 147, 161, 60 Sup. Ct. 146, 151 (1939)), and "immutable principles of justice which inhere in the very idea of free government" (*Holden v. Hardy*, 169 U. S. 366, 389, 18 Sup. Ct. 383, 387 (1897)).

and the rights of individuals suggests that the evacuation of persons of Japanese ancestry from the west coast has cut more deeply across those basic rights than has any government regulation thus far attempted. It is a commonplace that all private rights: property, personal, even life itself, are held subject to the public right of regulation in the common interest and that the right of private dominion is always in greater or less collision with the right of public control.⁵⁶ It would be simple to deny the government all right of control and make personal rights absolute, or to grant the government unfettered control and make government totalitarian. Our task, however, is more difficult, but more fruitful. As Aristotle remarks in the *Nicomachean Ethics*, Book V: "The easiest thing for the judge—or legislator—to do is to be strict and forbid. It is much more difficult to attempt to reconcile the seemingly irreconcilable, conserving the just in the claims of each side, and rendering a full measure of distributive justice to each." Our problem is to find a position sufficiently protective of the interests of government, which will nevertheless preserve to the individual citizen the greatest measure of those rights for the preservation of which government is itself formed.

We are indebted to government counsel in the *Hirabayashi* case, and to the recognized authority on martial law, Charles Fairman, for dispelling the idea which has pervaded much of the thinking on federal power in time of war, that declarations of "martial law" or "military necessity" or operations under "war powers" are determinative or even helpful in defining the extent of the power.⁵⁷ The plain and simple fact remains that we are exploring the boundaries of the "police power" under specific exigencies.

1. *Judicial Approach and Definition of Federal Police Power in Wartime.*—Thus having defined the problem and our basic legal concepts, we need to explore first the rules which have been developed to determine the right of the state, both in "peace" and "war," to regulate or prevent the use of one or

⁵⁶*West Coast Hotel Co. v. Parrish*, 300 U. S. 379, 57 Sup. Ct. 578 (1936); *Nebbia v. New York*, 291 U. S. 502, 523-5, 54 Sup. Ct. 505, 510-11 (1933); *Noble State Bank v. Haskell*, 219 U. S. 104, 111, 31 Sup. Ct. 186, 188 (1910); *Jacobson v. Massachusetts*, 197 U. S. 11, 25 Sup. Ct. 358 (1904); and *Commonwealth v. Alger*, 7 Cush. 53 (Mass. 1851). See also 1 THAYER, *CASES ON CONSTITUTIONAL LAW* (1895) 693, and Walter Wheeler Cook, *What Is the Police Power* (1907) 7 COL. L. REV. 322.

⁵⁷Charles Fairman, author of *The Law of Martial Rule and the National Emergency* (1930) 55 HARV. L. REV. 1253, is quoted as saying, concerning the evacuation: "The question in every case of military control would still be, (even with a martial law declaration) can the action complained of be justified as apparently reasonable and appropriate, under the circumstances, to the defense of the nation and the prosecution of the war?" *San Francisco Chronicle*, March 4, 1942, 14. See also the same position taken in his excellent article: Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253; Brief for Government, p. 42 ff., *Hirabayashi v. United States*, 2 WILLOUGHBY, *THE CONSTITUTIONAL LAW OF THE UNITED STATES* (2d ed. 1929) 1591.

more of an individual's basic rights, and, second, the attitude or general philosophy by which the courts have and should approach this inevitable collision of private and public rights.

Throughout the evacuation episode runs the attitude of unwillingness to trust any person of Japanese ancestry. Typical of this is the expression of Mayor Riley of Portland: "I wouldn't take a chance with one."⁵⁸ Is this the approach to the necessity for evacuation? Or is the approach that expressed in *Kwock Jan Fat v. White*,⁵⁹ "It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."⁶⁰

On April 13, 1943, General DeWitt, whose orders are the subject of our inquiry, was reported by the press as saying: "A Jap is a Jap . . . it makes no difference whether the Japanese is theoretically a citizen. . . . The west coast is too vulnerable . . . to take any chances."⁶¹ On May 17, the Supreme Court in *John T. Regan v. King*,⁶² recognized that there must continue to be a distinction between Japanese aliens and American citizens of Japanese ancestry and refused to reconsider the rule in the *Wong Kim Ark* case.⁶³ In *Ex parte Kawato*,⁶⁴ Justice Black speaking for the Court said:

"Nothing in this record indicates, and we cannot assume, that he [a Japanese *alien*] came to America for any purpose different from that which prompted millions of others to seek our shores—a chance to make his home and work in a free country, governed by just laws, which promise equal protection to all who abide by them."

Clearly the Supreme Court requires a more trustful and fair attitude than has been employed by those who advocated and directed the evacuation.

Wherever individual rights and public rights are in opposition, there are two ends to the problem—the "protection of individual rights" end and the "risk to the public" end.⁶⁵ It would seem that the courts of a country which starts its history with the wording of the Declaration of Independence, carries the same philosophy into the Constitution, surrounds its civil and criminal procedures with protections of the individual, and is currently waging a war

⁵⁸H. R. REP. NO. 2124, 77th Cong., 2d Sess. (1942) 146.

⁵⁹253 U. S. 454, 49 Sup. Ct. 566 (1919).

⁶⁰This is in keeping with the maxim that "it is better that 99 guilty escape than that one innocent man be punished."

⁶¹See the Washington Post, April 15, 1943; San Francisco News, April 13, 1943, 1.

⁶²— U. S. —, 63 Sup. Ct. 1168 (1943).

⁶³United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456 (1897) holding that a person born in the United States of Japanese parents is an American citizen with all the attendant rights of citizenship, on a par with all other citizens.

⁶⁴317 U. S. 69, 63 Sup. Ct. 115 (1942).

⁶⁵Chaffee, *The Bill of Rights Belongs to the People* (1942) 2 BILL OF RIGHTS REV. 92.

for "four freedoms," which mean nothing except in terms of the individual, must always think first of the individual rights, rather than the risk. In my opinion the evacuation has been almost entirely the product of "risk fixation," to employ a psychologist's terminology.

It appears that the view which the Supreme Court has developed in dealing with personal or civil rights cases has properly laid stress on private protection, rather than public risk. The general presumptions of constitutionality of legislation and of the reasonableness of classification, and the refusal to inquire into the policy of legislation⁶⁶ are recognized as the essence of judicial restraint and separation of powers. But this concession does not explore the issue deeply enough to be determinative. It may be that the tendency has been to refuse to draw tight the circle of inviolability about property.⁶⁷ The increased vigilance in protecting personal rights is the more manifest.⁶⁸ Gradually the distinction has been worked out. A liberal construction of the first ten amendments in favor of the individual, was first recognized.⁶⁹ The power to abridge personal liberties became considered "the exception rather than the rule."⁷⁰ Astuteness in examining legislation charged to abridge basic freedoms was manifested in the same period.⁷¹ A query was stated whether "there may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face . . . to be within the first ten amendments."⁷² In *Schneider v. Irvington*⁷³ the following year, Justice Roberts went on to answer the question:

"In every case, therefore, where legislative abridgement of the rights is asserted, the courts should be astute to examine the effect of the chal-

⁶⁶*United States v. Carolene Products Co.*, 304 U. S. 144, 153, 58 Sup. Ct. 778, 784 (1937); *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 209, 55 Sup. Ct. 187, 191-192 (1934); *Corporation Commission v. Lowe*, 281 U. S. 431, 50 Sup. Ct. 397 (1929); *Green v. Frazier*, 253 U. S. 233, 40 Sup. Ct. 499 (1919); and *Dartmouth College v. Woodward*, 4 Wheat. 518, 625 (U. S. 1820).

⁶⁷*United States v. Carolene Products*, 304 U. S. 144, 58 Sup. Ct. 778 (1937); *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398, 54 Sup. Ct. 231 (1933); *Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458 (1920); and *Hamilton v. Kentucky Distilleries*, 251 U. S. 146, 40 Sup. Ct. 106 (1919).

⁶⁸*Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1939); *Schneider v. State of New Jersey*, 308 U. S. 147, 60 Sup. Ct. 146 (1939); *Hague v. C. I. O.*, 307 U. S. 496, 59 Sup. Ct. 954 (1939); and *Johnson v. Zerbst*, 304 U. S. 458, 58 Sup. Ct. 1021 (1937).

⁶⁹*Sgro v. United States*, 287 U. S. 206, 53 Sup. Ct. 138 (1932); *Grau v. United States*, 287 U. S. 124, 53 Sup. Ct. 38 (1932); *United States v. Lefkowitz*, 285 U. S. 452, 52 Sup. Ct. 420 (1931); and *Go-Bart Importing Co. v. United States*, 282 U. S. 344, 51 Sup. Ct. 153 (1930).

⁷⁰*Herndon v. Lowry*, 301 U. S. 242, 258, 57 Sup. Ct. 732, 739 (1936).

⁷¹*DeJonge v. Oregon*, 299 U. S. 353, 57 Sup. Ct. 255 (1936); and *Lovell v. Griffin*, 303 U. S. 444, 58 Sup. Ct. 666 (1937) and cases cited therein.

⁷²*United States v. Carolene Products Co.*, 304 U. S. 144, 152, 58 Sup. Ct. 778, 783 (1937).

⁷³308 U. S. 147, 161, 60 Sup. Ct. 146, 150 (1939).

lenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

This decision has been generally accepted as giving "authoritative substance to the theory that there may be no room for the presumption of constitutionality, usually accorded state or municipal legislation, where the statute or ordinance interferes with a civil liberty as distinguished from legislative impairment of an economic privilege."⁷⁴ This approach has since been followed by the Court.⁷⁵ It is submitted that there is a real distinction authorizing this difference of approach. In the ordinary case involving constitutionality, government action either is being tested against the rule that this is a system of "express powers" or is being subjected to negative limitations. It is proper then that government should not be crippled, should be "allowed a little play in its joints."⁷⁶ And it is sufficient that only action which is arbitrary and wholly unreasonable be prevented. But individual rights are as specifically provided for by the Constitution as are governmental powers; in fact government was created for their protection. When these rights are involved, the *limitation* on governmental *power* is not as important as is the limitation on the individual's *rights*. Here the Court should itself determine, as umpire between government and the people, the extent to which the public need should be curtailed and some public risk be accepted and the degree to which cardinal freedoms should be overridden.

The Court in the *Hague* and *Schneider* decisions, carried this attitude protective of individual rights even further in a manner particularly applicable to the evacuation program. The evacuation has been justified as necessary to "protect" persons of Japanese ancestry against violence and vigilantism. In the *Hague* case the same argument was made, but the Court held that the city must meet threatened disorder by police protection instead of the more

⁷⁴(1940) 40 Col. L. Rev. 531, 532.

⁷⁵*Cantwell v. Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900 (1939); *Carlson v. California*, 310 U. S. 106, 60 Sup. Ct. 746 (1939); *Thornhill v. Alabama*, 310 U. S. 88, 60 Sup. Ct. 736 (1939); and *Hague v. C. I. O.*, 307 U. S. 496, 59 Sup. Ct. 954 (1939). See also *Opelika, Fort Smith, Casa Grande* and other *Jehovah's Witnesses* cases of 1943. Note that this approach stems back to earlier dissenting opinions. *Burns Baking Co. et al. v. Bryan*, 264 U. S. 504, 517, 520, 44 Sup. Ct. 412, 415, 416 (1924); and *Adams v. Tanner*, 244 U. S. 590, 597, 600, 37 Sup. Ct. 662, 665, 666 (1916). Although in *Minersville School District v. Gobitis*, 310 U. S. 586, 60 Sup. Ct. 1010 (1939) the Court seemed less solicitous of these rights. The Court engaged in no presumption and now entertains the same question for reconsideration (following the unexpected suppression of Jehovah's Witness activity after the *Gobitis* case *supra*). As this article goes to press, the Supreme Court has on June 14, 1943, reversed the *Gobitis* case.

⁷⁶*Justice Holmes in Bain Peanut Co. v. Pinson*, 282 U. S. 499, 51 Sup. Ct. 228 (1930).

efficient method of refusal of permits which interfered more seriously with the right of assembly. The threat of lawless conduct was no justification for depriving the innocent of their rights.⁷⁷ In the *Schneider* case the argument was advanced that the most efficient method of preventing fraudulent appeals, littering of the streets, and trespassing was to prohibit dissemination of information and pamphlets without permit. Again the Court required the less efficient method of ascertainment of guilt and punishment, since this would interfere less with basic liberties.⁷⁸ Against this background, what standing has the argument in favor of *evacuation that it constituted "protective custody"*⁷⁹ or that the difficulty of sorting out the disloyal by the method of individual hearing required the internment of the whole population of Japanese ancestry?

The two arguments most frequently used in support of the evacuation program and similar war measures: (1) that "the power to wage war is the power to wage war successfully,"⁸⁰ and (2) President Lincoln's homely words "by general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb,"⁸¹

⁷⁷This same argument of "prevention of conflict" was presented to the Supreme Court in *Buchanan v. Warley*, 245 U. S. 69, 81, 38 Sup. Ct. 16, 20 (1917), and was similarly rejected: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."

⁷⁸"Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press . . . , the public convenience in respect of cleanliness of the streets does not justify an exertion of the police power which invades the free communication of information and opinion secured by the Constitution." *Schneider v. New Jersey*, 308 U. S. 147, 162-3, 60 Sup. Ct. 146, 151 (1939).

"Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press." *Id.* at 164, 60 Sup. Ct. at 152 (1939). This was but a more specific application of the rule stated in *Mountain Timber Co. v. Washington*, 243 U. S. 219, 37 Sup. Ct. 260 (1916); *Schlesinger v. Wisconsin*, 270 U. S. 230, 46 Sup. Ct. 260 (1925); and *Weaver v. Palmer Brothers*, 270 U. S. 402, 46 Sup. Ct. 320 (1925).

⁷⁹There have been true cases of "protective custody" by the military. An example was the placing of Round Valley in California under martial law as a protection to the Indians, against whom the whites were committing outrages—but the Indians were left in the enjoyment of their property and liberties and the action was taken against the whites. See *WAR OF THE REBELLION: OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES*, Series I, Vol. 50, pt. 2, pp. 218, 219, 310.

⁸⁰Hughes, *War Powers under the Constitution* (1917) 42 A. B. A. REP. 237, 238; Brief for Government, p. 47 ff., *Hirabayashi v. United States*.

⁸¹Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253, 1278.

seem to carry argument by metaphor beyond what sound constitutional theory will justify. Amputation of a limb is a "last ditch" remedy and some risk to life is always attempted before this drastic step is taken. The "war successfully" argument is used to brand the war power as "plenary" and to suggest that the determination of the military commander must be accepted. This approach is wholly at variance with the attitude already discussed and its application to the exercise of war powers. From the earliest times, both in England⁸² and in the United States⁸³ the courts refused to accept the decision of the military and insisted on making a determination *de novo* of the necessity for military action infringing individual liberties.⁸⁴ Viewed from every angle it appears that the Supreme Court has recognized, both in war and in peace, that private rights must be protected even at some risk to the public generally and that the Court shall decide when and to what extent such risk must be accepted.

Developed concurrently with the rule restricting the presumption of constitutionality, has been the rule that in order to justify the invasion of individual rights, the danger to society must be "imminent and impending" or "clear and present."⁸⁵ This test has been devised to meet not only the stress of peacetime emergency but also the exigencies of war. To most lawyers the history of the adoption of this rule during the last war is known: how exponents of civil liberties had previously insisted that no act was punishable unless

⁸²The case of the Bristol Rights (S. T. U. S. III, 2-56), 1932, cited in 3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 1591.

⁸³*Mitchell v. Harmony*, 13 How. 115 (U. S. 1851): "It is not enough to show that he exercised an honest judgment, and took the property to promote the public service, he must also prove what the nature of the emergency was, or what he had reasonable grounds to believe it to be; and it will then be for the court and jury to say whether it was so pressing as to justify an invasion of private right."

⁸⁴Although the unguarded dictum in *Luther v. Borden*, 7 How. 1 (U. S. 1849) and the severely criticized opinion in *Moyer v. Peabody*, 212 U. S. 78, 29 Sup. Ct. 235 (1909) relaxed this rule, the Court in *Sterling v. Constantin*, 287 U. S. 378, 53 Sup. Ct. 190 (1932) returned to its former position, relying on the *Mitchell* case. It may be that under the *Sterling* case there is a "range of honest judgment permitted," but the military judgment is not conclusive. See also *Jones v. Securities Commission*, 298 U. S. 1, 23, 56 Sup. Ct. 654, 660-661 (1935); and *Ex parte Orzoco*, 201 Fed. 106 (W. D. Tex. 1912).

⁸⁵To the student of jurisprudence it will appear that this constitutes a replacement of the rule prevalent at the formation of this country and expressed particularly by Jefferson (see PADOVER, DEMOCRACY BY THOMAS JEFFERSON) which permitted of no group control by the "utilitarian" rule permitting governmental regulation of these rights in the common good, a position associated with Bentham and Mill, and more recently with Holmes and Brandeis. See: BENTHAM, THE BOOK OF FALLACIES; MILL, UTILITARIANISM; Holmes, J., in *United States v. Schwimmer*, 279 U. S. 644, 655, 49 Sup. Ct. 448, 451 (1928); Brandeis, J., in *Whitney v. California*, 274 U. S. 357, 375-77, 47 Sup. Ct. 641, 648-649 (1926). A more critical examination of the cases will prove that the replacement has not been complete and that the tendency is toward the preservation of the individual rights to the greatest extent possible, while permitting regulation only to the extent necessary.

it actually resulted in inciting criminal acts;⁸⁶ then in the five cases argued at the October term in 1918 the "clear and present danger" test was stated and such danger was found to exist in language that hindered the recruiting of an army;⁸⁷ in *Gitlow v. New York* it appeared the Court might accept suppression of "threatened danger in its incipency" as the criterion;⁸⁸ but the Court finally reestablished the "clear and present danger" test to meet the exigencies of the depression years.⁸⁹ In the later cases the test has been applied to disapprove of governmental action⁹⁰ and sociological balancing of the preservation of individual rights against the risk to society has been employed, even when the danger was "present," to determine how "clear" was the danger.⁹¹

What is perhaps not so well understood is the relation of this test to the general power of government in time of war. If we go back to the earlier

⁸⁶CHAFFEE, *FREE SPEECH IN THE UNITED STATES* (1941); Wechsler, *Symposium on Civil Liberties* (1941) 9 AM. L. SCHOOL REV. 881, 882; Murrish, *Protection of Free Speech under the Federal Constitution* (1940) 28 CALIF. L. REV. 733. In one of the first cases decided during the first World War, *Masses Publishing Co. v. Patten*, 244 Fed. 535 (S. D. N. Y. 1917), District Judge Learned Hand accepted this test.

⁸⁷See *Abrams v. United States*, 250 U. S. 616, 40 Sup. Ct. 17 (1919); *Schenck v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919); *Baer v. United States*, 249 U. S. 47, 39 Sup. Ct. 247 (1919); *Sugarman v. United States*, 249 U. S. 182, 39 Sup. Ct. 191 (1918); *Frohwerk v. United States*, 249 U. S. 204, 39 Sup. Ct. 249 (1918); *Debs v. United States*, 249 U. S. 211, 39 Sup. Ct. 252 (1918).

⁸⁸268 U. S. 652, 45 Sup. Ct. 625 (1924).

⁸⁹*Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732 (1936). There are those who find a clear return to this rule as early as *Fiske v. Kansas*, 274 U. S. 380, 47 Sup. Ct. 655 (1927); *Whitney v. California*, 274 U. S. 357, 47 Sup. Ct. 641 (1927); and *Near v. Minnesota*, 283 U. S. 697, 51 Sup. Ct. 625 (1931).

⁹⁰See cases cited note 89 *supra*, and see note 91 *infra*.

⁹¹In *Thornhill v. Alabama*, 310 U. S. 88, 102, 60 Sup. Ct. 736, 744 (1939), although the Court recognized a present danger, it balanced the value of labor organization against internal order and employer's rights and found certain risks worth taking "in the circumstances of our times . . . [to preserve] the area of free discussion that is guaranteed by the Constitution." And in *Lovell v. City of Griffin*, 303 U. S. 444, 58 Sup. Ct. 666 (1937); *Schneider v. New Jersey* (and companion cases), 308 U. S. 147, 60 Sup. Ct. 146 (1939); *De Jonge v. Oregon*, 299 U. S. 353, 57 Sup. Ct. 255 (1936) *Hague v. C. I. O.*, 307 U. S. 496, 59 Sup. Ct. 954 (1939); *Cantwell v. Connecticut*, 310 U. S. 296, 60 Sup. Ct. 900 (1939) though it was clear that some "danger" or risk was present, the Court permitted free discussion to prevail. Even in *Minersville School District v. Gobitis*, 310 U. S. 586, 60 Sup. Ct. 1010 (1939), where the alleged danger was to national unity, "an interest inferior to none in the hierarchy of legal values" (310 U. S. 586 at 595, 60 Sup. Ct. 1010 at 1013) the Court balanced values. The chief criticism of the case is that it over-emphasizes the salute as a path to unity. Now the Court is reconsidering the case, a recognition that even in this area perhaps sufficient attention was not given to the need for protecting individual rights. On June 14, concurrently with this article's going to press, this case has been reversed on a rebalancing of considerations. The Court in *Bridges v. State of California*, 314 U. S. 252, 62 Sup. Ct. 190 (1941) and *Times-Mirror Co. v. Superior Court*, 314 U. S. 252, 62 Sup. Ct. 190 (1941) again followed the clear and present danger test and found no such danger as justified citation for contempt of court. In addition to considering the nearness of the danger, it considered the interest threatened and the likely effect of their decision.

precedents defining the limits and conditions for the exercise of military power, we shall find that here also is the requirement of proximity and degree, a "clear and present" or "immediate, imminent, and impending" danger. Thus Charles Fairman has traced the beginnings of "martial law" or military control to the common law principle of "measures necessary to preserve the realm and resist the enemy,"⁹² which was analogous to protection of one's person or property by force.⁹³ Each of these principles recognized liability (lack of justification) if the danger was not real or imminent, or the means employed exceeded the occasion.⁹⁴

If we look to the few cases in this country which have stated the rule to be applied in testing the action of the government through the military branch, as it affects individual rights, we shall find the same rule of "imminent danger" and the same tendency to balance the conflicting interests in favor of the individual and against government, which we have seen develop in other civil liberties fields.⁹⁵ Two cases involving the taking of property in time of war, on the claim that it was necessary in order to prevent its falling into the hands of the enemy, serve as illustrations. In *United States v. Russell*,⁹⁶ the rule was stated as "the public danger must be immediate, imminent, and impending, and the emergency in the public service must be extreme and imperative, and such as will not admit of delay or a resort to any other source of supply." In *Mitchell v. Harmony*,⁹⁷ since the evidence showed that the seizure was for the purpose of using the property in a forthcoming campaign, rather than to prevent the property coming into the enemy's possession, the plaintiff was allowed to recover against the military officer. The Court's language is very clear:

"But in every such case the danger must be present or impending, and the necessity such as does not admit of delay or the intervention of the civil authority to provide the requisite means. It is impossible to define the particular circumstances in which the power may be lawfully exercised. Every case must depend on its own circumstances. It is the emergency

⁹²Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253, 1256-1264.

⁹³*Id.* at 1260.

⁹⁴*Id.* at 1261-1264; 3 WILLOUGHBY, THE CONSTITUTIONAL LAW OF THE UNITED STATES (2d ed. 1929) 1591. A further recognition of this are the "Indemnity Acts" which have been passed in England and the United States, after military control which may have exceeded the necessity. 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, 256-8; *Mitchell v. Clark*, 110 U. S. 633, 647, 4 Sup. Ct. 170 (1883); WAR OF THE REBELLION: O. R., *op. cit. supra* note 79, Series II, vol. 2, pp. 21-30.

⁹⁵See notes 89, 90, and 91 *supra*.

⁹⁶13 Wall. 623, 627-8 (U. S. 1871).

⁹⁷13 How. 115 (U. S. 1851); see also *Raymond v. Thomas*, 91 U. S. 712, 716 (1875). The test of "imminent danger" is that fixed by the Constitution as justification for the use of a state's war powers. U. S. CONST. ART. I, § 10.

that gives the right, and the emergency must be shown before the taking can be justified. In deciding upon this necessity, the state of facts as they appeared at the time will govern the decision, because the officer in command must act upon the information of others as well as his own observation. And if, with such information as he can obtain, there is reasonable ground for believing that the peril is immediate or the necessity urgent, he may do what the occasion seems to require, and the discovery that he was mistaken will not make him a wrongdoer. It is not enough to show that he exercised an honest judgment, and took the property to promote the public service, he must also prove what the nature of the emergency was, or what he had reasonable grounds to believe it to be; and it will then be for the court and jury to say whether it was so pressing as to justify an invasion of private right."

More recently the Court made clear that a danger more proximate than has, I believe, been shown to exist on the west coast must be shown before military control will be justified. Said Chief Justice Hughes:⁹⁸

"The absence of necessity for military order of the Governor . . . is established by showing that there was no actual uprising or showing of violence or anything more than threats of violence, breaches of the peace against oil producers, and that there was no closure of the courts or failure of civil authorities."

2. *The History of Governmental Action in Time of War.*—The other guide in determining rules to be applied now is found in action previously taken by the government in time of war, whether or not sustained by the courts, weighed in the light of the similarities or differences of the times. We can first dispose of a considerable number of cases, often cited but having little bearing on the problem in hand. Thus methods of raising an army and providing munitions fall within specific constitutional authorization.⁹⁹ War merely demonstrates the public nature of the use in taking private property with compensation in other cases.¹⁰⁰ Or national conditions created by war bring areas which were formerly subject to state police power under federal jurisdiction.¹⁰¹ The control of enemy aliens and their property is recognized and

⁹⁸*Sterling v. Constantin*, 287 U. S. 378, 53 Sup. Ct. 190 (1932).

⁹⁹*Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 56 Sup. Ct. 466 (1935); *Hamilton v. Regents of University of California*, 293 U. S. 245, 55 Sup. Ct. 197 (1934); and *Selective Draft Law Cases*, 245 U. S. 366, 38 Sup. Ct. 159 (1917).

¹⁰⁰*Highland v. Russell Car and Snowplow Co.*, 279 U. S. 253, 49 Sup. Ct. 314 (1929); *Dakota Central Tel. Co. v. South Dakota*, 250 U. S. 163, 39 Sup. Ct. 507 (1919); and *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502 (1919).

¹⁰¹*Block v. Hirsh*, 256 U. S. 135, 41 Sup. Ct. 458 (1920) (rents); *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146, 40 Sup. Ct. 106 (1919) (sale of liquor); *McKinley v. United States*, 249 U. S. 397, 39 Sup. Ct. 324 (1918) (prostitution near army camps); and *Stewart v. Kahn*, 11 Wall. 493 (U. S. 1870).

plenary.¹⁰² The freedom of speech cases have been treated elsewhere.¹⁰³

On October 6, 1775, the first Congress of Delegates recommended to the colonial assemblies that they confine any person who might endanger the liberties of America.¹⁰⁴ We know that some Tories assisting the British cause were in fact apprehended. The Continental Congress was upheld in compelling the removal of articles which might fall into the hands of the enemy.¹⁰⁵ The history of the Alien and Sedition Laws and the practical restriction of these to alien enemies has already been noted.¹⁰⁶ Although Washington called out the army during the Whiskey Rebellion, arrests were made only on warrant issued by a judge for specific crimes shown,¹⁰⁷ and in the Burr Conspiracy of 1805 civil agencies alone were employed.¹⁰⁸ In 1812, our coastline was invaded by the British and our Capitol was burned; under these circumstances removal of alien enemies above tidewater was upheld.¹⁰⁹

In the same period, the military attempted to control citizens, at least when they were suspected of being spies, but these were directed by the President to be released,¹¹⁰ and General Jackson's imposition of military control at New Orleans over civilians, and his refusal to heed a writ of habeas corpus resulted in his having to pay a \$1,000 fine.¹¹¹ The Mexican War saw no great interference with private rights, but the Supreme Court was astute to uphold an individual's right to recover for private property taken by a military officer without justification.¹¹²

It was the Civil War which produced a considerable amount of executive control over individual rights. James G. Randall has summarized some of the powers which President Lincoln claimed to exercise:

"As interpreted by President Lincoln, the war power specifically in-

¹⁰²Central Trust Co. v. Garvan, 254 U. S. 554, 41 Sup. Ct. 214 (1920); The Prize Cases, 2 Black 635 (U. S. 1862); and Miller v. United States, 11 Wall. 268 (U. S. 1870).

¹⁰³See notes 68-75, 91 *supra*. After *Schenck* and related cases, the other cases upholding convictions under the Espionage Act, United States v. Abrams, 250 U. S. 616, 40 Sup. Ct. 17 (1919), Schaeffer v. United States, 251 U. S. 466, 40 Sup. Ct. 259 (1919), Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. 205 (1919), were by divided courts, with Holmes and Brandeis, whose views shaped the present rule of law, taking the position that the writings there denouncing our intervention in Russia and criticising our war strength should not be suppressed.

¹⁰⁴1 ELLIOT'S DEBATES 50.

¹⁰⁵Respublica v. Sparhawk, 1 Dall. 357 (U. S. 1788).

¹⁰⁶See note 7 *supra*, and also 2 BEVERIDGE, THE LIFE OF JOHN MARSHALL (1919) 381 ff.; BOWERS, JEFFERSON AND HAMILTON: THE STRUGGLE FOR DEMOCRACY IN AMERICA (1937) 375 ff.

¹⁰⁷2 McMASTER, HISTORY OF THE PEOPLE OF THE UNITED STATES (1927) 190.

¹⁰⁸2 WANDELL AND MINNEGERODE, AARON BURR (1927) 118-145.

¹⁰⁹See notes 6 and 7 *supra*.

¹¹⁰*Ex parte Quirin et al.*, 317 U. S. 1, 63 Sup. Ct. 1 (1942).

¹¹¹J. S. BASSETT, LIFE OF JACKSON (1911) 224-230.

¹¹²Mitchell v. Harmony, 13 How. 115 (U. S. 1851).

cluded the right to determine the existence of 'rebellion' and call forth the militia to suppress it; the right to increase the regular army by calling for volunteers beyond the authorized total; the right to suspend the habeas corpus privilege; the right to proclaim martial law; the right to place persons under arrest without warrant and without judicially showing the cause of detention; the right to seize citizens' property if such seizure should become indispensable to the successful prosecution of the war; the right to spend money from the treasury of the United States without congressional appropriation; the right to suppress newspapers; and the right to do unusual things by proclamation, especially to proclaim freedom to the slaves of those in arms against the Government."¹¹³

Lincoln's apology, in his letter of June 12, 1863, for the action taken is one of his great writings and goes far to prove the enormity of the emergency, rebellion in the North itself, and conditions in the courts bordering on anarchy.¹¹⁴ Five famous cases growing out of the exercise by Lincoln and his generals of the war power are instructive: *Miller v. United States*,¹¹⁵ *Ex parte Merryman*,¹¹⁶ *Ex parte Vallandigham*,¹¹⁷ *Ex parte Milligan*,¹¹⁸ and the *Prize Cases*.¹¹⁹

The *Miller* case and the *Prize Cases* faced the problem that persons residing in the South were still technically citizens, but either they or their states were carrying on a rebellion against the central government. It was determined that a state of war existed between the southern states and the central government and that citizens of the southern states were "enemies" so that trading with them might be forbidden or their goods seized. Although this theory of "war" has been severely criticised, it is probably as good a description of a situation clearly "extra" the Constitution as any other phrase.

Merryman was a lieutenant drilling a secessionist company in Baltimore, a city in 1861 actively opposed to the war effort and on the only direct railroad line from the North to Washington. Troops moving through Baltimore to defend Washington had been set upon by a mob and the city and state had refused to take action;¹²⁰ General Cadwalader took Merryman into custody and, pursuant to presidential authorization, suspended the writ of habeas corpus. Chief Justice Taney wrote his famous opinion asserting that only

¹¹³RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926) 36.

¹¹⁴8 NICOLAY AND HAY, WORKS (1894) 298.

¹¹⁵11 Wall. 268 (U. S. 1870).

¹¹⁶17 Fed. Cas. 144, No. 9,487 (1861).

¹¹⁷1 Wall. 243 (U. S. 1863).

¹¹⁸4 Wall. 2 (U. S. 1866).

¹¹⁹2 Black 635 (U. S. 1862).

¹²⁰See FAIRMAN, MR. JUSTICE MILLER AND THE SUPREME COURT (1939) ch. 4; THE WAR OF THE REBELLION: OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Series 2, vol. 5, pp. 226, 564; and RANDALL, *op. cit. supra* note 47, at 161.

Congress could suspend the writ and leaving it to the President to cause "the civil process of the United States to be enforced." The sequel to that case must be noted. Soon after this opinion Merryman was transferred to a civil court, charged with treason (for destruction of railroad bridges), and released on bail. The case was delayed until after the war, when the charges were dropped.¹²¹

Vallandigham was an outstanding Copperhead politician of Ohio. Morgan and his raiders were preparing to, and later did, invade Ohio in the hopes of an uprising of Copperheads. General Burnside placed *Vallandigham* on trial before a military tribunal for the sentiments he had uttered. The district judge denied the writ of habeas corpus. A vain attempt to get the case to the Supreme Court for review was made by requesting certiorari of the military tribunal record, which of course was refused as not within the appellate jurisdiction of the Court. President Lincoln disapproved of Burnside's action, and commuted Vallandigham's sentence to removal within the Confederate lines, which was effected.¹²²

Milligan held much the same position in Indiana which Vallandigham did in Ohio. He was arrested in 1864, charged and found guilty by a military tribunal of conspiracy to overthrow the government. Morgan had invaded Indiana in 1863; the Southern cause seemed at its height; the pro-Southern movement in Indiana was substantial. When the case came before the Supreme Court all the justices agreed that Congress had not authorized trial by the military commission. The majority, by Justice Davis, went on to deny that Congress had the power to establish "martial law" except in case of actual, present invasion. The minority, by Chief Justice Chase, believed that Congress had the power in cases of "imminent public danger," "where ordinary law no longer adequately secures public safety and private rights."¹²³ The *Milligan* case, though the dictum of the majority has been severely criticized, has been accepted as stating the applicable rules of law in other particulars as late as 1942.¹²⁴ The government now admits that both the majority and minority in

¹²¹SWISHER, ROGER B. TANEY (1935) 557; see also note 120 *supra*.

¹²²For this history see: Fairman, *The Law of Martial Rule and the National Emergency*, (1942) 55 HARV. L. REV. 1253, 1283; RANDALL, *op. cit. supra* note 47, at 179; NICOLAY AND HAY, *op. cit. supra* note 114, at 336, 345, 360; and Lincoln's Letter to Burnside: "All the Cabinet regretted the necessity of arresting, for instance, Vallandigham—some perhaps doubting that there was a real necessity for it, but being done all are for seeing you through with it." THE WAR OF THE REBELLION: OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, Series 2, vol. 5, pp. 717, 657, 705.

¹²³4 Wall. 2, 140, 142 (U. S. 1866). For the general background see Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253, 1284.

¹²⁴*Ex parte Quirin*, 317 U. S. 1, 63 Sup. Ct. 1 (1942).

the *Milligan* case were right in holding that there was no "military necessity" for the action taken against Milligan.¹²⁵

The Habeas Corpus Act of March 3, 1863, had the effect of recognizing the supremacy of the civil power and of freeing all persons held by the military if grand juries did not find indictments for crimes committed.¹²⁶ There were cases not as famous as the above five, and incidents other than cases, which show that in spite of the untoward danger to the Union, the basic civil rights were protected against military action.¹²⁷

In both the Revolutionary War and the Civil War we have noted that persons who assisted those opposed to the government were interned by the military without trial. It appears to me that in the recent case of *Ex parte Quirin* the Court has recognized a distinction between this type of detention and the present detention of persons of Japanese ancestry. In the *Quirin* case the Court took great pains to point out that the military had a right to control Haupt, the only American citizen among the saboteurs, on the basis that "citizens who associate themselves with the military arm of the enemy government . . . are enemy belligerents," to be treated as such under the laws of war. Where, as in the Revolution, when there was no "citizenship," or in the Civil War when rebellion made "citizenship" only technical, it might be proper to treat those who assisted the "enemy" as "enemy belligerents." That would justify the military detention of persons of Japanese ancestry who could be proven to be aiding the enemy; but such determination of the military would be subject to judicial review just as at present judicial review may be had to

¹²⁵Brief for Government, *Hirabayashi v. United States*.

¹²⁶RANDALL, *op. cit. supra* note 47, at 163-164, 189.

¹²⁷Abrams, *The Jeffersonian, Copperhead Newspaper* (1942) 2 BILL OF RIGHTS REV. 284 describes the recovery by the owner of the Jeffersonian due to its suppression. Roscoe Pound, *War and the Law* (1943) 14 PA. BAR ASS'N Q. 242, 248 depicts both the emergency background and official reaction thus: "In the summer of 1863, when Lee was moving on Pennsylvania, Morgan was preparing to invade Ohio, Rosecrans was stalled in Middle Tennessee, and Johnston was collecting an army in Grant's rear behind Vicksburg, there was an emergency if our country ever encountered one. But General Burnside's order suspending the Chicago Times for 'repeated expressions of disloyal and incendiary sentiments' was at once revoked by President Lincoln. In the summer of 1864, after Cold Harbor, after the operations about Petersburg seemed to have reached a standstill, when Sherman seemed to be making little headway toward Atlanta, and Early was in the Shenandoah Valley, a great political party was allowed to hold a convention which in its platform pronounced the war a failure. Joel Parker at the Harvard Law School was allowed to attack the legality of important items of the administration's policy. There was a protracted newspaper controversy between the partisans of Meade and of Sickles as to the conduct of the battle of Gettysburg. After Shiloh, during the long struggle to get a foothold back of Vicksburg, and after Cold Harbor, Grant was persistently attacked in the press. But the attacks were without effect on his imperturbable pursuit of his duty, and neither helped the South nor hindered the military operations of the North."

determine whether a person held as an alien is in fact such.¹²⁸

Internment of aliens or citizens during World Wars I and II presents different questions in England and in the United States. In England during the First World War, the Defense of the Realm Act¹²⁹ provided for exclusion from defense areas, and internment on suspicion, of persons thought to be aiding the enemy. The power was lodged in *civilian* agencies. This action was upheld in *Bonnfeldt v. Phillips*¹³⁰ and *Rex v. Halliday*.¹³¹ In 1941 the House of Lords upheld, in the *Liversidge* and *Greene* cases,¹³² under the Emergency Powers Act of 1939¹³³ and Regulation 18B, internment on the order of the Home Secretary "with a view to preventing [the person held] acting in a manner prejudicial to the public safety or the defense of the realm." The decision turned on the issue of statutory construction: whether Parliament had lodged power in the Home Secretary to make the determination of prejudice or hostility objectively (of which courts should judge) or subjectively (of which he would be the sole judge). The court adopted the latter interpretation, but not without a strong dissent by Lord Atkin, who quoted the words of Pollock: "in a case in which the liberty of the subject is concerned we cannot go beyond the natural construction of the statute." The case was severely criticized by Carleton Kemp Allen in April, 1942.¹³⁴ In Canada, the War Measures Act¹³⁵ also lodges powers of exclusion in a *civilian*, the Minister of Justice, who has issued regulations excluding persons of the Japanese race from certain limited military areas, but not confining them in camps and allowing them to return to these areas under permit issued by the Mounted Police.¹³⁶ These cases must not be considered precedents for American action.¹³⁷ Although England has a tradition of protecting civil liberties not unlike our own, its constitutional theory is entirely different. Its Constitution is the Common Law as modified by Parliament; Parliament is the Constitution. As F. A. Brewing, in speaking of these statutes and decisions, says:

¹²⁸*Ex parte Quirin*, 317 U. S. 1, 63 Sup. Ct. 1 (1942); *Ex parte Gilroy*, 257 Fed. 110 (S. D. N. Y. 1919); *Ex parte Risse*, 257 Fed. 102 (S. D. N. Y. 1919); and *Ex parte Franklin*, 253 Fed. 984 (N. D. Miss. 1918). REP. ATT'Y GEN. (1918). 35.

¹²⁹4 & 5 GEO. V, c. 29; 5 & 6 GEO. V, c. 8.

¹³⁰35 T. L. R. 46 (K. B. 1916).

¹³¹(1917) A. C. 260.

¹³²*Liversidge v. Anderson*, [1942] A. C. 206, 3 All Eng. 338 (1941); *Greene v. Secretary of State for Home Affairs*, [1942] A. C. 284. Carr, *A Regulated Liberty* (1942) 42 COL. L. REV. 339.

¹³³2 & 3 GEO. VI, c. 62.

¹³⁴Allen, *Regulation 18b and Reasonable Cause* (1942) 58 L. Q. REV. 232.

¹³⁵REV. STAT. CANADA 1927, c. 206.

¹³⁶Canada Gazette, Extra No. 96, August 31, 1942.

¹³⁷Note the action of the highest court of Australia setting aside, in a case involving Jehovah's Witnesses, virtually all subversive activities regulations. Associated Press, June 14, 1943.

"The Imperial Parliament is absolute and can, of course, abrogate any civil liberty it sees fit."¹³⁸ Even where power is thus absolute it should be noted that Parliament has lodged the discretion in *civilian* agencies, and has itself kept constant control by requiring that all regulations must be submitted to and passed by Parliament before they are effective.¹³⁹

In the United States, World War I was marked by a liberalization of the treatment of enemy aliens so that only disloyal or dangerous aliens were interned;¹⁴⁰ even then the Attorney General pointed out in his 1918 report that such internment was "anomalous under the American judicial system, in that it provides for the summary exercise of executive authority. . . ." ¹⁴¹ A statute was proposed in Congress which would have divided this country into military districts subject to regulations to be adopted by the military commanders. President Wilson wrote to Senator Overman:

"I am wholly and unalterably opposed to such legislation. . . . I think it is not only unconstitutional, but that in character it would put us nearly upon the level of the very people we are fighting. . . . It would be altogether inconsistent with the spirit and practice of America. . . . I think it is unnecessary and uncalled for. . . ." ¹⁴²

In *Stoutenburgh v. Frazier*,¹⁴³ the Court of Appeals of the District of Columbia gave the only consideration, of which I know, to an act of Congress permitting the confinement of a person as subject to suspicion. Although this was one of the wartime acts and could have been construed to authorize "preventive custody" only after a hearing, the court held the act unconstitutional. On December 26, 1941, Congress authorized the Commissioners of the District of Columbia to evacuate (but not to intern) persons from the District when "public interest or the safety of such persons creates the necessity therefor."¹⁴⁴

In the fall of 1941 Attorney General Biddle spoke of the detention of aliens without trial:

"The Hobbs Bill, introduced this year, authorizes, when and only as long as deportation is impossible, detention of the alien in federal institutions. . . . The bill is in a sense revolutionary, because it permits deten-

¹³⁸Brewing, *Civil Liberties in Canada during Wartime* (1941) 1 BILL OF RIGHTS REV. 112.

¹³⁹Note that only about 2,000 have been interned and over half of these have been released. Laski, *Civil Liberties in Great Britain in Wartime* (1942) 2 BILL OF RIGHTS REV. 243; and see note 138 *supra*.

¹⁴⁰See note 9 and 10 *supra*.

¹⁴¹REP. ATT'Y GEN. (1918) 35.

¹⁴²BAKER, WOODROW WILSON, LIFE AND LETTERS (1927-1939) 100.

¹⁴³16 App. D. C. 229 (1900).

¹⁴⁴Pub. L. No. 373, 77th Cong., 1st Sess. (Dec. 26, 1941), 55 STAT. 858 (1941).

tion without trial by jury. But where aliens cannot be deported some control is desirable. It is a very serious curb on civil rights made essential by the circumstances of war."¹⁴⁵

The only act of Congress authorizing evacuation of internment relates solely to aliens.¹⁴⁶

It has been reported in the newspapers that several American citizens of German ancestry have been directed by the Army to leave designated areas on the east coast, have refused to do so, and have not been prosecuted.¹⁴⁷ Can it be that the government realizes the inability to sustain such evacuation? Such action is even more open to criticism than "temporary mass evacuation," since it is only "preventive" in a technical sense. It amounts to a determination of individual guilt of ordinary civilian citizens without a hearing.

B. Factual Background in Early 1942

The necessity for determining reasonableness requires the examination of the situation—military, political, social—as it existed in early 1942, against which background the evacuation prescribed by General DeWitt must be tested.

No exercise of the federal police or war power has ever infringed on basic individual rights of citizens as directly as this evacuation, without being condemned as in excess of constitutional authorization. Unless, therefore, there were compelling reasons in the facts existing in early 1942 for the adoption of a new rule, we would have to conclude that evacuation of 79,000 American citizens from the five west coast states was an unconstitutional exercise of the federal police power, even in time of war.

The author recognizes that the whole military situation, perhaps even the part familiar to General DeWitt, cannot be known to the public until the end of the war. Yet the Supreme Court must, of necessity, render its judgment on some conception of military necessity. The government, without suggesting that it will reveal to the Court so much of the secret information as may be necessary to justify the evacuation, has attempted to uphold the program on the basis of "facts known to the public."¹⁴⁸ The author disclaims any knowledge of military tactics, but he is impelled to the belief that if "military necessity" is going to be decided on the basis of facts known to the public, then when *all* the facts known to the public are considered, far from compelling

¹⁴⁵Attorney General Biddle, *Civil Rights in Times of Stress* (1941) 2 BILL OF RIGHTS REV. 13.

¹⁴⁶40 STAT. 531 (1918), 50 U. S. C. § 21 (1940).

¹⁴⁷Case of Mrs. Schuller, N. Y. Times, May 8, 1943. See also case of Wilcox on the west coast, CIVIL LIBERTIES QUARTERLY, A. C. L. U., June 1943.

¹⁴⁸See Brief for Government, *Hirabayashi v. United States*.

the evacuation, they do not even support an "honest" (to use the Supreme Court's terminology) conclusion that evacuation of these citizens was required.

1. *The Government's Claim of Military Necessity.*—The government's justification¹⁴⁸ for the west coast evacuation is based upon the Japanese successes in the Pacific and the alleged nonassimilation of the west coast Japanese by reason of continuous anti-Japanese agitation, and the policy of exclusion of Japanese aliens from immigration, from the right to become naturalized, from intermarriage, from owning land. The government points to these, to the belief in Shintoism, the continuance of Japanese language schools in the United States, and the possible retention of dual citizenship, and concludes that "it is entirely possible that an unknown number of the Japanese may lack to some extent a feeling of loyalty toward the United States as a result of their treatment."¹⁴⁹ In the footnote it is admitted, however, that "most of the evacuees are loyal to this country."

2. *Factual Background Showing Lack of Military Necessity.*—

(a) *The Military Background:* At the same time that we were girding ourselves for battle in the Pacific, Germany and Italy also declared war on the United States. Both of these countries had experienced phenomenal military successes as even the briefest chronological history will recall. Italy had overrun Ethiopia and Albania;¹⁵⁰ had invaded British African colonies,¹⁵¹ Egypt,¹⁵² and Greece;¹⁵³ with the help of Germany had taken Crete¹⁵⁴ and other Mediterranean islands and completed the conquest of Greece,¹⁵⁵ thus challenging Britain's lifeline in the Mediterranean. Germany, rising from complete impotence in military matters in 1933, had occupied the Rhineland, annexed Austria,¹⁵⁶ forced upon England and France the Munich appeasement,¹⁵⁷ overrun Czechoslovakia,¹⁵⁸ and devastated Poland in twenty-six days.¹⁵⁹ She had occupied Denmark and invaded Norway,¹⁶⁰ crushed the Netherlands in four days¹⁶¹ and Belgium in seventeen days,¹⁶² had annihilated

¹⁴⁸Brief for Government, p. 21, *Hirabayashi v. United States*.

¹⁵⁰April 7, 1939. Note: Details for all these footnotes may be found in the N. Y. Times for the day given, or the day following.

¹⁵¹August 6, 1940.

¹⁵²September 14, 1940.

¹⁵³October 28, 1940.

¹⁵⁴June 1, 1941.

¹⁵⁵April 27, 1941.

¹⁵⁶March 13, 1938.

¹⁵⁷September 30, 1938.

¹⁵⁸March 14, 1939.

¹⁵⁹September 1-27, 1939.

¹⁶⁰April 9, 1940.

¹⁶¹May 14, 1940.

¹⁶²May 28, 1940.

the highly ranked French army and conquered France in ten days;¹⁶³ had launched and maintained mass air raids on England consistently for nearly six months¹⁶⁴ and had achieved a recognized superiority in the air over England. The Nazis had taken Rumania with her rich oil wells¹⁶⁵ and Bulgaria¹⁶⁶ and had moved to swift victories in Greece¹⁶⁷ and Crete.¹⁶⁸ Turning from England she had invaded Soviet Russia on a 2,000 mile front¹⁶⁹ and had piled victory upon victory—Kiev, Odessa, Kharkov, the outskirts of Moscow, Rostov. All these were completed immediately prior to March, 1942;¹⁷⁰ and she went on immediately to take Sevastopol, a large part of the Caucasus, and Stalingrad.¹⁷¹ Surely in early 1942 the Germans seemed invincible.

Nor had the German efforts been limited to Europe. German armed ships and submarines had terrorized our Atlantic shipping and waters within 100 miles of our east coast. We recall a few of the better known examples: the raider *Deutschland* seized the S.S. *City of Flint*,¹⁷² the *Graf Spee*¹⁷³ and the *Columbus*¹⁷⁴ were scuttled off the American coast; the *Robin Adair* was sunk by Nazi submarines in the South Atlantic;¹⁷⁵ the United States Destroyer *Kearny* was torpedoed off Iceland,¹⁷⁶ and the destroyer *Reuben James* was torpedoed nearer our coast.¹⁷⁷ The number and proximity to our coast of the sinkings became alarming by January, 1942.¹⁷⁸ So complete was Germany's freedom of movement in our waters that a submarine shelled the oil refineries on Amba, in the Caribbean, on February 16, 1942, and submarines were able to land saboteurs and quantities of explosives at two points on our coast on June 13 and 17.¹⁷⁹

In Africa, Rommel launched his successful drive in January, 1942, which carried him by June to almost complete control of North Africa.¹⁸⁰ The Germans had large concentrations of planes, battleships, and submarines at

¹⁶³June 3-13, 1940.

¹⁶⁴Launched July 29, 1940; continued as heavy bombing until after January, 1941.

¹⁶⁵November 23, 1940.

¹⁶⁶March 1, 1941.

¹⁶⁷April 6-27, 1941.

¹⁶⁸June 1, 1941.

¹⁶⁹June 22, 1941.

¹⁷⁰September 20, October 14, October 17, October 25, November 22, 1941.

¹⁷¹May 11, 24, 26; July 2, 27; September 17, 1942.

¹⁷²October 23, 1939.

¹⁷³December 13, 1939.

¹⁷⁴December 19, 1939.

¹⁷⁵May 21, 1941.

¹⁷⁶October 17, 1941.

¹⁷⁷October 31, 1941.

¹⁷⁸January 14, 1942.

¹⁷⁹June 25, 1942.

¹⁸⁰January 21; June 21, 25, 1942.

bases nearer to New York than are Hawaii, Kiska, or Midway to the west coast. The roundup of two German spy and saboteur rings on the east coast was just being completed;¹⁸¹ the influence and size of the German-American Bund were being revealed and quantities of munitions in their possession were being seized. By comparison, our successes in the Pacific were considerably greater than those in the Atlantic; and Japan, unable to conquer China in seven years, was a less formidable foe than Germany with her record of conquest after conquest of the most difficult antagonists. Certainly there was no clearer "military necessity" in the Pacific than there was in the Atlantic.¹⁸²

(b) *Census Statistics*: One of the reasons given for the evacuation was the concentration of Japanese aliens and American citizens of Japanese ancestry in and around the major cities of the west coast. An examination of *Table A*, prepared from the census figures of 1940, shows how untenable on this basis evacuation of the Japanese without evacuation of the Germans and Italians really was.¹⁸³

The government also placed some stress on the Japanese group being one of "late arrival" in this country with attendant exposure to Japanese indoctrination. *Table B* demonstrates no problem of "recent arrival" applicable to the Japanese which is not equally and more applicable to the Germans.

We have already noted that the government has emphasized that the preponderance of Japanese aliens in the upper age groups made them especially dangerous in indoctrination of the younger persons of Japanese ancestry.¹⁸⁴ The unsubstantial character of this "evidence" is seen by an examination of *Table C* which is a combination of figures on pages 91, 95, 236, 242, 243 of *H. R. Rep. No. 2124*. In fact General DeWitt exempted the *older* German and Italian aliens from his orders of evacuation.¹⁸⁵ We should recognize that since 5,000 males of Japanese ancestry between 21 and 35 were in the army,¹⁸⁶ 55,000 were females,¹⁸⁷ the alien males averaged 59 years of age,¹⁸⁸ and 31,000 evacuees were under the age of 15, the Japanese evacuation was largely of old men, women, and children.

¹⁸¹February 4, 1942, p. 12, col. 5; March 3, p. 13, col. 2; March 7, p. 1, col. 1; January 3, p. 1, col. 2.

¹⁸²Brief for Government, p. 12 ff., *Hirabayashi v. United States*.

¹⁸³Compare the ratio of German and Italian foreign born to Japanese aliens or citizens of German and Italian ancestry with those of Japanese ancestry. Compare also the east coast which is as important in war material production as the west. *STATE DISTRIBUTION OF WAR SUPPLIES AND FACILITY CONTRACTS*, June, 1940 through December, 1941, (issued January 18, 1942, by the O.P.M.); and the *SUPPLEMENT*, cumulative through February, 1943 (issued April 3, 1943).

¹⁸⁴Note 16 *supra*.

¹⁸⁵H. R. REP. NO. 2124, 77th Cong., 2d Sess. (1942) 332.

¹⁸⁶Letter of the President to the Secretary of War, February 1, 1942.

¹⁸⁷H. R. REP. NO. 2124, 77th Cong., 2d Sess. (1942) 94.

¹⁸⁸*Id.* at 95.

TABLE A
CONCENTRATION OF JAPANESE, ITALIANS, AND GERMANS BY CITIES, 1940
WEST COAST

City	Los Angeles	Seattle	San Francisco	Oakland, Calif.	Portland, Oregon	Sacramento
Total population	1,191,182	368,302	634,536	302,163	305,394	105,958
Total "white"						
foreign born	215,248	59,612	130,271	42,661	38,608	12,144
German foreign born	17,528		14,977	3,682	3,947	931
Italian foreign born	13,256		24,036	5,707	2,685	1,962
Japanese foreign born	8,726	2,876	2,276	655	725	974
German alien	5,570	1,085	4,632	800	952	381
Italian alien	5,892	1,469	12,183	2,899	1,409	1,332
Japanese alien	8,726	2,876	2,276	655	725	974
Citizens of German ancestry†	126,150	35,760	78,160	25,590	23,160	7,280
Citizens of Italian ancestry†	73,180	20,264	44,302	14,500	13,120	4,120
Citizens of Japanese ancestry	14,595	4,099	3,044	1,135	955	1,905

EAST COAST

City	New York	Philadelphia	Baltimore	Pittsburgh	Chicago	Detroit
Total population	7,454,995	1,931,334	859,100	671,659	3,396,808	1,623,452
Total "white"						
foreign born	2,080,020	290,325	60,969	84,606	672,705	320,664
German foreign born	224,749	27,286	9,744	9,805	83,424	23,785
Italian foreign born	409,489	59,079	8,063	16,241	66,472	26,277
Japanese foreign born	1,456	*	*	*	*	*
German alien	91,240†	5,670	2,630	2,050	17,100	4,920
Italian alien	173,620†	21,250	6,430	5,840	23,460	11,400
Japanese alien	1,456	*	*	*	*	*
Citizens of German ancestry†	1,248,000	174,190	36,580	50,760	404,820	192,400
Citizens of Italian ancestry†	707,200	98,710	20,730	28,760	228,720	109,020
Citizens of Japanese ancestry	631	*	*	*	*	*

This chart is prepared from figures given in House Report No. 2124, pp. 100, 231, 233, 234, as supplemented by 16th Census of the United States, Population, Second Series Summary, pp. 108, 156.

*Negligible numbers—less than 500 (House Report No. 2124, p. 100).

†Computed figures based on percentage relation of aliens to foreign born for each group in the particular state (House Report No. 2124, p. 229).

‡Computed figures determined by multiplying the number of "white foreign born" in each city by the percentage (60% for the German, 34% for the Italians) showing the relationship of persons of German or Italian ancestry to the total "white foreign born" population of the United States (House Report No. 2124, pp. 229, 241).

TABLE B

ALIENS RESIDENT IN THE THREE WEST COAST STATES IN 1940 BY DATE OF LAST ARRIVAL

	1900 or prior	1910 or prior	1918 or prior	1935 or prior	Number who arrived after 1935
Italians	7.4%	41.3%	69.5%	94.5%	2,891
Japanese	3.0%	21.0%	46.7%	77.0%	6,671
Germans	11.0%	25.0%	35.0%	67.0%	7,710

This chart is prepared from House Report No. 2124, pp. 96, 235, 242.

Note: Japanese could not enter the United States for the *first* time after 1926 and therefore substantially all Japanese have had American contacts for at least 17 years. Among the Germans and Italians, the *last* arrival is most frequently also the *first*. Note also: This chart does not show *foreign born*; it omits Germans and Italians who have become naturalized, whereas no Japanese may become naturalized.

TABLE C

AGE GROUP CONCENTRATION (THREE WEST COAST STATES)

	German	Japanese	Italian
Foreign born females over 45 yrs.	56.0%	50%	65.00%
Foreign born males over 45 yrs.	60.5%	75%	74.84%
Foreign born males over 55 yrs.	36.29%	45%	44.62%

This chart is prepared from House Report No. 2124, pp. 91, 95, 236, 242, 243.

TABLE D

RELATION OF ALIENS TO NATIVE BORN CITIZENS OF JAPANESE ANCESTRY IN THE UNITED STATES

	Total Japanese	Percentage native born citizens	Native born	Foreign born
1910	72,157	6.2	4,502	67,655
1920	111,010	26.7	29,672	81,338
1930	138,834	49.2	68,357	70,477
1940	126,947	62.7	79,642	47,305

This chart is a combination of the figures given in House Report No. 2124, pp. 60, 78, 94.

Nor can it be asserted that the Japanese group is not becoming integrated in our society. In spite of the fact that no Japanese alien may be naturalized and, therefore, their number remains constant, except as altered by death, *Table D* shows that the percentage of native born citizens of Japanese ancestry has steadily increased from 6.2 per cent of the total Japanese population in 1910 to 62.7 per cent in 1940.

The studies available suggest that the integration of Italians and Germans into our culture is even slower than that of the Japanese.¹⁸⁹

The Japanese on the west coast were 45 per cent agricultural; the German and Italian aliens 3.43 per cent and 7.27 per cent agricultural and 52 per cent unemployed; the average value of a Japanese farm in California was \$12,810.¹⁹⁰ Are these the Japanese people from whom we should anticipate the attempted overthrow of this government which forms the only protection for the value of their investments?

(c) *Expectation of Sabotage or Fifth Column Activity and Effectiveness of Methods Other Than Evacuation to Prevent It*: On December 7, 1941, the Territory of Hawaii was attacked and immediately martial law was declared. Yet at no time, though the Japanese in Hawaii constitute 38 per cent of the total population,¹⁹¹ has it been deemed necessary to conduct any evacuation, and the evidence on record in the Tolan Committee Hearings at the time of General DeWitt's orders¹⁹² was all to the effect that there was no sabotage

¹⁸⁹On June 12, 1942, the census bureau reported that there were 3,360,740 native-born American citizens of German ancestry for whom German was the *mother tongue*. N. Y. Times, June 13, 1942. A careful study of Italians in San Francisco and the four surrounding counties, in 1935, reported 193,454 individuals of Italian ancestry "more or less directly in contact with Italian mores and habits of mind." RADIN, *THE ITALIANS OF SAN FRANCISCO* (1935) SERA Project 2-F2-98, pp. 38, 64. The studies showing the high degree of assimilation of the Japanese in the United States are of unimpeachable merit. See the monumental work, *The Second-Generation Japanese Problem* (1934) and companion volumes, by Professor E. K. Strong, who concludes at p. 6: "young Japanese are more readily assimilated than people of several European races." See also JAPAN REVIEW, April 1921, 93 ff.; SMITH, *AMERICANS IN PROCESS: A STUDY OF OUR CITIZENS OF ORIENTAL ANCESTRY* (1937); BEACH, *ORIENTAL CRIME IN CALIFORNIA* (1932); MEARS, *RESIDENT ORIENTALS ON THE AMERICAN PACIFIC COAST* (1928).

¹⁹⁰These figures are taken from H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) pp. 88, 104, 117, 131, 135, 237, 244.

¹⁹¹*Id.* at 91.

¹⁹²Stafford Austin, Chairman of all rural districts on Oahu under the Office of Civilian Defense said: "... at no time prior to or subsequent to December 7, 1941, have any signs of sabotage or subversive activities or 'blinker' signals been reported to affiant." *Id.* at 51. The Attorney General informed the Tolan Committee that "Mr. John Edgar Hoover, Director of the Federal Bureau of Investigation, has advised me there was no sabotage committed there [Hawaii] prior to December 7, on December 7, or subsequent to that time." *Id.* at 49. Henry L. Stimson, Secretary of War said: "... the War Department has received no information of sabotage committed by Japanese during the attack on Pearl Harbor." *Id.* at 48. John Burns of Honolulu, in charge of the espionage

or fifth column activity before, during, or after Pearl Harbor and that persons of Japanese ancestry behaved with remarkable loyalty.

The evidence of loyalty in the United States is equally clear. Persons who should know are direct in their testimony as to the loyalty of American citizens of Japanese ancestry in the United States.¹⁹³ Government counsel conceded, in the circuit court of appeals in the *Hirabayashi* case, that there had been no acts of sabotage or disloyalty by American citizens of Japanese ancestry.¹⁹⁴

Another attempt to find a justification for the evacuation of American citizens of Japanese ancestry is the government's argument that these American citizens retain a "dual citizenship" in Japan. There are five considerations which completely dispose of any justification based upon this alleged lack of loyalty. First, the government's position is directly contrary to and at variance with the express statutory law of the United States and decisions of the Supreme Court.¹⁹⁵ Second, every authority on international law recognizes the possibility of "dual citizenship" of a person born outside the country of his parents' nationality as a result of the two systems of law for determining citizenship: place of birth (*jus soli*) and ancestry or descent (*jus sanguinis*), since nearly all countries employ both systems.¹⁹⁶ Third, it needs to be said that Japan has gone farther in surrendering its claim to allegiance from persons of Japanese ancestry born elsewhere than in Japan than has almost any other country, certainly much farther than Germany and Italy.¹⁹⁷ Fourth,

bureau, working with the office of military intelligence and F. B. I., summarized his investigations: "... there has not been either on or since December 7 any authenticated case of sabotage or any authenticated case of group activity on behalf of Japan on the part of persons of Japanese ancestry, citizen or alien, residing on the Island of Oahu." *Id.* at 58.

¹⁹³The New Year's 1942 edition of the *Pacific Citizen* is made up almost entirely of statements by political and other leaders on the west coast attesting to this loyalty. Milton Eisenhower, then Director of the War Relocation Authority, had no difficulty in recognizing 85 per cent of the American born as loyal. (Testimony before House Subcommittee on Appropriations, June 15, 1942.)

¹⁹⁴Brief for *Hirabayashi*, p. 6, *Hirabayashi v. United States*.

¹⁹⁵REV. STAT. § 1999 (1875), 8 U. S. C. § 800 (1940); 54 STAT. 1168, 8 U. S. C. § 801 (1940); and *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456 (1897).

¹⁹⁶Flourney (assistant solicitor in the Department of State), *Dual Nationality and Election* (1921) 30 YALE L. J. 545; 3 JOHN BASSETT MOORE, A DIGEST OF INTERNATIONAL LAW (1906) 518-751; STOWELL, INTERNATIONAL LAW (1931) 190-91; HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES (1922) 658, 666-669; BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1927) 18-19, 550-580. MOORE, THE DOCTRINE OF EXPATRIATION (1905) 234-236; BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD (1927) 19. Our chief struggles as to dual allegiance have been with European nations, some of which absolutely refuse expatriation, and some of which require permission for expatriation and fulfillment of military service requirements. BORCHARD, *op. cit. supra*, at 546; MOORE, AMERICAN DIPLOMACY (1905) 190-91.

¹⁹⁷Prior to 1885 Japan forbade all immigration. In 1899 Japan enacted the first nationality law, which adopted the European rule of *jus sanguinis*. Expatriation under

against great odds and at considerable cost to themselves, American citizens of Japanese ancestry have, to a degree not shown by any other "foreign" group, surrendered any claim to Japanese citizenship.¹⁹⁸ Fifth, even if dual citizenship did exist in theory, it is recognized by international law that in fact only the nation of *domicile* is effective in claiming the person's allegiance.¹⁹⁹

Considerable point has been made of the attendance of children of Japanese parents at Japanese language schools, implying that these are something unique in this country and hotbeds of Japanese indoctrination.²⁰⁰ One who advances this argument must be unmindful of constitutional history. *Meyer v. Nebraska*²⁰¹ and *Bartels v. Iowa*²⁰² certainly recognized the right to teach German in a school. It is only necessary to read quickly what studies have been made of the Japanese language schools to be clear in several conclusions, all of which definitely disprove any subversive influence or disloyalty of these schools. Similar schools are conducted by Chinese, Germans, and others.²⁰³ The Japanese schools were originally formed either to teach Christianity or to expedite the Americanization of the Japanese.²⁰⁴ They form a necessary part of fitting the young people for vocations, since anti-Japanese agitation

this law was possible but difficult. The Japanese associations in the United States from 1914 to 1923 petitioned the Japanese government to facilitate expatriation. Finally, in 1924, Imperial Ordinance No. 262 conceded American citizenship to any person born in the United States of Japanese parents and *denied to him Japanese citizenship* unless within 14 days of birth he is registered by his parents. All impartial observers recognize that far from Japan having "made every effort" (through the doctrine of dual citizenship) to retain the allegiance of the American Japanese, as the government asserts at p. 12 of the *Yasui* brief (Brief for Government, p. 12, *Yasui v. United States*) it has in fact been the most liberal of governments in surrendering that allegiance. See for a recognition of this and the laws here summarized: STRONG, *JAPANESE IN CALIFORNIA* (1933) 45-47; KIYO SUE INUI, *THE UNSOLVED PROBLEM OF THE PACIFIC* (1927) 300-320; WILLIAM C. SMITH, *AMERICANS IN PROCESS: A STUDY OF OUR CITIZENS OF ORIENTAL ANCESTRY* (1937) 132-137; FLOURNOY AND HUDSON, *A COLLECTION OF NATIONALITY LAWS OF VARIOUS COUNTRIES* (1929) 385-387; KIYOSHI K. KAWAKAMI, *THE REAL JAPANESE QUESTION* (1921) 174-187. YAMAMOTO ICHIHASHI, *THE JAPANESE IN THE UNITED STATES* (1932) 323; MEARS, *RESIDENT ORIENTALS ON THE AMERICAN PACIFIC COAST* (1928) 107-11; 2 *FOREIGN RELATIONS OF THE UNITED STATES* (1924) 412.

¹⁹⁸Even before 1924 when the Japanese law required the registration of every child with the Japanese consul and the children were automatically citizens, Raymond Leslie Buell found that only two-thirds were being registered. Buell, *Some Legal Aspects of the Japanese Question* (1923) 17 AM. J. INT. L. 29, 34.

¹⁹⁹BORCHARD, *op. cit. supra* note 196, at 589; 3 MOORE, *A DIGEST OF INTERNATIONAL LAW* (1906) 518; STOWELL, *INTERNATIONAL LAW* (1931) 187; R. W. FLOURNOY, *Revision of Nationality Laws of the United States* (1940) 34 AM. J. INT. L. 43-44.

²⁰⁰Brief for Government, pp. 28-31, *Hirabayashi v. United States*.

²⁰¹262 U. S. 390, 43 Sup. Ct. 625 (1922).

²⁰²262 U. S. 404, 43 Sup. Ct. 628 (1922).

²⁰³PALMER, *ORIENTALS IN AMERICAN LIFE* (1934) 51.

²⁰⁴Colket, *Suppressing Japanese Schools in Hawaii*, *The Nation*, November 22, 1922; W. C. SMITH, *AMERICANS IN THE MAKING* (1939) 302; BELL, *PUBLIC SCHOOL EDUCATION OF SECOND-GENERATION JAPANESE* (1935) 20; and REUTER, *RACE AND CULTURE CONTRACTS* (1934).

requires them to work for Japanese.²⁰⁵ The splendid record of the Japanese for honesty, good citizenship, lack of disorganization and demoralization is directly traced to these schools.²⁰⁶ Impartial research categorically denies that they are intended to perpetuate the traditions or policies of Japan and verifies the cooperation of these schools in selecting textbooks and courses of study "which correspond to the spirit of Americanism."²⁰⁷

Shintoism as "loyalty to the emperor" seems to have been overemphasized. The brief, *amicus curiae*, of the Japanese American Citizens League shows that pictures of Washington or Lincoln were sometimes hung in a Shinto temple and revered as forefathers who had contributed greatly to human advancement, and that the majority of Japanese American citizens were in fact Christian.²⁰⁸

There is respectable evidence to the effect that there would have been no substantial danger of civil disorder had the Japanese been left on the west coast;²⁰⁹ and that the evacuation has been detrimental to productive war capacity,²¹⁰ thus not only failing to be a "military necessity" but proving to be a military "blunder."

When the final history of the Japanese evacuation is written, it will almost certainly appear that decisions were made on misinformation, assumptions, prejudices, half truths, when excellent, scientifically accurate material was available.²¹¹

I make no apology for the detailed examination of facts, for constitutional issues are now largely problems of social justice and degree. On the basis of the *known* facts the author cannot conclude that the military situation or conditions on the west coast in early 1942 could honestly be deemed to require

²⁰⁵Marian Svensrud, *Attitudes of the Japanese Toward Their Language Schools* (1933) 17 SOCIOLOGY AND SOCIAL RESEARCH 259-264; STRONG, THE SECOND-GENERATION JAPANESE PROBLEM (1934) 6; MEARS, RESIDENT ORIENTALS ON THE AMERICAN PACIFIC COAST (1928) 358; and Stearns, *History of the Japanese People in California*, Thesis Series 4, University of Oregon (1937).

²⁰⁶SMITH, AMERICANS IN THE MAKING (1939) 302; BELL, *op. cit. supra* note 204, at 106.

²⁰⁷BELL, *op. cit. supra* note 204, at 20-24; SVENSRUD, *op. cit. supra* note 205; MILLIS, THE JAPANESE PROBLEM IN THE UNITED STATES (1915) 265; and YAMATO ICHIHASHI, *op. cit. supra* note 197.

²⁰⁸Brief for Japanese American Citizens League, *Amicus Curiae*, pp. 49-53, *Hirabayashi v. United States*.

²⁰⁹*Id.* at 53-60.

²¹⁰*Id.* at 115-125.

²¹¹Typical of the misinformation are the following: Senator Johnson said: "... we have 130,000 Japanese, 30,000 of whom are citizens." 88 CONG. REC., FEBRUARY 17, 1942, 1371. Representative Ford said: "Every child of Japanese parentage, born in the States ... is still a citizen of Japan." 88 CONG. REC., FEBRUARY 18, 1942, 1458. There is some evidence that the demand for evacuation came from certain professional anti-orientals and selfish economic groups. Frank Taylor, *The People Nobody Wants*, Sat. Eve. Post, May 9, 1943, 24; *Tolan Committee Hearings*, 11, 242, 11432. This article refers to only a small portion of the accurate material available; see the Congressional Library catalogue in Washington for considerable additional material.

evacuation of 79,000 American citizens of Japanese ancestry, as a matter of "military necessity" or otherwise. The very foundation of upholding the evacuation and internment as an exercise of the federal police power, therefore, must fail.

C. *If Evacuation Was Justified, Was the Method Employed Constitutional?*

Although our conclusion has been that the situation in early 1942 did not justify the federal government in authorizing the evacuation program under any of its powers, we now approach the next issue as though the program could have been sustained if the proper authorization and procedure were followed.

1. *Preliminary Issues.*—There are several arguments debated by counsel for the government and counsel for the evacuees which need to be disposed of before facing the major issues. The first involves the question whether either as Commander in Chief or under his power to enforce the laws, the President could carry out the evacuation without congressional authorization; and if not, did Congress properly authorize the President and the military commanders to carry forward the program. That the President has asserted "war powers" other than those derived from congressional empowerment or the direct provisions of the Constitution cannot be doubted.²¹² Lincoln took a somewhat similar position, but the Supreme Court has never sustained this claim. In the *Prize Cases* Congress had ratified the earlier action taken by Lincoln, and the Court upheld the blockade on the basis of congressional action.²¹³ The position of the government is not confirmed by any of the authoritative text writers on presidential power²¹⁴ or by the decisions of the Supreme Court, which expressly held in *Brown v. United States*²¹⁵ that the President did not have the right to seize alien enemy *property* when Congress had only empowered him to detain alien enemies. Nor does it appear that the executive action can be sustained without congressional authorization on the basis of the President's power under Article II, Section 3, of the Constitution to see that

²¹²See the President's Labor Day address to Congress asking the repeal of the Emergency Price Control Act: "In the event that the Congress should fail to act, and act adequately, I shall accept the responsibility, and I will act . . . When the war is won, the powers under which I act automatically revert to the people—to whom they belong." And see preamble to Executive Order No. 9066, Feb. 21, 1942, 7 FED. REG. 1407 (1942).

²¹³2 Black 635, 671 (U. S. 1862).

²¹⁴RANDALL, CONSTITUTIONAL PROBLEMS UNDER LINCOLN (1926); CORWIN, THE PRESIDENT: OFFICE AND POWERS (1940); and BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES (1921).

²¹⁵8 Cranch 110 (U. S. 1814). See also *Ex parte Milligan*, 4 Wall. 2 (U. S. 1866); and the dissent in *Luther v. Borden*, 7 How. 1 (U. S. 1849), considered a classic on "War Powers."

the laws are faithfully executed.²¹⁶ As to the evacuation of "citizens," there was no law which the President could "execute."²¹⁷

Congressional authorization or ratification is extremely difficult to spell out in this case.²¹⁸ None of the actions taken prior to March 21, when Public Law No. 503 was adopted by Congress, had suggested that evacuation of any "loyal citizens" was to take place. Not only was Congress advised that executive evacuation under the existing congressional laws could not apply to citizens, but it refused to pass an express authorization for evacuation of all Japanese. Public Law No. 503 should be interpreted as punishing only those who refused to obey a constitutional order. The attempt to find ratification in the appropriation of money to care for the evacuees in the Congressional Appropriation Act of July 25, 1942, is a "grasping at straw" argument since obviously whether properly or improperly evacuated the government had to care for them. That Congress could have authorized or ratified executive action is well recognized.²¹⁹

2. *Delegation of Legislative Power.*—If it be assumed that Public Law No. 503 constituted congressional authorization, does that law stand the test of constitutionality? At its head are leveled two criticisms: (1) the act unconstitutionally delegates legislative authority; and (2) for a criminal law the statute is too indefinite. Although the limits placed upon delegation of legislative authority in *Panama Refining Co. v. Ryan*²²⁰ and the *Schechter* case²²¹ are recognized, it is the author's belief that the delegation here involved would be upheld. It could be argued from the circumstances surrounding its enactment that the law clearly shows the general policy (protection of military areas) and a primary standard (the prevention of any act which might unreasonably hamper the war effort). All cases recognize that Congress need only legislate "as far as was reasonably practicable."²²² It is certainly true that great discretion may be lodged in the executive in the fields of foreign

²¹⁶The cases relied upon are *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900 (1894); *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658 (1890); and *Ex parte Siebold*, 100 U. S. 371 (1879).

²¹⁷See concession of the government, Brief for Government, p. 51, *Yasui v. United States*.

²¹⁸See notes 14, 13-29 *supra* for proof of following statements.

²¹⁹*Mitchell v. Clarke*, 110 U. S. 633, 4 Sup. Ct. 170 (1884); *Graham v. Goodcell*, 282 U. S. 409, 51 Sup. Ct. 186 (1930); *Swayne & Hoyt, Ltd. v. United States*, 300 U. S. 297, 301, 57 Sup. Ct. 478, 479 (1936); and particularly *Tiaco v. Forbes*, 228 U. S. 549, 556, 33 Sup. Ct. 585, 586 (1912) (upholding legislative ratification of a prior executive deportation).

²²⁰293 U. S. 388, 55 Sup. Ct. 241 (1934).

²²¹*A. L. A. Schechter Poultry Corp. v. United States*, 295 U. S. 495, 55 Sup. Ct. 837 (1934).

²²²*United States v. Chemical Foundation*, 272 U. S. 1, 47 Sup. Ct. 1 (1926); and *Red "C" Oil Mfg. Co. v. Board of Agriculture*, 222 U. S. 380, 394, 32 Sup. Ct. 152, 156 (1911).

relations and war where decisions have to be made on "confidential information."²²³ Senator Taft was right in characterizing Public Law No. 503 as a "sloppy" criminal law, but appellants' argument of indefiniteness fails to take into account that if Congress had fixed the general standard and properly authorized administrative agencies to fill in the details, the indefiniteness of the definition of the acts made criminal must inhere in the regulations, as well as the law.²²⁴ The cases in which statutes were clearly indefinite and were not made definite by regulations are not applicable.²²⁵ Although the words "any act" in Public Law No. 503, and "any or all persons" or "military areas" in Executive Order No. 9066 seem indefinite, a construction which would interpret these in the light of the preamble of Executive Order No. 9066 as reasonably related to "espionage or sabotage" would seem sound. *United States v. Grimaud*²²⁶ recognized the right of Congress to make the violation of the Secretary of Agriculture's regulations, *not yet issued*, a misdemeanor.

3. *Due Process*.—There are, however, other more serious objections to the method employed in the evacuation regardless of whether congressional authorization was necessary or given. Did the program lack "due process" either by reason of improper discrimination or lack of hearing? It neither advances our discussion nor does it sound convincing in the mouth of the government to assert that the fifth, unlike the fourteenth amendment, contains no "equal protection" clause, even though the Supreme Court has used this language on countless occasions.²²⁷ Equal protection before the law is the

²²³*United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 57 Sup. Ct. 216 (1936); *United States v. Chemical Foundation*, 272 U. S. 1, 47 Sup. Ct. 1 (1926); *Northern Pacific Ry. Co. v. North Dakota*, 250 U. S. 135, 39 Sup. Ct. 502 (1918); *Union Bridge Co. v. United States*, 204 U. S. 364, 27 Sup. Ct. 367 (1906); *Field & Co. v. Clark*, 143 U. S. 649, 12 Sup. Ct. 495 (1891); and *The Thomas Gibbons*, 8 Cranch 420 (U. S. 1814).

²²⁴*United States v. Eaton*, 144 U. S. 677, 12 Sup. Ct. 764 (1891) (recognizing the right of Congress to make the violation of an administrative regulation a crime); *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 57 Sup. Ct. 216 (1936) (a criminal law imposing a penalty for selling arms); *McKinley v. United States*, 249 U. S. 397, 39 Sup. Ct. 324 (1918) (a criminal law whereby an administrative officer prescribed the area around army camps from which prostitutes were excluded); *Gorin v. United States*, 312 U. S. 19, 61 Sup. Ct. 429 (1940); *Kay v. United States*, 303 U. S. 1, 58 Sup. Ct. 468 (1937); and *Kentucky Whip & Collar Co. v. Illinois Central R. Co.*, 299 U. S. 534, 57 Sup. Ct. 277 (1936).

²²⁵*Lanzetta v. New Jersey*, 306 U. S. 451, 59 Sup. Ct. 618 (1936); *Connally v. General Construction Co.*, 269 U. S. 385, 46 Sup. Ct. 126 (1925); and *United States v. Cohen Grocery Co.*, 255 U. S. 81, 41 Sup. Ct. 298 (1920).

²²⁶220 U. S. 506, 31 Sup. Ct. 480 (1910).

²²⁷*Detroit Bank v. United States*, 317 U. S. 329, 63 Sup. Ct. 297 (1943); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 401, 60 Sup. Ct. 907, 916 (1939); *Curran v. Wallace*, 306 U. S. 1, 14, 16, 59 Sup. Ct. 379, 386, 387 (1938); *United States v. Caroleene Products Co.*, 304 U. S. 144, 151, 58 Sup. Ct. 778, 783 (1937); *Stewart Machine Co. v. Davis*, 301 U. S. 548, 584, 57 Sup. Ct. 883 (1930); and *LaBell Iron Works v. United States*, 256 U. S. 377, 392, 41 Sup. Ct. 528, 532 (1920).

very warp and woof of our Federal System;²²⁸ the President has declared racial discrimination abhorrent to our institutions²²⁹ and has said that "we are fighting, as our fathers have fought, to uphold the doctrine that all men are created equal in the sight of God";²³⁰ congressional acts of long standing have expressly forbidden discrimination based on race or color;²³¹ and even in the cases where a distinction between the fifth and fourteenth amendments has been stated, I do not find the court approving federal action which would not have been upheld under the "equal protection" clause of the fourteenth amendment as state action.²³²

The rules of permissible classification should perhaps be restated. A reasonable and causal relationship not based on conjecture must be shown between the basis of classification and a proper object to be accomplished.²³³ The class may be limited in its scope and not cover every possible source of danger; the limits may be determined by degree of evil or danger, but the classification should operate equally upon all in like circumstances.²³⁴ A practical classification may be sustained though lacking in scientific exactness or uniformity.²³⁵

²²⁸DECLARATION OF INDEPENDENCE, par. 2; Preamble to U. S. CONST.; U. S. CONST. Art. I, § 2, cl. 1 and 2, § 3, cl. 1 and 3, § 9, cl. 3, 4, and 8; Art. II, § 1, cl. 3 and 5; Art. IV, § 2, cl. 1, § 4; U. S. CONST. Amend. I to X, XIII, XIV, XV, XIX. *Truax v. Corrigan*, 257 U. S. 312, 332, 42 Sup. Ct. 124, 129 (1921).

²²⁹Exec. Order No. 8802, June 25, 1941, 6 FED. REG. 3109 (1941).

²³⁰*War and Peace Aims*, Special Supplement No. 1, UNITED NATIONS REVIEW, January 30, 1943, 6.

²³¹REV. STAT. §§ 1977-79 (1875), 8 U. S. C. §§ 41, 42, 43 (1940); 35 STAT. 1092 (1909), 18 U. S. C. §§ 51, 52 (1940).

²³²See note 227 *supra*, e.g., *Steward Machine Co. v. Davis*, 301 U. S. 548, 57 Sup. Ct. 883 (1930) upheld the Federal Social Security System; similar state action was also upheld. *W. H. Chamberlin v. Andrews*, Ind. Comm., 271 N. Y. 1, 2 N. E. (2d) 22 (1936), *aff'd*, 299 U. S. 515, 57 Sup. Ct. 122 (1936). The Court has also said that the same protection is afforded under "due process" as under "equal protection." *Heiner v. Donnan*, 285 U. S. 312, 326, 52 Sup. Ct. 358, 361 (1931); *Coolidge v. Long*, 282 U. S. 582, 51 Sup. Ct. 306 (1930); and *Sims v. Rives*, 84 F. (2d) 871 (App. D. C., 1936), *cert. den.* 298 U. S. 682, 56 Sup. Ct. 960 (1936).

²³³*Hartford Steam Boiler Insp. & Ins. Co. v. Harrison*, 301 U. S. 459, 57 Sup. Ct. 838 (1936); *West Coast Hotel v. Parrish*, 300 U. S. 379, 57 Sup. Ct. 578 (1936); *Mayflower Farms v. Ten Eyck*, 297 U. S. 266, 56 Sup. Ct. 457 (1935); *Sunday Lake Iron Co. v. Wakefield*, 247 U. S. 350, 38 Sup. Ct. 495 (1917); *Chicago Dock and Canal Co. v. Fraley*, 228 U. S. 680, 33 Sup. Ct. 715 (1912); and *Atchison, Topeka and Santa Fe R. Co. v. Matthews*, 174 U. S. 96, 19 Sup. Ct. 609 (1898). Compare *Grosjean v. American Press Co.*, 297 U. S. 233, 56 Sup. Ct. 444 (1935) where the number of outlets had no proper relation to the result to be accomplished with *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 51 Sup. Ct. 540 (1930) where it did.

²³⁴*State Board of Tax Commissioners v. Jackson*, 283 U. S. 527, 51 Sup. Ct. 540 (1930); *Silver v. Silver*, 280 U. S. 117, 50 Sup. Ct. 57 (1929); *Farmers & M. Bank v. Federal Reserve*, 262 U. S. 649, 43 Sup. Ct. 651 (1922); *Hall v. Geiger-Jones Co.*, 242 U. S. 539, 37 Sup. Ct. 217 (1916); *Miller v. Wilson*, 236 U. S. 373, 35 Sup. Ct. 342 (1914); *Patsone v. Pennsylvania*, 232 U. S. 138, 34 Sup. Ct. 281 (1913); and *Barbier v. Connelly*, 113 U. S. 27, 5 Sup. Ct. 357 (1884).

²³⁵*Continental Baking Co. v. Woodring*, 286 U. S. 352, 52 Sup. Ct. 595 (1931); *Chi-*

A margin of error is allowed, and the mere fact that some incidental innocent articles or transactions may be found in the class will not upset the plan.²³⁶ Although aliens, like citizens, are entitled in time of peace to the equal protection of the laws, alienage may have a reasonable relationship to a proper object so as to form a proper basis of classification.²³⁷ There is a presumption of reasonableness of classification.²³⁸

In a strict sense the classification here is not on a basis of race, for all Chinese, Japanese, Pacific islanders, and Indians are of the same race,²³⁹ but is a segregation on nationality of forebears. Yet, in a real sense the criterion is race; for the basic assumption is made that the portion of our citizenry descending from Mongolians who are our enemies may be disloyal, but those descending from "white" enemies are not. I would not agree that race may *never* be made the subject of valid classification,²⁴⁰ but it can be asserted with some finality that to the problem of "defense" race has no reasonable relationship. The concurring opinion of Justices Douglas and Jackson in the *Edwards* case²⁴¹ has stated: "we should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify or limit his right as a citizen of the United States . . . the mere state of being without funds is a neutral fact—constitutionally an irrelevance, like race, creed, or color." This is in accord with a long line of cases which hold that thus far we have never found a situation in which race is a proper basis of classification.²⁴² Just as race has no bearing on a person's tendency to

cago Dock and Canal Co. v. Fraley, 228 U. S. 680, 33 Sup. Ct. 715 (1912); Mutual Loan Co. v. Martell, 222 U. S. 225, 32 Sup. Ct. 74 (1911); and Orient Insurance Co. v. Daggs, 172 U. S. 557, 19 Sup. Ct. 281 (1898).

²³⁶*Euclid v. Ambler Realty Corp.*, 272 U. S. 365, 47 Sup. Ct. 114 (1926); *Jacob Rupert v. Caffey*, 251 U. S. 264, 40 Sup. Ct. 141 (1919); and *Purity Extract & Tonic Co. v. Lynch*, 226 U. S. 192, 33 Sup. Ct. 44 (1912).

²³⁷*Clarke v. Deckebach*, 274 U. S. 392, 47 Sup. Ct. 630 (1926) (operation of pool room); *Terrace v. Thompson*, 263 U. S. 197, 44 Sup. Ct. 15 (1923) (ownership of land); *Crane v. New York*, 239 U. S. 195, 36 Sup. Ct. 83 (1915) (employing aliens on public work); and *Patsone v. Pennsylvania*, 232 U. S. 138, 34 Sup. Ct. 281 (1913) (shooting wild life).

²³⁸*United States v. Carolene Products Co.*, 304 U. S. 144, 58 Sup. Ct. 788 (1937); *Borden's Farm Products Co. v. Baldwin*, 293 U. S. 194, 55 Sup. Ct. 187 (1934); *Silver v. Silver*, 280 U. S. 117, 50 Sup. Ct. 57 (1929); and *Clarke v. Deckebach*, 274 U. S. 392, 47 Sup. Ct. 630 (1926).

²³⁹KROEBER, *KINSHIP IN THE PHILIPPINES* (1921) 47; KROEBER, *ANTHROPOLOGY* (1923) 44; LINTON, *THE STUDY OF MAN* (1936) 43; STIBBE, *AN INTRODUCTION TO PHYSICAL ANTHROPOLOGY* (1930) 160; and Ales Hrdlicka, *No Certain Way to Tell Japanese from Chinese* (1941) 40 *SCIENCE NEWS LETTER* 394.

²⁴⁰An example could be imagined wherein one race had such a higher percentage of leprosy cases that members of that race could be compelled to submit to examination or other means of eradication of the disease. If some characteristic of the race made it more susceptible, the race would form a basis of classification.

²⁴¹*Edwards v. California*, 314 U. S. 160, 62 Sup. Ct. 164 (1941).

²⁴²*Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 59 Sup. Ct. 232 (1938); *Yu Cong*

sabotage or disloyalty, so neither nationality of forebears nor even former nationality of the person is pertinent.²⁴³

An equally critical omission of the evacuation program was the failure to afford hearings to determine the necessity for moving or confining any individual. If the Supreme Court ever intended, in *Whitney v. California*,²⁴⁴ to restrict a person's rights on the theory of "guilt by association" it has certainly now reversed its position and required a determination of individual guilt or innocence.²⁴⁵ It has also always been a cardinal principle that before any individual can be confined, punished, or even deprived of valued rights, a fair hearing must be accorded and personal guilt or obligation ascertained.²⁴⁶ Although an army intelligence officer has made a report finding 75 per cent of the Japanese on the west coast loyal and advocating individual examinations;²⁴⁷ although the advisability of individual hearings was recognized in the Tolan reports;²⁴⁸ although individual hearings were accorded aliens other than Japanese²⁴⁹ and the vast group of Italian aliens and Italian citizens was cleared of disloyalty by October, 1942,²⁵⁰ and German aliens were permitted to return to the west coast by July;²⁵¹ although the English experience of 73,353 hearings in six months resulting in 569 persons interned, 6,782 re-

Eng v. Trinidad, 271 U. S. 500, 528, 46 Sup. Ct. 619, 627 (1925); *Truax v. Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124 (1921); *Buchanan v. Warley*, 245 U. S. 60, 38 Sup. Ct. 16 (1917); and *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064 (1886). Cases like *Gong Lum v. Rice*, 275 U. S. 78, 48 Sup. Ct. 91 (1927) and *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138 (1895) which permits segregation if the colored race is given equal accommodations are decided on the basis that where there is equality there is no discrimination.

²⁴³In *United States v. Wong Kim Ark*, 169 U. S. 649, 18 Sup. Ct. 456 (1897), it was declared that Congress had no authority "to restrict the effective birth, declared by the Constitution to constitute sufficient and complete right to citizenship on the basis of nationality of the parents." And in *Skinner v. Oklahoma*, 316 U. S. 535, 62 Sup. Ct. 1110, 1113 (1941) the Court said: "... when the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race, or nationality for oppressive treatment." In *Ex parte Kawato*, 317 U. S. 69, 63 Sup. Ct. 115 (1943) the Court was unwilling to assume disloyalty, even of an alien Japanese.

²⁴⁴274 U. S. 357, 47 Sup. Ct. 641 (1926).

²⁴⁵*Ex parte Quirin*, 317 U. S. 1, 63 Sup. Ct. 1 (1942); *Herndon v. Lowry*, 301 U. S. 242, 57 Sup. Ct. 732 (1936); and *DeJonge v. Oregon*, 299 U. S. 353, 57 Sup. Ct. 255 (1936).

²⁴⁶CHAFEE, FREE SPEECH IN THE UNITED STATES (1941) 470-485. *Skinner v. Oklahoma*, 316 U. S. 535, 62 Sup. Ct. 1110 (1941); *Morgan v. United States*, 304 U. S. 1, 14, 58 Sup. Ct. 773, 776 (1937); *Buck v. Bell*, 274 U. S. 200, 47 Sup. Ct. 584 (1926); *Truax v. Corrigan*, 257 U. S. 312, 42 Sup. Ct. 124 (1921); and *Hurtado v. California*, 110 U. S. 516, 4 Sup. Ct. 111 (1884).

²⁴⁷Harper's Magazine, October, 1942, 489.

²⁴⁸H. R. REPS. No. 1911, 2124, 77th Cong., 2d Sess. (1942).

²⁴⁹See note 14 *supra*.

²⁵⁰Statement of Attorney General, October 12, Order October 14, 1942.

²⁵¹See note 14 *supra*.

stricted, and 64,254 freed completely was known,²⁵² and although the army was able to test loyalty individually when it inducted evacuees into the army,²⁵³ it was unable to stop long enough in March, 1942, to permit of individual hearings to test the loyalty of American citizens. That greater consideration should be accorded aliens than citizens is a bitter pill for *any* citizen to swallow. Even if congressional action and the orders of the President were legal, the action of General DeWitt would constitute administration "by public authority with an evil eye and an unequal hand" so as to deprive the whole evacuation program of constitutional validity.²⁵⁴

D. *The Problem of Detention*

Although strictly beyond the scope of this article, brief reference should be made to the continued detention of the evacuees.²⁵⁵ Detention stands on less firm ground from the beginning than does evacuation for neither congressional act nor executive order authorize detention;²⁵⁶ and it rests, therefore, solely on General DeWitt's orders. Further, even if evacuation were legal, it is so only on the theory that it was "preventive," not "punitive,"²⁵⁷ and was employed to gain time necessary to determine whether there were any specific persons of Japanese ancestry whose presence on the west coast would be dangerous. It was, as Professor Cushman has remarked,²⁵⁸ a vast quarantine program falling alike on those who have or may have been exposed to a disease, justifiable only for such time as would permit of individual examinations. But the facts demonstrate that evacuation has been used otherwise than as "preventive." Although citizens of Japanese ancestry have proved most cooperative in camps,²⁵⁹ and detention centers have been recognized as mistakes,²⁶⁰ only a few individual hearings, though practicable for the entire group, have been held. Regulations (requiring a job, sponsor, distance from war facilities, *etc.*) at present make it virtually impossible for very many to be resettled in ordinary civilian life; General DeWitt and some west coast congressmen have been making it clear that the evacuees will not return to

²⁵²H. R. REP. No. 2124, 77th Cong., 2d Sess. (1942) 280-281.

²⁵³See note 193 *supra*.

²⁵⁴Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064 (1886).

²⁵⁵A word of appreciation should be spoken concerning the efforts of the War Relocation Authority, which seems to have done an excellent job against the most trying opposition.

²⁵⁶See Exec. Order No. 9066, Feb. 21, 1942, 7 FED. REG. 1407 (1942).

²⁵⁷Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253, at 1302.

²⁵⁸Cushman, *Our Interned Citizens: The Problem of Japanese Evacuation* (1943) 23 B. U. L. REV. —.

²⁵⁹See statements of Milton S. Eisenhower and Edward J. Ennis. Brief for the Japanese American Citizens League, *amicus curiae*, p. 8, *Hirabayashi v. United States*.

²⁶⁰See note 41 *supra*.

the west coast alive.²⁶¹ David Reisman, in an excellent article,²⁶² has emphasized that the protection of civil liberties now depends upon an aggressive willingness of individuals to use the processes of government and their own abilities to prevent those inimical to civil liberties from using governmental processes to suppress liberties. Let us be fair and admit that our hasty action has left us with a difficult problem on our hands and that even if evacuation could be supported, detention cannot. We, therefore, should be prompt in making good to these citizens their loss from improper detention. Make it good in dollars and cents, yes; and in willingness to arrange for their discharge from camps and also to help them found new homes.

E. Miscellaneous Objections to Evacuation

Certain other objections to the evacuation program should be noted though space will not permit an analysis of them.

1. *Construction Treason*.—A tenable case can be made against the evacuation program as being the equivalent of constructive treason. The argument would run something like this: evacuation and detention were in the nature of punishment; espionage or sabotage, or disloyalty to the government constitutes treason. The Constitution specifies how treason shall be proved and that guilt shall not work corruption of blood to the person's descendants; the United States in the trial of Aaron Burr and in *Ex parte Bollman*,²⁶³ rejected the doctrine of "constructive treason" by which a person could be punished as though for treason without a trial. The confinement of citizens of Japanese ancestry either amounts to assuming treason of the parents (aliens) and working a corruption of blood, or to "constructive treason."

2. *Bill of Attainder*.—Of similar type is the argument that evacuation operated as a bill of attainder in violation of Article I, section 9, clause 3. In the *Test Oath Cases*,²⁶⁴ (civil war) the court held that to deprive a person of any basic rights as a citizen (such as right to office) on the basis of his former sympathy with the enemy, was unconstitutional as a bill of attainder. To deprive a citizen of his rights because of his ancestry, which is a "past fact" over which he has no control, is of the same nature.

3. *Slavery and Involuntary Servitude*.—The government claims that the evacuation is not punishment for crime. There is considerable evidence to show that the evacuees have been made to work at substantially less than the

²⁶¹Reply brief for Hirabayashi, appendix, *Hirabayashi v. United States*.

²⁶²Reisman, *Civil Liberties in a Period of Transition* (1942) 3 PUBLIC POLICY 33-96.

²⁶³4 Cranch 75 (U. S. 1807).

²⁶⁴4 Wall. 277 (U. S. 1866).

regular pay available in private employment²⁶⁵ and that they have been permitted to work only where assigned by the government. The only compulsory service for the government which has ever been considered legal has been service in the armed forces, on jury, in repair of roads, and in similar service.

III. THE POSITION OF THE ALIEN JAPANESE

Because I cannot agree with the position expressed in nearly all articles to date that "so far as enemy aliens are affected, *no* constitutional question is presented,"²⁶⁶ I shall make brief reference to the alien problem. I recognize that the war power *within constitutional limits* is as to the alien almost plenary. That disposes of any objection under sections IIA and IIB of this article. It does *not* answer the issue raised in IIC. The right to classify on the basis of alienage demands that alienage shall have a proper relation to the purpose to be accomplished. The purpose here is to prevent disloyal activities. The government has conceded that "alien Japanese individually conceived to be dangerous to the safety of the country *have been* apprehended and interned."²⁶⁷ Internment of other Japanese aliens could have no reasonable relation to safety. This, together with the discriminatory treatment accorded alien Japanese, as compared to Germans and Italians, may yet require the holding that the evacuation failed to accord alien Japanese the rights guaranteed them, as recently as 1942, by the Supreme Court in *Ex parte Kawato*,²⁶⁸ and admirably summarized with extensive citation by Reuben Oppenheimer.²⁶⁹

IV. CONCLUSION

Some may wish to shave off all nonessential protrusions from the streamlined war machine so that nothing may interfere with the speed of its progress. They forget that some of the things they term "gadgets" will be helpful, if not indispensable, when the machine gets its destination—in fact, the trip may well have been futile without them. The history of America has been one of jealously guarding the civil liberties of its people, even at the price of reduction in speed of its governmental or war machine.

If we would, therefore, preserve those principles which this country has designated its "war aims," then it would appear that the evacuation cannot be upheld.

²⁶⁵H. R. REP. NO. 2124, 77th Cong., 2d Sess. (1942).

²⁶⁶Fairman, *The Law of Martial Rule and the National Emergency* (1942) 55 HARV. L. REV. 1253, 1301; Comment, *Alien Enemies and Japanese Americans* (1942) 51 YALE L. J. 1316, 1322; and Cushman, *Our Interned Citizens: The Problem of Japanese Evacuation* (1943) 23 B. U. L. REV. —.

²⁶⁷Brief for Government, p. 51, *Yasui v. United States*. The reports of the F. B. I. are to the same effect. ANNUAL REP. F. B. I. (1941); ANNUAL REP. F. B. I. (1942).
²⁶⁸317 U. S. 69, 63 Sup. Ct. 115 (1943).

²⁶⁹Oppenheimer, *The Constitutional Rights of Aliens* (1941) 1 BILL OF RIGHTS REVIEW 100 ff.