IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No.....

MINOLA TAMESA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit and Brief in Support Thereof.

A. L. WIRIN,
J. B. TIETZ,
257 South Spring Street, Los Angeles 12.
Counsel for Petitioner.

The Myers Legal Press, Los Angeles. Phone MUtual 4961.

SUBJECT INDEX.

TABLE OF AUTHORITIES CITED.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

To the Supreme Court of the United States:

The petitioner, Minola Tamesa, respectfully alleges:

A.

Summary Statement of the Matter Involved.

The petitioner, an American citizen of Japanese ancestry, ordered to report for a physical examination by his local draft board, refused and failed to do so [R. 29], as did some sixty-two other Japanese American residents at the Heart Mountain Relocation Center, a place for the detention of persons of Japanese descent.

Indicted for violating the Selective Service and Training Act, Section 11 (Title 50, United States Code, Section

311), he was tried before the United States District Court for the District of Wyoming (without a jury), found guilty, and given a sentence of three years [R. 20].

On appeal to the Tenth Circuit Court of Appeals, the judgment was affirmed, as it was in sixty-two other companion cases.[1]

Of admitted loyalty to the United States, the petitioner refused to obey the draft board order for the reason, as he stated, that his constitutional rights had been taken from him by his enforced evacuation from his home in California by military order, and by his enforced detention thereafter at the Heart Mountain Relocation Center; that he did not know whether or not he was a citizen of the United States; and he desired to have his rights as a citizen clarified [R. 29].

At the time he was interviewed by an F. B. I. agent he did not express a desire for the United States to lose the war and for Japan to win the war; but he stated in substance during such interview that as long as he was behind barbed wire and in what he terms "a concentration camp," he felt he had nothing to fight for [R. 35].

After having had a classification of 4C—"alien enemy" [R. 28]—he was reclassified 1A—*i. e.*, available for induction into the armed forces. Upon receipt of his 1A classification from his draft board the petitioner wrote:

> "Dear Sir: I have received from your Board a reclassification to 1-A. Would you please tell me why? I am wondering if the army had not given instructions to fill out Japanese American Citizen questionnaire form 304-A, kindly advise. This classification as I understand it, designates the duty of a citizen to join the armed forces of his country. This is as it should be, were it not for the fact that we are receiving these reclassifications in concentration camps,[2] where we have been held for the past two years. All that has passed with our enforced evacuation is regarded in the words of Attorney General Biddle and Judge Denham as a mistake. Yet there has been no congressional move toward restoration of fully civil rights, the toneing down of prosecution, or compensation for damages suffered thru forced evacuation. In fact there have been movements backed by certain congressmen, and others in positions of responsibility to deport all persons of Japanese ancestry. All these acts without due process of law and against the Articles of the Constitution and the Bill of Rights. It seems that we are citizens with civil rights suspended.
>
> I believe that loyalty is like a covenant between a citizen and his country. A man should fight for his country. On the other hand he should feel that his cause is just, that he is accorded the full privileges of a citizen of a democratic nation, as clearly defined under the Constitution and Bill of Rights otherwise he will be fighting without aim in view.
>
> There have been legal proceedings begun to obtain from the attorney general of the United States, and

[1] By stipulation, the decision of the Circuit Court of Appeals in the *Fujii* case was to apply to the petitioner. [R. 1, 2, 59.]

[2] This Court protested the use of the phrase "concentration camp" in *Korematsu v. United States*, 323 U. S.—decided Dec. 18, 1944; hence we shall hereafter use its technical, rather than realistic, designation.

the Department of Interior, a clarification of the present and future status of persons of Japanese ancestry. Therefore, until such a time as a clear and just decision is forthcoming, I wish to ask for deferment from joining the armed forces." [R. 44, 45.]

Both the District Court [R. 19] and the Circuit below [R. 58], deemed themselves foreclosed from considering the merits of the petitioner's claim, by the decision of this Court in *Falbo v. United States,* 320 U. S. 549.

The District Court, rendering its judgment prior to *Ex parte Endo,* 323 U. S. ....., decided December 18, 1944, used *Hirabayashi v. United States,* 320 U. S. 81, as authority for its conclusion that the petitioner's detention at the Relocation Center was legal; the Circuit Court, having the benefit of this Court's ruling in the *Endo* case, construed it as requiring the petitioner to resort to habeas corpus as the exclusive method of securing judicial review of the legality of his detention.

1. Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals below, in the companion case of *Fujii v. United States,* is as yet unreported. It is reprinted in the Record at page 57.

The opinion of the United States District Court below is reported in the companion case, *United States v. Fujii,* at 55 Fed. Supp. 928, and appears in the Record, page 12.

2. Jurisdiction.

Jurisdiction of this Court is invoked under Judicial Code, Section 240a; 28 U. S. Code, Section 347a.

The judgment of the Circuit Court of Appeals below was entered in the instant case on March 27, 1944 [R. 59, 60].

Hence the petition for certiorari herein is timely.[8]

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[3]By stipulation [R. 1] accepted by the Circuit Court below [R. 2] the judgment in the case of the petitioner and sixty-one appellants, other than in the case of appellant Fujii, was not to be *entered* until the judgment in the *Fujii* case became final [R. 1]; see also [R. 60].

Thus the stipulation recited:

> "That when judgment is entered in the case of Shigeru Fujii, alias Shiga Fujii, alias *Shige Fujii v. United States of America* and said judgment *becomes final* that the same judgment shall *then* be entered in the sixty-two (62) other cases above numbered." [R. 1, 2.] (Italics ours.)

The decision of the Circuit Court in the *Fujii* case was made on March 12 and judgment entered on that date [R. 60], but judgment on March 12 was entered *only* in the *Fujii* case; in the remaining cases, including that of the petitioner, judgment was *not entered* until March 27, after the time for the filing of a petition for rehearing in the *Fujii* case had passed. [R. 60.] The Circuit Court apparently construed the phrase "final judgment" in the stipulation, as meaning that the judgment should not be entered in the remaining cases until the time for filing a petition for rehearing with that Court had elapsed [R. 61]; for it recited, on *March 27,* in ordering the entry of judgment on *March 27* in the *case of the petitioner,* in a document entitled "Judgment": "It is *now* here ordered and adjudged by this court that the judgment and sentence of the said District Court in each of the above-entitled causes be and the same is hereby affirmed." [R. 60]; and it ordered the issuance of the mandate in the petitioner's case on March 27. [R. 60.]

The Rules of Practice and Procedure In Criminal Cases (Rule XI), fixes a thirty-day period for the filing of a petition for a writ of certiorari with this Court, at 30 days after the *entry* of judgment.

No judgment was *entered* against the petitioner in the Circuit Court below, until *March 27, 1945.* [R. 59, 60.]

3. Questions Presented.

(1) Do the Selective Service Agencies, under the Selective Training and Service Act, have jurisdiction to order an American of Japanese descent, forcibly detained at a Relocation Center, to submit to a physical examination leading to induction into the armed forces of the United States?

(2) Were the Courts below foreclosed from determining the above question, in the instant case, by the *Falbo* decision of this Court?[4]

B.

Reasons Relied on for Allowance of the Writ.

1. Whether or not an American citizen, who has been forcibly detained in a Relocation Center and thus deprived of an essential right ordinarily attending American citizenship, is nonetheless subject to the obligation of serving in our armed forces, constitutes a novel and important federal question, never heretofore considered by this Court, which should be adjudicated by this Court, not for the benefit of the petitioner alone, but in the interest of all persons of Japanese descent who are subject to the draft, as well as for all persons of any descent.

2. There is a critical conflict, in two respects, in the reported decisions, which calls for solution by this Court:

(1) Whether a person detained in a Relocation Center is subject to induction, or to submit to physical examination leading to induction.

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[4] *Falbo v. United States*, 320 U. S. 549.

Thus, the opinion of United States District Judge Louis Goodman, of the Northern District of California, 56 Fed. Supp. 716, seems to be in conflict with the decision of the Circuit Court below in the instant and companion case, *Fujii v. United States* [R. 57]. Judge Goodman took the view that persons of Japanese descent involuntarily detained at the Tule Lake Relocation Center were *not* subject to induction or physical examination. Accordingly, he granted a motion to quash the indictment on that ground. From his ruling the government has not appealed. Hence it remains a final judgment.

Because no appeal was taken, the decision of Judge Goodman has been interpreted by hundreds of persons of Japanese descent in the various Relocation Centers in the United States as impliedly accepted by the Department of Justice, and hence a correct legal statement of the lack of jurisdiction of the Selective Service agencies over Japanese forcibly detained at Relocation Centers. Thus, unappealed, the ruling of the District Court for the Northern District of California has as great weight, so far as the general public at least, is concerned, as an opinion of a Circuit Court of Appeals.

Moreover, Judge Goodman's unappealed decision resulted in a cessation of criminal prosecutions for violations of the Selective Service and Training Act, of persons residenced at the Tule Lake Relocation Center. At the same time, persons of Japanese descent residenced in other Relocation Centers, including those at Heart Mountain, have been prosecuted for such violations. This difference in treatment of persons of Japanese descent has led many Japanese Americans throughout the Relocation Centers, other than those at Tule Lake, to the belief that the Selective Service and Training Act is being enforced by the

government in an unevenhanded manner, determined solely by the *place* of detention—a criterion having no basis in law or in fair dealing. And it is a fact, of common knowledge and of which this Court may take judicial notice, that when Tule Lake became filled to capacity, Japanese located in other Relocation Centers were detained at such other Centers, on the same terms as those detained at Tule Lake, the removal to Tule Lake or the remaining at such other Relocation Centers, being therefore conditioned solely upon the availability of accommodations at Tule Lake.

Certainly the accident of the situs of enforced residence cannot be permitted by this Court to afford a lawful basis for such discriminatory treatment of our citizens of the Japanese race.

The second conflict, between the decision of the Circuit Court below and the unappealed ruling of the District Court for the Northern District of California, is over

(2) The meaning and import of *Falbo v. United States.*

Thus, in *United States v. Kuwabara,* the District Court did not deem itself enjoined by the *Falbo* case from determining the issue on the merits, namely, whether the Tule Lake Japanese residents were subject to the orders of their local draft board, 56 Fed. Supp. 716, 718. But the Circuit Court in the instant cases deemed itself foreclosed from so ruling by the decision of this Court in *Falbo v. United States* [R. 57, 58]. Here again, this conflict should be resolved by this Court.

(3) The Courts below have not given a proper effect to an applicable decision of this Court, namely, *Falbo v. United States, supra;* and have, in effect, decided an important federal question in conflict with the true import of a decision of this Court, namely, the *Falbo* decision.

Falbo v. United States did not foreclose a decision by the Courts below on the merits.

The *Falbo* case does not concern itself, as does the instant case, with the *jurisdiction* of the Selective Service agencies to make the order challenged. The *Falbo* case decided only that once the Selective Service authorities have jurisdiction, the courts will not review the *correctness* of a classification, upon a criminal prosecution for a violation of a local draft board order. Thus this Court was careful to narrow its decision by stating:

> "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the *propriety of a board's classification* in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." (Italics ours.) (At p. 54.)

The history of this rule, first announced in the *Falbo* case, is significant, and leads to the conclusion that the narrow decision in it was not meant by this Court to be broadened to sweep in other and different factual and legal situations. For as Justice Murphy pointed out in his dissenting opinion, the *Falbo* case was a departure from the rule theretofore in effect so far as the availability of

judicial review of acts of administrative agencies was concerned. Here is what Justice Murphy said:

> "It is significant that in analogous situations in the past, although without passing upon the precise issue, we have supplied such a necessary review in criminal proceedings. Cf. *Union Bridge Co. v. United States,* 204 U. S. 364; *Monongahela Bridge Co. v. United States,* 216 U. S. 177; McAllister, 'Statutory Roads to Review of Federal Administrative Orders,' 28 California L. Rev. 129, 165, 166. See also *Fire Department v. Gilmour,* 149 N. Y. 453, 44 N. E. 177; *People v. McCoy,* 125 Ill. 289, 17 N. E. 786." (At p. 559.)

Moreover, this Court in *Hirabayashi v. United States,* 320 U. S. 81, apparently refused to apply the *Falbo* rule in that case, although Justice Douglas (who wrote the *Falbo* decision) urged it upon this Court. Justice Douglas was alone in his views, 320 U. S., at page 108.

It is to be noted, moreover, that even Justice Douglas acknowledged the narrow scope of the *Falbo* decision, and the danger of extending its apparent rationale to different situations by cautioning in *Billings v. Truesdell,* 321 U. S. 542, 558, that the courts should be careful not to make of the *Falbo* case a "trap" (at p. 558). Finally, it would seem, that this Court intends to continue to limit the rule in the *Falbo* case to situations where, jurisdiction of an executive agency being conceded or appearing, the agency takes *arbitrary* actions, as distinguished from action *beyond its jurisdiction.* For in *Korematsu v. United States,*

supra, this Court passed upon the merits of a claim that the military authorities had abridged constitutional right, *in a defense to a criminal prosecution,* for violation of a military order, involving Americans of Japanese descent.

Wherefore, your petitioner prays that this Court issue a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit; and that thereupon the judgment of said Circuit Court of Appeals affirming the judgment of the District Court below be set aside.

MINOLA TAMESA,
Petitioner.

A. L. WIRIN,
J. B. TIETZ,
Counsel for Petitioner.

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UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

For a statement showing the opinions of the Courts below, the basis on which the jurisdiction of this Court is claimed, the questions presented, and a statement of the case, reference is here made to the foregoing Petition for Writ of Certiorari.

Specifications of Errors.

The judgment of the District Court, as affirmed by the Circuit Court of Appeals, is contrary to law in that:

(1) The Selective Service agencies had no jurisdiction to make a valid order against the petitioner to submit to a physical examination, as preliminary to induction into the armed forces of the United States.

(2) The District Court was not foreclosed from determining whether the petitioner was subject to the jurisdiction of the Selective Service agencies by *Falbo v. United States.*

ARGUMENT.

I.

The Selective Service Agencies Had No Jurisdiction to Make a Valid Order Against the Petitioner to Submit to a Physical Examination, as Preliminary to Induction Into the Armed Forces of the United States.

Although an American citizen by birth, and of admitted loyalty to the United States, the petitioner, because of claimed war emergency, has in effect been treated as if he were an alien enemy, interned as a prisoner of war, solely because we are now at war with the government where his ancestors were born.

Although an American citizen in name, he was evacuated from his home and livelihood in California, and imprisoned in a Relocation Center, on precisely the same conditions as aliens of Japanese descent. The latter, however, have not been subjected to enforced induction.

Indeed, the treatment meted out to the petitioner, although he is both a citizen and loyal, is not dissimilar from the treatment accorded by our government to aliens of non-Japanese descent—*e. g.*, persons of German or Italian descent, who have been interned because of their disloyalty or danger to the United States.

Guarded by soldiers in a Relocation Center [R. 28], whose involuntary residents are exclusively Japanese, enclosed within a barbed-wire fence [R. 25], the petitioner was, at the time of the order upon him to report for a physical examination, in effect, a war prisoner.

Did Congress, in the enactment of the Selective Training and Service Act of 1940, intend that such a person be

subject additionally to involuntary impressment into military service? We believe Congress had the contrary intent when it adopted the following declaration of policy:

> "The Congress further declares, that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service."
>
> 50 U. S. C., Sec. 301.

The District Court for the Northern District of California in the *Kuwabara* case, *supra,* 56 F. Supp. 716, properly construed the Congressional intent when it stated:[1]

> "Certainly 'fair and just' compulsory military training in a 'free society' is wholly inconsistent with the instant proceeding. The 'due process' guaranteed by the Fifth Amendment means that 'there can be no proceeding against life, liberty, or property which may result in the deprivation of either, without the observance of those general rules established in our system of jurisprudence for the security of private rights.' *Hagar v. Reclamation District,* 111 U. S. 701, 4 S. Ct. 663, 667, 28 L. ed. 569. 'If any of

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[1]Certainly it may not be claimed that Congress intended that Japanese transported to one Relocation Center (Tule Lake) should not be subjected to induction, while Japanese imprisoned in other Relocation Centers (as for example, Heart Mountain), should be subject to induction.

As already indicated, that would be the state of the applicable law resulting from the opinions, taken together, of the Northern District of California and the Tenth Circuit Court of Appeals in the *Kuwabara* case and in the instant cases respectively. Only the granting of certiorari and the authoritative adjudication by this Court of the issue, will bring judicial order out of the current legal chaos on the subject.

these (general rules) are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by "due process of law." ' *Hurtado v. California,* 110 U. S. 516, 4 S. Ct. 111, 121, 292, 28 L. ed. 232. 'The public interest that a result be reached which promotes a well-ordered society is foremost in every criminal proceeding. That interest is entrusted to our consideration and protection as well as that of the enforcing officers.' *Young v. United States,* 315 U. S. 257, 258, 260, 62 S. Ct. 510, 511, 86 L. ed. 832.

"The government urges that the question of 'due process' is not reachable at this time, but only by writ of habeas corpus after compliance with the order of the local board. However, it is clear to me that defendant is under the circumstances not a free agent, nor is any plea that he may make, free or voluntary, and hence he is not accorded 'due process' in this proceeding.

"The issue raised by this motion is without precedent. It must be resolved in the light of the traditional and historic Anglo-American approach to the time-honored doctrine of 'due process.' It must not give way to overzealousness in an attempt to reach, via the criminal process, those whom we may regard as undesirable citizens."

56 F. Supp. 716, 719.

We submit that Congress did not intend, in the enactment of the Selective Training and Service Act, that persons treated as was the petitioner, be nonetheless subject to military service; that denuded of essential rights of

citizenship, such persons should still be subject to enforced military service—a duty traditionally and heretofore deemed to be an obligation of citizenship.[2]

This Court should rule accordingly, that under a proper construction of the legislative intent of Congress in the adoption of the Selective Training and Service Act, the petitioner was not subject to induction in the armed forces; and further that the Selective Service agencies had no jurisdiction to make a valid order requiring him to submit to a physical examination as a prelude to induction.

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[2]Our traditional policy of exempting aliens from enforced military service is seen from the following:

President James Madison, writing to the Minister to England James Monroe, in 1804 (Amer. State Papers, For. Rel. III, 81, 87), stated:

> "Citizens or subjects of one country residing in another though bound by their temporary allegiance to many common duties, can never be rightfully enforced into military service, particularly external service, nor be restrained from leaving their residence when they please. The law of nations protects them against both, and the violation of this law by the avowed impressment of American citizens residing in Great Britain may be pressed with greater force on the British Government."

Secretary of State Seward in an official letter to Governor Morton, of Indiana, dated September 5, 1862 (58 MS. Dom. Let. 169) declared:

> "There is no principle more distinctly and clearly settled in the law of nations than the rule that resident aliens not naturalized are not liable to perform military service. We have uniformly insisted upon it in our intercourse with foreign nations."

In 1874 Secretary of State Fish wrote to the Minister to Central America a letter as follows: (Mr. Fish, Sec. of State to Mr. Williamson, Minister to Central America No. 98, July 28, 1874. MS. Inst. Costa Rica, XVII, 191):

> "We did not claim the right to impress aliens into our forces during the late civil war, but it is understood that in one instance at least, in the case of a seige, we sought to justify such an impressment."

The above was cited in "Are Latin American Students Subject to the Draft." in 10 George Washington Law Review 845, May, 1942.

II.

The District Court Was Not Foreclosed From Determining Whether the Petitioner Was Subject to the Jurisdiction of the Selective Service System Agencies by Falbo v. United States.[3]

Falbo v. United States is limited, upon the facts in that case, to a factual situation where a local draft board has jurisdiction over the person of a defendant thereafter charged with a violation of the Selective Training and Service Act, but is claimed to have made an improper classification. The *Falbo* case does not concern itself with a factual situation reflected in the instant case, where a local draft board has no jurisdiction, or acts in excess of its jurisdiction.

In the latter case the claim that an order of an administrative agency is invalid, because that agency lacked jurisdiction, is, and should be, available to a defendant charged with a crime because of the violation of an order of the administrative agency.

Cf.

Union Bridge Co. v. United States, 204 U. S. 364; *Monongahela Bridge Co. v. United States*, 216 U. S. 177.

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[3]For a fuller discussion of this point, see *supra*, p. 9, in Petition for Writ of Certiorari under "Reasons Relied On For Allowance of the Writ," point (3): "The Courts below have not given a proper effect to an applicable decision of this Court, namely, *Falbo v. United States, supra;* and have, in effect, decided an important federal question in conflict with the true import of a decision of this Court, namely the *Falbo* decision."

Conclusion.

The petition for certiorari should be granted; and the judgment rendered by the Circuit Court of Appeals and the District Court against petitioner should be reversed.

Respectfully submitted,

A. L. WIRIN,

J. B. TIETZ,

Counsel for Petitioner.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of April. A. D. 1945.

4-24-45—200