323 U.S. 214

TOYOSABURO KOREMATSU v. UNITED STATES.

No. 22.

Argued Oct. 11, 12, 1944.

Decided Dec. 18, 1944.

Rehearing Denied Feb. 12, 1945.

See 321 U.S. 885, 65 S.Ct. 674.

1. Constitutional law ⇐45

All legal restrictions which curtail the civil rights of a single racial group are immediately suspect and must be rigidly scrutinized, though not all of them are necessarily unconstitutional.

2. Constitutional law ⇐82

Pressing public necessity may sometimes justify restrictions on civil rights of a single racial group, but racial antagonism never can.

3. War ⇐4

Exclusion of persons of Japanese ancestry, including citizen whose loyalty was not questioned, from West Coast war area in 1942 was within war power of Congress and the Executive, as related to prevention of espionage and sabotage. 18 U.S.C.A. § 97a.

4. Constitutional law ⇐83(1)

Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions.

5. War ⇐4

When under conditions of modern warfare our shores are threatened by hostile forces, power to protect must be commensurate with threatened danger.

6. Criminal law ⇐26

One cannot be convicted for doing the very thing which it is a crime to fail to do.

7. War ⇐4

An order of March 27, 1942, prohibiting persons of Japanese ancestry from leaving West Coast area, but limited until "a future proclamation or order should so permit or direct," was superseded by order of May 3, 1942, directing exclusion of persons of Japanese ancestry from the area, and hence conviction for violating subsequent order was not improper on ground that conflicting orders were outstanding. 18 U.S.C.A. § 97a.

8. Criminal law ⇐1134(1)

On certiorari to review conviction of violating order for exclusion of persons of Japanese ancestry from war area, Supreme Court could not say as a matter of fact or law, as affecting validity of the exclusion order, that defendant's obedience to exclusion order by going to an assembly center would have resulted in his improper detention in a relocation center. 18 U.S.C.A. § 97a.

9. War ⇐4

Orders for exclusion of persons of Japanese ancestry from war areas, and orders for their detention and resettlement, pose different problems and may be governed by different principles, so that lawfulness of one does not necessarily determine lawfulness of others. 18 U.S.C.A. § 97a.

10. Criminal law ⇐29

Violation of separate orders for exclusion and detention or resettlement, respectively, of persons of Japanese ancestry, promulgated pursuant to congressional enactments, may be treated as separate offenses. 18 U.S.C.A. § 97a.

11. Constitutional law ⇐46(1)

On certiorari to review conviction of violating order excluding persons of Japanese ancestry from war area, Supreme Court would not determine validity of provisions for reporting and remaining in assembly or relocation centers, which defendant was not convicted of violating. 18 U.S.C.A. § 97a.

Mr. Justice ROBERTS, Mr. Justice MURPHY and Mr. Justice JACKSON dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

Fred Toyosaburo Korematsu was convicted of remaining in a portion of a military area from which persons of Japanese ancestry had been ordered excluded, and to review a judgment, 140 F.2d 289, affirming his conviction, he brings certiorari.

Affirmed.

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Mr. Wayne M. Collins, of San Francisco, Cal., and Mr. Charles A. Horsky, of Washington, D. C., for petitioner.

Mr. Charles Fahy, Sol. Gen. of Washington, D. C., for respondent.

Mr. Justice BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area", contrary to Civilian Exclusion Order No. 34 of the Commanding General

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of the Western Command, U. S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed,[1] and the importance of the constitutional question involved caused us to grant certiorari.

[1, 2] It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, 18 U.S.C.A. § 97a, which provides that

"* * * 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."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated was one of a number of military orders and proclamations, all of which were substantially

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based upon Executive Order No. 9066, 7 Fed.Reg. 1407. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. * * *"

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p. m. to 6 a. m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the Hirabayashi case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities and of the President, as Commander in Chief of the Army; and finally that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

[3] In the light of the principles we announced in the Hirabayashi case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude

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those of Japanese ancestry from

1. 9 Cir., 140 F.2d 289.

the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p. m. to 6 a. m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our Hirabayashi opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case the petitioner challenges the assumptions upon which we rested our conclusions in the Hirabayashi case. He also urges that by May 1942, when Order No. 34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions we are compelled to reject them.

Here, as in the Hirabayashi case, supra, 320 U.S. at page 99, 63 S.Ct. at page 1385, 87 L.Ed. 1774, "* * * we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of

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whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.[2]

[4, 5] We uphold the exclusion order as of the time it was made and when the petitioner violated it. Cf. Chastleton Corporation v. Sinclair, 264 U.S. 543, 547, 44 S.Ct. 405, 406, 68 L.Ed. 841; Block v. Hirsh, 256 U.S. 135, 154, 155, 41 S.Ct. 458, 459, 65 L.Ed. 865, 16 A.L.R. 165. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. Ex parte Kumezo Kawato, 317 U.S. 69, 73, 63 S.Ct. 115, 117, 87 L.Ed. 58. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory

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exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

[6, 7] It is argued that on May 30, 1942,

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2 Hearings before the Subcommittee on the National War Agencies Appropriation Bill for 1945, Part II, 608-726; Final Report, Japanese Evacuation from the West Coast, 1942, 300-327; Hearings before the Committee on Immigration and Naturalization, House of Representatives, 78th Cong., 2d Sess., on H. R. 2701 and other bills to expatriate certain nationals of the United States, pp. 37-42, 49-58.

the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time "until and to the extent that a future proclamation or order should so permit or direct." 7 Fed.Reg. 2601. That "future order", the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 27 and May 3rd orders, whether he remained in or left the area.

It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had

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already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as "assembly centers", in order "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from military area No. 1 to restrict and regulate such migration." Public Proclamation No. 4, 7 Fed.Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed.Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

[8-10] We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear

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when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L.Ed. 306. There is no reason why violations of these orders, insofar as they were promulgated pursuant to congressional enactment, should not be treated as separate offenses.

The Endo case [Ex parte Mitsuye Endo] 323 U.S. 283, 65 S.Ct. 208, graphically illus-

trates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

[11] Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion

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Order No. 34, Korematsu was under compulsion to leave the area not as he would choose but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for

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action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Affirmed.

Mr. Justice FRANKFURTER, concurring. * * *

According to my reading of Civilian Exclusion Order No. 34, it was an offense for Korematsu to be found in Military Area No. 1, the territory wherein he was previously living, except within the bounds of the established Assembly Center of that area. Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, i. e., by reporting to the Assembly Center. I am unable to see how the legal considerations that led to the decision in Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, fail to sustain the military order which made the conduct now in controversy a crime. And so I join in the opinion of the Court, but should like to add a few words of my own.

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is "the power to wage war successfully." Hirabayashi v. United

States, supra, 320 U.S. at page 93, 63 S. Ct. at page 1382, 87 L.Ed. 1774 and see home Bldg. & L. Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 78 L.Ed. 413, 88 A.L.R. 1481. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as "an

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unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. "The war power of the United States, like its other powers * * * is subject to applicable constitutional limitations", Hamilton v. Kentucky Distilleries Co., 251 U.S. 146, 156, 40 S.Ct. 106, 108, 64 L.Ed. 194. To recognize that military orders are "reasonably expedient military precautions" in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare Interstate Commerce Commission v. Brimson, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1017; Id., 155 U.S. 3, 15 S.Ct. 19, 39 L.Ed. 49, and Monongahela Bridge Co. v. United States, 216 U.S. 177, 30 S.Ct. 356, 54 L.Ed. 435. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

Mr. Justice ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night as was Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774,

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nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home, by refusing voluntarily to leave and, so, knowingly and intentionally, defying the order and the Act of Congress.

The petitioner, a resident of San Leandro, Alameda County, California, is a native of the United States of Japanese ancestry who, according to the uncontradicted evidence, is a loyal citizen of the nation.

A chronological recitation of events will make it plain that the petitioner's supposed offense did not, in truth, consist in his refusal voluntarily to leave the area which included his home in obedience to the order excluding him therefrom. Critical attention must be given to the dates and sequence of events.

December 8, 1941, the United States declared war on Japan.

February 19, 1942, the President issued Executive Order No. 9066,[1] which, after

[1] 7 Fed.Reg. 1407.

stating the reason for issuing the

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order as "protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities", provided that certain Military Commanders might, in their discretion, "prescribe military areas" and define their extent, "from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions" the "Military Commander may impose in his discretion."

February 20, 1942, Lieutenant General DeWitt was designated Military Commander of the Western Defense Command embracing the westernmost states of the Union,—about one-fourth of the total area of the nation.

March 2, 1942, General DeWitt promulgated Public Proclamation No. 1,[2] which recites that the entire Pacific Coast is "particularly subject to attack, to attempted invasion * * * and, in connection therewith, is subject to espionage and acts of sabotage". It states that "as a matter of military necessity" certain military areas and zones are established known as Military Areas Nos. 1 and 2. It adds that "Such persons or classes of persons as the situation may require" will, by subsequent orders, "be excluded from all of Military Area No. 1" and from certain zones in Military Area No. 2. Subsequent proclamations were made which, together with Proclamation No. 1, included in such areas and zones all of California, Washington, Oregon, Idaho, Montana, Nevada and Utah, and the southern portion of Arizona. The orders required that if any person of Japanese, German or Italian ancestry residing in Area No. 1 desired to change his habitual residence he must execute and deliver to the authorities a Change of Residence Notice.

San Leandro, the city of petitioner's residence, lies in Military Area No. 1.

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On March 2, 1942, the petitioner, therefore, had notice that, by Executive Order, the President, to prevent espionage and sabotage, had authorized the Military to exclude him from certain areas and to prevent his entering or leaving certain areas without permission. He was on notice that his home city had been included, by Military Order, in Area No. 1, and he was on notice further that, at sometime in the future, the Military Commander would make an order for the exclusion of certain persons, not described or classified, from various zones including that in which he lived.

March 21, 1942, Congress enacted[3] that anyone who knowingly "shall enter, remain in, leave, or commit any act in any military area or military zone prescribed * * * by any military commander * * * contrary to the restrictions applicable to any such area or zone or contrary to the order of * * * any such military commander" shall be guilty of a misdemeanor. This is the Act under which the petitioner was charged.

March 24, 1942, General DeWitt instituted the curfew for certain areas within his command, by an order the validity of which was sustained in Hirabayashi v. United States, supra.

March 24, 1942, General DeWitt began to issue a series of exclusion orders relating to specified areas.

March 27, 1942, by Proclamation No. 4,[4] the General recited that "it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese *voluntarily migrating* from Military Area No. 1 to restrict and regulate such migration"; and ordered that, as of March 29, 1942, "all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby

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prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."[5]

No order had been made excluding the petitioner from the area in which he lived. By Proclamation No. 4 he was, after March 29, 1942, confined to the limits of Area No. 1. If the Executive Order No. 9066 and

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[2] 7 Fed.Reg. 2320.

[3] 56 Stat. 173, 18 U.S.C.A. § 97a.

[4] 7 Fed.Reg. 2601.

[5] The italics in the quotation are mine. The use of the word "voluntarily" exhibits a grim irony probably not lost on petitioner and others in like case. Either so, or its use was a disingenuous attempt to camouflage the compulsion which was to be applied.

the Act of Congress meant what they said, to leave that area, in the face of Proclamation No. 4, would be to commit a misdemeanor.

May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34[6] providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and non-alien, were to be excluded from a described portion of Military Area No. 1, which included the County of Alameda, California. The order required a responsible member of each family and each individual living alone to report, at a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942, supra. It is important to note that the order, by its express terms, had no application to persons within the bounds "of an established Assembly Center pursuant to instructions from this Headquarters * * *." The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.

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The predicament in which the petitioner thus found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document,—and, in the light of the above recitation, I think it is not,—that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.

June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the area covered by Exclusion Order No. 34. A demurrer to the Information having been overruled, the petitioner was tried under a plea of not guilty and convicted. Sentence was suspended and he was placed on probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102[7] establishing the War Relocation Authority under which so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has

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been confined either in an Assembly Center, within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in Ex parte Mitsuye Endo, 323 U.S. 283, 65 S.Ct. 208, demonstrate, he was illegally held in custody.

The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34 ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the Hirabayashi case, supra, to show that this court has sustained the validity of a curfew order in an emergency. The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature,—a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case actually before the court. I might agree with the court's disposition of the hypothetical case.[8] The

6 7 Fed.Reg. 3967.

7 7 Fed.Reg. 2165.

8 My agreement would depend on the definition and application of the terms "temporary" and "emergency". No pronouncement of the commanding officer

liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature the Hirabayashi case would be authority for sustaining it.

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But the facts above recited, and those set forth in Ex parte Mitsuye Endo, supra, show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.

We cannot shut our eyes to the fact that had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a figmentary and artificial situation instead of addressing ourselves to the actualities of the case?

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These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the Endo case, supra. The answer, of course, is that where he was subject to two conflicting laws he was not bound, in order to escape violation of one or the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.

Again it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute but must obey it though he knows it is no law and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him, in order to sustain his conviction for violation of another contradictory order.

I would reverse the judgment of conviction.

Mr. Justice MURPHY, dissenting.

This exclusion of "all persons of Jap-

can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained, at the date of the restraint out of which the litigation arose. Cf. Chastleton Corporation v. Sinclair, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841.

anese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration

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to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. "What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions." Sterling v. Constantin, 287 U.S. 378, 401, 53 S.Ct. 190, 196, 77 L.Ed. 375.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. United States v. Russell, 13 Wall. 623, 627, 628, 20 L.Ed. 474; Mitchell v. Harmony, 13 How. 115, 134, 135, 14 L.Ed. 75; Raymond v. Thomas, 91 U.S. 712, 716, 23 L.Ed. 434. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. Being an obvious racial discrimination, the

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order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that *all* persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than

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bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area.[1]

[1] Final Report, Japanese Evacuation from the West Coast, 1942, by Lt. Gen. J. L. De Witt. This report is dated June 5, 1943, but was not made public until January, 1944.

In it he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies * * * at large today" along the Pacific Coast.[2] In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal,[3] or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not

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ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion."[4] They are claimed to be given to "emperor worshipping ceremonies"[5] and to "dual citizenship."[6] Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty,[7] together with facts as to

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certain persons being educated and residing at length in Japan.[8] It is in-

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2 Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 739–40 (78th Cong., 1st Sess.):

"I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. * * * The danger of the Japanese was, and is now—if they are permitted to come back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. * * * But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. * * *"

3 The Final Report, p. 9, casts a cloud of suspicion over the entire group by saying that "while it was *believed* that *some* were loyal, it was known that many were not." (Italics added.)

4 Final Report, p. vii; see also pp. 9, 17. To the extent that assimilation is a problem, it is largely the result of certain social customs and laws of the American general public. Studies demonstrate that persons of Japanese descent are readily susceptible to integration in our society if given the opportunity. Strong, The Second-Generation Japanese Problem (1934); Smith, Americans in Process (1937); Mears, Resident Orientals on the American Pacific Coast (1928); Millis, The Japanese Problem in the United States (1942). The failure to accomplish an ideal status of assimilation, therefore, cannot be charged to the refusal of these persons to become Americanized or to their loyalty to Japan. And the retention by some persons of certain customs and religious practices of their ancestors is no criterion of their loyalty to the United States.

5 Final Report, pp. 10–11. No sinister correlation between the emperor worshipping activities and disloyalty to America was shown.

6 Final Report, p. 22. The charge of "dual citizenship" springs from a misunderstanding of the simple fact that Japan in the past used the doctrine of *jus sanguinis*, as she had a right to do under international law, and claimed as her citizens all persons born of Japanese nationals wherever located. Japan has greatly modified this doctrine, however, by allowing all Japanese born in the United States to renounce any claim of dual citizenship and by releasing her claim as to all born in the United States after 1925. See Freeman, "Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law," 28 Cornell L.Q. 414, 447–8, and authorities there cited; McWilliams, Prejudice, 123–4 (1944).

7 Final Report, pp. 12–13. We have had various foreign language schools in this country for generations without considering their existence as ground for racial discrimination. No subversive activities or teachings have been shown in connection with the Japanese schools. McWilliams, Prejudice, 121–3 (1944).

8 Final Report, pp. 13–15. Such persons constitute a very small part of the

timated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them "to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so."[9] The need for protective custody is also asserted. The report refers without identity to "numerous incidents of violence" as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself" and that the general public "was ready to take matters into its own hands."[10] Finally, it is intimated, though not directly

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charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area,[11] as well as for unidentified radio transmissions and night signalling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.[12] A military judgment

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based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic

entire group and most of them belong to the Kibei movement—the actions and membership of which are well known to our Government agents.

9 Final Report, p. 10; see also pp. vii, 9, 15-17. This insinuation, based purely upon speculation and circumstantial evidence, completely overlooks the fact that the main geographic pattern of Japanese population was fixed many years ago with reference to economic, social and soil conditions. Limited occupational outlets and social pressures encouraged their concentration near their initial points of entry on the Pacific Coast. That these points may now be near certain strategic military and industrial areas is no proof of a diabolical purpose on the part of Japanese Americans. See McWilliams, Prejudice, 119-121 (1944); House Report No. 2124 (77th Cong., 2d Sess.), 59-93.

10 Final Report, pp. 8-9. This dangerous doctrine of protective custody, as proved by recent European history, should have absolutely no standing as an excuse for the deprivation of the rights of minority groups. See House Report No. 1911 (77th Cong., 2d Sess.) 1-2. Cf. House Report No. 2124 (77th Cong., 2d Sess.) 145-7. In this instance, moreover, there are only two minor instances of violence on record involving persons of Japanese ancestry. McWilliams, What About Our Japanese-Americans? Public Affairs Pamphlets, No. 91, p. 8 (1944).

11 Final Report, p. 18. One of these incidents (the reputed dropping of incendiary bombs on an Oregon forest) occurred on Sept. 9, 1942—a considerable time after the Japanese Americans had been evacuated from their homes and placed in Assembly Centers. See New York Times, Sept. 15, 1942, p. 1, col. 3.

12 Special interest groups were extremely active in applying pressure for mass evacuation. See House Report No. 2124 (77th Cong., 2d Sess.) 154-6; McWilliams, Prejudice, 126-8 (1944). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that "We're charged with wanting to get rid of the Japs for selfish reasons. We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. * * * They undersell the white man in the markets. * * * They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either." Quoted by Taylor in his article "The People Nobody Wants," 214 Sat. Eve. Post 24, 66 (May 9, 1942).

ıtus has been substantially discredited by dependent studies made by experts in ese matters.[13]

The military necessity which is essen- d to the validity of the evacuation order ıs resolves itself into a few intimations at certain individuals actively aided the emy, from which it is inferred that the tire group of Japanese Americans could ıt be trusted to be or remain loyal to the nited States. No one denies, of course, at there were some disloyal persons of panese descent on the Pacific Coast who d all in their power to aid their ancestral nd. Similar disloyal activities have been ıgaged in by many persons of German, alian and even more pioneer stock in our untry. But to infer that examples of in- vidual disloyalty prove group disloyalty ıd justify discriminatory action against e entire group is to deny that under our stem of law individual guilt is the sole ısis for deprivation of rights. More- ver, this inference, which is at the very eart of the evacuation orders, has been sed in support of the abhorrent and despic- ble treatment of minority groups by the ctatorial tyrannies which this nation is ow pledged to destroy. To give consti- itional sanction to that inference in this ıse, however well-intentioned may have een the military command on the Pacific oast, is to adopt one of the cruelest of the ationales used by our enemies to destroy ıe dignity of the individual and to en- ourage and open the door to discriminatory ctions against other minority groups in ıe passions of tomorrow.

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No adequate reason is given for the fail- re to treat these Japanese Americans on n individual basis by holding investigations nd hearings to separate the loyal from ıe disloyal, as was done in the case of ersons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group "were unknown and time was of the essence."[14] Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these "subversive" persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free,[15] a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It

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seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.[16] Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

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13 See notes 4–12, *supra*.

14 Final Report, p. vii; see also p. 18.

15 The Final Report, p. 34, makes the amazing statement that as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage.

16 During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a "friendly enemy." About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned. Kempner, "The Enemy Alien Problem in the Present War," 34 Amer. Journ. of Int. Law 443, 444–46; House Report No. 2124 (77th Cong., 2d Sess.), 280–1.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Mr. Justice JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by

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residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained." Article 3, § 3, cl. 2. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should

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enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a com

mander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is

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what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more

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subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic."[1] A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

It argues that we are bound to uphold the conviction of Korematsu because we upheld one in Kiyshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We

[1] Nature of the Judicial Process, p. 51.

yielded, and the Chief Justice guarded the opinion as carefully as language

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will do. He said: "Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute *afforded a reasonable basis for the action taken in imposing the curfew.*" 320 U.S. at page 101, 63 S.Ct. at page 1386, 87 L.Ed. 1774. "We decide only the issue as we have defined it —we decide only that the *curfew order* as applied, and at the time it was applied, was within the boundaries of the war power." 320 U.S. at page 102, 63 S.Ct. at page 1386, 87 L.Ed. 1774. And again: "It is unnecessary to consider whether or to what extent *such findings would support orders differing from the curfew order.*" 320 U.S. at page 105, 63 S.Ct. at page 1387, 87 L.Ed. 1774. [Italics supplied.] However, in spite of our limiting words we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is Hirabayashi. The Court is now saying that in Hirabayashi we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

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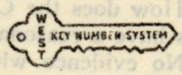
Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.



323 U.S. 283

Ex parte MITSUYE ENDO.

No. 70.

Argued Oct. 12, 1944.

Decided Dec. 18, 1944.

1. Habeas corpus ⟹13

A citizen of Japanese ancestry, whose loyalty was conceded, was entitled to habeas corpus for release from detention by War Relocation Authority after leave clearance had been granted. Executive Order Feb. 19, 1942, No. 9066; Resolution Dec. 8, 1941, 55 Stat. 795, 50 U.S.C.A. Appendix note preceding section 1; Executive Order March 18, 1942, No. 9102; 18 U.S.C.A. § 97a; U.S.C.A.Const. art. 1, § 9; Amends. 5, 6.

2. War ⟹4

The War Relocation Authority cannot subject citizens who are concededly loyal

though of Japanese ancestry to its leave procedure. Executive Order Feb. 19, 1942, No. 9066; Resolution Dec. 8, 1941, 55 Stat. 795, 50 U.S.C.A.Appendix note preceding section 1; Executive Order March 18, 1942, No. 9102; 18 U.S.C.A. § 97a; U.S. C.A.Const. art. 1, § 9; Amends. 5, 6.

3. Army and navy ⟹3

As affecting extent of judicial supervision, detention of person of Japanese ancestry by the War Relocation Authority, a civilian agency, did not involve questions of military law. Executive Order Feb. 19, 1942, No. 9066; Resolution Dec. 8, 1941, 55 Stat. 795, 50 U.S.C.A.Appendix note preceding section 1; Executive Order March 18, 1942, No. 9102; 18 U.S.C.A. § 97a.

4. War ⟹4

The court approaches construction of Executive Order authorizing detention of persons of Japanese ancestry as court would approach the construction of legislation in the same field. Executive Order Feb. 19, 1942, No. 9066; Executive Order March 18, 1942, No. 9102.

5. War ⟹4

The Executive Order authorizing detention of persons of Japanese ancestry must be considered along with the subsequent statute which ratified and confirmed it. Executive Order Feb. 19, 1942, No. 9066; Executive Order March 18, 1942, No. 9102; 18 U.S.C.A. § 97a.

6. Constitutional law ⟹48

Operation of the presumption of constitutionality is given narrower scope when legislation appears on its face to violate a specific prohibition of the Constitution.

7. Constitutional law ⟹48

That interpretation of legislation is favored which gives it the greater chance of surviving the test of constitutionality.

8. Evidence ⟹83(1)
Statutes ⟹212

The court must assume that the Chief Executive and members of Congress as well as the courts are sensitive to and respectful of the liberties of the citizen.

9. War ⟹4

In interpreting a wartime measure, Supreme Court must assume that the purpose of Chief Executive and Congress was to allow for the greatest possible accommodation between liberties of the citizen and exigencies of war.

10. Constitutional law ⟹48

When asked to find implied powers in a grant of legislative or executive authority, court must assume that lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language used.

11. War ⟹4

The sole purpose of Executive Orders and statutes governing detention and relocation of persons of Japanese ancestry was protection of the war effort against espionage and sabotage, and powers conferred by the orders must be construed in light of that objective. Executive Order Feb. 19, 1942, No. 9066; Resolution Dec. 8, 1941, 55 Stat. 795, 50 U.S.C.A.Appendix note preceding section 1; Executive Order March 18, 1942, No. 9102; 18 U.S.C.A. § 97a.

12. War ⟹4

A concededly loyal citizen presents no problem of espionage or sabotage, and since power to detain is derived from power to protect war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized. Executive Order Feb. 19, 1942, No. 9066; Resolution Dec. 8, 1941, 55 Stat. 795, 50 U.S.C.A.Appendix note preceding section 1; Executive Order March 18, 1942, No. 9102; 18 U.S.C.A. § 97a; Act July 12, 1943, 57 Stat. 533; Act June 28, 1944, 58 Stat. 545; U.S.C.A.Const. art. 1, § 9; Amends. 5, 6.

13. War ⟹4

Power to detain an admittedly loyal citizen of Japanese ancestry or to grant him a conditional release may not be implied as a useful or convenient step in the evacuation program. Executive Order Feb. 19, 1942, No. 9066; Resolution Dec. 8, 1941, 55 Stat. 795, 50 U.S.C.A.Appendix note preceding section 1; Executive Order March 18, 1942, No. 9102; 18 U.S.C.A. § 97a.

14. Habeas corpus ⟹48

A habeas corpus proceeding by citizen of Japanese ancestry for release from detention by War Relocation Authority was not rendered moot by fact that while

se was pending in Circuit Court of Appeals, petitioner was moved to another relocation center in a different district and circuit, where it was not shown that there was no one within the original district of suit who would be responsible for petitioner's detention, and it appeared that writ would be obeyed if issued. 28 U.S.C.A. § 452; Supreme Court Rule 45, subd. 1, 28 U.S.C.A. following section 354.

15. Habeas corpus ⇐67

The fact that no respondent was ever served with process or appeared in habeas corpus proceedings by citizen of Japanese ancestry for release from detention by War Relocation Authority, did not prevent relief where the United States resisted issuance of the writ.

16. Habeas corpus ⇐113(3)

An appeal lies from denial of habeas corpus, without the appearance of a respondent.

17. Habeas corpus ⇐43

The objective of statute authorizing grant of habeas corpus may not be impaired or defeated by removal of prisoner from territorial jurisdiction of the District Court. 28 U.S.C.A. § 452; Supreme Court Rule 45, subd. 1, 28 U.S.C.A. following section 354.

On Certificate from the United States Circuit Court of Appeals for the Ninth Circuit.

Petition by Mitsuye Endo for habeas corpus, for discharge from custody in relocation center for persons of Japanese ancestry. From a judgment denying the petition, petitioner appealed to the Circuit Court of Appeals, which certified to the Supreme Court questions of law upon which it desired instructions. The Supreme Court ordered the entire record to be certified, so as to proceed to a decision as if the case had been brought to the Supreme Court by appeal.

Reversed and remanded.

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Mr. James C. Purcell, of San Francisco, Cal., for Mitsuye Endo.

Mr. Charles Fahey, Sol. Gen., of Washington, D. C., for Eisenhower, Director.

Mr. Justice DOUGLAS delivered the opinion of the Court.

This case comes here on a certificate of the Court of Appeals for the Ninth Circuit, certifying to us questions of law upon which it desires instructions for the decision of the case. Judicial Code § 239, 28 U.S.C. § 346, 28 U.S.C.A. § 346. Acting under that section we ordered the entire record to be certified to this Court so that we might proceed to a decision, as if the case had been brought here by appeal.

Mitsuye Endo, hereinafter designated as the appellant, is an American citizen of Japanese ancestry. She was

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evacuated from Sacramento, California, in 1942, pursuant to certain military orders which we will presently discuss, and was removed to the Tule Lake War Relocation Center located at Newell, Modoc County, California. In July, 1942, she filed a petition for a writ of habeas corpus in the District Court of the United States for the Northern District of California, asking that she be discharged and restored to liberty. That petition was denied by the District Court in July, 1943, and an appeal was perfected to the Circuit Court of Appeals in August, 1943. Shortly thereafter appellant was transferred from the Tule Lake Relocation Center to the Central Utah Relocation Center located at Topaz, Utah, where she is presently detained. The certificate of questions of law was filed here on April 22, 1944, and on May 8, 1944, we ordered the entire record to be certified to this Court. It does not appear that any respondent was ever served with process or appeared in the proceedings. But the United States Attorney for the Northern District of California argued before the District Court that the petition should not be granted. And the Solicitor General argued the case here.

The history of the evacuation of Japanese aliens and citizens of Japanese ancestry from the Pacific coastal regions, following the Japanese attack on our Naval Base at Pearl Harbor on December 7, 1941, and the declaration of war against Japan on December 8, 1941, 55 Stat. 795, 50 U.S.C.A. Appendix note preceding section 1, has been reviewed in Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774. It need be only briefly re-

capitulated here. On February 19, 1942, the President promulgated Executive Order No. 9066, 7 Fed.Reg. 1407. It recited that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533, as amended by the Act of November

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30, 1940, 54 Stat. 1220, and the Act of August 21, 1941, 55 Stat. 655 (U.S.C., Title 50, Sec. 104)." And it authorized and directed "the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom, such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander, and until other arrangements are made, to accomplish the purpose of this order."

Lt. General J. L. De Witt, Military Commander of the Western Defense Command, was designated to carry out the duties prescribed by that Executive Order. On March 2, 1942, he promulgated Public Proclamation No. 1 (7 Fed.Reg. 2320) which recited that the entire Pacific Coast of the United States "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." It designated certain Military Areas and Zones in the Western Defense Command and announced that certain persons might subsequently be excluded from these areas.

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On March 16, 1942, General De Witt promulgated Public Proclamation No. 2 which contained similar recitals and designated further Military Areas and Zones. 7 Fed. Reg. 2405.

On March 18, 1942, the President promulgated Executive Order No. 9102 which established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority. 7 Fed.Reg. 2165. It recited that it was made "in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security." It provided for a Director and authorized and directed him to "formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision." The Director was given the authority, among other things, to prescribe regulations necessary or desirable to promote effective execution of the program.

Congress shortly enacted legislation which, as we pointed out in Kiyoshi Hirabayashi v. United States, supra, ratified and confirmed Executive Order No. 9066. See 320 U.S. at pages 87–91, 63 S.Ct. at pages 1379–1381, 87 L.Ed. 1774. It did so by the Act of March 21, 1942, 56 Stat. 173, 18 U.S.C.A. § 97a, which provided: "That 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

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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."

Beginning on March 24, 1942, a series of 108 Civilian Exclusion Orders[1] were issued by General De Witt pursuant to Public Proclamation Nos. 1 and 2. Appellant's exclusion was effected by Civilian Exclusion Order No. 52, dated May 7, 1942. It ordered that "all persons of Japanese ancestry, both alien and non-alien" be excluded from Sacramento, California,[2] beginning at noon on May 16, 1942. Appellant was evacuated to the Sacramento Assembly Center on May 15, 1942, and was transferred from there to the Tule Lake Relocation Center on June 19, 1942.

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On May 19, 1942, General De Witt promulgated Civilian Restrictive Order No. 1 (8 Fed.Reg. 982) and on June 27, 1942, Public Proclamation No. 8. 7 Fed.Reg. 8346. These prohibited evacuees from leaving Assembly Centers or Relocation Centers except pursuant to an authorization from General De Witt's headquarters. Public Proclamation No. 8 recited that "the present situation within these military areas requires as a matter of military necessity" that the evacuees be removed to "Relocation Centers for their relocation, maintenance and supervision", that those Relocation Centers be designated as War Relocation Project Areas, and that restrictions on the rights of the evacuees to enter, remain in, or leave such areas be promulgated. These restrictions were applicable to the Relocation Centers within the Western Defense Command[3] and included both of those in which appellant has been confined—Tule Lake Relocation Center at Newell, California, and Central Utah Relocation Center at Topaz, Utah. And Public Proclamation No. 8 purported to make any person who was subject to its provisions and who failed to conform to it liable to the penalties prescribed by the Act of March 21, 1942.

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By letter of August 11, 1942, General De Witt authorized the War Relocation Authority[4] to issue permits for persons to leave these areas. By virtue of that dele-

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1 Civilian Exclusion Orders Nos. 1 to 99 were ratified by General De Witt's Public Proclamation No. 7 of June 8, 1942 (7 Fed.Reg. 4498) and Nos. 100 to 108 were ratified by Public Proclamation No. 11 of August 18, 1942. 7 Fed. Reg. 6703.

2 By Public Proclamation No. 4, dated March 27, 1942 (7 Fed.Reg. 2601) General De Witt had ordered that all persons of Japanese ancestry who were within the limits of Military Area No. 1 (which included the City of Sacramento) were prohibited "from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."

Prior to this Proclamation a system of voluntary migration had been in force under which 4,889 persons left the military areas under their own arrangements. Final Report, Japanese Evacuation from the West Coast (1943), p. 100. The following reasons are given for terminating that program: "Essentially, the objective was twofold. First, it was to alleviate tension and prevent incidents involving violence between Japanese migrants and others. Second, it was to insure an orderly, supervised, and thoroughly controlled evacuation with adequate provision for the protection of the persons of evacuees as well as their property." Final Report, *supra*, p. 105.

3 Six War Relocation Centers and Project Areas were established within and four outside the Western Defense Command. See Final Report, *supra*, note 2, Part VI. Each one which was outside the Western Defense Command was designated as a military area by the Secretary of War in Public Proclamation No. WD1, dated August 13, 1942. That proclamation provided that all persons of Japanese ancestry in those areas were required to remain there unless written authorization to leave was obtained from the Secretary of War or the Director of the War Relocation Authority. 7 Fed.Reg. 6593. It recited that the United States was subject to "espionage and acts of sabotage, thereby requiring the adoption of military measures necessary to establish safeguards against such enemy operations emanating from within as well as from without the national boundaries." And it also purported to make any person who was subject to its provisions and who failed to obey it liable to the penalties prescribed by the Act of March 21, 1942.

4 The letter of August 11, 1942, is printed in the Final Report, *supra*, note 2, p. 530. It recited that the delegation of authority was made pursuant to provisions of Public Proclamation No. 8, dated June 27, 1942. Later General De Witt described the supervision of Relocation Centers by the War Relocation Au-

gation[5] and the authority conferred by Executive Order No. 9102, the War Relocation Authority was given control over the ingress and egress of evacuees from the Relocation Centers where Mitsuye Endo was confined.[6]

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The program of the War Relocation Authority is said to have three main features: (1) the maintenance of Relocation Centers as interim places of residence for evacuees; (2) the segregation of loyal from disloyal evacuees; (3) the continued detention of the disloyal and so far as possible the relocation of the loyal in selected communities.[7] In connection with the latter phase of its work the War Relocation Authority established a procedure for obtaining leave from Relocation Centers. That procedure, so far as indefinite leave[8] is concerned, presently provides[9] as follows:

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thority as follows: "The initial problem was one of security—the security of the Pacific Coast. The problem was met by evacuation to Assembly Centers followed by a transfer to Relocation Centers. The latter phase—construction, supply, equipment of Relocation Centers and the transfer of evacuees from Assembly to Relocation Centers had been accomplished by the Army. (While the Commanding General was made responsible for this latter phase of the program, in so doing, he was accomplishing a mission of the War Relocation Authority rather than strictly an Army mission.) The second problem—national in scope—essentially a social-economic problem, was primarily for solution by the War Relocation Authority, an agency expressly created for that purpose." Final Report, *supra*, note 2, p. 246.

On February 16, 1944, the President by Executive Order No. 9423, 50 U.S.C.A.Appendix, § 601 note, transferred the War Relocation Authority to the Department of the Interior. 9 Fed.Reg. 1963. The Secretary of the Interior by Administrative Order No. 1922, dated February 16, 1944, authorized the Director to perform under the Secretary's supervision and direction the functions transferred to the Department by Executive Order No. 9423.

5 And see the delegation of authority contained in the Secretary of War's Proclamation WD1 of August 13, 1942, supra, note 3, respecting Relocation Centers outside the Western Defense Command.

6 The Commanding General retained exclusive jurisdiction over the release of evacuees for the purpose of employment, resettlement, or residence within Military Area No. 1 and the California portion of Military Area No. 2. See Final Report, supra, note 2, p. 242. As to the Relocation Centers situated within the evacuated zone, the Commanding General regulated "the conditions of travel and movement through the area." Id.

"The Commanding General recognized fully that one of the principal responsibilities of War Relocation Authority was properly to control ingress and egress at Relocation Centers. The exercise of such control by Army authorities would have been tantamount to administering the Centers themselves. While the Commanding General retained exclusive control to regulate and prohibit the entry or movement of any Japanese in the evacuated areas, he delegated fully the authority and responsibility to determine entry to and departure from the Center proper." Id.

7 The functioning of Relocation Centers is described in the Final Report, supra note 2, Part VI and in Segregation of Loyal and Disloyal Japanese in Relocation Centers, Sen. Doc. No. 96, 78th Cong., 1st Sess., pp. 4-25.

8 Provision was also made for group-leave (or seasonal-work leave) and short term leave not to exceed 60 days. See Sen. Doc. No. 96, supra, note 7, p. 17.

9 The first leave procedure was contained in Administrative Instruction No. 22, dated July 20, 1942. It provided in short that any citizen of Japanese ancestry who had never resided or been educated in Japan could apply for a permit to leave the Relocation Center if he could show that he had a specific job opportunity at a designated place outside the Relocation Center and outside the Western Defense Command. Every permittee was said to remain in the "constructive custody" of the military commander in whose jurisdiction the Relocation Center was located. The permit could be revoked by the Director and the permittee required to return to the Relocation Center if the Director found that the revocation was necessary "in the public interest". The Regulations of September 26, 1942, provided more detailed procedures for obtaining leave. See 7 Fed.Reg. 7656. Administrative Instruction No. 22 was revised November 6, 1942. It was superseded as a supplement to the Regulations by the Hand-

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Application for leave clearance is required. An investigation of the applicant is made for the purpose of ascertaining "the probable effect upon the war program and upon the public peace and security of issuing indefinite leave" to the applicant.[10] The grant of leave clearance does not authorize departure from the Relocation Center. Application for indefinite leave must also be made. Indefinite leave may be granted under 14 specified conditions.[11] For example, it may be granted (1) where the applicant proposes to accept an employment offer or an offer of support that has been investigated and approved by the Authority; or (2) where the applicant does not intend to work but has "adequate financial resources to take care of himself" and a Relocation Officer has investigated and approved "public sentiment at his proposed destination", or (3) where the applicant has made arrangements to live at a hotel or in a private home approved by a Relocation

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Officer while arranging for employment; or (4) where the applicant proposes to accept employment by a federal or local governmental agency; or (5) where the applicant is going to live with designated classes of relatives.

But even if an applicant meets those requirements, no leave will issue when the proposed place of residence or employment is within a locality where it has been ascertained that "community sentiment is unfavorable", or when the applicant plans to go to an area which has been closed by the Authority to the issuance of indefinite leave.[12] Nor will such leave issue if the area where the applicant plans to reside or work is one which has not been cleared for relocation.[13] Moreover, the applicant agrees to give the Authority prompt notice of any change of employment or residence. And the indefinite leave which is granted does not permit entry into a prohibited military area, including those from which these people were evacuated.[14]

Mitsuye Endo made application for leave clearance on February 19, 1943, after the petition was filed in the District

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Court. Leave clearance[15] was granted her on Au-

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book of July 20, 1943. The Regulations of September 26, 1942 were revised January 1, 1944. See 9 Fed.Reg. 154.

10 Handbook, § 60.6.6. Nine factors are specified each of which is "regarded by intelligence agencies as sufficient to warrant a recommendation that leave clearance be denied unless there is an adequate explanation". Sec. 60.10.2. These include, among others, a failure or refusal to swear unqualified allegiance to the United States and to forswear any form of allegiance to the Japanese Emperor or any other foreign government, power, or organization; a request for repatriation or expatriation whether or not subsequently retracted; military training in Japan; employment on Japanese naval vessels; three trips to Japan after the age of six, except in the case of seamen whose trips were confined to ports of call; an organizer, agent, member, or contributor to specified organizations which intelligence agencies consider subversive.

11 Handbook, § 60.4.3.

12 Id.

13 Id. The War Relocation Authority also recommends communities in which an evacuee will be accepted, renders aid in finding employment opportunities, and provides cash grants, if needed, to assist the evacuee in reaching a specified destination and in becoming established there. The Authority has established eight area offices and twenty-six district offices to help carry out the relocation program.

14 Sec. 60.4.8 of the Handbook provides: "Before any indefinite leave permitting any entry into or travel in a prohibited military area may issue, a written pass or authorization shall be procured for the applicant from the appropriate military authorities and an escort shall be provided if required by the military authorities. Such pass or authorization may be procured through the Assistant Director in San Francisco, or in the case of the Manzanar Relocation Center through the commanding officer of the military police at the center to the extent authorized by the Western Defense Command."

15 The leave clearance stated that it did not authorize departure from the Relocation Center. It added: "You are eligible for indefinite leave for the purpose of employment or residence in the Eastern Defense Command as well as in other areas; provided the provisions of Administrative Instruction No. 22, Rev., are otherwise complied with. The Provost Marshal General's Dept. of the War Department has determined that you, Endo Mitsuye are not at this time eligible for employment in plants and facilities vital to the war effort."

gust 16, 1943. But she made no application for indefinite leave.[16]

Her petition for a writ of *habeas corpus* alleges that she is a loyal and law-abiding citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the Relocation Center under armed guard and held there against her will.

It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty. Moreover, they do not contend that she may

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be held any longer in the Relocation Center. They concede that it is beyond the power of the War Relocation Authority to detain citizens against whom no charges of disloyalty or subversiveness have been made for a period longer than that necessary to separate the loyal from the disloyal and to provide the necessary guidance for relocation. But they maintain that detention for an additional period after leave clearance has been granted is an essential step in the evacuation program. Reliance for that conclusion is placed on the following circumstances.

When compulsory evacuation from the West Coast was decided upon, plans for taking care of the evacuees after their detention in the Assembly Centers, to which they were initially removed, remained to be determined. On April 7, 1942, the Director of the Authority held a conference in Salt Lake City with various state and federal officials including the Governors of the inter-mountain states. "Strong opposition was expressed to any type of unsupervised relocation and some of the Governors refused to be responsible for maintenance of law and order unless evacuees brought into their States were kept under constant military surveillance."[17] Sen. Doc. No. 96, supra, note 7, p. 4. As stated by General De Witt in his report to the Chief of Staff: "Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated. That the evacuation program necessarily and ultimately developed into one of complete Federal supervision, was due primarily to the

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fact that the interior states would not accept an uncontrolled Japanese migration." Final Report, supra, note 2, pp. 43-44. The Authority thereupon abandoned plans for assisting groups of evacuees in private colonization and temporarily put to one side plans for aiding the evacuees in obtaining private employment.[18] As an alternative the Authority "concentrated on establishment of Government-operated centers with sufficient capacity and facilities to accommodate the entire evacuee population." Sen. Doc. No. 96, supra, note 7, p. 4. Accordingly, it undertook to care for the basic needs of these people in the Relocation Centers, to promote as rapidly as possible the permanent resettlement of as many as possible in normal communities, and to provide indefinitely for those left at the Relocation Centers. An effort was made to segregate the loyal evacuees from the others. The leave program which we have discussed was put into operation and the resettlement program commenced.[19]

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16 The form of a citizen's indefinite leave is as follows:

"This is to certify that ..... a United States citizen, who has submitted to me sufficient proof of such citizenship, residing within ..... Relocation Area, is allowed to leave such area on ..... 19.., and subject to the terms of the regulations of the War Relocation Authority relating to the issuance of leave for departure from a relocation area and subject to restrictions ordered by the United States Army, and subject to any special conditions or restrictions set forth on the reverse side hereof, to enjoy leave of indefinite duration."

One of the grounds given by the District Court for denial of the petition for writ of habeas corpus was the failure of appellant to exhaust her administrative remedies. The Solicitor General and the War Relocation Authority do not invoke that rule here, since the issue which appellant poses is the validity of the regulations under which the administrative remedy is prescribed.

17 Cf. the account of the meeting by General De Witt in the Final Report, supra, note 2, pp. 243-244.

18 And see the Fourth Interim Report of the Tolan Committee, H. R. Rep. No. 2124, 77th Cong., 2d Sess., p. 18.

19 There were 108,503 evacuees transferred to Relocation Centers. Final Re-

It is argued that such a planned and orderly relocation was essential to the success of the evacuation program; that but for such supervision there might have been a

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dangerously disorderly migration of unwanted people to unprepared communities; that unsupervised evacuation might have resulted in hardship and disorder; that the success of the evacuation program was thought to require the knowledge that the federal government was maintaining control over the evacuated population except as the release of individuals could be effected consistently with their own peace and well-being and that of the nation; that although community hostility towards the evacuees has diminished, it has not disappeared and the continuing control of the Authority over the relocation process is essential to the success of the evacuation program. It is argued that supervised relocation, as the chosen method of terminating the evacuation, is the final step in the entire process and is a consequence of the first step taken. It is conceded that appellant's detention pending compliance with the leave regulations is not directly connected with the prevention of espionage and sabotage at the present time. But it is argued that Executive Order No. 9102 confers power to make regulations necessary and proper for controlling situations created by the exercise of the powers expressly conferred for protection against espionage and sabotage. The leave regulations are said to fall within that category.

[1, 2] *First.* We are of the view that Mitsuye Endo should be given her liberty. In reaching that conclusion we do not come to the underlying constitutional issues which have been argued. For we conclude that, whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure.

[3] It should be noted at the outset that we do not have here a question such as was presented in Ex parte Milligan, 4 Wall. 2, 18 L.Ed. 281, or in Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3, where the jurisdiction of military tribunals to try persons according to the law of war was challenged in *habeas corpus* proceedings.

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Mitsuye Endo is detained by a civilian agency, the War Relocation Authority, not by the military. Moreover, the evacuation program was not left exclusively to the military; the Authority was given a large measure of responsibility for its execution and Congress made its enforcement subject to civil penalties by the Act of March 21, 1942. Accordingly, no questions of military law are involved.

Such power of detention as the Authority has stems from Executive Order No. 9066. That order is the source of the authority[20] delegated by General De Witt in his letter of August 11, 1942. And Executive Order No. 9102 which created the War Relocation Authority purported to do no more than to implement the program authorized by Executive Order No. 9066.

[4, 5] We approach the construction of Executive Order No. 9066 as we would approach the construction of legislation in this field. That Executive Order must indeed be considered along with the Act of March 21, 1942, which ratified and confirmed it (Kiyoshi Hirabayashi v. United States, supra, 320 U.S. at pages 87–91, 63 S. Ct. at pages 1379–1381, 87 L.Ed. 1774) as the Order and the statute together laid such basis as there is for participation by civil agencies of the federal government in the evacuation program. Broad powers frequently granted to the President or other executive officers by Congress so that they

port, supra, note 2, p. 279. As of July 29, 1944, there were 28,911 on indefinite leave and 61,092 in the Relocation Centers other than Tule Lake. It was sought to assemble at Tule Lake those whose disloyalty was deemed to be established and those who persisted in a refusal to say they would be willing to serve in the armed forces of the United States on combat duty wherever ordered and to swear unqualified allegiance to the United States and forswear any form of allegiance to the Japanese Emperor or any other foreign government, power or organization. This group, together with minor children, totaled 18,684 on July 29, 1944. And see Hearings, Subcommittee on the National War Agencies Appropriation Bill for 1945, p. 611.

20 Insofar as Public Proclamation No. WD 1, dated August 13, 1942, supra, note 3, might be deemed relevant, it is not applicable here since the Relocation Centers with which we are presently concerned were within the Western Defense Command.

may deal with the exigencies of war time problems have been sustained.[21] And the Constitution when it committed to the Executive and to Congress the exercise of the war power necessarily gave them wide scope for the exercise of judgment and

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discretion so that war might be waged effectively and successfully. Kiyoshi Hirabayashi v. United States, supra, 320 U.S. at page 93, 63 S.Ct. at page 1382, 87 L.Ed. 1774. At the same time, however, the Constitution is as specific in its enumeration of many of the civil rights of the individual as it is in its enumeration of the powers of his government. Thus it has prescribed procedural safeguards surrounding the arrest, detention and conviction of individuals. Some of these are contained in the Sixth Amendment, compliance with which is essential if convictions are to be sustained. Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519. And the Fifth Amendment provides that no person shall be deprived of liberty (as well as life or property) without due process of law. Moreover, as a further safeguard against invasion of the basic civil rights of the individual it is provided in Art. I, Sec. 9 of the Constitution that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it." See Ex parte Milligan, supra.

[6-10] We mention these constitutional provisions not to stir the constitutional issues which have been argued at the bar but to indicate the approach which we think should be made to an Act of Congress or an order of the Chief Executive that touches the sensitive area of rights specifically guaranteed by the Constitution. This Court has quite consistently given a narrower scope for the operation of the presumption of constitutionality when legislation appeared on its face to violate a specific prohibition of the Constitution.[22] We have likewise favored that interpretation of legislation which gives it the greater chance of surviving the test of constitutionality.[23] Those

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analogies are suggestive here. We must assume that the Chief Executive and members of Congress, as well as the courts, are sensitive to and respectful of the liberties of the citizen. In interpreting a war-time measure we must assume that their purpose was to allow for the greatest possible accommodation between those liberties and the exigencies of war. We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the law makers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used.

[11] The Act of March 21, 1942, was a war measure. The House Report (H. Rep. No. 1906, 77th Cong., 2d Sess., p. 2) stated, "The necessity for this legislation arose from the fact that the safe conduct of the war requires the fullest possible protection against either espionage or sabotage to national defense material, national defense premises, and national defense utilities." That was the precise purpose of Executive Order No. 9066, for, as we have seen, it gave as the reason for the exclusion of persons from prescribed military areas the protection of such property "against espionage and against sabotage." And Executive Order No. 9102 which established the War Relocation Authority did so, as we have noted, "in order to provide for the removal from designated areas

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21 See, for example, United States v. Chemical Foundation, 272 U.S. 1, 12, 47 S.Ct. 1, 5, 71 L.Ed. 131; United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 57 S.Ct. 216, 81 L.Ed. 255; Yakus v. United States, 321 U.S. 414, 64 S.Ct. 660; Bowles v. Willingham, 321 U.S. 503, 64 S.Ct. 641.

22 Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, 73 A.L.R. 1484; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949; Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S.Ct. 954, 83 L.Ed. 1423; Schneider v. State, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155; Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213, 128 A.L.R. 1352.

23 United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 82, 53 S.Ct. 42, 43, 77 L.Ed. 175; Interstate Commerce Commission v. Oregon-Washington R. & N. Co., 288 U.S. 14, 40, 53 S.Ct. 266, 274, 77 L.Ed. 588; Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 348, 56 S.Ct. 466, 483, 80 L.Ed. 688; National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30, 57 S.Ct. 615, 621, 81 L.Ed. 893, 108 A.L.R. 1352; Anniston Mfg. Co. v. Davis, 301 U.S. 337, 351, 352, 57 S.Ct. 816, 822, 823, 81 L.Ed. 1143.

of persons whose removal is necessary in the interests of national security." The purpose and objective of the Act and of these orders are plain. Their single aim was the protection of the war effort against espionage and sabotage. It is in light of that one objective that the powers conferred by the orders must be construed.

Neither the Act nor the orders use the language of detention. The Act says that no one shall "enter, remain

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in leave, or commit any act" in the prescribed military areas contrary to the applicable restrictions. Executive Order No. 9066 subjects the right of any person "to enter, remain in, or leave" those prescribed areas to such restrictions as the military may impose. And apart from those restrictions the Secretary of War is only given authority to afford the evacuees "transportation, food, shelter, and other accommodations." Executive Order No. 9102 authorizes and directs the War Relocation Authority "to formulate and effectuate a program for the removal" of the persons covered by Executive Order No. 9066 from the prescribed military areas and "for their relocation, maintenance, and supervision." And power is given the Authority to make regulations "necessary or desirable to promote effective execution of such program." Moreover, unlike the case of curfew regulations (Kiyoshi Hirabayashi v. United States, supra), the legislative history of the Act of March 21, 1942, is silent on detention. And that silence may have special significance in view of the fact that detention in Relocation Centers was no part of the original program of evacuation but developed later to meet what seemed to the officials in charge to be mounting hostility to the evacuees on the part of the communities where they sought to go.

We do not mean to imply that detention in connection with no phase of the evacuation program would be lawful. The fact that the Act and the orders are silent on detention does not of course mean that any power to detain is lacking. Some such power might indeed be necessary to the successful operation of the evacuation program. At least we may so assume. Moreover, we may assume for the purposes of this case that initial detention in Relocation Centers was authorized. But we stress the silence of the legislative history and of the Act and the Executive Orders on the power to detain to emphasize that any such authority which exists must be implied. If there is to be

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the greatest possible accommodation of the liberties of the citizen with this war measure, any such implied power must be narrowly confined to the precise purpose of the evacuation program.

[12] A citizen who is concededly loyal presents no problem of espionage or sabotage. Loyalty is a matter of the heart and mind not of race, creed, or color. He who is loyal is by definition not a spy or a saboteur. When the power to detain is derived from the power to protect the war effort against espionage and sabotage, detention which has no relationship to that objective is unauthorized.

[13] Nor may the power to detain an admittedly loyal citizen or to grant him a conditional release be implied as a useful or convenient step in the evacuation program, whatever authority might be implied in case of those whose loyalty was not conceded or established. If we assume (as we do) that the original evacuation was justified, its lawful character was derived from the fact that it was an espionage and sabotage measure, not that there was community hostility to this group of American citizens. The evacuation program rested explicitly on the former ground not on the latter as the underlying legislation shows. The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else. That was not done by Executive Order No. 9066 or by the Act of March 21, 1942, which ratified it. What they did not do we cannot do. Detention which furthered the campaign against espionage and sabotage would be one thing. But detention which has no relationship to that campaign is of a distinct character. Community hostility even to loyal evacuees may have been (and perhaps still is) a serious problem. But if authority

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for their custody and supervision is to be sought on that ground, the Act of March 21, 1942, Executive Order No. 9066,

and Executive Order No. 9102, offer no support. And none other is advanced.[24] To read them that broadly would be to assume that the Congress and the President intended that this discriminatory action should

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be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. We cannot make such an assumption. As the President has said of these loyal citizens: "Americans of Japanese ancestry, like those of many other ancestries, have shown that they can, and want to, accept our institutions and work loyally with the rest of us, making their own valuable contribution to the national wealth and well-being. In vindication of the very ideals for which we are fighting this war it is important to us to maintain a high standard of fair, considerate, and equal treatment for the people of this minority as of all other minorities." Sen. Doc. No. 96, supra, note 7, p. 2.

Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.

Second. The question remains whether the District Court has jurisdiction to grant the writ of *habeas corpus* because of the fact that while the case was pending in the Circuit Court of Appeals appellant was moved from the Tule Lake Relocation Center in the Northern District of California where she was originally detained to the Central Utah Relocation Center in a different district and circuit.

[14] That question is not colored by any purpose to effectuate a removal in evasion of the *habeas corpus* proceedings. It appears that appellant's removal to Utah was part of a general segregation program involving many of these people and was in no way related to this pending case. Moreover, there is no suggestion that there is no one within the jurisdiction of the District Court who is responsible for the detention of appellant and who would be an appropriate respondent. We are indeed advised by the Acting Secretary of the Interior[25] that if the writ

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issues and is directed to the Secretary of the Interior or any official of the War Relocation Authority (including an assistant director whose office is at San Francisco, which is in the jurisdiction of the District Court), the cor-

[24] It is argued, to be sure, that there has been Congressional ratification of the detention of loyal evacuees under the leave regulations of the Authority through the appropriation of sums for the expenses of the Authority. 57 Stat. 533, P.L. 139, 78th Cong., 1st Sess., approved July 12, 1943 and P.L. 372, 78th Cong., 2d Sess., approved June 28, 1944, 58 Stat. 533, 545. It is pointed out that the regulations and procedures of the Authority were disclosed in reports to the Congress and in Congressional hearings. See, for example, Sen. Doc. No. 96, supra, note 7; Report and Minority Views of the Special Committee on Un-American Activities on Japanese War Relocation Centers, H. Rep. No. 717, 78th Cong., 1st Sess., pp. 23-26; Hearings, Subcommittee of the Senate Military Affairs Committee on S. 444, 78th Cong., 1st Sess., pp. 45-46; Japanese War Relocation Centers, Subcommittee Report on S. 444 and S. 101 and 111, 78th Cong., 1st Sess., pp. 4-5 et seq. And it is shown that the leave program of the Authority was mentioned both in the House and Senate committee hearings on the 1944 Appropriation Act (Hearings, Subcommittee of the House Committee on Appropriations, National War Agencies Appropriation Bill for 1944, 78th Cong., 1st Sess., pp. 698, 699, 710; Hearings of the Senate Subcommittee on Appropriations, National War Agencies Appropriation Bill for 1944, 78th Cong., 1st Sess., p. 382) and on the floor of the House prior to passage of the 1944 Act. 89 Cong. Rec. p. 5983-5985. Congress may of course do by ratification what it might have authorized. Swayne & Hoyt, Ltd., v. United States, 300 U.S. 297, 301, 302, 57 S.Ct. 478, 479, 480, 81 L.Ed. 659. And ratification may be effected through appropriation acts. Isbrandtsen-Moller Co. v. United States, 300 U.S. 139, 147, 57 S.Ct. 407, 411, 81 L.Ed. 562; Brooks v. Dewar, 313 U.S. 354, 361, 61 S.Ct. 979, 982, 85 L.Ed. 399. But the appropriation must plainly show a purpose to bestow the precise authority which is claimed. We can hardly deduce such a purpose here where a lump appropriation was made for the overall program of the Authority and no sums were earmarked for the single phase of the total program which is here involved. Congress may support the effort to take care of these evacuees without ratifying every phase of the program.

[25] In a letter dated October 13, 1944 to the Solicitor General and filed here.

pus of appellant will be produced and the court's order complied with in all respects. Thus it would seem that the case is not moot.

In United States ex rel. Innes v. Crystal, 319 U.S. 755, 63 S.Ct. 1164, 87 L.Ed. 1708, the relator challenged a judgment of court martial by *habeas corpus*. The District Court denied his petition and the Circuit Court of Appeals affirmed that order. After that decision and before his petition for certiorari was filed here, he was removed from the custody of the Army to a federal penitentiary in a different district and circuit. The sole respondent was the commanding officer. Only an order directed to the warden of the penitentiary could effectuate his discharge and the warden as well as the prisoner was outside the territorial jurisdiction of the District Court. We therefore held the cause moot. There is no comparable situation here.

[15, 16] The fact that no respondent was ever served with process or appeared in the proceedings is not important. The United States resists the issuance of a writ. A cause exists in that state of the proceedings and an appeal lies from denial of a writ without the appearance of a respondent. Ex parte Milligan, supra, 4 Wall. at page 112, 18 L.Ed. 281; Ex parte Quirin, 317 U.S. 1, 24, 63 S.Ct. 2, 9, 87 L.Ed. 3.

Hence, so far as presently appears, the cause is not moot and the District Court has jurisdiction to act unless the physical presence of appellant in that district is essential.

We need not decide whether the presence of the person detained within the territorial jurisdiction of the District Court is prerequisite to filing a petition for a writ of *habeas corpus*. See In re Boles, 8 Cir., 48 F. 75; Ex parte Gouyet, D. C., 175 F. 230, 233; United States v. Day, 3 Cir., 50 F.2d 816, 817;

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United States v. Schlotfeldt, 7 Cir., 136 F.2d 935, 940. But see Tippitt v. Wood, 70 U.S.App.D.C. 332, 140 F.2d 689, 693. We only hold that the District Court acquired jurisdiction in this case and that the removal of Mitsuye Endo did not cause it to lose jurisdiction where a person in whose custody she is remains within the district.

[17] There are expressions in some of the cases which indicate that the place of confinement must be within the court's territorial jurisdiction in order to enable it to issue the writ. See In re Boles, supra, 48 F. at page 76; Ex parte Gouyet, supra; United States v. Day, supra; United States v. Schlotfeldt, supra. But we are of the view that the court may act if there is a respondent within reach of its process who has custody of the petitioner. As Judge Cooley stated in Matter of Jackson, 15 Mich. 417, 439, 440: "The important fact to be observed in regard to the mode of procedure upon this writ is, that it is directed to, and served upon, not the person confined, but his jailer. It does not reach the former except through the latter. The officer or person who serves it does not unbar the prison doors, and set the prisoner free, but the court relieves him by compelling the oppressor to release his constraint. The whole force of the writ is spent upon the respondent." And see United States v. Davis, Fed.Cas.No.14,926, 5 Cranch C.C. 622; Ex parte Fong Yim, D.C., 134 F. 958; Ex parte Ng Quong Ming, D.C., 135 F. 378, 379; Sanders v. Allen, 69 App.D.C. 307, 100 F.2d 717, 719; Rivers v. Mitchell, 57 Iowa 193, 195, 10 N.W. 626; People v. New York Juvenile Asylum, 57 App. Div. 383, 384, 68 N.Y.S. 279; People v. New York Asylum, 58 App.Div. 133, 134, 68 N.Y.S. 656. The statute upon which the jurisdiction of the District Court in habeas corpus proceedings rests (Rev. Stat. § 752, 28 U.S.C. § 452, 28 U.S.C.A. § 452) gives it power "to grant writs of habeas corpus for the purpose of

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an inquiry into the cause of restraint of liberty."[26]

[26] The entire section provides: "The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had." The last clause was added by § 6 of the Act of February 13, 1925, 43 Stat. 940. But we find no indication that it was added to change the

The objective may be in no way impaired or defeated by the removal of the prisoner from the territorial jurisdiction of the District Court. That end may be served and the decree of the court made effective if a respondent who has custody of the prisoner is within reach of the court's process even though the prisoner has been removed from the district since the suit was begun.[27]

The judgment is reversed and the cause is remanded to the District Court for proceedings in conformity with this opinion.

Reversed.

Mr. Justice MURPHY, concurring.

I join in the opinion of the Court, but I am of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty is not only unauthorized by Congress or the Executive but is another example of the unconstitutional resort to racism inherent in the entire evacuation program. As stated more fully in my

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dissenting opinion in Fred Toyosaburo Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, racial discrimination of this nature bears no reasonable relation to military necessity and is utterly foreign to the ideals and traditions of the American people.

Moreover, the Court holds that Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority. It appears that Miss Endo desires to return to Sacramento, California, from which Public Proclamations Nos. 7 and 11, as well as Civilian Exclusion Order No. 52, still exclude her. And it would seem to me that the "unconditional" release to be given Miss Endo necessarily implies "the right to pass freely from state to state," including the right to move freely into California. Twining v. New Jersey, 211 U.S. 78, 97, 29 S.Ct. 14, 19, 53 L.Ed. 97; Crandall v. Nevada, 6 Wall. 35, 18 L.Ed. 744. If, as I believe, the military orders excluding her from California were invalid at the time they were issued, they are increasingly objectionable at this late date, when the threat of invasion of the Pacific Coast and the fears of sabotage and espionage have greatly diminished. For the Government to suggest under these circumstances that the presence of Japanese blood in a loyal American citizen might be enough to warrant her exclusion from a place where she would otherwise have a right to go is a position I cannot sanction.

Mr. Justice ROBERTS.

I concur in the result but I cannot agree with the reasons stated in the opinion of the court for reaching that result.

As in Fred Toyosaburo Korematsu v. United States, 323 U.S. 214, 65 S.Ct. 193, the court endeavors to avoid constitutional issues which are necessarily involved. The opinion, at great length, attempts to show that neither the executive nor the legislative arm of the Government authorized the detention of the relator.

1. With respect to the executive, it is said that none of the executive orders in question specifically referred to detention and the court should not imply any authorization

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of it. This seems to me to ignore patent facts. As the opinion discloses, the executive branch of the Government not only was aware of what was being done but in fact that which was done was formulated in regulations and in a so-called handbook open to the public. I had supposed that where thus overtly and avowedly a department of the Government adopts a course of action under a series of official regulations the presumption is that, in this way, the department asserts its belief in the legality and validity of what it is doing. I think it inadmissible to suggest that some inferior public servant exceeded the authority granted by executive order in this case. Such a basis of decision will render easy the evasion of law and the violation of constitutional rights, for when conduct is called in question the obvious

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scope of jurisdiction in habeas corpus proceedings. On its face it is no more than a recording requirement.

27 Cf. Rule 45(1) of this Court, 28 U.S.C.A. following section 354, which provides: "Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed."

response will be that, however much the superior executive officials knew, understood, and approved the conduct of their subordinates, those subordinates in fact lacked a definite mandate so to act. It is to hide one's head in the sand to assert that the detention of relator resulted from an excess of authority by subordinate officials.

2. As the opinion states, the Act of March 21, 1942, said nothing of detention or imprisonment, nor did Executive Order No. 9066 of date February 19, 1942, but I cannot agree that when Congress made appropriations to the Relocation Authority, having before it the reports, the testimony at committee hearings, and the full details of the procedure of the Relocation Authority was exposed in Government publications, these appropriations were not a ratification and an authorization of what was being done. The cases cited in footnote No. 24 of the opinion do not justify any such conclusion. The decision now adds an element never before thought essential to congressional ratification, namely, that if Congress is to ratify by appropriation any part of the programme of an executive agency the bill must include a specific item referring to that portion of the programme. In other words, the court

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will not assume that Congress ratified the procedure of the authorities in this case in the absence of some such item as this in the appropriation bill:—"For the administration of the conditional release and parole programme in force in relocation centers." In the light of the knowledge Congress had as to the details of the programme, I think the court is unjustified in straining to conclude that Congress did not mean to ratify what was being done.

3. I conclude, therefore, that the court is squarely faced with a serious constitutional question,—whether the relator's detention violated the guarantees of the Bill of Rights of the federal Constitution and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged.

End.

323 U.S. 166

ORDER OF RAILWAY CONDUCTORS OF AMERICA et al. v. PENNSYLVANIA R. CO. et al.

No. 200.

Argued Nov. 15, 1944.

Decided Dec. 11, 1944.

Master and servant ⟹15(112)

Where bill sought cancellation of National Mediation Board's bargaining representative certification and an injunction against board action, a declaratory judgment that plaintiff union was representative of road conductors notwithstanding board's contrary certification, an injunction to prevent railroad from bargaining with certified representative, and an injunction against future acts of railroad coercive of road conductors in choosing a bargaining representative, but election had been held, representative chosen, and choice certified by board and all that bill did was to recite what railroad had done in advance of the election, and appeal had not been taken from order dismissing board from the case, no case was stated requiring the entry of injunction. Railway Labor Act § 2, subds. 3, 9, 10, as amended, 45 U.S.C.A. § 152, subds. 3, 9, 10.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

Suit for a declaratory judgment and for an injunction by the Order of Railway Conductors of America, etc., and others against the Pennsylvania Railroad Company and Brotherhood of Railroad Trainmen and others. From a judgment dismissing the suit, plaintiffs appealed to the United States Court of Appeals for the District of Columbia, which dismissed the appeal, 141 F.2d 366, and the plaintiffs bring certiorari to review the portion of judgment dismissing the suit as to the named defendants.

Writ of certiorari dismissed.

Mr. Rufus G. Poole, of Washington, D. C., for petitioners.

Mr. John B. Prizer, of Philadelphia, Pa., for respondent, Pennsylvania R. Co.