

R. CHIN

*“Japanese American Redress and Reparations:
A Case for Congressional Action”*

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SUBCOMMITTEE ON JAPANESE AMERICAN

REDRESS AND REPARATIONS

Legal Services Section,
State Bar of California

Lori Suzuki, Esq.
San Francisco

Dean Ito Taylor, Esq.
San Francisco

Joel J. Hayashida, Esq.
San Francisco

Lynne Ogawa, Esq.
San Francisco

Patricia E. Takayama
Hastings College of
the Law

Susan Lew
New College of California
School of Law

Gen Fujioka
New College of California
School of Law

Adrienne Tong
Hastings College of
the Law

Carole S. Morita, Esq.
Los Angeles

Edwin Yoshimura, Esq.
Santa Ana

Kathy Akao
University of Santa Clara Law School

Hisae Ishii
University of Santa Clara Law School

Kenneth Kamei, Esq.
Santa Clara

Lester Leu
University of Santa Clara Law School

Mary Osaka
Hastings College of
the Law

Alan Terakawa, Esq.
Los Angeles

Donn Ginoza, Esq.
Oakland

Lyle C. Wing
State Bar Staff

State Bar of California
Legal Services Department
555 Franklin Street
San Francisco, CA 94102
(415) 561-8250

Attn: Lyle C. Wing

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PRELIMINARY STATEMENT

We are representing the Subcommittee on Japanese American Redress/Reparations, a project of the Legal Services Section of the State Bar of California. In this capacity, we respectfully submit the following discussion on the need and propriety of Congressional action to remedy wrongs suffered by persons of Japanese ancestry and such others as were subject to or affected by the exclusion, incarceration, and related military orders promulgated under authority of Executive Order 9066. Our remarks are on behalf of the Subcommittee on Japanese American Redress/Reparations only, and do not represent the position of the State Bar's Board of Governors.

1 INTRODUCTION

2
3 "Some lost all of what they had; others lost
4 most of what they had."¹

5
6 The exclusion of all persons of Japanese ancestry, whether
7 United States citizens or not, and the incarceration of these
8 people for a period of over four years in internment camps
9 during World War II, caused the loss of an estimated \$400
10 million of real and personal property.² To date, compensation
11 for these losses has been severely inadequate.

12
13 In addition, the resultant psychological injury,
14 constitutional violations,³ personal injuries, destruction of
15 ethnic communities, cultural, family and religious damages have
16 yet to be accurately measured, adequately considered, nor have
17 reparations been made.

18
19 Before this commission, the stories of the Japanese people
20 will unfold, documenting these injustices, tragedies, and
21 losses. The Issei, Nisei, Kibei, Sansei, and Yonsei will speak
22 as an entire nationality whose history and lives bear the scars
23 of the internment camps.

24
25 The power is vested in Congress to symbolically remedy such
26 losses and injuries for which no truly adequate compensation
27 exists. Two means of Congressional action, not exclusive of
28 each other, will be presented in this brief:

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- 1) Legislation for direct appropriations, and
- 2) Enabling legislation allowing for the bringing of claims.

1 I. CONGRESSIONAL ACTION IS BOTH PROPER AND REQUIRED TO
2 EFFECTUATE JUST REPARATIONS FOR PERSONS OF JAPANESE
3 ANCESTRY WHO WERE EXCLUDED AND INCARCERATED DURING WORLD
4 WAR II.

5
6 The continued need, thirty-nine years after the signing of
7 Executive Order 9066, for Congressional action to realize just
8 compensation for the injuries and losses caused by the
9 exclusion and incarceration is based upon the existence of a
10 variety of causes of action for damages blocked by procedural
11 barriers, coupled with the inadequacy of the American Japanese
12 Claims Act of 1948. 50 U.S.C., Section 1981 (1976) (Amended
13 1951 and 1956).

14
15 A. POTENTIAL CAUSES OF ACTION IN TORT

16
17 Considering the great property losses as a result of the
18 exclusion and incarceration, it is not surprising that the
19 Tolan Committee report of May, 1942 predicted the advent of
20 law suits.

21 "Having in mind that the majority of the present
22 evacuees are American citizens, it is not incon-
23 ceivable that law suits may be instituted at the
24 close of the war in event negligence or damage to
25 property is suffered by individuals affected by the
26 evacuation."⁴

27 In addition to claims of property loss, the government
28 and/or its agents would have been liable for damages stemming

1 from other traditional tort theories (e.g., assault, battery,
2 invasion of privacy, defamation). Few actions were brought,
3 however, before the enactment of the American Japanese Claims
4 Act which effectively limited the scope of such suits.

5
6 B. POTENTIAL CAUSES OF ACTION IN CONSTITUTIONAL TORT
7

8 Further, the redress of civil rights violations is a
9 principle long established in American jurisprudence. In
10 1871, Congress enacted the Civil Rights Act, now codified in
11 42 U.S.C. 1983, to redress the violation of civil rights by
12 state government officials or persons acting under color of
13 state law. Subsequently, in Bivens v. Six Unknown Agents, 403
14 U.S. 388 (1971), the United States Supreme Court recognized a
15 comparable cause of action against federal officials implicit
16 in the Constitution. In such cases, monetary compensation or
17 damages have been held to appropriately remedy injuries
18 sustained as a consequence of the unconstitutional conduct.

19
20 Damages have been awarded for a variety of constitutional
21 violations. For example, in Bivens, the constitutional tort
22 derived from violations of the Fourth Amendment prohibition
23 against unreasonable search and seizures. Subsequently, the
24 lower federal courts have upheld constitutional tort actions
25 founded on the First Amendment guarantee of free speech and
26 political association (See Paton v. La Prade, 3d. Cir.(1975)
27 524 F.2d 862; Dellums v. Powell (D.C.Cir. 1977) 566 F.2d 167);
28

1 the Fifth Amendment guarantee of due process (See Carey v.
2 Piphus, (1978) 435 U.S. 247); the Eighth Amendment prohibition
3 against cruel and unusual punishment (See Carlson v. Green, __
4 U.S.__ [docket number 78-1261] 1981, and Hernandez v.
5 Lattimore (2d Cir. 1979) 612 F.2d 61).

6
7 Accordingly, actions by public officials or persons acting
8 under color of law in violation of the Constitution are
9 actions in excess of their authority and constitute civil
10 wrongs cognizable under traditional principles of tort. Such
11 actions are appropriately remedied by damages for injuries
12 consequentially caused by the unconstitutional conduct.

13
14 These potential causes of action are blocked by four major
15 procedural barriers: res judicata, statute of limitations,
16 sovereign immunity and standing. As argued below, legislative
17 action waiving said barriers is both proper and required to
18 effectuate just reparations.

19
20 C. INADEQUACY OF THE AMERICAN JAPANESE CLAIMS ACT OF 1948

21
22 The American Japanese Evacuation Claims Act of 1948
23 (hereinafter "Claims Act") was a public declaration that the
24 exclusion and incarceration directly caused the loss of
25 property. See Sonoda v. U.S., 154 Ct.C. 130 (1961). Congress
26 openly acknowledged an obligation to compensate those excluded
27 for their losses. The monetary settlements, however, were
28 meager compared to the losses sustained.⁵

1 The Claims Act provided a limitations period of 18 months
2 and limited claims to \$2,500. The Act excluded claims:

3 1) by persons who, after December 7, 1947, voluntarily or
4 involuntarily departed for Japan;

5 2) by any alien who, on December 7, 1941, was not residing
6 in the United States;

7 3) for damage or losses arising out of action taken by any
8 Federal agency pursuant to the Revised Statutes applicable to
9 "alien enemies" or pursuant to the "Trading with Enemies Act"
10 (50 U.S.C.A. Sec. 9);

11 4) for damage or loss to any property title which is now
12 in the U.S. pursuant to the "Trading with Enemies Act"
13 (supra);

14 5) for damage or loss on account of personal injury,
15 personal inconvenience, physical hardship, or mental
16 suffering; and

17 6) for loss of anticipated profits or loss of anticipated
18 earnings.

19
20 By January 3, 1950, the last day to file claims, only
21 23,689 claims had been received from more than 120,000
22 potential claimants. Of those 23,689, only 211 were processed
23 in 1950.⁶

24
25 A major problem of filing claims was providing
26 documentation or corroborative evidence of the losses that had
27 been lost or abandoned in the haste of the exclusion orders.

28

1 Consequently, adjudication was both lengthy and costly.
2 Moreover, many claimants compromised their claims solely to
3 expedite sorely needed relief. Finally, since all losses were
4 calculated at the pre-war 1942 values, the inflated post-war
5 claims did not fully compensate for actual losses.

6
7 In 1951, the Claims Act was amended to shift the emphasis
8 to compromise settlements. 50 U.S.C. Sec. 1981 (1976).
9 "Compromise" implies settlement for less than what is
10 rightfully deserved. Moreover, the Act was earlier amended to
11 limit the amount which the Attorney General was authorized to
12 appropriate to three-fourths of the amount claimed. 65 Stat.
13 L. 192. Here, the claimant was automatically forced to settle
14 for 75% or less.

15
16 Because of the need for immediate funds to provide for
17 their families, the possibility of imminent death for the
18 elder Japanese, and the diminishing value of money due to
19 inflation, many were forced to compromise their claims rather
20 than wait for a lengthy adjudication.

21
22 Some Issei claimants died while waiting for their
23 claims to be processed; one 92 year old accepted a
24 settlement of \$27,000 for a \$75,000 claim because he
25 was sure he would not live long enough to see the
26 matter through the courts.⁷

1 By the time the evacuation claims program finally drew to
2 a close in 1965, glaring inadequacies were apparent. The most
3 notable were:

4 1) All the claimants who recovered under the Evacuation
5 Claims Act received compensation at the pre-war 1942 rate.
6 Claimants whose adjudicated suits were based on real property
7 had their losses determined at the post-war rate as of the
8 Evacuation Claims Act of 1948;

9 2) Claimants were substantially under-compensated because
10 the government records did not reflect their lost property,
11 and the list of compensable items was limited. Insurance
12 policies and equity on land were lost because taxes or
13 payments could not be made on "camp" income of \$12.00 to
14 \$19.00 per month.⁸

15 3) A substantial number of claimants whose actual property
16 losses were in excess of \$2,500 settled rather than waited for
17 further congressional appropriations;

18 4) It is questionable whether "reasonable notice" was
19 "adequate notice" to afford everyone, especially those who
20 were non-English speaking, an opportunity to file a claim;

21 5) With questionable notice provisions, the 18 month
22 statute of limitations period was inadequately short. Of the
23 potentially 120,000 persons who were eligible to file, less
24 than one-quarter had filed a claim by the January 3, 1950
25 deadline;

26 6) Many potential claimants failed to file because the
27 original Claims Act did not provide recovery to non-profit
28 corporations, corporations or so-called "alien enemies." They

1 were eventually allowed to recover under the 1956 amendment,
2 if they filed a timely claim;

3 7) Many losses were directly related to Alien Land Laws:

4 a. While future profits were not recoverable under
5 the Act, losses pertaining to leaseholds were. Sonoda v. U.S.,
6 supra. Many claimants were tenant farmers who leased land in
7 the name of another adult citizen or a Hawaii national and
8 merely paid rent because of laws prohibiting land ownership by
9 Japanese. As a result, they were not able to claim losses
10 against the land;

11 b. In 1942 the Attorney General of California filed
12 twenty escheat actions to seize property where Issei had
13 purchased property in the name of their Nisei, citizen
14 children.⁹ This was the beginning of a wave of challenges to
15 ownership of property by U.S. citizens of Japanese ancestry,
16 some of which were successful. These cases had to be fought
17 in absentia;

18 c. Some property (e.g. buildings or business
19 equipment) owned by Issei was frozen or seized under the
20 Trading with Enemy Act, supra. Recovery was permitted under
21 the Alien Property Damage Claim Act, 50 U.S.C.A. Sec. 2045, to
22 the extent of \$1,000. However, settlements were final and thus
23 precluded recovery under the Claims Act.

24 8) One loss which was never compensated was loss of wages
25 by those incarcerated and the loss of employment opportunity
26 by the Nisei, a price for which they are still paying;

27 9) But, by far, the greatest loss was to the family unit
28 and the community. The exclusion and incarceration fractured

1 all the educational, social, religious, and political
2 organizations fostered by the Issei. The "camp" experience
3 disrupted the family unit and splintered loyalty. The
4 restrictive regulations prohibited the natural expression of
5 Japanese customs. Entire Asian communities were destroyed and
6 their residents displaced. These losses are among those that
7 cannot be measured in dollars as damages.

8
9 In essence, the government settled for approximately
10 one-third of the amount of losses for which claims were
11 actually filed. Taking into account the total amount of
12 losses estimated by the Federal Reserve Bank of San Francisco,
13 the government settled for about one-tenth of the total
14 property losses sustained by the evacuees.¹⁰

15
16 The need for congressional action is demonstrated by the
17 inadequacy of the Claims Act and the numerous unacknowledged
18 injuries and losses giving rise to the potential causes of
19 action for just restitution. Action in the form of direct
20 appropriations, granting adequate compensation to remedy the
21 limitations and failures of the Claims Act, and enabling
22 legislation, allowing for the waiver of procedural barriers to
23 thereby permit adjudication of claims for damages is demanded
24 by the urgent need for justice.

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1 II. CONGRESS HAS THE AUTHORITY TO LEGISLATE DIRECT
2 APPROPRIATIONS TO COMPENSATE THOSE EXCLUDED AND
3 INCARCERATED.

4
5 Article I, Section 8 of the Constitution grants to
6 Congress the express authority to, inter alia, collect taxes
7 and provide for the general welfare of the United States. The
8 taxing and spending power is an independent source of
9 Congressional authority, separate and distinct from the other
10 enumerated powers. U.S. v. Butler, 297 U.S. 1 (1936). The
11 federal government has the "authority to resort to all means
12 for the exercise of a granted power which are appropriate and
13 plainly adapted to the permitted end." U.S. v. Darby, 312 U.S.
14 124 (1941). The general welfare clause is a grant of power
15 which is expanded by the necessary and proper clause of the
16 Constitution; it is a substantive Congressional authority, not
17 a limitation on Congressional power. Buckley v. Valeo, 424
18 U.S. 1 (1976).

19
20 A. TO PROVIDE FOR THE GENERAL WELFARE

21
22 The scope of the power to spend for the general welfare is
23 considered solely within the discretion of Congress and has
24 been consistently affirmed by the Supreme Court. Justice
25 Cardozo, in validating the Old Age Assistance provisions of
26 the Social Security Act in Helvering v. Davis, 301 U.S. 619,
27 640 (1937), stated that such discretion was within the purview
28

1 of Congress, not the courts, "unless the choice is clearly
2 wrong, a display of arbitrary power, not an exercise of
3 judgment."
4

5 Therefore, legislative expenditures will not be
6 invalidated provided a reasonable relation to the general
7 welfare exists. The courts have refrained from infringing
8 upon the discretionary power of Congress in this area.
9 "Congress has the power to appropriate money to promote the
10 general welfare, and its determination that certain projects
11 are in furtherance of the general welfare is decisive, unless
12 arbitrarily made and clearly wrong." U.S. v. Boyle, 52 F.Supp.
13 906 (1943).
14

15 The expansiveness of appropriations made to promote the
16 general welfare is indicated by the diversity of programs
17 enacted yearly by Congress. Expenditures for bilingual
18 education programs, social welfare legislation affording
19 financial assistance to the aged, blind and disabled,
20 community development programs and environmental protection
21 measures have been enacted. Appropriations have been made to
22 benefit the injured in war and in natural catastrophes.
23 Congress has consistently made appropriations to assist the
24 more disadvantaged and deserving segments of society in the
25 promotion of the general welfare as a whole.
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1 B. TO PAY THE DEBTS OF THE UNITED STATES

2
3 Article I further grants Congress the power to pay the
4 debts of the United States. The term "debts" has been
5 defined to include more than written or legal obligations. The
6 court in United States v. Realty Company, 163 U.S. 427 (1896),
7 found that debts within the meaning of Article I, Section 8,
8 included "those debts or claims which rest upon a merely
9 equitable or honorary obligation, and which would not be
10 recoverable in a court of law." Id at 440.

11
12 Historically it has been the practice of Congress to make
13 payments to persons based upon moral obligation and justice,
14 not merely upon a legal claim. See Garber v. United States 46
15 Ct.C. 503 (1911); Emerson v. Hall, 38 U.S. 409 (1839);
16 United States v. Price, 116 U.S. 43 (1885); Williams v.
17 Heard, 140 U.S. 529 (1891). This doctrine was recently
18 reaffirmed in the Supreme Court decision of United States v.
19 Sioux Nation of Indians, ___U.S.___ (1980), 100 S.Ct. 2716,
20 which held that Congress, under its broad authority to define
21 and pay the debts of the United States, may recognize its
22 obligation to pay a moral debt by direct appropriations.

23
24 A review of the injuries, denial of rights, and losses of
25 those incarcerated and excluded, as discussed above,
26 establishes a substantial debt "payable by the United States
27
28

1 upon considerations of justice and honor," U.S. v. Realty Co.,
2 supra at 444, "founded upon equitable and moral
3 considerations." Id. The payment of such debts is valid even
4 without reference to the validity or invalidity of the
5 exclusion and incarceration. Direct appropriations are right
6 irrespective of strictly legal claims.

7
8 Under the broad powers granted Congress by Article I,
9 Section 8, various remedies are available to redress the moral
10 and equitable debt still unpaid to Japanese Americans. Since
11 the adoption of the Constitution, Congress has recognized
12 moral obligations to individuals and groups who have received
13 unjust and dishonorable treatment at the hands of the
14 government. Not only have payments been directly made to
15 injured individuals, as discussed in the cases cited above,
16 but Congress has fashioned a variety of additional remedies.

17
18 For example, the Indian Claims Commission Act was enacted
19 to provide assistance, rehabilitation, and a forum for
20 redressing the grievances of the Indian nations. Title 25
21 U.S.C. was passed to provide forms of assistance for community
22 development and relief for the various tribes. Under Title 25
23 U.S.C. 639 (1950), federal increases in the Social Security
24 benefits for members of the Hopi and Navajo tribes are
25 specifically provided for. The federal government
26 contributions to tribal members on aid to dependent children,
27 the aged, and needy blind provisions of the Social Security
28 Act were increased. An additional contribution equal to 80%

1 of the state contribution was allocated to the tribal members,
2 increasing the federal contribution to over 90%.

3 Congress enacted the "Alaska Native Claims Act", 43 U.S.C.
4 1603 (1971), to compensate natives of Alaska for disputed land
5 claims. Congress found an immediate need for a fair and just
6 settlement of all claims by natives, based on aboriginal land
7 claims, without litigation. Payments were made as
8 compensation for the loss of native land.

9
10 Further, Congress has implemented much legislation to
11 remedy past racial discrimination and unemployment. Such
12 legislation as the Public Works Employment Act, 42 U.S.C. 6701
13 (1977), specifically benefits minorities by requiring that at
14 least 10 per cent of each grant for any local public works
15 project be expended for minority businesses. Realizing its
16 responsibility to remedy the traditional racial discrimination
17 in the awarding of government contracts, Congress, in effect,
18 appropriated a small percentage of contracts to redress
19 injustice.

20
21 Similar claims acts and legislation more comprehensive and
22 effectual than the American Japanese Claims Act are required
23 to not only compensate the entire spectrum of injuries and
24 losses of those incarcerated in a just and adequate manner,
25 but also to provide additional remedies through existing
26 administrative agencies. As exemplified by the foregoing
27 discussion of legislation, such additional provisions could
28 take the form of increased social security benefits,

1 disability benefits, and tax benefits.

2 Funds for community development of the Asian communities
3 which were destroyed and whose residents were permanently
4 displaced can be appropriated to provide financial support for
5 community services, particularly for the elderly and
6 disadvantaged. Many within the communities were never able to
7 fully recover financially or psychologically. As low income
8 housing assistance to local and state governments has been
9 appropriated by Congress in the past, low income housing
10 projects or assistance in the form of rental subsidies can be
11 provided for the Asian communities through federal
12 expenditures. Support of community and cultural arts through
13 federal endowments and the support of recreational and
14 cultural centers are also valuable projects.

15
16 The need to prevent such future miscarriages of justice
17 requires the continued education of the public to this tragic
18 segment of United States history. Congress routinely
19 appropriates grants-in-aid to state and local governments for
20 educational purposes. The discontinued Ethnic Heritage
21 Program, Public Law 92-318, Title V, Section 504(a) (1972), is
22 a specific example of Congressional recognition of the
23 benefits of programs which promote cultural awareness in
24 schools. The Ethnic Heritage Program provided funding to
25 persons and organizations to assist in the development of
26 curriculum materials relating to ethnic cultures and for the
27 dissemination of such materials to secondary and elementary
28 schools and institutions of higher education. Congress has

1 the authority to develop similar programs for the publication
2 and dissemination of historical information on the exclusion
3 and incarceration. Such preventative measures are a vital
4 part of redressing the wrongs committed against those persons
5 of Japanese ancestry and other peoples who suffered
6 displacement and incarceration at the hands of the government
7 during World War II.

8
9 Finally, note should be taken of the Federal Compensation
10 Law¹¹ of the Federal Republic of Germany, designed to
11 compensate victims of Nazi persecution. That law provided
12 monetary compensation to individuals who had been oppressed by
13 virtue of political opposition to the National Socialist
14 Regime, race, religion, or ideology; for loss of life, limb
15 and health; deprivation of liberty, loss of property and
16 possessions; and injury to vocation and professional
17 advancement. Survivors of those persecuted and those closely
18 related in blood were also entitled to bring claims.

19
20 The German compensation law, specifically established to
21 remedy a moral debt, provides a model of certain provisions
22 which are required for any reparations legislation for the
23 Japanese in the United States. Much of the compensation under
24 the German law was in the form of annuities and other deferred
25 payments utilizing pre-existing social welfare programs.
26 Costs to the government can then be amortized over a long
27 period of time. But of greatest importance is the broad range
28 of injuries entitled to compensation under the German law.

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In summary, Congress clearly has the authority to legislate direct appropriations not only as providing for the general welfare, but to redress the moral debt incurred by the actions of the government against the Japanese people during World War II. Numerous means and models exist for monetary appropriations and benefits to injured individuals. The moral obligation mandates Congressional action.

1 III. CONGRESS HAS THE AUTHORITY TO ENACT ENABLING LEGISLATION
2 WHICH WAIVES PROCEDURAL DEFENSES, CONFERS JURISDICTION, AND
3 IMPOSES LIABILITY IN ORDER THAT CLAIMS OTHERWISE BARRED CAN
4 BE ADJUDICATED.

5
6 Enabling legislation is required to allow the adjudication
7 of claims heretofore barred by procedural barriers. Causes of
8 action in both traditional and constitutional torts, as
9 described above, would then be litigated, allowing the
10 opportunity for recovery for injuries never before addressed.

11
12 In addition, legislation can assume liability for injuries,
13 creating an obligation on the part of the government to
14 compensate valid claims. Such enabling legislation would
15 provide for compensation upon the adjudication of valid claims.

16
17 A. PROCEDURAL BARRIERS TO THE BRINGING OF CLAIMS BY THOSE
18 EXCLUDED AND INTERNED

19
20 There are four major procedural barriers in the case of the
21 Japanese-Americans. First is the res judicata effect of the
22 settlements from the Claims Act and the Supreme Court cases
23 which are used to uphold the validity of the exclusion and
24 internment; next is the statute of limitations; sovereign
25 immunity; and last is standing to sue.

1 The Evacuation Claims Act provides that all settlements
2 would have the effect of final judgments.

3 The payment of an award shall be final and conclusive
4 for all purposes, notwithstanding any other provision
5 of law to the contrary, and shall be a full discharge
6 of the United States and all of its officers, agents,
7 servants, and employees with respect to all claims
8 arising out of the same subject matter. 50 U.S.C. Sec.
9 1981 (1976).

10 A waiver of the res judicata effect of the settlements from
11 the Evacuation Claims Act would allow relitigation as to the
12 adequacy of the settlements.

13
14 A waiver of the res judicata effect of the Supreme Court
15 cases of Korematsu v. United States, 323 U.S. 214 (1944),
16 Hirabayashi v. United States, 320 U.S. 81 (1943), and Ex Parte
17 Endo, 323 U.S. 283 (1944), used to uphold the validity of the
18 exclusion and incarceration would be necessary for litigation
19 involving constitutional torts.

20
21 The 18 month statute of limitations period of the Claims Act
22 was inadequate:

23 The Attorney General shall receive claims for a period
24 of eighteen months from the date of enactment of this
25 Act (July 2, 1948). All claims not presented within
26 that time shall be forever barred. 50 U.S.C. Sec. 1981
27 (1976).

28

1 Many claims, for a variety of reasons as discussed earlier, were
2 never filed.

3
4 In addition, a waiver of the statute of limitations would
5 also be necessary to allow litigation of tort claims.

6
7 Under the doctrine of sovereign immunity, no action may
8 generally be commenced against the United States without its
9 permission. U.S. v. Shaw, 309 U.S. 495 (1940); Nehf v. U.S., 278
10 F.Supp. 444 (D.Ill. 1967).

11
12 Although specific legislation, such as the Federal Torts
13 Claims Act, 25 U.S.C. Sections 2671 et seq., allows certain
14 claims against agents of the government acting in an official
15 capacity, some claims may require a waiver of such immunity.

16
17 As to the issue of standing, in the intervening 36 years
18 since the exclusion and incarceration, many of the incarcerated
19 have died.¹² Thus, even if Congress waived procedural
20 barriers in the case of Japanese Americans, many just claims
21 would never be filed. One possibility to overcome this
22 difficulty is to permit heirs or other non-incarcerated Japanese
23 Americans to file claims in a representative capacity.

24
25 In addition, individuals who were not incarcerated, but
26 were excluded or "voluntarily relocated," and directly injured
27 by Executive Order 9066 will be confronted with a standing
28 problem. Additionally, third, fourth, and fifth generation

1 Japanese Americans who have been directly affected by Executive
2 Order 9066 will be confronted with a standing problem.

3 Requirements to establish standing have caused significant
4 problems where plaintiffs seek to enforce rights or redress
5 grievances of third parties since the litigant must have been
6 personally injured. In order to alleviate injustice to
7 plaintiffs as a result of technical rules of standing, the
8 courts have carved out a number of exceptions to this "third
9 party rule." Barrows v. Jackson, 346 U.S. 249 (1953), F.C.C. v.
10 Sanders Brothers Radio Station, 309 U.S. 470 (1940). The
11 exceptions may be analogized to the positions of the family and
12 friends of incarcerated, however, current case law has not
13 developed sufficiently that the standing issue can be resolved
14 without time consuming and extensive litigation.

15
16 Rather than rely on judicial relief, legislation creating
17 standing for the heirs of the incarcerated and those who were
18 excluded or "voluntarily relocated" and other third, fourth, and
19 fifth generation Japanese Americans directly affected by
20 Executive Order 9066 is a more promising avenue of overcoming
21 the standing problem. All jurisdictions statutorily provide
22 that causes of action for all damage to tangible property, real
23 or personal, shall survive the death of both parties. Most of
24 them have gone further. About half of the states permit
25 personal injury actions to survive on the theory that tort
26 causes of action and liabilities are as fairly a part of the
27 estate of either party as real or personal property.

28

1 Although the issue of standing is complex, the Supreme Court
2 "has indicated that it will be receptive to grants of
3 standing by Congress in situations in which, absent a
4 statute, standing would not be found. Congress cannot
5 exceed Article III limitations on standing, but those
6 limitations are not likely to be viewed restrictively
7 in the face of a Congressional grant. Thus...the way
8 is open to Congress to provide standing in what it
9 regards as appropriate cases."¹³

10
11 B. CONGRESS MAY RECOGNIZE ITS OBLIGATION TO PAY A MORAL DEBT

12
13 The nation...owes a 'debt' to an individual when his
14 claim grows out of general principles of right and
15 justice; when in other words, it is based upon
16 considerations of a moral or merely honorary nature,
17 such as are binding on the conscience or the honor of
18 an individual, although the debt could obtain no
19 recognition in a court of law. The power of Congress
20 extends at least as far as the recognition and payment
21 of claims against the government which are thus
22 founded. (Emphasis added) United States v. Realty
23 Company, 163 U.S. 427, 440 (1896).

24
25 The scope of Congress' power to pay the Nation's debts seems
26 first to have been construed by the United States Supreme Court
27
28

1 in United States v. Realty Company, supra. Congress in its
2 plenary power can recognize an equitable, a moral claim or any
3 claim on the conscience of the nation.

4 This concept of a moral debt was recently upheld by the
5 United States Supreme Court in United States v. Sioux Nation of
6 Indians, ___U.S.__(1980); 100 S.Ct. 2716. In this case, an
7 1877 Act gave subsistence rations to the Sioux Nation in
8 exchange for the Black Hills in South Dakota. The Sioux Nation
9 brought suit claiming a fifth amendment taking. A 1942 Court of
10 Claims' decision held that there had been no taking. Sioux
11 Tribe v. U.S., 97 Ct.C. 613 (1942). A subsequent Congressional
12 Act, in 1978, waived the res judicata effect of this
13 decision, thereby providing an opportunity for the issue to
14 be litigated de novo. On relitigation, the Court of Claims
15 found a fifth amendment taking. It awarded \$17.5 million, plus
16 \$85 million in interest to the Sioux Nation. Sioux Nation of
17 Indians v. U.S. 601 F.2d 1157 (1979). In upholding this
18 decision and the 1978 Act, the Court reaffirmed Congress'
19 authority to enact legislation when a moral debt is found:

20 ...Congress may recognize its obligation to pay a moral
21 debt not only by direct appropriation, but also by
22 waiving an otherwise valid defense to a legal claim
23 against the United States. U.S. v. Sioux Nation of
24 Indians, supra at 2731.

25 Congress must decide for itself on a case-by-case basis
26 whether the facts exist which bring it within the description of
27 the class of moral claims which Congress can and ought to
28 recognize. Garrett v. U.S., 70 Ct.C. 304 at 314 (1930).

1 Congress has enacted legislation, in recognition of its
2 obligation to pay a moral debt, allowing claims to be made and
3 adjudication in the courts in numerous cases and situations
4 throughout history.

5
6 Past Congressional jurisdictional acts can be placed in one
7 of two general categories. One type of act is designed merely
8 to waive some affirmative defense which the United States could
9 presumably otherwise effectively plead.

10
11 The other type of act additionally embraces an admission of
12 liability by the United States and leaves a greater or lesser
13 number of the factual and legal questions relating to damages
14 for the court.

15
16 Congress has enacted legislation, based upon a moral debt,
17 allowing Native Americans to make claims and have them
18 adjudicated on the issue of taking by the United States
19 government of Native American property without just
20 compensation. United States v. Sioux Nation of Indians, ___ U.S. ___
21 (1980), 100 S.Ct. 2716; United States v. Alcea Band of
22 Tillamooks, 329 U.S. 40 (1946); Indians of California v. United
23 States, U.S. 98 Ct.C. 583 (1942); United States v. Klamath
24 Indians 304 U.S. 119 (1938); Cherokee Nation v. United States,
25 270 U.S. 476 (1926).

26
27 In United States v. Klamath Indians, supra, Congress simply
28 waived the bar of a previous release and settlement of claims and

1 permitted a decision on the merits. In Cherokee Nation v. United
2 States, supra, a previous bar of a prior court judgment award to
3 the Cherokee Nation was lifted and they were allowed to
4 relitigate on the merits but without the creation of any
5 governmental liability. The subsequent denial of the Cherokee
6 Nation's claim supports the argument that Congress should create
7 liability for the wrong in order to prevent such denials or
8 lengthy litigation.

9
10 The Captured and Abandoned Property Act of 1863 (12 Stat.
11 L., 820) arising out of the civil war, afforded a cause of
12 action to non-combatant property owners for property taken by
13 the government upon proof that they had "never given any aid or
14 comfort to the present rebellion."

15
16 Enabling legislation can not only waive procedural barriers,
17 but can also admit liability for injuries. Cases have
18 consistently held that Congress can create a new obligation on
19 the part of the government to pay a claim where no obligation
20 previously existed.

21
22 Congress has enacted legislation allowing recovery of
23 certain contract claims against the United States which had not
24 previously been given legal recognition by the courts. A moral
25 obligation was found by the legislature in enacting the Special
26 Act of February 27, 1942 (56 Stat. L. 1122). Claimant was
27 contracted by the government to perform certain construction
28 work for which he was not compensated. He brought suit in the

1 Court of Claims and was awarded recovery on some of the claims.
2 The Act provided a waiver of the previous, partial Court of
3 Claims award and the statute of limitations. Congress here not
4 only created liability but went further and established
5 guidelines for the determination of the amount of judgment.
6 Pope v. United States, 323 U.S. 1 (1944). See also Nock v.
7 United States, 2 Ct.C. 451 (1866).

8
9 In Indians of California v. United States supra,
10 Congress recognized an equitable claim based on a moral debt
11 and authorized legislation allowing a claim to be litigated in
12 court. Congress, however, went further and created liability on
13 the part of the government to award judgment according to a
14 particular formula.

15
16 Congress enacted a special act conferring jurisdiction on
17 the Court of Claims to entertain and enter judgment on claims by
18 a farmer who had suffered damages due to the erroneous action of
19 the Food and Drug Administration. Mizokami v. U.S., 188 Ct.Cl
20 736 (1969). Shipments of spinach had mistakenly been condemned
21 based upon pesticide contamination. Congress waived the defense
22 of sovereign immunity. (Misrepresentation, the cause of action
23 in this case, is an exception to the waiver of sovereign
24 immunity included in the Federal Torts Claims Act (28 U.S.C.
25 Sec. 2671 et seq.), which necessitates Congress granting a
26 special waiver.) Additionally, Congress again went one step
27 further than simply waiving technical defenses and conceded
28 liability for the actions of the FDA.

1 Congressional jurisdictional acts which embrace an admission
2 of liability by the U.S. and leave for the Court a greater or
3 lesser number of the factual and legal questions have been the
4 most successful insofar as allowing recovery. By simply waiving
5 technical defenses, individuals must additionally prove a wrong
6 was committed. Even if a cause of action is jurisdictionally
7 allowed, litigation will be lengthy and uncertain due to the
8 possible defenses which could be raised, for example, in the
9 case of the exclusion and incarceration, the war powers
10 defense. Because of said uncertainty, the intent to remedy and
11 compensate those excluded and incarcerated for injuries might
12 not be realized if Congress does not enact legislation embracing
13 an admission of liability by the government and its agents.

14 The reports of the Court are replete with cases where
15 Congress, impressed with the equitable justice of claims which
16 could be or have previously been rejected by the Court on legal
17 grounds, has by special act, waived defenses that the government
18 might raise to prevent recovery, conferred jurisdiction on the
19 court to adjudicate the case, and created liability.

20
21 C. A MORAL DEBT IS OWED THOSE EXCLUDED AND INCARCERATED BASED
22 UPON INADEQUATE COMPENSATION AND CONSTITUTIONAL VIOLATIONS
23

24 The Japanese American claim of a moral debt is based upon
25 both unjust compensation and constitutional violations.

26 Unjust compensation has occurred not only in the 5th
27 Amendment, constitutional sense, but also in an equitable sense.

28

1 In the Sioux Nation case, a taking without just compensation
2 created a moral debt. An analogy may be drawn with the Japanese
3 American incarcerated and those excluded during and after World
4 War II. In the case of those incarcerated and excluded, a
5 taking occurred through government regulations. An inadequately
6 compensated loss of property created a similar moral debt. The
7 Japanese American claim for just compensation, like that of the
8 Sioux, grows out of "principles of right and justice."

9
10 There are many parallels between the Japanese Americans'
11 claim of a moral debt based on a fifth amendment right to just
12 compensation and that of the Sioux Nation. Under the
13 Constitution, the fifth amendment provides that private property
14 shall not be taken for public use without just compensation.
15 Literally, the fifth amendment's "taking" clause requires
16 compensation only if the property is acquired by the government
17 for public use. Such actions usually take the form of formal
18 condemnation proceedings. These acquisition type of takings
19 have traditionally been the most common form of eminent
20 domain.¹⁵

21
22 The "taking" clause has been extended to include government
23 action, absent actual acquisition of property, which causes a
24 direct and substantial interference with its value or which
25 impairs its use.¹⁶ Physical appropriation, therefore, is no
26 longer required to find a taking.

1 The remedy in most non-acquisition cases has been an action
2 in inverse condemnation.¹⁷ Inverse condemnation, as opposed
3 to formal condemnation, provides a property owner with a cause
4 of action for just compensation where there has been a taking
5 absent formal condemnation proceedings.¹⁸ A classic example
6 of an inverse condemnation situation is one where the government
7 builds a dam which causes the high water level of the river to
8 rise, flooding surrounding land and destroying the agricultural
9 value of the property. U.S. v. Lynah, 188 U.S. 445 (1903). In
10 such cases, the landowner has a cause of action for just
11 compensation.

12
13 Justice Oliver Wendell Holmes' opinion in Pennsylvania Coal
14 v. Mahon, 260 U.S. 393 (1922), established a link between the
15 government's police power and its power of eminent domain. When
16 a regulation, as a result of its police power, goes too far, it
17 becomes a taking in eminent domain. Whether the taking is a
18 compensable one is a question which the courts have determined
19 on an ad hoc basis.

20
21 Although it was known that the exclusion and incarceration
22 would cause property loss, no formal condemnation proceedings
23 were instituted at the time. Instead, the federal agencies, in
24 charge of protection of this property, openly encouraged
25 voluntary liquidation of assets. Because a government
26 regulation caused the loss, the Japanese American incarcerated
27 and those excluded have a cause of action in inverse
28 condemnation.

1 Basic to a consideration of the question of inverse
2 condemnation is the concept that an owner of property
3 is constitutionally protected against any taking of,
4 interference with, impact upon, or damage to his right
5 to use, possess or enjoy such property or his freedom
6 to dispose of the property. These constitutional
7 provisions are self-executing, constitute a waiver of
8 sovereign immunity and, thus provide a basis for
9 bringing an action by the affected owner, to recover
10 for his loss.¹⁹

11 Those incarcerated and excluded suffered losses during the
12 war through inverse condemnation. But, although the Claims Act
13 was a public declaration that the evacuation directly caused the
14 loss of property, it provided inadequate and unjust compensation
15 for losses as described previously.

16
17 The defense of war powers²⁰ must be addressed in that the
18 primary defense against a claim for just compensation is the
19 government's assertion that under its war powers, compensation
20 is not required. Article I, Section 8 of the United States
21 Constitution. The war power encompasses the government's power
22 to, directly or indirectly, appropriate or destroy private
23 property during war. This right, to take or destroy private
24 property during war, rests either on the power of destruction
25 from necessity or on the power of eminent domain.²¹ The
26 former does not require compensation to the property owner. The
27 valid exercise of eminent domain, however, mandates just
28 compensation.²²

1 To determine whether a taking in time of war falls under
2 eminent domain or whether it stems from the power of destruction
3 from necessity, several factors are considered: (1) the status
4 of the property owner; (2) the location of the property; (3)
5 immediate necessity; and (4) the degree to which the courts are
6 willing to compensate property loss during war.²³

7
8 The first determining factor is the status of the owner.
9 Taking property of an enemy alien or of a neutral because of
10 military necessity does not require compensation.²⁴ War does
11 not, however, justify the government's taking of property
12 belonging to its citizens without compensation.²⁵ The status
13 of a Japanese American, a United States citizen of Japanese
14 ancestry, was not that of an enemy alien nor that of a neutral.
15 War does not a fortiori justify the taking of property belonging
16 to its citizens without compensation.

17
18 The location of the property also determines whether
19 compensation is required. Property in enemy territory, owned by
20 alien enemies, neutrals or citizens, is subject to appropriation
21 or destruction without compensation.²⁶ Likewise, property
22 taken or destroyed which is located in the area of conflict
23 itself gives no legal right to compensation.²⁷ In the case of
24 the incarcerated and those excluded, the properties in question
25 were not located in enemy territory nor were they located at the
26 situs of the actual battle.

1 Property may be destroyed without compensation if the
2 destruction arises from the need to take immediate action.²⁸
3 Destruction from necessity arises where time-consuming
4 deliberation is impossible. The immediate destruction of
5 surrounding buildings to stop a spreading fire is a prime
6 example. However, when

7 it is sought by statute to add to the right or to
8 create the right to destroy in case of emergency rather
9 than necessity, such an attempt constitutes an exercise
10 of eminent domain and compensation must be made.
11 (Emphasis added).²⁹

12 The exclusion and incarceration orders are appropriate
13 examples of government acts which attempt "to add to the right
14 or to create the right to destroy in cases of emergency rather
15 than necessity..."³⁰ The decision to exclude and incarcerate
16 persons of Japanese ancestry was not an immediate result of the
17 attack on Pearl Harbor. It was not the result of an attack on
18 the West Coast. At best the exclusion and incarceration were
19 emergency measures. At worst the action was based upon racial
20 hatred.

21
22 In emergency situations, protective measures may be valid.
23 However, if they cause a loss, compensation is required.
24

25 Finally, the extent to which the courts are willing to find
26 a compensable taking must be considered. During emergency
27 situations such as war, the courts are generally reluctant to
28 find a compensable taking.³¹ A taking, nevertheless, can

1 still be measured by degree. As Justice Holmes stated, when a
2 regulation goes too far, it becomes a compensable taking.
3 Pennsylvania Coal v. Mahon, supra. "Regulating" the lives of
4 over 120,000 Japanese living on the West Coast went too far.
5 The losses which resulted from the exclusion and incarceration
6 should be viewed, therefore, as compensable losses.

7
8 For these reasons, the government's power to destroy or to
9 cause the loss of property in the case of the Japanese Americans
10 stemmed from its power of eminent domain. Even during war, the
11 Constitutional rights of American citizens are not totally
12 suspended. Ex Parte Milligan, 4 Wall. (71 U.S.) 2 (1866). Just
13 compensation, therefore is required under the fifth amendment.

14
15 In an equitable sense, even without regard to the validity
16 or invalidity of the government action, a moral debt is
17 established by the unjust compensation of the Claims Act.

18
19 As described above, the Claims Act strictly limited the
20 losses compensable. Not only was a small fraction of the losses
21 compensated, but only a small fraction of the types of losses
22 was allowed. No consideration was made for the extensive nature
23 of the injuries suffered by the Japanese. No compensation has
24 ever been made for personal injuries, psychological injury,
25 destruction of the ethnic communities, cultural, family, and
26 religious damages, and constitutional violations.

1 The lack of any redress for the broad types of injuries and
2 violations of rights, heretofore not compensable, clearly
3 creates a moral debt requiring just compensation.

4 5 CONCLUSION

6
7 Historical evidence reveals that the exclusion and
8 incarceration of persons of Japanese ancestry by the government
9 during World War II resulted in millions of dollars of real and
10 personal property losses for which compensation has never
11 adequately been made. Further, the American Japanese Claims
12 Act, the only remedial measure provided, strictly limited
13 compensation to property loss. No reparations have ever been
14 made for the multitude of personal, family, psychological and
15 other injuries which were suffered. Testimony submitted to this
16 Commission during the upcoming hearings will clearly document
17 such injuries.

18
19 Congressional action is both proper and essential to bring
20 about long-awaited redress and reparations. Legislation in the
21 form of direct appropriations, fulfilling the intent of adequate
22 compensation for injuries suffered by those incarcerated, and
23 enabling legislation, allowing the litigation of meritorious
24 claims is mandated by the principles of right and justice.
25
26
27
28

1 We respectfully urge the Commission and Congress to swiftly
2 grasp this opportunity to acknowledge a wrong, a moral debt by
3 providing just and adequate reparations to individuals of
4 Japanese ancestry. With time, the opportunity for the Issei to
5 benefit from Congressional action is coming to an end. The
6 injustice would truly be compounded if those who had struggled
7 and suffered the longest were no longer living to see just
8 redress and reparations.

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Respectfully submitted,

Subcommittee on Japanese American
Redress and Reparations,
Legal Services Section of the
State Bar of California

Dated: July 16, 1981

FOOTNOTES

1. Letter from the Secretary of the Interior, J. A. Krug, to Speaker of the House of Representatives, Hon. Joseph W. Martin, Jr. (Mar. 17, 1949), reprinted in 1948 U.S. Code Cong. & Ad. News 2297.

2. R. Daniels, Concentration Camps U.S.A. 168 (1971).

3. See Brief of Bay Area Attorneys for Redress.

4. Fourth Interim Report of the Select Committee Investigating National Defense Migration, House of Representative... Findings and Recommendations on Evacuation of Enemy Aliens and Others from Prohibited Military Zones, H.R. Rep. No. 2124, 77th Cong., 2d Sess. at 13-15.

5. Daniels, supra.

6. Frank Chuman, The Bamboo People (1976).

7. Daniels, supra.

8. U.S. Code Cong. Serv., 77th Cong., 2d Sess. 2299.

9. Chuman, supra, at 201.

10. Daniels, supra.

11. Bundesentschadigungsgesetz.

12. See W.R.A., The Evacuated People, A Quantitative Description, for a quantitative analysis of the age groups of evacuees in the internment camps.

13. C.A. Wright, Handbook of the Law of Federal Courts 49-50 (1976).

14. Indian Claims Commission Act, Pub. L. No. 95-243, 95 Stat. 153 (1978) (amending §20(b) of the Indian Claims Commission Act, U.S.C. §70s(b) (1976 ed., Supp. II)).

15. J.L. Sackman, Nichols' The Law of Eminent Domain §8.1 (rev. 3d ed. 1979).

16. Id.

17. Id.

18. Id.

19. Id.

20. See Brief of Bay Attorneys for Redress on Selected Constitutional Issues for more detailed discussion.

21. Sackman, supra.

22. Id.

23. Id.

24. Id.

25. Id.

26. Id.

27. Id.

28. Id.

29. Id.

30. Id.

31. Congressional Research Service Library of Congress,
The Constitution of the United States of America Analysis
and Interpretation, 1181 (1973).