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Sasha Hobri

BEFORE THE COMMISSION ON WAR TIME
RELOCATION AND INTERNMENT OF CIVILIANS

BRIEF BY BAY AREA ATTORNEYS FOR REDRESS
ON SELECTED CONSTITUTIONAL ISSUES

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1 The Bay Area Attorneys for Redress, an organization of
2 attorneys and legal workers in the San Francisco Bay area,
3 respectfully submits the following brief to the Commission on
4 War Time Relocation and Internment of Civilians on behalf of the
5 organizations and individuals listed in Appendix I.

6 Although we are focusing only on legal wrongs in this
7 brief, we firmly believe that the exclusion and imprisonment of
8 Japanese Americans during World War II were clearly morally wrong.
9 The case for redress should not rest on the legal correctness of
10 our position but upon the entire facts and circumstances of the
11 unfair treatment of Japanese Americans.

12 INTRODUCTION

13 The curfew, expulsion and imprisonment of Americans of
14 Japanese ancestry during World War II have been described by the
15 American Civil Liberties Union as the "...worst single wholesale
16 violation of civil rights in our history." During 1942, 120,000
17 Americans of Japanese ancestry were forcibly removed from their
18 homes and businesses, herded into concentration camps, imprisoned
19 and segregated from the rest of society in flagrant violation of
20 their constitutional rights. 70,000 were citizens; one-half were
21 under the age of 21 and 25 percent were under the age of 15.
22 No specific criminal charges were brought, no trials were held
23 and no convictions were obtained before imprisonment.

24 This brief will present legal and factual arguments that
25 the expulsion and imprisonment were unconstitutional as judged by
26 legal standards existing at the time of the expulsion as well as
27 legal principles which evolved thereafter. The brief will explore
28 and critique the arguments justifying the actions taken against

1 United States citizens and non-citizens of Japanese ancestry
2 (hereinafter, "Japanese Americans") with the hope that this
3 Commission will take decisive action toward providing reparations
4 to the victims.

5 We do not intend to present all possible legal arguments
6 against the expulsion and imprisonment nor do we intend to compose
7 a legal brief appropriate for submission to a court. We view the
8 public at large as the final judges and to that end, we have
9 avoided "legalese" and attempted to state simply the legal
10 concepts and facts supporting our arguments to the public.

11 It should be noted at the outset, that the imprisonment of
12 Japanese Americans was not an isolated act but a culmination of
13 years of discrimination against Asian Americans. The Chinese were
14 the first Asian group to arrive in substantial numbers to this
15 country and were greeted by hostility, violence and discrimi-
16 natory laws. They were restricted by laws from certain occupa-
17 tions, barred from citizenship and eventually excluded from
18 immigration to this country by the notorious Chinese Exclusion
19 Act of 1882.

20 The Japanese were heirs to this legacy of discrimination.
21 Like the Chinese, they were barred from certain occupations,
22 denied the right to citizenship, prohibited from owning land and
23 also excluded from immigration to this country in 1924. Thus,
24 the imprisonment of Japanese Americans must be viewed in the
25 historical context of pernicious and systematic racial prejudice
26 against Asian Americans.

27 The expulsion and imprisonment of Japanese Americans is,
28 however, the most dramatic and outrageous event in this

1 disgraceful history. All branches of the government combined to
2 deprive Japanese Americans of their basic constitutional rights.
3 Executive Order 9066, issued by the President, authorized the
4 military to issue orders excluding Japanese from certain areas;
5 Public Law 503 passed by Congress enacted criminal punishment for
6 those who disobeyed military orders aimed at Japanese Americans;
7 and the various military orders and acts of Congress were
8 validated as constitutional by the United States Supreme Court.

9 The Supreme Court's decisions in Korematsu v. The United
10 States, Hirabayashi v. The United States and Ex Parte Endo
11 announced the essential justifications for the expulsion and
12 imprisonment. The decisions rest upon racial stereotypes and
13 myths devoid of scientific testimony, evidence or documentation.
14 The Supreme Court approved the concept of guilt by ethnic
15 affiliation ignoring the basic standard of individual guilt
16 essential to our system of legal justice. In brief, the Court
17 abdicated its responsibility by refusing to review military
18 judgments based on half-truths, exaggerations and outright lies.

19 The disturbing precedents established by the Court stand
20 as "a loaded weapon", to use Justice Jackson's description in his
21 dissent, available against any racial or other identifiable group
22 whenever the military decides to claim a "necessity" for action
23 against such a group. From a legal perspective, we believe the
24 Court's decisions to be clearly incorrect. The legal precedents
25 created, which allow a suspected felon more constitutional rights
26 than innocent groups of people, must never be allowed to repeat
27 itself.

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ARGUMENT

I. THE EXCLUSION AND DETENTION OF AMERICANS OF JAPANESE ANCESTRY DURING WORLD WAR II CONSTITUTED ILLEGAL DISCRIMINATION ON THE BASIS OF RACE.

Equality under the law is a fundamental right guaranteed by the United States Constitution. The mandate of equality under the law is grounded in the Fifth Amendment's prohibition against unreasonable and discriminatory laws which is applicable specifically to the Federal Government. Bolling v. Sharpe. The basic idea of equality is that the government, through its laws, ought to treat persons equally. Where the government treats persons unequally, the courts require that the government justify its treatment Strauder v. West Virginia.

Laws which treat persons unequally solely on the basis of race and ancestry must be treated with great suspicion and courts must subject those laws to the most rigid inspection to preserve the basic value of equality. Race classifications are subject to this degree of scrutiny to prevent the operation of laws that are based on stereotyped prejudices and to protect racial minorities who have been politically powerless to halt the passage of such laws Loving v. Virginia; United States v. Carolene Products Co.

In the landmark cases of Hirabayashi v. United States, Korematsu v. United States and Ex Parte Endo, the Supreme Court upheld the curfew, exclusion and detention, respectively, of Japanese Americans despite its lofty pronouncements regarding the rights of racial minorities. In Hirabayashi, the Court noted that "...distinctions between citizens solely because of their ancestry are by their nature odious to a free people whose

1 institutions are founded upon the doctrine of equality." In
2 Korematsu, the Court amplified that holding, stating that "...all
3 local restrictions which curtail the civil rights of a single
4 racial group are immediately suspect." and "...[The] courts must
5 subject them to the most rigid scrutiny."

6 Unfortunately, the Court failed to apply such noble
7 declarations of the law to the situation at hand and, instead,
8 looked only to whether a "substantial basis" or "rational basis"
9 for the military decisions existed for the curfew, exclusion and
10 detention. Even after announcing these tests, the Court failed
11 to apply them to the facts and instead accepted irrelevant,
12 unsubstantiated and non-scientific proof of the danger of Japanese
13 Americans to justify the differential treatment accorded to
14 Japanese Americans. Further, the Court failed to determine —
15 whether any possible less drastic alternatives by which the
16 government could achieve its purpose were available as required
17 in cases involving racial classifications.

18 It is clear that the Supreme Court rejected the reality
19 of racism in the exclusion of Japanese Americans. In Korematsu,
20 the Court concluded that "Korematsu was not excluded from the
21 Military Area because of hostility to him or his race". This
22 ridiculous conclusion belies the military orders issued by
23 General DeWitt, Commander of the Western Defense Command, which
24 applied only to persons of Japanese ancestry. Thus, only Japanese
25 citizens and non-citizens were systematically expelled en masse
26 from the West Coast and imprisoned. Obviously, hostility to
27 Korematsu and the Japanese race was a major reason for the
28 exclusion.

1 United States citizens of Japanese ancestry were certainly
2 treated differently than U.S. citizens of non-Japanese ancestry.
3 These Japanese Americans were not only the specific target of the
4 Executive and military orders but were also segregated by
5 race into concentration camps. The feeble justification of
6 military necessity for such treatment as discussed and refuted
7 in Section IIB could not support the constitutionality of such
8 unequal treatment.

9 Further, persons of Japanese ancestry were treated
10 differently than other persons with ethnic affiliation to the
11 enemy, i.e. Germans and Italians. The ostensible rationale for
12 excluding and detaining Japanese was that ethnic affiliation to
13 the "enemy" rendered Japanese dangerous to the war effort but
14 this rationale could also have been applied to Germans and
15 Italians. Members of those ethnic groups were not subjected to
16 the systematic exclusion and detention to which Japanese were
17 subjected.

18 Under the War Department plan, the entire Japanese
19 population was excluded from certain areas but only Germans
20 specifically identified for evacuation would be excluded and no
21 evacuation of Italians would be conducted without the specific
22 permission of the Secretary of War. German and Italian aliens
23 who were excluded were even given the benefit of a hearing before
24 action was taken against them; Japanese American citizens were not.
25 Thus, not only were Americans of Japanese ancestry treated
26 unequally compared to all other Americans, all Japanese were
27 treated differently from other non-Japanese groups similarly
28 situated in their ethnic affiliations to an enemy country.

1 Because the laws authorizing the curfew, exclusion and
2 detention of Japanese Americans targeted a specific racial group
3 for discriminatory treatment, discriminatory intent or motive was
4 not necessary to prove illegal discrimination. Nevertheless, such
5 discriminatory intent is evident in the statements expressed by
6 officials in charge of the evacuation and relocation:

7 General DeWitt stated to the House Naval
8 Affairs Sub-Committee in San Francisco on
9 April 13, 1943: "A Jap's a Jap. They are
10 a dangerous element, whether loyal or not.
11 There is no way to determine their loyalty
12 ...it makes no difference whether he is an
13 American; theoretically, he is still a
14 Japanese, and you can't change him...
15 You can't change him by giving him a piece
16 of paper." (Note: In Ex Parte Endo,
17 the Court held that Japanese Americans could
18 not be detained any longer than necessary to
19 determine loyalty.)

20 General DeWitt also told the Sub-Committee,
21 "...You needn't worry about Italians at all
22 except in certain cases. Also, the same for
23 Germans except in individual cases. But we
24 must worry about the Japanese all the time
25 until he is wiped off the map."

26 In the Final Recommendation and Report
27 authored by Colonel Bendetsen and adopted
28 under General DeWitt's signature:
29 "The Japanese race is an enemy race and while
30 many second and third generations Japanese
31 born on United States soil, possessed of
32 United States citizenships have become
33 'Americanized', the racial strains are
34 undiluted."

35 Even the intent of President Franklin Delano
36 Roosevelt to single out Japanese was apparent
37 as reflected in an Attorney General Memorandum
38 to the President dated April 17, 1943:
39 "You signed the original Executive Order
40 permitting the exclusions so the army could
41 handle the Jap's. It was never intended to
42 apply to Italians and Germans."

43 Executive Order 9066, Public Law 503 and the Military
44 Orders issued authorizing exclusion and detention applied to a

1 single racial group - the Japanese. Although the government
2 asserted that military necessity justified the differential
3 treatment accorded Japanese Americans, no hard evidence was
4 produced in court or in public to support such a contention. The
5 "evidence" accepted by the Supreme Court in upholding the
6 exclusion and detention consisted of exaggerations, assumptions,
7 pseudo-genetics, racist myths and stereotypes. Further, less
8 restrictive alternatives were available to the government in
9 order to protect against espionage and sabotage (See Factual
10 Analysis in IIB). Without a doubt, the conclusion is inescapable
11 that the exclusion and detention of Japanese Americans violated
12 fundamental rights to equal treatment guaranteed by the Fifth
13 Amendment to the United States Constitution.

14 II. THE EXCLUSION AND EXPULSION OF JAPANESE AMERICANS
15 VIOLATED PROCEDURAL RIGHTS AND SUBSTANTIVE RIGHTS
16 UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CON-
17 STITUTION.

18 The Fifth Amendment Due Process Clause of the United
19 States Constitution guarantees that no person shall be "deprived
20 of life, liberty, or property, without due process of law. . ."
21 There are two aspects of the due process clause -- procedural
22 due process and substantive due process.

23 A. PROCEDURAL DUE PROCESS

24 Procedural due process requires a fair decision-making
25 process before the Government takes action impairing a person's
26 life, liberty or property. The fundamental requirements are that
27 individuals be given sufficient notice of the charges against
28 them and adequate opportunity to defend themselves against the
charges before any impairment occurs. Rogers v. Peck. These

1 liberty and property interests may not be deprived without some
2 type of hearing "at a meaningful time and in a meaningful manner."
3 Mathews v. Eldridge.

4 Both aliens and citizens are granted Fifth Amendment
5 procedural due process rights. "While an [alien] lawfully re-
6 mains here, he is entitled to the benefits of life, liberty and
7 property secured by the Constitution to all persons, of whatever
8 race, within the jurisdiction of the United States." Lem Moon
9 Sing v. United States.

10 The guarantee of procedural due process applies to govern-
11 ment actions which are civil, as well as criminal, in nature,
12 and which involve the taking of liberty and property alike.
13 Cole v. Arkansas, Anderson National Bank v. Lockett.

14 Japanese Americans were never accorded notice of the
15 charges against them or reasons for their incarceration and
16 exclusion. They were never given an opportunity to respond to
17 the charges or oppose their exclusion. Instead, they were put
18 behind barb wire and forced to leave their homes and belongings on
19 the unilateral decision of the Government.

20 This deprivation of rights has never been squarely con-
21 fronted by the Courts. The Court in Hirabayashi and Yasui v.
22 United States merely dismissed the due process issue by stating:

23 ...If it was an appropriate exercise of war
24 power, its validity is not impaired because
25 it has restricted the citizen's liberty...
26 Military control of the population...necessar-
27 ily involves some infringement of individual
28 liberty.

27 In failing to address the wholesale denial of the procedural
28 rights of Japanese Americans, the Court implicitly validated

1 the summary incarceration.

2 The Court in Endo finally acknowledged the procedural
3 due process rights of Japanese Americans:

4 The war power necessarily gave [the Executive
5 and Congress] wide scope for the exercise of
6 discretion so that wars might be waged effec-
7 tively and successfully... At the same time
8 however the Constitution is as specific in its
9 enumeration of many civil rights of individuals...
(T)hus it has prescribed procedural safeguards
surrounding arrest, detention, and conviction
of individuals, some of these contained in the
Sixth Amendment...and the Fifth Amendment.

10 The Court, however, avoided answering the procedural due process
11 issue and instead held that the Government could not continue
12 to detain admittedly loyal Japanese Americans. In so doing,
13 the Court implicitly revalidated the summary exclusion, deten-
14 tion and incarceration of Japanese Americans.

15 B. SUBSTANTIVE DUE PROCESS

16 Substantive Due Process protects individuals against
17 laws which place arbitrary limitations on individual freedom of
18 action. Mugler v. Kansas, Meyer v. Nebraska. Generally, the
19 Courts will determine whether the Government action bears a
20 rational relationship to a legitimate goal. However, when the
21 Government action affects a fundamental right or involves racial
22 discrimination, the Court will review the law with much greater
23 scrutiny, testing the underlying factual basis for the legisla-
24 tion to determine whether the law furthers a compelling Government
25 purpose with no less restrictive alternatives available. Bolling
26 v. Sharpe.

27 The Government sought to justify the expulsion and incar-
28 ceration of Japanese Americans and the limitations on individual

1 freedoms engendered by its action by claiming that military
2 necessity and the gravest imminent danger existed at the time
3 of the evacuation. The Supreme Court in Korematsu and Hiraba-
4 yashi agreed with the Government in upholding the curfew, exclu-
5 sion and expulsion under the due process clause. The arguments
6 presented below support the conclusion that no military necessity
7 existed to justify the government's actions and that the
8 Japanese Americans presence on the West Coast did not constitute
9 the "gravest imminent danger."

10 The Justice Department, State Department and Navy had
11 information even before the expulsion took place that Japanese
12 Americans were no threat to the security of the United States.
13 By July, 1941, the Justice and War Departments had already com-
14 piled a list of enemy aliens suspected of disloyalty. In October
15 and November of 1941, a special representative of the State De-
16 partment, Curtis B. Munson, was ordered by the President to ob-
17 tain a precise picture on the degree of loyalty of Japanese
18 Americans on the mainland and Hawaii. The reports were shared
19 by the State, War and Navy Departments, as well as the Executive
20 Branch.

21 Mr. Munson concluded that 90-98% of Nisei were loyal to
22 the United States and that the Issei were weakened in their
23 loyalty to Japan because they chose to make their homes here.
24 Many Issei would take out American citizenship but for laws
25 prohibiting their naturalization. Munson did not believe that
26 Japanese Americans were more disloyal than any other group and
27 he concluded that "there is no Japanese problem on the Coast."

28 Lt. Commander K. D. Ringle submitted to the Chief of Naval Opera-

1 tions a report that the Japanese American problem was blown out
2 of proportion, that Japanese Americans were no different from
3 Germans, and that 85% of the Japanese Americans were loyal. He
4 recommended that the situation be handled individually and that
5 mass evacuation was unwise.

6 Other governmental agencies had identified the Japanese
7 Americans considered dangerous prior to the exclusion. By
8 December, 1941, the Alien Enemy Control Unit under the Assistant
9 Attorney General had completed dossiers on aliens, including
10 Japanese Americans, considered likely to commit sabotage or
11 espionage. F.B.I. Director J. Edgar Hoover felt that the demand
12 for evacuation was based primarily upon public political pressure
13 rather than upon factual data. On December 7 and 8th, 1941, a
14 round-up of individual aliens identified by the F.B.I. as
15 potentially dangerous occurred and these aliens were placed in
16 confinement.

17 No concrete evidence of sabotage or impending sabotage
18 existed to justify the detention and exclusion. Even though
19 searches and seizures of suspected disloyal Japanese Americans
20 were conducted by the Department of Justice in December, 1941,
21 nothing was obtained from the raids relating to items to be
22 used for sabotage or espionage. No resident Japanese American
23 was convicted of sabotage or espionage during the course of the
24 war, and no act of sabotage or espionage in Hawaii or on the
25 mainland by Japanese Americans was ever reported. Attorney Gen-
26 eral Biddle stated in a memo to FDR on February 17, 1942, that
27 no evidence of imminent attack and no evidence of planned sabotage
28 was found.

1 Because of their identifiable physical characteristics,
2 Japanese Americans were not likely to have access to strategic
3 areas, plants or equipment. Further, out of 120,000 Japanese
4 Americans, one-half were under the age of 21 and one-quarter were
5 young children. 43% were over 50 or under 15.

6 While the Court in Hirabayashi stressed that the Government
7 had no time to separate the loyal from the disloyal and that the
8 military was confronted with an extreme emergency, there was in
9 fact no emergency situation requiring the immediate evacuation
10 of Japanese Americans. The exclusion was not completed until
11 long after Pearl Harbor and Japanese Americans lived in Calif-
12 ornia throughout this whole period of time without incident.
13 The first exclusion order was issued almost 4 months after
14 Pearl Harbor and almost 11 months elapsed before the evacuation
15 was completed.

16 The military's own assessment was that no threat of an
17 attack on the West Coast existed. In February of 1942, Admiral
18 Stark, Chief of Naval Operations, testified before a Congres-
19 sional Committee that he did not believe it possible for any
20 enemy to engage in a sustained attack on the West Coast. The
21 military concluded in June of 1942 that the Battle of Midway
22 decisively disposed of any possibility that the Japanese might
23 marshal the naval effort necessary for an invasion of the West
24 Coast. In early 1942, the Japanese code was broken enabling
25 the United States to monitor naval operations of the Japanese
26 and to determine when, if ever, an attack on the West Coast would
27 occur.

28 Although the Government maintained that Japanese Americans

1 on the West Coast constituted the gravest imminent danger to
2 national security, it did not imprison Japanese in Hawaii en
3 masse, even though Hawaii was more vulnerable strategically.
4 Japanese constituted only 1.2% of the population on the West
5 Coast, while constituting 32% of the population in Hawaii.
6 This point only underscores the fact that the exclusion and
7 incarceration of Japanese Americans was motivated by racist
8 wartime hysteria. The Government could not take action against
9 Japanese in Hawaii because they were part of Hawaii's economic
10 and political base. Japanese on the Mainland, however, were
11 powerless and posed a perceived economic threat to established
12 business on the West Coast.

13 The United States Supreme Court upheld the Government's
14 judgment of military necessity by validating certain assumptions,
15 exaggerations and distortions of fact that had no basis in
16 reality. Most of these assumptions were made by Lt. DeWitt,
17 Military Commander of the Western Defense Command, in his final
18 report and recommendations. Some of the facts cited to prove
19 disloyalty are discussed below.

20 --DeWitt stated that FBI raids discovered ammunition,
21 rifles, shotguns, maps and other instruments implying the possi-
22 bility of espionage and sabotage. The United States Attorney
23 General stated that no such evidence was found.

24 --DeWitt implied that Japanese Americans were sending
25 signal lights to the Japanese which were visible from the Coast,
26 but a Department of Justice investigation found nothing more
27 that unfounded reports by excited persons.

28 --DeWitt asserted that interceptions of illicit radio

1 transmissions indicated attempts by Japanese Americans to communi-
2 cate with the enemy, but the Chief of the FCC Radio Intelligence
3 for the division reported that there had been no illegitimate
4 radio transmissions or signaling from Japanese American Coastal
5 residents.

6 --DeWitt pointed out that Japanese Americans occupied
7 areas near strategic installations, including highways, power
8 houses, power lines, gas pipe lines, telephone and transmission
9 lines. Obviously, everyone must occupy areas near such installa-
10 tions in order to obtain the necessary services for modern living.
11 The Japanese Americans rented land for agricultural purposes under
12 high tension wires because the companies could not use such
13 land for other purposes and the companies offered the land to
14 the Japanese Americans. --Japanese Americans resided in such areas
15 long before the construction of such strategic installations and
16 the geographic pattern of Japanese American residents was fixed
17 by 1910.

18 --DeWitt claimed that Japanese language schools were
19 sources of Japanese nationalistic propaganda and cultivated
20 allegiance to Japan. The Court in Hirabayashi cited this claim
21 to support its findings. Such schools obviously provided for
22 communication between parent and child and in 1945 the War Re-
23 location Authority branded DeWitt's statements a myth. In fact,
24 in the 1920's Issei leaders revised the curriculum in these
25 schools to assist in the Americanization of students. In so doing,
26 they responded to social pressure to remove possible sources of
27 Japanese nationalism.

28 --DeWitt found special significance in the dual citizen-

1 ship system and its bearing on the loyalties of persons of
2 Japanese descent.' This claim was also cited by the Court in
3 Hirabayashi. In 1899 Japan adopted a system upon which citizen-
4 ship is based on the father's race. Japanese Americans had no
5 choice as to whether Japan conferred citizenship on him or her.
6 Dual citizenship declined after 1924, when the Japanese rule was
7 changed to provide that children born in the United States auto-
8 matically lost Japanese citizenship unless parents registered
9 Nisei children at the Japanese Consulate. According to the War
10 Relocation Authority Survey in 1943, between 15 to 25% of Japanese
11 Americans were dual citizens. While this factor was used to
12 incarcerate Japanese Americans, Germans and Italians in the
13 United States also had dual citizenship and were not incarcerated
14 as a race. No evidence linking dual citizenship and an indivi-
15 dual's predisposition to espionage and sabotage had been pre-
16 sented.

17 --DeWitt pointed to the segregation and solidarity of
18 Japanese Americans and to the position of influence that Japanese
19 aliens held in Japanese communities. The isolation and lack of
20 assimilation was stressed and was also cited in Hirabayashi.
21 Japanese Americans were isolated in part because of restrictive
22 covenants, social and economic pressures and their own preference
23 which resulted in some segregation. Historically, Japanese
24 American communities organized for mutual aid and the need for
25 protection against racism. The relationship between social
26 isolation and loyalty to Japan were flatly contradicted by com-
27 petent sociologists, anthropologists and other social scien-
28 tists. Issei actually did develop programs to assist the assimi-

1 lation of Japanese Americans.

2 --DeWitt claimed that there were about 100 fascistic or
3 militaristic organizations that had some relation to Japanese
4 organizations or individuals in the United States and that he had
5 "definite information" showing the line of control from the
6 Japanese government itself. The association of Japanese American
7 leaders and Japanese consulates was cited by the Court in
8 Hirabayashi. No evidence presented proved such a line of control.
9 Organizations cited included one which was a sports and physical
10 training society and another which assisted immigrants and acted
11 as a clearing house for numerous social, commercial, educational
12 and welfare groups.

13 --The Court in Hirabayashi also supported its findings
14 by pointing to the fact that some Japanese Americans were edu-
15 cated in Japan. No more than 20% of the Japanese Americans
16 attended schools in Japan. The practice of sending children to
17 Japan for an education was motivated by the fact that many
18 families could not afford to care for all their children here
19 and that children could help prepare for the anticipated return
20 of the family to Japan. No evidence existed that education in
21 Japan caused disloyalty or created a potential for sabotage or
22 espionage.

23 The Court in Korematsu supported its finding of potential
24 disloyalty by stating that 5000 Japanese Americans refused to
25 swear unqualified allegiance to the United States when the
26 loyalty oaths were administered in the camps. First, the Court
27 itself declared that it was limited to a review of the facts
28 known to the Government at the time of the exclusion orders; the

1 Court could not properly rely on the results of loyalty oaths
2 administered long after the incarceration had taken place. This
3 evidence was based on a loyalty oath which was ambiguous and
4 unreliable. The oath was taken under conditions of severe
5 physical and psychological stress, while Japanese Americans
6 were incarcerated and amid rumors and misinformation in the
7 camps with regard to the consequences of the oath. The evidence
8 also fails to account for the absurdity of asking alien residents
9 to pledge loyalty to America when the laws specifically denied
10 Japanese immigrants any opportunity to become naturalized citi-
11 zens. The country that was their home had incarcerated them
12 and now asked for a pledge of unqualified allegiance. The loyalty
13 oath responses were therefore not indicative of the true loyalty
14 of Japanese Americans before incarceration and cannot provide
15 concrete evidence of potential for espionage and sabotage.

16 Aside from the fact that no military necessity or gravest
17 imminent danger existed to justify the exclusion and incarceration
18 of Japanese Americans, the Government's acts also violated the
19 Fifth Amendment Due Process clause because adequate less drastic
20 alternatives existed. The Government purpose of ascertaining
21 the potential disloyal in the shortest amount of time could have
22 been met by providing individual hearings or questionnaires. Other
23 aliens arrested during the war were promptly examined by the
24 Volunteer Alien Enemy Hearing Boards consisting of citizens
25 appointed for the task by the Attorney General. Of the 1,100,000
26 enemy aliens in the United States, 9080 had been examined by the
27 end of 1943 and only 4,119 were interned. In Britain, during
28 World War II, 1120 tribunals were set up under citizens with legal

1 experience to examine enemy aliens.

2 In referring to the incarceration in his annual report for
3 June 30, 1943, the Attorney General stated that "the law does not
4 require any hearing before the internment of enemy aliens. I
5 believe that nevertheless, we should give each enemy alien who
6 had been taken into custody an opportunity for a hearing on
7 the question of whether he should be interned." Ironically, non-
8 citizens were thus given hearings while citizen Japanese Americans
9 were not.

10 Moreover, the Government had already identified Japanese
11 Americans believed to be potentially dangerous before the incar-
12 ceration had already begun and the information, along with a
13 loyalty questionnaire, could have been used to determine the
14 loyalty of Japanese Americans before incarceration. The Govern-
15 ment stated that it had no time to separate the loyal and dis-
16 loyal before the incarceration, but conducted the loyalty oath
17 program in only a few months. The actual incarceration of Japan-
18 ese Americans took about 11 months to complete, even though the
19 Government viewed it as the most expedient solution to the problem
20 of suspected sabotage.

21
22 C. CONCLUSION

23 The incarceration of Japanese Americans clearly vio-
24 lated the procedural and substantive due process rights of
25 Japanese Americans under the Fifth Amendment to the United
26 States Constitution. No rational basis or compelling state
27 interest existed to justify the exclusion and incarceration.
28 The United States Supreme Court failed to seek the truth in the

1 Government's assertion of military necessity and therefore wrong-
2 ly upheld the Government's action.

3 III. THE EXCLUSION AND DETENTION VIOLATED CERTAIN
4 RIGHTS GUARANTEED TO JAPANESE AMERICAN CITIZENS
5 AND RESIDENT ALIENS UNDER THE BILL OF RIGHTS OF
6 THE UNITED STATES CONSTITUTION.

7 The drafters of the Constitution regarded certain rights
8 of persons as so fundamental that they embodied them in the Bill
9 of Rights, the first ten amendments to the U. S. Constitution.

10 A. FIRST AMENDMENT FREEDOM OF SPEECH AND FREEDOM OF
11 ASSOCIATION.

12 "Congress shall make no law. . .abridging the freedom
13 of speech; or of the press; or the right of the people peace-
14 ably to assemble. . ."

15 First Amendment, U. S. Constitution.

16 The First Amendment secures to the people their right to
17 be free from unconstitutional governmental intrusions on their
18 Freedom of Speech, Freedom of the Press, Freedom to Assemble,
19 Freedom to Associate and Freedom of Religion. The Freedom of
20 Speech includes the right to speak freely and also the right not
21 to speak at all, both protected by the Amendment's guarantee of
22 "individual freedom of the mind." Wooley v. Maynard. The Free-
23 dom of Association guarantees that Americans be able to freely
24 associate with other persons, organizations and other groups
25 of the individual's choice. NAACP v. Alabama. Both of these
26 freedoms occupy a preferred position above all other constitu-
27 tional rights and are considered fundamental to the American
28 legal tradition. Murdock v. Pennsylvania, Thomas v. Collins.

The First Amendment prohibits outright governmental re-

1 strictions on these freedoms, as well as those governmental
2 actions which have a chilling effect upon the exercise of the
3 freedoms. Dombrowski v. Pfister. In other words, even if a law
4 or governmental action serves a valid governmental purpose, it
5 will be struck down under the First Amendment if its effect de-
6 ters individuals from freely exercising their free speech rights.

7 The exclusion, detention and incarceration of Japanese
8 Americans suppressed and denied their rights to express their
9 beliefs and cultural identity. The Government based the curfew,
10 exclusion and incarceration on suspicions of disloyalty and later
11 administered loyalty oaths to Japanese Americans in camps. These
12 governmental actions clearly violated the First Amendment rights
13 of Japanese Americans by creating a chilling effect on their
14 Freedom of Speech and Association.

15 Japanese Americans were incarcerated solely on the basis
16 of ethnic identity. The Supreme Court has repeatedly held that
17 membership in a group may not be used as a basis for the imposi-
18 tion of differential treatment, because such treatment will deter
19 individuals from freely associating according to their own free
20 choice. Japanese Americans were placed in camps because the
21 Government felt that, based on group association, Japanese Ameri-
22 cans were likely to commit espionage and sabotage. In Keyishian
23 v. Board of Regents, the Supreme Court stated that mere member-
24 ship in a group without specific intent to further unlawful
25 activities was insufficient to impose punishment. The Court in
26 United States v. Robel held that the Government could not exclude
27 members of Communist organizations from defense facilities, even
28 if the Government had fears of espionage and sabotage because

1 such an exclusion clearly violated the Freedom of Association.
2 The exclusion of Japanese Americans from the West Coast was simi-
3 larly motivated by the Government's fear of espionage and sabo-
4 tage.

5 Americans of Japanese ancestry who protested the exclusion,
6 detention, government actions or cruel conditions were often
7 punished by transfer to more isolated and more restrictive camps.
8 This punishment further deterred others from not only advocating
9 their beliefs, but also from even holding beliefs and ideas that
10 could in any way connect them to their ethnic heritage. Even
11 camp newspapers were censored in violation of the Freedom of the
12 Press.

13 The Government administered loyalty oaths to Japanese
14 Americans after they were incarcerated in order to ascertain those
15 possibly disloyal. These loyalty oaths violated the right of
16 Japanese Americans not to speak. Such oaths have only been upheld
17 where the Government has had a specific interest in the loyalties
18 of employees in sensitive positions and where the oaths are
19 narrowly drawn. Baggett v. Bullitt, Keyishian v. Board of Regents.
20 Japanese Americans were not in strategically sensitive positions,
21 particularly when already isolated in camps. The Japanese Ameri-
22 cans were coerced into choosing between countries under cir-
23 cumstances of extreme duress, after their own country had incar-
24 cerated them and under threat of deportation or harsher punish-
25 ment if they pledged loyalty to Japan. Issei were forced
26 to state their allegiance to a country where they were ineligible
27 for citizenship by law. Some Japanese Americans were in fact
28 punished or deported for refusing to swear allegiance to the

1 United States or for refusing to serve in the armed forces. The
2 loyalty oath procedure denied Japanese Americans their freedom
3 to believe and express themselves as they chose, and required in-
4 stead that they pledge unqualified allegiance or face punish-
5 ment for their expressions of beliefs.

6 B. FOURTH AMENDMENT RESTRICTION ON UNREASONABLE SEARCHES
7 AND SEIZURES.

8 "...[T]he right of the people to be secure in their
9 persons, houses, papers and effects, against unreasonable searches
10 and seizures, shall not be violated, and no warrants shall issue,
11 but upon probable cause."

12 Fourth Amendment, U. S. Constitution.

13 The Fourth Amendment protects both property and persons
14 against seizures by Government unless there is "probable cause"
15 to suspect criminal activity; that is, specific facts and circum-
16 stances must be articulated which would lead to the conclusion
17 that a crime was committed and that the individual or property
18 seized was actually part of that crime. Seizure of a person
19 includes arrest and investigatory detention. Davis v. Mississippi
20 and any other detention of a person against his will, Cupp v.
21 Murphy. Generally, warrants are required for an arrest or
22 search, unless emergency circumstances exist or the crime is
23 committed in the presence of an officer or the arrest is made
24 incident to a "hot pursuit."

25 During World War II, Japanese Americans were detained in
26 concentration camps based on a group suspicion that crimes of
27 espionage or sabotage would be committed. Although not formally
28 "arrested", the effect of the Government's action was undoubtedly

1 a physical detention against their will.

2 No specific crimes were committed by Japanese Americans
3 nor were there facts presented sufficient to constitute "probable
4 cause" to suspect criminal activity by Japanese Americans. The
5 only evidence existing to justify the detention of Japanese
6 Americans was some evidence that Japanese Americans were con-
7 sidered possible security risks and thus subject to detention.
8 As shown in Section IIB, this evidence consisted of distortions
9 and mis-statements which were contradicted by evidence that
10 Japanese Americans posed no threat to security. In short,
11 Japanese Americans were detained in violation of their Fourth
12 Amendment rights because no probable cause existed upon which
13 to base a seizure or arrest.

14 Furthermore, the Government's acts violated the Fourth
15 Amendment requirement that prior to any detention, facts must be
16 produced that each individual detained was linked to the crime
17 in question. Rather than provide proof of individual involvement,
18 the Government relied on a group suspicion and ignored any indi-
19 vidual connection to any specific crime.

20 No warrants were issued for the arrest of Japanese Ameri-
21 cans. Additionally, none of the exceptions to the warrant re-
22 quirement existed to justify the failure to obtain warrants
23 which should be issued by a neutral magistrate. No exigent cir-
24 cumstances existed to justify the failure to obtain warrants for
25 the arrest of Japanese Americans. Even assuming some crimes had
26 been committed and further assuming that some individual Japanese
27 Americans were connected to the crime, the military necessity
28 proffered by the Government to justify the detention was un-

1 supportable (See IIB, supra). Such assumptions contradict
2 the facts which even existed at the time of the detention and
3 thus Japanese Americans were denied Fourth Amendment rights dur-
4 ing World War II.

5 C. THE EXCLUSION AND DETENTION OF JAPANESE AMERICANS
6 VIOLATED THE FIFTH AMENDMENT.

7 The Fifth Amendment of the United States Constitution
8 guarantees that "no person shall be held to answer for a capital,
9 or other infamous crime, unless on a presentment or indictment
10 of a Grand Jury." An infamous crime has been defined as one for
11 which punishment includes imprisonment, Mackin v. United States.
12 All felonies are considered infamous crimes, Michel v. Louisiana.

13 Although never formally charged with any crimes, Japanese
14 Americans were incarcerated on the supposition that they had the
15 potential for committing acts of treason and sabotage. Such acts
16 have historically been among the most heinous of capital crimes.

17 Based on these presumptions, extended detention was imposed.
18 Yet at no time was a Grand Jury convened to assess any "facts"
19 supporting the conclusion that Japanese Americans had committed
20 any crimes. Rather, mass incarceration was simply put into
21 immediate effect. Because of this, it must be concluded that
22 the Fifth Amendment right to a Grand Jury was summarily violated.
23 The expulsion and exclusion of Japanese Americans also violated
24 the Fifth Amendment right to due process, which is outlined in
25 Section II.

26 D. SIXTH AMENDMENT RIGHT OF ACCUSED TO SPEEDY AND PUBLIC
27 TRIAL BY JURY, TO BE INFORMED OF THE NATURE AND CAUSE
28 OF ACCUSATION AND ASSISTANCE OF COUNSEL.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and

1 public trial by an impartial jury...to be
2 informed of a nature and cause of the
3 accusation; to be confronted with the
4 witnesses against him; to have compulsory
5 process for obtaining witnesses in his
6 favor, and to have the assistance of
7 counsel for his defense.

8 Sixth Amendment to the United States Constitution.

9 The right to trial by jury has been called "fundamental to
10 the American scheme of justice." Duncan v. Louisiana. The
11 right attaches where there is a criminal prosecution for a serious
12 crime and the potential for punishment is imprisonment for more
13 than 6 months. Duncan v. Louisiana, supra. The right to counsel
14 attaches in all felonies and misdemeanors which can actually
15 result in an imprisonment ("a loss of liberty") Argersinger v.
16 Hamlon.

17 Although Japanese Americans were not formally charged with
18 a crime nor convicted of any crime, the process of detention and
19 incarceration was in the nature of a criminal prosecution.
20 Japanese Americans were accused of criminal espionage and sabo-
21 tage, both considered felonies. Many Japanese Americans were
22 detained for several years. No Japanese Americans were given
23 the benefit of a trial, hearing, cross examination of the
24 accusers or legal representation. Japanese Americans were in
25 effect considered "guilty" of sabotage and espionage and
26 suffered imprisonment in concentration camps as punishment for
27 their suspected crimes. Persons accused of actually committing
28 crimes such as treason or sabotage were given a trial by jury,
the right to counsel and other Sixth Amendment rights while
Japanese Americans were not.

"Where a prosecution is 'technically' criminal in nature,

1 the Sixth Amendment rights attach." United States v. Zucker.
2 Executive Order 9066 and Public Law 503 were essentially criminal
3 in nature, with criminal penalties provided for violation.
4 In his dissent in Korematsu, Justice Roberts pointed out that
5 the entire evacuation was administered "under pain of criminal
6 prosecution." The Supreme Court in Ex Parte Endo finally ad-
7 mitted that the internment may have violated ". . .the prescribed
8 safeguards surrounding the arrests, detention and conviction
9 of individuals. . .contained in the Sixth Amendment. . .".

10 In essence, then, the process of accusation, detention and
11 incarceration was, in effect, a "technically criminal" prosecu-
12 tion. The Government simply short-cut the Constitution by
13 arresting and imprisoning Japanese Americans without the benefit
14 of a trial by jury, notice of the charges and the assistance of
15 counsel in violation of their Sixth Amendment rights.

16 E. EIGHTH AMENDMENT PROSCRIPTION AGAINST CRUEL AND
17 UNUSUAL PUNISHMENT.

18 "Excessive bails shall not be required, nor
19 excessive fines imposed, nor cruel or unusual
punishments inflicted."

20 Eighth Amendment to the United States Constitution.

21 The Eighth Amendment restricts the kind of punishment in-
22 flicted on individuals convicted of crimes. It prohibits punish-
23 ment which is grossly disproportionate to the severity of the
24 crime. Ingraham v. Wright.

25 Although not formally "convicted," Japanese Americans were
26 effectively punished merely for suspected potential for es-
27 pionage and sabotage, both of which are felonious crimes. Japan-
28 ese Americans were imprisoned even though no crimes were committed

1 and no evidence of espionage or sabotage existed. The punishment
2 was meted out, therefore, only on the basis of suspicion and not
3 on the basis of a conviction.

4 The Court in Robinson v. California held that punishment
5 for an individual's status is cruel and unusual punishment.
6 There, the Court said that a State could not punish a person
7 for being a drug addict, without requiring a showing of illegal
8 activity in using or purchasing the drug. Similarly, Japanese
9 Americans were punished merely for being of Japanese ancestry,
10 rather than for participation in espionage or sabotage.

11 The Government actions effectively sentenced Japanese
12 Americans to detention and incarceration under harsh and cruel
13 conditions. Abuse of prisoners and inhuman prison conditions
14 have been found to violate the Eighth Amendment. Jackson v.
15 Bishop, Holt v. Sarver. The camps were crowded and provided no
16 privacy. Internees did not receive adequate medical care and
17 their diet was poor. Mail was censored and the internees were
18 subject to curfew. Temperatures in the camps ranged from -30
19 degrees to 130° as the camps were established in the harshest
20 environments. Japanese Americans lived in converted horse
21 stables at several Assembly Centers established at race
22 tracks, where these citizens and resident aliens were subjected
23 to the stench and filth of the stables. 75% of illnesses at
24 Santa Anita Racetrack resulted from living in the horse stalls.
25 Federal Judge William Denman found Tule Lake worse than Federal
26 prisons. Internees at Tule Lake were subject to punishment by
27 severe, debilitating beatings in the stockades and were not
28 allowed visits from family. Banishment has also been held to

1 be cruel and unusual punishment, People v. Lopez. Japanese
2 Americans were effectively banished from the West Coast.

3 IV. IN ADDITION TO RIGHTS SPECIFICALLY ENUMERATED IN
4 THE CONSTITUTION, CERTAIN IMPLIED AND FUNDAMENTAL
RIGHTS WERE ALSO VIOLATED.

5 The specific guarantees in the Bill of Rights have penum-
6 bras that encompass other basic, fundamental rights which give
7 the enumerated constitutional rights life and substance. These
8 penumbral rights create zones of privacy and guarantee the
9 freedom of individual choice. Griswold v. Connecticut. If
10 these rights are violated by the Government, the Government must
11 demonstrate a compelling state interest justifying the violation
12 and must show that it had no other alternative method for meet-
13 ing its interests which are less restrictive of the individual
14 rights.

15 A. Right to Personal Privacy.

16 The right to personal privacy guarantees the sanctity
17 of the individual and his or her family.

18 Japanese Americans were denied all personal privacy
19 through invasions of their homes and Government searches,
20 Stanley v. Georgia, and through imprisonment in barracks with
21 paper-thin walls and community bathrooms and mess halls.

22 The right guarantees the freedom parents have to choose
23 how best to educate their own children, Pierce v. Society of
24 Sisters. As early as 1923, the United States Supreme Court
25 stated "the Japanese parent have the right to direct the educa-
26 tion of his own child without unreasonable restrictions; the
27 Constitution protects him as well as those who speak another
28 tongue." Farrington v. Tokushige (upholding the right to send

1 the child to Japanese language schools). Japanese American
2 children were forced to leave the schools in their own communities
3 and to attend those schools established in the camps.

4 The right of parents to direct the upbringing of their
5 own children, Pierce, supra, was violated, as much control over
6 the family was taken from the parents by the Government.

7 B. The Right to Travel.

8 The right of individuals to travel freely across the
9 country is a personal right which may not be conditioned except
10 upon a compelling Government purpose. Dunn v. Blumstein,
11 Shapiro v. Thompson, United States v. Guest.

12 Japanese Americans were unable to leave camp, except upon
13 permission of the camp director after a review of the internee's
14 file. The Director would consider whether the person had a
15 means of support, whether the person was willing to make reports,
16 the person's opportunity for employment and finding housing at
17 the proposed destination, and other factors relating to the
18 effect of granting leave upon the public peace. These conditions
19 effectively nullified the right to travel.

20 Before, during and after their incarceration Japanese
21 Americans were restricted in their travel to certain regions of
22 the United States. All of these restrictions denied these in-
23 dividuals their Right to Travel.

24 C. RIGHT TO VOTE

25 The Right to Vote is a fundamental political right,
26 because it is preservative of other basic civil and political
27 rights. Yick Wo v. Hopkins, Reynolds v. Sims.

28 Attorney General Warren ruled that Japanese Americans who left

1 California for the camps were not considered "residents" for
2 voting purposes and barred them from participating in elections.

3 V. THE MILITARY WAS WRONGFULLY ALLOWED BY THE EXECUTIVE,
4 LEGISLATIVE AND JUDICIAL BRANCHES TO EXERCISE POWER
5 OVER CIVILIANS

6 A. THE POWER OF THE MILITARY TO EXERCISE CONTROL
7 OVER CIVILIANS IS LIMITED TO SITUATIONS OF
8 MARTIAL LAW.

9 Fundamental to the existence, maintenance and value of our
10 democratic form of government is the principle that the military
11 has no jurisdiction over civilians. In the Japanese American
12 cases, however, the United States Supreme Court permitted the
13 executive and legislative branches to dangerously expand the
14 military's previously strictly limited power over the civilian
15 population.

16 The danger of allowing military control over civilians was
17 well expressed in the leading Civil War era case of Ex Parte
18 Milligan. In that case the Court considered a hypothetical
19 proposition remarkably similar to the case of the Japanese
20 American incarceration:

21The proposition is this: that in a time
22 of war the commander of an armed force (if
23 in his opinion the exigencies of the country
24 demand it, and of which he is to judge), has
25 the power, within the lines of his military
26 district, to suspend all civil rights and
27 their remedies, and subject citizens as well
28 as soldiers to the rule of his will; and in
the exercise of his lawful authority cannot
be restrained, except by his superior officer
or the President of the United States.

If this position is sound to the extent claimed
then when war exists, foreign or domestic, and
the country is subdivided into military depart-
ments for mere convenience, the commander of
one of them can, if he chooses, within his
limits, on the plea of necessity, with the
approval of the Executive, substitute military

1 force for and to the exclusion of the laws,
2 and punish all persons, as he thinks right
and proper, without fixed or certain rules.

3 The statement of this proposition shows its
4 importance; for, if true, republican
5 government is a failure, and there is an end
6 of liberty regulated by law. Martial law,
7 established on such a basis, destroys every
8 guaranty of the Constitution, and effectively
9 renders the 'military independent of and
10 superior to the civil power'--the attempt to
11 do which by the King of Great Britain was
12 deemed by our fathers such an offense, that
13 they assigned it to the world as one of the
14 causes which impelled them to declare their
15 independence. Civil liberty and this kind
16 of martial law cannot endure together; the
17 antagonism is irreconcilable and, in the
18 conflict, one or the other must perish."

12 The Supreme Court in Milligan clearly announced the rule
13 that military power over civilians is strictly limited to
14 circumstances of actual Martial law. Although Milligan has been
15 often relied upon to define this strict limitation on the
16 military's authority over civilians, the Supreme Court in the
17 Japanese American cases ignored Milligan and the fundamental
18 principle for which it stands. In Hirabayashi and Ex Parte Endo,
19 the Court dismissed the issue of military control over civilians,
20 which control was clearly exercised by the military during World
21 War II, by stating that civil authority involvement in the
22 exclusion and incarceration made Milligan inapplicable. Had the
23 Court directly faced the issue of limitation of military control
24 over civilians and applied existing precedent, it would have been
25 compelled to invalidate the military orders restricting,
26 excluding and incarcerating Japanese Americans.

27 In Milligan, the Court defined the constitutional limits
28 on military power over civilians:

1 If in foreign invasion or civil war, ...on
2 the theatre of active military operations,
3 where war actually prevails, there is a
4 necessity to furnish a substitute for the
5 civil authority, ...and as no power is left
6 but the military, it is allowed to govern
7 by martial rule until the laws can have
8 their free course. As necessity creates the
9 rule, so it limits its duration....

6 Martial law cannot arise from a threatened
7 invasion. The necessity must be actual and
8 present; the invasion real, such as
9 effectually closes the courts and deposes
10 the civil administration. (Milligan, at p.297;
11 emphasis added.)

10 Martial law was never declared on the West Coast during World
11 War II, nor did any of the other situations required by the
12 Milligan standard exist to justify allowing the military to
13 issue orders controlling civilians. In fact, the scope of the
14 congressional and executive grant of power to the military over
15 civilians during World War II was legally unprecedented in
16 American history. As the Ninth Circuit Court of Appeals noted in
17 transferring Korematsu to the United States Supreme Court:

18 ...this Court knows of no decision in which
19 citizens residing in areas not subject to
20 martial law have been required by military
21 authorities to observe a curfew and to report
22 to military control stations for exclusion
23 from a military area designated by military
24 authorities. (Emphasis added.)

22 The Supreme Court in Hirabayashi and Korematsu, however,
23 apparently unconcerned by the manifest lack of precedent and the
24 threatening implication of military control over the civil sector,
25 dismissed Milligan's principles as outmoded in light of the
26 technology of modern warfare. This approach is misleading and
27 establishes an extremely dangerous precedent. The Court in
28 Milligan sought to protect against tyrannical acts by the

1 government under the justification of military necessity.
2 Instead of being outmoded, the Milligan principle of limitation
3 of military power is even more relevant in these times of constant
4 threat of military confrontation.

5 As the Supreme Court itself recognized in Duncan v.
6 Kahanamoku, which struck down an actual declaration of martial
7 law in Hawaii during World War II:

8 Legislatures and courts are not merely
9 cherished American institutions; they are
10 indispensable to our government... [T]he
11 military should always be kept in subjection
12 to the laws of the country to which it
13 belongs... The established principle of
14 every free people is, that the law shall
15 alone govern; and to it the military must
16 always yield. (Emphasis added.)

17 B. THE DELEGATION OF LEGISLATIVE POWER TO THE
18 MILITARY UNDER WHICH JAPANESE AMERICANS WERE
19 EXCLUDED AND INCARCERATED WAS UNCONSTITUTIONAL.

20 Congress may properly delegate only its administrative,
21 rather than basic legislative power. When Congress does delegate
22 any of its administrative powers, it must establish clear policies
23 and standards for the guidance and limitation of the agency
24 carrying out the congressional command. Opp Cotton Mills v.
25 Administrator. The delegation under Executive Order 9066 and
26 Public Law 503 was clearly improper both because it conferred a
27 basic power to legislate and because it lacked Congressionally
28 established standards and guidelines which would prevent an
arbitrary abuse of the conferred power. Schechter Corp. v. United
States.

Executive Order 9066 provided that military authorities
were to establish military districts:

. . . from which any or all persons may be excluded,

1 and with respect to which, the right of
2 any person to enter, remain in, or leave
3 shall be subject to whatever restrictions
4 the Secretary of War or the appropriate
5 Military Commander may impose in his
6 discretion. (Emphasis added.)

7 Executive Order 9066 was ratified by Congress in Public Law 503
8 (Congressional Act of March 21, 1942). This grant of power to
9 the military was clearly an unconstitutional delegation of the
10 power to legislate.

11 By their very wording Public Law 503 and Executive Order
12 9066 clearly provided no standards or guidelines to define the
13 scope of the military powers. The Court, in fact admitted that
14 Public Law 503:

15 ...does not in terms establish a particular
16 standard to which orders of the military
17 commander are to conform, or require findings
18 to be made as a prerequisite to any order.
19 (Hirabayashi, at 103.)

20 However, the Court purported to "cure" the vagueness of the
21 Congressional Act by reading it in conjunction with Executive Order
22 9066. The Court thereby implied that the military orders
23 controlling civilians were limited by the "standard" that all such
24 orders be related to the protection of "military resources" against
25 "espionage and sabotage". Moreover, the Court concluded that
26 the military met the "standard" because the initial orders issued
27 by General DeWitt stated that "future actions" (emphasis added)
28 would be taken "in order to prevent espionage and sabotage."

Such desperate bootstrapping by the Court is even more
apocryphal when examined in light of Opp Cotton Mills v.
Administrator, which the Court relied on to justify the delegation
of civil legislative power to the military. Although the

1 Hirabayashi Court wholly adopted Opp's language and reasoning,
2 the delegation of legislative power in Opp to a civil agency
3 administering the Fair Labor Standards Act could not by any
4 stretch of imagination be said to be similar to the sweeping
5 powers granted the military under Executive Order 9066. In Opp,
6 the Court held that Congress had (1) delegated only administrative
7 powers (the power to set minimum wages) and (2) the Congress had
8 in fact established specific guidelines and standards (including
9 standards for setting minimum wages, specific factfinding
10 requirements and guidelines, and specific limitation and
11 definitions of the powers of the program administrator).

12 No such safeguards attended the delegation of legislative
13 power to the military under Executive Order 9066 and Public Law
14 503. Indeed, the only "standard" created, that the military
15 action be related to the prevention of espionage or sabotage,
16 was nullified because the Court accepted the military's mere
17 assertion, that the orders met such a standard, as conclusive
18 "proof" of meeting the standard. Additionally, orders could be
19 made by the military whenever deemed "necessary or desirable"
20 (again wholly by the discretion of the military commander) and
21 the commander had complete discretion to determine what measures
22 would be taken.

23 The incarceration of the Japanese Americans was clearly
24 the type of discretionary act specifically prohibited by Milligan,
25 for, as the Court expressly recognized in Endo, the entire program
26 of detention and incarceration was not authorized either by
27 Congress or the President. In the absence of any significant
28 limitation on the actions of the military, the delegation of civil

1 legislative power to the military under Executive Order 9066 and
2 Public Law 503 was plainly unconstitutional.

3 C. THE COURT FAILED TO PROPERLY REVIEW THE MILITARY'S
4 EXERCISE OF POWER OVER CIVILIANS.

5 Under our constitutional system of checks and balances
6 the courts are charged with the duty to review the actions of the
7 military, executive and legislature in their exercise of the war
8 power. The actions so taken remain subject to review by the
9 courts to assure that constitutionally protected rights are
10 not trampled in the government's fervor to fulfill so-called
11 "military necessity."

12 In Sterling v. Constantin, the Supreme Court expressly
13 rejected the notion that "mere executive fiat" in an alleged
14 emergency was its own justification, and stated:

15 The contrary is well established. What are the allowable
16 limits of military discretion and whether or not they
17 have been overstepped in a particular case are judicial
18 questions. (Emphasis added)

19 In upholding the military orders restricting, excluding and
20 incarcerating Japanese Americans, the Court not only failed to
21 protect the procedural and substantive rights of Japanese
22 Americans, but also condoned the violations of constitutional
23 rights described in the previous sections of this brief. In this
24 regard:

25 1. The Court failed to rigorously scrutinize the Japanese
26 American cases according to the high standard it announced
27 in cases of overt race discrimination. It is ironic that
28 Hirabayashi and Korematsu stand for the proposition that the
odious nature of racial discrimination renders "all legal

1 restrictions which curtail the civil rights of a single racial
2 group...immediately suspect," and that the "courts must subject
3 [such discrimination] to the most rigid scrutiny" (Korematsu,
4 at 216); for the Court in these cases, despite its words, failed
5 to follow these principles. (See discussion in Section I, supra)

6 2. The Court further failed to address the denial of
7 civil liberties of Japanese Americans, including due process,
8 the rights included in the Bill of Rights and the protection
9 against Bills of Attainder. (See discussion in Sections II, III,
10 IV and VI, supra).

11 3. The Court failed to confront the unconstitutionality of
12 the entire detention program.

13 The Hirabayashi court justified cursory examination of the
14 military actions by stating:

15 ...if conditions call for the exercise of judgment and
16 discretion and for the choice of means [by the warring
17 branches] it is not for any court to sit in review of
18 the wisdom of their action or substitute its judgment for
19 theirs.

20 (Hirabayashi, at 95, emphasis added.)

21 This proposition, that in time of war the military, executive
22 and legislative branches are released from the constitutional
23 check of judicial review, flies in the face of existing precedent.

24 In a classic statement of the war powers, the Court in Home
25 Building and Loan Association v. Blaisdell asserted:

26 [T]he war power of the Federal Government is...a power
27 to wage war successfully...But even the war power does
28 not remove the constitutional limitations safeguarding
essential liberties. (Emphasis added.)

If constitutional safeguards are to endure during the exercise of
the war powers, the judicial power to review any such exercise,

1 which is the sole mechanism for assuring protection of individual
2 rights, must necessarily remain intact as well.

3 The court's duty to preserve the balance between individual
4 rights and government interests through the exercise of judicial
5 review is not diminished in wartime. The Court's duty to assure
6 that constitutional rights are not sacrificed is perhaps most
7 urgent in time of war, when public fear, race hatred, hysteria
8 and greed may likely come to the fore.

9 The starkest example of the Court's failure to review mili-
10 tary actions was in its refusal to examine the constitutionality
11 of the detention program. The Supreme Court never examined the
12 constitutionality of the overall program detaining Japanese Ameri-
13 cans. Its refusal to do so, however, was typical of the Court's
14 irresponsible treatment of the fundamental issues presented in the
15 Japanese American cases and in a larger sense, the failure of the
16 Court system in times of national crisis.

17 From the beginning, the Court limited its review in such
18 a way as to avoid reaching the issue of the constitutionality
19 of the incarceration. Hirabayashi limited itself to the issue
20 of the validity of the curfew; Korematsu ruled only on the
21 exclusion issue; and, in Endo, only the validity of the detention
22 of Japanese Americans after they were found to be "loyal" was
23 considered. In all of these cases, the Court was squarely face
24 with the validity of the underlying program of incarceration.
25 The Court thus tolerated the removal and incarceration of the
26 entire West Coast Japanese American population without ever
27 directly facing the question of its legality.

28 In fact, in Endo, the Court set a dangerous precedent by

1 expressly assuming the legality of the detention program despite
2 its express recognition that there was no Congressional
3 authorization for the incarceration in Public Law 503 or its
4 legislative history.

5 The Court's failure to examine the detention in its
6 true form as an improper military action over civilians leads to
7 the intolerable result that the detention order was not reviewable
8 because they were military in nature. The Court's analysis is
9 even more suspect in light of its holding in Endo that the deten-
10 tion was carried out by a civil agency, the War Relocation
11 Authority. The Court thereby found that it was unnecessary to
12 determine whether the detention was an unconstitutional exercise
13 of military power. This schizophrenic result was not and should
14 not be the law.

15 D. CONCLUSION.

16 Despite the Court's purported standard of review, the Court
17 required no factual justification for the military order.
18 Instead, the bare, unsupported assertions of General DeWitt were
19 accepted as conclusive "proof" of the validity of the military
20 actions. (See discussion in IIB, supra). The Court based its
21 conclusion that the removal and imprisonment were not racially
22 motivated group punishment merely on the military claim that there
23 were an "unascertained number" of disloyal Japanese Americans who
24 could not be immediately segregated from the loyal. Judicial
25 review was thus cut short by the military's simple claim that it
26 was doing what it had to do.

27 The failure of the Supreme Court to apply constitutional
28 standards of review to military orders excluding and imprisoning

1 Japanese Americans gave judicial sanction to the most sweeping
2 deprivation of civil rights conducted by the Federal Government
3 in modern times and greatly diminished civil control over the
4 military. The Court's failure sets the stage for recurrence
5 of similar deprivations of rights in times of future conflict.
6 It is a chilling footnote that the Nazi defendants at the
7 Nuremberg Tribunal repeatedly cited Hirabayashi and Korematsu
8 as part of their defense, claiming that the "evacuation" of the
9 Jews was a "military necessity."

10 The courts in general, and the United States Supreme Court
11 in particular, are charged with preservation of the balance
12 between individual rights and government interests by virtue
13 of their responsibility to exercise review over governmental
14 actions which infringe individual rights. This duty is clearly
15 not diminished during times of war.

16 V. EXECUTIVE ORDER 9006 AND PUBLIC LAW 503 WERE
17 UNCONSTITUTIONAL BILLS OF ATTAINDER.

18 A. Introduction.

19 Article I, Section 9, clause 3 of the United States
20 Constitution states that "No Bill of Attainder or Ex Post Facto
21 law shall be passed." The general definition that has been most
22 commonly used to describe a Bill of Attainder is "a legislative
23 act which inflicts punishment without trial". (Cummings v.
24 Missouri).

25 Prior to the adoption of the U. S. Constitution, Bills of
26 Attainder were frequently used in England to deal with persons who
27 attempted, or threatened to attempt, an overthrow of the Govern-
28 ment.

1 Although these bills were originated in England, they
2 were used during the American Revolution when legislatures of
3 the thirteen colonies passed laws against Tories (Cooper v.
4 Telfair). Thus, when the Constitution was written, the drafters
5 had very clearly in mind that "the Bill of Attainder Clause was
6 intended not as a narrow, technical (and therefore soon to be out-
7 moded) prohibition, but rather as an implementation of the separa-
8 tion of powers, a general safeguard against legislative exercise
9 of the judicial function, or more simply -- trial by legislature."
10 (United States v. Brown).

11 The judicial system today views the ban on Bills of
12 Attainder as far from antiquated; the doctrine survives as a
13 continuing protection against legislative enactments which ef-
14 fectively impose punishment without judicial protection.

15 There are, essentially, three elements which must be
16 proven in order to classify an Executive Order or statute as a
17 Bill of Attainder:

- 18 1. Lack of judicial trial.
- 19 2. Specific identification of a group.
- 20 3. Nonjudicial punishment.

21 U. S. v. O'Brien.

22 B. NO JUDICIAL TRIAL WAS ALLOWED FOR JAPANESE AMERICANS.

23 In order to constitute a Bill of Attainder a law must
24 arise from an authority other than the judiciary, (Cummings v.
25 Missouri, based on the comments of the framers of the Constitu-
26 tion in publications such as the "Federalist Papers.") In such
27 instances, the legislature, above and beyond its normal duties,
28 exercises the powers and offices of a judge without the safe-

1 guard of trial. It also determines the sufficiency of proof
2 without regard to rules of evidence, passes guilt, and fixes
3 punishment based on its own idea of the gravity of the "offense."
4 (Cummings v. Missouri). Following such a definition, it would
5 appear that Public Law 503 passed by Congress and providing
6 criminal penalties for violation of Executive Order 9066 and
7 military orders met this requirement. As discussed previously
8 in the section on the Bill of Rights, no trial was ever conducted
9 for each of the Japanese Americans incarcerated during World War
10 II. Rather there was only a summary round-up and detention.

11 The question of whether the Executive Order itself meets
12 this requirement is less clear, because of the Bill of Attainder
13 is generally applied to legislative enactments. However, there
14 has been language by the Supreme Court indicating that executive
15 action may also be prohibited as a Bill of Attainder. Thus in
16 Joint Anti-Fascist Refugee Committee v. McGrath, the Court, com-
17 menting on an Attorney General's list of communist organizations
18 drawn up pursuant to an Executive Order, stated that it was in-
19 conceivable "that the authors of the Constitution, who outlawed
20 the Bill of Attainder, inadvertently endowed the executive with
21 power to engage in the same tyrannical practices that had made
22 the bill such an odious institution."

23 C. EXECUTIVE ORDER 9066 AND SUBSEQUENT CONGRESSIONAL
24 LEGISLATION SPECIFICALLY SINGLED OUT AMERICANS OF
25 JAPANESE ANCESTRY.

26 The second requirement of specific identification of
27 a group can be met when the legislature of Executive singles out
28 and designates an individual or ascertainable group (Cummings v.
Missouri). The Bill of Attainder must positively identify a

1 group; it is not simply a variant of the Equal Protection Clause,
2 invalidating legislative acts which burden some individuals or
3 groups but not all other plausible individuals (Nixon v. Adminis-
4 tration). Rather as the Court said in U. S. v. Brown: "the vice
5 of attainder that the legislature has decided for itself that
6 certain persons possess certain characteristics and are there-
7 fore deserving of sanctions, not that it has failed to sanction
8 others similarly situated."

9 In this case, the target of the Executive Order was suf-
10 ficiently specific, being all persons of Japanese ancestry or
11 descent. The Order was not drawn so broadly to include other
12 potential "domestic enemies" (i.e., Germans or Italians). A
13 particular ethnic group, identified by race, was singled out.
14 Commenting on this aspect of the Executive Order, Harry S. Free-
15 man, a law professor at Cornell University, stated that "to deprive
16 a citizen of his rights because of his ancestry. . . is uncon-
17 stitutional as a Bill of Attainder", (Geneology, Evacuation and
18 Law, Cornell Law Quarterly 457 (1943)).

19 D. THE EXCLUSION AND INCARCERATION OF JAPANESE
20 AMERICANS CONSTITUTED PUNISHMENT.

21 The question of whether legislative or executive action
22 assesses punishment sufficient to meet Bill of Attainder stand-
23 ards is the final requirement to be analyzed. Although the
24 Supreme Court has stated that the analysis of this issues de-
25 pends upon the particular circumstances of a case, the Court has
26 defined three tests which may be applied to an act to determine
27 whether sufficient punishment is evident: (a) historical treat-
28 ment, (b) function, (c) legislative or executive motivation. His-

1 torical treatment involves an analysis of punishment in terms
2 of what historically has been regarded as punishment for Bill of
3 Attainder purposes (Drehnan v. Stifle). Imprisonment, banishment,
4 and confiscation of property are punishment historically associa-
5 ted with Bills of Attainder. (Cooper v. Telfair). However, as
6 early as the Cummings case, the Supreme Court has defined "pun-
7 ishment" very broadly for purposes of Bills of Attainder, stating
8 that "the deprivation of any rights, civil or political, pre-
9 viously enjoyed, may be punishment, the circumstances attending
10 and the causes of deprivation determining this fact." Again, as
11 discussed earlier, the incarceration of Japanese Americans in-
12 volved wholesale deprivation of a number of civil and constitu-
13 tional rights, culminating in extended detention. Therefore,
14 there was punishment sufficient to meet the test of historical
15 analysis.

16 In an amicus brief to the Hirabayashi case, it was argued
17 that banishment was a punishment which historically characterized
18 Bills of Attainder. Support for this contention was based on
19 In re Yung Sing Hee which involved a Chinese American citizen
20 who went abroad but was excluded from the United States on her
21 return under the Chinese Exclusion Act. The Supreme Court in
22 that case concluded that such exclusion of a citizen amounted to
23 a banishment prohibited as a Bill of Attainder. "Bills of this
24 sort have been most usually passed in times. . . of violent
25 political excitement; periods in which all nations are most
26 liable to forget their duties and to trample upon the rights and
27 liberties of others."

28 Although exile and incarceration within a country has not

1 generally been considered banishment (which usually refers to
2 exile outside a country), it should be recognized that the ex-
3 clusion of Japanese American citizens from certain geographic
4 areas of the United States was, in essence, banishment, and there-
5 fore punishment.

6 The "function" test for punishment involves an analysis by
7 the Court of whether the law being challenged can reasonably be
8 said to further non-punitive legislative purposes (Cummings). The
9 professed purpose of the Executive Order was to prevent any sabo-
10 tage and espionage based on ethnic affiliations, which would im-
11 ply a preventative rather than an overtly retributive purpose.
12 Yet one aspect of the "function" test made explicit in the
13 United States v. Brown at page 458, is that punishment is not
14 merely defined as retribution for past events, but may also in-
15 clude inflicting deprivation on some group in order to prevent
16 future misconduct.

17 In Brown the Court pointed out that a measure designed to
18 be preventative was consistent with traditional purposes of
19 criminal punishment, stating "it would be archaic to limit the
20 definition of 'punishment' to 'retribution'." Punishment serves
21 several purposes: retributive, rehabilitative, deterrent and
22 preventive. One of the reasons society imprisons those convicted
23 of crimes is to keep them from inflicting future harm, but that
24 does not make imprisonment any less punishment."

25 The Court in Brown pointed out that England enacted Bills
26 of Attainder, passing judgment "that a given person or group was
27 likely to cause trouble and therefore inflicted deprivation upon
28 that group in order to keep it from bringing about the feared

1 event." Also as noted earlier, bills were passed by the colonies
2 in order to keep Tories from effectively assisting the British
3 in the American Revolution. Thus the Executive Order which had
4 an expressed purpose of being preventative in nature, was actually
5 a Bill of Attainder.

6 The motivation test is essentially an assessment of the
7 purposes or motives of the legislative authority, that is,
8 whether Congress evidences intent to punish (United States v.
9 Lovett). Such a determination does not have to be based on a
10 formal legislative announcement of punishment (Nixon). However,
11 an examination of the Congressional Record and history of a bill
12 is helpful (Nixon). The Congressional Record containing dis-
13 cussion of the Executive Order and subsequent legislation is
14 replete with demands for incarceration based on imagined sub-
15 versive activity. Such evidence of punishment motivation supports
16 classification of these acts and Bills of Attainder.

17 One other point made by the Court in Nixon was that
18 "in determining whether a legislature sought to inflict punish-
19 ment of an individual, it is often useful to inquire into the
20 existence of a less burdensome alternative by which that legis-
21 lature could have achieved its legitimate non-punitive objectives."
22 As discussed in the due process section of this brief, less bur-
23 densome alternatives clearly existed. The most obvious alter-
24 natives are judicial trial or a hearing where there was clear
25 evidence of criminal activity, or increased security on the
26 West Coast. Failure to consider implementing these alternatives,
27 however, is only further indication of the punishment motives
28 behind the Executive and Legislative enactments.

1 E. CONCLUSION.

2 Based on the above, Executive Order 9066 and subse-
3 quent legislation were Bills of Attainder. There were no judi-
4 cial trials, Japanese Americans were specifically identified
5 as the target of the order, and non-judicial punishment was in-
6 flicted. As such, there was a clear and distinct violation of
7 the Constitution's prohibition against Bills of Attainder.

1 CONCLUSION

2 The issues, arguments and counter-arguments raised by the
3 expulsion and imprisonment of both non-citizen and citizen
4 Japanese during World War II are impossible to summarize in such
5 a short brief. The legal questions have been the subject of
6 numerous law review articles and constant public debate over the
7 years. We have nevertheless attempted to bring to this
8 Commission's attention what we believe to be the most significant
9 issues and arguments challenging the constitutionality of the
10 expulsion and imprisonment.

11 There is, however, a greater fundamental question regarding
12 the nature of the accusations which the government employed to
13 justify the exclusion and detention. Without constitutional
14 guarantees before imprisonment, Japanese Americans were forced
15 into camps on a charge of "suspicion for potential for sabotage
16 and espionage" -- a charge which could never have even supported
17 an arrest much less a conviction or imprisonment.

18 Nevertheless, racism, economic greed and war time hysteria
19 shortcut normal constitutional procedures and rights and allowed
20 a mere suspicion to validate the expulsion and imprisonment of an
21 entire race of people including both citizens and non-citizens.
22 The ultimate disgrace is that the United States Supreme Court,
23 the last refuge for adjudication of the rights of the poor, the
24 unpopular and the powerless, abdicated its responsibility and
25 capitulated to the pseudo-arguments of the military in holding
26 that the curfew, expulsion and detention of Japanese Americans was
27 unconstitutional.

28 We do not believe that Japanese Americans or the Japanese

1 American community bears the burden of "proving" that wrongs
 2 were committed against Japanese Americans during World War II.
 3 What was done to Japanese Americans was morally wrong without
 4 regard to any legal rights violated. Nevertheless, we have
 5 chosen to focus on one aspect of the wrongs committed to demon-
 6 strate the nature, degree and scope of deprivations suffered by
 7 Japanese Americans.

8 Without a doubt, the expulsion and imprisonment of
 9 Japanese Americans remains along with the forced removal and
 10 incarceration of Native Americans, the slavery of Black persons
 11 and the theft of land from the Mexicans as one of the darkest
 12 blots on the history of the United States. While the suffering,
 13 financial losses, psychological traumas can never be repaired,
 14 this Commission has the opportunity to take positive steps toward
 15 both the reparation of individuals and communities which suffered
 16 and to prevent the recurrence of such an event.

17 We respectfully submit that this Commission recommend to
 18 Congress that adequate financial reparations be made to Americans
 19 of Japanese ancestry who were the victims of the unconstitutional
 20 acts by the United States Government and further issue a
 21 declaration that the acts and orders of the President and Congress
 22 and the decisions of the United Supreme Court upholding those acts
 23 and orders were incorrect and should never be used as a precedent
 24 against any identifiable group.

25 Dated: July 7, 1981.

26 RESPECTFULLY SUBMITTED,
 27 BAY AREA ATTORNEYS FOR REDRESS

BAY AREA ATTORNEYS FOR REDRESS

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