

ASIAN AMERICAN
LEGAL DEFENSE AND
EDUCATION FUND

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TESTIMONY OF STANLEY MARK, ESQ.,
STAFF ATTORNEY, ASIAN AMERICAN LEGAL
DEFENSE AND EDUCATION FUND

HEARINGS BEFORE THE COMMISSION ON WARTIME

RELOCATION AND INTERNMENT OF CIVILIANS

WASHINGTON, D.C.

JULY 16, 1981

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My name is Stanley Mark, and I am a staff attorney with the Asian American Legal Defense and Education Fund (AALDEF).

AALDEF supports redress for the over 120,000 Japanese Americans who were incarcerated in concentration camps during World War II because of their race and national origin. This deprivation of fundamental constitutional rights by all branches of the United States government was blatantly racist and economically motivated. It must never be allowed to occur again.

AALDEF advocates affirmative measures both to redress the wrongs suffered by Japanese Americans in the 1940's and to deter such acts in the future. To accomplish these goals, AALDEF supports direct monetary payments to all Japanese Americans who were interned, despite the fact that their personal and property losses can never be fully compensated. Moreover, AALDEF supports other actions designed to educate Americans about this historic injustice and to prevent future government abridgements of individual rights.

AALDEF's position paper will focus upon some lesser known legal theories, such as the internment as a violation of the Thirteenth Amendment, and also explore possible legal bases for monetary reparations to individual Japanese Americans. In my testimony today, I will merely highlight some of the legal theories to support redress. A more complete statement and analysis of the legal issues will be submitted to the Commission at a later date.

In the spirit of cooperation and to avoid duplication of efforts, AALDEF supports and endorses the legal theories set forth by the Bay Area Attorneys for Redress. We urge the Commission to examine closely all of the legal theories presented to it and recommend that Congress enact legislation either to award direct monetary payments to persons damaged by the incarceration or, alternatively, to remove existing procedural legal barriers, thereby enabling individual Japanese Americans to pursue appropriate remedies in the federal courts.

Japanese Americans and Their Legal History

To place the incarceration of Japanese Americans in an historical perspective, a brief summary of the legal history of Japanese Americans will be presented at the outset.

Significant numbers of Japanese laborers began immigrating to the United States in the 1890's. With this influx, anti-Asian sentiment, formerly directed against Chinese coolies, mounted

against Japanese laborers who worked, as the Chinese before them, in agriculture, railroad and mining.¹ Over 40% of California's agricultural labor force was Japanese by 1909.² Immigration and naturalization restrictions were enacted against Japanese with the use of precedents directed specifically at limiting Chinese immigration. By 1907, the so-called Gentleman's Agreement between Japan and the United States significantly restricted immigration of Japanese,³ and by 1924, all Japanese were totally excluded from entry into the United States as "aliens ineligible for citizenship."⁴

The Japanese Exclusion Act of 1924 remained in effect until 1952. Moreover, Japanese immigrants were found ineligible for naturalization because they were not "free white person(s)" under various naturalization acts dating back to 1790. Ozawa v. United States, 260 U.S. 178 (1922); see also Yamashita v. Hinkle, 260 U.S. 199 (1922); Toyota v. United States, 268 U.S. 402 (1925); Morrison v. California, 291 U.S. 82 (1934). It was not until 1952 that Japanese were permitted to become naturalized citizens,⁵ and in 1965 Japanese, along with Chinese, were accorded the same immigration privileges as Caucasians.⁶

The restrictive and exclusionary immigration laws directed against first the Chinese and then the Japanese laid the groundwork for discriminatory state legislation that rivaled the Black Codes of the South. Thus, the Alien Land Acts of 1913 and 1920 prohibited foreign-born Japanese from owning or possessing any legal interest in real property.⁷ The Supreme Court of the United

States sanctioned the California statute in Webb v. O'Brien, 263 U.S. 313 (1923); see also Terrace v. Thompson, 263 U.S. 197 (1923) (Washington State alien land law); Porterfield v. Webb, 263 U.S. 225 (1923); Frick v. Webb, 263 U.S. 326 (1923); Cockrill v. California, 268 U.S. 258 (1925) (California Cases).⁸ Japanese, as aliens ineligible for citizenship, were prohibited from owning or possessing firearms,⁹ from obtaining jobs with "any department of state, county, or city government,"¹⁰ and from obtaining commercial fishing licenses.¹¹ Such restrictions were not overturned until the Supreme Court decisions of Oyama v. California, 332 U.S. 633 (1948) and Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948).

This legacy of overt discrimination culminated in the incarceration of 120,000 Japanese Americans--an action that stigmatized them and deprived them of the constitutional rights guaranteed to all Americans.

Thirteenth Amendment and Redress

The en masse incarceration of Japanese Americans is usually viewed and analyzed as a deprivation of constitutional rights based on due process violations. It can and should also be viewed as a violation of the Thirteenth Amendment, a post-Civil War amendment that is more popularly associated with the abolition of slavery in the South.¹² Justice Miller stated for the majority of the Supreme Court in the Slaughterhouse Cases:

We do not say that no one else but the Negro can share in this protection. Both the language and the spirit of these Articles are to have their fair and just weight in any question of construction. Undoubtedly, while Negro slavery alone was in the mind of the Congress that proposed the Thirteenth Amendment, it forbids any other kind of slavery, now or hereinafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this Amendment may safely be trusted to make it void.

83 U.S. (16 Wall) 36, 72 (1873) (emphasis added).

The Thirteenth Amendment condemns the subjugation of all races and forbids not only the literal institution of slavery but also all "badges and incidents" associated with the system of slavery that stigmatizes a people as inferior. This stigma of inferiority persists even when the physical subjugation ceases.¹³

The United States Government forcibly removed over 120,000 Japanese Americans--70,000 of whom were U.S. citizens--from their homes and herded them into concentration camps. Although not convicted of any crimes, those incarcerated were not free to leave the camps or to conduct their lives as free people with the same rights and privileges accorded to all persons under our Constitution. Their incarceration and the unequal treatment afforded them constituted a form of slavery or involuntary servitude prohibited by the Thirteenth Amendment.

Although the physical confinement¹⁴ and the involuntary servitude has ceased, the "badges and incidents" of slavery arising from the incarceration continue as a stigma of inferiority because they remain unremedied to this date.

In Jones v. Alfred H. Mayer Co., 329 U.S. 409 (1968), the seminal case interpreting the reach of the Thirteenth Amendment, the Supreme Court held that if the right to buy or sell property turned upon the color of a person's skin, this constituted a badge and incident of slavery prohibited by the Thirteenth Amendment. The Court went further to state:

Surely Congress has the power under the Thirteenth Amendment rationally to determine what are badges and the incidents of slavery, and the authority to translate that determination into effective legislation And when racial discrimination herds men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery.

329 U.S. at 440-43.

The holding of Jones v. Alfred H. Mayer Co. is of special relevance to an analysis of the incarceration, since the government interfered with the property and contract rights of Japanese Americans during World War II. Japanese Americans, who were detained without criminal convictions, were stigmatized as inferior in a variety of ways. They were denied temporary leave to manage their private property.¹⁵ They were prohibited from establishing "evacuee-sponsored production enterprises,"¹⁶ and, in effect, were barred from fully exercising their contract rights.¹⁷ Furthermore, they were paid less than the prevailing wages for government and privately-sponsored employment.¹⁸

With respect to this latter point, it should be noted that the Geneva Convention governing the treatment of prisoners of war required that those incarcerated should be paid for their

labor "in accordance with the rates in force for soldiers of the national army". 47 Stat. 2021 (Article 34). Historians have documented that the wage scale of Japanese American internees ranged from \$12-16 per month, while U.S. military wages ranged from \$21-50 per month, including liberal fringe benefits. See, e.g., M. Weglyn, Years of Infamy 115 (1976). Similarly, private employers frequently requested Japanese Americans as laborers, paying them unconscionably low salaries. For example, as one Congressional report indicated, one farmer had been paying \$ 1.80 per 100 pounds of crops harvested but indicated he would pay the "going wage" to the Japanese internees--"probably 45¢ per hour." Select Committee Investigating National Defense Migration, Fourth Interim Report, 77th Cong., 2d Sess. (May 1942). While Japanese Americans were never formally accorded the status of prisoners of war, the U.S. Government had agreed to apply the standards of the Geneva Agreement to Japanese Americans incarcerated in the camps.¹⁹

These violations of the rights of Japanese Americans constituted badges and incidents of slavery that remain unremedied to this date. Despite their achievements, Japanese Americans continue to live under the stigma of inferiority and have yet to achieve equality with their white counterparts in all aspects of American life.²⁰ Since Congress is empowered to define and abolish such badges, we urge the Commission to recommend that Congress define the incarceration of Japanese Americans and those violations arising from the incarceration as badges and incidents of slavery and legislate an appropriate remedy to abolish them.

Legal Bases for Monetary Reparations to Japanese Americans

The Supreme Court has recognized Congress's primary authority to pay a moral debt by formulating broad equitable remedies for classwide injustice. See United States v. Choctaw Nation, 179 U.S. 494 (1900). Under American case law and international precedents, there are two possible forms of relief for Japanese Americans which Congress should consider: 1) direct monetary payments to individuals incarcerated in the camps; and 2) enabling legislation that would permit individuals to bring private suits in federal court. Neither approach would violate separation of powers principles, even in the face of prior adjudications and settlements under the American-Japanese Evacuation Claims Act of 1948 or existing Supreme Court decisions upholding various aspects of the incarceration. See Pope v. United States, 323 U.S. 1, 9-10 (1944); United States v. Sioux Nation, __ U.S. __, 100 S. Ct. 2716, 2731 (1980).

Direct Monetary Reparations

The recognition of a moral debt or obligation by a government is not without precedent among the international community of nations. In 1956, the Federal Republic of Germany (hereinafter "FRG") enacted the Federal Compensation Law [Bundesentschädigungsgesetz] (hereinafter "BEG"). This comprehensive set of laws resulted from Germany's recognition of its obligation to make moral and material amends to the victims of Nazi persecution, even though the FRG government was not the government in power when the wrongs were committed. The FRG was under no legal obligation

to provide restitution. See Honig, The Reparations Agreements Between Israel and the Federal Republic of Germany, 48 Am. J. Int'l L. 564 (1954). Nonetheless, as Konrad Adenauer emphasized in his speech before the Bundestag in 1951, "[U]nspeakable crimes were perpetrated in the name of the German people which impose upon them the obligation to make moral and material amends, both with regard to individual damage which Jews have suffered and with regard to Jewish property for which there are no longer claimants." See Schwerin, German Compensation for Victims of Nazi Persecution, 67 Northwestern U. L. Rev. 479, 482-83 (1972).

The BEG confers statutory protection to several groups of persons defined as "persecutees" victimized by the Nazis. Significantly, standing is conferred automatically to members of certain racial or religious groups who claim one of the categories of damages compensated by the BEG. The BEG allows for the recovery of damages for those who suffered loss of life; damage to limb or health; loss of liberty, property or possessions; or harm to vocational or economic pursuits. BEG ¶1.

We recommend that the Commission examine the specific aspects of Germany's Federal Compensation Law in considering the remedy of direct monetary payments to Japanese Americans. More importantly, however, we urge recognition of the principle adopted by the German government: that the U.S. government acknowledge its moral obligation to redress the wrongs committed against Japanese Americans during a time of national crisis and racist hysteria.

Enabling Legislation

As an alternative to direct monetary reparations, Congress may also enact enabling legislation to remove the procedural barriers that currently prevent Japanese Americans from pursuing redress in the courts.

Such enabling legislation would be required for several reasons. First, the widespread injuries suffered by those incarcerated during World War II occurred almost forty years ago. Thus, the legal claims for uncompensated personal injuries and property losses are now barred by statutes of limitations. Second, the American-Japanese Evacuation Act of 1948 (hereinafter Claims Act)²¹ constituted a vehicle--albeit grossly inadequate²²--to compensate the real and personal property losses suffered by Japanese Americans during World War II. For those individuals who filed claims that were adjudicated or settled under this Act, there might exist potential problems of res judicata, the doctrine which bars the relitigation of claims that were or could have been decided. Finally, the doctrine of sovereign immunity bars direct suits against the federal government for monetary damages unless that immunity has been expressly waived.

Congress has the power to enact legislation waiving government defenses such as the statute of limitations and res judicata. See, e.g., United States v. Sioux Nation, *supra*, 100 S. Ct. at 2731; Pope v. United States, 323 U.S. 1, 9 (1944); Cherokee Nation v. United States, 270 U.S. 476, 486 (1926).

Likewise, Congress can authorize suits against the U.S. government through limited waivers of its sovereign immunity. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 1291 et seq.

We therefore urge that the Commission recommend, as one alternative, enabling legislation that would permit Japanese Americans to adjudicate their individual claims in federal court.

Conclusion

The incarceration of Japanese Americans in concentration camps during World War II will serve as a continuing reminder of the delicate nature of individual rights in a democratic society. With the hindsight of history, it is clear that racial prejudice and wartime hysteria easily overrode well-established constitutional principles. Yet, this massive violation of the rights of 120,000 Japanese Americans was sanctioned by all branches of the U.S. government and to this day has never been fully redressed.

It is time for our government to acknowledge its full moral responsibility for the injustices inflicted upon Japanese Americans incarcerated because of their race and national origin. We therefore urge the Commission to recommend strong affirmative measures that will enable Japanese Americans to be compensated for their losses and to insure that such violations of fundamental constitutional rights will never be repeated in the future.

FOOTNOTES

1. See generally Y. Ichihashi, Japanese in the United States (1932); R. Daniels, The Politics of Prejudice: The Anti-Japanese Movement in California and the Struggle for Japanese Exclusion (1968); F. Chuman, The Bamboo People: The Law and Japanese Americans (1976).
2. C. McWilliams, Prejudice: Japanese Americans--Symbol of Racial Intolerance (1944).
3. See Higham, American Immigration Policy in Historical Perspective, 21 Law & Contemp. Problems 213, 227 (1956).
4. Immigration Act of 1924, 43 Stat. 153.
5. Immigration and Nationality Act of 1952, P.L. No. 82-414, 66 Stat. 163.
6. Immigration and Nationality Act of 1965, 8 U.S.C. §§ 1151-56.
7. Act of May 19, 1913, ch. 113, Cal. Stats. 1913; Initiative Measure adopted Nov. 2, 1920, Cal. Stats. 1921, p. lxxxiii.
8. See McGovney, The Anti-Japanese Land Laws of California and Ten Other States, 35 Cal. L. Rev. 7 (1947); Ferguson, The California Alien Land Law and the Fourteenth Amendment, 35 Cal. L. Rev. 61 (1947).
9. Game Laws, § 2, ch. 339, Cal. Stats. 1923.
10. Ch. 417, Cal. Stats. 1915.
11. Fish & Game Code, ch. 181, § 990, Cal. Stats. 1945.
12. The Thirteenth Amendment, ratified in 1865, provides:
 - Section 1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.
 - Section 2. Congress shall have the power to enforce this article by appropriate legislation.
13. "The plain intent was to abolish slavery of whatever name and form, and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude." Bailey v. Alabama, 219 U.S. 219, 241 (1911). The Thirteenth Amendment was intended to be "a direct ban against many of the evils radiating out from the system of slavery as well as a prohibition against the system itself." tenBroeck, The Thirteenth Amendment to the United States Constitution, 39 Calif. L. Rev. 171, 180 (1951).

14. For a description of the harsh living conditions, see F. Chuman, *The Bamboo People: The Law and Japanese Americans* 144-45 (1976).

15. [1948] U.S. Code Cong. & Ad. News 2298.

16. D. Myer, *Uprooted Americans--The Japanese Americans and the War Relocation Authority During World War II* 43 (1971).

17. Today, the same right to make and enforce contracts and to enjoy the full and equal benefits of all laws is protected by 42 U.S.C. § 1981 (1964). This provision was first included as part of the Civil Rights Act of 1866, which was enacted pursuant to Congress's power under the Thirteenth Amendment.

18. D. Myer, supra note 16, at 42.

19. On July 27, 1929, the United States and forty-six other countries signed the Geneva Convention, which set forth minimum standards of treatment applicable to prisoners of war. 47 Stat. 2021 (1932). After the outbreak of World War II and the internment of Japanese Americans, the American government assured Japan it would abide by the provisions of the treaty with respect to "any civilian enemy aliens that may be interned." Telegram from Cordell Hull, Secretary of State, to Huddle, Charge in Switzerland, Dec. 18, 1941, reprinted in *Foreign Relations of the United States--Diplomatic Papers* 792 (1942) (Vol. 1). Moreover, as the Assistant Secretary of State emphasized: "[t]he Department [of State] has a responsibility--because of the reciprocal treatment provision in the Geneva Convention--in connection with internment camps, relocation centers and prisoners of war camps in this country where Japanese citizens and American citizens of Japanese race are confined." Letter from Breckenridge Long, Assistant Secretary of State, to Cordell Hull, Secretary of State, Dec. 17, 1943, reprinted in M. Weglyn, *Years of Infamy*, 190-91 (emphasis added).

20. See U.S. Comm'n on Civil Rights, *Success of Asian Americans: Fact or Fiction?* 9, 10, 12 (1980); U.S. Dep't of HEW, *A Study of Selected Socio-Economic Characteristics of Ethnic Minorities Based On the 1970 Census*, Vol. II: *Asian Americans* 86, 88 (1974).

21. 50 U.S.C. app. §§ 1981-1987 (1951 & Supp. 1981).

22. The Claims Act was an inadequate remedy since it excluded claims based on personal injury, physical inconvenience and hardship, mental suffering and loss of anticipated profits or earnings.