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1 May 1984

Hon. William V. Roth, Jr.
Chairman
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Re: S.2116, 98th Cong., 1st sess.

Dear Mr. Chairman:

The purpose of this letter is to alert you to the easily demonstrable fact that the above-entitled bill, now pending before your Committee, would it passed in its present form, constitute a gross and indeed flagrant fraud against the American people.

This measure proposes "To accept the findings and implement the recommendations of the Commission on Wartime Relocation and Internment of Civilians", declaring that Commission's Report to be both accurate and complete.

In actual fact, the entire process under which the Commission operated was irreparably flawed, with the consequence that its Report adds up to a deplorable exercise in mendacious revisionism.

That Report's failings will be summarized below as briefly as the importance and complexity of the matter permit. I do not quarrel in the slightest with the proposition that everyone is entitled to his own opinion. But I must emphatically declare that no one is ever entitled to his own facts. From what follows, you will be able to determine to what extent the Relocation Commission fashioned and selected its own facts, on all of which the Congress is now being asked to place its imprimatur of faith and of approval.

First. FLAWED COMMISSION PROCESS.

The Relocation Commission's work was irretrievably marred and spoiled from the outset, because its operations were slanted and biased in four separate respects.

I. The terms of reference were stacked. The Commission was directed by the Congress (Act of July 1, 1980; 94 Stat. 964) to review the impact of the wartime relocation "on American citizens and permanent resident aliens". In actual fact, of the 112,353 individuals relocated, some 40,869, or more than 36%, were aliens born in Japan; so that, when the United States declared war on Japan on the day after the Pearl Harbor attack, all of that latter group became enemy aliens.

Here in the United States, ever since the Alien Enemy Act of 1798 -- not to be confused with the Alien Act of the same year; neither Jefferson nor Madison, who wrote the Kentucky and Virginia Resolutions because of the Alien Act and the Sedition Act, ever sought repeal of the Alien Enemy Act -- ever since 1798 it has been well settled in this country, by administrative action and judicial decision, that the resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a declared war exists between his country and ours. That rule was twice reaffirmed by the Supreme Court shortly after the end of World War II. Ludecke v. Watkins, 335 U.S. 160 (1948): Johnson v. Eisentrager, 339 U.S. 763 (1950).

As the act creating the Relocation Commission passed through the Congress, not a word was said by its sponsors, nor by anyone else, of the foregoing rule of law nor were those recent decisions cited. And the same deafening silence continued while the Relocation Commission was at work; neither the Supreme Court cases just mentioned, nor the principle justifying internment of enemy aliens that those cases confirmed, can be found anywhere in the Relocation Commission's Report.

Was it fair, was it honest, to denounce governmental action taken more than forty years ago as unjustified, without once disclosing, either to the Congress or to the public, that, as to over one third of the individuals affected, such action was clearly in accordance with settled law? I suggest that this obviously deliberate and calculated omission falls well within the proper disapproval of reliance on one's own facts.

II. The Commission itself was stacked. Of the nine members of the Commission, a majority of five were experienced former public servants whose general outlook was predictable. Indeed, once the Commission's composition was announced, it was perfectly clear to any reasonably well-informed individual what that body's conclusions would be.

More than that, one of its members had earlier expressed a settled opinion before a Committee of Congress on the very subject that he was (presumably) to consider open-mindedly and impartially as a Relocation Commissioner. Here is what Ex-Justice Arthur J. Goldberg said about the Japanese relocation in 1970: "a black page in our history"; "a horrendous thing"; "we made that mistake, and . . . a majority of the Supreme Court at the time failed to condemn the mistake." Hearings Relating to Various Bills to Repeal the Emergency Detention Act of 1950, House Committee on Internal Security, 91st Cong., 2d sess., pp. 2931, 2932, 2933.

How can the Congress -- or anyone else for that matter -- place any trust in the conclusions now reached by the Relocation Commission?

III. The Commission's staff was stacked. Of the 33 named staffers listed in the Commission's Report, 13 have Japanese surnames, and one of those 13 is married to still another staffer. Thus, nearly 40% of the staff preparing the Commission's Report were predisposed against the wartime relocation. And one of the Japanese-American staffers, in addition to working on the Report, assisted the Commission in another capacity by appearing before them as a witness.

Again, how can anyone have confidence in their work product?

IV. The conduct of the hearings was stacked. The conduct of the Commission's hearings was, to speak mildly, a disgrace to the fact-finding process. According to former Assistant Secretary of War John J. McCloy, "Any time anyone tried to say anything slightly favorable to the United States, they were greeted with hoots, hisses and feet stamping by an ethnic Japanese claque which made it a point to attend all the hearings." The foregoing is quoted, by permission, from a private letter. A more detailed account to the same effect will be found in a letter from Mr. McCloy to Senator Grassley of Iowa, July 20, 1983: see Japanese American Evacuation Redress, Hearing before Subcommittee on Administrative Practice and Procedure, Senate Judiciary Committee, 98th Cong., 1st sess., on S.1520, at pp. 483-484.

In short, four elements combined to render impossible either the conduct of an impartial inquiry or the preparation of an objective report. All was slanted, biased, prejudiced, and stacked against the ascertainment of truth: the terms of reference, the composition of the Commission, the composition of the Commission's staff, and the conduct of the Commission's hearings.

Second. FLAWED COMMISSION REPORT

In this necessarily long letter, there is of course no room for details. But every factual assertion in this communication can be fully documented, and I stand ready to supply all such documentation on request. Here there is space only for the essentials, and the only additional matter now submitted is an enclosure setting forth my qualifications for undertaking the present critique.

I. Conclusion as to Loyalty. The Commission asserted (Rep. 28) that "There was no evidence that any individual American citizen was actively disloyal to his country."

That assertion is demonstrably false.

A. Two Japanese-Americans were duly convicted of treason (Kawakita, 343 U.S. 171: D'Acquino (Tokyo Rose), 192 F.2d 338). Another, Harada, committed treasonable acts on the Hawaiian island of Nihau, as the Commission itself was well aware (Rep. 430-31 n.14).

B. Some 8,000 individuals out of those relocated voluntarily opted for repatriation to Japan.

C. Of the Japanese-Americans of military age in the relocation camps, only 6% volunteered for military service. Those in the 442d Regimental Combat Team, whose gallantry everyone admires and which cannot be denigrated for a moment, were an exception. They assuredly did not represent a majority among the Japanese-Americans.

D. Over a quarter of the Japanese-Americans in the relocation camps refused to answer the loyalty questions, which had been submitted to them in order to determine individual loyalty -- a step for which there had originally been no time.

E. Many of those who refused to declare loyalty to the United States were sent to the camp at Tule Lake. There many pro-Japanese and anti-American individuals undertook a campaign of violence to force other Japanese-Americans to execute certificates renouncing their American citizenship. There were beatings, stabbings, and at least one homicide. In all, over 5,000 citizens, including more than 70% of the Tule Lake Japanese-Americans, renounced their American citizenship. But the Commission's account of the Tule Lake reign of terror (Rep. 206-212, 247-251) falls far short of revealing the facts judicially found (Acheson v. Murakami, 176 F.2d 953) -- a decision which, characteristically, the Commission never cites.

F. Also passed by without mention by the Commission is the instance of the Kiyama family. This couple and their two small children were, all of them, born in the United States. The parents were deemed so pro-Japanese and so-anti-American that they were removed to Tule Lake, where the parents were among the leaders in the campaign of violence and fear that forced thousands to renounce American citizenship.

As late as December 1944, both Kiyamas said that their loyalty was still with Japan; and on September 27, 1945, which was after V-J Day, the husband declared that "I have always been loyal to Japan during the war and I have no intention to change my loyalty to any country at this time." Accordingly, all four were repatriated to Japan in 1945-46 in accordance with their expressed wishes.

Later, however, both Kiyamas had the gall to return to the United States to reclaim their American citizenship. But there, after some 12 years in the courts (258 F.2d 109; 268 F.2d 110; 291 F.2d 10; 368 U.S. 866), the Kiyama's claims to American citizenship were denied.

In a similar case, a United States Court of Appeals said that "The record shows the certainty that many of the 4,315 plaintiff's who voluntarily renounced [their American citizenship] were disloyal to the United States." McGrath v. Abo, 186 F.2d 766, 771; 342 U.S. 832.

No reader of the Relocation Commission's Report will ever learn of those instances.

II. Quality of the Report. Careful examination of that document -- for which, as indicated, I can supply full documentation -- reveals that it is a sloppy, indeed a slovenly, piece of work. It is full of demonstrable mistakes of law, and at nearly every critical point it relies on secondary evidence. Works critical of the relocation are freely cited, but the original references -- statutes and judicial decisions -- are rarely mentioned. Thus, on the critical question of the percentage of Japanese-Americans who held dual citizenship, where there is a vast disparity in the figures available, no text of any Japanese laws on citizenship is ever set forth.

III. Was the Relocation the Result of Racism? The Report answers this query qith a resounding affirmative, incorporating every view about the impulses and motives impelling the relocation program that has been formulated in the more than forty years since it was undertaken.

In a work consistently relied on by the Commission, ten Broek et al., Prejudice, War and the Constitution, the authors rejected two of the earlier views, one that the relocation was undertaken because of economic motives, viz., to be rid of Japanese business competition, the other that the relocation was a response to public opinion on the west coast, where all three Congressional delegations were unanimous in urging evacuation. No matter; the Commission revived both of these theories that ten Broek had rejected.

The latter concluded that the true cause was the stereotype of "the wily Oriental" -- but never went on to explain how that view was consistent with the reported instances, duly noted in the book, of a Black, a Filipino, and a Chinese-American each attacking individuals of Japanese ancestry.

Here, of course, we trench on matters of opinion. But both ten Broek and the Commission resolutely refuse to accept what by a strong preponderance of the evidence is probably the only true view, namely, that, following the unprovoked attack on Pearl Harbor, which took place at the very moment that the Japanese representatives were negotiating in Washington with Secretary of State Cordell Hull, virtually all Americans became suffused with loathing and indeed hatred of everybody and everything Japanese. In World War II there was accordingly no need to whip up hatred of the enemy such as George Creel did with such success in World War I, after the United States was at war with Imperial Germany.

As I say, here we deal with what may ultimately remain a question of opinion. But to undertake to analyze the basic impetus behind the Japanese relocation without considering the contemporary effect of the day that continues to live in infamy, as the Commission did, is not only to present Hamlet without the Prince of Denmark, it is to form an opinion on the basis of very selective and hence self-assembled facts.

IV. Was the Supreme Court Wrong in 1943 and 1944? The Report insists, with considerable acrimony, that the relocation was unconstitutional, this despite the Supreme Court's contrary rulings, which sustained the relocation, in Hirabayashi (320 U.S. 81) and Korematsu (323 U.S. 214).

There may be merit in being more papist than the Pope, more royalist than a king, or more constitutionally minded than the Supreme Court of the United States. But if the Supreme Court is to be assailed for its decisions, then every critic owes it to that tribunal, as well as to his audience, to explain wherein the Court was mistaken.

As Judge Learned Hand wrote, ". . . while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties . . . Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand them."

The Commission's Report fails that test. Nowhere therein can the reader find any discussion of the reasoning on which the Supreme Court rested its Hirabayashi or Korematsu decisions. All he can discover is the Commission's denunciation of their results.

Never once does the Commission summarize the Court's reasoning, much less set it forth. Thus, once again, the Commission's conclusion rests on its very own and carefully picked-over set of facts.

V. Hindsight versus Foresight. One of the Supreme Court's earliest cases on the reasonableness or otherwise of military action was Mitchell v. Harmony, 13 How. 115, 135, decided in 1852. There the question was whether, during the pendency of the War with Mexico, Colonel Mitchell was justified by military necessity in seizing property belonging to Harmony, a trader.

The Court declared that "the state of the facts, as they appeared to the officer at the time he acted, must govern the decision . . . And, if with such information as he had a right to rely upon, there is reasonable ground for believing that the peril is immediate and menacing, or the necessity urgent, he is justified in acting upon it; and the discovery afterwards that it was false or erroneous, will not make him a trespasser."

It is typical of the Commission's slipshod work that neither this decision nor the principle that it lays down receives mention in its Report.

But if, notwithstanding, it is permissible in passing judgment on what was done more than forty years ago to look to what was then the future, then the facts later disclosed amply justified the action taken:

We now know, from the treason cases, from the Tule Lake reign of terror, from the voluntary repatriation, and from the attitude of persons like the Kiyamas, that there were many, many Japanese-Americans who were indeed actively disloyal to the United States.

We knew that many Japanese-Americans had dual nationality. We know now that many were taught in their language schools that "You must remember that only a trick of fate has brought you so far from your homeland, but there must be no question of your loyalty. When Japan calls, you must know that it is Japanese blood that flows in your veins." (Rep. 39, quoting Senator Inouye about his own school experiences in 1939.)

This alone would explain the large percentage of Japanese-Americans who waffled when the loyalty questions forced them to stand up and be counted, and why even today they -- and the Commission -- denounce the loyalty program, which was intended to help empty the relocation camps, as "divisive".

Having now all of those facts before us, which in 1942 were only strongly suspected, is it either fair or honest, more than a generation later, to denounce the entire relocation program as unreasonable, and as based on racism rather than military necessity?

Of course there are always two widely differing views about when firm action must be taken. In the criminal law, one view is that the only justification for requiring bail is to insure the accused's presence at the trial. The other is that bail be denied in appropriate instances in order to protect the community, lest the accused burgle once again while he is temporarily free. The former view is of course responsible for the revolving-door use of bail that continues to render so many of our cities unsafe.

In the law of treason, it was argued in an old case that, inasmuch as the defendant had not been shown to have done actual harm to the king's ships, he could not be guilty of treason. But the court rejected that argument, saying, "And after this kind of reasoning they will not be guilty until they have success; and if they have success enough, it will be too late to question them." Trial of Capt. Vaughan, 13 How. St. Tr. 485, 533.

Whether the soft or hard line is preferable is, without doubt, a matter of opinion. Whether the military authorities should have left in place all persons of Japanese descent on the west coast until actual acts of espionage or sabotage on their part had occurred is also a matter of opinion. But no credible view on that point can ever be reached without all of the facts.

All too plainly, the Commission's Report does not include all of the facts relevant to passing judgment on the action taken by the President in 1942, then ratified by Congress, and later sustained by the Supreme Court.

Third. THE REPORT'S FLAWS WOULD BE CONFIRMED AND COMPOUNDED WERE S.2116 TO BECOME LAW

Flawed, inaccurate, and partial as the Commission's Report plainly is, its faults would be confirmed and compounded if S.2116 were to be passed by Congress in its present form.

I. S.2116 as drawn craftily ignores documented instances of disloyalty on the part of numerous Japanese-Americans. As has been pointed out, the Commission's assertion (Rep. 28) that "There was no evidence that any individual American citizen was actively disloyal to his country" is demonstrably untrue in the face of proof of treasonable acts by Harada, Kawakita, and Tokyo Rose.

Those who drafted S.2116 were too astute to be guilty of a similar misstatement. Accordingly, they craftily eliminated those three traitors by proposing that the Congress find (§ 1(a)) that --

> "(2) the internment of individuals of Japanese ancestry was carried out without any documented acts of espionage or sabotage, or other acts of disloyalty by any citizens or permanent resident aliens of Japanese ancestry on the west coast;"

After all, Harada's treason had its locale in Hawaii, Kawakita's and Tokyo Rose's in Japan; not one of those three was guilty of treason committed on the west coast.

Similarly adroit draftsmanship conceals from the reader that the "permanent resident aliens of Japanese ancestry" were enemy aliens in 1942, and thus could lawfully be interned without any proof of hostile action, under the Enemy Alien Act of 1798, and the later rulings to that effect in Ludecke v. Watkins and Johnson v. Eisentrager, mentioned on pages 1-2 of this letter.

The last clause of the quoted subsection, however, moves from tricky draftsmanship to palpable falsehood; there the statement that no documented acts of disloyalty other than sabotage or espionage were committed by persons of Japanese ancestry on the west coast is simply not true. All too plainly, the beatings and the stabbings and the threatened violence that forced thousands at Tule Lake to renounce their American citizenship were ongoing acts of disloyalty to the United States. A single reading of the judicial findings in Acheson v. Murakami, 176 F.2d 953 -- which, as shown above, nowhere appear in the Commission's Report -- demonstrate the utter falsity of the final clause of § 1(a)(2). Were Congress to enact that provision, it would be concocting "facts" that are simply without foundation.

II. S.2116 undertakes to pay compensation to thousands not entitled thereto on any footing. Under § 201(1) and (205(1) of S.2116, every person of Japanese ancestry who was relocated in 1942 will be entitled to be paid $20,000 as restitution for having been moved, and the Attorney General is bound to find where all such persons now live.

This would mean that the United States must make payment to the following individuals:

1. The thousands of enemy aliens who by settled rules of law were subject to internment once war was declared on the day after the Pearl Harbor attack, because by then they were enemy aliens subject to internment for that reason alone.

2. The 8,000 individuals who after the war opted for repatriation to Japan.

3. The 94% of those who were relocated and, being of military age, refused to volunteer for military service.

4. The 25% of those relocated who refused to answer the loyalty questions.

5. All those who participated in the Tule Lake campaign of violence that resulted in thousands of Japanese-Americans renouncing American citizenship.

And 6, those who, like the Kiyamas, were held to have been disloyal to the United States after full and extended judicial hearings.

Significantly, the single thread uniting all of the foregoing six obviously unworthy groups is ethnic origin: All were of Japanese ancestry.

Can it seriously be pretended that the individuals constituting those six groups have any claim whatever on the largesse of the American people forty years after the event? Yet, under S.2116 as it stands, every one of those persons now living will receive $20,000.

Accordingly, passage of S.2116 in its present form would involve this repulsive paradox, that a law denouncing "racial prejudice" (§ 1(a)(4)) actually constitutes a triumph of ethnicity over both enemy status and active disloyalty to the United States.

Finally, BY WAY OF CONCLUSION, § 1(a)(1) of S.2116 finds the Relocation Commission's Report to have been both accurate and complete. From what has only been summarized in the above rather lengthy communication, it is all too clear that this Report is both incomplete and grossly inaccurate.

It follows that, should S.2116 in its present form become law, that enactment could only be characterized, in the words of a notable and outstanding Seventeenth Century American, as "a solemn public lie".

I therefore urge, and earnestly hope, that your Committee will emphatically vote down S.2116.

Respectfully,

Frederick Bernays Wiener

Enclosure:
Writer's Résumé and Qualifications

FBW/erl

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RÉSUMÉ AND QUALIFICATIONS

BIRTH: New York, N. Y., 1 June 1906.

PARENTS: Felix Frederick Wiener, 1873-1930; Lucy Lea Bernays, 1886-1980

MARITAL STATUS: Married Doris Merchant, 29 October 1949.

FAMILY: Two sons: (1) Thomas Freud Wiener, Sc.D. (Commander, U. S. Navy, Retired), Alexandria, VA; (2) Frederick Robertson Wiener, Sergeant Major, U. S. Army, A.P.O. New York 09145. Two grandchildren.

EDUCATION: Ph.B., Brown Univ., 1927; LL.B., Harvard Univ., 1930.

OCCUPATION: Retired. ("Author-Consultant" on Sched. C of Form 1040.)

LEGAL CAREER: Private practice, Providence, R.I., 1930-1933; Government service in Washington, D. C., with Public Works Administration (Attorney Examiner; Executive Assistant to Deputy Administrator), 1933-1934; with Interior Department (Assistant Solicitor & Member, Board of Appeals), 1934-1937; with Department of Justice (Special Attorney; Special Assistant to Attorney General), 1937-1941; [military service, 1941-1945; see below]; Department of Justice (Assistant to the Solicitor General), 1945-1948; private practice, Washington, D. C., 1945-1973, practicing alone after 1 August 1950; retired from practice, 1 July 1973; occasional consultations since then.

Thirty-eight arguments before U. S. Supreme Court, representing both Government and private clients.

BAR ADMISSIONS: Rhode Island, 1931; U. S. Supreme Court, 1934; Virgin Islands, 1934; District of Columbia, 1938; nine of the existing U. S. Courts of Appeals (including the U. S. Court of Appeals for the Federal Circuit through prior admission to bars of Court of Claims and Court of Customs and Patent Appeals).

MILITARY CAREER: Commissioned Captain, Judge Advocate General's Department Reserve, U. S. Army, 1936; short tours of active duty, 1939 and 1940; extended active duty, March 1941 to December 1945, in grades from captain to colonel (before terminal leave), with service in three overseas theatres; recommissioned Colonel, JAGD, USAR, December 1945; annual tours of active duty, 1950-1960; retired for age, June 1961; Colonel, Army of the U. S., Retired, 1 July 1966.

Incl.

TEACHING & LECTURING: Lecturer and Professorial Lecturer in Law, The George Washington University, 1951-1956; lecturer before bar groups and law schools in England, 31 states of the Union, the District of Columbia, and the Virgin Islands.

SIGNIFICANT APPOINTMENTS: Reporter to the Committee of the U. S. Supreme Court on the Amendment of its Rules, 1952-1954 (services acknowledged by the Court, 346 U. S. 945-946): Consultant-Adviser, U. S. Army War College, 1954; Special Consultant to the Judge Advocate General of the Army, 1968-1969.

HONORS: Guggenheim Fellowship, 1962; Brown Univ. Bicentennial Medallion, 1965; Hon. LL.D., Cleveland-Marshall Law School, 1969; U. S. Army's Outstanding Civilian Service Medal, 1974.

ENCOMIA: Hon. William O. Douglas of the Supreme Court in 35 U. of Chicago Law Review 568 (1968); Editors of Military Law Review, Bicentennial Issue (1975), p. 169.

PRIOR CONGRESSIONAL TESTIMONY:

1. Before both House and Senate Committees on Armed Services on the bills that became the Uniform Code of Military Justice (now 10 U.S.C. §§801-940), 1949.
2. Before Senate Judiciary Committee on Constitutional Rights of Military Personnel, March 1962.
3. Before Joint Subcommittee of Senate Judiciary and Armed Services Committees on Military Justice, March 1966.
4. Before House Committee on Internal Security on Obstruction of Armed Forces, September 1969.
5. Before the House Committee on Internal Security on Bills to Repeal the Emergency Detention Act of 1950, April 1970.
6. Statement on Unionization of the Armed Forces, submitted at request of Senate Judiciary Committee, July 1977.

ORGANIZATIONAL OFFICES: Member of Council (1961-) and Vice-President for the U.S.A. (1978-1984) of the Selden Society (founded in England in 1887 "to encourage the study and advance the knowledge of the history of English law"); Fellow (1958-1972) and Director (1970-1972), International Academy of Trial Lawyers; Past Commander-General, Military Order of Foreign Wars of the U. S.; Historiador (Historian), Military Order of the Carabao (1958-1973).

PUBLICATIONS: Wide publication on legal, historical, and military subjects for over half a century, from The Rhode Island

Merchants and the Sugar Act, 3 New Eng. Q. 464 (1930), through German Sugar's Sticky Fingers, 16 Hawaiian J. of History 15 (1982).

Listing below, in chronological order, is limited to the area of constitutional law and practice, particularly in their military applications.

Books:

A PRACTICAL MANUAL OF MARTIAL LAW (1940),(quoted with approval by the Supreme Court in Duncan v. Kahanamoku, 327 U. S. 304, 321 n.18 [1946]).

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THE UNIFORM CODE OF MILITARY JUSTICE (1950).

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Pamphlets:

The New Articles of War (1948).

Uses and Abuses of Legal History: A Practitioner's View (Selden Society Lecture, London 1962).

Articles & Reviews:

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Martial Law Today, 55 A. B. A. J. 723 (1969)

A Lawyer Views the Gathering Storm, 115 Cong. Rec. 20274 (1969).

American Law for the Coffee Table---An Impossible Dream, [1975] Sup. Ct. Rev. 423.

Opening an American Base in a British Colony before Pearl Harbor, History, Numbers & War, vol. 1, nos. 1 and 2 (1977).

Advocacy at Military Law: The Lawyer's Reason and the Soldier's Faith, 80 Military L. Rev. 1 (1978).