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MISSTATEMENTS, OMISSIONS, AND CLEARLY ERRONEOUS CONCLUSIONS PERMEATING THE RELOCATION COMMISSION'S REPORT

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I. MAJOR MISSTATEMENT: ASSERTED 100% LOYALTY OF ALL JAPANESE-AMERICANS

Assertion (Rep. 28): "There was no evidence that any individual American citizen was actively disloyal to his country."

The facts:

a. Two Japanese-Americans were duly convicted of treason, Kawakita (343 U.S. 171), and D'Acquino [Tokyo Rose] (192 F.2d 338, cert. den., 343 U.S. 935).

b. Another Nisei, Harada, committed treason against the United States within the constitutional definition (Art. III, § 3) of "adhering to their Enemies, giving them Aid and Comfort." A Japanese warplane, damaged during the Pearl Harbor attack, landed on the small Hawaiian island of Niihau. Local Hawaiians took away the pilot's pistol and his papers, but Harada supplied him with other arms belonging to Harada's employer, after which, for six days, the pilot and Harada terrorized the entire island. Then a Hawaiian who had been shot by the pilot managed to kill him, after which Harada committed suicide. S. Conn, Guarding the United States and Its Outposts, p. 194 [hereafter "Conn, Guarding"]; W. Lord, Day of Infamy, pp. 195-200; J.J. Stephan, Hawaii Under the Rising Sun, p. 168.

The Commission relegates this incident to a footnote (Rep. 430-431, n.14), does not recognize that Harada's acts constituted treason, and therefore fails to recognize that, flatly contrary to its own blanket assertion, Harada, like Kawakita and Tokyo Rose, was indeed an "individual American citizen . . . actively disloyal to his country."

c. Some 8000 persons of Japanese descent were repatriated to Japan after the war at their own request (Rep. 252), including 248 formerly resident in Hawaii (Rep. 277). But the Commission did not trouble to break down these figures into first-generation Issei, born in Japan and hence alien enemies, and second-generation Nisei, born in the United States, many of whom had dual citizenship.

d. Only 6% of the Japanese-Americans of military age who were in the relocation camps volunteered for military service. This figure comes from ten Broek et al., Prejudice, War, and the Constitution, (p. 168) [hereafter simply "ten Broek"], a work frequently cited in the Commission's Report. But the Commission's own figures are far fuzzier (Rep. 195).

e. Over a quarter of the Japanese-Americans refused to answer the loyalty questions (ten Broek, p. 168; cf. Rep. 195) — are you willing to serve in the American military forces, do you swear unqualified allegiance to the United States — questions submitted in order to separate the loyal from the disloyal, requiring all Japanese-Americans to stand up and be counted, and thus to speed release from the relocation camps of those who professed loyalty.

The Commission deems the loyalty program "divisive" (Rep. 186), stigmatizes it as the evacuees' "bitterest experience in the camps" (Rep. 197) — and never once recognizes that these characterizations emphasize the emotional schizophrenia, and hence doubtful American loyalty, of so many Japanese-Americans. Yet questioned loyalty was precisely the factor that led to the national decision, reached after Pearl Harbor but before the Battle of Midway, to evacuate all persons of Japanese ancestry from the militarily sensitive West Coast, the site of so many airplane factories.

f. Virtually all of the Japanese-Americans who had refused to give affirmative answers to the loyalty questions were then moved to the relocation camp at Tule Lake in Northern California, where many enemy aliens had already been placed (Rep. 208, 234, 247-251).

The result was a veritable reign of terror directed at all Japanese-Americans who were initially unwilling to renounce their American citizenship; there were assaults, beatings, stabbings, and one actual homicide. As the court said in Acheson v. Murakami, 176 F.2d 953, 963, "A nucleus of genuinely pro-Japanese leaders whipped the people up to hysterical frenzy of Japanese patriotism" (Fdg. 29). The result was that, out of 7000 Japanese-Americans over 18, some 5000 applied for renunciation of their American citizenship. In consequence, those renunciations were held to be presumptively invalid because of the duress and coercion exercised by the pro-Japanese group, with the burden of proof on the Government to establish their voluntariness (Nishikawa v. Dulles, 356 U.S. 129; Yamamoto v. Dulles, 268 F.2d 111). But in later litigation, a court of appeals found that "The record shows the certainty that many of the 4,315 plaintiffs who voluntarily renounced were disloyal to the United States." McGrath v. Abo, 186 F.2d 776, 771, cert. den., 342 U.S. 832. Significantly, the Commission never cites either the Murakami or the Abo decisions.

g. Among the leaders of the militant pro-Japanese groups at Tule Lake, which terrorized that camp and forced thousands of Japanese-Americans to renounce American citizenship, were Norio and Miyoko Kiyama, both California-born. The births of their two children were registered with the Japanese consul. Both parents renounced American citizenship, after which they were transferred to an alien enemy camp in New Mexico.

There, on December 7, 1944, both Kiyamas said that their loyalty was still with Japan; and on September 22, 1945, after V-J Day, Norio 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 Kiyamas were repatriated to Japan in 1945-46 in accordance with the parents' expressed wishes.

Later, however, the adult Kiyamas returned to the United States, and had the gall to reclaim American citizenship. In the end, after 12 years in the courts — they were not denied due process, they had the full benefit of undue process — the Kiyamas' claims were denied (258 F.2d 109; 268 F.2d 110; 291 F.2d 10, cert. den., 368 U.S. 866).

Nowhere in the more than 400 pages of its Report does the Commission ever mention or even cite any phase of the extensive Kiyama litigation. Accordingly, it never urges that the adult Kiyamas' participation in the Tule Lake reign of terror that forced some 5000 Nisei to renounce American citizenship did not add up to active disloyalty to the United States.

It follows, from this circumstance as well as from the other facts enumerated under the present heading, that the Commission's assertion (Rep. 28) that "There was no evidence that any individual American citizen was actively disloyal to his country", is palpably and demonstrably false.

II. MAJOR OMISSION: FAILURE EVER TO MENTION THAT 36% OF THOSE RELOCATED WHERE ENEMY ALIENS, WHO IN TIME OF WAR WERE SUBJECT TO INTERNMENT UNDER LONG-SETTLED LAW

The 1940 census reflects 112,353 persons of Japanese ancestry living in the three Pacific states, of whom 40,869 or 36.37%, were aliens born in Japan. The latter group was ineligible for naturalization, except for the small number who had served in the American armed forces during the first World War. Act of June 24, 1935, c. 290, 49 Stat. 397. (The Commission, with characteristic inaccuracy, asserts that not even the few such veterans were allowed to become naturalized. Rep. 29, 363 n.4.)

When the United States declared war on Japan on the day following the Pearl Harbor attack, all unnaturalized Japanese became enemy aliens, and as such were subject to arrest, internment, and deportation under the Enemy Alien Act, first enacted in 1798, and on the books ever since. Act of July 6, 1798, c. 66, 1 Stat. 577; R.S. §4067; 50 U.S. Code §21.

That enactment is not to be confused with the Alien Act of the same year (Act of June 25, 1798, c. 58, 1 Stat. 576), which, together with the Sedition Act (Act of July 14, 1798, c. 74, 1 Stat. 596), evoked the Kentucky Resolutions authored by Jefferson and the Virginia Resolutions drafted by Madison. Both of the Acts last mentioned expired under their own terms before Jefferson succeeded to the Presidency on March 4, 1801 (Alien Act on June 25, 1800, see §6, 1 Stat. at 576; Sedition Act on March 3, 1801, see §4, 1 Stat. at 597).

But neither Jefferson nor Madison ever sought repeal of the Enemy Alien Act, as was emphasized by the Supreme Court when it sustained that enactment shortly after the close of hostilities in World War II. Ludecke v. Watkins, 335 U.S. 160, 171 n.18 (1948).

Under the Enemy Alien Act, now 50 U.S. Code §21, the only questions open for judicial consideration are whether a state of war exists, and whether the individual seeking relief is an enemy alien. Johnson v. Eisentrager, 339 U.S. 763, 775. Operation of the Enemy Alien Act ceases only when Congress terminates the state of war. Jaegeler v. Carusi, 342 U.S. 347.

Failure ever to discuss the effect of the Enemy Alien Act constitutes the great cover-up, both of the legislation creating the Relocation Commission, and of that body's Report.

The Act of July 31, 1980 (94 Stat. 964) directed the Commission to review the impact of the relocation "on American citizens and permanent resident aliens" — thus erasing all existing disabilities of enemy alien status on the part of over a third of those relocated. Not a word in the legislative history of the act creating the Commission ever discloses that effect.

Nor does a single word in the Commission's long Report ever mention this circumstance. That document appears to avoid the term "enemy alien" as though it were a four-letter obscenity, substituting euphenisms such as "aliens of enemy nationality" (Rep. 61, 183), "Japanese American aliens" (Rep. 277), and "resident aliens of Japanese ancestry" (Rep. 19).

In its recommendations, the Commission said (Rep.II, 6) that "The wartime events produced an unjust result that visited great suffering . . . upon resident aliens whom the Constitution also protects." As applied to aliens generally, that last statement is unexceptionable. But under the Enemy Alien Act's plain terms, confirmed in Ludecke v. Watkins,

335 U.S. 160, and in Johnson v. Eisentrager, 339 U.S. 763, 775 — neither of which decisions the Commissions so much as cites — the Constitution affords no protection whatever to enemy aliens who reside in the United States during a time of declared war.

Perhaps the Commission was seeking to amend the naturalization laws retroactively, treating Japanese nationals as the American citizens that, except for those with World War I military service, they could not become until 1952 (Sec. 311 of the Imigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 163, 239; 8 U.S. Code §1422). But the Commission never openly admits that this anachronistic and retroactive result was ever deliberately intended.

Only two conclusions are possible. One is that the Commission and its staff were inexcusably ignorant of the status of enemy aliens. The other possibility is that the Report's failure to disclose the disabilities of enemy alien status, which attached to over a third of those relocated, constituted downright dishonesty.

The question of which conclusion is correct is a matter that needs to be resolved by those now considering §1(a)(1) of S.2116, which finds the Relocation Commission's Report to be both complete and accurate.

Assistance in making that determination may possibly be found in two easily overlooked passages in the Report itself.

(i) At p. 54, there is mention of a presidential Proclamation issued "pursuant to the Enemy Alien Act of 1798, as amended, which gives the government the authority to detain enemy aliens and confiscate enemy property wherever found."

(ii) At p. 285, it is said that "the government had unquestioned authority to detain aliens of enemy nationality in time of war."

III. THE RELOCATION COMMISSION'S CLEARLY ERRONEOUS CONCLUSIONS

A. Allegation that the relocation was the result of racism, hysteria, and failure of leadership

The Commission asserts (Rep. 18) that the decision to relocate rested on "race prejudice, war hysteria and a failure of political leadership". The identical assertion is raised to the level of a Congressional finding in §1(a)(4) of S.2116.

Actually, not a single one of these characterizations can be sustained, essentially because the Commission rigorously excluded from consideration and discussion the overwhelmingly determinative factor - Japan's sneak attack on Pearl Harbor.

For it was this utterly unprovoked act, which took place at the very moment that the Japanese representatives were negotiating with Secretary of State Hull in Washington, that caused virtually all Americans to become suffused with loathing and hatred of everyone and everything Japanese.

By reason of never giving any weight whatever to the contemporary effect of a day that still lives in infamy, as the Commission did, it undertook to present Hamlet without the Prince of Denmark. Thus the Commission formed its opinion on the basis of a very selective collection of facts. Otherwise stated, it relied on its own facts — an impermissible approach.

All these asserted causes will be considered in order.

1. Asserted race prejudice. This alleged cause confuses race with nationality.

Americans throughout the war were not hostile to Orientals generally, i.e., to members of the yellow race. To the contrary, the United States was allied with China in World War II, and in the course of that conflict repealed the sixty-year old Chinese Exclusion Act, and admitted Chinese individuals to the naturalization from which they had previously been excluded. Act of December 17, 1943, c. 344, 57 Stat. 600. Japanese, however, did not become eligible for naturalization until nine years later. Sec. 311 of the Act of June 27, 1952, 66 Stat. at 239, supra.

In ten Broek et al., Prejudice, War, and the Constitution, a work consistently relied upon and cited by the Commission, the authors rejected two of the earlier views regarding the causes underlying the relocation. One was that it had an economic motive, to be rid of Japanese competition, even though individuals of Japanese extraction represented only 1.6% of California's population. The other view rejected in this work was that relocation was a response to public opinion on the West Coast, where all three Congressional delegations were unanimous in urging relocation. No matter; the Commission revived both of the theories that ten Broek and his colleagues had rejected.

The latter concluded that the true cause was the stereotype of "the wily Oriental" — but never went on to explain how that new view was consistent with the documented instances, duly noted in their book (pp. 95-96), of a black, a Filipino, and a Chinese-American, each attacking individuals of Japanese ancestry. The Commission's Report simply omits mention of these events.

Moreover, none of the three theories just mentioned can possibly explain the hostility of numerous other governors, of non-West Coast states (Rep. 10), or of Mayor LaGuardia of New York City as late as April 1944 (Rep. 203), to receiving or resettling persons of Japanese ancestry in their own communities. Certainly the Commission's assertion (Rep. 36) that "Anti-Japanese agitation continued to be part of the public life of the West Coast", will not and can not explain the strong anti-Japanese feeling that existed in the other 45 states then comprising the Union.

Here again, the Commission deliberately shuts its eyes to the fact that the anti-Japanese sentiment so universal in the United States after the Pearl Harbor attack did not reflect a West Coast pre-judgment, it was rather the predictable consequence of a nation-wide after-judgment. It was not prejudice, it was a postjudice.

2. Reliance on different policy in respect of ethnic Japanese in Hawaii

The Commission stated (Rep. 282) that "the experience in Hawaii rebukes events on the West Coast".

That conclusion disregards the vital military factors of shipping, logistics, and community outlook; these were differences of substance that underlay the differing military judgments in the two areas. That conclusion also glosses over a significant factor that the Commission recites but fails to evaluate, namely (Rep. 280), that the "Hawaiians felt that the West Coast Nisei lacked warmth", and "were not candid in their personal relationships".

It was President Roosevelt, primarily at the urging of Secretary of the Navy Knox, who directed on December 19, 1941, that all of the 118,000 Japanese on the island of Oahu (20,000 enemy aliens and 98,000 citizens) be evacuated to one of the other Hawaiian islands (Conn, Guarding, pp. 206-214). Whereas in California the ethnic Japanese consti-

tuted less than 2% of the population, in Hawaii they numbered over 35%. Also, in Hawaii, with its very mixed population, there was a pre-war climate of racial tolerance; this is based on personal observation, both in Hawaii and in San Francisco, in the spring of 1938.

By 1941-42, also, the position in Hawaii presented practical considerations very different from those obtaining on the West Coast. Persons of Japanese descent constituted a very substantial segment of Hawaii's labor force. To have removed them from Oahu would have involved shipping them away, plus shipping labor replacements from the United States, plus constructing housing after first shipping construction materials from the United States, plus providing guards for the relocation camps. Consequently, the Army resorted to foot-dragging that ultimately succeeded, despite continual prodding from Washington. As was ultimately announced, "The shipping situation and the labor shortage make it a matter of military necessity to keep most of the people of Japanese blood on the island." Ultimately, therefore, only 1875 persons of Japanese ancestry were removed from Hawaii (Rep. 277; Conn. p. 214).

3. Reliance on different policy in respect of individuals of German and Italian descent

The Commission asserts (Rep. 284) that "The wartime treatment of alien Germans and Italians, as well as the German American experience of the First World War, lends new perspective to the exclusion and detention of the ethnic Japanese." Indeed, the Commission devoted an entire chapter of its Report (c. 12, pp. 283-293) to finding racist prejudice in the circumstance that there never was any suggestion to relocate American citizens of German or Italian descent.

The Italians can be disposed of first. Only 264 Italians were interned, as against 1393 Germans and 2192 Japanese (Rep. 284). In the fall of 1942, the President dismissed the Italians as "a lot of opera singers" (Rep. 287), and at that time the Attorney General declared that Italian enemy aliens would no longer be considered or treated as such.

Insofar as the President's denigration involved an evaluation of martial prowess, no one familiar with the military history of Mussolini's legions in the Second War War could possibly quarrel with F.D.R.'s estimate.

And, without question, apart from the very few ardent Italian fascists who were interned, no one would similarly question the lack of military danger to America presented by the ethnic Italians regardless of nationality. They were therefore left undisturbed, not because of anti-Japanese bias on the part of those responsible for the differentiation in treatment, but because of a realistic evaluation of their thoroughgoing unlikelihood of harming the defense of the United States. These facts are recognized, if somewhat grudgingly, by the Commission (Rep. 287).

The Germans were similarly not comparable with the Japanese. So far as Germans and Americans of German ancestry were concerned, their time of trial was the period of the First World War, after enthusiasm had been whipped up for a conflict that, initially at least, left many Americans less than fully convinced of the validity of the casus belli.

It was then that the lowly hamburger was transformed into a salisbury steak, that sauerkraut became liberty cabbage, that Wagner and Beethoven could no longer be performed or listened to, and that teaching of the German language was banned in public schools.

Facing - and enduring - irrationalities of that nature, the German-Americans made their choice: They determined that they would no longer be hyphenates, they would be wholly and completely American. And, with perhaps minimal exceptions, that is what they were when Hitler's Germany declared war on the United States a few days after Pearl Harbor.

Significantly, the German-Americans who were prosecuted for treason during the Second World War had, all of them, first come to the United States after 1918: Stephan (133 F.2d 87); Cramer (325 U.S. 1); Haupt (330 U.S. 631). The same was true of the son of Herbert Haupt, an American citizen who suffered death, not as a traitor, but as one of the saboteurs (Ex parte Quirin, 317 U.S. 1, 20, 37-38).

Furthermore, many of the German enemy aliens in the United States in 1941 were refugees who had fled the Third Reich, and many of those had not then been residents long enough to qualify for citizenship. Additionally, many Germans and German-Americans were both emotionally and vocally anti-Nazi, while there was certainly no identifiable group of Japanese-Americans who denounced the militaristic groups that then controlled the government of Japan.

As for the Bundists, they were under constant F.B.I. surveillance, and, when it was established that any of them had deemed their American citizenship "a good thing to hide behind", denaturalization followed, even in the face of the Supreme Court's rigid requirements for proof in such cases (e.g., Knauer, 328 U.S. 654).

Summing up, therefore, the difference in treatment between Japanese enemy aliens and Americans of Japanese ancestry on the West Coast, as distinguished from the course followed in respect of the same groups in Hawaii, and as also distinguished from the steps taken (or rather not taken) regarding Germans, German-Americans, Italians, and Italian-Americans, reflected, not racist anti-Japanese bias directed against the groups first named, but rather reasonable and reasoned determinations based on the possible dangers that the other groups might pose to American interests in a global war that was going badly and indeed dangerously for the United States when the basic West Coast relocation decision was made.

Here again, the Commission's conclusion that the failure of the Government to relocate persons of German ancestry while evacuating those with Japanese blood was a distinction purely racist, is a consequence of that body's inability to distinguish between race and nationality, and of its obvious disregard of the national impact of the Pearl Harbor attack.

4. Asserted war hysteria

As has been indicated, the Commission found that one of the underlying causes of the relocation program was "war hysteria" (Rep. 18).

Observers more objective than either the Commission or its staff are constrained to respond to that conclusion by putting the following questions:

(a) Was it hysterical to question the completely pro-American loyalty of persons of Japanese descent, more than a third of whom were enemy aliens?

(b) Was it hysterical to question the completely pro-American loyalty of persons of Japanese descent born in the United States, an undetermined number of whom, by the law of their parents' country, had dual Japanese citizenship?

(c) Was it hysterical to question the completely pro-American loyalty of persons of Japanese descent born in the United States, many of whom had been taught in Japanese 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 [Rep. 366 n.76] from Senator Inouye's autobiography.)

(d) Was it hysterical to question the completely pro-American loyalty of Japanese descent born in the United States when only 6% of those of military age in the relocation camps indicated their willingness to render military service to the United States?

(e) Was it hysterical to question the completely pro-American loyalty of persons of Japanese descent born in the United States when over a quarter of such persons in the relocation camps refused to answer the loyalty questions in the affirmative and, even 40 years later, insisted that those questions were divisive?

(f) Was it hysterical to question the completely pro-American loyalty of persons of Japanese descent born in the United States when a numerous group of such individuals were so far pro-Japanese and anit-American that, at Tule Lake in 1944, they undertook a reign of terror that forced thousands of other persons of Japanese descent born in the United States, faced with such duress, to renounce American citizenship?

(g) Was it hysterical to question the completely pro-American loyalty of persons of Japanese descent born in the United States when, long after the war, American appellate courts in citizenship litigation, found that many had indeed been disloyal to the United States?

(h) Was it hysterical to question the completely pro-American loyalty of persons of Japanese descent born in the United States when two such persons were duly convicted of treason, and a third committed plainly treasonable acts not prosecuted only because he killed himself?

The Commission does not face up to questions such as these, largely because of its palpably false conclusion (Rep. 28) that "There was no evidence that any individual American citizen was actively disloyal to his country."

Needless to say, after ignoring the many documented acts of disloyalty enumerated in Part I above, it is easier for the Commission to assert that the bases for the relocation program were "race prejudice" and "war hysteria".

Of course everyone is entitled to his own opinion. But, to quote a co-sponsor of S.2116, "No one is entitled to his own facts." Yet the Commission's conclusions as to the underlying causes of the relocation are, all too plainly, based on its own collection of painstakingly selected facts.

5. Asserted "failure of political leadership"

"Failure of political leadership", charged by the Commission as one of the "historical causes" underlying the relocation decision (Rep. 18), is of course a thoroughly ambiguous allegation. It could mean that the basic decision to proceed with the relocation process was permitted to drift to a conclusion without guidance from the President, the top of the political pyramid. It is also susceptible of the meaning that a group of individuals without

the slightest contemporaneous responsibility for the safety of the nation or for the future of the civilized world, such as President Roosevelt bore early in 1942 when the war was going very badly indeed for the countries then allied as the United Nations, are now firmly of opinion that they would, more than 40 years after the event, have decided the relocation issue differently.

True, there were differences of opinion in American councils immediately below the presidential level. Significantly, Attorney General Biddle, who strongly opposed evacuation of enemy aliens, ceased to object when it was later proposed to evacuate everyone of Japanese descent, regardless of citizenship (Rep. 73, 74, 78-79, 83-86). But once Biddle withdrew his objections, there was no failure of political leadership; quite to the contrary, there was firm direction from the top. Indeed, as a knowledgeable Army historian has written (Stetson Conn, "The Decision to Evacuate the Japanese from the Pacific Coast", in Command Decisions [G.P.O. 1960], p.125 at p. 149), "the only responsible commander who backed the War Department's plan as a measure required by military necessity was the President himself, as Commander in Chief".

Ultimately, therefore, the Commission's basic conclusion that the decision to relocate rested on "race prejudice, war hysteria, and a failure of political leadership" necessarily involves an ad hominem attack on President Franklin D. Roosevelt. But no one with even the slightest familiarity with the career of the nation's 32nd President, before and during his more than 12 years in the White House, could possibly accuse that individual of either racism, hysteria, or failure of leadership.

Otherwise stated, the Commission's discussion of the factors underlying the decision to relocate starts by resolutely ignoring the unprovoked Japanese attack on Pearl Harbor as the truly operative fact of that decision, and then finishes by charging President Roosevelt with racism.

That is one of the many reasons why the characterization of the Relocation Commission's Report as "mendacious revisionism", see my letter of 1 May 1984 to Chairman Roth of the Senate Committee on Government Affairs, is not an epithet. It was simply a diagnosis.

B. Minimizing the Supreme Court decisions that upheld the constitutionality of the relocation program

Various phases of the relocation program were sustained by the Supreme Court in 1943 and 1944. In Hirabayashi (320 U.S. 81) and Yasui (320 U.S. 115), the curfew orders were sustained against two Americans of Japanese ancestry; in Korematsu (323 U.S. 214), an exclusion order was held constitutional against another such individual. In Ex parte Endo (323 U.S. 283, 297), the Court held that, "whatever power the War Relocation Authority may have to detain other classes of citizens, it has no authority to subject citizens who are concededly loyal to its leave procedure". The underscoring has been added to correct a mistake, in the debates on the act creating the Commission, that omitted the qualification thus emphasized (126 Cong. Rec. 12058).

How did the Commission deal with the first three adverse decisions? It simply screamed at them. It offered distinctions, asserted overrulings, and submitted a posthumous retraction in its effort (Rep. 238, 239) to demonstrate that "Today the decision in Korematsu lies overruled in the court of history", and that "Korematsu is a curiosity, not a precedent on questions of racial discrimination."

As will be seen, those animadversions are easily confuted. But what strikes any reader of the Commission's Report most forcibly is that this document never sets forth any of the pertinent and controlling excerpts from these so highly disesteemed decisions; all it offers are hostile characterizations. Nothing in the Report ever enables any disinterested outsider to learn the true basis for these decisions.

Instead, the Commission sets forth three principal contentions

First, the Commission relies on a law review article contending that the cases were wrongly decided because the government's proof was inadequate (Rep. 237-238). But the Commission never summarizes, quotes, or even cites Justice Douglas's concurring opinion in the Hirabayashi case, which not only dealt fully with the matter of proof, but which also, in the portions underscored below, answered the core of the Commission's present arguments. A short passage from that concurrence had therefore better be quoted (320 U.S. at 106-107):

> Nor are we warranted where national survival is at stake in insisting that those orders should not have been applied to anyone without some evidence of his disloyalty. The orders as applied to the petitioner are not to be tested by the substantial evidence rule. Peacetime procedures do not necessarily fit wartime needs. It is said that if citizens of Japanese ancestry were generally disloyal, treatment on a group basis might be justified. But there is no difference in power when the number of those who are finally shown to be disloyal or suspect is reduced to a small per cent. The sorting process might indeed be as time-consuming whether those who were disloyal or suspect constituted nine or ninety-nine per cent. And the pinch of the order on the loyal citizens would be as great in any case. But where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient whatever the ultimate percentage of those who are detained for cause. Nor should the military be required to wait until espionage or sabotage becomes effective before it moves.

Second, while ignoring all of the matter just quoted, the Commission prefers to rely on a supposed retraction in Justice Douglas's posthumous memoirs (Rep. 423 n. 112):

> "Locking up the evacuees after they had been removed had no military justification. I wrote a concurring opinion, which I never published, agreeing to the evacuation but not to evacuation via the concentration camps. My Brethren, especially Black and Frankfurter, urged me strongly not to publish . . . I have always regretted that I bowed to my elders and withdrew my opinion . . . The evacuation case . . . was ever on my conscience. Murphy and Rutledge, dissenting, had been right.

Posthumous memoirs are of course inherently untrustworthy, as they never indicate what was written by the alleged author and what by those who edited the manuscript after his death; and Justice Douglas's memoirs are additionally questionable in that his volume on The Court Years was written after he had suffered a disabling stroke.

But there is no need to rely on the foregoing general factors to establish the invalidity of Justice Douglas's asserted abjuration in respect of Korematsu; its very text abounds with demonstrable errors. One, he had obviously forgotten that he did write, and publish, the concurring opinion in Hirabayashi, that is quoted above, and that the Commission is at such pains to ignore. Two, by late 1944, when Korematsu was argued and decided, the influence of Justice Frankfurter on Justice Douglas was, if not precisely nil, then very nearly so. Three, Justice Jackson also dissented in Korematsu, another matter forgotten by Justice Douglas.

In short, the frailty of the Commission's arguments that attack the Supreme Court's relocation decisions is sharply underscored by the invocation of authority as shaky as Justice Douglas's asserted retraction.

It should also be noted that the Commission overlooked what Justice Douglas said in DeFunis v. Odegaard, 416 U. S. 312, 320. There, after citing the Hirabayashi and Korematsu cases, he said (416 U. S. at 339 n.20):

> 20/ Those cases involved an exercise of the war power, a great leveler of other rights. Our Navy was sunk at Pearl Harbor and no one knew where the Japanese fleet was. We were advised on oral argument that if the Japanese landed troops on our west coast nothing could stop them west of the Rockies. The military judgment was that, to aid in the prospective defense of the west coast, the enclaves of Americans of Japanese ancestry should be moved inland, lest the invaders by donning civilian clothes would wreak even more serious havoc on our western ports. The decisions were extreme and went to the verge of wartime power; and they have been severely criticized. It is, however, easy in retrospect to denounce what was done, as there actually was no attempted Japanese invasion of our country. While our Joint Chiefs of Staff were worrying about Japanese soldiers landing on the west coast, they actually were landing in Burma and at Kota Bharu in Malaya. But those making plans for the defense of the Nation had no such knowledge and were planning for the worst. Moreover, the day we decided Korematsu we also decided Ex parte Endo, 323 U. S. 283 * * *

The Commission asserts (Rep. 238) that "Today the decision in Korematsu lies overruled in the court of history." But Justice Douglas obviously did not think so when, in the DeFunis case in April 1974, he reaffirmed his support of Korematsu, in which he had concurred in December 1944, thirty years previously. And this was some time before he was stricken by a disabling stroke.

Third, the Commission attempts to establish that Korematsu has been overruled by subsequent decisions (Rep. 238-239, 280-282). But its contentions to that effect reflect simply lack of legal expertise.

Thus the Commission argues that Korematsu was overruled a little more than a year later by Duncan v. Kahanamoku, 327 U.S. 304. But the first case dealt with military interference with the person, the second with an entirely different matter, namely, military trials of civilians. The latter involves a demonstrably greater and hence far more serious military interference with civilian processes. Indeed, except when American forces were in actual occupation of enemy territory (Madsen v. Kinsella 343 U.S. 341), the Supreme Court has never sustained military trials of civilians. Ex parte Milligan, 4 Wall. 2; Reid v. Covert, 354 U.S. 1, withdrawing opinions in Kinsella v. Krueger, 351 U.S. 470, and in Reid v. Covert, 351 U.S. 487; Kinsella v. Singleton, 361 U.S. 234; Grisham v. Hagan, 361 U.S. 278; McElroy v. Gaugliardo, 361 U.S. 281.

The Commission further asserts (Rep. 239) that Korematsu was overruled by the decision that struck down President Truman's steel plant seizure, Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579. This argument verges on the fantastic. The thrust of all the opinions in Youngstown, the Court's and every concurrence, was that what President Truman did had never been authorized by Congress. But every executive step taken in the Japanese relocation had been specifically ratified by the Congress.

Fourth, the Commission never deals with, doubtless because unaware of, the century-old doctrine that military actions in a time of crisis must be judged in the light of the facts as they then appeared.

Here is what the Supreme Court said in 1852, some 90 years before the Pearl Harbor attack (Mithcell v. Harmony, 13 How. 115, 135):

> In deciding upon the necessity, however, 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 a 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.

The relocation cases followed and were consistent with this rule. Thus, in his concurring opinion in Hirabayashi, Justice Douglas said (320 U.S. at 107), ". . . military decisions must be made without the benefit of hindsight. The orders must be judged as of the date when the decision was made." And the Court's opinion in Korematsu concluded that (323 U.S. at 223-24) "There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot — by availing ourselves of the calm perspective of hindsight — now say that at that time these actions were unjustified."

Under that doctrine, the Commission's repeated assertions that after-discovered evidence proved the lack of factual support for the elements on which the rulings that upheld the relocation program rested, become simply irrelevant.

But if, contrary to this well settled principle, it is permissible to look to subsequent events to determine the reasonableness or otherwise of challenged action, then the subsequent disclosures of Japanese-American disloyalty, enumerated under Point I above but uniformly disregarded by the Commission, amply establish that the government acted reasonably and rationally in 1942, when it proceeded on the footing that national peril required relocation. See the underscored passages in Justice Douglas's Hirabayashi concurrence quoted above at p. 10.

Of course everyone is always entitled to one's own opinion, even of the correctness or otherwise of the solemn decisions of the nation's highest court. But, at the risk of repetition, no one is entitled to his own facts.

Here, where the Commission never set forth the opinions in the Supreme Court's relocation decisions, where it obviously undertakes to smother with a fog of silence even the existence of Justice Douglas's published concurrence in one of them, where its efforts to establish subsequent overrulings reflect a want of professional adequacy, and where all that the reader can gather from its Report is that its authors dislike and hence denounce the decisions, there, once again, the Commission's conclusions rest on its very own and carefully picked-over set of facts.

C. The Commission's characterization of the loyalty program as "divisive" goes far to justify the relocation decision

In February 1943, the government undertook, what it lacked time to do earlier, see Justice Douglas's Hirabayashi concurrence quoted above, namely, to make individual determinations of the loyalty or otherwise of the Japanese-Americans in the relocation camps, with a view to releasing those who could demonstrate their loyalty.

Yet the Commission bitterly criticizes the loyalty questions that required Americans of Japanese ancestry, the Nisei, to stand up and be counted. "Designed to hasten their release, the [loyalty review] program instead became one of the most divisive, wrenching episodes of the captivity" (Rep. 186). "The registration program, conceived by the War Department and W[ar] R[elocation] A[uthority] as a dramatic step toward freedom, had become for many evacuees their bitterest experience in the camps" (Rep. 197). More than that, the Commission consistently denounces the loyalty program as "divisive", devoting an entire chapter to the matter, and justifying those who gave negative answers to the loyalty questions (Rep. 12-15; c. 7, Rep. 195-212).

The Commission's position accordingly presents this paradox: The government's doubts as to the total loyalty of American-born Japanese resulted in the evacuation of all ethnic Japanese, the step that led Secretary of War Stimson to say "that to loyal citizens this forced evacuation was a personal injustice". But the War Department's effort to separate loyal from disloyal citizens was, according to the Commission, "divisive", and it now justifies negative answers to the loyalty questions because they reflected the relocatees' resentment at the treatment they received (Rep. 13-15, 168). Otherwise stated, the Commission argues that the government was wrong when it relocated the loyal and the disloyal together — and equally wrong when it undertook to separate the loyal from the disloyal.

Significantly, the Commission never appears to realize that the high percentage of negative answers to the loyalty questions amply vindicated the government's decision to evacuate all Japanese ethnics because of the potential disloyalty of many among them.

Here were the two loyalty questions:

Question 27 asked draft-age males, "Are you willing to serve in the armed forces of the United States on combat duty, wherever ordered?" Others, including the women, were asked whether they would join the Army Nurse Corps or the Women's Army Corps.

One would suppose that any Nisei of military age, seeking to demonstrate his unswerving loyalty to the United States in the manner of those who ultimately comprised the 442d R CT, would answer Question 27 with a resounding "Yes!" Not so; although the exact fig-

ures are unclear (Rep. 195), ten Broek showed (p. 168) that only 6% of the Nisei in the relocation camps volunteered for military service.

Question 28 inquired, "Will you swear unqualified allegiance to the United States of America and faithfully defend the United States from any and all attacks by foreign or domestic forces, and forswear any form of allegiance or obedience to the Japanese emperor, or to any other foreign government, power or organization?"

One would similarly suppose that any Nisei desirous of shedding his probable and certainly potential dual Japanese citizenship, and similarly seeking to demonstrate undiluted American loyalty would likewise hasten to answer Question 28 affirmatively. Not so in this instance either; again the precise figures are unclear (Rep. 195), but ten Broek found (p. 168) that over a quarter of the Nisei refused to answer "Yes" to this loyalty question.

This seems an appropriate place to discuss dual citizenship.

The Nisei were American by American law because born in the United States; U.S. Constitution, Amendment XIV. But Article I of Japanese Citizenship Law No. 19 of July 1924 provided that "A child is regarded as Japanese if its father is at the time of its birth a Japanese" (Shibata v. Acheson, 86 F. Supp. 1, 3). This last should not occasion surprise; American law is identical; a child born to American citizens residing abroad becomes an American citizen at birth (8 U.S. Code §1401(a)).

However, the Commission asserts (Rep. 39), citing only secondary references, that "after 1924 ethnic Japanese had to be registered promptly with the Japanese consul in order to obtain dual nationality".

Additional details are set forth by a more credible authority, Professor J.J. Stephan of the University of Hawaii, an individual fluent in both oral and written Japanese (Hawaii Under the Rising Sun [1984] p. 24): Nisei born before December 1, 1924 could nullify their Japanese citizenship by submitting formal notification to the Home Minister. Those born afterwards would lose their Japanese citizenship within two weeks of birth unless their parents registered them at a Japanese consulate.

Thus, after 1924, older Nisei could renounce their Japanese citizenship, while the parents of those born after 1924 needed only to do nothing, and their children would have no legal ties with Japan. But, as Stephan points out in his Hawaiian study, those ties were not significantly loosened in Hawaii until the eve of World War II. By 1933, only 8% of Nisei born before 1924 had renounced their Japanese citizenship, and by then, also, some 40% of the Nisei born after 1924 had been registered at the Japanese consulate so as to acquire Japanese citizenship. Further, in 1938 it was announced that children of dual citizens (the third generation, or Sansei) were eligible for registration as Japanese subjects (Stephan, loc. cit.), and it was under that ruling that the Kiyamas' two Sansei children were registered (Point I(g) above at p. 2).

In Hirabayashi, the Supreme Court noted (320 U.S. at 98 n.8) that, according to separate studies by Japanese officials, the percentage of dual citizens among American-born Japanese was 88% in 1927 and 47% in 1930. The Commission asserts (Rep. 39) that "By the 1930's, only twenty percent of the Nisei held dual citizenship."

Inasmuch as the Commission relied solely on secondary authorities, never set forth the text of any Japanese legislation, and never mentioned the qualifications and figures collected by Professor Stephan, its 20 percent figure cannot be accepted as definitive without more. Nor does the Commission note that individuals with dual citizenship were liable for Japanese military service, and that a number of Hawaiian Nisei were indeed drafted into the Imperial Japanese Army (Stephan, pp. 24-25).

If, as the Commission now urges, the loyalty questions were defective and unacceptable because they spawned divisiveness, then that very contention simply emphasizes the emotional schizophrenia that, unsurprisingly, the Pearl Harbor attack triggered in the minds of so many Nisei: Would they be Japanese, reflecting their home life and their cultural background? Would they be completely and irrefutably American in outlook and action, in word and in deed? Or was their veneer of Americanism actually so thin that, unlike their contemporaries of the 442d, their relocation experience, which was a consequence of the American government's doubts as to their complete and unequivocal loyalty, led them to conclude that blood and culture properly outweighed place of birth? That last was in fact the conclusion contemporaneously reached by a substantial portion of the Nisei in the camps.

At this point it needs to be emphasized, as strongly as possible, that loyalty is a matter of mind and heart, an overriding sentiment of fealty, fidelity, and faithfulness. It is not a shirt, to be removed or resumed as sentiments and circumstances shift or change. National loyalty is not a bond that can be shaken off "due to the disgusting and shabby treatment given us" (Rep. 196), or in consequence of the particular answer available at any given time to the query, "What have you done for us lately?"

The Commission's denigration of the loyalty review program, and its present preference for the Nisei witnesses' rationalizations, expressed in 1981, over their actual responses to the loyalty questions, made in 1943, nearly four decades earlier, reflect all too plainly the Commission's pro-Japanese ethnic bias.

More than that, and this strikes at the very heart of the judgment now to be rendered by the Congress on the relocation program, the Commission's view of the loyalty program goes far towards supporting the reasonableness of all in authority whose lack of confidence in the complete American loyalty of all the Nisei underlay the entire program. As Justice Douglas pointed out in Hirabayashi, the military should not be required to wait until espionage or sabotage become effective before they could move.

D. The Commission's recommendations in respect of the Aleuts demonstrate well-nigh incredible pro-Japanese ethnic bias

The Aleuts, living on the Aleutian and Pribilof Islands, were among the countless innocent victims of World War II: They occupied territory where fighting not of their choosing or doing happened to take place.

But some phases of the relief that the Commission recommended for these unfortunates reflect a well-nigh incredible pro-Japanese bias on the part of that body: (1) Although compensation is proposed for all surviving Aleuts resettled by the United States, none is suggested for any of the Aleuts removed from Attu by the Japanese and held as prisoners in Japan as long as the war lasted. (2) Much of the debris of war still remains in the Aleutian Islands where it was left in the course of defensive operations and after actual combat. The Commission recommends removal at the expense of the American taxpayer, not only of what the United States forces left behind, but also of whatever war material the Japanese invaders abandoned after their defeat.

What is perhaps the strangest aspect of these recommendations is that no member of the Commission was sufficiently objective to detect the pro-Japanese bias, or perhaps even the anti-American bias, that those recommendations reflected.

Now to the Aleuts:

The proximity of Alaska's Aleutian Islands to Japan made them an inevitable battlefield during World War II. The Japanese occupied Attu, which was retaken at heavy cost in May 1943, and Kiska, which they evacuated shortly before a joint American-Canadian expedition was poised to recover it a few months later. Earlier, the United States had built air fields along the Aleutian chain, and those at Dutch Harbor on Unalaska Island were heavily attacked in June 1942. The base on Adak was also bombed. Conn, Guarding, Chapters X and XI, pp. 253-300.

When the Japanese took Attu in June 1942, they captured 42 Aleuts and two Anglo Alaska Indian Service employees (Rep. 321), and by September the 41 surviving Aleuts, plus the non-Aleut schoolteacher, were taken to Japan as prisoners of war (Rep. 337). Half of those Aleuts died in captivity, and the surviving 21 Attuan Aleuts and one newborn baby left Japan in September 1945 (Rep. 337).

Meanwhile, about 900 Aleuts were evacuated by the United States from the Pribilof Islands in the Bering Sea and from many Aleutian Islands as well. The Commission did not criticize those steps. To the contrary, it said (Rep. II, 10), "This action was justified as a measure to protect civilians in an active theatre of war. The Commission found no persuasive showing that evacuation of the Aleuts was motivated by racism or that it was undertaken for any reason but their safety. The evacuation was a rational wartime measure taken to safeguard them."

Unhappily for the unfortunate Aleuts, however, there was no central plan and no central agency to direct their move or to supervise their disposition. The Governor of the Territory of Alaska reported to the Secretary of the Interior (Rep. 320n.*), but was not appointed by him, as that reference asserts with by now familiar sloppiness; as long as Alaska remained a Territory, until 1959, its Governor was appointed by the President (48 U.S. Code, 1934-58 eds., §62). But the Governor lacked direct control over the operating agencies in Alaska that also reported to the Secretary of the Interior, the Office of Indian Affairs, plus the Fish and Wildlife Service (particularly in connection with the Pribilofs); and he himself received secretarial directives through the Department's Division of Territories and Island Possessions.

Nor was there unity of command among the armed forces in Alaska; the area never had an overall military commander. Army and Navy headquarters were physically 300 miles apart, and the resultant separation was exacerbated by personality conflicts. (Here again, we encounter slovenly staff work: It was the Alaska Defense Command, not the Eleventh Air Force as incorrectly stated at Rep. 322-23, that became the Alaskan Department [Conn, p. 300]. The Eleventh Air Force continued to exist as such, though at reduced strength, until the end [Craven & Cate, Army Air Forces in World War II, vol. 5, pp. 743-744]).

In consequence, there was never formulated any single, coherent policy for Aleut evacuation, and their actual removal was almost invariably ordered on woefully short notice by subordinate naval commanders. At that point the Aleuts were literally dumped into scattered but wholly inadequate quarters. Little if any attention was paid them, and the conditions under which they lived were, to use far too mild a term, utterly deplorable.

The Commission accordingly recommended, with Congressman Lungren dissenting, "that Congress establish a fund for the beneficial use of the Aleuts in the amount of $5 million. The principal and interest of the fund should be spent for community and individual purposes that would be compensatory for the losses and injuries Aleuts suffered

as a result of the evacuation. These injuries . . . include lasting disruption of traditional Aleut means of subsistence and, with it, the weakening of their cultural tradition" (Rep. II, 11-12).

No payment is recommended to any Americans who were not Aleuts or of Japanese ancestry, but who also, in the course of World War II, suffered losses and injuries in consequence of steps taken by the American Government.

The Commission further recommended, with Congressman Lungren again dissenting, that Congress "direct a payment of $5,000 per capita to each of the few hundred surviving Aleuts who were evacuated by the federal government during World War II" (Rep. II, 12).

The underscoring has been added to emphasize that no Commissioner recommended compensation for any surviving Attuans whom the Japanese evacuated to Japan as prisoners of war during the same conflict. It may well be, of course, that, more than forty years later, there are no Attuan survivors. But the Commission does not rely on any such fact, if it be one, to justify the discrimination in its recommendation.

The Commission also found (Rep. 357) that "U.S. and Japanese military debris from World War II still litters the Aleutians. Most of it is unsightly; some is hazardous or polluting."

This time the underscoring has been included to bring into focus the Commission's recommendation (Rep.II, 12) that "Congress appropriate adequate funds through the public works budget for the Army Corps of Engineers to clear away the debris that remains from World War II in and around populated areas of the Aleutian Islands", an amount that the Commission elsewhere estimates at between $98 and $28 million (Rep. 357-58).

Otherwise stated, the Commission recommended that the American taxpayer bear also the expense of removing any and all war materiel that the Imperial Japanese Army abandoned in the Aleutians after its ultimately repulsed invasion and occupation of American soil.

These last two Commission recommendations, which would exclude compensation for any surviving Aleuts from among those whom the Japanese removed from Attu, and which would require the United States to pay for removal of whatever debris that the Japanese brought with them to the Aleutians in the course of their invasion, reemphasize in the most stark manner imaginable the all-permeating pro-Japanese bias of the Commission's staff, and the well-nigh incredible gullibility of the Commissioners who concurred.

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Dated July 3, 1984.