



Office of the Assistant Attorney General

Washington, D.C. 20530

APR 25 1986

Honorable Peter W. Rodino
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter responds to your request for the views of the Department of Justice on H.R. 442, a bill "[t]o implement the recommendations of the Commission on Wartime Relocation and Internment of Civilians." The Department of Justice recommends against enactment of this legislation.

Background

The wartime relocation and internment of Japanese-Americans were undertaken pursuant to decisions made at the highest level of our government during World War II as part of our nation's defense effort. These decisions were made at a time when the very survival of the Republic was threatened. With the passage of time, these decisions have been examined and questioned. In our view, the Commission's extensive effort to study the wartime relocation and internment program, despite its apparent thoroughness, proves the futility of endeavoring accurately and completely to comprehend the perception of our national leaders under the extreme wartime conditions of the period. These issues will continue to be a matter of historical and scholarly debate.

The United States government has officially recognized that much unjustified personal hardship came about as a result of the internment program. The internees were among the millions of innocent victims of World War II, confined in the wake of the unprovoked attack on Pearl Harbor and the very real fear of a Japanese invasion of the West Coast. Regardless of one's opinion as to the bona fides of the government officials who approved and implemented the relocation and internment program, we all can agree that Japanese-Americans suffered much

deprivation and hardship. They were expected to make personal, professional, and social sacrifices of a nature not expected of other United States citizens. As it is impossible to bring back to life the many Americans who died in the American war effort, including those heroic Americans of Japanese descent who fought in the U.S. Armed Forces, so it is impossible to restore to all those Americans the freedom that was taken from them as a result of war. However, previous Congresses, Presidents and the Attorney General have taken steps to acknowledge and compensate for the injuries suffered by Japanese-Americans during this period.

After the conclusion of World War II, Congress acted to authorize a program of compensation for the financial losses entailed by evacuations from the West Coast. The American-Japanese Claims Act, enacted in 1948, authorized compensation for "any claim" for damages to or loss of real or personal property as "a reasonable natural consequence of the evacuation or exclusion of" persons of Japanese ancestry as a result of governmental action during World War II. 50 U.S.C. App. § 1981-1987. This Act was amended by subsequent Congresses to liberalize its provisions for compensation. Under the Act as amended, the Justice Department received claims seeking approximately \$147 million. Ultimately, 26,568 settlements were achieved, many of which settled claims presented by family groups rather than individual claimants. Thus, it is safe to conclude that of the 120,000 evacuees, most submitted claims under the American-Japanese Claims Act and received compensation. A total of over \$37 million was paid in compensation pursuant to this Act.

In 1975, President Ford formally revoked Executive Order 9066, issued by President Roosevelt in 1942 to permit exclusions from the West Coast. Also in 1975, Congress repealed Public Law 77-503, which was enacted in 1942 to ratify Executive Order 9066. In repealing the Executive Order, President Ford stated that with the benefit of what we now know, the wartime exclusions were a mistake. Most Japanese-Americans demonstrated exceptional fidelity to our nation's ideals and loyalty to the United States despite the hardships visited upon them. There can be no doubt that Executive Order 9066 visited injustice upon loyal Americans of Japanese ancestry.

Recent Litigation

This issue has been the subject of extensive litigation in recent years. In 1983, three separate coram nobis petitions were filed seeking to have wartime misdemeanor convictions set

aside on the ground that the government knowingly suppressed evidence and misrepresented facts in submissions to the Supreme Court during the 1940's. In response to one of these coram nobis petitions filed by Fred Korematsu in the United States District Court for the Northern District of California, Attorney General Smith determined that "it is time to put behind us this controversy. . . and instead reaffirm the inherent right of each person to be treated as an individual." Accordingly, the Attorney General decided that "it is singularly appropriate to vacate [Korematsu's] conviction for nonviolent civil disobedience," as well as to do the same for other similarly situated individuals who request it. Thus, in each of these cases, the United States, while disputing petitioner's allegations, moved to vacate the conviction and dismiss the underlying indictment or information, thus moving effectively to afford petitioners the very relief they sought.

In Yasui v. United States (D. Ore., Jan. 26, 1984), the court granted the government's motion, vacated the conviction, and dismissed the petition as moot. On petitioner's appeal, the Ninth Circuit remanded the case to the district court to determine the timeliness of the appeal. In Korematsu v. United States (N.D. Cal., April 19, 1984) the court denied the government's motion, granted the coram nobis petition, but made no findings of fact. Consequently, the United States chose not to appeal.

Finally, in Hirabayashi v. United States, (W.D. Wash., Feb. 10, 1986), the court granted the petition to set aside the conviction for failure to report for internment, but refused to set aside the conviction for violating a curfew order. No decision has been made on whether to seek appellate review.

Hohri v. United States No. 84-5460, (D.C. Cir., Jan. 21, 1986), is a suit filed on behalf of 120,000 persons of Japanese ancestry and their heirs seeking personal injury and property loss damages claimed to arise out of the evacuation and internment program. The government had prevailed in the district court on limitations and other jurisdictional grounds. In a 2-1 decision, the court of appeals reversed and remanded for trial a portion of plaintiffs' claims.

The court of appeals affirmed dismissal of all personal injury claims and the contract and breach of fiduciary duty claims alleged in the complaint on jurisdictional grounds, but decided that plaintiffs' property damage claims under the Fifth Amendment Takings Clause could not be resolved on preliminary jurisdictional grounds and therefore reached the limitations issue. The majority opinion held that because the Supreme Court had established a presumption in favor of deferring to the

military judgment on the necessity for the evacuation program, limitations did not commence to run until Congress created the Commission on Wartime Relocation and Internment of Civilians in 1980. According to the court, the statute creating the Commission thereby "finally removed the presumption of deference to the judgment of the political branches." The court also concluded that the American-Japanese Claims Act did not provide an exclusive remedy because the Act did not provide relief that encompassed all damages required to make whole persons who suffered a "taking."

Chief Judge Markey of the Federal Circuit, sitting by designation, dissented. In his view, the appeal should have been transferred to the Federal Circuit for disposition and, in any event, the statute of limitations barred this suit.

The Department is considering whether to seek further review of the court's decision.

Section-by-Section Review of H.R. 442

1. Section 2(a) provides congressional findings: (1) that the findings of the Commission on Wartime Relocation and Internment of Civilians describe the circumstances of the exclusion, relocation and internment of citizens and aliens of Japanese and Aleut ancestry; (2) that the internment of those persons of Japanese ancestry on the West Coast "was carried out without any documented acts of espionage or sabotage, or other acts of disloyalty" by them; (3 and 4) that there was no military or security reason for the internment and that it was caused instead, by racial prejudice, war hysteria, and a failure of political leadership; (5) that the excluded persons of Japanese ancestry suffered enormous material, intangible, educational and job training losses; and (6) that the "basic civil liberties and constitutional rights" of those persons of Japanese ancestry were fundamentally violated by that evacuation and internment. Section 2(b) similarly states the purpose of the legislation. Section 101 apologizes on behalf of the nation for the wartime relocation and internment program.

We have reviewed the Commission's report. It does call attention to the hardships suffered by Americans of Japanese ancestry. However, it must be recognized that conclusions and subjective determinations which necessarily are an integral part of the report are subject to debate. Indeed, in June 1983, the Commission released an addendum to its report discussing a multi-volume Department of Defense publication entitled "The 'Magic' Background of Pearl Harbor" because it had not discussed this important source of wartime intelligence in its report.

We question the wisdom and, indeed, the propriety, of accusing leaders of the United States government during World War II, both civilian and military, of dishonorable behavior. The wartime decisions which form the predicate for this legislation were taken against a backdrop of fears for the survival of our nation; we recently had been attacked by a totalitarian regime which had enjoyed a virtually unbroken string of military successes, both before and immediately after it commenced war upon us. The decisions made by our wartime leaders should be considered in that context.

It may be that the Commission is correct in concluding that the assumptions on which the exclusion and evacuation and detention programs were based were erroneous. It is a long and unsubstantiated further step, however, to brand those actions as a product of "racial prejudice, or hysteria, and a failure of political leadership." In most instances, the persons so accused are not alive to defend themselves today. Moreover, some of the Commission's conclusions and its selection of evidence marshaled in support of its conclusions are suspect. These are matters best left to historical and scholarly analysis rather than debated by Congress.

We do not believe that this bill should be the vehicle for promulgation of an "official" version of these historical events. The Department opposes enactment of the findings in section 2.

2. The Department opposes sections 201(a) and 201(b), which require the Attorney General to review certain criminal convictions with a view toward pardon and to submit pardon recommendations to the President in certain cases.

The pardon provision of the bill is completely unnecessary. As noted above, the government has offered to move to vacate the conviction of all Japanese-Americans who were convicted of violating wartime restrictions imposed by Executive Order 9066 and has done so in the three coram nobis proceedings filed to date. It appears that about 39 Japanese-Americans were convicted of misdemeanor violations of Executive Order 9066, some of whom may no longer be living. Vacating the convictions and dismissing the underlying indictments or informations of Japanese-Americans affords these individuals the full and meaningful relief to which a pardon would entitle them, and completely obviates the pardon review process provided in § 201.

Moreover, § 201(b) provides that the Attorney General shall recommend to the President for pardon consideration convictions that the Attorney General finds to have been based on certain factors. In our view, this provision raises a substantial

separation of powers issue. Article II, Section 2, Clause 1 of the Constitution grants to the President a virtually absolute pardon authority, which extends to all offenses against the United States. The granting of a pardon is an act of grace by the President, and the Constitution does not invest the legislature with any authority in the pardon process. The Supreme Court has confirmed that the President's authority to grant pardons may not be limited by legislative restriction. Shick v. Reed, 419 U.S. 256 (1974). Generally, the President exercises the power based upon formal application and the recommendation of the Attorney General, now the Associate Attorney General by assignment.

The Associate Attorney General's advisory function (28 CFR 0.36) in connection with the consideration of all forms of Executive clemency, including pardon, commutation (reduction) of sentence, remission of fine and reprieve, and the President's ultimate decision to grant or deny Executive clemency, is wholly discretionary. Department of Justice officials involved in discharging this function act solely as confidential advisors to the President in the exercise of the pardon power, and not in fulfillment of any statutory mandate to conduct the kind of proceedings contemplated in the interdependent provisions of § 201.

Additionally, the language of § 201 is ambiguous in at least two respects. Section 201(a) directs the review of "all cases in which United States citizens and permanent aliens of Japanese ancestry were convicted of violations of laws of the United States, including convictions for violations of military orders, . . . during the evacuation, relocation and internment." First, the class of individuals whose cases are to be reviewed is vaguely defined. The present wording of § 201(a) could be interpreted to require the review of not only the cases of those living but also the cases of those who are deceased. It has been a long established practice not to grant posthumous pardons. The legal basis of the practice is in large part the concept that a pardon, like a deed, must be accepted by the person to whom it is directed. Acceptance, of course, is impossible when the recipient is deceased. See, United States v. Wilson, 7 Pet. 160 (1833); Burdick v. United States, 236 U.S. 79 (1915); Meldrim v. United States, 7 Ct. Cl. 595 (1871); Sierra v. United States, 9 Ct. Cl. 224 (1873); 11 Op. A.G. 35 (1864).

Second, provision for the review of "all cases" involving violations of "laws of the United States . . . [and] military orders" is too broad. This language may be interpreted to require the review of both felony and misdemeanor offenses, as well as require the review of any crime committed during the