

evacuation, relocation and internment period, such as murder, extortion, kidnapping, theft, counterfeiting and other offenses which may have been committed on a government reservation by members of the class.

3. Section 202 would require agencies to review with liberality applications for restitution of positions, status or entitlements, giving full consideration "to the historical findings" of the Commission and the findings in the Act. We see no need for this provision, are uncertain as to how it could fairly be applied in practice at this late date, and suggest that it could lead to extreme difficulties in administration with resultant litigation.

4. Section 203 would establish a Civil Liberties Public Education Fund in the amount of \$1.5 billion to be available for disbursement pursuant to §§ 204 and 205.

Section 204 provides for the award of \$20,000 to every living person of Japanese ancestry who was deprived of liberty or property as the result of the wartime programs. Non-residents apparently would also be entitled to the benefits of this section. Since, according to the recommendations of the Commission, approximately 60,000 persons would benefit from those awards, about \$1.2 billion would be expended on this program.

Section 205 would establish a Board of Directors of the Fund provided for in § 204. The Board would disburse the remaining \$300 million or more of the Fund for the purposes enumerated in subsection (b) of § 205, including projects "for the general welfare of the ethnic Japanese community in the United States."

The Department opposes these provisions for paying additional reparations to individuals where Congress has already enacted a comprehensive statutory scheme which provided a reasonable and balanced contemporaneous remedy to affected individuals. By enacting the 1948 American-Japanese Claims Act, Congress recognized long ago that many loyal Americans of Japanese descent were injured by the wartime relocation and internment program. Although the Commission's report challenges the amount of compensation chosen by Congress as inadequate, Congress has spoken after considerable debate, and there is no good reason to question that settlement now three-and-one-half decades later.

The American-Japanese Claims Act did not include every item of damages that was or could have been suggested. It did, however, address the hardships visited upon persons of Japanese ancestry in a comprehensive, considered manner, taking into

account individual needs and losses. This effort to correct injustice to individuals was in keeping with our nation's best tradition of individual rather than collective response and was more contemporaneous with the injuries to the claimants than would be any payments at this late date.

Moreover, in 1956, Congress considered legislation that directly called into question the adequacy of the claims settlements provided in the 1948 Act. The bill as introduced would have liberalized the relief provisions of the Act by granting expanded compensation for certain losses. Congress rejected this proposal because it "would substantially reopen the entire project." H.R. Rep. 1809, 84th Cong., 2d Sess., 9 (1956). Thus, with the hardships and deprivations of the internees still relatively contemporaneous, a later Congress adjudged the American-Japanese Claims Act to be fundamentally sound. Nothing has occurred since Congress last considered the matter to warrant a supplemental payment to internees. The results of the settlement process under the Act, long since completed, deserve to be accepted as a fair resolution of the claims involved.

The bill's restitution provisions would also impose heavy administrative burdens on the Attorney General. The bill would confer on the Attorney General responsibility for investigating, finding and paying eligible recipients. The Attorney General is specifically prohibited even from requiring eligible persons to make application for these payments. This duty could require the Department to commit a considerable amount of manpower and resources to the search for eligible recipients. Yet, the bill would provide no funding for the location or identification of eligible recipients and would expressly prohibit the Attorney General from recovering expenses incurred in carrying out this responsibility from the Trust Fund set up to pay eligible recipients.

We also oppose the concept of a special fund incorporated in § 205. As noted earlier, we do not believe it is the proper function of our government to adopt an "official" version of these historical events. Similarly, we oppose spending hundreds of millions of dollars to "educate" the American people to accept this official interpretation of our history.

5. We also oppose the breadth of the definitions of eligible individuals set forth at § 206 of the bill.

a. The term "living" should be determined with more precision. It should be made clear whether it is intended to refer to the time of the enactment of the legislation, the time when application for a benefit is made, or to the time when payment of a benefit is made.

b. The definition would cover "any living individual" who had been subject to the exclusion, relocation, or detention program, without any express exclusion of persons residing outside the United States. See § 206(2). The all-inclusiveness of the term "eligible individual" overlooks the important factor that at least several hundred of the detainees were fanatical pro-Japanese, had terrorized their fellow detainees loyal to the United States, and voluntarily sought repatriation to Japan after the end of the war. See, Acheson v. Murakami, 176 F.2d 953, 958 (9th Cir. 1949); McGrath v. Abo, 186 F.2d 766, 771-72 (9th Cir.), cert. denied, 342 U.S. 832 (1951); and in particular Findings of Fact 18, 20, 22, 25, 27, 29, 35, 39, 40, 44, 45, 46 of the United States District Court for the Southern District of California in Murakami v. Acheson, attached to, and made a part of the court of appeals' decision in that case. It would be unfair to the United States and to the loyal persons of Japanese descent if the benefits of this legislation were made available to persons who were disloyal to the United States.

6. We turn now to Title III of H.R. 442, entitled "Aleutian and Pribilof Islands Restitution." In this connection the Commission observed that "[t]he Aleut evacuation and the removal of persons of Japanese ancestry from the West Coast during the same period were separate events -- neither caused nor influenced the other. . . . The evacuation of the Aleuts was a reasonable precaution taken to ensure their safety." Personal Justice Denied, at 318. The focus of the Commission's report was upon its conclusion that "the evacuation of the Aleuts was not planned in a timely or thoughtful manner," leading to hardships upon the persons exposed to the conditions flowing from their evacuation from the war zone.

We analyze below the specific provisions which H.R. 442 would enact to benefit Aleuts. Fundamentally, however, we do not believe that wartime hardships of persons properly removed from a war zone provide any factual predicate for consideration of especial, favorable treatment for this group as opposed to other individuals whose lives were disrupted and who suffered hardship or death during World War II. Many activities undertaken by our government during World War II could be criticized, with hindsight, as untimely or poorly planned. We do not believe that such criticism can appropriately form the basis for special compensation.

7. Turning to the specific provisions of Title III of the bill, we have these comments.

a. Section 309(1) would provide for an "Administrator" who would administer certain expenditures made by the Secretary of the Treasury from the Aleutian and Pribilof Islands Restitution Fund established by § 302(a). Section 304(a) would designate as "Administrator" the "Association," defined in § 302(4) as "the Aleutian/Pribilof Islands Association, a non-profit regional corporation for the benefit of the Aleut people organized under the laws of the State of Alaska. (We do not know whether the Aleutian/Pribilof Islands Association would have to be incorporated, or whether it is already in existence; we are likewise not informed whether it is or would be a not-for-profit regional organization under the laws of Alaska Native Claims Settlement Act of 1971, 85 Stat. 691, as amended, 43 U.S.C. § 1606(d).)

The designation in a statute of a person or corporation to perform statutory functions necessarily raises the question whether the designee is charged with functions which may be performed only by an officer of the United States. If that is the case, the person or the governing body of the corporation must be appointed in the manner provided for in the Appointments Clause of the Constitution, i.e., by the President by and with the advice and consent of the Senate, or, where authorized by the statute, by the President alone, or by the courts or the heads of departments. Art. II, § 2, cl. 2. Congress cannot appoint officers of the United States.

Whether a person is an officer of the United States in the constitutional sense depends upon his statutory duties. A person who performs merely advisory functions, and who possesses no enforcement authority or power to bind the government, is generally not considered to be an officer within the meaning of the constitutional provisions cited above. 24 Op. A.G. 12 (1902); 26 Op. A.G. 247 (1907); H.R. Rep. No. 2205, 55th Cong. 3d Sess. 48-54 (1899). However, a person who performs significant governmental duties pursuant to the laws of the United States is an officer in the constitutional sense, and therefore must be appointed pursuant to Article II, § 2, cl. 2 of the Constitution. Buckley v. Valeo, 424 U.S. 1, 126, 141 (1976).

We have examined the statutory duties of the Administrator under section 305 of the bill in order to determine whether his functions will be merely advisory or whether he will be involved in the actual administration of the Act. According to § 305(a), the Administrator would make restitution as provided in that section for certain Aleutian losses sustained in World War II, and take such other action as required by Title III of the bill. These duties would include the establishment of a trust of \$5 million for the benefit of the affected Aleutian

communities and the appointment of not more than seven trustees to maintain and operate that trust (§ 305(b)(1)); the regulation of the manner in which the trust to be administered (§ 305(b)(3)); the rebuilding, restoration, or replacement of damaged or destroyed churches and church property (§ 305(c)); and assistance to the Secretary of the Treasury in identifying and locating Aleuts entitled to receive payments under § 306 (§ 306(a)(3)). The Administrator, thus, would not be a mere conduit of funds but would be charged with the performance of a significant amount of administrative responsibilities under a federal statute. The Constitution therefore requires either that he be appointed in accordance with Article II, § 2, cl. 2, or that the bill be amended so as to relieve him of any duties directly imposed upon by a federal statute.

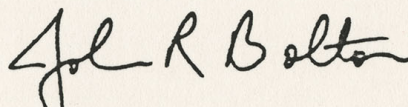
b. Section 305(c), dealing with the restoration of church property, also raises some constitutional concern. This subsection would authorize the Administrator "to rebuild, restore or replace churches and church property damaged or destroyed in affected Aleut villages during World War II." The Administrator would receive \$100,000 from the Secretary of the Treasury to make an inventory and assessment of all churches and church property damaged or destroyed in the affected Aleut villages during World War II. Within one year after the enactment of this legislation the Administrator would be required to submit the inventory and assessment "together with specific recommendations and detailed plans for reconstruction, restoration and replacement work to be performed" to a review panel comprised of the Secretary of Housing and Urban Development, the Chairman of the National Endowment for the Arts, and the Administrator of GSA. If the Administrator's plans and recommendations are not disapproved by the review panel within sixty days, the Administrator would implement them as soon as possible. If the differences between the Administrator and the review panel should be irreconcilable, the Secretary of the Treasury would submit the matter to Congress for approval or disapproval by joint resolution. Section 310(a)(2) would authorize the appropriation of \$1,399,000 to carry out the purposes of the church restoration program.

As explained above, the compensation for the destroyed or damaged churches would not be turned over directly to the affected Aleut villages, but to the Administrator. The Administrator would be charged with the statutory duties of making an inventory and assessment "together with specific recommendations and detailed plans for reconstruction, restoration and replacement work to be performed"; of submitting the inventory, assessment, and recommendation to a review panel consisting of three federal officers; and of trying to reconcile any differences between himself and the review panel,

irreconcilable differences between the Administrator and the review panel to be resolved by Congress. The effect of this procedure would be that the details of restoring or rebuilding the churches would be determined by the Administrator (who, as the result of his statutory functions would have to be an officer of the United States), and reviewed by the Secretary of Housing and Urban Development, the Chairman of the National Endowment for the Arts, the Administrator of GSA, and possibly Congress. This governmental involvement in the manner in which the funds allocated for church repair or reconstruction are to be spent would raise First Amendment concerns. Meek v. Pittenger, 421 U.S. 349, 370 (1975); Committee for Public Education v. Regan, 444 U.S. 646, 659-60 (1980).

For all of the foregoing reasons, the Department of Justice recommends against enactment of this legislation. The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,



John R. Bolton  
Assistant Attorney General