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DEPARTMENT OF JUSTICE.

OFFICE OF

UNITED STATES ATTORNEY,
Northern District of California,

San Francisco, November 2, 1906.

THE ATTORNEY GENERAL,

Washington, D. C.

Sir:

I received your letter of the 24th ultimo, relative to the exclusion of Japanese children from the public schools of San Francisco, on Monday, October 29th. On the following day I called upon the Japanese Consul, and advised him that I called at your request for the purpose of learning the facts connected with the situation. On the day of the receipt of your letter, I also received a telegram from Mr. Secretary Metcalf from Chicago, asking me to meet him at Sacramento. I went to Sacramento, and came to San Francisco with him.

Yesterday we took up the question, and had an interview with Mr. Altman, President of the Board of Education, and also his counsel, and

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this morning with the Japanese Consul and his representative.

The Board of Education are proceeding under section 1662 of the Political Code of California, which reads as follows:

"Sec. 1662. WHO MAY BE ADMITTED TO. Every school unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the board of school trustees, or city board of education, have power to admit adults and children not residing within the district, whenever good reasons exist therefor. Trustees shall have the

POWER TO EXCLUDE CHILDREN of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish

SEPARATE SCHOOLS FOR INDIAN CHILDREN and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted to any other school; provided, that in cities and

TOWNS IN WHICH THE KINDERGARTEN HAS BEEN ADOPTED or may hereafter be adopted as part of the public primary schools, children may be admitted to such kindergarten classes at the age of four years;

(Deaf Children) And provided further, that in cities or school districts in which separate classes have been or may hereafter be established, for the instruction of the deaf, children may be admitted to such classes at the age of three years."

A separate school for children of Mongolian or Chinese descent has been established in accordance with this provision. It is contended by the Board of Education that when such a school is

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once established, it is mandatory upon them to see that all Indian, Mongolian and Chinese children shall not be admitted into any other school. They contend that the school having been established, they have no power to rescind the resolution providing that Japanese children shall attend such school, but they are perfectly willing to have the matter tested by the Court, and to make an agreed case to that effect.

Mr. Metcalf saw members of the Supreme Court yesterday, and acting upon the assumption that the Treaty with Japan contained a clause giving them all the rights and immunities conferred upon subjects of other countries, was, in an informal discussion, advised that the Court was of the opinion that the Treaty provisions would prevail, and any law of the State of California, or action taken by the Board of Education of San Francisco thereunder, would be held nugatory as being in conflict with the provisions of the Treaty.

In examining the Treaty with Japan, it seems that the favored nation clause is restricted in its scope. This section seems to confine the rights of the respective contracting parties to commerce and navigation--the section reading as follows:

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"Art. XIV. The High Contracting Parties agree that, in all that concerns commerce and navigation, any privilege, favor or immunity which either High Contracting Party has actually granted, or may hereafter grant, to the Government, ships, citizens or subjects of any other State, shall be extended to the Government, ships, citizens or subjects of the other High Contracting Party, gratuitously, if the concession in favor of that other State shall have been gratuitous, and on the same or equivalent conditions if the concessions shall have been conditional; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other upon the footing of the most favored nation."

Taking the matter up with the Japanese Consul and his representative this morning, I am informed that the right claimed by the Japanese is based upon Section I of the Treaty, providing that they shall have full liberty to enter, travel or reside in any part of the territories of the United States--their contention being that the right of residence includes the right to have their children sent to the public schools.

Before passing to the import of this language, and the right conferred, I desire to call your attention to the favored nation clause in the Treaty with Persia, which in Article III provides:

"Art. III. The citizens and subjects of the two high contracting parties, travellers, merchants, manufacturers and others, who may reside in the Territory of either Country, shall be respected and efficiently protected by the authorities of the Country and their agents, and treated in all respects as the subjects and citizens of the most favored Nation are treated."

And also to Article II of the Treaty with China, which declares:

"Art. II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to do and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exceptions which are accorded to the citizens and subjects of the most favored nations."

You will observe that unless the word "reside" carries with it the right contended for, Article XIV is not broad enough to give this right. Accordingly, yesterday afternoon Mr. Metcalf telegraphed to the Secretary of State, calling his attention to this, and asking him to point out the clause upon which the right of Japan is founded.

I now desire to present to you, for my guidance, the question:

Do you consider that the language of the Treaty with Japan is sufficiently comprehensive to enable the United States to go into Court and assert that the compulsory attendance of Japanese children upon a school especially provided for them is in conflict therewith?

It is to be assumed, in deciding this question, that the Japanese are given the same educational advantages as are enjoyed by American children or children of other

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nationalities, and that the restriction is only that they shall attend a separate school. The line of argument that I had outlined for the presentation of the case was, that under Treaty provisions with Japan the United States was obligated to give to the Japanese residing in the United States the same rights and advantages accorded to the subjects of the most favored nations, and inasmuch as the Government has made no provisions for separate schools for Italian, French or German children, Japan could not be singled out for discrimination. Of course this involves the proposition that we are under Treaty obligation, and that our Treaty obligation is violated by the statute of California referred to and by the action of the Board of Education thereunder.

I doubt personally that the word "reside" in the Treaty is sufficiently comprehensive to cover this proposition, and therefore expressly ask that you give me your views upon which the United States can go into Court for the purpose of obtaining a judicial declaration that Treaty rights, by the action of the Board of Education, have been interfered with.

I would say that there are other objections against the action taken by the Board of Education that are more or less technical in character, and which, while they might be sufficient to give relief in the present

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case, would establish nothing of permanent benefit. The statute provides that the Boards of Education in the respective districts of California may provide separate schools for Japanese children. It is not expressly declared by the Legislature that such schools shall be provided, but the power is delegated to Board of Education to determine whether such separate schools shall or shall not be established. This legislation might be attacked upon the ground that it is a delegation of power, and is not uniform throughout the State. It also might be argued that the Japanese are not of the Mongolian race. Upon this point I think there is some difference of opinion.

If, however, a decision should be gained upon this point, it would be of no practical value, because the Legislature of the State of California, if so minded, at its next session, commencing in January, could enact legislation to cure these defects.

I presume also that the Government would not desire to ask the interposition of the Court upon any mere technical ground, but only upon the broad proposition that under its Treaty with Japan, which is the supreme law of the land, and at the same time a contract, it was prevented from carrying out its obligations by both the State and local authorities.

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I have in this communication refrained from reporting on facts other than such as relate to the law, for the reason that Mr. Metcalf is gathering all these, and I shall, if desired, report at a later date.

I think I can confidently assure you that there will be no difficulty in obtaining a decision of our highest court that the legislation and action referred to can not be tolerated or upheld provided it can be shown they are in conflict with Treaty provisions, and the main question is to show the Treaty provision with which they are in conflict.

I would therefore ask for a full response upon this subject. I have submitted this letter to Mr. Metcalf before sending it to you, and it is written with his approval, and is correctly stating the question involved.

Very respectfully yours,

(Signed) Robt. T. Devlin,

UNITED STATES ATTORNEY.