

Fighting the Japanese Internment in Federal Court: The A.C.L.U. During World War II

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Abstract

An earlier paper (Blair, 1999) describes the background of the Japanese Internment and the efforts of the American Civil Liberties Union to lobby against it before legislatures and the public. This paper describes the organization's efforts to litigate in the courts against curfews imposed on the West Coast Japanese, their evacuation, and their internment in camps.

Three Caucasian groups in the United States—the Fair Play Committee (Shidler, 1952), the American Friends Service Committee, and the American Civil Liberties Union (Blair, 1999 and McDaid, 1969)—recognized the grave injustice of the Japanese Internment carried out during the Second World War. All three attempted to defend the reputation of Japanese (this term will include all ethnic Japanese regardless of citizenship) on the West Coast and to mitigate the impact of the United States government's shameful and racist policy. When the political battle was lost, the American Civil Liberties Union (ACLU) continued this fight in the courts. Since the legal issues under dispute concerned federal policy, all litigation took place in the federal courts—United States district courts, appeals courts, and the U.S. Supreme Court. (For convenience and the sake of brevity, the term “United States” will be omitted when referring to these courts.)

In the first half of 1942, the ACLU national office prodded its three West Coast branches to find evacuation test cases and bring them to litigation. All three complied enthusiastically. Seattle took up the defense of Minoru Yasui

and Gordon Hirabayashi; San Francisco found Fred Korematsu and Mitsuye Endo; and Los Angeles argued the cause of Earnest Wakayama.

Resistance and Evasion

As a direct challenge to Executive Order 9066 and the subsequent military orders (see Blair, 1999, 195–196), Gordon Kiyoshi Hirabayashi refused to comply with Evacuation Order #57 (Seattle). He then presented himself, with a prepared statement, to agents of the Federal Bureau of Investigation (FBI) for arrest. The statement explained his purpose:

If I were to register and cooperate ... I would be giving hapless consent to the denial of practically all of the things which give me incentive to live. I must maintain the democratic standards for which this nation lives. Therefore, I must refuse this order for evacuation ... I am objecting to the principle of this order which denies the rights of human beings, including citizens. (Girdner and Loftis, 1969)

Hirabayashi, born in Seattle in 1918, had resided in Washington State all of his life. He had attended public schools, graduated, and continued his education at the University of Washington. At the age of twenty-four he was finishing his senior year in the College of Arts and Sciences when ordered to evacuate. As vice-president of the campus YMCA and a member of the Seattle Meeting of the Society of Friends, Hirabayashi already had ample contact with community groups that would support his cause.

The FBI immediately arrested him, and bail was set at 5,000 dollars. They charged him first with failure to report on May 11 or 12 to the Civil Control Station in response to Civilian Exclusion Order No.57. A second count declared Hirabayashi to have been in unlawful violation of curfew regulations on May 9, the night he and some friends had held a farewell dinner for the neighborhood Japanese-Americans. The others had slipped out of the small church prior to the eight o'clock curfew, but not Hirabayashi.

Hirabayashi spent five months cramped with thirty to forty other inmates

in the King County Jail. Then, in the early fall, ACLU attorney Frank Walters presented Federal Judge Lloyd Black with two pretrial motions (*U.S. v. Hirabayashi*, 1942, 658). One argued for dismissal of the indictment because the military orders involved exceeded the constitutional limits imposed by the Fifth Amendment and Article IV, Section 2, Clause 1. It further claimed that these orders had not been properly authorized by executive order or legislative enactment. The second motion, a plea in abatement, called attention to Hirabayashi's status as a natural born American citizen and recorded his sworn allegiance to the United States.

The judge disallowed the plea in abatement since the indictment identified the defendant as being of Japanese ancestry only, without reference to loyalty or citizenship (*U.S. v. Hirabayashi*, 1942, 659). Next the court took up the challenge to the indictment's constitutionality. Following the oral arguments in court, Black warned the defense that his views as expressed in *Ex parte Ventura*, et al. ran contrary to the defense's line of reasoning. Leaning heavily on the notion of military necessity, Judge Black noted that since Pearl Harbor:

We have been engaged in a total war with enemies unbelievably treacherous and wholly ruthless, who intend to totally destroy this nation, its Constitution, our way of life, and trample all liberty and freedom everywhere from this earth. It must be realized that civilization itself is at stake in this global conflict. (*U.S. v. Hirabayashi*, 1942, 659)

Characterizing the curfew provision and the Civilian Exclusion Order as "not only reasonable but vitally necessary", he even proclaimed "their advantage to all those American citizens of Japanese ancestry who are loyal to this country" (*U.S. v. Hirabayashi*, 1942, 661). In view of the extraordinary circumstances, he concluded that Hirabayashi's "technical right ... should not be permitted to endanger all of the constitutional rights of the whole citizenry" (*Ibid.*). The motion was denied.

The trial, set for October 20, drew a crowd of university students, Quakers, and other supporters. The defendant's parents had even been released from

the Tule Lake Relocation Center to attend (Fisher, 1970, 103). The prosecutor laid out the legal foundation for his case: Executive Order 9066, Public Law 503, Public Proclamation 3, and Civilian Exclusion Order No. 57. The defendant's acts within this legal framework were clearly established both in the prosecutor's case and Hirabayashi's own testimony. It took the jury only ten minutes to pronounce guilt on both counts (Fisher, 1970, 107). Frank Walters gave an immediate notice of appeal.

Hirabayashi returned to jail and later received two concurrent sentences of three months' imprisonment. In February 1943 he was released on his own recognizance pending final determination of his appeal. As the case made its way up to the Supreme Court, he worked at the Spokane Friends Center and traveled with Quaker Floyd Schmoe to various War Relocation Authority (WRA) camps.

The test case for the Northern California branch was that of Fred Toyosaburo Korematsu (N. Cal. ACLU ExComm, 4 June 1942). Unlike Hirabayashi, who resisted military orders to defend American principles, Korematsu evaded the orders for a personal motive. Born in Oakland and educated in the public schools, he found that almost all his friends were Caucasian, including the girl he planned to marry. In order to avoid the painful separation that evacuation would bring, he underwent a nose operation, changed his name, and posed as a Spanish-Hawaiian.

This single transgression of military orders conspicuously stands out from Korematsu's otherwise complete support of the war effort. After graduation from high school he had attempted to enlist in the Army. It rejected him because of stomach ulcers; and the draft board classified him 4-F, physically unfit for military service. Then he went to work in the defense industry as a shipyard welder. But here again his attempts to aid in the war effort were frustrated. The Boilermakers Union canceled his membership because he was Japanese, although he had never been outside the United States and could not read or write Japanese. He had found new employment as a welder for a trailer company before Exclusion Order No. 34 ordered him out of the area.

Korematsu's attempted disguise failed to fool the Federal Bureau of

Investigation. They seized him and on June 12 formally charged him with remaining in the City of San Leandro. First, he was committed to the San Francisco County Jail. When Besig posted his bond, the jailer telephoned the military police. Without warrants or writs of any kind, the soldiers seized Korematsu and hauled him to the Tanforan Assembly Center. Judge Welsh subsequently sanctioned the action yet refused to release Besig's bail. In fact, the bail was raised to \$2,500. Korematsu refused to sign the bail bond. This time the United States Marshal seized him and returned him to the county jail, where he awaited trial.

On June 22, shortly after the local committees had lined up the *Korematsu* and *Hirabayashi* cases, the national office in New York ordered the local committees to conform to a new policy concerning the evacuation (see Blair, 1999, 199–200). A referendum by the national committee and the Board of Directors had defeated Resolution One's forceful and direct challenge of the evacuation in favor of a more narrow legal challenge to procedural abuses. This new policy would not allow the Northern California branch to argue the *Korematsu* case on the broadest possible issues, including the constitutionality of Executive Order 9066.

The national office said the Northern California Union should organize a defense committee for *Korematsu* and turn the case over to that committee. Besig and the Executive Committee refused to retreat (see Blair, 1999, 200–202), insisting that they must honor their commitment to *Korematsu* under the old policy. At their July meeting the Executive Committee decided to continue the *Korematsu* case as planned and to follow the new national policy in any future cases (N. Cal. ACLU ExComm, 2 July 1942). Back in New York, the National Committee was not satisfied. Letters were exchanged and, finally, a compromise reached. The Northern California branch would carry the case through the Ninth Circuit Court of Appeals. Then the national committee would set up a defense committee to plead *Korematsu*'s case before the Supreme Court (N. Cal. ACLU, 1943a).

The national committee made a similar request of the Seattle branch to drop the *Hirabayashi* case and submit, instead, an *amicus curiae* brief on limited grounds (Girdner and Loftis, 1969, 206). Wayne Collins replied that

the case he was prepared to plead in court would challenge the administration of the evacuation along the lines of the new national policy.

Korematsu's case ran into the opposition not only of the national ACLU, but also large segments of the Japanese community. Some inmates of the assembly centers wanted to see the entire case dropped. In response to widespread suspicion, many of them had adopted a super-patriotic attitude. To satisfy them a test case would have to have been grounded firmly in moral principles, to be above reproach along the line of Hirabayashi's case. This led one inmate to complain, "Mr. Besig wants to clarify the evacuation order via ... Fred Korematsu. We think that the circumstances surrounding his case would not give the group any favorable publicity, but on the contrary play into the hands of the reactionary forces" (Kunitani, 1942). Yet the case moved forward. In August, Judge Welsh overruled Korematsu's demurrer; and, at trial, a guilty verdict was returned. The judge suspended sentence, put the defendant on five years probation, and released him inside the military's prohibited area. Once again soldiers seized him for transportation to an assembly center.

At the appeals level, the ACLU entered into a third test case, this one involving a twenty-five year old Nisei attorney who had challenged the legality of the restrictions imposed upon Japanese-Americans prior to the evacuation. On March 28th Minoru Yasui, in violation of an eight o'clock curfew, walked into a Portland police station at 11:20 pm and presented himself for arrest. The government obliged with an indictment and trial, while the Japanese-American Citizens' League repudiated him as a "glory-grabbing, self-styled martyr" (Girdner and Loftis, 1969, 204).

Yasui, a dual citizen, had lived in the United States since birth except for a summer trip at age nine to visit his grandfather in Japan. He received his education at public schools, Japanese language school, and the University of Oregon. At the University of Oregon he was required to undergo ROTC (Reserve Officers Training Corps) training and, consequently, was commissioned as a second lieutenant in the U.S. Army Reserve. After graduation he found employment as an attorney with the Japanese Consul in

Chicago, but resigned the day after the Pearl Harbor attack and, unsuccessfully, offered his services to the United States Army.

In district court, Judge James A. Fee ruled that the curfew order was illegal as applied to United States citizens. Contrary to Judge Black's opinion in the *Hirabayashi* case, he noted that the perils facing the nation were "not more dreadful than ... the Revolution" (U.S. v. Yasui, 1942, 45) whose leaders adopted the Bill of Rights. Despite this hopeful beginning the judge added a surprise twist. Choosing the most sinister interpretation possible of the evidence, he maintained that Yasui had

served the purposes and philosophy of the ruling caste of Japan as a propaganda agent ... and only resigned when it seemed apparent that he could no longer serve the purposes of his sovereign in that office, but could do better [as] an officer in the armed forces of the United States on active service (U.S. v. Yasui, 1942, 55).

Yasui's employment with the Japanese Consul, the judge ruled, deprived him of his United States citizenship; and as a Japanese alien he was legally at the mercy of the Army. He fined the defendant five thousand dollars and sent him to jail for a year, the maximum sentence allowed.

A second and more bitter policy dispute arose after the National Board's enactment of the "Resolution of October 19, 1942". The disagreement centered around a common dilemma in time of war. How do you oppose the administration of a war program without appearing to side with the enemy? It was, in fact, under such circumstances during the First World War that the American Civil Liberties Union first emerged from its own parent organization, the American Union Against Militarism.

Throughout the summer of 1917 Roger Baldwin and his Civil Liberties Bureau had been creating a stir in the American Union Against Militarism (for more detail on the early history of the ACLU see Johnson, 1963). Ever since its inception in early June, the Bureau had embarrassed a certain group of social workers with its work on behalf of conscientious objectors. That

group believed that the Bureau had gone beyond the maintenance of civil rights and opposition to militarism to a point of embarrassing and opposing the American government itself. The opinions of this group of social workers could not be overlooked, because three of them—Jane Addams, Paul Kellogg, and Lillian Wald—had established the original Henry Street group that later evolved into the American Union Against Militarism (AUAM). When the AUAM's national board finally had to decide between the Bureau and the social workers, it voted to separate the Bureau from the rest of the organization. Three days later, on October 1, the National Civil Liberties Bureau set out on its own. Despite the impounding of some of its publications and the imprisonment of its director, the Bureau flourished into the ACLU, while the AUAM dissolved soon after the separation.

Twenty-five years later history threatened to repeat itself. In order to avoid the appearance of giving aid and comfort to the enemy, the October Resolution would prevent the Union's intervention in cases where there were grounds to believe that the defendant was "cooperating with or acting on behalf of the enemy" (N. Cal. ACLU, 1943a). Accordingly the national office established a Committee of Sedition Cases to conduct investigations into the loyalty of these defendants. This committee subsequently ordered the Northern California branch to refrain from filing an *amicus curiae* brief in Yasui's appeal to the Ninth Circuit Court. The Sedition Committee was concerned with the fact that Yasui had worked for the Japanese Consulate in Chicago.

San Francisco protested this new policy on its face and as applied to Yasui. Their objections numbered three. First, the new policy represented a "radical and indefensible departure" from the Union's avowed purpose of defending everyone's constitutional rights. Second, they felt that the national office should have consulted the local branches before adopting such a major change in policy. And finally, they protested, the ACLU was neither equipped nor disposed to carry out such loyalty investigations as this new policy would require. The district court's ruling that Yasui had lost his American citizenship, the Northern California branch contended, raised a far-reaching civil liberties issue. It went ahead and filed the *amicus curiae*

brief under the name of its attorney, Wayne Collins. Sometime later the branch was able to convince the national office that its decision with regards to Yasui was an error. They had not been aware that Yasui quit his post at the consulate immediately after the Pearl Harbor attack. The national office agreed to file an *amicus curiae* brief in the Supreme Court. Yasui's sentence was later reduced to eight months and ten days, after which Yasui was interned at the Minidoka Relocation camp.

Yasui appealed the decision and in February 1943 the Northern California ACLU agreed to file a brief in his behalf (N. Cal. ACLU ExComm, 4 February 1943). Thus the West Coast offices of the ACLU entered the spring of 1943 with three Japanese test cases challenging Executive Order 9066. All three would eventually come before the United States Supreme Court for final disposition.

Court Appeals

In the spring of 1943 the United States Supreme Court agreed to review the district court decisions in both *Hirabayashi* and *Yasui* directly, without any hearing in the Circuit Court of Appeals.

Hirabayashi had been convicted of two counts: violation of the evacuation order and violation of the curfew. He received concurrent sentences, however. If either conviction was affirmed the sentence would stand. Accordingly the court addressed the curfew violation only and avoided any ruling on the question of evacuation (*Hirabayashi v. U.S.*, 1943, 1378 & 1386–1387).

Hirabayashi did not deny that he had violated the military orders, but challenged instead their constitutionality. The defense argued that Congress had improperly delegated its legislative responsibilities to General DeWitt and that General DeWitt's regulations, applying only to ethnic Japanese violated the equal protection provisions of the Constitution. The majority opinion, delivered by Chief Justice Stone, countered these two points.

The court found no unlawful delegation of legislative power (*Hirabayashi v. U.S.*, 1943, 1381). The President and Congress, it declared, have the power to wage war and defend the nation. The danger of espionage and sabotage

was imminent, and the curfew was an appropriate measure to meet it (Ibid., 1387). The President had authorized the curfew regulations when he issued Executive Order 9066, and Congress was aware of the curfew regulations when it enacted the penalty provisions for violations of military orders by civilians. All the necessary branches of government had given their assent.

As to the question of racial discrimination, the court conceded that legislative classification based solely upon race had often been held a denial of equal protection. But it found that race might be a reasonable standard by which to judge a person's loyalty. The mere fact that Japan might attack the West Coast, in the court's opinion, "set these citizens [Japanese-Americans] apart from others" (*Hirabayashi v. U.S.*, 1943, 1386). The court pointed out the lack of assimilation of the Japanese into white society, the use of language schools, the possession of dual citizenship, and the influential position of aliens in the Japanese community. The Japanese population in America had never entered the mainstream of American society and culture; therefore, they were, perhaps, less loyal. The court also pointed out that the discrimination shown to West Coast Japanese might well have made them resentful of the federal government, and thus more willing to side with Japan. Loyalty, of course, might be determined more accurately with a system of individual hearings. Yet hearings would require time—time that the Allied cause could ill afford. In this case justice would have to give way to the demands of expediency. The curfew conviction would stand.

The court's decision had been unanimous, but three of the justices were uncomfortable enough with it to write their own separate concurring opinions into the record. Justice Frank Murphy was particularly reluctant, siding with the majority under some pressure from his colleagues (Fine, 1964). Murphy and William Douglas both declared that timing was a crucial point in their decisions. "[W]here the peril is great and the time is short, temporary treatment on a group basis may be the only practical expedient, [but if the evacuees are never to receive hearings] questions of a more serious character would be presented" (*Hirabayashi v. U.S.*, 1943, 1388–1389). Murphy indicated further that the enforcement of Executive Order 9066 might be valid only within the designated military zones.

The *Yasui* case confronted the Supreme Court with precisely the same

issues as were decided in *Hirabayashi*. After reversing the district court's ruling that Yasui had lost his American citizenship, it affirmed the conviction and remanded the case for resentencing (*Yasui v. U.S.*, 1943, 1393).

Unlike *Hirabayashi* and *Yasui*, *Korematsu* had not violated the curfew order. The sole issue in his case, the evacuation question, could no longer be side-stepped. When the case first came before the Ninth Circuit, the government maintained that no right to appeal existed since sentence had not been imposed. Defense counsel then requested a fine or jail sentence so as to avoid the technicality (ACLU News, January 1943). The court sought the advice of the justices in Washington. It attached *Korematsu*'s case to those of *Hirabayashi* and *Yasui*, asking the Supreme Court to decide specific questions in each. Though taking charge of the *Hirabayashi* and *Yasui* cases in their entirety, Washington sent *Korematsu* back to San Francisco with directions to proceed with the appeal.

The Ninth Circuit heard the appeal and filed their opinions on 2 December 1943. The three separate opinions all agreed as to the validity of *Korematsu*'s conviction, though Judge Denman lambasted the majority for their reluctance to deal with the true issues of the case.

The majority's opinion, delivered by Judge Wilbur, was short and concise (*Korematsu v. U.S.*, 1943b, 289–290). Although recognizing that the Supreme Court had avoided any judgment upon the validity of the evacuation order, they felt that the principles enunciated in the decision in *Hirabayashi* clearly applied to and sustained the validity of evacuation as well as curfew.

Judge Denman's long and detailed text took his colleagues to task (*Korematsu v. U.S.*, 1943b, 291–304). He denounced the term "evacuation" as a euphemism for deportation and imprisonment "not unlike that of Hitler in so confining the Jews". He drew a sharp distinction between such an oppressive process and *Hirabayashi*'s curfew violation. To further distinguish the two cases, he refuted the Supreme Court's analogy to police fire lines. Unlike a person prevented from entering a burning building, *Korematsu* could not simply walk away from the prohibited area. He had been convicted for remaining in San Leandro, but another military order

prohibited his leaving the area. Finally, Denman observed that the majority's opinion failed to take into account evidence of Japanese-American loyalty, the government's admission that no charges of espionage, sabotage, or treason had been filed against any of the internees in the five months between Pearl Harbor and the evacuation.

Despite his recognition of the seriousness of Korematsu's contentions, however, Denman found that the wartime emergency had created an overpowering necessity that could justify the government's actions. He pointed out that the complexity and increased striking distance of modern warfare had greatly expanded the territory which might be labeled as the combat zone. He compared the herding of loyal and disloyal Japanese-Americans behind barbed wire to a quarantine of both exposed and diseased people "until shown free of [the disease] after the period of its development has expired" (*Korematsu v. U.S.*, 1943b, 298). And with what disease were the Japanese-Americans plagued? Racial discrimination. Denman pointed to various racial inequities—the prohibition of intermarriage with whites, the alien exclusion acts, the prohibition against Issei ownership of land in California, and the racial discrimination of labor unions—as a "humiliation so inconsistent with the quality of [American] teachings, that there will be those who will hesitate or fail to perform a citizen's duty" (*Korematsu v. U. S.*, 1943b, 302). Thus an earlier policy of racial discrimination justified, in Denman's mind, a continuation of that racial discrimination.

Judge Stephens, in a third opinion, defended the majority opinion against Denman's attack. He argued that the act of exclusion was separable from the subsequent internment and that courts lack jurisdiction over military policy in wartime (*Korematsu v. U.S.*, 1943b, 304–309).

Meanwhile the Northern California ACLU's reluctance to follow the dictates of (a) the June Referendum and (b) the October Resolution brought about a flurry of correspondence between New York and San Francisco, then an ultimatum. On May 13, 1943 the national office took exception to the branch's handling of the Japanese test cases and gave the branch thirty days to apologize or face disaffiliation. The national office accused it of "refusing to recognize control by the Board of Directors in national matters" (N. Cal.

ACLU, 1943a) and failing to notify the national office of the briefs it was filing.

The branch finally responded in writing on August 5. In response to the *Korematsu* and *Hirabayashi amicus curiae* briefs that had been filed in Collins' name, the Northern California committee denied any wrongdoing (N. Cal. ACLU, 1943b). The national office had been informed, they declared, both through the board's minutes of April 8 and in conversation with A.L. Wirin, who was acting as the national office's representative in such matters. They did concede fault in their handling of the *Hirabayashi* case before the Ninth Circuit Court of Appeals and apologized for testing the constitutionality of Executive Order 9066 after telling the national office that they would follow the new policy in all cases entered into after notification of the new policy was received. Then following this limited apology, the committee renewed its protests to the October Resolution. It characterized the conditions as intolerable, but rejected disaffiliation as the solution, requesting instead a conference to discuss the organization of the Union and its various locals.

This response did not completely satisfy the national office, but did serve to prevent the threatened disaffiliation. The question of disaffiliation lingered on into the next year. As late as March 1944 the Northern California Committee was seriously considering disaffiliating itself from the Union (N. Cal. ExComm., 9 March 1944). They deferred their actions until the result of the Corporation's Committee on Reorganization were announced. By that time interest in disaffiliation had subsided.

In the fall of 1944 *Korematsu's* conviction, once again, came before the Supreme Court of the United States. The justices could no longer evade a decision on the evacuation, since *Korematsu* had no other offenses charged against him except the single count of remaining in a prohibited area. The result was a split decision which affirmed the conviction and the evacuation.

Justice Hugo Black delivered the majority opinion. The opinion rationalized the case in such a way that the *Hirabayashi* case could be directly applied. Stating that evacuation was a military necessity, Black pointed to the thousands of evacuees who had subsequently refused to swear

unqualified allegiance to the United States and to the thousands who had requested repatriation to Japan (*Korematsu v. U.S.*, 1944, 195). This, he said, was plain evidence of disloyalty within the Japanese population residing in America. Thus evacuation was, indeed, a military necessity. “[E]xclusion from a threatened area, no less than a curfew, has a definite and close relationship to the prevention of espionage and sabotage” (*Ibid.*).

Then came the key to the whole decision. Taking a cue from Judge Stephens, Black painstakingly dissected the government’s relocation program, separating exclusion from the subsequent internment, so as to concentrate exclusively upon the first. Violations of each phase of the government’s program should be considered as separate offenses. Exclusion in May 1942, not the continuation of exclusion (*Korematsu v. U.S.*, 1944, 195) nor the interment at the relocation centers (*Ibid.*, 197), was the only issue that the majority would recognize. Viewed in this manner, the evacuation was a bit harsher, but not fundamentally different from a curfew.

One more point remained. The defense had argued that the exclusion order directly conflicted with the freezing order which General DeWitt had previously issued. Thus if *Korematsu* had left the area, except by submitting to detention at an assembly center, he would have been charged with violation of the freezing order. Black and his colleagues ruled that the evacuation order superseded the freezing order. Unlike Denman the justices apparently felt that *Korematsu* was free to leave the military area any time after the exclusion order was issued. With this in mind the evacuation was sustained, *Korematsu*’s conviction affirmed.

In his dissent Justice Roberts, like Denman, characterized the majority’s construction “a figmentary and artificial situation” rather than “the actualities of the case” (*Korematsu v. U.S.*, 1944, 201). Furthermore, he attacked the terms “Assembly Centers” and “Relocation Centers” as euphemisms for prisons and concentration camps. Looking past this facade of euphemisms and artificial constructions, Roberts denied that exclusion could be separated from the question of interment and affirmed the contradictory nature of the exclusion and freezing orders. “[E]xclusion was but a part of an over-all plan for forcible detention” (*Ibid.*). Since the detention was not a military necessity, the conviction should have been

reversed.

Murphy never bothered to distinguish Korematsu's evacuation from Hirabayashi's curfew, but simply reversed the opinion he had expressed in *Hirabayashi*. He denied the reasonableness of classifying United States residents according to the nationality or race of their ancestors. The suspicion of Japanese in America, he said, was based upon "misinformation, half-truths and insinuations that for years have been directed against the Japanese by people with racial and economic prejudices" (Korematsu v. U. S., 1944, 204). He quoted some references General DeWitt had made to those of Japanese descent, such as "an enemy race" (Ibid., 203). Murphy also pointed out that "[l]eisure and deliberation seem to have been more of the essence [of the evacuation] than speed" (Ibid., 205). The first evacuation order was issued a full four months after the Pearl Harbor attack. It then took a full seven months to complete the evacuation. Loyalty hearings, he concluded, could have and should have been held.

Justice Jackson seemed embarrassed by the use of *Hirabayashi* to justify any kind of treatment that might be handed out to the evacuees. "Now," he declared, "the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones" (Korematsu v. U.S., 1944, 208). He then found the racial basis of the evacuation to be unconstitutional, without regard to the reasonableness of the actions taken. The legislative and executive branches of the government had, in fact, granted overly broad powers to the military authorities. Because of this and because he felt that guilt must be personal, not inherited, Jackson joined with Murphy and Roberts in their dissent. All together then, three justices opposed the constitutionality of the evacuation and Korematsu's conviction.

In the wake of *Hirabayashi* and *Korematsu* the most important questions were still unanswered. Only two judges—Denman and Murphy—had the fortitude to squarely face the issue of internment. Both of these men saw the situation in the same unholy light, the imprisonment of a suspicious race without even the appearance of due process for the individuals involved. They settled, however, on opposite sides in their final decisions. Denman felt

that the urgency of the war situation justified these harsh precautions; Murphy did not.

Meanwhile, the majorities on both courts had gone to great lengths in order to separate the question of evacuation from internment. The Supreme Court's extreme caution in formulating its written opinion makes it appear that the six justices wanted to give the federal government maximum leeway during this wartime emergency, but balked at the idea of setting precedent for any such future programs. Even their affirmation of the evacuation was strictly limited to the time of Korematsu's offense, May 1942. Not only detention, but the issue of the indeterminate evacuation of suspicious groups had been judiciously sidestepped.

The curfew in *Hirabayashi* received the Supreme Court's strongest backing. Though Murphy, in particular, was reluctant to affirm, the court's unity was maintained in a unanimous ruling. But then, sometime between *Hirabayashi* and *Korematsu*, two justices reversed their judgments. By 1944 Murphy decided that the Army's decision to evacuate the Japanese was nothing more than a leisurely, deliberate, and ill-conceived plan based on prejudice. Equally alarmed at the use of *Hirabayashi* to uphold evacuation was Justice Jackson. One year after having joined in the majority opinion, he refuted that ruling point by point. Opinions were shifting in favor of the evacuees.

Habeas Corpus

The government attorneys relied on a strategy which avoided the issue of detention and internment in its prosecution of resisters and evaders. The strategy worked, frustrating the ACLU's attempts to defend those who violated curfews and the evacuation orders. The Union, however, also went on the offensive by petitioning the courts to order the release (*habeas corpus*) of Japanese that had unwillingly submitted to detention and internment.

The first such challenge, by a private attorney, in March 1942, centered around a marriage of mixed ancestry (Thomas, n.d., 17-19; Civil Liberties Quarterly, June 1942, 1 & 4; and Girdner and Loftis, 1969, 202). Mary Asaba, a Nisei woman, had married a native of the Philippines and become

Mrs. Ventura. Because she lived in the State of Washington, Mrs. Ventura was subjected to the curfew regulations. Before the evacuation separated Mrs. Ventura from her husband, she filed suit in federal court asking to be released from the provisions of the evacuation orders. Federal Judge Black declared in his Seattle courtroom that the action was premature. The restraints imposed by the curfew did not constitute imprisonment. And her detention at an assembly center, which might be considered imprisonment, had not yet occurred. If she violated the evacuation order later, he assured her, she would get a fair trial with all the constitutional guarantees that go with it.

In May the Southern California Union found a test case on this issue. Ernest Wakayama and his wife were Los Angeles residents who had been detained at the Santa Anita Assembly Center (McDaid, 1969, 41-42). As a postal employee and veteran of the French campaign in World War I, Wakayama was outraged at the treatment he was receiving. Although the American Civil Liberties Union filed on his behalf, he was not satisfied to patiently wait for the outcome of that suit. On June 18 he and several others were arrested for holding a secret meeting in Japanese. At this point the Union almost gave up on Wakayama because the National Office believed that the rules against such gatherings were reasonable. They discovered, however, that the orders against meetings had not officially been issued until a week after the incident. Only then did the Los Angeles branch undertake the defense of Wakayama and two of his companions—Kaname Takahashi and Masaru Kawada—in federal court (S. Cal. ACLU, 8 Aug 1942). Jotaro Ban, a fourth defendant, retained his own counsel. The Army finally agreed to drop charges. Thus two months after having been jailed, the defendants were released.

As months of delays passed, Wakayama became increasingly bitter about his internment (McDaid, 1969, 42-43). WRA attorneys harassed him. The camp administration arrested him for rioting; then, without explanation, released him. Many evacuees, afraid of being turned out of the camps into a hostile environment without assistance, put pressure on Wakayama to drop his suit. Finally in February 1943 amidst this mounting pressure, he decided

to renounce his American citizenship and apply for "repatriation" to Japan. The case was dropped.

The Northern California branch had more success with their test case on behalf of Mitsuye Endo, another American citizen of Japanese ancestry (N. Cal. ExComm, 2 Sep 1943 and McDaid, 1969, 46). Endo was evacuated from Sacramento May 15, 1942; then removed one month later to the Tule Lake Relocation Center (Ex parte Endo, 1944, 208–222). In July 1942 she filed a petition for a writ of *habeas corpus* in the Northern District Court of California. Endo's attorney argued for her release on four grounds: (a) the continued detention, (b) the lack of due process in the evacuation, (c) the abuse of war powers, and (d) the violation of equal protection because German-Americans and Italian-Americans had not been evacuated (Fellowship of Reconciliation, n.d.). On February 19, 1943—the anniversary of Executive Order 9066—while the case was still pending (N. Cal. ACLU, 1943a, 1), she applied for leave clearance from the camp. Clearance was granted in August, one month after the federal district court had denied her writ. She immediately appealed to the Ninth Circuit.

On appeal the Circuit Court decided to seek instruction from the Supreme Court on some specific points raised in the case. But in April 1944 the Supreme Court decided to review the case in *toto*. The entire record in the case was certified up, and the points argued before the nine justices. In December the court rendered a unanimous verdict that the defendant be released.

By the time the Supreme Court heard her case Endo had already been found to be a loyal American and consequently issued leave clearance, so the government agreed that she must be released. Government attorneys claimed, however, the right (a) to detain her for the period of time it would take to process her out of camp and (b) to supervise her relocation.

Justice Douglas, delivering the majority's opinion, assumed that the initial detention was authorized, but maintained that the provisions of Executive Order 9066 were not meant to apply to loyal citizens. The stated purpose of the evacuation had always been to protect the vulnerable West Coast from

spies and saboteurs, not from loyal citizens of Japanese ancestry.

Though the decision was unanimous, Justices Murphy and Roberts prepared separate concurring opinions. Roberts took issue with the majority's implication that administration subordinates had abused the powers Congress and President Roosevelt had conferred upon them. He felt that Congress and Roosevelt had exceeded their constitutional authority and should share blame for the error. Murphy referred back to his opinion in *Korematsu* and declared that both the evacuation and interment were unconstitutional.

Conclusions

The end result of these court cases was that the judicial branch of government chose to exercise as little control as possible over the evacuation and internment. Each case that came before the United States Supreme Court was decided upon the narrowest possible construction of the facts. While the court allowed the army to carry on its program almost without restriction, it went to great lengths in the *Korematsu* case to avoid ratifying the program. To this day, a huge gray area remains between the black and white of *Endo* and *Korematsu*.

The rights of individuals often suffer in wartime, when the courts are especially reluctant to place burdensome restrictions upon the conduct of national government. The *Endo* decision, admittedly limited in scope, stands out as an exception to this rule. Among the many defeats the ACLU experienced in trying to protect the rights of Japanese-Americans, it represents a real victory.

The final opinions in *Korematsu* and *Endo* were released the day after the Army revoked the evacuation order. Though these decisions came too late to affect the plight of the Japanese, they are still important for their value as legal precedents in future cases. The decision in *Korematsu* affirmed the initial evacuation; and as such poses a sinister threat to individual rights. Popular sentiment among liberals of the 1960s and 70s, however, had mistakenly interpreted this as a broad affirmation of the use of concentration camps for the control of anti-government suspects. The courts relied heavily

upon the dire circumstances of World War II in rendering their decisions. In order to invoke a clear precedent, any future evacuation would have to occur during a period of total war in which American territory had been attacked and in an area that continued to be threatened with attack. Even in considering the issue of temporary evacuation under these extreme circumstances, *Korematsu* split the Supreme Court six to three. Such a weak showing would remove some of the temptation for extending the precedent beyond the specific circumstances of *Korematsu*.

The success of the ACLU contentions in *Endo* is clear cut. Though skirting the constitutional issue, the Supreme Court unanimously decided that loyal citizens did not belong in the interment camps. Although questions of the presumption of loyalty and who has the burden to prove it or disprove it still remain unresolved, the efforts of the American Civil Liberties Union seem to have paid off in a very limited decision striking down internment and, though leaving a very large gray area, avoiding an unfavorable precedent. Modest as such victories appear, they might just prevent a similar injustice in the future.

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