

Dedicated to my daughters,

Haley Ellen Fox and
Maya Grace IronFox

PENGUIN BOOKS

Published by the Penguin Group
Penguin Group (USA) Inc., 375 Hudson Street, New York, New York 10014, U.S.A.
Penguin Group (Canada), 90 Eglinton Avenue East, Suite 700, Toronto,
Ontario, Canada M4P 2Y3 (a division of Pearson Penguin Canada Inc.)
Penguin Books Ltd, 80 Strand, London WC2R 0RL, England
Penguin Ireland, 25 St Stephen's Green, Dublin 2, Ireland (a division of Penguin Books Ltd)
Penguin Group (Australia), 250 Camberwell Road, Camberwell,
Victoria 3124, Australia (a division of Pearson Australia Group Pty Ltd)
Penguin Books India Pvt Ltd, 11 Community Centre, Panchsheel Park, New Delhi - 110 017, India
Penguin Group (NZ), cnr Airborne and Rosedale Roads, Albany,
Auckland 1310, New Zealand (a division of Pearson New Zealand Ltd)
Penguin Books (South Africa) (Pty) Ltd, 24 Sturdee Avenue, Rosebank, Johannesburg 2196, South Africa

Penguin Books Ltd, Registered Offices:
80 Strand, London WC2R 0RL, England

First published in the United States of America by Viking Penguin,
a member of Penguin Putnam Inc. 1999
Published in Penguin Books 2000
This revised edition published 2006

3 5 7 9 10 8 6 4 2

Copyright © Peter Irons, 1999, 2006
Foreword copyright © Howard Zinn, 1999
All rights reserved

LIBRARY OF CONGRESS CATALOGING IN PUBLICATION DATA

Irons, Peter H., 1940-
A people's history of the Supreme Court : the men and women whose cases and decisions have shaped our
Constitution. / Peter Irons.

P. cm.
Includes bibliographical references and index.

ISBN 0 14 30.3738 2

1. United States. Supreme Court—History. 2. Constitutional law—United States.
3. Law and politics. I. Title.
KF8742.I766 2006
347.732609—dc22 2006044779

Printed in the United States of America

Set in Garamond MT

Designed by Kathryn Parise

Except in the United States of America, this book is sold subject to the condition
that it shall not, by way of trade or otherwise, be lent, resold, hired out, or otherwise
circulated without the publisher's prior consent in any form of binding or cover
other than that in which it is published and without a similar condition
including this condition being imposed on the subsequent purchaser.

The scanning, uploading and distribution of this book via the Internet or via any other
means without the permission of the publisher is illegal and punishable by law. Please purchase
only authorized electronic editions, and do not participate in or encourage electronic piracy of

A
PEOPLE'S HISTORY
OF THE
SUPREME
COURT



The Men and Women Whose
Cases and Decisions Have
Shaped Our Constitution

Peter Irons



PENGUIN BOOKS

27



“A Jap's a Jap”

The justices who decided the *Barnette* case on Flag Day in 1943 were bitterly divided over the expulsion of young Witnesses from their schools for disloyalty. Just a week later, however, they agreed without dissent in a case that involved more than 100,000 Americans who were expelled from their communities for disloyalty. The mass evacuation of Japanese Americans from the West Coast during World War II and their confinement for three years in tar-paper barracks—fenced by barbed wire and guarded by armed soldiers—confronted the justices with their own test of loyalty. Does the Constitution protect “all classes of men, at all times, and under all circumstances, equally in war and in peace,” as the justices stated without dissent in 1866? Or can “the clamor of an excited people” and the government’s claims of “military necessity” allow the suspension of constitutional rights during wartime? The justices faced these momentous questions in deciding the challenges of three young Japanese Americans—Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu—to the army’s evacuation and exclusion orders.

Taking a closer look at events we “know” through history books can be surprising. One surprise about the wartime treatment of Japanese Americans is that the initial reaction in the area most stricken with “Pearl Harbor panic” was one of tolerance and understanding. Most of the “thousands of Japanese here and in other coast cities,” the *Los Angeles Times* editorialized on December 8, 1941, were “good Americans, born and educated as such.” Published in the city with the largest number of Japanese Americans, this influential paper urged its readers that “there be no precipitation, no riots, no mob law.” The *Times* editors tried to calm fears of a follow-up Japanese attack on West Coast targets. “Let’s Not Get Rattled,” they cautioned on December 10. It would be virtually impossible for Japanese aircraft carriers to “sneak up on this Coast undetected by our

now aroused sky scouters,” they assured a jittery public. Echoed by other prominent West Coast papers, such assurances helped to calm public fears and protected Japanese Americans from retaliation.

Some six weeks after Pearl Harbor, however, the tide of public opinion abruptly shifted. Both the press and public officials demanded the removal of all Japanese Americans from the West Coast. On January 16, 1942, Los Angeles congressman Leland Ford urged that “all Japanese, whether citizens or not, be placed in inland concentration camps.” Two weeks later the *Los Angeles Times* reversed its editorial stance and argued that “the rigors of war demand proper detention of Japanese and their immediate removal from the most acute danger spots” along the coast. Walter Lippmann, the nation’s most respected columnist, deplored “the unwillingness of Washington to adopt a policy of mass evacuation and mass internment” of Japanese Americans. “Nobody’s constitutional rights include the right to reside and do business on a battlefield,” he wrote like a judge. Westbrook Pegler issued another ruling in his widely read column: “The Japanese in California should be under armed guard to the last man and woman right now—and to hell with habeas corpus until the danger is over.”

The growing force of demands like these hit Washington like a tidal wave. Officials in the War and Justice Departments ended their squabbling over legal niceties and sent a two-page document to the White House. On February 19, 1942, President Franklin Roosevelt signed Executive Order 9066, authorizing Secretary of War Henry L. Stimson and his subordinates to designate military zones “from which any or all persons may be excluded.” General John L. DeWitt, the West Coast army commander, first imposed a nighttime curfew on “all persons of Japanese ancestry” and then issued “exclusion orders” that were backed by Congress with criminal penalties. By the end of 1942, all but a handful of the Japanese Americans who lived between Seattle and San Diego had been herded into ten “relocation centers,” the government’s euphemism for America’s wartime concentration camps. Scattered from the California desert to Arkansas swamps, these camps imprisoned more than 110,000 people—most of them native-born American citizens—who were never charged with crimes or given a hearing.

Behind the initial appeals for tolerance after Pearl Harbor lay decades of intolerance toward Orientals of any nationality. The arrival of Chinese laborers in the 1850s to lay railroad track and pick vegetables produced resentment among Caucasian workers, many of them also recent immigrants. With congressional passage in 1882 of the Chinese Exclusion Act, nativist groups turned their demagoguery against the Japanese, who numbered only two thousand in 1890, almost all in California. But the flow increased until Congress shut off all further Japanese immigration in 1924, by which time more than 100,000 lived on the West Coast. Japanese natives were excluded from citizenship and barred in California from owning or leasing land.

Despite these legal barriers, Japanese Americans worked hard and prospered. Many found ways around the Alien Land Law and operated farms owned by friendly whites, or bought land in the names of their native-born children, granted citizenship at birth by the Fourteenth Amendment. By 1940, Japanese farmers produced close to half of California's vegetables. Leaders of the Grower-Shipper Vegetable Association, a powerful lobby of white farmers, took advantage of "Pearl Harbor panic" to cut down their competitors. "We're charged with wanting to get rid of the Japs for selfish reasons," the group's manager said. "We might as well be honest. We do."

Another group was less honest in its campaign to rid the coast of Japanese Americans. Military officials made claims of widespread "sabotage and espionage" in arguing for mass internment. But they had no evidence that any Japanese American had committed such crimes. They were not deterred by this fact. In the "Final Recommendation" he sent to Secretary Stimson, urging mass internment, General DeWitt blamed this lack of evidence against Japanese Americans on their sneaky nature: "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken," he claimed. DeWitt's support for internment was really based on unvarnished racism. "The Japanese race is an enemy race," he stated, "and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted." DeWitt used blunter language before a congressional panel: "A Jap's a Jap," he said; "it makes no difference whether he is an American citizen or not. I have no confidence in their loyalty whatsoever."

General Dewitt was hardly alone in basing his wartime decisions about Japanese Americans on racial stereotypes. DeWitt had no legal training, but many military and civilian officials who attended prestigious law schools showed little respect for the Constitution they had sworn to uphold as lawyers. One of the first and most influential advocates of mass internment was Colonel Karl Bendisen, a Stanford Law School graduate who drafted General DeWitt's "Final Recommendation" for the evacuation of Japanese Americans. Admitting in February 1942 the army's inability to justify "the sheer military necessity for such action," Bendisen nonetheless argued that "a substantial majority" of Japanese Americans "bear allegiance to Japan, are well controlled and disciplined by the enemy, and at the proper time will engage in organized sabotage" to aid the Japanese cause. He presented no evidence for this claim, simply asserting that the "racial affinities" of Japanese Americans predisposed them to disloyalty.

Even those officials with qualms about the constitutional basis for mass internment fell prey to racial stereotypes. During the internal debate that preceded President Roosevelt's executive order, even General DeWitt acknowledged the legal barriers to the military orders he later signed. "An American citizen, after all, is an American citizen," he reminded the army's chief lawyer. At the War Department's very top, Secretary Henry Stimson—a Harvard

lawyer—knew the Constitution stood in Dewitt's way. "We cannot discriminate against our citizens on the ground of racial origin," he admitted before DeWitt's "Final Recommendation" reached his desk. But after reading its racist claims, Stimson agreed that "their racial characteristics are such that we cannot understand or trust even the citizen Japanese." He backed mass internment even though "it will make a tremendous hole in our constitutional system." Perhaps the most revealing—and cynical—remark came from John J. McCloy, another Harvard lawyer who served as Stimson's chief deputy. "To a Wall Street lawyer," he told an army official, "the Constitution is just a piece of paper."

Many civilian officials shared the racial views of their military counterparts. Attorney General Francis Biddle asked three young government lawyers to advise him on the internment question. All three—Benjamin Cohen, Oscar Cox, and Joseph Rauh—were trained at Harvard Law School. None had any training in anthropology, but this did not deter them. "Since the Occidental eye cannot readily distinguish one Japanese resident from another," they told Biddle, "effective surveillance of the movement of particular Japanese residents suspected of disloyalty is extremely difficult if not impossible." As Caucasians, Biddle's legal advisers considered it unnecessary "to bar the millions of persons of German or Italian stock from either seacoast area," since "the normal Caucasian countenances of such persons enable the average American to recognize particular individuals by distinguishing minor facial characteristics." None of these lawyers had ever met Gordon Hirabayashi, Min Yasui, or Fred Korematsu, whose faces were easily distinguishable to anyone with normal vision. Biddle's legal adviser recommended setting aside "special reservations" where Japanese Americans could "live under special restrictions."

Perhaps the most extreme version of the "racial characteristics" argument was presented in a brief submitted to a federal district judge by Charles Burdell, a special assistant to Attorney General Biddle. Urging the judge to dismiss a constitutional challenge to the army's internment orders, Burdell wrote that "Jap citizens are inevitably bound, by intangible ties, to the people of the Empire of Japan. They are alike, physically and psychologically." Burdell elaborated his genetic theory of loyalty. "Even now, though we have been separated from the English people for over 100 years, we still take pride in the exploits of the RAF over Berlin, and the courageous fighting of the Aussies in Northern Africa. Why? Because they are people like us. They are Anglo-Saxons." Burdell's theory equally fit the Japanese Americans. "Who can doubt that these Japs in this country, citizens as well as aliens, feel a sense of pride in the feats of the Jap Army—this feeling of pride is strong in some, weak in others, but the germ of it must be present in the mind of every one of them."

What feelings *did* go through the minds of the three young men whose challenges to General DeWitt's military orders reached the Supreme Court? Much

like Dred Scott and Homer Plessy before them, these young Americans were viewed by the Supreme Court solely on the basis of their shared race and ancestry. But their stories, even briefly told, show us how members of the same group—supposedly identical in their physical and psychological characteristics—can differ in many ways.

Gordon Hirabayashi was born in 1918 in Auburn, a rural town near Seattle, where his father ran a roadside fruit market. His parents belonged to a Japanese pacifist sect, similar to the Society of Friends, better known as Quakers; both groups worshiped without ministers and rejected military service. During high school, Gordon became an Eagle Scout and served as president of the Auburn Christian Fellowship. When he entered the University of Washington in Seattle in 1937, he joined the University Quaker Meeting and registered with his local draft board as a conscientious objector. When General DeWitt imposed a nighttime curfew order on all Japanese Americans in March 1942, Gordon was living in the campus YMCA dormitory. He obeyed the curfew for more than a month, often running back to his dorm to beat the clock. He later recalled thinking, “Why the hell am I running back? Am I an American or not? Why am I running back and nobody else is?”

On the night of May 4, Gordon stopped running and stayed out past the curfew hour. He recorded his feeling in his diary: “Peculiar, but I received a lift—perhaps it is a release—when I consciously break the silly old curfew.” The army’s evacuation orders gave Japanese Americans one week to dispose of their property and report to “assembly centers” at racetracks and fairgrounds. Before the orders reached Seattle, Gordon worked with the Quakers in helping families store their household goods and move with suitcases to the Puyallup Fairgrounds near Seattle. “Gosh!—something seems wrong there; helping people to go behind barbed wires and flimsy shackles,” he wrote. “What a mixed-up life this is—the American way.”

When the evacuation orders reached Seattle on May 16, Gordon became a conscientious objector to internment. He went to the downtown FBI office and told Special Agent Francis Manion that he would not report to Puyallup. Manion recorded Gordon’s statement that “it was the principle of the Society of Friends that each person should follow the will of God according to his own convictions and that he could not reconcile the will of God, a part of which was expressed in the Bill of Rights and the United States Constitution, with the order discriminating against Japanese aliens and American citizens of Japanese ancestry.” Agent Manion arrested Gordon for violating both the curfew and evacuation orders and placed him in the county jail to await trial.

Minoru Yasui did not share Gordon Hirabayashi’s pacifism. Born in 1916 in the apple-growing region of Hood River, Oregon, he entered the University of Oregon in 1933 and volunteered for the army’s reserve officer training program. After receiving a second lieutenant’s commission in 1937, Min attended the university’s law school, graduating in 1939. His law dean later wrote that he

held a “relatively high opinion” of Yasui as a student, “but on many occasions I detected a streak of blind stubbornness in him.” Unable to find legal work in Oregon, Min landed a job with the Japanese consulate in Chicago. His work was mostly clerical, but he also gave speeches defending Japanese policies in Asia before Rotary Clubs and similar groups. As an American citizen, he duly registered with the State Department as a foreign agent.

The day after Pearl Harbor, Min received a telegram from his father: “Now that this country is at war and needs you, and since you are trained as an officer, I as your father urge you to enlist immediately.” Responding to this patriotic appeal, he resigned his consular post and returned to Oregon. Min then received an army order to report for duty at Fort Vancouver, near Portland. But when he arrived in uniform, army officers told him he was unacceptable for service and ordered him off the base. This rebuff on racial grounds triggered a stubborn reaction; Min returned eight times to Fort Vancouver and was turned away each time.

Even before the evacuation orders reached Portland, Min decided to challenge the curfew, imposed by General DeWitt through Military Order Number 3 of the army’s Western Defense Command. Min had no quarrel with a curfew applied to aliens. “But Military Order Number 3 applied to all persons of Japanese ancestry,” he later said. “I said, ‘There the general is wrong, because it makes distinctions between citizens on the basis of ancestry.’ That order infringed my rights as a citizen.” The night of March 28, 1942, Min approached a policeman in downtown Portland. “I pulled out this order that said all persons of Japanese ancestry must be in their place of abode, and I pulled out my birth certificate and said, ‘Look, I’m a person of Japanese ancestry, arrest me.’ And the policeman said, ‘Run along home, you’ll get in trouble.’” Min stubbornly persisted, finally convincing a sergeant at police headquarters to arrest him for curfew violation. He spent nine months in solitary confinement before his trial.

Fred Korematsu did not challenge the internment from religious conviction or legal training. Unlike Gordon Hirabayashi and Min Yasui, he did not court arrest. In fact, Fred tried to evade the evacuation orders by changing his name, altering his draft card, and undergoing plastic surgery on his eyelids and nose. But his effort to escape detection as a Japanese American failed. On the afternoon of May 30, 1942, police officers in San Leandro, California, got a tip and picked up a young man walking down the street with his girlfriend. The suspect claimed to be Clyde Sarah, of Spanish-Hawaiian origin. But his story quickly fell apart; he spoke no Spanish, and his draft card had been crudely altered with ink eradicator. The officers took him to police headquarters. “One of the girls who worked in the office seemed to recognize me,” Fred recalled, “and so I finally said who I was.”

Born in 1919 in Oakland, California, Korematsu finished high school in 1938 and dropped out of college after one month for financial reasons. He then attended welding school in Oakland and worked as a shipyard welder following

this training. The navy turned him away in June 1941 because of gastric ulcers, and his union expelled its Japanese American members after Pearl Harbor. Fred took piano lessons from an Italian woman and fell in love with her daughter. After his arrest, he told an FBI agent what he did after his family reported to the Tanforan Racetrack for evacuation: "I stayed in Oakland to earn enough money to take my girl with me to the Middle West. Her name is Miss Ida Boitano. She is a different nationality—Italian. The operation was for the purpose of changing my appearance so that I would not be subjected to ostracism when my girl and I went East." Fred never saw Ida again; FBI agents reported that she answered Fred's letters from jail by "telling him not to write her anymore."

Fred Korematsu did not volunteer to challenge the evacuation orders, but he eagerly accepted legal help from Ernest Besig, the ACLU director in San Francisco. The city's newspapers had reported Fred's arrest, and Besig visited him in jail. He was pleased to find a willing client for a test case. Behind his personal reasons for evading the evacuation, Fred shared with Gordon Hirabayashi and Min Yasui an awareness of his constitutional rights. During a jailhouse visit, he gave Ernest Besig a handwritten statement arguing that Japanese Americans "should have been given a fair trial in order that they may defend their loyalty at court in a democratic way, but they were placed in imprisonment without a fair trial!" He posed this question to the government: "Is this a racial issue?" And he suggested a way to find the answer: "Fred Korematsu's Test Case may help."

Despite the differing motivations of the "test case" defendants, their criminal trials in federal district courts were uniformly brief and perfunctory. Judge Lloyd Black, who presided at Gordon Hirabayashi's trial in Seattle, rejected his lawyers' claims that General DeWitt's curfew and evacuation orders violated the Due Process Clause of the Fifth Amendment by singling out a racial group for "special restrictions" not imposed on others. Noting the proximity of aircraft plants and naval bases to Seattle, Black pointed to "the fact that the parachutists and saboteurs, as well as the soldiers, of Japan make diabolically clever use of infiltration tactics. They are shrewd masters of tricky concealment among any who resemble them. With the aid of any artifice or treachery they seek such human camouflage and with uncanny skill discover and take advantage of any disloyalty among their kind." Judge Black directed the jurors to convict Gordon, which they did after just ten minutes of deliberation.

Min Yasui's trial in Portland took a bit longer, largely because Judge Alger Fee took over the questioning from the government's lawyer, Charles Burdell, who had pressed the "genetic disloyalty" claim in his pretrial brief. Fee surprised Min, who had never been to Japan, with questions about Japanese customs and beliefs. "What is Shinto?" he abruptly asked. Min was clearly puzzled by the question. "Shinto? As I understand, Shinto is the national religion of Japan," he answered. "Do you give adherence to its precepts?" Fee asked. "My

mother and father were Methodists in Japan," Min replied, "and I myself have been a Methodist in this country and I don't know the precepts of the Shinto religion." Fee pressed on doggedly: "Was not Shinto practiced in your household?" Min tried to conceal his irritation. "Both my mother and father are good, devout Methodists," he assured Fee. "They are really Christians." Fee heard the case without a jury, and pronounced Min guilty for his admitted curfew violation. Before passing sentence, Fee ruled in a written opinion that despite Min's American birth and citizenship, he considered him "a citizen of Japan and subject to the Emperor of Japan," a finding the judge based on "the nativity of his parents and the subtle nuances of traditional mores engrained in his race by centuries of social discipline." After linking Min to "the treacherous attack by the armed forces of Japan" on Pearl Harbor, Judge Fee imposed the maximum penalty of one year in prison and a \$5,000 fine.

Fred Korematsu came to trial in San Francisco before Judge Adolphus St. Sure, who differed from his Seattle and Portland colleagues in treating the defendant with respect. After an FBI agent testified about Fred's draft-card forgery and plastic surgery, the soft-spoken defendant took the stand to explain his actions. His description of Dr. Bennett Masten's bargain-rare surgery drew smiles in the courtroom. "I don't think he made any change in my appearance," he said, "for when I went to the Tanforan Assembly Center everyone knew me and my folks didn't know the difference." Fred told the judge that he had applied for military service before Pearl Harbor, but had been rejected on medical grounds. "As a citizen of the United States I am ready, willing, and able to bear arms for this country," he affirmed. This forthrightness impressed Judge St. Sure, but he nonetheless found Fred guilty and sentenced him to a five-year probationary sentence. When Fred's lawyer announced his intention to appeal the conviction, St. Sure obligingly set bail at \$2,500. Fred was legally free to remain at liberty, but when he stepped outside the courthouse he was grabbed by a waiting military policeman, who pulled a pistol and took his prisoner to the army jail at General DeWitt's headquarters, from which Fred was shipped to the Tanforan Racetrack, where his parents were confined in horse stalls, awaiting transfer to an internment camp in the Utah desert.

All three test-case defendants appealed to the Supreme Court after circuit court judges upheld their convictions, but the Justices sent Fred Korematsu's case back to the circuit court for a ruling on Judge St. Sure's sentencing decision. Before it returned, the Court heard argument in the *Hirabayashi* and *Yasui* cases in April 1943. The briefs on both sides stuck closely to legal issues and included no evidence on the government's claim that Japanese Americans posed a danger of "espionage and sabotage" to West Coast defense facilities. There was, in fact, no evidence that *any* member of this racial group had committed these treasonous acts.

The government's brief in *Hirabayashi v. United States* asserted that "an unknown number of the Japanese may lack to some extent a feeling of loyalty

toward the United States" because of resentment against legal discrimination. Largely drafted by Arnold Raum, a Harvard Law School graduate in the solicitor general's office, the brief cited laws barring Japanese immigrants from American citizenship and landownership. This discrimination supposedly produced "a consequent tie to Japan" and a "compensatory feeling of racial pride" in Japan's achievements. Asserting without any supporting evidence "the virtually impossible task of promptly segregating the potentially disloyal from the loyal" among Japanese Americans, Raum argued that "the only certain way" of removing the disloyal "was to remove the group as a whole."

Solicitor General Charles Fahy, who commanded the legal battalion that won the Wagner Act cases in 1937, defended General DeWitt's orders in arguing the *Hirabayashi* case in 1943. Claiming that Japanese Americans "had never become assimilated" into American society, he called it "not unreasonable" to fear that members of this group "might assist the enemy." The fear he attributed to DeWitt "was not based on race but on these other factors," Fahy assured the justices. Harold Evans, who argued for Gordon Hirabayashi, relied on the Supreme Court's 1866 ruling in *Ex parte Milligan* for the proposition that "legislative authority over civilians may not be delegated to the military when the area in question is not a strictly military area." The *Milligan* decision, holding that Confederate sympathizers could not be tried by military tribunals while civilian courts remained open, did not impress Justice Felix Frankfurter, an army prosecutor during World War I. "There's a lot in Milligan," he told Evans, "that will not stand scrutiny in 1943, a lot of talk that is purely political." Frankfurter did not elaborate on his cryptic statement, leaving Evans without a question to answer. "That's for this Court to decide," he weakly replied.

The Court issued its *Hirabayashi* decision on June 21, 1943, along with a short opinion in the *Yasui* case. Chief Justice Stone wrote for a unanimous Court in upholding Gordon Hirabayashi's conviction for curfew violation. He sidestepped the conviction for violating the evacuation order, on the ground that Judge Black had imposed concurrent sentences on both counts and that Hirabayashi consequently faced no additional penalty for the evacuation violation. Stone most likely dodged the more difficult issue of evacuation in hopes that government officials might end the internment program before Fred Korematsu's case, which directly challenged the evacuation orders, returned from the circuit court. In that event, of course, the case—and the internment issue—would become moot and the Court would be off the hook.

The Chief Justice also dodged the statement in Footnote Four of his *Carolene Products* opinion that laws directed against racial minorities should be subjected to "more searching judicial inquiry" than statutes involving economic regulations. The author of the "strict scrutiny" doctrine proved highly lenient in judging the government's "military necessity" claims. "Distinctions between citizens solely because of their ancestry," he conceded, "are by their very nature

odious to a free people whose institutions are founded upon the doctrine of equality." But "the danger of espionage and sabotage" by Japanese Americans overrode the Constitution's promise of "the equal protection of the laws" to every American, regardless of ancestry. Stone proclaimed that "those facts and circumstances which are relevant to measures for our national defense" provided military officials with reason to "place citizens of one ancestry in a different category from others." And what *were* the facts and circumstances that justified General DeWitt's military orders? On this crucial issue, Stone accepted Solicitor General Fahy's "racial characteristics" argument without questioning its veracity.

"At a time of threatened Japanese attack upon this country," Stone wrote, "the nature of our inhabitants' attachments to the Japanese enemy was consequently a matter of grave concern." Citing the references in Arnold Raum's brief to laws directed against Japanese immigrants, Stone concluded that such discrimination had "intensified their solidarity" and "prevented their assimilation as an integral part of the white population." Raum's brief also contained data on the number of children who attended Japanese language classes and those who returned to Japan for schooling. Stone concluded from this data that Japanese Americans sought "relatively little social intercourse between them and the white population." It was thus "reasonable" for military authorities to consider Japanese Americans "a menace to the national defense and safety" and to restrict their movements. All these factors gave President Roosevelt and War Department officials "a rational basis for the decision" to "set these citizens apart from others who have no particular association with Japan."

One week before the Court issued its *Hirabayashi* decision, Justice Felix Frankfurter had referred to his Jewish ancestry in angry response to the overruling of his *Gobitis* opinion in the *Barnette* decision. Frankfurter had rejected Justice Frank Murphy's appeal to avoid "catapulting a personal issue into the arena." But Frankfurter made his own appeal when Murphy circulated a blistering dissent in *Hirabayashi*, finding a "melancholy resemblance" between the restrictions on Japanese Americans and "the treatment accorded to members of the Jewish race" in Germany. Frankfurter asked Murphy to consider whether his statement might be read as accusing his colleagues of "playing into the hands of the enemy." This appeal to wartime unity convinced Murphy to change his dissent to a concurrence, but he retained the comparison of Japanese Americans to German Jews and his conclusion that the military orders approached "the very brink of constitutional power."

Stone's wish that government officials would end the internment program and thereby moot the *Korematsu* case was not granted before the Court heard arguments in October 1944. The decision to keep Japanese Americans behind

barbed wire, long after Japanese forces posed any threat to the West Coast, reveals the dominance of politics over law. Dillon Myer, who headed the Interior Department agency that ran the internment camps, appealed to Assistant Secretary of War John J. McCloy in October 1943 for "the return of evacuees to the West Coast" because "the military necessity for total exclusion from this area no longer exists." McCloy replied that "active and powerful groups in California" opposed the return of Japanese Americans. "This means that considerations other than of mere military necessity enter into any proposal" for ending the internment program, McCloy added. Attorney General Francis Biddle appealed directly to President Roosevelt in December 1943. "The present practice of keeping loyal American citizens in concentration camps on the basis of race for longer than is absolutely necessary is dangerous and repugnant to the principles of our Government," Biddle argued. Roosevelt simply ignored his letter.

The real reason for delay became apparent as the 1944 elections approached. Secretary of War Stimson raised the internment question at a cabinet meeting in May of that year. Biddle recorded Stimson's admission that internment could be ended "without danger to defense considerations but doubted the wisdom of doing it at this time before the election." President Roosevelt agreed with Stimson. Interior Secretary Harold Ickes made another appeal to Roosevelt in June 1944, arguing that the detention of Japanese Americans "is clearly unconstitutional in the present circumstances." He predicted that "the continued retention of these innocent people in the relocation centers would be a blot upon the history of this country." Roosevelt again raised his electoral concerns. "I think the whole problem, for the sake of internal quiet, should be handled gradually," he told Ickes. Later in June, John McCloy attended a White House meeting to present the army's plan for returning a "substantial number" of Japanese Americans to the West Coast. Roosevelt "put thumbs down on this scheme," McCloy reported to army officials. "He was surrounded at the moment by his political advisors," McCloy added, "and they were harping hard that this would stir up the boys in California and California, I guess, is an important state." McCloy told the army officials that internment could not end before "a date somewhat later than November 6." The elections, as McCloy well knew, would be held on November 6. On that date, the voters gave Roosevelt a fourth presidential term and the Democrats picked up four House seats in California. Japanese Americans, who had been deprived of their right to vote, remained behind barbed-wire fences while Roosevelt celebrated his victory in the White House.

Argument in *Korematsu v. United States* began on October 11, 1944. The justices also heard argument in *Ex parte Endo*, which involved a habeas corpus petition filed by Mitsuye Endo, a young Japanese American woman who had volunteered to test the government's power to detain citizens the army had conceded were loyal. Her case had languished in the lower courts for more than two years before the Supreme Court agreed to hear Endo's appeal from a district court ruling that dismissed her petition. Since the government made no effort

in its *Endo* brief to defend the continued detention of loyal Japanese Americans, the central issue before the justices was the question, raised in the *Korematsu* case, of the power to order their evacuation in the first place. Once again the government's *Korematsu* brief made the "racial characteristics" argument that had convinced the Court in *Hirabayashi*. But this time, the brief turned the argument completely around. Government lawyers now claimed that mass internment was necessary to protect Japanese Americans against racial hostility rather than to protect military installations against their hostile reaction to discrimination. No longer were DeWitt's orders a "reasonable" response to the dangers posed by disloyal Japanese Americans. They had in fact been designed to "prevent incidents involving violence between Japanese migrants" and Caucasians who blamed them for Pearl Harbor. "The belief of the military authorities in the danger of violence has not been shown to be unreasonable," the government's brief weakly claimed. Fred Korematsu had not met "the burden which rested upon him" to disprove the evidence "of hostility to the evacuees which lay at the basis of the decision to impose detention" on them. This about-face in the government's position reflected the fact that Japanese forces posed no threat to the West Coast after 1943, eroding arguments based on the danger of espionage and sabotage by Japanese Americans.

The obvious absurdity of forcing Korematsu to prove that whites were not hostile toward Japanese Americans did not faze Justice Hugo Black, who wrote for six justices in upholding Korematsu's criminal conviction. Determined to rescue the government from an untenable position, Black returned to *Hirabayashi* for support, quoting Stone's claim that the danger posed by "disloyal" Japanese Americans justified the curfew imposed on them. Black brushed aside complaints that removing people from their homes imposed greater hardships than curfews. "But hardships are part of war," he replied, "and war is an aggregation of hardships."

Solicitor General Fahy had argued that racial hostility against Fred Korematsu justified his internment. Justice Black denied that racial hostility had anything to do with the case. "Korematsu was not excluded from the Military Area because of hostility to him or his race," Black asserted. "He was excluded because we are at war with the Japanese Empire" and because "the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast" until the danger passed. The internment camps protected West Coast residents from people like Fred Korematsu, not the other way around. Years later, Black exposed the racial stereotypes on which his opinion rested. "People were rightly fearful of the Japanese," he told an interviewer, because "they all look alike to a person not a Jap."

Justice Murphy stood with the Court at "the very brink of constitutional power" in the *Hirabayashi* case. But he would not stand with Black in *Korematsu*. The exclusion of Japanese Americans from their homes, he wrote in dissent, went over that brink "and falls into the ugly abyss of racism." Murphy attacked

the racial stereotypes on which both Stone's and Black's opinions rested. He called the government's justifications of internment "largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation." Murphy repeated the word that must have stung his colleagues: "I dissent, therefore, from this legalization of racism."

Murphy had withdrawn his *Hirabayashi* dissent because he did not want to stand alone on the constitutional battlefield. But two colleagues stood with him in *Korematsu*. Justices Owen Roberts and Robert Jackson wrote separate dissents with different objections to Black's opinion. Black denied that Fred Korematsu faced detention if he violated the evacuation order, asserting that he could have left California before the order became effective. This struck Roberts as a denial of reality, because an earlier order forbid Korematsu from leaving the state. He called the two orders "a cleverly devised trap to accomplish the real purpose of the military authorities, which was to lock him up in a concentration camp." Jackson accused the majority of validating "the principle of racial discrimination" under the guise of military necessity. "The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need," he warned.

The Court announced its *Korematsu* decision on December 18, 1944, a Monday, along with a unanimous ruling that reversed the dismissal of Mitsuye Endo's habeas corpus petition. Justice Douglas wrote the *Endo* opinion for the court, declining to reach "the underlying constitutional issues which have been argued." He simply held that military authorities had "no authority to subject citizens who are concededly loyal" to continued detention. Douglas wrote an equivocal opinion in *Endo* to avoid a head-on collision with Justice Black's claim in *Korematsu* that the Constitution did not block General DeWitt's power to order the evacuation of all Japanese Americans. Justices Murphy and Roberts needed Douglas in separate concurrences; Roberts assailed his colleague for encouraging "the evasion of law and the violation of constitutional rights" by government officials.

The timing of the *Korematsu* and *Endo* decisions was no accident. The Court had waited to issue the opinions while government officials—most likely alerted by Justice Frankfurter—prepared for the Court's ruling that loyal Japanese Americans could no longer be detained. One day earlier, in an unusual Sunday statement, the War Department had issued a press release. "Those persons of Japanese ancestry whose records have stood the test of Army scrutiny during the past two years," the release stated, would be released from internment camps and "permitted the same freedom of movement throughout the United States as other loyal citizens and law-abiding aliens." The decision to close the internment camps met with a mixed reaction on the West Coast. Press reports of the new policy played up the threat of vigilante action: "Outbreak of

Violence Seen by Nips' Return," headlined the *Los Angeles Times*. Public officials, however, did their best to protect the returning Japanese Americans. California governor Earl Warren, an original advocate of mass evacuation, proclaimed his belief that "all Americans will join in protecting constitutional rights, and will maintain an attitude that will discourage friction and prevent civil disorder." Only a few scattered incidents of violence and harassment marred the peaceful return of Japanese Americans to their homes, farms, and businesses along the West Coast.

The impact of Supreme Court decisions is often immediately apparent; the *Gibbs* ruling in 1940 provoked a wave of persecution against Jehovah's Witnesses. But that decision was reversed just three years later, after the Court realized the destructive consequences of its action. The impact on Japanese Americans of the *Hirabayashi* and *Korematsu* decisions, however, was not evident to many people for more than three decades after the Court upheld their exclusion from the West Coast. The former internees returned to their communities after the war and rebuilt their lives as hardworking, law-abiding citizens. But underneath their image as a "model minority" was pent-up anger at the injustice they endured for no reason but their race. Some of them, and many of their children, marched for civil rights and against the Vietnam War. During the 1970s, several groups of Japanese Americans began a grassroots lobbying campaign, asking Congress to make symbolic payments to Japanese Americans who had been forced into internment camps.

The first victory of the "redress movement" came in 1980 when Congress established a blue-ribbon Commission on Wartime Relocation and Internment of Civilians, charged with reviewing the mass internment and making recommendations for methods of redress. This nine-member body—which included former Supreme Court justice Arthur Goldberg—conducted hearings around the country at which more than 750 people testified, many speaking tearfully about their wartime hardships and lingering pain. In a 467-page report in 1983, the commissioners agreed unanimously that Japanese Americans had suffered a "grave injustice" that was produced by "race prejudice, war hysteria, and a failure of political leadership." All but one commissioner—Republican congressman Daniel Lungren of California—recommended that Congress provide compensation of \$20,000 for each survivor of the internment camps.

The redress campaign included a legal effort to reverse the wartime convictions of Gordon Hirabayashi, Min Yasui, and Fred Korematsu. Normally, criminal defendants cannot ask judges to reopen their cases after appeals have been exhausted and sentences completed. The only exception to the "finality" rule stems from one of the "ancient writs" of English law, called the writ of *error coram nobis*. This term is legal Latin for "error before us," referring to the trial judges. This application for judicial relief is related to the better-known

writ of habeas corpus, an order to “bring the body” of the defendant into court for a hearing on the legality of the detention. In *coram nobis* cases, the former defendant must show that “prosecutorial misconduct” during the original trial deprived him or her of a fair trial. There are two grounds for *coram nobis* relief: one requires proof that government lawyers deliberately withheld “exculpatory” evidence that would show the defendant’s innocence; the other involves the government’s introduction at trial of false evidence of the defendant’s guilt. The burden of proof on defendants is high, and *coram nobis* relief is rarely sought and even more rarely granted.

The *coram nobis* effort in the wartime internment cases began in 1981, when Peter Irons (this book’s author and also a lawyer) was conducting research for a book on the cases, hoping to explain why the Supreme Court—with so many “liberal” members—made decisions in these cases that scholars have agreed were judicial “disasters,” as Yale law professor Eugene Rostow wrote in 1945. Using the Freedom of Information Act, Irons obtained the Justice Department’s files in the *Hirabayashi*, *Yasui*, and *Korematsu* cases, and he discovered several astounding documents. The “loaded weapons” that Justice Jackson warned about in his *Korematsu* dissent were really “smoking guns” of legal misconduct.

Two memoranda by Edward Ennis, who headed the Justice Department’s Alien Enemy Control Unit, shot out of these files. He sent the first to Solicitor General Fahy in April 1943, shortly before Fahy’s Supreme Court argument in the *Hirabayashi* case. Ennis had obtained military intelligence reports to General DeWitt, informing him that no evidence existed to support claims of Japanese American disloyalty. Ennis reminded Fahy of his “duty to advise the Court of the existence” of these crucial reports. Failing to perform this duty “might approximate the suppression of evidence,” he warned. But Fahy ignored the warning and assured the Court that DeWitt had evidence of disloyalty among Japanese Americans before he signed the internment orders in 1942. Chief Justice Stone based his *Hirabayashi* opinion in large part on Fahy’s assurances, citing “the judgment of the military authorities” that “there were disloyal members” of the Japanese American community who constituted “a menace to the national defense and safety” on the West Coast.

Ennis sent another memorandum to Fahy in September 1944, during his preparation for the *Korematsu* argument. Suspicious of General Dewitt’s claims to have evidence of “espionage and sabotage” by Japanese Americans, Ennis had found more intelligence reports that refuted the charges DeWitt made in his “Final Report” on the internment program. Excerpts of DeWitt’s report were included in the *Korematsu* brief that Fahy was about to file with the Court. Ennis urged Fahy to disavow the report’s claims that “overt acts of treason were being committed” by Japanese Americans. “Since this is not so,” Ennis wrote, “it is highly unfair to this racial minority that these lies, put out in an off-

cial publication, go uncorrected.” Again, Fahy ignored Ennis and assured the justices that he vouched for “every sentence, every line, and every word” in DeWitt’s report. Again, the Court accepted Fahy’s assurances in upholding Fred Korematsu’s conviction; Justice Hugo Black cited DeWitt’s report as providing sufficient “evidence of disloyalty” among Japanese Americans to justify their mass evacuation from the West Coast.

Armed with these “smoking guns” and other records of legal misconduct, Irons tracked down Gordon Hirabayashi, Min Yasui, and Fred Korematsu and showed them his findings. All three men, then in their sixties, agreed to join an effort to erase their criminal records. Irons then recruited a team of committed young lawyers, most of them the children of internment camp survivors, headed by San Francisco attorney Dale Minami. The *coram nobis* team prepared a 150-page petition, which was submitted in 1983 to federal district judges in San Francisco, Portland, and Seattle, the courts in which the “test case” defendants had been tried and convicted in 1942. Based entirely on evidence from government files, the petition urged the judges “to carefully weigh the complete record of governmental abuses” in the wartime cases and “do justice where it was denied forty years ago.”

Fred Korematsu’s petition came before federal judge Marilyn Hall Patel in November 1983, at a hearing crowded with internment survivors. After Dale Minami reviewed the evidence of legal misconduct, Fred made a brief statement to Judge Patel. “Your Honor, I still remember 40 years ago when I was handcuffed and arrested as a criminal,” he began. Fred recalled his family’s living quarters at the Tanforan Racetrack: “The horse stalls that we stayed in were made for horses, not human beings.” Speaking for “all Japanese Americans who were escorted to concentration camps,” he asked the government to “admit that they were wrong and do something about it so this will never happen again to any American citizen of any race, creed, or color.” The government’s lawyer, Victor Stone, denied that the Supreme Court’s *Korematsu* decision still “lies around like a loaded gun” and asked Judge Patel to dismiss Korematsu’s petition. Ruling from the bench, she found “substantial support” in the petition that “the government deliberately omitted relevant information and provided misleading information” to the Supreme Court in 1944. Judge Patel passed a posthumous verdict on Solicitor General Fahy. “The judicial process is seriously impaired when the government’s law enforcement officers violate their ethical obligations to the court,” she concluded. Patel ended by reminding her audience—which needed no reminder—that the *Korematsu* decision “remains on the pages of our legal and political history” as a “constant caution that in times of war or declared military necessity our institutions must be vigilant in protecting constitutional guarantees.”

Federal judges in Portland and Seattle later vacated the wartime convictions of Min Yasui and Gordon Hirabayashi. Justice Department lawyers had with-

drawn an earlier appeal of Judge Patel's ruling to the Ninth Circuit Court of Appeals, but they pursued an appeal in 1987 of the ruling of Judge Donald Voorhees that granted Hirabayashi's petition. Government lawyers never revealed their reasons, but members of the *coram nobis* legal team suspected that pressure from veterans' groups on the Reagan administration lay behind this legal about-face. During argument before the Ninth Circuit panel, Judge Mary Schroeder asked Victor Stone why the government had not acted on its own to vacate the convictions. "We didn't think there was anyone out there who cared," Stone replied, bringing gasps from the courtroom audience. Writing for the appellate panel, which unanimously reversed both of Hirabayashi's wartime convictions, Judge Schroeder showed that she cared: "A United States citizen who is convicted of a crime on account of race is lastingly aggrieved." Government lawyers did not appeal Schroeder's ruling, and the *coram nobis* campaign ended with total victory: all three wartime defendants had their records cleared after more than forty years. Gordon Hirabayashi spoke the last words on the steps of the Seattle courthouse in which he received final vindication of his wartime stand: "Ancestry is not a crime."

The nation finally showed that it cared as well. At a White House ceremony in January 1998, President Bill Clinton placed the Presidential Medal of Freedom around Fred Korematsu's neck. "A man of quiet bravery," the president said, "Fred Korematsu deserves our respect and thanks for his patient pursuit to preserve the civil liberties we hold dear." Fred pursued his constitutional rights for almost half a century, never losing his faith in American justice. But other Japanese Americans had lost faith, and more than sixty thousand camp survivors had died before Congress finally enacted a redress bill in 1988 and President Ronald Reagan signed the national apology that accompanied the redress checks of \$20,000 to those who remained. For three years of their lives, imprisoned without charges in desolate camps and denied their rights and dignity, this was small compensation.