

Justice At War

Peter Irons

New York Oxford
OXFORD UNIVERSITY PRESS
1983

munal bathing and toilet facilities, things entirely foreign to their culture. Forced to live in a virtual fishbowl, camp residents often lost their traditional reserve and good manners. "As time went on," Yoshiko Uchida later wrote of her experiences in the Central Utah Relocation Center, "the residents of Topaz began to release their frustrations on others in acts that seemed foreign to the Japanese nature. Internal squabbling spread like a disease."⁶⁹

Physical hardships added to the discomfort of crowded living conditions. In later recollections, camp residents almost unanimously cited their revulsion at the dust and sand that blew across the camps and seeped through the cracks of their barracks. Lillian Tateishi had a vivid memory of the camp in Manzanar, California: "Those awful sandstorms. The sand would blow right through the floor. Several times every night we had to get up and wash off. Sometimes we had to wear goggles. Some people just cried."⁷⁰

John McCloy, whose directive to General DeWitt in February 1942 set the internment program in motion, claimed forty years later that "the whole operation was as benignly conducted as wartime conditions permitted." McCloy also asserted that conditions in the camps he visited during the war were "very good and very pleasant." Those who lived in the camps, and who spent an average of 900 days behind barbed wire, did not share McCloy's sentiments. The fact remains that Japanese Americans reported for internment virtually without exception. Had the internment been ordered forty years later, there is no question that more than a handful of Japanese Americans would have refused to obey General DeWitt's military orders. Looking back, however, it is hard to fault those who chose to endure two or three years of barbed wire and sandstorms as an alternative to prison.⁷¹

4

"Am I an American or Not?"

JAPANESE AMERICANS first confronted the regime of military edict on March 28, 1942, the effective date of the curfew imposed on them by General DeWitt. Congressional enactment of Public Law 503 exposed curfew violators to criminal prosecution and possible imprisonment. The fusillade of exclusion orders that began on March 29 also relied on this statute as an enforcement threat. Faced with DeWitt's orders, Japanese Americans were forced to make unenviable choices. Compliance led inexorably to internment, first in "assembly centers" and then in "relocation centers" ringed with armed guards. Resistance seemingly led with equal inevitability to internment, either as a form of sentencing or after release from jail, with the lasting stigma of a criminal record branded on violators. With a choice of barbed wire or prison bars, it is hardly surprising that all but a handful of this frightened and almost friendless minority complied with the curfew and dutifully reported for internment.

Were there in fact no alternatives to eventual internment? Among the 120,000 Japanese Americans subject to DeWitt's orders, a mere dozen looked to the legal system for redress. This chapter will introduce the four young Nisei whose challenges to the various military orders ultimately reached the Supreme Court, and whose cases are followed to their conclusion in this book. Only the barest sketch of these challengers emerges from the Court's opinions in their cases, a consequence of the depersonalization of the legal process. One purpose of this chapter is to remove what John Noonan has called the "masks of the law" and to reveal the faces of this disparate quartet. Looking behind these masks we see four unique individuals, each with a separate path to resistance

and a different reason for challenging DeWitt's orders. What we view is less a group portrait than a collection of snapshots in the Supreme Court's album of opinions.¹

Literally the only link that joined the four challengers was the shared circumstance of their Japanese ancestry. The related factors of race and national origin provide a second focus for this chapter and raise a preliminary question of great significance: Why did such a tiny number of the Japanese Americans choose resistance over compliance? Including those whose cases failed to reach the Supreme Court, only one in ten thousand of this group directly challenged the curfew and exclusion orders. The inevitable prospect of detention helps to explain why the vast majority chose to remain with family and friends over the alternative of separation and stigma. The total sweep of the military dragnet also differentiates the response of this minority to legal apartheid from that shown in later decades by others, in particular the black Americans who courted arrest and went to jail by the thousands as a form of protest.

The wartime setting of this forced choice, however, does not fully answer the question posed above. Certainly more than a dozen of the Japanese Americans considered resistance at some point before reporting for internment. We cannot even guess at their number and can only speculate about why they rejected the course of resistance. Some clues come from conversations with those who did resist about their friends and families. The prospect of indefinite separation from their families and close-knit communities quite naturally deterred most of those who thought of resistance. Lack of familiarity with the legal system and the scarcity of lawyers who served the Japanese American population were additional deterrents.

Several factors made it easier for the civil rights activists of the 1950s and 1960s to engage in mass resistance to the laws and customs of a segregated society. It took courage, of course, to face police dogs and cattle prods as well as vigilante terror in the Deep South. But the jailed demonstrators could return to their families and hometowns after serving sentences that were generally short, however unpleasant the conditions to which they had been subjected. Black lawyers were in short supply, but a dedicated contingent of white lawyers—most of them volunteers—filled the breach. On the local and state levels, judges and jurors alike were almost uniformly hostile to civil rights defendants. Federal judges, however, particularly those who sat on the Fifth Circuit Court of Appeals whose jurisdiction spanned the Deep South states, took their constitutional oaths seriously and reversed most of the convictions brought before them. The Supreme Court as well, having placed its legal and moral authority behind the assault on official racism in its

1954 decision in *Brown v. Board of Education*, subsequently struck down most of the civil rights convictions presented to the justices.

The factor that most sharply divided the Japanese Americans from black Americans, however, was that of leadership. This crucial factor rests in turn on the links between the younger and older leaders in the respective minority groups. Most of those who assumed the leadership of civil rights movements in the 1950s and 1960s were young and lacked experience when they were thrust into the front ranks by their impatient followers. When he was abruptly drafted to lead the Montgomery, Alabama, bus boycott in 1955, Martin Luther King, Jr., was barely twenty-six years old. King had behind him, however, not only a determined mass movement but the support of an older and more experienced generation of black leaders which included his father. Although few of the black ministers and lawyers who advised the young militants were themselves willing to face beatings and arrest, their advice on strategy and tactics proved invaluable to the emerging leaders of groups such as the Southern Christian Leadership Conference and the Student Non-Violent Coordinating Committee.²

In contrast to the generational ties that fostered a continuity of leadership within black communities and organizations, Japanese Americans confronted evacuation and internment almost bereft of direction. Before the outbreak of war, the older Issei had provided their communities with a measure of cohesion and continuity. However, the sudden roundup of the Issei on the Justice Department's "ABC" list had deprived Japanese Americans of leadership at a critical time. Cut off from their elders, the younger Nisei faced the evacuation campaign and DeWitt's orders as political neophytes. Only one organization, the Japanese American Citizens League (JACL), tied together the Nisei scattered along the West Coast when the war began. Pulled together from a loose confederation of Nisei clubs in 1930, the JACL was an avowedly assimilationist and patriotic organization. The JACL's limitation of membership to American citizens, and its requirement that members sign a profession of loyalty to the United States, drove an additional wedge between the younger and older generations of Japanese Americans.

Two young men, Saburo Kido and Mike Masaoka, shared the responsibility for shaping the JACL's response to evacuation pressures and DeWitt's orders in the months after Pearl Harbor. Opposites in appearance and temperament, Kido and Masaoka complemented each other in approach and training. Slight in build and serious in demeanor, Kido was a Hawaii native who came to the mainland in 1921 at the age of nineteen. After his graduation from the Hastings Law School in 1926, he established a marginal practice near the "Japantown" area of San

Francisco. His interests soon shifted, however, to the efforts to build an effective Nisei organization. Kido attended the JACL's founding convention and in 1934 he assumed the office of executive secretary. After six years in this post, during which he traveled endless miles in organizing several dozen JACL chapters along the coast and across the country, Kido was elected in 1940 to a two-year term as president. While he served in this largely honorific position, Kido retained his role as executive secretary until August 1941.³

Drained of energy by incessant travel and concerned about the inroads on his law practice and income, Kido turned his organizational post over to Mike Masaoka just four months before Pearl Harbor. Only twenty-five at the time, Masaoka was a burly, cocky, and articulate counterpart to his predecessor. Born in Fresno, California, in 1915 and the fourth of eight children, Masaoka moved with his family three years later to Salt Lake City, where his father operated a small fish market before his death in 1924. Masaoka majored in speech at the University of Utah, where his skills as a debater and his friendship with Elbert Thomas, then a political science professor and later a Democratic Senator, helped him land a job as instructor of speech. A relative newcomer to the JACL, Masaoka made up in drive and brashness what he lacked in experience and contacts with the Japanese American communities along the West Coast.⁴

Under the leadership of Kido and Masaoka, the JACL and its 15,000 members confronted an agonizing dilemma in responding to the political campaign for evacuation that followed Pearl Harbor. In a sense, the JACL's eagerness to demonstrate the patriotism and loyalty of Japanese Americans made it difficult if not impossible to launch an effective effort to block evacuation. Professions of willingness to share the "sacrifices" of other Americans placed the JACL in a bind: resistance to evacuation on a mass basis would fuel the charges that Japanese Americans constituted a "disloyal" group and represented a fifth-column threat. As an alternative to resistance, and with the hope of heading off more Draconian measures than voluntary migration, the JACL adopted a strategy of collaboration with government intelligence officers. This policy, established well before the outbreak of war, in effect made the JACL a hostage of the intelligence agencies through the enlistment of its leaders as informers on Japanese Americans suspected of "disloyalty." Collaboration in adding names to the "ABC" lists fatally compromised the JACL. Regardless of motive, such informing put the JACL at the mercy of officials who could easily discredit the organization and its leaders. Resistance thus became futile once evacuation and internment became a reality.

The links that bound the JACL to the government's intelligence network were forged in March 1941 at a dinner hosted in Los Angeles by Lieutenant Commander Kenneth D. Ringle, the Naval Intelligence officer delegated to investigate the loyalty of Japanese Americans. JACL vice-president Ken Matsumoto headed the Nisei delegation and Ringle brought with him an Army Intelligence officer and Los Angeles County Sheriff Eugene Biscailuz. Ringle's later reports vouching for the loyalty of the vast majority of Japanese Americans relied in large part on the eager cooperation of JACL leaders in fingering both Issei and Nisei considered sympathetic to Japan. In the months before Pearl Harbor, those who informed perhaps had no idea that the names they provided the FBI and military intelligence would be added to the "ABC" lists as candidates for arrest and internment. But with the "ABC" roundup underway JACL leaders appealed to fellow Japanese Americans to become volunteer informers. Togo Tanaka, editor of the Los Angeles newspaper *Rafu Shimpo*, spoke to Nisei in a radio broadcast on the evening of Pearl Harbor: "As Americans we now function as counterespionage. Any act or word prejudicial to the United States committed by any Japanese must be warned and reported to the F.B.I., Naval Intelligence, Sheriff's Office, and the local police."⁵

JACL leaders in Los Angeles moved from informal to formal collaboration with the FBI soon after Pearl Harbor. Under the leadership of Fred Tayama the Southern California chapters formed an Anti-Axis Committee on December 7, 1941. Two weeks later a Committee delegation met with Richard B. Hood, who directed the FBI's Los Angeles office. Hood chided his visitors for their earlier reluctance to "furnish any specific derogatory information concerning any organization or individual." Unlike Ringle, FBI agents had viewed the names and information provided before Pearl Harbor as little more than gossip. Members of the Anti-Axis Committee admitted the truth of this reproof but assured Hood that "they were now willing to inform on all individuals who appeared to be a danger to this country."⁶

Over the next month the Committee met frequently with Hood and his staff and furnished the FBI with detailed information. In a report to J. Edgar Hoover on January 20, 1942, Hood listed a dozen "ardent supporters of the Japanese cause" fingered by the Anti-Axis Committee. This list included Kaoru Akashi, director of the Japanese Chamber of Commerce and Industry in Los Angeles. "A presidential warrant has been requested for the apprehension of this individual," Hood noted to Hoover. Committee members also turned over to Hood the membership list of the Kibei Division of the Los Angeles JACL, and the names of "pro-Japanese" Kibei Leaders. Other JACL leaders joined the Anti-

Axis Committee in providing information to the FBI, and "expressed no objection" to Hood's intention to share this material with other intelligence agencies. Fred Tayama paid a heavy price for his role as a government informer after his internment in the Manzanar Relocation Center. On the night of December 5, 1942, reported Bill Hosakawa, "six masked men invaded Tayama's barracks room and beat him so badly that he had to be hospitalized." The ringleader of the Kibei suspects was arrested, and during a rock-throwing melee that followed a Kibei protest demonstration military police shot and killed one young man and wounded several others.⁷

The consequences of collaboration, and of the bind in which protestations of loyalty put the JACL, became evident during the period that preceded DeWitt's internment orders. In his March 1942 testimony before the congressional Tolan Committee, Mike Masaoka struggled to reconcile the conflicting pressures of patriotism and revulsion from the racist motives behind internment. "With any policy of evacuation definitely arising from reasons of military necessity and national safety," he assured the congressmen, "we are in complete agreement. . . . But, if, on the other hand, such evacuation is primarily a measure whose surface urgency cloaks the desires of political or other pressure groups who want us to leave merely from motives of self-interest, we feel that we have every right to protest and to demand equitable judgment on our merits as American citizens."⁸

Masaoka's acceptance of the "military necessity" rationale for evacuation left him defenseless as the Tolan Committee members pressed him for an endorsement of evacuation. Congressman John Sparkman of Alabama demanded to know whether "in the event the evacuation is deemed necessary by those having charge of the defenses, as loyal Americans you are willing to prove your loyalty by cooperating?" His professions of JACL loyalty left Masaoka trapped. "Oh yes, definitely," he answered Sparkman, adding that "if the military say 'Move out,' we will be glad to move, because we recognize that even behind evacuation there is not just national security but also a thought as to our own welfare and security because we may be subject to mob violence and otherwise if we are permitted to remain."⁹

Saburo Kido found himself in the same trap when he addressed an emergency meeting of the JACL National Council in Salt Lake City on March 8. "Today we are preparing to go into temporary exile from the homes in which we were born and raised," Kido said in his emotional leave-taking. As a lawyer, he denounced evacuation as a violation of "fundamental rights" guaranteed by the Constitution to all citizens and predicted that "the day is coming when those who are responsible for

these outrageous violations of our rights will be ashamed of their conduct." Kido nonetheless expressed "implicit confidence" in President Roosevelt and the gratitude of the JACL "for the fairness with which our case has been handled. We are glad that we can become the wards of our government for the duration of war."¹⁰

Dictated by the policy of collaboration adopted before Pearl Harbor and carried out through informing on fellow Japanese Americans after war began, the JACL's acceptance of evacuation and internment precluded any possible strategy of mass resistance. Another consequence of this policy, however reluctantly adopted, was that the JACL found itself unable to offer support to those who resisted DeWitt's orders as individuals.



One minute after midnight on March 28, 1942, Japanese Americans on the West Coast became subject to criminal penalties for violation of the curfew imposed by General DeWitt on "all persons of Japanese ancestry." Later that same day, five hours after the 6:00 P.M. curfew took effect, Minoru Yasui walked into a Portland, Oregon, police station and demanded to be arrested for curfew violation. This early act of resistance gave Yasui the distinction of raising the first legal test of DeWitt's orders among the entire Japanese American population.

Min Yasui was in many ways an unlikely candidate for this distinction. The path that ended in the Portland drunk tank on that Saturday night had passed through training as an Army officer, education as a lawyer, employment in a Japanese consular office, and active involvement in the Japanese American Citizens League. In pursuing his challenge to the Supreme Court, Yasui nonetheless accepted the basic legality of Roosevelt's executive order and the congressional statute that enforced it. Even the ordeal of nine months in solitary confinement failed to shake Yasui's avowed "110 percent" patriotism and his commitment to military obedience. In a final touch of irony, Yasui volunteered his services to the Justice Department in a futile campaign to dissuade imprisoned Japanese American draft resisters from continuing their own objections to military orders.¹¹

Perhaps the best explanation of the apparent contradiction between Yasui's roles as a law violator and law enforcer lies in his thoroughly American upbringing. Born in October 1916 to parents who settled in Hood River, Oregon, after their migration from Japan, Min Yasui was the second of seven children. Masuo Yasui raised his children as Methodists, sent them to public schools, and put them all through college.

The owner of an apple orchard in the fertile Hood River Valley, Masuo was accepted into the largely white leadership of the apple growers' association, while at the same time he acted as a leader of the six hundred Japanese Americans in the valley. As a youngster, Min attended the local Japanese language school for three summers but never achieved fluency in his ancestral tongue. Even then he was a stubborn student. "I was kicked out before I finished Book Three for being a bad boy," he later said with obvious relish.¹²

Min entered the University of Oregon at Eugene in 1933. After two years of compulsory military training, he volunteered for the final two years of reserve officer training. Forced to wait until his twenty-first birthday, he received a commission as Second Lieutenant in the Army Infantry Reserve on December 8, 1937. Min then entered the University's law school, where he studied under Wayne Morse, then the nation's youngest law school dean and later a maverick member of the United States Senate. Morse later provided an incisive but telling thumbnail sketch of Yasui's personality in a 1943 letter to ACLU director Roger Baldwin. He held a "relatively high opinion" of Yasui as a law student, Morse wrote, "but on many occasions I detected a streak of blind stubbornness in him. . . ." This was a characterization that others who knew and dealt with Yasui would not dispute.¹³

Yasui found it difficult to land a job as a lawyer following his law school graduation in 1939. His father, who had been decorated by the Japanese government for his leadership of the Hood River Valley community, was a close friend of the Japanese consul in Portland. Through the intercession of his father, Yasui secured a position as an attaché of the Japanese consulate in Chicago. As an American citizen, he duly registered with the State Department as a foreign agent. Yasui later described his work as primarily clerical. Under questioning at his trial, however, he admitted having defended Japanese policies in Asia in speeches before Rotary clubs and similar civic groups in the Chicago area. But he insisted that in none of these speeches had he acted in opposition to the interests of the United States.¹⁴

The day after Pearl Harbor, while the Japanese consul hurriedly burned cables and codes, Yasui 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 parental request on his own patriotic impulse, Yasui immediately resigned his consular post. When he went to the Chicago railroad station to buy a ticket to Portland, he discovered that the agents would not sell a ticket to anyone of Oriental appearance. Only after he received a telegram from the Army a few days later,

ordering him to report for duty at the Vancouver barracks across the Columbia River from Portland, was Yasui able to buy a train ticket. When he reported to Fort Vancouver, Yasui was placed in command of a platoon of soldiers. The next day, before his formal induction, Army officers told Yasui he was unacceptable for service and ordered him off the base. This rebuff on purely racial grounds triggered Yasui's streak of stubborn determination. He returned eight times to Fort Vancouver with an offer to serve and was turned away each time.¹⁵

A few days after he rejoined his family, Yasui's father was arrested for membership in the "ABC" list and sent to the Justice Department internment camp in Missoula, Montana. At loose ends after his father's arrest and his rejection by the Army, Yasui moved from Hood River to Portland and hung out his shingle as a lawyer. In the atmosphere of uncertainty and fear within the Japanese American community, few clients appeared in his office. Concerned about his father's fate, Yasui traveled to Missoula early in February and requested permission from Justice Department lawyers to represent his father and several of the Issei internees from Portland at their loyalty hearings. But these hearings were conducted without legal counsel and Yasui's request was rejected.

"So far as my father was concerned," Yasui later said, "I was permitted to sit in as a member of the family. The hearing was a complete farce. They produced some very childish maps of the Panama Canal, and they were saying, 'Do you know what these are?' Dad looked at them and said, 'They look like maps of the Panama Canal.' 'How did you get them?' he was asked. 'Well, my kids drew these maps in school.' The maps were illustrations of how the locks worked. The questioner said, 'This shows how you were really trying to disguise a nefarious plot to blow up the Panama Canal.' Dad said, 'Of course not; I had no such intention.' 'Well, prove that you didn't have such an intention,' they replied." Classified as "disloyal" on the basis of this colloquy and his prewar decoration by the Japanese government, Masuo Yasui remained in detention until 1945.¹⁶

Within two weeks of Min Yasui's return from Missoula to Portland, President Roosevelt signed Executive Order 9066. "A lot of rumors were flying back and forth," Yasui recalled. "They were going to take the Nisei, they were not going to take the Nisei, they were going to draft everybody and put them into labor camps, all sorts of rumors." Hoping even before the curfew and the first evacuation orders to find a legal means to block internment, Yasui consulted Earl F. Bernard, a leading Portland lawyer and at the time only a casual acquaintance. Bernard, a stolid and conservative lawyer in his early fifties, advised

Yasui that no challenge was possible until the government issued orders backed with criminal penalties. However, Bernard did offer to represent Yasui in the event that he later raised a challenge to the anticipated orders.

Never shy about approaching those in authority, Yasui also met with Frank Nash, a Portland FBI agent and a former law school classmate, and with Carl Donaugh, the local United States attorney. "We had a lot of discussions about what the government could do and could not do," Yasui recalled of these meetings. "I said to Donaugh, 'Look, if this ever happens, we're going to start a test case on this.' " Meeting with fellow Nisei in Portland, Yasui plotted a strategy to find an appealing test case. "We were going to find a Nisei who'd served in the Army and had an honorable discharge, with two or three little kids, and we thought that would be an ideal test case. So I talked to my friends, but none of them were willing to undertake it. I had a few bucks, so I said, 'Look, I'll put up the money, you guys be the guinea pigs.' But it's hard to tear yourself away from your family and friends. I knew I was not an ideal test case, but somebody had to do it." ¹⁷

Yasui did not wait for the evacuation orders he felt were inevitable. Reports in the newspapers that a curfew would begin on the night of March 28 impelled him to resist. The decision to violate the curfew and to court arrest stemmed in part from Yasui's resentment at the internment of his father and his rejection by the Army. He had no quarrel with the curfew order on general principle, or with one applied only to aliens. "But Military Order Number 3 applied to all persons of Japanese ancestry. I said, 'There the general is wrong, because it makes distinctions between citizens on the basis of ancestry.' That order infringed on my rights as a citizen." ¹⁸

Yasui wasted no time in offering himself as a test case. "I had my secretary call the police on March 28th, a Saturday night, and report that 'There's a Japanese walking up and down the streets, arrest him.' I had an awful time getting arrested. I was getting tired walking around town, and I approached a policeman at eleven o'clock at night. 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.' I actually had to go down to the Second Avenue police station and talk to the sergeant and tell him what I wanted to do. He said, 'Sure, we'll oblige you.' So they threw me in the drunk tank until Monday morning, which was a miserable experience." In his eagerness to institute a test case, Yasui forgot that persons arrested on Friday and Saturday nights languished in the lockup

over the weekend. He remained behind bars until Earl Bernard arrived on Monday morning to bail him out. ¹⁹

Coming only two weeks after Mike Masaoka had assured the Tolan Committee that Japanese Americans were willing to "move out" on military order, Yasui's curfew challenge precipitated a crisis in the JACL. His role as an apostate JACL member provoked a personal attack from Masaoka, who described Yasui as "a Nisei attorney who worked for the Japanese consulate in Chicago as late as last December 7th, registered with the State Department as a propaganda agent for a foreign government" in a bulletin circulated to all JACL chapters on April 7, 1942. Masaoka was obviously concerned that Yasui's example might prompt other Nisei to resist the Army's curfew and evacuation orders. What especially bothered Masaoka was that Yasui "is 'out' on bail and is said to be circulating a petition among the Portland chapter members demanding that the National Organization take some definite stand on the question of the constitutional rights of the Japanese Americans." ²⁰

Even one resister undercut the JACL's promise to the Tolan Committee that Japanese Americans would "move out" at DeWitt's direction. Masaoka feared that Yasui's act might arouse further public hostility toward the group. "Even though we should win a legal victory," he wrote in the April 7 bulletin, "if the people at large resent our activities, it might have been better either to have lost or not to have attempted a contest." The JACL did "not intend to create any unnecessary excuses for denouncing the Japanese as disloyal and dangerous." Masaoka quoted from a letter to the San Francisco *Examiner* as evidence of such an excuse: "Yasui took advantage of an American education, going to the University of Oregon, and paid that back with the usual treachery." He made it clear that Yasui could not expect support or sympathy from the JACL: "National Headquarters is unalterably opposed to test cases to determine the constitutionality of military regulations at this time." ²¹

Masaoka's effort to brand him as a renegade left Yasui unshaken. His response in this internal polemical battle took the form of a point-by-point rebuttal circulated on April 17. Yasui took care not to criticize those who felt compelled to obey DeWitt's orders: "The National JACL is to be commended on its attitude of cooperation with the Federal Government." He also disclaimed "advocacy of mass violation of the orders of the duly constituted Army authorities." Yasui emphasized that he had acted as an individual in bringing a test case and had no desire to create dissension within the JACL. ²²

Masaoka had urged that Japanese Americans accept a "temporary suspending or sacrificing some of our privileges and rights of citizen-

ship" as a show of wartime patriotism. This appeal failed to budge Yasui, who refused to surrender his constitutional rights as a test of patriotism. If the JACL "is willing to sacrifice certain fundamental rights of citizenship," he asked Masaoka, "then is it not possibly contributing to the destruction of the very fundamental basis of this country?" Yasui rested his challenge to the curfew on the narrowest legal point raised by DeWitt's order: its failure to distinguish between aliens and citizens. When Army orders "place us in a less favorable position than that of an enemy alien," he wrote, "surely there is basis for protest and redress of our grievances." The fact that Yasui had worked for the Japanese government obviously colored the vehemence of his response to Masaoka. It seems clear in retrospect that Yasui's legal test of the curfew stemmed in large part from an eagerness to reclaim and defend his status as an American citizen.²³

Notwithstanding his constitutional challenge to the curfew, Yasui never abandoned his professions of patriotism or his attachment to the Army. Yasui also retained his allegiance to the JACL. Following his conviction for curfew violation and his subsequent internment in the Minadoka, Idaho relocation center, Yasui patched up his quarrel with Mike Masaoka and the JACL. Along with Masaoka's older brother, Joe Grant, Yasui undertook in 1944 to quash the resistance movement to the government's belated decision to require Selective Service registration of the young Japanese Americans in internment camps.

"As part of the JACL program," Yasui recalled, "Joe Grant Masaoka and I decided that it would be wise to talk to these young people in jails and try to have them change their minds." Yasui referred to the fifty-nine young men—all from the Heart Mountain Relocation Center in Wyoming—who had been jailed after refusing to submit to pre-induction draft physicals. Years later, Yasui vividly recounted his visit to the Cheyenne County Jail. "I remember talking to this 18-year-old kid and saying, 'Look, it doesn't do any good to refuse, it will just hurt you and your record.' This kid was gripping the bars with tears streaming down his face. He said, 'The government seized my father, they put him in camps. Who's going to take care of my mother and sister if I go off to war?' I told him, 'You fulfill your obligations, otherwise you're not being true as an American citizen.' He said, 'If the government recognizes my rights, I'll recognize my obligations.' And we said, 'You don't bargain with the government. You fulfill your obligations, and then you demand your rights.'"²⁴

Yasui's recollection of these interviews matches the report he and Joe Grant Masaoka submitted to the Denver JACL office in May 1944. Yasui wrote that the two men hoped to "straighten out these boys" and persuade them to abandon their resistance. He added that "such repu-

diation would have some effect upon the draft-resistance group in the centers, and tend to dissuade others from following the same course of action." Yasui and Masaoka subsequently gave copies of their report to the FBI agent in Denver, who informed J. Edgar Hoover that "their purpose in visiting the Heart Mountain draft delinquents was to ascertain their reasons for refusing to report for the pre-induction physical examinations as ordered."²⁵

On the surface, Yasui's stance in 1942 as a curfew resister seems incompatible with his 1944 efforts to dissuade the jailed draft resisters. A comparison of Yasui's earlier exchange with Mike Masaoka and his later JACL report abounds with ironies. Masaoka had denounced "self-styled martyrs who are willing to be jailed in order that they might fight for the rights of citizenship." Yasui had responded to this denigration of his stand as "unacceptably condescending." Two years later, he wrote condescendingly of the Heart Mountain resisters: "Some display manifestations of a martyr complex, some are sullen and resentful, and in others, traces of self-pity can be discerned." Masaoka had expressed fear that Yasui's act of resistance might erode the last vestiges of public sympathy for the plight of Japanese Americans. "Surely, the American citizen who qualms before the possible criticism of unthinking people is certainly a poor American," Yasui replied scornfully. Two years later, he directed his scorn at the draft resisters. "Boomeranging of good will toward persons of Japanese ancestry," he wrote in 1944, was "seemingly of secondary concern to the boys in jail."²⁶

What appear as contradictions, however, actually help to define Min Yasui's unique role among those who challenged General DeWitt's orders. Distinctions between citizens on the grounds of ancestry offended Yasui's conception of the Constitution. He refused to obey the curfew because it "infringed on my right as a citizen" to be treated without regard to race. The military draft, on the contrary, offered Japanese Americans the chance to fulfill their obligations of citizenship alongside those of other races.²⁷

The motivations of people whose cases reach the Supreme Court and shape constitutional doctrine are sometimes simple, and their acts are often inadvertent. The factors that underlay Min Yasui's curfew challenge were complex, and his act of resistance was deliberate. Yasui emerges from the apparent contradictions of his statements and behavior as a distinctive type of constitutional challenger: the legalist.



More than six weeks passed before Min Yasui was joined by a second challenger to DeWitt's military orders. On the morning of May 16, 1942,

Gordon Kiyoshi Hirabayashi arrived at the FBI office in Seattle, accompanied by a local lawyer, Arthur Barnett. Then a twenty-four-year-old University of Washington senior, Hirabayashi had been required by Civilian Exclusion Order No. 57 to report to the Maryknoll Mission House in Seattle's University District on May 11 to register for evacuation on May 16.

Barnett had earlier called the FBI office to announce that he and Hirabayashi were coming, and the two men were met by Special Agent Francis V. Manion on their arrival. Hirabayashi handed to Manion a neatly typed four-page statement headed "Why I refused to register for evacuation." Phrased in terms that were rooted in his Quaker faith and colored by his exposure to the pains of evacuation, Hirabayashi's statement expressed both anguish and determination: "This order for the mass evacuation of all persons of Japanese descent denies them the right to live. It forces thousands of energetic, law-abiding individuals to exist in a miserable psychological and a horrible physical atmosphere. This order limits to almost full extent the creative expression of those subjected. It kills the desire for a higher life. Hope for the future is exterminated. Human personalities are poisoned."²⁸

The statement went on to objections to evacuation based upon civics-lesson precepts. "Over sixty percent are American citizens," Hirabayashi wrote of his fellow Japanese Americans; yet their rights "are denied on a wholesale scale without due process of law and civil liberties which are theirs." He concluded on a defiant note: "If I were to register and cooperate under those circumstances, I would be giving helpless consent to the denial of practically all of the things which give me incentive to live. I must maintain my Christian principles. I consider it my duty to maintain the democratic standards for which this nation lives. Therefore, I must refuse this order for evacuation."²⁹

Special Agent Manion read through the statement, but did not tell the serious young man that the FBI already had a copy. The day before, running to catch a bus, Hirabayashi had dropped a copy on the sidewalk in front of the Sears Roebuck store; the woman who picked it up promptly called the FBI, which dispatched an agent to collect the copy. While Hirabayashi and Barnett waited in the FBI office, Manion conferred with Assistant U.S. Attorney Gerald Shucklin, who advised him to give Hirabayashi a chance to register for evacuation. Manion then drove with Hirabayashi to the Maryknoll Mission House, where the Army officer in charge offered him the registration forms. When Hirabayashi refused to complete them, Manion called Shucklin and was told to file a complaint for violation of the evacuation order. After returning to the FBI office, Manion completed the necessary paperwork and then took his charge to the nearby King County Jail.³⁰

The next day, Hirabayashi was visited in jail by Captain M. A. Ravisto, adjutant of the Wartime Civil Control Administration in Seattle. Ravisto's effort to change Hirabayashi's mind proved futile. Three days later, on May 20, Hirabayashi appeared before United States Commissioner Harry Westfall for a preliminary hearing on the evacuation violation charge. "Subject admitted his failure to comply with the Exclusion Order and was bound over to the Grand Jury under bond of \$5,000," Manion reported to FBI headquarters in Washington. The setting of bail was academic, since Commissioner Westfall conditioned Hirabayashi's release from jail on his transfer to the Puyallup fairgrounds near Tacoma, where his fellow Japanese Americans were being held. Despite this chance to join his family and friends, Hirabayashi turned down the offer on principle and remained behind bars in the King County Jail.³¹

Unlike Min Yasui, who had been raised in a thoroughly "American" setting and who welcomed military training, Gordon Hirabayashi grew up in an unconventional family. Born in 1918 in Auburn, a town twenty miles south of Seattle where his father ran a roadside fruit market, Hirabayashi absorbed the pacifism of his parents, Japanese natives who belonged to a sect called "Friends of the World." Similar in organizational form and beliefs to the Quakers, of which it was a Japanese offshoot, this group worshipped without ministers and rejected military service and war. Eager for contact with young people outside the small Japanese American community in his home town, Hirabayashi served as president of the nondenominational Auburn Christian Fellowship during his high school years.³²

When he entered the University of Washington in Seattle in 1937, Hirabayashi became active in the student religious and social-action groups that contended with the dominant fraternity and sorority atmosphere of the conservative campus. He assumed a leadership role in the student YMCA and the Japanese Student's Club, and also joined the Seattle chapter of the Japanese American Citizens League. Shopping around for a religious home, Hirabayashi and his roommate, Bill Makino, attended in turn the University Temple ("because they had an excellent choir"), the Unitarian Church, and finally the University Quaker Meeting. "We liked that setting," he recalled. "We found ourselves gravitating over there more frequently, and after a while we weren't shopping around."³³

As a YMCA officer, Hirabayashi traveled to New York City in the summer of 1940 to attend the "President's School" held jointly at Columbia University and the affiliated Union Theological Seminary. Here he was exposed in seminars and discussions to the social activism and pacifism preached by A. J. Muste, Evan Thomas (brother of Socialist

Party leader Norman Thomas), and John Nevin Sayre, all members of the pacifist Fellowship of Reconciliation (FOR). This experience proved to be a turning point in the young student's life. "I guess I was ready for that philosophy," Hirabayashi later said. "It all made sense, and the fact that my parents belonged to this non-conformist, non-church Christian group from Japan made these things at home to me." Hirabayashi joined the FOR, which advocated nonviolent but militant resistance to war and military service, during his summer in New York. On his return to Seattle, he registered with his local draft board as a conscientious objector and was granted that status without objection.³⁴

Precarious family finances had forced Hirabayashi to alternate quarters of study at the University with work as a houseboy and farmhand during his first two years of school. At the age of twenty-four, he had just begun his senior year when the curfew on Japanese Americans became effective in March 1942. Hirabayashi was then living with a dozen other students in a dormitory at the campus YMCA. The issuance of the first Civilian Exclusion Order on March 29, which required the evacuation of the Japanese American residents of nearby Bainbridge Island, prompted Hirabayashi to drop out of school. "I knew I wasn't going to be around very long," he recalled, "so I just didn't register for the spring quarter and volunteered with the fledgling American Friends Service Committee [AFSC] in Seattle." Headquartered in Philadelphia, the AFSC was the social-service branch of the Quakers. Working with AFSC director Floyd Schmoie, Hirabayashi helped Japanese American families subject to exclusion orders in finding storage space for their furniture and in transporting them to the Puyallup Fairgrounds. His family had not yet been ordered to the assembly center, but Hirabayashi felt anguish at the plight of those he helped to dispose of their household goods and pets and whom he drove to Puyallup center. "I fully expected that when the University District deadline came up I would be joining them," he later said, "and those that saw me waving goodbye to them all expected to see me within a few weeks."³⁵

Like all Japanese Americans, Hirabayashi had been subject to General DeWitt's curfew order since March 28, 1942. He obeyed the curfew until the evening of May 4, unaware of Min Yasui's challenge to it more than a month before. "I expected like every citizen to obey the law, and I did," he recalled. "There were twelve of us living in the YMCA dorm, and they all became my volunteer timekeepers—'Hey, it's five minutes to eight, Gordy'—and I'd dash back from the library or the coffeeshop. One of the times I stopped and said, 'Why the hell am I running back? Am I an American or not? Why am I running back and nobody else is?'"³⁶

Hirabayashi began keeping a diary of his activities on May 4, when he first broke the curfew. His friend Helen Blom had come to the YMCA dormitory that night to return his raincoat. "Helen lives one half block west of Roosevelt—the 'line that mustn't be crossed,'" his first entry read. "Though it was 8 P.M. I walked over to the line and back with her. Peculiar, but I received a lift—perhaps it is a release—when I consciously break the silly old curfew."³⁷

Gordon and Bill Makino made dozens of trips to the Puyallup fairgrounds in the course of their AFSC work. Hirabayashi's diary recorded his revulsion at conditions in the center. "All morning Bill and I hauled baggage to the pick up places," he wrote on May 9. "Gosh!—something seems wrong there; helping people to go behind barbed wires and flimsy shacks, etc. What a mixed-up life this is—the American way. Went over to the Schmoes with Bill and had a waffle and little pigs dinner. Stayed over in spite of curfew regulations."³⁸

During the weeks that preceded the order to evacuate the University District, Hirabayashi and Makino talked for hours about a joint stand against evacuation. Both young men encountered opposition from their parents. Hirabayashi later recounted these arguments: "My mother said, 'I know you're right, I agree with you and I admire this stand of yours. But we don't know if we'll ever see each other again. Why stick to a principle? Stick with us.' She used tears and everything, but I couldn't do it. Dad was physically able, so I didn't have that worry. But Bill was the only son of parents who were at least ten years older than my parents and this pressure was very strong. I didn't want to have someone who would be having remorse all the way through, and I figured we were going to have serious problems. So I told him, 'You should think this thing through very carefully, and if there's any way you could persuade yourself to go with your family you should do that. You should come with me only if you can't go and you have to object. Then I welcome you.' He thought about it and decided he'd just have to stick with his family."³⁹

Before he made a final decision to resist, Hirabayashi sought legal advice from Arthur Barnett, a thirty-five-year-old lawyer and fellow member of the Friends Meeting. Word of his stand also reached Mary Farquharson, a lawyer who represented the University District in the state senate. Although not a Quaker, her efforts on behalf of interned Japanese Americans kept her in touch with Arthur Barnett. She was also a member of the small local chapter of the American Civil Liberties Union, which had decided to back any of the Japanese Americans who might refuse to report for evacuation.

"Mary Farquharson came to see me," Hirabayashi recalled. "She

said, 'I'm checking up on a rumor that you are intending to object to evacuation; is that true?' I said, 'Yes, I've already made a stand, and I've written a statement.' She said, 'Are you planning to make a test case of this?' 'Well, I know that's a possibility,' I said, 'but I don't know very much about law and I don't have any money. I'm making a personal stand. I don't know what's going to happen as a result of it and I've made no plans.' 'If you've made no plans,' she said, 'there's a group here including myself who are very upset about what's happening to our civil liberties and the status of citizenship. We've been looking for a case to object to these things, and we haven't been able to find one. Do you have any objections to a group of us using your case as a vehicle to fight for citizens' rights?'⁴⁰

Hirabayashi was delighted with this offer of support, and Farquharson quickly organized an informal committee to provide legal advice and to raise money for bail in anticipation of his arrest. Arthur Barnett volunteered his legal services, although he suggested that a lawyer more familiar with constitutional issues and with more prestige be recruited to act as trial counsel. Ray Roberts, a former YMCA secretary in China who owned a Chinese goods store in Seattle, offered to act as treasurer and to put up Hirabayashi's bail. Gordon then met several times with Arthur Barnett to discuss the legal steps that lay ahead and to polish the statement he intended to give the FBI.

When he and Barnett arrived at the FBI office on May 16, Hirabayashi intended simply to initiate a test case of the evacuation order. Had he not brought with him a briefcase that contained his incriminating diary, it is unlikely the FBI would have learned of his repeated curfew violations. FBI agent Manion, however, confiscated the briefcase. After filing the complaint charging Hirabayashi with violation of the evacuation order, and taking him to the King County Jail, Manion went through the briefcase and discovered the diary. On May 24, Manion visited Hirabayashi in jail and secured from him a five-page statement admitting three curfew violations from May 4 to May 10. Gordon refused to sign the statement because his lawyer was not present, but Manion turned it over to the U.S. attorney's office. Four days later, after amendment of the initial complaint, the federal grand jury in Seattle returned an indictment that charged Hirabayashi with two violations of Public Law 503, the first for failure to report for evacuation and the second for curfew violation.⁴¹

Legal training and frustrated patriotism underlay Min Yasui's challenge to the curfew. Gordon Hirabayashi came to resistance from a contrasting background of social activism and religious pacifism. Added to the basic moral underpinning of his decision to offer himself as a test

case, however, was a sketchy but real knowledge of the constitutional rights of citizenship. "I knew something of court cases as a student," he later said. "I had read of World War I and the constitutional cases," referring to the trials of Socialist Party leader Eugene V. Debs and other war objectors, "but it wasn't a high priority in forming my decision."⁴²

The report that Manion sent to FBI headquarters of his initial meeting with Hirabayashi accurately recorded the amalgam of these motivations: "He stated . . . 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."⁴³

These forceful words, and the statement that Hirabayashi handed to Manion in the FBI office, bear a remarkable similarity to the letter composed two decades later by Martin Luther King in the Birmingham City Jail. Religious conviction and constitutional concerns are separately powerful. Joined in struggles against discrimination, they lead to acts of legal significance. In expressing through his act of resistance the separate commandments of the Christian and constitutional decalogues, Gordon Hirabayashi exemplified a second type of challenger: the moralist.



The third Japanese American whose violation of DeWitt's orders reached the Supreme Court had not intended to offer himself as the subject of a test case. On the afternoon of May 30, 1942, the police in San Leandro, California, picked up a young man walking down the street with his girlfriend. Under questioning by Lieutenant A. B. Poulsen at the San Leandro police headquarters, the young man produced a draft registration card that identified him as "Clyde Sarah." The suspect claimed to be of Spanish-Hawaiian origin. He had been born in Las Vegas, the suspect told Poulsen, and his parents had been killed in a fire that burned their house to the ground. The young man's story quickly fell apart. He spoke no Spanish, and his draft card had been clumsily altered with ink eradicator.

Poulsen could not persuade the suspect to reveal his name, although he did admit that he was of Japanese descent. His identity came out by chance: "One of the girls who worked in the office seemed to recognize me, and so I finally said who I was." The slim young man told Poulsen that his name was Fred Toyosaburo Korematsu. He was a welder and

had lived until recently in nearby Oakland, where he had been born in 1919, with his Japanese-born parents and three brothers. Korematsu told Poulsen that the other members of his family had reported to the Tanforan assembly center—located south of San Francisco in a converted race track—three weeks earlier on May 9. This was the effective date of Exclusion Order No. 34, to which all Japanese Americans who lived in Oakland and San Leandro were subject.⁴⁴

The San Leandro police apprehended Korematsu on a Saturday afternoon and transferred him the following day to the Alameda County Jail in Oakland. Lieutenant Poulsen had notified the San Francisco FBI office of Korematsu's arrest, and he was intensively questioned on May 31 and June 1 by Special Agent Oliver T. Mansfield. The FBI agent encountered a cooperative prisoner who no longer held back the details of his life or of his violation. After graduation from Oakland High School in 1938, Korematsu told Mansfield, he entered Los Angeles City College but dropped out after only one month for financial reasons. He then attended the Master School of Welding in Oakland and worked as a shipyard welder following this training. The Navy turned down his attempt to volunteer for service in June 1941; the next month he was classified 4-F by his draft board because of gastric ulcers. Korematsu had belonged to the Boiler Makers Union, which expelled its members of Japanese descent after the Pearl Harbor attack. He lost his shipyard job as a result and had worked before his evacuation order at a series of short-term welding jobs.⁴⁵

After taking down this history, Mansfield turned the questioning to the circumstances of Korematsu's arrest. The San Leandro police had given their prisoner no hint of how he had been spotted on the street. Korematsu was convinced that his arrest was not accidental. "The way I got caught," he later said, "was that I went into a drugstore to get some cigarettes and the pharmacist recognized me. He was the one who called the police; otherwise I don't think I would have been recognized."⁴⁶

What gave Korematsu confidence that he would not be recognized in San Leandro as a Japanese American, three weeks after the evacuation deadline? Mansfield's initial report to FBI headquarters illustrated why this confidence was misplaced. The report described Korematsu as a member of the "yellow race" and included this observation: "Scars or marks—Cut scar on the forehead, lump between eyebrows on nose." Asked about these recent scars, Korematsu confessed that he had undergone plastic surgery in an effort to conceal his racial identity.⁴⁷

This is the statement that Korematsu dictated to Mansfield the day after his arrest to explain why he had tried to alter his appearance: "I

am of Japanese ancestry. I have lived all my life in Oakland . . . with my folks until four weeks before we had to evacuate. Then I left home telling them I was going to Nevada. Then instead 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. Between the time I left home and the date before evacuation I lived 2 wks in San Francisco during an operation on my face and 2 wks in Oakland with a Friend. 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."⁴⁸

Under subsequent questioning by FBI agent G. E. Goodwin, Korematsu gave a fuller account of his plastic surgery. About a month before the May 9 evacuation order, he said, he had noticed an advertisement in the San Francisco *Examiner* placed by a Dr. Masten, offering facial operations at low prices. According to Goodwin, Korematsu "discussed the matter with his fiancé, Ida Boitano, and they decided that if he had the operation performed, it might be possible for them to go to Arizona and get married without anyone suspecting that subject was Japanese. He continually reiterated that he feared violence should anyone discover that he, a Japanese, was married to an American girl." When he visited Masten's office, the doctor asked no questions and offered to perform plastic surgery on his eyes and nose for \$300. Korematsu replied that he could pay only \$100, and Masten "agreed this to be payment in full."⁴⁹

FBI agents quickly located and interviewed Dr. Bennett B. Masten at his office in downtown San Francisco and reported that the elderly physician was "quite cooperative." An unidentified "confidential source"—most likely an official of the local medical society—had earlier told the agents that Dr. Masten "engages in various unethical practices" and was considered "entirely untrustworthy." The FBI informant added that "he has had numerous complaints that Masten's work was highly unsatisfactory but that he was unable to take any action on such a matter." Armed with this knowledge and with derogatory reports from a San Francisco credit-reporting agency, FBI agents paid a visit to Dr. Masten.⁵⁰

The agents reported that Masten told them that Korematsu "first came to his office on March 4, 1942, and stated that he wanted an operation on his facial characteristics and had seen the doctor's card in a San Francisco paper." Korematsu had explained to Masten "that he was American-born of Japanese parents and that he was married to an American girl. He desired to have his Oriental facial features changed so that he and his wife would not be subjected to comment and embar-

rassment." Masten informed the agents that he had explained to Korematsu "that he could build up his nose and remove the folds from the inner corner of his upper eyelids but that he could not make the subject look like an American." On March 18, Masten performed an operation on Korematsu's nose, for which he received \$75. Six days later, he operated on Korematsu's eyelids and charged him an additional \$25. Masten did not charge his patient for removing the final dressings on March 30.⁵¹

FBI agents also questioned Ida Boitano, who expressed remorse about her relationship with Fred Korematsu. "She said that she was originally engaged to subject and had intended to marry him," the agents reported, "but that she now realized that such a marriage was impossible and that she had made a big mistake, particularly after the law regarding evacuation went into effect." The young woman, who worked in a San Leandro biscuit factory, told the agents that she had met Korematsu during a trip to the mountains in 1939. Korematsu had later visited Ida to take piano lessons from her. Ida's parents objected to these visits, and the two young people had continued their budding romance away from the Boitano residence.⁵²

Korematsu's decision to undergo plastic surgery had led to conflict between the young couple, the FBI agents reported. Ida "tried to talk the subject out of having an operation performed," they wrote, "because she feared he would get into some trouble with authorities over this." However, Korematsu "continually assured her that if he was unable to go to Arizona with her and marry her that he would surrender himself for evacuation." She was now sorry, Ida assured the FBI agents, "that she did not report subject to proper authorities when he refused to give himself up." The engagement was definitely over, the agents reported dryly: "Miss Boitano stated that subject had recently written her a personal letter from Tanforan and that she had answered him telling him not to write her anymore."⁵³

Fred Korematsu was not the only person of Japanese ancestry picked up in the evacuation dragnet. FBI records show that local police arrested nine other Japanese Americans in the San Francisco area and six in Sacramento. The day after Korematsu's arrest in San Leandro, the San Francisco police found Koji Kurokawa in the basement of the house where he worked as a houseboy. Kurokawa had hidden out, sneaking upstairs at night to find food, for three weeks before his apprehension. Food had run out and Kurokawa was weak from hunger when his employer discovered him and called the police. Taken to the hospital before he was sent to jail, Kurokawa told the police he had decided on May 9 not to report for evacuation. "I am an American citizen," he

explained to a newspaper reporter from his hospital bed. John Ura, who was then a college student in Atlanta, had been arrested when he returned to San Francisco to pick up his typewriter.⁵⁴

A few days after their arrests, these three young men received a visit from Ernest Besig, a lawyer who directed the San Francisco office of the American Civil Liberties Union. Besig had learned of the arrests from newspaper reports, and came to the San Francisco County Jail—Korematsu's fourth stop behind bars—looking for a test case volunteer. Koji Kurokawa and John Ura both met briefly with Besig and politely declined his offer of legal assistance. The two men later pleaded guilty to violations of Public Law 503 and were sentenced to short terms at the Federal Prison Camp in Dupont, Washington.⁵⁵

Besig was surprised to find a willing client in Fred Korematsu. The ACLU official knew from press accounts of his arrest that Korematsu had undergone plastic surgery, and he encountered a shy and reticent young man. Outlining the legal steps that lay ahead, Besig made clear that chances of ultimate victory were slim. Wartime hysteria, prejudice against Japanese Americans and judicial reluctance to upset military decisions all made a challenge to General DeWitt's orders an uphill battle. Besig also warned Korematsu that he would be exposed to the glare of publicity, and that the press would undoubtedly focus on his altered features. This blunt advice failed to deter Korematsu, who assured Besig he was willing to endure public scrutiny and to pursue his challenge to the Supreme Court.⁵⁶

On the surface, Korematsu seemed an unlikely candidate for a test case. He had neither the legal training of Min Yasui nor the background of religious and social activism that motivated Gordon Hirabayashi. From the time of his arrest to the present, accounts of his case have uniformly portrayed Korematsu as a young man impelled by romance alone, and whose effort to change his features was a bizarre response to DeWitt's exclusion order. The decision of the Supreme Court to uphold Korematsu's conviction reflected, at least in part, these assumptions. "After notice of his proposed exclusion," Justice Hugo Black wrote in the first draft of the Court's opinion, Korematsu "moved from his home to another place in Oakland" and had "an operation on his face" in order to "conceal his identity as a person of Japanese ancestry."⁵⁷

Black had second thoughts about the propriety of these personal references and removed them from his final opinion. However, they show that Black had misread the record in the case. The FBI reported accurately that Korematsu had moved from his home and had undergone plastic surgery several weeks before the exclusion order was issued. Korematsu had first intended to take advantage of DeWitt's short-lived

offer of "voluntary" migration from the West Coast and had altered his features so that he and Ida Boitano could move "to some spot in the Middle West where they could live as normal people." It is unlikely that Black's errors in chronology affected the Court's decision in the case, but they certainly reflected an error in judgment about Korematsu's motivation.⁵⁸

Min Yasui and Gordon Hirabayashi both turned themselves in for arrest and intended from the outset of their cases to raise constitutional challenges to DeWitt's orders. Fred Korematsu, in contrast, hoped to evade the exclusion order and seemed to be motivated solely by personal interest. The ties of romance, depleted finances, and the naïve belief that he could escape detection as a Japanese American were among the reasons he remained behind and risked arrest. These factors help to explain why Korematsu failed to report for evacuation. They offer little help, however, in explaining the quiet but firm determination that Ernest Besig discovered in his first jailhouse visit with Korematsu. There is considerable evidence, in fact, that this shy young man shared with Yasui and Hirabayashi an equal devotion to constitutional principle in offering himself as a test case challenger.

FBI records provide part of this evidence. According to Special Agent Goodwin, Korematsu "stated that he believed that the statute under which he is imprisoned was wrong . . . and that he intended to fight the case even before being approached by the Civil Liberties Union." This interview took place after Korematsu's transfer from jail to the Tanforan assembly center, where he finally joined his parents and three brothers. Before he left his family's home early in March 1942, however, Fred had spent hours in debate over the impending evacuation with his eldest brother, Hiroshi. As chairman of the Committee on Alien Resettlement of the San Francisco YMCA, Hi Korematsu had worked before the evacuation and internment to mitigate its impact on Japanese Americans. On February 20, 1942, the day that newspapers reported President Roosevelt's approval of the evacuation program, Hi sent a letter to Attorney General Biddle expressing the YMCA's concern about the "growing critical problem of caring for the dispossessed aliens" already held in Justice Department camps. Fred and Hi differed in their individual responses to DeWitt's exclusion order, but the two brothers had discussed their obligations at length before their temporary separation.⁵⁹

After his arrival at Tanforan, where he had been sent to await trial, Fred resumed his debate with Hi over the effect of his test case on the interned Japanese Americans. "My older brother arranged a meeting in Tanforan," Fred recalled. "I asked whether I should go ahead and fight the case or not. Some people said, 'We're in here now, why make it

worse.' And other people said, 'It's up to you.' They left everything up to me, because I'm fighting the case and they're not. So I decided to go ahead and see the thing through." FBI agents learned of the meeting from an informant on the Tanforan staff. The FBI informant reported that few of those at the meeting offered support to Korematsu "due to the fact that most of them desired to be cooperative with the United States government."⁶⁰

Forced to stand almost alone, Korematsu did not back down from his challenge to internment. During one of Ernest Besig's visits to Tanforan, he handed the ACLU official a statement that expressed his position in words that made up in conviction what they lacked in grammar: "Assembly Camps were for: Dangerous Enemy Aliens and Citizens; These camps have been definitely an imprisonment under armed guard with orders shoot to kill. In order to be imprisoned, these people 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 any fair trial! Many Disloyal Germans and Italians were caught, but they were not all corralled under armed guard like the Japanese—is this a racial issue? If not, the Loyal Citizens want fair trial to prove their loyalty! Also their [*sic*] are many loyal aliens who can prove their loyalty to America, and they must be given fair trial and treatment! Fred Korematsu's Test Case may help."⁶¹

The statement that Korematsu gave to Besig lacked the polish of the one Gordon Hirabayashi had composed, and the young welder could not match Min Yasui in legal sophistication. As a resister, Korematsu more resembled Rosa Parks, the footsore seamstress whose refusal to yield her seat in the "white" section of a city bus sparked the Montgomery, Alabama, bus boycott in 1955. Rosa Parks later explained her decision to risk arrest for her lone protest: "It just happened the driver made a demand and I just didn't feel like obeying his demand." Fred Korematsu later explained his refusal to leave his home in similar terms: "I figured I'd lived here all my life and I was going to stay here."⁶²

Korematsu took a unique path to resistance, one which set him apart from Yasui and Hirabayashi as challengers who had planned their arrests. He shared with them, however, an equal commitment to his rights as an American citizen. In refusing to obey the exclusion order, Fred Korematsu personified a third type of constitutional challenger: the loner.



A fourth Japanese American joined these three young men in bringing a challenge to General DeWitt's orders before the Supreme Court. Mitsuye Endo differed from them, however, not only in sex but in the form

of her challenge. Endo did not test the curfew and exclusion orders that preceded internment, nor did she risk the criminal penalties provided in Public Law 503. Her challenge to internment began after she reported to the Tanforan assembly center and was based on the civil procedure of a habeas corpus petition. Despite a lengthy delay in the lower courts, the petition brought on behalf of Mitsuye Endo eventually forced the Supreme Court to confront the internment issue directly.

Endo's case actually began several months before she reported to Tanforan, and well before the decision to intern Japanese Americans had been made. James Purcell, a thirty-six-year-old San Francisco lawyer, received a telephone call late in January 1942 from his friend, Saburo Kido. The two lawyers had worked together on earlier cases that involved Japanese American clients. Kido had called Purcell from Sacramento, the state capital, where he had gone in response to rumors of an impending purge of state employees of Japanese ancestry.⁶³

Kido had found a state of near-panic among the civil servants with whom he met in Sacramento. They had suddenly been ordered by the State Personnel Board to complete lengthy questionnaires that probed their past and present activities in detail. Despite the fact that all the affected workers were American-born citizens, the questionnaire seemed to be predicated on the assumption that they were citizens of Japan under that country's "dual nationality" law. The forms asked for details about past visits to Japan, knowledge of the Japanese language, and membership in organizations with ties to Japan. A firm statement by California attorney general Earl Warren that dismissals on the basis of race would be illegal had failed to deter the personnel board. News reports of a resolution of the California state senate calling for the firing of the state's Nisei employees added to their concern.⁶⁴

Kido met with the apprehensive state workers both as a lawyer and as president of the Japanese American Citizens League, and assured them that the JACL would provide legal support. Until the personnel board actually moved to dismiss any of the Nisei, he added, informal efforts to block the anticipated firings offered the only avenue of redress. Assuming that a purge was imminent, Kido decided to recruit a lawyer who was not of Japanese ancestry, with the hope of deflecting prejudice at personnel board hearings and in the courts. After he failed in repeated efforts to enlist a lawyer from one of the well-connected San Francisco firms, he approached James Purcell, who practiced in a two-man office. Purcell agreed to take the assignment without fee and soon traveled to Sacramento, where he advised a group of Nisei state employees to hold tight while he tried to convince members of the personnel board to rescind their dismissal efforts.⁶⁵

Against a background of increasing pressure for mass evacuation, Purcell was given a cold shoulder by the personnel board. Days after President Roosevelt signed Executive Order 9066 on February 19, Nisei employees were "advised" to stay home from work, although they were not formally dismissed. On April 2, with the evacuation program underway, the personnel board notified these employees of their immediate suspension and that charges would soon be filed against them. Wayne Miller, secretary of the personnel board, sent to each Nisei employee on April 13 an identical seven-page statement of charges. Cast in the form of an indictment, the board's statement alleged "failure of good behavior, fraud in securing employment, incompetency, inefficiency, and acts incompatible with and inimical to the public service" as grounds for dismissal.⁶⁶

All of the charged Nisei employees were native-born American citizens, a requirement of California law. Each was nonetheless first charged with being "a citizen of the Empire of Japan, and a subject of the Emperor of Japan." Each "defendant" in the dismissal proceedings was additionally charged with the ability to "read and write the Japanese language," having attended "a Japanese school conducted by the officials of the Buddhist Church," and with being "a member and officer of certain Japanese organizations" which were "violently opposed to the Democratic form of Government of the United States and to its principles." The necessary exposure of the public to state employees of Japanese descent, claimed the personnel board, had "created discord, hostility, unfriendliness, opposition, antagonism, disharmony [and] truculency. . . ."⁶⁷

The patent absurdity of such broadside charges encouraged Purcell to believe that "we'd have no difficulty meeting the charges as they were originally filed." He and Kido quickly began work on a suit to challenge the dismissals, which the two lawyers intended to file in a state court. Their effort was sidetracked, however, by the rapid pace of General DeWitt's exclusion orders. Before Purcell completed the complaint he planned to file on behalf of his new clients, they had been forced by DeWitt's orders to report to assembly centers along with all the other Japanese Americans who lived in California.⁶⁸

Faced with this situation, Purcell visited those of his clients who were held in the Tanforan assembly center, located in a converted race-track near San Francisco. The conditions under which his clients were held appalled Purcell and sparked his sensitivity to injustice. "I grew up in Folsom prison," he later said. "My father was a guard there. I know a prison when I see it, and Tanforan was a prison with watch towers and guns." The Army staff at Tanforan required Purcell to meet

with his clients in their living quarters rather than in an office. "They'd put a family in a stall big enough for one horse, with whitewash over the manure," he recalled. "Guards with machine guns stood at the gates. I couldn't understand why innocent citizens were being treated this way."⁶⁹

Purcell returned to his San Francisco office after these meetings determined to find an interned state employee willing to challenge his or her detention in Tanforan. With his clients now under Army control, Purcell shifted his legal strategy. Aware that a challenge to dismissal of the Nisei state workers would most likely be dismissed quickly by a state court, Purcell now hoped to find an interned state employee on whose behalf he could file a habeas corpus petition in federal court. The ground for such a petition would be that unlawful detention by the Army had deprived a state employee of the right to report for work. In pursuing this strategy, Purcell put together his own questionnaire, closely modeled on the form circulated by the state personnel board. He asked more than a hundred interned state workers whether they could read or write the Japanese language, had ever been to Japan, considered themselves dual citizens under Japanese law, subscribed to Japanese language newspapers, or belonged to Japanese clubs and organizations.

Although he had no specific client in mind, Purcell scrutinized the completed questionnaires with a careful eye. He finally picked out Mitsuye Endo as a "perfect type" of plaintiff for a habeas corpus petition. A twenty-two-year-old clerical worker in the California Department of Motor Vehicles in Sacramento, Endo had been raised as a Methodist, did not speak or read Japanese, and had never visited Japan. Best of all, she had a brother serving in the Army. Purcell had not previously met with Mitsuye Endo and secured permission to file suit on her behalf by correspondence. On July 12, 1942, Purcell filed a habeas corpus petition with the federal district court in San Francisco under the caption of *Endo v. Eisenhower*, asking the court to require Milton Eisenhower, as director of the War Relocation Authority and as the person responsible for her detention, to show cause why Mitsuye Endo should not be released from internment.⁷⁰

In a way, Mitsuye Endo resembled the "picture brides" who were picked from photo albums and sent from Japan to marry earlier immigrants to the United States. Purcell met his client only once during the entire course of her case, during an interrogation conducted by WRA solicitor Philip Glick, who offered to release her from internment in return for an agreement that she would not return to the "restricted area" of the West Coast, which included all of California. Despite this offer to escape from internment, made as part of the government's effort

to avoid a Supreme Court test of its powers to detain Japanese Americans, Endo refused to abandon her legal challenge and remained behind barbed wire for another two years.⁷¹

Aside from this brief meeting with the lawyers on both sides of her case, Endo remained an anonymous litigant. She never appeared in court during the judicial proceedings and disappeared from public view after the Supreme Court ruled on her case. In this respect, Mitsuye Endo exemplified a unique type of constitutional challenger: the recruit.



Purcell's action in filing the habeas corpus petition completed the roster of cases that would reach the Supreme Court as tests of the three stages of the internment program: curfew, evacuation, and detention. Behind the "masks of the law" that concealed them from the high court, the four young Japanese Americans who brought these test cases emerge as individuals who differed markedly in background and motivation.

Much like runners who complete the first leg of a relay race, the four challengers left the track after they passed the baton to their lawyers for the subsequent laps through the courts. Although the three criminal defendants testified at their perfunctory trials and appeared for sentencing, they then became, like Mitsuye Endo, simply names on legal briefs and opinions. In the legal battles recounted in the following chapters of this book, these four challengers—and the vastly larger group of Japanese Americans confined in internment camps—remained as mute observers of the legal process.