TO: ACLU Board 2/28/87
FROM: Sam Walker
RE: For the Record

During the January Board debate on policy 527(b) several Board members referred to the ACLU's role in the World War II Japanese-American internment cases. Because most of the statements were either misleading or incorrect (and because yet another book with the same misinformation has just appeared), I thought it worthwhile to set the record straight.

The ACLU was the only organization that took any steps to challenge the government's actions against the Japanese-Americans. While some religious organizations deplored the program and provided humanitarian assistance, they did nothing to oppose it. Even the Japanese-American Citizens League urged its members to cooperate with the evacuation.

At its first meeting after Roosevelt issued Executive Order 9066, the ACLU Board sent a letter of protest to the President and voted to seek a court test. Roger Baldwin asked the ACLU affiliates and contacts on the west coast to identify potential plaintiffs. Because of the JACL's policy of cooperating with the government, few came forward. In the end, only twelve individuals defied the government. Four of those cases reached the Supreme Court, with the ACLU participating in two: Hirabayashi and Korematsu.

After the ACLU representatives in Seattle and San Francisco had made commitments to Gordon Hirabayashi and Fred Korematsu, some members of the ACLU Board forced a reconsideration of the whole issue. They represented a curious coalition of conservatives, self-styled pragmatic liberals, and leftists who, for different reasons, did not want the ACLU to challenge the authority of the Commander-in-Chief during wartime. In the ensuing referendum, the ACLU National Committee approved by a 2-1 margin the less principled of two statements. It rejected a statement opposing in principle the right of the President to declare war zones and remove citizens. Instead, it approved a policy that conceded the President's right to declare war zones and remove citizens in principle, but only under specified conditions. Removals had to be directly related to military necessity and be carried out by civilian authorities. There could be no overly broad categories of persons to be removed and persons had to be granted individual hearings. The policy thus provided at least four grounds for a court test and the ACLU pursued its challenges.

11. Civil Rights – Japanese American Detention – Hirabayashi

A dispute with the Northern California ACLU immediately arose over the question of what issues could be raised in any brief with the ACLU's name on it. Northern California felt bound by its prior commitment to Fred Korematsu which included a test of the Constitutionality of the President's Order itself. To finesse the problem, Baldwin suggested creating separate defense committees which could raise issues outside of ACLU policy. The Seattle ACLU accepted this arrangement in Hirabayashi's case but Northern California refused. The dispute soon escalated and embraced a number of different issues. Northern California had earlier opposed the ACLU 1940 anti-totalitarian resolution and, within months, would oppose the national's policy on another important wartime issue. Once Korematsu's case reached the courts, serious questions were raised about the competence of Wayne Collins, the Northern California ACLU attorney. The dispute became extremely personal as Baldwin, A. L. Wirin and others tried to maneuver Collins out of case.

Two myths emerged out of this conflict. The first is that the national ACLU "did nothing" to fight the internment of the Japanese-Americans. While the ACLU did adopt the weaker of two policy statements, it continued to pursue the two court cases. Roger Baldwin handled virtually all of the fund-raising while Osmond Fraenkel supervised the briefs for the Supreme Court appeals. Fraenkel's brief in <u>Hirabayashi</u> argued two points: the curfew exceeded the intent of the President's Order and it was an unconstitutional form of racial discrimination. Charles Horsky's brief in <u>Korematsu</u> reiterated both these points and linked the evacuation to the even more constitutionally suspect detention.

The dispute with the Northern California ACLU turned on the question of what issues could be raised in briefs filed in the ACLU's name. It was never a dispute over whether to challenge the internment program at all. It is worth noting that both the executive committee and the general membership of the Northern California ACLU voted to <u>not</u> file a court challenge. The membership vote was 100 to 91. Executive Director Ernest Besig simply ignored them and did what he thought needed to be done.

A. L. Wirin, attorney for the ACLU of Southern California paid perhaps the highest price of any ACLU official, despite the fact that he could not develop a case of his own. His private law practice depended largely on retainers from the CIO unions in Los Angeles. The CIO leaders told him he had to choose between their pledge to support the war effort or the ACLU's challenge to the President's Order. When he stood by his civil liberties principles, the CIO cut off his retainers and evicted him from his office space. The Lawyers Guild also pledged

itself to the war effort and said not one word in opposition to the internment program. The JACL finally recovered its footing in 1943 and filed an amicus brief in Hirabayashi.

To sum up: the ACLU was the only organization to challenge the Japanese-American internment program. Everyone else, either because of racism or commitment to the war effort, looked the other way or endorsed the forced evacuation and internment of 70,000 American citizens and another 40,000 resident aliens.

The second myth involves the alleged "disaffiliation" of the Northern California ACLU. While Northern California threatened to sever relations with the national ACLU, it never did. (The Chicago Civil Liberties Committee disaffiliated in 1945 but for other reasons.) The conflict arose from the peculiar structure of the ACLU at the time. None of the affiliates had integrated memberships and finances with the national ACLU. Individuals joined one or both organizations as they wished. The process of integration did not begin until 1950. Besig, still angry over the wartime cases, refused to participate in this restructuring of the ACLU and Northern California did not integrate until after his retirement in the early 1970's.

No episode in ACLU history is more misunderstood than the Japanese-American internment cases. With the exception of Peter Irons's Justice at War (1983) virtually all of the published accounts misrepresent the ACLU's role. It is often presented as a "betrayal" of the ACLU's own principles. In fact, the ACLU was the only organization to challenge the internment program. All of the other liberal, left, civil rights and civil liberties organizations saluted the President on this issue. There are three explanations for the persistent misrepresentation of the ACLU's role. First, much of the research has simply been shoddy. Second, as the story has been passed on by oral tradition, there has been a tendency to lose sight of the subtlties. The fact that the national ACLU adopted the weaker of two statments becomes converted into the allegation that it did "nothing." Third, some leading participants, embittered at the national ACLU, have for years given willfully misleading accounts of the story.