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Gordon Hirabayashi v. United States: "This is an American case"[1]

Kathryn A. Bannai[2]

Gordon Hirabayashi was a twenty-four-year-old senior at the University of Washington in the spring of 1942 when he—along with over 110,000 Japanese Americans[3]—was subjected to curfew and ordered to report for removal from the West Coast.[4] He knew that the orders were wrong and that

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[1] This article is based on remarks made on a panel discussion at The 25th Anniversary of the *United States v. Hirabayashi Coram Nobis* Case: Its Meaning Then and Its Relevance Now, a conference hosted by Seattle University School of Law's Fred T. Korematsu Center for Law and Equality. The panel discussion was titled, "The Reopening of *Hirabayashi v. United States*: Reflections by the Legal Team." "This is an American case" was a statement made by Gordon Hirabayashi in proceedings heard before Judge Donald S. Voorhees. Transcript of Record at 75:14–15, Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986) (No. C83-122V).

[2] Kathryn Bannai is the Associate Director of the Office of Employment Equity at Rutgers, The State University of New Jersey. The author is grateful to her sister Lori Bannai, her dear friend Sharon Sakamoto, and her son Sean Miura for their encouragement and support, as well as to the staff of the *Seattle Journal for Social Justice* for their editorial assistance.

[3] The World War II military orders applied to all persons of Japanese ancestry, both citizens and lawful permanent residents of the United States. Two-thirds of those persons were, like Gordon, American citizens by birth; others (their immigrant parents) were prohibited from becoming naturalized citizens by discriminatory laws. In this article, I refer collectively to those subject to the military orders as Japanese Americans. *See* Lorraine K. Bannai, *Introduction: The 25th Anniversary of the* United States v. Hirabayashi Coram Nobis *Case: Its Meaning Then and Its Relevance Now*, 11 SEATTLE J. FOR SOC. JUST. 1, 1 n.2 (2012).

[4] Gordon Hirabayashi was convicted of two counts of violation of Public Law 503, Act of Mar. 21, 1942, ch. 191, 56 Stat. 173 (1942), in the United States District Court for the Western District of Washington on October 20, 1942. Judgment and Sentence, Hirabayashi v. United States, No. 45738 (W.D. Wash. 1942). One count was based on his refusal to report for removal from the West Coast. *Id.* The other count was based on violation of Public Proclamation No. 3, which imposed a curfew on Japanese Americans. *Id.*

he could not comply.[5] On May 13, 1942, he authored a statement in which he objected to the government's exclusion of Japanese Americans en masse from their West Coast homes. In that statement, he went on to explain that maintaining fidelity to his principles compelled him to take a stand, which he memorialized in this declaration: "I consider it my duty to maintain the democratic standards for which this nation lives. Therefore, I must refuse this order for evacuation."[6] With this statement in hand and accompanied by his friend and legal advisor, Arthur Barnett,[7] he presented himself at the local office of the FBI.

Gordon was convicted of failing to comply with the curfew and exclusion orders.[8] In 1943, in one of the most infamous cases in its history, the United States Supreme Court upheld his conviction, holding that the orders issued against Japanese Americans were justified by imminent military necessity.[9]

I. PETITION FOR WRIT OF ERROR CORAM NOBIS

Forty years later, Gordon was given the opportunity to challenge his wartime convictions. Evidence uncovered by Professor Peter Irons and archival researcher Aiko Herzig-Yoshinaga established that, during World War II, the government had suppressed, altered, and destroyed material evidence while it was arguing Gordon's case (as well as Minoru Yasui and Fred Korematsu's cases) before the Supreme Court.[10] With this new

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[5] WASHINGTON COMES OF AGE: THE STATE IN THE NATIONAL EXPERIENCE 24 (David H. Stratton ed., 1992).

[6] PETER H. IRONS, JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES 88 (1993) (quoting Memo, Special Agent in Charge, Seattle, WA, to Director, FBI, May 23, 1942, File 146-42-20, DOJ).

[7] WASHINGTON COMES OF AGE, *supra* note 5, at 26. Gordon described Arthur as a fellow Quaker, personal legal advisor, legal liaison, and member of the wartime Gordon Hirabayashi Defense Committee. *Id.*

[8] Hirabayashi, 320 U.S. 81, 84 (1943).

[9] Gordon appealed his convictions to the Ninth Circuit Court of Appeals, which certified the case to the United States Supreme Court. On June 21, 1943, the Supreme Court upheld the convictions. *Hirabayashi*, 320 U.S. at 81.

[10] For a discussion of the evidence that supported the reopening of Gordon Hirabayashi, Fred Korematsu, and Minoru Yasui's cases, see IRONS, JUSTICE AT WAR, *supra* note 6;

evidence, Gordon had a means to seek vacation of his convictions through the vehicle of a petition for writ of error coram nobis. Gordon readily agreed to challenge his convictions, not only to achieve justice for himself and other Japanese Americans, but also to serve the broader purpose of preventing such occurrences in the future.[11]

A. The Legal Team

I first met Gordon in 1980. I knew of him then as a civil rights icon and was familiar with his case from my studies. I regarded the wartime outcome of Gordon's case as a denial of justice for Gordon and, by extension, for Japanese Americans—including my parents, grandparents, and relatives—who had been incarcerated as a consequence of the race-based exclusion orders. So for me, as a lawyer and a Japanese American, the opportunity to challenge the government's actions against Gordon was of singular

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JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES (Peter H. Irons ed., 1989); ERIC YAMAMOTO ET AL., RACE, RIGHTS AND REPARATION: LAW AND THE JAPANESE AMERICAN INTERNMENT (2001). Irons discovered several documents that led him to contact Gordon, as well as Fred Korematsu, and Minoru Yasui about the possibility of reopening their cases. Interview by Alice Ito and Lorraine Bannai with Peter Irons (Oct. 25, 2000), *available at* www.densho.org; JUSTICE DELAYED, at 4–6. Aiko Herzig-Yoshinaga, a researcher for the Commission on Wartime Relocation and Internment of Civilians, made the critical discovery of General John L. DeWitt's original Final Report; her work was key in gaining redress for Japanese Americans. *See* Josh Getlin, *Redress: One Who Made a Difference*, L.A. TIMES, June 2, 1988, at 1; Marjorie Williams, *The 40-Year War of Aiko Yoshinaga*," WASH. POST, Aug. 4, 1988, at C1.

[11] Gordon's agreement to challenge his convictions is described in JUSTICE DELAYED, *supra* note 10, at 4; Gordon expressed his objectives in bringing his Petition in an affidavit:

> With my Petition for writ of error *coram nobis,* there is now the possibility of having my wartime charges finally vacated. However, in order that this judicial action may serve to reduce the probability that other members of minority groups will be similarly treated, it is important that the unconstitutionality of the laws under which I was convicted and the evidence leading to the vacation of charges be specified.

Affidavit of Gordon K. Hirabayashi in Support of Reply to Government's Response and Motion, Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986) (No. C83-122V).

importance. I felt that it would be a privilege to pursue the litigation and social justice goals of Gordon's case. In 1982, I agreed to serve as lead counsel in Gordon's case.[12]

One of my first jobs was to recruit attorneys who, like me, were willing to commit their time to work on Gordon's case on a pro bono basis. Our team's work began with a core group of four attorneys: Gary Iwamoto, Benson Wong, Jerald Nagae, and me. During the summer of 1982, the team expanded to include Rod Kawakami, Nettie Alvarez, and Richard Ralston. Michael Leong, who began working on the case while still a law student, became a key member of our team. Arthur Barnett, who had stood beside Gordon during World War II, joined us in our effort. As the coram nobis case moved forward, we continued to recruit attorneys to meet both the growing magnitude of the work and our needs for special expertise.[13]

B. Gordon's Case

It was a different time in the practice of law. In the early 1980s, law offices still used carbon sheets and yellow onionskin paper to produce copies of documents created on typewriters. We had limited access to word processing. Making photocopies and placing long distance phone calls was too costly to be frequently utilized. Furthermore, without email or video-conferencing capabilities, team members communicated among themselves and with others by regular mail, by telephone, or in face-to-face meetings. Given the types of work we had to do, meeting frequently became essential.

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[12] In 1980, Gordon and I had gotten to know each other when we collaborated to organize a symposium, which was presented in Seattle.

[13] Gordon's coram nobis legal team also included Jeffrey Beaver, Camden Hall, Daniel Ichinaga, Craig Kobayashi, Diane Narasaki, Karen Narasaki, Sharon Sakamoto, and Roger Shimizu. Many others, especially members of the Korematsu coram nobis team, contributed significantly to Gordon's case and were thus essential parts of the Hirabayashi coram nobis story. While these remarks cannot detail the full scope of those contributions, they have been documented elsewhere. *See, e.g.*, JUSTICE DELAYED, *supra* note 10; Interview, *supra* note 10; Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

Team members attended long meetings and work sessions during the evenings and on weekends, outside the hours of their regular day jobs. We discussed case theory and strategy; analyzed and parsed the legal research; reviewed and classified what seemed to be endless stacks of government documents; and prepared submissions to be filed with the court. Our discussions were collegial, and our decisions were reached through consensus. Outside of meetings and work sessions, we worked on tasks, such as legal research, that could be accomplished individually or in small work groups. Gordon, who resided in Canada, stayed keenly interested in our work and kept in touch with us through correspondence and occasional visits to Seattle.

In addition, the team sought opportunities to educate the Japanese American community and public at large about Gordon's challenge to the wartime military orders. Gordon later observed:

> Democracy is obviously a group effort, but it requires the commitment of individuals. In fact, during struggles for justice and fair play, individual action must be joined by group support or equality before the law will cease to exist.[14]

Gordon acknowledged the importance of the support provided by individuals, the media, and groups during his coram nobis case.[15] One such group was the Committee to Reverse the Japanese American Wartime Cases, which was comprised of Japanese Americans and other individuals and organizations representing a cross-section of the Seattle community. In addition to educating the Seattle-area community about the coram nobis case, it raised funds to pay for litigation costs.[16] Gordon noted, with

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[14] WASHINGTON COMES OF AGE, *supra* note 5, at 38.
[15] *Id.*
[16] Community organizations that were part of the Committee to Reverse the Japanese American Wartime Cases included the American Friends Service Committee, ACLU, American Jewish Committee, Church Council of Greater Seattle, and Seattle Urban League. Financial support was mainly from individuals who contributed ten to twenty dollars each to support Gordon's case.

satisfaction, that his case and "the cases of others in the redress movement" had become "national issues."[17]

C. Judicial Proceedings

On January 31, 1983, we filed a petition for writ of error coram nobis on Gordon's behalf in the United States District Court for the Western District of Washington and welcomed the assignment of the case to Judge Donald S. Voorhees, especially because we knew of his favorable ruling in a major Seattle civil rights case.[18] On October 11, 1983, the government filed papers in the case. The government agreed to vacate Gordon's conviction. But, instead of responding to the misconduct alleged in the petition, it moved to dismiss the petition. The government asserted that there was a lack of "continuing reason" for the court "to convene hearings or make findings about petitioner's allegations of governmental wrongdoing."[19] We opposed the government's motion to dismiss the petition and urged the court to make findings that addressed the substantive claims it raised, including the lack of military necessity justifying the exclusion and curfew orders and the pervasive pattern of misconduct by government officials.[20]

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[17] WASHINGTON COMES OF AGE, *supra* note 5, at 38. Gordon was actively involved in the Seattle movement that sought redress for Japanese Americans who were incarcerated during World War II. *See, e.g.*, ROBERT SADAMU SHIMABUKURO, BORN IN SEATTLE THE CAMPAIGN FOR JAPANESE AMERICAN REDRESS 66 (2001). In a statement submitted to the Commission on Wartime and Relocation of Civilians, Gordon detailed his support for redress for Japanese Americans. Densho Digital Archive, http://archive.densho.org/main.aspx, Densho ID: denshopd-i67-00325 (last visited July 25, 2012).

[18] Washington v. Seattle Sch. Dist. No. 1, 473 F. Supp. 996 (W.D. Wash. 1979), *aff'd*, 458 U.S. 457 (1982) (enjoining the State of Washington from implementing a voter initiative that would have created a barrier to desegregating racially imbalanced schools in the Seattle Public School District).

[19] Government's Response and Motion, Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986) (No. C83-122V).

[20] Reply to Government's Response and Motion, *Hirabayashi*, 627 F. Supp. 1445 (No. C83-122V); *see also* Reply to Government's Supplemental Points and Authorities, *Hirabayashi*, 627 F. Supp. 1445 (No. C83-122V).

Judge Voorhees heard oral argument on the government's motion to dismiss at the United States Courthouse in Seattle on May 18, 1984.[21] The packed courtroom included many members of the Japanese American community who had been forced from their homes as a result of the exclusion orders. Victor Stone, representing the government, argued that the government's motion should be granted because the government had discretion, in effect, to dismiss Gordon's case.[22] He also argued that Gordon's case should be dismissed because of the doctrine of laches (i.e., delay in bringing the petition) and because Gordon suffered no continuing harm as a consequence of his World War II convictions.

In response, I argued that the government could not unilaterally dismiss Gordon's case, that the government's assertion of the doctrine of laches was ill-founded, and that Gordon did suffer continuing harm as a result of his convictions. My argument also addressed the merits of the petition, including the destruction and withholding of crucial evidence contained in General John L. DeWitt's original Final Report and the withholding of federal intelligence reports that undermined the government's World War II claim of military necessity,[23] all of which deprived Gordon of his constitutional rights to a fair trial and appeal. Further, I argued that the court had an opportunity in Gordon's case to deter government officials, including prosecutors, from engaging in similar unlawful conduct that restricts easily identifiable minority groups. Finally, as we had urged in our

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[21] Transcript of Record at 2–97, *Hirabayashi*, 627 F. Supp. 1445 (No. C83-122V).

[22] Transcript of Record at 12–14, *Hirabayashi*, 627 F. Supp. 1445 (No. C83-122V). The government relied on Rule 48(a) of the Federal Rules of Criminal Procedure: "The Attorney General or the United States Attorney may by leave of court file a dismissal of an indictment, information or complaint, and the prosecution shall thereupon terminate. Such a dismissal may not be filed during the trial without leave of the defendant." Fed. R. Crim. P. 48(a).

[23] The Office of Naval Intelligence, the Federal Bureau of Investigation, and the Federal Communications Commission prepared the intelligence reports. For a discussion of the suppressed reports, see Lorraine K. Bannai, *supra* note 3, at 5–7 (2012).

written brief, I requested that Judge Voorhees order an evidentiary hearing on the Petition.[24]

After Gordon presented his own statement to the court, Judge Voorhees denied the government's motion to dismiss and granted our request for an evidentiary hearing on the merits.[25] In the order that followed, Judge Voorhees concluded that a prima facie showing had been made that "evidence essential to [Gordon's] defense at his trial or upon his appeal may have been knowingly suppressed by the government" and, therefore, that Gordon may have been deprived of due process in those proceedings.[26]

With an evidentiary hearing scheduled,[27] the team entered a new phase of litigation that included continued discovery. In October 1984, Rod Kawakami joined me in leading the legal effort and eventually assumed the role of lead counsel in early 1985.[28] Michael Leong, who had become a lawyer by then, assumed the role of coordinator. Under Rod's leadership, the case proceeded to a full evidentiary hearing and eventual appeal, concluding in the vacation of Gordon's wartime convictions and his vindication in the courts.[29]

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[24] Reply to Government's Supplemental Points and Authorities, *supra* note 20. Transcript of Record at 46:3–7, *Hirabayashi*, 627 F. Supp. 1445 (No. C83-122V). (Camden Hall followed me in presenting further argument that supported our positions.)

[25] Transcript of Record at 99:16–24, *Hirabayashi*, 627 F. Supp. 1445 (No. C83-122V).

[26] Order, *Hirabayashi,* 627 F. Supp. 1445 (No. C83-122V). In the May 24, 1984, order, Judge Voorhees stated the following:

> Rule 48(a) provides that the government may dismiss an indictment only by leave of court. In the present case, where petitioner seeks to have his petition considered on its merits, the Court is of the opinion that it is not in the public interest, over the objection of the petitioner, to grant the government's motion to vacate the conviction and dismiss the indictment.

Id.

[27] Order, *Hirabayashi*, 627 F. Supp. 1445 (No. C83-122V). The hearing was scheduled for June 17, 1985. *Id.*

[28] I had given birth to my first child, and my new personal responsibilities restricted my ability to devote the time necessary to continue leading and coordinating the team.

[29] *See* Hirabayashi v. United States, 627 F. Supp. 1445 (W.D. Wash. 1986); Hirabayashi v. United States, 828 F.2d 591 (9th Cir. 1987).

II. REFLECTIONS ON GORDON'S LEGACY

President Obama recently recognized Gordon's "lasting contribution to the life of our Nation" by posthumously awarding him the Presidential Medal of Freedom.[30] The Medal Presentation on May 29, 2012, was accompanied by a citation that reads, in part:

> Gordon Hirabayashi's legacy reminds us that patriotism is rooted not in ethnicity, but in our shared ideals, and his example will forever call on us to defend the liberty of all our citizens.[31]

This well-deserved award, the highest civilian honor, signifies the profound impact of Gordon's principled stand against racism and steadfast pursuit of justice through the courts.

Of course, Gordon's case has had enduring significance for members of the Japanese American community (as have the coram nobis cases of Fred Korematsu and Minoru Yasui). By helping to prove that the forced removal and incarceration of Japanese Americans was based on racism and misrepresentations, Gordon aided in healing the wounds suffered as a result of that experience.

During his coram nobis case, Gordon spoke out about the fragility of the guarantee of civil rights. He hoped that the outcome of his case might have

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[30] *President Obama Names Presidential Medal of Freedom Recipients*, THE WHITE HOUSE OFFICE OF COMMUNICATIONS, Apr. 26, 2012, *available at* 2012 WL 1438252.

[31] Presidential Medal of Freedom (May 29, 2012) (on file with author). The citation reads:

> In his open defiance of discrimination against Japanese Americans during World War II, Gordon Kiyoshi Hirabayashi demanded our Nation live up to its founding principles. Imprisoned for ignoring curfew and refusing to register for internment camps, he took his case to the Supreme Court, which ruled against him in 1943. Refusing to abandon his belief in an America that stands for fundamental human rights, he pursued justice until his conviction was overturned in 1987. Gordon Hirabayashi's legacy reminds us that patriotism is rooted not in ethnicity, but in our shared ideals, and his example will forever call on us to defend the liberty of all our citizens.

Id.

a deterrent effect on the government when, in the future, events give rise to calls to curtail the civil liberties of Americans on the basis of their ancestry or other similar traits. When he addressed the court on May 18, 1984, Gordon pointed to publicly-expressed sentiment that favored interning persons of Iranian ancestry during the hostage crisis in Iran. He continued:

> My case stands for the precedent that it can happen again. This is not only my case. This is not only a Japanese American case. This is an American case. Since the answer to the question, "Can it happen again?" is yes, it is vitally important during relative periods of calm to ensure that "bizarre solutions" have less opportunity to occur again.[32]

In the aftermath of the September 11, 2001, attacks, as I became aware of incidents occurring in my community (located in the New York City metropolitan area), Gordon's admonition regarding the importance of vigilance came to mind. I recall an occasion in which one of my son's friends, a girl of Middle Eastern ancestry and a practicing Muslim, was subject to intimidation by a middle school classmate who cast blame on her for the attacks because of her background. Also, apparently aware that the media carried discussion of the possibility of incarcerating persons on the basis of ancestry and religion, she expressed to my son her fear that she and her family might be incarcerated as Japanese Americans had been during World War II.

Gordon would have been gratified to know how the lessons he taught now resonate with a new generation of young adults as they navigate the challenges of living in a post-9/11 America. For example, in February 2012, at a gathering in Los Angeles to observe the seventieth anniversary of the promulgation of Executive Order 9066,[33] young Japanese American and

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[32] Transcript of Record 75: 12–19, *Hirabayashi*, 627 F. Supp. 1445 (No. C83-122V).

[33] Exec. Order No. 9066, 7 Fed. Reg. 1407 (1942) (authorizing the governmental action that led to the exclusion and incarceration of Japanese Americans).

American Muslim activists paid tribute to Gordon and honored his legacy for its relevance to their own pursuits of social justice.[34]

III. APPRECIATION

For the team of lawyers on Gordon's coram nobis case, the experience of getting to know Gordon left an indelible impression. Among Gordon's many admired attributes, we recall his integrity, humility, and gentle humor. As expressed by team member Daniel Ichinaga, "[w]e are grateful for the great privilege of having played a role in Gordon's case and for the fond memories of our shared journey with him during this part of his life."[35] With heartfelt sorrow, we marked Gordon's passing on January 2, 2012. We will never forget him.

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[34] J.K. Yamamoto, *Defending Our Civil Liberties 70 Years Later*, RAFU SHIMPO, Feb. 23, 2012, http://rafu.com/news/2012/02/defending-civil-liberties-70-years-later/ (covering the Japanese American National Museum's annual Day of Remembrance program, "70 Years After Executive Order 9066: Defending Our Civil Liberties").

[35] Email from Daniel Ichinaga, Member, Hirabayashi coram nobis legal team, to author (May 16, 2012, 13:49 EST) (on file with author).