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What Gordon Hirabayashi Taught Me About Courage[1]

Judge Mary M. Schroeder[2]

I first saw Gordon Hirabayashi on March 2, 1987, when I walked into the courtroom of our Seattle Courthouse for the oral argument of his case seeking a writ of coram nobis to overturn his wartime convictions forty-four years before. I had barely heard of coram nobis, and now the opinion in his case is our leading authority on it.[3] Gordon sat in the courtroom ramrod straight, and the light from the courtroom window seemed to put him in a sort of a halo. I knew it was going to be an historic day. There were all the portents.

The presiding judge of our court, Ted Goodwin of Oregon, was not only a veteran federal judge, he was a veteran of World War II.[4] But for the atomic bomb, in all likelihood he would have died in an invasion of Japan. I thought he would not enter the courtroom with a favorable view of Hirabayashi's case. By rights Ted should have authored the opinion. I have never known whether he gave me the opportunity to write what became the opinion of my career because he liked me, or because he knew by the end of

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[1] This article originates in Judge Mary Schroeder's February 2012 presentation 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.

[2] Judge Mary M. Schroeder is a judge of the United States Court of Appeals for the Ninth Circuit, and served as its Chief Judge for seven years. She is a graduate of Swarthmore College and the University of Chicago Law School. She lives in Phoenix, AZ, and believes she has decided no more memorable case than *Hirabayashi v. United States*.

[3] Hirbayashi v. United States, 828 F.2d 591 (9th Cir. 1987) (according to Westlaw's Key Cite service, as of July 2012, this case has been cited 153 times by both state and federal courts).

[4] PETER P. IRONS, JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES 44 (1989).

the argument that I had two votes for Hirabayashi. In any event, it was a memorable day.

A description of the judges, and what might have been the nature of our views that morning, was memorialized by Peter Irons, with permissible imaginative license, in the introduction to his book, *Justice Delayed*. Irons said this:

> When Victor Stone [lawyer for the United States] walked into the clerk's office that morning and looked at the sheet listing the appellate panel, his face fell. The presiding judge, Alfred T. Goodwin, was a former World War II infantry captain, and a Republican nominee of President Richard Nixon. The other two judges, however, both owed their judicial posts to President Jimmy Carter. . . . Rod Kawakami [Hirabayahi's lawyer], smiled broadly when he looked at the list.[5]

As Irons described it, though I personally cannot remember this part, Kawakami fielded only a few questions and sat down after ten minutes.[6] Irons must have been sitting behind the counsel table, because he says in his book that Stone scribbled a reminder to himself on a legal pad to, "Be low key."[7] The following description by Irons of the government's argument is in accord with what I personally remember.

> [The lawyer for the United States] began his argument by disparaging the case as a "history exercise" that had wasted two weeks of [District] Judge Voorhees's time. If that was true, Judge Schroeder asked, why had the government bothered to appeal? The suggestion that he was wasting the appellate court's time rattled Stone, whose composure soon crumbled. His later interruption of a question from Judge Farris drew a rebuke: "You can't answer my question if you don't let me ask it." Stone's running dispute with Judge Farris over the government's wartime concealment of General DeWitt's racist beliefs prompted another rebuke: This is

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[5] *Id.*
[6] *Id.*
[7] *Id.*

> the only time you get to talk, Mr. Stone, but I get to talk in the conference.[8]

Irons continues his description of the argument:

> Stone once again raised the subject of [some] cables in defending DeWitt, claiming they revealed an "underground network" of Japanese American spies. Stone also reminded the panel that President Ford had labeled the internment a "mistake" in 1976. Judge Schroeder asked why the government had not acted then to vacate the wartime convictions. Stone's answer brought gasps of disbelief from the audience: "We didn't think there was anyone out there who cared."[9]

Irons concludes the description of the argument with this: "When Stone left the podium after forty-five minutes, he looked as if he never wanted to say another word about the internment cases. He never did, to any court."[10] I have at times been asked whether oral argument makes any difference. In this case it did.

There was no appeal to the US Supreme Court. This was very satisfying to me, but it infuriated Gordon, who wanted the government to appeal. He was a fighter. I thought he should stop running for the train after he caught it.

By the time the *Korematsu* and *Hirabayashi* cases hit the courts of the Ninth Circuit in the 1980s, the justice and wisdom of the US Supreme Court's wartime decisions in those cases had been thoroughly trashed by scholars and by history. It was always my view that, by then, the government never wanted to defend the decisions, but had to do so since the decisions originally had been decided by the US Supreme Court.

The government did not appeal Judge Marilyn Patel's decision in the *Korematsu* coram nobis.[11] It was forced to appeal to the Ninth Circuit in the

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[8] *Id.* The conference is the time during which judges confer about how to decide a case.
[9] *Id.*
[10] *Id.* at 45.
[11] Korematsu v. United States, 584 F. Supp. 1406 (N.D. Cal. 1984).

Hirabayashi case because the district court had, in effect, split the baby. It had granted relief on the conviction for violation of the exclusion order, but had denied relief on the conviction for violation of the curfew.[12] Thus both sides were unsatisfied and appeal was necessary. The district judge, Don Voorhees, was eloquent in his praise of Gordon Hirabayashi's courage:

> His refusal to obey the curfew order and, even more so, his refusal to obey the order to report for his imprisonment were in the tradition of those who have forged the freedoms which we now enjoy. . . . His courage was comparable to the courage of those who stood up to the Crown during the reign of the Stuarts. . . . Like [them], petitioner accepted imprisonment rather than concede the government's power to imprison one who had committed no offense. His steadfastness, like theirs, has earned him a place in the pantheon of those who have sacrificed themselves in order to further the common good.[13]

After the Ninth Circuit's decision, I am sure that the government never considered taking the case back to the US Supreme Court to review our ruling. This is why my late, great mentor, John Frank of Arizona, who himself both represented Ernesto Miranda in *Miranda v. Arizona* and clerked for Justice Black the year that *Hirabayashi* was decided, always described me as the court of appeals judge who had overruled the US Supreme Court. According to John, when he read the *Hirabayashi* case in 1944, he rushed into Justice Black's office and called it a "damned Fascist outrage."[14]

I have written hundreds of judicial opinions, but I think *Hirabayashi* is the only one I ever wrote that I was sure from the beginning was absolutely right—legally, intellectually, and morally. Writing an opinion for three judges to agree on can be difficult, and looking back, I think the only good

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[12] Hirabayashi v. United States, 627 F. Supp. 1445, 1457–58 (W.D. Wash. 1986), *aff'd in part, rev'd in part*, 828 F.2d 591 (9th Cir. 1987).
[13] IRONS, *supra* note 4.
[14] John P. Frank, Speech at the Arizona Humanities Council Conference on the Japanese Exclusion (Feb. 14, 1998).

sentence was, "A United States citizen who is convicted of a crime on account of race is lastingly aggrieved."[15]

But what I want to discuss is not about me or the case or the US Supreme Court, but about Gordon Hirabayashi, the man. He was the only true hero that I have ever known. (I had the good fortune to meet another hero, Fred Korematsu, but I never knew him.)

Although Hirabayashi was in the courtroom when his case was argued in Seattle, WA, I got to know him many years later in Chicago, IL. I was in Chicago to receive an award from the American Bar Association (ABA), and John Frank, who loved a good party, had a dinner in my honor the evening before. He knew that a video about me was to be shown at the award luncheon the next day, and that it contained a reference to the *Hirabayashi* decision, so John did what no one else in the world would do: he tracked down Gordon Hirabayashi in Canada and flew him to Chicago for the party.

After dinner, Gordon regaled us with his wartime tales. He said he was convinced that the curfew and the internment were wrong. He had the encouragement of the American Civil Liberties Union, so he brought the case to the US Supreme Court in June 1943. He then told us the most interesting part of his story, which was what happened after he lost his case in the US Supreme Court. He explained that the government was supposed to transport him to a prison camp in Arizona to serve his sentence, but the government had no money and no train or truck to get him there. It was the height of the war. For Gordon, however, it was extremely important that he serve his sentence and receive his punishment for standing up for principle. He was a true conscientious objector in the mold of those like Martin Luther King, Jr. and Mahatma Gandhi, only years before the world considered them heroes. What did Gordon Hirabayashi do when the government could not transport him to prison? Always resourceful, he hitchhiked to the

[15] Hirabayashi v. United States, 828 F.2d 591, 607 (9th Cir. 1987).

Arizona prison camp in the summer. As he described it, the trip was fairly easy until he got to Nevada, where the young man from Seattle began to experience the desert heat. Needless to say, being Gordon Hirabayashi, he kept going.

Therefore, nearly fifty years later, it must have been a great day for him when the site of the prison camp on Mt. Lemon, near Tucson, AZ, was dedicated as the Gordon Hirabayashi Rest Area. I have often thought that, during that little ceremony, Gordon must have been thinking that he was really glad that he had taken that hot, hitchhiking trek from Seattle to Arizona. I looked at him with some awe. If I could capture the spirit of Gordon Hirabayashi as he seemed to me that day, it would be as a man who had displayed enormous courage, determination, and just plain guts, and who now took enormous and justifiable pride in his ultimate vindication.

I have since appeared on many panels involving the internment cases. During one of them, an expert on Japan was a speaker, and the speaker commented most eloquently on how contrary to the Japanese character it was to resist authority in the way Korematsu and Hirabayashi had done. This demonstrated to me that Gordon Hirabayashi was not only courageous, determined, and gutsy, but he was also thoroughly American. I always thought it very sad that he chose to live most of his later life in Canada. I believe we were robbed of a national treasure.

Gordon's courageous story is not only the part of my legal career that will be most remembered, but Gordon's story is also part of our family's history.

Gordon Hirabayashi came to the Phoenix Library once for a humanities program on the internment. I was late for his speech and when I arrived, Gordon was reading a letter that he had received when he visited a college campus on the East Coast a few years before. As I listened to him read, I realized that the letter could only have been written by my own daughter. It seemed that when Gordon had visited my daughter's college, she had left a

letter[16] for him. He had kept the letter, made a copy of it for his trip to Phoenix, and inscribed the copy to me. We now have it framed and sitting in a place of honor in our living room. The letter says this:

> Dear Mr. Hirabayashi,
>
> My name is Kate Schroeder. I am the daughter of the Ninth Circuit Court of Appeals Judge Mary M. Schroeder. I wish to take this opportunity to express to you my undying regard for your strength of will. I was nine when your case reached the Circuit Court, but my mother took the time to explain to me and my older sister what a tragic injustice had been done to you and every Japanese-American in the country. Because of your story, I have always been aware of the need to question and examine the actions of our government. And even though it has sought to provide restitution for its crimes, I, and I believe Mother, feel that no one can ever make up for the wrongs done to you. My family has always admired you for your courage to bring the terrible truths of our nation's racism to the surface.
>
> I know that Mother is honored to have had a small part in your search for justice. She has told me many times that this was the most important case she had or will ever have decided. As it has shaped her life, so too, has it shaped my understanding of our history and of the sometimes fragile state of human rights in our country. I give you my highest respect and send you my Mother's most affectionate regards.
>
> Sincerely Yours,
>
> Kate Schroeder
>
> Brown University

After that humanities program in Arizona, the program's organizer sent me a copy of the letter he had received from Gordon in response to the invitation. Gordon's letter said he was interested in the program and went on to say, "when I learned that Peter Irons [wa]s being invited, and also

[16] Letter from Kate Schroeder to Gordon Hirabayashi (1996) (on file with author).

Judge Mary Schroeder, who wrote that powerful decision in our circuit Court of Appeals (scaring away the government from appealing to the US Supreme Court), I was even more interested."[17]

Gordon delighted in the notion of the government being too scared to appeal, since Gordon was never scared of anything.

And it is not only my nuclear family that has been influenced by Gordon Hirabayashi's case; my court family has as well. The law clerk who was originally assigned to help with the opinion was Pam Peterson, now an experienced appellate lawyer in Phoenix, AZ. When the project began to take on proportions approaching the monumental, her co-clerk pitched in. He was Daniel Goodman, who later decided to become a prosecutor for the Department of Justice.[18] Dan never misled any court in his career and was beloved for his integrity. When he tragically passed away a few years ago, the US Attorney dedicated a conference room to his memory in the United States Courthouse in downtown Los Angeles, CA.[19] I like to think there is a bit of the legacy of Hirabayashi there as well.

Two years after the Hirabayashi opinion, I had a dinner to celebrate the tenth anniversary of my appointment to the federal bench. For a gift, my former clerks enlisted the help of our then US senator, Dennis DeConcini, to track down, through the Smithsonian, a copy of Ansel Adams's famous photograph of the Manzanar memorial at the site of the Manzanar internment camp. The framed photograph has hung in my office conference room ever since.

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[17] Letter from Gordon Hirabayashi to Rick Noguchi, Program Coordinator, Transforming Barbed Wire, Ariz. Humanities Council (May 1, 1997) (on file with author).

[18] Gabe Freidman, *U.S. Attorney Leader Guided Prosecutors*, L.A. DAILY J., Sept. 8, 2010, at 4, *available at* http://www.law.uci.edu/pdf/djournal_elayanlam_090810.pdf.

[19] *Recent Events,* U.S. ATTY'S OFF.: CENT. DISTRICT CAL., http://www.justice.gov/usao/cac/Recent/ (last visited July 13, 2012).

In the wake of Hirabayashi's death a few weeks ago, a lot of folks sent me copies of his obituary in the *New York Times*, including many of my former law clerks. I received the following from one of them:

> Dear Mary,
>
> I remember meeting Mr. Hirabayashi in Chicago at a dinner with you and the Franks. And every Schroeder clerk views Hirabayashi as one of your most important opinions.
>
> -Janet

The letter[20] is on the letterhead of Department of Homeland Security Secretary Janet Napolitano. I could not help but think how amazed Gordon Hirabayashi and Fred Korematsu would have been to think that their sacrifices would eventually come to be known, comprehended, and respected by the member of the president's cabinet having the greatest responsibility for maintaining our internal security and preventing any repetition of what happened to Japanese Americans in World War II.

There has been a great deal written about the Japanese exclusion cases in the years following the vindication of Gordon Hirabayashi and Fred Korematsu in the 1980s. In his book, *Perilous Times: Free Speech in Wartime*, Professor Geoffrey Stone of the University of Chicago Law School has pointed out the legacy of the wartime internment cases:

> The Court's decision in *Korematsu* [which relied on *Hirabayashi*] was immediately condemned in the public and professional literature. Eugene Rostow, then dean of the Yale Law School, termed the decision a "disaster." He chastised the Court for dealing with the facts as "Kiplingesque folklore" and for upholding a military policy that clearly had been based not on military necessity but on "ignorant race prejudice." There is little doubt that even at the time of the decision the justices knew or should have known that the government's justifications for the internment were without merit, but they "chose to ignore" the facts. Over the years,

[20] Letter from Janet Napolitano, Sec'y, Dep't of Homeland Sec., to author (Jan. 4, 2012) (on file with author).

> *Korematsu* has become a constitutional pariah. The Supreme Court has never cited it with approval of its result.[21]

I don't know whether the justices knew at the time there was no military justification for the interment. But most Japanese Americans at the time knew it, and most certainly Gordon Hirabayashi understood the US Supreme Court's decision was built on lies. It was Gordon's good fortune to live long enough to see that understanding vindicated. While Gordon Hirabayashi has become a symbol in my life of extraordinary courage, the US Supreme Court's decisions in his and Korematsu's cases represent extreme illustrations of the US Supreme Court demonstrating a lack of courage. Indeed, the ultimate irony may be that the US Supreme Court's decision in *Korematsu* was handed down December 19, 1944, the day after the War Department announced the revocation of the 1942 exclusion orders, and, incidentally, while Hirabayashi may well have still been serving his sentence in that camp on Mt. Lemon.[22] Professor Dennis Hutchinson has observed the irony about the timing of the *Korematsu* opinion: "The government thus had Supreme Court precedent for power it no longer wished to use."[23]

Looking forward, I think Gordon Hirabayashi will always be my personal role model for integrity and courage. On his death, the *New York Times*, National Public Radio, and the Japanese American community—indeed the entire nation—remembered him and the important role he played in our nation's history.[24] But on a more personal level, I will always remember the

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[21] GEOFFREY STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 307 (2004).

[22] Dennis Hutchinson, *"The Achilles Heel" of the Constitution: Justice Jackson and the Japanese Exclusion Cases*, 2002 SUP. CT. REV. 455, 486 (2002).

[23] *Id.* at 487.

[24] Richard Goldstein, *Gordon Hirabayashi, World War II Internment Opponent, Dies at 93*, N.Y. TIMES, Jan. 3, 2012, http://www.nytimes.com/2012/01/04/us/gordon-hirabayashi-wwii-internment-opponent-dies-at-93.html; Mark Memmott, *Gordon Hirabayashi Has Died; He Refused To Go To WWII Internment Camp*, NPR, (Jan. 4, 2012), http://www.npr.org/blogs/thetwo-way/2012/01/04/144684260/gordon-hirabayashi-has-died-he-refused-to-go-to-wwii-internment-camp.

day that he sat with my friends at that Chicago ABA award luncheon and, in my acceptance speech, I pointed him out as being present in the room. The ABA gave awards to some fairly distinguished people at that luncheon, but Gordon Hirabayashi stole the show.