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Scenes from the Struggles of a Courageous American: Recollections of Peter Irons About the Life of Gordon Hirabayashi¹

Peter H. Irons²

In preparation for this piece, which has been revised and expanded from extemporaneous remarks I presented as part of the Hirabayashi Commemoration at Seattle University School of Law, I thought it appropriate to focus on several scenes from Gordon Hirabayashi's life and his legal challenge to the wartime internment of Japanese Americans.³ It struck me that there are scenes in every story (and this, of course, is a story) that stand out and that are worth looking at and remembering. When you put these scenes together, they make a coherent story—one that is not only dramatic, but also meaningful. I could easily recount many more scenes from Gordon's story, equally important and revealing, but those scenes that

¹ This article originates in Peter Irons' 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. He would like to thank Lorraine Bannai, Professor of Legal Skills and Associate Director of the Korematsu Center, for initiating and helping to organize this event and inviting him to attend and speak, and the editors of *Seattle Journal for Social Justice* for their help in transcribing his remarks and suggesting helpful revisions.

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³ This piece draws upon my books about the internment cases, including the following: PETER IRONS, *JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES* (1983, updated edition with new Epilogue published in 1993) [hereinafter IRONS, *JUSTICE AT WAR*]; PETER IRONS, *JUSTICE DELAYED: THE RECORD OF THE JAPANESE AMERICAN INTERNMENT CASES*, (1989) [hereinafter IRONS, *JUSTICE DELAYED*]. *See also* Peter Irons, *Gordon Hirabayashi v. United States*, in *THE COURAGE OF THEIR CONVICTIONS: SIXTEEN AMERICANS WHO FOUGHT THEIR WAY TO THE SUPREME COURT* 37, 37–62 (1988) (an account of the *Hirabayashi* case and an interview with Gordon Hirabayashi) [hereinafter Irons, *COURAGE*].

I will discuss here shed light on decisions that helped shape the events that have led to this commemorative event.

As a preface to my own involvement in what later became the *coram nobis* legal effort to overturn the wartime criminal convictions of three young men—Gordon Hirabayashi, Minoru Yasui, and Fred Korematsu—who challenged the military curfew and evacuation orders that led to the internment of some 110 thousand Americans, in 1981, I decided to write a book about the internment cases, which was first published in 1983.⁴ This book was originally designed as an academic exercise to explore and explain how the United States Supreme Court, which at the time of its decisions in these cases in 1943 and 1944⁵ included such noted liberal justices as William O. Douglas, Felix Frankfurter, Frank Murphy, Harlan Fiske Stone, and Hugo Black, could have made such terrible decisions and upheld the convictions of all three challengers.

It was during my research for this book that I discovered in the US Department of Justice's files on these cases many of the documents that formed the basis of the *coram nobis* petitions, some of which are quoted below.⁶ After obtaining these documents, I tracked down and met with Gordon, Min, and Fred to see if they would be interested in reopening the cases to seek the vacation of their convictions. I visited Gordon in his home in Edmonton, Canada, where he taught sociology at the University of Alberta, and he recalled for me the events that led him to disobey the curfew and evacuation orders while he was a senior at the University of Washington (UW) in Seattle, WA.

During my talk with Gordon, he recounted a scene that began in Suzzalo Library on the UW campus:

⁴ IRONS, *JUSTICE AT WAR*, *supra* note 3.

⁵ *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Yasui v. United States*, 320 U.S. 115 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

⁶ *See* *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984); *Yasui v. United States*, 772 F.2d 1496 (9th Cir. 1985); *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986).

When the curfew was imposed I obeyed for about a week. We had about twelve living in the Y[MCA] dormitory, so it was a small group, and they all became my voluntary time-keepers. ‘Hey, Gordy, it’s five minutes to eight!’ And I’d have to dash back from the library or from the coffee shop. One of those times, I stopped and I thought, Why the hell am I running back? Am I an American? And if I am, why am I running back and nobody else is? I think if the order said *all* civilians must obey the curfew, if it was just a nonessential restrictive move, I might not have objected. But I thought it was unfair, just to be referred to as a ‘non-alien’—they never referred to me as a citizen. This was so pointedly, so obviously a violation of what the Constitution stood for, what citizenship meant. So I stopped and turned around and went back.⁷

This defining moment in Gordon’s life led to the next scene in this story. The day after the evacuation orders were posted in Seattle, Gordon walked into the downtown FBI office and handed the agent in charge a four-page statement headed, “Why I Refuse to Register for Evacuation.” Here is some of what Gordon wrote about his decision:

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 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.⁸

Then Gordon described his fellow Japanese Americans:

Over sixty percent are American citizens. [Yet their rights] are denied on a wholesale basis without due process of law and civil liberties which are theirs. 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 the incentive to live. I must maintain my Christian principles. I consider it my duty

⁷ Irons, COURAGE, *supra* note 3, at 53.

⁸ IRONS, JUSTICE AT WAR, *supra* note 3, at 88.

to maintain the democratic standards for which this nation lives. Therefore, I must refuse this order for evacuation.⁹

Try to visualize, if you can, this scene of a determined young man and an FBI agent, who must have been surprised to see someone walk in and voluntarily give himself up for arrest. Can you imagine placing yourself in danger of incarceration by taking a stand for your principles during a time of war? On the basis of Gordon's statement, and the discovery of a diary in his briefcase, in which Gordon had recorded all of his curfew violations, the US Attorney charged Gordon with two counts of curfew violation and failure to report for evacuation.

The next scene in this story took place in the federal courtroom in Seattle in which Gordon was tried and convicted. This was literally a kangaroo court. The jurors were mostly elderly, many of them were members of the American Legion, and they were all white, highly patriotic, and prejudiced against Japanese Americans, as was the judge in the case, US District Judge Lloyd Black. In his opinion dismissing Gordon's constitutional challenges to the curfew and evacuation orders, Judge Black wrote the following:

It must not for an instant be forgotten that since Pearl Harbor last December we have been engaged in a total war with enemies unbelievably treacherous and wholly ruthless, who intend to totally destroy this nation, its Constitution, our way of life, and trample all liberty and freedom everywhere from this earth. . . . Of vital importance in considering this question is the fact that the parachutists and saboteurs, as well as the soldiers, of Japan make diabolically clever use of infiltration tactics. They are shrewd masters of tricky concealment among any who resemble them. With the aid of any artifice or treachery, they seek human camouflage and with uncanny skill discover and take advantage of any disloyalty among their kind.¹⁰

⁹ *Id.*

¹⁰ *United States v. Hirabayashi*, 46 F. Supp. 657, 659, 661 (W.D. Wash. 1942).

It is hard to imagine that a statement as blatantly stereotypical and racist as this could come from a US judge. In fact, Judge Black *ordered* the jury to find Gordon guilty; he did not even give them a choice in their decision. Judge Black told the jury that Gordon had confessed to violating the military orders and that “you are instructed to return a finding of guilty, and if you will not you are violating your oath.”¹¹ Obeying this judicial order, the jurors returned in ten minutes with verdicts of guilty on both counts of the indictment.¹²

Let me move ahead to another scene, which took place in the US Department of Justice in 1943, after Gordon’s lawyers appealed his convictions to the US Supreme Court. One of the documents I discovered in the Department’s case files in 1981 was a memorandum from a Department of Justice lawyer, Edward J. Ennis, to Solicitor General Charles Fahy, who was preparing to argue the case before the Supreme Court. In this memorandum, Ennis wrote that he had located a report, written in January 1942 by Lieutenant Commander Kenneth Ringle of the Office of Naval Intelligence headed, “Report on the Japanese Question.” Ringle, who spoke fluent Japanese, had thoroughly investigated the Japanese American community on the West Coast and had concluded that only a small minority—no more than ten percent of the total, and all of them known to the government or already in custody—posed any danger of committing acts of sabotage or espionage. Ringle strongly urged against any mass evacuation of Japanese Americans.¹³

Ennis noted in his memorandum to Fahy that “one of the crucial points” stressed in the government’s brief to the Supreme Court in the *Hirabayashi* case was that “individual selective evacuation would have been impractical and insufficient.”¹⁴ He cited the Ringle Report as “positive knowledge that

¹¹ IRONS, JUSTICE AT WAR, *supra* note 3, at 158–59.

¹² *Id.* at 159. See *id.* at 154–59, for a full account of Gordon Hirabayashi’s trial.

¹³ See *id.* at 202–06.

¹⁴ *Id.* at 204.

the only intelligence agency responsible for advising General [John L.] DeWitt [the military commander who ordered the mass evacuation] gave [DeWitt] advice directly to the contrary.”¹⁵ Ennis phrased his warning to Fahy in blunt words:

I think we should consider very carefully whether we do not have a duty to advise the Court of the existence of the Ringle memorandum and of the fact that this represents the view of the Office of Naval Intelligence. It occurs to me that any other course of action might approximate the suppression of evidence.¹⁶

As lawyers know, the conscious suppression of evidence is not only misconduct that taints a court’s decision, but grounds for censure or even disbarment of the lawyer responsible for withholding the evidence. Unfortunately, Solicitor General Fahy ignored Ennis’s warning and assured the justices, during his oral argument before the Court, that mass evacuation of Japanese Americans was necessary because it was “not unreasonable for those charged with the defense of the West Coast to fear that in case of an invasion there would be among this group of people a number of persons who might assist the enemy,” presumably Gordon Hirabayashi was included among those supposedly disloyal Japanese Americans.¹⁷ Unaware of the Ringle Report and its “suppression” by Fahy, the Court accepted Fahy’s argument without question and voted unanimously, on June 21, 1943, to uphold Gordon’s conviction for curfew violation. In his opinion for the Court, Chief Justice Stone wrote that he and his colleagues could not “reject as unfounded the judgment of the military authorities . . . that there were disloyal members of that population” who “could not readily be isolated and separately dealt with, and constituted a menace to the national

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 225–26.

defense and safety.”¹⁸ We can only speculate about what the Court’s decision would have been, had the justices been advised by Fahy of the Ringle Report and its opposition to mass evacuation, but it seems clear in retrospect that Gordon, in his initial statement to the FBI, understood the Constitution and its protections of *all* Americans far better than the nine men who voted to affirm his criminal conviction.

I left to other speakers at the commemorative event—especially the members of Gordon’s legal team, who deserve our admiration for their dedication, hard work, and legal skills—their accounts of the *coram nobis* effort that began in 1983 and concluded in 1987 with the decision of the US Court of Appeals for the Ninth Circuit to vacate both of Gordon’s convictions.¹⁹ I was honored to be a member of that team, and consider the whole *coram nobis* effort, and its ultimate victories in all three cases, to be the highlight of my legal career. And I was equally honored to know and admire Gordon Hirabayashi, a courageous and principled American whose memory and legacy should be remembered and passed on, not only to this generation, but to generations to come.

The final scene in this story took place after the commemorative event. On May 29, 2012, President Barack Obama conferred on Gordon, in a posthumous gesture after Gordon’s death on January 2, 2012, the nation’s highest civilian honor: the Presidential Medal of Freedom. I was also honored to attend, in January 1998, the ceremony at the White House in which President Bill Clinton placed that medal around the neck of Fred

¹⁸ *Hirabayashi v. United States*, 320 U.S. 81, 99 (1943). See IRONS, *JUSTICE AT WAR*, *supra* note 3, at 227–50, for an account of the Supreme Court’s deliberations in the *Hirabayashi* case, including Justice Stone’s fierce debates with the justices.

¹⁹ *Hirabayashi v. United States*, 627 F. Supp. 1445 (W.D. Wash. 1986), *rev’d*, 828 F.2d 591 (9th Cir. 1987). The district court *coram nobis* decision vacated Hirabayashi’s conviction for violating the evacuation order, but upheld his conviction for violating the curfew order. *Id.* The Ninth Circuit later reversed the curfew violation conviction, resulting in the vacation of both wartime convictions. *Hirabayashi v. United States*, 828 F.2d 591 (9th Cir. 1987). See also *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984).

Korematsu. Although the Supreme Court decisions in their cases remain on the books, their repudiation by the judges who later vacated those convictions attest to the enduring struggle of Americans, like Gordon, Min, and Fred, who defend our Constitution. As Gordon told me in our first meeting, “I never look at my case as just my own, or just as a Japanese American case. It is an *American* case, with principles that affect the fundamental human rights of all Americans.”²⁰

²⁰ Irons, *COURAGE*, *supra* note 3, at 62.