



12-1-1984

Book Essay

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Recommended Citation

Barry Sullivan, *Book Essay*, 60 Notre Dame L. Rev. 237 (1984).

Available at: <http://scholarship.law.nd.edu/ndlr/vol60/iss1/5>

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BOOK ESSAY

JUSTICE AT WAR. By *Peter Irons*. New York and Oxford: Oxford University Press. 1983. Pp. xiii, 407. \$18.95.

*Reviewed by Barry Sullivan**

In the months following the Japanese attack at Pearl Harbor, the United States government first imposed a curfew on Japanese Americans residing in the Western states and then ordered their evacuation and detention in internment camps. These measures, as the Commission on Wartime Relocation and Internment of Civilians has recently explained, were enforced against 120,000 men, women and children of Japanese ancestry, American citizens as well as resident aliens, "without individual review, and . . . virtually without regard for their demonstrated loyalty to the United States."¹ Indeed, these measures were undertaken despite the absence of "a single documented act of espionage, sabotage or fifth column activity . . . by an American citizen of Japanese ancestry or by a resident Japanese alien on the West Coast."² No similar measures were undertaken with regard to persons of German or Italian descent.

The legal authority for these measures rested on Executive Order No. 9066, which President Roosevelt signed on February 19, 1942, a little more than two months after the attack on Pearl Harbor.³ Based on the premise that "successful prosecution of the war require[d] every possible protection against espionage and against sabotage" of defense installations, Executive Order No. 9066 authorized the Secretary of War and his military subordinates "to prescribe military areas . . . from which any or all persons may be excluded," to impose such further restrictions as the military authorities might see fit on "the right of any person to enter, remain in, or leave" such areas, and to provide "transportation, food, shelter, and other accom-

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1 PERSONAL JUSTICE DENIED: REPORT OF THE COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS 3 (1982) (hereinafter referred to as PERSONAL JUSTICE DENIED).

2 *Id.*

3 7 Fed. Reg. 1407 (1942). In 1976, President Ford formally repealed Executive Order No. 9066, stating that evacuation was one of our "national mistakes." 41 Fed. Reg. 7741 (1976).

modations" to persons affected by evacuation orders.⁴ On March 21, 1942, President Roosevelt signed Public Law 503, which Congress had speedily enacted to provide criminal penalties for civilian violations of military orders issued under the authority of Executive Order No. 9066.⁵

These extraordinary measures were adopted and implemented, with little public debate or discussion, in the bleak days following the destruction of the Pacific Fleet. While only a handful of Japanese Americans challenged the constitutionality of these measures during the war, the government's wartime policy has emerged as a significant issue of public debate. In recent years, both Congress and the courts have been asked to redress the wrongs that were admittedly inflicted on the Japanese Americans more than 40 years ago.⁶

In these circumstances, historical understanding is essential to any reasoned discussion of current public policy. In *Justice at War*, Peter Irons has offered an historical account of the formulation and defense of the government's wartime policy towards the Japanese Americans. The central question raised in this review is whether Irons's account contributes to our understanding of why those events occurred as they did. The historian's art, as Professor Butterfield has said, "is to recapture a moment and seize upon particulars and fasten down a contingency."⁷ In assessing *Justice at War* against that standard, this essay will first review the Supreme Court's opinions in the Japanese American cases and then consider the validity of Irons's account in light of existing scholarship on the subject.

I. The Japanese American Program in the Supreme Court

The constitutionality of each of the measures imposed by the

4 7 Fed. Reg. at 1407.

5 Act of Mar. 21, 1942, Pub. L. No. 503, 56 Stat. 173. Public Law 503 was reenacted as part of another statute in 1948. Act of June 25, 1948, Pub. L. No. 772, 62 Stat. 765 (codified at 18 U.S.C.A. § 1383). In 1976, Congress repealed this latter statute. Act of Sept. 14, 1976, Pub. L. No. 94-412, 90 Stat. 1258.

6 Congress has recently considered legislation aimed at compensating Japanese Americans for the damages they suffered because of the government's wartime policy. See, e.g., H.R. 4110, 98th Cong., 1st Sess. (1983); H.R. 3387, 98th Cong., 1st Sess. (1983); S. 1520, 98th Cong., 1st Sess. (1983).

Victims of the Japanese American program have also sought redress in the courts. See *Hohri v. United States*, 586 F.Supp. 769 (D.D.C. 1984), *appeal docketed*, No. 84-5460 (D.C. Cir. July 12, 1984) (holding that action by Japanese Americans for damages resulting from internment was barred by the statute of limitations because newly released government documents were cumulative). For a discussion of other court cases recently filed by victims of the Japanese American program, see note 73 *infra*.

7 H. BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* 66 (1931).

military—the curfew, evacuation and detention—was litigated in the lower federal courts in a quartet of cases which culminated in decisions by the United States Supreme Court in June 1943 and December 1944. In the first pair of cases, *Hirabayashi v. United States*⁸ and *Yasui v. United States*,⁹ a unanimous Court upheld the criminal convictions of two American citizens of Japanese ancestry who had violated the curfew order. Hirabayashi, as the Court noted, “was born in Seattle in 1918, of Japanese parents who had come from Japan to the United States, and who had never afterward returned to Japan; . . . he was educated in the Washington public schools and at the time of his arrest was a senior in the University of Washington; . . . he had never been in Japan or had any association with Japanese residing there.”¹⁰ Yasui was born in Oregon in 1916 of alien parents; he had spent a summer in Japan when he was eight years old and had attended a part-time Japanese language school for about three years. He had also attended public schools in Oregon, including the state university, from which he had received his undergraduate and law degrees. Yasui was a member of the Oregon bar and an Army Reserve officer. He “had been employed by the Japanese Consulate in Chicago, but had resigned on December 8, 1941, and immediately offered his services to the military authorities; . . . he had discussed with an agent of the Federal Bureau of Investigation the advisability of testing the constitutionality of the curfew; and . . . he [had] requested that he be arrested so that he could test its constitutionality.”¹¹

In *Hirabayashi* and *Yasui*, the Court rejected the defendants’ constitutional arguments that the curfew imposed by the military violated the nondelegation doctrine and the equal protection component of the due process clause.¹² In *Hirabayashi*, the lead case, Chief Justice Stone summarily disposed of the nondelegation issue, reasoning that Congress had ratified and confirmed Executive Order No. 9066 when it enacted Public Law 503.¹³ Since the Court also

8 320 U.S. 81 (1943).

9 320 U.S. 115 (1943).

10 *Id.* at 84.

11 *Id.* at 116-17.

12 *Id.* at 89-90, 94-95. The Court had not then held, of course, that “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 93 (1976); *see also* *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

13 320 U.S. at 92. The Chief Justice stated:

The question then is not one of Congressional power to delegate to the President the promulgation of the Executive Order, but whether, acting in cooperation, Congress and the Executive [have] constitutional authority to impose the curfew restriction

held that the imposition of a curfew was within the constitutional war power of the national government, the Court then considered the curfew's constitutionality in light of its exclusive application to persons of Japanese ancestry. The possibility of espionage and sabotage by Japanese Americans was "obvious," Chief Justice Stone said, in "the critical days of March 1942."¹⁴ The Chief Justice noted that conditions prevailing on the West Coast since the nineteenth century, which had affected American citizens of Japanese ancestry as well as resident aliens, had led to "relatively little social intercourse between them and the white population."¹⁵ Moreover, the practical and legal restrictions "affecting the privileges and opportunities afforded to persons of Japanese extraction residing in the United States, have been sources of irritation and *may well* have tended to increase their isolation, and in many instances their attachments to Japan and its institutions."¹⁶

Such primitive speculations, cast in the language of social science, were deemed a sufficient basis to justify the imposition of a racially selective curfew. The Chief Justice concluded:

Whatever views we may entertain regarding the loyalty to this country of the citizens of Japanese ancestry, *we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained.* We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.¹⁷

In *Hirabayashi*, the defendant had also been convicted of failing "to report to the Civil Control Station within the designated area, . . . a

. . . [and] whether, acting together, [they] could leave it to the designated military commander to appraise the relevant conditions and on the basis of that appraisal to say whether, under the circumstances, the time and place were appropriate for the promulgation of the curfew order and whether the order itself was an appropriate means of carrying out the Executive Order for the "protection against espionage and against sabotage" to national defense materials, premises and utilities.

Id. at 91-92.

14 *Id.* at 96.

15 *Id.* at 98. The character of the evidence upon which the Court relied is well demonstrated by its assertion that some Japanese language schools "are *generally believed* to be sources of Japanese nationalistic propaganda, cultivating allegiance to Japan." *Id.* at 97 (emphasis added; footnote omitted).

16 *Id.* at 98 (emphasis added).

17 *Id.* at 99 (emphasis added).

preliminary step to the exclusion from that area of persons of Japanese ancestry."¹⁸ The Court avoided deciding the constitutionality of exclusion, however, on the technical ground that concurrent sentences had been imposed on both counts.¹⁹ Justices Douglas, Murphy and Rutledge expressed reservations in *Hirabayashi*, but concurred in the judgment.²⁰ Justice Murphy expressed perhaps the greatest degree of disquiet, noting that the government's action went "to the very brink of constitutional power."²¹ But even Justice Murphy was unwilling to dissent.

In *Korematsu v. United States*,²² which was decided in December 1944, the Court was forced to address the constitutionality of exclusion, which it upheld over the dissents of Justices Roberts, Murphy and Jackson.²³ Consistent with the Court's reluctance to address the constitutionality of exclusion in *Hirabayashi*, however, the Court in *Korematsu* avoided ruling on the constitutionality of detention.

Korematsu, "an American citizen of Japanese descent, was convicted," as Justice Black noted in his opinion for the majority, "for remaining in San Leandro, California, 'a Military Area,' contrary to Civilian Exclusion Order No. 34 . . . which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area."²⁴ Korematsu's loyalty to the United States was not disputed.²⁵ It appears that Korematsu violated the exclusion order only because he did not wish to be separated from his girlfriend, who was of Italian ancestry, and with whom he intended to move to the interior when he had earned enough money to do so (p. 95).

Justice Black began his opinion in *Korematsu* with the observation that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect," but, he added, "[t]hat is not to say that *all* such restrictions are unconstitutional."²⁶ After reviewing the history of the curfew and discussing the Court's opinion in *Hirabayashi*, Justice Black observed that "[t]he military authorities, charged with the primary responsibility of defending our shores,

18 *Id.* at 84.

19 *Id.* at 84-85. See also *Roviaro v. United States*, 353 U.S. 53, 59 n.6 (1957).

20 *Id.* at 105-109 (Douglas, J., concurring); *id.* at 109-14 (Murphy, J., concurring); *id.* at 114 (Rutledge, J., concurring).

21 *Id.* at 111.

22 323 U.S. 214 (1944).

23 *Id.* at 225-33 (Roberts, J., dissenting); *id.* at 233-42 (Murphy, J., dissenting); *id.* at 242-48 (Jackson, J., dissenting).

24 *Id.* at 215-16.

25 *Id.* at 216.

26 *Id.* (emphasis added).

[had] concluded that curfew provided inadequate protection and ordered exclusion."²⁷ The constitutionality of the curfew had been upheld in *Hirabayashi* "because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal," and the military's policy of "temporary exclusion" rested on the same footing.²⁸ Justice Black therefore concluded:

To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this. *There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short.* We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.²⁹

The absence of hard facts to support Justice Black's well-turned phrases did not go unnoticed by the dissenters. Justice Roberts was wholly unpersuaded by Justice Black's facile analogy to *Hirabayashi*. "This is not a case," Justice Roberts wrote, "of keeping people off the streets at night."³⁰ He continued: "On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States."³¹ Finally, Justice Roberts stated, "I need hardly labor the conclusion that Constitutional rights have been violated."³²

The dissent filed by Justice Murphy was equally blunt: "Such exclusion goes over 'the very brink of constitutional power' and falls

27 *Id.* at 218.

28 *Id.* at 219.

29 *Id.* at 223-24 (emphasis added).

30 *Id.* at 225 (Roberts, J., dissenting).

31 *Id.* at 226.

32 *Id.*

into the ugly abyss of racism."³³ While conceding that deference must be accorded to the wartime judgments of "military authorities who are on the scene and who have full knowledge of the military facts," Justice Murphy insisted that "[i]ndividuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support."³⁴ Given these countervailing considerations, judicial review should not be premised upon standards that are "too high or too meticulous," but should be limited to the question whether the disputed action has "some reasonable relation to the removal of the dangers of invasion, sabotage and espionage."³⁵

Based on his review of the evidence, Justice Murphy found no such reasonable relation to these potential dangers.³⁶ Drawing heavily on the final report of Lt. Gen. J.L. DeWitt, the West Coast commanding officer in charge of evacuation, Justice Murphy concluded that the evacuation decision was premised not on military considerations, but on "questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence."³⁷

Dissenting on separate grounds, Justice Jackson effectively despaired of finding a principled basis for resolving the case.³⁸ He was impressed by the argument that "[n]o court can require . . . a [military] commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting."³⁹ Nonetheless, Justice Jackson continued, "if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient."⁴⁰ Justice Jackson de-

33 *Id.* at 233, quoting *Hirabayashi v. United States*, 320 U.S. 81, 111 (1943) (Murphy, J., concurring).

34 *Id.* at 234.

35 *Id.* at 235.

36 *Id.* ("[T]he exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation.")

37 *Id.* at 236-37. Justice Murphy stated:

The reasons [invoked in support of the government's policy] appear . . . to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.

Id. at 239 (footnote omitted).

38 *Id.* at 244 (Jackson, J., dissenting).

39 *Id.*

40 *Id.*

clined to join the other dissenters in concluding that the record showed that mass evacuation was unnecessary, but he also rejected the majority's view as to the sufficiency of that evidence:

How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.⁴¹

In *Ex parte Endo*,⁴² which was decided the same day as *Korematsu*, the Court grasped the nettle of detention only to the extent of holding that the War Relocation Authority had no authority to detain citizens of Japanese ancestry after their loyalty had been established. A unanimous Court, speaking through Justice Douglas, therefore ordered the release of Mitsuye Endo, a California state employee who had been evacuated from Sacramento and removed to the Tule Lake War Relocation Center at Newell, California (p. 102).⁴³ Invoking the presumption that Congress and the President "are sensitive to and respectful of the liberties of the citizen," and would therefore wish "to allow for the greatest possible accommodation between those liberties and the exigencies of war,"⁴⁴ and in view of the fact that "[n]either the Act nor the orders use the language of detention,"⁴⁵ the Court concluded that the political branches could not have intended that citizens be detained beyond the time necessary to ascertain their loyalty. "When the power to detain is derived from the power to protect the war effort against espionage and sabotage," Justice Douglas wrote, "detention which has no relationship to that objective is unauthorized."⁴⁶ Thus, because "[a] citizen who is concededly loyal presents no problem of espionage or sabotage,"⁴⁷ he may not be detained. Justices Murphy and Roberts concurred in the result, but declined, based on the views they had expressed in *Korematsu*, to join in the Court's reasoning.⁴⁸

41 *Id.* at 245.

42 323 U.S. 283 (1944).

43 *Id.* at 284-85.

44 *Id.* at 300.

45 *Id.*

46 *Id.* at 302.

47 *Id.*

48 *Id.* at 307-08 (Murphy, J., concurring); *id.* at 308-10 (Roberts, J., concurring).

II. The Legacy of the Japanese American Cases

The Japanese American cases illustrate the imperfect and seemingly random way in which decisions of even the greatest import are sometimes made at the highest levels of government.⁴⁹ The questions raised by the Japanese American cases are these: How was a policy so fundamentally at odds with constitutional principle so readily embraced not only by the military, but by all three branches of the national government? How, indeed, were these measures adopted when the Attorney General and the Secretary of War both harbored grave doubts about their constitutionality? How, moreover, were these measures adopted, and ultimately approved by the Supreme Court, when the principal factual justification for them—the government's alleged inability to identify and segregate disloyal Japanese Americans within the time available—was known to be insubstantial by many high-ranking government officials, not only when the Supreme Court rendered judgment, but even when the initial administrative decisions were made?

Neither the government's wartime policy towards the Japanese Americans nor the Supreme Court's ratification of that policy escaped serious scholarly attention during the war and post-war eras.⁵⁰

49 The Japanese American cases have never been explicitly overruled, but it is not for their value as constitutional exegesis that they command our attention. As Professor Pole has said, the prevailing opinions "are out of character with the surrounding and ensuing cases that involved other American minorities." J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 292 (1978).

The Japanese American cases do not speak with their own authority. They have little to teach us about the legitimacy of race as a factor in government decision-making. *See* Fullilove v. Klutznick, 448 U.S. 448, 507 (1980) (Powell, J., dissenting). *Ex parte* Milligan surely provides a truer constitutional compass for ascertaining the proper place of civil liberties in time of war. 71 U.S. (4 Wall.) 2 (1866). At most, to borrow a phrase used by Justice Roberts on another occasion, the controlling opinions in the Japanese American cases are like "a restricted railroad ticket, good for this day and train only." *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

50 As early as February 1942, a group of social scientists at the University of California at Berkeley embarked on a multidisciplinary study of the government's Japanese American program. The field work for that study continued through December 1945 and resulted in several important scholarly works. *See* D. THOMAS & R. NISHIMOTO, *THE SPOILAGE* (1946) (examination of social implications of the government's policy); D. THOMAS, *THE SALVAGE* (1952); J. TENBROEK, E. BARNHART & F. MATSON, *PREJUDICE, WAR AND THE CONSTITUTION* (1954) (consideration of evacuation "in terms of its historical origins, its political characteristics, the responsibility for it, and the legal implications arising from it." *Id.* at vi); M. GRODZINS, *AMERICANS BETRAYED: POLITICS AND THE JAPANESE EVACUATION* (1949) (political study of the adoption and implementation of the government's program).

In addition, two extensive and well-reasoned attacks on the Court's opinions appeared in law reviews in 1945. Curiously, the first was written by Nanette Dembitz, a Justice Department lawyer who had helped prepare the government's Supreme Court briefs in the Japanese

More recently, of course, the government's wartime policy towards the Japanese Americans was the subject of an exhaustive inquiry by the Commission on Wartime Relocation and Internment of Civilians, which reviewed voluminous published and unpublished documentary materials, conducted lengthy public hearings, and published a comprehensive report, *Personal Justice Denied*,⁵¹ in 1982.

Although the Commission had access to previously unavailable documentary evidence, that evidence appears to have been largely cumulative because the Commission's report confirms the accuracy of much that had previously been written on the subject. As the Commission noted in its report, "[h]istorical writing about the exclusion, evacuation and detention of the ethnic Japanese has two great set pieces—analysis of events which led to Executive Order 9066, and life in the relocation camps," and, "[i]n large measure, these events were accessible to historians from the moment they took place."⁵² Even the earliest students of the government's Japanese American program had access to the principal documents concerning the development of the government's policy, and they were able to interview many of the key participants at a time when their recollections of the relevant events were still fresh.⁵³ In evaluating *Justice at War*, one must therefore ask whether this book, in view of the existing scholarship, materially advances our knowledge of the events that it chronicles. Although Irons interviewed a number of the key actors in this story, and had access to previously unavailable documentary evi-

American cases, and who was therefore partially responsible for the outcome (pp. 119, 196-97, 206). See Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945). The second was written by Professor Eugene Rostow of the Yale Law School, who summed up the meaning of the Japanese American cases in these words: "The idea of punishment only for individual behavior is basic to all systems of civilized law. A great principle was never lost so casually." Rostow, *The Japanese American Cases: A Disaster*, 54 YALE L.J. 489, 532 (1945). More particularly, Professor Rostow found implicit in the prevailing opinions "five propositions of the utmost potential menace": (1) that protective custody for periods of more than four years is a permitted form of imprisonment in the United States; (2) that the mere holding of certain political opinions justifies imprisonment; (3) that persons of a particular ethnic group may be presumed to hold the kind of dangerous political opinions which justify imprisonment; (4) that decisions as to which political opinions justify imprisonment, and as to which ethnic groups may be infected with such opinions, are decisions that may be made by military authorities in times of emergency; and (5) that the military's discretion to make and enforce such decisions is not limited by the requirements of the Bill of Rights. *Id.* Contrary views were also expressed in the literature. See, e.g., Fairman, *The Law of Martial Rule and The National Emergency*, 55 HARV. L. REV. 1253 (1942).

51 See note 1 *supra*.

52 PERSONAL JUSTICE DENIED, *supra* note 1, at 213.

53 See, e.g., M. GRODZINS, *supra* note 50, at 231-322.

dence, Irons's account does not contribute measurably to our understanding of the process which led to the adoption, defense, and judicial vindication of the government's program.

From this perspective, *Justice at War* is disappointing at the outset. Only a relatively short portion of the book (pp. 18-74) discusses the initial formulation of the government's policy towards the Japanese Americans, and, although that portion of the book is seemingly filled with facts, Irons's account does not adequately explain the process by which this policy was adopted. While the government's litigation strategy in the Japanese American cases deserves our attention,⁵⁴ that strategy was largely determined when the policy was adopted. Unlike many government policies that eventually become the subject of litigation, this policy was decided at the highest levels of government and therefore carried an unusual degree of momentum when it was contested in the courts. The Solicitor General may decline to defend the policy of a particular agency on the ground that it is inconsistent with the overall interests of the United States, but that authority is ordinarily exercised with great circumspection, and even more so when the policy under review has been set not by some subordinate executive officer, but by the highest level policymaking officials of the government.⁵⁵

Newly discovered evidence may lead the government's litigating officials to abandon the position that the government's policymakers have formulated. In the Japanese American cases, however, the basic factual infirmities of the government's position were known, if not fully documented, at the time it was initially formulated. The issue was therefore joined at that time. Once those government officials who opposed evacuation had failed to prevent it from becoming the official policy of the government, the litigating position of the United States could not have been altered without substantial intragovernmental conflict. Thus, there was little chance that the measures imposed by the government would not be defended in litigation.

III. Irons's Account

In *Justice at War*, Irons has offered an account of the circumstances surrounding the adoption and implementation of the govern-

54 Irons's account of the trials of the Japanese American cases (pp. 134-62) is certainly the most interesting and best realized part of *JUSTICE AT WAR*.

55 See, e.g., Griswold, *The Office of the Solicitor General—Representing the Interests of the United States before the Supreme Court*, 34 MO. L. REV. 527 (1969); McCree, *The Solicitor General and His Client*, 59 WASH. U.L.Q. 337 (1981).

ment's policy towards the Japanese Americans, the defense of that policy in litigation, the consideration given by the courts to the constitutional questions raised by the Japanese Americans, and the ethical behavior of the various actors involved in these events. With respect to each of these topics, the validity of Irons's account warrants consideration.

A. *Formulation of the Government's Policy*

Irons's account of the events leading to the promulgation of Executive Order No. 9066 and the enactment of Public Law 503 follows that given by previous scholars. In the weeks immediately following Pearl Harbor, not even General DeWitt, the West Coast Army commander, favored mass evacuation. On December 26, 1941, General Gullion, the Army's chief law enforcement officer, advised General DeWitt that the Washington lobbyist for the Los Angeles Chamber of Commerce was urging the evacuation of all ethnic Japanese, citizens as well as aliens (p. 29). Noting that he "had thought the thing out to [his] satisfaction," General DeWitt stated his opinion that the evacuation from California of all ethnic Japanese would not only be "an awful job," but would also be "very liable to alienate the loyal Japanese" (p. 29). Evacuation was simply unnecessary, General DeWitt contended, because the Army could "weed the disloyal out of the loyal and lock them up if necessary" (p. 30).⁵⁶

In early January, representatives of the Departments of Justice and War met in San Francisco to discuss the Japanese American situation (pp. 32-33). The Justice Department was represented by James Rowe, a New Deal veteran and assistant to Attorney General Francis Biddle, and by Edward Ennis, an experienced government lawyer who was then Director of the Justice Department's Alien Enemy Control Unit. The War Department was represented by General DeWitt and Karl Bendetsen, General Gullion's assistant. The Justice Department apparently had no agenda for this meeting and General DeWitt succeeded in securing certain concessions concerning the compulsory registration of aliens, the promulgation of contraband regulations, the liberalization of procedures for searching alien prem-

⁵⁶ On December 19, 1941, DeWitt had urged the evacuation of all aliens from the West Coast (p. 27). Later in the month, he stated his opposition to mass evacuation, but pressed for authority to conduct warrantless raids on the homes of Japanese aliens and to confiscate shortwave radios, cameras, firearms and other articles that might be used in espionage and sabotage (pp. 28-29). Civilian officials, such as FBI Director Hoover, opposed mass raids on the ground that they "would not only be most difficult but would also have a very bad effect on the law-abiding people who were raided" (p. 29).

ises, and the exclusion of aliens from limited geographical areas (pp. 34-35). As Professor Grodzins has noted, there was no discussion or apparent dispute concerning mass evacuation:

As of January 7 the principal disagreements concerned search procedures. There was no disagreement with respect to mass evacuation. Evacuation of both citizens and aliens had not been discussed, and Mr. Rowe left San Francisco with the definite impression that General DeWitt was opposed to any large-scale movement of citizens and aliens.⁵⁷

The call for mass evacuation had already been sounded, however, by some California special interest groups, and members of the West Coast congressional delegation soon added their voices to the call. According to Irons, “[t]his sporadic and unofficial campaign took a dramatic turn on January 16, 1942, when Congressman Leland M. Ford, a California Republican, sent identical letters to Secretary of War Stimson and Attorney General Biddle urging that ‘all Japanese, whether citizens or not, be placed in inland concentration camps’ ” (p. 38). In making this statement, Irons relies not on primary sources, but on Professor Grodzins’s account, which he has inaccurately summarized (p. 376 n.31). The “identical letters” of January 16 noted by Professor Grodzins were letters from Ford to Navy Secretary Frank Knox and FBI Director J. Edgar Hoover.⁵⁸ According to Grodzins, Ford wrote directly to Attorney General Biddle on January 23.⁵⁹ In any event, Ford wrote to both the Attorney General and the Secretary of War in late January, and, despite the fact that both men harbored grave doubts concerning the constitutionality of Ford’s proposal, they made very different replies. Attorney General Biddle stated that “‘unless the writ of habeas corpus is suspended, I do not know any way in which Japanese born in this country, and therefore American citizens, could be interned’ ” (p. 39). Secretary Stimson, on the other hand, replied that the internment of more than 100,000 people would involve some “‘complex considerations,’ ” but that “‘the Army is prepared to provide internment facilities in the interior to the extent necessary’ ” (p. 39).

Towards the end of January, the Justice Department began to balk at General DeWitt’s requests for authority to designate increasingly large parts of the West Coast as areas from which Japanese

57 M. GRODZINS, *supra* note 50, at 240 (footnote omitted).

58 *Id.* at 64-65.

59 *Id.* at 65.

aliens should be excluded.⁶⁰ DeWitt, who was being barraged in California with demands for mass evacuation, had become convinced of its inevitability by January 29 (pp. 40-42), although his formal recommendation to that effect would not be forwarded to Secretary Stimson until February 17 (pp. 60-61).

After the West Coast congressional delegation had presented Bendetsen, Rowe and Ennis with an elaborate evacuation plan on January 30 (pp. 42-43), Biddle played what was to be his final card. He called Secretary Stimson and asked him to send Assistant Secretary John McCloy to a meeting at the Justice Department on Sunday, February 1 (p. 44). At that meeting, Biddle handed McCloy a statement which, Biddle said, he intended to release to the press that evening over his and Stimson's signatures. The statement not only related that the FBI had uncovered "no evidence of planned sabotage by any alien," but also stated that both Departments agreed that the present military situation did not warrant the removal of American citizens of Japanese ancestry (p. 44). Biddle quickly agreed to delay publication of the press release, however, until General DeWitt had been consulted (p. 44).

On February 5, the two Departments aired their disagreements in testimony before a Senate Committee. Ennis testified that mass evacuation could not be supported on the ground of military necessity because the Justice Department had already identified and arrested the disloyal Japanese, a point which had been made by FBI Director Hoover in a February 1 memorandum to the Attorney General (p. 52). Yet Biddle conceded that the need for evacuation was a military question, which immediately led Bendetsen to assert that the military believed that the risk posed by the Japanese Americans was substantial (p. 52).

On February 11, when Stimson finally seized the initiative by telephoning the President and asking him to decide the matter, the President replied that Stimson should do what he thought best (pp. 57-58). Bendetsen then prepared a memorandum recommending evacuation and detention for submission to Stimson over DeWitt's signature; Stimson adopted the recommendation (pp. 59-61). On February 17, Biddle sent the President a letter ridiculing the need for evacuation, but by then Stimson had already made the decision (p. 61). When Justice and War Department officials met at Biddle's home on the evening of February 17, all that remained for the Justice Department lawyers was to clean up the syntax in the Executive Or-

60 J. TENBROEK, E. BARNHART & E. MATSON, *supra* note 50, at 106-09.

der that the War Department had drafted (pp. 61-63).⁶¹

These facts have been recounted in some detail because they constitute the salient facts of Irons's dense but unsatisfying account. Irons asserts that the Justice Department was outmaneuvered by the War Department, at least in part because Stimson and McCloy had better access to the President than did their Justice Department counterparts (pp. 16, 18). Yet, Irons presents no evidence that the War Department had any contact with Roosevelt other than Stimson's telephone conversation with him on February 11, when Roosevelt declined to grant Stimson a personal audience (p. 58). Moreover, Rowe, who was opposed to evacuation, was a veteran New Dealer known for his "political savvy and outspoken assertiveness" (p. 31). He was "on close and easy terms with Roosevelt," for whom he had worked in the White House, and by whom he had been personally assigned to the Justice Department (p. 32). If anyone could have captured Roosevelt's attention, it would have been Rowe. Similarly, Biddle had the opportunity to discuss the subject with the President during lunch on February 7 (p. 53). But Biddle did not question the constitutionality of the plan; he simply raised logistical considerations, questioned the need for evacuation, and then dropped the subject when he discerned the President's lack of interest in it (p. 53).

Thus, while Irons attributes the decision to Roosevelt's alleged insensitivity to racial minorities (pp. 57, 63), and to Biddle's inability to stand up to Roosevelt and Stimson (p. 53), the facts do not support that interpretation. Apart from the luncheon with Biddle and the telephone call from Stimson, Irons has presented no evidence to show that Roosevelt ever discussed the evacuation issue with either of them. Nor has Irons presented any evidence to show that the situation was ever presented to the President in a way that focused his attention on the constitutional questions involved. Finally, the evidence does not support Irons's contention that "the congressional campaign for internment . . . gained the support of that consummate politician, Franklin Roosevelt" (p. 42). Roosevelt, who must have been preoccupied with many important matters during the opening days of the war, remains a shadowy figure in this drama. Invocation of his alleged insensitivity to racial minorities falls far

61 Irons notes that Biddle had telephoned Roosevelt earlier in the day and pledged his support for Stimson's decision (p. 62), but Irons does not explain how Biddle knew of the decision or why he suddenly agreed to support it.

short of reasoned explanation.⁶²

Irons's emphasis on Biddle's alleged inability to stand up to Roosevelt and Stimson seems misplaced, not only because of Roosevelt's apparent lack of personal participation in the decision, but also because of the late date at which Stimson became committed to evacuation. As Irons points out, Stimson's diary shows that, as late as February 12, he had serious "doubts about the constitutionality of a plan based on the 'racial characteristics' of one minority group, and the Army's inability to back up its 'military necessity' claim with hard evidence" (p. 57). Ironically, Biddle and Stimson harbored the same constitutional misgivings concerning evacuation, but the two men apparently never consulted with each other about the question. Thus, at least at the Cabinet level, the adoption of the evacuation policy appears to have resulted more from a failure of communication than from a test of wills.

In Irons's account, it is Biddle's patrician ineptitude and political inexperience that were responsible for the Justice Department's loss of the interdepartmental conflict over evacuation. Yet Rowe—who was Biddle's proxy at the San Francisco meeting, his chief lieutenant at other meetings, and a veteran bureaucratic infighter who clearly had access to the President—escapes censure.

From the viewpoint of administrative decision-making, there are a number of critical questions that Irons has left unanswered. For example, Congressman Ford's evacuation proposal was allowed to drive an early wedge between the Justice and War Departments because of the inconsistent replies made by Stimson and Biddle. If Irons's account is accurate on this point, the two Departments made no effort to formulate a common response to Ford's proposal. Did Biddle and Stimson know that they were both the objects of Ford's importuning? Even if they did not actually know that Ford had written to both of them, would much imagination have been required, given the overlapping jurisdictions of the two Departments, to guess that Ford's attack would be two-pronged? In any event, given the rapid development of anti-Japanese animus on the West Coast, and the increasing support for evacuation of all persons of

62 Indeed, the only direct evidence of Roosevelt's own views which Irons recites is a one-page memorandum which the President dispatched to the Chief of Naval Operations in August 1936 (p. 20). In that memorandum, Roosevelt suggested that a list be kept of Japanese Americans meeting Japanese ships in Hawaii to facilitate their placement "in a concentration camp in the event of trouble." *Id.* Given the early date and limited subject matter of this memorandum, there is little basis for asserting, as Irons does, that it constitutes "a chilling forecast of Roosevelt's later approval of internment on the mainland." *Id.* (footnote omitted).

Japanese ancestry, why was there no effort to work out a joint position on the issue? Indeed, why did Biddle wait until February 9 to bring his views to Stimson's personal attention (pp. 53-55), and then only by letter? By the same token, why was it that Stimson, who was clearly troubled by the constitutional implications of evacuation (p. 57), did not seek the views of the Justice Department on the subject? Curiously, Irons suggests that Biddle's difficulty in taking issue with Stimson, whom Biddle later described as an " 'heroic figure of sincerity and strength,' " became important, "during their face-to-face meetings over the evacuation issue" (p. 17). But Irons does not recount a single meeting between the two men prior to the final drafting of Executive Order No. 9066 (p. 62). Even if one accepts Irons's view that Biddle was intimidated by Stimson, why did Biddle fail to bring other Cabinet members into the decision-making process? Might not the support of Secretary Morgenthau and Secretary Ickes have made a difference, as Professor Burns has suggested?⁶³ What views, if any, were held by the White House staff? And why was the matter never discussed in the Cabinet?

The answers to these questions would be essential to any real understanding of the process by which the government embarked upon its wartime policy towards the Japanese Americans. Yet none of these questions is addressed, let alone answered, in *Justice at War*. For this part of the story, Irons has mainly relied on a patchwork of secondary sources and a few newly discovered documents for weaving together a plausible, but superficial, chronology of events. Although Irons interviewed many of the key participants, including Ennis and Rowe, he appears to have asked the wrong questions or, perhaps, to have ignored the answers.⁶⁴

63 J. BURNS, *ROOSEVELT: THE SOLDIER OF FREEDOM* 215 (1970).

64 Marc Bloch, the French historian, has suggested that every "historical book worthy of the name ought to include a chapter, or if one prefers, a series of paragraphs inserted at turning points in the development, which might almost be entitled: 'How can I know what I am about to say?'" M. BLOCH, *THE HISTORIAN'S CRAFT* 71 (Putnam trans. 1953). Bloch's rationale is obvious. An historian's conclusions are not susceptible to demonstration in the same way as a chemist's. Whether the chemist's hypothesis is correct depends on the repetition of his result. The soundness of historical conclusions, on the other hand, can be judged only in view of the credibility of the evidence and the integrity of the inferences that have been drawn from it. Oral history presents special problems because the reader needs to know the questions asked, the answers given, the circumstances of the interview, and, especially, the amount and kind of preparation done by the historian and his witness. Irons has disclosed nothing about the methodology that he used in interviewing his witnesses, even though they were interviewed concerning events which occurred more than 40 years ago, and which, while certainly important, clearly were not even then the exclusive or principal concerns of the witnesses.

B. *Litigation of the Japanese American Cases*

The discussion of the government's litigation of the Japanese American cases in *Justice at War* is also populated with Irons's heroes and villains: "Two groups of lawyers jockeyed for position inside the Justice Department, one in the Alien Enemy Control Unit headed by Edward Ennis and the other in the Office of Solicitor General Charles Fahy" (p. 195). In Irons's view, Fahy demeaned the Office of Solicitor General by choosing to act as the mouthpiece for the War Department, rather than representing the broader interests of the United States (p. 196). Ennis, on the other hand, "made no secret either of his belief that Public Law 503 was unconstitutional or of his distrust of War Department arguments" (p. 196). Thus, Ennis followed the dictates of common morality and legal ethics, while Fahy was interested only in his win-loss record (pp. 164, 224). These are serious charges which are not supported by the evidence that Irons has mustered.

Fahy's first significant contact with the Japanese American cases apparently occurred when Ennis forwarded the draft brief in *Hirabayashi* to the Solicitor General's Office in late April 1943, just days before the brief was to be filed in the Supreme Court (pp. 202, 204).⁶⁵ The Supreme Court had expedited the case and scheduled oral argument for May 10 (pp. 219-20). Ennis was intimately involved with the details of the litigation. Not only had he overseen the preparation of the draft brief, but he also had been primarily responsible for litigating the government's position in the lower federal courts (pp. 119, 167). Irons asserts that, "[a]s their debates over the *Hirabayashi* brief progressed, . . . Ennis found that Fahy remained unyielding in his determination to defer to the War Department" (p. 196). Irons fails to provide any detailed account of these "debates," however, and it seems far-fetched that any debates could have "progressed" very far in the short time available to the Solicitor General to put Ennis's draft in final form. The centerpiece of Irons's development of

65 Irons asserts that Fahy became involved in the Japanese American cases at an early stage (p. 120), but he mentions only two fleeting contacts prior to April 1943. On the first occasion, in late December 1942, Ennis sought Fahy's advice as to whether the government should ask the district judge to expedite his decision in *Endo*, which Fahy thought imprudent (p. 150). On the second occasion, also in December 1942, Ennis suggested that the government dismiss the Japanese American cases (p. 163). Although Fahy rejected Ennis's suggestion, which was equivocal in any event, Fahy accepted the alternative suggestion that he delegate to Ennis the responsibility for coordinating the litigations (p. 167). There is virtually no support in the record for Irons's colorful assertion that Fahy and Ennis were positioned like "scorpions in a bottle" (p. 164).

this theme is a memorandum which Ennis prepared for Fahy on April 30, 1943, approximately ten days before the case was to be argued. This appears, even by Irons's reckoning, to be the first time that Fahy was made aware of Ennis's "suppression of evidence" charges.

In this memorandum, Ennis drew Fahy's attention to an article that had appeared in the October 1942 issue of *Harper's* under the pseudonymous byline of "An Intelligence Officer." This article asserted that the government's mass evacuation policy had not been deemed necessary by the Office of Naval Intelligence, which was principally responsible for intelligence gathering on the West Coast. Ennis reported to Fahy that the article, which Ennis had sent a few days earlier to one of Fahy's assistants, reflected the views, "if not of the Navy, at least of those Naval Intelligence officers in charge of Japanese counter-intelligence work" (pp. 202-03). Far from being novel, however, the opinion expressed in the article was the same opinion which Ennis and Biddle had been given by the FBI more than a year earlier, and which Ennis had duly reported to a Senate committee on February 5, 1942, two weeks before the President signed Executive Order No. 9066 (pp. 23, 44). Ennis now asserted that the Solicitor General's failure to apprise the Supreme Court of this evidence, which Ennis apparently had felt no need to disclose in the lower courts, "might approximate the suppression of evidence" (p. 204).

Irons asserts that Fahy "rebuffed" Ennis's efforts to put this material before the Supreme Court (p. 206), but Irons does not report the substance of any discussion that Fahy and Ennis may have had on this subject, and Irons does not indicate whether Fahy personally reviewed the materials that Ennis had sent to him. Even if Fahy did read the materials, it is questionable whether they would have made any impression on him in these circumstances. Not only were the materials submitted to him at the eleventh hour, but they merely corroborated the views already expressed by the FBI. In any event, Irons does not explain why Ennis waited so long to drop this alleged "bombshell." Moreover, while the documents in Ennis's possession allegedly "refuted at almost every point the conclusions drawn" in the draft brief which he had submitted to the Solicitor General (p. 206), Irons does not explain why Ennis prepared and submitted the brief in that form. It is indeed curious that a responsible government lawyer would transmit a draft brief, which always carries the implicit representation that it is ready for filing, and then submit a separate

memorandum asserting that the contents of the brief were materially false. Irons offers no explanation for this unusual conduct. Nor does he explain how Ennis possibly could have given "up for the time his objection to Fahy's 'suppression of evidence'" and added his signature to the government's brief (p. 206).

Irons's account of Fahy's role in the preparation of the *Korematsu* brief in September 1944 is also inconclusive. In early 1944, the War Department published General DeWitt's final report on the evacuation, which chastised the Justice Department for its lack of cooperation, contained assertions of fact that were inconsistent with those made by other agencies, such as the FBI, the FCC, and the Office of Naval Intelligence, and contained an overtly racist justification for evacuation (pp. 278-79). At Ennis's suggestion, Biddle requested that the FBI prepare an analysis of the factual information contained in DeWitt's report (p. 280). Both the FBI and the FCC eventually submitted reports which again contested the accuracy of much of that information (pp. 281-87).⁶⁶ The draft brief which Ennis's staff prepared for submission to the Solicitor General contained the following footnote:

"The recital of the circumstances justifying the evacuation as a matter of military necessity, however, is in several respects, particularly with reference to the use of illegal radio transmitters and shore-to-ship signaling by persons of Japanese ancestry, in conflict with information in the possession of the Department of Justice. In view of the contrariety of the reports on this matter we do not ask the Court to take judicial notice of the recital of those facts contained in the Report."

(p. 286). The Solicitor General's staff apparently simplified this footnote to state only that the Justice and War Departments held divergent views as to the reliability of this evidence. Irons asserts that this editorial change "concealed the existence of the FBI and FCC reports that refuted DeWitt's espionage charges" (p. 286). But neither the original nor the amended footnote specifically referred to these reports, and, while the Solicitor General's version was more general, it certainly conveyed the extraordinary message that the Justice De-

66 Irons devotes substantial attention to the War Department's suppression of DeWitt's report between April 1943 and January 1944 (pp. 206-12, 278-93). Given the significance that Irons attributes to this episode, it is unfair for him to purport to identify, without any factual citation, what it was that McCloy found "alarming" when he first read the report (pp. 207-08). One plausible explanation for the War Department's suppression of the report is that it represented the views of General DeWitt, rather than the views of the Secretary of War, whose decision was at issue. To have released the report at the time it was written might well have confused that issue, as it ultimately did.

partment did not stand with the War Department on a critical issue in the case. Either version was likely to provoke tough questioning at oral argument.

Although the precise chronology of events is not clear from Irons's account, it appears that the War Department objected strenuously to both versions of the footnote, that Fahy first insisted on including the version prepared by Ennis's staff, and then offered the War Department a choice between his version and a still milder version prepared by Herbert Wechsler, who put the matter so obliquely that only the most circumspect reader could possibly detect any suggestion of the conflict between the two Departments (pp. 287-91). The War Department naturally chose the Wechsler version, but Irons does not explain why Fahy took the various positions that he did. In this instance as well, however, the dispute seems to have come to a boil at the last conceivable moment. The brief was already in the print shop; the presses had to be stopped twice to accommodate the airing of the dispute (pp. 288, 290).

C. *Supreme Court Deliberations*

Perhaps the least satisfactory portion of *Justice at War* is that devoted to the Supreme Court's deliberations in the Japanese American cases (pp. 219-52, 311-46). The only tangible evidence of Supreme Court deliberations are the occasional notes made by the individual Justices to refresh their recollections about points made during the conference, the draft opinions preserved in the papers of the individual Justices, and any preserved correspondence that may have passed among the Justices commenting on the various drafts. Although this evidence is seductive because of its tangible character, it really tells us little about the decision-making process, which also includes informal discussions among the Justices, discussions between the Justices and their law clerks, and the Justices' independent study of the case before them.

At the initial conference in *Hirabayashi*, only Justice Murphy failed to register his tentative vote in favor of the government; he was not prepared to vote one way or the other (p. 234). Irons points out that four other Justices voiced various concerns about the government's policy prior to the announcement of the Court's unanimous decision, but that all of the wavering Justices eventually set aside their reservations because of "[c]ompromise, cajolery, and their own concerns that the Court should maintain unity" (p. 250). Irons suggests that Justice Frankfurter, to whom he patronizingly refers as

“the irrepressible Supreme Court [J]ustice under whom McCloy had studied at Harvard” (p. 16), was largely responsible for wearing down the resolve of the potential dissenters (p. 239). Irons further suggests that Frankfurter may have been motivated by his close personal associations with Stimson and McCloy (p. 239). Yet, Irons fails to note that Justice Frankfurter and McCloy had actually exchanged correspondence on the subject, and that Justice Frankfurter had assured McCloy in April 1942 that he “‘was handling [this] delicate matter with both wisdom and appropriate hard-headedness.’”⁶⁷ Although a good question might well be raised as to whether Justice Frankfurter should have recused himself because of his correspondence with McCloy specifically concerning the case, Irons’s generalized assertions of friendship lay no foundation for raising this issue.

Whatever the motivation, nature or scope of Justice Frankfurter’s efforts in *Hirabayashi* to persuade his brethren of the constitutionality of the government’s policy, the fact remains that the final vote was essentially the same as the impression vote at the conference. Justice Murphy prepared and circulated a draft dissenting opinion, but failed to gain a single adherent to his position. In the end, Justice Murphy gave in to his prior indecision and transformed his dissenting opinion into a half-hearted concurrence (pp. 246-47). The process by which *Hirabayashi* was decided seems as free, robust and uninhibited as can be expected within the context of collegial decision-making. Justice Murphy did his best to persuade his brethren based on the evidence and arguments that he then had available to him. Unfortunately, of course, he was unable in *Hirabayashi* to make the point-by-point rebuttal to the government’s case that he was able to formulate in *Korematsu*. That rebuttal depended upon General DeWitt’s report, which had been suppressed by the War Department. When the ammunition became available in *Korematsu*, the choice available to the Justices could not have been put more bluntly than it was by Justice Murphy when he registered his dissent “from this legalization of racism.”⁶⁸ In *Korematsu*, the Court splintered, but the majority had already committed themselves to the approach articulated in *Hirabayashi*. While it may be titillating to pierce the Supreme Court’s cloak of secrecy, it is questionable whether Irons has told us anything of consequence that we did not know well enough from reading the opinions themselves.

67 PERSONAL JUSTICE DENIED, *supra* note 1, at 113.

68 323 U.S. at 213.

D. *Ethical Considerations*

Irons's consideration of the ethical questions posed by the conduct of the various lawyers involved in the Japanese American cases also warrants discussion. Although Irons's consideration of these questions is a major focus of the book, it is appropriate that they should be considered last because their vitality necessarily rests upon the reader's evaluation of the factual predicate that Irons has ostensibly established for discussing them. There is no question, of course, as to where Irons stands. At the very outset, he asserts that *Justice at War* is the story of a "legal scandal without precedent in the history of American law" (p. viii). That is a point far different, and far less obvious, than the point on which he closes the book, quoting Mr. Korematsu's words, "[t]hey did me a great wrong" (p. 367). The facts recounted in *Justice at War* are surely sufficient to show that the Japanese Americans were done "a great wrong," but that point was demonstrated long ago. Whether the facts show a "legal scandal without precedent in the history of American law" is a far different question which Irons has not answered because he has not provided a sufficiently close analysis of the facts. He has described events, but he has failed to probe with any acuity the background of the decisions that led to those events. In the absence of such a foundation, the reader has no business attempting to make the ethical judgments which Irons invites him to make (p. xi).

Irons has not equipped the reader to evaluate objectively the ethical shortcomings of the lawyers involved. One of the major deficiencies of this book is its surfeit of advocacy, and this segment of the book, despite the author's disclaimers, is not exceptional in that respect. Three examples illustrate the point. First, Irons deals harshly with Captain Herbert Wenig, a former Assistant Attorney General of California who participated, while also serving on DeWitt's legal staff, in the drafting of an *amicus curiae* brief which the Western states submitted in *Hirabayashi* (pp. 121, 180, 212-17). Wenig's dual role surely presented ethical problems because he used the opportunity to present to the Court materials that the Justice Department, which had responsibility for representing the government, chose not to present (pp. 215-17).⁶⁹ Irons is not content to rest on that fact, but contends that Wenig's conduct would have violated fundamental ethical

69 Wenig apparently did not use classified information in drafting the brief. Although he used material that was recited in the suppressed report, that material had been plagiarized from the reports of the Tolson and Dies committees (pp. 212-17). Thus, Irons's description of "the use made of the Final Report" (p. 217) is somewhat deceptive insofar as it implies that

rules in any circumstance. He states: "Judicial rules prohibit the direct participation of a party to a lawsuit in the preparation of [an] amicus brief" (p. 213). That Irons cites no authority for that proposition is not surprising because it is not substantiated by common experience. In fact, lawyers for parties and their supporting *amici curiae* often assist each other for the simple reason that the coordination of briefs on the same side is likely to result in a less repetitious and more effective presentation of common concerns.⁷⁰

Second, Irons's lack of even-handedness is demonstrated by his assertion that Ennis merely "stretched the limits of professional obligation in meeting with Roger Baldwin and Charles Horsky to help shape the legal strategy of the American Civil Liberties Union in the *Korematsu* case" (p. 302). If Wenig acted improperly in working on an *amicus* brief, he was at least assisting *amici* on the same side of the case. Ennis, on the other hand, was deeply enmeshed in planning the strategy for his opponent in litigation (pp. 182, 260-61, 267, 304-07). Whatever the vagaries of legal ethics, Ennis's conduct did not merely "stretch the limits of professional obligation." Ennis's conduct was profoundly unethical. If his activities had been known to his superiors, he surely, and quite deservedly, would have been relieved of his duties.⁷¹

Finally, a large part of the book concerns the allegedly unethical conduct of the American Civil Liberties Union. According to Irons, the national leadership of the ACLU "bear[s] much of the blame for the outcome of the Japanese American cases" because their "personal and partisan loyalty" to President Roosevelt "crippled the effective presentation of these appeals" (p. ix). Whether the conduct of the ACLU materially affected the outcome of the Japanese American cases is surely open to question. Irons's observation is interesting, however, because it reveals the ethical yardstick against which he measures the conduct of the ACLU. Irons apparently criticizes the

Wenig used information which, because of the War Department's suppression of the DeWitt report, was available only to him. Clearly, that was not the case.

70 See, e.g., Shapiro, *Amicus Briefs in the Supreme Court*, 10 LITIGATION 21, 24 (1984); Ennis, *Effective Amicus Briefs*, 33 CATH. U.L. REV. 603, 606-08 (1984).

71 A further example of Irons's selective discussion of ethical considerations is his off-hand remark that agents of the FBI had told Nanette Dembitz, a member of Ennis's staff, that they would provide her with materials they had gathered from the trash of Wayne Collins, one of the lawyers for *Korematsu*, so that she would be aware of the development of his strategy (p. 197). Irons does not state whether Dembitz accepted this offer. Similarly, Irons gives little attention to the propriety of Ennis's *ex parte* submissions to the Ninth Circuit, which resulted in the transfer of the three criminal cases to the Supreme Court's docket (pp. 182-83).

ACLU for not providing sufficient support to the Japanese Americans at an early stage of the litigations (pp. 108-18, 129-36, 168-75) and for using its financial support of the *Hirabayashi* case in the Supreme Court to block a constitutional attack on Executive Order No. 9066, as opposed to Public Law 503 and the military orders (pp. 184-93, 254-67).

Neither criticism is well founded. First, the ACLU cannot fairly be faulted for not immediately supporting the Japanese Americans. The ACLU is not a legal aid organization; it undertakes to finance the litigation of certain cases based on the views of its leadership as to desirable constitutional policy. Such an organization has no obligation to provide counsel for every individual in need of representation, nor is it required by some higher law to commit its resources to advance positions which its leadership considers unwise as a matter of strategy or substantive principle. As Irons notes, the Japanese American cases presented novel questions of constitutional law (pp. vii, 104, 135). Thus, it is not surprising that the ACLU Board, whose membership spanned the ideological spectrum (p. 106), had difficulty in settling on a consistent approach (p. 108). Moreover, Irons offers no evidence to show that the positions taken by the various members of the ACLU Board were based on political considerations rather than sincerely held views as to the meaning of the Constitution.

Irons's second criticism is also wide of the mark. Once having agreed to provide support, an organization like the ACLU must candidly deal with its client concerning any possible divergence of interests, so that the client can decide whether to forego the contested point or seek new counsel. But, if Irons is correct in asserting that *Hirabayashi* and the ACLU held divergent interests, the relevant ethical question is whether the ACLU made any litigation strategy decision without *Hirabayashi's* full knowledge and consent. Since *Justice at War* does not address that question, Irons has not established the factual predicate for his conclusion of unethical conduct. In sum, the divisions within the ACLU may be interesting, but from an ethical perspective their importance is secondary.

IV. Conclusion

The Japanese American cases are inherently interesting and a great book could have been written on this subject. Despite the Freedom of Information Act, the work of the Commission on Wartime Relocation, and the oral history interviews which Irons conducted,

that book remains to be written. In Irons's book, there is too little attention to detail, too little focus on essential questions, and far too little effort to be fair and objective.

The shortcomings of *Justice at War* are rooted in the discontinuity which necessarily separates the domains of history and advocacy. As Professor Butterfield has wryly suggested, "for the compilation of trenchant history there is nothing like being content with half the truth."⁷² To say that *Justice at War* consciously tells only "half the truth" would certainly be unfair. Likewise, to say that "half the truth" is the lawyer's stock in trade would overstate the point. Nonetheless, the fact remains that the lawyer's profession is persuasion, not explanation. If an advocate is to be persuasive, he must be selective, both in his arrangement of the facts and in the inferences he draws from them. To serve the purposes of advocacy, he will at least paint with a broader brush. Despite certain superficial similarities, the ends of these two enterprises—history and advocacy—are fundamentally different.

Irons's failure rests largely on his own efforts to play two incompatible parts. Irons acted as counsel for Hirabayashi, Yasui and Korematsu in the recent *coram nobis* proceedings which they instituted.⁷³ In those proceedings, Irons and his colleagues had to persuade the courts that their clients' convictions were tainted by "fundamental error" or "manifest injustice" (p. viii). As lawyers, they were required to shoulder a singularly heavy burden. Although Irons acknowledges the tension between his roles as historian and ad-

72 H. BUTTERFIELD, *supra* note 7, at 52.

73 In January 1983, Fred Korematsu filed a petition for a writ of *coram nobis* in the United States District Court for the Northern District of California, claiming that his conviction should be set aside because, among other things, the government had suppressed or destroyed evidence in the proceedings which led to that conviction and its affirmance. *Korematsu v. United States*, 584 F. Supp. 1406 (N.D. Cal. 1984) *appeal docketed*, No. 84-1235 (9th Cir. Aug. 31, 1984). The government sought to avoid a decision on the merits of Korematsu's claim by asking the court to vacate the conviction and dismiss the criminal complaint. Finding no precedent to support the government's suggestion (*id.* at 1410-11), and in view of the government's failure to contest Korematsu's claim that his conviction constituted a grave miscarriage of justice (*id.* at 1420), the district court granted the writ. The court declined to reach any of the legal errors presented by Korematsu, however, holding that the correction of legal errors was beyond the court's power in a *coram nobis* proceeding. *Id.* In *Yasui v. United States*, No. CV83-151 (D. Ore. 1984), *appeal docketed*, No. 84-3730 (9th Cir. Mar. 30, 1984), the district court granted the government's counter-motion to dismiss the indictment and vacate Yasui's conviction. The court declined to make the specific factual findings requested by Yasui "forty years after they took place" on the ground that the parties' agreement as to Yasui's entitlement to relief had effectively mooted the controversy (slip op. at 2). A similar action filed by Gordon Hirabayashi is still pending in the district court. *Hirabayashi v. United States*, No. C83-122V (W.D. Wash. filed Jan. 31, 1983).

vocate, he claims to have separated those roles, and he asserts that *Justice at War* should not be construed “as a brief on . . . behalf” of his clients (p. xii). Unfortunately, that is precisely what it is.

