

# Michigan Law Review

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Volume 82 | Issue 4

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1984

## Justice at War: The Story of the Japanese American Internment Cases

Michigan Law Review

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### Recommended Citation

Michigan Law Review, *Justice at War: The Story of the Japanese American Internment Cases*, 82 MICH. L. REV. 887 (1984).

Available at: <https://repository.law.umich.edu/mlr/vol82/iss4/30>

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JUSTICE AT WAR: THE STORY OF THE JAPANESE AMERICAN INTERNMENT CASES. By *Peter Irons*. New York: Oxford University Press. 1983. Pp. xiii, 407. \$18.95.

Peter Irons's<sup>1</sup> *Justice at War* adds new evidence to the extensive array of literature<sup>2</sup> attacking the internment of Japanese Americans

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1. Peter Irons is Assistant Professor of Political Science at the University of California at San Diego, and is the author of *THE NEW DEAL LAWYERS* (1982).

2. For scathing condemnations of the Supreme Court's decisions, see Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175 (1945); Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945); see also M. GRODZINS, AMERICANS BETRAYED 354 (1949); J. TENBROEK, E. BARNHART AND F. MATSON, PREJUDICE, WAR AND THE CONSTITUTION (1954); Freeman, Genesis, Exodus, and Leviticus: *Genealogy, Evacuation and Law*, 28 CORNELL L.Q. 414 (1943). In the years since Dembitz's and Rostow's articles were published, "not a single legal scholar or writer has attempted a substantive defense of the Supreme Court opinions." P. 371. Despite the government's claim that the evacuation was a military necessity, numerous authors have argued not only that hindsight has shown that this was not in fact the case, but also that the military knew or at least should have known the falsity of the claim at the time of the evacuation. See, e.g., F. BIDDLE, IN BRIEF AUTHORITY (1962); M. GRODZINS, *supra*; C. MCWILLIAMS, WHAT ABOUT OUR JAPANESE-AMERICANS? (1944); J. TENBROEK, E. BARNHART & F. MATSON, *supra*; Freeman, *supra*; Rostow, *supra*. But see WAR RELOCATION AUTHORITY, U.S. DEPT. OF THE INTERIOR, LEGAL AND CONSTITUTIONAL PHASES OF THE WRA PROGRAM (1946). Further, a recent congressionally established commission investigated the internment

during World War II and the Supreme Court cases that sanctioned the internment.<sup>3</sup> In *Justice at War*, Irons focuses on lawyers who could have prevented the internment tragedy — those who had significant connections with the original evacuation decisions and the court cases testing those decisions. He takes for granted, and indeed one might hope, that those lawyers should have been sufficiently principled to ignore the clear prejudice that motivated the internment, competent enough to recognize the constitutional rights that the internment violated, and sufficiently dedicated and independent to pursue a course that would vindicate those rights. Yet that clearly did not happen, and Irons is able to document convincingly “a deliberate campaign to present tainted records to the Supreme Court” (p. viii) in the cases that upheld the government’s actions. In fact, based on the evidence Irons uncovered while researching his book, he and other attorneys have sought to reverse the wartime convictions of Fred Korematsu, Gordon Hirabayashi, and Minoru Yasui<sup>4</sup> by using the ancient writ of *coram nobis*, which allows a court to reverse its initial decision if that decision was affected by fundamental error or a party’s misconduct. Irons asserts that the record he has uncovered reveals “a legal scandal without precedent in the history of American law” (p. viii). Regardless of the accuracy of this statement, Irons presents strong documentation of a scandal of vast proportions.

On February 19, 1942, President Roosevelt signed Executive Order 9066 authorizing the Secretary of War to prescribe military areas and to exclude “any or all persons” (p. 48) from those areas. In the Internment Cases, the government was forced to defend this order, as well as the congressional action and military orders that followed it, in the face of exclusionary measures directed solely toward Japanese Americans. The government argued that “military necessity” justified applying those measures to a single class of citizens. The purported military necessity was based on the notion that Japanese Americans were predisposed to disloyalty, sabotage, and espionage because of their distinctive racial characteristics. Given the complete absence of hard evidence that any Japanese American had menaced national security either before or after Pearl Harbor (pp. 145-46, 179), the government had a difficult task buttressing its arguments.

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(soliciting Irons’ testimony) and similarly concluded that no military necessity existed. The commission attributed the evacuation and internment primarily to political pressures. See REPORT OF THE COMM. ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1982).

3. *Korematsu v. United States*, 323 U.S. 214 (1944) (upholding conviction for violating military order directing exclusion from “Military Area” by remaining in the area); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding conviction for violations of military curfew); *Yasui v. United States*, 320 U.S. 115 (1943) (same).

4. See note 3 *supra*.

To overcome this difficulty, Irons argues, government attorneys crossed the boundary of legitimate advocacy and entered into the realm of deceit (p. ix). Irons leaves little doubt in his exceedingly well-documented account that at the time of the exclusion the military knew the falsity of a number of the "facts" on which it was relying to show "military necessity." Additionally, though Justice Department lawyers who represented the government discovered that the military knew the falsity of some of its claims, they failed to inform the Court.<sup>5</sup> Thus, this is not simply a case where the benefits of hindsight clearly reveal that a mistake has been made.

While *Justice at War* does more than delineate acts of attorney misconduct,<sup>6</sup> it is with these acts that Irons is primarily concerned. In them, he sees "profound questions of legal ethics and professional responsibility" (p. ix). Although the code of legal ethics requires a lawyer to represent his or her client's interests zealously, it also demands that lawyers "function as officers of the courts, sworn to canons of fairness and justice" (p. ix). Lawyers may only present the courts with evidence they know to be truthful. Irons clearly demonstrates that government lawyers breached this latter duty by failing to inform the courts of the questionable validity of evidence intended to justify the military's actions.

*Justice at War* also examines the ethical dilemmas that faced some of the government lawyers when what they perceived as their professional responsibility conflicted with their personal beliefs. Each of the government lawyers involved felt this conflict differently, but for all, in the end, personal qualms bowed to the "demands of

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5. The accuracy of this grave charge appears to have been confirmed by the Justice Department's response to the claims recently filed against it in the challenge to *Korematsu* and by the judge's determination of that challenge. The charge against the government was that it had knowingly presented false evidence of the existence of a "military necessity." On October 4, 1983, the government joined Irons and Korematsu's other attorneys in requesting that the Court set aside the conviction. N.Y. Times, Oct. 5, 1983, at A24, col. 1. In mid-November, Federal District Judge Patel did so. Although the Justice Department did not admit to any governmental misconduct — it stated instead that it was not fighting the case because the evacuation program was "an unfortunate episode in our nation's history" that should be "put behind us" — Judge Patel interpreted the Justice Department's conciliatory approach to be tantamount to a confession of error. The Supreme Court's decision, she stated, was "based on unsubstantiated facts, distortions and misrepresentations." *Bad Landmark*, TIME, Nov. 21, 1983, at 51.

In 1983, bills were introduced and referred to the judiciary committees in both houses of Congress to provide for payments to certain Japanese Americans and others who were detained, interned or relocated by the United States during World War II. See S. 1520, 98th Cong., 1st Sess. (1983); S. 2116, 98th Cong., 1st Sess. (1983); H.R. 3387, 98th Cong., 1st Sess. (1983); H.R. 4110, 98th Cong., 1st Sess. (1983).

6. In addition to exploring these instances of misconduct, Irons depicts the influence of political pressures in the government's decisions to begin and end the evacuation. He illuminates the tactical disputes among the lawyers on both sides, disputes that indicate what these lawyers thought about the various justifications for the actions taken and about the conflict between institutional loyalty and personal conscience. He also discusses the lawyers' arguments before the courts and the courts' subsequent deliberations and opinions.

duty" (p. 350). As Irons shows, the conflict for a government lawyer may be particularly acute, because he or she has a dual professional responsibility "as the advocate for his federal client and as defender of the Constitution" (p. 350).

Irons focuses on Edward Ennis, a Justice Department lawyer with a major role in formulating the government's positions in the test cases. Ennis personified the conflict between professional obligation and personal conscience because, unlike many others, he did not simply view the War Department, which was promulgating and enforcing military orders pursuant to Roosevelt's Executive Order, as his client. He objected to the notion that the Justice Department should passively offer all the arguments that the War Department told it to make without exercising some independent judgment.

Ennis distrusted the War Department's claims and believed the evacuation and internment were unconstitutional, yet there was a limit to what he would do to back up those beliefs. He considered, but decided against, resigning when the evacuation decision was first made (p. 62). Later, while defending the government's actions in the courts, he believed the government was obliged to be frank and to confess the doubts it felt about the military's position. Unable to prevail within the government, Ennis went behind the scenes and actually undercut the government's position by helping to shape the opposition's legal strategy (pp. 182, 302-05). Again, however, Ennis chose not to resign and signed the government's *Korematsu* brief "as a sign of institutional loyalty" (p. 302). Thus, despite Ennis's belief that the internment was immoral and unconstitutional, he eventually capitulated and supported his client — the government. Ennis has attempted to account for his defense of programs he personally opposed; he stressed the demands of duty, explaining that he had seen it as his responsibility to state his position and then do the job determined by his superiors (p. 350). But Irons questions Ennis's approach, believing that more forceful action by Ennis might have altered the unfortunate outcome of *Korematsu* (p. 351).

Two of the incidents of governmental misconduct that Irons documents best illustrate the difficulty Ennis and his assistant, John Burling, faced in attempting to merge their personal and professional roles. First, while preparing the *Hirabayashi* brief, Ennis learned that the intelligence agency responsible for advising General John DeWitt, the ranking west coast military figure, had told the General that selective evacuation of Japanese Americans was preferable to mass evacuation. Ennis told the Solicitor General, who had control over the briefs, that since they were now defending the army on the basis that selective evacuation had been impracticable, they had to consider what their obligation to the Court was "in view of the fact that the responsible intelligence agency regarded a selective

evacuation . . . as preferable" (p. 204). Ennis warned that failure to advise the Court of the existence of this information might "approximate the suppression of evidence" (p. 204). But even though the final brief stated the opposite of the intelligence agency's conclusion, Ennis, as a loyal government lawyer, "swallowed his doubts and added his name to the . . . brief" (p. 206).

A second conflict arose when FBI and FCC reports ordered by the Justice Department at Ennis's prompting cast doubt on the accuracy of claims that some Japanese Americans were spying and signalling to offshore submarines. General DeWitt had made such claims in a document entitled *Final Report, Japanese Evacuation From the West Coast, 1942*. The FBI and FCC reports showed that DeWitt knew that the statements about the radio signalling were false both at the time he recommended the evacuation and at the time he included the charges in the *Final Report* as a central reason for the evacuation (p. 284). In a draft of their brief, Burling and Ennis included a footnote that would have notified the Court that the *Final Report's* claims about illegal radio transmitters and signalling conflicted with information that the Justice Department possessed. Heated debates between and within the Justice and War Departments ensued, in which Burling and Ennis argued that the government had an ethical obligation not to cite the *Final Report*. But the final footnote, though subtly expressing some doubts about the veracity of parts of the *Final Report*, contained no reference to specific conflicting information (p. 292). And again, despite their vehement disagreement with the decision not to express forthrightly the existence of these "lies" to the Court, Ennis and Burling signed the brief. "Institutional loyalty had prevailed over personal conscience" (p. 292).

Though Irons states that *Justice at War* "is not intended as a brief" (p. xii) on behalf of the clients he is now representing, at times the style of the book resembles a brief in its overt, and to this reader successful, attempt to persuade. This argumentativeness detracts a bit from the sense of outrage that Irons tries to convey, especially since the facts themselves are sufficient to make the point. Yet despite the tenor of advocacy conveyed by comments such as "a legal scandal of unprecedented scope and consequence" (p. 254), Irons's conclusions, though forcefully stated, can hardly be doubted. To Irons, "the historical record of the Japanese American wartime cases," supports "the conclusion that their outcome reflected the failure of the legal system" (p. 365).