

## Book Reviews

**Justice At War.** By Peter Irons.<sup>1</sup> New York: Oxford University Press. 1983. Pp. xiii, 407. \$18.95.

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In a famous law review article in 1945, Eugene V. Rostow wrote:

The opinions of the Supreme Court in the Japanese-American cases do not belong in the same political or intellectual universe with *Ex parte* Milligan, *De Jonge v. Oregon*, *Hague v. C.I.O.*, or Mr. Justice Brandeis' opinion in the *Whitney* case. They threaten even more than the trial tradition of the common law and the status of individuals in relation to the state. By their acceptance of ethnic differences as a criterion for discrimination, these cases will make it more difficult to resolve one of the central problems in American life—the problem of minorities. They are a breach, potentially a major breach, in the principle of equality. Unless repudiated, they may encourage devastating and unforeseen social and political conflicts.<sup>3</sup>

Subsequently, in 1954, Jacobus ten Broek, along with Edward N. Barnhart and Floyd W. Matson, in *Prejudice, War and the Constitution*, offered an even more telling and extensive critique of the doctrinal and factual shortcomings of the Court's opinions in these wartime cases. Such was the unanimity of acquiescence in these views, that in the last twenty-five years no legal scholar or writer has attempted a substantive defense of the opinions.

Professor Irons became intrigued with the episode in 1981 as an outgrowth of his broader interest in the lawyers who participated on both sides of the cases. His particular concern was the differing legal strategies and tactics these lawyers employed in wrestling with the important and unsettled issues of constitutional law the cases raised. Irons quickly found that other lawyers were also investigating the cases, most of them third generation Japanese-Americans whose parents had been interned. Ultimately he joined them in filing a lawsuit that sought the reversal of the criminal convictions of four of the best known of the Japanese-American victims. This entailed a petition for a writ of error, *coram*

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3. Rostow, *The Japanese American Cases—A Disaster*, 54 *YALE L.J.* 489, 492 (1945).

*nobis*, on the grounds that the original trial was tainted by fundamental error and that the convictions resulted in manifest injustice to the defendants.

What led to the effort to reverse these criminal convictions after forty years was the evidence uncovered during the research, which in Irons's words, revealed "a legal scandal without precedent in the history of American law."<sup>4</sup> Never before, he writes, "has evidence emerged which shows a deliberate campaign to present tainted records to the Supreme Court." He charges that the government's own lawyers suppressed evidence before the Supreme Court, relying on a military report containing "lies" and "intentional falsehood." He also contends that his research uncovered military files that disclosed the alteration and destruction by War Department officials of crucial evidence in these cases. The responsibility for this he lays not only on government lawyers, but on leaders of the American Civil Liberties Union for failing to present an adequate constitutional challenge when the cases were argued.

Irons's book promises documentation to support these allegations. Unfortunately, while the story presented is fascinating in its detail, and moving in its assault upon the injustice perpetrated, the existence of some kind of conspiratorial behavior, either on the part of the government or the ACLU, is not persuasively proven. The imputations of conspiracy may be traceable to book packagers at the Oxford University Press, who—having exaggerated the deviousness and underhandedness of the Brandeis-Frankfurter connection—may have wanted to hit the bookstalls with another juicy exposé. More likely, it was the result of the need, in securing the writ of *coram nobis*, to demonstrate that the original trial was tainted with fraud or with defects well beyond the normal limits of stupidity, negligence, and error on the part of lawyers.

The Japanese relocation episode, and particularly the judiciary's role in it, was a genuine scandal that hardly needs to be sensationalized.<sup>5</sup> Shortly after Pearl Harbor, pressure mounted for some action against the 112,000 persons of Japanese descent living on the West Coast. (Roughly two-thirds were citizens and others would have been if they had not been barred by the federal naturalization laws). The idea of evacuating them from the coast,

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4. P. IRONS, *JUSTICE AT WAR* viii (1983).

5. The judiciary's role is well explored in Rostow's article, the ten Broek book, and several other works. *E.g.*, M. GRODZINS, *AMERICANS BETRAYED* (1947); Dembitz, *Racial Discrimination and the Military Judgment*, 45 COLUM. L. REV. 175 (1945); *see also* Sidney Fine, *Mr. Justice Murphy and the Hirabayashi Case*, 33 PACIFIC HIST. REV. 195 (1964).

however, did not gain momentum until several months later. Initially even West Coast military leaders did not contemplate such a step. General J.L. DeWitt, head of the Western Defense Command, told a Justice Department official—fully a month after Pearl Harbor—that “any proposal for mass evacuation was ‘damned nonsense.’”<sup>6</sup> He thought it would suffice to exclude aliens from restricted areas around military bases. Unfortunately, the general’s opinion soon veered sharply. He adopted the position that the absence of even sporadic attempts at sabotage showed an “exercised control” on the part of the Japanese; when sabotage began, he reasoned, it would be massive. As Francis Biddle, then Attorney General, wrote some years later, “[he] was feeling the impact of aroused public opinion, particularly among the ‘best people of California.’”<sup>7</sup>

Professor Irons recounts how unsubstantiated rumors and mere suspicions of Japanese-American espionage came to be regarded as facts by General DeWitt. These “facts” then became the justification for the state of military necessity leading to internment. That DeWitt’s report was misleading and filled with fallacies, distortions, and clever omissions may well have been true. But Irons is on shakier ground when he claims that John J. McCloy and Karl R. Bendetsen of the War Department accepted the report uncritically. As the architect and engineer of the evacuation program, Bendetsen may have welcomed the report. But neither he nor McCloy docilely accepted all of DeWitt’s sweeping allegations. In fact, both questioned many of them sharply. DeWitt dug in his heels, contending that a general’s report to his military superiors was not subject to censorship by civilians in the War Department. The series of meetings which followed produced a revised version of the report which was substituted for the earlier one, and remained a confidential document. Even this was ultimately challenged by a series of objections which led to further meetings on the subject. To get a conspiracy out of this is difficult. More plausibly, it seems to reflect bureaucratic bungling, egotism, and jockeying for power.

In the end, Solicitor General Fahy notified the Supreme Court that he would not rely on the DeWitt Report for anything but a few incidental statistics, thereby depriving the government’s internment decision of any supporting findings which might have permitted the Court to evaluate its rationality as an exercise of the war power.

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6. F. BIDDLE, IN BRIEF AUTHORITY 215 (1962).

7. *Id.* at 216.

Irons's criticisms of the American Civil Liberties Union, while legitimate, are also a bit too categorical. His thesis is that if the ACLU had played an aggressive role in bringing the constitutional issues before the Court, the justices might well have done a better job of coming to grips with the issues. The ACLU's failure to do so, he surmises, was due to its leader Roger Baldwin's friendship with the President. This line of conjecture overlooks the fact that other lawyers in the case made the constitutional arguments reasonably well. It seems far more likely—and decisive—that the Court was feeling a variety of political pressures: the wartime climate; interpersonal tensions; and the fact that the President, the Congress, and the War Department had all supported the program that the Court was being asked to denounce. There was also the reality that its own members owed their appointment to Franklin Roosevelt and perceived him as generally favorable to minorities and to civil liberties. If there was scandal in the Court's behavior it was not that the justices reponded to the ACLU's dodging of the constitutional question. It was that the Court reflected and responded to the racism of that time, a racism accepted and reinforced through the military.<sup>8</sup> The other "scandal" is that the American legal profession did not openly question the constitutionality of the internment program. From the outset there was flagrant violation of the principle that Americans are Americans, not "Germans" or "Poles" or "Japanese." Similarly, it is shocking that contemporary lawyers did not openly condemn the fact that the executive order and the statute condoning it were an invasion of the constitutional rules governing trials for treason. Further, the statute imposed punishment in the name of military tribunals, and was a bill of attainder not based on any demonstrable, empirical justification.

Fortunately, the matter remained on the consciences of a good many Americans throughout the postwar era, especially during the sixties, when some activists denounced it as a flagrant and typical case of American racism. Books and articles on the subject continued to appear.<sup>9</sup> Even so, compensatory governmental ac-

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8. Bendetsen was particularly candid in this regard. "In the war in which we are now engaged racial affinities are not severed by migration," he wrote. "The Japanese race is an enemy race and while many second and third generation Japanese born on United States soil, possessed of United States citizenship, have become 'Americanized,' the racial strains are undiluted." There are "along the Pacific Coast over 112,000 potential enemies, of Japanese extraction, at large today." U.S. DEPT. OF WAR, FINAL REPORT, JAPANESE EVACUATION FROM THE WEST COAST 1942 at 34 (1943).

9. A. BOSWORTH, AMERICA'S CONCENTRATION CAMPS (1967); M. & R. CONRAT, EXECUTIVE ORDER 9066: THE INTERNMENT OF 110,000 JAPANESE AMERICANS (1972); R. DANIELS, CONCENTRATION CAMPS U.S.A. (1977); A. FISHER, EXILE OF A RACE (1965); A.

tions were minimal and cautious. In 1948 Congress had passed a Japanese-American Evacuation Claims Act<sup>10</sup> under which 23,000 claims totaling roughly \$37 million were paid to former internees. On the other hand, many claims were rejected, or were settled at a fraction of their real value. In May, 1959, the Justice Department formally completed a program to return U.S. citizenship to those Nisei who had renounced it in a wave of bitterness against their confinement. Attorney General William Rogers said at that time, in a public ceremony, that "This was an attempt to make up for a mistake our nation made toward a group of its citizens." He expressed the hope that the Nisei would have the charity to forgive their government.<sup>11</sup>

But the issue festered on. It was not until the later 1970's that a redress and reparations movement, led particularly by younger Japanese-Americans whose parents and grandparents still bore the psychological scars of internment, gained enough political backing to persuade Congress to establish a Commission on War-time Relocation. Divisions within the Japanese-American community lay behind the choice of the commission approach. The militant wing of the redress movement prevailed on Seattle Congressman Mike Lowry to introduce in 1979 a bill providing for \$25,000 payments directly to those who had been interned or to their heirs.<sup>12</sup> However, leaders of the Japanese American Citizens' League, with Washington lobbyist Mike Masaoka at their helm, campaigned for the commission alternative, hoping that the backing of a prestigious panel would add strength to the redress effort. Congressional leaders responded predictably, shunting aside Lowry's bill and pushing through a measure creating a nine-member commission headed by Joan Z. Bernstein, a Washington lawyer and former Carter administration official. Congress directed the Commission to review the facts and circumstances that led to Executive Order 9066 and to the detention in internment camps of American citizens. It also charged the commission with the additional task of recommending appropriate remedies to Congress. The commission then held a series of hearings across the country between July and December, 1981. Most of the 750

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GIRDNER & A. LOFTIS, *THE GREAT BETRAYAL: THE EVACUATION OF JAPANESE-AMERICANS DURING WORLD WAR II* (1969); J. MODELL, *THE KIKUCHI DIARY: CHRONICLE FROM AN AMERICAN CONCENTRATION CAMP* (1973); W. MOSOKAWA, *THE J.A.C.L. IN QUEST OF JUSTICE* (1982); D. MYER, *UPROOTED AMERICANS: THE JAPANESE AMERICANS AND THE WAR RELOCATION AUTHORITY DURING WORLD WAR II* (1971); M. WEGLYN, *YEARS OF INFAMY: THE UNTOLD STORY OF AMERICA'S CONCENTRATION CAMPS* (1976).

10. 50 U.S.C. app. §§ 1981-1987 (1976).

11. N.Y. Times, May 21, 1959, § 1, at 4, col. 1.

12. P. IRONS, *supra* note 4, at 348.

witnesses who testified were Japanese-Americans who related, in emotional and often tearful words, the memories of internment and the psychic wounds they still endured. For many of these witnesses, this was the first time they had spoken openly of that experience.

The commission's report was released in February, 1983.<sup>13</sup> It called the exclusion, relocation, and detention programs "unique in our history" and criticized Congress, the Supreme Court, President Franklin D. Roosevelt, the press, and others for advocating or permitting this "grave injustice" to Japanese-Americans. This was the government's first official acknowledgement that the program had been "conceived in haste and executed in an atmosphere of fear and anger at Japan," and that "Executive Order 9066 was not justified by military necessity" but had been prompted instead by "race prejudice, war hysteria and a failure of political leadership."<sup>14</sup> The commission then set out to determine what would be a fair redress in terms of monetary settlement.

Before it reported on this, however, twenty-five Japanese-Americans filed a multibillion dollar damage suit against the government charging deprivation of their most fundamental and constitutional rights.<sup>15</sup> This class action sought \$210,000 for the survivors of the internment camps, or for their heirs, in payment for loss of their homes, businesses, education, careers, severe psychological and physical injuries, loss of life, destruction of family ties, and tremendous personal stigma. The National Council for Japanese American Redress, which filed this suit, quoted the commission's report in support of its claims.

In the meantime, a private consulting firm had been retained to evaluate the claims. These were estimated at between \$149 million and \$370 million in 1945 dollars; a sum which would have run, in 1983, between \$2.5 and \$2.6 billion. The amount seemed high. Critics of the commission immediately set out to fight it and ultimately the commission recommended reparations of \$20,000 to each of the 60,000 living internees.<sup>16</sup> But action still awaited congressional support and that matter still pends. Irons, in describing the commission hearings, is especially revealing in his treatment of the latter-day testimony of such principals as Edward Ennis, former director of the Alien Enemy Control Unit of the

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13. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS. PERSONAL JUSTICE DENIED (1982).

14. *Id.* at 18.

15. Wash. Post, Mar. 17, 1983, § 1, at 9, col. 3.

16. COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS. PERSONAL JUSTICE DENIED, PART II, RECOMMENDATIONS 5, 9-10 (1983).

Justice Department, and an early critic of the whole program, John J. McCloy, and Herbert Wechsler, Assistant Attorney General for the War Division. Each sought to justify his former role and behavior and the role of those with whom he had worked. McCloy was especially adamant in defending the government's actions. When challenged for his insensitivity, he waved the "surprise attack" flag, insisting that internment had been adopted "in way of retribution for the attack that was made on Pearl Harbor."<sup>17</sup> Such unrepentant imperiousness, and the hostility it provoked in the hearings, clearly affected the commission's outcome.

In 1982 Irons finally gained access to the Justice Department documents on the original test cases against Executive Order 9066. Petitions were then filed seeking to overturn the long-standing convictions of the four incarcerated Japanese-Americans. In October, 1983, the Department of Justice filed a motion in federal court in San Francisco, agreeing that Fred Korematsu's conviction, and symbolically the legality of internment for all Japanese-Americans, should be set aside as "an unfortunate episode in our nation's history." The Department did not, however, respond directly to the charges of suppression of evidence or admit to any wrongdoing. Nevertheless, Judge Marilyn Patel called the government's admission "tantamount to a confession of error."<sup>18</sup> She overturned Korematsu's conviction, saying that internment of all Japanese-Americans was "based upon . . . unsubstantiated facts, distortions and misrepresentations of at least one military commander whose views were affected by racism." The judge also expressed hope that the Korematsu case would stand as a "signal for caution" for the government, reminding it of its constitutional responsibilities to "protect all citizens from petty fears and prejudices so easily stirred" by war.

Seldom in American public law has such an effort been made to "correct" the historical record. One can only celebrate this outcome, and Professor Irons's role in it, while regretting the touches of needless hyperbole in its pursuit.

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17. IRONS, *supra* note 4, at 353.

18. Nash, *Korematsu's Wartime Conviction Vacated*, 112 N.J.L.J. 11 (Dec. 15, 1983).