



Judges in the Classroom
Exploring United States V. Hirabayashi

Source:

Adapted by Tarry L. Lindquist from the Hirabayashi Lesson, written by Margaret Fisher and Julia Gold, the Institute for Citizen Education in the Law, Seattle, Washington, and updated in 2012. Staff at the Washington State Administrative Office of the Courts (AOC) edited the lesson. For more information, contact AOC Court Services, 1206 Quince Street SE, PO Box 41170, Olympia WA 98504-1170. For an electronic copy of this lesson, or to view other lesson plans, visit Educational Resources on the Washington Courts Web site at: www.courts.wa.gov/education/.

Objectives:

1. Students will place the order of the events in the case of United States v. Gordon K. Hirabayashi on a time line.
2. Students will identify the arguments put forward by Mr. Hirabayashi and by the U.S. government at trial.
3. Students will analyze the actions of the judge, the jury, and Gordon Hirabayashi; students will analyze the decision reached in the case.
4. Students will create alternative outcomes for the initial trial of United States v. Hirabayashi centering on the actions of Gordon Hirabayashi and Judge Lloyd Black.

Grade Level:

Grades 4-8

Time:

At least one class period (approximately 50 minutes)

Materials:

One copy of Handout 1 (Time Line) for each student
(The teacher should prepare this ahead of time for students and the judge. The teacher and judge should also have a copy of the answer key to the time line, which is included with the lesson plan.)

Note: This lesson assumes the teacher has introduced students to the history of internment, and specifically, to Gordon Hirabayashi's case. The students should have a basic understanding of this period in history and of Mr. Hirabayashi's background. They should also be familiar with the Fifth and Fourteenth Amendments, concepts of curfew, Executive Order 9066, and Civilian Exclusion orders.

Procedures:

1. **Begin the class by introducing yourself** to the students and telling a little bit about what you do, if this is your first class.
2. **Explain to the students** that your role today will be to help them analyze the case of United States v. Hirabayashi and to determine what other outcomes could have occurred with the case.
3. **Pass out Handout 1** (Time Line) and ask the students to work in pairs to place the events in the order they happened chronologically. Give the students about five minutes to complete this task. You might find it helpful to walk around and quietly interact with pairs of students as they work.
4. **Ask the students** to volunteer the sequence of events from earliest event to latest event. (See attached answer key for Handout 1.) Call on individual students. Acknowledge correct answers. For incorrect responses, simply say, "No, not quite. Does anyone have another idea?" Have the teacher write the answers on the board or docu-camera as you elicit responses from the students.
5. **After verifying** that the students do understand the order of events, review the charges against Mr. Hirabayashi. Tell students the U.S. charged Mr. Hirabayashi with two counts, which means he was charged with two crimes.

- **Count 1: Violation of Civilian Exclusion Order Number 57**

Lt. General DeWitt issued Civilian Exclusion Order Number 57 on May 10, 1942. It required persons of Japanese ancestry in a specific area (including the University District in Seattle where Gordon Hirabayashi lived) to report to a Civil Control Station in Seattle between the hours of 8:00 a.m. and 5:00 p.m. on May 11 or May 12, 1942.

- **Count 2: Violation of Public Proclamation Number 3**

Lt. General DeWitt issued Public Proclamation Number 3 on March 21, 1942. It established a curfew period and provided that after 6:00 a.m. on March 27, 1942, all persons of Japanese ancestry must remain within their place of residence between the hours of 8:00 p.m. and 6:00 a.m.

Remind students the U.S. government had the burden to prove these charges beyond a reasonable doubt. Point out the case was tried in the federal court at the U.S. District Court for the Western District of Washington, Northern Division, in Seattle.

6. **Ask the students** the following two questions:

- **What was the U.S. government's position at trial, that is, what did the government need to prove its case?**

The U.S. argued Mr. Hirabayashi violated two different orders, the exclusion order and the curfew order.

Count 1: To win its case for violation of the exclusion order, the government needed to show that Gordon Hirabayashi did not report to the U.S. Civil Control Station on May 11 or May 12, 1942. The U.S. argued Mr. Hirabayashi did not report to the Civil Control Station on those dates.

Count 2: To win its case for violation of the curfew order, the government needed to prove that Mr. Hirabayashi violated the curfew by staying out between 8:00 p.m. and 6:00 a.m. The U.S. argued Mr. Hirabayashi was out past the curfew time.

- **What was Gordon Hirabayashi's position at trial?**

Gordon Hirabayashi argued he had committed no act of espionage or spying and there was no proof he had committed such an act. He was not even accused of espionage.

Mr. Hirabayashi argued he was a loyal American citizen. He stated he did not report to the Civil Control Center and had not remained within his residence during the curfew hours because he honestly believed the evacuation and curfew orders were unconstitutional and violated his rights as an American citizen. He asserted the orders discriminated against him because of his Japanese ancestry.

Note: Although Mr. Hirabayashi did not specifically state which constitutional rights were violated, it would be his Fifth Amendment right to due process ("No person shall be . . . deprived of life, liberty, or property, without due process of law"). The equal protection clause of the Fourteenth Amendment is the amendment used today in discrimination cases (along with many specific laws that prohibit discrimination). However, the Fourteenth Amendment, as written, only applied to actions by the states. At the time of Mr. Hirabayashi's trial, the Fourteenth Amendment's equal protection clause had not been formally incorporated into the Fifth Amendment; therefore, it was not applicable to the federal government. Mr. Hirabayashi's attorney made some of these arguments to the judge anyway.

7. **Discuss the arguments** until you feel the students have a firm grasp of each argument.
8. **Talk to the students** about a judge's responsibilities in a criminal case and on what basis judges give instructions to juries.

9. Read or share the following in your own words:

Judge Lloyd Black instructed the jury that both orders were valid and enforceable. If they found as matters of fact that Gordon Hirabayashi was of Japanese ancestry and therefore subject to the orders, he violated the curfew, and he failed to report for evacuation, then they should find Gordon Hirabayashi guilty. The jury returned in 10 minutes with a finding of guilty on both counts.

Note: At the Hirabayashi trial, Judge Black actually refused to use any of the instructions proposed by the defendant.

10. Elicit analyses from the students regarding the judge, the jury, and Gordon Hirabayashi.

11. Provide students with the following information:

At sentencing the next day, the judge took the five months that Mr. Hirabayashi had already spent in the King County jail into account and sentenced him to 30 days on each count, to be served consecutively.

Mr. Hirabayashi then asked if he could serve a longer sentence--90 days--because he had found that if his sentence was at least 90 days, he would be allowed to serve the sentence outside a prison, in a road camp. The judge agreed and changed the sentence to 90 days for each count, to be served concurrently.

Note: Mr. Hirabayashi and his lawyers agreed, not realizing that the U.S. Supreme Court would use the concurrent sentences to avoid ruling on the constitutionality of the exclusion order and rule only on the curfew order, considered to be less intrusive, and therefore, more justifiable. In Hirabayashi, the U.S. Supreme Court said imposing an evening curfew exclusively on Japanese Americans was not a violation of the equal protection clause of the Fourteenth Amendment.

12. Discuss the decision and the sentence given Mr. Hirabayashi. The decision-making process that judges go through to render decisions is unknown to most students. Share your own insights especially how you, as a judge, think about the issues that come before you. You might tell students that judges are human beings who make serious decisions every day. Judges, like other decision-makers, are under a lot of pressure and must weigh all sides of the issues before rendering their decisions. You might explain that during the time of the internment cases, judges were probably getting pressure from many people (their friends, neighbors, and other community members) concerned about persons of Japanese ancestry and the perils of war.

Note: Fourth and fifth grade classes may only get this far in one class period.

13. Say to the students:

A variable is something that can change. Suppose we think of Gordon Hirabayashi as a variable, so that we could change his actions back in history. Or we could change Judge Black. Or the jury. Work in small groups for a few minutes to come up with a different outcome for the case, which is different because of a change in the actions of one of these key players or variables. Think about how history would be altered because of a variable.

14. With the teacher's assistance, quickly divide students into small groups of three or four students each and assign each group one variable to consider (Mr. Hirabayashi, Judge Black, or the jury). Help them to view the case in the context of 1942. Give the students time to work, but be sure you save at least 15 minutes for discussion.

15. Ask each group to share a different outcome of the case because of the variable the group discussed.

Examples: Judge Black could have altered his instructions to the jury. Gordon Hirabayashi could have denied that he broke the curfew. The jury could have returned a verdict of not guilty.

Ask students how this would have changed history. Would it have been for better or for worse?

16. Respond to the student scenarios from a legal point of view. Help students to begin to understand what the law can and cannot do in relation to this case.

Extension Activities/Procedures:

1. **Tell students** that Mr. Hirabayashi appealed his case and it was heard by the U.S. Supreme Court.

2. **Give an overview** of the appellate review process in both the state and federal court systems. Explain how the U.S. Supreme Court decides to take cases.

3. **Ask the students** to work in small groups to discuss possible arguments in an appeal of the Hirabayashi case. Divide students into small groups of three or four students each. Tell students to answer the following three questions:

- **What could Gordon Hirabayashi argue on appeal?**

Congress should not have delegated its legislative power to the military; such delegation allowed military commanders to issue orders requiring curfew and exclusion.

The orders violated the due process clause of the Fifth Amendment and the equal protection clause of the Fourteenth Amendment by unfairly discriminating against Japanese Americans as a class.

- **What could the U.S. government argue on appeal?**

The military commander had proper authority from Congress and the President; there had been no time to determine the loyalty of individual Japanese Americans.

Japanese Americans were not assimilated into the white population because of social, economic, and political conditions. This isolation might have increased their attachment to Japan, making them potentially willing to aid the enemy.

The government's actions were reasonable considering all of the circumstances.

- **How do you think the U.S. Supreme Court ruled in this case?**

4. **Tell students** the U.S. Supreme Court issued an opinion on June 21, 1943, which affirmed Mr. Hirabayashi's conviction. The unanimous decision stated that, given the danger at the time, a curfew was "an appropriate measure against sabotage."
5. **Have students** try to put themselves in the year 1943, a time when the country is at war with Japan. Ask them if they support the U.S. Supreme Court's decision.
6. **Ask students** what they think about the Court's opinion from their perspective today. Ask them whether or not they think such a thing could happen today. Have students think about the war on terrorism. Do students think the U.S. is justified to increase surveillance or attention to Muslims or people of Arab descent? When, if ever, would there be sufficient threat to justify the relocation and internment of people? Would citizenship matter? Is any limitation of a civil liberty justified during wartime? Limitation of speech? Press? Movement? Due process?
7. **If time permits** or if students ask, explain the country's reexamination of its treatment of the Japanese during World War II.

On December 17, 1944, the War Relocation Authority announced that internment camps would close.

In 1976, President Gerald Ford rescinded Executive Order 9066 and called the internment "a mistake." In 1980, Congress repealed Public Law 503 and created the Commission on Wartime Relocation and Internment of Civilians. The Commission conducted hearings on the internment from July to December 1981. The Commission's report, *Personal Justice Denied*, issued December 1982, concludes that "a grave injustice" had been committed against Japanese Americans.

In 1983, Gordon Hirabayashi filed a petition for writ of *coram nobis* seeking

vacation of his convictions on the grounds the government knowingly suppressed evidence during his trial and appeal. *Coram nobis* is a rarely used judicial process, by which a court can correct an error made in an earlier criminal conviction.

In 1985, Gordon Hirabayashi had a second trial on his *coram nobis* petition. The evidence at trial consisted of documents found at the National Archives and others obtained under a Freedom of Information Act request that showed government lawyers during the appeal to the U.S. Supreme Court in 1943 had intentionally withheld important intelligence reports and other evidence from the courts, which showed the "military necessity" for the internment was less dire than asserted.

For example, the government lawyers had claimed there was no time to determine the loyalty of individual Japanese Americans. The evidence uncovered revealed the military commanders had decided that it would be impossible to determine loyalty of Japanese, regardless of the time factor.

The judge at Hirabayashi's second trial set aside the conviction on Count 1 (the exclusion order), but not on Count 2 (the curfew order). Both sides appealed the decision and the U.S. Ninth Circuit Court of Appeals set aside both convictions. Finally, in 1987, Gordon Hirabayashi's struggle to clear his name was over.

In August 1988, Congress passed a statute that provided compensation, up to a maximum of \$20,000 per individual, for Japanese Americans and resident aliens who were living as of August 10, 1988 and who were confined, held in custody, relocated or otherwise deprived of property or liberty as a result of Executive Order 9066.

United States V. Hirabayashi Background

In early 1942, the United States was at war with Japan. This conflict followed the surprise attack by Japan on Pearl Harbor on December 7, 1941. Almost immediately, the Japanese went on to attack Malaysia, Hong Kong, the Philippines, and Wake and Midway Islands. Many people feared Japanese air raids and invasion of the West Coast by Japanese forces. Attitudes to Japanese Americans went from relative tolerance to hostility.

Out of a fear of espionage by Japanese persons in the United States or an invasion by Japanese military, the U.S. government placed severe restrictions on the rights of persons of Japanese ancestry during World War II. In the western states, Japanese citizens and aliens were subject to detention in guarded camps whether or not they were as individuals at all likely to engage in disloyal acts. These actions were taken with the unanimous concurrence of the various branches of government.

As a reaction to public pressure and on the advice of the War Department that military necessity required it, President Franklin Roosevelt issued Executive Order 9066 on February 19, 1942. This security measure authorized military commanders to exclude persons from vast areas. Congress passed Public Law 503 on March 21, 1942, which made it a federal crime to violate any orders that military commanders made pursuant to this authority.

Beginning in March 1942, Army Lieutenant General John DeWitt issued a series of such orders for Military Area Number 1 -- the Pacific coast states. These orders included a curfew that kept Japanese persons in their residences all night and required the movement of Japanese persons from certain areas to inland relocation centers. Lt. General DeWitt issued Public Proclamation Number 3 on March 21, 1942. It established a curfew period and provided that after 6:00 a.m. on March 27, 1942, all persons of Japanese ancestry must remain within their place of residence between the hours of 8:00 p.m. and 6:00 a.m. On May 10, 1942, Lt. General DeWitt issued Civilian Exclusion Order Number 57. It required persons in specific areas to report to a Civil Control Station between the hours of 8:00 a.m. and 5:00 p.m. on May 11 or 12, 1942.

Gordon Hirabayashi was born in Auburn, Washington on April 23, 1918. His parents were both born in Japan and came to the U.S. as teenagers. Gordon Hirabayashi attended public schools in King County and was active in Boy Scouts. He entered the University of Washington in 1937 and was a student there in the spring of 1942 when the government issued the curfew and exclusion orders. While at the University, Mr. Hirabayashi was active in the YMCA and the Society of Friends (Quakers).

Mr. Hirabayashi decided to defy the military orders because:

It was my feeling at that time, that having been born and educated here and having the culture of an American citizen, that I should be given the privileges of a citizen -- that a citizen should not be denied such privileges because of his descent. I expressed my thoughts that I had a right to stay.

On May 16, 1942, Mr. Hirabayashi voluntarily reported to the Federal Bureau of Investigation

(FBI). The FBI charged him with a violation of Exclusion Order Number 57 and placed him in the King County jail, where he remained until his trial. Later, the FBI found a diary in which he recorded his curfew violations; the FBI then charged him with violation of the curfew order under Public Proclamation Number 3.

Gordon Hirabayashi's was the first case the U.S. Supreme Court heard regarding the constitutionality of the military orders issued pursuant to Executive Order 9066.

Mr. Hirabayashi's lawyers argued that Congress unconstitutionally delegated its legislative power to the military by authorizing Lt. General DeWitt to issue the orders. His lawyers also asserted the due process clause of the Fifth Amendment prohibited the discrimination against citizens of Japanese descent. Because Mr. Hirabayashi was a loyal citizen, he should be treated as an individual. He was deprived of his life, liberty, and property without due process of law.

The U.S. government argued that the military commander had authority from Congress and the President. The government also claimed there was no time, because of the imminent danger of air raids and invasion by Japanese forces, to determine the loyalty of individual Japanese citizens.

The U.S. Supreme Court issued a unanimous ruling on June 21, 1943, that affirmed Hirabayashi's conviction and upheld the government's action. The Court chose to address only the curfew order, because the trial judge made the sentences on the two convictions concurrent. The Court found that under the war powers given to the President and Congress in Articles I and II of the U.S. Constitution, the President and Congress have wide discretion to determine the nature and extent of the danger during war and how to resist such danger. The Court concluded there was a "substantial basis" for the action taken and cited information about how Japanese had not assimilated into the white population, how Japanese children attended Japanese language schools believed to be sources of Japanese nationalistic propaganda, and how many Japanese American citizens were actually citizens of Japan also because Japan allowed dual citizenship.

The Court then turned to the discrimination argument. The Court pointed out the Fifth Amendment does not contain an equal protection clause as that found in the Fourteenth Amendment. (The Fourteenth Amendment is specifically aimed at discrimination by the states, not the federal government. In the 1950's, the U.S. Supreme Court informally incorporated the equal protection clause of the Fourteenth Amendment into the due process guarantees of the Fifth Amendment, which applies to the federal government).

After stating that distinctions between citizens solely because of their race are "odious to a free people whose institutions are founded upon the doctrine of equality" and that discrimination based on race alone would be insupportable "were it not for the fact that danger of espionage and sabotage, in time of war and of threatened invasion, calls upon the military authorities to scrutinize every relevant fact bearing on the loyalty of populations in the danger areas," the Court concluded:

The adoption by Government, in the crisis of war and of threatened invasion, of measures for the public safety, based upon the recognition of facts and circumstances which indicate that a group of one national extraction may menace that safety more

than others, is not wholly beyond the limits of the Constitution and is not to be condemned merely because in other and most circumstances racial distinctions are irrelevant.

Gordon Hirabayashi's case and the cases filed by three other individuals challenging Executive Order 9066 and other orders issued pursuant to it can be classified into three categories, based on the U.S. Supreme Court's treatment of the issues in its decisions:

- Challenge of the **curfew orders** --
Hirabayashi v. U.S., 320 U.S. 81 (decided June 21, 1943)
Yasui v. U.S., 320 U.S. 115 (decided June 21, 1943)
Both were unanimous decisions in which the Court upheld the constitutionality of the curfew order, as applied to Gordon Hirabayashi and Minoru Yasui.
- Challenge of the **detention** --
Ex Parte Endo, 323 U.S. 283 (decided December 18, 1944)
In this *habeas corpus* challenge by Mitsuye Endo, the U.S. Supreme Court unanimously found that Endo, as a loyal citizen, could not be legally detained in a camp. The Court held that President Roosevelt's executive order did not authorize the continued detention of Japanese persons following an initial evacuation and determination of their loyalty. This opinion did indicate the justices would have stricken such an order as being beyond any reasonable exercise of war powers, but the decision was based on the president's order.
- Challenge of the **exclusion orders** --
Korematsu v. U.S., 323 U.S. 214 (decided December 18, 1944)
The Court, in a 6-3 decision, relied on the Hirabayashi case and affirmed the conviction of Korematsu; the decision upheld the constitutionality of the exclusion orders as applied to Korematsu. The Court avoided ruling on the issue whether or not it would be constitutional to detain Korematsu, concededly a loyal citizen, in one of the camps because there was no evidence that he would have been sent to a camp if he had reported to an assembly center. Justice Roberts, one of the dissenters along with Justices Murphy and Jackson, characterized the exclusion orders as "imprisonment in a concentration camp, based on ancestry."

The decision in Korematsu was the start of a revolution in constitutional analysis of equal protection issues. The opinion gave great deference to the combined war powers of the president and Congress as these detentions far exceeded anything necessary to protect the country. The majority opinion agreed with the dissent as to the general burdens on a person because of race but these justices felt the needs of the nation, as perceived at the start of the war, justified these measures.

The majority opinion by Justice Black established the basis for a new constitutional standard of review of race classifications. The opinion established three points for future analysis of classifications based on race or national origin. First, these classifications were "suspect," which meant that, at a minimum, they were likely to be based on an impermissible purpose. Second, these classifications were to be subject to independent judicial review -- "rigid scrutiny." Third, the classification would be invalid if based on racial antagonism and upheld only if they were based on "public

necessity."

Significant excerpts taken from J. Nowak, R. Rotunda, and J. Young, *Constitutional Law*
pp. 631-633 (2d ed. 1983).

Time Line Answer Key

Directions: Place the corresponding letter on the time line below where appropriate. Some years have more than one historic event. These years are marked with the asterisks (*).

- A. The United States declares war on Japan.
- B. Gordon Hirabayashi fails to report to the U.S. Civil Control Station.
- C. Japanese are encouraged to immigrate to the western United States.
- D. President Franklin Roosevelt signs Executive Order 9066.
- E. Gordon Hirabayashi is born in Auburn, Washington.
- F. Judge Lloyd Black presides at the jury trial of Gordon Hirabayashi.
- G. Gordon Hirabayashi enters the University of Washington.
- H. The U.S. enacts the Webb Act, which denies Japanese born in Japan the right to own land in the U.S.
- I. Japanese planes bomb Pearl Harbor.
- J. Gordon Hirabayashi reports to the FBI and is charged with violations.
- K. Lt. General DeWitt is appointed Military Commander to carry out evacuations in the Western Defense Command.
- L. The U.S. enacts the Immigration Exclusion Act, which closes all immigration to the U.S. from Japan.
- M. The U.S. establishes the War Relocation Authority to coordinate the evacuation program.
- N. Gordon Hirabayashi violates curfew orders by staying in the library to study with his classmates at the University of Washington.
- O. The U.S. issues Civilian Exclusion Order No. 57, which orders all persons of Japanese ancestry to report to a control station on May 11 or May 12.
- P. Lt. General DeWitt declares curfew for all persons of Japanese ancestry.
- Q. President Franklin Roosevelt signs Public Law 503, which makes a knowing violation of DeWitt's orders a crime, punishable by law.

Early 1900's	1913	1918	1924	1937	December 1941		February 1942		March 1942			May 1942		October 1942		
					7	8	19	20	18	21	24	4	9	10	11&12	16
*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*	*
C	H	E	L	G	I	A	D	K	M	Q	P	N	O	B	J	F