

Korematsu v. United States (1944)

“As long as my record stands in federal court, any American citizen can be held in prison or concentration camps without trial or hearing...I would like to see the government admit they were wrong and do something about it, so this will never happen again to any American citizen of any race, creed, or color.”

- Fred Korematsu (1983), on his decision to again challenge his conviction 40 years later



A son and soldier of the 442nd visiting his parents at Manzanar Concentration Camp. © Archie Miyatake.

Resources

- 2 [About landmarkcases.org](#)
- 3 [Teaching Recommendations Based on Your Time](#)
- 5 [Background Summary and Questions](#)
 - • • [Reading Level](#)
 - • [Reading Level](#)
 - [Reading Level](#)
- 12 [Diagram of How the Case Moved Through the Court System](#)
- 13 [Key Excerpts from the Majority Opinion](#)
- 16 [Key Excerpts from the Dissenting Opinion](#)
[Full Text of the Majority Opinion](#) (online only)

Activities

The Case

- 19 [Classifying Arguments](#)
- 21 [Primary Documents: Executive Order 9066](#)
- 24 [A Question of Loyalty](#)
[Presidential Powers in Wartime](#)
- 29 [Standard level activity](#)
- 35 [AP level activity](#)
- 40 [Cartoon Analysis](#)

After The Case

- 42 [Did the Court Err in *Korematsu*?](#)
- 47 [Cases in the War Against Terrorism](#)
[Fred Korematsu's Obituary](#) (online only)

Additional Resources (online only)

- [Densho: The Japanese American Legacy Project](#)
- [Exploring the Japanese American Internment](#)
- [Japanese American Internment Curriculum](#)

About landmarkcases.org

This site was developed to provide teachers with a full range of resources and activities to support the teaching of landmark Supreme Court cases, helping students explore the key issues of each case. The "Resources" section features basic building blocks such as background summaries and excerpts of opinions that can be used in multiple ways. The "Activities" section contains a range of short activities and in-depth lessons that can be completed with students. While these activities are online, many of them can be adapted for use in a one-computer classroom or a classroom with no computer.

Depending upon the amount of time you have to teach the case, you may want to use one or more of the "Resources" or "Activities" in conjunction with one or more of the general teaching strategies. These general teaching strategies include moot court activities, political cartoon analysis, continuum exercises, and Web site evaluation.

If you have time constraints, look at the Teaching Recommendations on page 3.

Feel free to experiment with these materials!

Teaching Recommendations Based on Your Time

If you have one day...

- Do the activity “Primary Documents: Executive Order 9066.”
- Read the Background Summary and discuss the questions.
- Have students begin the “Classifying Arguments” activity and finish for HW, if necessary.

If you have two days...

- Do all of the activities recommended for the first day.
- Go over the “Classifying Arguments” activity.
- Read and discuss the “Key Excerpts from the Majority Opinion” and the accompanying questions.
- Complete the cartoon analysis.

If you have three days...

- Do all of the activities recommended for days one and two.
- Have students complete and discuss the “Loyalty Questionnaire.”
- Do “Presidential Powers in Wartime.” This activity is formatted in both a standard-level and as a Scored Discussion for AP level students. This provides excellent material for a discussion.

If you have four days...

- Do all of the activities recommended for days one, two, and three.
- Do either “Did the Court Err in Korematsu?” or “Cases in the War Against Terrorism.”

Background Summary and Questions ...

When the Japanese bombed Pearl Harbor on December 7, 1941, destroying much of the American Pacific Fleet, the American military became concerned about the security of the mainland United States, particularly along the West Coast. The Japanese military had achieved significant and swift success throughout the Pacific. Many Americans turned their fear and outrage over the actions of the Japanese government on people of Japanese descent, both citizens and non-citizens, living lawfully in the United States.

At the time, approximately 112,000 people of Japanese descent lived on the West Coast, about 70,000 of these were American citizens. Many Japanese Americans had close cultural ties with their homeland, sending children home for schooling and even collecting tinfoil and money to send to Japan during its war with China. At the time, however, there was no proven case of espionage or sabotage on the part of Japanese or Japanese Americans in the United States.

Nonetheless, in February 1942, General DeWitt, the commanding officer of the Western Defense Command, recommended that “Japanese and other subversive persons” be evacuated from the Pacific Coast. He claimed,

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. To conclude otherwise is to expect that children born of white parents on Japanese soil sever all racial affinity and become loyal Japanese subjects ready to fight and, if necessary, to die for Japan in a war against the nation of their parents.

He also said that there was “no ground for assuming that any Japanese, barred from assimilation by convention as he is, though born and raised in the United States, will not turn against this nation when the final test of loyalty comes.”

President Franklin D. Roosevelt acted on this recommendation by signing Executive Order 9066. This authorized the Secretary of War or any designated commander, at their sole discretion, to limit and even prohibit some people from being in certain areas. The ensuing restrictions on people of Japanese origin included curfews and forced removal to assembly and relocation centers much farther inland. Relocation to these centers was called internment. Most were required to live in barracks, many of which did not have running water or cooking facilities. They were only allowed to bring basic personal items. Thus, many suffered heavy financial losses when they were forced to quickly sell their homes, vehicles, and other belongings. Soon after the order was enacted, Congress sanctioned the executive order by passing a law that imposed penalties for those who violated the restrictions that evolved from the order.

Fred Korematsu was an American-born citizen of Japanese descent who grew up in Oakland, California. He tried to serve in the United States military, but was rejected for poor health. He was able, however, to get a job in a shipyard. When Japanese internment began in California, Korematsu evaded the order and moved to a nearby town. He also had some facial surgery, changed his name and claimed to be Mexican-American. He was later arrested and convicted of violating Exclusion Order No. 34 issued by General DeWitt, which barred all persons of Japanese descent from the “military area” of San Leandro, California. There was no question at the time of conviction that Korematsu had been loyal to the United States and was not a threat to the war effort.

Korematsu challenged his conviction on the grounds that the relocation orders were beyond the powers of Congress, the military authorities and the President. He also asserted that to apply these orders only to those of Japanese ancestry amounted to constitutionally prohibited discrimination based on race. The government argued that the exclusion and internment of Japanese Americans was justified because it was necessary to the war effort. They said there was evidence that some Japanese Americans were

Korematsu v. United States

involved in espionage, and argued that because there was no way to tell the loyal from the disloyal, all Japanese Americans had to be treated as though they were disloyal.

The federal appeals court ruled in favor of the United States, and Korematsu's appeal brought the issue before the U.S. Supreme Court.

Background Summary and Questions ...

Questions to consider:

1. Under which sections of the U.S. Constitution could the President and Congress have the power to issue the executive order and penalties discussed above?

2. How convincing is General DeWitt's argument about the loyalty of the Japanese and Japanese Americans?

3. The United States was also at war with Germany and Italy. Yet people of German and Italian descent were not gathered up for internment as a group like the Japanese. Why do you suppose the Japanese were treated this way?

4. In times of war, governments often must balance the needs of national security with the civil rights of its citizens. In your opinion, did the internment order find the right balance between these competing values?

Background Summary and Questions ••

After Pearl Harbor was bombed in December 1941, the American military became concerned about an attack from the Japanese on the mainland of the United States. There were many people of Japanese descent living on the West Coast at the time and the American government was worried that they might aid the enemy. However, at the time there was no proven case of espionage or sabotage on the part of Japanese or Japanese Americans in the United States.

Nonetheless, in February 1942, General DeWitt, the commanding officer of the Western Defense Command, recommended that “Japanese and other subversive persons” be removed from the West Coast. President Franklin D. Roosevelt soon signed Executive order 9066, which allowed military authorities to enact curfews, forbid people from certain areas, and to move them to new areas. Congress then passed a law imposing penalties for people who ignored these orders. Many Japanese and Japanese Americans on the West Coast were moved to camps farther inland. This was called internment. Japanese Americans were forced to sell their homes and personal belongings and to move to the camps. They were required to live in barracks which did not have running water or cooking facilities.

Fred Korematsu was born in America of Japanese parents. He tried to serve in the United States military, but was rejected for poor health. When Japanese internment began in California, Korematsu moved to another town. He also had some facial surgery and claimed to be Mexican-American. He was later arrested and convicted of violating an order that banned people of Japanese descent from the area of San Leandro, California.

Korematsu challenged his conviction in the courts. He said that Congress, the President, and the military authorities didn’t have the power to issue the relocation orders. He also said that because the order only applied to people of Japanese descent, the government was discriminating against him on the basis of race.

The government argued that the evacuation of all Japanese Americans was necessary to protect the country because there was evidence that some were working for the Japanese government. The government said that because there was no way to tell the loyal from the disloyal, all Japanese Americans had to be treated as though they were disloyal.

The federal appeals court agreed with the government. Korematsu appealed this decision and the case came before the U.S. Supreme Court.

Background Summary and Questions ••

Questions to Consider:

1. Under which sections of the U.S. Constitution could the President and Congress have the power to issue the executive order and penalties discussed above?
2. The United States was also at war with Germany and Italy. Yet people of German and Italian descent were not gathered up for internment as a group like the Japanese. Why do you suppose the Japanese were treated this way?
3. In times of war, governments often must balance the needs of national security with the civil rights of its citizens. In your opinion, did the internment order find the right balance between these competing values?

Background Summary and Questions •

Vocabulary

espionage

Define:

Use in a sentence:

descent

Define:

Use in a sentence:

executive order

Define:

Use in a sentence:

curfew

Define:

Use in a sentence:

internment

Define:

Use in a sentence:

inherit (inheritable)

Define:

Use in a sentence:

The port of Pearl Harbor, Hawaii was attacked by the Japanese in December 1941. After this, the American government was worried that the West Coast of the United States would also be attacked. Many Americans were angered by the bombing of Pearl Harbor and blamed Japanese Americans who were living in the United States. People thought that the many Japanese and Japanese Americans who lived there would help the Japanese military. But at the time, there was no known case of **espionage** from any person of Japanese **descent**.

In February, 1942, President Franklin D. Roosevelt signed **Executive Order** 9066. This order allowed the military to use **curfews** and to move Japanese and Japanese Americans to special camps. Japanese Americans were only allowed to bring very basic items with them. Moving people to camps is called **internment**.

Fred Korematsu was born in America and had Japanese parents. He wanted to be in the United States military, but he was not healthy enough. Korematsu did not want to go to the internment camps. He moved away and changed the way he looked to avoid the order. But he was arrested later and sent to a camp.

Korematsu took his case to the courts. He said that Congress, the President, and the military authorities didn't have the power to send people to internment camps. He also said that the government was discriminating against him because of his race.

The government argued that the evacuation of all Japanese Americans was necessary because there was evidence that some were working for the Japanese government. The government said that because there was no way to tell the loyal from the disloyal, all Japanese Americans had to be treated as though they were disloyal.

The federal appeals court agreed with the government. Korematsu appealed this decision and the case came before the U.S. Supreme Court.

Background Summary and Questions •

Questions to Consider:

1. Why was Korematsu arrested?

2. What sections of the U.S. Constitution give the Congress and President the war powers?

3. The United States was also at war with Germany and Italy. But people of German and Italian descent were not gathered up for internment as a group like the Japanese. Why do you suppose the Japanese were treated this way?

4. In times of war, governments have to balance national security with citizens' rights. In your opinion, did internment of Japanese descendents strike a good balance?

Diagram of How the Case Moved Through the Court System

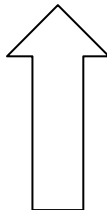
Supreme Court of the United States (1944)

By 6-3 margin, the Court upheld Korematsu's conviction. The Court adopted a new test (strict scrutiny), holding that any law or order that discriminated on the basis of race or ethnicity could only be constitutional if it served an extremely important purpose for the government (referred to as a compelling state interest). However, the Court found that the Government had met its burden because discrimination against the Japanese in this case served the government's military concerns about the possibility of Japanese spies.



United States Court of Appeals for the Ninth Circuit (1943)

The Court of Appeals upheld Korematsu's conviction.



United States District Court for the Northern District of California (1942)

Korematsu was convicted of being in a place from which all persons of Japanese ancestry were excluded.

Key Excerpts from the Majority Opinion

The decision was 6-3, and Mr. Justice Black delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, and the importance of the constitutional question involved caused us to grant *certiorari*.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially based upon Executive Order No. 9066, 7 Fed. Reg. 1407. That order, issued after we were at war with Japan, declared that "the successful prosecution of the war requires every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities. . . ."

One of the series of orders and proclamations, a curfew order, which like the exclusion order here was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States*, we sustained a conviction obtained for violation of the curfew order. . . . We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

...Here, as in the *Hirabayashi* case, ". . . 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."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was 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 that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.

We uphold the exclusion order as of the time it was made and when the petitioner violated it. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers -- and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies -- we are dealing specifically with nothing but an exclusion order. 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.

Affirmed.

Key Excerpts from the Majority Opinion

Questions to Consider:

1. How does the Court compare Korematsu's challenge to the relocation order to Hirabayashi's challenge to the curfew that was imposed on Japanese Americans?
2. The Court says that the military order is not based on racial prejudice but instead is based on legitimate military concerns. What are those military concerns?
3. Do you agree that racial prejudice does not play a role in the government's treatment of Japanese Americans during World War II? Give reasons to support your answer.

Excerpts from the Dissenting Opinion

Mr. Justice Murphy, dissenting:

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power" and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts...

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support...

...Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

... The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, 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. A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.

...No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry...

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly

revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Excerpts from the Dissenting Opinion

Questions to Consider:

1. Why does Justice Murphy believe that the Court should not defer to the military decisions in this case?

2. What rights does Justice Murphy claim are affected by the evacuation order?

3. Justice Murphy acknowledges that there are some disloyal persons in the United States. How does he believe the government should treat such disloyalty?

4. Justice Murphy accuses the American government of engaging in the same type of racism and discrimination as the United States' World War II enemies. Research some of the discriminatory activities in which Germany, Italy, and Japan were engaged during World War II. Do you agree with Justice Murphy's comparison? Explain your answer.

Classifying Arguments

The following is a list of arguments in the *Korematsu v. United States* court case. Read through each argument and decide whether it supports Korematsu's side against internment (K), the United States' side in favor of internment (US), both sides (BOTH), or neither side (N).

1. The Fifth Amendment of the Constitution states:

No person shall...be deprived of life, liberty, or property, without due process of law....

By subjecting Japanese and Japanese Americans to internment as a group, the United States has denied them due process of law. Proper due process require proof of guilt through individual, established procedures.

2. The Fourteenth Amendment states

No State shall...deny to any person within its jurisdiction the equal protection of the laws.

Though the Fourteenth Amendment refers to states, it also applies (through the Fifth Amendment) to the federal government. The government is obliged to provide equal rights; if the rights of a particular racial group are taken away, the reason for doing so must pass the highest scrutiny possible.

3. Article II, Section 2 of the Constitution gives the President the power as commander in chief of the military. Commanding the military includes issuing orders as necessary to help the military carry out its duties to protect the nation. Such orders include Executive Order 9066, which expressly allowed restrictions on the movement and presence of groups of people in certain areas of the country.
4. German- and Italian-Americans were treated differently from the Japanese during World War II. Though some were interned and suffered discriminatory treatment, they were not gathered up *en masse* without hearing or evidence as the Japanese were.
5. It is impossible for the Supreme Court to confirm or deny the military authorities' claim that it was impossible to quickly separate out disloyal and dangerous Japanese or Japanese-Americans.
6. In *Hirabayashi v. United States (1943)*, the Supreme Court supported the conviction of a Japanese-American who violated a curfew order imposed through the same presidential Executive Order and Congressional Act at issue in this case.
7. When our shores are threatened by hostile forces, the power to protect should be commensurate with the threatened danger.
8. No Japanese or Japanese-American had been accused of or convicted for espionage or sabotage in the months between the attack on Pearl Harbor and the beginning of internment.
9. Approximately 5,000 American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor.
10. In the American legal system, "guilt is personal and not inheritable." There was no evidence that Fred Korematsu engaged in any subversive or conspiratorial activity.

11. The armed services must protect a society, not merely its Constitution.
12. We may not be able to confine military actions to the boundaries of the Constitution, but that does not mean that the Constitution should be distorted to approve of all the military deems expedient.
13. If the Supreme Court issues a ruling supporting racial discrimination in this case, it becomes a principle for supporting racial discrimination in any case where an urgent need is claimed.
14. Under the *Alien Enemy Act of 1798*, which remains in effect today, the U.S. may apprehend, intern and otherwise restrict the freedom of “alien enemies” upon declaration of war or actual, attempted or threatened invasion by a foreign nation.

Working with Primary Documents: Executive Order 9066

EXECUTIVE ORDER NO. 9066

FEBRUARY 19, 1942

Authorizing the Secretary of War to Prescribe Military Areas

Whereas, The successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises and national defense utilities as defined in Section 4, Act of April 20, 1918, 40 Stat. 533 as amended by the Act of November 30, 1940, 54 Stat. 1220. and the Act of August 21, 1941. 55 Stat. 655 (U.S.C., Title 50, Sec. 104):

Now, therefore, by virtue of the authority vested in me as President of the United States, and Commander in Chief of the Army and Navy, I hereby authorized and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deem such action necessary or desirable to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion. The Secretary of War is hereby authorized to provide for residents of any such area who are excluded therefrom. such transportation, food, shelter, and other accommodations as may be necessary, in the judgment of the Secretary of War or the said Military Commander and until other arrangements are made, to accomplish the purpose of this order. The designation of military areas in any region or locality shall supersede designation of prohibited and restricted areas by the Attorney General under the Proclamation of December 7 and 8, 1941, and shall supersede the responsibility and authority of the Attorney General under the said Proclamation in respect of such prohibited and restricted areas.

I hereby further authorize and direct the Secretary of War and the said Military Commanders to take such other steps as he or the appropriate Military Commander may deem advisable to enforce compliance with the restrictions applicable to each Military area herein above authorized to be designated. including the use of Federal troops and other Federal Agencies, with authority to accept assistance of state and local agencies.

I hereby further authorize and direct all Executive Department, independent establishments and other Federal Agencies, to assist

the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities and service.

This order shall not be construed as modifying or limiting in any way the authority granted under Executive Order 8972. dated December 12.1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with response to the investigation of alleged acts of sabotage or duty and responsibility of the Attorney General and the Department of Justice under the Proclamation of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas thereunder.

Franklin D. Roosevelt

The White House, February 19,1942.

Working with Primary Documents: Executive Order 9066

Questions to Consider

Directions: Answer each question and include the exact language from Executive Order 9066 in which the answer is found.

1. What was the reasoning used to justify the issuance of Executive Order No. 9066?
2. Under what authority did President Roosevelt issue Executive Order No. 9066?
3. To whom did President Roosevelt designate authority to carry out the evacuation?
4. Give specific examples of the powers authorized by the President to be used in carrying out the Order.

A Question of Loyalty

Justice Black's majority opinion in *Korematsu v. United States* never questioned the judgment of military authorities that there were disloyal members of the Japanese and Japanese-American population. The opinion also never questioned the military's assertion that the number of disloyal people could not be quickly determined.

...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.

Nonetheless, while in the internment camps, a loyalty questionnaire was distributed, partly to determine who could have been eligible to serve in the military and partly to determine who may have required further confinement. Justice Black made reference to this questionnaire in his decision:

That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor....

So while accepting the military's assertion that the entire group had to be confined because they could not quickly ascertain who was loyal and disloyal, Justice Black used the numbers obtained from a simple questionnaire to support the military's opinion that some people of Japanese origin were disloyal.

Putting aside this contradiction in logic, an examination of the loyalty questionnaire reveals the difficulties it must have presented for the internees and their families. Examine the questionnaire on the next page and address the following questions:

Questions to consider:

1. Which questions on the form do you think are relevant to determine a person's loyalty to the United States? Explain.
2. Which questions on the form do you think are irrelevant to determine a person's loyalty to the United States? Explain.
3. Look carefully at questions 27 and 28. These were given special attention by the military authorities and are referred to in Justice Black's opinion. People who answered "no" to these questions were considered to be disloyal.
 - (a) Can you think of reasons why a person would answer "no" to question 27 other than disloyalty?
 - (b) First generation Japanese immigrants (Issei) were unable to obtain American citizenship. How might this have complicated their ability to answer question 28?
 - (c) Are there other difficulties you can identify with these questions?

To see the an original copy of the questionnaire and read what internees though of it, visit the Smithsonian's "A More Perfect Union" website:

http://americanhistory.si.edu/perfectunion/non-flash/loyalty_questionnaire.html

WAR RELOCATION AUTHORITY APPLICATION FOR LEAVE CLEARANCE

Relocation Center _____

Family No. _____

Center Address _____

1. _____
Surname English given name Japanese given name

(a) Alias _____

2. Names and ages of dependents you propose to take with you _____

3. Date of birth _____ Place of birth _____

4. Citizenship _____

5. Last two addresses at which you lived 3 months or more (includes residence at relocation center and at assembly center):

_____ From: _____ To: _____

_____ From: _____ To: _____

6. Sex _____ Height _____ Weight _____

7. Are you a registered voter? _____ First year registered? _____

Where? _____ Party? _____

8. Marital status _____ Citizenship of spouse _____

Race of spouse _____

9. _____
Father's name Birthplace: Town or City State or Country Occupation

10. _____
Mother's name Birthplace: Town or City State or Country Occupation

In items 11 and 12, list relatives other than your parents, your children, your brothers and sisters. For each person, give name, relationship to you, citizenship, complete address, and occupation.

11. Relatives in the United States (if in military service, indicate whether a selectee or volunteer):

(a) _____
name relationship to you citizenship

_____ complete address occupation selectee or volunteer

Korematsu v. United States

(b) _____
name relationship to you citizenship

complete address occupation selectee or volunteer

24. List magazines and newspapers to which you have subscribed or have customarily read:

25. To the best of your knowledge was your birth ever registered with any Japanese agency for the purpose of establishing a claim to Japanese citizenship?

(a) If so registered, have you applied for cancellation of such registration? _____
yes or no

When? _____ Where? _____

26. Have you ever applied for repatriation to Japan? _____

27. If the opportunity presents itself and you are found qualified, would you be willing to volunteer for the Army Auxiliary Corps or the WAAC _____

28. Will you swear unqualified allegiance to the United States of America and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign power, government, or organization? _____

29. Have you ever worked for or volunteered your services to the Japanese or Spanish government?
If so, indicate which and give dates:

30. Have you ever registered your children with a Japanese or Spanish consul? _____
yes or no If so:

Names	Dates	Names	Dates
_____	_____	_____	_____
_____	_____	_____	_____
_____	_____	_____	_____

31. Have you ever sent any of your children to Japan? _____ If so, give names and dates:
yes or no

Names	Dates	Names	Dates
_____	_____	_____	_____
_____	_____	_____	_____

32. State any type of leave previously applied for and indicate whether leave clearance has previously been applied for, giving date and place of application.

33. If employment is desired, but no definite offer has been received, list the kinds of employment desired in order of preference: First choice: _____
Second choice: _____
Third choice: _____

(a) Will you take employment in any part of the United States? _____
yes or no

(b) Location preferences _____

_____	_____
date	signature

© 2005 Street Law, Inc. and the Supreme Court Historical Society
Visit www.landmarkcases.org

WRA-100, REV.

FORM NO. 100-100-100
REVISED 7/15/42

WAR RELOCATION AUTHORITY APPLICATION FOR LEAVE CLEARANCE

Relocation Center _____
Family No. _____
Center Address _____

1. _____
(Surname) (English given name) (Japanese given name)

(a) Alias _____

2. Names and ages of dependents you propose to take with you _____

3. Date of birth _____ Place of birth _____

4. Citizenship _____

5. List two addresses at which you lived 5 months or more (include residence at relocation center and at assembly center):

_____ From _____ To _____
_____ From _____ To _____

6. Sex _____ Height _____ Weight _____

7. Are you a registered voter? _____ Your first registered _____
Where? _____ Party _____

8. Marital status _____ Citizenship of spouse _____
Date of spouse _____

9. _____
(Father's name) (Year of birth) (State or country) (Occupation)
(Birthplace)

10. _____
(Mother's name) (Year of birth) (State or country) (Occupation)
(Birthplace)

In items 11 and 12, you need not list relatives other than your parents, your children, your brothers and sisters. For each person give name, relationship to you (such as father), citizenship, complete address, occupation.

11. Relatives in the United States (if in military service, indicate whether a volunteer or conscript):

(a) _____
(Name) (Relationship to you) (Citizenship)
_____ (Complete address) (Occupation) (Volunteer or conscript)

(b) _____
(Name) (Relationship to you) (Citizenship)
_____ (Complete address) (Occupation) (Volunteer or conscript)

4-1000

24. List magazines and newspapers to which you have subscribed or have customarily read:

25. To the best of your knowledge, was your birth ever registered with any Japanese governmental agency for the purpose of establishing a claim to Japanese citizenship?

(a) If so registered, have you applied for cancellation of such registration? _____ (Yes or no)

When? _____ Where? _____

26. Have you ever applied for repatriation to Japan?

27. If the opportunity presents itself and you are found qualified, would you be willing to volunteer for the Army Nurse Corps or the WASC?

28. Will you swear unqualified allegiance to the United States of America and forswear any form of allegiance or obedience to the Japanese emperor, or any other foreign government, power, or organization?

29. Have you ever worked for or volunteered your services to the Japanese or Spanish government? _____ (Yes) (No)

If so, indicate which and give date: _____

30. Have you ever registered any of your children with a Japanese or Spanish consular? _____ (Yes) (No). If so, give name and date:

Name	Date	Name	Date
_____	_____	_____	_____
_____	_____	_____	_____

31. Have you ever sent any of your children to Japan? _____ (Yes) (No). If so, give names and dates:

Name	Date	Name	Date
_____	_____	_____	_____
_____	_____	_____	_____

32. State any type of leave previously applied for, and indicate whether leave clearance has previously been applied for, giving date and place of application.

33. If employment is desired, but no definite offer has been received, list the kinds of employment desired in order of preference:

First choice _____

Second choice _____

Third choice _____

(a) Will you take employment in any part of the United States? _____ (Yes) (No)

(b) Give location preferences _____

(Date) _____ (Signature) _____

8-5278

Presidential Powers in Wartime –Activity 1

Introduction

The delegates to the 1787 Constitutional Convention were very concerned about the balance of power in the government they sought to create. In the office of presidency, they were worried from past experience with England's king that a single person at the head of government would take too much power and become a tyrant. However, they were also aware that legislatures with too much power could also be oppressive. Thus, they sought to divide power between the branches, so that no one had too much, and they incorporated a system of limits on each branch of government by the others. Thus, explained James Madison in Federalist 51, "Ambition must be made to counteract ambition."

Since the ratification of the U.S. Constitution, there have been many battles between the branches of government over the scope of their respective powers. One such battle concerns the power to conduct war. The activity below will help you understand how the Framers of the U.S. Constitution dealt with the question of who should have this power in government.

- Using the chart, brainstorm some advantages and disadvantages of having the power to conduct war held exclusively by one branch of government, or in sharing that power.
- As a whole class, share your ideas with one another by creating a chart for the entire class either on the board or on a large piece of paper. Do the advantages and disadvantages seem to favor giving more power to the president, or to the legislature, or for shared power?
- Examine the excerpts from the U.S. Constitution regarding the powers of the president and legislature in war and answer these questions:
 1. List the powers that the U.S. Constitution gives to the Congress.
 2. List the powers that the U.S. Constitution gives to the president.
 3. Which branch appears to have more war powers, in terms of number?
 4. Which branch appears to have more dominance with its war powers? In other words, does one branch appear to have more important war powers than the other? Explain.
 5. Without mentioning every single power, how would you summarize the way that the Framers divided the war powers between the two branches?
 6. In your opinion, did the Framers divide the power well? Why or why not?
- While the U.S. Constitution may appear clear in the way it divides power, in practice, there have been questions over whether presidential actions in wartime were constitutional. Your teacher will divide the class into three groups and assign you the number 1, 2, or 3. Read the situation corresponding to your number. Appoint a recorder and reporter and discuss whether the president should have the power in wartime to do as he did. The recorder should write the arguments from the discussion. After your discussion, read the Supreme Court's decisions.
- The reporter from each group then explains to the class as a whole the arguments that the group formulated regarding the use of presidential power in the situation. The reporter should also explain how the Supreme Court decided the case.
- For homework, or class work, students should answer the questions titled "Questions about Presidential Power in Wartime." These could be discussed as a class or submitted to the teacher for feedback.

CHART – ADVANTAGES AND DISADVANTAGES OF LOCATION OF WAR POWERS

	Advantages	Disadvantages
War powers are held exclusively by the president		
War powers are held exclusively by the legislature		
War powers are shared by the president and the legislature		

Excerpt 1

Article 1

Section 8 - Powers of Congress concerning war

The Congress shall have Power...

[11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

[12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

[13] To provide and maintain a Navy;

[14] To make Rules for the Government and Regulation of the land and naval Forces;

[15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

[16] To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

[18] To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Excerpt 2

Article 2

Section 2 - Civilian Power over Military, Cabinet, Pardon Power, Appointments

[1] The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States; he may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.

[2] He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

SHOULD THE PRESIDENT HAVE THIS POWER IN WARTIME?

The following situations represent actual presidential actions during war. For the number you have been assigned, read the situation and discuss whether the president should be able to exercise this power or not. Some issues to think about as you discuss:

- Is there evidence of this power for the president in the U.S. Constitution? If there is nothing specifically, could you interpret the Constitution in such a way that the president would have this power?
- What are the advantages and disadvantages of the president having this power?

Situation 1

Suppose the United States is involved in a war overseas and needs more steel to produce military equipment. The owners of the steel factories and the workers are in a disagreement over wages and working conditions. The steel workers' union announces that there will be a strike. Should the president have the power to put the factories under government control, so that they continue to produce steel?

Read about the case and the Supreme Court's decision on the next page. Do you agree with it?

Situation 2

Suppose the United States is involved in a war overseas. Not all citizens are completely supportive of the U.S. involvement and there are some groups organized specifically in protest of U.S. involvement in the war. A protester is arrested by federal officers, held in jail, and put on trial before a military tribunal. Should the president have the power to suspend habeas corpus (the protection against illegal imprisonment) and allow for civilian prosecutions to take place in military courts?

Read about the case and the Supreme Court's decision on the next page. Do you agree with it?

Situation 3

Suppose the United States is involved in a war overseas as a result of a terrorist attack that took place on American soil. U.S. troops capture an individual who is a U.S. citizen, claiming he was fighting against the U.S. and is therefore considered an unlawful combatant. As such, the government says he is not entitled to the same rights as a regular U.S. citizen (such as access to the court system and legal counsel). Should the president have the power during wartime to label U.S. citizens as unlawful combatants (with no oversight), hold them indefinitely, and deny them counsel?

Read about the case and the Supreme Court's decision on the next page. Do you agree with it?

Situation 1 - *Youngstown Sheet and Tube Co. v. Sawyer (1952)*

During the early 1950s, there was significant unrest in the labor and business sectors which prompted President Truman to set up the Federal Wage Stabilization Board. The Board had the power to set wages and handle labor disputes.

The United States was involved in the Korean War and therefore the military was dependent on steel production for war materials. In 1951, the steel mill owners and employees (who were represented by a strong union) were involved in a labor dispute and the union threatened strikes. Truman ordered the Board to investigate, which delayed the strike. When there was no clear settlement after the investigation, the union again announced there would be a strike. In response, Truman issued Executive Order 10340 which ordered the Secretary of Commerce to seize the steel mills and continue to operate them. The obvious justification was for steel production necessary for war materials.

The Supreme Court ruled against the government, invalidating Truman's order. The Court held that the President's power during wartime does not extend to the power to seize private property. That power is not enumerated in Article 2 of the Constitution, and Congress had not given the President authorization, therefore it was unconstitutional.

Situation 2 - *Ex Parte Milligan (1866)*

In 1863, Congress gave President Lincoln authorization to suspend the writ of habeas corpus in cases dealing with offenses against the armed forces. Milligan, a civilian from Indiana, was involved in local activities supporting the Confederacy. He was arrested and tried by a military court. The court found him guilty of treason and sentenced him to death. Because the trial was conducted by a military court, Milligan was not entitled to the same protections he would have received otherwise, such as a jury trial.

The Supreme Court agreed to hear the case in 1866, after the Civil War was over. The Court said that even though civilians could be imprisoned by the military during times of war, if the civilian courts are still operating, it is unconstitutional to subject Milligan to a military court martial. Therefore, the suspension of habeas corpus was unconstitutional because the civilian courts were still operating. The Court further pointed out that even when habeas corpus has been suspended, the civilian can only be held without charges; but not tried or sentenced by a military court.

Situation 3 - *Hamdi v. Rumsfeld (2004)*

Hamdi, an American citizen, was arrested by U.S. military troops in Afghanistan in 2001. He was charged as an "enemy combatant" and accused of fighting against the U.S. He was originally held in Guantanamo Bay and then transferred to a military prison in Virginia. Hamdi claimed that as an American citizen he was entitled to an attorney and a trial, and was protected against being held indefinitely. The U.S. argued that during wartime, the government can declare people "enemy combatants" which then limits what rights they are entitled to while in custody.

The Supreme Court heard the case, and had to decide not only if Hamdi's Fifth Amendment rights were violated, but also if the Court was bound to defer to the Executive branch during wartime because of the separation of powers. The Court held that while it was lawful to hold Hamdi, he must be given the protections of the Fifth Amendment and the opportunity to challenge his detention. The Court also rejected the argument that the judicial branch is prevented by the separation of powers from hearing Hamdi's case.

QUESTIONS ABOUT PRESIDENTIAL POWER IN WARTIME

1. What does the U.S. Constitution say about the respective war powers of the president and Congress?
2. Does the power of the president as “commander in chief” give him unlimited power to act in time of war? Cite evidence from the three Supreme Court cases you read and heard about to support your answer.
3. How did the Supreme Court rule in the *Korematsu* case with regard to President Roosevelt’s use of presidential power in wartime?
4. Why do you think that the Supreme Court was willing to defer to the president in *Korematsu*, but not in the other three cases?
5. On the continuum below, place an “X” in the position that designates how much power the president should have in a time of war. Below the continuum, write two reasons to justify your position.



President should have
unlimited power

President should have
no power

Presidential Powers in Wartime- Activity 2 (AP level) Scored Discussion

Introduction

The delegates to the 1787 Constitutional Convention were very concerned about the balance of power in the government they sought to create. In the office of presidency, they were worried from past experience with England's king that a single person at the head of government may take too much power and become a tyrant. However, they were also aware that legislatures with too much power could also be oppressive. Thus they sought to divide power between the branches, so that none had too much, and they incorporated a system of limits on each branch of government by the others. Thus, explained James Madison in Federalist 51, "Ambition must be made to counteract ambition."

Since the ratification of the U.S. Constitution, there have been many battles between the branches of government over the scope of their respective powers. One such battle concerns the power to conduct war.

This activity has you participating in a scored discussion of the controversial question: (Note to teachers: If you have not used a scored discussion strategy previously, the teaching strategies section of Landmark Cases, at www.landmarkcases.org)

"How much power should a president have in order to protect the nation in wartime?"

Procedure:

- As an introduction to the scored discussion, students brainstorm the advantages and disadvantages of having either the executive or legislative branch of government control war powers exclusively, as well as the advantages and disadvantages of shared control over war powers. Use the Chart (on page 30 of this pdf) to organize their initial thoughts on the issue.
- Before tackling the reading material, students may want to lay out an initial position with regard to the amount of power a president should have in wartime. Such a position could be written on a (like the one on page 37 of this pdf) in the students' notebooks and changed as the student gains more information.
- Students should read and take notes on all material listed below to prepare for the scored discussion:

Excerpts from the U.S. Constitution with regard to the executive and legislative war powers (on page 31 of this pdf)

Summary of from *Ex Parte Milligan* (1866) from Wikipedia, available on the internet at:
http://en.wikipedia.org/wiki/Ex_Parte_Milligan

Excerpt from *Korematsu v. United States* (1944) (on page 13 of this pdf)

Summary of *Youngstown Sheet and Tube Co. vs. Sawyer* (1952), available on the internet at:
http://en.wikipedia.org/wiki/Youngstown_Sheet_&_Tube_Co._v._Sawyer#Majority_Opinion

Summary of *Hamdi v. Rumsfeld* (2004), available on the internet at
http://en.wikipedia.org/wiki/Hamdi_v._Rumsfeld

“The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations That Support Them” by Robert J. Delahunty and John Yoo – This paper was written for the Bush Administration to support enlarged presidential powers in the war on terror and caused a great deal of controversy. It is long, so perhaps students should only read through page 11, which outlines a particular interpretation of the U.S. Constitution favoring significant war powers for the president.

Available on the internet at:

<http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1003&context=boaltwp>

“Declare war before going to war,” by Doug Bandow, Cato Institute, available on the internet at **<http://www.csmonitor.com/2002/0315/p11s01-coop.html>**

War Powers Resolution, 1973 (on page 38 of this pdf).

- Once students have completed the readings, the scored discussion can take place.
- After the scored discussion is finished, students should again note their position on the continuum on how much power a president should have in times of war, in particular explaining any differences in their opinion from before the scored discussion.

How much power should a president have in wartime?

Your position **before reading any text** – mark an “X” along the continuum and write your reasoning below the continuum



Unlimited power to
protect the nation

No power to
protect the nation

Your position **after reading the texts** – mark an “X” along the continuum and write your reasoning below the continuum (note why you changed your mind, if you did)



Unlimited power to
protect the nation

No power to
protect the nation

Your position **after the scored discussion**– mark an “X” along the continuum and write your reasoning below the continuum (note why you changed your mind, if you did)



Unlimited power to
protect the nation

No power to
protect the nation

War Powers Resolution of 1973

Public Law 93-148
93rd Congress, H. J. Res. 542
November 7, 1973

Joint Resolution

Concerning the war powers of Congress and the President.

Resolved by the Senate and the House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This joint resolution may be cited as the "War Powers Resolution".

PURPOSE AND POLICY

SEC. 2.

(a) It is the purpose of this joint resolution to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof.

(c) The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

CONSULTATION

SEC. 3. The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situation where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

REPORTING

SEC. 4.

(a) In the absence of a declaration of war, in any case in which United States Armed Forces are introduced--

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation; the president shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth--

(A) the circumstances necessitating the introduction of United States Armed Forces;

(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

(b) The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad

(c) Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

CONGRESSIONAL ACTION

SEC. 5.

(a) Each report submitted pursuant to section 4(a)(1) shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on Foreign Affairs of the House of Representatives and to the Committee on Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

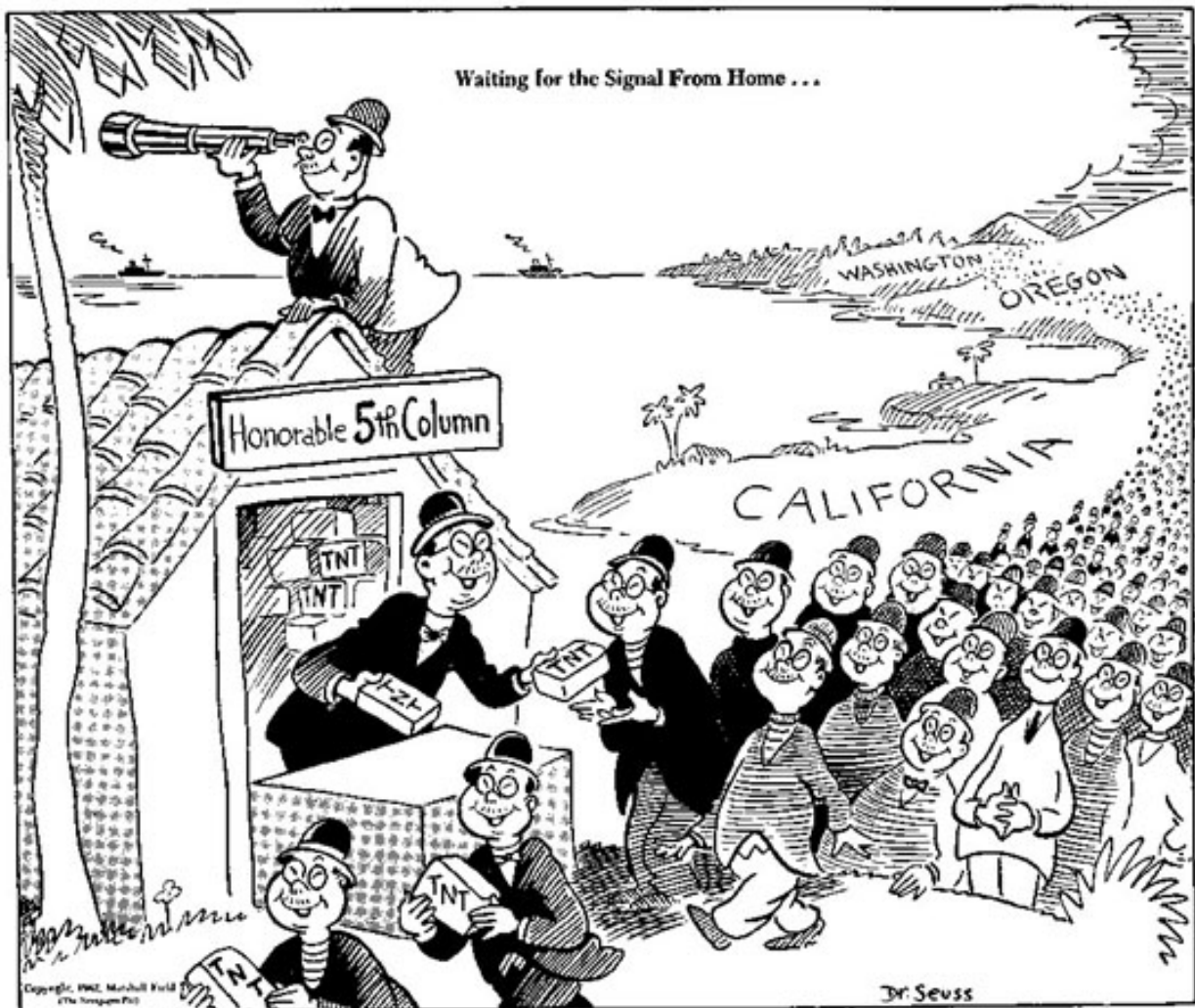
(b) Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 4(a)(1), whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Notwithstanding subsection (b), at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

Cartoon Analysis

Analyze the cartoons below in terms of its meaning related to the internment of Japanese Americans during World War II and *Korematsu v. United States*.

1. What do you see in the cartoon? Make a list. Include objects, people, and any characteristics that seem to be exaggerated.
2. Which of the items on the list from Question 1 are symbols? What does each symbol stand for?
3. What is happening in the cartoon?
4. What is the cartoonist's message?
5. Do you agree or disagree with the message? Explain your answer.





Cartoon provided courtesy of the Virtual Museum of San Francisco, at www.sfmuseum.org

Did the Court Err in *Korematsu*?

Most internees suffered significant financial and property losses. Upon evacuation, the Japanese American internees were told that they could bring only as many articles of clothing, toiletries, and other personal effects as they could carry.

To compensate these losses, the US Congress, on July 2, 1948 passed the "American Japanese Claims Act," which stated that all claims for war losses not presented within 18 months "shall be forever barred." Approximately \$147 million in claims were submitted; 26,568 settlements to family groups totaling more than \$38 million were disbursed.

Beginning in the 1960s, a younger generation of Japanese Americans who felt energized by the Civil Rights movement began what is known as the "Redress Movement" -- an effort to obtain an official apology and reparations (compensation) from the federal government for interning their parents and grandparents during the war. The movement's first success was in 1976, when President Gerald Ford proclaimed that the evacuation was "wrong."

In 1980, President Carter set up a congressional commission to investigate Japanese internment during World War II. Specifically, the Commission on Wartime Relocation and Internment of Civilians was directed to review the facts and circumstances surrounding Executive Order 9066 and the impact of the Order on American citizens and permanent resident aliens. In addition, the Commission was to recommend appropriate remedies for the government's actions at the time.

The Commission held 20 days of hearings in 1981, listening to testimony from more than 750 witnesses including evacuees, government officials, historians and other professionals. The Commission also reviewed the records of government action, contemporary writings and historical analyses.

On February 24, 1983, the commission issued a report entitled *Personal Justice Denied*, condemning the internment as unjust and motivated by racism rather than real military necessity. The Commission concluded in its report that "the decision in *Korematsu* lies overruled in the court of history." Later in the report, the Commission stated that "*Korematsu* has not been [technically] overruled--we have not been so unfortunate that a repetition of the facts has occurred to give the Court that opportunity--but each part of the decision, questions of both factual review and legal principles, has been discredited or abandoned." The Commission suggested that the *Korematsu* judgment was an anomaly in Supreme Court decision-making.

As a result of these conclusions, President Ronald Reagan signed the Civil Liberties Act of 1988, which provided redress of \$20,000 for each surviving detainee, totaling \$1.2 billion dollars. On September 27, 1992 the Amendment of the Civil Liberties Act of 1988, and an additional \$400 million in benefits was signed into law by President George H. W. Bush, who also issued another formal apology from the U.S. government.

Other actions by the U.S. government since *Korematsu* support this view. In 1988, Congress officially apologized for Japanese internment in the Civil Liberties Act (follows on next page). Furthermore, President Bill Clinton sent a formal letter of apology (follows on next pages) to survivors of Japanese internment in 1993 with reparations.

But these actions were taken at a time when the United States did not face a threat on its territory. Since the events of September 11, 2001, debate over the *Korematsu* decision has once again ignited as the United States attempts to deal with the threat of terrorism. In 1998, before this terrorism threat fully surfaced, Chief Justice William Rehnquist wrote a book titled "All the Laws But One: Civil Liberties in Wartime" where he discussed the balance that past governments have negotiated between security and civil liberties. In a speech given in 2000 (follows on next pages), Justice Rehnquist sums up a position

supported by many that the Courts may need to give greater leeway to other branches of government in time of war.

Forty years after his conviction, Fred Korematsu once again decided to challenge it. Korematsu's conviction was overturned by the United States District Court for the Northern District of California, the same court that had originally convicted him. The case was heard as a *coram nobis* case. A writ of *coram nobis* is a remedy used only in special circumstances to correct errors in a criminal conviction.

The court ruled that newly uncovered evidence revealed the existence of a manifest injustice which—had it been known at the time—would likely have changed the Supreme Court's decision. The decision rested on a series of documents recovered from the National Archives showing that the government had withheld important and relevant information from the Supreme Court that demonstrated that the Army had altered evidence to make it appear that Japanese Americans posed a greater threat of spying and disloyalty.

It is important to note that the *coram nobis* decision overturned Korematsu's conviction based on the faulty evidence, but did not overturn the constitutionality of the Supreme Court's decision. Although Korematsu has not been followed as precedent, it remains good law to this day.

Given these materials and what you have learned about the *Korematsu* case, do you think that the Supreme Court erred in its 1944 decision? In what way, if any, do the events of September 11, 2001, affect your decision? Explain.

CIVIL LIBERTIES ACT OF 1988

**Enacted by the United States Congress
August 10, 1988**

“The Congress recognizes that, as described in the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent residents of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II.

As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership.

The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made.

For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.”

THE WHITE HOUSE

WASHINGTON

October 1, 1993

Over fifty years ago, the United States Government unjustly interned, evacuated, or relocated you and many other Japanese Americans. Today, on behalf of your fellow Americans, I offer a sincere apology to you for the actions that unfairly denied Japanese Americans and their families fundamental liberties during World War II.

In passing the Civil Liberties Act of 1988, we acknowledged the wrongs of the past and offered redress to those who endured such grave injustice. In retrospect, we understand that the nation's actions were rooted deeply in racial prejudice, wartime hysteria, and a lack of political leadership. We must learn from the past and dedicate ourselves as a nation to renewing the spirit of equality and our love of freedom. Together, we can guarantee a future with liberty and justice for all. You and your family have my best wishes for the future.

Bill Clinton

**Remarks of Chief Justice William H. Rehnquist
100th Anniversary Celebration
Of the Norfolk and Portsmouth Bar Association
Norfolk, Virginia
May 3, 2000**

Lincoln felt that the great task of his administration was to preserve the Union. If he could do it by following the Constitution, he would; but if he had to choose between preserving the Union or obeying the Constitution, he would quite willingly choose the former course. Franklin Roosevelt felt the great task of his wartime administration was to win World War II, and, like Lincoln, if forced to choose between a necessary war measure and obeying the Constitution, he would opt for the former.

This is not necessarily a condemnation. Both Lincoln and FDR fit into this mold. The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim Inter Arma Silent Leges -- time of war the laws are silent.

To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the greater scheme of things it may be best for all concerned. The fact that judges are loath to strike down wartime measures while the war is going on is demonstrated both by our experience in the Civil War and in World War II. This fact represents something more than some sort of patriotic hysteria that holds the judiciary in its grip; it has been felt and even embraced by members of the Supreme Court who have championed civil liberty in peacetime. Witness Justice Hugo Black: he wrote the opinion for the Court upholding the forced relocation of Japanese Americans in 1944, but he also wrote the Court's opinion striking down martial law in Hawaii two years later. While we would not want to subscribe to the full sweep of the Latin maxim -- Inter Arma Silent Leges -- in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.

Source: http://www.supremecourtus.gov/publicinfo/speeches/sp_05-03-00.html

Cases from the War on Terrorism

After the attacks of September 11, 2001, President Bush declared a “war on terrorism.” Part of this war on terrorism involved the passage of new laws, establishment of warning systems, and increased surveillance. The Supreme Court heard several cases involving the detention of persons alleged to be “enemy combatants.” These detentions forced many people to reflect on the detentions of Japanese Americans during World War II.

***Rasul v. Bush* and *Al Odah v. United States* (The Guantanamo Bay Detention Cases)**

Directions:

1. Read the synopsis of facts for the Guantanamo Bay Detention Cases.
2. Complete the legal arguments for each side using the graphic organizer.
3. Read the opinions in the Guantanamo Bay Detention Cases and discuss which arguments appeared to be most persuasive to the Court.
4. Prepare to present the key facts, arguments, and the Court’s decision to the entire class.

The Guantanamo Bay Detention Cases: Synopsis of Facts

In early 2002, the U.S. military began transporting foreigners captured in Pakistan and Afghanistan to the United States military base in Guantanamo Bay, Cuba. The Bush Administration labeled those captured as “enemy combatants” rather than prisoners of war (POWs). Unlike POWs, enemy combatants do not enjoy the protections of the Geneva Convention (which include humane treatment, protection from coercive interrogation and the right to due process of law). According to the Administration, the prisoners in Guantanamo may never be granted a trial, either military or civil, and may be detained until the end of the war on terrorism.

The families of sixteen prisoners—two Australians, two British, and 12 Kuwaitis—filed suit in federal court seeking a writ of *habeas corpus* that would force the government to present evidence justifying their continued holding at Guantanamo Bay. The detainees all claim their innocence and charge that the government's decision to deny them access to attorneys and to hold them indefinitely without charges, access to a court, or recourse to any legal process violates the Fifth Amendment's Due Process Clause.

The government argued that the federal courts had no jurisdiction to hear the case because the prisoners were not American citizens and were not being held in United States territory. Guantanamo Bay base was leased by the US from Cuba indefinitely in 1903, but Cuba retains “ultimate sovereignty.” The lease, however, gives the US “complete jurisdiction and control.”

The Guantanamo Bay Detention Cases: Graphic Organizer

Issue: Can United States courts consider legal appeals filed on behalf of foreign citizens held by the United States military in Guantanamo Bay Naval Base, Cuba?

Arguments for Detainees	Arguments for the United States

The Guantanamo Bay Detention Cases: Opinions

Majority

The Court decided the case 6-3, and Justice Stevens was joined in the majority opinion by Justices Ginsburg, Souter, Breyer and O'Connor. Justice Stevens' opinion found that federal courts have jurisdiction to consider *habeas corpus* petitions from detainees at Guantanamo Bay Naval Base in Cuba. Conceding that the Constitution did not require *habeas corpus* to be available to enemy aliens held outside the United States, the majority nonetheless upheld their access to courts based on the federal habeas statute.

Concurrence

Justice Kennedy joined the five justices in the majority in holding that the federal courts have *habeas corpus* jurisdiction over the detainees in this case. His opinion stressed deference to "the power of the President as Commander in Chief" and respect for "military necessity" while recognizing that "as the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker."

Dissent

Justice Scalia, along with Chief Justice Rehnquist and Justice Thomas, dissented from the judgment of the Court and would not have allowed the detainees to bring their *habeas* petitions before a federal district court. He noted the "breathtaking" consequences of the majority holding and potentially extending jurisdiction to Afghanistan, Iraq and millions of future POWs.

Rumsfeld v. Padilla

Directions:

5. Read the synopsis of facts for *Rumsfeld v. Padilla*.
6. Complete the legal arguments for each side using the graphic organizer.
7. Read the opinions in *Rumsfeld v. Padilla* and discuss which arguments appeared to be most persuasive to the Court.
8. Prepare to present the key facts, arguments, and the Court's decision to the entire class.

Rumsfeld v. Padilla: Synopsis of Facts

Jose Padilla is a United States citizen. He is a former gang member who was arrested in Chicago upon arrival from Pakistan on May 8, 2002. The FBI claimed that Padilla, while in Pakistan, met with members of Al-Qaeda and was coming back to the U.S. to commit acts of violence. He was therefore held as a material witness for the 9/11 grand jury in New York. President Bush later declared Padilla an “enemy combatant” and transferred him to a military base in South Carolina. Classification as an “enemy combatant” allows the government to detain him without the constitutional protections which are generally extended to criminal defendants.

In New York, the federal court ruled against Padilla, finding that he had been appropriately detained and could be labeled as an enemy combatant. They did, however, order that he be permitted access to a lawyer. The United States appealed the case to the Second Circuit Court of Appeals. The government argued that:

- a. Padilla shouldn’t have access to a lawyer because he was a national security concern. They cited the congressional authorization for the war on terrorism, which granted the President “necessary and appropriate” powers.
- b. The New York federal court didn’t have the authority to hear the case because Padilla had been moved to South Carolina, and because the South Carolina prison warden should have been named as the defendant rather than Secretary of Defense Donald Rumsfeld.

The Second Circuit ruled against both of the government’s arguments. They found that the New York court did have the authority to hear the case and that Rumsfeld could be named as the defendant. The also ruled that Padilla could not be held as an enemy combatant, and therefore deserved access to a lawyer. The United States appealed that ruling to the Supreme Court.

Rumsfeld v. Padilla: Graphic Organizer

Issue: Do the President's Commander-in-Chief powers allow him to seize and detain a United States citizen arrested in the United States based on the President's own determination that he is an "enemy combatant"?

Arguments for Padilla	Arguments for Rumsfeld (United States)

Rumsfeld v. Padilla: Opinions

Majority

Chief Justice Rehnquist (joined by Justices Scalia and Thomas) wrote the majority opinion, dismissing Padilla's case after finding that the federal District Court in New York did not have jurisdiction over his claim. The Court further held that the proper defendant in the case was the warden of the facility where the prisoner is being held, and not Secretary Rumsfeld. Here, the warden was clearly outside the reach of the New York courts.

Concurrence

Justice Kennedy wrote a concurrence, in which Justice O'Connor joined, clarifying their understanding of the majority decision. They stressed that where jurisdiction over the direct warden is lacking, courts should direct the case to the most appropriate venue where the nearest custodian can be found. Furthermore, the concurrence explicitly allowed for an exception if "the Government's purpose in removing a prisoner were to make it difficult for his lawyer to know where the habeas petition should be filed, or where the Government was not forthcoming with respect to the identity of the custodian and the place of detention."

Dissent

Justice Stevens' bitter dissent was joined by Justices Souter, Ginsberg, and Breyer, and not only challenged the majority's understanding of jurisdiction, but reached the merits of the case to find the Government's arguments lacking. In this case, the dissent found that the Government's late notice to Padilla's lawyer of their intention to relocate him "should not permit the Government to obtain a tactical advantage." Justice Stevens felt strongly that the Court should address itself to the real question in this case, which was "whether [Padilla] is entitled to a hearing on the justification for his detention."