KOREMATSU V. U.S. (1944)

DIRECTIONS

Read the Case Background *and* Key Question*. Then analyze the Documents provided. Finally, answer the* Key Question *in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history.*

CONSTITUTIONAL PRINCIPLES

Equal protection
Due process
Inalienable rights

Case Background

Tension between liberty and security, especially in times of war, is as old as the republic itself. Should the text of the Constitution be interpreted one way in peacetime and another way in wartime, as suggested for a unanimous Court in the World War I era by Justice Oliver Wendell Holmes in *Schenck v. U.S.* (1919)? "When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right." After Japan attacked Pearl Harbor on December 7, 1941, the United States entered World War II, and faced once again the challenge of applying the Constitution's guarantees in the context of wartime. Based on advice from the military that there was a real threat of Japanese invasion of the west coast, as well as a credible danger of Japanese espionage, the U.S. government ordered the relocation and detention of Japanese Americans living in that region. From April of 1942 until the end of the war in September of 1945, 110,000 persons of Japanese ancestry, most of them U.S. citizens, were deprived of their liberty and held in detention camps far from their former homes. They lost most of the property they had entrusted to government authorities, but had no way of documenting their losses because they only had a few days' notice to dispose of their property before reporting to assembly centers for relocation. The surprise attack on Pearl Harbor was very real, as was the fear engendered by it. How real was the threat of espionage?

Faced with extensive questioning on this point by the Supreme Court in oral argument, Solicitor General Charles Fahy convinced a majority of the Justices that the detention of Japanese Americans was justified by "military necessity."

TEACHING TIPS: KOREMATSU V. U.S.

LEARNING OBJECTIVES

- Students understand the major events related to the internment of Japanese Americans during World War II.
- Students understand and apply constitutional principles at issue in *Korematsu v. U.S.* to evaluate the Supreme Court's ruling in that case.

ACTIVITIES

1. To prepare students for this lesson, have them read the background essay, **Handout A: *Korematsu v. U.S.***, and answer the questions.
2. Lead students to develop a timeline on the board to show the significant events described in the background essay.
3. Ask students: "If your family had 48 hours to dispose of your home, car, and all other property before being forced to move into distant temporary housing, which of your inalienable rights might be in jeopardy?" Discuss: Internees lost liberty AND property. Internees were forced to sell their businesses for terrible losses. For example, Representative Robert Matsui of California was 6 months old when his family was interned. His family had just 48 hours to relocate. His father was forced to sell their house in Sacramento for $50 and simply abandon his small produce business.
4. Assign appropriate documents for student analysis. Divide the class into five groups. Assign each group to study and report on documents as follows: (1) **Documents A, B, C**; (2) **Documents D, E**; (3) **Documents F, H**; (4) **Documents G, I**; (5) **Documents J, K**. Conduct a Moot Court according to directions in Appendix, p. 235.
5. After moot court activity, in which students have presented oral arguments and determined how they would decide the case, then guide the class to consider **Documents L, M**, and **N**. Compare students' decisions to Supreme Court's majority and dissenting opinions.
6. Guide the class to read and discuss **Document O: Letter from President Bush to Internees (1991)**.
7. Guide the class to read and discuss additional documents, **The Issue Endures** and **Document P: Duty of Absolute Candor: Katyal Blog Post (2011)**.
8. Wrap up by returning to the last question accompanying the **Introductory Essay**: Should the Constitution's meaning change during times of crisis?

See Appendix for additional Graphic Organizers.

EXTENSIONS

Have students discuss the following:

- The late Supreme Court Chief Justice, William H. Rehnquist, explored the wartime powers of government in his 1998 book *All the Laws But One-Civil Liberties in Wartime*. He noted the pattern throughout our history, that in times of crisis the government's powers are magnified regardless of constitutional limits. In his conclusion he wrote, "An entirely separate and important philosophical question is whether occasional presidential excesses and judicial restraint in wartime are desirable or undesirable. In one sense, this question is very largely academic. There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently than their predecessors."
- Use **Document P: Duty of Absolute Candor: Katyal Blog Post (2011)** to discuss the discovery in the early 1980s of documents proving that the government's attorneys had failed to present in the Supreme Court evidence that might have influenced their ruling in the case. The Supreme Court majority referred to the necessity that judges defer to the recommendations of the Executive Branch and the military during wartime. However, memos from the FBI and the Office of Naval Intelligence explicitly refuting claims of espionage and sabotage by Japanese Americans not shared with the Court. The discovery of this evidence suggests that the policy of internment may have been largely motivated by racial prejudice, as the dissenters in the Court's opinion maintained. If we discover in the future some evidence of a well-concealed Japanese-American spy ring, how would that affect your opinion of this case?

KOREMATSU V. U.S.

CONSTITUTIONAL PRINCIPLES

Equal protection
Due process
Inalienable rights

KEY QUESTION

Assess the Supreme Court's decision in *Korematsu v. U.S.*

A The United States Constitution (1789)
B The Fifth Amendment (1791)
C *Ex Parte Milligan* (1866)
D A Date Which Will Live in Infamy (1941)
E Franklin D. Roosevelt's Infamy Speech (1941)
F Information Bulletin Number 6 (1942)
G Executive Order 9066, February 19, 1942
H Executive Order 9102, March 18, 1942
I Instructions to Japanese, April 1, 1942
J *Hirabayashi v. United States* (1943), Majority Opinion
K Memorandum, Biddle to FDR, December 30, 1943
L *Korematsu v. United States* (1944), Majority Opinion
M *Korematsu v. U.S.* (1944), Dissenting Opinion
N *Ex parte Mitsuye Endo*, December 18, 1944
O George H. W. Bush, Letter from President Bush to Internees (1991)
P Duty of Absolute Candor: Katyal Blog Post (2011)

INTRODUCTORY ESSAY

UNDERSTANDING KOREMATSU V. U.S. (1944)

by Art Ward

Japanese people began immigrating to the United States at the end of the 19th Century because of political and social upheaval in their homeland. Moving from Hawaii to the Western states, they came in large numbers until a ban was put in place by the Immigration Act of 1924. The population of Japanese in the U.S. ballooned from 2,000 in 1890 to well over 100,000 at the time of the ban. A generation of Japanese-American children, born in the United States, were quite distinct from their immigrant parents – they spoke fluent English and were Americans by birth. Their communities – such as the largest, Little Tokyo in Los Angeles, California – thrived. Its sixty-square blocks housed some 40,000 people and included temples, schools, markets, and businesses.

The attack on Pearl Harbor, image courtesy Library of Congress Prints and Photographs Division (LC-USZ62-104778).

Attack on Pearl Harbor

Just after Japan attacked Pearl Harbor, Hawaii on Dec. 7, 1941, General John L. DeWitt of the Western Defense Command and others urged President Franklin Roosevelt to take action against the nearly 140,000 Japanese Americans living on the west coast of the United States. On February 14, 1942, Roosevelt issued Executive Order 9066 giving the military authority to forcibly remove and incarcerate anyone of Japanese descent living within 60 miles of the California, Oregon, and Washington coast – an area deemed critical to national defense and potentially vulnerable to espionage. One month later, Roosevelt issued Executive Order 9102 establishing the War Relocation Authority to carry out the internment. Congress subsequently passed legislation in support of the president's orders. On April 1, 1942, General DeWitt imposed a curfew on Japanese Americans which the Court upheld unanimously on June 21, 1943 in the case of *Hirabayashi v. United States*. DeWitt also ordered that they report to Assembly Centers, and 110,000 people were placed in relocation camps away from the coast. In Los Angeles, Little Tokyo vanished.

Fred Korematsu was an American citizen of Japanese ancestry born in San Francisco. Wanting to serve his country in the war effort, he tried to join the military but was denied for health reasons. Undeterred from doing his part, he got a job as a welder in the defense industry. He was engaged to an Italian-American woman and did not want to leave his job and fiancé when ordered to report to a relocation center. Instead, he moved

to a neighboring town and underwent plastic surgery to convince authorities that he was of Spanish-Hawaiian origin. In May 1942, Korematsu was arrested for violating Civilian Exclusion Order No. 34 of the U.S. Army. He was convicted, sentenced to five years in prison, paroled, and sent to the internment camp at Topaz, Utah. Korematsu challenged the wartime provisions, believing that the President and Congress had exceeded their war powers by implementing exclusion and restricting the rights of Americans of Japanese descent.

The entrance to Manzanar War Relocation Center, one of ten camps where Japanese-American citizens and resident Japanese aliens were interned during World War II. Image courtesy Library of Congress Prints and Photographs Division (LC-DIG-ppprs-00286).

Supreme Court Decision

The U.S. Supreme Court sided with the government and held that the need to protect against espionage outweighed Korematsu's rights. Justice Hugo Black wrote the 6-3 majority opinion and argued that compulsory exclusion, though constitutionally suspect, is justified during circumstances of emergency and peril. Black noted that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect and should be judged under the most rigid scrutiny. This was the first time the Court applied strict scrutiny but upheld a racial classification. Black accepted the military's assertion that it was impossible to determine loyal from disloyal Japanese Americans and that their temporary exclusion was based on military judgment that an invasion of the West Coast by Japan was a real possibility.

The dissenters called the government's actions racist and said the relocation centers were concentration camps. Justice Frank Murphy said: "This exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.... I dissent from the legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. 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." Justice Robert Jackson also dissented and was particularly troubled that the Court had accepted the case in the first place and then, by ruling in favor of the government, had created a constitutional precedent for future action: "While an unconstitutional order will only last as long as the conflict, a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the order itself.... The Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

Handed down the same day as *Korematsu*, the Court held in *Ex parte Endo* (1944) that citizens deemed "loyal" must be set free. The war ended in the fall of 1945, and all of the citizens interned at the camps were released. The 1948 Japanese-Americans Claims Act allowed camp detainees to receive compensation for their losses. The government received

$131 million in claims, and paid $38 million to settle them. Around 3,000 Japanese-Americans resettled in Little Tokyo, Los Angeles. Laws that had prevented ownership of land were lifted, but buildings remained empty, and what was once a vibrant, dynamic community more or less died. In 1970, Los Angeles officially designated a seven-block area as Little Tokyo in hopes of redeveloping the area. While Japanese Americans did not return in large numbers, some Japanese companies opened American offices there and other businesses continued to serve the community.

In the early 1980s, attorneys studying Korematsu's case uncovered archival evidence that the Solicitor General's office – which represented the United States in the lawsuit – had not reported to the Supreme Court evidence that Japanese American citizens actually posed no security risk. Fred Korematsu again challenged his conviction in the United States District Court for the Northern District of California. In 1983, using the newly discovered documentation, Judge Marilyn Patel cleared Korematsu's conviction, but this did not overturn the Supreme Court's decision that removal and internment of Japanese Americans was a constitutional war measure.

In 1988, President Ronald Reagan signed the Civil Liberties Act, which authorized $20,000 in reparations to camp detainees and called for an apology for their loss of liberty and property. Three years later, the checks were issued and President George H.W. Bush signed a formal letter of apology. In 1998, President Bill Clinton awarded Fred Korematsu the Presidential Medal of Freedom. He died on March 30, 2005 at the age of 86.

Comprehension and Critical Thinking Questions

1. **According to Executive Order 9066, what authority did the military have?**
2. **What was the objective of Executive Order 9102?**
3. **On what grounds did Fred Korematsu challenge his detention?**
4. **How did the majority opinion explain the Court's decision in *Korematsu v. U.S.*?**
5. **What was the reasoning of the dissenters in Korematsu's case?**
6. **Why do you think the Solicitor General's Office did not report to the Supreme Court evidence that Japanese Americans actually posed no documented security risks?**
7. **Should the Constitution's meaning change during times of crisis?**

DOCUMENT A

The United States Constitution (1789), Article I, Section 9

...The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

1. **What is "the writ of *habeas corpus*"? In what cases can it be suspended?**

DOCUMENT B

The Fifth Amendment (1791)

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

1. **What types of rights does this amendment to the Constitution protect? What is the relationship between them?**
2. **What must the government provide when it tries to deprive someone of these rights?**

DOCUMENT C

***Ex Parte Milligan* (1866)**

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence...

1. **This ruling, following the suspension of habeas corpus during the Civil War, held that civilians could not be tried in military tribunals as long as civil courts were operational. How might this reasoning apply to the *Korematsu* case?**

DOCUMENT D

A Date Which Will Live in Infamy (1941)

Images courtesy Library of Congress Prints and Photographs Division (LC-USZ62-104778; LC-USZ62-16555; LC-USZ62-129811).

1. **What impression do these images portray? How is that impression related to public reaction to the decision to remove Japanese Americans from their homes along the west coast?**

DOCUMENT E

Franklin D. Roosevelt's Infamy Speech (1941)

December 8, 1941

Yesterday, December 7, 1941 - a date which will live in infamy - the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan....

It will be recorded that the distance of Hawaii from Japan makes it obvious that the attack was deliberately planned many days or even weeks ago. During the intervening time the Japanese Government has deliberately sought to deceive the United States by false statements and expressions of hope for continued peace. ...

As Commander-in-Chief of the Army and Navy, I have directed that all measures be taken for our defense. ...

I believe I interpret the will of the Congress and of the people when I assert that we will not only defend ourselves to the uttermost but will make very certain that this form of treachery shall never endanger us again.

Hostilities exist. There is no blinking at the fact that our people, our territory and our interests are in grave danger.

I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December seventh, a state of war has existed between the United States and the Japanese Empire

1. **What is infamy?**
2. **Note the descriptive terms that President Roosevelt used in this speech on the day after the Japanese attack on Pearl Harbor. What is the overall effect of this speech?**
3. **Why did the President maintain that a state of war "has [already] existed"?**
4. **According to the Constitution, which branch of government has the power to declare war? (See the Constitution, Article 1, Section 8, Clause 11.)**

DOCUMENT F

Information Bulletin Number 6 (1942, emphasis original)

CONFIDENTIAL
INFORMATION BULLETIN
NUMBER 6
G-2 SECTION
GENERAL HEADQUARTERS, U.S. ARMY,
Army War College,
Washington, D. C.,
January 21, 1942

JAPANESE ESPIONAGE

6. Conclusions. --

a. It may be expected that Japanese diplomatic and consular communications will be replaced now by using the diplomatic and consular organization of an allegedly neutral power identified with the Axis. They may also use officials of other neutral countries whom they have subverted.

b. Their espionage net containing Japanese aliens, first and second generation Japanese and other nationals is now thoroughly organized and working underground.

c. In addition to their communications net through neutral diplomats, they may be expected to have their own **underground communication net.**

d. Extensive use of Occidentals, such as Axis nationals, neutral nationals, and **subverted Americans**, is to be expected.

(signed)

P. M. ROBINETT,

Lieut. Colonel, G.S.C.,

Ass't Chief of Staff, G-2.

1. **Of what dangers does this confidential memo warn?**
2. **How long after the Pearl Harbor attack was this memo written?**

DOCUMENT G

Executive Order 9066, February 19, 1942

...the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such actions necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commanders may determine, from which any or all persons may be excluded, and with such respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Sectary of War or the appropriate Military Commander may impose in his discretion...

1. **What does this executive order authorize the Secretary of War and his military commanders to do?**

DOCUMENT H

Executive Order 9102, March 18, 1942

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security, it is ordered as follows:

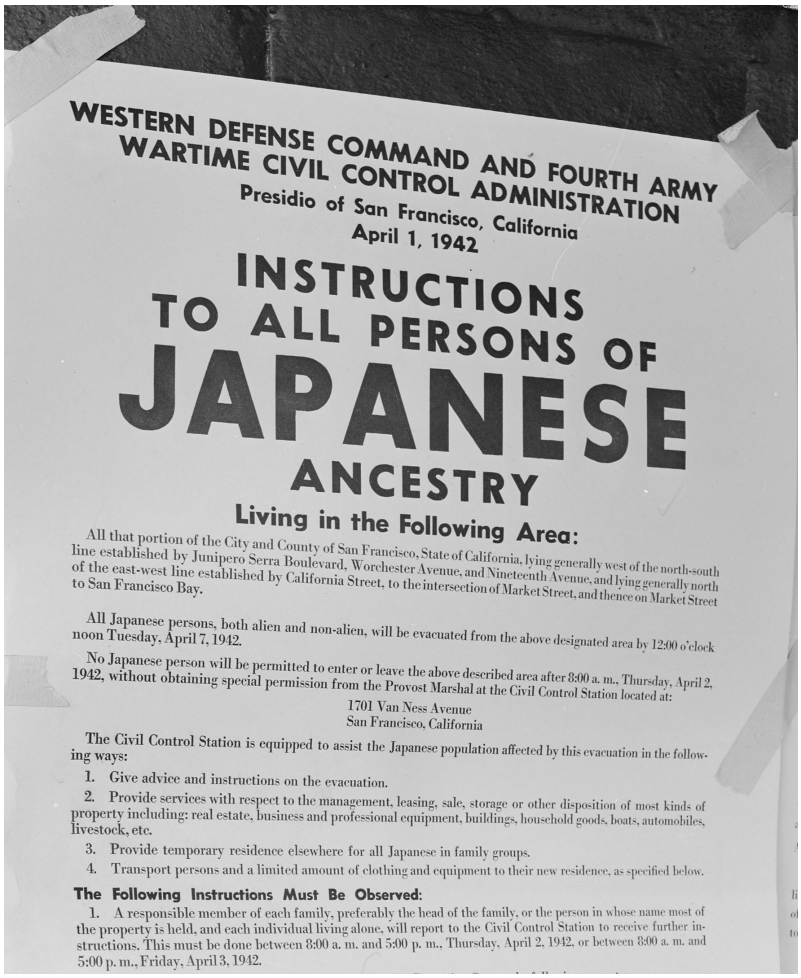
1. There is established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority, at the head of which shall be a Director appointed by and responsible to the President.

2. The Director of the War Relocation Authority is authorized and directed to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision....

1. **How is Executive Order 9102 different from Executive Order 9066?**

DOCUMENT I

Instructions to Japanese, April 1, 1942



WESTERN DEFENSE COMMAND AND FOURTH ARMY
WARTIME CIVIL CONTROL ADMINISTRATION
Presidio of San Francisco, California
April 1, 1942

INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY

Living in the Following Area:

All that portion of the City and County of San Francisco, State of California, lying generally west of the north-south line established by Junipero Serra Boulevard, Worchester Avenue, and Nineteenth Avenue, and lying generally north of the east-west line established by California Street, to the intersection of Market Street, and thence on Market Street to San Francisco Bay.

All Japanese persons, both alien and non-alien, will be evacuated from the above designated area by 12:00 o'clock noon Tuesday, April 7, 1942.

No Japanese person will be permitted to enter or leave the above described area after 8:00 a. m., Thursday, April 2, 1942, without obtaining special permission from the Provost Marshal at the Civil Control Station located at:

1701 Van Ness Avenue
San Francisco, California

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.
2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property including: real estate, business and professional equipment, buildings, household goods, boats, automobiles, livestock, etc.
3. Provide temporary residence elsewhere for all Japanese in family groups.
4. Transport persons and a limited amount of clothing and equipment to their new residence, as specified below.

The Following Instructions Must Be Observed:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 a. m. and 5:00 p. m., Thursday, April 2, 1942, or between 8:00 a. m. and 5:00 p. m., Friday, April 3, 1942.

Image courtesy the National Archives and Records Administration (Records of the War Relocation Authority, 1941 - 1989, ARC identifier: 537).

1. **To whom are these instructions directed? On what date was the announcement posted?**
2. **What are they instructed to do?**
3. **What assistance is promised to them?**
4. **What part(s) of these instructions would be most frightening/ unpleasant to you? Why? To what extent would you trust the Wartime Civil Control Administration to safeguard any property left behind in their care?**

DOCUMENT J

***Hirabayashi v. United States* (1943)**

Pursuant to Executive Order No. 9066 ... the military commander of the Western Defense Command promulgated an order requiring ... that all persons of Japanese ancestry within a designated military area "be within their place of residence between the hours of 8 p.m. and 6 a.m." Appellant, a United States citizen of Japanese ancestry, was convicted in the federal District Court for violation of this curfew order.

Held:

It was within the constitutional authority of Congress and the Executive, acting together, to prescribe this curfew order as an emergency war measure.

In the light of all the facts and circumstances, there was substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion.

The Fifth Amendment contains no equal protection clause, and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process.

The fact ... that attack on our shores was threatened by Japan, rather than another enemy power, set [Japanese] citizens apart from others who have no particular associations with Japan. ...We cannot close our eyes to the fact, demonstrated by experience, that, in time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.

1. **Of what act was Hirabayashi convicted?**
2. **Why did the Court hold that the curfew was reasonable?**
3. **In your opinion, to what extent did persons of Japanese ancestry receive due process?**

DOCUMENT K

Memorandum, Biddle to FDR, December 30, 1943

Attorney General Francis Biddle, Letter to President Roosevelt:

...The important thing is to secure the reabsorption of about 95,000 Japanese, of whom two-thirds are citizens and who give every indication of being loyal to the United States, into normal American life. The present practice of keeping loyal American citizens in concentration camps on the basis of race for longer than is absolutely necessary is dangerous and repugnant to the principles of our Government. It is also necessary to act now so that the agitation against these citizens does not continue after the war.

1. **What practice did Biddle describe as "dangerous and repugnant to the principles of our Government"?**
2. **To what principles do you think he was referring in this warning?**
3. **Why did he write that it was important to act immediately "to secure the reabsorption [of loyal Japanese people] into normal American life"?**

DOCUMENT L

MAJORITY OPINION

***Korematsu v. United States* (1944)**

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....

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.

1. **According to the majority opinion, why was the exclusion order within the power of Congress?**
2. **What were the "real military dangers" that justified the exclusion order? (See paragraph 3)**
3. **Why do you think this Justice clarified the point regarding racial prejudice?**

DOCUMENT M

***Korematsu v. U.S.* (1944), Dissenting Opinion**

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. … But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need….

1. **Why does this dissenting justice object to the majority's ruling?**
2. **Put the following phrase in your own words: "The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need."**

DOCUMENT N

***Ex parte Mitsuye Endo*, December 18, 1944**

Mitsuye Endo... is an American citizen of Japanese ancestry. She was evacuated from Sacramento, California, in 1942, pursuant to certain military orders ... and was removed to the Tule Lake War Relocation Center located at Newell, Modoc County, California.

Her petition for a writ of *habeas corpus* alleges that she is a loyal and law-abiding citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the Relocation Center under armed guard and held there against her will.

It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty.

The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else. That was not done by Executive Order No. 9066 or by the Act of March 21, 1942, which ratified it. ... To read them that broadly would be to assume that the Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. We cannot make such an assumption. ...

Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.

The court is squarely faced with a serious constitutional question,-whether [her] detention violated the guarantees of the Bill of Rights of the federal Constitution and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged.

1. **What is the "serious constitutional question" in Endo's case, according to this Justice's reasoning? What did he say was the clear answer to that question?**

2. **This decision was announced on the same day as *Korematsu v. U.S.*, December 18, 1944. Compare and contrast the two cases. Why do you think the Court's majority came to such different conclusions in these two related cases?**

DOCUMENT 0

George H. W. Bush, Letter from President Bush to Internees (1991)

THE WHITE HOUSE
WASHINGTON

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.

In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. You and your family have our best wishes for the future.

Sincerely,
George Bush

THE WHITE HOUSE

WASHINGTON

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.

In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. You and your family have our best wishes for the future.

Sincerely,

George H. W. Bush, LETTER FROM PRESIDENT BUSH TO INTERNEES (1991). Courtesy of California State University—Sacramento, the Department of Special Collections and University Archives.

1. **Living survivors of internment camps received these letters along with $20,000 as partial restitution for lost property. What constitutional ideals did President Bush mention in his letter?**
2. **Where did those ideals come from?**
3. **To what extent do you think the United States lived up to those ideals with respect to the events and aftermath of *Korematsu v. U.S.*?**

DOCUMENT P

Duty of Absolute Candor: Katyal Blog Post (2011)

Background: In 1980, President Jimmy Carter ordered a special investigation of the facts regarding the relocation and detention of Japanese Americans during World War II. The Commission on Wartime Relocation and Internment of Civilians issued its report in 1983, concluding that the decision to remove Japanese Americans from the west coast had been based on "race prejudice, war hysteria, and a failure of political leadership." (Report of the Commission on Wartime Relocation and Internment of Civilians)

Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases, by the Department of Justice, May 20, 2011

Neal Katyal, Acting Solicitor General of the United States.

...The Solicitor General is responsible for overseeing appellate litigation on behalf of the United States, and with representing the United States in the Supreme Court. There are several terrific accounts of the roles that Solicitors General have played throughout history in advancing civil rights. But it is also important to remember the mistakes. One episode of particular relevance to AAPI Heritage Month is the Solicitor General's defense of the forced relocation and internment of Japanese-Americans during World War II....

By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, the Solicitor General had learned of a key intelligence report that undermined the rationale behind the internment. The Ringle Report, from the Office of Naval Intelligence, found that only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody. But the Solicitor General did not inform the Court of the report, despite warnings from Department of Justice attorneys that failing to alert the Court "might approximate the suppression of evidence." Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones. Nor did he inform the Court that a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC. And to make matters worse, he relied on gross generalizations about Japanese Americans, such as that they were disloyal and motivated by "racial solidarity."

The Supreme Court upheld Hirabayashi's and Korematsu's convictions. And it took nearly a half century for courts to overturn these decisions. One court decision in the 1980s that did so highlighted the role played by the Solicitor General, emphasizing that the Supreme Court gave "special credence" to the Solicitor General's representations. The court thought it unlikely that the Supreme Court would have ruled the same way had the Solicitor General exhibited complete candor. Yet those decisions still stand today as a reminder of the mistakes of that era.

Today, our Office takes this history as an important reminder that the "special credence" the Solicitor General enjoys before the Supreme Court requires great responsibility and a duty of absolute candor in our representations to the Court. Only then can we fulfill our responsibility to defend the United States and its Constitution, and to protect the rights of all Americans.

Source: http://blogs.justice.gov/main/archives/1346

1. **Based on this document, to what extent do you believe the relocation and detention of Japanese Americans was based on "military necessity?"**

2. **Restate the last paragraph of Acting Solicitor General Katyal's 2011 blog post in your own words. To what extent do you believe that Solicitor General Fahy in 1944 carried out his "great responsibility and duty of absolute candor?"**

THE ISSUE ENDURES

National Defense Authorization Act (2012)

Subtitle D — Counterterrorism

20 SEC. 1021. AFFIRMATION OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

24 (a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force includes the authority for the Armed Forces of the United States to detain covered persons pending disposition under the law of war.

6 (b) COVERED PERSONS.—A covered person under this section is any person as follows:

(1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

(c) DISPOSITION UNDER LAW OF WAR.—The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force....

Detainee access to military or civilian legal representation, or both, including any limitations on such access and the manner in which any applicable legal privileges will be balanced with national security considerations

1. **According to this law, who are "covered persons"?**
2. **What actions against covered persons are authorized by this law?**
3. **To what extent does this law permit covered persons access to legal representation?**

Identifying and Teaching against Misconceptions: Six Common Mistakes about the Supreme Court

By Diana E. Hess

This article originally appeared in Social Education, the official journal of the National Council for the Social Studies (NCSS). Reprinted here with permission of the author and NCSS.

My colleagues in science and math tell me that discussing students' preconceptions and misconceptions is a typical part of the discourse about teaching in their fields. By contrast, I rarely hear social studies teachers talk about this—perhaps because so much of the content in social studies is or could be contested and we therefore shy away from labeling students' ideas as "pre" or "mis" conceptions.[1]

As a general rule, in my social studies courses I tend to focus on topics and issues that are controversial or—as I often argue—are taught as "settled" and really need some unsettling.[2] But I do not think that everything that should be taught in social studies is controversial. In fact, much of what I think students should learn is not controversial—just hard. Consequently, I have come to believe that it is important for teachers to think deeply about the kinds of understandings that students come in with, identify their conceptions, and then organize teaching purposely to develop the "pre" and correct "the mis."

An institution that is commonly taught about in middle and high schools is the U.S. Supreme Court. Many people—adults and young people alike—hold misconceptions about how it works. Interestingly, however, this lack of knowledge does not stop people from having a generally positive opinion of the Court—especially relative to the other two branches of the federal government.[3] Every so often, polling is done that asks people to name Supreme Court justices as well as other groups (e.g., the Three Stooges and the Seven Dwarfs). The findings are always embarrassing and a bit bizarre. Notably, an astonishingly large percentage of people in the United States know all three of the stooges' names (74 percent to be exact), and about 80 percent can name two of Snow White's dwarfs.

By comparison, 63 percent of Americans cannot name two Supreme Court justices.[4] Clearly, we should not over-generalize—it may be that some people who cannot name justices actually know a lot about the Supreme Court. Conversely, knowing the name of a justice does not indicate that a person understands anything substantive about the Court. Yet it is my sense that most people are not informed about what the Supreme Court does—in part because the media typically pays little attention to the Court, except when a Supreme Court position falls vacant and a new justice has to be nominated and approved.[5]

For many teachers, then, it is likely that while most of their students may have vague ideas and feelings about the Court, they are not coming into the classroom with robust content knowledge. However, this does not mean that they do not have any conceptions about the Court and what it does, or should do. In my experience teaching high school students in a variety of venues, and listening to hundreds of middle and high school teachers talk about their understandings about the Court—and what their students tend to know and not know—I have encountered six key misconceptions that many people hold about the Court (and the Constitution) that need to be corrected, or at least contested.

1. THE CONSTITUTION APPLIES TO EVERYONE AND EVERYTHING

When I was teaching high school government, history, and law courses, it was not unusual for students to believe that virtually every person and organization with which they interacted had to "follow" the Constitution. Because many students thought the Supreme Court only heard cases that dealt with the Constitution, this mistaken belief often worked to corrupt their understanding of what the Court did. It was not unusual for me to hear students say that their parents had violated their Fourth Amendment rights when they searched their bedrooms; complain that a private organization limited their free expression rights when it enforced strict behavior rules for activities; or argue that employers were violating their rights under the Constitution when they told them what to wear to work.

This mistaken belief about the Constitution's reach is a sign that the core concept of "state action" had not been formed. That is, in virtually all circumstances, the Constitution only applies to actions taken by a federal, state, or local government actor. But my students believed that any person or organization that "governed" them by exerting authority in their lives was analogous to the "state" and therefore had to follow the Constitution. For example, one of my students believed that his employers were violating workers' Fourth Amendment rights when they searched employee lockers.

This was a clear signal that he held a misconception about the reach of the Constitution. If he had understood the concept of state action, he would have realized that because his employer was a private entity, not the government, it was under no obligation to adhere to the procedures required by the Fourth Amendment. I realized that for a variety of reasons, my students seemed to have one large concept labeled "rights" under which they thought everything fit—as opposed to a more variegated understanding of the multiple sources of rules and rights. I have since come to believe that many people, not just young people, do not know what state action is. Thus, a fundamental misconception needs to be corrected by explicitly teaching students about the limits of the Constitution's reach, and particularly about the difference between state and non-state actions. This is a perfect topic for a concept formation lesson where students are provided with examples of constitutional cases that clearly illustrate state action (as well as non-examples) and asked to identify who is being accused of violating the Constitution (e.g., a prison warden, a public school board, or a city council).

2. THE LIBERATION GENERALIZATION

Another belief that many people hold is that the Court's primary and most frequently enacted function is to liberate people from the heavy hand of a discriminatory majority.

Supreme Court scholar Michael Klarman traces this misconception to the Court's landmark decision in *Brown v. Board of Education*. Klarman explains,

The conventional assessment of the Court's countermajoritarian capacity has been distorted, I believe, by a single decision—Brown*. Because that ruling rescued us from our racist past, the conventional storyline runs, the Court plainly can and does play the role of heroic defender of minority rights from majoritarian oppression.*[6]

The Supreme Court is not so much an error-correcting court as a uniformity-producing institution.

I learned about the relationship between Brown and the formation of the "liberation generalization" when a very skillful and experienced teacher told me how learning about the contemporary Supreme Court worked to diminish her interest in teaching a course in American government. She had attended a professional development program where she was taught that the primary function of the Supreme Court is to ensure uniformity in the federal judiciary. Consequently, most of the cases the Court chooses to decide revolve around legal issues for which there was disagreement among the lower federal courts. This information was profoundly disturbing to this teacher. She exclaimed, "I grew up at the time of *Brown*—we revered the Court." Because she interpreted the ruling in Brown as a particularly potent representation of the Court liberating people from racist policies that the "majority" had enacted, she had come to believe that this was what the Court typically did. While there is a robust debate about whether the purpose of the Court should be to provide individuals with protection against the majority, there is less controversy among scholars about whether the Court sees that as its role, or has in fact, actually done that on a consistent basis. This is not to suggest that there are no examples of the Court performing this function, just that this particular role of the Court may be more the exception rather than the rule.

Most recently, the Court's controversial decision in the 2003 gay rights case *Lawrence v. Texas* has been interpreted by some as a particularly powerful example of the Court's majority acting to liberate or defend a group that was targeted by legislation (e.g., the "majority"). In this case, the Court ruled that a Texas state law that criminalized homosexual sodomy violated the due process clause of the 14th amendment. But it is important to note that many of the opponents of the Court's decision in the case have challenged the very right of the Court to overturn majority decisions—especially if they are about topics that are not explicitly mentioned in the Constitution. Teaching to correct Teaching to correct students' misconception that the Court's primary role is to liberate people is challenging, because this is clearly one function of the Court—and when that function is performed, the cases are often very important, so they garner landmark status. Yet it is a misrepresentation to teach that this is the focus of the Court most of the time.

3. THE BELIEF IN ERROR CORRECTION

Another common misconception that many lay people hold is that the role of the Court—as the "highest court"—is to correct errors when lower courts have made mistakes. But in most cases, the fact that a federal or state court below made a decision that seems to

be erroneous is not, by itself, a major reason why the Court takes a case. Most students would be surprised to know that if the error is actually a dispute over the "true" facts, then the errors are solely in the domain of the trial courts and will be not corrected or even addressed by the appellate courts. This is not to suggest that the Court does not overturn lower court decisions on issues of law (in fact, about 75 percent of the cases the Court decides do overturn a decision from below), but that is not its primary function. The Supreme Court is not so much an error-correcting court as a uniformity-producing institution. To understand the significance of this distinction, it is important to understand how cases get to the Court in the first place. Virtually all the cases decided by the United States Supreme Court have been granted a writ of *certiorari*. *Certiorari* is a Latin word that means "to be informed of." Black's Law Dictionary defines a writ of *certiorari* as:

"An order by the appellate court to bring the case before them when the court has discretion on whether or not to hear an appeal." The Court does not have to grant requests for writs of certiorari, and most of the petitions requesting one are denied. For example, in most years the Court receives about 7,500 petitions for certiorari, but they typically take only 75-85 cases.

The vast majority of cases the Court agrees to decide each year involve a question about which there is disagreement among the lower federal Courts of Appeals (this is called a "circuit conflict").[7] Supreme Court litigator Tom Goldstein analyzed the Court's docket in one recent term and found that 80 percent of cases involved a circuit conflict.[8] As a general rule of thumb, the conflict must be significant enough to deserve attention. There are many instances in which the Court does not hear a case even when there is a circuit conflict. But if a strong argument can be made that a case focuses on an important question for which there is currently a conflict among circuits, and there is a need for a uniform answer across the nation (such as what a part of the federal tax code means), then it is more likely that the Court will decide to hear the case than they would a case for which there was not a circuit conflict.

4. THE *GIDEON* EFFECT

In addition to addressing misconceptions about the kind of cases the Court typically decides, it is important to teach accurate information about who is more likely to get a case heard by the Court. Among the cases the Court has selected to hear, very few are *in forma pauperis*, or cases filed by people who cannot afford the filing fee. In recent terms, an average of only one-tenth of one percent of paupers' petitions were granted review (8 cases out of 6,386 in 2002-2003), compared to an average of 4 percent of paid cases (83 cases out of 1,869 in 2002-2003), during the same terms. This is extremely important information because it illustrates how relatively rare it is for the Court to take a case filed by a person in prison, a common misperception sometimes referred to as the "Gideon effect," after *Gideon v.*

While many standard government textbooks mention that individuals and groups can file amicus briefs, few explain how deeply and broadly engaged many groups are in the work of the Court on a variety of levels.

Wainwright, in which the petitioner, Clarence Earl Gideon, famously appealed to the Court with his handwritten petition. This case is commonly taught—as it should be—but if not put in the context of its rarity, the effect of the case will be to reinforce a misconception about what kinds of cases the Court typically considers, and why.

5. A RULING IS A "RIGHT" ANSWER

In addition to misconceptions about what kinds of cases the Court takes, and for what reasons, it appears that many people believe that when the Court decides a case, its members are identifying the "right" answer to a challenging question. As Justice Robert Jackson famously wrote, however, "We are not final because we are infallible, but we are infallible only because we are final." In an unusual statement, Jackson's remark acknowledges that the Court makes mistakes. By definition, then, it seems logical that the Court's rulings are supposed to be "right" answers. If they were not, how could the Court make mistakes? The Court often goes to great lengths to communicate this belief when it overturns its own precedents. In these decisions, the majority will often say that the Court got it wrong in the past, and this wrong must now be righted. But if that were really the case, then how do we explain the tendency of the Court to split on many hot-button cases, such as those that involve affirmative action, abortion, gay rights, or presidential-vote counting? Although most of the Court's decisions are not split, in the cases involving matters that are especially divisive to the public, the Court often splits as well.

What makes the *Brown* decision so unusual is that it was the exception to this general rule—a divisive issue that the Court decided unanimously. When the Court wades into matters that deeply divide people in the United States, it is usually a solid bet that they involve questions for which there is lively dispute about what the correct answer should be. That is, there is a lively intellectual contest going on that involves scholars and the public about what is the right answer to a constitutional or legal question. Rather than being viewed as final arbiters in this intellectual debate, justices are better seen as participants in the debate—and what they rule is not "right," just what a majority of the Court agree on at a particular time. Finality, not being right, is what the system is designed to produce. Today, we would not say that the Court's decision in the *Dred Scott* case was "right," but it was final from a legal standpoint, even though the social and political issue was an open wound. This does not mean that the Court's decisions can be ignored, but its decisions can certainly be criticized— and indeed, this is an important productive part of public discourse in a democratic society. Teachers who adopt this latter view are more likely to ask students to evaluate whether they think the Court made the correct decision in a particular case, a pedagogical move that would go a long way toward correcting the misconception that what the Court rules is right simply because it emanated from the Court. In other words, Justice Jackson may have overstated his case (perhaps intentionally so) when he said the Court was infallible because it was final. A more accurate read of the Court's role in the knowledge-production process (which is one way to characterize the sector that the Supreme Court is in) is to say that the Court is neither infallible nor final. Either of those options would be, by definition, antithetical to democratic notions of how the meaning of what is "right" comes to be constructed and reconstructed.

6. INTEREST GROUPS AND THE COURT: DISROBING THE BLIND JUSTICE METAPHOR

Another significant misconception that many people hold about the Court is that Court decisions are made without influence from the public—or specifically, from groups the public forms to influence policy, such as Planned Parenthood and Liberty Forum. This misconception is probably linked to the mistaken belief that the Court's primary function is to serve in an anti-majoritiarian role; if the Court is supposed to constantly "check" the majority, then it must not be susceptible to its views. However, even a cursory understanding of how interest groups influence the work of the Court indicates that the notion that the Court makes decisions without input from the public is false. The important influence that individuals and interest groups have on the Court's thinking is not something that the Court hides; indeed, it openly admits and even references such influences. For example, it is fairly common knowledge that individuals and groups interested in the outcome of a case file *amicus* (or friend of the court) briefs, in which they are expected to provide important ideas and information they want the Court to consider when ruling on the case. The Court relies on these briefs, and it is clear that some of them are quite influential. Although an unusually large number of such briefs were filed in the two University of Michigan affirmative action cases (over 100), many of the justices asked questions that referred to one in particular—a brief supporting affirmative action filed by a group of former military academy superintendents and retired military officers. This brief was also referenced in the majority decision written by Justice Sandra Day O'Connor.

While many standard government textbooks mention that individuals and groups can file amicus briefs, few explain how deeply and broadly engaged many groups are in the work of the Court on a variety of levels. Interest groups routinely pay for or provide a party's legal representation. In fact, they often "shop" for compelling cases that they think the Court will resolve in their favor. This has been a frequently used litigation tactic by groups of every persuasion. These same groups serve the reverse function—working to keep cases off the Court's docket—by discouraging petitioners from going forward with an appeal (or in one recent example, encouraging a party to settle a case even after the Court had granted review).[9]

Not only are many interest groups deeply involved in the work of the Court, but some are involved in an inordinate number of the Court's cases. In the term that just ended, the National Chamber Litigation Center, Inc. (the public policy law firm affiliated with the U.S. Chamber of Commerce) filed 18 briefs in support of certiorari, 15 briefs on the merits, for a total of more than 25 percent of the Court's cases.

When one high school teacher learned this at a recent professional development institute about the Supreme Court, she exclaimed, "But isn't that just like lobbying—and aren't the courts supposed to be independent?" This exclamation sparked a very interesting conversation about what the role of interest groups in the Court should be.[10] What became clear to the teachers attending the event was that interest groups are much more involved with the Court than those teachers had previously believed—and they now needed to figure out how to communicate that to students.

THE EFFECT OF CORRECTING MISCONCEPTIONS

Teaching to correct students' misconceptions about the Supreme Court may seem like a form of myth busting. Some people might think that this will diminish students' respect for important government institutions. In fact, it is possible that teaching to correct students' misconceptions may cause students to be less likely to revere the Court. However, we should not fear this result. I think we should be more nervous about teaching students to revere institutions. After all, awe is the enemy of inquiry. Conversely, it is more important that people know how institutions, such as the Supreme Court, really work if they are to truly understand what influence it has on U.S. society. Correcting many of the misconceptions I have described could serve an important role in disentangling the damaging connection that is often made between reverence and engaged citizenship. For example, someone who understands that the Court's primary and most frequently enacted function is to create uniformity in the federal court system may be less likely to view the Court as a political savior. This can be a good thing if we want to encourage people to let their views be known in the policy-making process. I am not suggesting that the Supreme Court, as an institution, does not deserve respect—I think it does, even though, like most people, I disagree with some of its decisions. But true respect is much more powerful when it comes from a strong knowledge base that can only be built if we recognize misconceptions and teach in a very explicit way to correct or at least expose them.

I doubt that all students hold the misconceptions I have discussed, or that my list of misconceptions is complete. However, I have frequently encountered them in my experience teaching about the Court. In the past, I did not consistently and purposely plan instruction to target students' misconceptions and work to change them. Now, I intend to work toward that goal, because eliminating misconceptions about critically important institutions in our society is a step to building deep knowledge about how such institutions actually work—surely a more important goal than simply fostering reverence.

Diana E. Hess is an associate professor of Curriculum and Instruction at the University of Wisconsin-Madison. *She is grateful for the helpful feedback on earlier drafts of this article provided by Lee Arbetman, Keith Barton, Jeff Brown, Bebs Chorak, and Simone Schweber.*

[1] Thanks to Jeff Passe for this explanation of why there is a difference in the discourse about misconceptions in the science, math, and social studies teaching communities.

[2] For example, I have written a number of articles about how *Brown v. Board of Education* is taught, in which I argue that we need to teach the controversies of *Brown* and its aftermath and that we rarely do. See Diana Hess, "Moving beyond Celebration: Challenging Curricular Orthodoxy in the Teaching of Brown and its Legacies," Teachers College Record 107, no. 3 (2005): 2046-2067.

[3] See PollingReport.com, **http://www.pollingreport.com/institute.htm**, for recent opinion poll data about the views that people in the United States have about the Supreme Court, especially relative to their opinions about Congress and the presidency.

[4] Zogby International, July 28, 2006, **http://www.zogby.com/wf-AOL%20National.pdf**.

[5] Of course, there are times when the Court receives quite a bit of attention; two recent notable examples are *Bush v. Gore*, and the decision in 2005 on eminent domain (*Kelo v. City of New London*).

[6] Michael J. Klarman, "How Brown Changed Race Relations: The Backlash Thesis," Journal of American History 81, no. 1 (1994):81-118.

[7] Go to **http://www.uscourts.gov/courtlinks** for a map showing the federal circuits.

[8] Information received from Tom Goldstein via personal communications on September 5, 2006.

[9] In 1997, the Court granted certiorari in an affirmative action case about whether race could be a factor in teacher lay-offs. Before the oral arguments, the school board agreed to a surprise out-of-court settlement that was funded by a consortium of civil rights groups who feared that the Court would rule against affirmative action.

[10] This teacher was attending the Supreme Court Summer Institute sponsored by Street Law, Inc., and the Supreme Court Historical Society.

CLASSROOM APPLICATIONS

Scaffolding questions are provided as an option. Teachers of AP or honors classes may choose not to have students write answers to these.

Context/Background information for some documents is provided as an option to brief students on historical/legal context and significance.

DBQ Strategies:

- Write the Key Question on the board and give each student a copy of one document. Ask this question: Does this document help you to answer this question? If so, how? If not, what additional information might you need? Allow students 3-4 minutes to answer these questions. Then, have students pair up, sharing their documents and answering the same questions. Have each pair join another and repeat the process. Finally, bring the entire class together and answer the Key Question as a group.
- Write the Key Question on the board and spend one class period having students analyze documents and answer the scaffolding questions, followed by one class period writing their answers to the key question.
- Divide students into pairs or trios and assign one or more documents per group. Then ask groups to report on their documents to the class, being sure that they explain how their specific documents can help to answer the Key Question.
- Go over DBQs as a large group, using scaffolding questions and key questions as discussion prompts.
- Give students the documents from a case and have them craft a key question.
- Have students complete a Case Briefing Sheet (see p. 231) to reinforce key concepts.
- Have students determine for each document which side would be more likely to use it in oral argument of the case. (See graphic organizers, p. 232.)
- Conduct a Moot Court presentation (see p. 235 for directions).
- Lightning Round Moot Court: This strategy might be especially helpful to provide a quick review of a number of cases. Assign two students to each case-one to present the petitioner's position and one to present the respondent's. Each student has two minutes to present his/her position to the entire class, which then must vote on this question: Is the law in question a valid exercise of government power under the relevant constitutional principles?
- Have students conduct research to discover more details about the people involved in a case, and then report to the class.
- Develop an illustrated timeline to depict changes and trends in interpretation of a given constitutional principle.
- Develop political cartoons to highlight the important issues in a case.

ONLINE RESOURCES

Consult any of the following websites for additional resources to learn more about the Supreme Court and landmark cases.

http://billofrightsinstitute.org/resources/educator-resources/landmark-cases/
www.oyez.org
http://www.streetlaw.org/en/landmark.aspx
http://www.supremecourt.gov/
http://www.law.cornell.edu/supct/cases/name.htm
http://www.scotusblog.com/

CASE BRIEFING SHEET

Case Name and Year: _____

Facts of the Case: _____

_____

What is the constitutional question that the Supreme Court must answer?
(This is a yes/no question and spells out the specific part of the Constitution at issue.)

_____

_____

What constitutional principles are indicated in the case? _____

_____

Summary of one side's arguments:

_____

_____

_____

Summary of the other side's arguments:

_____

_____

_____

How would you decide the case and why? _____

_____

_____

How did the Supreme Court majority decide the case and why?_____

_____

_____

What were the main points raised in any dissenting opinions? _____

_____

_____

What other Supreme Court cases are related in important ways? _____

_____

_____

CONSTITUTIONAL ISSUE EVIDENCE FORM

How would you use the documents provided to answer the constitutional question?

Case Name and Year:

Constitutional Issue:

Yes (Source/Evidence)	No (Source/Evidence)

DOCUMENTS SUMMARY

Use this form to develop an overview of the evidence available.

Document name & date	Author	Answer to scaffolding question	How each side might use this document to answer the Key Question —OR— What is the main idea of this document?

ATTORNEY DOCUMENT ANALYSIS

Use this form to show which attorney would probably use each document provided, and why.

Petitioner	Both sides	Respondent
Additional notes: How did majority/dissenting opinions align with each attorney's position?		

MOOT COURT PROCEDURES

Preparation

- Encourage students to use the background knowledge they have developed. Attorneys and Justices of the U.S. Supreme Court apply a great deal of background and historical knowledge.
- Caution students that "gotcha" questions within the classroom context are not productive. "Justices" should not ask questions that, based on their background and class activities, would not be fair game.
- Decide whether students will be allowed to use online resources via their smartphones during the exercise—there are good arguments both for using and for not using them.
- Recommendation—do not allow "Justices" to interrupt the attorneys in the first time or two that you run moot courts. They can ask their questions at the end of each attorney's oral arguments.
- Encourage teamwork among "attorneys" in their presentations. Each team should have a lead attorney, but others will help fill in as needed.

Divide class into 3 groups: 9 Justices, advocates for the petitioner, and advocates for the respondent (A fourth group could be journalists.)

- Give time for planning: Justices decide what questions they want answered in oral arguments; advocates for each side plan their oral arguments.
- Allow equal time for presentation of each side, including interruptions from Justices (or not—your choice). In the U.S. Supreme Court, each side has 30 minutes, and the Justices interrupt continuously.
- Justices deliberate and announce decision. Deliberation is actually done in strict privacy in the U.S. Supreme Court conference, but you decide for your class.

At the beginning of each session of the Supreme Court, the Marshal of the Court (Court Crier) announces:

> "Oyez! Oyez! Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court!"
>
> The Chief Justice will begin the oral argument phase by saying, "Petitioner, you may begin."
>
> The petitioner's attorney says, "Mr. Chief Justice, and may it please the Court…"

Debrief: Discuss both the content of the case (Constitutional principle and its application) and the processes employed. Consider thinking and planning process, civil discourse process, and the application of these skills outside the classroom.

TIPS FOR THESIS STATEMENTS AND ESSAYS

Thesis Statement: The thesis statement condenses your arguments to a nutshell and appears in the opening paragraph, but it is not written until AFTER you have planned your overall response. (Planning process shown in table below.)

A good thesis statement—

- Fully addresses all parts of the prompt, while acknowledging the complexity of the issue.
- Clearly takes a side—makes a declarative statement that one thing was more important, more persuasive, etc. than another. Since the verb in the prompt is often something like "assess" or "evaluate," the thesis statement should show which side the writer takes.
- Suggests a "table of contents "or road map for the essay—shows what elements enter into consideration.
- Begins an essay that is proven by abundant and persuasive facts and evidence.

In a DBQ essay, the student writes a well-organized response to target a specific prompt, analyzing pertinent documents in order to support his/her thesis. The steps described here will guide the process of handling the documents. (For Advanced Placement US History the response must include BOTH outside information AND information from the documents. On US History AP exams, one of the essays that must be written under timed conditions is the DBQ.)

DBQ Do and Don't

Steps	Do	Don't
1. Analyze the prompt and divide it into its components. A graphic organizer helps with this step.	Fully address the prompt. It is better to address all parts of the prompt, even if you must do some in a way that is less complete, than to spend all your time on just one of two parts or 3 of 4 parts.	Neglect part of the prompt because you spent too much time on the part you know more about.
2. Plan to prove your point. It is best to begin by planning the overall structure BEFORE even looking at the documents.	Organize your thoughts before writing the thesis statement. What are the logical points your essay needs to include?	Write a "laundry list" that simply summarizes each document.

Steps	Do	Don't
3. Check the documents to see how you can use them as tools.	Strive to use all the documents; but be sure you accurately understand their main ideas.	Take quotes or ideas out of context to use them in a manner other than the author intended.
4. Ask yourself when writing every paragraph: "How does this help to prove my thesis?"	Analyze to prove the position asserted in the thesis statement. Analysis is not the same thing as description or narrative. Merely making a series of true statements is not analysis. Key to analysis—is the essay answering the "So what?" question?	Use 1st-or 2nd-person pronouns "I think the Supreme Court has the authority to use judicial review because..." "Have you ever wondered how the Supreme Court got the authority to overturn federal laws?"
5. Manage time wisely; writing long quotes will eat up thinking time.	Use relevant facts, evidence, proof. A well-chosen brief phrase in quotations and worked into your own sentence is powerful.	Use lengthy quotes. Pad the paper in an attempt to conceal a lack of analysis.
6. Give credit to sources.	Cite sources using the author's name and/or document title.	Write "According to Document B,..."
7. Think as you write!	Let logic and analysis drive the essay.	Let documents drive the essay.

RUBRIC FOR EVALUATING A DBQ ESSAY ON A 9-POINT SCALE

Adapted from AP US History guidelines

Score (Grade)	Thesis	Analysis (tends to be the most difficult component)	Entire Prompt	Documents	Outside Info (required for AP class)	Organization & Writing Skill	Errors
8-9 (95-100)	Contains a well-developed thesis which clearly addresses all aspects of the prompt and shows organizational roadmap	Effective analysis which shows & proves relationships; fully answers the "so what?" questions; more analytical than narrative.	Addresses all aspects of the prompt, though coverage may be slightly uneven	Effectively and appropriately uses all —(or almost all) documents "The angels are starting to sing!"	Supports thesis with substantial and relevant outside information.	Clearly organized & well-written—evident on first reading, but we'll read it again just for pleasure. "Call the President; he needs to hear this essay!"	May contain minor errors. "Get this writer to proofread your next paper!"
5-6-7 (80-85-90)	Contains a thesis which addresses the prompt	Limited analysis; mostly descriptive; knowledge & comprehension level in use of facts	Slights or neglects some parts of the prompt	Uses some documents effectively	Supports thesis with some outside information	Acceptable organization; language errors do not interfere with comprehension and do not indicate misunderstanding of the topic	May contain errors that do not seriously detract from quality of the essay
2-3-4 (65-70-75)	Presents a limited, confused and/or poorly developed thesis	Simplistic explanations that do not indicate mastery of the content; may list facts without analysis	Deals with one aspect of the prompt in a general way or with additional parts in a superficial way	Quotes or briefly cites some documents, but does not use them as tools to support thesis	Contains little outside information	Demonstrates weak organizational and/or writing skills which interfere with comprehension	May contain major errors
0-1 (60 & below)	Contains no thesis or a thesis which does not address the prompt	Shows inadequate or inaccurate understanding of the prompt	Ignores part of the question	Contains little or no understanding of the documents or ignores them completely	Includes inappropriate, off-target, or no outside information	Is so poorly organized or written that it is difficult to understand	Contains numerous errors, both major and minor
--	Response is completely off-target. Examples: "I didn't have to pay for this exam and I'm not wasting my time on it"; "I know nothing about the prompt, but let me tell you about snow-boarding…"; "My former boyfriend is the world's biggest jerk and here's why…"						

KEY QUESTION SCORING GUIDELINES FOR ALL ESSAYS

The Good-Excellent Essay

- Asserts a strong, clear, and well-developed thesis in response to the key question.
- Supports the thesis with outstanding analysis of Founding documents, custom, legal precedent and contemporary views.
- Intelligently applies and/or critiques the Court's opinion(s).
- Effectively uses many documents and incorporates prior knowledge.
- Contains only minor errors; is clearly organized and exceptionally well-written.

The Average-Good Essay

- Asserts a thesis in response to the key question.
- Supports the thesis with some analysis of Founding documents, custom, legal precedent and/or contemporary views. Analysis of some aspects may be cursory or absent.
- Critiques and/or applies the Court's opinion(s), but may demonstrate less command of nuance than the Good-Excellent Essay.
- Effectively uses many documents and incorporates prior knowledge.
- Contains few significant errors; is acceptably organized and written.

The Below Average-Average Essay

- Asserts a limited thesis or does not fully address the key question.
- Analysis is largely incomplete, superficial, or incorrect; may merely paraphrase or quote documents.
- Contains simplistic or incorrect application/critique of the Court's opinion(s).
- Uses few documents and incorporates little prior knowledge.
- Contains some significant errors and is poorly organized and written.

The Poor-Below Average Essay

- Lacks a thesis.
- Exhibits inadequate understanding of the question and the documents.
- Offers no application/critique of the Court's opinion(s).
- Uses very few documents and incorporates no prior knowledge.
- Contains numerous significant errors and is poorly organized and written.

CONSTITUTIONAL PRINCIPLES AND THEIR DEFINITIONS

The words and ideas of America's Founders were reflections of certain widely accepted understandings about how people can govern themselves to best protect liberty. These understandings include the concepts listed here.

Due process: Government must interact with all citizens according to the duly-enacted laws, applying these rules equally among all citizens.

Equal protection: The laws apply equally to all people; government assures equal opportunity but not equal outcomes.

Federalism: A system of dual sovereignty in which the people delegate certain powers to the national government, while the states retain other powers; and the people, who authorize the states and national government, retain all freedoms not delegated to the governing bodies.

Inalienable rights: Rights with which all of us are born. Examples are the rights to life, liberty, property, and the pursuit of happiness.

Liberty: Except where authorized by citizens through the Constitution, government does not have the authority to limit freedom.

Limited government: Citizens are best able to pursue happiness when government is confined to those powers which protect their life, liberty, and property.

Popular sovereignty: The power of the government comes from the people.

Private property: The natural right of all individuals to create, obtain, and control their possessions, beliefs, faculties, and opinions, as well as the fruit of their labor.

Representative/republican government: Form of government in which the people are sovereign (ultimate source of power) and authorize representatives to make and carry out laws.

Separation of powers/Checks and balances: a system of distinct powers built into the Constitution, to prevent an accumulation of power in one branch

INTRODUCTORY ESSAY

UNDERSTANDING KOREMATSU V. U.S. (1944)

by Art Ward

Japanese people began immigrating to the United States at the end of the 19th Century because of political and social upheaval in their homeland. Moving from Hawaii to the Western states, they came in large numbers until a ban was put in place by the Immigration Act of 1924. The population of Japanese in the U.S. ballooned from 2,000 in 1890 to well over 100,000 at the time of the ban. A generation of Japanese-American children, born in the United States, were quite distinct from their immigrant parents – they spoke fluent English and were Americans by birth. Their communities – such as the largest, Little Tokyo in Los Angeles, California – thrived. Its sixty-square blocks housed some 40,000 people and included temples, schools, markets, and businesses.

The attack on Pearl Harbor, image courtesy Library of Congress Prints and Photographs Division (LC-USZ62-104778).

Attack on Pearl Harbor

Just after Japan attacked Pearl Harbor, Hawaii on Dec. 7, 1941, General John L. DeWitt of the Western Defense Command and others urged President Franklin Roosevelt to take action against the nearly 140,000 Japanese Americans living on the west coast of the United States. On February 14, 1942, Roosevelt issued Executive Order 9066 giving the military authority to forcibly remove and incarcerate anyone of Japanese descent living within 60 miles of the California, Oregon, and Washington coast – an area deemed critical to national defense and potentially vulnerable to espionage. One month later, Roosevelt issued Executive Order 9102 establishing the War Relocation Authority to carry out the internment. Congress subsequently passed legislation in support of the president's orders. On April 1, 1942, General DeWitt imposed a curfew on Japanese Americans which the Court upheld unanimously on June 21, 1943 in the case of *Hirabayashi v. United States*. DeWitt also ordered that they report to Assembly Centers, and 110,000 people were placed in relocation camps away from the coast. In Los Angeles, Little Tokyo vanished.

Fred Korematsu was an American citizen of Japanese ancestry born in San Francisco. Wanting to serve his country in the war effort, he tried to join the military but was denied for health reasons. Undeterred from doing his part, he got a job as a welder in the defense industry. He was engaged to an Italian-American woman and did not want to leave his job and fiancé when ordered to report to a relocation center. Instead, he moved

to a neighboring town and underwent plastic surgery to convince authorities that he was of Spanish-Hawaiian origin. In May 1942, Korematsu was arrested for violating Civilian Exclusion Order No. 34 of the U.S. Army. He was convicted, sentenced to five years in prison, paroled, and sent to the internment camp at Topaz, Utah. Korematsu challenged the wartime provisions, believing that the President and Congress had exceeded their war powers by implementing exclusion and restricting the rights of Americans of Japanese descent.

The entrance to Manzanar War Relocation Center, one of ten camps where Japanese-American citizens and resident Japanese aliens were interned during World War II. Image courtesy Library of Congress Prints and Photographs Division (LC-DIG-ppprs-00286).

Supreme Court Decision

The U.S. Supreme Court sided with the government and held that the need to protect against espionage outweighed Korematsu's rights. Justice Hugo Black wrote the 6-3 majority opinion and argued that compulsory exclusion, though constitutionally suspect, is justified during circumstances of emergency and peril. Black noted that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect and should be judged under the most rigid scrutiny. This was the first time the Court applied strict scrutiny but upheld a racial classification. Black accepted the military's assertion that it was impossible to determine loyal from disloyal Japanese Americans and that their temporary exclusion was based on military judgment that an invasion of the West Coast by Japan was a real possibility.

The dissenters called the government's actions racist and said the relocation centers were concentration camps. Justice Frank Murphy said: "This exclusion goes over 'the very brink of constitutional power' and falls into the ugly abyss of racism.... I dissent from the legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. 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." Justice Robert Jackson also dissented and was particularly troubled that the Court had accepted the case in the first place and then, by ruling in favor of the government, had created a constitutional precedent for future action: "While an unconstitutional order will only last as long as the conflict, a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the order itself.... The Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need."

Handed down the same day as *Korematsu*, the Court held in *Ex parte Endo* (1944) that citizens deemed "loyal" must be set free. The war ended in the fall of 1945, and all of the citizens interned at the camps were released. The 1948 Japanese-Americans Claims Act allowed camp detainees to receive compensation for their losses. The government received

$131 million in claims, and paid $38 million to settle them. Around 3,000 Japanese-Americans resettled in Little Tokyo, Los Angeles. Laws that had prevented ownership of land were lifted, but buildings remained empty, and what was once a vibrant, dynamic community more or less died. In 1970, Los Angeles officially designated a seven-block area as Little Tokyo in hopes of redeveloping the area. While Japanese Americans did not return in large numbers, some Japanese companies opened American offices there and other businesses continued to serve the community.

In the early 1980s, attorneys studying Korematsu's case uncovered archival evidence that the Solicitor General's office – which represented the United States in the lawsuit – had not reported to the Supreme Court evidence that Japanese American citizens actually posed no security risk. Fred Korematsu again challenged his conviction in the United States District Court for the Northern District of California. In 1983, using the newly discovered documentation, Judge Marilyn Patel cleared Korematsu's conviction, but this did not overturn the Supreme Court's decision that removal and internment of Japanese Americans was a constitutional war measure.

In 1988, President Ronald Reagan signed the Civil Liberties Act, which authorized $20,000 in reparations to camp detainees and called for an apology for their loss of liberty and property. Three years later, the checks were issued and President George H.W. Bush signed a formal letter of apology. In 1998, President Bill Clinton awarded Fred Korematsu the Presidential Medal of Freedom. He died on March 30, 2005 at the age of 86.

Comprehension and Critical Thinking Questions

1. **According to Executive Order 9066, what authority did the military have?**
2. **What was the objective of Executive Order 9102?**
3. **On what grounds did Fred Korematsu challenge his detention?**
4. **How did the majority opinion explain the Court's decision in *Korematsu v. U.S.*?**
5. **What was the reasoning of the dissenters in Korematsu's case?**
6. **Why do you think the Solicitor General's Office did not report to the Supreme Court evidence that Japanese Americans actually posed no documented security risks?**
7. **Should the Constitution's meaning change during times of crisis?**

KOREMATSU V. U.S. (1944)

DIRECTIONS

Read the Case Background *and* Key Question*. Then analyze the Documents provided. Finally, answer the* Key Question *in a well-organized essay that incorporates your interpretations of the Documents as well as your own knowledge of history.*

CONSTITUTIONAL PRINCIPLES

Equal protection
Due process
Inalienable rights

Case Background

Tension between liberty and security, especially in times of war, is as old as the republic itself. Should the text of the Constitution be interpreted one way in peacetime and another way in wartime, as suggested for a unanimous Court in the World War I era by Justice Oliver Wendell Holmes in *Schenck v. U.S.* (1919)? "When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right." After Japan attacked Pearl Harbor on December 7, 1941, the United States entered World War II, and faced once again the challenge of applying the Constitution's guarantees in the context of wartime. Based on advice from the military that there was a real threat of Japanese invasion of the west coast, as well as a credible danger of Japanese espionage, the U.S. government ordered the relocation and detention of Japanese Americans living in that region. From April of 1942 until the end of the war in September of 1945, 110,000 persons of Japanese ancestry, most of them U.S. citizens, were deprived of their liberty and held in detention camps far from their former homes. They lost most of the property they had entrusted to government authorities, but had no way of documenting their losses because they only had a few days' notice to dispose of their property before reporting to assembly centers for relocation. The surprise attack on Pearl Harbor was very real, as was the fear engendered by it. How real was the threat of espionage?

Faced with extensive questioning on this point by the Supreme Court in oral argument, Solicitor General Charles Fahy convinced a majority of the Justices that the detention of Japanese Americans was justified by "military necessity."

TEACHING TIPS: KOREMATSU V. U.S.

LEARNING OBJECTIVES

- Students understand the major events related to the internment of Japanese Americans during World War II.
- Students understand and apply constitutional principles at issue in *Korematsu v. U.S.* to evaluate the Supreme Court's ruling in that case.

ACTIVITIES

1. To prepare students for this lesson, have them read the background essay, **Handout A: *Korematsu v. U.S.***, and answer the questions.
2. Lead students to develop a timeline on the board to show the significant events described in the background essay.
3. Ask students: "If your family had 48 hours to dispose of your home, car, and all other property before being forced to move into distant temporary housing, which of your inalienable rights might be in jeopardy?" Discuss: Internees lost liberty AND property. Internees were forced to sell their businesses for terrible losses. For example, Representative Robert Matsui of California was 6 months old when his family was interned. His family had just 48 hours to relocate. His father was forced to sell their house in Sacramento for $50 and simply abandon his small produce business.
4. Assign appropriate documents for student analysis. Divide the class into five groups. Assign each group to study and report on documents as follows: (1) **Documents A, B, C**; (2) **Documents D, E**; (3) **Documents F, H**; (4) **Documents G, I**; (5) **Documents J, K**. Conduct a Moot Court according to directions in Appendix, p. 235.
5. After moot court activity, in which students have presented oral arguments and determined how they would decide the case, then guide the class to consider **Documents L, M**, and **N**. Compare students' decisions to Supreme Court's majority and dissenting opinions.
6. Guide the class to read and discuss **Document O: Letter from President Bush to Internees (1991)**.
7. Guide the class to read and discuss additional documents, **The Issue Endures** and **Document P: Duty of Absolute Candor: Katyal Blog Post (2011)**.
8. Wrap up by returning to the last question accompanying the **Introductory Essay**: Should the Constitution's meaning change during times of crisis?

See Appendix for additional Graphic Organizers.

EXTENSIONS

Have students discuss the following:

- The late Supreme Court Chief Justice, William H. Rehnquist, explored the wartime powers of government in his 1998 book *All the Laws But One-Civil Liberties in Wartime*. He noted the pattern throughout our history, that in times of crisis the government's powers are magnified regardless of constitutional limits. In his conclusion he wrote, "An entirely separate and important philosophical question is whether occasional presidential excesses and judicial restraint in wartime are desirable or undesirable. In one sense, this question is very largely academic. There is no reason to think that future wartime presidents will act differently from Lincoln, Wilson, or Roosevelt, or that future Justices of the Supreme Court will decide questions differently than their predecessors."
- Use **Document P: Duty of Absolute Candor: Katyal Blog Post (2011)** to discuss the discovery in the early 1980s of documents proving that the government's attorneys had failed to present in the Supreme Court evidence that might have influenced their ruling in the case. The Supreme Court majority referred to the necessity that judges defer to the recommendations of the Executive Branch and the military during wartime. However, memos from the FBI and the Office of Naval Intelligence explicitly refuting claims of espionage and sabotage by Japanese Americans not shared with the Court. The discovery of this evidence suggests that the policy of internment may have been largely motivated by racial prejudice, as the dissenters in the Court's opinion maintained. If we discover in the future some evidence of a well-concealed Japanese-American spy ring, how would that affect your opinion of this case?

KOREMATSU V. U.S.

CONSTITUTIONAL PRINCIPLES

Equal protection
Due process
Inalienable rights

KEY QUESTION

Assess the Supreme Court's decision in *Korematsu v. U.S.*

A The United States Constitution (1789)
B The Fifth Amendment (1791)
C *Ex Parte Milligan* (1866)
D A Date Which Will Live in Infamy (1941)
E Franklin D. Roosevelt's Infamy Speech (1941)
F Information Bulletin Number 6 (1942)
G Executive Order 9066, February 19, 1942
H Executive Order 9102, March 18, 1942
I Instructions to Japanese, April 1, 1942
J *Hirabayashi v. United States* (1943), Majority Opinion
K Memorandum, Biddle to FDR, December 30, 1943
L *Korematsu v. United States* (1944), Majority Opinion
M *Korematsu v. U.S.* (1944), Dissenting Opinion
N *Ex parte Mitsuye Endo*, December 18, 1944
O George H. W. Bush, Letter from President Bush to Internees (1991)
P Duty of Absolute Candor: Katyal Blog Post (2011)

DOCUMENT A

The United States Constitution (1789), Article I, Section 9

...The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

1. **What is "the writ of *habeas corpus*"? In what cases can it be suspended?**

DOCUMENT B

The Fifth Amendment (1791)

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

1. **What types of rights does this amendment to the Constitution protect? What is the relationship between them?**
2. **What must the government provide when it tries to deprive someone of these rights?**

DOCUMENT C

***Ex Parte Milligan* (1866)**

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false, for the government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence...

1. **This ruling, following the suspension of habeas corpus during the Civil War, held that civilians could not be tried in military tribunals as long as civil courts were operational. How might this reasoning apply to the *Korematsu* case?**

DOCUMENT D

A Date Which Will Live in Infamy (1941)

Images courtesy Library of Congress Prints and Photographs Division (LC-USZ62-104778; LC-USZ62-16555; LC-USZ62-129811).

1. **What impression do these images portray? How is that impression related to public reaction to the decision to remove Japanese Americans from their homes along the west coast?**

DOCUMENT E

Franklin D. Roosevelt's Infamy Speech (1941)

December 8, 1941

Yesterday, December 7, 1941 - a date which will live in infamy - the United States of America was suddenly and deliberately attacked by naval and air forces of the Empire of Japan....

It will be recorded that the distance of Hawaii from Japan makes it obvious that the attack was deliberately planned many days or even weeks ago. During the intervening time the Japanese Government has deliberately sought to deceive the United States by false statements and expressions of hope for continued peace. ...

As Commander-in-Chief of the Army and Navy, I have directed that all measures be taken for our defense. ...

I believe I interpret the will of the Congress and of the people when I assert that we will not only defend ourselves to the uttermost but will make very certain that this form of treachery shall never endanger us again.

Hostilities exist. There is no blinking at the fact that our people, our territory and our interests are in grave danger.

I ask that the Congress declare that since the unprovoked and dastardly attack by Japan on Sunday, December seventh, a state of war has existed between the United States and the Japanese Empire

1. **What is infamy?**
2. **Note the descriptive terms that President Roosevelt used in this speech on the day after the Japanese attack on Pearl Harbor. What is the overall effect of this speech?**
3. **Why did the President maintain that a state of war "has [already] existed"?**
4. **According to the Constitution, which branch of government has the power to declare war? (See the Constitution, Article 1, Section 8, Clause 11.)**

DOCUMENT F

Information Bulletin Number 6 (1942, emphasis original)

CONFIDENTIAL
INFORMATION BULLETIN
NUMBER 6
G-2 SECTION
GENERAL HEADQUARTERS, U.S. ARMY,
Army War College,
Washington, D. C.,
January 21, 1942

JAPANESE ESPIONAGE

6. Conclusions. --

a. It may be expected that Japanese diplomatic and consular communications will be replaced now by using the diplomatic and consular organization of an allegedly neutral power identified with the Axis. They may also use officials of other neutral countries whom they have subverted.

b. Their espionage net containing Japanese aliens, first and second generation Japanese and other nationals is now thoroughly organized and working underground.

c. In addition to their communications net through neutral diplomats, they may be expected to have their own **underground communication net.**

d. Extensive use of Occidentals, such as Axis nationals, neutral nationals, and **subverted Americans**, is to be expected.

(signed)

P. M. ROBINETT,

Lieut. Colonel, G.S.C.,

Ass't Chief of Staff, G-2.

1. **Of what dangers does this confidential memo warn?**
2. **How long after the Pearl Harbor attack was this memo written?**

DOCUMENT G

Executive Order 9066, February 19, 1942

...the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such actions necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commanders may determine, from which any or all persons may be excluded, and with such respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions the Sectary of War or the appropriate Military Commander may impose in his discretion...

1. **What does this executive order authorize the Secretary of War and his military commanders to do?**

DOCUMENT H

Executive Order 9102, March 18, 1942

By virtue of the authority vested in me by the Constitution and statutes of the United States, as President of the United States and Commander in Chief of the Army and Navy, and in order to provide for the removal from designated areas of persons whose removal is necessary in the interests of national security, it is ordered as follows:

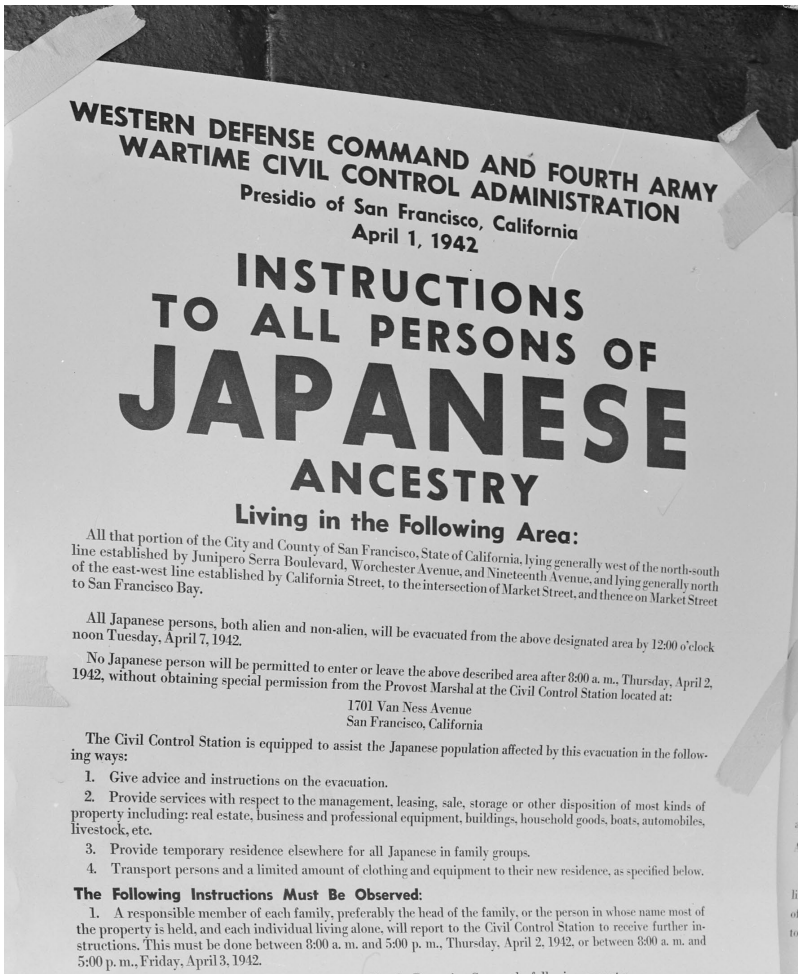
1. There is established in the Office for Emergency Management of the Executive Office of the President the War Relocation Authority, at the head of which shall be a Director appointed by and responsible to the President.

2. The Director of the War Relocation Authority is authorized and directed to formulate and effectuate a program for the removal, from the areas designated from time to time by the Secretary of War or appropriate military commander under the authority of Executive Order No. 9066 of February 19, 1942, of the persons or classes of persons designated under such Executive Order, and for their relocation, maintenance, and supervision....

1. **How is Executive Order 9102 different from Executive Order 9066?**

DOCUMENT I

Instructions to Japanese, April 1, 1942



WESTERN DEFENSE COMMAND AND FOURTH ARMY
WARTIME CIVIL CONTROL ADMINISTRATION
Presidio of San Francisco, California
April 1, 1942

INSTRUCTIONS TO ALL PERSONS OF JAPANESE ANCESTRY

Living in the Following Area:

All that portion of the City and County of San Francisco, State of California, lying generally west of the north-south line established by Junipero Serra Boulevard, Worchester Avenue, and Nineteenth Avenue, and lying generally north of the east-west line established by California Street, to the intersection of Market Street, and thence on Market Street to San Francisco Bay.

All Japanese persons, both alien and non-alien, will be evacuated from the above designated area by 12:00 o'clock noon Tuesday, April 7, 1942.

No Japanese person will be permitted to enter or leave the above described area after 8:00 a. m., Thursday, April 2, 1942, without obtaining special permission from the Provost Marshal at the Civil Control Station located at:

1701 Van Ness Avenue
San Francisco, California

The Civil Control Station is equipped to assist the Japanese population affected by this evacuation in the following ways:

1. Give advice and instructions on the evacuation.
2. Provide services with respect to the management, leasing, sale, storage or other disposition of most kinds of property including: real estate, business and professional equipment, buildings, household goods, boats, automobiles, livestock, etc.
3. Provide temporary residence elsewhere for all Japanese in family groups.
4. Transport persons and a limited amount of clothing and equipment to their new residence, as specified below.

The Following Instructions Must Be Observed:

1. A responsible member of each family, preferably the head of the family, or the person in whose name most of the property is held, and each individual living alone, will report to the Civil Control Station to receive further instructions. This must be done between 8:00 a. m. and 5:00 p. m., Thursday, April 2, 1942, or between 8:00 a. m. and 5:00 p. m., Friday, April 3, 1942.

Image courtesy the National Archives and Records Administration (Records of the War Relocation Authority, 1941 - 1989, ARC identifier: 537).

1. **To whom are these instructions directed? On what date was the announcement posted?**
2. **What are they instructed to do?**
3. **What assistance is promised to them?**
4. **What part(s) of these instructions would be most frightening/ unpleasant to you? Why? To what extent would you trust the Wartime Civil Control Administration to safeguard any property left behind in their care?**

DOCUMENT J

***Hirabayashi v. United States* (1943)**

Pursuant to Executive Order No. 9066 ... the military commander of the Western Defense Command promulgated an order requiring ... that all persons of Japanese ancestry within a designated military area "be within their place of residence between the hours of 8 p.m. and 6 a.m." Appellant, a United States citizen of Japanese ancestry, was convicted in the federal District Court for violation of this curfew order.

Held:

It was within the constitutional authority of Congress and the Executive, acting together, to prescribe this curfew order as an emergency war measure.

In the light of all the facts and circumstances, there was substantial basis for the conclusion, in which Congress and the military commander united, that the curfew as applied was a protective measure necessary to meet the threat of sabotage and espionage which would substantially affect the war effort and which might reasonably be expected to aid a threatened enemy invasion.

The Fifth Amendment contains no equal protection clause, and it restrains only such discriminatory legislation by Congress as amounts to a denial of due process.

The fact ... that attack on our shores was threatened by Japan, rather than another enemy power, set [Japanese] citizens apart from others who have no particular associations with Japan. ...We cannot close our eyes to the fact, demonstrated by experience, that, in time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry.

1. **Of what act was Hirabayashi convicted?**
2. **Why did the Court hold that the curfew was reasonable?**
3. **In your opinion, to what extent did persons of Japanese ancestry receive due process?**

DOCUMENT K

Memorandum, Biddle to FDR, December 30, 1943

Attorney General Francis Biddle, Letter to President Roosevelt:

...The important thing is to secure the reabsorption of about 95,000 Japanese, of whom two-thirds are citizens and who give every indication of being loyal to the United States, into normal American life. The present practice of keeping loyal American citizens in concentration camps on the basis of race for longer than is absolutely necessary is dangerous and repugnant to the principles of our Government. It is also necessary to act now so that the agitation against these citizens does not continue after the war.

1. **What practice did Biddle describe as "dangerous and repugnant to the principles of our Government"?**
2. **To what principles do you think he was referring in this warning?**
3. **Why did he write that it was important to act immediately "to secure the reabsorption [of loyal Japanese people] into normal American life"?**

DOCUMENT L

MAJORITY OPINION

***Korematsu v. United States* (1944)**

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....

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.

1. **According to the majority opinion, why was the exclusion order within the power of Congress?**
2. **What were the "real military dangers" that justified the exclusion order? (See paragraph 3)**
3. **Why do you think this Justice clarified the point regarding racial prejudice?**

DOCUMENT M

***Korematsu v. U.S.* (1944), Dissenting Opinion**

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. … But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need….

1. **Why does this dissenting justice object to the majority's ruling?**
2. **Put the following phrase in your own words: "The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need."**

DOCUMENT N

***Ex parte Mitsuye Endo*, December 18, 1944**

Mitsuye Endo... is an American citizen of Japanese ancestry. She was evacuated from Sacramento, California, in 1942, pursuant to certain military orders ... and was removed to the Tule Lake War Relocation Center located at Newell, Modoc County, California.

Her petition for a writ of *habeas corpus* alleges that she is a loyal and law-abiding citizen of the United States, that no charge has been made against her, that she is being unlawfully detained, and that she is confined in the Relocation Center under armed guard and held there against her will.

It is conceded by the Department of Justice and by the War Relocation Authority that appellant is a loyal and law-abiding citizen. They make no claim that she is detained on any charge or that she is even suspected of disloyalty.

The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else. That was not done by Executive Order No. 9066 or by the Act of March 21, 1942, which ratified it. ... To read them that broadly would be to assume that the Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. We cannot make such an assumption. ...

Mitsuye Endo is entitled to an unconditional release by the War Relocation Authority.

The court is squarely faced with a serious constitutional question,-whether [her] detention violated the guarantees of the Bill of Rights of the federal Constitution and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged.

1. **What is the "serious constitutional question" in Endo's case, according to this Justice's reasoning? What did he say was the clear answer to that question?**

2. **This decision was announced on the same day as *Korematsu v. U.S.*, December 18, 1944. Compare and contrast the two cases. Why do you think the Court's majority came to such different conclusions in these two related cases?**

DOCUMENT 0

George H. W. Bush, Letter from President Bush to Internees (1991)

THE WHITE HOUSE
WASHINGTON

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.

In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. You and your family have our best wishes for the future.

Sincerely,
George Bush

THE WHITE HOUSE

WASHINGTON

A monetary sum and words alone cannot restore lost years or erase painful memories; neither can they fully convey our Nation's resolve to rectify injustice and to uphold the rights of individuals. We can never fully right the wrongs of the past. But we can take a clear stand for justice and recognize that serious injustices were done to Japanese Americans during World War II.

In enacting a law calling for restitution and offering a sincere apology, your fellow Americans have, in a very real sense, renewed their traditional commitment to the ideals of freedom, equality, and justice. You and your family have our best wishes for the future.

Sincerely,

George H. W. Bush, LETTER FROM PRESIDENT BUSH TO INTERNEES (1991). Courtesy of California State University—Sacramento, the Department of Special Collections and University Archives.

1. **Living survivors of internment camps received these letters along with $20,000 as partial restitution for lost property. What constitutional ideals did President Bush mention in his letter?**
2. **Where did those ideals come from?**
3. **To what extent do you think the United States lived up to those ideals with respect to the events and aftermath of *Korematsu v. U.S.*?**

DOCUMENT P

Duty of Absolute Candor: Katyal Blog Post (2011)

Background: In 1980, President Jimmy Carter ordered a special investigation of the facts regarding the relocation and detention of Japanese Americans during World War II. The Commission on Wartime Relocation and Internment of Civilians issued its report in 1983, concluding that the decision to remove Japanese Americans from the west coast had been based on "race prejudice, war hysteria, and a failure of political leadership." (Report of the Commission on Wartime Relocation and Internment of Civilians)

Confession of Error: The Solicitor General's Mistakes During the Japanese-American Internment Cases, by the Department of Justice, May 20, 2011

Neal Katyal, Acting Solicitor General of the United States.

...The Solicitor General is responsible for overseeing appellate litigation on behalf of the United States, and with representing the United States in the Supreme Court. There are several terrific accounts of the roles that Solicitors General have played throughout history in advancing civil rights. But it is also important to remember the mistakes. One episode of particular relevance to AAPI Heritage Month is the Solicitor General's defense of the forced relocation and internment of Japanese-Americans during World War II....

By the time the cases of Gordon Hirabayashi and Fred Korematsu reached the Supreme Court, the Solicitor General had learned of a key intelligence report that undermined the rationale behind the internment. The Ringle Report, from the Office of Naval Intelligence, found that only a small percentage of Japanese Americans posed a potential security threat, and that the most dangerous were already known or in custody. But the Solicitor General did not inform the Court of the report, despite warnings from Department of Justice attorneys that failing to alert the Court "might approximate the suppression of evidence." Instead, he argued that it was impossible to segregate loyal Japanese Americans from disloyal ones. Nor did he inform the Court that a key set of allegations used to justify the internment, that Japanese Americans were using radio transmitters to communicate with enemy submarines off the West Coast, had been discredited by the FBI and FCC. And to make matters worse, he relied on gross generalizations about Japanese Americans, such as that they were disloyal and motivated by "racial solidarity."

The Supreme Court upheld Hirabayashi's and Korematsu's convictions. And it took nearly a half century for courts to overturn these decisions. One court decision in the 1980s that did so highlighted the role played by the Solicitor General, emphasizing that the Supreme Court gave "special credence" to the Solicitor General's representations. The court thought it unlikely that the Supreme Court would have ruled the same way had the Solicitor General exhibited complete candor. Yet those decisions still stand today as a reminder of the mistakes of that era.

Today, our Office takes this history as an important reminder that the "special credence" the Solicitor General enjoys before the Supreme Court requires great responsibility and a duty of absolute candor in our representations to the Court. Only then can we fulfill our responsibility to defend the United States and its Constitution, and to protect the rights of all Americans.

Source: http://blogs.justice.gov/main/archives/1346

1. **Based on this document, to what extent do you believe the relocation and detention of Japanese Americans was based on "military necessity?"**

2. **Restate the last paragraph of Acting Solicitor General Katyal's 2011 blog post in your own words. To what extent do you believe that Solicitor General Fahy in 1944 carried out his "great responsibility and duty of absolute candor?"**

THE ISSUE ENDURES

National Defense Authorization Act (2012)

Subtitle D — Counterterrorism

20 SEC. 1021. AFFIRMATION OF AUTHORITY OF THE ARMED FORCES OF THE UNITED STATES TO DETAIN COVERED PERSONS PURSUANT TO THE AUTHORIZATION FOR USE OF MILITARY FORCE.

24 (a) IN GENERAL.—Congress affirms that the authority of the President to use all necessary and appropriate force pursuant to the Authorization for Use of Military Force includes the authority for the Armed Forces of the United States to detain covered persons pending disposition under the law of war.

6 (b) COVERED PERSONS.—A covered person under this section is any person as follows:

(1) A person who planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored those responsible for those attacks.

(2) A person who was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act or has directly supported such hostilities in aid of such enemy forces.

(c) DISPOSITION UNDER LAW OF WAR.—The disposition of a person under the law of war as described in subsection (a) may include the following:

(1) Detention under the law of war without trial until the end of the hostilities authorized by the Authorization for Use of Military Force....

Detainee access to military or civilian legal representation, or both, including any limitations on such access and the manner in which any applicable legal privileges will be balanced with national security considerations

1. **According to this law, who are "covered persons"?**
2. **What actions against covered persons are authorized by this law?**
3. **To what extent does this law permit covered persons access to legal representation?**

Document L: *Citizens United v. F.E.C.* (2010), Concurring Opinion

1. This concurring justice argues that corporations existed at the time of the Founding. They not only engaged in speech and petitioned the government, but were understood by the authors of the First Amendment to have speech rights equivalent to individual Americans. Further, the First Amendment does not allow restrictions to be made on the basis of who is speaking.

Document M: "Another Dam Breaks," Matt Wuerker, 2010

1. The cartoonist believes the Supreme Court's ruling in *Citizens United* has "broken the dam" holding back union and corporate money from overwhelming American voters with political speech. The resulting wave of "special interest" money threatens to drown the influence and voices of individual voting Americans.
2. Accept reasoned answers.

UNIT 4 – THE PRESIDENCY: CONSTITUTIONAL CONTROVERSIES

Presidents and the Constitution Introductory Essay

1. According to Executive Order 9066, the military had authority to forcibly remove and incarcerate anyone of Japanese descent living within 60 miles of the California, Oregon, and Washington coast—an area deemed critical to national defense and potentially vulnerable to espionage.
2. Executive Order 9102 established the War Relocation Authority to carry out the internment.
3. Korematsu challenged the wartime provisions, believing that the President and Congress had exceeded their war powers by implementing exclusion and restricting the rights of Americans of Japanese descent.
4. The U.S. Supreme Court sided with the government and held that the need to protect against espionage outweighed Korematsu's rights. Compulsory exclusion, though constitutionally suspect, is justified during circumstances of emergency and peril. The majority accepted the military's assertion that it was impossible to determine loyal from disloyal Japanese Americans and that their temporary exclusion was based on military judgment that an invasion of the West Coast by Japan was a real possibility.
5. The dissenters called the government's actions racist and said the relocation centers were concentration camps. Justice Robert Jackson dissented and was particularly troubled that the Court had accepted the case in the first place and then, by ruling in favor of the government, had created a constitutional precedent for future action.
6. Accept reasoned answers.
7. Accept reasoned answers.

KOREMATSU V. U.S. (1944)

Document A: The United States Constitution (1789)

1. The writ of *habeas corpus* is the guarantee that a person who is arrested may insist on being taken before a judge for a hearing. If the arresting authorities cannot demonstrate to the judge that they have good cause for detaining the prisoner, he or she must be promptly released. The privilege of the writ of *habeas corpus* may be suspended only in cases of rebellion or invasion, when public safety does not allow for prompt individual hearings.

Document B: The Fifth Amendment (1791)

1. This portion of the Fifth Amendment provides that the federal government must not take anyone's life, liberty, or property without following fair and just procedures according to the law. Life, liberty, and property are inalienable rights belonging by nature to every human being.
2. due process of law

Document C: *Ex Parte Milligan* (1866)

1. In Ex Parte Milligan, the Supreme Court ruled that, even in wartime or other emergencies, government must follow the rule of law. If government is allowed to ignore its own rules at these times, the result is "anarchy or despotism". Applying this reasoning to the *Korematsu* case leads to the conclusion that the government failed to follow the rule of law by forcing law-abiding Japanese citizens and legal residents into holding camps.

Document D: A Date Which Will Live in Infamy (1941)

1. Students may respond that the images portray a sense of shock and panic, and that Japan is responsible for significant death and destruction. In such times people are often willing to take shortcuts in the name of security. Previously existing prejudices against Asian Americans were more likely to come to the surface, so that many people might approve of the decision to round up Japanese Americans and send them to detention camps.

Document E: Franklin D. Roosevelt's Infamy Speech (1941)

1. Definition of infamy: shameful, criminal, or outrageous act.
2. Descriptive terms include infamy, suddenly, deliberately, obvious, false, uttermost, certain, treachery, grave danger, unprovoked, dastardly. Accept reasoned responses regarding the overall effect of the speech. Students may suggest that the overall effect was to highlight the urgent situation that the Japanese attack created, while conveying a calm and strong sense of resolve in the nation's response.
3. Beginning from the time that the Japanese attacked, the U.S. was at war, even before Congress could make the official declaration.
4. According to Article 1, Section 8, Clause 11, only Congress has the power to declare war.

Document F: Information Bulletin Number 6 (1942)

1. The memo warns that the Japanese government may be expected to engage in espionage, for example by routing communications through allegedly neutral countries, Japanese aliens, first and second generation Japanese, Axis nationals, and subverted Americans in an underground communication net.
2. The memo was written 2 weeks after the Japanese attack on Pearl Harbor.

Document G: Executive Order 9066, February 19, 1942

1. The executive order authorizes the Secretary of War and his military commanders, whenever necessary or desirable, to designate and take control of certain military areas. This control includes the power to exclude any and all persons, as well as to determine who has the right to enter, remain in, or leave the area. The Secretary of War and military commanders have discretion to determine and impose any restrictions at any time.

Document H: Executive Order 9102, March 18, 1942

1. Executive Order 9102 provides for the creation of a specific agency, the War Relocation Authority, to carry out Executive Order 9066 by developing procedures for "relocation, maintenance, and supervision" of those "persons or classes of persons designated…"

Document I: Instructions to Japanese, April 1, 1942

1. The instructions are directed to all persons of Japanese ancestry within the area indicated in the first paragraph. It was posted April 1.
2. The head of each family is to report to the Civil Control Station on April 2 or 3 for further instructions for the evacuation.
3. Assistance is promised with respect to the following: advice, disposition of property, temporary residence, transportation of people and limited amounts of their belongings to temporary housing.
4. Accept reasoned responses.

Document J: *Hirabayashi v. United States* (1943)

1. Hirabayashi was convicted of violating the curfew order that required all persons of Japanese ancestry to be in their residences between 8 p.m. and 6 a.m.
2. The Court held that the curfew was reasonable because the curfew was a reasonable war measure—"necessary to meet the threat of sabotage and espionage." The reasoning was that "… in time of war, residents having ethnic affiliations with an invading enemy may be a greater source of danger than those of a different ancestry." Also, the Court noted that "The Fifth Amendment contains no equal protection clause, and it restrains only such discriminatory legislation by congress as amounts to a denial of due process."
3. Accept reasoned responses. Students may reply based on Executive Orders 9066 and 9102, that people had very little notice of the various restrictions on their activities.

Document K: Memorandum, Biddle to FDR, December 30 (1943)

1. According to Biddle, the practice of "keeping loyal American citizens in concentration camps on the basis of race for longer than is absolutely necessary is dangerous and repugnant to the principles of our government."
2. Accept reasoned responses. The principles to which Biddle seems to be referring may include rule of law, due process, inalienable rights, limited government.
3. Biddle wrote that it was important to act immediately to "to secure the reabsorption [of loyal Japanese people] into normal American life… so that agitation against them would not continue after the war."

ANSWER KEY

Document L: *Korematsu v. United States* (1944), Majority Opinion

1. According to the majority opinion, the exclusion order was within the power of Congress due to the "conditions of modern warfare,..." Even though "compulsory exclusion...is inconsistent with our basic governmental institutions, ...the power to protect must be commensurate with the threatened danger. "

2. The real military dangers included the following: We were at war with the Japanese empire and the properly constituted military feared an invasion of our West Coast. ...There was evidence of disloyalty on the part of some...we cannot determine that the actions were unjustified based on hindsight.

3. The majority disputed the dissenters' claim that the exclusion and detention of Japanese Americans was based on racial prejudice. "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." Military leaders determined that it was necessary for the nation's safety to remove the Japanese from the area, and Congress was correct to trust the military leaders.

Document M: *Korematsu v. U.S.* (1944), Dissenting Opinion

1. The dissenting justice charges that the military order was unconstitutional because it was based on racial prejudice.

2. Once the Court decides that the exclusion and detention of the Japanese was consistent with due process under wartime circumstances, it becomes easier in the future to use emergency conditions to justify a flawed interpretation of the Constitution and infringe on inalienable rights.

Document N: *Ex parte Mitsuye Endo*, December 18, 1944

1. The "serious constitutional question,- whether [her] detention violated the guarantees of the Bill of Rights of the federal Constitution and especially the guarantee of due process of law. There can be but one answer to that question. An admittedly loyal citizen has been deprived of her liberty for a period of years. Under the Constitution she should be free to come and go as she pleases. Instead, her liberty of motion and other innocent activities have been prohibited and conditioned. She should be discharged."

2. Accept reasoned responses In Korematsu's case, the court ruled that the removal of Americans of Japanese descent did not exceed the war powers of the President and the Congress.

   In Endo's case, the government ruled that, even though the removal and detention process was within the government's power as a wartime measure, once the government conceded an individual's loyalty, she must be released. "The authority to detain a citizen or to grant him a conditional release as protection against espionage or sabotage is exhausted at least when his loyalty is conceded. If we held that the authority to detain continued thereafter, we would transform an espionage or sabotage measure into something else. That was not done by Executive Order No. 9066 or by the Act of March 21, 1942, which ratified it. ... To read them that broadly would be to assume that the Congress and the President intended that this discriminatory action should be taken against these people wholly on account of their ancestry even though the government conceded their loyalty to this country. We cannot make such an assumption...."

Document O: George H. W. Bush, Letter from President Bush to Internees (1991)

1. The constitutional ideals mentioned by President Bush were freedom, equality, and justice.
2. The ideals come from our constitutional principles of limited government, equal protection, and due process.
3. Accept reasoned responses with respect to the remaining question.

Document P: Duty of Absolute Candor: Katyal Blog Post (2011)

1. Based on this document, it appears clear that the relocation policy was not in any way based on military necessity.
2. Accept reasoned responses.

The Issue Endures

1. Covered persons includes anyone who was involved in planning or carrying out the Sept. 11, 2001 attacks on the U.S., as well as anyone connected with al-Qaeda, the Taliban, or others engaged in hostilities against the U.S.
2. Actions authorized against covered persons include indefinite detention without trial until the end of hostilities.
3. Access by covered persons to legal representation "will be balanced with national security considerations."

[redacted]

Handout A: Eisenhower and the Little Rock Crisis Background Essay

1. The *Plessy* case upheld mandated segregation in public rail cars. The *Brown* decision invalidated segregation, holding that separate facilities were inherently unequal.
2. The Little Rock Crisis took place when the Governor of Arkansas refused to intervene when a mob prevented nine African American students from attending their school. A federal court had approved their desegregation plan as consistent with the *Brown* ruling and ordered integration to begin.
3. Eisenhower ordered the mob to disperse and when it did not, sent the 101st Airborne Division to keep the peace. He also federalized the Arkansas National Guard, removing those men from the Arkansas governor's command.
4. Eisenhower described his constitutional duty to take care that the laws were faithfully executed as "inescapable."
5. Students may say that the Constitution says the states and the people keep all the powers not given to the federal government and that therefore states are rightfully in charge of matters such as public education. They may also say that Article II says the President is Commander in Chief of the militia of the several states when called into actual service of the states, but that it does not say who can call them into service. Since Congress can declare war and provide for calling forth the militia, perhaps it is also Congress's power to call the militia into service.

EISENHOWER AND THE LITTLE ROCK CRISIS DBQ

Document A: The United States Constitution (1789)

1. The President has the power to carry out the laws. He is in charge of the armed forces, and he is responsible for making sure the laws are enforced.
2. The militia could refer to the National Guard.