

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 Secretary 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

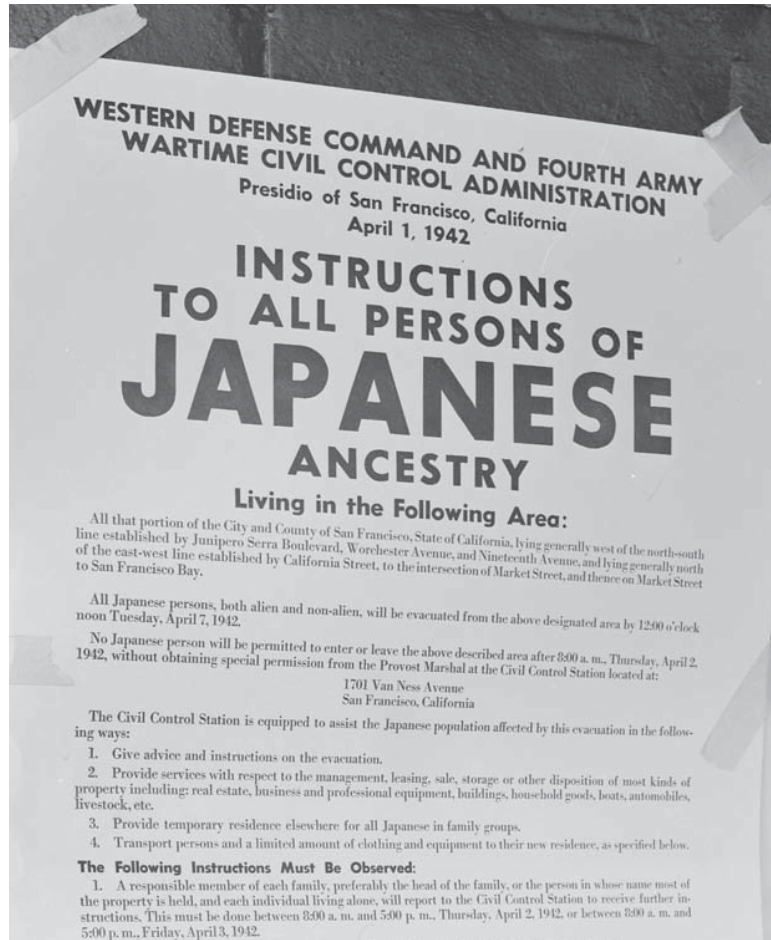


Image courtesy the National Archives and Records Administration (Records of the War Relocation Authority, 1941 - 1989, ARC identifier: 537).

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 War-time 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 O

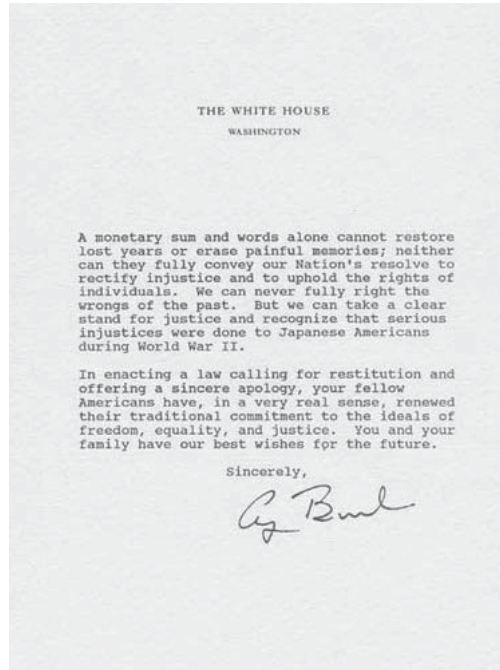
George H. W. Bush, Letter from President Bush to Internees (1991)

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



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?**

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.”

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.”

EISENHOWER AND THE LITTLE ROCK CRISIS (1957)

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.