

When National Security Trumps Individual Rights

A Lesson by Linda Weber



The Annenberg Foundation Trust at
SUNNYLANDS

Leonore Annenberg
Institute for Civics

www.annenbergclassroom.org

SUMMARY

On December 18, 1944, the Supreme Court handed down one of its most controversial decisions when it upheld the government's decision to intern of all persons of Japanese ancestry (both alien and non-alien) on the grounds of national security. Over two-thirds of the Japanese in America were citizens, and the internment took away their constitutional rights.

In 1942, Fred Korematsu, a 22-year-old Japanese American, refused an evacuation order and was arrested, then convicted of a felony. He challenged his conviction in court on constitutional grounds, and the case was appealed to the Supreme Court. Korematsu lost in a 6-3 decision, but when new evidence surfaced 40 years later proving the government had withheld evidence, Korematsu went back to federal court to have his conviction vacated. This time, he won. In 2018, the Supreme Court overturned the 1944 ruling.

Fred Korematsu was an ordinary citizen who took an extraordinary stand. Through his pursuit of justice, the country learned about what can happen when national security trumps civil liberties.

In this lesson, students evaluate the consequences of past events and decisions related to the Supreme Court case *Korematsu v. United States* (1944). They consider the challenges involved when trying to balance civil liberties and national security during threatening times and reflect on the lessons learned about civil liberties from the justices in *Korematsu*.

NOTES AND CONSIDERATIONS

- This lesson presumes that students have some experience reviewing Supreme Court cases.
- Technology is relied on to enhance learning.
- This is a self-contained lesson with a variety of resources and activities that can be adapted to different lengths of classes and levels of students.

Snapshot of Lesson

Grades: Middle School; High School (Focus)

Subject Focus: Civics/Government

Estimated Time: 3 days

Alignment to National Standards for Civics and Government: Grades 5-8; Grades 9-12

Materials/Equipment Needed:

- Video: *Korematsu and Civil Liberties* available on DVD and at <http://www.annenbergclassroom.org/page/korematsu-civil-liberties>
- Computer lab

Materials Included:

Readings and Resources

- Video Transcript: *Korematsu and Civil Liberties*
- Chapter 11: "Internment of Japanese Americans during World War II" from *The Pursuit of Justice* by Kermit Hall
- Full text of Supreme Court case: *Toyosaburo Korematsu v. United States* (1944)
- Executive Order 9066
- U.S. Constitution: Articles I & II; Fifth Amendment; Fourteenth Amendment

Student Activities

- Class Prep: Assignment Sheet
- Timeline: "Chronology Tells the Story"
- Case Profile: "Lessons in Civil Liberties from *Korematsu v. United States*"

Teacher Materials

- Timeline Key

National Standards for Civics & Government

- Standards level detail for grades 5-8, 9-12

TOPICS

- Constitutional foundations
- Civil liberties
- Role and responsibilities of government
- War powers
- U.S. Supreme Court
- Japanese internment

NATIONAL STANDARDS

Document: National Standards for Civics and Government (1994) Center for Civic Education
<http://www.civiced.org/index.php?page=stds>

Grades 5-8 Organizing Questions

The national content standards for civics and government are organized under five significant questions. The following outline lists the high-level organizing questions supported by this lesson.

- I. What are civic life, politics, and government?
 - A. What is civic life? What is politics? What is government? Why are government and politics necessary? What purposes should government serve?
 - B. What are the essential characteristics of limited and unlimited government?
 - C. What are the nature and purposes of constitutions?
 - D. What are alternative ways of organizing constitutional governments?

- II. What are the foundations of the American political system?
 - A. What is the American idea of constitutional government?
 - B. What are the distinctive characteristics of American society?
 - C. What is American political culture?
 - D. What values and principles are basic to American constitutional democracy?

- III. How does the government established by the Constitution embody the purposes, values, and principles of American democracy?
 - A. How are power and responsibility distributed, shared, and limited in the government established by the United States Constitution?
 - E. What is the place of law in the American constitutional system?
 - F. How does the American political system provide for choice and opportunities for participation?

- V. What are the roles of the citizen in American democracy?
 - A. What is citizenship?
 - B. What are the rights of citizens?
 - C. What are the responsibilities of citizens?
 - D. What dispositions or traits of character are important to the preservation and improvement of American constitutional democracy?
 - E. How can citizens take part in civic life?

Grades 9-12 Organizing Questions

The national content standards for civics and government are organized under five significant questions. The following outline lists the high-level organizing questions supported by this lesson.

- I. What are civic life, politics, and government?
 - A. What is civic life? What is politics? What is government? Why are government and politics necessary? What purposes should government serve?
 - B. What are the essential characteristics of limited and unlimited government?
 - D. What are alternative ways of organizing constitutional governments?

- II. What are the foundations of the American political system?
 - A. What is the American idea of constitutional government?
 - B. What are the distinctive characteristics of American society?
 - C. What is American political culture?
 - D. What values and principles are basic to American constitutional democracy?

- III. How does the government established by the Constitution embody the purposes, values, and principles of American democracy?
 - A. How are power and responsibility distributed, shared, and limited in the government established by the United States Constitution?
 - B. How is the national government organized, and what does it do?
 - D. What is the place of law in the American constitutional system?
 - E. How does the American political system provide for choice and opportunities for participation?

- IV. What is the relationship of the United States to other nations and to world affairs?
 - C. How has the United States influenced other nations, and how have other nations influenced American politics and society?

- V. What are the roles of the citizen in American democracy?
 - B. What are the rights of citizens?
 - C. What are the responsibilities of citizens?
 - D. What civic dispositions or traits of private and public character are important to the preservation and improvement of American constitutional democracy?
 - E. How can citizens take part in civic life?

Note: A more detailed standards-level alignment related to these questions can be found in the “Standards” section at end of this lesson plan.

STUDENT OUTCOMES

Knowledge, skills, and dispositions

Students will . . .

1. Identify cause-and-effect relationships between historical events, governmental decisions, and changes in society.
2. Explain the lessons learned about civil liberties from *Korematsu v. United States*.
3. Identify the distribution of war powers as set forth in the Constitution.
4. Make observations and conclusions about the responsibilities and functions of government during wartime.
5. Appreciate the impact that one citizen can have when justice is pursued under the Constitution.

Integrated Skills

1. Information literacy skills

Students will . . .

- Analyze primary and secondary sources to gather information.
- Organize and analyze information
- Use skimming and search skills.
- Make informed decisions.
- Use technology as a tool to support learning.

2. Media literacy skills

Students will . . .

- Read, view, and listen to information delivered via different media formats in order to make inferences and gather information

3. Communication skills

Students will . . .

- Write and speak clearly to contribute ideas, information, and express own point of view.
- Listen for understanding.
- Collaborate with others to deepen understanding

4. Study skills

Students will . . .

- Manage time and materials.
- Organize work effectively

5. Thinking skills

Students will . . .

- Describe and recall information.
- Explain ideas or concepts.
- Make connections between concepts and principles.
- Draw conclusions.
- Synthesize information.
- Use sound reasoning and logic.
- Distinguish the facts.
- Evaluate opposing viewpoints.

6. Problem-solving & Decision-making

Students will . . .

- Ask meaningful questions.
- Consider diverse perspectives.
- Make informed decisions.
- Explore alternative solutions.

7. Participation skills

Students will . . .

- Contribute to small and large group discussion.
- Work responsibly both individually and with diverse people.
- Express own beliefs, feelings, and convictions.
- Show initiative and self-direction.

ASSESSMENT

Evidence of understanding may be gathered from student performance related to the following:

1. Student activities
2. Participation in small and large group discussions

VOCABULARY

- **checks and balances**—the way power is divided among the three branches of the federal government and the states ensures that each checks—that is, restrains—and balances the others. The branches share certain powers but also exercise some exclusive powers.
- **civil liberties**—basic individual rights of all citizens, as expressed in the Bill of Rights and reinforced by the 14th Amendment. These include such liberties as freedom of speech, press, religion, and assembly; freedom from unreasonable search and seizure; and the right to privacy.
- **due process of the law**—guaranteed by the Fifth and Fourteenth Amendments, governments cannot deprive people of their lives, liberty, or property without “due process,” that is, appropriate legal proceedings.
- **equal protection of the law**—guaranteed by the Fourteenth Amendment, all citizens have equal protection of the law. This provision prevents the government from discriminating against any particular group, and ensures citizens’ civil rights.
- **espionage**—the practice of gathering, transmitting, or losing through gross negligence information relating to the defense of the U.S. with the intent that or with reason to believe that the information will be used to the injury of the U.S. or the advantage of a foreign nation
- **executive order**—legally binding orders issued by the president
- **felony**—a crime that has a greater punishment imposed by statute than that imposed on a misdemeanor; a federal crime for which the punishment may be death or imprisonment for more than a year
- **fifth column activity**—people who aid the enemy from within their own country.
- **good law**—laws that still apply because they have not been officially overturned.
- **rights**—a person’s justifiable claim, protected by law, to act or be treated in a certain way.
- **separation of powers**—specific powers assigned to each branch of the federal government by the Constitution. Some powers belong exclusively to a single branch; others are shared among the branches.
- **war powers**—provisions of the Constitution that define government powers related to war. Only Congress can declare a war and appropriate the funds necessary to fight it, but the president, as commander in chief of the military, has considerable latitude in sending American troops into combat.
- **writ of coram nobis**—The Supreme Court has held that the writ of error coram nobis is available only when the challenged conviction is one that has been obtained as a result of errors “of the most fundamental character” that have “rendered the proceeding itself irregular and invalid.”

Sources for Definitions

Annenberg Classroom Glossary

<http://www.annenbergclassroom.org/terms>

Merriam-Webster’s Dictionary of Law

<http://dictionary.lp.findlaw.com/dictionary.html>

LESSON OVERVIEW

Class-Prep Assignment:

Advance preparation is important for students so they have the background knowledge and understanding needed for viewing the video on the first day; therefore, a Class Prep Assignment Sheet is provided.

DAY 1: Justice Lost; Justice Found; Justice Pending

Students view the video *Korematsu and Civil Liberties* to learn about the way civil liberties can be lost during times of war and what a Japanese American named Fred Korematsu did for all Americans when he pursued justice under the Constitution. The troubling precedent established by the Supreme Court ruling in Korematsu's case, however, has not been challenged, which leaves justice pending.

DAY 2: Chronology Tells the Story

Students gain historical understanding and perspective by exploring the chronology and relationship of events and decisions surrounding the internment of Japanese Americans that prompted the U.S. government to restrict human rights on the grounds of national security.

DAY 3: Lessons in Civil Liberties from *Korematsu v. United States* (1944)

Students analyze *Korematsu v. United States* to extract details, create a case profile, and identify lessons learned about civil liberties from the justices' own words.

TEACHING ACTIVITIES

CLASS-PREP ASSIGNMENT

In preparation for the first class session, students complete a Class Prep Assignment Sheet (included) that requires background reading and responses to questions.

Readings (copies are also included with this lesson)

- Chapter 11: "Internment of Japanese Americans during World War II" from *The Pursuit of Justice* by Kermit Hall
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/93_100_Ch_11.pdf
- *Understanding Democracy: A Hip Pocket Guide* (Separation of Powers, pg. 90-93)
<http://www.annenbergclassroom.org/page/understanding-democracy-a-hip-pocket-guide>
- U.S. Constitution
 - o Fifth Amendment
 - o Fourteenth Amendment
 - o Article I, II: War Powers ClausesThe Annenberg Guide to the United States Constitution
<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>

DAY 1: JUSTICE LOST; JUSTICE FOUND; JUSTICE PENDING

Overview:

The video students watch today, *Korematsu and Civil Liberties*, tells the story of Fred Korematsu and the turbulent times that led the Supreme Court to uphold the denial of civil liberties in the interest of national security. Though troubling, the precedent still stands today as “good law.”

Goal: Students identify cause-and-effect relationships between historical events and governmental decisions that resulted in national security trumping civil liberties.

Materials/Equipment Needed:

- Video: *Korematsu and Civil Liberties* available on DVD and at <http://www.annenbergclassroom.org/page/korematsu-civil-liberties>
- Computer with Internet connection and projector for class viewing

Student Materials

- Completed Class Prep Assignment Sheet
- Timeline: “Chronology Tells the Story” (1 per student)

Before Viewing:

1. Discuss the questions on the Class Prep Assignment Sheet.
2. Introduce the video by reading the words of President Clinton when Fred Korematsu was awarded the Presidential Medal of Freedom in 1998.

The President’s introductory remarks (in part):

All of our honorees have helped America to widen the circle of democracy – by fighting for human rights, by righting social wrongs, by empowering others to achieve, by preserving our precious environment, by extending peace around the world. Every person here has done so by rising in remarkable ways to America’s highest calling, the calling, as the First Lady said, of active citizenship.

The President’s words to Mr. Korematsu:

In 1942, an ordinary American took an extraordinary stand. Fred Korematsu boldly opposed the forced internment of Japanese Americans during World War II. After being convicted for failing to report for relocation, Mr. Korematsu took his case all the way to the Supreme Court. The high court ruled against him.

But 39 years later, he had his conviction overturned in federal court, empowering tens of thousands of Japanese Americans and giving him what he said he wanted most of all – the chance to feel like an American once again.

In the long history of our country’s constant search for justice, some names of ordinary citizens stand for millions of souls: Plessy. Brown. Parks. To that distinguished list, today we add the name of Fred Korematsu.

Source: <http://clinton6.nara.gov/1998/01/1998-01-15-remarks-by-the-president-at-medals-of-freedom-event.html>

3. Distribute the timeline activity and go over the instructions. Work begins AFTER the video.

During Viewing:

Students watch and listen to get the flow of the story. On Day 2, they use the video as a resource.

DAY 2: CHRONOLOGY TELLS THE STORY

Overview: Students review the video *Korematsu and Civil Liberties* and use other resources to identify the chronology and relationship of events and decisions that prompted the U.S. government to restrict the human rights of Fred Korematsu on the grounds of national security.

Goal: Analyze and interpret the causes and effects of events that led to the Supreme Court ruling in *Korematsu v. United States* and reflect on the importance of the case for us today.

Materials/Equipment Needed:

- Computer lab with Internet connection
- Video: *Korematsu and Civil Liberties* available on DVD and at <http://www.annenbergclassroom.org/page/korematsu-civil-liberties>

Readings Included

- Chapter 11: “Internment of Japanese Americans during World War II” from *The Pursuit of Justice* by Kermit Hall

Also may be viewed/downloaded from Annenberg Classroom:

http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/93_100_Ch_11.pdf

- U.S. Constitution
 - Fifth Amendment
 - Fourteenth Amendment

Also may be viewed /downloaded from The Annenberg Guide to the United States Constitution: What it says. What it means. <http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>

Student Materials

- Timeline: “Chronology Tells the Story”

Student Materials

- Timeline Key

Procedure:

By today, students will have viewed the video 1 time. On this day, they will use it as a resource to gather information and complete the timeline activity.

Note: Other resources may also be used as a few dates/events were added for more historical context.

DAY 3: LESSONS FROM *KOREMATSU V. UNITED STATES*

Overview: Students analyze the Supreme Court case *Korematsu v. United States* to extract details, create a case profile, and identify lessons learned about civil liberties from the justices' own words.

Goal: Explore the reasoning behind different points of view regarding the restriction of civil liberties on the grounds of national security.

Materials/Equipment Needed:

- Computer lab

Readings

- Full text of Supreme Court case: *Toyosaburo Korematsu v. United States*, (1944)

A copy is included with this lesson or it can be accessed from United States Reports at this link:

<http://ftp.resource.org/courts.gov/c/US/323/323.US.214.22.html>

- Korematsu Obituary: Seattle Times, March 31, 2005
“Fred Korematsu, 86, fought World War II internment, dies”

The article can be read at this link:

http://seattletimes.nwsourc.com/html/nationworld/2002226476_webkorematsuobit31.html

Student Materials

- Activity: “Lessons in Civil Liberties from *Korematsu v. United States*”

Procedure:

1. Allow students time to complete the activity, then regroup to discuss the Wrap-up questions on the last page.
2. Conclude the lesson by having the students read the obituary for Fred Korematsu, then discuss the closing comments by his *coram nobis* lawyer, Dale Minami. (2nd to last paragraph)

“What Fred represents as a symbol is the significance of dissent in a free society,” Minami said today. “A courageous stance by individuals like Fred helps strengthen our Constitution and inspires us to be a stronger country.”

EXTENSION ACTIVITIES

Have more time to teach?

- On October 3, 2003, Geoffrey Stone from the University of Chicago (one of the speakers in the video) filed a brief in the Supreme Court on behalf of Fred Korematsu. In it, he argues for a more delicate balance of power between the three branches of government and supports his position with examples from history.

o Read about the brief in this article from the University of Chicago Chronicle.
“Stone Writes Fred Korematsu’s amicus brief as history repeats. . .”

<http://chronicle.uchicago.edu/031106/korematsu.shtml>

o Read the brief: Brief Amicus Curiae Of Fred Korematsu

http://supreme.lp.findlaw.com/supreme_court/briefs/03-1027/03-1027.mer.ami.korematsu.pdf

- Research to learn about the history of presidential executive orders and the controversies that surround their use.

RESOURCES

Annenberg Classroom

- Video: *Korematsu and Civil Liberties*

<http://www.annenbergclassroom.org/page/korematsu-civil-liberties>

- *Our Rights* by David J. Bodenhamer

<http://www.annenbergclassroom.org/page/our-rights>

- *The Pursuit of Justice: Supreme Court Decisions that Shaped America*—Kermit L. Hall & John J. Patrick

<http://www.annenbergclassroom.org/page/the-pursuit-of-justice>

- The Annenberg Guide to the United States Constitution

<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>

- *Our Constitution* by Donald A. Ritchie

<http://www.annenbergclassroom.org/page/our-constitution>

- Civil Liberties in Wartime

<http://www.annenbergclassroom.org/issue/civil-liberties-in-war>

Primary Documents

- Executive Order 9066

<http://www.ourdocuments.gov/doc.php?flash=true&doc=74&page=transcript>

- Public Law 503

http://www.internmentarchives.com/showdoc.php?docid=00104&search_id=9609

- Exclusion Order No. 34

<http://www.hsp.org/default.aspx?id=1131>

Other Resources

- *Toyosaburo Korematsu v. United States*, 323 U.S. 214 (1944)
<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=323&invol=214>
- OYEZ
<http://oyez.org>
- Landmark Supreme Court Cases
<http://www.landmarkcases.org/korematsu/home.html>
- CSR Report to Congress
Presidential Directives: Background and Overview, Updated April 23, 2007
<http://www.fas.org/irp/crs/98-611.pdf>

In the long history of our country's constant search for justice, some names of ordinary citizens stand for millions of souls: Plessy. Brown. Parks. To that distinguished list, today we add the name of Fred Korematsu.

President Clinton
1998 Ceremony for the Presidential Medal of Freedom

Readings & Resources

- Video Transcript: *Korematsu and Civil Liberties*
- Chapter 11: “Internment of Japanese Americans During World War II” from *The Pursuit of Justice* by Kermit Hall
- Full text of Supreme Court case: *Toyosaburo Korematsu v. United States* (1944)
- Executive Order 9066
- U.S. Constitution
 - Articles I & II
 - Fifth Amendment
 - Fourteenth Amendment

Video Transcript: *Korematsu and Civil Liberties*

December 7th, 1941. A Japanese fleet had crossed the Pacific undetected, launching planes into the morning sky. The bombs that dropped on Pearl Harbor that morning brought death, destruction, and a nationwide sense of terror.

AKHIL AMAR: AMERICANS HAD BEEN ATTACKED ON AMERICAN SOIL. IT WAS A SNEAK ATTACK. WE DIDN'T SEE IT COMING. AND THERE WAS PANIC.

FRANK WU: THAT SHOOK THE PSYCHE OF THE NATION. BEFORE PEARL HARBOR THE UNITED STATES HAD NEVER SUFFERED A SNEAK ATTACK OF THAT MAGNITUDE.

AKHIL AMAR: PEOPLE WERE WORRIED, WELL, IF WE DIDN'T SEE THAT COMING // MAYBE SAN FRANCISCO OR LOS ANGELES WILL BE NEXT.

How does the Constitution guide us when the nation is governed by fear? During times of peace, the rules are clear. Three separate branches of equal power, each with the duty to enforce the Constitution. But when the nation is at war, that balance of power tips in favor of the President. Associate Justice of the United States Supreme Court, Stephen G. Breyer:

JUSTICE STEPHEN G. BREYER: HE HAS AUTHORITY TO WAGE THE WAR // HE CAN DO THINGS IN THE CASE OF INVASION FOR EXAMPLE THAT HE MIGHT NOT BE ABLE TO DO WERE THERE NO INVASION.

The balance also tips in favor of national security over civil liberties. Associate Justice of the United States Supreme Court, Anthony Kennedy:

JUSTICE ANTHONY KENNEDY: THE CONSTITUTION IS AT ITS MOST VULNERABLE WHEN WE'RE IN A CRISIS. // THIS CLARITY OF VISION THAT WE NEED TO SEE THE MEANING OF JUSTICE, // TENDS TO BE BLURRED.

JUSTICE STEPHEN G. BREYER: WHEN YOU GET INTO A WAR // YOU DO NOT KNOW WHAT KIND OF BOX YOU ARE OPENING UP. IT IS JUST FILLED WITH EMOTION, HATRED, VIOLENCE, AND IT ALL COMES OUT.

GEOFFREY STONE: ONE OF THE REAL CHALLENGES OF A FREE SOCIETY IS TO PROTECT ITSELF // WHILE AT THE SAME TIME MAINTAINING AN ADHERENCE TO THOSE VALUES THAT MAKE IT A FREE SOCIETY IN THE FIRST PLACE. AND ONE OF THE LESSONS OF OUR HISTORY IS THAT WE TEND TO, IN FACT, GO OVERBOARD. AND WE TEND TO ERR TOO MUCH ON THE SIDE OF // SECURITY RATHER THAN LIBERTY.

And the consequences can be disastrous.

----- (black) -----

The attack on Pearl Harbor destroyed much of America's Pacific fleet, and killed over two thousand people. The very next day, President Franklin Delano Roosevelt addressed a joint session of Congress, asking it to declare war.

FRANKLIN DELANO ROOSEVELT: YESTERDAY, DECEMBER 7TH, 1941, A DATE THAT WILL LIVE IN INFAMY....

Congress declared war 33 minutes after FDR was done with his speech. Within days, a thousand Japanese nationals were rounded up, as fear of fifth column activity – or spying –reached new levels of hysteria.

JUSTICE STEPHEN G. BREYER: THERE WAS FEAR. THERE WAS UNCERTAINTY. I CAN REMEMBER SOME OF THAT. // I REMEMBER WE HAD TO PULL OUR CURTAINS DOWN IN THE

EVENING, // BLACK OUT CURTAINS, BECAUSE PEOPLE WERE AFRAID THAT WE WOULD BE BOMBED IN SAN FRANCISCO.

JOHN FERREN: ELEVEN DAYS AFTER PEARL HARBOR // PRESIDENT ROOSEVELT ISSUED AN ORDER CREATING A COMMISSION TO LOOK INTO THE DEBACLE OF PEARL HARBOR.

Supreme Court Justice Owen Roberts was picked to lead a commission to investigate the Pearl Harbor Attack. There was pressure to release a report quickly, so the commission did a number of interviews, but it didn't really gather evidence. Based on nothing more than hearsay, the Roberts report made wild and unsupported accusations about Japanese-Americans.

GARY OKIHIRO: HE SAID THAT THERE WAS AN UNPRECEDENTED DEGREE OF FIFTH COLUMN ACTIVITY AND THAT SUBVERSIVE PRESENCE WERE THESE DISLOYAL JAPANESE AND JAPANESE-AMERICANS. // THAT WAS IRRESPONSIBLE, BECAUSE THERE WAS NOT A SHRED OF EVIDENCE TO DEMONSTRATE THAT.

The hysteria generated by the Roberts Report resulted in calls to have the entire population of people with Japanese ancestry removed from the west coast – actually physically taken away – all 120,000 of them.

JUSTICE ANTHONY KENNEDY: REMEMBER IGNORANCE FUELS FRIGHT. AND WE SIMPLY DIDN'T KNOW MUCH ABOUT THE JAPANESE PEOPLE OR THE JAPANESE CULTURE OR OUR OWN FELLOW CITIZENS.

Now, it's important to know a little history about the Japanese in America. From the start, the US did not allow any immigrants from Asia to become citizens mostly for fear they would compete for jobs with white American citizens. And racism. So when the Japanese immigrants – called "Issei" – started arriving in the mid 19th century, only their children who were born here – called "Nisei" – could be citizens because the 14th Amendment said so. But for decades, states and cities passed laws discriminating against immigrants from Asia, like California's Alien Land Law.

NAOKO SHIBUSAWA: AND THIS SORT OF LAW WAS MIMICKED ACROSS THE WEST COAST. OREGON PICKED IT UP, WASHINGTON ALSO PICKED IT UP. AND AS A RESULT, THEY WERE NOT ABLE TO BUY LAND.

GARY OKIHIRO: NEXT THEY PASS: ALIENS INELIGIBLE FOR CITIZENSHIP COULD NOT RENT LAND IN CALIFORNIA. AND THEN A FEW YEARS LATER: ALIENS INELIGIBLE FOR CITIZENSHIP COULD NOT SHARECROP.

All Japanese immigration was cut off in 1924. And despite all these obstacles, and on the worst land available, by 1941, Japanese Americans had somehow managed to produce more than 10% of the total value of California's resources. The war was likely to take that away.

KERMIT ROOSEVELT: CIVIL LIBERTIES GET TRAMPLED BASICALLY WHEN THERE'S A LOT OF PUBLIC FEAR.

The Secretary of War, Henry Stimson, along with the entire Congressional delegation from the three west coast states, argued for removal.

JUSTICE STEPHEN G. BREYER: WELL THOSE WHO WERE IN FAVOR OF EVACUATION USED THIS ARGUMENT – ABSOLUTELY TRUE THEY USED THIS, YOU WON'T BELIEVE IT, YOU'LL THINK I'M MAKING IT UP, BUT I'M NOT – THEY SAID THE VERY FACT THAT THERE HAS BEEN NO ACT OF SABOTAGE SO FAR IS THE PROOF THAT SOME IS PLANNED AND INTENDED.

Some of the greatest civil libertarians in American history during peace, advocated for removing the Japanese during war.

JUSTICE STEPHEN G. BREYER: AT THE TIME PEOPLE WHO WERE GREAT CIVIL LIBERTARIANS – EARL WARREN // SAID THAT THE JAPANESE INCLUDING CITIZENS SHOULD BE EVACUATED FROM THE WEST COAST. // LATER, I HAVE TO ADD, SAID IT WAS THE GREATEST MISTAKE HE EVER MADE.

But not everyone in the government bought into the hysteria.

GEOFFREY STONE: MEN LIKE FRANCIS BIDDLE AS THE ATTORNEY GENERAL, WAS ACTUALLY QUITE HEROIC IN SAYING, THIS IS THE WRONG THING TO DO, WE SHOULDN'T DO IT.

The Attorney General said the Justice Department “would have nothing to do with the evacuation.” It was a position he and J. Edgar Hoover had maintained from the start.

NAOKO SHIBUSAWA: THE FBI WAS SAYING, THESE PEOPLE AREN'T A THREAT. AND SO YOU HAVE A FIGHT IN THE GOVERNMENT BETWEEN JUSTICE – CIVILIANS – AND THE MILITARY.

The military won. President Franklin Delano Roosevelt was about to assert the kind of power that could only come to a Commander in Chief during wartime.

JOHN FERREN: THE PRESIDENT TENDS TO ASSERT GREAT POWER DURING WARTIME EVEN TO THE POINT OF TAKING MEASURES THAT CAN RESTRICT CIVIL LIBERTIES BECAUSE HIS PRINCIPAL CONCERN // WOULD BE TO PROTECT THE NATION.

FDR was in his third term as president when the war began. He had guided the nation through the Great Depression; no President was ever more powerful.

On February 19, 1942, FDR signed Executive Order 9066. 9066 put the Secretary of War and his commanders in charge of deciding where the military zones would be and who should be removed. It gave the military power over the Attorney General to make these decisions without any hearings or due process. This was unprecedented power for a President – even for FDR. He asked Congress to support Executive Order 9066, and it did.

GARY OKIHIRO: CONGRESS FOLLOWED THAT WITH PUBLIC LAW 503, WHICH THEN // GAVE IT // POWER.

The laws did not specifically name any race or ethnic group, but allowed the military to impose restrictions on anyone it deemed a threat. But everyone knew who would be targeted. Military Areas were created, and at first, curfews and other restrictions were imposed on everyone of Japanese descent.

When the evacuation began on March 22, 1942, newsreels announced its start with a tone wavering between fear and contempt. This one, called “Out They Go,” never mentions that two-thirds of the evacuees were American citizens, but refers to them by a word we'd never use today...

NEWSREEL: JAPS EVACUATE VITAL WEST COAST AREAS FOR THE NATIONAL SECURITY. AT LOS ANGELES, 36,000 JAPS SEE THE HANDWRITING ON THE WALL AND SELL OUT THEIR GOODS BEFORE THEIR VOLUNTARY DEPARTURE.

The evacuation wasn't voluntary, it was the law. And before it even began, came mayhem, theft and loss. People were only allowed to take to the camps what they could carry on their backs. They had to make arrangements to store or get rid of everything else they owned on short notice. The lucky ones got two weeks, some – only a few days.

NAOKO SHIBUSAWA: MOST JAPANESE AMERICANS HAD TO LEAVE THEIR PROPERTIES BEHIND. // THERE'S LOTS OF INCIDENTS WHEN, YOU KNOW, THEY WERE CHEATED OR THEY WEREN'T GIVEN FULL VALUE FOR THEIR PROPERTY. THERE WERE A LOT OF FIRE SALES THAT HAPPENED. // SO THEY HAD TREMENDOUS LOSSES.

A Congressional report 40 years later detailed some of the loss: one proprietor had to sell her 26-room hotel for only \$500... refrigerators were extorted for \$5 or less. One man poured gasoline on his house, determined to burn it down rather than leave it behind. His wife stopped him, saying, "we are civilized people, not savages."

NEWSREEL: EMPTY STREETS AND VACATED STORES STAND IN SHADOW. // AND IN THE COUNTRY THE SAME STORY, ABANDONED FARMS.

All they had left were suitcases, sheets and blankets. 120,000 people – babies and the elderly. They were searched, some were even tagged.

No one knew if they were going to be deported or how long they would be imprisoned because there were no trials, no hearings, and there was no due process to inform them.

GARY OKIHIRO: THEY DIDN'T KNOW WHAT THE INTENTION OF THEIR GOVERNMENT WAS TOWARD THEM AND THEY DIDN'T KNOW WHAT THE FUTURE HELD.

The evacuation took almost 18 months. Eight thousand actually moved east to parts of the country outside of the military areas to avoid internment. The whole thing took place in stages. First, evacuees were taken by buses, cattle trucks and trains to nearby Assembly Centers, where they would be checked in for a few weeks, before being shipped out to the more permanent Internment Camps.

GARY OKIHIRO: ASSEMBLY CENTERS WERE OFTENTIMES // TEMPORARY SHELTERS IN FAIRGROUNDS AND SOMETIMES IN // HORSERACING TRACKS. // THE CONDITIONS WERE EXCEEDINGLY ROUGH. // HORSE STALLS THAT WERE HASTILY CLEANED UP OF THE MANURE AND THE SMELL AND SO FORTH

NORMAN MINETA: THE FIRST THING WE HAD TO DO WAS // TO MAKE OUR OWN MATTRESSES.

Norman Mineta was born in San Jose, California. He grew up to be a Congressman, and the first Asian-American to serve in the Cabinet – he served under BOTH President Clinton and President Bush.

NORMAN MINETA: THE IDEA THAT THEIR OWN GOVERNMENT THOUGHT THEM TO BE DISLOYAL // THIS WAS A YOKE OF SHAME THAT WAS BORNE BY THE JAPANESE-AMERICAN POPULATION FROM THAT TIME ON.

JOHN TATEISHI: THIS IS WHAT WE WOULD DO TO SHOW THIS COUNTRY THE EXTENT OF OUR LOYALTY...

John Tateishi was born in South Central Los Angeles.

JOHN TATEISHI: WE'LL GIVE UP EVERYTHING. WE'LL SACRIFICE EVERYTHING WE OWN AND ALL OUR FUTURES AND GO QUIETLY INTO THESE // CAMPS. IT WAS ASTOUNDING.

People were confined in camps at some point from May of 1942 to as late as 1946. But at first, many camps weren't even ready. Sewage systems, schools, winter insulation, all had to be built by the very people who were being forced to live there. Most were in the desert, where sandstorms were common. Others were built on swamps and overrun by mosquitoes.

NORMAN MINETA: ALL OF THE CAMPS THEY BUILT WERE IN ISOLATED SPOTS.

GARY OKIHIRO: TEN OF THEM SCATTERED THROUGHOUT THE AMERICAN WEST AND //A COUPLE IN // ARKANSAS.

Heart Mountain, Poston and Tule Lake were the largest. Tule Lake also housed those whose loyalty the government specifically questioned. The War Relocation Authority, or WRA, called them “Relocation Centers.”

NORMAN MINETA: I REMEMBER WHEN THEY WOULD SAY, “WELL, UH, YOU’RE BEING INTERNED FOR YOUR OWN PROTECTION.” WELL, AS A 10-, 11-YEAR-OLD KID I KNEW THAT IF I WERE IN HERE FOR MY OWN PROTECTION WHY ARE THE MACHINE GUNS POINTING IN AT US AND NOT OUT?

JOHN TATEISHI: WE HEARD THIS YOUNG, YOUNG MAN SHOUTING AND SAYING, AS I RECALL, SOMETHING ABOUT THEY COULDN’T KEEP HIM THERE, HE WAS AN AMERICAN. HE STARTED WALKING OUT AND THE GUARD, WHO WAS PROBABLY ABOUT 15 FEET FROM HIM JUST SHOT HIM IN THE STOMACH.

It was a felony for anyone of Japanese descent to live in Oakland on the afternoon of May 30, 1942. That made 22-year-old Fred Korematsu a criminal. He had defied the evacuation order to stay behind with his Italian-American girlfriend. When he was arrested on this street corner in San Leandro, he knew that the shame of internment would be nothing compared to how his family would react.

KAREN KOREMATSU-HAIGH: WHEN MY GRANDPARENTS GOT WORD IN TANFORAN RACETRACK THAT MY FATHER HAD BEEN ARRESTED, I KNOW THAT IT BROUGHT GREAT SHAME TO THEM. // HE WAS TREATED, YOU KNOW, LIKE THE PLAGUE. I MEAN, NO ONE WANTED ANYTHING TO DO WITH HIM.

Fred Korematsu had lost his home, his job – and even his girlfriend. He was outraged that an American citizen would be treated like this, so he challenged his arrest. He tested his faith in the Constitution by appealing his case all the way up to the Supreme Court.

The Korematsu case lingered for over two years. It was finally argued before the Court over two days on October 11th & 12th in 1944. *Korematsu’s* attorneys argued that Executive Order 9066 was a violation of the 14th Amendment’s guarantee of equal protection because only citizens of Japanese ancestry were being forced to report to the Assembly Centers. And the fact that they were detained without a hearing or trial was a violation of their 5th Amendment right of due process, protecting them against the federal government.

Solicitor General Charles Fahy argued the case for the United States that, in time of war, the government – and especially the President as Commander in Chief – could do what was necessary for the nation’s security – even discriminate on the basis of race.

AKHIL AMAR: YOU HAVE TO REMEMBER, AT THE TIME OF *KOREMATSU*, // *BROWN VERSUS BOARD OF EDUCATION* HASN’T YET BEEN DECIDED. SEGREGATION IS STILL THE LAW OF THE LAND.

The Supreme Court handed down one of its most controversial decisions on December 18, 1944.

JAN CRAWFORD GREENBURG: THE SUPREME COURT RULED IN A 6 TO 3 DECISION THAT PRESIDENT ROOSEVELT’S ORDER // WAS CONSTITUTIONAL.

GEOFFREY STONE: THE COURT SAID THAT THIS IS TIME OF WAR, AND IN TIME OF WAR IT IS NECESSARY TO DO THINGS THAT MIGHT NOT BE PERMISSIBLE IN TIME OF PEACE.

Justice Hugo Black, who later became known as one of the Court’s great champions of civil liberties and equal rights, wrote the majority decision that accepted the government’s argument of military necessity.

AKHIL AMAR: IMAGINE YOU'RE A JUDGE: SUPPOSE YOU DON'T BELIEVE THE MILITARY, BUT YOU MIGHT POSSIBLY BE WRONG. AND IF YOU'RE WRONG, WHAT WILL HAPPEN IF YOU ACTUALLY SHUT DOWN A GOVERNMENT POLICY, A SECURITY POLICY, AND THEN THERE'S ANOTHER ATTACK?

JUSTICE ANTHONY KENNEDY: YOU THINK SOME JUDGE KNOWS AS MUCH AS GENERAL EISENHOWER? // SO OF COURSE WE MUST GIVE GREAT DEFERENCE // TO OFFICIALS WHO TELL US, WE HAVE A PROBLEM, WE KNOW THE SITUATION, AND WE NEED YOU TO UNDERSTAND THAT.

For Justice Black, deference to the military – while at war – was more important than the racial nature of the internment. He wrote that Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because the country was at war with the Japanese Empire.

JAN CRAWFORD GREENBURG: OTHER JUSTICES CERTAINLY DIDN'T SEE IT THAT WAY. JUSTICE FRANK MURPHY, FOR THE VERY FIRST TIME EVER IN A SUPREME COURT OPINION, USED THE WORD RACISM. // THE UNITED STATES GOVERNMENT IN THIS ORDER WAS TARGETING JAPANESE AMERICANS. IT WASN'T LOOKING AT OTHER GROUPS THAT THE COUNTRY WAS ALSO AT WAR AGAINST... ITALIANS, GERMANS... ONLY THE JAPANESE. AND TO JUSTICE MURPHY, THAT CLEARLY SHOWED THAT THAT ORDER WAS RACIST.

FERREN: Murphy also said he couldn't see any military necessity for this order.

Justice Murphy also insisted that there was no evidence to justify the President's internment order – and that the majority decision in this case would allow the President to act outside the law.

JUSTICE ANTHONY KENNEDY: MURPHY MADE A POWERFUL DISSENT // PRESIDENTS MUST BE REMINDED THAT THEY TOO ARE SUBJECT TO THE LAW. // // AND THE LAW MUST INSIST THAT THE LAW MUST ALWAYS BE OBEYED. ONCE WE DEPART FROM THAT RULE, THERE'S NO STOPPING.

JUSTICE STEPHEN G. BREYER: IT IS A DANGEROUS THING TO TELL THE PRESIDENT HE CAN IGNORE THE LAW, OR TO EXPECT HIM TO, OR TO PUT HIM IN THE POSITION OF HIS HAVING TO DO SO TO SAVE THE COUNTRY.

Also dissenting was Justice Roberts – the same Justice Roberts whose Pearl Harbor report created so much hysteria about Japanese spies on the mainland. By 1944, he no longer believed the military.

GEOFFREY STONE: JUSTICE ROBERTS // SAYS THAT WE HAVE TO BE VERY SKEPTICAL ABOUT THE CLAIMS OF THE GOVERNMENT IN THESE CIRCUMSTANCES, AND WE HAVE TO HOLD THE GOVERNMENT TO A VERY HIGH STANDARD OF JUSTIFICATION. AND ONE HAS TO WONDER WHETHER ROBERTS // DIDN'T WANNA MAKE THE SAME MISTAKE THE SECOND TIME.

The third dissent was written by Justice Robert Jackson.

FRANK WU: JUSTICE JACKSON ACTUALLY REFERRED TO THE PRECEDENT THAT THE MAJORITY WAS CREATING AS A "LOADED WEAPON."

JUSTICE STEPHEN G. BREYER: AND HE SAID, IF WE UPHOLD THAT, WELL THAT PRECEDENT WILL STAND LIKE A LOADED GUN READY TO BE PICKED UP BY SOMEONE IN THE FUTURE WHO WILL USE IT TO JUSTIFY WHO KNOWS WHAT.

FRANK WU: HE THOUGHT IT MEANT THAT THE COURTS AND THE RULE OF LAW WERE BEING ERODED DURING WARTIME.

The decision came near the end of the war. Germany surrendered about six months later, and the United States had turned back the Japanese in the Pacific, making a Japanese invasion of the west coast unthinkable.

JOHN FERREN: THE TIDES OF WAR HAD CHANGED MUCH MORE FAVORABLY TO THE UNITED STATES BY THE TIME THE KOREMATSU DECISION CAME DOWN.

A month after the *Korematsu* decision, the camps officially began to close. Going home was the next challenge.

GARY OKIHIRO: THEY FELT THAT THEY WOULD BE GREETED WITH HOSTILE NEIGHBORS AND SO FORTH. AND WORD ALSO CAME BACK THAT MANY OF THEIR // FARMS HAD IN FACT BEEN DESTROYED, TORCHED BY PEOPLE.

For all the fear of sabotage that led to internment, by the end of World War II, not a single person of Japanese ancestry in the United States had even been accused of sabotage.

Fred Korematsu waited 40 years before he got the chance to clear his name. He joined up with a team of young lawyers led by Dale Minami.

DALE MINAMI (*YOUNG*): COURTS MUST BE ALLOWED TO FUNCTION EVEN DURING TIMES OF CRISES, AND SHOULD NOT BE SUBJUGATED TO THE WILL OF AN ARBITRARY MILITARY DECISION MAKER.

DALE MINAMI: WE WANTED A DECLARATION FROM THE COURTS // THAT WHAT JAPANESE AMERICANS DID WAS NOT WRONG. IT WAS NOT ESPIONAGE. IT WAS NOT SABOTAGE. THEY WERE NOT TRAITORS.

Normally, once the Supreme Court decides a case, that's it. The case is closed. But Minami and his team brought the *Korematsu* case back to federal court under a motion that is rarely used, and almost never successful... *coram nobis*.

JAN CRAWFORD GREENBURG: *CORAM NOBIS* IS // A WAY THAT SOMEONE CAN GO INTO COURT AFTER THEY'VE BEEN CONVICTED AND SERVE THEIR SENTENCE AND CHALLENGE IT TO SAY THIS WAS WRONG. THE FACTS WERE WRONG AND THIS COURT HAS A DUTY TO CORRECT IT. **A legal historian named Peter Irons had discovered documents proving that government lawyers had hidden evidence from the Supreme Court.**

On November 10, 1983, the US District Court agreed. Fred Korematsu's conviction was vacated – it was thrown out.

FRED KOREMATSU: I HAD TO DO SOME REAL DEEP THINKING IN ORDER TO REOPEN THIS CASE AGAIN AND I AM VERY HAPPY THAT I DID, BECAUSE THIS IS NOT ONLY FOR JUST THE JAPANESE-AMERICAN CITIZENS BUT IT'S FOR ALL AMERICAN CITIZENS.

In 1988, Congress passed the Civil Liberties Act, which not only apologized for the internment, but paid each survivor of the camps \$20,000. The Act was signed by President Ronald Reagan and sponsored by Congressman Norman Mineta. That's him right there. He learned during a time of war, the ultimate defense of civil liberties may not come from the courts, but from American citizens exercising their right to vote.

NORMAN MINETA: ALL OF A SUDDEN, THE CONSTITUTION REALLY DIDN'T HOLD UP FOR US. // MY EXPERIENCE FROM HAVING SEEN THE EVACUATION, THE INTERNMENT – THE REASON THAT HAPPENED TO THE JAPANESE-AMERICAN POPULATION WAS THAT, // IN 1942, WE WERE ABOUT AS POPULAR AS SKUNKS AT A GARDEN PARTY AND SO WE HAD NO ACCESS TO OUR POLITICAL OFFICEHOLDERS.

AKHIL AMAR: SO THE JAPANESE-AMERICANS WERE VULNERABLE BECAUSE THERE WASN'T A POLITICAL COALITION IN PLACE THAT WOULD DEFEND THEIR INTERESTS. // WE HAVE A MUCH MORE MULTI-CULTURAL SOCIETY AND A MUCH MORE MULTI-CULTURAL VOTING BASE THAN WE HAD IN THE 1940S. AND THAT'S WHAT WILL PROBABLY PROTECT LIBERTY MOST OF ALL, THE RIGHT TO VOTE.

In 1998, President Clinton awarded the Presidential Medal of Freedom to Fred Korematsu – the highest honor an American civilian can receive. America had officially and from the very top, apologized for the internment.

But there's a hitch. You see, only the Supreme Court can really overturn a Supreme Court precedent. Because Korematsu's case was vacated by the District Court and never made it all the way back to the Supreme Court – Justice Black's decision still stands. It's what they call, "good law." Technically, the military still has the Supreme Court's blessing to remove an entire race of people from the population during wartime.

JAN CRAWFORD GREENBURG: *KOREMATSU* REMAINS GOOD LAW. IT'S STILL ON THE BOOKS.

AKHIL AMAR: KOREMATSU HAS NEVER OFFICIALLY BEEN OVERRULED BY THE COURT. // ON THE OTHER HAND, THE JUDGES DON'T LIKE CITING KOREMATSU. THEY DON'T CITE IT WITH APPROVAL. IT'S MUCH MORE COMMON TO SEE A JUDGE OR A JUSTICE CITE ONE OF THE DISSENTS IN KOREMATSU.

DALE MINAMI: THE VALUE OF THE PRECEDENT HAS BEEN IMPAIRED TERRIFICALLY. // TO TAKE AWAY AN ENTIRE RACE OF PEOPLE, TWO-THIRDS OF WHOM WERE AMERICAN CITIZENS, WITHOUT ANY EVIDENCE OF ESPIONAGE OR SABOTAGE, // HOW COULD THAT BE PART OF OUR UNITED STATES CONSTITUTION OUR AMERICAN DEMOCRATIC HERITAGE?

JUSTICE STEPHEN G. BREYER: IT WAS NOT NECESSARY. // I HOPE IT WOULDN'T BE REPEATED. I THINK IT IS UNIVERSALLY ACKNOWLEDGED THAT THAT WAS AN ERROR.

It's unlikely that the *Korematsu* decision would serve as a precedent for a comparable case today. But if future threats to national security endanger civil liberties again, perhaps instead of fear, Americans will embrace the Constitution.

JUSTICE ANTHONY KENNEDY: COULD IT HAPPEN AGAIN? OF COURSE IT COULD HAPPEN AGAIN. // THE CONSEQUENCES OF FEAR IS THAT YOU MAY TEND TO FORGET YOUR COMMITMENT // TO PROTECT YOUR CONSTITUTIONAL HERITAGE. // THE CONSTITUTION BELONGS TO THE PEOPLE; CONSTITUTION DOESN'T BELONG TO A BUNCH OF JUDGES OR LAWYERS. IT BELONGS TO THE PEOPLE. PEOPLE HAVE TO UNDERSTAND IT. THEY HAVE TO RESPECT IT. THEY HAVE TO REVERE IT. THEY HAVE TO DEFEND IT.

11

Internment of Japanese Americans during World War II

Hirabayashi v. United States (1943)

Korematsu v. United States (1944)

A nation at war with a formidable enemy is a nation at risk. National security becomes a paramount concern of the government, which may, under certain conditions, decide to subordinate the constitutional rights of some individuals to the collective safety of the people. But in the United States, a primary purpose of the government has always been to provide equal protection for the constitutional rights of all the nation’s people. So, during a wartime crisis, critical questions about individual liberty and collective security are inevitable.

Can strong war powers, which the national government may need to defeat a fearsome foreign enemy, be reconciled with the immutable constitutional rights of individuals? Or must the liberty of some persons be sacrificed temporarily to the exigencies of national survival? These questions were raised in the United States after an attack by Japanese aircraft against Pearl Harbor, Hawaii, on December 7, 1941. And they were associated with two cases brought to the U.S. Supreme Court within the context of World War II: *Hirabayashi v. United States* and *Korematsu v. United States*.

The Japanese attack on Pearl Harbor was a disaster for the United States. The American naval forces on Hawaii, stunned and surprised, suffered a devastating defeat. The Japanese disabled or destroyed five American battleships and three cruisers, and they killed 2,355 military personnel and wounded 1,178. President Franklin D. Roosevelt, speaking by radio to a shocked and scared nationwide audience, said that the American people would remember this “date which will live in infamy” and exact revenge for Japan’s “sneak attack” against the United States. Congress declared war against Japan. Germany and Italy, military allies of Japan, then declared war on the United States. Thus, the United States entered World War II.

Within three months, Japanese forces invaded and occupied nearly all of Southeast Asia and had taken the U.S. territories of Guam and the Philippines. Americans feared a Japanese invasion of the Hawaiian Islands and the states along their country’s Pacific coast, California, Oregon, and Washington.

General J. L. DeWitt, who was responsible for defending the Pacific coastal region, felt threatened by the more than 112,000 people of Japanese ancestry who lived on the West Coast. More than two-thirds were U.S. citizens, and most others were long-settled resident aliens. General DeWitt wanted to relocate all of them to the interior of the country, where they could be

Hirabayashi v. United States

- 320 U.S. 81 (1943)
- Decided: June 21, 1943
- Vote: 9–0
- Opinion of the Court: Harlan Fiske Stone
- Concurring opinions: William O. Douglas, Frank Murphy, and Wiley Rutledge

Korematsu v. United States

- 323 U.S. 214 (1944)
- Decided: December 18, 1944
- Vote: 6–3
- Opinion of the Court: Hugo L. Black
- Concurring opinion: Felix Frankfurter
- Dissenting opinions: Owen J. Roberts, Frank Murphy, and Robert H. Jackson

prevented from having contact with the enemy.

Members of President Roosevelt's cabinet debated General DeWitt's national security recommendations, which were supported strongly by top political leaders in California, including the state's attorney general, Earl Warren, a future chief justice of the United States. However, U.S. Attorney General Francis Biddle urged caution; he believed that forcible relocation of the Japanese Americans would violate their due process rights under the Fifth Amendment to the Constitution. Other Presidential advisers stressed that military necessity and national survival were the paramount concerns of this moment, and President Franklin D. Roosevelt agreed with them.

On February 22, 1942, President Roosevelt issued Executive Order 9066, providing authority for military commanders to establish special zones from which civilians might be excluded for reasons of national defense. The President based his order on the Espionage Act of 1918 and statutes enacted by Congress in 1940 and 1941 to enhance the chief executive's wartime powers. On March 18, President Roosevelt issued Executive Order 9102 to establish the War Relocation Authority. This executive agency was empowered to relocate the people identified by military commanders under the provisions of the previously issued Executive Order 9066.

On March 21, the President signed a law, enacted unanimously by Congress, that supported the previously issued executive orders pertaining to national security. The way was cleared for military commanders to remove Japanese Americans from the Pacific Coast to regions within the interior of the United States.

On March 24, General DeWitt announced a daily curfew. From 8:00 p.m. until 6:00 a.m., all persons of Japanese ancestry living within Military Area 1, which comprised the entire Pacific coastal region, were required to stay indoors. This command was a prelude to the exclusion order that came on May 9, when General DeWitt directed the removal of all persons of Japanese ancestry from Military Area 1. They had to check in at "civilian control centers" from where they were sent to internment camps in the interior of the country.

The internment camps were forbidding places of confinement, ringed by barbed-wire fences and guarded by armed soldiers. The internees came to their sparsely furnished dwellings with few possessions, having been forced to sell or leave behind most of what they had owned. Homes, farms, and places of business were mostly sold on short notice for a small percentage of their true value.

Most of the relocated people were citizens of the United States, who had been born and raised in America and were thoroughly American in their beliefs and behavior. They considered themselves to be loyal citizens of their country, with little or no allegiance to Japan, which most of them had never visited. They were incarcerated because some government officials and military commanders suspected them of sympathy with a wartime enemy, even though no hard evidence was ever produced that any of them had acted disloyally against the United States.

During 1942, the Office of Naval Intelligence commissioned an investigation on the loyalty of Japanese Americans. An official report based on this study, written by Navy Commander Kenneth Ringle, concluded that fewer than 3 percent of Japanese Americans could be considered possible threats to national security. Further, most of those suspected of disloyalty had already been arrested. Thus, the Ringle Report strongly advised against any kind of mass relocation

and internment of Japanese Americans as unnecessary and most likely unconstitutional. Unfortunately the policy makers who mandated the internment and the federal judges who allowed the legislation to stand disregarded this report.

The internment of the Japanese Americans certainly raised serious issues about constitutional rights. For example, the Constitution's Fifth Amendment says, "No person shall be . . . deprived of life, liberty, or property, without due process of law." Had the federal government deprived the interned Japanese Americans of their Fifth Amendment rights? Or did the wartime emergency justify the federal government's placement of extraordinary limitations on the constitutional rights of a particular group of Americans? Federal courts soon confronted these critical issues about the government's use of war powers and the constitutional rights of Japanese Americans.

The first Japanese American internment case to come before the U.S. Supreme Court concerned Gordon Hirabayashi, a U.S. citizen born and raised in Seattle, Washington. Prior to his problems with the federal government, he was a highly regarded student at the University of Washington in Seattle.

Hirabayashi had been arrested and convicted for violating General DeWitt's curfew order and for refusing to register at a control station in preparation for transportation to an internment camp. His noncompliance with federal regulations was based strongly on principle. Hirabayashi believed that the President's executive orders, and the federal laws enacted in support of them, were racially discriminatory violations of the U.S. Constitution. He later said: "I must maintain the democratic standards for which this nation lives....I am objecting to the principle of this order which denies the rights of human beings, including citizens."

The Court unanimously upheld the curfew law for Japanese Americans living in Military Area 1 and ruled that the federal government had appropriately used its war powers under the Constitution. It did not directly confront the issue of whether the exclusion and internment order violated Hirabayashi's Fifth Amendment rights, as the Court focused on the constitutional justifications for the curfew law during a wartime crisis, a law that Hirabayashi clearly had violated.

Writing for the Court, Chief Justice Harlan Fiske Stone recognized that discrimination based upon race was "odious to a free people whose institutions are founded upon the doctrine of equality." In this case, however, Stone ruled that the need to protect national security in time of war compelled consideration of race and ancestry as reasons for confinement of a certain group of people. The chief justice wrote, "We cannot close our eyes to the fact...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."

Although the Court's decision in Hirabayashi was unanimous, Justice Frank Murphy did not wholeheartedly endorse it, and he wrote a concurring opinion that verged on dissent. In fact, Murphy had at first decided to write a dissenting opinion, but Chief Justice Stone, with help from Justice Felix Frankfurter, talked him out of it. Frankfurter argued that in a socially sensitive case like this one, it was important for the Court to present an appearance of unity. Nonetheless, Murphy's concurrence was sprinkled with sharply stated reservations about the Court's opinion. For example, Murphy expressed great concern that "we have sustained a substantial restriction of the personal liberty of citizens of the United States based on the accident of race or ancestry....In my opinion, this goes to the

very brink of constitutional power.”

The tenuous unity of the Hirabayashi opinion was broken in the next Japanese American internment case to reach the Supreme Court, *Korematsu v. United States*.

Born and raised in Oakland, California, Fred Korematsu was, like Gordon Hirabayashi, a U.S. citizen of Japanese ancestry who was thoroughly American in culture and loyalty to the United States. In June 1941, more than five months before the United States entered World War II, Korematsu volunteered to join the U.S. Navy. Although actively seeking enlistments, the Navy recruitment officials rejected Korematsu’s application for reasons of poor health. He then found employment as a welder at a shipyard in northern California, a job related to national defense.

On the day he was ordered to report at an assembly area for his likely relocation and internment, Korematsu refused to go, and for good reasons. He wanted to marry his girlfriend and move to Nevada. She was not a Japanese American and thereby not affected by the removal order. Furthermore, Korematsu could not imagine that he in any way threatened the security of the United States. Federal government officials thought otherwise. They arrested and convicted him of violating the law requiring him to report to the assembly center and sentenced him to five years in prison. Then the court paroled Korematsu, who was taken to an internment camp in Utah. From there, he appealed directly to the U.S. Supreme Court, which decided his case on December 18, 1944.

The Supreme Court upheld the federal law requiring Japanese Americans in the Pacific coastal region to report to an assembly center for likely relocation and internment in another part of the country. The war powers of the federal government, provided by the Constitution, were the Court’s justification for upholding the federal law under which Korematsu had been arrested and convicted.

In his opinion for the Court, Justice Hugo Black began by noting “that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions, racial antagonism never can.” Thus, Justice Black recognized that the type of intentional racial classification applied against Japanese Americans in this case would normally be ruled unconstitutional. It was justified in this instance, according to Black’s opinion for the Court, only by the compelling interest of the federal government to protect the nation during a wartime emergency.

Justice Black recognized that Japanese American citizens of the United States, such as Korematsu, had endured severe hardships because of the federal order at issue in this case. “But hardships are a part of war,” wrote Black, “and war is an aggregation of hardships.” Justice Black said the federal government’s orders at issue had not been directed against Japanese Americans because of race or ancestry, but for reasons of national security and military necessity.

The Court’s ruling did not directly address the constitutionality of the federal law authorizing the internment of Japanese Americans. It sidestepped that sensitive question, emphasizing the national crisis caused by the war as justification for the extraordinary actions of the federal government. Further, Justice Black’s opinion separated the law requiring Japanese Americans to report to an assembly center from the law forcing them to be excluded from the Pacific coastal region and relocated to an internment camp. As Korematsu had been

convicted only for not reporting to an assembly center, the Court did not directly consider the constitutionality of the orders forcing Japanese Americans into the internment camps.

Black concluded:

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.

Three justices—Owen Roberts, Frank Murphy, and Robert Jackson—strongly dissented from the Court’s decision. Roberts thought it a plain “case of convicting a citizen as punishment for not submitting to imprisonment in a concentration camp solely because of his ancestry.”

Murphy claimed that the exclusion orders violated the right of citizens to due process of law and were a “legalization of racism.” He wrote, “Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life.” Murphy admitted that the Court majority’s argument citing military necessity carried weight, but he insisted that such a claim must “subject itself to the judicial process” to determine “whether the deprivation is reasonably related to a public danger that is so immediate, imminent, and impending.” Finally, Murphy concluded that “individuals must not be left impoverished in their constitutional rights on a plea of military necessity that has neither substance nor support.”

Jackson expressed grave concern about the future uses of the precedent set in this case. He wrote:

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...the Court for all time has validated the principle of racial discrimination in criminal procedures 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.

On December 18, 1944, the very day of its *Korematsu* decision, the Court also reported its ruling in *Ex parte Endo*, a related case. A writ of habeas corpus had been filed on behalf of Mitsuye Endo, an American of Japanese ancestry, who had been sent in May 1942 from her home in California to an internment camp by order of the War Relocation Authority. Unlike *Korematsu*, Endo had obeyed the relocation order and so had not violated a federal law. Like *Korematsu*, she was a loyal American citizen. The Court unanimously agreed that Endo “should be given her liberty” because there was no evidence that she had done anything to justify her detention.

The gates of the internment camps were opened in January 1945, less than one month after the *Endo* decision. Major General Henry C. Pratt, commander of Military Area 1 at that time, suspended the exclusion orders, and more than

fifty thousand Japanese Americans were set free. The war against Japan was in its final phase, and there no longer was any threat to the U.S. mainland from Japanese military forces. More than thirty thousand internees, however, continued in their confinement until the end of World War II, because military authorities remained skeptical of their loyalty to the United States.

Among those returning to civilian life after the war were more than 1,200 members of a U.S. Army brigade comprised entirely of Japanese American volunteers who were Nisei, or second-generation Japanese Americans. This Nisei Brigade fought heroically against the German military occupiers of Italy during the U.S. Army's invasion in 1943. Soldiers of the Nisei Brigade won more medals for bravery in action than any other military unit in American history.

Shortly after the end of World War II, Japanese Americans who had been relocated to internment camps filed grievances with the federal government to seek compensation for unjust treatment. In 1948, Congress responded by enacting the Japanese American Evacuation Claims Act, which provided compensation to internees who had evidence to prove the amount of their property losses. However, no more than \$37 million was paid in compensation, despite estimates that Japanese Americans had suffered property losses totaling more than \$400 million. Furthermore, compensation was not provided for losses of income or profits that they would have earned during the period of detention in the relocation centers.

In 1980, Congress established the Commission on Wartime Relocation and Internment of Civilians to investigate the treatment of Japanese Americans during World War II and to make recommendations about financial compensation to the victims. After careful examination of the evidence, including testimony from 750 witnesses, the commission issued a report on February 25, 1983. The commission found no evidence of espionage or sabotage by any of the Japanese Americans. In addition, it noted that officials of both the Federal Bureau of Investigation and the Office of Naval Intelligence had opposed the exclusion and internment orders because they believed the Japanese Americans collectively posed no threat to the country's security. The report concluded: "A grave injustice was done to American citizens and resident aliens of Japanese ancestry who, without individual review or any probative evidence against them, were excluded, removed, and detained by the United States during World War II."

In January 1983, Gordon Hirabayashi and Fred Korematsu petitioned the federal judiciary to vacate and overturn their criminal convictions. They claimed procedural errors and faulty use of information had influenced the judicial decisions against them. First Korematsu and later Hirabayashi achieved reversal of their convictions, which were erased from federal court records.

In 1988, on the basis of the 1983 report by the federal government commission, Congress officially recognized the wrongs done to Americans of Japanese ancestry by the exclusion and relocation policies. It enacted legislation to provide twenty thousand dollars in compensation to each person still living who had been detained in a relocation center or to the heirs of deceased victims. More than forty-six years after the fateful executive orders that had victimized them were issued, the Japanese American community received a belated token of compensatory justice.

Gordon Hirabayashi Remembers His Conviction and Its Reversal



From the beginning of his ordeal, Gordon Hirabayashi protested the injustice of the federal regulations forcing the exclusion and removal of Americans of Japanese ancestry from the Pacific Coast, and he refused on principle to comply with them. Consequently, Gordon spent more than three years in county jails and federal prisons; but he never accepted the legitimacy of the judgments against him and resolved to overturn them.

Following World War II and his release from federal custody, Hirabayashi completed work for his undergraduate degree at the University of Washington, and continued on at the university to earn his Ph.D. in sociology in 1952. He later worked as a professor at the University of Alberta in Canada, until he retired in 1983.

Two years before his retirement, Professor Peter Irons of the University of California at San Diego contacted Hirabayashi and advised him to reopen his case. While doing research for a book on the Japanese American internment cases, Irons discovered information that could be used to help Hirabayashi achieve justice. Irons became Hirabayashi's legal adviser and assisted him in filing a petition in a federal district court seeking a reversal of his long-ago conviction on grounds of an erroneous and invalid use of evidence by the prosecutors in this case.

Hirabayashi won complete vindication in 1987, when the federal Court of Appeals for the Ninth Circuit ruled in his favor. His convictions for violating both the curfew and exclusion orders were overturned. In the course of his research, Irons interviewed Hirabayashi about his case, and Hirabayashi recounted his courageous effort to achieve justice.



After the Curfew order was announced, we knew there would be further orders to remove all persons of Japanese ancestry from the West coast. When the exclusion orders specifying the deadline for forced removal from various districts of Seattle were posted on telephone poles, I was confronted with a dilemma. Do I stay out of trouble and succumb to the status of second-class citizen, or do I continue to live like other Americans and thus disobey the law?

When the curfew was imposed I obeyed for about a week....I think if the order said *all* civilians must obey the curfew, if it was just a nonessential restrictive move, I might not have objected. But I felt it was unfair, just to be referred to as a "non-alien"—they never referred to me as a citizen. This was so pointedly, so obviously a violation of what the Constitution stood for, what citizenship meant....

After that, I just ignored the curfew. But nothing happened. And it became a kind of expression of freedom for me to make sure that I was out after eight....

When the exclusion order came, which was very close to that time, I was expecting to go along. I had dropped out of school at the end of the winter quarter, which was the end of March. I knew I wasn't going to be around very long, so I just didn't register for spring quarter. . .

Eventually, I wrote out a statement explaining the reasons I was refusing evacuation, and I planned to give it to the FBI when I turned myself in....

The day after the University district deadline for evacuation, Art [Gordon's lawyer] took me to the FBI office to turn myself in. At first, I was only charged with violating the exclusion order. They threw in the curfew count afterward....

My trial in October lasted just one day. It started in the morning and they took a noon recess and continued in the afternoon until my conviction....

Two days after I was sentenced, we appealed, and I continued to remain in jail because the judge and I couldn't agree on bail conditions. He said that if my backers put up the bail he would release me to

one of the barbed-wire interment camps. And I said, If my backers put up the bail, I should be released out the front door like anybody else. He said, There's a law that says you're not allowed out in the streets, so I can't do that....

When the Supreme Court decision in my case came down in June 1943, I expected I would have to serve my sentence....

When I came out of prison, the war had just finished, and so I was released to Seattle....

After the Supreme Court decided my case in 1943, there was always a continuous hope and interest on my part that the case could be reviewed at some point. Not being a lawyer, I didn't know exactly what my options were....

It wasn't until Peter Irons called me from Boston in 1981, saying that he had discovered some documents that might present an opportunity under a rarely used legal device to petition for a rehearing, that I felt there was a chance. I said to him, I've been waiting for over forty years for this kind of phone call. So he arranged to fly to Edmonton, and eventually we got a legal team organized that filed a petition in the federal court in Seattle to vacate my conviction.

My petition was filed in January 1983 and we had a two-week evidentiary hearing in June 1985. Judge Donald Voorhees, who presided over the case, impressed me as a very fair judge. He was obviously interested in the case and well-informed about the evidence. Naturally, I was delighted that he ruled that my exclusion order conviction had been tainted by government misconduct. But I was disappointed that he upheld the curfew conviction, and we appealed that. The government also appealed on the exclusion order. We had arguments before the appellate judges in March 1987, and they handed down a unanimous opinion in September, upholding Judge Voorhees on the exclusion order and also striking down the curfew conviction. So I finally got the vindication that I had wanted for forty years, although I'm a little disappointed that the Supreme Court didn't have a chance to overrule the decision they made in 1943.

When my case was before the Supreme Court in 1943, I fully expected that as a citizen the Constitution would protect me. Surprisingly, even though I lost, I did not abandon my beliefs and values. And I never look at my case as just my own, or just as a Japanese American case. It is an American case, with principles that affect the fundamental human rights of all Americans.

Full text of Supreme Court case: *Toyosaburo Korematsu v. United States* (1944)

323 U.S. 214

Source: United States Reports
<http://ftp.resource.org/courts.gov/c/US/323/323.US.214.22.html>

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65 S.Ct. 193

89 L.Ed. 194

TOYOSABURO KOREMATSU

v.

UNITED STATES.

No. 22.

Argued Oct. 11, 12, 1944.

Decided Dec. 18, 1944.

Rehearing Denied Feb. 12, 1945.

See 324 U.S. 885, 65 S.Ct. 674.

Mr. Wayne M. Collins, of San Francisco, Cal., and Mr. Charles A. Horsky, of Washington, D.C., for petitioner.

Mr. Charles Fahy, Sol. Gen., of Washington, D.C., for respondent.

Mr. Justice BLACK delivered the opinion of the Court.

1 The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a 'Military Area', contrary to Civilian Exclusion Order No. 34 of the Commanding General of the Western Command, U.S. Army, which directed that after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed,¹ and the importance of the constitutional question involved caused us to grant certiorari.

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

3 In the instant case prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, 18 U.S.C.A. § 97a, which provides that

'* * * whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a

4 misdemeanor and upon conviction shall be liable to a fine of not to exceed \$5,000
or to imprisonment for not more than one year, or both, for each offense.'

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

6 One of the series of orders and proclamations, a curfew order, which like the
exclusion order here was promulgated pursuant to Executive Order 9066, subjected
all persons of Japanese ancestry in prescribed West Coast military areas to remain
in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order
here, that prior curfew order was designed as a 'protection against espionage and
against sabotage.' In *Kiyoshi Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct.
1375, 87 L.Ed. 1774, we sustained a conviction obtained for violation of the curfew
order. The *Hirabayashi* conviction and this one thus rest on the same 1942
Congressional Act and the same basic executive and military orders, all of which
orders were aimed at the twin dangers of espionage and sabotage.

7 The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional
delegation of power; it was contended that the curfew order and other orders on
which it rested were beyond the war powers of the Congress, the military
authorities and of the President, as Commander in Chief of the Army; and finally
that to apply the curfew order against none but citizens of Japanese ancestry
amounted to a constitutionally prohibited discrimination solely on account of race.
To these questions, we gave the serious consideration which their importance
justified. We upheld the curfew order as an exercise of the power of the government
to take steps necessary to prevent espionage and sabotage in an area threatened by
Japanese attack.

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

9 In this case the petitioner challenges the assumptions upon which we rested our
conclusions in the *Hirabayashi* case. He also urges that by May 1942, when Order
No. 34 was promulgated, all danger of Japanese invasion of the West Coast had
disappeared. After careful consideration of these contentions we are compelled to
reject them.

Here, as in the *Hirabayashi* case, *supra*, 320 U.S. at page 99, 63 S.Ct. at page
1385, 87 L.Ed. 1774, '* * * we cannot reject as unfounded the judgment of the
military authorities and of Congress that there were disloyal members of that

10 population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that in a critical hour such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety, which demanded that prompt and adequate measures be taken to guard against it.'

11 Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was for the same reason a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan.²

12 We uphold the exclusion order as of the time it was made and when the petitioner violated it. Cf. *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 547, 44 S.Ct. 405, 406, 68 L.Ed. 841; *Block v. Hirsh*, 256 U.S. 135, 154, 155, 41 S.Ct. 458, 459, 65 L.Ed. 865, 16 A.L.R. 165. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. *Ex parte Kumezo Kawato*, 317 U.S. 69, 73, 63 S.Ct. 115, 117, 87 L.Ed. 58. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

13 It is argued that on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time 'until and to the extent that a future proclamation or order should so permit or direct.' 7 Fed.Reg. 2601. That 'future order', the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did 'direct' exclusion from the area of all persons of Japanese ancestry, before 12 o'clock noon, May 9; furthermore it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942 Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order, which he stipulated in his trial that he had violated, knowing of its existence. There is

14 therefore no basis for the argument that on May 30, 1942, he was subject to punishment, under the March 27 and May 3rd orders, whether he remained in or left the area.

15 It does appear, however, that on May 9, the effective date of the exclusion order, the military authorities had already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry, at central points, designated as 'assembly centers', in order 'to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from military area No. 1 to restrict and regulate such migration.' Public Proclamation No. 4, 7 Fed.Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed.Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.

16 We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center we cannot say either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306. There is no reason why violations of these orders, insofar as they were promulgated pursuant to congressional enactment, should not be treated as separate offenses.

17 The *Endo* case (*Ex parte Mitsuye Endo*) 323 U.S. 283, 65 S.Ct. 208, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious

18 constitutional issues which petitioner seeks to raise when an assembly or relocation
order is applied or is certain to be applied to him, and we have its terms before us.

19 Some of the members of the Court are of the view that evacuation and detention
in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion
Order No. 34, Korematsu was under compulsion to leave the area not as he would
choose but via an Assembly Center. The Assembly Center was conceived as a part of
the machinery for group evacuation. The power to exclude includes the power to do
it by force if necessary. And any forcible measure must necessarily entail some
degree of detention or restraint whatever method of removal is selected. But
whichever view is taken, it results in holding that the order under which petitioner
was convicted was valid.

20 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.

21 Affirmed.

22 Mr. Justice FRANKFURTER, concurring.

23 According to my reading of Civilian Exclusion Order No. 34, it was an offense for
Korematsu to be found in Military Area No. 1, the territory wherein he was
previously living, except within the bounds of the established Assembly Center of
that area. Even though the various orders issued by General DeWitt be deemed a
comprehensive code of instructions, their tenor is clear and not contradictory. They
put upon Korematsu the obligation to leave Military Area No. 1, but only by the
method prescribed in the instructions, i.e., by reporting to the Assembly Center. I
am unable to see how the legal considerations that led to the decision in *Kiyoshi
Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, fail to
sustain the military order which made the conduct now in controversy a crime. And
so I join in the opinion of the Court, but should like to add a few words of my own.

The provisions of the Constitution which confer on the Congress and the
President powers to enable this country to wage war are as much part of the
Constitution as provisions looking to a nation at peace. And we have had recent
occasion to quote approvingly the statement of former Chief Justice Hughes that
the war power of the Government is 'the power to wage war successfully.'

24 Hirabayashi v. United States, supra, 320 U.S. at page 93, 63 S.Ct. at page 1382, 87 L.Ed. 1774 and see Home Bldg. & L. Ass'n v. Blaisdell, 290 U.S. 398, 426, 54 S.Ct. 231, 235, 78 L.Ed. 413, 88 A.L.R. 1481. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as 'an unconstitutional order' is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. 'The war power of the United States, like its other powers * * * is subject to applicable constitutional limitations', Hamilton v. Kentucky Distilleries, Co., 251 U.S. 146, 156, 40 S.Ct. 106, 108, 64 L.Ed. 194. To recognize that military orders are 'reasonably expedient military precautions' in time of war and yet to deny them constitutional legitimacy makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare Interstate Commerce Commission v. Brimson, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047; Id., 155 U.S. 3, 15 S.Ct. 19, 39 L.Ed. 49, and Monongahela Bridge Co. v. United States, 216 U.S. 177, 30 S.Ct. 356, 54 L.Ed. 435. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

25 Mr. Justice ROBERTS.

26 I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

27 This is not a case of keeping people off the streets at night as was Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

28 The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home, by refusing voluntarily to leave and, so, knowingly and intentionally, defying the order and the Act of Congress.

29 The petitioner, a resident of San Leandro, Alameda County, California, is a native of the United States of Japanese ancestry who, according to the uncontradicted evidence, is a loyal citizen of the nation.

30 A chronological recitation of events will make it plain that the petitioner's supposed offense did not, in truth, consist in his refusal voluntarily to leave the area which included his home in obedience to the order excluding him therefrom. Critical attention must be given to the dates and sequence of events.

31 December 8, 1941, the United States declared war on Japan.

32 February 19, 1942, the President issued Executive Order No. 9066,¹ which, after stating the reason for issuing the order as 'protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities', provided that certain Military Commanders might, in their discretion, 'prescribe military areas' and define their extent, 'from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restrictions' the 'Military Commander may impose in his discretion.'

33 February 20, 1942, Lieutenant General DeWitt was designated Military Commander of the Western Defense Command embracing the westernmost states of the Union,—about one-fourth of the total area of the nation.

34 March 2, 1942, General DeWitt promulgated Public Proclamation No. 1,² which recites that the entire Pacific Coast is 'particularly subject to attack, to attempted invasion * * * and, in connection therewith, is subject to espionage and acts of sabotage'. It states that 'as a matter of military necessity' certain military areas and zones are established known as Military Areas Nos. 1 and 2. It adds that 'Such persons or classes of persons as the situation may require' will, by subsequent orders, 'be excluded from all of Military Area No. 1' and from certain zones in Military Area No. 2. Subsequent proclamations were made which, together with Proclamation No. 1, included in such areas and zones all of California, Washington, Oregon, Idaho, Montana, Nevada and Utah, and the southern portion of Arizona. The orders required that if any person of Japanese, German or Italian ancestry residing in Area No. 1 desired to change his habitual residence he must execute and deliver to the authorities a Change of Residence Notice.

35 San Leandro, the city of petitioner's residence, lies in Military Area No. 1.

36 On March 2, 1942, the petitioner, therefore, had notice that, by Executive Order, the President, to prevent espionage and sabotage, had authorized the Military to exclude him from certain areas and to prevent his entering or leaving certain areas without permission. He was on notice that his home city had been included, by Military Order, in Area No. 1, and he was on notice further that, at sometime in the future, the Military Commander would make an order for the exclusion of certain persons, not described or classified, from various zones including that in which he lived.

37 March 21, 1942, Congress enacted³ that anyone who knowingly 'shall enter, remain in, leave, or commit any act in any military area or military zone prescribed * * * by any military commander * * * contrary to the restrictions applicable to any such area or zone or contrary to the order of * * * any such military commander' shall be guilty of a misdemeanor. This is the Act under which the petitioner was charged.

- 38 March 24, 1942, General DeWitt instituted the curfew for certain areas within his command, by an order the validity of which was sustained in *Hirabayashi v. United States*, *supra*.
- 39 March 24, 1942, General DeWitt began to issue a series of exclusion orders relating to specified areas.
- 40 March 27, 1942, by Proclamation No. 4,⁴ the General recited that 'it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1 to restrict and regulate such migration'; and ordered that, as of March 29, 1942, 'all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct.'⁵
- 41 No order had been made excluding the petitioner from the area in which he lived. By Proclamation No. 4 he was, after March 29, 1942, confined to the limits of Area No. 1. If the Executive Order No. 9066 and the Act of Congress meant what they said, to leave that area, in the face of Proclamation No. 4, would be to commit a misdemeanor.
- 42 May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34⁶ providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and non-alien, were to be excluded from a described portion of Military Area No. 1, which included the County of Alameda, California. The order required a responsible member of each family and each individual living alone to report, at a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942, *supra*. It is important to note that the order, by its express terms, had no application to persons within the bounds 'of an established Assembly Center pursuant to instructions from this Headquarters * * *.' The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.
- 43 The predicament in which the petitioner thus found himself was this: He was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document,—and, in the light of the above recitation, I think it is not,—that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.
- 44 In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.
- June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the area covered by Exclusion Order No. 34. A demurrer to the information having been overruled, the petitioner was tried under a plea of not guilty and convicted. Sentence was suspended and he was placed on

45 probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102⁷ establishing the War Relocation Authority under which so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has been confined either in an Assembly Center, within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in *Ex parte Mitsuye Endo*, 323 U.S. 283, 65 S.Ct. 208, demonstrate, he was illegally held in custody.

46 The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34 ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the *Hirabayashi* case, *supra*, to show that this court has sustained the validity of a curfew order in an emergency. The argument then is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature,—a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case with the court's the court. I might agree with the court's disposition of the hypothetical case.⁸ The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature the *Hirabayashi* case would be authority for sustaining it. But the facts above recited, and those set forth in *Ex parte Mitsuye Endo*, *supra*, show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

47 As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

48 I had supposed that if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that under these circumstances a conviction for violating one of the orders could not stand.

We cannot shut our eyes to the fact that had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a

49 figmentary and artificial situation instead of addressing ourselves to the actualities of the case? These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the Endo case, supra. The answer, of course, is that where he was subject to two conflicting laws he was not bound, in order to escape violation of one of the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.

50 Again it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute but must obey it though he knows it is no law and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

51 Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him, in order to sustain his conviction for violation of another contradictory order.

52 I would reverse the judgment of conviction.

53 Mr. Justice MURPHY, dissenting.

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

55 In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

56 At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.' *Sterling v. Constantin*, 287 U.S. 378, 401, 53 S.Ct. 190, 196, 77 L.Ed. 375.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States v. Russell*, 13 Wall. 623, 627, 628, 20 L.Ed. 474; *Mitchell v. Harmony*, 13 How. 115, 134, 135, 14 L.Ed. 75; *Raymond v. Thomas*, 91 U.S. 712, 716, 23 L.Ed. 434. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific

57 Coast 'all persons of Japanese ancestry, both alien and non-alien,' clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

58 It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

59 That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area.¹ In it he refers to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose 'racial strains are undiluted,' and as constituting 'over 112,000 potential enemies * * * at large today' along the Pacific Coast.² In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal,³ or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be 'a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.'⁴ They are claimed to be given to 'emperor worshipping ceremonies'⁵ and to 'dual citizenship.'⁶ Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty,⁷ together with facts as to certain persons being educated and residing at length in Japan.⁸ It is intimated that many of these individuals deliberately resided 'adjacent to strategic points,' thus enabling them 'to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so.'⁹ The need for protective custody is also asserted. The report refers without identity to 'numerous incidents of violence' as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded

60 that the 'situation was fraught with danger to the Japanese population itself' and that the general public 'was ready to take matters into its own hands.'¹⁰ Finally, it is intimated, though not directly charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area,¹¹ as well as for unidentified radio transmissions and night signalling.

61 The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.¹² A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.¹³

62 The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

63 No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group 'were unknown and time was of the essence.'¹⁴ Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these 'subversive' persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of

64 the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free,¹⁵ a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.¹⁶ Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

65 I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

66 Mr. Justice JACKSON, dissenting.

67 Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

68 Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

69 A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

70 Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that 'no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.' Article 3, § 3, cl. 2. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.

71 But the 'law' which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

72 It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

73 But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. This is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

74 The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

75 In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

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. Even during

76 that period a succeeding commander may revoke it all. 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. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.'¹ A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

77 It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Kiyshi Hirabayashi v. United States*, 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774, when we sustained these orders in so far as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

78 In that case we were urged to consider only that curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language will do. He said: 'Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew.' 320 U.S. at page 101, 63 S.Ct. at page 1386, 87 L.Ed. 1774. 'We decide only the issue as we have defined it—we decide only that the curfew order as applied, and at the time it was applied, was within the boundaries of the war power.' 320 U.S. at page 102, 63 S.Ct. at page 1386, 87 L.Ed. 1774. And again: 'It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order.' 320 U.S. at page 105, 63 S.Ct. at page 1387, 87 L.Ed. 1774. (Italics supplied.) However, in spite of our limiting words we did validate a discrimination of the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. The Court is now saying that in *Hirabayashi* we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely; and if that, we are told they may also be taken into custody for deportation; and if that, it is argued they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

79 I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me

80 wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

81 My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution I would reverse the judgment and discharge the prisoner.

¹ 9 Cir.,.

² Hearings before the Subcommittee on the National War Agencies Appropriation Bill for 1945, Part II, 608—726; Final Report, Japanese Evacuation from the West Coast, 1942, 309—327; Hearings before the Committee on Immigration and Naturalization, House of Representatives, 78th Cong., 2d Sess., on H.R. 2701 and other bills to expatriate certain nationals of the United States, pp. 37—42, 49—58.

¹ 7 Fed.Reg. 1407.

² 7 Fed.Reg. 2320.

³ 56 Stat. 173, 18 U.S.C.A. § 97a.

⁴ 7 Fed.Reg. 2601.

⁵ The italics in the quotation are mine. The use of the word 'voluntarily' exhibits a grim irony probably not lost on petitioner and others in like case. Either so, or its use was a disingenuous attempt to camouflage the compulsion which was to be applied.

⁶ 7 Fed.Reg. 3967.

⁷ Fed.Reg. 2165.

⁸ My agreement would depend on the definition and application of the terms 'temporary' and 'emergency'. No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained, at the date of the restraint out of which the litigation arose. Cf. *Chastleton Corporation v. Sinclair*, 264 U.S. 543, 44 S.Ct. 405, 68 L.Ed. 841.

¹ Final Report, Japanese Evacuation from the West Coast, 1942, by Lt.Gen. J. L. De Witt. This report is dated June 5, 1943, but was not made public until January, 1944.

² Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 739—40 (78th Cong., 1st Sess.):

I don't want any of them (persons of Japanese ancestry) here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. * * * The danger of the Japanese was, and is now—if they are permitted to come

back—espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. * * * But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. * * *

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- ³ The Final Report, p. 9, casts a cloud of suspicion over the entire group by saying that 'while it was believed that some were loyal, it was known that many were not.' (Italics added.)
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- ⁴ Final Report, p. vii; see also pp. 9, 17. To the extent that assimilation is a problem, it is largely the result of certain social customs and laws of the American general public. Studies demonstrate that persons of Japanese descent are readily susceptible to integration in our society if given the opportunity. Strong, *The Second-Generation Japanese Problem* (1934); Smith, *Americans in Process* (1937); Mears, *Resident Orientals on the American Pacific Coast* (1928); Millis, *The Japanese Problem in the United States* (1942). The failure to accomplish an ideal status of assimilation, therefore, cannot be charged to the refusal of these persons to become Americanized or to their loyalty to Japan. And the retention by some persons of certain customs and religious practices of their ancestors is no criterion of their loyalty to the United States.
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- ⁵ Final Report, pp. 10—11. No sinister correlation between the emperor worshipping activities and disloyalty to America was shown.
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- ⁶ Final Report, p. 22. The charge of 'dual citizenship' springs from a misunderstanding of the simple fact that Japan in the past used the doctrine of *jus sanguinis*, as she had a right to do under international law, and claimed as her citizens all persons born of Japanese nationals wherever located. Japan has greatly modified this doctrine, however, by allowing all Japanese born in the United States to renounce any claim of dual citizenship and by releasing her claim as to all born in the United States after 1925. See Freeman, 'Genesis, Exodus, and Leviticus; Genealogy, Evacuation, and Law,' 28 *Cornell L.Q.* 414, 447—8, and authorities there cited; McWilliams, *Prejudice*, 123—4 (1944).
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- ⁷ Final Report, pp. 12. We have has various foreign language schools in this country for generations without considering their existence as ground for racial discrimination. No subversive activities or teachings have been shown in connection with the Japanese schools. McWilliams, *Prejudice*, 121—3 (1944).
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- ⁸ Final Report, pp. 13. Such persons constitute a very small part of the entire group and most of them belong to the Kibei movement—the actions and membership of which are well known to our Government agents.
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- ⁹ Final Report, p. 10 see also pp. vii, 9, 15—17. This insinuation, based purely upon speculation and circumstantial evidence, completely overlooks the fact that the main geographic pattern of Japanese population was fixed many years ago with reference to economic, social and soil conditions. Limited occupational outlets and social pressures encouraged their concentration near their initial points of entry on the Pacific Coast. That these points may now be near certain strategic military and industrial areas is no proof of a diabolical purpose on the part of Japanese Americans. See McWilliams, *Prejudice*, 119 121 (1944); House Report No. 2124 (77th Cong., 2d Sess.), 59—93.
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- ¹⁰ Final Report, pp. 8. This dangerous doctrine of protective custody, as proved by recent European history, should have absolutely no standing as an excuse for the deprivation of the rights of minority groups. See House Report No. 1911 (77th Cong., 2d Sess.) 1—2. Cf. House Report No. 2124 (77th Cong., 2d Sess.) 145—7. In this instance, moreover, there are only two minor instances of violence on record involving persons of Japanese ancestry. McWilliams, *What About Our Japanese-Americans?* Public Affairs Pamphlets, No. 91, p. 8 (1944).
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¹¹ Final Report, p. 18. One of these incidents (the reputed dropping of incendiary bombs on an Oregon forest) occurred on Sept. 9, 1942—a considerable time after the Japanese American had been evacuated from their home and placed in Assembly Centers. See New York Times, Sept. 15, 1942, p. 1, col. 3.

¹² Special interest groups were extremely active in applying pressure for mass evacuation. See House Report No. 2124 (77th Cong., 2d Sess.) 154–6; McWilliams, Prejudice, 126–8 (1944). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that 'We're charged with wanting to get rid of the Japs for selfish reasons. We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. * * * They undersell the white man in the markets. * * * They work their women and children while the white farmer has to pay wages for his help,. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either.' Quoted by Taylor in his article 'The People Nobody Wants,' 214 Sat. Eve. Post 24, 66 (May 9, 1942).

¹³ See notes 4–12, supra.

¹⁴ Final Report, p. vii; see also p. 18.

¹⁵ The Final Report, p. 34, makes the amazing statement that as of February 14, 1942, 'The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken.' Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage.

¹⁶ During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a 'friendly enemy.' About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned. Kempner, 'The Enemy Alien Problem in the Present War,' 34 Amer. Journ. of Int. Law 443, 444–46; House Report No. 2124 (77th Cong., 2d Sess.), 280–1.

¹ Nature of the Judicial Process, p. 51.

Transcript of Executive Order 9066: Resulting in the Relocation of Japanese (1942)

Executive Order No. 9066

The President

Executive Order

Authorizing the Secretary of War to Prescribe Military Areas

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

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

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

I hereby further authorize and direct all Executive Departments, independent establishments and other Federal Agencies, to assist the Secretary of War or the said Military Commanders in carrying out this Executive Order, including the furnishing of medical aid, hospitalization, food, clothing, transportation, use of land, shelter, and other supplies, equipment, utilities, facilities, and services.

This order shall not be construed as modifying or limiting in any way the authority heretofore granted under Executive Order No. 8972, dated December 12, 1941, nor shall it be construed as limiting or modifying the duty and responsibility of the Federal Bureau of Investigation, with respect to the investigation of alleged acts of sabotage or the duty and responsibility of the Attorney General and the Department of Justice under the Proclamations of December 7 and 8, 1941, prescribing regulations for the conduct and control of alien enemies, except as such duty and responsibility is superseded by the designation of military areas hereunder.

Franklin D. Roosevelt

The White House,

February 19, 1942.

The Constitution of the United States [War Powers Clauses]

Article I: Section 8

Section 8 - The Text

[1] *The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;*

[2] *To borrow Money on the credit of the United States;*

[3] *To regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes;*

[4] *To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;*

[5] *To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;*

[6] *To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;*

[7] *To establish Post Offices and post Roads;*

[8] *To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;*

[9] *To constitute Tribunals inferior to the supreme Court;*

[10] *To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;*

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

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

[13] *To provide and maintain a Navy;*

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

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

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

[17] *To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals,*

The Constitution of the United States [War Powers Clauses]

dock-Yards, and other needful Buildings; —And

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

Section 8 - The Meaning

Article I, Section 8, specifies the powers of Congress in great detail. These powers are limited to those listed and those that are "necessary and proper" to carry them out. All other lawmaking powers are left to the states. The First Congress, concerned that the limited nature of the federal government was not clear enough in the original Constitution, later adopted Amendment X, which reserves to the states or to the people all the powers not specifically granted to the federal government.

The most important of the specific powers that the Constitution enumerates is the power to set taxes, tariffs and other means of raising federal revenue, and to authorize the expenditure of all federal funds. In addition to the tax powers in Article I, Amendment XVI authorized Congress to establish a national income tax. The power to appropriate federal funds is known as the "power of the purse." It gives Congress great authority over the executive branch, which must appeal to Congress for all of its funding. The federal government borrows money by issuing bonds. This creates a national debt, which the United States is obligated to repay.

Since the turn of the 20th century, federal legislation has dealt with many matters that had previously been managed by the states. In passing these laws, Congress often relies on power granted by the commerce clause, which allows Congress to regulate business activities "among the states."

The commerce clause gives Congress broad power to regulate many aspects of our economy and to pass environmental or consumer protections because so much of business today, either in manufacturing or distribution, crosses state lines. But the commerce clause powers are not unlimited.

In recent years, the U.S. Supreme Court has expressed greater concern for states' rights. It has issued a series of rulings that limit the power of Congress to pass legislation under the commerce clause or other powers contained in Article I, Section 8. For example, these rulings have found unconstitutional federal laws aimed at protecting battered women or protecting schools from gun violence on the grounds that these types of police matters are properly managed by the states.

In addition, Congress has the power to coin money, create the postal service, army, navy and lower federal courts, and to declare war. Congress also has the responsibility of determining naturalization, how immigrants become citizens. Such laws must apply uniformly and cannot be modified by the states.

The Constitution of the United States [War Powers Clauses]

Article II: Section 3

Section 2 - The Text

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

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

Section 2 - The Meaning

The president serves not only as the head of the executive branch of government, but also as the commander in chief of the armed forces (including state national guards when they are called on to serve with the federal armed forces).

As chief executive, the president runs the different executive agencies, such as the Department of the Treasury or the Department of Health and Human Services.

The president has the power to pardon (let free) any person who has committed a federal crime, except in cases of impeachment.

With permission from two-thirds of the senators present, the president can make treaties (agreements) with other countries. With the approval of a majority of senators, the president makes a number of key appointments. These include U.S. ambassadors and foreign consuls, Supreme Court justices and federal judges, U.S. attorneys, U.S. marshals, Cabinet officers, independent agency heads, and members of regulatory commissions. To ensure that the president can fill vacancies when the Senate is not in session, the president can make any of these appointments without Senate approval, but these “recess appointments” end at the end of the next Senate session.

Congress may choose to require Senate approval of other presidential appointments or let the president, courts or department heads appoint staff and agency employees without approval by the Senate.

Source: The Annenberg Guide to the United States Constitution

<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>

The Constitution of the United States

Fifth Amendment

Fifth Amendment - The Text

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fifth Amendment - The Meaning

Grand Jury Protection: The Fifth Amendment requirement that serious federal criminal charges be started by a grand jury (a group of citizens who hear evidence from a prosecutor about potential crimes) is rooted in English common law. Its basic purpose is to provide a fair method for beginning criminal proceedings against those accused of committing crimes. Grand jury charges can be issued against anyone except members of the military, who are instead subject to courts-martial in the military justice system.

To avoid giving government unchecked powers, grand jurors are selected from the general population and their work, conducted in secret, is not hampered by rigid rules about the type of evidence that can be heard. In fact, grand jurors can act on their own knowledge and are free to start criminal proceedings on any information that they think relevant.

It is these broad powers that have led some critics to charge that grand juries are little more than puppets of prosecutors. Grand juries also serve an investigative role—because grand juries can compel witnesses to testify in the absence of their lawyers.

A significant number of states do not use grand juries, instead they begin criminal proceedings using informations or indictments. The right to a grand jury is one of only a few protections in the Bill of Rights that has not been applied to the states by the Fourteenth Amendment.

Protection against Double Jeopardy: This portion of the Fifth Amendment protects individuals from being “twice put in jeopardy of life or limb”—that is, in danger of being punished more than once for the same criminal act. The U.S. Supreme Court has interpreted the double jeopardy clause to protect against a second prosecution for the same offense after acquittal or conviction and against multiple punishments for the same crime. Like other provisions in the Bill of Rights that affect criminal prosecutions, the double jeopardy clause is rooted in the idea that the government should not have unlimited power to prosecute and punish criminal suspects. Rather, the government gets only one chance to make its case.

Right against Self-Incrimination: This provision of the Fifth Amendment is probably the

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Fifth Amendment

best-known of all constitutional rights, as it appears frequently on television and in movies—whether in dramatic courtroom scenes (“I take the Fifth!”) or before the police question someone in their custody (“You have the right to remain silent. Anything you do say can be used against you in a court of law.”). The right protects a person from being forced to reveal to the police, prosecutor, judge, or jury any information that might subject him or her to criminal prosecution. Even if a person is guilty of a crime, the Fifth Amendment demands that the prosecutors come up with other evidence to prove their case. If police violate the Fifth Amendment by forcing a suspect to confess, a court may suppress the confession, that is, prohibit it from being used as evidence at trial.

The right to remain silent also means that a defendant has the right not to take the witness stand at all during his or her trial, and that the prosecutor cannot point to the defendant’s silence as evidence of guilt. There are, however, limitations on the right against self-incrimination. For example, it applies only to testimonial acts, such as speaking, nodding, or writing. Other personal information that might be incriminating, like blood or hair samples, DNA or fingerprints, may be used as evidence. Similarly, incriminating statements that an individual makes voluntarily—such as when a suspect confesses to a friend or writes in a personal diary—are not protected.

Right to Due Process: The right to due process of law has been recognized since 1215, when the Magna Carta (the British charter) was adopted. Historically, the right protected people accused of crimes from being imprisoned without fair procedures (like indictments and trials, where they would have an opportunity to confront their accusers). The right of due process has grown in two directions: It affords individuals a right to a fair process (known as procedural due process) and a right to enjoy certain fundamental liberties without governmental interference (known as substantive due process). The Fifth Amendment’s due process clause applies to the federal government’s conduct. In 1868 the adoption of the Fourteenth Amendment expanded the right of due process to include limits on the actions of state governments.

Today, court decisions interpreting the Fourteenth Amendment’s due process right generally apply to the Fifth Amendment and vice versa.

Takings Clause: The takings clause of the Fifth Amendment strikes a balance between the rights of private property owners and the right of the government to take that property for a purpose that benefits the public at large. When the government takes private property, it is required to pay just compensation to the property owner for his or her loss. The takings power of the government, sometimes referred to as the power of eminent domain, may be used for a wide range of valid public uses (for a highway or a park, for example). For the most part, when defining just compensation, courts try to reach some approximation of market value.

Source: The Annenberg Guide to the United States Constitution
<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>

The Constitution of the United States

Fourteenth Amendment

Fourteenth Amendment - The Text

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Fourteenth Amendment - The Meaning

Because many states continued to pass laws that restricted the rights of former slaves, on June 13, 1866, Congress passed and sent to the states for ratification, Amendment XIV. Ratified on July 9, 1868, the amendment granted U.S. citizenship to former slaves and specifically changed the rule in Article 1, Section 2 that slaves be counted only as three-fifths of a person for purposes of representation in Congress. It also contained three new limits on state power: a state shall not

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Fourteenth Amendment

violate a citizen's privileges or immunities; shall not deprive any person of life, liberty, or property without due process of law; and must guarantee all persons equal protection of the laws.

These limitations on state power dramatically expanded the protections of the Constitution. Prior to the adoption of the Fourteenth Amendment, the protections in the Bill of Rights limited only the actions of the federal government, unless the provision specifically stated otherwise. The Supreme Court, in what is called "the doctrine of incorporation" has since interpreted the Fourteenth Amendment to apply most provisions in the Bill of Rights against state and local governments as well. This has meant that the Fourteenth Amendment has been used more frequently in modern court cases than any other constitutional provision.

Guaranteed Rights of Citizenship to all Persons Born or Naturalized: The right of citizenship in the Fourteenth Amendment was intended to overturn the case of *Dred Scott v. Sanford*, a decision that had long been considered as one of the Supreme Court's worst mistakes. *Dred Scott*, born into slavery, argued that he should be granted freedom from the family that claimed ownership over him because he had lived in free states and thus had become a citizen of the United States before returning to Missouri, a state where slavery was sanctioned.

Chief Justice Taney, denying *Scott's* appeal, held that African Americans were not citizens, and therefore were "not included, and were not intended to be included, under the word citizens." By specifically granting citizenship to all persons born or naturalized, the Fourteenth Amendment has not only guaranteed citizenship to former slaves but to most children born within the United States, even if the child's parents are not and cannot become citizens.

Amendment XIV, however, limited the broad grant of citizenship to those "subject to U.S. jurisdiction." As a result, Native Americans, who were governed by tribal law, were not guaranteed citizenship by this amendment. Many Native Americans became citizens by a variety of means such as marriage, treaties, or military service. But with the passage of the Indian Citizenship Act of 1924, Congress granted the rights of citizenship to all Native Americans.

Privileges and Immunities: Within five years of its adoption, the privileges and immunities clause of the Fourteenth Amendment was interpreted very narrowly by the U.S. Supreme Court. In *In Re Slaughter-House Cases*, the Court rejected the argument that the provision gave the federal government broad power to enforce civil rights, finding that to do so would infringe on a power that had and should belong to the states. The Court found that the only privileges protected by the clause are those "which owe their existence to the Federal Government, its National character, its Constitution, or its laws," all of which are already protected from state interference by the supremacy clause in Article VI. Subsequent cases have recognized several federal privileges such as the right to travel from state to state, the right to petition Congress for a redress of grievances, the right to vote for national officers, and so forth, but other efforts to broaden the meaning of this clause have been rejected.

Procedural Due Process: The Fourteenth Amendment's due process clause has been interpreted by the courts to provide the same "protection against arbitrary state legislation, affecting life, liberty and property, as is offered by the Fifth Amendment." This has meant that state laws that

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Fourteenth Amendment

take away a person's property or otherwise jeopardize their life or liberty must afford persons a fair and impartial way to challenge that action.

For example, the due process clause has ensured that people on welfare are able to challenge the loss of their benefits at an administrative hearing, and has meant that parents who are accused of child abuse, or the mentally ill who are being committed will have the opportunity to contest the state's allegations in a court hearing. Often thought of as a provision that guarantees fairness, the due process clause requires government to use even-handed procedures, so that it is less likely to act in an arbitrary way.

Substantive Due Process: The Supreme Court has found that the Fourteenth Amendment's due process clause protects individuals from arbitrary state laws or actions that interfere with fundamental liberties. More than offering a process of fairness, courts have found that the Fourteenth Amendment prohibits states from harming an individual's ability to fully participate in society. Liberty, the Court held in *Meyer v. Nebraska*, "denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men."

Although the Supreme Court usually presumes that state legislation, particularly economic regulation, is valid since it is the product of a democratic process, the Court has held that substantive due process will provide some protections for parents' rights to care for their children, a woman's ability to use contraception and to have an abortion; and other significant freedoms.

Equal Protection of the Laws: Although the Declaration of Independence declared that all men were created equal, many persons living in our early republic, including Native Americans, African-American slaves and women were denied fundamental rights and liberties such as the right to vote, own property and freely travel. The passage of Amendment XIV—particularly the equal protection clause—along with the power of Congress to enforce it, incorporated the Declaration's ideal into the Constitution. The equal protection clause limits the ability of states to discriminate against people based on their race, national origin, gender, or other status. For example the clause has been used to guarantee voting rights, school integration, the rights of women and minorities to equal employment opportunities and the rights of immigrants to attend public school. The extensive history of litigation under the equal protection clause in fact mirrors the struggle for civil rights of all Americans.

Apportionment and Reapportionment: Article I, Section 2 had initially provided that the number of districts in the House of Representatives would be divided among the states according to a formula in which only three-fifths of the total number of slaves in slave-owning states were counted in the state's population. Amendment XIV, Section 2 eliminated the three-fifths rule, specifically stating that representation to the House is to be divided among the states according to their respective numbers, counting all persons in each state (except Native Americans who

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Fourteenth Amendment

were not taxed). The provision also punished states that did not let all males over the age of 21 vote by reducing their population for purposes of representation in Congress.

With the adoption of the Nineteenth Amendment in 1920, the right to vote in federal elections was extended to women. Eighteen- to twenty-one-year-olds became voters in 1971, with the adoption of Amendment XXVI. But language in this section has been used to support the constitutionality of state laws that deny felons the right to vote. Both Sections 3 and 4 of the Fourteenth Amendment affected persons who waged war against the Union during the Civil War and the obligations of those states who had been part of the Confederacy. Amendment XIV, Section 3 prohibits any person who had gone to war against the union or given aid and comfort to the nation's enemies from running for federal or state office, unless Congress by a two-thirds vote specifically permitted it.

Amendment XIV, Section 4 allowed the federal and state governments to refuse to pay war debts of the Confederate army as well as any claims made by slave owners for their losses when slaves were freed. Lastly, Amendment XIV, Section 5 gives Congress the power to enforce all the provisions within the whole amendment. This gives Congress the power to pass laws that protect civil rights, such as the Civil Rights Act of 1964 or the Americans with Disabilities Act of 1990.

Source: The Annenberg Guide to the United States Constitution

<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>

Student Materials

- Class Prep Assignment Sheet
- Timeline: “Chronology Tells the Story”
- Case Profile: “Lessons in Civil Liberties from *Korematsu v. United States*”

Class Prep Assignment Sheet

The following assignment provides important background knowledge and context for the video *Korematsu and Civil Liberties*, which will be shown in class.

INSTRUCTIONS

Read, review, and become familiar with the following resources, then answer the questions. **Bring this sheet and the completed questions with you to class.**

1. Readings and resources to review.

(Copies are available from the teacher or the readings may be viewed at the links provided.)

- Chapter 11: “Internment of Japanese Americans during World War II” from *The Pursuit of Justice* by Kermit Hall
http://www.annenbergclassroom.org/Files/Documents/Books/The%20Pursuit%20of%20Justice/93_100_Ch_11.pdf
- *Understanding Democracy: A Hip Pocket Guide* (Separation of Powers, pg. 90-93)
<http://www.annenbergclassroom.org/page/understanding-democracy-a-hip-pocket-guide>
- U.S. Constitution
 - o Articles I & II: War Powers ClausesThe Annenberg Guide to the United States Constitution
<http://www.annenbergclassroom.org/page/a-guide-to-the-united-states-constitution>
- Executive Order 9066
<http://www.ourdocuments.gov/doc.php?flash=true&doc=74&page=transcript>

2. Questions to answer.

- a) Who is Fred Korematsu, and why is his story important?
- b) Make a chart that identifies the distribution of war powers for each branch of government.

Legislative Branch	Executive Branch	Judicial Branch
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- Indicate which powers are shared and which are exclusive.
 - Summarize the main function of each branch.
 - What checks are in place?
 - Does one branch appear to have more important powers than another? Explain.
 - In wartime, does one branch take the lead? Explain?
- c) From time to time, presidents issue executive orders that may be administrative or policy setting. While most are directed to executive officials and agencies to deal with management issues, some are issued in response to emergency situations and have broader implications. Executive orders are legally binding and have the weight of law, but they are not officially laws. What was the purpose of Executive Order 9066 issued by President Franklin Roosevelt? What does the issuing of the order, and subsequent support of it, say about the power of the president, the mood of the country, and the president’s priorities when it comes to national security and civil liberties?

Chronology Tells the Story

Video: *Korematsu and Civil Liberties*

Instructions: Develop, then analyze the chronology of events and decisions in the video *Korematsu and Civil Liberties*. Match the events to the dates, then identify the results and explain the effects/consequences. Use additional resources as needed.

World Events	United States				
	Time/Date	Event/Action	Result	Effects/Consequences	
Japanese Immigration to America	Mid-1800s				
	1913				
	1921				
	1923				
	1924				
World War II	Japanese in America	September 1, 1939			
		By 1941			
	U.S. Participation in WORLD WAR II	December 7, 1941			
		December 8, 1941			
		December 18, 1941			
		January 23, 1941			
		February 19, 1942			
		March 21, 1942			
		March 24, 1942			
		May 3, 1942			
		May 30, 1942			
		December 11, 1942			
		October 11, 12, 1944			
		December 18, 1944			
		January, 1945			
September 2, 1945					
Post-World War II	November 10, 1983				
	1988				
	1998				
	Today				

Chronology Tells the Story

Video: *Korematsu and Civil Liberties*

EVENTS

1. Alien Land Law (California).
2. All Japanese immigration cut off.
3. Beginning of a series of civilian exclusion orders by the military
4. Congress passed Public Law 503
5. Congress passed the Civil Liberties Act.
6. Exclusion Order 34 issued by J. L. DeWitt, Lieutenant General, U.S. Army
7. FDR orders creation of a commission to look into the debacle of Pearl Harbor.
8. FDR signed Executive Order 9066.
9. FDR speech: "Yesterday, December 7th 1941, a date that will live in infamy. . ."
10. Fred Korematsu, a 22-year-old, Japanese-American citizen, arrested for defying the evacuation order.
11. Germany invades Poland.
12. Immigrants from Asia arrive in U.S.
13. Internment camps officially begin to close.
14. Japanese Americans productive as agricultural producers.
15. Korematsu back in federal court seeking *coram nobis*.
16. Korematsu case argued before the Supreme Court.
17. Korematsu filed in federal district court claiming his constitutional rights were denied.
18. *Korematsu* precedent stands.
19. Oregon alien land law.
20. President Clinton awarded the Presidential Medal of Freedom to Fred Korematsu.
21. Roberts report issued.
22. Sneak attack on Pearl Harbor by Japan.
23. Supreme Court issued *Korematsu* decision.
24. Surrender of Japan.
25. Washington alien land law.

GOVERNMENT DOCUMENTS (Primary Source)

- Executive Order 9066
<http://www.ourdocuments.gov/doc.php?flash=true&doc=74&page=transcript>
- Public Law 503
http://www.internmentarchives.com/showdoc.php?docid=00104&search_id=9609
- Exclusion Order No. 34 (Click on thumbnail images to enlarge)
<http://www.hsp.org/default.aspx?id=1131>

QUESTIONS

1. What was the constitutional basis for Korematsu's challenge in court? Identify which amendments his lawyer used and the reasons given.
2. Cite the applicable text from the amendments below:

Lessons in Civil Liberties from *Korematsu v. United States* (1944)

Instructions: Analyze *Korematsu v. United States* (1944) to extract details, create a case profile, and identify lessons learned about civil liberties from the justices' own words. After conducting the review, work with a partner to complete the Wrap-Up at the end. Use other paper if necessary.

Note: A copy of the case is available from the teacher. It can also be accessed at this link:

<http://ftp.resource.org/courts.gov/c/US/323/323.US.214.22.html>

Case Name:	
Citation:	
Background Story (Include Dates)	
Problem	
Petitioner	
Respondent	
Issue(s) involved	
What question needs to be settled?	
Identify the constitutional issue	
Reason Supreme Court decided to hear the case	
Vote of the Court	
Justice delivering the Court's opinion	
Justice who wrote the concurring opinion	
Opinion of Court (5 significant quotes)	
Justices who dissented	
Dissenting Opinions (5 significant quotes)	

Lessons in Civil Liberties from *Korematsu v. United States* (1944)

Excerpts from each justice's opinion follow:

The Words of the Justices: Court's Opinion

Justice Black: Opinion of the Court (in part)

. . . exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. . . .

But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But when under conditions of modern warfare our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger. . . .

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders as inevitably it must—determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot—by availing ourselves of the calm perspective of hindsight—now say that at that time these actions were unjustified.

Justice Frankfurter: Concurring opinion (in part)

"The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is 'the power to wage war successfully.' . . . Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as 'an unconstitutional order' is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are of course very different. But within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. 'The war power of the United States, like its other powers * * * is subject to applicable constitutional limitations' . . ."

Lessons in Civil Liberties from *Korematsu v. United States* (1944)

The Words of the Justices: Dissenting Opinions

Justice Roberts: Dissenting opinion (in part)

"This is not a case of keeping people off the streets at night as was *Kiyoshi Hirabayashi v. United States* . . . , nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated."

Justice Murphy: Dissenting opinion (in full)

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

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. 'What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.' *Sterling v. Constantin*, 287 U.S. 378, 401, 53 S.Ct. 190, 196, 77 L.Ed. 375.

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so 'immediate, imminent, and impending' as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. *United States v. Russell*, 13 Wall. 623, 627, 628, 20 L.Ed. 474; *Mitchell v. Harmony*, 13 How. 115, 134, 135, 14 L.Ed. 75; *Raymond v. Thomas*, 91 U.S. 712, 716, 23 L.Ed. 434.

Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast 'all persons of Japanese ancestry, both alien and non-alien,' clearly does not meet that test. Being an obvious racial discrimination, the order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an 'immediate, imminent, and impending' public danger is evident to support this racial restriction which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons

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with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt rather than bona fide military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area.¹ In it he refers to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose 'racial strains are undiluted,' and as constituting 'over 112,000 potential enemies * * * at large today' along the Pacific Coast.² In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal,³ or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise by their behavior furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be 'a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion.'⁴ They are claimed to be given to 'emperor worshipping ceremonies'⁵ and to 'dual citizenship.'⁶ Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty,⁷ together with facts as to certain persons being educated and residing at length in Japan.⁸ It is intimated that many of these individuals deliberately resided 'adjacent to strategic points,' thus enabling them 'to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so.'⁹ The need for protective custody is also asserted. The report refers without identity to 'numerous incidents of violence' as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the 'situation was fraught with danger to the Japanese population itself' and that the general public 'was ready to take matters into its own hands.'¹⁰ Finally, it is intimated, though not directly charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area,¹¹ as well as for unidentified radio transmissions and night signalling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices—the same people who have been among the foremost advocates of the evacuation.¹² A military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and legal and economic status has been substantially discredited by independent studies made by experts in these matters.¹³

The military necessity which is essential to the validity of the evacuation order thus resolves itself into a few intimations that certain individuals actively aided the enemy, from which it is inferred that the entire group of Japanese Americans could not be trusted to be or remain loyal to the United States. No one denies, of course, that there were some disloyal persons of Japanese descent on the Pacific Coast who did all in their power to aid their ancestral land. Similar disloyal activities have been engaged in by many persons of German, Italian and even more pioneer stock in our country. But to infer that examples of individual disloyalty prove group disloyalty and justify discriminatory action against the entire group is to deny that under our system of law individual guilt is the sole basis for deprivation of rights. Moreover, this inference, which is at the very heart of the evacuation orders, has been used in support of the abhorrent and despicable treatment of minority groups by the dictatorial tyrannies

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which this nation is now pledged to destroy. To give constitutional sanction to that inference in this case, however well-intentioned may have been the military command on the Pacific Coast, is to adopt one of the cruelest of the rationales used by our enemies to destroy the dignity of the individual and to encourage and open the door to discriminatory actions against other minority groups in the passions of tomorrow.

No adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal, as was done in the case of persons of German and Italian ancestry. See House Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of this group 'were unknown and time was of the essence.'¹⁴ Yet nearly four months elapsed after Pearl Harbor before the first exclusion order was issued; nearly eight months went by until the last order was issued; and the last of these 'subversive' persons was not actually removed until almost eleven months had elapsed. Leisure and deliberation seem to have been more of the essence than speed. And the fact that conditions were not such as to warrant a declaration of martial law adds strength to the belief that the factors of time and military necessity were not as urgent as they have been represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the military and naval intelligence services did not have the espionage and sabotage situation well in hand during this long period. Nor is there any denial of the fact that not one person of Japanese ancestry was accused or convicted of espionage or sabotage after Pearl Harbor while they were still free,¹⁵ a fact which is some evidence of the loyalty of the vast majority of these individuals and of the effectiveness of the established methods of combatting these evils. It seems incredible that under these circumstances it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved—or at least for the 70,000 American citizens—especially when a large part of this number represented children and elderly men and women.¹⁶ Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must accordingly be treated at all times as the heirs of the American experiment and as entitled to all the rights and freedoms guaranteed by the Constitution.

Justice Jackson: Dissenting opinion (in part)

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that apart from the matter involved here he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four—the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole—only Korematsu's presence would have violated the order. The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

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Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that 'no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attained.' Article 3, § 3, cl. 2. But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress in peace-time legislation should enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the 'law' which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that if the military commander had reasonable military grounds for promulgating the orders, they are constitutional and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander in temporarily focusing the life of a community on defense is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. This is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

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

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last longer than the military emergency. Even during that period a succeeding commander may revoke it all. 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. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as 'the tendency of a principle to expand itself to the limit of its logic.'¹ A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice as I see them do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution I would reverse the judgment and discharge the prisoner.

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Wrap-Up

1. List important issues raised by the Supreme Court Justices in this case.
2. What factors mattered to each of them?
3. What messages did they want to convey by their responses?
4. Do you believe that matters of national security should ever trump civil liberties? Explain.
5. Did the Court err in *Korematsu v. United States*? Explain.
6. What did you find the most troubling about the story of Fred Korematsu? Why?
7. In your opinion, what can Americans do to help prevent a similar incident from happening again, especially since the *Korematsu* opinion stands as “good law” today?
8. In the video, Justice Kennedy said, “The Constitution is at its most vulnerable when we’re in a crisis. This clarity of vision that we need to see the meaning of justice tends to be blurred.” How can clarity of vision be maintained when the nation is threatened?