

## Civil Liberties in Wartime

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### INTRODUCTION

The conflict between the civil liberties of individuals and the interests of the government in protecting the country in times of declared and undeclared war has been a problem throughout United States history. This unit, designed for use in a junior-year United States History course, will examine some of the specific instances when the government, in an effort to protect the country from threats that were either real or perceived to be real, has eliminated or curtailed rights guaranteed by the First and Fourth Amendments of the Constitution. Concerned citizens should learn what limitations there are on the government's ability to curtail the rights of citizens and what restrictions can sometimes legally be put on speech.

There are many examples of actions that limit free speech and infringe on a citizen's security from unreasonable searches. The Sedition Act of 1798 was aimed at anti-Adams editorial writers. Civil War actions included Lincoln's order to suspend the writ of *habeas corpus* (1861) in Maryland and Justice Roger B. Taney's decision in *ex parte Merryman* (1861); another applicable case from the same period is *ex parte Milligan* (1866). Twentieth century examples include the Sedition Act (1918), the internment of Japanese during World War II and the Rosenberg Spy case from the second Red Scare of the McCarthy era 1950s. The Patriot Act of 2001 is the most recent example. In each section of this unit, students will look at the criteria used for determining whether actions or words are seditious and whether actions of an individual pose a threat.

The subject of this unit will help students in several ways. First, by examining some of the specific cases, students will analyze the circumstances surrounding the events that brought about the suits and will increase their knowledge of the historical period. Second, in reading the laws and the court decisions they will use abstract reasoning and will appreciate how words can be used to persuade. Third, by writing comments on and by making comparisons between the cases, they will apply what they have learned and will practice their own writing skills. Fourth, after studying the cases, they will learn that court decisions are products of the time in which each was written and slightly changed circumstances might change a decision. Of the six topics covered in this unit, only two, Lincoln's suspension of the writ of *habeas corpus* and the internment of the Japanese in 1942 occurred during actual war. The other four were products of times in which the United States was perceived to be under threat of attack from hostile alien elements.

One of the main emphases in United States History is to study and to find the motives and causes that precipitate a certain government action. The theme of the importance of

civil liberties will be used throughout the course. The students will be encouraged to use their imaginations to place themselves in the appropriate historical period and weigh the seriousness of the threats as perceived by a historical contemporary against the reality of the situation. Students will then have to use critical reasoning and more recent information to decide whether the alleged threats and dangers were real.

Elaboration and clarification of First Amendment law begins in the twentieth century, but in the lesson plans that accompany this unit, students will be encouraged to evaluate judgments on the cases using several modern approaches to interpretation, in addition to ethical considerations. The absolutist approach is a literal reading and interpretation of the amendment. The clearest example of this approach would be in the First Amendment which says that “no law” should be passed that abridges the freedom of speech. A strict interpretation says that “no law” means exactly that and that the government has no right to pass any legislation. A second approach is a balancing approach, in which the interest and rights of the individual are weighed against the general well-being of society. Examples here might be the censorship of sensitive information during war time or the refusal to give one’s name to the police while being stopped for a traffic offense. In the first case, an individual might want to publish details of troop deployments or advances in new weaponry, but the general interest of the nation lies in restricting the disclosure of such information. In the second example, the individual’s desire and right of privacy is outweighed by the needs of society. A third approach splits speech into several categories and maintains that some of these categories, such as hate speech or obscenity are, by nature, not protected rights. A fourth approach involves reading the decisions in a case in the historical context of the times. Lesson plans in this unit will emphasize the second and fourth of these approaches as well as ethical implications.

## **DISCUSSION OF THE UNIT**

### **The Zenger Case (1735) and the Federalist Acts of 1798**

Free speech is mentioned in the second clause of the First Amendment. The experiences of the colonists’ ancestors under state mandated religious practice probably assured the establishment of religion clause the primary position in the amendment. The threat of prosecution for seditious libel under Colonial rule, as illustrated by the 1735 trial of Peter Zenger for this offense, highlighted the necessity for including the prohibition of “abridging the freedom of speech or of the press.” Zenger was not the author of the offending articles, but he was one of two New York newspaper printers and, therefore, as the responsible party, had been accused of “printing and publishing a false, scandalous and seditious libel, in which . . . the governor . . . is greatly and unjustly scandalized.” Editions of his newspaper were burned by the public hangman and whipper because they tended to encourage “sedition and faction, to bring His Majesty’s government into contempt and to disturb the peace” (Linder; *New York vs. John Peter Zenger*). Zenger was defended by two of the leading attorneys of the day, Andrew Hamilton, who later designed Independence Hall in Philadelphia, and James Alexander. The main issue was

whether or not these articles had appeared in print, because the printing or publication of these accusations was the crime; whether or not the stories were true was not important. Zenger was acquitted, even though the judge had directed the jury to convict.

Zenger's paper, *The New York Weekly Journal*, (11/19/73) had carried several articles on the importance of freedom of the press. It argued that "loss of liberty generally would soon follow suppression of the liberty of the press" (Linder). The notoriety of this case and the importance of the press in publicizing and discussing the issues concerning independence of the colonies and the establishment of the Constitution guaranteed the prominence of the free speech clause.

The four acts supported by the Federalists and passed during the administration of John Adams (1797-1801) were the first challenges to the First Amendment of the Bill of Rights. The roots of the problem addressed by the Acts lie in the conflict between those advocating loyalty to France for her help during the American Revolution and others who believed that Americans should stay out of European conflicts. Thomas Jefferson, a Republican, was more sympathetic to France, whereas John Adams was following Washington's advice to stay clear of foreign entanglements. As a result, the Federalists saw the Republicans as a "pro-French" party. The Republicans, in turn, saw the New England Federalists, who were trying to rebuild their pre-war commerce with England, as being strongly pro-British. Although the United States was not involved in the European war, the country had only state militias and no navy and the resulting weak military status encouraged the French to ignore the rights of free passage for ships of non-belligerent nations. The actions of the French against American ships and seamen and the perceived threat of a French invasion caused the Federalists to take unusual steps against the Republican opposition.

The first act, the Naturalization Act, extended the amount of time needed to become a citizen to fourteen years; the Alien Act and the Alien Enemies Act permitted the President to eject any alien who was thought to be a threat to the safety of the country, even in peacetime. The last Act, the Sedition Act, was the most dangerous to civil liberties. It established fines of up to \$5,000 and set prison terms of six months to five years for anyone convicted of any spoken or written attacks against or criticism of the government. Anyone who wrote, spoke or assisted in publishing "false, scandalous and malicious writings ... with the intent to defame" the Congress, the government or the President could be arrested under this law. The language is reminiscent of that used in the Zenger trial. This charge was a clear violation of the principles of the First Amendment and the Act was passed for the sole purpose of muzzling pro-Jefferson newspapers, thereby ending criticism of the Adams administration. The legislation was to expire at the end of the Adams administration. The targets of all these acts were more likely to be immigrants and Americans of Irish ancestry, groups that were presumed by the Federalists to be anti-British and pro-Republican. Matthew Lyon, an Irish immigrant and veteran of the American Revolution, was found guilty of sedition for publishing a letter

that criticized John Adams. William Duane, a native born American of Irish ancestry, was accused under both the Alien Act and the Sedition Act. (*Infoplease*)

The case this unit will look at is *The United States v. Thomas Cooper* (April, 1800). Cooper, an English immigrant, was both a lawyer and a scientist and was a close friend of Joseph Priestly. He was a professor of natural philosophy (physics) and chemistry at Dickinson College, had been invited by Thomas Jefferson to be a professor at the University of Virginia, and later became the second President of what became the University of South Carolina. He had strong Republican views and was accused and convicted of writing articles for *The Public* that opposed and criticized the government. By modern standards, these complaints were mild: complaints about the cost of the recently established navy, the presence of a permanent militia and, more seriously, trying to interfere in court decisions. The protests against these acts were especially vehement in Republican areas and in Virginia and Kentucky resolutions were passed that called for the state to abrogate the Acts. These Resolutions were later used as precedents to support the power of an individual state to cancel actions of the federal government and encouraged the Secession of those states that joined the Confederacy. (*Thomas Cooper, Letter from Thomas Jefferson to Dr. Cooper*)

Some of the documents used in the Cooper case can be easily obtained online from the National Archives. Students will be able to follow this case and will be able to compare it to current legal practices. They will be able to see the importance of carefully choosing words and being observant of detail. The evidence against Cooper can be found in the newspaper. His indictment follows the wording of the Sedition Acts in stating that he intended to “defame the President . . .and bring him into disrepute”. He is described as a “person of wicked and turbulent disposition” who did “wickedly and maliciously write, print, utter and publish a false, scandalous and malicious writing” (U.S.N.A.R.A, *US v. Thomas Cooper, Indictment*). Some of these phrases had been used earlier in the warrant for his arrest and in Cooper’s plea of innocence. The National Archives documents also provide two examples of a subpoena, and the sentencing.

## **Civil War**

In March, 1861 military action between North and South had started, Abraham Lincoln had been recently inaugurated, the nation was splitting politically and the parts of the country still loyal to the Union, but threatened by Confederate invasion, had been placed in military districts and had become subject to military law. Military courts had been established, although civilian courts were still in operation. An immediate threat to the Union arose in the Chesapeake Bay areas of Baltimore and Annapolis where the Confederacy enjoyed strong support. Lincoln realized there was a great danger that the pro-Southern faction might seize power in Maryland, force the state to secede from the Union, and cause Washington DC to be surrounded by areas under enemy control. Should this have happened, the seat of the United States government was in immediate danger of being besieged or captured by hostile Confederate forces.

The United States Constitution permits the suspension of the writ of *habeas corpus* “. . . when in cases of rebellion or invasion the public safety may require it” (Article I, section 9). Fort Sumter had fallen two weeks before, on April 14, 1861, a defeat for the Union and a source of optimism for the Confederacy. (*Lincoln’s Suspension of Habeas Corpus*). These circumstances at the onset of the Civil War presented the strong possibility of invasion of the north. The clear risk to the Union justified Lincoln’s order of April 17 to Gen. Winfield Scott calling for the suspension of the writ of *habeas corpus* in the Military Department that included the border states of Pennsylvania, Maryland and Delaware.

*Habeas corpus* is a writ that requires an accused person to appear before a judge so it can be determined whether the person has been put in jail legally and whether he should be released. Suspension of this writ permits the government to jail people for indefinite times without legal charges and without a trial. On May 25, 1861 Union troops in Baltimore arrested and imprisoned people who were suspected of being pro-Confederacy and pro-secession. Among those arrested and put in prison at Fort McHenry was a member of Baltimore County’s Horse Guards, Lt. John Merryman. In response to the arrest, the next day Supreme Court Chief Justice Roger B. Taney who was sitting in Baltimore issued a writ of *habeas corpus* asking that Merryman be delivered to his court. Taney argued that Merryman’s arrest was illegal because the president did not have the power to suspend the writ, the military did not have proper authority and the arrest occurred at two in the morning. Roger Taney, who had been appointed by Andrew Jackson as the successor to John Marshall and who is probably best known for his decision in the Dred Scott case, was a Maryland native and was nearing the end of a long tenure on the Court (1836-1864) and was seen as antagonistic toward Lincoln. Taney’s arguments were included in his *ex parte Merryman* opinion.

Taney’s decision was to send the documents to the President so that he could follow the constitutional oath that “the laws be faithfully executed” and see to it that the “civil process of the United States . . . be respected and enforced” (Vance). Taney’s arguments were that there was a viable and conveniently located court system in Maryland that had not been disturbed by the war, that the power to suspend *habeas corpus* lay with the Congress and that the President had exceeded his constitutional powers when he gave this power to a military authority. He cited as historic precedent Thomas Jefferson’s refusal to take unconstitutional measures against Aaron Burr and Jefferson’s request for legislation from Congress. Taney also objected to the time and manner of Merryman’s arrest. (Vance) Lincoln responded to these questions and problems in his July 4, 1861 speech before a special session of Congress. He pointed out that writers of the Constitution had not stated whether the President or Congress had the authority to suspend *habeas corpus* and that because this course of action should be taken only when the nation was in grave danger, it was necessary for the President to act immediately and not wait for Congress to meet. He also spoke of the need for war powers and asked “Must a government of necessity be too strong for the liberties of its people or too weak to maintain its own existence” (*Lincoln’s Special Session Message*). Congress responded to

both Lincoln's requests and Taney's objections by passing the Habeas Corpus Act of 1863, legislation that specifically gave Lincoln the power to suspend the writ.

Five years later, a similar decision was issued in the matter of *ex parte Milligan* (1866). Lambden Milligan had been sentenced to death by a military court in Indiana for disloyal activities. Lincoln had postponed the sentence, but his successor, Andrew Johnson, reimposed it. The opinion of the circuit court was that the military court did not have a valid jurisdiction because Indiana had always been loyal to the union, and Milligan had been neither a resident of a rebelling state nor a prisoner of war. Furthermore he had never been in the United States military and had been arrested at home. Therefore, he was not a belligerent, a member of the military or present on a military base, circumstances that might have subjected him to military jurisdiction. The court held that it was improper to impose military rule and law on civilians in places where civil courts are functioning, an argument similar to the one made by Taney. The court did not object to martial law and agreed that in emergencies it is sometimes necessary to suspend some rights, but stated that civil liberty required that people be tried in civil courts once the danger had passed. Although these decisions came too late to influence procedure in the Civil War, they did set limits on the subsequent judicial treatment of civilians under martial law. (Vance)

It should be noted that in neither case did the court object to or condemn martial law. Rather each focused on the limit of the power of military courts. Taney's arguments emphasized the need to use civilian courts when possible and the unconstitutional usurpation of Congressional power by the President; the later case addressed the problem of who should not be tried by the military.

### **Red Scares of 1920s and 1950s: Palmer Raids and the Rosenberg Case**

Clarification of First Amendment law developed during the twentieth century. The beginning of this area of jurisprudence can be found in the suits that were brought as a result of legally questionable searches and arrests that were carried out during the Palmer raids. Attorney General A. Mitchell Palmer saw the post World War I labor unrest not as a legitimate protest against working conditions, but as part of an international Communist inspired threat. He used the Sedition Act, a May 16, 1918 amendment to the Espionage Act (June 1917) as a legal basis for his crusade against radicals, anarchists, and those perceived to be involved in hostile actions against the government. Many of those accused were recent immigrants from Italy and Eastern Europe to the United States. The prohibited actions included making false statements, obstructing the sale of bonds, interfering with recruiting, publishing "disloyal, profane, scurrilous...language about the form of government . . . the Constitution . . . the flag . . . of the United States" (*Modern History Sourcebook*). The maximum penalties were fines of \$10,000 and 20 years in prison. Distributing anti-war material or questioning the government's actions in sending troops to fight in Russia could be interpreted as offenses under the law. (Ibid) Another

example of unjust accusations is the case of a man who received a six-month jail term for saying that Lenin was smart. (*Fear of Dissent*)

Mitchell's reactions were typical of the times and combined the twin fears of communism and of increased immigration from southern and eastern Europe. Palmer in an article in *Forum* (1920) compares the spread of revolution in the United States to a prairie fire and said that he wanted quicker action in making arrests and in deporting immigrants because he was afraid that "communism in this country was an organization . . . of aliens who were direct allies of Trotsky" (*Palmer Raids*).

Justice Oliver Wendell Holmes formulated the first test of the limits of free speech in wartime. In *Schenck v. United States*, a case in which people were convicted of passing out anti-war leaflets during World War I, the conviction was upheld and Holmes wrote that their actions were "of such a nature as to create a clear and present danger . . . they will bring about the substantial evils that Congress has a right to prevent. It is a question of proximity and degree" (O'Neil 28). The significance is that the danger presented by the activity has to be imminent. The interpretation of the degree of imminence is left to be determined in individual cases. It is this interpretation of the imminent threat that will change depending on the circumstances. The 1917 Act and its amendment were also used at the beginning of World War II in efforts to limit criticism of the war effort by groups that were perceived as presenting a threat to the United States.

The persistent spectre of alien threats to the United States provided the background for several cases that helped define both the limits of permitted speech and the instances where certain speech was required. The combined fear of Communism and German fascism caused an increase in the demand for patriotic affirmations and declarations, as illustrated by the growth of the number of states that required students in public schools to recite the Pledge of Allegiance (Irons 16). The landmark *Gobitis* case (*Gobitis v. Minersville* 310 U.S. 586) that started in 1935 involved Mennonite children in the Minersville (Penn.) School District who were prohibited from attending school because they would not recite the pledge. Their conviction was appealed to the Supreme Court and their conviction was upheld on the basis that "National unity was the basis of national security" (Irons 22) and that compliance was necessary (*Modern History Sourcebook*). There was opposition to this required demonstration of patriotism at the time and the *Minersville* decision was eventually overturned in 1943 in *Barnette v. West Virginia* (319 U.S. 624), a similar case in which children of Jehovah's Witnesses refused to pledge on the similar grounds that this action violated their religious beliefs.

In the *Barnette* case, Justice Jackson wrote the majority opinion that overturned the *Gobitis* decision. He wrote that the flag salute was a type of utterance that when recited gave proof of patriotism, but that forcing everyone to participate was similar to actions taken by tyrannical governments in the past and present, in that it denied free speech. He also specifically mentioned the required raising of the arm toward the flag, a gesture that was very similar to that used in Nazi Germany. (After Pearl Harbor, saluting the flag by

putting the hand to the forehead was reserved for members of the military. Civilians started by holding the hand over the heart and on the words “to the flag” extended the arm, palm up toward the flag. The gesture was clearly reminiscent of the Nazi salute. Later the extended arm gesture was removed and the modern civilian salute became the standard.) “Compulsory unification of opinion,” he added, “achieves only the unanimity of the grave” (*Barnett v. West Virginia*, 319 U.S. 624). His opinion also included a reference to Lincoln’s comments on the strength of government made in the July 4, 1861 speech.

The symbolism involved in saying the Pledge to the Flag was reinforced in the 1950s, at the time of the Cold War, when the phrase “under God” was inserted. This addition was made during the Red Scare of the 1950s to illustrate the moral and ethical differences between the purported divinely guided United States and the forces of “godless Communism.” This particular rewriting of the Pledge has moved the area of controversy from free speech to a different area of First Amendment jurisprudence – the establishment of religion. This area is still being tested. A case was brought challenging the constitutionality of the phrase because the phrase represented an attempt to establish a religion. In June 2004, the Supreme Court refused to decide the constitutionality of this argument because the appellant, a father acting in behalf of his daughter, did not have complete custody of the child and therefore did not have the legal standing necessary to act on her behalf; therefore the question is still undecided.

The best known case of the 1950s that involved a threat to the United States was the trial of Julius and Ethel Rosenberg who were accused of conspiring to commit espionage and of providing information about weapons development to the Soviet Union. Free speech was not an issue in this case of alleged spying. Two of the factors weighing against the defendants were Julius Rosenberg’s membership in the Communist party and the sympathy of the couple toward the aims of Communism; each of these factors has First Amendment ramifications. What is noteworthy about this case was that it was the only example of peacetime executions of individuals convicted of espionage.

This trial was extensively covered by the press and was highly publicized. The conduct of the trial and the verdict remain very controversial today. The trial was held in 1951 and the execution took place June 19, 1953 at the height of the Cold War and McCarthyism. Critics of the handling of the case maintain that the case was tried in the papers, the case against Ethel Rosenberg was not proved and that the fervent anti-Communism of the time precluded a fair trial. As a Federal case, the defendants were tried together and information about the extent of Ethel Rosenberg’s knowledge of the plot and her involvement in it was excessively influenced by evidence that was gathered to accuse her husband. Attempts are still being made to reopen the case and to clear the names of the Rosenbergs.



## Japanese Internment 1942

The World War II internment of Japanese-Americans is another example of alleged danger arising from people perceived to be different or alien. This fits into the series of ethnically based prejudices starting with the Irish of the 18<sup>th</sup> century Sedition Acts, continuing with the Italians and Russians of the 20<sup>th</sup> Century Sedition acts and extending to the Middle Easterners of the post 9/11 era.

The December 7, 1941 attack on Pearl Harbor led to a general fear that the West Coast of the United States was in imminent danger of a Japanese invasion. This paranoia led to decisions that, in retrospect, seem ludicrous, such as relocating the 1942 Rose Bowl game to North Carolina. Another reaction was less benign and far more threatening to civil liberties—the forced relocation of Japanese-Americans to areas outside Military Area I that included the Pacific coast. In March 1942 Congress gave President Franklin D. Roosevelt the power to restrict movements of civilians in military areas or war zones if there appeared to be a threat to the United States. Under this authority, Roosevelt issued Executive Order 9066, the Civilian Exclusion Order, that was used to relocate Japanese-Americans to centers that were far removed from the coast. Not only aliens, but American citizens of Japanese ancestry were included. People of all ages were involved in these forced removals. Both the Issei, Japanese immigrants, and the Nisei, members of the first-generation of children born to the Nisei, were treated quite differently than were Americans who had Italian or German ancestry. (Schuler; *Korematsu vs. United States*)

Civilian Exclusion Order 9066 provided the basis for various military orders that imposed curfews or removed people from sensitive military areas. Lt. General John L. DeWitt issued Public Proclamation Number 1 (April 1, 1942), an order that required any person of Japanese, German or Italian ancestry leave the military areas that were judged to be threatened by enemy invasion. These areas included the entire west coast of the United States as well as the neighboring states of Idaho, Montana, Nevada, Utah and the southern part of Arizona. This order preceded the June 22, 1942 bombardment of Fort Stevens, OR, by a Japanese submarine, an attack that did little damage but did rouse fear among the public. (FindLaw)

Toyosaburo Korematsu, Minoru Yatsu and Gordon Hirabayashi were three plaintiffs who challenged this order. Each was convicted and their cases were sent by the U.S. court of appeals in San Francisco to the Supreme Court (1943). Their convictions were upheld. Wartime conditions made it possible to single out certain ethnic groups that might pose a danger to the country. Justice Murphy argued that the Japanese were maintaining their cultural heritage by operating Japanese language schools for their children and that this type of activity raised the possibility of a “fifth column” that might endanger the United States. Justice Frank Murphy’s arguments that many other immigrant groups also had schools to maintain their languages and cultures were ignored.

Justice Hugo Black, writing for the majority, stated that in wartime, the defense and protection of the country made it possible for the government to take “every possible protection against sabotage” (*Korematsu v. U.S.*, 323 U.S. 214). These actions could include a curfew as well as removing suspicious people from the area, steps that would cut down on the possibility of sabotage. These measures were necessary because in wartime there was no time to spend in examining each person individually and that one investigation showed that there were at least five thousand people who would not renounce allegiance to the Japanese Emperor or swear allegiance to the United States. This inability to act quickly when “the shores were threatened by hostile forces,” made acceptable the belief that “the power to protect must be commensurate with the threatened danger” (*Korematsu v. U.S.*, 323 U.S. 214). The danger to the country required a balancing of the interests of the individual and of society as a whole. In this measurement, if protecting the country required the limitation of an individual’s freedom, and there was no time to separate loyal from disloyal Japanese-Americans, the interests of the country would prevail. A further argument was that in wartime, everyone had to accept and expect hardships. (323 U.S. 214)

There are parallels in Blacks’ reasoning to Lincoln’s statement that in time of great danger, quick action was necessary. Black adds that the president, Franklin D. Roosevelt, did not overstep his constitutional authority when he issued the executive order.

In a concurring opinion, Justice Felix Frankfurter pointed out that it was necessary to view the actions in the context of war. A certain action might be illegal in peacetime but the dangers to the nation in war changed the situation. He appeared to give almost a *carte blanche* to the military when he compared the powers of the military should have in deciding the conduct of war to the jurisdiction that the Interstate Commerce Commission had over commerce. The emphasis and compelling reason in the Black and Frankfurter opinions was that the dangers to the survival of the nation presented by war permitted actions that would be unconstitutional in peace.

Dissenting opinions were written by Justices Murphy, Roberts, and Jackson. Murphy’s dissent focused on the spectre of racism, the lack of martial law and the ignorance of Japanese customs. These factors combined to deprive the Japanese, both alien and citizens, of their constitutional rights. The footnotes to his argument explain the “dual citizenship” attributed to Japanese-Americans as examples of *ius sanguinis*. This was a tradition followed by several European ethnic groups. Roberts’ dissent uses emotionally loaded words “prison” and “concentration camp” to describe the Assembly Center and the Relocation Center. Jackson’s dissent stressed the racial injustice and argues that judicial approval of this measure does more lasting damage than the military order itself because the latter will eventually end with the cessation of hostilities, whereas the former judicial order has approved of racial discrimination and has put this into the law. He also worried that a precedent had been set and that should “power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint” (*Korematsu v. U.S.*, 323 U.S. 214). It is interesting to consider this argument against the

background of state-approved laws on segregation as well as segregation in the United States military.

The significance of racial prejudice in the Korematsu conviction continued to be discussed and in 1983, Judge Marilyn Patel of the U.S. District Court, Northern California Division overturned the conviction. The growing sentiment that some type of restitution should be offered to people who were detained under Executive Order 9066 caused the United States Congress in 1988 to issue a formal apology to Japanese-Americans for the internment and later, in 1998, to give each survivor a payment of \$20,000.

Fred Korematsu continued to be interested in problems concerning the limitation of rights of individuals in wartime. In 2003, in a brief written by Geoffrey Stone and David Strauss, he joined as *amicus curiae* in the suit filed on behalf of prisoners taken in the Afghan war who have been detained at Guantanamo Bay. This decision in this case is still to be handed down by the Supreme Court.

### ***After the 9/11/2001 attacks***

Following the September 11, 2001 terrorists' attacks on New York and Washington, President George W. Bush proposed legislation that would help the United States fight terrorism. The first of these actions was the Authorization for Use of Military force, passed on Sept. 18, 2001. This act, which incorporated language used in Public Law 105-235 (Aug. 14, 1998), allowed the President to take "appropriate action in accordance with the Constitution" in efforts to stop "nations, organizations or persons" who were using terrorist acts against the United States. Five weeks later, the second and more extensive legislation, The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, or the USA PATRIOT Act, was passed. The name of this second piece of legislation implies that those who oppose it are not patriots. The aim of each Act was to help the government be more efficient in collection of information on illegal activities, an aim that required certain modifications in the law. The PATRIOT Act has made it possible for law enforcement and government agencies, such as the FBI and the CIA to share information. However, some provisions, such as the ability to check on library records or student records and changes in regulations regarding intercepting electronic communication, have raised constitutional questions.

A major aim of the Patriot act was to simplify communication between government agencies, avoid overlap and increase efficiency. Lines of separation between the FBI, Immigration and the CIA were blurred. At its inception, the CIA was prohibited from conducting or cooperating with any investigations carried out in the United States; this separation might have caused information about the 9/11 attacks to be missed. The Patriot Act used many laws that were already in place and that had been used to fight organized crime. For example, obtaining a single permission to put taps on all phones and

phone numbers used by one person was a reasonable attempt to combat the practice of criminals in using many lines.

One of the most contentious issues is the detention of those who might be considered terrorists. Sixty years after the Japanese attack on Pearl Harbor, the country was again faced with threats of attack and this time the technology was available to make these threats credible. The language describing the threat changed from “Fifth Column” to “sleeper cells,” but the underlying fear was the same. The attacks showed the amount of carnage a relatively small group of fanatical people could accomplish and there was no guarantee that other organized groups might not introduce poison into drinking water, initiate germ warfare by spreading deadly disease, contaminate the food supply or even detonate a small nuclear weapon. The dangers in 2001 were much more immediate than those in 1941. Under the Authorization for Military Force, in late 2001 and early 2002, the United States military forces apprehended people in Pakistan and Afghanistan who were accused of being terrorists or members of Al Qaeda and were considered to be enemy combatants. The people who were captured denied that they were combatants and claimed they were civilians working in the country. None of those apprehended was in a uniform and the lack of an identifiable uniform and the absence of insignia make it difficult, if not impossible, to determine who is a soldier and who is not. Those captured were taken to the United States base at Guantanamo Bay, Cuba and were detained as enemy combatants.

The Guantanamo base has a legally uncertain status. The base was one of the territories acquired by the United States following the 1898 Spanish American War. The 1903 lease arrangement with Cuba gave the United States control over the area in perpetuity, but assigned “ultimate sovereignty” to Cuba. Although the United States has *de facto* control the question is whether United States laws and constitutional rights are applicable there.

There were two sets of cases before the Court in the 2003-2004 term. The cases involved the rights of non-citizens and citizens with respect to the applicability of *habeas corpus*. The first set of cases that were argued (4/21/2004), *Rasul. Shafiq, et al. v. Bush, George and Al Odah, Fawzi et al. V. U.S.* claim that the plaintiffs, Australian and British citizens, were being illegally detained and were being denied rights of due process, including denial of *habeas corpus*. The government’s basic argument was that these people were not citizens and had never been in a country or area that was included in United States sovereignty and that, therefore, the United States lacked the power to grant the requested writ. The precedent was a 1950 case (*Johnson v. Eisentrager*) that involved German nationals working in China on behalf of the Japanese in the waning days of World War II. These prisoners were moved to Germany and were kept under U.S. military control. The Court ruled that aliens held in non-U.S. territory could not be granted *habeas corpus*. To interpret the 2003 case using *Johnson v. Eisentrager* the Court would have to decide that Cuba did have sovereignty over Guantanamo.

The second set of cases (4/28/04) involve United States citizens, also held at Guantanamo and later moved to a navy brig, who were accused of helping Al Qaeda. They had been detained for two years without receiving a formal notification of the reasons for their imprisonment. In Section 412 of the PATRIOT Act, if a person is detained as a terrorist “no court shall have the power to review, by habeas corpus petition or otherwise any such action.” Even if the prisoners had been moved to a location in the United States, they could be denied this notification. Another justification for this detention is that shortly after the 9/11 attacks, Congress gave the president the power to use “all necessary and appropriate force against those . . . persons he determined planned, authorized committed or aided the terrorist attacks” (Lithwick).

The struggle against terrorism has given rise to many ethical problems regarding the treatment of prisoners. Not acknowledging the presence of prisoners or not permitting them to meet with representatives of humanitarian organizations is a breach of ethics, the rules of warfare and various Geneva conventions. Problems of this type that stem from the difficulty of differentiating combatants and civilians in unconventional and, sometimes, undeclared war, will continue to exist.

The rulings of the Court (06/28/04) in each of these cases balanced the government’s need to protect the state and the individual’s right to due process. In the Guantanamo cases (03-334) the legal rights of the detained prisoners were upheld on a six to three vote (Justices Rehnquist, Scalia and Thomas dissenting). The Court did not specifically address the problem of Cuba’s sovereignty over the land occupied by the base, but did refer to the United States’ “exclusive jurisdiction and control,” a situation that placed the base under United States’ judicial oversight and gave the prisoners the right to obtain writs of *habeas corpus*.

The Court spoke more forcibly in one of the two cases involving American citizens who were detained. Justice Sandra Day O’Connor, writing a majority opinion in the Hamdi case (03-6696) made two major points. First, she put limits on the power of the government in stating that “a “state of war is not a blank check for the president” (*Hamdi v. U.S.*, 03-6696). Second, she stressed the importance of the balance of powers between the branches of government by rejecting the claim that only the administration could have access to the prisoners. O’Connor said that the detained citizen had the right to have his case heard by an objective judge and that abolishing or denying this right would have the effect of concentrating an excessive amount of power in the administrative branch. Justices Souter and Ginsburg concurred in the eight to one decision (Justice Thomas dissenting) by citing a lack of statutory authority. These two justices referred to the 1971 Non-Detention Act that said the government may not detain citizens unless there is an Act of Congress and there had been no act of Congress to justify this. This argument is reminiscent of the argument of Justice Taney at the time of the Civil War. The question of statutory authority was found by O’Connor and Thomas in the Authorization for the use of Military Force that was passed in the immediate aftermath of the Sept. 11, 2001 terrorist attacks. Justice Souter, who disagreed, quoted Justice Jackson’s 1952 decision

that overturned Truman's seizure of the steel mills. "Truman," Jackson said, "was not commander-in-chief of the country, only of the military" (Greenhouse). The other two Justices, Scalia and Stevens, said that Hamdi deserved a writ of *habeas corpus* asking for his release unless he was either accused of treason or Congress passed an act suspending *habeas corpus*.

The rulings of the Court (06/28/04) in each of these cases balanced the government's need to protect the state and the individual's right to due process. In the Guantanamo cases (03-334) the legal rights of the detained prisoners were upheld in court review on a six to three vote (Justices Rehnquist, Scalia and Thomas dissenting). The Court did not specifically address the problem of Cuba's sovereignty over the land occupied by the base, but did refer to the United States' "exclusive jurisdiction and control," a situation that placed the base under United States' judicial oversight and gave the prisoners the right to obtain writs of *habeas corpus*.

The Court spoke more forcibly in one of the two cases involving American citizens who were detained. Justice Sandra Day O'Connor, writing a majority opinion in the Hamdi case (03-6696) made two major points. First, she thought that at some point, even in times of armed conflict, there are at least some limits on the power of the government in stating that a "state of war is not a blank check for the President" (*Hamdi v. U.S.*, 03-6696). Second, she stressed the importance of the balance of powers between the branches of government by rejecting the claim that only the administration could have access to the prisoners. O'Connor said that the detained citizen had the right to have his case heard by an objective judge and that abolishing or denying this right would have the effect of concentrating an excessive amount of power in the administrative branch.

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The Court rejected the appeal of another American citizen, Jose Padilla (03-127) on the grounds that the case had been filed in the wrong court. In light of the Hamdi decision, Padilla will have a good chance of success when he refiles.

## CONCLUSION

For over two centuries the courts have given the government the power to act for the safety and well-being of the many and in behalf of the interest in seeing that the government will survive. In the process, there has been a consistent pattern of pursuing the “greater good” at the expense of the rights of individuals. The general tenor of the reasoning behind these interpretations is correct. Problems arise over the interpretation of the immediacy of the threat and the actual danger. Students will have to realize that an act or statement that might seem innocuous today might have been considered a bigger threat at the time. Cooper’s accusation that the government was spending too much money on the military, and the navy in particular, sounds very modern. The alternative in 1800 was to do away with the navy and army—to disarm.

More serious problems and questions arise when threats are seen to come from a particular ethnic group. Racial prejudice then muddles the picture and makes the methods of the government questionable. The court opinions in the Korematsu case use the phrase “Japanese blood,” a common use of the time, but one that raises the possibility that different ethnicities have different blood, an implication that arises in the legal phrase *ius sanguinis*. When political danger appears to come from one ethnic group, abuses will arise. It is this aspect of the Japanese internment case that has the closest parallels with the 2004 cases dealing with detained prisoners. A detailed and thoughtful analysis of threats is required if citizens are to make an informed decision.

## LESSON PLANS

General note on length of Lesson plan: Each segment within a lesson plan will take about 30 to 45 minutes, depending on how much material is assigned as homework. The bibliography and web sites for each section are listed in the bibliography.

### **Lesson Plan 1: Zenger Trial and Alien and Sedition Acts**

#### ***Materials***

##### *Web Sites*

The University of Houston Law Center’s site *New York v. John Peter Zenger (1735)*

The Avalon Project’s site *Alien and Sedition Acts*

Documents from the U.S. National Archives and Records Administration’s site *Teaching with Documents Lesson Plan: United States v. Thomas Cooper – A Violation of the Sedition Act.*

##### *Books*

David Crump and William J. Merten’s *The Story of a Criminal Case: The State v. Albert Delman Greene.*

### ***Zenger Trial***

Read the summary of the Zenger trial. Find words that are similar to those used in the Sedition Act (examples: false libel, scandalous, malicious).

#### *Questions*

1. Define libel.
2. What was the crime of which Zenger was accused?
3. How was the jury selected? Is selection done the same way today?
4. What is meant by a “charge to the jury” or “instructions to the jury”?
5. What are the advantages of a free press? (examples: informing public, providing a place for dissent, discussing issues)
6. Are the advantages of a free press the same in the 18<sup>th</sup> and 21<sup>st</sup> centuries?
7. Are there times when the press should be censored? (example: war information)
8. Zenger was German, his attorneys were Scottish and the governor was English. How are these ethnicities typical of those who were settlers in the Middle Atlantic colonies?

### ***Alien and Sedition Acts***

Go through each of the Sedition and Alien Acts, list the restrictions and explain how these restrictions would apply to the enemies of the Federalists.

#### *Activity One*

1. Read a page from the *Public*. (National Archives)
2. What evidence is there that Cooper has committed the crime?
3. What in the paper would be offensive to the Federalists?
4. Whom does the State want to protect from libel?
5. Why should these people be protected? What danger is there?
6. What did Cooper say that Adams had done?

#### *Activity Two*

1. Examine other documents in the Archives.
2. What is the purpose of a warrant?
3. What was Cooper’s plea?
4. What are an indictment and a subpoena?
5. Find similarities in the language of each document.
6. Find sections in the indictment that are consistent with the offenses mentioned in the Sedition Act.
7. List the names on each subpoena.
8. Find information about Albert Gallatin, Thomas Pinckney, and Edward Livingston.
9. What was the XYZ affair?
10. What was the verdict? Is the verdict correct? What was his punishment?



## **Lesson Plan 2: Civil War**

### ***Materials***

History books or web sites containing information on the Civil War  
Web sites listed below in the bibliography.

### ***Examine Lincoln's Reasons for Limiting Habeas Corpus***

1. Make a timeline of early Civil War action. Include date of Lincoln Inaugural.
2. What is the geographic location of DC and the danger of being surrounded?
3. Where was the Confederate fleet?
4. How much reason did the Federal troops have for arresting either Merryman or Milligan?
5. Look at Civil War activity in Indiana and Maryland. Where was there a greater danger?

### ***The Hearing***

#### ***Part One***

1. What were Taney's arguments? What were the arguments of Davis? Which arguments are similar? What is the view of military law?
2. Taney's reasons: Taney had been appointed to the Supreme Court by Andrew Jackson. Taney was a native of Frederick, Maryland and had moved to Baltimore. His family owned slaves. If he had pro-southern sympathies, how could these explain his reluctance to see a member of the Baltimore County Horse Guard imprisoned? Why is an arrest in the middle of the night more threatening or frightening than an arrest in the middle of the day?

#### ***Part Two***

Review Taney's background.

1. As Jackson's Attorney General and later as Secretary of the Treasury, he helped destroy the Second National Bank. What were his reasons? How would his view that a bank was an unconstitutional activity of the Federal government consistent with his argument that Lincoln was overstepping the powers of the presidency?
2. He wrote the decision in the *Charles River Bridge v. Warren Bridge* (1837). What did this say about contracts?
3. His most famous decision was the one regarding Dred Scott. What were the legal points brought up in this case?

### ***Lincoln's July 4, 1861 speech***

1. What military actions does Lincoln mention?
2. Why was it necessary for the President to act without waiting for Congress?
3. What transportation was available?
4. How serious was the threat to the Union? Do you agree?
5. What arguments does Lincoln use to justify the debt needed to pay for the war?

6. What does he ask Congress to do?
7. What does Lincoln mean by “war powers”?
8. How is this speech an answer to Taney’s opinion?

***Contemporary Attitudes toward Lincoln.***

In some areas of the Border States, Lincoln was very unpopular. Find the original lyrics of “Maryland, My Maryland” and use them as evidence of Lincoln’s unpopularity. (Example: “The despot’s heel is on thy shore.”)

**Lesson Plan 3: The Red Scares**

***The Red Scares of the 1920s and 1930s***

Make a timeline of events from the Russian withdrawal from World War I through 1938. Include the Palmer raids, the administrations of the Presidents and events in Germany and the Soviet Union.

- Use the web sites in the bibliography to study the Palmer raids.
  1. What were the reasons for the raids?
  2. What is the similarity between the acts passed for these raids and the Sedition Acts of the 18<sup>th</sup> century?
  3. What economic and social conditions caused fear?
  4. Was there opposition to the raids?
- Palmer’s article *The Case Against the “Reds”*
  1. Find examples of words that are used to inflame emotions (examples: “poisonous theories,” “blaze of revolution,” “robbery,” and “murder”)
  2. What does Palmer say that the Communists want to do?
  3. What evidence is there that these accusations are true?
  4. Who are these Communists?
  5. Has Congress done a good job in protection the country?

***Minersville and Barnett Cases***

- Read the Gobitis decision.
  1. What are the reasons given by the majority?
  2. What are some reasons given in the dissent?
- The Barnett Case
  1. What historical references are given? Are these valid?
  2. How does he bring in current events?
  3. What objections does he mention in the Gobitis case?
  4. Why was Gobitis overturned?
- Concurring opinions of Black and Douglass

1. They had concurred with the majority in the Gobitis case. What is different in this case?
- Dissent of Frankfurter
    1. Why is it difficult for him to disagree?
    2. Why does he dissent?
  - Possible research topics for students
    1. A Texas 2003 law requires the recitation of the Pledge of Allegiance. How is it administered in a school? Why do people support this and why do others oppose it?
    2. Other dissent in schools: *Tinker v. Des Moines School District* which deals with the wearing of arm bands to protest the Vietnam War.

### ***The Red Scare of the 1950s***

#### *Web Sites*

Douglas Linder's site *The Rosenberg Trial*

Rob Goldman and Dan Hittner's site *Reopen the Rosenberg Case*

#### *Questions*

- *The Rosenberg Trial* site
  1. What was it alleged that the Rosenbergs had done?
  2. When and where was the trial conducted?
  3. What was the evidence against each defendant?
  4. What was the decision?
- The *Reopen the Rosenberg Case* site has an agenda. This will give students the opportunity to read and carefully separate fact from opinion.
  1. What was wrong with the trial?
  2. What errors were made?
  3. How did the anti-Communism of the 1950s prejudice the case?

### **Lesson Plan 4: Japanese Internment**

#### ***Materials***

Pictures of Pearl Harbor after the Japanese attack

Pictures of the World Trade Center after the 9/11 attacks

Web sites mentioned in bibliography.

#### ***Removal of Japanese***

- Start the class with pictures of the destruction at Pearl Harbor and pictures of the remains of the World Trade Center.
  1. Ask students to tell which scene showed greater damage.

2. Compare the death tolls in each attack.
  3. Which was the greater threat? An imminent attack by the Japanese or attacks by Al Qaeda?
- Read Executive Order 9066. Locate the affected areas on the map.
  - Find parallels with the removal of Native Americans from their lands in the 19<sup>th</sup> century to resettlement areas on reservations.
  - National Archives has many pictures and documents (the order, for example) that can be used in class.

### ***The Court Opinions***

- Questions on Justice Black’s majority opinion
  1. What was the difference between a curfew and an exclusion and why was each thought to be necessary?
  2. Why did Black say it was necessary to exclude all, if only a few were disloyal?
  3. The power to protect must be commensurate with the danger. What was the danger perceived to be in 1942? In retrospect was the danger really there?
  4. Why does Black want to use the word “relocation center” and not “concentration camp”?
  5. Black says that 5000 Japanese refused to renounce allegiance to the Emperor of Japan. How might religious beliefs have caused this?
  6. Do you think that Korumatsu received equal protection under the law?
- Questions on Justice Roberts’ dissenting opinion.
  1. Why does he call “assembly centers” and “relocation camps” euphemisms for “prisons” and “concentration camps”?
  2. To what two orders was Korumatsu subject and why would he have broken one if he obeyed the other?
- Questions on Justice Jackson’s dissent.
  1. How are American citizens of Italian or German ancestry treated differently under this order?
  2. Why is this decision a bad precedent for civil liberties? How does it validate racial discrimination?
- Questions on Justice Murphy’s dissent:
  1. Why does he think that the threat was not “immediate, imminent and impending”?
  2. Why does he think that removal of people of Japanese ancestry was wrong?
  3. Why does racial discrimination deprive people of 5<sup>th</sup> amendment rights?
  4. How were attempts that were made to maintain culture, such as maintaining the Japanese language, interpreted as being disloyal?
  5. Comparison with today: Is maintaining the language of your parents a source of pride or is it a sign of disloyalty to the United States?

- Possible student topics
  1. As a result of these relocations, Japanese-Americans formed Army Regimental Combat Unit #442 that fought in the Italian Campaign, and became one of the most highly decorated units in the Armed services. Why did this happen?
  2. Find pictures of the Relocation Camps. Imagine life in them. If you could take only one suitcase, what would you pack? (Clothes, books, pictures.) Take only items that were available in 1942.
  3. Find a picture of the high school. Compare this school to your school.

**Lesson Plan 5: The War on Terrorism**

The Patriot Act is too long to read in class. Use the ACLU and the Department of Justice web sites and highlight places where there is disagreement.

- The government is able to look at library records of an individual.
  1. Suppose someone has taken out books on ways to detonate explosives and books describing the architecture of the White House. Should he be arrested?
  2. Would you want your library records examined? Compare this to lists of web sites you have visited.
- The government wants colleges to turn over lists of all foreign students and says a foreign student can't hold a job in which sensitive research is conducted.
  1. What is good and bad about this?
  2. How does this hurt the university?
- What were the arguments in each of the cases concerning illegal detention? Why is it logical that Korematsu was an *amicus curiae*?

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### Works Cited

#### *Books*

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## **Supplemental Resources**

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